

Alternative Dispute Resolution



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Editor's Note

Welcome to the *Alternative Dispute Resolution Journal* Vol. 7 No. 2, 2019, a publication of the Chartered Institute of Arbitrators-Kenya Branch (CIArb-K).

The rebranded Journal has continually improved as we take on board the feedback from readers worldwide.

The Journal is published twice a year in hard copy and also online at www.ciarkenya.org.

Our global audience has expanded over the years. The Journal is a must-have for Alternative Dispute Resolution (ADR) practitioners and scholars.

ADR discourse revolves around the use of negotiation, mediation, arbitration and Traditional Justice Systems to access justice.

The Journal is peer reviewed and refereed so as to ensure the highest quality and validity of data.

This volume contains articles covering various themes and emerging issues in Alternative Dispute Resolution from an international and Kenyan context.

The articles featured in this volume cover different themes including: the viability of introduction of formal negotiation classes and exercises in undergraduate law courses in Kenya; a case for the use of ADR in proceedings before tribunals; a case for African Arbitration Association and its place in promoting different ADR mechanisms; corruption allegations in arbitration; arbitrability of employment disputes in Kenya; institutionalizing alternative dispute resolution in the legislative process with a focus on Mediation Committee of Parliament In Kenya; mediation by professional bodies with a focus on Law Society of Kenya; the relationship between litigation and ADR; role of courts in arbitration; reconciling states quest to uphold their sovereignty through the doctrine of sovereign immunity; arbitrability in Nigeria; and a case review on the test for annulment of arbitral awards: *RMS Production Corporation v Saint Lucia*.

ADR in Africa is not alternative; it is a way of life. The formal court system is what is alternative. Negotiation, mediation, conciliation and Traditional Justice Systems have existed over the years and continue to thrive.

The recognition of ADR in the Kenya Constitution has gone a long way to mainstream it as a potent tool ensuring Access to Justice. The ongoing efforts to formulate a policy and a legal framework are welcome. The informality of ADR should however never be lost.

The Editorial team welcomes feedback on the content of the Journal. We aim to continually improve the product.

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

CIArb-K takes this opportunity to thank the Publisher, contributing authors, Editorial Team, Reviewers, scholars and those who have made it possible to continue publishing a quality scholarly Journal that is respected by ADR practitioners and academia.

Dr. Kariuki Muigua, Ph.D; FCIArb (Chartered Arbitrator)

Editor

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Should Formal Negotiation Classes and Exercises Be Introduced in Undergraduate Law Courses in Kenya?

*By: L. Obura Aloo and Muiruri E. Wanyoike***

Abstract

Negotiation is a key element of law practice; it is arguably the most important skill a lawyer can possess. While negotiation is hardly isolated to law and its practice, it is fair to note that the stakes are significantly raised when a lawyer is negotiating on behalf of his or her client. The ability to negotiate effectively and efficiently to the benefit of the client is a lawyer's mandate. Considering that any other skill required in the legal field from contract preparation to submissions in courts are not only taught in undergraduate studies but also drilled in and tested thoroughly at the Bar School, Kenya School of Law, it begs the question why negotiation is sorely missing. More concerning is the fact that lawyers are expected to negotiate and do so effectively without any background training.

In this paper, we explore the University of Nairobi Negotiation Simulation Exercises with Loyola University Law School and SOAS University of London where a team of undergraduate law students conducted simulated negotiations requiring the use of their negotiation skills to arrive at a mutually agreeable solution that benefited their respective clients. The paper then applies the lessons from this simulation alongside an exploration of relevant research to make the case for the introduction of formal training at the undergraduate level of law training in Kenya.

1.0 Introduction

It has been argued that law practice, when distilled down to its constituent elements, is just negotiation.¹ Since lawyers' legal training and professional

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expertise is arguably directed to the objective of solving the client's problems, then negotiation serves as the primary tool for accomplishing that goal. It follows then, that a lawyer who cannot effectively negotiate cannot effectively practice law. While most legal practitioners would agree that this view is rather extreme, the importance of negotiation in the legal practice cannot be understated since it is the most frequently used strategy in the resolution of conflicts and claims. In the United States, an estimated 95% of all civil claims are settled by negotiation rather than litigation or other forms of Alternative Dispute Resolution (ADR) involving third parties such as mediators or arbitrators.² In addition, even cases that proceed to trial and other forms of dispute resolution have a significant portion being settled by negotiation before the final verdict.³

While there is no available data on Kenyan cases settled through negotiation, anecdotal evidence suggests that the numbers could be higher due to the associated inefficiencies in the Kenyan judiciary such as backlog and long waiting times combined with the costs of Arbitration⁴ and Mediation⁵ *vis a vis* simply negotiating the matter between the two parties. Considering the importance of negotiation in the life of a lawyer, it is worrying that negotiation is under-empathized in the legal training both locally in Kenyan and even at the international level.⁶ Litigation has been the tradition and main focus of legal studies. More recently, mediation, arbitration, and traditional justice systems are taught. In the case of litigation, mediation and arbitration teaching

¹ Frascogna, X.M. and Hetherington, H.L., 2009. *The lawyer's guide to negotiation*. American Bar Association.

² *Ibid*

³ *Ibid*

⁴ Muigua, K., 2016. *Emerging Jurisprudence in the Law of Arbitration in Kenya: Challenges and Promises*.

⁵ Henrysson, E. and Joireman, S.F., 2009. *On the edge of the law: Women's property rights and dispute resolution in Kisii, Kenya*. *Law & Society Review*, 43(1), pp.39-60.

⁶ Graham, J.L., Lawrence, L. and Requejo, W.H., 2014. *Inventive Negotiation: Getting Beyond Yes*. Palgrave Macmillan.

includes the use of exercises and competitions such as moots.⁷ Kenyan lawyers, it would appear, approach negotiation with little if any formal training or theoretical knowledge of the area of negotiation. No practical negotiation skills are formally imparted on the students as can be observed from a glance at the syllabi of undergraduate law courses offered in Kenyan undergraduate law courses and the advocates training program at the Bar School, Kenya School of Law.⁸ In this paper, we consider a case study of two negotiation simulation exercises carried out across three universities, the University of Nairobi (UoN) in Kenya, Loyola University in the US, and SOAS University of London in the UK. The first exercise ran from 29th October 2018 to 2nd November 2018 and the second exercise ran from 25th March to 8th April 2019 where students across the three universities engaged in negotiation over simulated business matters and sought to arrive at a mutually agreeable and beneficial agreement within a stipulated time limit.

Negotiation is an essential part of a lawyer's life and practice as it guides them through most of their interactions. However, the legal training in Kenyan and even internationally has underemphasized the value of negotiation leading to a case of most lawyers working without any formal training or theoretical knowledge of negotiation. In response to this issue, this study will seek to develop structured negotiation exercise that would build on the strengths

⁷ Oduor, M., 2016. A Kenyan experience with LL. M. education. In *The Export of Legal Education* (pp. 31-44). Routledge.

⁸ Ksl.ac.ke. (2019). *Advocates Training Program – Kenya School of Law*. [online] Available at: <https://www.ksl.ac.ke/advocates-training-program/> [Accessed 11 May 2019]. See also Law-school.uonbi.ac.ke. (2019). [online] Available at: [https://law-school.uonbi.ac.ke/sites/default/files/chss/law/law/degree_documents/LL.B%20H and%20book.pdf](https://law-school.uonbi.ac.ke/sites/default/files/chss/law/law/degree_documents/LL.B%20H%20and%20book.pdf) [Accessed 12 May 2019]; School of Law. (2019). *Law Programme - School of Law*. [online] Available at: <http://www.jkuat.ac.ke/schools/law/law-programme/> [Accessed 11 May 2019]; Egerton.ac.ke. (2019). *Bachelor of Laws degree Curriculum structure*. [online] Available at: <http://www.egerton.ac.ke/index.php/bachelor-of-laws-degree-curriculum-structure.html> [Accessed 11 May. 2019]; Law.ku.ac.ke. (2019). *Undergraduate*. [online] Available at: <http://law.ku.ac.ke/index.php/2015-03-09-11-36-58/undergraduate> [Accessed 11 May 2019].

while mitigating the weaknesses for use by law schools and institutions to train lawyers.

2.0 Examination of the Negotiation Simulation Exercises

It is important to note that this simulation was not a legal training exercise; rather it sought to understand the issues facing cross-cultural negotiation. Nonetheless, it inadvertently showed the potential benefits of a similar exercise geared towards legal training. Therefore, our study will conduct a case study review of the exercise, its positive elements and the shortcomings with the goal of developing a structured negotiation exercise that would build on the strengths while mitigating the weaknesses for use by law schools and institutions in training lawyers. In addition, considering that it was done over three different countries, it also offers an insight into how cross-country negotiations occur and the challenges that face such negotiations.

The negotiation simulation had the participating students divided into teams of two or four students with each team being subdivided into two negotiation parties. Each party was provided with their own set of facts and goals to achieve in the negotiation. The teams negotiated then prepared a report on how the negotiation went. Finally, the whole group of participating students and supervisors held a video-conference to review the exercise and obtain feedback from the participants. The particular method used to conduct the negotiations was left to the negotiators which lead to several different approaches ranging from emails, video calls, and even text messages. The result was varying levels of successes with some teams managing to conduct their negotiations with ease while other teams faced challenges with the technology. For example, some teams faced lags and constant interruptions when making the video calls, which can be attributed to the high bandwidth requirements of a smooth video call link. The teams that chose to conduct their negotiations on a Friday evening (Kenyan time) were especially plagued by this problem considering that most of the students within the Parklands Campus also use this time to access the internet recreationally which meant that overall internet speeds were reduced significantly. This was instrumental

in highlighting the need for a proper set up when making the video calls. Notably, using the lessons learnt from the first simulation exercise, the second time the teams chose to use private internet connections through phone modems rather than rely on the school provided internet that was prone to the aforementioned lags. The final step in the negotiation simulations was a video conference call involving all participants where the teams could review the lessons learnt from the simulation while sharing feedback on their personal experiences. The fact that the negotiation was occurring over three countries in three different time zones meant that the participants had to find a means of negotiating that worked for their teammates.

The teams that could not manage to have a coincidence of free times across the participants chose to use emails as their means of negotiation. Among the advantages of email communication that the participants noted was the fact that it allowed them to communicate without fear of interruptions that video calls might have experienced. In addition, it allowed them to communicate within their personal schedules while providing a record of the communication. On the other hand, some of the participants noted that emails failed to convey the spirit of negotiations, lacking the non-verbal communication that would have been present in a video-call. In addition, the written nature of the negotiation could have led to a formalistic approach to the negotiation with the participants being restrained in their negotiations. This could be seen in the final video-conference call where the members who communicated via email did not have a social rapport established. This is in line with research indicating that email negotiations are often limited by the lack of emotion and tone in the written text; individuals tend to grossly overestimate their ability to communicate tone and emotions such as sarcasm, seriousness, anger, or sadness over email.⁹ As such, emails might decrease the informational exchange in a negotiation as opposed to a medium where the negotiators can view each other's non-verbal communication cues.

⁹ Kruger, J., Epley, N., Parker, J. and Ng, Z.W., 2005. Egocentrism over e-mail: Can we communicate as well as we think? *Journal of personality and social psychology*, 89(6), p.925.

The rest of the participants chose to rely on video-calls and conferences, which was greatly aided by the virtually unlimited means of making video calls. Among the options used included WhatsApp video calls, Skype video call application, Facebook video call, Google Hangouts, Apple's FaceTime, Google Duo, and finally Zoom video conferencing software. This is perhaps a demonstration of the wide-ranging choices available for use in the present day for video calling and video conferencing. The main issue that the participants noted was the need to coordinate the video-calls across different time-zones. As such, most of the participants in Kenya chose to make the video calls at night around 3.00 AM so as to accommodate their teammates in Loyola while the students at SOAS made their calls in the early morning which coincided with daytime in Kenya. Among the advantages enjoyed by the participants who chose to use video conferencing included an improved rapport during the negotiations and more amicable settlements as opposed to their counterparts using email communications. In addition, it was noted that video conferencing was particularly vulnerable to network disruptions which frustrated a few calls.¹⁰ It is also notable that the members often had to switch across different applications when selecting the most convenient application for the negotiators. For example, the students at Loyola mostly recommended the FaceTime application but this is limited to Apple Inc devices such as iPhones and iPads which a majority of the Kenyan counterparts lacked; the Skype application was also not used by many participants with most who tried it noting that it was "complicated" and "hard to use".¹¹ As such, the successful video calls used web-based platforms including Google Duos and Hangouts, Facebook video call, WhatsApp video calls, and Zoom video conferencing software.

¹⁰ Tutas, C.A., 2015. Lessons learned using web conference technology for online focus group interviews. *Qualitative Health Research*, 25(1), pp.122-133. Also see Ebner, N., 2017. Negotiation via Videoconferencing. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3029020

¹¹ Ibid.

3.0 Observations

The exercise exposed the need for formal negotiation training considering that most of the participants especially from the Kenyan end had no exposure to formal negotiation for the cases provided. As such, all went with “gut feeling” of the issues, interests, and positions at hand rather than applying any particular training to the issue which is unique considering that legal training often covers everything else; it would be unheard of for a lawyer to rely on gut feeling in preparing a legal document or addressing the court on a particular issue of law. It is notable that the students who had undertaken the Alternative Dispute Resolution (ADR) course at the Law Campus were aware of the basics of negotiation such as arguments based on interests rather than positions, and differences between hard bargaining and soft bargaining, and win-win being the best outcome for all parties. Nonetheless, the simulation exercise was the equivalent of being thrown into the deep end¹² which is exactly how all lawyers end up negotiating in their legal career without any training on negotiation. Therefore, it is apparent that there is a need for a more formal approach to legal training on negotiation skills.

4.0 Lay of the Land - Role of Negotiation in Law both Legal Practice and Education

Negotiation in the legal field has been defined to include any communication process between individuals or parties that are intended to reach a compromise or agreement that satisfies both parties. As such, negotiation streamlines the functions of the justice system while transforming and educating the lawyer. According to the American Bar Association, negotiation is a legal practice.¹³ It effectively means that negotiation is a requisite legal skill for a lawyer in his or her practice. In legal education, both substantive and procedural, students are taught on the benefits of negotiation as a mandatory

¹² This is consideration of the fact that with only a few weeks’ notice, the students were expected not only to handle a negotiation on behalf of their simulated clients they also had to negotiate with other students across three countries, three time zones, and try to arrive at a mutually agreeable solution.

¹³ *Supra* note 1.

pre-litigation stage.¹⁴The Constitution of Kenya, 2010 not only makes access to justice a right under the Bill of Right but it urges the courts (inclusive of legal practitioners) to ensure they administer justice to any parties to a dispute in the fastest manner. Similarly, the Civil Procedure Rules Order 3 Rule 2(d) stipulates that an advocate should write a demand letter to another party to a dispute before instituting any form of litigation. The demand letter can either feature hard or soft bargaining styles of negotiation.

The legal practice encompasses any form of dispute resolution – court procedures and alternative dispute resolution mechanism. Substantive (the why) and procedural (the how) legal education is an important precipitant of legal practice, hence the link between the two.¹⁵ Despite the indirect nature and infusion of negotiation skills in the training of advocates for legal practice in Kenya, the curriculum at both undergraduate and the Advocates Training Program fails to outline the role of negotiation explicitly in the practice of the law in Kenya. Dr. Kariuki Muigua¹⁶ provides proof of this from the fact that most lawyers (this paper would use advocates and lawyers interchangeably) who negotiate fail to conceptualize and understand its machinations.¹⁷ However, mastery of negotiation would improve the lawyers’ understanding, skills, and roles.

While Dr. Muigua Kariuki proposes that negotiation can educate and transform the lawyer, the paper also argues that such understanding is only gained from the learning and conceptualization of it.¹⁸ This perspective is counteractive as one side negates the other. However, Vilhelm¹⁹ offers a

¹⁴ Lande, J., 2012. Teaching students to negotiate like a lawyer. *Wash. UJL & Pol'y*, 39, p.109.

¹⁵ Advocates Act Cap 16, Laws of Kenya ss. 9-11.

¹⁶ Kariuki Muigua. “The Lawyer as a Negotiator, Mediator and Peacemaker in Kenya,” 2015, In 2015 LSK Annual Conference.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Aubert Vilhelm. “Courts and Conflict Resolution” 1967 *Journal of Conflict Resolution* 11, pp. 40-51.

different perspective that anchors on the legal positivism theory - the lack of legal structures that support negotiation in legal education and training. For instance, the choice to enter negotiations is often associated with a lack of proper training and / or the fear of litigation.²⁰ However, negotiation, similar to litigation, is often accompanied by the choice of the parties except in criminal cases. Vilhelm²¹ presents the fact that the structure of any adversarial system pits two sides against each other and the practice means that the conflict resolution takes the form of either side winning. In legal training, this creates the desire in advocates to measure their success in any case through wins in litigation. In fact, according to Vilhelm²², this phenomenon relies on the fact that the laws are man-made and have a social impact operating in a natural setting, the war of opinions between two sides to litigation. Such issues would not crop up in negotiation, which, Dr. Muigua²³ advises would reshape lawyers' perspective of dispute resolution.

5.0 Current State of Negotiation in Legal Training

In Kenya, the wording of the law is that justice should be dispensed with in a speedy manner. But the question that comes up is: in whose interest? Currently, the most common type of negotiation in criminal procedures is plea bargaining deals governed by the Criminal Procedure Code, which answers the question of in whose interest is negotiation resorted to? The Code under Section 137 states that a plea bargain can be entered into by agents authorized to act by the Director of Public Prosecution. Usually, the most common cases arise when the prosecution fails to adduce enough evidence and opts for a lesser charge in exchange for an admission of guilt. Additionally, Menkel-Meadow's²⁴ review on the legal literature that defines negotiation, the author finds that most of the definitions entail interest, a particular individual's interests or what they need. The author also notes that negotiations have the

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ Carrie, Menkel-Meadow. "The Trouble with the Adversary System in a Post-Modern, Multi-Cultural World" 1996, William and Mary Law Review 38, pp. 5-44.

effect of exposing shared interests and avoiding unnecessary costs and procedures that are characteristic of litigation. She also says that given the pervasiveness of litigation, legal training requires it as law touches on several aspects of people's lives. However, the definition that encompasses people's interests could be an explanation of the slow and dependent integration of negotiation into legal training as it depends on the parties' interests.

The issue of interests is key as it refers to the practice of law and advocates' practice. Advocates have the duty to advise their clients and the clients have the choice to consider or ignore such advice in relation to their interests. For instance, *Halsey v Milton Keynes General NHS Trust*,²⁵ the court declined to compel the party that had declined optional negotiation to negotiate. The ratio shows that the judge's or court's duty is to encourage negotiations or any form of alternative dispute resolution. Furthermore, the decision to decline negotiation, which would have most likely guaranteed a win-win situation for both parties shows the low level of integration of negotiation in legal training. Essentially, it displays the suspicion that the adversarial system pits parties against each other with a determination to win or lose it all.

Furthermore, the encouragement to practice decorum between opposing counsels in professional legal training asserts the need for negotiation skills. According to Lande,²⁶ law curriculums underscore the requirement for civility among legal counsels in any in or out-of-court process under Professional Ethics. This requirement for civility can pave the way for the negotiation of a shared interest basis if it is implemented on a large scale.²⁷ However, this is not the case as hostility among opposing counsels is common given the win or lose nature of the adversarial system.²⁸

²⁵ [2004] EWCA Civ 576.

²⁶ John Lande. "Getting Good Results for Client's by Building Good Working Relationships with Opposing Counsel" 2011, 33 *ULA Vere L Rev* 107.

²⁷ *Ibid.*

²⁸ Timothy Tree. "International Law: A Solution or a Hinderance towards Resolving the Asian Comfort Women Controversy" 2001 *UCLA J. Int'l L. & Foreign Aff.*, 5, p.461.

For instance, in Kenya, the cost of litigation from taking instructions to filing fees in court might be unattainable for most Kenyans of moderate incomes. However, there is the Advocates Remuneration Order that stipulates the minimum fees for any transaction when a client instructs an advocate to pursue. A prima facie examination of the level of prevalence of litigation over negotiation could relate to the high monetary expectations newest advocates have of remuneration. Bok²⁹ suggests that any legal training system that mainly focuses on training advocates in litigation is flawed. It is because while some clients might prefer and manage to pay for a litigation process to the highest appellate courts, most would be unable to afford legal fees for such long and tedious processes.

In civil cases, negotiations when successful are a chargeable item and will be allowed in the taxation of a bill of costs. Kuloba³⁰ citing the unreported case of *National & Grindlays Bank Ltd v Bhavanlal Lalji Ghandi*³¹ notes that

“where negotiation between parties lead and eventually result in a compromise of proceedings, the cost of such negotiations will be allowed on a party and party basis. Where, however, there are abortive negotiations, the prevailing practice is not to allow the costs as between party and party.”

The best example of negotiation training or lack therefore of in Kenya is the Kenya School of Law (KSL), the statutory body charged with the specific mandate to organize and conduct courses for the development of legal professionals³², Government personnel and paralegal personnel. By the virtue of being the only bar school in Kenya, every practicing advocate in Kenya has to attend the 18-month Advocates Training Program (ATP) program at KSL

²⁹ Derek C. Bok. “A Flawed System of Law and Practice and Training” 33 *J. Leg Educ* 570.

³⁰ Kuloba, R. *Judicial Hints on Civil Proicedure* (full reference) p. 152

³¹ Patel M.F., Taxing Officer in *National & Grindlays Bank Ltd v Bhavanlal Lalji Gandhi* HCCC No 154/1962 (unreported)

³² 'Advocates Training Program - Kenya School of Law' (Ksl.ac.ke, 2019)

<<http://www.ksl.ac.ke/advocates-training-program/>> accessed 6 May 2019

that includes a combination of problem questions for discussion, simulation, role-plays, interactive seminars and moot court.³³ Despite this, in KSL, there is no specific course offering formal negotiation training despite the fact that this would be the best opportunity to ingrain proper negotiation training in the Kenyan legal professionals. In fact, the designated courses do not include any for Alternative Dispute Resolution seeming to abdicate that responsibility to third party institutions and organizations.³⁴ This means that majority of practicing advocates in Kenya have not had formal training in ADR and negotiation in particular, and mainly learn this on the ground through trial and error results with noted failures and breakdowns in the process.³⁵

6.0 The Future of Negotiation in Law Practice and Education

Grande³⁶ proposes that the future of legal practice and education would be tethered on negotiation, especially in the Horn of Africa (Kenya included). The author bases her assertions on the fact that the current legal systems in most African countries bear a distinct similarity to their former colonial masters'. These systems rely on the social contract system where the populace cedes some of its freedoms and rights in exchange for protection from an elected government in cases of a democracy. However, a keen look at the practices of various African communities was solving disputes, including criminal cases via negotiation. An example is the two prominent Kenyan cases of settlement for payment to the deceased family - Republic v Mohamad Abdow Mohamad³⁷ and Republic v Musili Ivia and Mutinda Muli³⁸. Justices Lagat-Korir and George Dulu, respectively, agreed to the victims' communities request for an out-of-court settlement citing the Constitution.³⁹ These cases⁴⁰ and Grande's⁴¹ remedy the complaint that Bok⁴² raises.

³³ Ibid

³⁴ Ibid

³⁵ Fisher, R., 1983. What about negotiation as a specialty? *ABAJ*, 69, p.1221.

³⁶ Elisabetta Grande. "Alternative Dispute Resolution: Africa and the Structure of Power" 1999 *Journal of African Law* 43, pp. 63-70.

³⁷ [2013] eKLR.

³⁸ [2017] eKLR.

³⁹ Constitution of Kenya, 2010, Articles 157 (6) and (8) and 159 (2) (c).

While most people believe that there is an apparent shift in adjudicating legal matters, Craver⁴³ asserts that negotiation, the most basic form of alternative dispute resolution is common since most litigators prefer to pursue negotiation with fellow counsel. Factors like financial and emotional implications involved in several matters of law necessitate negotiations to resolve disputes between parties. This, in turn, calls for the need for negotiation to be incorporated in legal training and later practice. Furthermore, the ratio in *Halsey v Milton Keynes General NHS Trust*⁴⁴ underscores the need for lawyers to be trained in negotiation as a separate course instead of incorporating it in various disciplines.

In conclusion, the case for formal training in negotiation in Kenya has been made conclusively in the paper. However, the question at hand is whether it should be offered at the undergraduate level or at the bar school level. This would require further research and study to understand the point at which formal Negotiation training offers the greatest value to the upcoming lawyers and advocates. Nonetheless, it is the opinion of the authors of this paper that it would be better if offered at both levels similar to other courses such as Legal Methods, Systems & Constitutional Law; Law of Contract; Law of Torts; Land Law; Family Law and Succession; Commercial Law. Perhaps, having the undergraduate training focusing on the fundamentals of negotiation while the bar school places an emphasis on the practicalities of negotiation in the legal practice. This would serve not only the lawyers aiming to become advocates but also those who seek other paths.

⁴⁰ Supra 14 and 15.

⁴¹ Ibid.

⁴² Ibid 12.

⁴³ Charles B. Craver. "Negotiating Ethics: How to be Deceptive Without being Dishonest/How to be assertive Without being Offensive." George Washington University Public Policy and Legal Theory Working Paper No 268.

⁴⁴ Ibid 8.

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Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management

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Abstract

Tribunals play an important role within the justice system in Kenya by not only reducing pressure on courts but also assisting the mainly commercial class of people access justice in an expeditious way. However, the ever growing of cases with the relatively fewer number of members in these tribunals means that they can remain effective only for so long. Eventually the challenges of backlog and delayed justice as a result may arise. This paper makes a case for the use of ADR in proceedings before tribunals as one of the ways of easing pressure on the tribunals.

1.0 Introduction

The Judiciary, comprising of courts and independent tribunals, is the main formal institution in Kenya that is charged with conflict management and the formal administration of justice. The Constitution of Kenya 2010 provides that judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution¹

In exercising judicial authority, the courts and tribunals are to be guided by the following principles—justice shall be done to all, irrespective of status; justice shall not be delayed; alternative forms of dispute resolution including

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¹ Article 159(1), Constitution of Kenya 2010 (Government Printer, Nairobi, 2010).

reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3); justice shall be administered without undue regard to procedural technicalities; and the purpose and principles of this Constitution shall be protected and promoted.² In order to achieve this constitutional mandate, the Judiciary has been concentrating on capacity building as evidenced by setting up more courts across the country, as well as promoting the use of Alternative Dispute Resolution (ADR) mechanisms in order to ease the pressure on courts and enhance expeditious access to justice for all.³

It is against this background that this paper discusses the place of ADR mechanisms in conflict management especially in the context of tribunals, which are in the process of transition to the Judiciary, and how these mechanisms can enhance the tribunals' effectiveness in administration of justice through the active use of ADR mechanisms in conflict management.

2.0 Conflict Management and Alternative Dispute Resolution Mechanisms in Kenya

There are two main approaches to conflict management.⁴ Traditional theory considers people involved in conflict situations as trouble makers while the modern theory considers conflict as a natural and inevitable outcome of human interaction.⁵

Conflict management is used to refer to the various processes required for stopping or preventing overt conflicts, and aiding the parties involved to reach

² Ibid, Article 159 (2).

³ The Judiciary of Kenya, *State of the Judiciary and the Administration of Justice Annual Report, 2017 - 2018*, March 2019. Available at <https://www.judiciary.go.ke/wp-content/uploads/sojar20172018.pdf> [Accessed on 26/4/2019].

⁴ Della, V.E. & Cerizza, LD, *Management of agricultural research: A training manual*, ('Session 5' FAO), available at <http://www.fao.org/docrep/w7504e/w7504e07.htm#reading%20note:%20conflict%20management> [accessed 26/4/2019].

⁵ Ibid.

lasting peaceful settlement of their differences.⁶ This definition conceives conflict management' as an 'umbrella term' that refers to all the stages of conflict as well as all the mechanisms that are used to deal with conflict.⁷ "Management" in this context is used in a wider meaning than the strict sense of "to manage" or "to cope with" to include the meaning of "to administer".⁸ The discussion herein adopts the term in this context and as such, this section highlights all the approaches employed in dealing with conflict. This is against the narrow view by some scholars that conflict management, as a concept, refers to conflict containment, a view that is based on the belief that violent conflicts are ineradicable consequence of differences of values and interests within and between communities.⁹ According to this school of thought, resolving such conflicts is unrealistic: the best that can be done is to manage and contain them, and occasionally to reach a historic compromise in which violence may be laid aside and normal politics resume.¹⁰ It has been argued that if the basic human needs are unfulfilled because the state fails to properly address them, or if a group feels that these needs are unmet, or perceives a threat to these needs, violence can emerge.¹¹ It is against the foregoing background that the author explores the various mechanisms that can be employed in conflict situations especially social conflicts in Kenya.

3.0 Conflict Management Mechanisms

Generally, conflict management mechanisms include any process which can bring about the conclusion of a dispute or conflict, ranging from the most informal negotiations between the parties themselves, through increasing formality and more directive intervention from external sources, to a full court

⁶ Leeds, C.A., 'Managing Conflicts across Cultures: Challenges to Practitioners,' *International Journal of Peace Studies*, Vol. 2, No. 2, 1997.

⁷ Hamad, AA, 'The Reconceptualisation of Conflict Management' (2005) 7 *Peace, Conflict and Development: An Interdisciplinary Journal* 1, pp. 6-7.

⁸ *Ibid*, p. 11.

⁹ *Ibid*.

¹⁰ *Ibid*, p. 4.

¹¹ Doucey M, 'Understanding the Root Causes of Conflicts: Why It Matters for International Crisis Management,' *International Affairs Review*, Vol. 20, No. 2, Fall2011, p. 4.

hearing with strict rules of procedure.¹² There is a range of conflict management mechanisms available to parties in conflict or dispute. For instance, Article 33 of the *Charter of the United Nations*¹³ outlines the various conflict management mechanisms that parties to a conflict or dispute may resort to.¹⁴ It provides that *the parties to any dispute should, first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice* [Emphasis added].¹⁵

Litigation or judicial settlement is a coercive dispute settlement mechanism that is adversarial in nature, where parties in the dispute take their claims to a court of law to be adjudicated upon by a judge or a magistrate. The judge or magistrate gives a judgment which is binding on the parties, subject only to statutory right of appeal. In litigation, the parties to the dispute have minimum or no control at all over the forum, the process and outcome of the process and as such the outcome may not satisfy both parties.

The judicial authority in Kenya is exercised by the courts and tribunals.¹⁶ Litigation has its advantages in that precedent is created and issues of law are interpreted.¹⁷ It is also useful where the contract between the parties

¹² Sourced from, <<http://www.buildingdisputestribunal.co.nz/.html>> [accessed on 26/4/2019].

¹³ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

¹⁴ See generally Eunice R. Oddiri, *Alternative Dispute Resolution*, paper presented by author at the Annual Delegates Conference of the Nigerian Bar Association, 22nd - 27th August 2004, Abuja, Nigeria. Available at [http://www.nigerianlawguru.com/articles/arbitration/Alternative%20dispute%20re solution.htm](http://www.nigerianlawguru.com/articles/arbitration/Alternative%20dispute%20resolution.htm) Accessed on 26/4/2019; See 'The Role of Private International Law and Alternative Dispute Resolution', Available at http://www.wipo.int/copyright/en/ecommerce/ip_survey/chap4.html [Accessed on 26/4/2019].

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

¹⁶ See Art. 159 of the Constitution of Kenya, [Government Printer, Nairobi, 2010].

¹⁷ See the argument by Calkins, R.M., 'Mediation: A Revolutionary Process That Is Replacing the American Judicial System,' *Cardoza Journal of Conflict Resolution*, Vol. 13, No. 1, 2011; cf. Ray, B., 'Extending The Shadow Of The Law: Using Hybrid

does not stipulate for a consensual process and the parties cannot agree on one, the only alternative is litigation. Through litigation, it is possible to bring an unwilling party into the process and the result of the process be enforceable without further agreement.¹⁸ Litigation has its advantages as it comes in handy, for instance, where an expeditious remedy in the form of an injunction is necessary.

The Constitution provides that the national courts and tribunals should do justice to all irrespective of status; justice should not be delayed; alternative forms of dispute resolution should be promoted; and justice should be administered without undue regard to procedural technicalities.¹⁹ Courts in Kenya, however, have encountered many problems related to access to justice, for instance, high court fees, geographical location, complexity of rules and procedure and the use of legalese.²⁰ The court's role is also 'dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves.'²¹ Dispute settlement through litigation can take years before the parties get justice in their matters due to the formality and resource limitations placed on the legal system by competing fiscal constraints and public demands for justice, litigation is so slow and too expensive and it may at times lose the commercial and practical credibility necessary in the corporate world. It is against this backdrop that this paper explores how litigation can be complemented with the effective use of ADR mechanisms in facilitating access to justice especially within tribunals. The diagram below offers a general introduction to conflict management,

Mechanisms To Develop Constitutional Norms In Socioeconomic Rights Cases,' *Utah Law Review*, No. 3, 2009, pp. 797-843, p. 799.

¹⁸ See generally, *Dispute Resolution Guidance*, available at [http://www.ogc.gov.uk/documents/dispute resolution.pdf](http://www.ogc.gov.uk/documents/dispute%20resolution.pdf), [accessed on 26/4/2019].

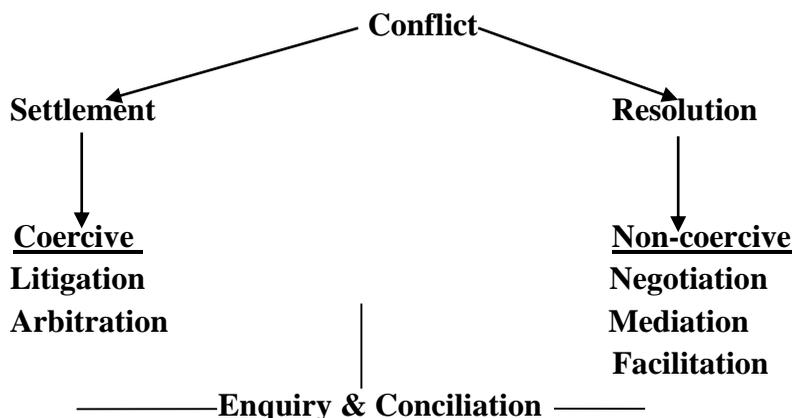
¹⁹ See Art. 48 & 159 (2) of the Constitution of Kenya.

²⁰ *Strengthening Judicial Reform in Kenya; Public Perceptions and Proposals on the Judiciary in the new Constitution*, ICJ Kenya, Vol. III, May, 2002.

²¹ Ojwang, J.B., "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," *Kenya Law Review Journal*, Vol. 1, No. 19, 2007, pp. 19-29 at p.29.

clarifying issues and concepts that inform various conflict management mechanisms.

Figure 1: Methods of Conflict Management



***Source:** The author

Figure 1 shows that there are certain methods of conflict management that can only lead to a settlement. Those that lead to a settlement fall into the category of coercive methods where parties have little or no autonomy over the forum, choice of the judges and the outcome. The coercive methods are litigation or judicial settlement and arbitration. It also shows the non-coercive methods (negotiation, mediation and facilitation) which lead to resolution. In the non-coercive conflict management methods the parties enjoy autonomy over the choice of the mediator or third party, the process and the outcome. Conciliation and enquiry can be classified as coercive (when the reports emanating from them are enforced) and non-coercive, for example, when the reports are used as the basis for negotiation between the parties.

As Fig. 1 illustrates, there are certain conflict management mechanisms that can lead to a settlement²² only, while others have been effective in bringing

²² Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *Journal of Peace Research*, Vol. 32, No. 2 (May, 1995), p. 153. Bloomfield argues that a settlement is temporal and does not eliminate

about a resolution. A *settlement* is attained when the parties have to come to accommodations which they are forced to live with due to the anarchical nature of society and the role of power in relationships. On the other hand a *resolution* prescribes an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship.²³ The Conflict resolution methods that lead to a settlement fall into the category of *coercive methods* where parties have little or no autonomy over the forum, choice of the judges and the outcome. The coercive methods are litigation or judicial settlement and arbitration. The *non-coercive methods* (negotiation, mediation and facilitation) lead to resolution. In the non-coercive conflict management methods the parties enjoy autonomy over the choice of the mediator or third party, the process and the outcome.

4.0 Tracing the Place of Tribunals within Kenya's Justice System

As a way of enhancing the capacity of the formal conflict management institutions in the country, there has been transition of tribunals to the Judiciary. This, it is expected, will streamline their administration and enhance their capacity as important players within the administration of justice. Indeed, the Constitution of Kenya recognises subordinate courts as including the Magistrates courts; the Kadhis' courts; the Courts Martial; and any other court or *local tribunal* as may be established by an Act of Parliament, other than the courts established as required by Article 162 (2) (emphasis added). The Constitution thus recognises tribunals as important players in the administration of justice and places them under the Judiciary. Previously, the different tribunals were under the respective ministries.²⁴ The purpose of transitioning tribunals is to ensure they are delinked from the executive and integrated in the court system. The transition is still ongoing, and the Judiciary, in the fullness of time, shall therefore, have an obligation to manage tribunals including their staff in order to effectively and efficiently render

the underlying causes of the inter-disputant relationship whereas a resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based out-comes.

²³ Ibid.

²⁴ The Judiciary of Kenya, *State of the Judiciary and the Administration of Justice Annual Report, 2017 – 2018*, March 2019, op. cit., p. 66.

services to users.²⁵ Tribunals are now coordinated through the office of Registrar Tribunals established by the Judicial Service Commission.²⁶

Tribunals are established by different Acts of Parliament, with about 60 of them in existence, and are mandated to resolve disputes in a fast, simple and speedy manner.²⁷ The *State of the Judiciary and the Administration of Justice Annual Report, 2017 – 2018* indicates that during the period under review, 5,615 cases were filed while 2,530 cases were resolved.²⁸ These statistics not only demonstrate the important role that these tribunals play but also show that these tribunals also require case management lest they find themselves under the case backlog challenge that is currently facing the courts.

This is why there is a need for enhancing the use of ADR mechanisms by these tribunals where circumstances so allow. It is worth mentioning that many of these tribunals in Kenya play a pivotal role in administering commercial justice, an area where ADR is readily acceptable worldwide. The next section looks at why and how the tribunals can make more use of ADR mechanisms in order to *boost their effectiveness and achieve a better case turnover which will in turn win them the public confidence* (emphasis added). The ripple effect may not necessarily be fewer appeals to courts but more cases getting the important preliminary determination by the tribunals.

4.0 Integrating the Use of Alternative Dispute Resolution in Conflict Management through Tribunals

As already pointed out, the Constitution of Kenya, 2010 recognizes the application of Traditional Dispute Resolution (TDR) and ADR mechanisms in conflict management for efficient dispensation of justice since their merits outweigh any disadvantages thereof.²⁹ It is noteworthy that a high percentage

²⁵ Ibid.

²⁶ <http://kenyalaw.org/kl/index.php?id=9050> [Accessed on 26/4/2019].

²⁷ For the full list of the tribunals and their mandate, see Judiciary of Kenya, *State of the Judiciary and the Administration of Justice Annual Report, 2017 – 2018*, March 2019, op. cit., Chapter Three.

²⁸ Ibid, p.73.

²⁹ See Art. 159 (2) (c) of the Constitution of Kenya 2010.

of disputes in Kenya are resolved outside courts or even before they reach courts by use of TDR or ADR mechanisms. TDR and other community justice mechanisms are widely used by communities to resolve conflicts owing to their legitimacy and accessibility.

Alternative Dispute Resolution (ADR) mechanisms refer to the set of mechanisms that are utilized to manage disputes without resort to the often costly adversarial litigation.

The main disputes that may be resolved by way of ADR and Traditional Dispute Resolution Mechanisms (TDR) mechanisms in the communities include land disputes, marriage, gender violence, family cases including inheritance, clan disputes, cattle rustling, debt recovery, overall community conflicts and resolution of political disputes in the community, and welfare issues such as nuisance, child welfare and neglect of elderly in a community amongst others.³⁰

The main aspects of TDR and other ADR mechanisms which make them unique and community oriented is that they focus on the interests and needs of the parties to the conflict as opposed to positions, which is emphasized by formal common law and statutory regimes.³¹ The main objective of TDR in African societies is to resolve emerging disputes and foster harmony and cohesion among the people.³² ADR is mainly concerned with enabling parties take charge of their situations and relationships.

³⁰ Kenyatta, J., *Facing Mount Kenya: The Tribal life of the Gikuyu*, *op cit*; See also Lenkinski, E.L. & Mehra, M., 'Are 'We Counsel or Counsellors? Alternative Dispute Resolution & the Evolving Role of Family Law Lawyers in Canada,' available at https://www.iaml.org/cms_media/files/are_we_counsel_or_counsellors.pdf [Accessed on 26/4/2019].

³¹ Muigua, K., 'Effective Justice for Kenyans: Is ADR Really Alternative?' pp. 12-13. Available at <http://www.kmco.co.ke/attachments/article/125/Alternative%20Dispute%20Resolution%20or%20Appropriate%20Dispute%20Resolution.pdf> [Accessed on 26/4/2019].

³² Hwedie, K. O. & Rankopo, M. J., "Chapter 3: Indigenous Conflict Resolution in Africa: The Case of Ghana and Botswana," available at <http://home.hiroshima-u.ac.jp/heiwa/Pub/E29/e29-3.pdf> [Accessed on 26/4/2019], p. 33.

Generally, many cases are resolvable through TDR, except for serious criminal offences that require the intervention of the courts. Where attempts have been made to subject the matters that were previously believed to fall within the exclusive ambit of criminal law, it has led to heated deliberations as to whether the same should be allowed.³³ Increased application of ADR is considered as one of the measures that will lead to faster dispensation of cases, particularly in tribunals.

The Kenyan populace is still a believer in getting their day in court. Many people would rather have an order of the court or a decision of an administrative tribunal to enforce, rather than a negotiated agreement that is wholly dependent of parties' goodwill. Even where the law has put in place enforcement mechanisms for negotiated settlements, people still desire the coercive nature of courts and other tribunals, as opposed to all the cordial talks that are ADR. This should however not discourage tribunals.

With adequate legal and policy framework on the application of ADR in Kenya, it is possible to create awareness on ADR mechanisms for everyone, including the poor who may well be aware of their right of access to justice but lacking means of realizing the same. Continued sensitization of the key players in the Government, the judiciary, legal practitioners, business community and the public at large will also boost support for ADR mechanisms in all possible

³³ See the case of *Republic v Mohamed Abdow Mohamed* [2013] eKLR, High Court at Nairobi (Nairobi Law Courts) Criminal Case 86 of 2011, where the learned Judge of the High Court upheld a community's decision to settle a murder case through ADR. It is also important to point out that the *National Cohesion and Integration Act*, No. 12 of 2008 [2012] under S. 25(2) thereof states that the National Cohesion and Integration Commission is to facilitate and promote equality of opportunity, good relations, harmony and peaceful co-existence between persons of the different ethnic and racial communities of Kenya, and to advise the Government on all aspects thereof. To achieve this, the Commission should *inter alia* promote arbitration, conciliation, mediation and similar forms of dispute resolution mechanisms in order to secure and enhance ethnic and racial harmony and peace. What remains to be seen is how the Commission will handle any cases which, just like the *Mohamed case*, the involved communities or families feel that they can be handled locally but the Commission feels that the same should go to courts owing to their magnitude.

aspects as contemplated under the Constitution and various statutes. A full appreciation of the workings of ADR mechanisms is key in achieving widespread yet effective use of ADR and TDR mechanisms for access to justice especially in matters within the jurisdiction of tribunals.

While carrying out their administrative or quasi-judicial functions, tribunals should strive to encourage parties to make more use of ADR mechanisms. Article 47(1) of the Constitution of Kenya guarantees the right of every person to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In addition, Article 48 provides for State's obligation to ensure access to justice for all persons and, if any fee is required, it should be reasonable and should not impede access to justice.

The Fair Administrative Action Act, 2015³⁴ interprets "administrative action" to include- the powers, functions and duties exercised by authorities or quasi-judicial tribunals.³⁵ While this Act has no express provision requiring tribunals to use ADR within their procedures, Article 159 (2) (c) of the Constitution obliges courts and tribunals, in the exercise of judicial authority, to encourage parties to endeavor to resolve their disputes through ADR. It is on the basis of this provision that tribunals can competently employ the use of ADR mechanisms in discharging their constitutional and statutory mandate.

The major selling point of the ADR approaches of conflict management is their attributes of flexibility, low cost and lack of complex procedures. These attributes are no longer tenable in arbitration as it is gradually becoming as expensive as litigation, especially when the arbitral process is challenged in court. When the matter goes to court, it is back to the same old technicalities that are present in civil proceedings.

There is thus a need for an increased use of ADR mechanisms in matters before tribunals in order to fully enjoy the main objective of tribunals: expeditious, efficient, lawful, reasonable and procedurally fair proceedings.

³⁴ Fair Administrative Action Act, No. 4 of 2015, Laws of Kenya.

³⁵ Ibid, sec. 2.

Even as the Judiciary seeks to entrench the use of ADR mechanisms within the country's justice system, it should not treat the transition process as a separate process and then later embark on streamlining the ways these tribunals operate. As they get absorbed into the judiciary, the tribunals should be reminded to encourage those who seek justice before them to explore ADR not only to fulfil the constitutional requirements but also to enjoy the potential benefits of ADR.

It must however be appreciated that the tribunals' jurisdiction is as varied as the statutes that donate such jurisdictions. Admittedly, some matters may not be ideal for management through ADR processes. However, this is a matter that can be decided on a case to case basis depending on the issues that arise from the case. Any legal and institutional framework to facilitate the use of ADR before tribunals should therefore consider the possibility of such differences arising and should thus be broad enough to distinguish between the matters.

Encouraging a higher uptake of ADR before tribunals will be a step in the right direction in a bid to enhance access to justice in Kenya and creating a culture of using ADR in the country. This will streamline the judicial system by minimising appeals from these tribunals to the Courts, eventually aiding in reduction or elimination of the backlog.

5.0 Conclusion

Tribunals are an important part of the justice system in Kenya. This is not only because of their potential to facilitate faster management and settlement of disputes but also their ability to deal with specialized matters under different statutes. This puts them at a better place to decide which specialized matters would ideally be resolved using ADR. These tribunals are however at a high risk of suffering from the challenges bedeviling the formal courts, such as high caseload leading to backlog and consequently delayed justice. Even as their oversight is transited to judiciary, there is a need to rethink their modes of operation by, inter alia, encouraging greater use of ADR mechanisms. This will go a long way in reducing the pressure on the tribunals and make them more

accessible to a greater number of people. There is a need to integrate ADR in conflict management especially within the tribunals so as to enhance access to justice.

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The African Arbitration Association is Here: Now What?

*By: Eng. Bwalya Lumbwe**

1.0 Introduction

The preamble to the Constitution of the African Arbitration Association ('AfAA') states that the organisation is '**founded for the purpose of promoting international arbitration and other forms of international dispute resolution on the African continent,**' and that the Constitution is the guiding instrument of the initiative.¹

The preamble notes the growth in the use of international arbitration on the African continent but not the growth of the other forms of international dispute resolution. This, therefore, is the beginning of subtle and sometimes overt 'bias' towards international arbitration at the expense of the other forms of international dispute resolution.

For example, two of the aims and objectives under the Constitution are to:

- to act as the platform for African international arbitration practitioners and African arbitration institutions within the African continent to enhance the capacity of African parties, institutions and practitioners
- to promote African international arbitration practitioners and African arbitration institutions within and outside the African continent;²

Paper Based on a Presentation at the African Arbitration Association 1st Annual International Arbitration Conference Radisson Blu, Hotel & Convention Centre, Kigali, Rwanda, 4th April 2019.

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¹ *Constitution of the African Arbitration Association (as amended on 28 September 2018), Preamble.*

² (n 1), Aims and Objectives.

With regard to the above examples, there are no equivalent statements covering other forms of international dispute resolution as envisioned by the constitution. However, other aims and objectives clearly cover both arbitration and alternative dispute resolution ('ADR') in their wording.³

A further example of the 'bias' is contained in the AfAA mission statement which is '*...to promote, encourage, facilitate and advance the use of international arbitration within the African continent.*'⁴ The mission statement makes no mention of any alternative dispute resolution or other international forms of dispute resolution.

At the African Arbitration Association 1st Annual International Arbitration Conference,⁵ the 'bias' was further demonstrated by the conference theme which was '*The Coming of Age of International Arbitration in Africa*'⁶, totally ignoring the other forms of international dispute resolution.

AfAA, therefore, needs to resolve the 'biases' and inconsistencies between the founding principle, the aims & objectives and the mission statement. A further consideration is that the name, African Arbitration Association, does not infer any connection to any other alternative dispute resolution methods. A name change may attract a lot more ADR practitioners as members.

The formation of AfAA has a genesis, partly, in the small number of Africans dispute practitioners used in African international arbitrations.⁷ Given the above, it is, thus, important to examine the usage and application of other ADR methods in Africa, as well as the use of Africans as practitioners in those methods and demonstrate that the utilisation of Africans on disputes emanating from Africa may be small, just like in arbitration.

³ Ibid.

⁴ <<https://afaa.ngo/page-18068>> accessed 25th March 2019.

⁵ Held on the 4th of April 2019 at the Radisson Blu, Hotel & Convention Centre Kigali, Rwanda.

⁶ <<https://afaa.ngo/page-18123>> accessed 25th March 2019.

⁷ SOAS Arbitration in Africa Survey Domestic and International Arbitration: Perspectives from African Arbitration Practitioners, 2018, p 4

2.0 ADR and Its Impact

The Chartered Institute of Arbitrators (CI Arb), arguably the world's foremost promoter of dispute resolution⁸ describes ADR as:

...made of a number of methods all designed to settle disputes **without involving the courts...**⁹

A course provided by CI Arb in ADR covers 14 different types of ADR methods.¹⁰ Of these, the most significant and familiar international ADR methods are:

- i. Negotiation;
- ii. Mediation or Conciliation;
- iii. Construction Adjudication;
- iv. Dispute Boards; and
- v. International and Domestic Arbitration

The International Center for Settlement of Investment Disputes-ICSID,¹¹ which exists for the purpose of the resolution of international investment disputes between investors and States, uses arbitration, conciliation and fact-finding as dispute resolution mechanisms.¹²

It has been established that under ICSID and similar bodies, the number of Africans acting as arbitrators, counsel or tribunal secretary is very small compared to the number of African cases referred to the body.¹³ ICSID also uses some other non-binding ADR methods such as early neutral evaluation,

⁸ <<https://www.ciarb.org/>> accessed 27th March 2019

⁹ <<https://www.ciarb.org/training/introduction-courses/>> accessed 14th March 2019. Emphasis added.

¹⁰ <https://www.ciarb.org/training/bookings/introduction-to-adr-14112019/> accessed 14th March 2019

¹¹ Part of the World Bank Group

¹² See <<https://icsid.worldbank.org/en/pages/process/overview.aspx>> accessed 20th March 2019

¹³ SOAS *Arbitration in Africa Survey Domestic and International Arbitration: Perspectives from African Arbitration Practitioners, 2018*, p 4

facilitated negotiation and/or mediation.¹⁴ It is safe to conclude that, the number of Africans appointed in these other ICSID ADR methods is also likely to be small.

Though there is no empirical evidence available, infrastructure projects should form a substantial part of the dispute resolution landscape in Africa. Dispute resolution is quite often tiered,¹⁵ more so in infrastructure, in the sense that, a contract will have several levels of dispute resolution methods available. This, for example, will start with negotiations, followed by determination by a person acting as a neutral,¹⁶ then on to adjudication or a dispute board, and finally arbitration as the final tier.¹⁷ These intermediate methods are in many respects quite successful, in reducing referrals to arbitration, while settling disputes in very short time periods and at much lower costs. For example, in the UK since the inception of statutory construction adjudication,¹⁸ well over 90% of decisions reached are accepted or form the basis for a negotiated settlement and, in either event do not lead to further proceedings.¹⁹ There is no reason why the same success cannot be achieved on an international scale, though a means of international enforcement may be helpful.

Dispute boards are equally successful. A Dispute Resolution Board Foundation ('DRBF')²⁰ study of 2017 found that, out of 512 Decisions, 480 or 94% were accepted by the parties, hence no further action was required. Thus only 6% were referred to arbitration, of which only 1.36% of the total were

¹⁴ See <<https://icsid.worldbank.org/en/Pages/process/Other-ADR-Mechanisms.aspx>> accessed 20th March 2019

¹⁵ Jane Jenkins, *International Construction Arbitration Law* (2nd edn, Wolters Kluwer) para 3.02.

¹⁶ Who under infrastructure project will be the Engineer or a person designated as such.

¹⁷ Ibid.

¹⁸ Under the *Housing Grants, Construction and Regeneration Act, 1996*.

¹⁹ John Uff, *Construction Law* (11th edn, Sweet and Maxwell, 2013) p 67.

²⁰ For more information on the board refer to < <http://www.drb.org/> > accessed 27th March 2019.

later overturned.²¹ Dispute boards and other forms of ADR offer parties a chance to avoid expensive follow-on dispute resolution procedures like arbitration and litigation. This, may have been the reason why the founding members of AfAA included other forms of ADR in the preamble and objectives, an obligation that at this early stage of AfAA's development already appears to have been lost.

Therefore, 'promoting international arbitration and other forms of international dispute resolution on the African continent'²² will produce maximum dispute settlement impact and increased Africa appointments, if the other ADR methods, other than arbitration, are also equally promoted.

3.0 Usage of Other International ADR Methods and Appointments of Africans

To demonstrate the usage and that there is a high probability that the number of Africans utilized in African generated disputes, using other ADR methods is small, an example from the use of dispute boards is described below. In a Dispute Resolution Board Foundation ('DRBF') study referred to above, the authors state that, from a sample size of 231 dispute boards constituted, 99 were in Africa, with 51 from Eastern Europe representing 43% and 22% respectively. The pair conclude, that Africa and Asia are the predominant areas in which dispute boards are used.²³

Of the 231 Projects, the International Federation of Consulting Engineers ('FIDIC')²⁴ form of contract commands 70 % of the usage.²⁵ The FIDIC form of

²¹ Geoff Smith, Leo Grutters, *Update on the DRBF Survey*, Dispute Resolution Board Foundation DRBF 18th Annual International Conference, Tokyo, Japan, May 2018. Paper can be found at < <http://www.drb.org/publications-data/library />>

²² *Constitution of the African Arbitration Association* (as amended on 28 September 2018), Preamble.

²³ Geoff Smith, Leo Grutters, *Update on the DRBF Survey*, Dispute Resolution Board Foundation DRBF 18th Annual International Conference, Tokyo, Japan, May 2018. Paper can be found at < <http://www.drb.org/publications-data/library />>

²⁴ French acronym for the *Federation Internationale des Ingenieurs-Conseils*.

²⁵ (n 24).

contract is very popular on African international projects,²⁶ with development banks using the FIDIC Multilateral Development Bank Harmonized Edition.²⁷ A substantial number of dispute boards are therefore, bound to be of an international nature. Generally, international development agencies, unlike state agencies, insist on the mandatory use of dispute boards for projects of a certain complexity or monetary value.²⁸

Most employers using the FIDIC forms of contract will use the FIDIC President's List²⁹ as a basis for the appointment of the dispute board members. In international projects, the President's list is the go-to list. The list is made up of professionals trained and approved by FIDIC in the dispute board processes.³⁰ FIDIC, though, does not impose on parties, the use of the Presidents List, where the FIDIC form is used. However, Employers prefer the surety offered by the list.³¹

²⁶ See Dr Nelson Ogunshakin-CEO FIDIC, *Keynote Speech*, FIDIC Africa Contract Users' Conference, Johannesburg, 30-31 October 2018. South Africa, though, is the biggest user of the FIDIC forms on local projects.

²⁷ Participating Banks are currently: The World Bank, African Development Bank (AfDB), Asian Development Bank (AsDB), Black Sea Trade and Development Bank (BSDB), Caribbean Development Bank (CDB), Council of Europe Development Bank (CEB), European Bank for Reconstruction and Development (EBRD), Inter-American Development Bank (IADB). Participating agencies are currently: AusAID-Australia, AFB-France, JICA-Japan, EXIM-Korea.

²⁸ Development Banks will insist on dispute boards for large projects which will normally be included as part of a funding and be in the conditions of contract.eg. World Bank, JICA, ADB. See Tomohide Ichiguchi, *JICA's Experience on Dispute Boards*, Dispute Resolution Board Foundation DRBF 18th Annual International Conference, Tokyo, Japan, May 2018. Paper can be found at < <http://www.drb.org/publications-data/library/> >

²⁹ <<http://fidic.org/president-list> > accessed on 28 Sept 2018.

³⁰ The listed individuals are experienced in all forms of FIDIC Contracts, in dispute resolution, and are skilled in construction contract adjudication and Dispute Boards. President's List adjudicators have proven ability by having passed the rigorous testing administered by the FIDIC Body of Adjudicators (FBA), after which the adjudicator is invited for inclusion on the President's List. See < <http://fidic.org/about-fidic/adjudicators> >

³¹ See the *FIDIC Conditions of Contract for Construction for Building and Engineering Works designed by the Employer 1999*, the Red book, cl 20.2, 20.3.

An examination of the President's List, which totals 68, reveals that there is only one Sub-Sahara African on the list. The other listed Africans are four South Africans citizens, though two have dual citizenship and one Egyptian also with dual nationality. It is therefore safe to conclude that Africans are well under-represented in dispute board appointments under the FIDIC forms of contract.

Therefore, the low African numbers from the Presidents List, translate into fewer African dispute board appointments under FIDIC contracts, but also under any other contracts which may utilize the list, as FIDIC does not bar its use. The two countries which are ardent users of dispute boards in infrastructure are Uganda and Ethiopia. Both, will typically, require listing on the FIDIC Presidents List as condition precedent to an appointment. Ethiopia does not typically use the FIDIC contract forms, yet being on the FIDIC Presidents list, is a condition precedent for any appointment.³²

Furthermore, the suspicion is that African representation on other dispute board lists is also likely to be quite low. Other lists include those of the Dispute Board Federation,³³ The Dispute Resolution Board Foundation,³⁴ and the International Chamber of Commerce.

4.0 Conclusion

For AfAA to meet all its objectives, the following further suggestions are offered:

1. FIDIC contracts are widely used in Africa and the organization is a world leader in the training of dispute resolvers. It, therefore, makes sense to engage FIDIC in the training of Africans for disputes board appointments.

³²See <http://www.era.gov.et/web/guest/invitation_bid?p_p_id=101_INSTANCE_Efz4&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column2&p_p_col_count=2&_101_INSTANCE_Efz4_delta=5&_101_INSTANCE_Efz4_keywords=&_101_INSTANCE_Efz4_advancedSearch=false&_101_INSTANCE_Efz4_andOperator=true&cur=4> Accessed 31st March 2019.

³³ see < <https://dbfederation.org/> >

³⁴ see < <http://www.drb.org/> >

2. Governments, especially those with fairly developed public procurement systems and regulations, be prodded to include dispute resolution provisions in contracts and to encourage the use of Africans in both local and international dispute resolution.³⁵ In Zambia, for example, public procurement regulations mandates, that every contract contain a dispute resolution clause³⁶other than litigation.³⁷ Furthermore, the regulations, mandate the use of standard contract conditions, all of which contain tiered dispute resolution clauses.³⁸

Public procurement in many African countries' accounts for substantial state budget allocations.³⁹ Unfortunately, it may also be a rich source of disputes.

3. Engage development agencies like the African Development Bank Group, World Bank Group, JICA etc, to see how the utilisation of African ADR practitioners can be increased. These organisations are a rich source of consultancies in services, works and sometimes goods into Africa. They, additionally, all have a vested interest in dispute resolution and will typically insist that any funded projects contain a dispute resolution mechanism included in a contract other than litigation.
4. Meeting all of AfAA's aims and objectives is a mammoth task that requires substantial resource mobilisation which appears not to have been appreciated by AfAA. This will necessitate the production of a

³⁵ For more information on Public Procurement in Africa see: Geo Quinot, Sue Arrowsmith- Editors, *Public Procurement Regulation in Africa* (Cambridge University Press, 2013).

³⁶ The Public Procurement Regulations, 2011, regulation 137 (3) (H). Regulations are found at <https://www.zppa.org.zm/procurement-legislations-and-handbooks>>

³⁷ This is implied.

³⁸ The Public Procurement Regulations, 2011, regulation 137 (1). Regulations are found at <https://www.zppa.org.zm/procurement-legislations-and-handbooks>>

³⁹ See Geo Quinot, Sue Arrowsmith- Editors, *Public Procurement Regulation in Africa* (Cambridge University Press, 2013).p 3, note 14. COMESA, with 20 members, is the largest economic zone in Africa with an estimated annual public procurement market of \$50 billion.

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professional action and funding plan. The one body that has the interest of Africa and should take a keen interest in the AfAA is the African Union and thus should be approached for this purpose.

World Duty-Free Lessons for Presidents

By: *Paul Ngotho**

1.0 Introduction

How does one bribe a country's president and commander-in-chief? That thought crossed my mind intermittently since the first time I read the International Centre for Settlement of Investment Disputes (ICSID) arbitral award in the World Duty Free case¹ about five years ago. The arbitrators were Gilbert Guillaume, a former President of the International Court of Justice, as president, Professor Andrew Rogers QC, a former Chief Justice of the Court of Appeals of New South Wales and V.V. Veeder QC, an international arbitrator.²

The thought flashed again in my mind as I read Honourable Justice Tuiyott's judgment of 5th October 2018 in *Kenya Airports Authority v. World Duty Free Ltd T/A Kenya Duty Free Complex* in High Court (Commercial & Admiralty)³, where the Authority (KAA) sought the setting aside, in its entirety of the Award of Hon. Justice (Rtd) E. Torgbor, as an Arbitrator, dated 5th December 2012 and delivered on 21st January 2013. The Award was in favour of World Duty Free Company Limited t/a Kenya Duty Free Complex. That judgment has since been appealed to the Court of Appeal. However, the evidence that one Nasir Ibrahim Ali, who, on behalf of World Duty Free, allegedly signed both the

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¹ World Duty Free Co. Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7 (World Duty Free v. Kenya). Award available at <http://ita.law.uvic.ca/documents/WDFv.KenyaAward.pdf>

² Ibid.

³ Kenya Airports Authority v World Duty Free Company Limited t/a Kenya Duty Free Complex [2018] eKLR, Miscellaneous Application 67 of 2013. Available at <http://kenyalaw.org/caselaw/cases/view/159886/>

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1989 agreement and the 1990 amendment, bribed⁴ H.E. Daniel Toroitich Arap Moi, the Second President of the Republic of Kenya and Commander-in-Chief of the Armed Forces for close to a quarter of a century, to procure the initial contract remains uncontroverted and cannot be an issue in the appeal.

So, how does one bribe a president? The thought lingered, then colonised my mind interfering with my concentration on Tuiyott's decision. So I scribbled it on the margin. Nothing doing. In a desperate attempt to appease it, I jotted a few bullet points on the margin. I transferred the notes to a new Word Document, which I saved in my articles-in-progress folder, where it duly joined the queue. But now I was hooked, with my head bubbling with ideas. I decided to write just one paragraph for easier follow-up in future. Then the article got a life of its own. There was no turning back. The title of this article was initially "How to Bribe a President". It evolved into "How to Bribe a President 101". I finally settled for the above less sensational and more positive title.

Justice Tuiyott had his work cut out for him. At para 17 of his judgment, he explains that he felt obliged to quote *verbatim* 5 entire paragraphs of the ICSID decision. The quotation takes four whole pages of his judgment, because of their importance. This article is based purely on Para 135 and 136 of the ICSID award as reproduced by Tuiyott. I was tempted to refer to additional sections of the ICSID award itself in order to enrich the article and fill in the gaps but in the end I decided not to as all the graphic details had been captured word for word. To keep out of harm's way, I will follow Tuiyott's good example of reproducing the two paragraphs as a block below. I will not underline anything there as both of them are treasures laden with gold and rare gems.

"135. In the present case, Mr. Ali asked Mr. Sajjad for advice on arranging the necessary licences and authorizations for the establishment of duty-free complexes in Kenya. Mr. Sajjad informed Mr. Ali that he would arrange meetings with the relevant officials for him. The first meeting was to be with President Moi. Before that audience, Mr. Sajjad informed Mr. Ali that a

⁴ World Duty Free Co. Ltd. v. Republic of Kenya, paras. 130-132.

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“persona donation” of US\$2 million in cash should be made to the President, and Mr. Ali understood that ‘this was payment for doing business with the Government of Kenya’. This sum was transferred by Mr. Ali to Mr. Sajjad’s account in London in February 1989. Mr. Ali then visited with the President at his residence in Kabarak, and on this occasion US\$500,000 in cash was “left in a brown briefcase by the wall”. After the meeting, Mr. Ali ‘saw that the money had been replaced with fresh corn’. Mr. Ali says that he was “uncomfortable with the idea of handling over this “personal donation” which appeared to him to be a bribe”. But he adds that he did not have a choice if he wanted the investment contract, and that he paid “the money on behalf of House of Perfume, treating it as part of the consideration for the agreement and documented it fully.

136. Under these circumstances, such as described by Mr. Ali himself, the Tribunal has no doubt that the concealed payments made by Mr. Ali on behalf of the House of Perfume to President Moi and Mr. Sajjad could not be considered as a personal donation for public purposes. Those payments were made not only in order to obtain an audience with President Moi (as submitted by the Claimant), but above all to obtain during that audience the agreement of the President on the contemplated investment. The Tribunal considers that those payments must be regarded as a bribe made in order to obtain the conclusion of the 1989 Agreement.”

The two paragraphs sound like a tried and tested step-by-step how-to guide of the type which come with glossy covers, a 100% success warranty or 100% money-back guarantee sealed with catchy, brightly coloured endorsements from various celebrities. Only that this time the subject is unusual: how one Mr Ali, a foreigner and complete stranger, got inside the president's private residence and bribed him, just like that.

The World Duty Free Ltd was previously known as the House of Perfume, which is in Kenya closely related to the Goldenberg Scandal⁵ - the fairy tale of

5 Republic of Kenya, *Report of the Judicial Commission of Inquiry into the Goldenberg Affair*, October, 2005. Available at <http://kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-the-Judicial->

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how a country with negligible gold deposits briefly became a significant exporter of hot air packed as gold. Suffice to say that gold and perfumes are very popular items in the duty-free world.

One cannot say for sure if Moi was bribed or not due to several factors. Firstly, the standard of proof in the ICSID arbitration is “balance of probability”⁶, which is quite low compared to “beyond reasonable doubt”, which applies in criminal matters like bribery. Secondly, Ali's evidence does not, with respect to Moi, probably enjoy the legal status of unchallenged evidence since Moi was not party to the ICSID arbitration. Thirdly, Moi has not, to-date, been charged with the offense in a competent Kenyan criminal court. Fourthly, and needless to say, a person is presumed innocent until proven guilty.

Yet Ali's sworn evidence remains uncontroverted and in public domain. That is not to say it is truthful. If anything, it is clearly not above Ali to fabricate lies. Yet, whether he bribed Moi is the wrong question. The more useful question would be: Did the ICSID Tribunal believe Ali? All the three ICSID arbitrators believed him. Furthermore, Ali's sworn evidence, which has been in public domain for over a decade, has not been controverted even in a PR exercise, for whatever that is worth, even though Moi has, in his retirement package, a fully-fledged public-funded press unit.

Now to the lessons in the World Duty Free case.

Lesson No. # 1 – Money Blinds!

The fact that World Duty Free had been under receivership since 24th February 1988 and was still under receivership in 1989 when Ali's company, House of Perfume, entered the first agreement with the Government of Kenya and, more importantly, also on 11th May 1990 when that agreement was amended and assigned to World Duty Free, no doubt with the consent of the Government of Kenya, were overlooked.

Commission-of-Inquiry-into-the-Goldenberg-Affair.pdf

⁶ Volkov, O. "Standard of proof in international arbitration-search for precision in considering corruption claims." (2015). Available at https://uba.ua/documents/presentation/VolkovO_2015.pdf

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At stake was the monopoly to run duty-free shops and billboard advertising in Kenya's then 2 international airports for decades. How, on this world, duty-free or not, does one pawn national crown jewels to a foreign-owned company which is under receivership? If you are asking that question, then you have not understood that money talks.

Lesson # 2 – Beware Election Fever

Enrique Peña Nieto, the president of Mexico, is accused in a US court of accepting a \$100-million bribe from Joaquin “El Chapo” Guzman of the Mexican mafia drug king two months to the 2012 election.⁷

In Kenya elections are held every five years – we have one election year and four pre-election years. Therefore, 1989 was a pre-election year. Moi was particularly vulnerable and amenable, and Ali knew it. Sitting and aspiring presidents, deputy presidents, beware.

Lesson # 3 – Tolerated, Never Trusted

Ali allegedly paid the first instalment of USD 500,000, or 25% of the bribe to show commitment and pay the balance later because he did not trust Moi. Politicians, including presidents, are tolerated, never trusted.

Lesson # 4 – Walls have Ears!

Ali allegedly placed the loaded briefcase against a wall in Moi's house. You have been told this before: walls have ears. Otherwise, we would never know about the shady goings-on inside Moi's heavily guarded private residence 30 years later, some 170 kilometres from Nairobi.

Lesson # 5 – Signage

We have no idea how Ali got to know exactly which of the presumably many walls was reserved for bribes. Was there a signpost written, “Place your Bribes

⁷ BBC, “El Chapo 'paid \$100m bribe to former Mexican president Peña Nieto” 15 January 2019. Available at <https://www.bbc.com/news/world-us-canada-46872414>

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Here, Please", and an arrow pointing downward and a smiling cartoon?⁸ There were no emojis in 1989.

Lesson # 6 – National Monument

Retired presidents are entitled to a presidential library. Now, Moi was never a great reader. In fact, he reserved his choice insults for *waafrika waliosoma* (learned Africans). Fortunately, his stately private mansion at Kabarak qualifies to be converted into a bribery museum. Tourists from Kenya, rest of Africa and the whole world would pay handsomely now but even much more in the future just to see the wall where the president's bribe was placed. Those who insist on touching the wall or taking selfies there must pay double.

No doubt that enterprise would earn a lot of money for the first country in the world to have a bribery museum. For authenticity, which is singularly important in such matters, the entry fees would be in US Dollars, no less, as that was the original house owner's undisputed currency of choice.

Ali could be persuaded to donate a replica briefcase, which would be loaded with USD 500,000. Here we have to be creative. I can show you a bank in Nairobi which apparently has large depositories of fake dollars. The tour guide will be stopping at that point and smiling wisely to explain something of great historical significant in truly Kenyan English or something he would have you believe is Italian, German or Russian. No, it is not that we use fake dollars in Kenya but we display real dollars here as the house has a history of burglary.

The original owner had a 20 kilogram golden toy⁹, which was stolen from his bedroom in 1999, exactly ten years after he received the bribe. He was very enterprising – he once borrowed 110 acres from his good neighbour, one Macolm Bell, and forgot to return it leading to a case in the Supreme Court of Kenya¹⁰.

⁸ World Duty Free Co. Ltd. v. Republic of Kenya, para. 130.

⁹ <https://www.nation.co.ke/lifestyle/1190-21042-dopw5nz/index.html>

¹⁰ <http://kenyalaw.org/caselaw/cases/view/91707/>

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Lesson # 7 - Presidential Pride

Seasoned presidents do not take small change. Would you believe that the president¹¹ of a gold, uranium and diamond exporting country would take small bribes, by instalments and through a bank account? And just to pay for house repair and plumbing bills? I do not. I am sure he will be discharged and charged with more worthy offenses. He should have learnt some style and French shopping from one of his northern neighbours. Such behaviour gives presidents a bad name.

While at it, do not forget to protect your family. A first lady¹², having entered a plea bargain after fraudulently using state funds for meals - yes, food - is having to pay 10,000 shekels (\$2,800) and a further 45,000 shekels as costs in monthly instalments even though her husband is a millionaire. The first instalment was due three months after the deal. The less said about such the better.

Lesson # 8 - Bragging Rights

Now you are ready for a major lesson: a person who bribes a president, a judge, an arbitrator, policeman or you, yes you my dear reader, acquires certain life-long bragging rights which he or she is entitled to exercise when it suits him or her. He or she will certainly talk. When it suits him or her.

Ali did not bother with pedestrian stuff like memoirs, a press conference or Facebook. His moment to sing like a bird eventually came. Caged in an ICSID confession box in New York and under oath, he confessed his sins in the tone one reserves for reporting an uneventful African Safari.

Lesson # 9 - State Lodge

Moi retired to the very same Kabarak home in which he allegedly hosted Ali. He is lucky. The arm of the law, which is famously long for pick-pockets and chicken thieves, has been remarkably short here. Elders are treated with kid

11_ <https://www.nation.co.ke/news/africa/Witness-claims-Zuma-received-monthly-bribes/1066-4955876-k96mdyz/index.html>

12 <https://mobile.nation.co.ke/news/world/Israel-PM-s-wife-convicted-of-misusing-public-funds/3126396-5159830-7v4x2d/index.html>

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gloves in some cultures. People are much less sympathetic with younger people. That they have turned a blind eye to the sworn allegations against Moi and to Mugabe's countless indiscretions, misadventures and atrocities is not a licence to others.

In South Africa, South Korea¹³, Singapore and other elsewhere, presidents are either in court or in prison for bribery. Presidents beware! Even if you are not forced into a miniature state lodge, your transgressions will haunt you in retirement as you have no idea when the devil will come for his pound of flesh.

Lesson # 10 - The Small Print

Some presidents are insured from prosecution by law but do not read the small print. Such statutory immunity is a double-edged sword - protecting a serving or retired president denies him the opportunity to clear his name in court. Even presidents cannot eat their cake and have it.

Lesson # 12 - Legacy

Regardless of how former presidents are treated locally, there are no holy cows in the international arena. Ali's confessions are talked about in nearly every international conference which I have attended. This two-million-dollar scandal will be probably one of the saddest parts in Moi's legacy. The jury is still out on the ultimate lowest moment. There are two other contenders for that slot. One is his role, if any, in the suicide-turned-murder/assassination of his dear prayer partner and Foreign Affairs Minister Dr Robert Ouko¹⁴ shortly after both attended a who-is-who prayer breakfast in New York. The other is turning a completely deaf ear to pleas by the doctors, family and friends of Kenneth Matiba¹⁵ that the politician, who was fit to climb mountains when he

13 <https://www.npr.org/2018/10/05/654851055/former-south-korean-president-sentenced-to-15-years-in-prison-on-corruption-char>

14 Ochieng, J., "Robert Ouko murder: Fear still stalks Koru, 29 years later," *Daily Nation*, Wednesday February 13 2019. Available at <https://www.nation.co.ke/news/Fear-still-stalks-Koru--29-years-after-the-Ouko-murder/1056-4978764-6g846s/index.html>

15 Asamba, M., "Confidant, Kibe narrates resistance Matiba faced in fight for multi-party democracy," *Standard Digital*, 26/4/2018. Available at

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was detained without trial for opposing rigging of presidential elections and for demanding a return of multi-party politics, was gravely ill and required urgent specialised treatment, at his own, Matiba's, cost!¹⁶

Lesson # 13 – Of Cavemen, Elephants and Internet

Quiz: *What is the similarity between an elephant and the internet? Answer: Both never forget.* Like the queer drawings which cavemen and presumably women bequeathed us in dark places, Ali's confession and Moi's alleged transgressions will be on record for ever through the ICSID award, Tuiyott decision, innumerable adverse references¹⁷, articles in local dailies and even blogs in internet¹⁸.

Aspiring, serving and retired presidents, deputy-presidents, prime ministers and governors worldwide must never forget this lesson. I must engrave that on the wall of my cave tonight – future generations will be grateful.

Epilogue

We now all know how to bribe a president and commander-in-chief of a sovereign state. The knowledge is no longer patented for use by selected few. Now the whole world is wiser. Thanks a lot, Ali. *Shukran. Thengiû mûno.*

Courtesy requires that we salute our mentor and benefactor in a befitting manner. Like all great teachers and mentors, you, no doubt, hope to hear in due course how your most discerning students applied your deceptively simple lessons and went even further than you did – we will keep you posted. Meanwhile, on behalf of the world, I will do the honours.

I have the honour of informing you that your bust will be displayed in a place of honour in the proposed bribery museum. A seasoned writer will be

<https://www.standardmedia.co.ke/article/2001278310/matiba-s-long-term-friend-names-his-political-foes>

¹⁶ Ibid.

¹⁷ For example <https://www.threecrownsllp.com/case-studies/world-duty-free-co-ltd-v-the-republic-of-kenya/>

¹⁸ For example <http://isdsblog.com/2015/02/20/case-summary-no-2/>

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engaged to craft a worthy citation but kindly accept the following in the interim,

"To Ali. For explaining, without notes but with amazing clarity and in one short lesson, to mankind the perplexing and complex subject: How to Bribe a President. Drawing from his worldwide experience, he bared his soul and withheld nothing he considered might be remotely helpful to the current and future generations of humanity. Going well beyond the call of duty and without taking more time than was necessary, he managed to expound not only the how but delved into the why, how much and the where."

"na huu ndio mwisho wa hadithi. Ikiwa njema, njema yetu wote, na ikiwa mbaya, mbaya yangu mimi peke yangu..." (Customary Swahili epilogue for oral stories, meaning "This is the end of my story. If it is good, we all own it. If it is bad, I suffer alone").

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The 'Haves' and The 'Have-Mores': Arbitrability of Employment Disputes in Kenya

*By: Evans Lagat * & George Ogembo***

Abstract

For a long time, there has existed a debate in Kenya and indeed the entire commonwealth nations whether arbitration agreements can successfully be inserted into individual employment contracts and whether such agreements are enforceable and parties compelled to subject all employment disputes to arbitration. The situation is not helped by the fact that there exist contrasting judicial decisions on the issue with the relevant legislations appearing vague on the subject. In the circumstances, it is safe to conclude that the subject of inclusion and enforceability of arbitration provisions in employment agreements is generally considered controversial. Amidst the controversy, there exist points of convergence and opportunities that could be explored to midwife a suitable framework for the application and acceptance of arbitration as a proper mode of resolution of employment disputes away from adjudication.

1.0 Introduction

Arbitration is classified as a form of Alternative Dispute Resolution (ADR) mechanism. ADR is used in a wider sense to mean any method of resolving disputes other than those adopted by Courts of law as part of the system of justice established and administered by a State.¹

Arbitration is a consensual and voluntary process of dispute settlement which presumes that both parties are expected to be treated with equality with each having a fair and reasonable opportunity to present their cases as is provided,

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¹ Redfern A & Hunter M, pg 32.

for instance, in the Kenyan Arbitration Act.² It is however worth noting that in the case of employment disputes, there will inevitably be a power imbalance between employers and employees given that employers have a higher bargaining power than the employees hence the tagline of this paper: “*the haves*” and “*the have mores*” respectively.

Employment arbitration specifically refers to resolution of workplace disputes by way of arbitration.³ Indeed, the Constitution of Kenya promotes but does not compel utilization of alternative dispute resolution mechanisms including arbitration by the courts and tribunals when exercising judicial authority.⁴ The employer is hence not compelled to enter into arbitration agreement with an employee as a viable route to resolve disputes that arises within or upon termination of the employment contract. Generally, there has been slow uptake or embrace of arbitration agreements to regulate dispute resolutions by both employers and employees with majority of labour disputes being settled in Employment and Labour Relations Court.⁵

The preference of courts has led to increased caseloads prompting a relook at the viability of employment arbitration as alternative pathway.⁶ The

² Section 19, Kenyan Arbitration Act, 1995.

³ Arbitration has been defined as a process whereby parties voluntarily agree to refer their disputes to an impartial third person or persons selected by the parties for a decision that is final and binding on the parties. Parties usually make these choices by way of a written contract or agreement, referred to as the arbitration agreement.

⁴ Article 159(2) of the Constitution provides that in exercising judicial authority, the courts and tribunals shall be guided by principles that inter-alia promotes alternative forms of dispute resolution including arbitration.

⁵ The Court was established as a specialized court for labour and employment disputes and is distinct from the ordinary courts. The special procedures and Judges in these courts was intended to ensure application of expertise in complex labour law jurisprudence while making the system less formal, faster, more economical and more accessible than the ordinary courts.

⁶ According to the 2016-2017 State of the Judiciary and the Administration of Justice Report, there existed a backlog of at least 13,273 cases pending at the Employment and Labour Relations Court of Kenya dating back to 5 years. < <https://www.judiciary.go.ke/download/state-of-the-judiciary-and-the-administration-of-justice-report-2016-2017/>> accessed on August 28,2018

Employment Act and the Labour Relations Act has not explicitly addressed the actual place of employment arbitration and instead given pre-eminence to conciliation as opposed to arbitration in resolving workplace conflicts. The move has its roots in the enactment of the Labour laws in 2007 that effectively eroded the conventional employment at-will doctrine and concomitant creation of statutory and constitutional concept of fair labour practices.⁷ With the emergence of the new jurisprudence, various concepts that govern commercial arbitration key being party autonomy have struggled to find relevance and footing within the spheres of employment law.⁸

Common cases where the court has been called upon to pronounce itself on the validity or otherwise of an arbitration clause is at the post-employment contract stage where the dispute revolves around termination and attendant terminal benefits. It is hardly possible for parties within an employment contract to submit to an arbitration process during the term of the employment contract and still maintain an amicable employment relationship.

The foregoing brings into a sharp focus the legal and practical concerns as regards mandatory arbitration and whether an arbitration agreement can preclude the judicial adjudication of statutory rights.

The article will be limited to arbitration of employment disputes involving the individual rights of employers and employees that arises outside the context of Collective Bargaining Agreement (CBA).⁹ It is different from the arbitration of

⁷ The new labour laws include Employment Act, No. 11 of 2007; The Labour Institutions Act, No. 12 of 2007; The Work Injury Benefits Act, No. 13 of 2007; The Labour Relations Act No. 14 of 2007 and The Occupational Safety and Health Act, No. 15 of 2007

⁸ The freedom of parties to consensually execute arbitration agreement is known as the principle of party autonomy. The principle provides a right for the parties to international commercial arbitration to choose applicable substantive law and these laws when chosen shall govern the contractual relationship of the parties.

⁹ Section 2 of the Labour Relations Act, No. 14 of 2007 defines a collective agreement to mean a written agreement concerning any terms and conditions of employment made

workplace disputes under a CBA. The latter is designed to resolve workplace disputes as a substitute for economic pressure in the form of strikes. Labour Relations Act expressly provide that an employer, group of employers or employers' association and a trade union may conclude a collective agreement providing for arbitration of any category of trade disputes identified in the collective agreement by an independent and impartial arbitrator agreed upon by the parties.¹⁰

This paper seeks to answer the question as to whether employment disputes are arbitrable in Kenya. In doing so, the paper will first discuss the concept of arbitrability generally and more specifically undertake a comprehensive analysis of the existing legal framework in Kenya as regards employment arbitration. Thereafter, a comparative study of arbitrability of employment disputes in other jurisdictions namely the EU and the USA will be undertaken.

2.0 Concept of Arbitrability

Arbitrability is concerned with the determination of the types of disputes that are capable of being resolved by arbitration and the disputes which belong exclusively to the domain of Courts of law.¹¹

In principle, *any* dispute should be capable of being resolved by either arbitration or by courts. However, it is because arbitration is a private proceeding with public consequence that some types of disputes are reserved for national courts whose proceedings are generally in the public domain.¹²

Whether or not a particular type of dispute is arbitrable under a given law is in essence a matter of public policy. Public policy varies from one country to another and changes from time to time.¹³ Therefore, each country establishes

between a trade union and an employer, group of employers or organisation of employers.

¹⁰ Section 58(1), Labour Relations Act, Act No. 14 of 2007.

¹¹ Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration*, Sweet & Maxwell London, 3rd Edition 1999 at page 148.

¹² *Ibid.*

¹³ *Ibid.*

which matters may or may not be resolved by arbitration in accordance with its own political, social and economic policy. The legislators and courts in each country must balance the domestic importance of reserving matters of public interest to the courts against the more general public interest in promoting trade and commerce and settlement of disputes. This balance becomes even more profound in the international sphere with the interest of promoting international trade and international comity. In view of the above, arbitrability is dependent on what is considered to be acceptable under public policy in the context of the social, economic and political considerations applicable in a given country.¹⁴

In effect, most disputes are arbitrable under laws of most countries. Some of the categories that have generally been agreed as being outside the domain of arbitration include: patents and trademarks¹⁵, anti-trust and competition laws,¹⁶ securities transactions,¹⁷ bribery and corruption.¹⁸

3.0 The place of arbitration in employment law jurisprudence

It cannot be gainsaid that arbitration provisions can be effective, efficient and economic ways of disposing employment disputes. However, in majority of instances where parties to an employment contract have resorted to arbitration, they have largely been compelled to arbitrate with an attempt to resolve an employment arbitration case using commercial arbitration principles notwithstanding the fact that labour arbitration is distinctly different from commercial arbitration. This has the potential of distorting the unique policies attendant to employment arbitration. In fact, the jurisprudential underpinnings, sources of law and the policy justifications vary between the two models of arbitration.

¹⁴ Ibid.

¹⁵ Ibid at page 149.

¹⁶ Ibid at page 149.

¹⁷ Ibid at page 151.

¹⁸ Ibid at page 152.

Generally, employment law jurisprudence is hinged on expeditious access to justice by an employee at minimal costs devoid of complex legal hurdles. The power relationship between the employer and employee is strictly regulated. Modern employment law mirrors a dual perspective or model with contractual and regulatory elements. To this end, employment laws are enacted along public policy principles to re-arrange the power relationship in favour of employees by providing the floor of rights principally aimed at protecting the rights of weaker members of the society while maintaining the social goals necessary for an employer-employee relationship to be nurtured and protected. The enactment of the floor of rights was an interventionist reaction to the shortcomings of the contractual employment law. Further, the enactments are principally aimed at tempering the exploitation of the employer's power position in the workplace and address the failure of contractual employment law to effectively adjust or leverage the relative power positions between the employer and employee.¹⁹

The Employment and Labour law is a classic example of a determination by the State that a host of rights and obligations owed between parties should not be determined solely by agreements between them. The legislature has created and sought to protect these rights through the enactment of public laws which by their very nature cannot be abrogated by the members of the public or institutions.²⁰ The laws guarantee an employee minimum employment terms and conditions as well as eliminating discrimination and other forms of unfair labour practices including unfair termination. These are mandatory provisions and the law abhors any form of departure from this floor of rights by providing inferior rights as the same would be tantamount to infringing on the principles of public policy.

¹⁹ Simon Deakin, *The Floor of Rights in European Labour Law*, New Zealand Journal of Industrial Relations, 1990, Pg. 219.

²⁰ William H. Daughtrey, *Modifications Necessary for Commercial Arbitration Law to protect Statutory Rights Against Discrimination in Employment: A Discussion and Proposals for Change*, Ohio State Journal on Dispute Resolution Vol 14:1 (1998) Page 32.

Even though Arbitration has many benefits, it cannot survive a fairness analysis unless both parties have the ability to voluntarily, knowingly, and without pressure or coercion, choose to arbitrate rather than litigate claims.²¹ Generally, in employment contracts, employees have either little or no meaningful choice regarding whether to accept undesirable provision in the employment agreement since the general feeling is that if they were to refuse to sign and insist on further negotiation of any term of the contract, the employer may decline to grant them employment and the situation is likely to render them unemployed.

The arbitration clauses in employment contracts would initially have to surmount the hurdle of potential or loose presumption of procedural and substantive unconscionability. In the circumstances, the court faced with an application seeking implementation of an arbitration clause ought to address itself on the question of unconscionability. The key guiding parameter is whether the court is dealing with an employer who has unilaterally incorporated a standardized arbitration clause for all its employees on one hand or in other words, the potentially procedurally unconscionable means by which the agreement was signed and offered the employee on a take-it-or-leave-it basis. While procedural unconscionability involves analysis whether fraud and duress was involved in the execution of the contract, substantive unconscionability principally aims at interrogating whether the terms of the agreement are unfairly one-sided.²²

²¹ Ganna Giesbrecht-McKee, *The Fairness Problem: Mandatory Arbitration in Employment Contracts*, *Willamette Law Review* (2014), Pg. 259.

²² Karl G. Nelson, *Arbitration of Employment Claims: Challenges and Limits on Enforceability in Texas*, <https://www.gibsondunn.com/wpcontent/uploads/documents/publications/NelsonWilliamsArbitrationAdvocate.pdf> <Accessed on August 28, 2018>

4.0 Analysis of Kenyan Legal Framework on Employment Arbitration

4.1 Legislative framework

Even though arbitration is constitutionally entrenched and widely accepted as a mode of dispute resolution, the Kenyan Labour Laws drastically limits the extent to which employment-related issues can be arbitrated especially where it relates to individual employee claims. Generally, the right of an individual employee to access the protection of Employment and Labour Relations Court (ELR court) for resolution of employment disputes is a public policy issue and ought to be protected as part of the minimum statutory terms and conditions of employment. Several provisions of the Employment Act and Employment and Labour Relations Act have significantly diminished the possibility of arbitrating employment disputes with ease. Indeed, an issue of public policy would arise where a party argues that Parliament did intend for parties to litigate employment disputes only through the court, mediation or conciliation.

Part III of the Employment Act provides that a written contract of employment shall provide certain detailed particulars. From a reading of the particulars, it is not a statutory requirement that a dispute resolution clause be included as a mandatory clause in a written contract of employment. Further, it is expressed that provisions of Part V and VI constitutes the minimum terms of the contract of service. However, if it is regulated by any other regulations as agreed in CBA, contract between the parties, enacted by any other written law or decreed by a judgement which are more favourable terms and conditions of employment that are more favourable for an employee than the terms provided in Part V and VI, then such favourable terms and conditions of service shall apply. However, it is arguable whether introduction of a dispute resolution clause which is not contemplated by the Employment Act could be classified as a favourable term of employment.

The Employment Act provides an inbuilt statutory mechanism for addressing any complaint as regards summary dismissal and unfair termination. It provides that an employee has an option of presenting a complaint to a labour

officer for conciliation or the ELR Court.²³ Part XII addresses the issue of disputes settlement procedures. It provides that “... whenever an employer or employee neglects or refuses to fulfil a contract of service; or any question, difference or dispute arises as to the rights and liabilities of either party; or touching any misconduct, neglect or ill treatment of either party or any injury to the person or property of either party, an aggrieved party may complain to the labour officer or lodge a complaint or claim to the ELR court. It further provides that no court other than the ELR court shall determine any complaint on matters specified.²⁴ The remedies for wrongful dismissal and unfair termination provided for under the Employment Act can only be granted either by the labour officer or ELR court.²⁵

The foregoing buttresses the fact that the ELR court and the labour officer have been conferred the principal responsibility to enforce the statutory employment claims and the restrictions mirror the public policy principles aimed at providing uniformity in enforcement as regards violation of statutory rights of an employee. An aggrieved employee should not ordinarily be denied access to these statutory mechanisms for adjudication or redress with respect to violations or complaints arising out of the employment relationships.

Employment and Labour Relations Courts (Procedure) Rules²⁶ **encourages** parties before it “...to enter into conciliation, negotiations and agreements and where a consensus is reached, consent to that effect shall be recorded by the Court at any time before conclusion of the hearing of the proceedings and the Court shall adopt the consent reached by the parties as its own ruling in that matter”.

Turning to the provisions of Employment and Labour Relations Court Act, the ELR Court is granted an exclusive original and appellate jurisdiction to hear and determine all disputes relating to employment and labour relations

²³ Section 47, Employment Act, Act No. 11 of 2007.

²⁴ Section 87, Employment Act, Act No. 11 of 2007.

²⁵ Section 49 & 50, Employment Act, Act No. 11 of 2007.

²⁶ Legal Notice No. 78 of 2010.

including disputes relating to or arising out of employment between an employer and employee.²⁷ The jurisdiction is expansive and at the same time jealously guarded. Even though parliament is granted the power to enact legislations conferring jurisdiction on Magistrates Courts with respect to disputes relating to employment and labour relations, only certain limited disputes can be litigated in these courts. The Magistrate Court Act only limits the jurisdiction of Magistrate Courts to matters specified in Section 29 of the Employment and Labour Relations Courts Act.²⁸ The aforesaid section provides that the Magistrate Courts can only handle disputes relating to offences under the Employment Act or any other dispute as may be designated in the Gazette notice by the Chief Justice on the advice of the Principal Judge of the Employment and Labour Relations Court. The limitation has been confirmed in a recent Court of Appeal decision.²⁹ However, in June 2018, the Chief Magistrate allowed magistrates in the rank of Senior Resident Magistrate and above to determine disputes arising from contracts where an employee's gross monthly pay does not exceed Kshs. 80,000. The directive is clearly an additional work to magistrates whose courts had at least 366,133 pending cases with a total of 199,536 being classified as a backlog as at 2017.³⁰

However, the ADR mechanisms are not precluded and it is provided as follows:

"Nothing in this Act may be construed as precluding the court from adopting and implementing, on its own motion, or at the request of the parties, any other appropriate means of resolution of the dispute, including internal methods, conciliation, mediation and traditional dispute resolution mechanism in accordance with Article 159(2)(c) of the Constitution."

²⁷ Section 12, Employment and Labour Relations Court Act, Act No. 20 of 2011.

²⁸ Section 9(b), Magistrate Court Act, No.26 of 2015.

²⁹ *Law Society of Kenya, Nairobi Branch v Malindi Law Society & 6 others*, Nairobi CA No. 287 of 2016.

³⁰ State of the Judiciary and Administration of Justice Report 2016-2017
< <https://www.judiciary.go.ke/download/state-of-the-judiciary-and-the-administration-of-justice-report-2016-2017/>> accessed on August 28, 2018

From the wording of the above clause, it is clear that the Court has absolute discretion to adopt and implement an appropriate means on its own motion or at the request of a party. The Court should first analyse the appropriateness of the mode. It is very curious why there is no mention of arbitration expressly under this section.

The only provision under the entire Employment and Labour Relations Court Act which mentions the word 'arbitration' is Section 15(4) which we shall set out *in extenso* given its uniqueness. It states that: "*If at any stage of the proceedings it becomes apparent that the dispute ought to have been referred for conciliation or mediation, the Court may stay the proceedings and refer the dispute for conciliation, mediation or arbitration."* This Section is ambiguous in that a Court satisfied that a matter can be referred to conciliation or mediation cannot proceed to make an order that it be referred to arbitration. We believe this may have been a mistake of legislative draftsmanship and the word '*arbitration*' should not have been included.

It therefore appears that the law gives pre-eminence to conciliation and mediation as an alternative mode of resolution of employment disputes as opposed to arbitration.

The court has proceeded to hold that the fact that the law omits to mention arbitration as an alternative method of dispute resolution was a deliberate omission as the labour laws provide for both internal dispute resolutions and conciliation. The reason for reference of disputes to ADR is to save time and expenses or utilize expert opinion. This is such that if these ends are not likely to be achieved, the courts provide the most direct and expedient avenue to resolve the dispute.³¹

It is apparent from the reading of both the Constitution and the Labour Laws that ADR as a means of dispute settlement in employment disputes looms large. It can however be observed that in all the aforementioned laws, the ADR

³¹*Dr. Kennedy Amuhaya Manyonyi v African Medical and Research Foundation* [2014] eKLR.

mechanism is voluntary as between employer and employee and that arbitration is not mentioned. It is therefore contended that in respect to individual employment disputes, no mandatory pre-dispute arbitration was contemplated in the Kenyan Labour Laws and that the forms of ADR for such disputes is conciliation and mediation.

It is important to distinguish between individual employment disputes and trade disputes³² which are capable of being settled through arbitration as is provided for under Section 58 of the Labour Relations Act. Trade disputes are arbitrable while individual employment disputes may not be arbitrable. It is argued that the reason why arbitration is permissible in trade disputes is because both parties (i.e. employer and trade union) have almost equal bargaining powers while the balance is tipped in favour of the employer in individual employment disputes. Some courts have recognized the distinction between trade disputes and individual employment as was explained in *Cole v. Burns International Security Services* [105 F.3d 1467 (D.C. Cir. 1997)].³³

Finally, the Kenyan Arbitration Act deals with the question of arbitrability in Section 35(2)(b) & 37(1)(b) which provide that the High Court may set aside or refuse to recognize/enforce an arbitration award only if the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or the arbitral award is in conflict of or would be contrary to the public policy of Kenya.

³² A Trade Dispute is defined in the Labour Relations Act Section 2 to mean “a dispute or difference, or an apprehended dispute or difference, between employers and employees, between employers and trade unions, or between an employers’ organisation and employees or trade unions, concerning any employment matter, and includes disputes regarding the dismissal, suspension or redundancy of employees, allocation of work or the recognition of a trade union.”

³³ Carmen Comsti, A Metamorphosis: How Forced Arbitration Arrived in the Workplace, 35 Berkeley J. Emp. & Lab. L. (2015) at page 22, available at <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1466&context=bjell>

The elephant in the room therefore is whether employment disputes are capable of settlement through arbitration or it would be contrary to public policy in Kenya. It is worth pointing out that there is no explicit carve-out of employment disputes as a category that is excluded under the Kenyan Arbitration Act. It is argued elsewhere in this paper that it is time that the Kenyan judges develop jurisprudence to the effect that individual employment disputes are not arbitrable on grounds of public policy.

4.2 Case Laws

The Kenyan labour Courts have had occasion to deliberate on the question of whether employment matters are arbitrable yet there seems to be no settled jurisprudential direction on the same. This is evidenced by some of the following cases which we have analyzed. The cases favour both schools of thought i.e. the unarbitrability of employment matters and arbitrability of employment matters.

The Court in *William Lonana Shena v HJE Medical Research International Inc*³⁴ took the position that given that there was a valid arbitration clause in the employment contract, the court would not hesitate to uphold the same. The court also held that the fact that the labour court has unlimited jurisdiction does not defeat arbitration process. Additionally, the Court curiously proceeded in a wholesale manner and without in-depth analysis to dismiss the arguments against arbitration of employment matters in a two paged Ruling stating “...the arguments raised by the claimant ...are not good enough to defeat the arbitration clause”. This is very intellectually underwhelming.

In *Stephen Nyamweya & Another vs. Riley Services Limited*³⁵ the Respondent (Employer) raised a preliminary objection claiming that the dispute was premature before the Court given that there was an arbitration Clause in the employment contract. The labour Court noted that the Employment Act,³⁶ places the responsibility of drawing employment contracts on the employer

³⁴ Cause No. 1096 of 2010 [2012] eKLR.

³⁵ Cause No. 2469 of 2012 [2013] eKLR.

³⁶ Section 10, Employment Act, 2007.

and sets out the mandatory elements to be contained in employment contracts. Dispute resolution is not one of the mandatory elements to be included. The Court was of the view that the law provides for an elaborate conciliation process in employment matters. The Court also observed that one of the unique features of the Industrial Court is that parties can access justice expeditiously, at a minimal cost and without too many legal hurdles. Ultimately, the Court struck out the arbitration clause.

Some courts have held that employment contracts are distinct as against commercial contracts on grounds that firstly, employment contracts are drawn by the employer in a standard format to be applied to all employees, with minimal adjustments on job description and remuneration and secondly, the employee has no opportunity to negotiate on standard clauses.³⁷

A similar conclusion was reached by Justice Maurine Onyango in *Jane Muthoni Mukuna Vs. FSI Capital Ltd*³⁸ wherein she was of the considered opinion that reference of employment cases to arbitration is expensive and in many cases takes more time than reference of disputes to the ELRC hence against the very objectives of arbitration which is to save time and costs.

The above school of thought which distinguishes employment contracts from commercial contracts was disputed and held to be untenable by the Court in *James Heather-Hayes Vs. African Medical and Research Foundation (AMREF)*.³⁹ The Court in this case also held that arbitration clauses in employment contracts were valid given that the employment contract was entered into between sober and willing parties otherwise issues of duress and undue influence would render the contracts void.

In a case in 2016 the Court in *Francis Nuttall Vs Gor mahia Football Club*⁴⁰ took the view that where parties have voluntarily entered into an

³⁷ Cause No. 2469 of 2012 [2013] eKLR.

³⁸ Cause No. 688A of 2014 [2015] eKLR.

³⁹ Cause No. 626 of 2013 [2014] eKLR.

⁴⁰ Cause No. 807 of 2016 [2017] eKLR.

agreement governing the conduct of their affairs, the courts cannot intervene and rewrite the contract for the parties. The court's interference is limited to the instances where the contract is illegal, immoral or contrary to public policy. Additionally, the Court while acknowledging that it was the only court with exclusive jurisdiction to hear and determine employment and labour relations disputes noted that such jurisdiction could only be exercised over matters voluntarily brought by the parties and only in the absence of a recognized alternative method of dispute resolution preferred by the parties. The Court also took cognizance of Article 159(2) (c) of the Constitution which mandated Courts to promote alternative forms of dispute resolution in exercise of their judicial authority. This was a case where the employment contract provided that any dispute would be referred to arbitration by an arbitrator appointed by the Kenya Premier League Ltd in accordance with the Arbitration Act 1995 and FIFA Statutes.

The Court above did not delve into what constitutes public policy and whether arbitration of labour disputes was within the public policy of Kenya. One would argue that the judge applied a textual interpretation of the subject employment contract.

In a more recent case, *JK Vs PATH & Another*⁴¹, the Court in an employment dispute that included a claim for general damages in respect to sexual harassment, reaffirmed that courts do not have powers to rewrite contracts voluntarily entered between the parties. On the claim on sexual harassment the court was emphatic that arbitrators were professionals in their area of expertise hence '*able to handle the dispute in accordance with the dictates of their profession.*' Curiously however, while referring the dispute to arbitration, the court observed that given that it was dispute over an employment contract, it '*would most likely be handled by an arbitrator with a legal background who should be capable to assess general damages.*' This in our opinion is not a sound legal ground since there is no certainty that the arbitrator appointed will have a

⁴¹ Cause No. 869 of 2017 [2018] eKLR.

legal background unless both parties consent to such arbitrator being appointed.

This paper recommends that Kenyan judges should attempt to come up with clear jurisprudence that seeks to define Kenya's public policy as far as arbitrability of employment disputes is concerned.

5.0 Comparative Study on Employment Arbitration

A snapshot of how different countries treat the question of labour and employment arbitration points to the fact that utilization of arbitration procedures in this sub sector ought to be treated differently and cautiously. There exist common themes and comparative contrasts in the use of arbitration as regards approaches of each country. Whereas North America, led by United States of America and Canada embraces the concept of employment arbitration, the reception in Europe and in most Commonwealth States range from relatively chillier to being completely outlawed.⁴² Such strict interpretation and application is based on an argument bordering on public policy measures intended to protect employees who are in a weaker bargaining position as compared to employers. In countries that have outlawed or severely restricted arbitration of employment disputes key being Brazil, France, Germany, South Africa, Spain and United Kingdom have instead established or established special labour courts, special tribunals or administrative systems for adjudicating labour disputes which also provide appellate systems.⁴³ These mechanisms, which may operate either on governmental or private structures, provide varied alternative approaches that

⁴²*International Labour and Employment Arbitration: A French and European Perspective*, American Bar Association (www.americanbar.org). Arbitration of employment disputes is forbidden in German Labour Law, except for matters collective issues; In Spain, arbitration is generally not used for individual workplace disputes; In France, as a general rule, arbitration concerning individual employment contracts is prohibited. In Austria, a 1993 Supreme Court decision outlawed arbitration clause contained in CBA as contrary to Labour Constitution Act. In UK, there are prohibitions on resolving workplace disputes through arbitration.

⁴³ Examples of these bodies include: Superior Labour Court in Brazil, Conseils De Prud' Homme in France, Arbeitsgerichte in Germany, UK Employment Tribunals, Juzgados de lo social in Spain, CCMA in South Africa.

facilitate efficient and cost effective measures without necessarily requiring employees to waive their rights to utilize the judicial system. In most countries arbitration of individual employment disputes is restricted by law, or is used rarely if at all.⁴⁴ In France for instance, parties can include an arbitration clause in an employment contract in only three specified circumstances namely: disputes arising from international employment contracts, or involving journalists or salaried lawyers.⁴⁵ In Japan, the use of private external mediators or arbitrators in individual labour disputes has never been developed.⁴⁶ In Sweden, private arbitration through employment contracts is permitted but its use is limited mainly to chief executive officers.⁴⁷ As had been discussed earlier, mandatory arbitration in employment contracts is very prevalent in the US.

The key underlying commonality is that employment arbitration is not usually kept far away from the influence of government regulations or institutions. It is trite that despite globalization and spread of international business, employment relations systems are usually embedded in national rather than a global institution.⁴⁸ The key variable is on the degree of government regulations and whether to house the institutional processes within the government, in the private sector or a combination of the two.⁴⁹ Studies show that when properly instituted and implemented, employment arbitration

⁴⁴ Minawa Ebisui, Sean Cooney & Colin Fenwick (eds), *Resolving Individual Labour Disputes: A Comparative Overview*, International Labour Office, - Geneva (2016), at page 9-10, available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_488469.pdf

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Katz, Harry C., & Kochan, T. A., & Colvin, A. J. S. (2015). *Labor, management, and interactions [Electronic version]*. In *Labor relations in a globalizing world* (pp. 27-51). Ithaca, NY: ILR Press, an imprint of Cornell University Press.

⁴⁹ Ronald C. Brown, 'Comperative Alternative Dispute Resolution for Individual Labour Disputes in Japan, China and the United States: Lessons from Asia?', *St. John's Law Review*, Vol. 86:543

could assist in decongestion of the ordinary court system.⁵⁰ Understanding the common themes and comparatives presents an opportunity for Kenya to choose the best practices with an intention of redesigning of the current ADR systems to fully accommodate employment arbitration.

5.1 EU Experience

The evolution of employment relationship and the phenomenon of labour laws in Europe can be traced through the process of industrialization that took place in the 19th and 20th centuries during which period industrial production necessitated employment of a large number of people to work in the factories. This led as a matter of necessity to the imbalance of power against the employees.⁵¹

Trade unions were initially prohibited in Europe and only individual disputes were recognized by law which led to a great disadvantage to employees. This changed in the late 19th century when the constructive role of trade unions was recognized as a means of containing social unrest against the backdrop of communism. As such, collective disputes were recognized in addition to individual disputes. At this point recourse was had to such informal mechanisms as conciliation, mediation and arbitration (*voluntary*). It is noted that only during World War I & II that most governments in Europe put in place *mandatory* arbitration so as to prevent strikes from paralyzing the vital war industry. Following integration of Europe after World War II, the European States adopted the European Social Charter in 1961 which required member states to support the use of appropriate machinery for conciliation and *voluntary* arbitration for settlement of labour disputes in respect to collective bargaining.⁵²

⁵⁰ Example, in China, the number of labour arbitration cases grew from 10,326 in 1989 to about 693,000 in 2008, an increase of more than 6,000%

⁵¹ Jagtenberg R & Roo de A, *Employment Disputes and Arbitration an Account of Irreconcilability, With Reference to the EU and the USA* at page 172 (available at <https://hrcak.srce.hr/file/295286+&cd=1&hl=en&ct=clnk&gl=ke>).

⁵² European Social Charter, Article 6(3).

In regards to individual employment disputes, most EU countries have enacted various statutes aimed at protecting workers against hazardous conditions of work, unfair dismissals as well as discrimination⁵³. The employee's rights are therefore protected by a Collective Bargaining Agreement (CBA) and Statutes both of which are enforced through the Courts.⁵⁴

It is worth pointing out that in the EU, there is a distinction in employment disputes between collective and individual disputes. On the one hand, there is a role for voluntary arbitration in conformity with the European Social Charter in respect to collective disputes.⁵⁵ On the other hand, individual disputes which are about statutory rights are adjudicated through labour courts as the paramount mode of dispute resolution and may be preceded by conciliation or mediation.⁵⁶

Most EU countries are skeptical of arbitration in employment disputes especially on individual employment cases. Under French law for instance, arbitration is prohibited and the Supreme Court has taken the position that statutory employment rights concern public policy hence lack arbitrability.⁵⁷ In the UK and Netherlands, voluntary arbitration may be allowed but under certain restrictions for instance in the UK it depends on the amount in dispute while in Netherlands, only disputes concerning contractual rights may be submitted to arbitration and even then only senior managers.⁵⁸

⁵³ Jagtenberg R & Roo de A, *Employment Disputes and Arbitration an Account of Irreconcilability, With Reference to the EU and the USA* at page 174 (available at <https://hrcak.srce.hr/file/295286+&cd=1&hl=en&ct=clnk&gl=ke>).

⁵⁴ Ibid.

⁵⁵ Jagtenberg R & Roo de A, *Employment Disputes and Arbitration an Account of Irreconcilability, With Reference to the EU and the USA* at page 178 (available at <https://hrcak.srce.hr/file/295286+&cd=1&hl=en&ct=clnk&gl=ke>)

⁵⁶ Ibid at page 179.

⁵⁷ Ibid at page 179

⁵⁸ Ibid at 179.

In practice therefore, even where voluntary arbitration is available, it is rarely used in the EU given the legal complexities thereof which make it too risky.⁵⁹ This is exemplified by the lack of cases in the EU on mandatory employment arbitration hence the absence of a debate on this subject in the EU.⁶⁰ It is important to balance the disparity in resources between employer and employee. Under the Belgian law, it is not possible to insert in the employment agreement an arbitration clause in the employment agreement with the purpose of bringing the case to an arbitrator unless the employee earns at least \$66,406 gross per year and is in the management position. This is to ensure that an employee would be in a better position to meet the costs attendant to the arbitration process.⁶¹

Most European countries have specialized labour Courts which offer conciliation and arbitration as an option to litigants either integrated in the courts system such as in Germany and France or annexed to the court system such as the UK's Advisory Conciliation and Arbitration Services (ACAS).⁶²

It is worth noting that progressively, the protection of workers under statutes and collective bargaining agreements is in doubt owing to the growing pressures to maintain competitive costs in a global world.

5.2 US Experience

The development of labour law in the US is different from the EU experience in large due to the fact that the US has always embraced a free market philosophy. As a consequence, protective legislation in the US never became as elaborate as in Europe.

In regards to arbitration of employment matters, the US has taken a more pronounced role especially in the financial sector. Arbitration contracts are

⁵⁹ Ibid at 179.

⁶⁰ Ibid at 179.

⁶¹ <https://statbel.fgov.be/en/themes/work-training/overview-belgian-wages-and-salaries> (Accessed on August 28, 2018).

⁶² Ibid at page 174.

found in individual contracts but as is often the case the terms are not negotiated as they are usually standard form contracts which are on a 'take or leave' basis.⁶³

During the post-World War II period, the U.S. Supreme Court had initially set a course of delimiting the scope of employment arbitration. Notably in its 1974 decision in *Alexander v Gardner-Denver*, the Supreme Court held that no mandatory arbitration was allowed in respect of individual employees claiming statutory rights⁶⁴

The situation changed between 1985 and to 2015, where there have been a dozen Supreme Court decisions which sought to expand the scope of arbitration in employment cases.⁶⁵

The US Supreme Court in the 1980s adopted a presumption in favour of arbitration by expanding the types of disputes that were subject to the Federal Arbitration Act (FAA).⁶⁶ For instance, in 1985, the Supreme Court in *Mitsubishi Motors v. Soler Chrysler-Plymouth* compelled arbitration of statutory disputes involving violation of anti-trust laws.⁶⁷ Similarly, the Supreme Court two years later in 1987 in *Shearson/American Express v. McMahon case* expanded the scope further by holding that disputes involving violation of anti-racketeering statute and federal securities laws were subject to arbitration.⁶⁸

⁶³ Roma, Elizabeth. "Mandatory Arbitration Clauses in Employment Contracts and the Need for Meaningful Judicial Review." *American University Journal of Gender, Social Policy & the Law*. 12, no. 3 (2004) at page 520.

⁶⁴ Jagtenberg R & Roo de A, *Employment Disputes and Arbitration an Account of Irreconcilability, With Reference to the EU and the USA* at page 176 (available at <https://hrcak.srce.hr/file/295286+&cd=1&hl=en&ct=clnk&gl=ke>)

⁶⁵ Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of their Rights*, 414 Economic Policy Institute (2015), at page 6, available at <https://www.epi.org/files/2015/arbitration-epidemic.pdf>

⁶⁶ *Ibid* at page 7-8.

⁶⁷ *Ibid* at page 8.

⁶⁸ *Ibid* at page 8.

In regards to employment related cases, the atmosphere changed in the USA in 1991 when the US Supreme Court in the case of *Gilmer Vs. Interstate/Johnson-Lane* (hereinafter '*Gilmer Case*') held that a stockbroker employee was bound by a standard clause in the contract to arbitrate.⁶⁹

This paper shall discuss the *Gilmer case* a little more extensively since it has been a watershed case in the US in regards to arbitration of employment matters.

The *Gilmer* case involved an employer (*Interstate/Johnson-Lane Corporation*), who required its employee (*Robert Gilmer*) to register as a stockbroker with the New York Stock Exchange (NYSE).⁷⁰ *Gilmer* was the Manager of Financial Services for *Interstate*, hired in 1981 and fired in 1987. When *Interstate* terminated *Gilmer* at age 62, *Gilmer* filed suit, alleging the termination violated the *Age Discrimination in Employment Act of 1967 (ADEA)*. *Interstate* contended that *Gilmer* could not go to court to enforce his statutory right, but was required to arbitrate the issue. When *Gilmer* accepted his job as manager, he registered as a stockbroker, signing form, which is required as a condition of employment in the securities industry. The registration form for NYSE contained a requirement that all disputes out of *Gilmer's* employment had to be arbitrated.

The Court found for the employer (*Interstate*) and in the process established important rules for employment arbitration. The first was a clear-cut endorsement of the arbitrability of statutory claims in employment agreements. The Court rejected the argument that arbitration was inferior to a judicial remedy and stated,

⁶⁹ Jagtenberg R & Roo de A, *Employment Disputes and Arbitration an Account of Irreconcilability, With Reference to the EU and the USA* at page 176 (available at <https://hrcak.srce.hr/file/295286+&cd=1&hl=en&ct=clnk&gl=ke>)

⁷⁰ George Nicolau, *Gilmer Vs. Interstate/Johnson Lane Corp: Its Ramifications and Implications for Employees, Employers and Practitioners*, 1 U. PA Journal of Labour and Employment Law (1998), at page 178, available at <https://www.law.upenn.edu/journals/jbl/articles/volume1/issue1/Nicolau1U.Pa.J.Lab.&Emp.L.177%281998%29.pdf>

"[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum."⁷¹ The Court also "rejected a number of arguments about arbitration's intrinsic unfairness" and called these complaints "far out of step with [the Court's] current strong endorsement of the federal statutes favoring this method of resolving disputes."⁷² The Court also rejected *Gilmer's* defence and noted that the mere inequality in bargaining power is not a sufficient reason to hold that arbitration agreements are never enforceable in employment context.⁷³

The *Gilmer* case therefore reversed a longstanding presumption that employment claims were exempt from arbitration.⁷⁴ It also laid a solid foundation for the growth of mandatory arbitration agreements in employment contracts and subsequently the U.S. Supreme Court jurisprudence built upon *Gilmer's* foundation.⁷⁵

It is particularly worth noting that mandatory arbitration has its roots in the US Federal Arbitration Act (FAA) which is a statute that was passed by the US Congress in 1925 (over 90 years ago) and that notwithstanding, it is not until 1991 that the US Supreme Court in the *Gilmer case* allowed statutory employment claims to be submitted to arbitration.⁷⁶ It is worth noting that the

⁷¹ Janna Giesbrecht-McKee, *The Fairness Problem: Mandatory Arbitration in Employment Contracts*, 50 Willamet Law Review (2014) at page 263.

⁷² *Ibid* at page 263-264.

⁷³ Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 Journal of Dispute Resolution (1991) at page 274 Available at: <https://scholarship.law.missouri.edu/jdr/vol1991/iss2/2>

⁷⁴ Janna Giesbrecht-McKee, *The Fairness Problem: Mandatory Arbitration in Employment Contracts*, 50 Willamet Law Review (2014) at page 263.

⁷⁵ *Ibid* at page 264.

⁷⁶ Carmen Comsti, *A Metamorphosis: How Forced Arbitration Arrived in the Work Place*, 35 Berkley Journal of Employment & Labour Law (2015) at page 6, available at <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1466&context=bjell> (last accessed 17th June 2019)

drafters, legislators and advocates of the FAA assumed that it applied only to commercial disputes and not employment or consumer disputes.⁷⁷

As a result of this, there has been an increase in mandatory arbitration of employment claims in the US. This is evidenced by the fact that as at 1995, a survey conducted revealed that only 2% of employers used mandatory arbitration to resolve employment disputes.⁷⁸ This figure has increased significantly and by 2010 surveys estimated that 27% of employers in the US had mandatory arbitration which translated to an equivalent to 36 million employees being under mandatory arbitration.⁷⁹

The US Supreme Court has therefore repeatedly articulated a liberal policy favouring arbitration with the presumption of arbitrability under which Courts should rigorously enforce arbitration agreements according to their terms.⁸⁰ This is confirmed in a more recent case in 2001 namely *Circuit City Stores, Inc. v. Adams* wherein the Supreme Court stated that the FAA applied to all contracts of employment except those involving workers who, like seamen and railroad workers engaged in transportation that crossed state lines.⁸¹ Since then, courts have applied the FAA to numerous employment cases

Since *Gilmer*, there has been a firm support for arbitration in employment claims in the US.

⁷⁷ Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of their Rights*, 414 Economic Policy Institute (2015), at page 7, available at <https://www.epi.org/files/2015/arbitration-epidemic.pdf>

⁷⁸ Ibid at page 6.

⁷⁹ Ibid at page 7.

⁸⁰ Peresie, Jennifer L. (2004) "Reducing the Presumption of Arbitrability," Yale Law & Policy Review: Vol. 22: Iss. 2, Article 9, at page 453 - 454. Available at: <http://digitalcommons.law.yale.edu/ylpr/vol22/iss2/9>

⁸¹ Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of their Rights*, 414 Economic Policy Institute (2015), at page 10, available at <https://www.epi.org/files/2015/arbitration-epidemic.pdf>

Despite the ubiquity of mandatory arbitration on employment disputes, there is growing disillusionment and mounting criticism with the practice.⁸² Indeed, some judges have urged the US Supreme Court to reconsider the 'national policy favouring arbitration' in respect to relationships of grossly disparate bargaining power.⁸³

Both the Equal Employment Opportunity Commission (EEOC) and Department of Labour (DOL) two of the primary federal government agencies on employment matters in the US have issued policy statements and reports against mandatory arbitrations in resolution of employment disputes.⁸⁴ Similarly, arbitrators through the National Academy of Arbitrators (NAA) have publicly criticized and opposed mandatory arbitrations.⁸⁵

The US Congress in recognition of the shortcomings of the mandatory arbitration, has begun to limit the reach of the Federal Arbitration Act (FAA) by banning mandatory arbitration through passing a number of piecemeal amendments which excludes employees in defence contracts, car dealers and farming industry.⁸⁶ In 2009, a Bill titled *Arbitration Fairness Act* was tabled in the US Congress whose object was to render mandatory arbitration clauses in employment void and unenforceable.⁸⁷ The Bill however stalled when the Republicans gained control of Congress and is currently pending in Congress.⁸⁸

⁸² Carmen Comsti, *A Metamorphosis: How Forced Arbitration Arrived in the Workplace*, 35 Berkeley J. Emp. & Lab. L. (2015) at page 26, available at <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1466&context=bjell>

⁸³ Ibid at page 27.

⁸⁴ Ibid at page 27 - 28.

⁸⁵ Ibid at page 28.

⁸⁶ Ibid at page 28 - 29.

⁸⁷ Jagtenberg R & Roo de A, *Employment Disputes and Arbitration an Account of Irreconcilability, With Reference to the EU and the USA* at page 186, available at <https://hrcak.srce.hr/file/295286+&cd=1&hl=en&ct=clnk&gl=ke>.

⁸⁸ Ibid at page 186.

One category of ADR (quasi-arbitration) used in the USA is the 'Court-Annexed arbitration' wherein Courts mandatorily refer mostly small claims to an arbitrator who is paid out of Court's funds.⁸⁹ A similar arrangement is also available in Kenya and is done under a Court-Annexed mediation. The Court Annexed Mediation in Kenya is guided by Practice Direction Notice issued by the Chief Justice under the Civil Procedure Act.⁹⁰ Section 59B provides that the Court on the request of parties or on its own motion direct any dispute before it to be referred to mediation.⁹¹

6.0 Concerns on Mandatory Arbitration of Employment Disputes

a) Employer/Employee Power Imbalance

It is largely held that employers have exclusive control over the employment agreement including all terms of an employment relationship.⁹² Section 9(2) of the Kenyan Employment Act places the responsibility of drawing up the employment contract on the employer.

The relationship between an employer and an employee is '*inherently asymmetrical*' with employees receiving contracts as condition of employment on a take-it-or-leave-it basis.⁹³ Employment contracts with mandatory arbitration clauses may be deemed to be unconscionable.⁹⁴ These contracts are not the result of negotiations between parties of equal bargaining power but rather employers unilaterally insert arbitration provisions without any input from the employee.⁹⁵ In the US several judges have decried the lamentable state of the law which have continued to bind courts to come to an 'unappetizing' and unjust result noting the unequal bargaining power

⁸⁹ Ibid at page 182.

⁹⁰ Section 2 & 59B, Civil Procedure Act as amended by the Statue Law (Miscellaneous Amendments) Act No. 17 of 2012.

⁹¹ Kariuki Muigua, *Court Sanctioned Mediation in Kenya – An Appraisal*, at page 3 & 4.

⁹² Janna Giesbrecht-McKee, *The Fairness Problem: Mandatory Arbitration in Employment Contracts*, 50 Willamet Law Review (2014) at page 268.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Ibid.

between the employer and the employee where the employer “holds all the cards” and the “employee must chew the distasteful dilemma – give up certain rights or give up the job.”⁹⁶

Given that it is evident that the relationship of the employer and employee is inherently asymmetrical, we opine that it would be against public policy to enforce mandatory arbitration clauses for employment disputes. Sight must not be lost to the fact that not all employees find themselves in such a disadvantageous situation and parties could, in certain situations, be allowed to mutually benefit from the flexibility, efficiency and privacy of arbitration proceedings. Some employees are presumed to possess sufficient bargaining powers and can freely accept or object the inclusion of the arbitration clause in employment contracts. In such cases, it may easily be discerned that the employee being able to so negotiate, has indeed mutually agreed with free and informed consent, to include an arbitration clause in the contract of employment.⁹⁷

b) Repeat Player Issues

Generally in dispute resolution, repeat players have been identified as having advantages relative to one-shot participants in the dispute resolution process.⁹⁸ These concerns are heightened in regards to employment arbitration because employers are asymmetrically likely to be repeat players while it is very rare to have an employee participating in more than one arbitration cases with the same employer.⁹⁹ As a result, it is argued that arbitrators will likely favour employers in the hope of securing future business from the said employers and hence this raises serious concerns on a policy standpoint.

⁹⁶ Ibid.

⁹⁷ *Dr. Kennedy Amuhaya Manini v AMREF* [2014] eKLR.

⁹⁸ Colvin, A. J. S., *An empirical study of employment arbitration: Case outcomes and processes*, Journal of Empirical Legal Studies (2011), Cornell University ILR School, at page 16-17.

⁹⁹ Ibid at page 17.

Additionally, even absent any sort of arbitral bias, repeat-player employers may gain an advantage by getting to know particular arbitrators well and developing an understanding of their decision-making patterns and what types of arguments appeal to them.¹⁰⁰ This therefore suggests bias in the system which is a great concern.

It is important to quickly point out that this concern of repeat player does not arise in respect to trade disputes between employers and trade unions this being a bilateral system between two strong players who are both likely to be involved in future cases and have experience with past cases.¹⁰¹

c) Lack of Judicial Review of Arbitration Decisions

Scholars have continued to protest the privatization of civil rights and other discrimination claims in arbitration ostensibly on grounds that arbitration is not well equipped to deal with them given its non-standardized procedures, questions of fairness, questions of due process and lack of transparency.¹⁰² In addition, it is argued that courts review arbitration awards under an 'extremely deferential standard' meaning that decisions are effectively unreviewable. As such, an arbitrator can foreclose any possibility of an employee vindicating his or her statutory rights.¹⁰³ This is even compounded where the arbitrator is a non-lawyer and hence has not been trained in enforcement of statutory rights or even human rights so that an employee will live with any error in interpretation as he or she will be precluded from any appeal to correct the error.¹⁰⁴

¹⁰⁰ Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of their Rights*, 414 Economic Policy Institute (2015), at page 23, available at <https://www.epi.org/files/2015/arbitration-epidemic.pdf>

¹⁰¹ Ibid at page 22.

¹⁰² Janna Giesbrecht-McKee, *The Fairness Problem: Mandatory Arbitration in Employment Contracts*, 50 Willamet Law Review (2014) at page 271.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

The Arbitration Act¹⁰⁵ provides under Section 39 that an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than provided by the said Arbitration Act.

The Kenyan Constitution and the Employment Act both have extensive provisions on employee rights in the form of socio-economic rights which include rights covering fair labour practices,¹⁰⁶ non-discrimination,¹⁰⁷ sexual harassment¹⁰⁸ and forced labour.¹⁰⁹ The Kenyan Constitution has been lauded as one of the most progressive constitutions the world over with an enhanced bill of rights which in this context address labour relations under Article 41 which include right to fair labour practices, right to fair remuneration, right to reasonable working conditions, right to form or join a trade union and right to go on strike.¹¹⁰ In *JK Vs PATH & Another*¹¹¹, a case which had a claim of sexual harassment, the Court suggested without any ground that if the matter was referred to arbitration it would be handled by an arbitrator with legal background who can assess damages for the violation of rights. There is no guarantee that the arbitrator appointed will have a legal background as it is dependent mostly on the appointing authority where applicable.

d) Costs

Many times arbitration is hailed as a cost effective and less complex mode of dispute resolution as compared to litigation.

The argument in regards to cost may not entirely be true given that in practice arbitration is generally costly especially if one was to consider the low earning categories of employees. The arbitration fees for instance as published by the

¹⁰⁵ Kenyan Act No. 4 of 1995.

¹⁰⁶ Article 41, Kenyan Constitution.

¹⁰⁷ Section 5, Kenyan Employment Act.

¹⁰⁸ Section 6, Kenyan Employment Act.

¹⁰⁹ Section 4, Kenyan Employment Act.

¹¹⁰ Ruth Tubei, et al, *An Overview of Industrial Relations in Kenya*, 5 Research on Humanities and Social Sciences, No. 3 (2015) at page 224, available at <https://pdfs.semanticscholar.org/b170/3c240449f340e230f56b89016767fa46e85b.pdf>

¹¹¹ Cause No. 869 of 2017 [2018] eKLR.

Chartered Institute of Arbitrators, Kenya Branch range from US\$.40/= to US\$.250/= per hour depending on experience and rank of the arbitrator appointed. This fact was reiterated in *Jane Muthoni Mukuna Vs. FSI Capital Ltd.*¹¹² It is interesting to note that a lot of the low income workers in Kenya earn a minimum wage which is approximately US\$.150 and would therefore find the arbitration fees very prohibitive as opposed to going to the Employment and Labour Relations Court where the filing fees is less than US\$.10/=.

On the other hand litigants in Court do not pay any fees to the judges who sit as they are paid by the State and the only cost is the filing fees which is nominal for employment matters.

7.0 Conclusion & Recommendations

It is evident that whereas there is no express provision in the Arbitration Act for the exclusion of arbitration of individual employment disputes in Kenya, there are various factors that militate against their arbitrability. These include the lack of balance of bargaining power on the part of employees, high costs, disadvantages of repeat player biases and lack of benefit of judicial review in respect to protection of employee statutory rights.

This paper argues that arising from the fact that employees may not have the ability to negotiate at arm's length at the time of entering the contract, it would be against public policy to railroad them into mandatory arbitration process especially in respect to low ranking employees owing to the concerns of arbitration raised above. The Courts should therefore interrogate and establish whether an employee had the freedom to enter into an arbitration contract in respect to their employment contract and in so doing Kenyan judges should attempt to come up with clear jurisprudence that seeks to define Kenya's public policy as far as arbitrability of employment disputes is concerned. This paper is intended to excite discussion with a possibility for law reform that would require an amendment to the Arbitration Act so as to exclude employment disputes from being arbitrable in Kenya.

¹¹² Cause No. 688A of 2014 [2015] eKLR.

This paper therefore recommends the adoption in Kenya of the EU model which prohibits arbitration of employment disputes. However, the opportunities that exists and which have been extensively highlighted in the article can only be exploited and implemented if necessary safeguards are adopted to facilitate arbitrability of employment disputes.

To effectively accommodate employment disputes in arbitration, it would be important to set out clear arbitration rules and structures slightly modified to guarantee its acceptability and enforceability. In this regard, it is important to adopt minimum standards of procedural fairness which shall apply to all pre-dispute employment arbitration agreements and the arbitration process. This would be a convenient starting point in enactment of new *Employment Arbitration Rules* under the Arbitration Act to properly guide employment arbitration in Kenya.

The Mediation Committee of Parliament in Kenya: Institutionalizing Alternative Dispute Resolution in the Legislative Process

By: *Brian Sang YK* & Desmond Tutu Owuoth***

Abstract

Article 113 of the Constitution of Kenya, 2010 establishes the Mediation Committee as a device for resolving legislative deadlock over the content of bills that require the concurrence of both the National Assembly and the Senate. Its core function and mode of operation is to reconcile the rival opinions of the two Houses of Parliament regarding contentious clauses of bills and, by way of mediation and other consensus-building strategies, to arrive at a compromise version of the bill that is acceptable to both Houses. Although the Mediation Committee is becoming a critical component of the legislative process, there has been little methodical and in-depth analysis of its institutional structure, operational modalities and impact. This article contributes towards filling this gap by systematically examining the status and role of the Mediation Committee in Kenya's legislative process. Specifically, the article analyzes the structure, composition and procedure of the Mediation Committee in light of its actual practice and legislative output. After identifying the critical shortcomings of Kenya's inter-chamber dispute resolution model, the article draws on the experience of comparable jurisdictions such as Germany, South Africa and the United States to glean insights on how best to legally and institutionally reform Kenya's Mediation Committee process. A number of reform proposals are therefore advanced as recommended forward steps towards effective institutionalization of alternative dispute resolution in the Kenyan legislative process.

1.0 Introduction

Bicameral constitutional democracies, where the legislature comprises a lower and upper house, face the inevitable challenge of resolving disputes in the legislative process when disagreements arise regarding the text of bills that require concurrence between both houses.¹ Effective dispute settlement within

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the legislature is all the more critical because in most bicameral jurisdictions, one of the houses of the legislature is empowered to veto a bill originating from the other house if no agreement is reached.² In Kenya, where there is a bicameral Parliament comprising the National Assembly and the Senate,³ the Constitution anticipates differences of opinion between the two houses and provides a dispute settlement mechanism: mediation committee.⁴ Established by Article 113 of the Constitution of Kenya, 2010, the Mediation Committee is an institutional intermediary between the two houses that operates to seek compromise solutions so as to secure the passage of bills.⁵ Hence, it is a crucial device for reconciling the competing visions of the two houses of Parliament which represent distinct interests and constituencies.

The Kenyan model of dispute settlement in the legislative process draws from the equivalent mechanisms in Germany, South Africa and the United States.⁶ A shared aspect of these three constitutional democracies is the express adoption of models of cooperative decision-making in their bicameral systems to promote the attainment of legislative compromise.⁷ Yet, unlike the case in

¹ Melling, T., 'Dispute Resolution within Legislative Institutions,' *Stanford Law Review* 46, 1994: 1677-1715; Heuglin, T.O. and Fenna, A., *Comparative Federalism: A Systematic Inquiry*, University of Toronto Press, 2015, 222.

² Heller, W.B. and Branduse, D.M., 'The Politics of Bicameralism,' in Martin, S., Saalfold, T. and Strøm, K.W. (eds), *The Oxford Handbook of Legislative Studies*, Oxford University Press, 2014, 332; Tsebelis, G., 'Decision Making in Political Systems: Veto Powers in Presidentialism, Parliamentarism, Multicameralism, and Multipartyism,' *British Journal of Political Science* 25, 1995: 289-326.

³ Article 94, Constitution of Kenya, 2010; Ghai, Y.P. and Cottrell, J., *Kenya's Constitution: An Instrument for Change*, Katiba Institute, 2011.

⁴ *Speaker of the Senate and Another v Attorney-General and 4 Others* [2013] eKLR, para 145.

⁵ Parliament of Kenya, *Mediation Process in Law Making* (2017) 1.

⁶ Koggel, C., 'The Mediation Committee of the Bundestag and Bundesrat: A Special Institution of German Constitutional Law,' *International Journal of Legal Information* 44, 2016: 35-42; Rybicki, E., *Conference Committee and Related Procedures: An Introduction*, 2 April 2018.

⁷ Druckman J.N. and Thies, M.F., 'The Importance of Concurrence: The Impact of Bicameralism on Government Formation and Duration,' *American Journal of Political Science* 46, 2002: 760-771; Murray, C., 'Designing Parliament for Cooperative Federalism: South Africa's National Council of Provinces,' in Seidle L. and Docherty

the three comparable jurisdictions, the operational modalities and effect of the Mediation Committee in Kenya remain little explored and under-analyzed. Neglected by legal researchers and overlooked by practitioners, the impact of the Mediation Committee and the extent to which it has contributed to the institutionalization of alternative dispute resolution (ADR) in Kenya's legislative process is difficult to determine. This, therefore, presents a subject ripe for exploration and critical analysis.

The purpose of this article is three-fold: (a) to describe systematically the role of the Mediation Committee in the legislative process in Kenya; (b) to critique work of the Mediation Committee in the light of legislative outcomes; and (c) to propose ways in which the Mediation Committee can be strengthened so as to more effectively institutionalize ADR in the process of making and interpreting law in Kenya. To achieve these stated objects, the practice of selected mediation committees convened in the course of processing specific bills/laws will be analyzed. Analysis of this little-known practice serves the dual purpose of assessing the efficacy of ADR techniques and, crucially, supporting the proposals for reform that will be made in this article.

This article's core argument is that ADR is an essential component of the legislative process in bicameral constitutional democracies that needs to be developed. In order to advance this thesis, this article proceeds in seven parts. After this introduction, an overview is given, in section 2, of dispute settlement arrangements in other bicameral legislatures so as to supply a comparative basis on which to assess the Kenyan model. Focusing on the particular Kenyan context, sections 3 and 4 respectively describe the legislative process in Kenya and identify the bills that may be considered by the Mediation Committee. In sections 5 and 6 the article takes an analytical turn by providing a critique of the work of the mediation committee and offering corresponding proposals for reform. The article concludes in section 7 with some remarks on forward steps for Kenya's ADR.

2.0 Bicameral Legislatures and their Dispute Resolution Mechanisms

Constitutional democracies that institute bicameral legislative systems and devolved governance models often factor in the potential for deadlock between the two houses.⁸ The reason for this is that the upper houses usually have restricted legislative jurisdiction but with the power to nullify some bills originating from the lower houses.⁹ In addition, the upper houses are in most instances comprised of numerically less representatives safeguarding the interests of federal units rather than those of constituents.¹⁰ These, among other, differences contribute to the differing visions between the two houses thus resulting in legislative deadlock. Hence, it has been found necessary to adopt legislative conflict avoidance or settlement mechanisms.¹¹

An early and notable example is to be found in the American Constitution which adopted the conference committee as a means to resolve differences between the Houses of Representatives and the Senate.¹² A joint committee of the two houses composed of three to nine members of each house, the conference committee has engaged in legislative dispute resolution since 1890.¹³ A key feature of the conference committee is that it is not a standing committee; rather, it is convened whenever one house refuses to accept a version of a bill passed by the other house.¹⁴ This *ad hoc* approach has the advantage of expertise because the membership of the conference committee

⁸ Heller, W.B., 'Political Denials: The Policy Effect of Intercameral Partisan Differences in Bicameral Parliamentary Systems,' *Journal of Law, Economics, and Organization* 17, 1997: 34-61.

⁹ Shell, D., 'The History of Bicameralism,' *Journal of Legislative Studies* 7, 2001: 5-18.

¹⁰ Russell, M., 'The Territorial Role of the Upper House,' in Baldwin, N.D.J. and Shell, D. (eds), *Second Chambers*, Frank Cass Press, 2001, 112; Money, J. and Tsebelis, G., 'Cicero's Puzzle: Upper House Power in Comparative Perspective,' *International Political Science Review* 15, 1992: 25-43.

¹¹ Binder, S.A., 'Dynamics of Legislative Gridlock, 1947-1996,' *American Political Science Review* 93, 1999, 519-33.

¹² Gross, D.R., 'Conference Committee, Sophisticated Voting, and Cyclical Majorities,' *Legislative Studies Quarterly* 4, 1979: 74-94.

¹³ Tsebelis, G. and Money, J., *Bicameralism*, 1997, 29.

¹⁴ Ortega, L. and McQuillan, L.J., 'Why Does the Senate "Win" in Conference Committee?: A Stability Explanation,' *Public Choice* 87, 1996, 101-116.

in every new case is drawn from the specialist committees that handled the bill in each house. In practice, however, political party leadership nominates members to the conference committee there may be political interference to secure certain special interests.¹⁵

Another jurisdiction where legislative disputes are anticipated and a means for their resolution expressly provided is Germany. Section 77 of the German Basic Law establishes a Mediation Committee designed to resolve inter-chamber legislative gridlock.¹⁶ Though modelled after the US Conference Committee, the German Mediation Committee differs in an important respect: it is “established as permanent body for each legislative period” which lasts for five years.¹⁷ Thus unlike its American equivalent which is convened only on *ad hoc* basis, the German Mediation Committee is a standing committee.¹⁸ Section 77 of the Basic Law further specifies that this Committee is comprised of 16 members from Bundestag and equal number from the Bundesrat. In this regard, the German Mediation Committee operates as a generalist committee that seeks settlement of disputes on all types of bills.¹⁹

The South African mechanism for inter-cameral dispute settlement is modelled to a significant extent after its German equivalent. Like its German counterpart, the membership of South Africa’s Mediation Committee comprises an equal number of representatives from the two houses of Parliament: the National Assembly and the National Council of Provinces which represents nine provinces. This model of equal representation from both

¹⁵ Binder, S.A., *Stalemate*, Brookings Institution Press, 2008.

¹⁶ Koggel, C., ‘The Mediation Committee of the Bundestag and Bundesrat: A Special Institution of German Constitutional Law,’ *International Journal of Legal Information* 44, 2016: 36.

¹⁷ Heuglin and Fenna, 223.

¹⁸ Koggel, C., ‘The Mediation Committee of the Bundestag and Bundesrat: A Special Institution of German Constitutional Law,’ *International Journal of Legal Information* 44, 2016: 36-37.

¹⁹ Murray, C., ‘Designing Parliament for Cooperative Federalism: South Africa’s National Council of Provinces,’ in Seidle L. and Docherty D. (eds), *Reforming Parliamentary Democracy*, McGill-Queens University Press, 2003, 208.

Houses has its legal basis in section 78(1) of the South African Constitution which provides that the Mediation Committee shall consist of: (i) one delegate from each of the nine provincial delegations in the National Council of Provinces and (ii) nine members of the National Assembly elected through a procedure that results in proportionate representation of parties in the Assembly.

An important difference, however, between the German and South African legislative dispute resolution mechanisms is that decisions of the South African Mediation Committee can only be considered if they have been endorsed by a majority of members of each House. The relevant legislative majority in this context refers to “(a) at least five of the representatives of the National Assembly; and (b) at least five of the representatives of the National Council of Provinces.”²⁰

3.0 Overview of the Legislative Process in Kenya

A bill usually makes its debut in the originating House vide the reading of its title by the Clerk of that House: the first reading. At this stage of legislation, no debate is conducted nor a vote taken on any issue. Rather, the bill is committed to the relevant departmental committee which will then facilitate public participation and stakeholder engagement on the content of the bill.²¹ As a matter of law, the departmental committee must facilitate meaningful and effective participation by the public in this process.²² On receiving the views from the public and technical experts, that committee is required to produce a report on the same to be tabled before the house.²³ The process of compiling a report entails inviting the sponsor of the bill and relevant stakeholders to discuss specific points of the bill, including proposed amendments.

²⁰ Section 78(2), Constitution of the Republic of South Africa.

²¹ *Robert N Gakuru and Others v Governor Kiambu County and 3 Others* [2014] eKLR; *Nairobi Metropolitan PSV Saccos Union Limited and 25 Others v County of Nairobi Government and 3 Others* [2013] eKLR.

²² *Kenya Union of Domestic, Hotels and Allied Workers (KUDHEIA Workers) v Salaries and Remuneration Commission* [2014] eKLR.

²³ National Assembly, Standing Order No. 127(3); Parliament of Kenya, *How Law is Made*, 4.

The first reading is followed by the second reading where the bill is read for a second time and its contents debated by the house seated in plenary. At this stage, the report compiled by the departmental committee offers a structured guide for debate on the likely positive and adverse impacts of the bill. Once the debate is concluded, the Speaker offers an opportunity to the sponsor of the bill to answer questions relating to the Bill raised by members.²⁴ This is followed by a vote presided over by the Speaker on whether the bill should proceed to the committee stage where it will be considered by the entire house membership.

The Committee stage derives its name from the fact that the full membership of the house seats as a Committee of the Whole House to analyse systematically and in a detailed way each clause of the bill.²⁵ The Committee of the Whole House is presided either by the Deputy Speaker or any member of the Chairpersons Panel²⁶ who then calls out in a consecutive manner the clauses of the bill to be considered by the members. It is at this stage that the proposed amendments which may have been specified in the departmental committee report or which were raised in the course of the second reading will be considered and voted on individually.

Following this vote, the Committee of the Whole House may then approve clauses and schedules of the bill in their original form or with amendments. According to parliamentary custom, this Committee “should make such amendments [to] the Bill as may seem likely to render it more acceptable, practical or efficient without having to severely deviate from its primary principles and objectives.”²⁷ Once the Committee of the Whole House has concluded its review of the bill, its chairperson submits a report to the relevant house seeking the approval of the bill and the House resumes its seating in plenary.

²⁴ Parliament of Kenya, *How Law is Made*, 4.

²⁵ Parliament of Kenya, *Procedure in Committee of the Whole House on a Bill*, Fact Sheet No. 3, 2017, 1.

²⁶ Parliament of Kenya, *The Speaker and Other Presiding Officers*, 3.

²⁷ Parliament of Kenya, *How Law is Made*, 5.

The report of the Committee of the Whole House will then be read before the House after it resumes its seating in plenary and a vote taken on whether or not to approve the bill. If there is a specific clause that any member of the House feels needs further re-examination, parliamentary procedure allows for a motion of re-committal.²⁸ This motion has the effect of transforming the House once again into a Committee of the Whole House. However, in the interest of conserving parliamentary time and to avoid duplicating effort, such re-committal motions must be supported by compelling reasons.

If the bill obtains the approval of the House after the committee stage, it proceeds to the third reading. Being an advanced stage in the legislative process, the third reading limits debate to the content of the bill and substantive amendments are not permitted.²⁹ Even so, minor alterations such as re-numbering of clauses may be accommodated. On concluding the brief and restricted debate, members will take a vote on whether the final version of the bill should be passed in the House. If the bill garners the requisite threshold of support, it is considered passed in that House. The next stage of law-making depends on the nature of the bill: if it is a bill concerning county governments, it will first require concurrence from the other House of Parliament before it is presented for assent; if it is a bill not concerning county government, it automatically moves to the assent stage.³⁰

Bills requiring concurrence from both the National Assembly and Senate are usually referred by the Speaker of the originating House to the Speaker of the other House who will then present it to the membership of that House for consideration and passage. Accordingly, such a bill will go through the first, second and third reading, and in the event that it passes in that House without amendments it is referred back to the originating House.³¹ On receipt of the Bill, the Speaker of the originating House will present the bill within seven

²⁸ Parliament of Kenya, *How Law is Made*, 5.

²⁹ Parliament of Kenya, *How Law is Made*, 5.

³⁰ Kenya Law Reform Commission, *A Guide to the Legislative Process in Kenya*, Kenya Law Reform Commission, 2015, 70.

³¹ Parliament of Kenya, *How Law is Made*, 7.

days to the President for assent.³² There may be cases, however, where the other House passes the Bill with certain amendments thus necessitating consideration by the originating House of such amendments for possible adoption. If the originating House subsequently refuses any of the amendments proposed by the other House, the bill must be referred to the Mediation Committee.³³

4.0 Bills that May Be Considered by the Mediation Committee

It has already been mentioned that the passage of certain bills requires consideration by both the National Assembly and the Senate. Such bills include those concerning county governments and those that relate to the internal affairs of the Houses of Parliament. Bills of this cast may end up being considered by the Mediation Committee in the event that one House refuses to accept the version of that bill or the amendments made to it by the other House. Where such disagreement arises, a mediation committee will be constituted with the mandate of resolving the differences of opinion between the two Houses so as to arrive at a mutually agreeable version of the bill that can be passed by both Houses. Before going into the detail of the operational modalities of the Mediation Committee (which is supplied in section 5), it useful to first elucidate the types of bills that may be concluded through the mediation committee system.

4.1 Bills concerning County Government

A bill concerning county government is defined in the Constitution of Kenya, 2010 as one that contains provisions affecting the functions and powers of county governments, relates to the election of members of a county assembly or a county executive, and affects the finances of county governments.³⁴ Such bills are further classified into special bills and ordinary bills, and this categorization has significant implications for their respective legislative procedures. Special bills are those relating to the election of members of a county assembly or a county executive as well as the County Revenue

³² Article 112(1)(b), 2010 Constitution.

³³ Article 112(2)(b), 2010 Constitution.

³⁴ Article 110(1), Constitution of Kenya, 2010.

Allocation Bill, while ordinary bills are those that are not classified as special bills.

Determining the category into which a particular bill falls, a process known as ‘tagging’, is thus a critical component of the legislative process because it is decisive of the legislative route a bill takes and its eventual passage.³⁵ Cognizant of this, the Constitution requires that before either House considers a bill, “the Speakers of the National Assembly and Senate shall jointly resolve any question as to whether it is a Bill concerning counties and, if it is, whether it is a special or ordinary Bill.”³⁶ It is useful to recall in this regard that Article 109 of the Constitution, which elaborates the scope of the exercise of legislative powers, provides that a bill concerning county government may originate in the National Assembly or Senate.³⁷ The implication of the conferral on both Houses of equal legislative jurisdiction to introduce and consider bills concerning county government has been explained thus:

*whenever the National Assembly considers and passes a Bill concerning county governments, the Bill has to be referred to the Senate for concurrence and whenever the Senate considers and passes a Bill concerning county governments, the Bill has to be referred to the National Assembly for concurrence.*³⁸

In the case of ordinary bills, the involvement of the Mediation Committee is triggered in two ways. First, one House may pass an ordinary bill concerning counties and the second House rejects it. In this scenario, the Constitution requires that the bill be referred to the Mediation Committee. Secondly, an amended version of the bill may be referred back to the originating House for reconsideration then the originating House rejects the bill as amended. In that

³⁵ Bosire C., ‘Kenya’s Budding Bicameralism and Legislature-Executive Relations,’ in Fombad, C. (ed), *Separation of Powers in African Constitutionalism*, Oxford University Press, 2016, 127.

³⁶ Article 110(3), Constitution of Kenya, 2010.

³⁷ Article 109(4), Constitution of Kenya, 2010.

³⁸ Parliament of Kenya, *The Mediation Process in Law Making*, Clerk of the National Assembly, 2017, 2.

event, the amended bill must be referred to a Mediation Committee. Although special bills concerning county governments are processed in the same manner as ordinary bills, the former affords the National Assembly the option to unilaterally amend or veto the bill passed by the Senate.

Thus, whereas all inter-chamber legislative disputes in Kenya are to be resolved by the mediation committee system, Article 112 supplies an override provision that allows the National Assembly to circumvent it: "The National Assembly may amend or veto a special Bill that has been passed by the Senate only by a resolution supported by at least two-thirds of the members of the Assembly."³⁹

4.2 Bills concerning Internal Affairs of Parliament

Bills which relate to or affect the internal governance and operations of a House of Parliament or which have implications for its membership and staff may be considered by both the Senate and National Assembly.⁴⁰ As with bills concerning county government, bills concerning the internal affairs of the Houses of Parliament must be passed in either House and then referred to the other House for concurrence. If the second House rejects it, the bill must be referred to the Mediation Committee. If the second House passes the bill with amendments, it must be referred back to the originating House for reconsideration. If, however, the originating House rejects the bill in its amended form, the bill must be referred back to the Mediation Committee.

5.0 Organizational Structure and Operational Modalities of the Mediation Committee

Kenya's Mediation Committee, like its United States equivalent, is essentially a joint committee of the two Houses that is convened on an ad hoc basis whenever one House refuses to agree to the version of a bill already passed by the other House. On a number of occasions, the Mediation Committee has been convened to resolve legislative gridlock in the course of passing certain

³⁹ Article 112(2).

⁴⁰ Parliament of Kenya, *The Mediation Process in Law Making*, Clerk of the National Assembly, 2017, 2.

bills, and its deliberations and outcomes provide crucial insight into the actual operation and impact of this legislative dispute resolution mechanism. This section discusses the institutional structure, membership, dispute resolution procedure, and decision-taking measures of Kenya's Mediation Committee. In addition, it critically appraises the work of the Mediation Committee in light of its actual as well as comparative practice.

5.1 Appointment and Membership

In the event that one House rejects the version of a bill passed by the other House, the Speaker of that House must proceed to formally communicate, by way of a Message, this development to the Speaker of other House.⁴¹ Taking the decision as to whether or not there is need to convene a Mediation is the remit of Speakers by virtue of their role as presiding officers of their respective Houses. This is deliberate because once a Message indicating the occurrence of an inter-chamber legislative dispute has been transmitted to the Speaker of the other House, it has the irrevocable effect of committing the dispute to the mediation committee system.⁴²

The Constitution provides that where a bill is referred to a Mediation Committee, the Speakers of both the Senate and National Assembly must jointly "appoint a Mediation Committee consisting of equal numbers of members of each House to attempt to develop a version of the Bill that both Houses will pass."⁴³ In Kenya, parliamentary custom, rather than specific procedural rules, guide the two Speakers in the appointment of members of the Mediation Committee. For instance, it is part of the custom that the mover of the bill and the chair of the parliamentary committee that handled the bill are included in the membership of the Mediation Committee. Other members may be chosen, in consultation with the party whips, from such ranking members of the parties or those with relevant expertise in the subject-matter of the bill.

⁴¹ Senate Standing Order 160; National Assembly, Standing Order 149.

⁴² Parliament of Kenya, *The Mediation Process in Law Making*, Clerk of the National Assembly, 2017, 3.

⁴³ Article 113(1).

A publication prepared by the National Assembly Taskforce on Factsheets, Online Resources and Webcasting of Proceedings indicates that the following may be included in the membership of the Mediation Committee:

- a) *the mover of the Bill;*
- b) *the Chairperson or member(s) from the relevant Committee which interacted with the Bill during public participation;*
- c) *senior/ranking members of the departmental/standing committees of each House that originally considered the Bill;*
- d) *member(s) with strong views, either against or in favour of the contended clauses;*
- e) *member(s) with expertise or experience on the subject of the Bill;*
- f) *leaders of the Majority and Minority Parties.*⁴⁴

The actual practice of the mediation committee system, which is discussed further below, shows that the above criteria for appointment of members of the Mediation Committee is followed only in broad outline and with little consistency. As will be demonstrated by reference to specific case studies in section 5.4, in the majority of cases the composition of the Mediation Committee has tended to be informed more by political strategy rather than considerations of subject-matter expertise.

5.2 Procedure, Deliberation and Outcome

The rules governing the procedure of the Mediation Committee are found in the Constitution and in the Standing Orders of the Senate⁴⁵ and National Assembly.⁴⁶ Article 113 of the Constitution stipulates the timeline within which the mediation processes should be concluded; it provides that the Mediation Committee must formulate a version of the bill that is acceptable to both Houses “within thirty days” or else the bill will be defeated.⁴⁷ This timeline is reiterated in the Standing Orders of the Senate as well as that of the National Assembly where the text of Article 113(4) is reproduced word for

⁴⁴ Parliament of Kenya, *The Mediation Process in Law Making*, Clerk of the National Assembly, 2017, 3.

⁴⁵ The Senate, Standing Orders, 9 August 2018.

⁴⁶ National Assembly, Standing Orders, 10 September 2017.

⁴⁷ Article 113(4).

word.⁴⁸ As a matter of parliamentary custom, which is confirmed by the actual practice, the 30 days countdown begins on the day the Mediation Committee holds its first meeting.⁴⁹ It is crucial to note that as far as the procedural rules of the Mediation Committee are concerned, the Standing Orders of the Senate and National Assembly are functionally identical. Both sets of standing orders provide for the requisite quorum in a sitting of the Mediation Committee as follows:

The quorum of [Senators or Members of the National Assembly] who shall be present to take part in a sitting of a Mediation Committee shall be a third of the [Senators or Members of the National Assembly] and no sitting of the Committee shall be validly constituted unless there is also a like quorum of [representatives from the other House].⁵⁰

Despite the welcome emphasis on equality of arms as regards quorum, the Standing Orders may be faulted for not specifying the number of members of a Mediation Committee, as is the case in Germany where the Basic Law specifies that the Mediation Committee comprises 16 members.⁵¹ It is understandable that this omission may have been occasioned by the variable membership of various parliamentary committees. Still, it may be necessary to specify a minimum number of members for purposes of certainty.

The respective standing orders of the National Assembly and the Senate also prescribe how the presiding officers, namely the Chairperson and Vice-Chairperson, are to be appointed. On this aspect, both sets of standing orders are identical: “The Chairperson and Vice-Chairperson of the Mediation

⁴⁸ Article 113(4), Constitution of Kenya, 2010: “If the mediation committee fails to agree on a version of the Bill within thirty days, or if a version proposed by the committee is rejected by either House, the Bill is defeated.”

⁴⁹ Parliament of Kenya, *The Mediation Process in Law Making*, Clerk of the National Assembly, 2017, 4.

⁵⁰ Senate, Standing Order 160(3); National Assembly, Standing Order 149(3).

⁵¹ Koggel, C., ‘The Mediation Committee of the Bundestag and Bundesrat: A Special Institution of German Constitutional Law,’ *International Journal of Legal Information* 44, 2016: 36.

Committee shall be appointed by the majority of the members present at the first meeting of the Committee.”⁵² Another rule of procedure that also reflects parliamentary custom in bilateral legislative systems with inter-chamber dispute resolution mechanisms, is that the Chairperson and Vice-Chairperson of the Mediation Committee must not be drawn from the membership of the same House. Accordingly, if the Chairperson is a member of the National Assembly, the Vice-Chairperson must be a senator and vice versa.

Besides rules relating to the timeline for mediation, quorum, and appointment of the Chairperson and Vice-Chairperson of the Mediation Committee, there are no specific rules of procedure for the inter-chamber legislative mediation process. This makes the process uncertain and subject to ad hoc attempts to manipulate the process so as to produce outcomes that do not reflect good faith dialogue and genuine consensus. For instance, there are no clear rules on changing or substitution of members, which may be necessitated by reasons of expertise or other compelling circumstances. Also unclear is the possibility of the Mediation Committee, as is the practice in some comparable jurisdictions, to set up subcommittees to expedite the process of inter-chamber legislative dispute resolution or allow third parties to attend Mediation Committee meetings for the same purpose.⁵³ This lack of elaborate and comprehensive rules of procedure is a shortfall of Kenya’s mediation committee system to which we will return in section 6.

Though not specified in the standing orders of the two Houses, parliamentary custom rules that the Mediation Committee may take its decisions by way of majority of the votes of the members present. It is useful to recall that the objective of the Mediation Committee is to reconcile two versions of a bill with a view to bringing the divergent views of the two Houses within the frame of mutually agreeable compromise. Accordingly, the work of the Mediation Committee is to focus on the contentious clauses and any other consequential provisions of a bill with the aim of producing a compromise version of that bill. Once the compromise version has been endorsed by a majority vote,

⁵² Senate SO 160(4); National Assembly 149(4).

⁵³ Bundstag, Rules of Procedure; South African National Assembly, Standing Orders.

Standing Orders of the Senate and National Assembly both require the preparation by the Mediation Committee of a report on that bill. In addition, the Mediation Committee must append the mediated version of that bill to the report which will then be tabled before both Houses.⁵⁴

5.3 Post-mediation Processes

Once the report of the Mediation Committee has been laid on the Table of both Houses, the next procedural step is determined by the nature of the decision issuing from the mediation process. Three probable scenarios can be considered here. First, the report of the Mediation Committee may indicate its failure to agree on a version of the bill. The implication of this scenario is that the bill shall stand defeated.⁵⁵ A similar result attends the second scenario where the Mediation Committee fails to agree on a version of the bill within the constitutional timeline of 30 days. The third scenario is where the report of the Mediation Committee indicates agreement on a version of the bill. In this case, both Houses will proceed to consider the report of the Mediation Committee on a motion that the report of the Committee be approved and, accordingly, vote to approve or reject it.

A vote of this manner has two outcomes. If, on the one hand, a motion is voted against in the first House, the Clerk of that House shall transmit a Message to the other House indicating disagreement and the bill will be deemed defeated.⁵⁶ On the other hand, if the motion is passed, the Clerk shall send a Message to the other House signifying such agreement. The bill will then make progress if it garners similarly favourable support in the other House:

On receipt by the clerk of a similar message from the [other House], the Bill shall be deemed to have been passed by both Houses in the form agreed to by the Mediation Committee and the Clerk of [that House] shall forthwith send a

⁵⁴ Parliament of Kenya, *The Mediation Process in Law Making*, Clerk of the National Assembly, 2017, 4.

⁵⁵ Article 113.

⁵⁶ Parliament of Kenya, *The Mediation Process in Law Making*, Clerk of the National Assembly, 2017, 4.

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*message to the Clerk of the [other House] conveying the decision of [that House].*⁵⁷

This indicates that the Kenyan system of intercameral dispute resolution is essentially bilateral, requiring concurrence by both Houses before an agreed version of a contested bill passes into law. Yet the actual practice of the Mediation Committee, though generally consistent with this observation, reveals shortcomings that may challenge this view or at least lead one to qualify such this conclusion. The following section critiques the work of the Mediation Committee with a view to providing a basis for proposing measures to strengthen it so as to better promote the dual aims of political representation and legislative efficiency.

5.4 Critical Appraisal of the Work of the Mediation Committee

A comprehensive survey of the practice of Kenya's Mediation Committee is not possible within the context of this article. Hence, only selected instances of legislative deadlock which resulted in recourse to inter-cameral mediation will be used to evaluate the role and impact of the work of the Mediation Committee. Inevitably, the conclusions drawn from this discussion can at best be tentative. Nonetheless, such conclusions supply unique insights that may inform future directions in the reform of Kenya's legislative dispute settlement mechanism.

Rather than considering every bill that was referred to the Mediation Committee process, as has been stated above, a more efficient and enlightening approach would be to critically analyze the work of the Mediation Committee in light of the question as to the factors that account for the success or failure of legislative mediation. Subject-matter expertise of the membership of a given Mediation Committee is one of the factors that can be noted as contributing to a high likelihood of settling inter-cameral differences. This point can be illustrated by the respective membership of the committees that considered the following bills: Energy Bill, 2015; Petroleum (Exploration, Development and Production) Bill, 2015; Forest Conservation and

⁵⁷ Senate Standing Order 162(4)(b); National Assembly, Standing Order 150(4)(b).

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Management Bill, 2015; Natural Resources (Classes of Transactions Subject to Ratification) Bill, 2015; Land Laws (Amendment) Bill, and the Community Land Bill. In all these cases, the level of expertise of the representatives appointed to the Mediation Committee resulted in a unity of purpose toward reconciliation of contentious clauses and arriving at reasonable compromise.

Bills that present opportunities for bargaining between the main political parties represented in Parliament also have enhanced chances of succeeding in the Mediation Committee process. This is particularly true for proposed laws that aim to establish statutory regulatory entities such as boards, tribunals and parastatal authorities. Examples of bills of this nature include the National Drought Management Authority Bill and the Environmental Coordination and Management (Amendment) Bill, 2014. In both of these cases, issues such as composition and powers of the respective statutory bodies became the bases for consultation, mutual exchange and negotiated compromise.

A related factor that has contributed to the success of the Mediation Committee system is the clear formulation of contentious issues in a manner that promotes bipartisan consensus. The way in which the respective Mediation Committees went about cultivating mutual compromise when mediating contested clauses of the Political Parties (Amendment) Bill, Mining Bill, 2014 and the Statute Law (Miscellaneous Amendments) (No. 2) Bill illustrates this point well. Besides clear identification of the aspects that need to be resolved, the non-political character of contested clauses in bills plays a crucial role in increasing the probability of compromise. This can be illustrated by deliberations of the respective Mediation Committees that considered the Climate Change Bill and the Water Bill where contested issues were technical rather than political in nature.

In those cases, where bills have failed or have been passed irregularly because the Mediation Committee could not agree on how best to reconcile contested clauses, a number of contributory factors can also be identified. One of the key factors is where the membership is appointed on the basis of party loyalty rather than technical expertise. This non-objective approach is particularly

common where the bill at issue concerns sharing revenue between the national government and counties. The Mediation Committee process related to the Distribution of Revenue Bill, 2017 is a case in point and illustrates the tendency of political expediency obscuring objective legislative conflict resolution where matters as sensitive as revenue sharing are concerned.

Because the preceding paragraph focused on the unsatisfactory aspects which impede the effective functioning of the Mediation Committee, it may seem to suggest that Kenya's inter-chamber legislative dispute resolution system has been a failure. By no means is that the true position. Quite the contrary, it shows that the mediation committee system in Kenya is a vibrant work-in-progress that can greatly benefit from careful reform measures. Despite the problems identified here, it is evident from the selective survey of practice 2010–2018 that the Mediation Committee has progressively refined its procedure, taken steps to clarify its status and role, and by pursuing its mandate has asserted itself in the national legislative process.

Considering that administrative processes and procedural rules of the Committee are not fully elaborated in the Constitution nor have they since been updated in the Standing Orders, that the Committee has been able (in the greater proportion of cases) to produce versions of bills that are agreeable to both Houses is remarkable. The next logical step then is to focus on how best the progress thus far can be consolidated and strengthened so as to more effectively institutionalize ADR as a critical component of the legislative process. It is to this task that the next section turns.

6.0 Strengthening the Institutionalization of the Mediation Function in Kenya Legislative Process: Proposals for the Reform of the Mediation Committee System

Comparative constitutional law has the distinct merit of being an instructive source of solutions to intractable legal and political problems.⁵⁸ Though

⁵⁸ Ghai, J.C. and Ghai, Y., 'The Contribution of the South African Constitution to the Kenyan Constitution,' in Dixon, R. and Roux, R. (ed), *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African*

disputed by some critics,⁵⁹ comparative constitutional law has long yielded useful insights on which reform programs have been founded and implemented. The Kenyan context supplies a ready example of the positive implications of comparative law for a jurisdiction in the process of giving effect to constitutional arrangements that have a politically and socio-economically transformative import.⁶⁰ For one, the Constitution of Kenya draws heavily on the Constitution of South Africa for its decentralized structure of government, and on the American Constitution for its executive-legislature relations.⁶¹ It is thus a reasonable proposition that the constitutional experiences of these jurisdictions can be provide a basis on which to draw ideas for overcoming comparable challenges in Kenya.

Returning to the matter of legislative dispute resolution, it is clear that the Mediation Committee of Kenya is an institution shaped by the constitutional influences of jurisdictions that have also drawn inspiration elsewhere.⁶² Thus it may be remarked that most legislative dispute resolution systems are creatures of cross-national constitutional borrowing. As was discussed above,⁶³ the American Constitution was the first one to establish a legislative dispute resolution mechanism. Yet this was essentially a modification of British Westminster parliamentary custom according to which differing views in the

Constitution's Local and International Influence, Cambridge University Press, 2018, 252-293.

⁵⁹ Saunders, C., 'The Use and Misuse of Comparative Constitutional Law,' *Indiana Journal of Global Legal Studies* 13, 2006: 37.

⁶⁰ Gathii, J.T., *The Contested Empowerment of Kenya's Judiciary, 2010–2015: An Institutional Historical Analysis*, Sheria Publishing, 2016.

⁶¹ Bosire C., 'Kenya's Budding Bicameralism and Legislature-Executive Relations,' in Fombad, C. (ed), *Separation of Powers in African Constitutionalism*, Oxford University Press, 2016, 117; Ghai, Y.P. and Cottrell, J., *Kenya's Constitution: An Instrument for Change*, Katiba Institute, 2011, 94-95.

⁶² Ghai, J.C. and Ghai, Y., 'The Contribution of the South African Constitution to the Kenyan Constitution,' in Dixon, R. and Roux, R. (ed), *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Local and International Influence*, Cambridge University Press, 2018, 253.

⁶³ See section 2 above.

House of Commons and House of Lords on crucial issues requiring bicameral concurrence were resolved by a council comprising members of both houses.⁶⁴

The German Constitution subsequently borrowed from and developed the American model by establishing a standing committee for legislative dispute resolution guided by elaborate procedure rules.⁶⁵ The South African model is also modelled on the German system, save for the fact that one house (the National Assembly) has an institutional override over objections of the other by way of a two-thirds majority vote; in the case of the German model the Bundesrat has absolute veto over national legislation.⁶⁶ For its part, Kenya's model can be characterized as a hybrid of the South African and German design.

It is therefore reasonable to suppose that one of the more principled ways to proceed in the cause of reforming Kenya's Mediation Committee is to examine carefully the respective organizational structures and performance of equivalent institutions in comparable jurisdictions so as to draw guidance from them. Convinced of the merits of such an approach, this section focuses on five aspects of Kenya's legislative dispute resolution system that have been identified as its critical shortcomings in need of immediate attention: lack of elaborate procedural rules; indeterminate tagging of legislation; non-objective membership of the Mediation Committee; and institutional inequality of arms between the two Houses. With reference to the institutional experiences in South Africa, Germany and the United States, this section proposes tentative reform measures by which Kenya's Mediation Committee can be strengthened.

⁶⁴ North, D.C. and Weingast, B.R., 'Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century Britain,' *Journal of Economic History* 49, 1989: 803-32.

⁶⁵ Koggel, C., 'The Mediation Committee of the Bundestag and Bundesrat: A Special Institution of German Constitutional Law,' *International Journal of Legal Information* 44, 2016: 35.

⁶⁶ Murray, C., 'Designing Parliament for Cooperative Federalism: South Africa's National Council of Provinces,' in Seidle L. and Docherty D. (eds), *Reforming Parliamentary Democracy*, McGill-Queens University Press, 2003, 208.

6.1 Adoption of Rules of Procedure

One of the weaknesses of the inter-chamber legislative dispute resolution system in Kenya is the absence of detailed rules of procedure for mediating between the Senate and National Assembly. This is a significant shortcoming because procedural rules determine the quality of deliberations and in turn the legitimacy of the decision.⁶⁷ Since the rules of procedure are so scant, it becomes difficult for the process of institutionalization to occur; that is, for core norms and decision-making processes to crystallize so that the expectations of relevant actors can converge around them. It may therefore be remarked that thus far Kenya's Mediation Committee is an institution yet to attain institutionalization. This is supported by a review of the practice of the Mediation Committee in various legislative processes which shows significant divergence in the procedural approach and consensus-building strategies.

In contrast to the Kenyan Mediation Committee, its United States and German equivalents are governed by elaborate rules of procedure. Adoption of rules of procedure can therefore be seen to be an indispensable first step toward institutionalizing ADR in the legislative process, creating stability and ensuring longevity. This is certainly true in the case of the United States which has since 1890 relied on its rules of procedure in conference committee to guide the inter-chamber legislative dispute resolution. But given the recent decline of the US conference committee system because of preference for an alternative process, it is more judicious to draw guidance from Germany whose Mediation Committee is in the ascendant and has even been described as the most progressive intercameral dispute resolution mechanism, a conclusion that is supported by in-depth analyses of comparative bicameralism.⁶⁸

⁶⁷ Hedlund, R.D., 'Organizational Attributes of Legislatures: Structure, Rules, Norms, Resources,' *Legislative Studies Quarterly* 9, 1984: 51-121.

⁶⁸ Koggel, C., 'The Mediation Committee of the Bundestag and Bundesrat: A Special Institution of German Constitutional Law,' *International Journal of Legal Information* 44, 2016: 35.

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Germany's Mediation Committee supplies an instructive study for the institutionalization of mediation in the legislative process and commends itself to the project of reforming its Kenyan equivalent. In particular, the Rules of Procedure of the Mediation Committee promulgated by the Bundestag and which is published with the consent of the Bundesrat offers a model worthy of imitation in Kenya and elsewhere.

The key lesson for Kenya from Germany is that in order to institutionalize and secure long-term success of the mediation committee system, there is urgent need to adopt more formal and comprehensive internal procedures governing the inter-chamber dispute resolution process. Also, there is need to develop clear and coherent rules that regulate arrangements for bargaining the necessary trade-offs and concessions between the two Houses. Implementation in Kenya of these recommended reforms can reasonably be expected to give rise to a regime for resolving inter-chamber legislative differences that is formal and institutionalized yet flexible and adaptable.

The adoption of institutional rules and distinct internal procedures is critical since it establishes the template on which organizational norms and customs will be developed. This will afterward provide a systemic pattern of conduct and expectation that can enable observers to predict the dynamics of likely procedural routes and probable outcomes when the Mediation Committee considers certain types of bills. This will result in the progressive institutionalization of the mediation committee system, enhance its status and visibility, and offer a coherent and plausible theory about Senate-National Assembly mediation.

6.2 Reforming the Legislative Tagging Mechanism

Different categories of bills trigger distinct legislative procedures and thus Kenya's Constitution provides a system for determining the particular designation of a bill. Some bills can be passed unilaterally by one House, but others have to be passed by both Houses. Bills which require the concurrence of the Senate and the National Assembly are those concerning county governments, and these may originate in either House but must be referred to

the other House. Yet the question as to what constitutes a bill concerning county government is a contested matter that has not conclusively been answered. Article 110(3) of the Constitution establishes a cooperative tagging mechanism which requires that before either House considers a bill, the Speakers of both Houses must *“jointly resolve any question as to whether it is a Bill concerning and, if it is, whether it is a special or an ordinary Bill.”*

Despite the provisions of Article 110(3) which envisage cooperative and collegial processes in which the Speakers of both Houses jointly resolve questions related to the appropriate design of a bill, certain recurring incidents suggest that the joint legislative tagging is not working. Proper legislative tagging or labelling is crucial because it is only bills designated as concerning county governments that can trigger the operation of a Mediation Committee in case of disagreement between the two Houses. There are notable instances where the National Assembly unilaterally processed bills that ordinarily require concurrence of both Houses, thereby excluding the Senate from the legislative process.

The controversy regarding the Division of Revenue Bill 2013 is an instructive example. Here, the National Assembly passed that Bill and subsequently referred it to the Senate for concurrence. In considering the Bill, the Senate made some amendments to its clauses and sent it back to the National Assembly for reconsideration. However, the National Assembly rejected the amended version of the Bill. At that stage it would have been appropriate for the Speaker of the National Assembly to call for the appointment of a Mediation Committee with a view to resolving the legislative gridlock.

Yet the Speaker of the National Assembly presented the bill as originally passed in the House for assent by the President, arguing that it was a mistake to involve the Senate in the first place because it had no role in considering that bill which did not concern county governments. The Senate therefore sought an advisory opinion from the Supreme Court on the constitutionality of the exclusion by the National Assembly of its input from the Division of Revenue Bill. Its core argument was that the bill was one that concerned

county governments because according to Article 218 such bills are intended to “divide revenue raised by the national government among the national and county levels of government in accordance with this Constitution”.⁶⁹

In *Speaker of the Senate and Another v Attorney General and Others*, the Supreme Court held that the Division of Revenue Bill is a bill concerning county governments and therefore both Houses must play a meaningful and effective participatory role in its legislative process.⁷⁰ With reference to provisions of Articles 109–113, the Supreme Court emphasized that devolution requires mutually cooperative relations between the two Houses so as to promote consultation. In particular, it held that “neither Speaker may, to the exclusion of the other, ‘determine the nature of the bill’ for that would inevitably result in usurpation of jurisdiction to the prejudice of the constitutional principle of harmonious interplay of state organs.”⁷¹ This astute observation by the Supreme Court supplies a basis for reforming the legislative tagging process to ensure consensus and collegiality between the Speakers of both Houses in determining the status of contested bills.

6.3 Electing Expertise over Expediency

It is a truism that the work of legislatures in parliamentary democracies is mainly accomplished through its specialist committees.⁷² Also widely acknowledged is the view that members of such specialist committees frequently endorse in an uncritical manner the positions of their respective parties.⁷³ This presents what can be referred to here as the objectivity challenge: how should the composition, deliberations and decision-taking processes of inter-chamber legislative dispute resolution institutions be structured so as to promote the needful cooperative law-making and

⁶⁹ Article 218(1)(a).

⁷⁰ [2013] eKLR.

⁷¹ *Ibid* para 143.

⁷² Shepsle, K.A., ‘The Institutional Foundations of Committee Power,’ *American Political Science Review* 81, 1987: 85-104.

⁷³ König, T., ‘Bicameralism and Party Politics in Germany: An Empirical Social Choice Analysis,’ 49 *Political Studies* 49, 2001: 411-37; Cox, G.W. and McCubbins, M.D., *Legislative Leviathan: Party Government in the House*, University of California Press, 1993.

compromise as opposed to needless unhealthy political competition?⁷⁴ The actual practice of the Mediation Committee in Kenya illustrates well the tension between the ideal of cooperative and consultative cross-party legislative engagement and the reality of devious political manipulation.

A survey of the practice of the Mediation Committee of Kenya 2010–2018 indicates that the more politically sensitive the content of a bill, the less objective the process of mediation and the higher the degree of unhealthy competition.⁷⁵ Examples that support the thesis that objective inter-chamber and cross-party legislative engagement is inversely proportional to the political sensitivity of a bill include the Division of Revenue Bill, 2017 Security Laws (Amendment) Bill and the Election Laws (Amendment) Bill, 2017. This thesis is also borne out by examining less controversial bills such as the Forestry Bill and the Climate Change Bill which featured the participation of legislators with more expertise in the subject as well as collegial and cooperative participation across party lines. One of the conclusions that may be drawn from this is that there is a tendency for political parties to entrench their positions by strategically selecting members on the basis of party loyalty. This therefore points to the need for reform discussions towards the establishment of a standing mediation committee.

South Africa, which has had a dominant ruling party since 1994, has also faced similar problems in its inter-chamber legislative dispute resolution process.⁷⁶ Constitutional commentators have lamented that instead of focusing on subject-matter expertise as the key criterion for appointment to sit in the Mediation Committee, the African National Congress (ANC) has for the most part been driven by considerations of political expediency and preoccupied with party discipline.⁷⁷ It is notable that the National Assembly Taskforce has

⁷⁴ Hug, S., 'Strategic Voting in a Bicameral Setting,' in König T., Tsebelis, G. and Debus M. (eds), *Reform Processes and Policy Change: Veto Players and Decision-Making in Modern Democracies*, Springer, 2010, 231-46.

⁷⁵ See section 5.4 above.

⁷⁶ De Vos

⁷⁷ Obiero, R.E., *The South African Parliamentary Committee System: The Constitutional Parameters and Structure*, 53.

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identified tentative criteria for membership of the Mediation Committee, including expertise or experience in the subject-matter. However, the publication in which this appears is not a source of legal or regulatory guidance and thus is not binding. A more effective solution is to adopt rules of procedure to set out the appropriate criteria for membership of the Mediation Committee. Parliamentary custom in the United States and current practice in Germany can be relied on as guidance in developing such regulations on the membership of Kenya's Mediation Committee.⁷⁸

6.4 Fostering Inter-Chamber Equality of Arms

Kenya's system of bicameralism establishes the legislature as consisting of two co-equal chambers. Yet despite their presumptive equality of status, parliamentary practice and political experience indicates that the National Assembly enjoys relative primacy over the Senate. Inevitably, this power imbalance has the effect of diminishing the quality of inter-chamber dispute resolution because of the existence of institutional inequality of arms in the dispute settlement process. Indeed, there are notable instances where the National Assembly has wilfully disregarded the legislative input of the Senate and altogether ignored the Mediation Committee process. Examples include the irregular passage of the Division of Revenue Bill, 2014 and the Security Laws (Amendment) Bill, 2014 both of which were unilaterally passed by the National Assembly although they required concurrence of the Senate. Another example is the Division of Revenue Bill, 2017 which stalled after the Mediation Committee failed to reach agreement on the amount of revenue to be shared between the national and county levels of government.

What the survey of the work of the Mediation Committee indicates is that National Assembly dominance over the Senate and polarized party politics respectively undermine the ability of the members of the Senate and opposition parties to participate meaningfully and effectively in the inter-chamber dispute resolution process. There thus arises a need to reform its dispute resolution design so as to promote inter-chamber collegiality and

⁷⁸ Van Dusky-Allen, J. and Heller, W.B., 'Bicameralism and the Logic of Party Organization,' *Comparative Political Science* 97, 2014: 715-42.

mutual respect as a counterpoint to needless competition and unprofitable showmanship. The focus on changing process design, as opposed to the law, in order to influence institutional culture finds support in the dictum of the Supreme Court of Kenya in *Speaker of the Senate and Another v Attorney General and Others*, where Mutunga CJ (as he then was) observed:

Mediation is not something one can command – it is all about managing relationships between disputing parties. The law itself, therefore, will have very little to do with a successful mediation outcome. Thus any hiccups that may occur in the mediation process, including the one defined under Article 110(3), will have to be ironed out through the development of a culture of consultation, the progress of mutual respect between the two chambers and the practice of collegiality between the Speakers of each House. This Court, I humbly submit, may not go further than to suggest this⁷⁹

Thus guided, it is submitted that the reform of the informal procedures of the Mediation Committee and the interrelations between the National Assembly and the Senate should precede and inform the inevitable law reform process intended to strengthen the role of ADR in Kenya's legislative process.

7.0 Conclusion

The Kenyan Constitution offers a basis for mediation to become an integral component of the system for resolving inter-chamber disputes between the Senate and the National Assembly. This is a progressive step towards mainstreaming recourse to ADR as a means to resolve political or ideological differences that may result in legislative gridlock. Thus, the Mediation Committee is a unique institution in Kenyan constitutional law because it is unprecedented in its history, and it is useful since some of the most important classes of bills require the concurrence of both Houses. As has been demonstrated in this article, the Mediation Committee system has been utilized on a number of occasions where crucial laws concerning county governments were being deliberated. The review of this Committee's practice 2010–2018 shows that, on the one hand, the Mediation Committee is becoming

⁷⁹ [2013] eKLR at para 283.

a critical device in the Kenyan legislative process because it offers an institutional means by which mutual concessions can be made and crucial intercameral compromises reached so that both Houses of Parliament can agree on the final version of laws that have implications for multi-level governance and public policy in Kenya.

Yet, on the other hand, the practice of the Mediation Committee demonstrates that its efficacy is impeded by certain systemic and institutional obstacles such as the lack of detailed procedural rules, partisan rigidity, a defective legislative tagging mechanism, and inter-chamber inequality of arms between the Senate and the National Assembly. Nonetheless, these challenges are not unique to Kenya because they have been noted in other jurisdictions that have comparable inter-chamber legislative dispute resolution mechanisms. Comparable institutional experiences from Germany, South Africa and the United States – three parliamentary democracies with bicameral systems whose legislative dispute resolution systems are functionally equivalent to the Kenyan model – can thus be used as a viable basis for gleaning crucial insights for reforming Kenya’s Mediation Committee system.

Drawing on the cumulative experience from comparable jurisdictions, this article has identified the following four points as essential forward steps if Kenya’s Mediation Committee system is to effectively become the avenue for institutionalizing ADR in the legislative process. First, it is vital that appropriate and detailed rules of procedure be adopted so as to clarify what exactly should happen when the committee is in session. Second, it is necessary to promote a culture of objective independence whereby the membership of a Mediation Committee is not obliged to adhere uncritically to partisan lines. Third, there is need to reconsider the voting arrangements by which decisions are taken in the Committee, with particular focus on introducing a requirement that (instead of a simple majority vote) decisions should only be passed by minimum number of members of both Houses. Fourth, the joint tagging mechanism of Parliament should be reformed and harmonized so that where bills requiring the concurrence of both Houses and

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which are not subject to the override are passed by one House absent effective or meaningful input of the other House, they are rendered invalid.

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The Role of Professional Bodies in ADR: The LSK Experience as an Institutional Mediator

*By: Peter Joseph Keya**

With the advent of the new constitutional dispensation in the year 2010, alternative dispute resolution (ADR) mechanisms were given prominence. Specifically, in exercising judicial authority, courts and tribunals are mandated to be guided by some principles which include promoting alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.¹ Article 159(3) of the Constitution limits the extent to which traditional dispute resolution mechanisms can be invoked in the following terms:

“Traditional dispute resolution mechanisms shall not be used in a way that –

- (a) contravenes the Bill of Rights;*
- (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or*
- (c) is inconsistent with this Constitution or any written law.”*

This constitutional dispensation provided a fundamental shift from the previous reference to the use ADR processes which mainly were in the sphere of Arbitration as set out in Arbitration Act² and conciliation especially within disputes arising in the course of labour relations under the Labour Relations

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¹ Article 159 (2) (c) of the Constitution of Kenya 2010.

² No. 4 of 1995.

Act.³ For instance, section 58 of the Labour Relations Act deals with alternative dispute resolution to be incorporated in any collective bargaining agreement concluded between a group of employers or employer's organization and a trade union. The Labour Relations Act also mandates the Cabinet Secretary in charge of labour relations to appoint conciliators to resolve a trade dispute⁴ and empowers conciliators to resolve such disputes.⁵ This law has evidently more emphasis on conciliation as an ADR mechanism. Indeed, one of the most significant development of the 2010 Constitution in dispute resolution mechanism - the focus of this work - is mediation. In essence, *mediation* is a process by which a *mediator* assists the parties in actual or potential litigation to resolve the dispute between them by facilitating discussions.⁶ The role of the mediator - a neutral party who does not take sides - is to help those involved sort out their issues and arrive at a consensus.⁷ This might involve helping parties to finalize an agreement, resolve a dispute, develop effective communications, build or improve relationships, or all of these things.

Accordingly, courts are now legally seized with the powers to require parties to undertake mandatory mediation process inter alia in the form of court annexed mediation.⁸ The Constitution in its text also does specifically refer to instances where recourse to mediation is mandatory. In its advisory opinion in the matter between the Senate and the National Assembly,⁹ the Supreme Court, by majority¹⁰ emphasised the constitutional stature of mediation in the following manner:¹¹

³ No.14 of 2007.

⁴ Section 65.

⁵ Section 67.

⁶ www.justice.gov.za/mediation/steps.html

⁷ <https://www.imimmediation.org/resources/background/what-is-mediation>.

⁸ Section 59B (1), Civil Procedure Act Chapter 21 Laws of Kenya.

⁹ *Speaker of the Senate & another v Attorney-General & 4 others* [2013] eKLR Advisory Opinion No. 2 of 2013.

¹⁰ with Ndungu Njoki SCJ dissenting.

¹¹ at paragraph 148.

“But our specific Advisory Opinion, which culminates from the detailed review, is as follows:

- (a) The Division of Revenue Bill, 2013 was an instrument essential to the due operations of county governments, as contemplated under the Constitution, and so was a matter requiring the Senate’s legislative contribution. Consequently, the Speaker of the National Assembly was under duty to comply with the terms of Articles 110(3), 112 and 113 of the Constitution, and should have co-operated with the speaker of the Senate, as necessary, to engage the mediation forum for resolution of the disagreement.*

- (b) With regard to any future lack of accord of a similar nature, between the two Chambers of Parliament, there shall be an obligation resting on the State organs in question to resort to mediation, as a basis for harmonious functioning, as contemplated by the Constitution.”*

In her dissenting opinion, Ndungu Njoki SCJ expressed herself on mediation thus: ¹²

“The law itself, therefore, will have very little to do with a successful mediation outcome. Thus, any hiccups that may occur in the mediation process, including the one defined under Article 110(3), will have to be ironed out through the development of a culture of consultation, the progression of mutual respect between the two chambers and the practice of collegiality between the Speakers of each House. This Court, I humbly submit, may not go further than to suggest this.”

In the same breadth, the Intergovernmental Relation Act¹³ was enacted to give effect to the dispute settlement provisions of Article 189 of the Constitution. In particular, section 19 of National Government Co-ordination Act¹⁴ provides that where a dispute arises as to the mandate or powers of any of the officers,

¹² at paragraph 283.

¹³ Act No. 2 of 2012.

¹⁴ No. 1 of 2013.

or roles of respective officers of the county governments and those of the national Government, a mediation team shall be constituted to deal with the dispute. Should the mediation team fail to resolve the dispute within the stipulated time, the matter may be referred to the Summit under the Intergovernmental Relations Act,¹⁵ for resolution. Pursuant to the said provisions, the court refused to exercise jurisdiction over a dispute holding that the case was not ripe for determination in view of the dispute resolution mechanism of mediation provided.¹⁶

The advantages of mediation include mutually acceptable outcomes as the success of the process in resolving the dispute is entirely dependent on the parties. Mediation is a confidential process where what was discussed or agreed in private is not disclosed to others without everyone's agreement.¹⁷ Where mediation is used to try to avoid or resolve a dispute, and if the mediation does not result in an agreement, the parties can still go to court. Details about what went on at the mediation will not be disclosed or used at a court hearing. In the context of court annexed mediation, there is reduction of court backlog, reduction of time taken to resolve otherwise time consuming litigation over the same dispute and it is cheaper than the court process. This is because, the litigants subjected to the court annexed mediation process are not expected to incur any further costs in hiring the mediator or the venue, all of which are facilitated by the judiciary.

To enable this, the courts, following successful pilot program, has continued to facilitate the mediation process, both administratively ¹⁸ and through accreditation of mediators to undertake the court annexed mediation process. After the pilot phase and comprehensive assessment, the Honourable Chief

¹⁵ Act No. 2 of 2012.

¹⁶ *Law Society of Kenya v Transition Authority & 2 others* [2013] eKLR High Court Petition No.190 of 2013.

¹⁷ <https://www.imimmediation.org/resources/background/what-is-mediation/>

¹⁸ For example through having a registrar specifically in charge of mediation ably assisted by Deputy Registrars.

Justice of Kenya has since issued practice directions¹⁹ on court annexed mediation for purposes of encouraging parties to arrive at an amicable settlement without going through or completing a trial or appeal. Mediation is therefore unsurprisingly gaining momentum as a viable ADR mechanism with the court annexed mediation achieving over 50% settlement rate.²⁰

As part of the development of the mediation, situations have arisen that necessitate mediation to be undertaken not by individual mediators but by professional bodies. One such body which this article focuses on is the Law Society of Kenya (LSK) established under the provisions of the Law Society of Kenya Act.²¹ The membership of the society comprises mainly advocates.²² The objectives and functions for which the society was established are set out in section 4 of the establishing statute. They include assisting the Government and the courts in matters relating to legislation, the administration of justice and the practice of law in Kenya and to protect and assist the members of the public in matters relating to or ancillary or incidental to the law.²³ This is a unique attribute of the LSK in comparison to other professional bodies.²⁴ At the onset, it is worthy of note that mediation by institutions is not entirely novel. It will be recalled that Kenya's post 2007 election dispute was successfully mediated under the auspices of the African Union Panel of Eminent Personalities. The panel was led by the former United Nations Secretary General Koffi Annan and also included Their Excellency Benjamin

¹⁹ Practice Directions on Court Annexed Mediation (Amendment) 2018 which are currently in operation were made vide Gazette Notice No.7263 of 2018.

²⁰ As per the Judiciary Mediation Manual (2nd ed, 2018), the foreword by the Honourable Chief Justice indicates the settlement rate in the Family and Commercial Division at 55.7% and 53.8% respectively with a total sum of Kshs.1.4 Billion being released back to the economy.

²¹ Chapter 18 Laws of Kenya.

²² Section 5.

²³ Section 4(a) and (d)

²⁴ In comparison to other professionals recognized by statute such as the Accountants under Accountants Act No.15 of 2008, Engineers under the Engineers Act No.43 of 2011, Hydrologists under the Hydrologists Act No.19 of 2017 and Medical Practitioners and Dentists under their Act, Chapter 253 of the laws of Kenya, just as examples

Mkapa and Graca Machel.²⁵ However, it is to be pointed out that the said dispute was never before the courts at the time of the mediation. This article thus focuses on instances where LSK as an institution was involved as such in disputes before the courts at the highest level – before the Supreme Court. In the case pitting two firms of advocates and members of the Law Society,²⁶ the Supreme Court referred the dispute to the LSK for mediation. The brief circumstances of the matter are that on 17th July, 2014, while a ruling was pending, the Supreme Court invoked Article 159(2) (c) of the Constitution and urged the parties to consider mediation as a last recourse. All counsel involved in this matter were present and agreed to the proposal; and on that basis, the Court referred this matter to the LSK for mediation, in these terms:

“So we direct that the matter goes to the Law Society for mediation and the Law Society files a report to us on or before 27th August, 2014 . . . and this matter shall be mentioned before this Court on 27th of August at 10.00 a.m.”²⁷

As a follow-up, on 22nd July, 2014, Rawal, DCJ as she then was, wrote to the LSK, through its then chairman Mr. Eric Mutua, informing him of the Court’s proposal for mediation, and requesting the Society to take charge of the matter. On 19th August, 2014 a meeting was convened, with all counsel present, or represented; and on 21st August, 2014, by letter dated 20th August, 2014, the LSK informed the Court of the progress in the mediation process. Subsequently, as earlier directed, the matter was mentioned before two judges

²⁵ see also Juma M. K “African mediation of the Kenyan post-2007 election crisis” in *Journal of Contemporary African Studies Volume 27, 2009 Issue 3: Kenya's Uncertain Democracy: The Electoral Crisis of 2008* accessed at <https://www.tandfonline.com/doi/abs/10.1080/02589000903187016> and Khadiagala G.M. “Forty days and nights of peacemaking in Kenya in *Journal of African Elections* Vol 7 No. 2 at page 4 accessed at <https://www.eisa.org.za/pdf/JAE7.2Khadiagala2.pdf>

²⁶ In *Peter Odiwuor Ngoge t/a O P Ngoge & Associates Advocates & 5379 others v J Namada Simoni t/a Namada & Co Advocates & 725 others* [2014] eKLR Supreme Court Petition No. 13 of 2013.

²⁷ at paragraph 84.

of the Court²⁸ on the 27th of August, 2014. The Court was informed that on the strength of LSK's letter of 20th August, 2014, the mediation process was on course. Parties sought more time to conclude the process, and the Court granted a one-month extension. Before the lapse of the one-month extension, on 2nd September, 2014 the Court received two letters from the firm of M/s. O.P. Ngoge & Associates, dated 28th August, 2014 and 2nd September, 2014 respectively. In the first letter, Mr. Ngoge expressed his protest and disagreement with the contents of the LSK letter of 20th August, 2014. In particular, he stated that at the meeting with the LSK, he had firmly signaled that he would not share the pleadings which he drew with other advocates unless his fee was first paid in full. In the second letter, Mr. Ngoge notified the Deputy Registrar of his intention to withdraw from the mediation process. The matter was subsequently mentioned on 25th September, 2014. (before Ibrahim, SCJ) The Court was informed of the deadlock in the mediation process. Mr. Ngoge informed the Court of his withdrawal from the mediation process. After hearing all counsel present, the Judge pronounced the mediation process aborted, and directed that the Court would formally deliver its Ruling. The ruling was eventually delivered on 25th November 2014, the merits of which are not relevant for this purpose.

Another instance before the Supreme Court was early in the year 2016. The country at large and the legal profession in particular was faced with a unique challenge involving what others termed as a potential constitutional crisis. As to whether the crisis attained the constitutional threshold remains moot and is beyond the scope of this writing. In the wake of the retirement of the immediate former Chief Justice Hon. Justice Dr. Willy Mutunga, who had opted to retire one year before attaining retirement age, two other judges of the Supreme Court including the immediate former Deputy Chief Justice Hon Lady Justice Kalpana Rawal and Hon. Justice Philip Tunoi were faced with exit through retirement notices issued to them by the Judicial Service Commission. Additionally, Hon. Justice Philip Tunoi faced tribunal proceedings investigating his conduct with a possibility of recommending his

²⁸ (Dr. Mutunga, CJ & P, and Ibrahim, SCJ)

removal from office as a judge of the Supreme Court. The learned judges of the Supreme Court together with other judges of the High Court, having been notified of their retirement by the Judicial Service Commission, having attained the age of 70 years, challenged in court the applicability of the retirement age of 70 years to them as set out in the Constitution of Kenya 2010. Among their arguments, the retirement age of 74 years stipulated in the repealed constitution applied to them, the learned judges having been appointed as judges prior to the promulgation of the current Constitution in August 2010. The challenge by the learned judges before the High Court against the Judicial Service Commission was unsuccessful leading to an appeal before the Court of Appeal. Their appeal was equally unsuccessful leading to further appeal and/or proceedings before the Supreme Court.²⁹ The events surrounding the proceedings before the Supreme Court arguably had the potential of resulting into the constitutional crisis alluded to earlier.

Among the issues faced in the circumstances were the imminent retirements of Dr. Willy Mutunga as the Chief Justice within days of filing the dispute before the Supreme Court, the potential retirement of the Deputy Chief Justice and assistant to the Chief Justice, the retirement removal of one further Judge of the Supreme Court.³⁰ In addition, the Chief Justice is the Chairperson of the Judicial Service Commission³¹ while one more judge of the Supreme Court³² served as the representative of the Supreme Court to the Judicial Service Commission. Under Article 163(2) of the Constitution, the Supreme Court is properly constituted for the purposes of its proceedings if it is composed of five judges. The entire Supreme Court consists of seven judges. With the exclusion of the two judges who had instituted proceedings against the

²⁹ In *Kalpana H. Rawal, Philip Tunoi & David A. Onyancha v Judicial Service Commission & Judiciary* [2016] eKLR. While an appeal had been filed before the court, the matter was determined on the basis of applications and not the substantive appeal.

³⁰ See reporting on <https://hivisasa.com/posts/rawals-retirement-case-brought-forward-as-cj-mutunga-eyes-retirement>.

³¹ Article 171(a) of the Constitution of Kenya.

³² By virtue of Article 171(b) of the Constitution, Hon. Justice Smokin Wanjala at the time represented the Supreme Court.

Judicial Service Commission and a potential conflict of interest by two more Judges being the Chief Justice and the Supreme Court judges' representative to the Judicial Service Commission, there was real danger of the dispute degenerating further to unimagined levels. This is so coupled with the fact that an ex parte conservatory order had been granted³³ effectively suspending the implementation of the retirement against the judges and directions issued that the matter be heard on a date when the Chief Justice would have retired from office.

The Chief Justice as the President of the Supreme Court and as the head of Judiciary issued directions on 30th May 2016, fast tracking the hearing of the application by the judges on a date before his retirement from office as the Chief Justice.³⁴ The Chief Justice's exercise of his powers as the President of the Supreme Court in issuing directions as well as other matters were thus heard and were barely concluded on the last day of office for the Chief Justice in a most dramatic court session.³⁵

One of the now renowned activists and litigant on constitutional matters³⁶ raised a Preliminary Objection alongside other applications. His main argument was that the Supreme Court lacks the necessary jurisdiction to entertain all the applications filed based on his argument that Article 50(1) as read with Article 25(c) of the Constitution places an absolute bar to the exercise of jurisdiction by a judge who is neither impartial nor independent. He urged that Articles 50(1), 73(1)(a)(iii) and 73(2)(b) of the Constitution demand a mandatory and outright disqualification of judges in the case of

³³ *Kalpana H. Rawal, Philip Tunoi & David A. Onyancha v Judicial Service Commission & Judiciary* [2016] eKLR.

³⁴ See media reporting on <https://www.the-star.co.ke/news/2016-05-30-cj-mutunga-brings-forward-rawals-retirement-case/>

³⁵ the rulings on the different issues were delivered on the former Chief Justice's last day in office, 14th June 2016

³⁶ Okiya Omtatah Okoiti. See also his reported profile at <https://www.capitalfm.co.ke/news/2016/06/okiya-omtatah-defender-public-interests/and> <https://www.nation.co.ke/news/Where-would-we-be-without-Okiya-Omtatah-/1056-4270618-s3nv0nz/index.html>)

conflict of interest. In such circumstances, he submitted, recusal is an option. He urged that litigants are entitled to the constitutional guarantee of a fair trial by an impartial and independent court. Further, that the courts must guard against even the appearance of bias. There were further applications by the learned Judges and by Judicial Service Commission all challenging and/or supporting one position over the other. In essence, the dispute was murky and had the potential to get murkier. The merits of the dispute are however beyond the scope of this article save for giving a background and context of the dispute.

In the above context and in line with its statutory mandate set out in section 4(a) of the Law Society of Kenya Act which include the mandate to assist the courts in matters relating to administration of justice and practice of law in Kenya and promote public interest generally, the LSK successfully applied to be joined into the proceedings as an *amicus curiae*. This was nothing new as the LSK has previously applied to be enjoined in proceedings at the Supreme Court successfully and unsuccessfully. Upon admission, the LSK through its Advocate on record submitted that the matter strictly fell within the purview of Alternative Dispute Resolution and that it is only if that position was untenable, should the judicial process be allowed to take its course. LSK informed the Court that the proposed mediation process was consistent with Article 159 of the Constitution and it would be undertaken within a limited time. All parties addressed the Court with regard to LSK's proposal to have the matter settled out of Court. Thereafter, the Court allowed the LSK request to give time for further consultations among the parties and their clients. However, the LSK subsequently and upon expiry of the time allowed by the Supreme Court informed the Court that the extensive consultations did not bear fruits and the proposed mediation process was not mutually acceptable prompting the resumption of the hearing by the court of the applications that had been placed in abeyance pending the outcome of the attempted mediation.

The LSK having been admitted as an *amicus curiae* and having sought to mediate the dispute albeit unsuccessfully, it is evident that the LSK remained party to the dispute when the hearing by the court resumed by adopting

certain positions in the course of its arguments. For instance, in the course of the court hearing, Counsel appearing for LSK challenged the powers of the Chief Justice to vary orders in view of the prescriptions in Section 24 of the Supreme Court Act,³⁷ in consonance with the position adopted against the Judicial Service Commission.

Whereas the courts eventual decision in the matter as reported did not elaborate on how the mediation exercise was to be undertaken or was actually undertaken, it is worth interrogating this unprecedented step undertaken by LSK and the questions that arose therefrom. For instance, should the LSK have proceeded to participate in the suit beyond its failed attempt at mediation by adopting one of the litigant's position in the dispute in light of the fundamental tenet of a mediation in the neutrality of the mediator? Moreover, noting that LSK is an institution, is it capable of undertaking mediation as such and if so is it for the LSK President or a LSK council member to undertake such mediation. How should such a council member be arrived at and what if there is no agreement on the issue? While at it, do the ordinary members of LSK have any say on such matters and should they? These questions are informed by the fact that membership to LSK is compulsory and the members including those in the dispute and their advocates appearing before the courts had all along taken diametrically opposed positions in the dispute. The LSK council is ordinarily mandated to represent the interests of the members. The situation however turns awkward when members of the council express differences publicly in a manner that affects the public confidence on the abilities to effectively carry out such ventures. Whereas the LSK is sometimes seized of the appointment of arbitrators in a dispute, can the same mechanism that is deployed apply to this situation? While that position can be deemed to apply, the situation at hand is unique in the sense that the appointment of arbitrators by LSK is done at the instance of third parties wherein LSK is not at the centre of the dispute³⁸ as was the case in the matter at hand.

³⁷ No. 7 of 2011

³⁸ all the disputants with the exception of activist Okiya Omtata and the individual members under the Judicial Service Commission, the latter not being directly involved in the litigation.

It is also worth pointing out that there are many other instances when LSK has sought to be admitted as *amicus curiae* in litigation proceedings before the Supreme Court and other courts. However, at no time have LSK ever sought to mediate in other disputes in which they have been admitted. This leaves the retirement cases above as the only instance so far when LSK adopted such an approach hence worth consideration and interrogation. Without downplaying the efforts by the LSK at mediating that particular dispute, it remains unclear whether such a process adopted by the Supreme Court in the different contexts – self invitation and court referred – should be envisaged and resorted to more frequently as part of the court annexed mediation process.

If that were to be the case, in light of the above concerns arising, it is time the profession properly considered the issues and came up with a definite criteria and structure on when and how to carry any Alternative Dispute Resolution attempts and mediation under the auspices of LSK as an institution in the context of a dispute before the courts in which LSK has been admitted as an *amicus curiae*. Though it can be assumed that the LSK council does exercise wisdom whenever they undertake such steps in furtherance of LSK statutory objectives, caution has to be taken into consideration of the sometimes sharp differences expressed by the LSK membership or even among LSK council members, sometimes publicly through press conferences and/or social media on the council's exercise of its mandate some of which end up being litigated upon.³⁹ This article posits that some ground rules be they in form of regulations or guidelines may need to be developed and the general membership of LSK given an opportunity to participate in their formulation.

In conclusion, though this article raises more questions than answers, it serves as a rallying call to the legal profession and in particular the professional body of LSK to take a keener interest in promotion and facilitation of ADR with a view of enhancing the same in line with the LSK's objectives. Mediation by

³⁹ *Kenneth Kiplagat v LSK [2000] eKLR*, *Aaron Ringera and others vs LSK HCC Misc. 1330 of 1991* and more recently *Deynes Muriithi v LSK & Another [2016] eKLR* over the construction of the contentious arbitration centre which went all the way to the Supreme Court despite eventually being settled following change of LSK council.

LSK as an institution is an area that can be developed and used effectively towards the resolution of otherwise high profile public interest cases pending before the courts thereby saving invaluable court's time and avoiding any acrimony that may result from litigation. Unlike many other professional bodies including those which may seek to mediate in disputes touching on their members' areas of practice, LSK has a statutory duty to assist the courts and the public at large on administration of justice, an obligation that goes beyond its members and LSK having pioneered at the highest level of litigation before the Supreme Court. However, LSK cannot have the monopoly and other professional bodies and institutions are at liberty to initiate their own mechanisms towards participating in mediation and other ADR initiatives before the courts. After all the overriding intention is to facilitate quick resolution of disputes and access to justice by the Kenyan citizens. This is by no means the only conclusive way forward in addressing the issues and this article does not in any way make any specific prescription to address the challenges raised. Over to LSK membership!

Examining the Relationship Between ADR Mechanisms and Litigation in Enhancing Access to Justice in Kenya

*By: Jeffah Ombati**

Abstract

Access to justice is an essential and fundamental human right whose inviolability cannot be compromised. Article 48 of Constitution of Kenya 2010 mandates the state to ensure all persons access justice. Also, article 159 (2) (c) enshrines forms of Alternative Dispute Resolution (ADR) Mechanisms which judicial bodies should adopt to complement litigation in fostering access to justice. However, there has been a tendency of viewing ADR Mechanisms and litigation as mutually exclusive. This notion is premised on the presumption that a dispute can either be resolved formally and openly through litigation, or informally and privately through ADR Mechanisms.

This wrongful perception of ADR Mechanisms and litigation as mutually exclusive has resulted in tension between the two. First, ADR Mechanisms have been narrowly construed and denoted as “Alternative” to litigation. Second, most ADR processes have been construed as inconsistent with the rule of law.

This paper advocates that ADR Mechanisms should be properly referred to as Appropriate Dispute Resolution Mechanisms as the term ‘alternative’ subordinates their intended objective of complementing litigation via enhancing access to justice, reducing backlogs, and expediting dispute settlement. Also, it reveals that most ADR processes are construed as inconsistent with the rule of law because of the narrow construction of the rule of law to only include litigation-oriented approaches. Finally, it seeks to show that ADR Mechanisms and litigation are supportive modes of dispute resolution that have been entrenched in the Constitution of Kenya 2010 to enhance access to justice.

1.0 Introduction

Access to justice is an essential and fundamental human right whose inviolability cannot be compromised.¹ The Constitution of Kenya 2010

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mandates the state to ensure that all persons access justice.² Also, the supreme law enshrines forms of ADR Mechanisms which judicial bodies should adopt to complement litigation in fostering access to justice.³ There has been a tendency of viewing ADR Mechanisms and litigation as mutually exclusive.⁴ This notion is premised on the presumption that a dispute can either be resolved formally and openly through litigation, or informally and privately through ADR Mechanisms.⁵ This wrongful perception of ADR Mechanisms and litigation as mutually exclusive has resulted in tension between the two. First, ADR Mechanisms in Kenya have been narrowly construed and denoted as “Alternative” to litigation.⁶ Second, ADR Mechanisms have been construed as inconsistent with the rule of law.⁷ This paper begins with the background of ADR Mechanisms in Kenya, and how they should be construed and applied to complement litigation and foster access to justice. Subsequently, it analyses the legal framework on ADR Mechanisms in Kenya, and later on, delves into the relationship between ADR Mechanisms and litigation and access to justice in Kenya.

2.0 Background, Interpretation and Application of ADR Mechanisms in Kenya

2.1 Background of ADR Mechanisms in Kenya

The background of ADR Mechanisms in Kenya entails their setting during pre-colonial era and in the wake of colonialism. Also, it explores post-colonial developments in the legal system, up to 2010 constitutional dispensation and

¹ Rhode, DL, *Access to justice*, (OUP, 2004) p 3-7; Art 10, Universal Declaration of Human Rights, (Adopted 10 Dec 1948, entered into force 16 Dec 1948), G/A/Res 217A (III), UN Doc A/810.

² Art 48 Constitution of Kenya 2010, laws of Kenya.

³ Art 159 (2) (c) Constitution of Kenya 2010, laws of Kenya.

⁴ Sternlight, Jean R. "Is Alternative Dispute Resolution Consistent with the Rule of Law-Lessons from Abroad." *DePaul L. Rev.* 56 (2006): 569.

⁵ *Ibid.*

⁶ Kariuki, Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya*, (Glenwood Publishing Nairobi, December 2015) *Op cit.*, p 71.

⁷ Sternlight, Jean R. "Is Alternative Dispute Resolution Consistent with the Rule of Law-Lessons from Abroad." *DePaul L. Rev.* 56 (2006): 569. *Op cit.*

its executing statutory and policy frameworks.⁸ Prior to colonialism, African communities in Kenya embraced communal lifestyle which was, for instance, evidenced via communal land tenure systems.⁹ They had their conflict settlement and Traditional Dispute Resolution Mechanisms (TDRMs) under the auspices of customary laws.¹⁰ TDRMs included mediation; conciliation; negotiation; council of elders and consensus approaches which were applied in solving disputes and settling conflicts such as family and land matters.¹¹

In the colonial era, African conflict resolution and dispute settlement institutions were substituted with Western ideologies of justice which were not anchored on political negotiations and reconciliation.¹² This was due to misconceptions of the African *modus operandi* by colonialists who consequently restrained its usage via entrenchment of justice and morality clauses of repugnancy in then legal framework.¹³ Pertaining post colonialism,

⁸ Kariuki, Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya*, (Glenwood Publishing Nairobi, December 2015) Op cit., p 58-66; Muigua, K., *Effective Justice for Kenyans: Is ADR Really Alternative?* 2014, p 3-9, Available at <http://www.kmco.co.ke/attachments/article/125/Alternative%20Dispute%20Resolution%20or%20Appropriate%20Dispute%20Resolution.pdf> [Accessed on March 8th 2017].

⁹ Sobania, NW, *Culture and customs of Kenya*, Greenwood Publishing Group, 2003, p 11-18, Available at https://books.google.co.ke/books?hl=en&lr=&id=gfUbHXT2dloC&oi=fnd&pg=PR9&dq=Culture+and+Customs+of+Kenya&ots=2egvkc-_AQ&sig=Oeya_j42fi9TORHR0sNAPFBndw&redir_esc=y#v=onepage&q=Culture%20and%20Customs%20of%20Kenya&f=false [Accessed on March 13th 2017].

¹⁰ Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishing Nairobi, December 2015, Op cit., p 58-61.

¹¹ Ibid; see generally Muigua, K., *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, Retrieved 16th Aug 2014, Available at <http://www.kmco.co.ke/attachments/article/111/Paper%20on%20Article%20159%20Traditional%20Dispute%20Resolution%20Mechanisms%20FINAL.pdf> [Accessed on March 8th 2017].

¹² Muigua, K., 'Resolving Conflicts Through Mediation in Kenya,' Glenwood Publishing Nairobi, 2012, p 21.

¹³ Kariuki M., 'Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms,' March 2015 Paper Presented at the CI Arb Africa Region Centenary Conference 2015, held on 15-17 July, 2015, p 3, Available at http://erepository.uonbi.ac.ke/bitstream/handle/11295/88542/Muigua_Empoweri

implanted legal framework acknowledged institutionalism of ADR Mechanisms subject to their consistency with constitutional, morality and justice precepts.¹⁴

Concerning contemporary legal system, the Constitution entrenches provisions for ADR Mechanisms¹⁵ which must conform to constitutional, morality and justice tenets for validity.¹⁶ Similarly, stipulations for ADR Mechanisms are premised in various statutes such as the Civil Procedure Act,¹⁷ the Marriage Act¹⁸ and Employment and Labour Relations Court Act.¹⁹

Thus, institution of ADR Mechanisms roots in pre-colonial era. Its formalisation has hitherto gradually evolved, modified and shaped by various legal, policy and governmental frameworks.²⁰

2.2 Interpretation and Application of ADR Mechanisms in Kenya

ADR Mechanisms in Kenya are wrongly construed and denoted as Alternative Dispute Resolution Mechanisms.²¹ They should be properly referred to as Appropriate Dispute Resolution Mechanisms²² as the term 'alternative' subordinates their intended objective of complementing litigation via

ng%20the%20Kenyan%20people%20through%20alternative%20dispute%20resolutio
%20mechanisms.pdf?sequence=1&isAllowed=y [Accessed on March 7th 2017].

¹⁴ Sec 3 (2) Judicature Act, CAP 8, laws of Kenya, came into force, 1st Aug 1967.

¹⁵ Art 159 (2) (c) of Constitution of Kenya 2010, laws of Kenya.

¹⁶ Art 159 (3) of Constitution of Kenya 2010, laws of Kenya.

¹⁷ CAP 21; Sec 3A & Sec 59A, laws of Kenya.

¹⁸ Act No 4 of 2014; Sec 68, laws of Kenya.

¹⁹ CAP 243B; Sec 15, laws of Kenya.

²⁰ Kariuki, Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya*, (Glenwood Publishing Nairobi, December 2015) Op cit., p 66-72; Gaur LK, 'Why I Hate "Alternative" in Alternative Dispute Resolution,' Available at http://www.delhidistrictcourts.nic.in/Why_I_Hat1.pdf [Accessed on March 15th 2017].

²¹ Kariuki, Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya*, (Glenwood Publishing Nairobi, December 2015) Op cit., p 71.

²² Ackerman, RM, Introduction: ADR: An Appropriate Alternative, (Willamette L. Rev. 33 1997) 497, p 499, Available at http://heinonline.org/HOL/Page?handle=hein.journals/willr33&div=22&g_sent=1&collection=journals [Accessed on March 13th 2017].

enhancing access to justice; reducing backlogs and expediting dispute settlement.²³ Furthermore, institutions tasked with administration of justice are morally obligated and legally mandated to uplift status of ADR Mechanisms to commensurate with litigation.²⁴ ADR Mechanisms are often more appropriate than litigation²⁵ as they are: flexible; informal; cost-effective; expeditious; efficient; foster parties' relations and produce win-win outcome.²⁶ Moreover, judicial bodies should treat ADR Mechanisms as aiding mechanism and not a threat to judicial process, which will consequently foster their advancement.²⁷

Thus, proper interpretation and application of ADR Mechanisms by institutions legally mandated with administration of justice determines their effectiveness in enhancing access to justice.²⁸ Hence, they should be referred to

²³ Ibid; Amollo O, Enhancing Access to Justice through Alternative Dispute Resolution Methods, A Presentation Made at the Law Society of Kenya Seminar on The Theme 'Alternative Dispute Resolution Spectrum,' Held in Eldoret, on Oct 9th 2015, p 9-12, Available at <https://www.scribd.com/document/306514831/Presentation-on-Access-to-Justice-and-ADR-in-Kenya> [Accessed on March 8th 2017].

²⁴ Amollo O, Enhancing Access to Justice through Alternative Dispute Resolution Methods, A Presentation Made at the Law Society of Kenya Seminar on The Theme 'Alternative Dispute Resolution Spectrum,' Held in Eldoret, on Oct 9th 2015, p 9-12, Available at <https://www.scribd.com/document/306514831/Presentation-on-Access-to-Justice-and-ADR-in-Kenya> [Accessed on March 8th 2017].

²⁵ Kariuki, Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya*, (Glenwood Publishing Nairobi, December 2015) Op cit., p 68-69.

²⁶ Agrawal, K., Justice Dispensation through the Alternative Dispute Resolution System in India, (Russian Law Journal vol 2.2 p 63-74, 2014), Available at <http://cyberleninka.ru/article/n/justice-dispensation-through-the-alternative-dispute-resolution-system-in-india> [Accessed on March 10th 2017]; Muigua, K., *Heralding a New Dawn: Achieving Justice through effective application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya*, (ALTERNATIVE DISPUTE RESOLUTION CI Arb (K)) 40, p 56, Available at <http://ciarbkenya.org/assets/final-vol-1-issue-1.pdf#page=48> [Accessed on March 7th 2017].

²⁷ Amollo O, Enhancing Access to Justice through Alternative Dispute Resolution Methods, A Presentation Made at the Law Society of Kenya Seminar on The Theme 'Alternative Dispute Resolution Spectrum,' Held in Eldoret, on Oct 9th 2015, p 9-12, Op cit., Available at <https://www.scribd.com/document/306514831/Presentation-on-Access-to-Justice-and-ADR-in-Kenya> [Accessed on March 8th 2017].

²⁸ Kariuki, Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya*,

as Appropriate Dispute Resolution Mechanisms and construed as complementary and not alternative mechanism to litigation.²⁹

3.0 Current Legal Framework on ADR Mechanisms in Kenya

Current legal framework on ADR Mechanisms in Kenya denotes juridical and policy framework past 2010 constitutional dispensation.³⁰ These include constitutional provisions, Statutory, and International framework subject to article 2 (5) and (6) of The Constitution of Kenya, 2010.³¹

3.1 Constitutional Framework

The Constitution advocates for employment of both ADR and TDRM Mechanisms in dispute settlement and conflict resolution to foster access to justice to all persons.³² Constitutionally premised ADR Mechanisms include: negotiation; reconciliation; arbitration and mediation.³³

Moreover, the supreme law incorporates TDRM Mechanisms.³⁴ Hence, it underpins culture as foundational pillar of the nation and distinctive identity of the Kenyan people and their nation.³⁵ The binding nature of customs,

(Glenwood Publishing Nairobi, December 2015) Op cit., p 71.

²⁹ Amollo O, Enhancing Access to Justice Through Alternative Dispute Resolution Methods, A Presentation Made at The Law Society of Kenya Seminar on The Theme 'Alternative Dispute Resolution Spectrum,' Held in Eldoret, on Oct 9th 2015, Op cit., p 8-12, Available at <https://www.scribd.com/document/306514831/Presentation-on-Access-to-Justice-and-ADR-in-Kenya> [Accessed on March 8th 2017].

³⁰ See generally Mbondenyi MK, Lumumba PLO & Odero SO, The Constitution of Kenya: Contemporary Readings, Law Africa, 2013.

³¹ Ibid.

³² Art 159 2 (c); Kariuki M., Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework, July 2015, P 10, Available At <Http://Www.Kmco.Co.Ke/Attachments/Article/156/Legitimising%20alternative%20dispute%20resolution%20mechanisms%20in%20kenya.pdf> [Accessed on March 7th 2017].

³³ (Art 159 2 (c), Art 112 (1) (a), Art 113 & Art 189 (4)), Constitution of Kenya, laws of Kenya.

³⁴ Art 159 (2) (c) of Constitution of Kenya 2010, laws of Kenya.

³⁵ Art 11 (1) Constitution of Kenya 2010, laws of Kenya: Culture.

traditions and social norms³⁶ fosters dispute settlement among community members hence propagating peaceful coexistence and community integration.³⁷

Fundamentally, the Constitution sets prerequisites for validity of TDRM Mechanisms.³⁸ These prerequisites are: consistency with constitutional and statutory values and principles, conformity to the spirit of the Bill of Rights and compatibility with precepts of justice and morality.³⁹ Therefore, the Constitution embraces use of ADR Mechanisms in realisation of the fundamental right of access to justice.⁴⁰ Also, it obligates both houses of Parliament⁴¹ to embrace mediation⁴² in case of disagreement on Ordinary Bills.⁴³ Besides, both levels of government⁴⁴ are obligated to resolve their

³⁶ Sobania, NW, *Culture and customs of Kenya*, Greenwood Publishing Group, 2003, p 11-18, Available at

https://books.google.co.ke/books?hl=en&lr=&id=gfUbHXT2dloC&oi=fnd&pg=PR9&dq=Culture+and+Customs+of+Kenya&ots=2egvkc_AQ&sig=Oeya_j42fi9TORHR0sNAPFBndw&redir_esc=y#v=onepage&q=Culture%20and%20Customs%20of%20Kenya&f=false [Accessed on March 13th 2017]; see generally Muigua, K., *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, Retrieved 16th Aug 2014, Available at

<http://www.kmco.co.ke/attachments/article/111/Paper%20on%20Article%20159%20Traditional%20Dispute%20Resolution%20Mechanisms%20FINAL.pdf> [Accessed on March 8th 2017].

³⁷ Muigua, K., *Resolving Conflicts Through Mediation in Kenya*, Glenwood Publishing Nairobi, 2012, Op cit., p 35.

³⁸ Art 159 (3) Constitution of Kenya 2010, laws of Kenya.

³⁹ Ibid; also highlighted in Sec 3 (2) of Judicature Act, CAP 8, laws of Kenya.

⁴⁰ See generally Kariuki, D. M., *Alternative Dispute Resolution and Article 159 of The Constitution*, (2012), p 2-3, available at <http://www.ciarkkenya.org/assets/a-paper-on-adr-and-article-159-of-constitution.pdf> [Accessed on March 9th 2017].

⁴¹ Art 93 (1) Constitution of Kenya 2010, laws of Kenya: (the Senate and the National Assembly).

⁴² Art 113 Constitution of Kenya 2010, laws of Kenya: Mediation Committees.

⁴³ Art 112 Constitution of Kenya 2010, laws of Kenya: Ordinary Bills concerning county governments.

⁴⁴ Art 1(4) Constitution of Kenya 2010, laws of Kenya: (the National level and the County level).

conflicts by use of ADR Mechanisms.⁴⁵ However, even though the Constitution establishes ADR Mechanisms, it wrongly premises ADR Mechanisms, TDRM and community justice systems as synonymous,⁴⁶ situation which has not yet been rectified by statutory or policy framework thus leading to uncertainty and ambiguity.⁴⁷

3.2 Statutory Framework

ADR Mechanisms are also entrenched in the statutory law of Kenya. The Statutes incorporating ADR Mechanisms in Kenya include: The Arbitration Act;⁴⁸ The Arbitration Rules;⁴⁹ The Civil Procedure Act;⁵⁰ The Civil Procedure Rules;⁵¹ The Marriage Act;⁵² Employment and Labour Relations Court Act;⁵³ Commission on Administrative of Justice Act;⁵⁴ Consumer Protection Act;⁵⁵ Intergovernmental Relations Act;⁵⁶ Nairobi Centre for International Arbitration Act;⁵⁷ National Cohesion and Integration Act;⁵⁸ The Labour Relations Act;⁵⁹ Environment and Land Court Act⁶⁰ and Media Council Act.⁶¹

⁴⁵ Art 189 (4) Constitution of Kenya 2010, laws of Kenya: Cooperation between national and county governments.

⁴⁶ Kariuki, Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya*, (Glenwood Publishing Nairobi, December 2015) Op cit., p 66-72; Gaur LK, 'Why I Hate "Alternative" in Alternative Dispute Resolution,' Available at http://www.delhidistrictcourts.nic.in/Why_I_Hat1.pdf [Accessed on March 15th 2017]; Art 159 (2) (c) of Constitution of Kenya 2010, laws of Kenya.

⁴⁷ Ibid.

⁴⁸ CAP 49, laws of Kenya.

⁴⁹ 1997 LN 58 of 1997, laws of Kenya.

⁵⁰ CAP 21: Sec 3A & Sec 59A, laws of Kenya.

⁵¹ 2010 LN 151 of 2010, laws of Kenya.

⁵² Act No 4 of 2014: Sec 64, Sec 66 (4) & (5), & Sec 68 (1)-(3), laws of Kenya.

⁵³ CAP 243B: Sec 15, laws of Kenya.

⁵⁴ CAP 102A: Sec 8 (f) & Sec 29 (2) & (3), laws of Kenya.

⁵⁵ No 46 of 2012: Sec 88 & 90, laws of Kenya.

⁵⁶ CAP 5G: Part IV, laws of Kenya.

⁵⁷ No 26 of 2013, laws of Kenya.

⁵⁸ No 12 of 2008: Sec 25 (2) (g), laws of Kenya.

⁵⁹ No 14 of 2007: Part VIII & IX; Sec 62-Sec 75, laws of Kenya.

⁶⁰ CAP 12A: Sec 20 (1) & Sec 20 (2), laws of Kenya.

⁶¹ No 46 of 2013: Sec 27 (1), Sec 31 (a) & Sec 32 (a), laws of Kenya.

Others includes: The Magistrates' Court Act;⁶² The Small Claims Courts Act;⁶³ Nairobi Centre for International Arbitration (Mediation) Rules;⁶⁴ Nairobi Centre for International Arbitration (Arbitration) Rules;⁶⁵ The High Court (Organisation and Administration) Act;⁶⁶ The Court of Appeal (Organisation and Administration) Act;⁶⁷ Land Act⁶⁸ and The National Land Commission Act⁶⁹ among others.

3.3 International Framework

Kenya is a sovereign state⁷⁰ thus bearing international duties and obligations.⁷¹ She is a member of the United Nations;⁷² African Union;⁷³ East Africa Community;⁷⁴ Common Market for Eastern and Southern Africa (COMESA);⁷⁵ various treaties⁷⁶ and several International Intergovernmental

⁶² No 26 of 2015: Sec 3 & Sec 16, laws of Kenya.

⁶³ No 2 of 2016: Sec 18, laws of Kenya.

⁶⁴ 2015 LN 253 of 2015, laws of Kenya.

⁶⁵ 2015 LN 255 of 2015, laws of Kenya.

⁶⁶ No 27 of 2015: Sec 3 & Sec 26, laws of Kenya.

⁶⁷ No 28 of 2015: Sec 3, laws of Kenya.

⁶⁸ No 6 of 2012: Sec 2 & Sec 4, laws of Kenya.

⁶⁹ No 5 of 2012: Sec 3, laws of Kenya.

⁷⁰ Art 4 (1), Constitution of Kenya 2010, laws of Kenya.

⁷¹ Art 2 (2), Charter of The United Nations (Adopted 26 June 1945, entered into force 24 Oct 1945), 1 UNTS Xvi.

⁷² Kenya became member of the United Nations on 16th Dec 1963 pursuant to Art 110 of Charter of the United Nations.

⁷³ Kenya became member of the Organisation of African Union on 13th Dec 1963 and later member of African Union on 26 May 2001 pursuant to Art 29 of the Constitutive Act of the African Union (Adopted 11 July 2000, entered into force 26 May 2001) OAU Doc. CAB/LEG/23.15 (2001).

Kenya became member of East African Community on 7th July 2000 subject to Art 152 of Treaty Establishing the East African Community (1999) (Adopted 30 November 1999, entered into force on 7 July 2000) INT-1999-IA-79634.

Kenya became member of Preferential Trade Area (PTA) for Eastern and Southern Africa on 30th Sep 1982, PTA was later replaced by COMESA which Kenya attained membership on 8th Dec 1994 pursuant to Art 194 of Treaty establishing Common Market for Eastern and Southern Africa (Adopted 5th Nov 1993, entered into force 8th Dec 1994) 33 ILM 1067 (1994).

⁷⁶ Subject to pertinent provisions of Vienna Convention on the Law of Treaties, (Adopted 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331.

Organisations.⁷⁷ Constitution of Kenya incorporates conventional and customary international law provisions into the legal system of Kenya.⁷⁸

The United Nations General Assembly established United Nations Commission on International Trade Law (UNCITRAL) in 1966.⁷⁹ UNCITRAL adopted the UNCITRAL Model Law on International Commercial Arbitration⁸⁰ on 21st June 1985⁸¹ and revised it in 2006.⁸² International Commercial Arbitration is governed under Arbitration⁸³ and Conciliation Rules.⁸⁴ Moreover, UNCITRAL Model Law sets out features of international arbitration.⁸⁵ It is designed to help States modernize their arbitration laws⁸⁶ and effectively settle and determine international commercial disputes⁸⁷ by setting up proficient local⁸⁸ and regional institutions⁸⁹ for arbitration.

⁷⁷ Subject to provisions of 1947 Convention on the Privileges and Immunities of the Specialized Agencies (Adopted 21 November 1947, entered into force 2 December 1948) 33 UNTS 261.

⁷⁸ Art 2 (5) & (6) Constitution of Kenya 2010, laws of Kenya.

⁷⁹ United Nations Commission on International Trade Law, UN Doc A/RES/63/438 (17th Dec 1966).

⁸⁰ UN Doc A/RES/40/17 annex1.

⁸¹ See generally UNCITRAL Model Law on International Commercial Arbitration UN Doc A/RES/40/17 annex1 (As adopted by the United Nations Commission on International Trade Law on 21st June 1985).

⁸² Paul Ngotho, Nairobi as A Centre of International Arbitration, Atlanta International Arbitration Society, International Arbitration Conference, 3-4 November 2014 Marriot Buckhead Hotel & International Centre Atlanta, Georgia, p 2, Available at <http://arbitrateatlanta.org/wp-content/uploads/2014/11/Nairobi-as-a-Centre-of-International-Arbitration.pdf> [Accessed March 21st 2017].

⁸³ United Nations Commission on International Trade Law, (UNCITRAL Arbitration Rules), UN Doc A/RES/31/98 (15th Dec 1976).

⁸⁴ United Nations Commission on International Trade Law, (UNCITRAL Conciliation Rules), UN Doc A/RES/35/52 (4th Dec 1980).

⁸⁵ UNCITRAL Model Law on International Commercial Arbitration UN Doc A/RES/40/17 annex1 (As adopted by the United Nations Commission on International Trade Law on 21st June 1985), Art 1 (3).

⁸⁶ Muigua, K., Arbitration Institutions in East Africa, p 77, Available at https://profiles.uonbi.ac.ke/kariuki_muigua/files/05_onyema_ttaa_ch.4_kariuki_muigua.pdf#page=19 [Accessed March 21st 2017].

⁸⁷ Muigua, K., Promoting International Commercial Arbitration in Africa, Paper Presented at the East Africa International Arbitration Conference, held on 28-29 July

These Institutions are primarily designed to enhance regional integration⁹⁰ and consequently globalisation⁹¹ through efficient and effective settlement of commercial disputes hence subsequently fostering economic integration and transnational trade.⁹²

2014, at Fairmont the Norfolk, Nairobi, p 3-4, Available at <http://ciarbkenya.org/assets/promoting-international-commercial-arbitration-in-africa-eaia-conference-presentation.pdf> [Accessed March 21st 2017].

⁸⁸ Local institutions are established and regulated by a state, for instance, Arbitration Institutions in Kenya as highlighted in Muigua, K., *Reawakening Arbitral Institutions for Development of Arbitration in Africa*, p 4-8, Available at <http://www.kmco.co.ke/attachments/article/154/Reawakening%20Arbitral%20Institutions%20for%20Development%20of%20Arbitration%20in%20Africa.pdf> [Accessed March 21st 2017].

⁸⁹ Province of Regional Arbitration Institutions run across sub regions like East Africa and Regions like Africa, as generally expounded in Muigua, K., *Reawakening Arbitral Institutions for Development of Arbitration in Africa*, Op cit., Available at <http://www.kmco.co.ke/attachments/article/154/Reawakening%20Arbitral%20Institutions%20for%20Development%20of%20Arbitration%20in%20Africa.pdf> [Accessed March 21st 2017].

⁹⁰ See generally Muigua, K., *Building Legal Bridges: Fostering Eastern Africa Integration through Commercial Arbitration*, Paper presented, at the 3rd Annual East Africa International Arbitration Conference 2015 held on 9th and 10th April, 2015 at Hyatt Regency Hotel, Dar Es Salaam-Tanzania, Available at <http://www.kmco.co.ke/attachments/article/153/Building%20Legal%20Bridges,%20FOSTERING%20EASTERN%20AFRICA%20INTEGRATION%20THROUGH%20COMMERCIAL%20ARBITRATION-April%20%202015.pdf> [Accessed March 21st 2017].

⁹¹ Muigua, K., *Promoting International Commercial Arbitration in Africa*, Paper Presented at the East Africa International Arbitration Conference, held on 28-29 July 2014, at Fairmont the Norfolk, Nairobi, Op cit., p 1, Available at <http://ciarbkenya.org/assets/promoting-international-commercial-arbitration-in-africa-eaia-conference-presentation.pdf> [Accessed March 21st 2017].

⁹² Muigua, K., *Effectiveness of Arbitration Institutions in East Africa*, p 2-4, Available at <http://www.kmco.co.ke/attachments/article/170/Effectiveness%20of%20Arbitration%20Institutions%20in%20East%20Africa%2022%20February%202016.pdf> [Accessed March 21st 2017].

Kenya has adopted UNCITRAL Model Law in its 1995 Arbitration Act,⁹³ which was amended in 2009⁹⁴ and revised in 2010 and 2012.⁹⁵ It has incorporated the amendments in the 2006 edition of UNCITRAL Model Law especially the power of the arbitral tribunal to grant interim measures.⁹⁶ This Act is governed under Arbitration rules.⁹⁷ Its application covers both domestic and international arbitration.⁹⁸ Also, it provides for arbitral proceedings and enforcement of arbitral awards by Kenyan courts.⁹⁹

In addition, Kenya has acceded¹⁰⁰ to the New York Convention¹⁰¹ with reciprocity reservation.¹⁰² New York Convention is the bedrock premising

⁹³ No 4 of 1995, laws of Kenya; also its background expounded in, Muigua, K., *The Arbitration Acts: A Review of Arbitration Act, 1995 Of Kenya Visa-Viz Arbitration Act 1996 Of United Kingdom*, p 2, Available at http://www.kmco.co.ke/attachments/article/75/075_Arbitration_Act_Review.pdf [Accessed March 21st 2017].

⁹⁴The Arbitration (Amendment) Act, No 11 of 2009, laws of Kenya.

⁹⁵ LN 48/2010, laws of Kenya.

⁹⁶ Paul Ngotho, Nairobi as A Centre of International Arbitration, Atlanta International Arbitration Society, International Arbitration Conference, 3-4 November 2014 Marriot Buckhead Hotel & International Centre Atlanta, Georgia, Op cit., p 3, Available at <http://arbitrateatlanta.org/wp-content/uploads/2014/11/Nairobi-as-a-Centre-of-International-Arbitration.pdf> [Accessed March 21st 2017].

⁹⁷ LN 394/1995, laws of Kenya.

⁹⁸ Id 173, Sec 3 (2); Muigua, K., *Effectiveness of Arbitration Institutions in East Africa*, Op cit., p 4-5, Available at <http://www.kmco.co.ke/attachments/article/170/Effectiveness%20of%20Arbitration%20Institutions%20in%20East%20Africa%2022%20February%202016.pdf>[Accessed March 21st 2017].

⁹⁹ See generally Muigua, K., *Making East Africa a Hub for International Commercial Arbitration: A Critical Examination of the State of the Legal and Institutional Framework Governing Arbitration in Kenya*, Available at <http://ciarbkenya.org/assets/making-east-africa-a-hub-for-international-commercial-arbitration-paper.pdf> [Accessed March 21st 2017].

¹⁰⁰ Acceded on 10th Feb 1989, confirm at Muigai, G., (eds) *Arbitration Law &Practice in Kenya*, Law Africa, Nairobi 2011 p 197.

¹⁰¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York Convention, (Adopted 10th June 1958, came into force 7th June 1959) 330 UNTS 38.

¹⁰² Sec 36 (5), Arbitration Act of Kenya, No 4 of 1995, laws of Kenya; Muigai, G., (eds) *Arbitration Law &Practice in Kenya*, Law Africa, Nairobi 2011 Op cit., p 197.

international arbitration¹⁰³ and it obligates each contracting state to recognize arbitration awards as binding and enforce them in relation to procedural rules of the territory premising the award.¹⁰⁴

The High Court of Kenya is empowered to recognise international arbitral awards as binding and enforceable in accordance to provisions of the New York Convention or any other convention binding Kenya that relates to arbitral awards.¹⁰⁵ With Regard to foregoing provisions, Kenyan courts have significantly demonstrated goodwill.¹⁰⁶ For instance, in *Nyutu Agrovet Limited v Airtel Networks Limited*,¹⁰⁷ Justice Musinga espoused that courts should only invoke particular instances stipulated in the Arbitration Act when interfering in any arbitral process.¹⁰⁸

However, although the Convention has significantly enhanced recognition and enforcement of foreign arbitral awards, it does not provide comprehensive procedure on how domestic courts should recognise and enforce foreign awards thus opening room for illegal compromise.¹⁰⁹

¹⁰³ Kariuki, F., *Challenges facing the Recognition and Enforcement of International Arbitral Awards within the East African Community*, p 6, Available at <http://www.kmco.co.ke/attachments/article/163/Paper%20on%20Recognition%20and%20Enforcement%20of%20Foreign%20Arbitral%20%20Awards.pdf> [Accessed March 21st 2017].

¹⁰⁴ Ibid 181, Art III.

¹⁰⁵ Sec 36 (2), Arbitration Act of Kenya, No 4 of 1995, laws of Kenya.

¹⁰⁶ Muigua, K., *Emerging Jurisprudence in the Law of Arbitration in Kenya: Challenges and Promises*, p 12, Available at <http://www.kmco.co.ke/attachments/article/122/Emerging%20Jurisprudence%20in%20the%20Law%20of%20Arbitration%20in%20Kenya.pdf> [Accessed March 21st 2017].

¹⁰⁷ eKLR, Civil Appeal (Application) No 61 of 2012.

¹⁰⁸ Ibid, para 39.

¹⁰⁹ Kariuki, F., *Challenges facing the Recognition and Enforcement of International Arbitral Awards within the East African Community*, p 8, Op cit., Available at <http://www.kmco.co.ke/attachments/article/163/Paper%20on%20Recognition%20and%20Enforcement%20of%20Foreign%20Arbitral%20%20Awards.pdf> [Accessed March 21st 2017].

Moreover, the Parliament of Kenya enacted Nairobi Centre for International Arbitration Act¹¹⁰ in 2013¹¹¹ providing for establishment of regional centre for International Commercial Arbitration¹¹² and Arbitral Court,¹¹³ and also mechanisms for ADR and TDR.¹¹⁴ The headquarters of the Centre is situated in Nairobi.¹¹⁵ Its major objective is to nurture international commercial arbitration in Kenya.¹¹⁶

Its mandate entails: administering domestic and international arbitrations with ADR mechanisms under its auspices and ensuring that arbitration is reserved as voluntary dispute resolution process among others.¹¹⁷ Furthermore, it is obligated to establish rules encompassing conciliation and mediation processes which culminated into formulation and gazetting of Mediation¹¹⁸ and arbitration rules¹¹⁹ in 2015.¹²⁰

However, although these institutions ensure access to justice,¹²¹ they are coupled with numerous challenges. These includes: inadequate legal and

¹¹⁰ Nairobi Centre for International Arbitration Act, No 26 of 2013, laws of Kenya.

¹¹¹ (Date of assent: 14th January, 2013, Date of commencement: 25th January, 2013).

¹¹² Ibid: Sec 4 (1).

¹¹³ Ibid: Sec 21 (1).

¹¹⁴ Ibid: Sec 24.

¹¹⁵ Ibid: Sec 4 (3).

¹¹⁶ Muigua, K., *Nurturing International Commercial Arbitration in Kenya*, p 8, Available at

<http://www.kmco.co.ke/attachments/article/128/Nurturing%20International%20Commercial%20Arbitration%20in%20Kenya.pdf> [Accessed March 21st 2017].

¹¹⁷ Ibid 190: Sec 5; Muigua, K., *Arbitration Institutions in East Africa*, Op cit., p 77, Available at

https://profiles.uonbi.ac.ke/kariuki_muigua/files/05_onyema_ttaa_ch.4_kariuki_muigua.pdf#page=19 [Accessed March 21st 2017].

¹¹⁸ Nairobi Centre for International Arbitration (Mediation) Rules, 2015 LN 253 of 2015, laws of Kenya.

¹¹⁹ Nairobi Centre for International Arbitration (Arbitration) Rules, 2015 LN 255 of 2015, laws of Kenya.

¹²⁰ Ibid 198 & 199.

¹²¹ Gachie, A., Kashindi, E., Gum M., & Nyamwange, W., *Pertinent Issues in International Commercial Arbitration*, p 103, Available at

policy framework, and infrastructures for proper and effective organization and conduct of international commercial arbitration;¹²² lack of comprehensive legal framework defining the relationship and jurisdiction of the national courts, and the Centre and Arbitral Court;¹²³ lack of government support¹²⁴ and government intrusion.¹²⁵

4.0 Relationship Between ADR Mechanisms and Litigation, and Access to Justice in Kenya

In Kenya, litigation is a principal means of fostering access to justice.¹²⁶ However, it is bedevilled with numerous challenges and predicaments hampering access to justice.¹²⁷ However, these defects can be cured by ADR thus actualising access to justice to all persons.¹²⁸ ADR Mechanisms facilitate

[http://www.ciarbkenya.org/assets/volume-4-issue-2--2016-ciarb-k-journal\(2\).pdf#page=104](http://www.ciarbkenya.org/assets/volume-4-issue-2--2016-ciarb-k-journal(2).pdf#page=104) [Accessed March 21st 2017].

¹²²Id 196, p 9.

¹²³ Id 197, p 81; Muigua, K., & Maina N., *Effective Management of Commercial Disputes: Opportunities for the Nairobi Centre for International Arbitration*, p 10-12 Available at

<http://www.kmco.co.ke/attachments/article/172/Effective%20Management%20of%20Commercial%20Disputes,%20Opportunities%20for%20the%20Nairobi%20Centre%20for%20International%20Arbitration-Final%20Paper.pdf> [Accessed March 21st 2017].

¹²⁴ *The Role of Arbitration Institutions in the Development of Arbitration in Africa*, Arbitration Institutions in Africa Conference 2015, Thursday 23 July 2015, African Union Commission New Building Addis Ababa Ethiopia, p 158-60, Available at <http://eprints.soas.ac.uk/20421/1/Addis%20Arbitration%20Conference%202015.pdf> [Accessed March 21st 2017].

¹²⁵ Namachanja, C., *The Challenges facing Arbitral Institutions in Africa*, learning from Africa, CIArb Centenary Conference, held on 15-17 July, 2015, p 6, Available at <https://www.ciarb.org/docs/default-source/centenarydocs/speaker-assets/collins-namachanja.pdf?sfvrsn=0> [Accessed March 21st 2017].

¹²⁶ Art 22 & 23, Constitution of Kenya, 2010, laws of Kenya.

¹²⁷ *Judicial Transformation Framework, 2012-2016*, p 14-16, Available at

<http://www.judiciary.go.ke/portal/assets/downloads/reports/Judiciary's%20Transformation%20Framework-fv.pdf> [Accessed on March 10th 2017]; Annual Report on, 'The State of the Judiciary and The Administrative of Justice,' p 25-55, Available at http://www.kenyalaw.org/kl/fileadmin/SoJA_2012-2013.pdf [Accessed on March 10th 2017].

¹²⁸ Muigua, K., *ADR: The Road to Justice in Kenya*, (2014), p 22-42, Op cit., Available at

accessibility to justice since they are flexible, informal, cost-effective, expeditious, efficient, foster parties' relations and produce win-win outcome.¹²⁹

4.1 Access to Justice in Kenya

Access to justice refers to judicial and administrative remedies¹³⁰ available to aggrieved persons to seek redress via efficient resolution of conflicts and effective settlement of disputes¹³¹ under fair and equitable legal framework that protects human rights and ensures delivery of justice.¹³² It is a basic human virtue¹³³ and fundamental principle in the legal system whose inviolability cannot be compromised.¹³⁴ It is conceptualised as two-dimensional: procedural access, which entails fair hearing before an impartial tribunal; and substantive justice which encompasses fair and just remedy for infringement and violation of one's rights.¹³⁵ The state is constitutionally and

http://erepository.uonbi.ac.ke/bitstream/handle/11295/80110/Muigua_ADR%3a%20The%20road%20to%20justice%20in%20Kenya.pdf?sequence=1&isAllowed=y [Accessed on March 7th 2017].

¹²⁹ Agrawal, K., Justice Dispensation through the Alternative Dispute Resolution System in India, (Russian Law Journal vol 2.2 p 63-74, 2014), Op cit., Available at <http://cyberleninka.ru/article/n/justice-dispensation-through-the-alternative-dispute-resolution-system-in-india> [Accessed on March 10th 2017].

¹³⁰ Kariuki, Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya*, (Glenwood Publishing Nairobi, December 2015) Op cit., p 121.

¹³¹ Ojo, CB, *Achieving Access to Justice through Alternative Dispute Resolution*, p 2, Available at

<http://www.ciarbkenya.org/assets/final-vol-1-issue-1.pdf#page=9> [Accessed March 23rd 2017].

¹³² Muigua, K., *ADR: The Road to Justice in Kenya*, (2014), p 5, Available at http://erepository.uonbi.ac.ke/bitstream/handle/11295/80110/Muigua_ADR%3a%20The%20road%20to%20justice%20in%20Kenya.pdf?sequence=1&isAllowed=y [Accessed on March 7th 2017].

¹³³ Bhandari, DR, *Plato's concept of justice: An analysis*, Ancient Philosophy 1998, Available at <https://www.bu.edu/wcp/Papers/Anci/AnciBhan.htm> [Accessed on March 14th 2017].

¹³⁴ Rawls, J., *A Theory of Justice*, OUP Revised edn, 1999, p 1-46.

¹³⁵ Kariuki, Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya*, (Glenwood Publishing Nairobi, December 2015) Op cit., p 122; Majanja J, *Kenya Bus Service Ltd & another v Minister for Transport & 2 others* [2012] eKLR, para 17-49.

internationally obliged to entrenchment institutions entrusted with enhancement of justice.¹³⁶

Moreover, access to justice is contextualised to encompass three fundamental constituents, viz.: equality of access to legal services which entails access to quality legal services or effective conflict resolution and dispute settlement mechanism to all persons; national equity which encompasses equal access to legal services; and equality before the law which entails equal opportunities to all persons in all fields.¹³⁷

Thus, access to justice is a fundamental and inviolable right entrenched under international plane¹³⁸ and municipal level.¹³⁹ Its enhancement to all persons strengthens Rule of Law¹⁴⁰ and is central to legitimacy of democratic processes.¹⁴¹ Proper and efficient access to justice entails: legal framework on rights and fundamental freedoms; access to pertinent information; affordability of legal services; comprehensive and proper gist of law; equality and non-discrimination in observance and protection of rights; access to justice systems especially formal adjudicatory process; availability of physical legal infrastructure; expeditious disposal of cases; conducive environment

¹³⁶ Freeman MDA, 'Lord's Introduction to Jurisprudence,' Sweet & Maxwell 8th edn, 2008, p 632-659.

¹³⁷ Muigua, K., ADR: The Road to Justice in Kenya, (2014), Op cit., p 5, Available at http://erepository.uonbi.ac.ke/bitstream/handle/11295/80110/Muigua_ADR%3a%20The%20road%20to%20justice%20in%20Kenya.pdf?sequence=1&isAllowed=y [Accessed on March 7th 2017].

¹³⁸ Art 10, Op cit., Universal Declaration of Human Rights, (Adopted 10 Dec 1948, entered into force 16 Dec 1948), G/A/Res 217A (III), UN Doc A/810; Art 14, International Covenant on Civil and Political Rights (Adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

¹³⁹ Art 48, Constitution of Kenya, 2010, laws of Kenya.

¹⁴⁰ Kariuki, F., & Muigua, K., ADR, Access to Justice and Development in Kenya, 'In Strathmore Annual Law Conference 2014 held on 3rd & 4th July 2014 at Strathmore University Law School,' (June 2015) p 12-17, Op cit., Available at <http://www.strathmore.edu/sdrc/uploads/documents/books-and-articles/ADR%20access%20to%20justice%20and%20development%20in%20Kenya.pdf> [Accessed on March 7th 2017].

¹⁴¹ Rhode, DL, Access to justice, (OUP, 2004) Op cit., p 3-7.

within judicial system and enforcement of judicial decisions without undue delay.¹⁴²

In Kenya, the state is constitutionally mandated to guarantee all persons access to justice.¹⁴³ Litigation is a principal means of fostering access to justice.¹⁴⁴ However, it is bedevilled with numerous predicaments hampering access to justice,¹⁴⁵ inter alia: juridical; institutional; structural; and procedural obstacles¹⁴⁶ which encompass: delays; inaccessible distant courts; complex procedures; illiteracy; bureaucracy; high filing costs and application of legalese.¹⁴⁷

Thus, incorporation of ADR Mechanisms into Kenyan judicial system is geared towards accomplishment of the constitutional objective of complete access to

¹⁴² Dry Associates Ltd v Capital Markets Authority & Anor, Petition 328 of 2011, Nairobi [2012] eKLR Op cit.

¹⁴³ Art 48, Constitution of Kenya, 2010, laws of Kenya; also, Art 2 (5) & (6) on international law obligations.

¹⁴⁴ Art 22 & 23, Constitution of Kenya, 2010, laws of Kenya.

¹⁴⁵ Kariuki, Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya*, (Glenwood Publishing Nairobi, December 2015) Op cit., 126-28.

¹⁴⁶ Ibid 126; Prof Wambua PM, *The Challenges of Implementing ADR as An Alternative Mode of Access to Justice in Kenya*, (Alternative Dispute Resolution CI Arb (K)) 15 Op cit., (p 27-31), Available at <http://www.ciarbkenya.org/assets/final-vol-1-issue-1.pdf#page=23> [Accessed on March 8th 2017].

¹⁴⁷ See generally Muigua, K., *Access to Justice: Promoting Court and Alternative Dispute Resolution Strategies*, Available at <http://www.kmco.co.ke/attachments/article/108/Access%20to%20Justice.pdf> [Accessed March 21st 2017]; also, *Judicial Transformation Framework, 2012-2016*, Op cit., p 14-16, Available at <http://www.judiciary.go.ke/portal/assets/downloads/reports/Judiciary's%20Transformation%20Framework-fv.pdf> [Accessed on March 10th 2017]; Annual Report on, 'The State of The Judiciary and The Administrative of Justice,' Op cit., p 25-55, Available at http://www.kenyalaw.org/kl/fileadmin/SoJA_2012-2013.pdf [Accessed on March 10th 2017].

justice to all persons¹⁴⁸ which will consequently uplift the rule of law and development.¹⁴⁹

4.2 ADR Mechanisms in Kenya

ADR refer to all dispute settlement and conflict resolution mechanisms other than litigation, which entail: conciliation; negotiation; expert determination; mediation; enquiry and arbitration.¹⁵⁰ Others include: Mediation-Arbitration; Arbitration-Mediation; adjudication and Traditional Justice Systems (TJS).¹⁵¹ Dispute settlement entails conflicting but negotiable interests requiring judicial treatment or arbitration while conflict resolution entails negotiable issues of basic human needs deprivation requiring analytical problem solving.¹⁵² On the other hand, conflict resolution entails two conceptual frameworks; political realism and idealism, which advocates for conflict prevention and cooperative problem-solving via ADR Mechanisms hence fostering access to justice.¹⁵³

¹⁴⁸ Kariuki, Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya*, (Glenwood Publishing Nairobi, December 2015) Op cit.,121-44; Ojo, CB, *Achieving Access to Justice through Alternative Dispute Resolution*, Op cit., p 3, Available at <http://www.ciarbkenya.org/assets/final-vol-1-issue-1.pdf#page=9> [Accessed March 23rd 2017].

¹⁴⁹ Kariuki, F., & Muigua, K., *ADR, Access to Justice and Development in Kenya*, In 'Strathmore Annual Law Conference 2014 held on 3rd & 4th July 2014 at Strathmore University Law School,' (June 2015), Op cit., Available at <http://www.strathmore.edu/sdrc/uploads/documents/books-and-articles/ADR%20access%20to%20justice%20and%20development%20in%20Kenya.pdf> [Accessed on March 7th 2017].

¹⁵⁰ Kariuki, DM, *Alternative Dispute Resolution and Article 159 of The Constitution*, (2012), p 2-3, Op cit., available at <http://www.ciarbkenya.org/assets/a-paper-on-adr-and-article-159-of-constitution.pdf> [Accessed on March 9th 2017].

¹⁵¹ Kariuki, Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya*, (Glenwood Publishing Nairobi, December 2015) Op cit., p 128-144.

¹⁵² Burton, JW, *Conflict Resolution as a Political Philosophy' in Conflict Resolution Theory and Practice: Integration and Application*, Ed. Dennis JD Sandole and Hugo van der Merwe, Manchester and New York, Manchester University Press, 1993, p 55-64, Summarised by Mariya Yevyukova, Available at <http://www.colorado.edu/conflict/transform/burton.htm> [Accessed on March 10th 2017].

¹⁵³ Ibid.

4.2.1 Conciliation

Conciliation involves a third party¹⁵⁴ who restores tainted rapport between disputing parties by bringing them together; clarifying perceptions; and highlighting misconceptions.¹⁵⁵ It differs with mediation as the third party assumes more interventionist role in bonding the two disputing parties.¹⁵⁶

It significantly fosters dispute settlement and enhances restorative justice¹⁵⁷ via condensing tension, inventing avenues for communication and fostering negotiations.¹⁵⁸ It is entrenched under TDRM;¹⁵⁹ current statutory¹⁶⁰ and constitutional¹⁶¹ framework in Kenya; and international framework.¹⁶²

¹⁵⁴ Called conciliator.

¹⁵⁵ Muigua, K., *Effective Justice for Kenyans: Is ADR Really Alternative?* 2014., Op cit., p 13, available at <http://www.kmco.co.ke/attachments/article/125/Alternative%20Dispute%20Resolution%20or%20Appropriate%20Dispute%20Resolution.pdf> [Accessed on March 8th 2017].

¹⁵⁶ Muigua, K., *ADR: The Road to Justice in Kenya*, (2014), Op cit., p 32, Available at http://erepository.uonbi.ac.ke/bitstream/handle/11295/80110/Muigua_ADR%3a%20The%20road%20to%20justice%20in%20%20Kenya.pdf?sequence=1&isAllowed=y [Accessed on March 7th 2017].

¹⁵⁷ Restorative justice connotes corrective justice [Kariuki, Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya*, (Glenwood Publishing Nairobi, December 2015) Op cit., p 121], it is fostered by conciliation as expounded in Muigua, K., *Effective Justice for Kenyans: Is ADR Really Alternative?* 2014., Op cit., p 13, available at <http://www.kmco.co.ke/attachments/article/125/Alternative%20Dispute%20Resolution%20or%20Appropriate%20Dispute%20Resolution.pdf> [Accessed on March 8th 2017].

¹⁵⁸ Kariuki, Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya*, (Glenwood Publishing Nairobi, December 2015) Op cit., p 33.

¹⁵⁹ Muigua, K., *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, Retrieved 16th Aug 2014, Op cit., p 1, Available at <http://www.kmco.co.ke/attachments/article/111/Paper%20on%20Article%20159%20Traditional%20Dispute%20Resolution%20Mechanisms%20FINAL.pdf> [Accessed on March 8th 2017].

¹⁶⁰ For instance, Sec 20 (1), Environment and Land Court Act, CAP 12A, laws of Kenya.

¹⁶¹ (Art 159 2 (c), Art 112 (1) (a), Art 113 & Art 189 (4)), Constitution of Kenya, laws of Kenya.

4.2.2 Negotiation

Under negotiation, parties explore themselves appositely and available options for dispute settlement without aid of a third party.¹⁶³ It is premised under TDRM;¹⁶⁴ contemporary constitutional¹⁶⁵ and statutory¹⁶⁶ framework in Kenya; and international framework.¹⁶⁷ It primarily aims at cordially harmonizing interests of concerned parties.¹⁶⁸

Also, negotiation enables parties to fully control both the process and outcome of settlement of their disputes via voluntary mechanisms.¹⁶⁹ Moreover, it is efficient and fosters parties' relationship.¹⁷⁰ For instance, in *Republic v Mohamed*

¹⁶² Art 33 (1), Charter of The United Nations (Adopted 26 June 1945, entered into force 24 October 1945), 1 UNTS Xvi ; Kariuki, F., & Muigua, K., ADR, Access to Justice and Development in Kenya, In 'Strathmore Annual Law Conference 2014 held on 3rd & 4th July 2014 at Strathmore University Law School,' (June 2015), p 5, Op cit., Available at

<http://www.strathmore.edu/sdrc/uploads/documents/books-andarticles/ADR%20access%20to%20justice%20and%20development%20in%20Kenya.pdf> [Accessed on March 7th 2017].

¹⁶³ Introduction to Ury W., Fisher R., and Patton B., *Getting To Yes: Negotiating an Agreement Without Giving In* (2nd Ed London: Random House Business Books, 1999); Art 159 2 (c); Kariuki M., *Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework*, July 2015, Op cit., p 7, Available at <http://www.kmco.co.ke/attachments/article/156/Legitimising%20alternative%20dispute%20resolution%20mechanisms%20in%20kenya.pdf> [Accessed on March 7th 2017].

¹⁶⁴ Kariuki, Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya*, (Glenwood Publishing Nairobi, December 2015), Op cit., p 21.

¹⁶⁵ (Art 159 2 (c), Art 112 (1) (a), Art 113 & Art 189 (4)), Constitution of Kenya, laws of Kenya.

¹⁶⁶ For instance, Sec 15 (1), Employment and Labour Relations Court Act, CAP 243B, laws of Kenya.

¹⁶⁷ Art 33 (1), Charter of The United Nations (Adopted 26 June 1945, entered into force 24 October 1945), 1 UNTS Xvi, Op cit.

¹⁶⁸ Ibid 244, p 23; Kariuki M., *Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework*, July 2015, Op cit., p 7, Available at <http://www.kmco.co.ke/attachments/article/156/Legitimising%20alternative%20dispute%20resolution%20mechanisms%20in%20kenya.pdf> [Accessed on March 7th 2017].

¹⁶⁹ Muigua, K., *Resolving Conflicts Through Mediation in Kenya*, Glenwood Publishing Nairobi, 2012, Op cit., p 11.

¹⁷⁰ Kariuki, Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya*,

Abdow Mohamed,¹⁷¹ the two disputing families were satisfied and felt adequately compensated via negotiation and reconciliation.¹⁷² Besides, failure of negotiation opens room for arbitration.¹⁷³

4.2.3 Expert Determination

Under expert determination, disputing parties voluntarily submit their differences to an expert in the particular field for determination.¹⁷⁴ It is entrenched as an ADR Mechanism in Kenya.¹⁷⁵ It is flexible; confidential; cost efficient and faster compared to litigation.¹⁷⁶ It is commonly embraced in resolution of disputes pertaining building and construction industry,¹⁷⁷ for instance, qualitative and quantitative issues of particular technical nature.¹⁷⁸

(Glenwood Publishing Nairobi, December 2015) Op cit., p 23; Nhema, Zeleza A., Tiyambe P., *Resolution of African Conflicts*, (Ohio University Press, 2008) p 122.

¹⁷¹ [2013] (eKLR Criminal Case 86 of 2011, May 2, 2013, R. Lagat Korir, Judge.

¹⁷² Id 251; also, Kariuki, F., *Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohamed Abdow Mohamed* [2013] eKLR, p 13, Available at

<http://www.kmco.co.ke/attachments/article/166/download1352184239.pdf> [Accessed March 21st 2017].

¹⁷³ Id 244, p 24; Shako, FK, *Mediation in the Courts' Embrace: Introduction of Court Annexed Mediation into the Justice System in Kenya*, p 131, Available at <http://www.riarauniversity.ac.ke/wp-content/uploads/2016/07/volume-4-issue-2-2016-ciarb-k-journal-2.131-155.7-23.pdf> [Accessed March 21st 2017].

¹⁷⁴ Kariuki, Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya*, (Glenwood Publishing Nairobi, December 2015) Op cit., p 50.

¹⁷⁵ Muigua, K., *ADR: The Road to Justice in Kenya*, (2014), Op cit., p 24, Available at http://erepository.uonbi.ac.ke/bitstream/handle/11295/80110/Muigua_ADR%3a%20The%20road%20to%20justice%20in%20Kenya.pdf?sequence=1&isAllowed=y [Accessed on March 7th 2017].

¹⁷⁶ Kariuki, Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya*, (Glenwood Publishing Nairobi, December 2015) Op cit., p 50.

¹⁷⁷ Ibid; See generally Mix, DM, *ADR in the construction industry: continuing the development of a more efficient dispute resolution mechanism*, (Ohio St. J. on Disp. Resol. 12, 1996), 463, Available at http://heinonline.org/HOL/Page?handle=hein.journals/ohjdpr12&div=25&g_sent=1&collection=journals [Accessed March 24th 2017].

¹⁷⁸ Kariuki, Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya*, (Glenwood Publishing Nairobi, December 2015) Op cit., p 51.

4.2.4 Mediation

Mediation is defined as informal and non-adversarial process where a neutral third-party person¹⁷⁹ encourages and facilitates resolution of a dispute between conflicting parties,¹⁸⁰ but does not have decision making authority.¹⁸¹ It is entrenched as an ADR Mechanism in the legal system of Kenya.¹⁸² It is cost-effective and easily accessible to conflicting parties as compared to litigation thus fostering access to justice.¹⁸³

4.2.5 Arbitration

Arbitration is a dispute settlement mechanism¹⁸⁴ subject to statutory control whereby formal disputes are determined by a third-party neutral¹⁸⁵ appointed by the parties or appointing authority to determine the dispute and give a final and binding award.¹⁸⁶In Kenya, it is entrenched under the legal framework

¹⁷⁹ Called a mediator.

¹⁸⁰ Sec 2, The Civil Procedure Act, CAP 21, laws of Kenya.

¹⁸¹ Muigua, K., Court Sanctioned Mediation in Kenya-An Appraisal, p 2, Available at <http://www.kmco.co.ke/attachments/article/152/Court%20Sanctioned%20Mediation%20in%20Kenya-An%20Appraisal-By%20Kariuki%20Muigua.pdf> [Accessed March 21st 2017].

¹⁸² Muigua, K., 'Resolving Conflicts Through Mediation in Kenya,' Glenwood Publishing Nairobi, 2012, Op cit., Chapter 10, p 119-56.

¹⁸³ Muigua, K., *Heralding a New Dawn: Achieving Justice through effective application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya*, (ALTERNATIVE DISPUTE RESOLUTION CI Arb (K)) 40, Op cit., p 55, Available at <http://ciarbkenya.org/assets/final-vol-1-issue-1.pdf#page=48> [Accessed on March 7th 2017]; Kajimanga, C, *Enhancing Access to Justice Through Alternative Dispute Resolution Mechanisms - The Zambian Experience*, Presented at The Annual Regional Conference Held at Southern Sun, Mayfair Nairobi, Kenya On 25 - 26 July, 2013, p 9, available at <https://www.ciarb.org/docs/default-source/default-document-library/abstract---enhancing-access-to-justice-through-alternative-dispute-resolution-mechanisms-the-zambian-experience.pdf?sfvrsn=2> [Accessed on March 8th 2017].

¹⁸⁴ Muigua, K., *Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending and After Arbitration in Kenya*, p 44, Available at http://www.kmco.co.ke/attachments/article/80/080_role_of_court_in_arbitration_2010.pdf [Accessed March 21st 2017].

¹⁸⁵ Known as arbitrator.

¹⁸⁶ Muigua K., *Settling Disputes Through Arbitration in Kenya*, Glenwood Publishing Nairobi, 2012, p 1.

expounded hereinbefore.¹⁸⁷ It is confidential; voluntary; and its result is binding thus enhancing access to justice.¹⁸⁸

4.2.6 Mediation-Arbitration

Med-Arb refers to combination of mediation and arbitration where parties voluntarily agree to mediate failure of which arbitration ensues for settlement of dispute.¹⁸⁹ This combination allows disputing parties to profit from merits of both procedures.¹⁹⁰ Med-Arb is successfully employed where parties need opportunity to first discuss their issues before opting for a final and binding decision.¹⁹¹

4.2.7 Arbitration-Mediation

Arb-Med refers to where parties begin settlement of their disputes with arbitration and subsequently opt for resolution via mediation.¹⁹² It is best conducted when different persons mediate and arbitrate since the person arbitrating may be tempted to keep previous determination thus innovating possibility of biasness during the mediation process.¹⁹³

¹⁸⁷ Refer to the section of this paper on international framework).

¹⁸⁸ Muigua, K., Overview of Arbitration and Mediation in Kenya, A Paper Presented at a Stakeholder's Forum on Establishment of Alternative Dispute Resolution (ADR) Mechanisms for Labour Relations in Kenya, held at the Kenyatta International Conference Centre, Nairobi, on 4th - 6th May, 2011, p 3, Available at <https://www.ciarbkenya.org/assets/overview-of-arbitration-and-mediation-in-kenya.pdf> [Accessed March 21st 2017].

¹⁸⁹ Kariuki, Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya*, (Glenwood Publishing Nairobi, December 2015) Op cit., p 44.

¹⁹⁰ Ibid.

¹⁹¹ Muigua, K., *Heralding a New Dawn: Achieving Justice through effective application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya*, (Alternative Dispute Resolution Ciarb (K)) 40, Op cit., p 59, Available at <http://ciarbkenya.org/assets/final-vol-1-issue-1.pdf#page=48> [Accessed on March 7th 2017].

¹⁹² Kariuki, Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya*, (Glenwood Publishing Nairobi, December 2015) Op cit., p 48.

¹⁹³ Muigua, K., *Heralding a New Dawn: Achieving Justice through effective application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya*, (Alternative Dispute Resolution CIARB (K)) 40, Op cit., p 59, Available at

4.2.8 Adjudication

Adjudication is defined as dispute settlement mechanism where an impartial and neutral third-party person¹⁹⁴ makes a fair; inexpensive; and rapid determination on a particular dispute emanating under a construction contract.¹⁹⁵ It is an informal process operating under fixed time constraints,¹⁹⁶ inexpensive mechanism;¹⁹⁷ and flexible process that empowers weaker sub-contractors to cope with more powerful contractors.¹⁹⁸ The adjudicator's decision is binding unless the matter is submitted to arbitration or litigation.¹⁹⁹

4.2.9 Traditional Dispute Resolution Mechanisms

TDRM refer to all intergenerational conflict management mechanisms embraced by African communities.²⁰⁰ It includes: mediation; conciliation; negotiation; council of elders and consensus approaches.²⁰¹ They are firmly

<http://ciarbkenya.org/assets/final-vol-1-issue-1.pdf#page=48> [Accessed on March 7th 2017].

¹⁹⁴ Known as (adjudicator).

¹⁹⁵ Chartered Institute of Arbitrators, The CI Arb (K) Adjudication Rules, Rule 2.1.

¹⁹⁶ Ibid Rule 23.1 (the adjudicator is supposed to reach a decision within 28 days or the period stated in the contract).

¹⁹⁷ Muigua, K., *Heralding a New Dawn: Achieving Justice through effective application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya*, (Alternative Dispute Resolution CI Arb (K)) 40, Op cit., p 59, Available at <http://ciarbkenya.org/assets/final-vol-1-issue-1.pdf#page=48> [Accessed on March 7th 2017].

¹⁹⁸ Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishing Nairobi, December 2015, Op cit., p 51.

¹⁹⁹ Chartered Institute of Arbitrators, The CI Arb (K) Adjudication Rules, Rule 29.

²⁰⁰ Kariuki, F., & Muigua, K., *ADR, Access to Justice and Development in Kenya*, In 'Strathmore Annual Law Conference 2014 held on 3rd & 4th July 2014 at Strathmore University Law School,' (June 2015), Open cit., p 4, Available at <http://www.strathmore.edu/sdrc/uploads/documents/books-and-articles/ADR%20access%20to%20justice%20and%20development%20in%20Kenya.pdf> [Accessed on March 7th 2017].

²⁰¹ Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishing Nairobi, December 2015, Op cit., p 58-61; see generally Muigua, K., *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, Retrieved 16th Aug 2014, Available at

embedded on customary laws of various ethnic groups.²⁰² TDRMs are premised in the constitution²⁰³ and they must conform to tenets of the constitution, morality and justice for validity.²⁰⁴ Also, they enhance justice by focusing on the interests and needs of the disputing parties²⁰⁵ and have significantly aided in resolving marriage disputes.²⁰⁶

4.2.10 Community Justice Systems

Community justice systems refer dispute resolution mechanisms based on community of similar or shared interests.²⁰⁷ It is broader than TDRM and customary justice systems²⁰⁸ as it encompasses cosmopolitan societal set up

<http://www.kmco.co.ke/attachments/article/111/Paper%20on%20Article%20159%20Traditional%20Dispute%20Resolution%20Mechanisms%20FINAL.pdf> [Accessed on March 8th 2017].

²⁰² Kariuki, F., Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems, p 10, Available at

<http://www.kmco.co.ke/attachments/article/137/TDRM%20and%20Jurisprudence.pdf> [Accessed on March 8th 2017].

²⁰³ Art 159 (2) (c) of Constitution of Kenya 2010, laws of Kenya.

²⁰⁴ Art 159 (3) of Constitution of Kenya 2010, laws of Kenya.

²⁰⁵ Muigua, K., Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010, Retrieved 16th Aug 2014, Op cit., p 3, Available at

<http://www.kmco.co.ke/attachments/article/111/Paper%20on%20Article%20159%20Traditional%20Dispute%20Resolution%20Mechanisms%20FINAL.pdf> [Accessed on March 8th 2017].

²⁰⁶ Muigua, K., Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010, Retrieved 16th Aug 2014, Op cit., p 4, Available at

<http://www.kmco.co.ke/attachments/article/111/Paper%20on%20Article%20159%20Traditional%20Dispute%20Resolution%20Mechanisms%20FINAL.pdf> [Accessed on March 8th 2017].

²⁰⁷ Kariuki, F., Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology, Op cit., p 9, Available at

<http://www.strathmore.edu/sdrc/uploads/documents/books-and-articles/Paper%20on%20Traditional%20justice%20terminology.pdf> [Accessed on March 21st 2017].

²⁰⁸ Kariuki, F., Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology, Op cit., p 14, Available at

<http://www.strathmore.edu/sdrc/uploads/documents/books-and-articles/Paper%20on%20Traditional%20justice%20terminology.pdf> [Accessed on March 21st 2017].

particularly in urban centres.²⁰⁹ Thus, it is argued to be hierarchically positioned higher than TDRM and customary justice systems.²¹⁰

It fosters access to justice as various communities depending on their interests, come up with different mechanisms for resolution of their challenges.²¹¹ These includes: dispute resolution mechanisms and framework for community policing.²¹²

4.2.11 Customary Justice Systems

Customary justice systems entail all dispute resolution mechanisms that develop from customs and other customary practices of particular group of people.²¹³ They cover broader province than TDRM are they accommodate both traditional African customs and modern customs;²¹⁴ and TDRM precepts are narrow hence cannot suffice applicability of some customary dispute resolution mechanisms.²¹⁵ Thus, customary dispute resolution mechanisms are propounded to rank higher than TDRM hierarchically²¹⁶ but subordinate to community justice systems.²¹⁷

Customary dispute resolution mechanisms are entrenched in the current legal framework in Kenya,²¹⁸ for instance, the Marriage Act provides that parties to

²⁰⁹ Ibid, p 9.

²¹⁰ Ibid, p 15.

²¹¹ Ibid.

²¹² Ibid.

²¹³Kariuki, F., *Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology*, Op cit., p 10, Available at <http://www.strathmore.edu/sdrc/uploads/documents/books-and-articles/Paper%20on%20Traditional%20justice%20terminology.pdf> [Accessed on March 21st 2017].

²¹⁴ Ibid, p 10 & 14.

²¹⁵ Ibid.

²¹⁶ Ibid, p 15.

²¹⁷ Ibid.

²¹⁸ Kariuki, F., *Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohamed Abdow Mohamed* [2013] eKLR, Op cit., p 7, Available at

a customary marriage may undergo conciliation processes or customary dispute resolution mechanisms before the court may determine petition for dissolution of marriage.²¹⁹ These systems foster access to justice due to their flexibility²²⁰ and they must conform to the constitutional principles.²²¹ Thus, the court plays a supervisory role in them.²²²

4.3 Relationship between ADR Mechanisms and Litigation

Under the Constitution of Kenya 2010, ADR Mechanisms are established to complement litigation in fostering access to justice.²²³ The overarching goal of ADR is to enhance effective and efficient access to justice to all.²²⁴ Also, ADR is concerned with designing institutionalised alternatives to litigation in order to reduce vexation, expense and delay in dispensation of justice.²²⁵ Both litigation and ADR have their own benefits and drawbacks and it is upon the disputants to determine the best method to be used in resolving their dispute.²²⁶

However, there has been a tendency of viewing ADR Mechanisms and litigation as mutually exclusive.²²⁷ This notion is premised on the presumption that a dispute can either be resolved formally and openly through litigation, or

<http://www.kmco.co.ke/attachments/article/166/download1352184239.pdf>
[Accessed March 21st 2017].

²¹⁹ Sec 68 (1): The Marriage Act, Act No 4 of 2014, laws of Kenya.

²²⁰ Kariuki, F., *Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohamed Abdow Mohamed* [2013] eKLR, Op cit., p 4, Available at

<http://www.kmco.co.ke/attachments/article/166/download1352184239.pdf>
[Accessed March 21st 2017].

²²¹ *Ibid*, p 17.

²²² *Ibid*.

²²³ Art 159 (2) (c) Constitution of Kenya 2010, laws of Kenya.

²²⁴ Tan, H. S. A. "Alternative dispute resolution in civil justice." W113-Special Track 18th CIB World Building Congress May 2010 Salford, United Kingdom. 2010.

²²⁵ Twining, William. "Alternative to What-Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics." *Mod. L. Rev.* 56 (1993): 380. p. 391

²²⁶ Sander, Frank EA. "Alternative methods of dispute resolution: an overview." *U. Fla. L. Rev.* 37 (1985): 1.

²²⁷ Sternlight, Jean R. "Is Alternative Dispute Resolution Consistent with the Rule of Law-Lessons from Abroad." *DePaul L. Rev.* 56 (2006): 569.

informally and privately through ADR Mechanisms.²²⁸ This wrongful perception of ADR Mechanisms and litigation as mutually exclusive as resulted into tension between the two. First, ADR Mechanisms in Kenya have been narrowly construed and denoted as “Alternative” to litigation.²²⁹ Second, ADR Mechanisms have been construed as inconsistent with the rule of law.²³⁰

5.0 Conclusion

Access to justice is an essential and fundamental human right whose inviolability cannot be compromised. Article 48 of Constitution of Kenya 2010 mandates the state to ensure all persons access justice. ADR Mechanisms have been entrenched in the Kenyan legal system to complement litigation in enhancing access to justice. ADR Mechanisms should be properly referred to as Appropriate Dispute Resolution Mechanisms as the term ‘alternative’ subordinates their intended objective of complementing litigation via enhancing access to justice; reducing backlogs and expediting dispute settlement. Also, the rule of law should be widely construed beyond litigation-oriented approaches purposefully to avoid instances where most ADR processes are rendered inconsistent with the rule of law. Finally, ADR Mechanisms and litigation are supportive modes of dispute resolution that have been entrenched in the Constitution of Kenya 2010 to enhance access to justice.

²²⁸ Ibid.

²²⁹ Kariuki, Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya*, (Glenwood Publishing Nairobi, December 2015) Op cit., p 71.

²³⁰ Sternlight, Jean R. "Is Alternative Dispute Resolution Consistent with the Rule of Law-Lessons from Abroad." *DePaul L. Rev.* 56 (2006): 569. Op cit.

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Examining the Role of Courts in Arbitration: Ally or Foe?

By: *Amollo Simba**

Abstract

This paper is about the role of the courts in arbitration. It seeks to find out whether the court is an ally or a foe of arbitration. The author examines the various instances of court intervention in arbitration and whether they are necessary. To dissect the issue, the paper relies on the various statutes establishing arbitration in Kenya and also how the courts have handled arbitration matters.

1.0 Introduction

The main goal of arbitration is to ensure expeditious settlement of disputes. The Arbitration Act, 1995 borrows from the UNCITRAL Model Law on Arbitration, 1985, to which Kenya is a signatory. Article 5 of the Model Law states, "in matters governed by this law, no court shall intervene except where provided in this law." The Arbitration Act was thus enacted to promote the country as a destination for commercial arbitration. It sought to enhance the efficiency of arbitration by reducing the level of court intervention. Section 10 of the Act states that court intervention is limited to only the instances provided for in the Act. The same was reiterated in the case of *Anne Mumbi Hinga v Victoria Njoki Gathara*,¹ where the court stated that allowing parties make applications to court may render nonsense the arbitration process.²

Arbitration in Kenya still has many instances of court intervention. The court intervention is in the stay of court proceedings,³ interim measures,⁴ taking of evidence,⁵ setting aside arbitral awards,⁶ and recognition and enforcement of

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¹ [2009] eKLR.

² Kariuki Muigua, Role of the Court Under Arbitration Act 1995: Court Intervention Before, Pending and Arbitration in Kenya, Kenya Law Review (2010), Available at <http://www.kenyalaw.org/klr/index.php?id=824>.

³ Arbitration Act No. 4 of 1995 (as amended in 2009), section 6.

⁴ Ibid section 7.

⁵ Ibid section 28.

awards.⁷ The overreliance of arbitration on the court process limits its effectiveness.

2.0 Legal Framework That Governs Arbitration in Kenya

Arbitration in Kenya is governed by both international conventions and domestic statutes. Any convention that has been ratified by Kenya becomes part of the laws of Kenya.⁸

2.1 Domestic Legal Framework

2.1.1 Constitution of Kenya, 2010

The Constitution has various provisions recognising arbitration as a means of alternative dispute resolution. Article 159(2) states that, in exercising judicial authority, courts shall promote alternative means of dispute resolution such as arbitration. Arbitration is also listed as a means of resolving inter-governmental disputes. Article 189(4) states that inter-governmental disputes between the national and county governments shall be settled through alternative means of dispute resolution such as negotiation, mediation, and arbitration.

2.1.2 Arbitration Act, 1995⁹

The Act mirrors the UNCITRAL Model Arbitration Law.¹⁰ It seeks to limit the level of court intervention in arbitration. Section 10 states "except as provided in this Act, no court shall intervene in matters governed by this Act." It outlines how arbitration is governed and the instances where the court shall intervene. The Act promotes arbitration through various provisions. Section 6, for instance, allows a party to arbitration to apply for a stay of court proceedings pending arbitration. Further section 12 of the Act also limits court intervention to the instances envisaged in the Act.

⁶ Ibid section 35.

⁷ Ibid section 36.

⁸ Constitution of Kenya, 2010. Article 2(6).

⁹ Arbitration Act No. 4 of 1995 (as amended in 2009).

¹⁰ UNCITRAL Model Law on International Commercial Arbitration, 1985.

2.1.3 Arbitration Rules, 1997

The rules are a subsidiary to the Arbitration Act. They lay down the procedure for arbitration. The rules cover the court intervention and outline the manner in which a party may apply to the court under the various provisions of the Arbitration Act. The rules are meant to streamline arbitration and to ensure uniformity and consistency in arbitration.

2.1.4 Civil Procedure Act and the Civil Procedure Rules, 2010

Section 59 of the Civil Procedure Act states that reference of matters to arbitration shall be governed by the prescribed rules, which in this case is the Arbitration Act. Order 46 of the Civil Procedure Rules, 2010 provides for arbitration under an order of a court. Parties to a dispute before a court may apply to have the matter referred to arbitration. The order provides for how such arbitration shall be governed. Rule 3 of the Order states that the court may set a reasonable time for determination of the arbitral award. Further, the court shall not intervene in a matter referred to arbitration save for as provided under the Order. The Civil Procedure Act gives the court the power to direct parties to settle their dispute through arbitration. The provision has sometimes been used in commercial disputes to reduce the backlog of cases by referring some suits to arbitration.

2.1.5 Nairobi Centre for International Arbitration Act¹¹

The Act established the Nairobi Centre for International Commercial Arbitration. It aims to promote and facilitate international commercial arbitration.¹² It also offers a neutral venue for the conduct of international arbitration while also providing institutional support to the arbitration process.¹³

¹¹ No. 26 of 2013, laws of Kenya.

¹² Ibid section 5.

¹³ Sourced from: <https://ncia.or.ke/about-ncia/>.

2.2 International Conventions

2.2.1 UNCITRAL Model Law on International Commercial Arbitration

The Model Law requires State parties to harmonise their arbitration laws to be in tandem with the model law. The underlying goal of this was to promote international commercial arbitration. Kenya is a party to the model law. The Arbitration Act, 1995 was enacted in line with the UNCITRAL model law and largely resembles it. It limits the extent of court intervention in arbitration to promote the efficiency of the arbitration process.

2.2.2 New York Convention¹⁴

The Convention allows parties to apply the principle of reciprocity in recognition of foreign arbitral awards made in states that are parties to the Convention. It also covers arbitral agreements where each party to the Convention shall recognise an arbitral agreement made in another member state. Kenya is a party to the convention and is, therefore, bound to recognise and enforce foreign arbitral awards. Section 36(2) of the Arbitration Act states that international arbitral awards shall be recognised as binding and enforced in accordance with the New York Convention.

3.0 The Relationship between the Courts and Arbitration

The existence of an arbitration agreement does not totally oust the jurisdiction of the courts. In *Sadrudin Kurji & another v. Shalimar Limited & 2 Others*¹⁵, the Court of Appeal stated that despite the existence of limitations to court intervention under section 10 of the Arbitration Act, the courts will not sit back when cardinal rules of natural justice are breached in arbitration. The case illustrates that the arbitration cannot be detached from the courts. However, the relationship should not be used as an excuse for the court to interfere in arbitration especially in instances where its assistance is unnecessary.

The court has sometimes used the pretext of the right to intervene in peripheral matters as a means of entrenching itself in arbitration. In the case of

¹⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

¹⁵ [2006] eKLR.

*Tononoka Steels Ltd v E.A. Trade and Development Bank (PTA Bank)*¹⁶, the arbitration clause stated that disputes arising from the contract shall be referred to the International Chamber of Commerce in London (ICC). A party to the contract sought an injunction against the respondent in the High Court. The court held that Kenyan courts had jurisdiction to deal with peripheral matters whereas the ICC was limited to the substantive disputes. Section 7 of the Arbitration Act states that a party can request the High Court either before or during arbitral proceedings for an interim measure of protection. In giving the orders the court relied on that provision. The question, however, is why should a party seek an interim order of protection from the court when they can seek the same orders from the tribunal? A party who acts in bad faith may use the provision to delay the arbitration process. The arbitral tribunal should, therefore, deal with both substantive and peripheral matters.

In Kenya, the law provides for two types of arbitration: Arbitration under the Arbitration Act and arbitration under supervision of the court. Arbitration under the supervision of the court is provided under the Civil Procedure Act.¹⁷ The two types of arbitration have varied levels of court involvement.

3.2 Arbitration under the Civil Procedure Act

Section 59 of the Civil Procedure Act states that reference to arbitration by an order in the suit may be governed in such a manner as may be prescribed by the rules. Order 46 of the Civil Procedure Rules provides that at any time before judgment is pronounced, interested parties in a suit who are not under any disability can agree to refer a suit for arbitration.¹⁸ Rules 3(1) of order 46 states that the court can refer a matter to arbitration, where the court shall set the timelines for the making of the arbitration award. Rules 3(2) further states that once the court has referred a matter to arbitration, the court shall cease to deal with the matter except to the extent provided by the Civil Procedure Rules. Rule 5 of the order states that the court has the power to appoint an arbitrator where the parties are unable to appoint an arbitrator or where the arbitrator appointed by the parties is unable to take up the position.

¹⁶ Civil Application Sup.3 of 2015.

¹⁷ Arbitration Act section 1.

¹⁸ Civil Procedure Rules, 2010.

There are some differences between arbitration under the Civil Procedure Act and Arbitration under the Arbitration Act. First, Arbitration under the Civil Procedure Act does not require an arbitration agreement. Second, arbitration under the Civil Procedure Act requires the arbitration award to be filed in court within 14 days of the award.

The court plays a critical role after the arbitrator gives an arbitration award. The Civil Procedure Rules, Order 46, Rule 11, states that once the award has been filed, it must be read out to the parties by the registrar of the court, at a date set by the registrar, and in the presence of the parties. The court has the power to direct the arbitrator, at the time of reference of the matter to arbitration, to state the award as a special case for the opinion of the court. Where the arbitrators state that the award is a special case, the court shall add its opinion which shall form part of the award.¹⁹

The arbitration under the Civil Procedure Act has many instances of court involvement which defeats the essence of choosing arbitration over litigation. For instance, where the award is stated as a special case and the court is allowed to give its opinion, there is the danger that the court's opinion may override the decision of the arbitrator.

3.3 Arbitration under the Arbitration Act

The Arbitration Act, 1995 limits the court intervention to circumstances provided under the Act. The intervention of the court, however, is not limited to only the instances provided in the Act as the court can intervene in judicial review though the same is not expressly provided in the Arbitration Act.

3.4 Court involvement in arbitration under the Arbitration Act

3.4.1 Determination of the enforceability of the arbitration agreement

The arbitration Act requires that for parties to engage in arbitration, they must have an arbitration agreement. A party to arbitration has the right to move to court to challenge the enforceability of the arbitration agreement. The reasons

¹⁹ Rule 12.

for the challenge include: that the parties lacked capacity to enter into the agreement, that the agreement does not cover the subject matter of the dispute.

3.4.2 Stay of court proceedings

Section 6 of the Arbitration Act provides that a party to suit can apply to the court for a stay of proceedings and reference of the matter to arbitration. The application shall be not later than at the time when the party enters appearance or otherwise acknowledges the claim against which stay of proceedings is sought. The court is obliged to grant stay of proceedings unless “the arbitration agreement is null and void or there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.”²⁰ In the case of *UAP Provincial Insurance Company Ltd (‘the Insurance Company’) v Michael John Beckett*²¹ the court declined to stay the proceedings since the subject matter of the dispute was not covered by the arbitration agreement.

When a party to an arbitration agreement enters appearance in a court proceeding or takes other steps, the party waives their right to seek the stay of proceedings pending arbitration. In *Peter Mwema Kahoro & another v. Benson Maina Gitethuki*²², the court found that the defendant had waived his right to seek a stay of proceedings since he had taken active steps in the suit. The condition that the application for stay must be made before a party enters appearance or acknowledges the claim is a hindrance to arbitration as it bars many people who would want to settle their disputes through arbitration from engaging in the process.

The Arbitration Act is unclear about what happens where part of the dispute is subject to arbitration while the other part is not. For instance, where the dispute involves both tort and contract law and only the contract part is subject to arbitration. The lack of clarity may be used to bar disputes that would have otherwise qualified to be handled by arbitration. In the United Kingdom, where only part of the dispute is subject to arbitration, the court can

²⁰ Ibid section 6(1).

²¹ Civil Appeal 26 of 2007.

²² [2006] eKLR.

still stay the suit pending arbitration. The position was started in the case of *Channel Tunnel Corporation Ltd and others-v-Balfour Beatty Construction Ltd*²³ where the House of Lords held that where only a part of the dispute is subject to arbitration, the court is not prevented from allowing an application for stay of proceedings. Kenya should adopt the same approach as the UK by allowing for stay of proceedings even where only a part of the dispute is subject to arbitration.

3.4.3 *Interim measures*

Section 7(1) of the Arbitration Act states that a party to arbitration can request for the protection of the High Court in providing interim measures pending the conclusion of arbitration and the High Court can grant that protection. The right to apply for an interim measure is, however, not absolute. The Arbitral tribunal has the primary jurisdiction to provide interim measures. Section 7(2) states that where the arbitral tribunal has already ruled on the matter for which the party seeks protection of the court, the High Court shall treat the ruling of the arbitration tribunal as conclusive.

The aim of the interim measures is to facilitate arbitration. In the case of *Donwood Co. Ltd-v-Kenya Pipeline Ltd*²⁴, the court held that the purpose of the interim injunction was to preserve the subject matter of the dispute pending the determination of the issues between the parties. In the case of *Safari Limited v Ocean View Beach Hotel Limited & 2 Others*²⁵, Nyamu J laid down the factors that the court must consider when providing interim measures as follows: the existence of an arbitration agreement; whether the subject matter of arbitration is under threat; the appropriate measure of protection in the circumstances; and for what period must the measure be given.

3.4.4 *Appointment of Arbitrators*

Section 12 of the Arbitration Act states that parties are free to agree on the procedure to appoint the arbitrators. The parties to arbitration can make an application to the High Court where they have disagreements as to the

²³ [1993] 1 Lloyd's Rep. 291, HL

²⁴ HCCC No. 104 of 2004.

²⁵ [2010] eKLR.

appointment of the arbitrators. The High Court may, by the consent of the parties, appoint a sole arbitrator. Where the High Court appoints an arbitrator, its decision is considered final and not subject to appeal. If a party to the dispute does not appoint an arbitrator within the required time as set out in the arbitration agreement or the Arbitration Act, the other party can appoint a sole arbitrator who will proceed with the arbitration. The party in default can apply to the High Court to set aside the appointment of the sole arbitrator. The High Court shall set aside the appointment if it finds reasonable grounds to do so. Where the High Court sets aside the appointment of the arbitrator, it can appoint an arbitrator with the consent of the parties.

In the case of *Pan African Mills (East Africa) Limited (In Receivership) v First Assurance Company*²⁶, the arbitration agreement stated that the arbitrator shall be appointed in writing by the parties. The Defendant refused to cooperate in the appointment of the arbitrator. The plaintiff appointed a sole arbitrator whom the Defendant later objected. The court allowed the plaintiff's application to have the arbitrator (appointed by the plaintiff) to act as the sole arbitrator.

3.4.5 Challenging the appointment of arbitrators

The procedure for challenging an arbitrator is laid down in section 14 of the Arbitration Act. First, the party that seeks to challenge the appointment of the arbitrator shall send a statement of the reasons for the challenge to the arbitral tribunal. The arbitrator can choose to withdraw or the parties may agree on the issues raised in the challenge. If the parties do not agree and the arbitrator does not withdraw, the arbitral tribunal shall determine the challenge of the arbitrator. If the arbitral tribunal rejects the challenge, the party shall apply to the High Court within 30 days of the decision. The High Court can either confirm the rejection of the challenge or uphold the challenge and remove the arbitrator. The decision of the High Court shall be final and not subject to appeal.

²⁶ [2015] eKLR.

In the case of *Zadock Furnitures Systems Litimited & another v Central Bank of Kenya* the court held that for an arbitrator to be removed by the court there must be circumstances raising justifiable doubts about the impartiality of the arbitrator. The burden of proving impartiality of the arbitrator lies on the party raising the claim.

3.4.6 Jurisdiction of the arbitrator

Arbitral tribunals are competent to handle any application challenging their jurisdiction. However, where a party is dissatisfied with the decision of the tribunal, the party may seek redress in the High Court.²⁷

A party seeking to challenge the arbitral tribunal's jurisdiction shall make the application not later than at the time of the submission of the statement of defense. A party can also raise the plea that the tribunal is exceeding its scope of authority as soon as the act of exceeding the authority occurs. The application challenging the tribunal's jurisdiction shall be made to the tribunal. Where the tribunal upholds that it has jurisdiction and the party is dissatisfied the party shall apply to the High Court within 30 days of notice of the ruling. The decision of the High Court shall be final.

3.4.7 Taking evidence

Section 28 of the Arbitration Act gives the High Court the power to take evidence. The court can act either on the request of the arbitration tribunal or a party to the arbitration, with the approval of the tribunal. When such a request is made, the High Court will use the ordinary rules of evidence. The power of the High Court to enforce summons, for instance, by convicting persons who disobey summons, makes it an essential ally to the arbitral tribunal. Though the arbitral tribunal has the power to summon witnesses and to take evidence, it lacks the power and instruments to punish third party witnesses who disobey its summons.

²⁷ Arbitration Act No. 49 of 1995 (as amended in 2009). S. 17.

3.4.8 Setting aside arbitral awards

Section 35 of the Arbitration Act gives the High Court the power to set aside an arbitral award. The grounds for setting aside an arbitral award are: that a party to the arbitration was under any incapacity; the arbitration agreement was invalid; the party making the application was not given adequate notice of the appointment of the arbitrator; where the award deals with issues not contemplated in the arbitration agreement; where the composition of the arbitral tribunal was not in accordance with the arbitration agreement; corruption or undue influence. The High Court also has the power to set aside the arbitral award where the subject matter of the arbitration is not capable of being settled in Kenya or where the award is contrary to the public policy.

3.4.9 Recognition and enforcement of awards

After an arbitration award has been made by the arbitration tribunal, a party to the arbitration shall make an application to the High Court for the enforcement of the arbitral award.²⁸ The High Court can refuse to recognize an arbitral award based on the grounds laid down in section 37 of the Act. The grounds are similar to the grounds for setting aside an arbitral award. In the case of *Tanzania National Roads Agency v Kundan Singh Construction Limited*²⁹ the applicant sought to enforce a foreign award in Kenya in accordance with section 36(2) of the Arbitration Act. The court declined to enforce the award, stating that the award was in breach of the express terms of the contract by the parties as was captured in the arbitration clause.

3.4.10 Judicial review

The Constitution of Kenya, 2010 and the Fair Administrative Action Act³⁰ give the High Court the power to review the decisions of the bodies that exercise quasi-judicial power. Article 47 of the Constitution states that “every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair”. Section 3 of the Fair Administrative Action Act states that the Act applies to “a person performing a judicial or quasi-

²⁸ Arbitration Act section 36.

²⁹ [2013] eKLR.

³⁰ No. 4 of 2015.

judicial function under the Constitution or any written law”³¹ A party to the arbitration who feels that their right to a fair administrative action has been infringed on can approach the court and seek judicial review of the arbitration proceedings. The Arbitration tribunal exercises a quasi-judicial function and therefore the High Court has the power to review its decisions.

The power of the High Court to conduct judicial review of arbitration can either be facilitative or a hindrance to arbitration. It is facilitative in that it protects the rights of the parties to access justice. Where there is a breach of the due process during arbitration, an aggrieved party can seek redress in the court. On the other hand, judicial review can be a hindrance to arbitration in that parties can use the process to re-open arbitral awards and to delay the process of enforcement of the awards, therefore, defeating the essence of arbitration.

4.0: Critical and Comparative Analysis

This part seeks to compare arbitration in Kenya and arbitration in other jurisdictions namely, the United Kingdom and Zambia. It also seeks to find the lessons that Kenya can draw from the other jurisdictions so as to promote the efficiency of Kenya’s arbitration.

4.1 United Kingdom

The UK arbitration is governed by the Arbitration Act of 1996³² (the UK Arbitration Act). The UK is also a party to the UNCITRAL Model Law. The Arbitration Act of 1996 has limited the role of the courts in arbitration. The UK promotes arbitration through the doctrine of separability, where a defect in the contract does not vitiate the arbitration clause. The UK courts have emphasized the limited role of court intervention and the need for party autonomy. In the case of *Cetelem v Roust*³³ the court held that the 1996 Arbitration Act sought to limit the level of court intervention and to ensure party autonomy in arbitration. The role of the court is, therefore, limited to assisting the arbitral tribunal and it should not usurp the role of the tribunal.

³¹ Fair Administrative Action Act section 3(b).

³² Arbitration Act, 1996, Chapter 23.

³³ [2005] 1 W.L.R. 3555 at 3571.

The UK Arbitration Act has a lot of similarity with the Kenya legislation. It provides for court intervention in arbitration prior to the arbitration, during the pendency of arbitration and after arbitration. Section 1(c) provides that the court should not intervene in arbitration except as provided by the Act. The Act lists court intervention in the stay of proceedings,

Section 24 (1) (a) of the Act states that the court may, upon application by a party to the arbitration, remove an arbitrator (and umpire) on the grounds that justifiable doubts arise as to his impartiality. In addition to removal of an arbitrator the Act also provides other instances of court involvement in arbitration such as stay of legal proceedings,³⁴ power of court to extend time for beginning arbitral proceedings,³⁵ the power to act in case parties fail to appoint an arbitrator,³⁶ and determination of a preliminary point of law. Section 44 lists the court's powers exercisable in support of arbitral proceedings. The powers include: taking evidence; preservation of evidence; making orders in relation to property which is the subject of the proceedings; and granting interim injunctions. In *Assimina Maritime Ltd v. Pakistan Shipping Corporation and another*³⁷ it was held that the court's supportive power to preserve evidence can even be used against non-parties to the arbitration in order to secure the provision of specified documents that are anticipated to bear directly on the resolution of the issues underlying the arbitral.

Just like Kenya, in the UK a party needs to enforce an arbitral award through the courts. Section 66 of the Arbitration Act states that an arbitration award may, by leave of court be enforced in such a manner as a judgment or an order of the court. The Act also allows parties to challenge an arbitral award within 28 days of the award. This like the Kenyan scenario which also allows parties to challenge arbitral awards. The grounds for the challenge of an arbitral award are: substantive jurisdiction³⁸, serious irregularity³⁹, and point of law.⁴⁰

³⁴ UK Arbitration Act section 9.

³⁵ Ibid section 12.

³⁶ Ibid section 18.

³⁷ [2004] EWHC 3005 (Comm).

³⁸ UK Arbitration Act section 67.

The main difference between the Arbitration Act of the UK and Kenya's Arbitration Act is that in the UK a party can apply for stay of proceedings even after entering appearance unlike in Kenya. In the case of *Eagle Star Insurance Company Limited-v-Yuval Insurance Company Limited*,⁴¹ Lord Denning stated that the defendant is not prevented from applying for stay of proceedings unless it is established that they have affirmed the correctness of the court proceedings and are willing to go along with the determination of the court instead of arbitration.

4.2 Zambia

Arbitration in Zambia is governed by the Arbitration Act of 2000⁴². The Act is also more flexible when it comes to the rights of the parties to apply for stay of proceedings and reference of the subject matter of the dispute to arbitration. Section 10(1) of the Act states that "*a court before which legal proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests at any stage of the proceedings and notwithstanding any written law, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.*" The Arbitration Act allows the court to stay proceedings at any time before the determination of the suit and refer the matter to arbitration. In *Zambia National Holdings Limited and another v the Attorney General*⁴³ the court held that "where parties have agreed to settle any dispute between them by arbitration, the court's jurisdiction is ousted unless the agreement is null and void, inoperative or incapable of being performed."

The advantage of the Zambian approach is that it gives parties wider room to explore arbitration. This is in contrast to the Kenyan approach where a party would be stopped from applying for stay in order to go for arbitration just because they applied for the stay after entering appearance. The provision, however, may be abused by parties who seek to prolong the dispute and will,

³⁹ Ibid section 68.

⁴⁰ Ibid section 69.

⁴¹ [1978] Lloyds Rep. 357

⁴² Arbitration Act No. 19 of 2000.

⁴³ S.C.Z Judgment No. 3 of 1994 [1995] ZMSC 1.

therefore, apply for stay at the advance stages of the case. The courts can prevent the abuse by ensuring that only applications for stay that are made in good faith are granted.

5.0 Conclusion

Arbitration cannot be completely detached from the courts. The arbitral tribunals require the court to assist them in taking evidence, enforcing arbitral awards among other things. The parties also have recourse in the courts whenever they are dissatisfied with the decisions of the arbitral tribunal. Unnecessary court injunctions can, however, be used to delay the arbitration process. When dealing with the question of interim measures, the courts should restrict themselves to only those instances where the party applying would suffer irreparable damage if the measures are not granted. Where the party can obtain the same measures from the arbitral tribunal, then the court should direct the party to go to the tribunal instead. Kenya can also borrow from the Zambian approach by allowing parties to apply for stay of proceedings at any time before the case is determined in order to go for arbitration. The courts can prevent the abuse of the process by ensuring that only applications for stay made in good faith are granted. Generally, the courts must be facilitators of arbitration not obstacles. The interventions must, therefore, must be to the extent that they promote expeditious justice.

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Reconciling States Quest to Uphold Their Sovereignty through the Doctrine of Sovereign Immunity and the Need for Effective Settlement of Investor State Disputes under the ICSID Convention

*By: Peter Mwangi Muriithi**

Abstract

The motivation behind this paper is to analyze how states pursuit to maintain their sovereignty through doctrine of sovereign immunity and the need to have an effective mode of settlement of investor state dispute has been balanced under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (herein after ICSID Convention).

In doing so, the author shall do an analysis on: the brief history behind creation of the ICSID Convention, International Centre for Settlement of Investment Disputes(herein after ICSID) jurisdiction over investor state disputes; analyze what constitutes the doctrine of sovereign immunity; enunciate what constitutes investor state disputes settlement; and, analyze the seminal provisions of ICSID Convention that seek to uphold states sovereignty through the doctrine of sovereign immunity and also ensure effective settlement of investor state disputes resolution under the ICSID Convention. Lastly the paper shall give a conclusion on whether the Convention has succeeded in maintaining this delicate yet vital balance.

1.0 Introduction

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States¹ (herein ICSID Convention) established the International Centre for Settlement of Investment Disputes (herein referred to

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¹ ICSID website< <https://icsid.worldbank.org/en/pages/icsiddocs/overview.aspx>>
lastly accessed on 3rd May 2019

as ICSID), which is an institution that provides for facilities and services for arbitration and conciliation of investment disputes.²

The ICSID Convention became operational on 14th October 1966 with about 28 members states; today 163 countries have ratified the convention to become contracting parties.³ This paper will enunciate how states sovereignty is upheld by the ICSID Convention, while ensuring there is effective settlement of Investor state disputes under the aegis of ICSID Convention.

2.0 Succinct history behind creation of the ICSID Convention

It is undeniable that foreign investment plays a key role in the progress and development of a country, especially less developed countries.⁴ Various international incidents between foreign investors and host states confronted the World Bank in the 1950's and 1960's prior to the making of the ICSID Convention. These incidents made it imperative for the making of an international legal regime that would address and provide an acceptable mechanism for resolution of investor state disputes.⁵

For example, on 10th May 1964, the Tunisian National Assembly shocked the world by rushing through a bill nationalizing all farmland that belonged to foreign investors. As a result, much of the one million acres of land and other assets were seized from large French corporations.⁶

² Article 1 (2) of the ICSID Convention (The principal mandate of ICSID is to provide facilities for conciliation and arbitration between contracting states and nationals of other contracting states.)

³ ICSID website < <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx> > lastly accessed on 3rd May 2019

⁴ Singh S & Sharma S, *Investor-State Dispute Settlement Mechanism: 'The Quest for a Workable Roadmap'* (2013) 29 *Merkourios - International and European Law: General Issue* 91

⁵ David A. Soley *ICSID Implementation: An Effective Alternative to International Conflict* (The International Lawyer, Vol. 19, No. 2 (Spring 1985), pp. 521-544)

⁶ David A. Soley *ICSID Implementation: An Effective Alternative to International Conflict* (The International Lawyer, Vol. 19, No. 2 (Spring 1985), pp. 521-544)

In May 1951, Iran nationalized Anglo-Iranian Oil Company's (AIOC) assets, a British owned company. The British as the foreign investors in the oil industry in Iran through Anglo-Iranian Oil Company (AIOC) were unable to come to terms with Iranian demands for a fairer oil arrangement. This led to Iranians nationalization of Anglo-Iranian Oil Company's (AIOC) assets.⁷

In 1956, the Egyptian government nationalized the Suez Canal Company. The World Bank intervened and successfully mediated the settlement of claims by the Company's shareholders against the Egyptian Government.⁸ The World Bank was involved in settlement of many of these investor state disputes. The World Bank played an active role in seeking to have an amicable settlement of these investor state disputes.⁹

However, it was apparent that there existed gaps in the existing structures for the settlement of investment disputes. This led to an initiative in the 1960's by the World Bank to have in place an acceptable mechanism for resolution of investor state disputes. The plan was to create a mechanism specifically designed for the settlement of disputes between host States and foreign investors. This led to the drafting of the ICSID Convention. The driving force behind the Convention's drafting was the World Bank's General Counsel at the time, Aron Broches.¹⁰

The Convention's drafting took place between the years 1961 to 1965. The main bodies involved were the World Bank's legal department, the World

⁷ Edward Henniker Major, Nationalization: The Anglo-Iranian Oil Company, 1951 Britain vs. Iran <<https://sevenpillarsinstitute.org/articles/nationalisation-anglo-iranian-oilcompany-1951-britain-vs-iran-2/>

⁸ E. Mason & R. Asher, *The World Bank Since Bretton Woods* 18 (1973)

⁹ Ibrahim F.I. Shihata, *The Settlement of Disputes Regarding Foreign Investment: The Role of the World Bank*, with Particular Reference to ICSID and MIGA page 98

¹⁰ United Nations Conference on Trade and Development, *Course On Dispute Settlement*(UNCTAD/EDM/Misc.232) page 9

Bank's Executive Directors and a series of regional meetings in which experts from 86 States participated.¹¹

The text of the Convention together with a short explanatory report was adopted by the Executive Directors of the World Bank on 18th March 1965. Its official designation is Convention on the Settlement of Investment Disputes between States and Nationals of Other States.¹² It created the International Centre for Settlement of Investment Disputes (ICSID).¹³ This is why the Convention is commonly referred to as the ICSID Convention.¹⁴

However, it is notable that the creation of the ICSID Convention, was advocated for by developed countries while developing countries had some reservations against it. The reservations by the developing countries were informed by the need to uphold their sovereignty. This clearly indicates that states pursuit to maintain their sovereignty through the doctrine of sovereign immunity and the need to have effective settlement of investor state dispute existed at the formulation of ICSID Convention.¹⁵

3.0 ICSID Jurisdiction over Investor state disputes

The ICSID Convention confers upon ICSID jurisdiction over disputes arising directly out of an investment.¹⁶ Article 25 to 27 of the ICSID Convention

¹¹ Ibid No. 10 page 9

¹² The text of the Convention is published in 575 United Nations Treaty Series 159; 4 International Legal Materials 524 (1965) and 1 ICSID Reports 3 (1993). An electronic version is available at:

<<http://www.worldbank.org/icsid/basicdoc/9.htm>> lastly accessed on 3rd May 2019

¹³ Article 1 to 24 of the ICSID Convention.

¹⁴ United Nations Conference on Trade and Development, Course On Dispute Settlement (UNCTAD/EDM/Misc.232), page 9

¹⁵ Singh S & Sharma S, Investor-State Dispute Settlement Mechanism: The Quest for a Workable Roadmap' (2013) 29 *Merkourios - International and European Law: General Issue* 91.

¹⁶ Jacob K Gakeri, Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR (*International Journal of Humanitarian and Social Sciences*, Vol. 1 No. 6; June 2011) page 224.

delimits ICSID's jurisdiction over investor state disputes. Article 25(1) of the Convention to a great extent expounds on the ICSID jurisdiction over investor state disputes.

To this end, Article 25(1) of the ICSID Convention verbatim provides:

"The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally..."

The paper generally seeks to answer the question of how in exercise of its jurisdiction, ICSID upholds states sovereignty and also ensures there is effective settlement of investor state disputes. ICSID has two sets of procedural rules that may govern the initiation and conduct of its proceedings.¹⁷ These are: the ICSID Convention, Regulations¹⁸ and Rules¹⁹ and the ICSID Additional Facility Rules.²⁰

¹⁷ Background Information on the International Centre for Settlement of Investment Disputes (ICSID) page 3

<<https://icsid.worldbank.org/en/Documents/ICSID%20Fact%20Sheet%20%20ENGLISH.pdf>>lastly accessed on 3rd May 2019.

¹⁸ Administrative and Financial Regulations.

¹⁹ Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules) and Rules of Procedure for Conciliation Proceedings (Conciliation Rules); Rules of Procedure for Arbitration Proceedings (Arbitration Rules).

²⁰ Background Information on the International Centre for Settlement of Investment Disputes (ICSID) page 3

<<https://icsid.worldbank.org/en/Documents/ICSID%20Fact%20Sheet%20%20ENGLISH.pdf>>lastly accessed on 3rd May 2019.

The ICSID Convention, Regulations and Rules are available only when a dispute is between an ICSID Convention Contracting State (Contracting State) and a national of another Contracting State.²¹

The ICSID Additional Facility Rules are available for settlement of investment disputes where only the home-state or the host-state is a Contracting State.²² ICSID also administers investment disputes under other rules such as the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) rules.²³

4.0 Upholding sovereignty of states through the Doctrine of Sovereign Immunity

States often claim doctrine of sovereign immunity as a means of upholding their sovereignty. Sovereign immunity is a legal doctrine by which the sovereign or the state cannot, commit a legal wrong and is immune from civil suit or criminal prosecution.²⁴ The basis of the doctrine of sovereign immunity is from the common law principle borrowed from the British Jurisprudence that the King commits no wrong and that he cannot be guilty of personal negligence or misconduct of his servants.²⁵ The doctrine of sovereign

²¹ Article 25 (1) of the ICSID Convention.

²² ICSID Additional Facility Rules' 2006 page 5: The Administrative Council of the Centre adopted Additional Facility Rules authorizing the Secretariat of ICSID to administer certain categories of proceedings between States and nationals of other States that fall outside the scope of the ICSID Convention.

<https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/AFR_English-final.pdf>lastly accessed on 3rd May 2019

²³ Background Information on the International Centre for Settlement of Investment Disputes (ICSID) page 3

<<https://icsid.worldbank.org/en/Documents/ICSID%20Fact%20Sheet%20-%20ENGLISH.pdf>>lastly accessed on 3rd May 2019.

²⁴ NeerajAroram, Doctrine of Sovereign Immunity, <<http://www.neerajaarora.com/doctrine-of-sovereign-immunity>> lastly accessed on 3rd May 2019

²⁵ NeerajAroram, Doctrine of Sovereign Immunity, <<http://www.neerajaarora.com/doctrine-of-sovereign-immunity>> lastly accessed on 3rd May 2019

immunity, rests upon the foundation that it is contrary to the dignity of any sovereign that he should be impleaded in the Courts of any other sovereign unless he should-elect to waive his immunity.²⁶

Types of immunity

States generally enjoy two types of immunity: -

- a) **Immunity to Jurisdiction**
- b) **Immunity from execution**

1. Immunity to jurisdiction²⁷

A state's immunity to jurisdiction results from the belief that it would be inappropriate for one State's courts to call another State under its jurisdiction. Therefore, State entities are immune from the jurisdiction of the courts of another State. However, this immunity can generally be waived by the State entity. Reference to arbitration is in many legal systems sufficient to demonstrate a waiver of immunity to jurisdiction by the State.²⁸

However, certain developing countries may be hesitant to submit themselves to international arbitration, believing that arbitration is dominated by Western principles and would not give a developing country a fair hearing.²⁹ These same developing countries may feel more secure submitting to arbitration under the UNCITRAL institutions and rules, which are often considered more culturally neutral than those of the ICC or other Western tribunals.³⁰

²⁶ Erwin H. Loewenfeld; W. T. Wells, *Doctrine of Sovereign Immunity, The*, 44 Int'l L. Ass'n Rep. Conf. 204 (1950).

²⁷ <<https://www.lawctopus.com/academike/sovereign-immunity/>>lastly accessed on 3rd May 2019

²⁸ <<https://www.lawctopus.com/academike/sovereign-immunity/>>lastly accessed on 3rd May 2019

²⁹ Craig, Park and Paulsson, *International Chamber of Commerce Arbitration* (3rd edition 2000).

³⁰ Craig, Park and Paulsson, *International Chamber of Commerce Arbitration* (3rd edition 2000).

2. Immunity from execution³¹

The State will also have immunity from execution, as it would be improper for the courts of one State to seize the property of another State. Immunity from execution may also generally be waived.³²

Waiving immunity from execution may be difficult for a government to address. As a general proposition under most legal systems, certain assets belonging to the state should not be available for satisfaction of the execution of an arbitral award; for example, the country's foreign embassies, or consular possessions. Therefore, some method may have to be made available for the private party to seize certain state assets, possibly through careful definition of those possessions available for seizure.³³

5.0 Investor state disputes settlement defined

Investor-state dispute settlement is a form of resolution of disputes between foreign investors and the state that hosts the investment (host-state).³⁴

Investor-state dispute settlement allows foreign investors to initiate dispute settlement proceedings against a host-state, normally by means of arbitration proceedings.³⁵ Investor-state dispute settlement mechanisms are commonly

³¹ <<https://www.lawctopus.com/academike/sovereign-immunity/>>lastly accessed on 3rd May 2019.

³² <<https://www.lawctopus.com/academike/sovereign-immunity/>>lastly accessed on 3rd May 2019.

³³ <<https://www.lawctopus.com/academike/sovereign-immunity/>>lastly accessed on 3rd May 2019.

³⁴ Background Information on the International Centre for Settlement of Investment Disputes (ICSID) page 3

<<https://icsid.worldbank.org/en/Documents/ICSID%20Fact%20Sheet%20-%20ENGLISH.pdf>>lastly accessed on 3rd May 2019.

³⁵ Gauthier A, Investor-State Dispute Settlement Mechanisms: What is their History and where are they going? (2015) Publication No. 2015-115-E 1.

<<http://www.lop.parl.gc.ca/Content/LOP/ResearchPublications/2015-115-e.pdf>>lastly accessed on 3rd May 2019

provided for in trade / investment agreements between two states (bilateral) or more than two states (multilateral).³⁶

They can also be found in domestic legislation or contracts.³⁷ Both the foreign investor and the host-state must consent to Investor-state dispute settlement before the proceedings may commence. Usually, the consent of the host-state is contained in the trade / investment agreement.³⁸ The foreign investor consents to Investor-state dispute settlement by submitting its claim to be resolved by Investor-state dispute settlement proceedings.³⁹

6.0 Reconciling state's quest to uphold sovereignty and the need to have effective settlement of investor state disputes under the ICSID Convention

The ICSID Convention precariously balances these two vital yet conflicting issues that usually arise when it comes to investor state disputes settlement. From the onset the ICSID Convention under the *preamble* provides that the contracting parties to the ICSID Convention which by mutual consent submit their dispute to conciliation or arbitration under the aegis of ICSID shall comply with the award rendered.

³⁶ Gauthier A, Investor-State Dispute Settlement Mechanisms: What is their History and where are they going? (2015) Publication No. 2015-115-E 1.<http://www.lop.parl.gc.ca/Content/LOP/ResearchPublications/2015-115-e.pdf> lastly accessed on 3rd May 2019

³⁷ Background Information on the International Centre for Settlement of Investment Disputes (ICSID) page 3
<<https://icsid.worldbank.org/en/Documents/ICSID%20Fact%20Sheet%20-%20ENGLISH.pdf>>lastly accessed on 3rd May 2019.

³⁸ Background Information on the International Centre for Settlement of Investment Disputes (ICSID) page 3
<<https://icsid.worldbank.org/en/Documents/ICSID%20Fact%20Sheet%20-%20ENGLISH.pdf>>lastly accessed on 3rd May 2019.

³⁹ Singh S & Sharma S, Investor-State Dispute Settlement Mechanism: The Quest for a Workable Roadmap' (2013) 29 *Merkourios - International and European Law: General Issue* 91 (hereafter Singh S & Sharma S (2013)).

This provision by the preamble of the ICSID Convention seeks ensures there is effective settlement of investor state disputes under the ICSID Convention as it binds parties which submit their investor-state disputes to ICSID to implement or enforce the award. Also this provision ensures that states do not raise the doctrine of sovereign immunity when it comes to complying with the award rendered in ICSID, as it requires that parties to an investor-state dispute to submit the dispute to ICSID for settlement *through mutual consent*. This provision under the preamble of the ICSID Convention connotes an aspect of waiver of sovereign immunity by the states. This reconciles doctrine of sovereign immunity as claimed by states and the need to have effective settlement of investor state disputes.⁴⁰

The preamble of the ICSID Convention also provides that no Contracting State shall by the mere fact of its ratification, acceptance or approval of the Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration. The interpretation of this provision is that states will only be considered to have submitted a dispute to ICSID for settlement only where it expressly does so. This eliminates the concept of tacit submission of disputes by states by mere fact of its ratification, acceptance or approval of the Convention. This to a great extent upholds states sovereignty.

Under Article 25 (1) of the ICSID Convention, ICSID acquires jurisdiction over an investor state dispute where parties to the dispute consent in writing to submit to the Centre. This provision upholds states sovereignty and also prevents states from claiming the doctrine of sovereign immunity, as ICSID only acquires jurisdiction over an investor state dispute where parties to such a dispute submit it to ICSID through consent and in writing. Consensual submission of investor state disputes to ICSID by states connotes an aspect of waiver of sovereign immunity by the states.

⁴⁰ Preamble of the ICSID Convention.

Further to ensure effective settlement of investor state disputes, Article 25(1) of the ICSID Convention stipulates that when the parties have given their consent, no party may withdraw its consent unilaterally. This ensures parties are bound by their agreement to submit their investor state dispute to ICSID. It further pre-empts any party to such an agreement from claiming ICSID does not have jurisdiction as that party has unilaterally withdrawn its consent unilaterally. This ensures effective settlement of investor state disputes under the aegis of ICSID Convention.

ICSID Convention under Article 25(3) provides that consent to submit disputes to ICSID by a constituent subdivision or agency of a Contracting State will require the approval of that State unless that State notifies the Centre that no such approval is required. This to a great extent upholds state sovereignty as it gives states power to determine which disputes a constituent subdivision or agency of that state are submitted to ICSID. This salient provision of Article 25(3) of the ICSID also ensures effective settlement of disputes in ICSID. This is because it prevents injunction of a dispute settlement process under ICSID by a state claiming that its constituent subdivision or agency had no authority to submit the dispute to ICSID.

To uphold states sovereignty and ensure states do not claim doctrine of sovereign immunity Article 25(4) of the ICSID Convention gives contracting states, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, an option to notify ICSID of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. This ensures states have power to decide which disputes to submit to ICSID as a sovereign state. For example, in 1978, Papua New Guinea notified ICSID that it would submit only those disputes which are elementary to the investment itself.⁴¹

⁴¹ Singh S & Sharma S, *Investor-State Dispute Settlement Mechanism: The Quest for a Workable Roadmap* (2013) 29 *Merkourios - International and European Law: General Issue* 91 (hereafter Singh S & Sharma S (2013)).

Furthermore, to uphold states sovereignty and ensure states do not claim doctrine of sovereign immunity Article 26 of the ICSID Convention provides that a contracting state may require the exhaustion of local remedies. According to this Article, all local administrative and judicial remedies available to the contracting parties are to be exhausted before submitting the dispute to the jurisdiction of the ICSID. This enhances effective settlement of investor state disputes as it ensures that only investor state disputes that are not resolved through local remedies are submitted to ICSID.

To uphold sovereignty of states consent to arbitration on a case by case basis is required under ICSID Convention. Being a party to the ICSID Convention does not mean unconditional consent to ICSID settlement of investor state disputes. According to the ICSID Convention, the contracting parties must consent in writing to submitting the dispute to the ICSID.⁴²

Under Article 42(1) of the ICSID Convention, the law of a host country is to be the governing law in the absence of an agreement between the parties to a dispute of the applicable law. Seeking to uphold their sovereignty, developing countries wanted disputes to be settled on the basis of their domestic laws whereas developed nations wanted disputes settled on the basis of international law. The ICSID reached a compromise between both schools of thought by permitting the contracting parties to choose the governing law by agreement. In the absence of any agreement, the law of the host country was to be applied, along with any rules of international law as may be applicable.⁴³

State sovereignty and national security: This means that even after acceding to the ICSID Convention, a nation can at any time decide the class or classes of cases it wishes to submit to the jurisdiction of ICSID.⁴⁴ In a bid to ensure there is effective settlement of investor state disputes in ICSID, Article 26 of the

⁴² Article 25(1) of the ICSID Convention

⁴³ C Huiping, 'The Investor State Dispute Settlement Mechanism: Where to go in the 21st Century?' (2008) 9 *The Journal of World Investment & Trade* 2.

⁴⁴ Article 25(4) of the ICSID Convention

ICSID Convention provides that consent of the parties to arbitration under ICSID Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.

7.0 Unequal bargaining power as an antithesis to the concept of consent as envisaged under the ICSID Convention.

As in-depth discussed above, the ICSID convention envisages consent as the basis of upholding state sovereignty. However, there arises the question of *indirect coercion* where investors demand that states should agree to an ICSID investment clause in any contract. Foreign direct investment is essential for enhancing economic development especially in developing countries.⁴⁵

However, in the competition to attract investment, developing countries are in a disadvantaged bargaining position during the investment agreement negotiation process.⁴⁶ Foreign investors often request to include a provision in the investment agreement stipulating that ICSID shall govern the resolution of any dispute arising out of an investment.⁴⁷ Overtime many powerful global corporations have been accused of taking advantage of developing countries by coercing them into entering into investment agreements, with investment dispute settlement clauses like ICSID clauses.⁴⁸

This concept of unequal bargaining power, can be regarded as a factor vitiating consent as envisaged in the provisions of the ICSID Convention. In

⁴⁵ Ibranke T. Odumosu, *The Antinomies of the (Continued) Relevance of ICSID to the Third World*, 8 SAN DIEGO INT'L L.J. 345, 357 (2006–2007) page 359.

⁴⁶ Olivia Chung, Note, *The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration*, 47 VA. J. INT'L L. 953,957 (2007) page 958

⁴⁷ Background Information on the International Centre for Settlement of Investment Disputes (ICSID) page 2

<<https://icsid.worldbank.org/en/Documents/ICSID%20Fact%20Sheet%20-%20ENGLISH.pdf>>lastly accessed on 3rd May 2019

⁴⁸ Pia Eberhardt & Cecilia Olivet, *profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom*, page 7 (Helen Burley ed., Corporate Eur. Observatory and the Transnational Inst. 2012).

the competition to attract investment, developing countries are allegedly coerced into forfeiting concerns about economic sovereignty and capital controls in exchange for greater incentives to investors.⁴⁹ Therefore, developing countries are considered to be in a disadvantaged position when negotiating investment agreements and are often pressured to acquiesce to investor's demands which may include ICSID investment clauses.⁵⁰

Premised on this understanding, it is crystal clear that the salient provisions of the ICSID convention envisages upholding states sovereignty mainly through the concept of consent. However, the concept of consent overtime has been bypassed through the existence of unequal bargaining power, especially where developing countries are involved. This raises the question of whether there is need to redefine what constitutes consent as prescribed by the ICSID convention.

These concerns which are considered to threaten states sovereignty especially the developing countries, have led to states denouncing their membership from ICSID. In 2012, Venezuela became the third country, following Ecuador and Bolivia, to have denounced its membership from ICSID.⁵¹ States exit from ICSID signals the growing loss of faith in the system and raises questions about the Convention's legitimacy and purpose to provide an unbiased investment dispute resolution forum. ⁵² These withdrawals by states from

⁴⁹Elizabeth Moul, *The International Centre for the Settlement of Investment Disputes and the Developing World: Creating a Mutual Confidence in the International Investment Regime*, page 899.

⁵⁰ Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 672 (1997-1998).

⁵¹ Diana Marie Wick, *The Counter-Productivity of ICSID Denunciation and Proposals for Change*, 11 J. INT'L BUS. & L. 239, 241 (2012).

⁵² *Ibid* No.51

ICSID demonstrates that changes are imperative to prevent the current international investment regime from potential collapse.⁵³

It is on this basis that this paper submits, such changes should involve evaluating the success of the concept of consent as the basis of upholding state sovereignty as envisaged by the ICSID convention.

8.0 Conclusion

To a great extent, the ICSID Convention manages to maintain the delicate yet vital balance of ensuring there is effective settlement of investor state disputes under the ICSID Convention while ensuring states sovereignty is upheld. This balance is mainly maintained through requirement of states consent to submit any dispute to ICSID. This negates any claim that a state may raise of sovereign immunity.

However, the concept of consent overtime has been by-passed through the existence of unequal bargaining power, especially where developing countries are involved. This raises the question of whether there is need to redefine what constitutes consent as prescribed by the ICSID convention. It is only by addressing such concerns, especially those that threatens states sovereignty, that the ICSID Convention can be considered a success. This is especially so, when it comes to maintaining the delicate yet vital balance, of ensuring there is effective settlement of investor state disputes while ensuring states sovereignty is upheld. This will in-turn create an environment for economic growth through foreign investment especially in developing countries.

⁵³ Elizabeth Moul, *The International Centre for the Settlement of Investment Disputes and the Developing World: Creating a Mutual Confidence in the International Investment Regime*, page 898.

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United Nations Conference on Trade and Development, *Course On Dispute Settlement (UNCTAD/EDM/Misc.232)*.

Arbitrability under the Nigerian Law

By: Adesina Coker*

Abstract

Arbitration has become prominent amongst the various Alternative Dispute Resolution (ADR) mechanisms. It has acquired a status that has made it independent and unique as a dispute resolution mechanism as well as enjoys both judicial and statutory recognition in Nigeria. This prominence of arbitration is due to its advantages which include confidentiality, binding and self-enforcing outcome, informality of the process, relative inexpensiveness and more particularly liberty of the parties to determine the whole procedure and the process of arbitration otherwise known as the doctrine of party autonomy. This liberty of the parties makes arbitration attractive. The issue is that does the fact that parties are free to agree on the procedure and process of arbitration empower them to arbitrate any and every dispute? The answer to this question is what is known as "arbitrability". Arbitrability is to the effect that though parties are at liberty to decide the process and procedure of arbitration, the liberty is not absolute or sacrosanct. If the parties were free to submit every dispute to arbitration, the safety and progress of the society may be jeopardized. There are some disputes that cannot be subject of arbitration but can only be settled through litigation. The doctrine of arbitrability which is a limitation to party autonomy is not a tyrannous phenomenon that is meant to wage war on the liberty of the party, to determine the incidence of arbitration parties, but a safeguard to the concept of arbitration which ensures that unscrupulous disputants in a bid to circumvent the course of justice do not use arbitration as an aid. It is also to ensure that arbitration is not abused or used as an instrument of fraud or illegality thereby preserving the sanctity of the process. The effect is that for the purpose of public safety, stability and security, the liberty of parties to arbitrate is not sacrosanct, hence, certain disputes cannot be submitted to arbitration. This paper examines the meaning of the doctrines and its philosophical basis. It examines certain circumstances in which arbitrability explicates itself and further analyzes the importance of the doctrine of arbitrability to arbitration.

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1.0 Introduction

Dispute is an inevitable occurrence in human relations. Traditionally, man devised litigation as a means of settling dispute and has used it over the years. In modern societies, the courts are regarded as traditional *forum conveniens* for resolving disputes.¹ Owing to certain inadequacies associated with litigation, formality of court proceedings and procedures, technicalities and inability to foster relationship through a win-win outcome, lack of confidentiality, time consuming, relative expensive nature, and so on and so forth, there has been a search for an appropriate or complimentary dispute resolution option(s). This search has led to the emergence of formal recognition of Alternative Dispute Resolution (ADR)² which is a non-adversarial way of resolving disputes that is being increasingly used in the public and private sectors, especially in developed countries and is about solving problems rather than imposing solutions through litigation. The hallmark of arbitration is the liberty of disputants to determine the procedure and process of the proceedings with regards to the scope of the dispute, the number and qualification of the arbitrator(s), seat of arbitration, the governing law (also known as *lex arbitri*), the possible duration of the arbitration, mode of remuneration of the arbitrator and other matters incidental thereto. Accordingly, there has been a marked growth in the preference for alternative dispute resolution (ADR) procedures rather than the more precise, costly and lethargic method of the courts. The principal advantages in such extra-judicial procedures lie not only in relieving the burden on the judicial system, but also increasing possible choices for the parties to a dispute. However, the truth of the matter is that the potential advantages claimed for these ADR mechanisms, in particular arbitration over litigation in Nigeria (as a more expeditious and cost effective method of dispute resolution) are often not achieved in practice.³

¹ Silungwe, A, "Alternative Dispute Resolution", A paper presented at the 9th Commonwealth Law Conference, Auckland, 1990, p.205.

² Abimbola, A.O, "Prospects in Arbitration: An Overview". *Diverse Issues in Nigerian Law, Essays in Honour of Hon. Justice Ojunola Akintunde Boade*: Olatunbosun, I.A., and Laoye, L, (Eds), Ibadan, Zenith Publishers, 2013), p.27.

³ Akpata, E. *The Nigerian Arbitration Law in Focus*, West African Books Publishing Ltd, 1997, p.11; Akanbi, .M.M. *Domestic Commercial Arbitration in Nigeria: Problems and Challenges*. LAP Lambert Academic Publishing, Germany, 2012, p.32; Oyekunle, Tinuade, *New Options in Dispute Management*, (1991) 4 (15) GRBPL 104.

Arbitrability, on the other hand, is to the effect that, though parties to arbitration are at liberty to decide the process and procedure of the arbitration, this liberty is not absolute, sacrosanct or untrammelled. If parties were free to submit every dispute to arbitration, the safety and progress of the society may be jeopardized. There are some disputes that by their nature cannot be the subject of arbitration but can only be settled through traditional litigation. This doctrine of arbitrability which is a limitation to party autonomy is not a tyrannous phenomenon that is meant to do war with the liberty of the parties to determine the incidence of arbitration but a safeguard to the estate of arbitration which ensures that unscrupulous disputants in a bid to circumvent the course of justice do not use arbitration as an aid. It ensures that arbitration is not abused or used as an engine of fraud or illegality thereby preserving the sanctity of the process.

1.1 Alternative Dispute Resolution and Arbitration

Arbitration may be defined as the reference of dispute or the difference between not less than two parties for determination after hearing both parties in a judicial manner by a person or persons other than a court of competent jurisdiction.⁴ It is the voluntary submission of a dispute between two or more persons to a neutral, independent and impartial third party, who must decide in a judicial manner.

The acronym “ADR” means Alternative Dispute Resolution, which is a group of flexible approaches to resolving disputes more quickly and at a lower cost than going through the tedious road of adversarial proceedings before formal courts. It is a term which has been associated with a variety of specific dispute resolution options such as negotiation, mediation, conciliation, case evaluation, and a lot of other hybrid mechanisms.⁵ Alternative Dispute

⁴ See *MISR Nigeria Ltd v. Oyedele* (1996) NCLR p.191 at 194.

⁵ Dada T.O. *General Principle of Law*, 3rd Ed., Lagos, (Manure-Joe Production Ent., 2013), p 528. See also Borokini, A.A., “Is ADR the Death of Litigation”, Vol 4, No.2, *Fountain Quarterly Law Journal*, 2006 p. 43-55 particularly at p. 43. “ADR is to supplement the available resources for justice by providing enhanced, more-timely, cost effective and user-friendly access to justice . . . the courts of this country should not be places where the resolution of dispute begins. They should be the place where disputes end after all means of resolving disputes have been considered.”

Arbitrability under the Nigerian Law: Adesina Coker 2019) 7(2) *Alternative Dispute Resolution* Resolution (ADR), as the name implies, are forms of disputes settlement mechanisms which have evolved as a result of business exigencies and the short comings of litigation; coupled with the demands of modern commercial and socio-political agitations such as the need for preservation of relationships at the end of dispute settlement, confidentiality, informality, avoidance of technicalities, desire for expeditious disputes settlement, party autonomy, the need to minimize cost, unwillingness of a disputant to submit himself to the rules and laws of a forum other than his. These mechanisms include but are not limited to the following; Mediation, Negotiation, Mini trial, Early Neutral Evaluation, Mini Judge, Arbitration and Conciliation. Orojo and Ajomo⁶ opines that the term “Alternative Dispute Resolution” (abbreviated as “ADR”) is generally used to describe the methods and procedures used to resolve disputes either as alternatives to traditional dispute resolution mechanism of the court or in some cases as supplementary to such mechanisms.

Arbitration is a private dispute resolution mechanism established for the settlement of disputes by a neutral third party (the Arbitrator) or panel of neutrals referred to as the Arbitral tribunal.⁷ It is a procedure for settlement of disputes under which the parties agree to be bound by the decision of an arbitrator whose decision is in general final and legally binding on both parties⁸. Arbitration is the reference of a dispute or difference between not less

⁶ Orojo, J.O, and Ajomo, M.A, *Law and Practice of Arbitration and Conciliation in Nigeria*, Mbeyi & Associates (Nigeria) Limited, Lagos), 1999, p. 4; See also Akeredolu, E. A, *Mediation: What it is and How it Works*, Carenter Associates, Ibadan), 2011, p. 5.

⁷ The Court of Appeal in the customary arbitration case of Raphael Agu v. Christian Ozurumba Ikwibe [1991] 3 NWLR (Pt. 180) 385 at 417, gave the following definition to arbitration “Arbitration is a reference to decision of one or more persons, either with or without an umpire, of a particular matter in difference between the parties.”

⁸ Idornigie, P.O, and Adewopo, A, “Arbitrating Intellectual Property Disputes: Issues and Perspectives” Vol. 7, No. 1, *The Gravitas Review of Business and Property Law Journal*, (2016) pp. 1-19 at p.1 posits thus “in modern commercial environment, arbitration is no longer a new system of dispute resolution. Arbitration understandably provides a special procedure by agreement, where parties agree to submit their dispute to a neutral arbitral tribunal for a binding decision. While court proceedings are usually held in public, parties in arbitration have chosen a procedure that is private and confidential for determining their commercial disputes... with notably for fundamental features, arbitration continues to complement litigation as a dispute settlement mechanism: it is a private mechanism for dispute resolution; It is

than two parties for determination, after hearing both sides in judicial manner, by a person or persons other than a court of competent jurisdiction.⁹ Arbitration, which may be institutional or ad-hoc is usually the referral of a dispute between at least two parties to a person or group of persons, chosen by them to consider the dispute between them in an adjudicatory manner.¹⁰

There are some basic similarities between arbitration and litigation.¹¹ Thus, the adversarial nature of arbitral awards have raised debate regarding whether arbitration should be classified as an ADR process or not. However, reference to arbitration here should be primarily viewed in the context of an alternative dispute settlement procedure to litigation which gives the parties freedom to

an alternative to national courts; it is selected and controlled by the parties (principle of party autonomy); and is the final and binding determination by an impartial tribunal of party right and obligations. Arbitration is also anchored on three other fundamental principles: principle of separability (the arbitration clause in a contract is separate and independent of the main contract): the competence of the arbitral tribunal to rule on its own jurisdiction (kompetenz-kompetenz); and the principle of judicial non or minimal intervention." See also Borokini, A.A., "Is ADR the Death of Litigation" Vol. 4, No. 2, *Fountain Quarterly Law Journal*, 2006, page 43-55, at p. 44 "This is procedure for the settlement of dispute by which the parties agree to be bound by the decision of an arbitrator whose decision shall be binding on the parties. Arbitration is a product of a contract between the parties", Adejo, L "Arbitration Law and Practice in Settlement of Industrial Dispute", Vol.5. January 2007, *Igbenedion University Law Journal*, pp 193-206 at p.193-194. "Arbitration is a quasi-judicial process in which the parties agree to submit and unresolved dispute to a neutral third party for binding settlement. The parties submit their propositions and arbitrators decides which party is entitled to what type of reliefs". Adenipekun, A., "Arbtration "Vol. 2, *Journal of the law Students 'Society, University of Ibadan*, 2008 p. 11-28 at p.11. "the reference of a dispute or difference between two or more persons for determination by an umpire in a judicial manner..." Nicholas Gould, "The Mediation of Construction Dispute: Recent Research" Vol. 3 No. 2, *The Journal of the Dispute Resolution Section of international Bar Association*, (2009) 185-197 at 185.

⁹ Halsbury's Laws of England, 4th ed., Vol. 2, p. 256, Para. 501. See also Dada, T.O, General Principles of Law, 2nd ed. (Lagos, see also Dada, T.O, *General Principles of Law*, 2nd Ed, Lagos, T.O Dada & Co., 1998) p.342.

¹⁰ Onigbinde, A., and Adesiyani, F., The Practice of Arbitration and Allied Alternative Dispute Resolution Mechanism in Nigeria, being a paper presented at the Christian Lawyers Fellowship of Nigeria, (CLASFON) (DIRECTORATE OF TRIAL AND ADVOCACY) on the 23rd day of May, 2015 at Reiz Continental Hotel, Abuja.

¹¹ Because of its court-like feature, arbitration is seen as the closest ADR to litigation.

Arbitrability under the Nigerian Law: Adesina Coker 2019) 7(2) *Alternative Dispute Resolution* include arbitration clauses in the contract thereby signifying preference for private settlement of disputes over litigation.

In Nigeria, the law regulating “domestic commercial arbitration” is the Arbitration and Conciliation Act (ACA) 2004.¹² This Arbitral law provides for unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation.¹³ Thus, the ACA 2004 is the legal regime that shall be duly considered in this article.

2.0 What is Arbitrability?

Arbitrability¹⁴ is one of the issues where the contractual and jurisdictional nature of international commercial arbitration meet head-on. It involves the

¹² It was first enacted on 14th March 1988. See Cap.A18, LFN 2004; Part 1 of the Act which contains sections 1-36 covers domestic arbitration. Sec 15(1) restrict the operation of Part 1 to the Arbitration Rules set out in the first Schedule to the Act. See also Orojo and Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria*, Mbeyi & Associate, Lagos, 1999) p. 166.

¹³ The 1988 Arbitration Act derives from the following sources: (i) The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (also known as the New York Convention); Nigeria ratified the Convention on 17th March 1970. The Convention constitute the second Schedule to the Arbitration Act; (ii) The UNCITRAL Arbitration Rules-the Rules contained in the first Schedule to the Act which applies to both domestic and international arbitration are by and large *ipsissima verba* of the UNCITRAL Arbitration Rule; (iii) the UNCITRAL MODEL Law- the draft was finalized and adopted at the 18th Session of UNCITRAL in June 1985.

¹⁴ Bajpai, P., “Limitations of Party Autonomy in International Regime of Arbitration, *Law Mantra Journal*, “Online Law Mantra Journal. Available online at <http://www.thecanvascolumn.com/2015/04/party-autonomy-and-its-limitation-in-dispute-resolution/> or <http://journal.lawmantra.co.in/?p=162>. Accessed on 21 February, 2016. Where it was stated that: “Arbitrability means whether an issue is appropriate for subjecting it to be resolved by arbitration or whether it is capable to be resolved by arbitration. However, this is purely a concern for legal domain, therefore it is definitely a limitation on autonomy of the parties. Suppose there is an issue which is not arbitrable then the arbitration agreement will lose its validity and will be void. Certain issues like family and criminal law are subject to national courts and so can’t be subject matter of arbitration even if parties wish to. Therefore, the tribunal will have no jurisdiction over it. Non-arbitrability can be one of the reasons under the *lex-arbitri* for setting aside the award.”

simple question of what type of issues that can be submitted to arbitration.¹⁵ Arbitrability is concerned with whether a particular type of dispute is amenable to settlement by arbitration, or if instead jurisdiction lies exclusively with the domestic court or state organs. These determinations are usually made by reference to domestic statutes.¹⁶ The parties to a dispute, when considering whether its subject matter is arbitrable must ensure the said dispute is arbitrable not only in accordance with the *lex arbitri*¹⁷, but that it also conforms to the laws and public policy of the governing law of the contract and of those states where enforcement of the award will be sought. It should be said that some confusion exists with regard to the precise terminology associated with the concept of arbitrability.¹⁸

Arbitrability determines the point at which the exercise of contractual freedom ends and the public mission of adjudication begins.¹⁹ It helps to preserve the jurisdiction of the national courts to be the sole settler of certain disputes which are considered unsuitable by means other than litigation.²⁰ These

¹⁵Lew, D. M. J., et al, *Comparative International Commercial Arbitration*, New York, Kluwer Law International 2003, P. 187. See also Dursun, G. S., A Critical Examination of the Role of Party Autonomy in International Commercial Arbitration and an Assessment of its Role and Extent. Available online at http://www.yalova.edu.tr/Files/UserFiles?83/8_Dursun.pdf Accessed 20 February, 2016.

¹⁶Bantekas, I., "The Foundation of Arbitrability in International Commercial Arbitration". Available online at <http://www.austlii.edu.au/au/journals/AUYrBkIntLaw/2008/10.pdf> Accessed 20 February, 2016.

¹⁷ Mbam, C., "Resolution of Political Parties Disputes through Arbitration and Alternative Disputes Resolution(ADR)" *Journal of Arbitration*, Vol. 11, NO. 1, April, 2016, p. 228. States that "lex arbitri is a body of rules which sets a standard external to the arbitration agreement, and the wishes of the parties, for the conduct of arbitration."

¹⁸ *Ibid*, note 11 above

¹⁹ Carboneau, J., "Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability" *2 Tul J int'l & Comp L* 193, 1994, p.194.

²⁰ Lew, J. D M., op. cit. note 9 above p.188. "National laws often impose restrictions or limitations on what matters can be referred to and resolved by arbitration. For example, the states or state entities may be allowed to enter into arbitration agreements at all or may require a special authorization to do so. This is 'subjective arbitrability.' More important than the restrictions relating to the parties are limitations based on the subjective matter in issue. This is 'objective arbitrability.'

unarbitrable disputes are usually considered to be of such a sensitive nature that making them amenable to arbitration is capable of compromising the sanctity of the state. This restriction on party autonomy is justified to the extent that arbitrability is a manifestation of national or international public policy. Consequently, arbitration agreements covering those matters will be considered invalid, not established the jurisdiction of the arbitrators and the subsequent award may not be enforceable. Worthy of note is the fact that a challenge on the ground of arbitrability can be presented to the arbitrator and/or tribunal and before the court.²¹ The issue of arbitrability can arise either at the inception of the proceedings, during or at the stage of seeking its recognition and/or enforcement. Section 35 of the Arbitration and Conciliation Act tacitly recognize the principle of arbitrability when it provides that “this Act shall not affect any other law by virtue of which certain disputes may not be submitted to arbitration; or may be submitted to arbitration only in accordance with provisions of that or another law”.

2.1 The Rationale of Arbitrability in Arbitration

If every dispute was allowed to be capable of settlement through arbitration or any other ADR mechanism, the effect of this on the society will be adverse.²² Thus, certain disputes by virtue of their nature should be made incapable of settlement except through the courts of the particular forum. Every state exists first to protect itself from undesirable outcomes based on the actions of its citizens or persons living within its geographical territory or persons having any contact with it. Hence, the need to protect the sanctity and sanity of the forum from harm is the basis for making certain disputes non-arbitrable.²³

Certain disputes may involve such sensitive public policy issues that it is felt that they should only be dealt with by the judicial authority of state courts. An obvious example is criminal law which is generally the domain of the national court. These disputes are not capable of settlement by arbitration.”

²¹ Kenneth, M., *How arbitration Works*, 7 Ed ., Arlington, Bloomberg BNA, 2012 p. 62

²² Mbam, C., “Resolution of Political Parties Disputes through Arbitration and Alternative Disputes Resolution (ADR)”, *Journal of Arbitration*, Vol. 11, NO. 1, April, 2016, p .216

²³ Pamboukis, C., On Arbitrability: The Arbitrator as Problem Solver [Thoughts About the Applicable Law on Arbitrability. Available online at <<http://www.a-law.gr/pdf/Applicable-law-on-arbitrability>>. Accessed on 21 February 2016. “Arbitrability in essence consist in putting limits to the power of the Arbitral Tribunal

The sensitive nature of such disputes arising from causes such as taxation, bankruptcy, criminal law, divorce, etc., and the effects their outcome would have on the forum justifies the reason the government will grant exclusive right of their settlement in national courts.²⁴ Also, the court of the Forum, if allowed to compete with arbitral tribunals in settlement of disputes, would be brought to disrepute and this will open it to mockery and undue rivalry.

2.2 Instances of Arbitrability in Arbitration

The doctrine of arbitrability explicates itself through various means.²⁵ One of the means through which arbitrability explicates itself is through the doctrine of Public Policy.²⁶ It is a general and well-settled opinion relating to man's plain palpable duty to his fellow man, having due regard to all circumstances of each particular relation and situation.²⁷ Public policy or *ordre public international* is the negation of private international law; the triumph of nationalism over internationalism, of policy over uniformity or harmony.²⁸ The doctrine of public policy is to be invoked in clear cases where the harm to the public is substantially incontestable and does not depend on the

but also of the parties as to what subject matter can be arbitrate. In that sense limitation can only arise from the state law tending to protect its own general (social or economic) interest. The may concern either persons -subjective arbitrability- or more properly, matters- objective arbitrability”.

²⁴ Okonkwo v. Okagbue [1991] 9 NWLR (Pt 368) 301; see also Anekwe v. Nweke [2014] 9 NWLR (Pt 1412) 393 at pp 421-422; see also Nzekwu v. Nzekwu [1989] SCNJ p. 167.

²⁵ Shore, L “Defining Arbitrability: The United States v The World” available online at www.gibsondunn.com/publication/documents/shore-definingarbitrability.pdf accessed on 10 Jan 2016

²⁶ Ikhariale, M.A and Obadan, A “Judicial Review of Arbitral Awards: Issues and Prospects” Journal of Arbitration, Vol 1, No.1, April 2016 at p. 190, asserts as follows: “The term Public Policy can be defined as the fundamental legal principles and generally recognized values, which is the foundation of the legal order of a society. The concept of public policy is very open-ended, depending on some socio-cultural notions prevailing in the society and impossible to straight-jacket. It is not possible to classify the element inclusive and exclusiveness of public policy. In England, public policy is interpreted to mean, firstly, anything which does not go against fundamental conception and morality of the English system, secondly, which does not prejudice the interest of the country or its relation with foreign countries and lastly which is not against the English concept of human liberty and freedom of actions.”

²⁷ Henry Campbell Black's Law Dictionary, 6th Ed., West Publishing Co. St. Paul MINN, 1990, p.1231.

²⁸ Kahn [1994] 9 NWLR (Pt. 368) p.301.

Arbitrability under the Nigerian Law: Adesina Coker 2019) 7(2) *Alternative Dispute Resolution* idiosyncratic inferences of a few judicial minds. The Supreme Court of Nigeria in *Okwonko v. Okagbue*²⁹ succinctly stated that;

*the phrase public policy appears to mean the ideal which for the time being prevails in any community as to the conditions necessary to ensure its welfare, so that anything is treated as against public policy if it is generally injurious to the public interest. It is the community common sense and common conscience, extended and applied throughout the state to matters of public morals, health, safety, welfare and the like.*³⁰

It is apposite to state that every country decides which matters are arbitrable depending on its social, moral, economic and political policy. Therefore, there will be no consensus as to what is arbitrable as this would vary from country to country in so far as their public policy varies. In some countries, criminal, divorce, bankruptcy and security issues, as well as the validity of arbitration in issues of patents, trademarks and copyright should not be arbitrable and their validity, are not subject to arbitration but left to the exclusive jurisdiction of national courts. The Supreme Court of Nigeria in **Kano State Urban Development Board v. Fanz Construction Ltd**,³¹ held that

an indictment for an offence of public nature cannot be subject of an arbitration agreement nor disputes arising out of an illegal contract, nor disputes arising under agreement void as being by way of gaming or wagering. Equally, disputes leading a change of statute, such as divorce petition cannot be referred, nor it seems can any agreement purporting to be arbitration the right to give a judgement in rem.

²⁹ [1994] 9 NWLR (Pt. 368) p. 649.

³⁰ Bockstiegel, K "Public Policy as a Limit to Arbitration and its Enforcement", Being a paper presented at 11th International Bar Association, International Arbitration Day and United Nations New York Convention Day, "The New York Convention: 50 Years" in New York on 1st February 2008.

³¹ [1990] 4 NWLR (Pt. 142) p. 1 at 33.

The courts in other jurisdictions with regards to the interpretation of public policy as a limitation to party autonomy have adopted both broad and narrow interpretations. In **Renusagar Power Co Ltd v. General Electric Company**,³² the concept of public policy with respect to foreign arbitral awards was construed in a narrow matter. The Indian Supreme court held that an arbitral award could be considered as being in conflict with public policy of India if it is contrary to (a) fundamental policy of Indian law; or (b) the interest of Indians; or (c) Justice or morality. Also, in **Paper Works International v. Misco**,³³

the United States of America Supreme Court stated that public policy exception can be invoked only when the public policy is explicitly well defined and dominant. To determine if an arbitral award infract the forum public, the court must review existing laws and legal precedents in order to demonstrate that they have established a well-defined and dominant policy.

Furthermore, mandatory rule could expressly render certain disputes incapable of settlement through arbitration. Considering arbitrability, it is argued that “party autonomy to arbitrate contractual disputes traditionally does not extend to the arbitration of claims arising under mandatory national laws.³⁴ Thus, an arbitral award would be set aside if it is a product of a dispute that under the law of the *situs* is declared unarbitrable. Also, a dispute will be unarbitrable if the arbitration agreement is null and void and therefore of no effect whatsoever. The arbitration agreement is the fulcrum as was held by the Supreme Court in the case **M.V. Lupex v. N.O.C. & S Ltd**.³⁵ that

Section 52(2)(a-b) of the Arbitration and Conciliation Act provides that the court, where recognition or enforcement of an award is sought or

³² MANU/SC/0195/1994.

³³ 484 U.S 29 (1987).

³⁴ Mbam, C, “Resolution of Political Parties Disputes Through Arbitration and Alternative Disputes Resolution”, *Journal of Arbitration*, Vol.11, No.1 April 2016, p. 225.

³⁵ [2003] 15 NWLR (Pt.844) 469 at 487; *Celte Nigeria BV v Econet Wireless Ltd & Ors* [2014] LPELR 22430; In the case of *Silo Afric Agricultural & Industrial Co Ltd & Ors v. Ministry of Finance Incorporation & Anor* [2014] 10 NWLR (Pt. 1416) 515 at 535-536.

*where application for refusal of recognition or enforcement thereof is brought, may, irrespective of the country in which the award is made refuse to recognize or enforce an award if it is shown that the arbitration agreement is not valid under the law which the parties have indicated should be applied, or failing such indication, that the arbitration agreement is not valid under the law of the country where the award was made.*³⁶

An arbitration agreement that promotes immoral act, unconscionable or incapable of being performed is capable of being declared null and void and of no effect whatsoever.

Mbadugha argues that an arbitration agreement could be incapable of performance or unenforceable if, for instance, a designated appointing party is non-existent, or is wound up or dead and could no more appoint an arbitrator pursuant to the parties' agreement.³⁷ This proposition has been given judicial approval in the case of **Christian Imoukhuede v. Charles Mekwunye**,³⁸ the arbitration agreement stipulated that:

any conflict and/or disagreement arising out of these present ... shall be referred to a sole arbitrator that will be appointed by the President of the Chartered Institute of Arbitrators-London, Nigeria Chapter....

The respondent challenged the validity of the arbitration clause basing his objection on the ground that there is no Chartered Institute of Arbitrators, London - Nigeria Chapter. The Court of Appeal in setting aside the award held "it follows therefore that since there is in effect no body/organization known as The Chartered Institute of Arbitrators, London Nigerian Chapter then, the clause itself is unenforceable. The third respondent (The Chartered Institute of

³⁶ Article (ii) (3) of the New York Convention, 1958 contain similar provision.

³⁷ Mbadugha, J.N.M, op cit at p.7.

³⁸ Unreported suit CA/L/314M/2012.

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Arbitrators (UK) Nigerian Branch do not therefore possess the power to either recommend and/or appoint the second respondent.³⁹

2.3 Classification of Arbitrability

In formal treatment of the subject, arbitrability is typically divided into subjective and objective arbitrability.⁴⁰ It has been emphasized that, arbitrability ensures that certain disputes are not capable or suitable for settlement through arbitration while party autonomy gives parties the liberty prior to the commencement of the arbitral proceeding to determine its incidence.⁴¹ Whether under an applicable law, a particular entity particularly a state or other public body may be a party for an arbitration agreement and thus whether a dispute to which such entity is a party may be submitted to arbitration is referred by commentators as 'subjective arbitrability' (or arbitrability *ratione personae*). Subjective arbitrability (or *ratione personae*) means

³⁹ The issue of arbitrability may arise through or raised through the following means "(a) normally the issue of arbitrability is invoked by a party at the beginning of the arbitration, before the tribunal, which will have to decide whether it has jurisdiction or not (b) the issue of arbitrability may also be referred by a party to a state court which will be requested to determine whether the arbitration agreement relate to a subject matter which is arbitrable (c) the issue of non-arbitrability can be raised in setting aside proceedings before the state court, usually at the place deciding on the recognition and enforcement of the award".

⁴⁰ Honotiau, B "The Law Applicable to Arbitrability", *Singapore Academic Law Journal*, Vol.26, 2014 p.875. available online at <http://journals.academicpublishing.org.sg/journals/Singapore-academy.of.law.journal.special-issue> last accessed on 17th Feb 2016. Stated thus "arbitrability became probably the most fashionable subject in the field of international arbitration. One may say that actually is corner stone of international arbitration in the sense that it ties up pole of autonomy of the parties and the pole of states mandatory area. In order words it is the area of tension between these two poles representing the general and individual interest. Arbitrability in essence consist in putting limit to the power of the arbitral tribunal but also of the parties to what subject matter can be arbitrable. In that sense, limitation can arise from a state law tending to protect its general (social or economic) interests. They may concern either persons- subjective arbitrability or more properly, matters - objective arbitrability."

⁴¹ It is noteworthy that parties' liberty to decide on how the arbitration should be is more before the arbitration commences at the stage of creation of the arbitration agreement. Once the parties have agreed on arbitration and have started the process, the extent of party autonomy becomes limited especially as provided under the arbitration rules annexed to the ACA.

Arbitrability under the Nigerian Law: Adesina Coker 2019) 7(2) *Alternative Dispute Resolution* that the party willing to be subjected to arbitration agreement (for example, an individual, legal entity, state entity) must be allowed to enter into such agreement, that is, must obtain a special authorization. Thus, in order to make subjective arbitrability come into existence, a person it refers to must be entitled either with individual rights to enter into such legal relationship or, in case of state entity, it must be endowed with legal capacity to enter into arbitration agreement. To put it in opposite terms, subjective non-arbitrability generally relates to deficiencies in contractual capacity and thus, affects the validity of the arbitration agreement.⁴² The issue of subjective arbitrability arises when a state or public entity which has signed an arbitration agreement subsequently wishes to exculpate itself from the agreement.⁴³

Objective arbitrability on the other hand deals with the objects of arbitration under the *lex arbitri*.⁴⁴ Whether under an applicable law, the particular subject matter of a dispute is capable of resolution by arbitration, in the light of relevant public policy consideration or mandatory rules is often referred as “objective arbitrability” or (arbitrability *ratione materiae*).⁴⁵

3.0 Arbitration and the Constitutionality of Section 34 ACA 2004

The juridical nature of arbitration⁴⁶ has been explained as an extension of the judicial process of the state⁴⁷ or a contractual agreement between parties

⁴² <http://www.sccinstitute.com/media/arbitrability-problematic-issues>, last accessed on 21 February 2016

⁴³ Hanotiau, B., “The Law Applicable to Arbitrability” Singapore Academic Journal, 2014, Vol.26. p.876

⁴⁴ Article II(i) New York Convention, 1958 addresses objective arbitrability thus “each contracting state shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.”

⁴⁵ Aksen, G, Global Reflections on International Law, Commerce and Dispute Resolution”, Paris, International Chambers of Commerce Publishing, 2005, p.269.

⁴⁶ See generally, Julian D.M.Lew, Lucas, A. Mistelism, Stepane M.Croll, “Comparative International Commercial Arbitration (Kluwer Law Int., Hague 2003)p.71-98.

⁴⁷Carlson, Kenneth, “Theory of the Arbitration Process” (1952) 17 Law and Contemporary Problem, p.331 at 635.

which the courts recognized and enforced because the state so permits.⁴⁸ In an autonomous arbitral regime where parties opt for a private dispute resolution forum and choose their judges, the court would readily intervene.⁴⁹ In reality, however, arbitration must sometimes necessarily depend on the coercive power of the court for the legitimate expectations of the parties to be met, despite its contractual nature.⁵⁰

Under the old Arbitration Law, 1914,⁵¹ the court frequently intervened in the arbitral process under the guise of judicial control and supervision.⁵² However, under the ACA 2004, the frequent court intervention has been severely curtailed. Following the trend of most modern arbitration laws, the ACA 2004 adopts the policy of “least judicial interference”.⁵³

Specifically, Section 34 of the extant Act provides that “a court shall not intervene in matters governed by this Act except where so provided in this Act.” Asouzu interprets this clause to mean an exclusion of any inherent and statutory powers of the court to intervene in arbitral matters when such intervention is not anchored on ACA 2004.⁵⁴

⁴⁸ Akanbi, M.M, “Examining the Effect of Section 34 of the Arbitration and Conciliation Act of 1988 on the Jurisdiction of Courts in Nigeria”, 2009, NJPL 298; Hohacio, A Grigera Naon, *Soice-of Law, Problems in International Commercial Arbitration* (J.C.B. Mohr, Tubingen 1992) p.15; Amissah, “Judicial Aspect of the Arbitral Process”. Paper presented at the Biennial IFCAI Conference, Geneva, 1997, <http://arbiter.wipo.int/events/conferences/1997/october/amissah.html> accessed last on 16 February 2016.

⁴⁹ *Ogunwale v. Syria Arab Republic* (2002) 19 WRN 194 at p.162

⁵⁰ See Chukwumerije, “Judicial Supersession of Commercial Arbitration: The English Arbitration Act of 1966” (1999) 15(2) *Arb-inter* p.171-173; Hunter, “Judicial Assistance for the Arbitrator” in Lew (Ed) *Contemporary Problems in International Arbitration* (Queenmary College, Centre for Commercial Law Studies, London, (1986) p. 195.

⁵¹ Arbitration (Ordinance) Act, 1914, Cap.13, LFN 1958.

⁵² Akanbi, M.M, “A Critical Assessment of the History and Law of Domestic Arbitration in Nigeria”, in Oluduro (Eds), *Trends in Nigerian Law* (Constellation (Nig.) Pub. Ibadan, 2007) p.475. Also see Section 15 of the Arbitral (Ordinance) Act, Cap.13, LFN, 1958.

⁵³ Asouzu, “The Arbitration and Conciliation Decree (Cap.19) as a Legal Framework for Institutional Arbitration: Strength and Pitfalls”, (1952) 2 *Lawyers’ Biannual* p.1.

⁵⁴ *Ibid.*

To understand the basis of section 34 of ACA 2004, the reason behind the provisions of Article 5 of the UNCITRAL Model Law, from which section 34 was adopted, must first be appreciated. In the report of the UN Commission (1985) on International trade law, it was observed that the intention of the drafters of the Model Law was not *stricto sensu* the exclusion of court intervention. On the contrary, it was to create a situation where the legislature of different countries adopting the Model Law would make clear and certain in their national arbitration laws, all the situations which allow for judicial intervention. This is in order to prevent any recourse to remedies outside the Act based on the general residual power of the court.⁵⁵

3.1 Challenge Procedure under Section 9 of ACA 2004

The constitutionality of section 34 as relating to the challenge procedure under section 9 of ACA 2004 which deals with the procedure for challenging the appointment of arbitrator is hereby examined. As a prelude to section 9, section 8 provides that the appointment of an arbitrator in a domestic arbitration may be challenged if circumstances exist likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence or if the arbitrator lacks the qualification agreed by the parties. When a challenge is made on any of these grounds, the tribunal is empowered to decide on the challenge.⁵⁶ The decision of the tribunal is final and the party challenging the appointment has no choice but to submit to the jurisdiction of the arbitral tribunal. By virtue of the exclusion clause in section 34 and the finality of the arbitrator's decision, the aggrieved party is presented with *fait accompli* because he has no avenue for redress open to him.⁵⁷

⁵⁵ See Paras 62-63 of the UN Commission Report, (1985) on International Trade Law on the work of its 18th Session (1985) Xvi UNCITRAL Yearbook 11; Law Commission of India. <http://lawcommissionofindia.nic.in/arb.pdf> last accessed 28 February 2016.

⁵⁶ Section 9(3).

⁵⁷ He cannot seek relief under arbitration rules contained in Art. 12 of the first Schedule to the Act because the provisions of the Rules vest the decision on the challenge in the court in the first instance contrary to the provisions of the Act and where any of the rules is in conflict with provision of the Act, the provision of the Act prevails; see Art 1 of the first Schedule to the 1988 Act; see also Orojo and Ajomo, Law and Practice of Arbitration and Conciliation in Nigeria, p.137

From the foregoing, the purpose of section 34 is not to strip parties of the constitutional right of access to the courts. It is also not the intendment of the section to lift the jurisdiction of the courts in determination of matters within their jurisdiction but it is to the effect that no application may be made to the courts in any matter where there is an available process in ACA 2004.⁵⁸ Therefore, the provisions of section 34 can only come into play in situations where the Indian Act of 1996 which is similar to section 9(3) of the ACA 2004. Rather than foist a state of hopelessness on an aggrieved party, section 13(5) of the Indian Act allows the party to apply for setting aside the award in accordance with section 34 of the Indian Act.⁵⁹

4.0 Conclusion

The concept of arbitrability determines the point when the exercise of contractual freedom ends and the public mission of adjudication begins. Arbitrability rule preserves the jurisdiction of the courts in certain areas of the law that are deemed to deserve a particularly accurate application of the law. This particularly affects areas of law with public policy implications, where the public interest is deemed to prevail against the freedom of the parties to regulate their own interest. What constitute public policy differs from jurisdiction to jurisdiction depending on the level of social, political and economic development of the states.⁶⁰ The Court of Appeal in **Macaulay v. R.ZB of Austria**⁶¹ described public policy as the principles under which freedom of contract and private dealings is restricted by law for the good of the community. The principal reason standard prescribed by the State and agreements reached in breach of the prescribed national standard shall be null and void and also unenforceable.

The concept of arbitrability curtails the right of parties to refer some disputes to private tribunals on the basis of sensitive public policy considerations or as

⁵⁸ Chukwudi Nwakoby Greg, "The Courts and Arbitral Process in Nigeria", (2004) 4 *Unizik Law Journal* p.20

⁵⁹ Most countries that have adopted the Model Law have careful not to allow Article 5 (section 34 of the 1998 Arbitration Act) work injustice.

⁶⁰ Asouzou, *International Commercial Arbitration and African States: Practice, Participation and Institutional development*, 1996, p.100.

⁶¹ (1996) 4 NWLR (Pt.600) p.611.

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a result of the desire by a country to prefer a standard and uniform method of settlement for some types of disputes, which cannot be compromised, lowered or altered by agreement of the parties. The concept of absolute party autonomy therefore becomes a fallacy in the face of public policy consideration. It is thus only realistic and necessary that the resolution of such kinds of disputes is done in the national courts or other appropriate tribunals to the exclusion of the arbitration forum.

ICSID Ad hoc Committee Resets the Test for Annulment of Arbitral Awards: RMS Production Corporation v Saint Lucia

By: *Wilfred A. Mutubwa**

ICSID Case No. ARB/12/10 (Annulment proceedings)

1.0 Background

In its decision published on April 29, 2019, the ICSID ad hoc Committee (Prof. Donald M. McRae (Presidents), Prof. Andreas Bucher and Mr Alexis Mourre) determined an application seeking the annulment of an Award made by RSM Production Corporation (RSM) (a company organised and licenced in Texas, USA) against the state of Saint Lucia. The annulment proceedings related to the Award by a tribunal that had dismissed the case with prejudice and the disqualification decision issued by the majority of the Tribunal with respect of Dr. Gavan Griffith, Arbitrator.¹

2.0 The Underlying Dispute

The dispute related to the implementation of an agreement concluded by the parties on Mach, 29, 2000.

This Respondent granted RSM an exclusive oil exploration licence in an area off the coast of St. Lucia. A Boundary dispute developed, affecting the exploration area, in particular in relation to Martinique, Barbados and St. Vincent, which allegedly prevented RSM from initiating exploration. RSM argued that the Agreement has expired or, at least, was not enforceable due to force majeure.

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¹ <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/12/10>

The ICSID reconceived a request for arbitration from RSM against St. Lucia as March 30, 2012. On August 6 2013 a tribunal composed of Prof. Siegfried H Elsing, appointed by RSM; and Dr. Gavan Griffith Qc, appointed by St Lucia, was constituted.

On September 6, 2013, St Lucia filed a request for provisional measures seeking (1) a provisional measure requiring RSM to post security for costs in the form of an irrevocable bank guarantee for USD 759,000 pursuant to Article 47 of the ICSID Convention Arbitration Rule 39; and (2) an order requiring RSM to pay all costs advances during the pendency of the arbitration, pursuant to ICSID Administrative and Financial Regulation 14 (3) (d) and Arbitration Rule 28(1) (a).

On December 12, 2013, the tribunal issued a Decision on St Lucia's Request for provisional measures whereby it ordered RSM to pay all costs advances pursuant to ICSID Administrative and Financial Regulation 14 (3) (d) and Arbitration Rule 28 (1) (a) and adjourned St Lucia's request for an order requiring RSM to post Security for costs for USD 750,000.

In its counter-memorial on the merits, St Lucia reiterated its request for an order obliging RSM to post security for costs in addition to its request to order that RSM bear all outstanding advances, that was dealt with in the tribunal's decision of December 12, 2103. On August 13, 2014, the tribunal issued its security for costs decision, together with Dr. Griffith's assenting reasons. On September 10, 2014, RSM submitted a proposal for the disqualification of Dr Gavan Griffith. On October 23, 2014, Prof Elsing and Judge Nottingham issued their decisions on RSM's proposal for the disqualification of Dr Griffith in which they declined RSM's proposal. On December 15, 2014, RSM informed the tribunal that it would be unable to provide a bank guarantee or place the amount ordered amount in an escrow.

On December 24, 2014, St. Lucia filed a request for the discontinuation of proceedings to which RSM objected on January 5th 2015. On April 15 2015, the tribunal issued a decision on St. Lucia's request for suspension on

discontinuation of proceedings (the vacatur decision) with assenting reasons from Judge Nottingham. In its Vacatur decisions, the tribunal directed, that:

“

- (i) *The deadline for Respondent's Rejoinder and the hearing dates are vacated and, subjected to (ii) below, the procedural directions, of hearing are stayed until further order.*
- (ii) *The Vacatur will be lifted if the Claimant (RSM) within six months as of date of this decisions [i.e by October 8, 2015] provides security for costs in the amount of USD 750,000, as directed by the Security for costs decisions as modified on August 20, 2014.*
- (iii) *In default of (ii) the Respondent is granted leave to apply to the tribunal for a Final Award for dismissal, with costs or such orders as it may be advised.*
- (iv) *All other procedural request are dismissed.*
- (v) *The decision regarding the costs of Respondent's application remained reserved until a later stage in these proceedings.”*

On October 13, 2015 the secretariat on behalf of the tribunal informed the parties that the vacatur period as ordered in the vacatur decision expired on October 8, 2015 and that the tribunal had noted that RSM did not provide for the security for costs as referred to under (ii) of the vacatur decision. The tribunal rendered its Award along with an assenting opinion of Dr Griffith. The tribunal directed as follows:

- (i) All Claimant [RSM]'s prayers for relief are dismissed.
- (ii) Costs of the proceedings are fixed at USD.615, 670.25. Claimant [RSM] is ordered to bear all costs of the proceedings.
- (iii) Claimant [RSM] is ordered to reimburse Respondent's legal and other costs in amount of USD 291,152.76 plus interest at the rate of 3 moths LIBOR plus 4% per annum from the notification of the Award until full and final payment.
- (iv) All further prayers for relief submitted by the parties are dismissed.

RSM sought annulment of the Award on the following three grounds:

1. The tribunal was not properly constituted because Dr Griffith allegedly did not possess the required impartiality;
2. The tribunal manifestly exceeded its powers because it (i) improperly ordered RSM to post security of costs before any hearing on the merits while the ICSID Convention does not provide for such; (ii) vacated the proceedings when there are no provisions to this effect in the ICSID Convention; and (iii) dismissed the case due to RSM's failure to post the security while it had no such authority under the ICSID Convention; and
3. The tribunal departed from the fundamental rules of procedure because Dr Griffith did not possess the required impartiality and participated in all the stages of the decision making

3.0 Ad hoc Committee's Analysis and Conclusions

While the ad hoc committee agreed with the Respondent that facts not advanced before the arbitral tribunal cannot be raised at the annulment stage, the committee, however qualified this general rule by adding that arguments raised that relate to the annulment proceedings need not have been raised in the original arbitration. In essence that an applicant in annulment proceedings is not inhibited from raising arguments relating to the interpretation or application of Article 52 of the ICSID convention (which sets out the criteria for annulment) that best support its position.

In seeking the annulment of the Final Award, the Applicant advanced, *inter alia*, that the arbitral tribunal fell short of the requisite standard of impartiality. The applicant premised its argument on account of the decision made on its unsuccessful challenge against one of the arbitrators, Dr Griffiths.

In accordance with Article 58 of the ICSID Convention; it is the unchallenged members of a tribunal who decide on a challenge to an arbitrator. The tribunal underscored that decision of the unchallenged members of a tribunal on a challenge of their co-arbitrator is not a decision of the tribunal, and as such is not amenable to the annulment proceedings under Article 53 of the ICSID convention, which is only available against decisions of the arbitral tribunal.

The Committee resolved that an ad hoc committees constituted for purposes of entertaining an annulment application is bereft of the jurisdiction to reverse the decision challenging an arbitrator, even if the same is incorporated in the final award.

In essence the ad hoc committee opined that the unchallenged members exercise a special jurisdiction which is not necessarily in their capacity as the tribunal. However, the committee observed, that does not preclude a committee from taking into account a challenge decision when deciding whether the terms of Article 53(1) (a) have been met and a tribunal has been properly constituted.

The committee also grappled with the question as to the standard of review to apply when considering a challenge decision. The Committee acknowledged that previous ad hoc committees have differed on this question. For example the *Azurix v Argentina* set the test as whether the unchallenged arbitrator had failed to comply properly with the procedures for challenging members of the tribunal. The *EDF v Argentina* ad hoc committee set the standard as whether the unchallenged arbitrator's decision so plainly unreasonable that no reasonable decision maker could have come to such a decision.

The Applicant had taken issue with Dr Griffith's impartiality on account of his views expressed in his assenting decision on security for Costs. In that opinion Dr. Griffiths had referred to third party funders as "mercantile adventures" and likened third party funding with "gambling". The Applicant saw these references as being "negative and radical in tone" and hence "negative and extreme, and suggested bias." The committee, though acknowledging that the language used by Dr Griffith was "evocative" it was emphasising a point rather than bias.

Although the ad hoc committee dismissed the application for annulment, a crucial point on third party funding and its possible effect on the tribunal's prejudices was exposed by this case. Debate is still ongoing on whether there should be disclosure of third party funding of parties to arbitral tribunals.

This is essentially driven by the need to pressure the integrity of the arbitral process and to eliminate or reduce any possibilities of conflict of interest. Some institutional arbitration rules such as the LCIA have moved towards this end to amend their rules to require this disclosure.

4.0 With prejudice dismissal of claim

Chapter II of the Arbitral Award under challenge was headed “Dismissal without prejudice” and at paragraph 108 of the Award the award reads: the Tribunal unanimously dismissed the case with prejudice”. The same is restated in paragraph 138. The formal decision of the tribunal, in its disposing, which is normally taken as the only part of the award that is binding the tribunal expenses itself thus: “all claimant’s prays for relief are dismissed”. There is no mention of the dismissal with prejudice in the operative part of the award.

The committee held that the decision to discontinue the proceedings for failure to provide security for costs is a procedural matter, and falls within the power of a tribunal under Article 44. The Tribunal held, further, that a decision to dismiss a claim with prejudice precludes the claim from being reintroduced at a later stage, even though no decision on the substance of the issues claimed has been made. Consequently, dismissing a claim with prejudice is the same as concluding that the claim has no merit and it can therefore not just be a matter of procedure but a substantive one.

Even where there were genuine concerns over the ability of a successful applicant for security for costs being able to recover its costs, in the event that it was successful the committee’s conclusion was that an arbitral tribunal does not possess the power to dismiss the case with prejudice. This is primarily because it is not just a procedural matter affecting the case but it is a substantive matter affecting the merits of the case and the Applicant RSM’s right to pursue its claims.

The ad hoc committee partially set aside the arbitral tribunal’s Award to the extent that it dismissed RSM’s prayers for relief with prejudice.

5.0 Conclusions

The ad hoc committee in this case set out to underscore and settle the following principles of the ICSID annulment and Review mechanisms:

1. That when co Arbitrators sit to determine a challenge on a co Arbitrator, they assume a sui generis jurisdiction conferred by the Convention that is quite apart from their constitution as the original arbitral tribunal.
2. As such, the decision of the co arbitrators in an application challenging of their colleague does not fall within the definition of a final award against which annulment proceedings could be brought. In essence, the jurisdiction of an ICSID annulment committee can only be invoked on a final award of an original arbitral tribunal.
3. The committee attempted to settle the divergent approaches on critical principles that attend the Annulment proceedings. While this will go a long way in bringing some certainty and consistency in this sometimes grey area, the secondary or persuasive quality of precedent in international arbitration remains a hindrance.

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