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ALTERNATIVE DISPUTE RESOLUTION JOURNAL

Volume 2 **Number 1** **2022** **ISBN No. 978-9914-40-777-8**

Nairobi Centre
for International
Arbitration

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Alternative Dispute Resolution Journal by the Nairobi Centre for International Arbitration (NCIA)

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Ngara
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Email: info@text40.co.ke
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Published by;
Nairobi Centre for International Arbitration
Co-Operative Bank House-8th Floor
Haile Selassie Avenue
P.o Box 548-00200,
Nairobi, Kenya
Tel +254 771 293055
Email: info@ncia.or.ke
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EDITORIAL TEAM

This journal should be cited as (2022) 2 (1) NCIA ADR Journal

EDITOR'S NOTE

We invite readership of the Alternative Dispute Resolution Journal Vol. 2 No. 1 2022, a publication of the Nairobi Centre for International Arbitration (NCIA).

The NCIA journal provides a platform for scholarly dialogue on important issues across the whole sphere of Alternative Dispute Resolution (ADR) mechanisms including Arbitration, Mediation, Construction Adjudication and Negotiation.

This journal offers perspectives from distinguished authors on various ADR mechanisms together with some of the key concerns, challenges and opportunities for ADR. The Journal is an invaluable resource for scholars, ADR practitioners and academics seeking information on ADR.

The journal is peer reviewed and adheres to the highest quality of scholarly standards and credibility of information. The Editorial Board welcomes feedback from our readers across the globe to improve our publication.

Nairobi Centre for International Arbitration (NCIA) takes this opportunity to thank the contributing authors, Editorial Board, reviewers, scholars and the NCIA Board of Directors who have made it possible to publish this Journal.

Lorna Kerubo
Editor
November 2022

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Arbitrability of Fraud in Kenya

By Francis Kariuki* and Vianney Sebayiga**

Abstract

Generally, parties can have virtually all disputes between them resolved through arbitration due to the doctrine of party autonomy. However, the state can constrain party autonomy by limiting the kind of disputes that can be arbitrated. Historically, fraud has been deemed non-arbitrable as a matter of public policy as it is seen as a criminal offence. Fraud can arise during the formation and performance of the contract, in the appointment of the arbitral tribunal, and also out of the arbitral award. This paper discusses the arbitrability of fraud in Kenya. It critically examines the legal framework and principles governing arbitration to illustrate that they empower the arbitral tribunal to handle any dispute, including fraud disputes. The authors argue that fraud should be arbitrable because the defrauded party can be compensated with damages occasioned by breach of contract due to fraud. Furthermore, the paper analyses the arbitrability of fraud in India to highlight some lessons for Kenya. Finally, it offers recommendations on how to deal with fraud in arbitration.

1. Introduction

Arbitration is voluntary and is founded on parties' agreement.[1] The consent of parties is expressed through an arbitration agreement which essentially ousts the jurisdiction of courts to decide certain disputes while empowering an arbitral tribunal to resolve those disputes.[2] To be enforceable, the subject matter under an arbitration agreement must be arbitrable.[3] The question of arbitrability concerns whether or not a dispute is capable of settlement by arbitration.[4]

Arbitrability can be subjective or objective in nature.[5] Subjective arbitrability considers whether or not parties have consented to submit specific claims to arbitration.[6] It requires the arbitrator to interpret the scope of the arbitration agreement.[7] Consequently, phrases such as 'in connection with' or 'arising out of the contract' are assessed to ascertain whether a given dispute is within the scope of the arbitration agreement.[8] Subjective arbitrability is provided

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1 Zubeyde Deniz, 'The Impact of Fraud in International Arbitration: A Question of Admissibility, Jurisdiction or Merits?' (LLM diss., Ghent University 2019) pg.14.
2 Simon Greenberg, Christopher Kee, and Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press 2011) pg.144.
3 Margaret Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, 3rd edn 2017) pg.35.
4 Greenberg (n 2) pg.182.
5 Peter Muriithi, 'Demystifying Arbitrability of Disputes in Kenya' (2017) 5(2) *Alternative Dispute Resolution*, pg.167.
6 Emmanuel Gaillard and John Savage, *Fouchard Gaillard & Godman on International Commercial Arbitration*, (Kluwer Law International, 1999) pg.312.
7 Greenberg (n 2) pg.182.
8 id.

for under the New York Convention which provides for the scope of the arbitration agreement.[9] It follows that an argument that a particular claim is not subjectively arbitrable would fall under the ground of excess of jurisdiction.[10]

On the other hand, objective arbitrability is concerned with whether or not the law permits the resolution of certain disputes through arbitration.[11] Where the law prohibits the determination of a particular kind of dispute through arbitration, the parties' consent to arbitrate is irrelevant.[12] As a result, the arbitration agreement becomes null and void, thus impairing the tribunal's jurisdiction to hear and determine the dispute.[13] Similarly, during the enforcement of an arbitral award, a party seeking enforcement in a particular country must ensure that the subject matter is arbitrable under that country's laws.[14] Be that as it may, the New York Convention has no definition of arbitrability, leaving it up to individual states to determine which subject matter is non-arbitrable.[15]

Fraud is regarded as a deliberate misrepresentation of the truth or a concealment of a material fact in order to induce someone to act to his or her detriment.[16] In contrast to negligence, fraud is always positive and intentional.[17] It can arise at any stage during the formation of the contract or its execution.[18] During the formation stage, claims of fraudulent inducement of a material fact may arise. In such cases, the contract is voidable and will rarely affect the arbitration clause.[19] Alternatively, allegations of fraud may arise when one of the disputants asserts that they never agreed to anything in the document or that their signature was forged.[20] Such an allegation may also have an effect on the arbitration, as it is incorporated in the main contract.[21] Similarly, if a party claims that the person who purportedly signed the contract on their behalf lacks the authority to conduct any business for them, such allegation is an attack on both the original contract and the arbitration clause.[22] Furthermore, allegations of fraud may be raised during the performance of a contract that has an arbitration clause.[23] Lastly, a party may allege fraud in the conduct of the proceedings, which may serve as a basis for contesting or resisting the enforcement of an award.[24]

This paper seeks to analyse whether fraud as a subject matter is arbitrable. It is divided into six parts. Part I is this brief introduction on arbitrability and fraud. Part II critically examines the international and domestic legal framework governing the arbitrability of fraud. Part III analyses the internationally recognised arbitration principles governing the arbitrability of fraud to emphasize that they support the resolution of fraud disputes through arbitration. Part IV explores the arbitrability of fraud in Kenyan courts. Part V discusses the Indian experience on the arbitrability of fraud, highlighting the similarities and differences. Part VI makes recommendations while Part VII concludes the paper.

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9 Article V (1)(C), *the United Nations Convention on the Recognition and Enforcement of Foreign Awards*, 10 June 1958, UNTS 330 entered into force 7 June 1959.
10 Greenberg (n 2) pg.461.
11 Toni Deskosk Toni and Vangel Dekovski, 'Notes on Arbitrability – Focus on Objective Arbitrability' (2018) 9(1*) Iustinianus Primus Law Review*,pg.5.
12 Greenberg (n 2) pg.186.
13 Deniz (n 1) pg.34.
14 Greenberg (n 2) pg.461.
15 Pascal Hollander, 'Report on the Concept of Arbitrability under the New York Convention' (2017) 11(1) Dispute *Resolution International*, pg.48.
16 https://www.lexisnexis.com/uk/lexispsl/disputeresolution/document/393747/5T7S-MTD1-F18B-723H-00000-00/Civil_fraud_overview (visited 8 March 2022). See also Black's Law Dictionary (11th edn 2019)
17 Black's Law Dictionary (11th edn 2019).
18 Deniz (n 1).
19 id pg.21.
20 Abdul Razaq Adelodun and Ibrahim Kayode Adam, 'Competence-Competence Under the Nigerian Arbitral Law: A Curse or Blessing' [2017] *Yonsei Law Journal*, pg.44.
21 id.
22 id pg.45.
23 Parul Kumar, 'Is Fraud Arbitrable: Examining the Problematic Indian Discourse' (2017) 33(2) Arbitration International, pg.249.
24 id.

2. The Legal Framework Governing the Arbitrability of fraud in Kenya

a) The New York Convention and fraud

The New York Convention allows states to limit their obligations to differences arising out of legal relationships they deem arbitrable.[25] One of such obligations is a general obligation on contracting states to enforce arbitration agreements where the disputes can be lawfully settled through arbitration.[26] Incidentally, these provisions mean that when it comes to fraud disputes, states can choose whether such disputes are arbitrable or not.

In addition, the Convention obligates contracting state courts to refer parties to arbitration unless they find the agreement to be null and void, inoperative, or incapable of being performed.[27] During stay proceedings, the objection must be raised by a party who is contesting the validity of the arbitration agreement.[28] That notwithstanding, an arbitration agreement may be declared null and void if actual consent was obtained through fraud, duress, or misrepresentation.[29] Besides, the Convention spells out the grounds for refusing to recognise and enforce arbitral awards such as non-arbitrability, incapacity, fairness, equal opportunities to present the case, and lack of jurisdiction.[30] Kenya ratified the New York Convention in 1989 and is therefore obligated Kenya to uphold the Convention's obligations highlighted above.

b) The United Nations Commission on Trade Law (UNCITRAL) Model Law and fraud

The Model Law's stated objectives are to liberalize international arbitration by emphasizing party autonomy and allowing parties to choose how their disputes will be resolved.[31] It also seeks to limit judicial intervention in arbitration.[32] In 1995, Kenya adopted the Model law, incorporating it into its 1995 Arbitration Act as amended in 2009.[33] To further demonstrate this inspiration, the Kenyan Arbitration Act contains numerous provisions that are *pari materia* with those of the Model Law.[34]

Similar to the New York Convention, the Model Law requires courts to refer parties to arbitration unless they find that the arbitration agreement is null and void, inoperative, or incapable of being performed.[35] An arbitration agreement becomes *void abinitio* if the subject atter is non-arbitrable. Be that as it may, the Model Law makes no distinction between the types of disputes that can be resolved through arbitration and those that cannot. Fraud on the part of the arbitrator is a ground for annulling an award under the Model Law.[36] Although the

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25 Domenico di Pietro, 'General Remarks on Arbitrability under the New York Convention' in Loukas Mistelis and Stavras Brekuoulakis (eds), *International and Comparative Perspectives* (International Arbitration Law,2019) pg.88 and Article I(3), New York Convention.
26 Article II, New York Convention.
27 Id Article II(3).
28 Id Article II. See also Marike Paulsson, *The 1958 New York Convention in Action* (Wolters Kluwer 2016) pg.64.
29 Moses (n 2) 36.
30 Article V, New York Convention.
31 Sujoy Chaterjee, 'Judicial Import of the Model Law: How far is too far' (2015) 4(1) *Indian Journal of Arbitration Law*, 20.
32 Greenberg (n 2) 16.
33 Evelyn Mbula, 'Critical Analysis of Section 6 of Kenya's Arbitration Act: A Case for Reform' (2018) 6(1) *Alternative Dispute Resolution*, pg.70.
34 Njoroge Rogeru, 'Recognition and Enforcement of Arbitral Awards' in Githu Muigai (ed), *Arbitration Law and Practice in Kenya* (Law Africa 2011) pg.124.
35 Article 8, *UNCITRAL Model Law on International Commercial Arbitration*, (United Nations Document A/40/17, Annex 17), as adopted by the United Nations Commission on trade and law on June 21, 1985
36 Id Article 34(2).

Model Law does not expressly mention fraud, its drafting history indicates that it was intended to allow fraud as a ground for annulment under the heading of public policy.[37]

c) The Constitution of Kenya 2010 and fraud

In exercising judicial authority, courts and tribunals must be guided by *inter alia* alternative forms of dispute resolution including negotiation, mediation, reconciliation, and arbitration, and traditional dispute resolution mechanisms.[38] The High Court in *Goodison Sixty-One School v Symbion Kenya Limited* opined that the said provision is an obligation that must be enforced by the courts. It also observed that promoting arbitration requires supporting and upholding its tenets such as party autonomy, limited court intervention, and finality of the arbitral award.[39] The Constitution of Kenya 2010 also provides that a national legislation shall be enacted to provide procedures for settling governmental disputes between the county and national government, and between or among counties through alternative dispute resolution mechanisms including negotiation, mediation, and arbitration.[40] The implication of the above constitutional provisions is that there is no limit on the scope of what is arbitrable or not. Additionally, it means that all disputes including fraud are arbitrable.[41] Moreover, the fact that governmental disputes which essentially raise sensitive issues of national interest can be settled by arbitration means that the arbitrability of fraud cannot be rejected on grounds of public policy only.[42] Therefore, fraud is arbitrable in Kenya because of the widened scope of arbitrability under the 2010 Constitution. Consequently, there is no limit of arbitrability in the sense of objective or subjective arbitrability.[43]

3. The Principles Governing the Arbitrability of Fraud in Kenya

a) Stay of legal proceedings and arbitrability of fraud

The stay of proceedings is an enforcement mechanism available to a party seeking to compel the initiator of legal proceedings to refer the dispute to arbitration in accordance with an arbitration agreement.[44] According to the Kenyan Arbitration Act, before granting a stay of proceedings, the court must satisfy itself that a valid arbitration agreement exists, and that the dispute falls within the scope of the arbitration agreement.[45] In its inquiry, the court must determine whether the parties have a dispute and, if so, whether the dispute concerns matters agreed to be arbitrated.[46] During stay proceedings, questions can arise as to whether fraud issues are part of the matters agreed by the parties to be settled through arbitration. Therefore, the court may have to determine whether fraud is arbitrable or not.

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37 Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 3rd edn 2021) pg. 394. See also *Euro Gas Turbines SA v Westman International Limited XXX. B Comm. Arb 198(1995)* where the Paris Court of Appeal held that the use of fraudulent documents is a ground for annulling an award as contrary to international public policy.

38 Article 159(2)(c), *Constitution of Kenya* (2010).

39 (2017)eKLR, para 29. See also *World Vision International v Synthesis Limited & another* (2019)eKLR, para 30.

40 Article 189(4), *Constitution of Kenya* (2010).

41 Francis Kariuki, 'Redefining "Arbitrability": Assessment of Articles 159 and 189(A) of the Constitution (2013) 1(1) Alternative Dispute Resolution, pg.178

42 Id.

43 Id pg.184. Under Article 2, the Constitution declares its supremacy and that any law that is inconsistent with it is void to the extent of the inconsistency.

44 *UAP Provincial Insurance Co. Ltd v Michael John Beckett* (2013) eKLR.

45 Section 6(1), *Arbitration Act Kenya* (1995).

46 UAP Case (n 44) para 16.

When determining whether a dispute exists, the court has authority to evaluate the merits or demerits of the dispute.[47] In its evaluation, the phrase *'that there is not in fact any dispute between the parties'* in the Kenyan Arbitration Act requires courts to consider whether a genuine dispute exists.[48] A "genuine dispute" is one where there is an arguable defence.[49] Consequently, where a claim is indisputable by the parties, the court will not refer the parties to arbitration as there is no dispute. Instead, the court can give a summary judgement for that amount and refer the remaining claims to arbitration if any.[50]

b) The Doctrine of Separability and arbitrability of fraud

Under the doctrine of separability, allegations that the parties' underlying contract was fraudulently induced do not affect the validity of the arbitration clause.[51] If the arbitration agreement was not separate, then the termination of the underlying contract would not only bring an end to the obligations under the contract, but also the right to arbitrate.[52] This would frustrate the agreement of the parties that all disputes that arise ought to be resolved by arbitration.[53] The separability doctrine is provided for under the Model Law and the Kenyan Arbitration Act.[54]

From the foregoing, to have the arbitration clause voided, it must be directly impeached.[55] As a result, only fraud directed at the arbitration agreement will invalidate it.[56] In practice, it is possible that the grounds for such a claim may also apply to the main contract.[57] For instance, where the arbitral clause is contained in the main contract as seen in the *Fiona Trust & Holding Corp v Privalov* where the court observed as follows:-

> *"If the main agreement and the arbitration agreement are contained in the same document and one of the parties claims that they never agreed to anything in the document and that their signature was forged, that will be an attack on the validity of the arbitration agreement. But the ground of attack is not that the main agreement was invalid. It is that the signature to the arbitration agreement, as a 'distinct agreement,' was forged".*[58]

The courts in the *United States of America* (USA) have also affirmed the doctrine of separability. In *Prima Paint Corp v Conklin Mfg Co*, the USA Supreme Court held that unless the fraud is directed against the arbitration clause, a claim that the contract was induced by fraud will not affect the validity of the arbitration clause.[59]

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47 Id para 18.
48 Id para 24.
49 *Halki Shipping Corporation v Sopex Oils Limited* (1997) Adj.L.R 12/19.
50 *Addock Ingram East Africa v Surgilinks Limited* (2012) eKLR. The rationale for this was stated in *Eunice Soko Mlagui v Suresh Parmar & 4 Others* (2014)eKLR where the Court observed that in light of another critical constitutional principle - justice shall not be delayed , a court of law must ascertain whether there is a genuine dispute before referring it to arbitration. See also *Nanchana Foreign Engineering Company (K) Ltd v Easy Properties (K) Ltd* (2014) eKLR.
51 Born (n 37) pg.92.
52 Deniz (n 1) pg.16.
53 Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes* (Oxford University Press 2005) pg.125.
54 Article 16(1), *Model Law and Section* 17(1)(a), *Arbitration Act of Kenya*.
55 *Kenya Anti-Corruption Commission v Nedermar Technology BV Limited* (2017)eKLR.
56 Born (n 37).
57 Deniz (n 1) pg.27.
58 *Fiona Trust & Holding Corp v Privalov* (2007) UKHL para 17.
59 US 395 (US.S.Ct 1967).The Supreme Court however observed that parties can choose that the agreement is not separable from the actual contract.

c) The Doctrine of Competence-Competence and Arbitrability of fraud

The doctrine of competence-competence refers to the authority of the arbitral tribunal to determine its own jurisdiction, including any objections to the arbitration agreement's existence or validity.[60] Arbitrability challenges the jurisdiction of an arbitral tribunal because it entails the inquiry as to whether or not the tribunal is competent to hear the claim before it or not.[61] The jurisdiction of an arbitral tribunal emanates from the arbitration agreement.[62]

In view of the above, the wording of an arbitration agreement becomes critical in determining whether or not the tribunal has jurisdiction over certain claims.[63] For example, the term '*arising out of the contract*' has been broadly interpreted to include claims for negligent and fraudulent misrepresentation.[64] It encompasses all issues that have their origin from the contract whether or not they implicate interpretation of the contract *per se*.[65]

Another frequently used phrase is '*arising under the contract*'. Disputes as to repudiation, frustration, non-disclosure, illegality rendering the contract unenforceable are all disputes arising under the contract.[66] According to the court in *Delos Owners of Cargo v Delos Shipping Limited* such terms encompass both contractual and tortious claims, to the extent that the claim is contingent on the existence of a contract.[67]

In other contracts, phrases such as '*in connection with the contract*' are used and are sufficiently broad to permit claim in tort to be born. They are also broad to cover claims arising during the formation of the contract, for example, misrepresentation and negligent misstatements.[68] Closely related to this, phrases such as '*any dispute that arises*' includes all disputes even those involving fraud and misrepresentation.[69] To interpret such a phrase, a dispute/difference arises where there is a disagreement about a central issue. Even then, there is no requirement to formulate a claim, and the cause of action does not need to be fully constituted.[70]

The Model Law and the Kenyan Arbitration Act stipulate that an arbitral tribunal can rule on a question of its jurisdiction as either a preliminary question or in a final award. The jurisdictional decision of the tribunal as a preliminary question is appealable to a court of law to determine whether the jurisdiction is proper or not. [71] It follows that the doctrine of competence

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60 Vaishnavi Chillakuru, 'The Rule of Competence-Competence: A Comparative Analysis of Indian and English Law' (2013) 6(1) *Willamette Journal of International Law and Dispute Resolution*, pg.135.

61 Daniel Girsberger and Nathalie Voser, *International Arbitration: Comparative, and Swiss Perspectives* (Kluwer Law International, 3rd Edn 2016).

62 Tweeddale (n 53) pg.34.

63 Id.

64 *Capital Trust Investment Limited v Radio Design AB* (2002) EWCA Civil 135, para 42. See also the *Premium Nafta Products Limited v Fili Shipping Company Limited* [2007] UKHL 4, *Euromec International Limited v Shandong Taikai Power Engineering Company Limited* (Civil Case E527 of 2020)[2021] KEHC 93 (KLR), High Court of Kenya

65 Tweeddale (n 53) pg.166.

66 Datuk Professor Sundra Rajoo, *Practice and Procedure of Arbitration* (Lexis Nexis, 2nd Edn 2016) pg.162.

67 [2001] 1 ALL ER Comm 763 Lloyd's Rep 703.

68 Tweeddale (n 53)pg.168.

69 *Shamji v Treasury Registrar Ministry of Finance* (2002) 1 EA 173.

70 Rajoo (n 66) pg.177.

71 Article 16(3) of the Model Law. The separability doctrine is codified under Section 7 of the English Arbitration Act (1996).

-competence would still empower arbitral tribunals to rule on their ability to deal with fraud claims.[72] This is because they do not lose jurisdiction over a matter solely on the basis of allegations of fraud in the pleadings; rather, they have the authority to hear the evidence and determine whether fraud has been established or not.[73] The Court of Appeal held in *Safaricom Limited v Ocean View Beach Hotel*, that a national court has no authority to determine an arbitral tribunal's jurisdiction except on appeal pursuant to Section 17(6) of the Arbitration Act.[74]

4. Arbitrating Fraud in Kenya: Key observations from Kenyan Courts

Recently, there has been an increase in the number of cases in Kenya where fraud is a subject matter for arbitration, and where allegations of fraud in the performance of the contract are claimed. This section keenly observes and discusses principles developed by Kenyan courts when dealing with the arbitrability of fraud.

a) Wide Interpretation of the Scope of Arbitration Agreements

The authors highlight that fraud has risen not only with regard to subject matter but also as to whether or not claims touching on fraud are within the ambit of disputes referred to arbitration under the arbitration agreement. In *Nedermar Technology BV Limited v Kenya Anti-Corruption Commission*, the High Court while interpreting Section 3 of the Arbitration Act, highlighted that the said provision does not exclude disputes related to fraud, bribery, and corruption.[75] Consequently, the court held that under the principle of separability, the arbitral tribunal in the Hague could rule on the effect of fraud and bribery on the arbitration agreement, if proven.[76]

The courts have also offered a broad interpretation of words like "*any dispute arising from or in connection with the agreement*". In *Great Phone Communications Limited & 2 Others v Safaricom*, the claimant argued that the arbitral clause did not contemplate the existence of fraud in the disputes to be referred to arbitration.[77] Additionally, they averred that fraud is not an issue that can be decided upon by an arbitral tribunal, and that it is only a court that can decide. Mabeya J observed as follows:

> *"Any dispute arising from or in connection with the agreement" means that all disputes whatever nature touching upon the agreement were to be referred to arbitration. The clause does not differentiate between disputes arising out of good faith/bad faith or disputes of a fraudulent nature or otherwise. I am unable to agree with the Plaintiffs that the issue of fraud cannot be adjudicated upon through arbitration*".[78]

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72 Simon Bushell, et al, Crime and Arbitration : Bringing Fraud Claims Under an Arbitration Agreement – Does the Arbitral Process Pack Enough Punch? in Christian Klaussegger, et al (eds), Austrain Yearbook on International Law (Verlage Manz 2012) pg.328.

73 *Kenya Pipeline v Datalogix Limited* (2008) 2EA 193. See also *Telkom (K) Limited v Kamconsult Limited* (2001) 2 EA 574.

74 (2010)eKLR.

75 (2006)eKLR, pg.11. See also Section 3 of the Kenyan Arbitration Act defines an arbitration agreement to mean an agreement by the parties to submit to arbitration all disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

76 Id.

77 (2012)eKLR.

78 Id paras 6 –10.

Recently, in *Elige Communications Limited v Safaricom Plc*, the High Court while determining a setting aside application under Section 35 of the Arbitration Act, dealt with the scope of the arbitration agreement.[79] The Plaintiff contended that the finding of the arbitrator that they were engaged in fraudulent activities was beyond the scope of reference to arbitration. To their mind, this was because the matter was pending before the Communications Authority of Kenya.[80] On the other hand, the Defendant denied the Plaintiff's position that the arbitrator was beyond the scope of arbitration agreement. According to them, the Plaintiff's fraudulent conduct was strongly brought out in the Defendant's defence.

One of the issues before the court was whether or not the arbitrator dealt with matters beyond the terms and scope of the reference to arbitration.[81] In addressing this issue, the High Court began by examining the arbitration Clause 32.3 of the Interconnection Agreement pursuant to which the dispute between the parties therein was referred to arbitration. The said Clause 32.3 stipulated in part as follows:

> *"...any dispute or difference between the parties relating to the rights or obligations of the parties under this Agreement shall save as herein specifically otherwise provided (Clause 6.3) be referred to and finally determined by Arbitration in Nairobi."*[82]

After analysing the above clause, the High Court held that it empowered the arbitral tribunal to determine any dispute or difference between the parties except those on billing information and statements.[83] Consequently, the issue of fraud was within the purview and terms of reference of the arbitrator.[84]

b) Fraud must be distinctly pleaded and proved

This rule is a common thread in all the cases determined by Kenyan courts on the arbitrability of fraud.[85] In *Vijay Morjaria v Nansingh Madhusingh Darbar*, the Court of Appeal held that fraud must be specifically pleaded, its particulars must be set out, and should not be inferred from facts.[86] This stringent requirement is attributable to the very serious nature of fraud allegations as they attack the integrity of persons mentioned and constitute criminal offences.[87] Consequently, such allegations must be based and supported by cogent/substantive evidence.[88] Moreover, the standard of proof for fraud is one above a balance of probabilities but below beyond reasonable doubt.[89] Therefore, evidence of high quality and strength is therefore required to discharge the high burden of proof in a case of alleging fraud.[90]

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79 (2021)eKLR
80 Id para 82.
81 Id para 81.
82 Id para 84.
83 Id para 86.
84 Id para 89.
85 See *Central Bank of Kenya Ltd v Trust Bank Limited & 4 Others* (1996)eKRL where the court held that the onus of prima facie proof is much heavier than in ordinary civil case. *Gerrick Kenya Limited v Honda Motorcycle Kenya Limited* (2019)eKLR and the Court of Appeal decision in *Inter-Continental Hotels Corporation v Mukawa Hotels Holdings* (1997)eKLR.
86 (2000)eKLR.
87 *Central Bank of Kenya Limited v Trust Bank Limited* (1996)eKLR
88 *Evangelical Mission for Africa v Kimani Gachuhi* (2015)eKLR. See also *Le Lievre v Gould* (1893) 1QB491 where Lord Esher remarked that *'a charge of fraud is such a terrible thing to bring against man that it cannot be maintained in any court unless it is shown that he had a wicked mind'*.
89 *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* (2015)eKLR.
90 *Hangzhou Agrochemicals Industries Limited v Panda Flowers Limited* (2021)eKLR, para 66.

In addition, the way allegations of fraud are pleaded is important. In *Kenneth Maweu Kasinga v Cytonn High Yield Solutions*, the High Court laid down two aspects of looking at the pleadings to determine whether allegations of fraud are merely sprinkled on the pleadings as a hook to oust the arbitrator's jurisdiction or whether they disclose plausible claims of fraud that warrant the ousting of arbitration on public policy grounds.[91] First, the court considers the relationship between the fraud claims and the prayers in the Plaint. One the one hand, a court is more likely to infer that the fraud claims are pre-textual, strategic, and insufficient to oust the arbitral jurisdiction when the prayers sought are in the form of remedies for a breach of contract rather than rescission owing to the claimed fraud.[92] On the other hand, the court is more likely to oust the jurisdiction of the arbitrator and decide that the issue be litigated in court, if the pleadings indicate a direct relationship between the claims of fraud and the prayers, which are not in the nature of executing the contract but of avoiding it.[93]

Second, the court considers the *prima facie* plausibility of allegations or if they reflect a genuine dispute over wilful misstatements of material fact made with intent to deceive the party alleging fraud. The nature of the allegations as well as the specifics given, aids the court in determining whether the allegations are merely pretextual as well as whether the claimed fraud is sophisticated or significant enough to oust arbitration jurisdiction.[94]

c) The commencement of criminal proceedings makes the fraud non-arbitrable

In *Laiser Communications Limited v Safaricom Limited*, the Court of Appeal found that fraud was involved in the performance of the dealer agreement buttressed by criminal investigations that revealed that the person involved was an employee of the Respondent. Consequently, the matter could only be properly adjudicated in court.[95] According to the court, enforcing an arbitral clause alongside a liability clause within the dealer agreement which limited Safaricom's liability to only Kshs 100,000, would severely obstruct the applicant's right of access to justice.[96] Clause 22.2 of the Dealer Agreement provided that:

> *"If the dispute has not been settled pursuant to the amicable settlement process in Clause 22.1 above within 30days or such longer period as the parties may agree then any party may elect to commence arbitration".*

In the same agreement, Clause 17 stipulated as follows:

> *"17.2 Without prejudice to the exclusion clauses in clauses 17.1 above, Safaricom's liability shall not whether in contract, tort or otherwise exceed in aggregate for any breach or breaches arising under this Agreement the sum of Kshs.100,000.00 (Kenya Shillings One Hundred Thousand Only). Safaricom shall have no liability in respect of a claim unless notice therefor shall have been given with one month of the cause of action arising and proceedings in respect of the same shall have been issued no later than 6 months thereafter."*

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91 (2020)eKLR.
92 Id para 21.
93 Id.
94 Id para 22.
95 (2016)eKLR.
96 Id. See also *Hassan Babakar Osman & Another v Nuh Abdulwahab Mohamud & 8 Others* (2019)eKLR where the court found that any controversy, claim or cause of action arising out of or relating to the fraudulent transfer of shares/or depository shares and receipts as claimed by plaintiffs cannot be subject to arbitration.

The court held as follows:

> *"The learned judge erred in holding that allegations of fraud do not rob an arbitrator of his jurisdiction despite sufficient evidence by the appellants showing that the fraudulent claims went beyond the level of mere allegations. In addition, the claim is founded on contract and tort, in particular defamation, fraud, restitution, unjust enrichment, restrictive trade practices, abuse of dominant position and public policy issues. These are issues that are beyond the arbitral scope and it is only the court which is vested with sufficient jurisdiction to deal with them. In view of the seriousness of the matters raided, the suit can only be properly advanced in court"*[97]

5. The Arbitrability of Fraud in India

The 1899 Arbitration Act governed arbitration in India until it was replaced in 1940 by the Arbitration and Conciliation Act. The 1940 Arbitration and Conciliation Act was repealed in 1996 by the 1996 Arbitration and Conciliation Act (*A&C Act hereinafter*) which was based on the Model Law.[98] In its preamble, the A&C Act recognises that it took account of the Model Law and Rules.[99] The Indian parliament aimed at passing a legislation that mirrored the provisions of the Model Law and one in sync with global commercial realities.[100] The A&C Act covers both domestic and international arbitration.[101] In India, the subject of whether or not fraud is arbitrable has sparked a lot of debate.

a) Jurisprudential Development of the Arbitrability of Fraud in India

The Indian Supreme Court in *Abdul Kadir Shamsuddin v Madhar Prabhaka Oak* considered the context of the 1940 Arbitration Act. According to the Supreme Court, where serious fraud allegations are levelled against a party, and the party charged wishes to have the matter tried in open court, the court will not stay legal proceedings.[102] In arriving at that holding, the Supreme Court relied heavily on a Chancery Division decision in *Russell v Russell*.[103] That was a case in which a partner issued a notice of dissolution of the partnership prompting the other partner to bring an action alleging various counts of fraud and seeking a declaration that the notice of dissolution was void. One of them who was charged with fraud sought reference of the disputes to arbitration. According to the court, in cases involving allegations of fraud, the courts generally decline to refer the dispute to arbitration. But where the objection to arbitration is by a party charging the fraud, the court will not necessarily accede to it and would never do so unless a *prima facie* case of fraud is proved.

In *N Radhakrishnan v M/S Mastero Engineers*, the Supreme Court upheld the *Abdul Khadir decision*. In its holding, the Supreme Court affirmed a decision of the High Court dismissing a revision against a Trial Court order dismissing the appellant's application under Section 8 of the A&C Act which provides for stay of legal proceedings.[104] In denying the appelant's request

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97 Id.
98 Shivam Singh, 'Arbitrability of Fraud: Analysing India's Problematic Jurisprudence' (2019) 37(1) *Indian Journal of International Arbitration*,pg.150.
99 Preamble, *Arbitration & Conciliation Act* (India),para 6.
100 Chaterjee (n 31) 25.
101 Kumar (n 23) pg.256. See also Commission of India, *Amendments to the Arbitration and Conciliation Act*,2014,para 11.
102 *Abdul Kadir Shamsuddin v Madhar Prabhaka Oak* : AIR 1962 SC 406, para 17.
103 Russel v. Russel (1880) LR 14 Ch D 471 Chancery Division (United Kingdom).
104 1 SCC 72.

to refer the parties to arbitration, the Trial Court found that the since the appellants had raised issues of misappropriation of funds and malpractices, such matters should be resolved by a civil court.[105] Consequently, relying on the judgment in the *Abdul Khadir Case*, the Supreme Court ruled that since the Appellants had made serious allegations against the Respondents alleging malpractices in the account books and manipulation of the finances of the partnership firm, the matter could not be properly dealt with in arbitration.[106] In summary, the court held that fraud was not subject to arbitration.

Still in 2010, the Supreme Court of India, in *Afcons Infrastructure Limited v Cherian Varkey Construction (P) Limited*, identified a number of matters that are not arbitrable, for example, serious and specific allegations of fraud, forgery, coercion, and impersonation.[107] The Supreme Court confirmed once again in 2011, in *Booz Allen & Hamilton v SBI Home Finance Limited*, that disputes relating to rights and liabilities which give rise to or arise out of criminal offences such as fraud are not arbitrable.[108] In laying down the general rule of arbitrability under Indian law, the court noted that historically, all disputes relating to rights in *personam* were arbitrable whereas disputes involving *rights in rem* were not arbitrable, and could only be resolved by courts. However, the court added that certain categories of disputes despite their *personam* nature, may be deemed non-arbitrable as a matter of public policy, if they are expressly or implicitly reserved for courts. For example, matrimonial and testamentary disputes, insolvency and winding up matters, guardianship matters, and tenancy disputes.[109]

The issue of whether or not fraud is arbitrable was also considered in *A. Ayyasamy v A. Paramasivam*.[110] After examining its earlier decisions, the Supreme Court held as follows:-

> *"Mere allegations of fraud simpliciter are not a ground to nullify the effect of an arbitration agreement. Where a court exercising a power to refer finds very serious allegations which make a virtual case of criminal offence or where allegations are so complicated that it becomes absolutely essential that such complex issues can be decided by a civil court on the appreciation of the voluminous evidence that needs to be produced, the court can side-track the agreement by dismissing the application under Section 8 and proceed with the suits on the merits. It can also be done where there are serious allegations of forgery/ fabrication of documents in support of the plea of fraud or where fraud is alleged against the arbitration provision itself or is of such a nature that permeates the entire contract, including the agreement to arbitrate. Where simple allegations of fraud touch upon the internal affairs of the party inter se and has no implication in the public domain, the arbitration clause need not be avoided and the parties can be relegated to arbitration"*[111].

105 Id.
106 Id para 26.
107 8 SCC 24, para 27.
108 5 SCC 532,para 36.
109 Id para 35.
110 (2016)10 SCC 386.
111 Id para 43.

Justice Chandrachud, in his concurring opinion observed thus:

> *"Allegations of criminal wrongdoing or of statutory violation do not deprive the arbitral tribunal the jurisdiction to resolve a dispute arising out of a civil/contractual relationship. Allegations of fraud are not alien to ordinary courts. If an allegation of fraud can be adjudicated upon in the course of a trial before an ordinary civil court, there is no justification to exclude such disputes from the ambit of a claim in arbitration."*[112]

Consequently, it was held that since the disputes were only of a character that related to alleged fraudulent accounting entries between the parties, the matter was capable of being resolved through arbitration.[113]

Furthermore, the Supreme Court of India has limited the fraud exception in *Rashid Raza v. Sadaf Akhtar* by articulating two tests which are required to be met for a dispute involving allegations of fraud.[114] These are: (i) whether or not those allegations pervade the entire contract, most notably the arbitration agreement, rendering it void or; (ii) whether or not the allegations of fraud concern parties' internal affairs without a bearing on the public domain.[115] The Supreme Court in *Avitel Post Studioz Limited & Ors. v HSBC PI Holdings (Mauritius) Ltd* explained the two tests thus:

> *"Serious allegations of fraud arise only if either of the two tests laid down are satisfied, and not otherwise. The first test is satisfied only when it can be said that the arbitration clause or agreement itself cannot be said to exist in a clear case in which the court finds that the party against breach is alleged cannot be said to have entered into the agreement relating to arbitration at all. The second test can be said to have been met in cases in which allegations are made against the state or its instrumentalities of arbitrary, fraudulent, or mala fide conduct, thus necessitating the hearing of the case by a writ court in which questions are raised which are not predominantly questions arising from the contract itself or breach thereof, but questions arising in the public law domain"*[116]

In the *Avitel Decision*, the Supreme Court considered the earlier decisions and clarified that merely because some facts involve civil and criminal proceedings, it does not necessarily lead to the conclusion that the dispute ceases to be arbitrable on that count alone.[117] Additionally, the court stated that where a contract's performance is vitiated by fraud, the defrauded party is entitled to recover damages. However, where fraud is found on the arbitration agreement, the matter is serious and non-arbitrable.[118] The Supreme Court further emphasized that fraud that arises from civil matters is arbitrable.[119] While the decision provided clarity on the test for determining the arbitrability of fraud, it has been criticised on grounds that the second test for serious fraud may be used to avoid arbitration especially with the increased cases where the government is a party.[120]

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112 Id para 45.2.
113 Id.
114 (2019) 8CC 710.
115 Id para 4.
116 (2020) SCC Online SC, para 35.
117 Id para 43.
118 Id paras 17 and 18.
119 Sonam Gupta & Sneha Jaisingh, 'Arbitration gets support in validity and fraud challenges' available <https://law.asia/arbitration-gets-support-validity-fraud-challenges/> (Last accessed on 8 March 2022).
120 Sarah Ayreen, 'The Test for Determining Arbitrability of Fraud in India: Clearing the Mist' http://arbitrationblog.kluwerarbitration.com/2020/10/06/the-tests-for-determining-arbitrability-of-fraud-in-india-clearing-themist/ (Last accessed on 8 March 2022).

In 2021, the Supreme Court, in *Vidya Drolia v. Durga Trading Corporation*, expressly overruled the *Radhakrishnan case*, holding that allegations of fraud can be arbitrated when they arise out of a civil dispute.[121] However, the court noted that fraud, which would void or invalidate an arbitration agreement would be a factor in determining non-arbitrability. According to the Supreme Court, a dispute is not capable of adjudication and settlement by arbitration when the cause of action and subject matter of the dispute:-

(i) Relates to actions *in rem*, that do not pertain to subordinate rights in *personam* that arise from rights *in rem*.
(ii) Affects third-party rights and has *erga omnes* effect. This requires centralised adjudication, and mutual adjudication would not be appropriate and enforceable.
(iii) Relates to inalienable sovereign and public interest functions of the state and hence mutual adjudication would be unenforceable.
(iv) Is expressly or by necessary implication non-arbitrable as per mandatory statute(s).[122]

The Supreme Court clarified that these tests are not water-tight apartments, and they do overlap but when applied holistically, they will help in ascertaining non-arbitrable matters.[123]

Still in 2021, the Supreme Court laid the issue of the arbitrability of fraud to rest in *N.N Global Mercantile Pvt Limited* where the court was considering whether an allegation of fraudulent invocation of a bank guarantee is an arbitrable dispute.[124] The Supreme Court held that:-

"*The civil aspect of fraud is considered to be arbitrable in contemporary arbitration jurisprudence, with the only exception being where the allegation is that the arbitration agreement itself is vitiated by fraud or fraudulent inducement, or the fraud goes to the validity of the underlying contract, and impeaches the arbitration clause itself.*"[125]

The current position on the arbitrability of fraud in India is summarised in the case of *Avantha Holdings Limited v Cg Power and Industrial Solutions* where the High Court of New Delhi has observed that:

"*It is now settled that the disputes involving allegations of fraud are not per se non-arbitrable. It is only the allegations of fraud that fall within the realm of public law (and public law remedies) that cannot be made a subject matter of arbitration. Private disputes, inter se parties are arbitrable. However, fraud that vitiates the arbitration agreement would have a bearing on arbitrability*".[126]

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121 2 SCC 1.
122 Id paras 76.1-76.5
123 Id.
124 2021 SC Online SC 13.
125 Id paras 45-46.
126 MANU/DE/3352/2021 para 74.

b) Analysis of the Arbitrability of fraud in India and Kenya

Kenyan Courts borrow extensively from the principles developed by Indian courts on the arbitrability of fraud. In *Gerrick Kenya Limited v Honda Motorcycle Kenya Limited*, the Kenyan High Court was seized with an application of setting aside an award under Section 35 of the Arbitration Act. In that case, the Claimant argued that the arbitrator decided a dispute that was not covered by the arbitral agreement and determined fraud, which was outside the scope of reference. In determining the issue whether or not fraud was outside the scope of reference, the High Court used the standards governing the arbitrability of fraud developed by the Indian Supreme Court in the *A. Ayyasamy case* and the *Booz Allen decisions*.[127] The said principles are that where a party plausibly pleads fraud and the fraud relates to a right *in rem* (as opposed to a right in *personam*), then the matter is non-arbitrable. Second, even if the fraud issue involves a dispute in persona but involves a serious or sophisticated question of fraud, arbitration is ruled out as an appropriate forum for the dispute on public policy reasons.[128]

While Kenyan courts rely on principles developed by Indian Courts on the arbitrability of fraud, they have not provided guidance on what constitutes serious fraud under Kenyan law. In India, the courts have defined what constitutes serious fraud, thereby promoting certainty (See Section 4a). Similarly, Kenyan courts have not developed tests for determining arbitrability under Kenyan law as is the case in India.

As established in the Indian *A. Ayyasamy case*, the mere commencement of parallel criminal proceedings for fraud does not deprive the arbitral tribunal of jurisdiction to hear disputes concerning fraud. This is because of the inherent power of a tribunal to rule on its own jurisdiction. In Kenya, however, in *Laiser Communications Limited v Safaricom Limited*, the Court of Appeal relied on the fact that, because criminal investigations had been initiated, the fraud matter was serious and could only be adjudicated upon by courts. In our opinion, the court's holding goes against the doctrine of party autonomy and might make investors reluctant in choosing Kenya as an arbitral seat. Additionally, it is our view that the holding is arguably debatable because a given set of facts can give rise to both civil fraud and criminal fraud. However, this does not preclude a party from pursing civil fraud under arbitration.

Historically, arbitration was deemed unsuitable for fraud because arbitrators lacked the necessary skills, despite the fact that allegations of fraud require cogent evidence. In addressing this issue, the Supreme Court noted in *Ayyasamy*, however that arbitrators are now dealing with complex matters requiring voluminous evidence. Calculating damages and determining the parties' liability, for example, require a deep appreciation of evidence. These skills are not dissimilar to those required in cases of alleged fraud.[129] Therefore, the long-held bias that arbitrators lack the necessary skills to deal with fraud matters cannot stand. In Kenya, there is still resistance on appreciating that even arbitrators are capable of resolving complex matters of fraud as seen from the *Laiser Communication decision*.

127 (2019)eKLR.
128 *Kenneth Maweu Kasinga v Cytonn High Yield Solution LLP & another* (2020) eKLR.
129 Kumar (n 23)pg.271.

In part 3a, we discussed the stay of proceedings under Section 6 of the Kenyan Arbitration Act. In that section, we highlighted that in examining the existence of a valid arbitration agreement, the High Court has the authority to examine the merits and demerits of the case to determine whether or not the matter is arbitrable. This interpretation is consistent with the Indian position. Sections 8 and 11 of the A&C Act provide for the stay of legal proceedings.[130] Sections 8 and 11 are complementary in nature as they both relate to reference to arbitration. Section 8 applies when judicial proceeding is pending and an application is filed for stay of judicial proceeding and for reference to arbitration. Section 11 applies in cases where the parties petition the court for the appointment of an arbitrator.

The Supreme Court, in *Vidya Drolia v. Durga Trading Corporation*, dealt with the scope of a *prima facie* examination of an arbitration agreement. It held as follows;-

> "*Prima facie examination is not full review but a primary first review to weed out manifestly and ex facie non-existent and invalid arbitration agreements and non-arbitrable disputes. Only when the court is certain that no valid arbitration agreement exists or the disputes/subject-matter are not arbitrable, the application under Section 8 would be rejected. At this stage, the court should not get lost in thickets and decide debatable questions of facts. Referral proceedings are preliminary and summary and not a mini trial.*[131] *Nevertheless, the court must consider the part-test in determining whether a dispute is arbitrable or not. The exercise of the limited prima facie review does not in any way interfere with the principle of competence-competence and separation as to obstruct arbitration proceedings but ensures that vexatious and frivolous matters get over at the initial stage*".[132]

To conclude this section, it is unclear why such a determination can be made only at the referral stage by the court. While it is understandable that the review is aimed at sieving out claims that are non-arbitrable to save the tribunal's time and resources, the tribunal should have the competence to deal with arbitrability issues including those on fraud. A judicial investigation into the nature of fraud would inevitably entail a detailed examination of the facts of each case. This could interfere with the tribunal's ability to determine whether it has jurisdiction or not.[133] In our view, Indian and Kenyan courts are excessively intrusive when it comes to determining the arbitrability of disputes during the stay of legal proceedings by conducting an examination of the merits and demerits of the dispute, a function that ought to be left to the arbitral tribunal.

6. Recommendations

In light of the above discussions, the authors make the following proposals on how to deal with the arbitrability of fraud in Kenya:

Firstly, fraud should generally be arbitrable. This is because a party contesting arbitrability may still pursue remedies under the Kenyan Arbitration Act.

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130 Section 8 of the Indian A&C Act provides that : "Power to refer parties to arbitration where there is an arbitration agreement.—1 [(1)A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.]"

131 2 SCC 1, para 134.

132 Id para 147.7.

133 Kumar n(23) pg.272.

Such a party may challenge the appointment of an arbitrator on grounds that they were fraudulently appointed. They may also challenge the arbitrator's competence to hear the dispute involving allegations of fraud. Moreover, the party may seek vacation of the award under Section 35 of the Arbitration Act on the grounds that the arbitration agreement was *null* and *void*. The *A.Ayysamy Case's* dual classification of simple (arbitrable) and complex fraud (non-arbitrable), which Kenyan courts have adopted, is inconsistent with arbitration principles such as competence-competence to the extent the arbitrator is not given a chance to rule on whether or not they have jurisdiction.[134] In the USA, the Supreme Court has unanimously endorsed the idea that arbitrability as a threshold issue, must be decided by the arbitrator, and not the civil court. Additionally, even if a party pleads fraud, the doctrine of competence-competence demands that the decision on this plea should determined by the arbitrator as they are competent to rule on their jurisdiction.[135] Kenya should adopt this approach. Already the CIArb-Kenya Arbitration Rules empower the arbitral tribunal to decide any question of bad faith, dishonesty or fraud arising in the dispute between parties.[136]

Secondly, the authors propose legislative amendments to the Kenyan Arbitration Act. To begin with, the Act can be amended to preserve the doctrine of competence-competence for the tribunal and to ensure that the High Court does not usurp the arbitral tribunal's authority to determine whether it has jurisdiction even in cases involving fraud.[137] It can be amended to read as follows:-

> *(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement notwithstanding that the dispute involves serious allegations of fraud, and for that purpose—*

Additionally, Section 6 of the Arbitration Act should be amended to provide that when the High Court is presented with an application for stay, it should restrict itself to the ascertainment of the existence of a valid arbitration agreement. The issue of arbitrability should be left to the arbitral tribunal. Section 6 should also stipulate a strict timeline for the High Court to hear applications for stay of legal proceedings. In our view, such an amendment could reduce the number of instances in which frequent court delays caused by backlogs negate the benefits of arbitration. Arbitration cases are typically commercial in nature, necessitating prompt resolution.[138] Furthermore, the Arbitration Act should be amended to define arbitrable and non-arbitrable disputes to provide certainty to arbitrators, legal practitioners, and consumers of arbitration as a form of dispute resolution. In the meantime, Kenyan Courts should follow the lead of Indian courts, which have established adequate precedent regarding the arbitrability of disputes.

Thirdly, parties should exercise caution when drafting arbitration clauses. They should strive to draft broad clauses that cover virtually all disputes arising out of the parties' dealings.[139] Where they wish to exclude disputes arising from fraud from the jurisdiction of the arbitral tribunal, this should be expressly stated in the arbitral clause. Consequently, express exclusion will ensure that the party's wishes regarding arbitrating fraud are respected and that no issues of non-arbitrability of a fraud claim arise.

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134 Singh(n 94) pg.150.
135 *Henry Schein Inc v Archer & White Sales Company* 139 S.CT 524 (2019).
136 Rule 90(e), *Arbitration Rules* (2020). The NCIA Rules 2015 Revised 2019 are silent on the arbitrability of fraud.
137 The Law Commission of India, *Amendments to the Arbitration and Conciliation Act, 2014*, para 50.
138 ibid para 22.
139 Born (n 37) pg.38.

Additionally, parties to a fraud claim require a robust and experienced tribunal that is not afraid to address the issues of fraud. Such a tribunal will be confident in its ability to tailor the procedure to the nature of the claim before it.[140] Practising lawyers with extensive experience of claims involving English equity principles and a breach of fiduciary duties may be more prepared or willing to establish a fraud claim than others with insufficient experience.[141] Therefore, parties should consider appointing arbitrators with experience in equity principles among other fields of law. Closely related to this, where parties and their advocates elect to plead fraud, the averments of fraud must be specific. The pleadings must adequately express the nature of the claim to the opposing party.[142] This is because arbitrators are not investigators and are not required to infer fraud in the absence of express allegations.[143]

Fourthly, there is a need to educate the public about the distinction between civil and criminal fraud. When civil fraud is established during arbitration proceedings, the aggrieved party can be awarded damages and compensation.[144] Civil fraud must be proven by clear and convincing evidence. The same set of facts could also attract a charge of criminal fraud which requires the standard of proof of beyond reasonable doubt.[145] As a result, parties to an arbitration agreement should not be quick to frustrate the arbitral process by claiming that civil fraud is non-arbitrable.

Fifthly, courts should clarify the standard of proof required in fraud cases. In *Athi Highway Developers Limited v West End Burhcery Limited*, the Kenyan Court of Appeal, noted, citing older English cases that fraud has to be proved to a standard above a balance of probabilities but not beyond reasonable doubt.[146] This may no longer be the case in England as a result of the English Court of Appeal's decision in *St Petersburg PJSC v Vitaly Arkhangelsky*. In that case, the English Court of Appeal held that even in cases of fraud or dishonesty the proper standard is whether the allegation has been proven to be more likely than not. There is no requirement to prove that the fraud has occurred beyond all possible doubt, or to prefer an innocent explanation in place of a dishonest one. Nonetheless, cogent evidence must be produced to establish fraud.[147] The Court of Appeal's decision in the *Petersburg Case* followed the House of Lords decision in Re B (children) in which Lady Hale stated that:

> *"Neither the seriousness of the allegation or the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant in deciding where the truth lies. As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability."*[148]

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140 Bushell (n 72) 342.
141 ibid 342-343.
142 *Bata v Central Penn National Bank* 423 (1966).
143 *Paragon Finance PLC v DB Thakerara & Company* 1999 1 ALL ER 400.
144 Centre for Local Government Excellence, *Introduction to Fraud*, 2019,pg.11.
145 Id pg.13.
146 *Hangzhou Agrochemicals industries Limited v Panda Flowers Limited* (2021)eKLR.
147 (2020) EWCA 408, para 48-51.
148 Id para 119.

7. Conclusion

While judges have a duty to uphold public policy, the primary role of arbitrators is to enforce the contract between the parties and resolve the dispute referred to them.[149] Arbitrators possess the authority and competence to hear and resolve all disputes referred to them including those on fraud as this is consistent with the doctrine of competence-competence. The arbitral tribunal should be the forum for determining the arbitrability of fraud and whether the alleged fraud is simple or serious. As demonstrated in the Indian context, serious questions of fraud arise where either the fraud vitiates the arbitration agreement or allegations of fraud fall within the realm of public law and public law remedies. It is only in these limited instances where fraud cannot be a subject matter of arbitration. In all other cases, fraud is arbitrable. The Kenyan courts should provide guidance on what constitutes the serious fraud exception under Kenyan law. Lastly, the Kenyan Arbitration Act should be amended to clarify the types of disputes that are arbitrable in Kenya as suggested above.

149 Alexis Mourre, 'Arbitration and Criminal Law : Jurisdiction, Arbitrability and Duties of the Arbitral Tribunal' (eds) in Loukas Mistellis & Stavros Brekoulakis, Arbitrability: International and Comparative Perspectives (Wolters Kluwer 2009) pg.229.

The Role of an Arbitral Tribunal Secretary

By CPA Nancy Manyara* (MCIArb) (**With the guidance of Senior Annemarie Grosshans**)

Abstract

The snowballing complexity of international arbitration have led to an increase in the appointment of Arbitral Secretaries. However, their appointment remains a matter of debate which reflects a misconception of their mission. Guidelines have been issued on the same in international arbitration. E.g Young International Council for Commercial Arbitration (Young ICCA) guidelines on Arbitral Secretaries. With appropriate direction and supervision by the Tribunal, the Arbitral Secretary's tasks may involve the following: undertaking administrative matters; communicating with the arbitral institution and parties; organizing meetings and hearings with the parties; handling and organizing correspondence, submissions and evidence on behalf of the Tribunal; researching questions of law; researching discrete questions relating to factual evidence and witness testimony; drafting procedural orders and similar documents; reviewing the parties' submissions and evidence, and drafting factual chronologies and memoranda summarizing the parties' submissions and evidence. In addition to this, the Arbitral Tribunal Secretary may be tasked to assist the Tribunal in drafting certain parts of the award and provide general attendance to the Tribunal's deliberations. Proper use of Arbitral Secretaries can be beneficial to all. However, improper use of Arbitral Secretaries can have an adverse effect. International arbitrations have been faced with challenges of award based on misuse of Tribunal Secretaries. In Kenya, we should get ready for possible future challenges of this nature due to the increasing concerns on the role of Arbitral Secretary. Noting that, the Arbitration Act, Chapter 49 of the Laws of Kenya and general arbitration rules are silent on this an issue. This article will seek to establish who is an Arbitral Tribunal Secretary and what is the proper role of an Arbitral Tribunal Secretary.

1. Introduction

The increasing intricacy of international arbitration and the professionalisation of arbitrators have led to an upsurge in the appointment of Tribunal Secretaries. However, the appointment of the Tribunal Secretaries remains a matter of controversy which reflects a misapprehension of their mission.[1] International arbitration is moving towards a prominent role for Tribunal Secretaries and it has become a common practice in international arbitration to use Tribunal Secretaries to support the Arbitral Tribunal. The use of Arbitral Secretaries helps to ensure that arbitrations are conducted efficiently and effectively with Arbitral Secretaries taking away much of the administrative burden from Tribunal.[2]

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1 "Understand the role of the Tribunal Secretary," *an insight by Dr. Amel Makhlouf MCIArb: Dispels misconceptions around the support role.*

2 Tom Yates and Georgiana Andrews, *LCIA Updates Guidelines on Tribunal Secretaries*, (Global Arbitration News 15 January 2018) online at https://globalarbitrationnews.com/lcia-updates-guidelines-on-tribunal-secretaries (visited April 4, 2022)

Parties appoint arbitrators for their qualifications and therefore the arbitrator's mandate is typically personal and carries a duty of confidentiality. This mandate gives the personally nominated arbitrators' competence to resolve the case and ensure transparent arbitral proceedings. The Tribunal Secretary however, is not appointed by parties but he/she is normally proposed by the Arbitral Tribunal.[3] The question that arises is what rules apply to the roles of a Tribunal Secretary?

The arbitration practitioners have not conclusively agreed on the proper limits of the scope of the Tribunal Secretary's role and at what point the Tribunal is inappropriately delegating tasks that ought to be solely carried out by it. Several arbitral awards have been challenged on grounds of alleged improper exercise of the Arbitral Tribunal Secretary role.[4] There is a lot of anxiety in the world of arbitration at what is perceived to be the excessive role of Tribunal Secretaries.[5]

2. Arbitral Tribunal

An Arbitral Tribunal has several other names; Arbitration Tribunal, Arbitration Council, Arbitration Committee or Arbitration Commission. An Arbitral Tribunal refers to a panel of unbiased judges which is convened and sits to resolve a dispute by way of arbitration. The Tribunal may consist of a sole arbitrator, or there may be two or more arbitrators, which might include a chairperson or an umpire. Members selected to serve on an arbitration panel are typically professionals with expertise in both law and in friendly dispute resolution. According to some scholars, the ideal composition of an Arbitral Tribunal should include at least also one professional in the field of the disputed situation.[6]

An Arbitral Tribunal consists of one or more arbitrators that hear and resolve the dispute and provide an arbitral award. The Arbitration Act, Chapter 49 of the Laws of Kenya interprets an Arbitral Tribunal to mean a sole arbitrator or a panel of arbitrators. The Chartered Institute of Arbitrators (Kenya) Rules (2020), defines an Arbitral Tribunal to include one or more arbitrators.

3 Seminar Young Arbitrators Copenhagen, *The Secretary to the Arbitral Tribunal – The fourth arbitrator?* The Danish Institute of Arbitration, (2016) online at https://voldgiftsinstituttet.dk/en/the-secretary-to-the-arbitral-tribunal-the-fourth-arbitrator (visited April 4, 2022)

4 Tom Yates and Georgiana Andrews, *LCIA Updates Guidelines on Tribunal Secretaries*, (Global Arbitration News 15 January 2018) online at https://globalarbitrationnews.com/lcia-updates-guidelines-on-tribunal-secretaries (visited April 4, 2022)

5 C Partasides, "The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration," 2002(18) *Journal of International Arbitration*, p. 147

6 J.Gregory Sidak, *Economists as Arbitrators*, 30 EMORY INT'L L. REV. 2105 (2016), https://www.criterioneconomics.com/economists-as-arbitrators.html; Joshua B. Simmons, "Valuation in Investor-State Arbitration: Toward a More Exact Science," *30 Berkeley Journal of International Law*. 196 (2012).

Rule 2 of the Rules of Arbitration by the Indian Council of Arbitration defines an Arbitral Tribunal as an arbitrator or arbitrators appointed for determining a particular dispute or difference. Section 2(d), of the Arbitration and Conciliation Act, 1996 of India also defines an Arbitral Tribunal as a sole arbitrator or panel of arbitrators. Nairobi Centre for International Arbitration Rules, 2015 Preliminary Rule 2 interpret an Arbitral Tribunal to mean a sole arbitrator or a panel of arbitrators appointed in accordance with these Rules;[7]

The Arbitral Tribunal shall consist of three (3) arbitrators, of whom one shall be nominated by Claimant(s) and one shall be nominated by Respondent(s). The parties or the two party-appointed arbitrators shall jointly nominate the third arbitrator who act as the president of the Arbitral Tribunal.[8] Section 12 (1), of the Arbitration Act, Chapter 49 of the Laws of Kenya provides that no person shall be precluded by reason of that person's nationality from acting as an arbitrator, unless otherwise agreed by the parties. The Act also in Section 12 (2) provides that the parties are free to agree on a procedure of appointing the arbitrator or arbitrators and any chairperson and failing such agreement—

(a) In an arbitration with three arbitrators, each party shall appoint one arbitrator and the two arbitrators so appointed shall appoint the arbitrator;
(b) In an arbitration with two arbitrators, each party shall appoint one arbitrator; and
(c) In an arbitration with one arbitrator, the parties shall agree on the arbitrator to be appointed.

Judges' powers are clearly defined under the relevant national laws and procedures while, an Arbitral Tribunal's jurisdiction, powers and duties are set by: the agreement between the parties to the dispute; the agreement between the State parties to the relevant treaty; the law of the place/seat of arbitration; the applicable arbitration rules.[9]

Procedural laws in the jurisdiction of the arbitration and the provisions of the arbitration agreement will determine the duties of an Arbitral Tribunal. The interplay between the two will be determined by the extent to which the laws of the seat of the arbitration permit "party autonomy". However, in almost all countries the Tribunal owes several non-derogable duties. These will normally be: to act fairly and impartially between the parties, and to allow each party a reasonable opportunity to put their case and to deal with the case of their opponent; to adopt procedures suitable to the circumstances of the particular case, so as to provide a fair means for resolution of the dispute.[10]

7 Nairobi Centre for International Arbitration, Arbitration Rules, (2015) Revised Version (2019)
8 Bowmans, *Drafting Effective Arbitration Clauses*, (19 November 2019) online at https://www.bowmanslaw.com/insights/dispute-resolution/drafting-effective-arbitration-clauses (visited April 8, 2022)
9 Ms. Rachel Chiu, Mr. Kevin Cheung, and Dr. Andrew Willcocks, *Arbitral Tribunal*, Jus Mundi (8 February 2022) online at https://jusmundi.com/en/document/wiki/en-arbitral-tribunal (visited April 4, 2022)
10 Ansell Murray Limited, *The Arbitral Tribunal*, The World of Commercial Support (wordpress.com) (14 August 2015) online at https://ansellmurray.wordpress.com/2015/08/14/the - arbitral-tribunal/ (visited April 4, 2022)

3. Arbitral Tribunal Secretary

A Tribunal Secretary is not a member of the Arbitral Tribunal but a player in the arbitral proceeding who can be appointed at any time during an arbitration, to assist the Arbitral Tribunal at all stages. The appointment of the Tribunal Secretary is subject to parties' approval and that of co-arbitrators. This appointment also requires disclosing the identity, expertise, qualification and missions conferred upon the Tribunal Secretary. Just like an arbitrator, the Secretary must satisfy the same requirements of impartiality and independence.[11]

A Tribunal Secretary is most commonly a junior lawyer who works at the same law firm as the chair of the Arbitral Tribunal or the sole arbitrator. The Tribunal Secretary assists the Tribunal in the case management related matters which in turn helps to substantially save time and costs on the case.[12]

The Tribunal Secretaries are in high demand in international arbitration, a reflection of practical need for administrative support. Proper use of the Tribunal Secretary would help to minimize cost, time for making decision and ultimately enhance the quality of the proceedings, which is beneficial to all parties.[13]

4. The Role of an Arbitral Tribunal Secretary

The role of a Tribunal Secretary provides less experienced arbitration practitioners with the opportunity to familiarize with the workings of an Arbitral Tribunal before becoming arbitrators themselves.[14] Tribunal Secretaries provide administrative and other assistance to the Arbitral Tribunal in large and complex arbitrations.[15] The Tribunal Secretary performs several duties under the directions and strict supervision of the Tribunal. Such duties include; managing the Tribunal's file, conducting legal research, drafting and reviewing procedural documents, drafting parts of an award, organizing procedural meetings and evidentiary hearings, and attending the Tribunal's deliberations. It should be noted that the communication between the Tribunal and its Secretary is confidential.[16]

Guidelines have been issued on the role of Arbitral Secretaries in international arbitration. This article will highlight the guidelines issued by; London Court of International Arbitration (LCIA) updated Notes for Arbitrators (the LCIA note 2017); Young International Council for Commercial Arbitration (Young ICCA) guidelines on Arbitral Secretaries (The ICCA report no. 1); Hong Kong International Arbitration Centre HKIAC guidelines on the use of a Secretary to the Arbitral Tribunal (Effective 1 June 2014).

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11 Understand the role of the Tribunal Secretary an insight by Dr. Amel Makhlouf MCIArb dispels misconceptions around the support role

12 Mme Anna Tujakowska and Docteur Kabir Duggal, *Secretary of the Tribunal*, Jus Mundi (25 February 2022) online at https://jusmundi.com/fr/document/wiki/en-secretary-of-the-tribunal (visited April 4, 2022)

13 Understand the role of the Tribunal Secretary an insight by Dr. Amel Makhlouf MCIArb dispels misconceptions around the support role

14 Tom Yates and Georgiana Andrews, *LCIA Updates Guidelines on Tribunal Secretaries*, (Global Arbitration News 15 January 2018) online at https://globalarbitrationnews.com/lcia-updates-guidelines-on-tribunal-secretaries (visited April 4, 2022)

15 Kovise Foundation Conflict Resolution International (KFCR1), *Accredited Tribunal Secretary of KFCRI – (AcTS-KFCRI)*, kfcri.org (2019) online at https://kfcri.org/tribunal-secretary.php (visited April 5, 2022)

16 Understand the role of the Tribunal Secretary an insight by Dr. Amel Makhlouf MCIArb dispels misconceptions around the support role

4.1 London Court of International Arbitration (LCIA) Updated Notes for Arbitrators (THE LCIA NOTE 2017)[17]

In an effort to provide more detail and clarity on its approach to the role and use of Tribunal Secretaries, the London Court of International Arbitration (LCIA) published its updated Notes for Arbitrators on 26 October 2017. The London Court of International Arbitration (LCIA) note on the role of Tribunal Secretary provides that: The Arbitral Tribunal is at liberty to obtain assistance from the Tribunal Secretary in relation to an Arbitration. Caution is however given to the Tribunal that it should not delegate its fundamental decision-making function.

Tribunal Secretary's assistance does not discharge any member of an Arbitral Tribunal from their personal duty to ensure that all tasks are performed to the standard required by the London Court of International Arbitration (LCIA) Rules and the Notes. The Tribunal must strictly supervise all tasks performed by the Tribunal Secretary as these tasks are carried out on behalf of the Arbitral Tribunal.

An Arbitral Tribunal must ensure that a Tribunal Secretary: only carries out tasks that have been agreed by the parties; does not provide assistance until approved by the parties; does not carry out any tasks that the parties have contracted with the London Court of International Arbitration (LCIA) to provide under the LCIA Rules; does not engage in any unilateral contact with any party or with any party's representative in relation to the arbitration or the parties' dispute.

The London Court of International Arbitration (LCIA) note on proposing the use of a Tribunal Secretary provides that: the Tribunal must bring to the attention of the parties, the tasks it proposes to assign to the Tribunal Secretary. The London Court of International Arbitration (LCIA) does not approve any particular tasks as necessarily being appropriate for a Tribunal Secretary to carry out, but it does allow the Tribunal to propose any of the following tasks; administrative tasks, such as communicating on behalf of the Arbitral Tribunal, organizing procedural matters, organizing documents, proofreading, and dealing with matters relating to invoices; attending hearings, meetings, and deliberations; substantive tasks, such as summarizing submissions, studying authorities, and preparing first drafts of awards, or sections of awards, and procedural orders. These tasks must be carried out in accordance to the specific instructions of the Tribunal.

4.2 Young International Council for Commercial Arbitration(YOUNG ICCA) Guidelines on the Role of the Arbitral Secretary[18]

With appropriate direction and supervision by the Arbitral Tribunal, an Arbitral Secretary's role may legitimately go beyond the purely administrative sphere. Many arbitrators responsibly make full use of Arbitral Secretaries, beyond the purely administrative sphere, to help them in the discharge of their functions. To maximumly derive benefits from the appointment of an Arbitral Secretary, the tasks delegated to the Arbitral Secretary must go beyond the purely administrative. The efficiency gained in an arbitral process through the

17 LCIA Notes for Arbitrators, updated on 26 October 2017. LCIA Notes for Arbitrators online at LCIA Notes for Arbitrators (visited April 5, 2022)

18 International Council for Commercial Arbitration [ICCA], '*The ICCA Reports No. 1: Young ICCA Guide on Arbitral Secretaries*', [2014]

appointment of a secretary would be substantially lost if the Arbitral Secretary role in supporting the Tribunal is limited to administrative matters only. The Tribunal must closely instruct and supervise the Arbitral Secretary in order to minimize the risk of diluting the arbitrator's personal mandate.

On this basis, the Arbitral Secretary's tasks may involve all or some of the following: undertaking administrative matters as necessary in the absence of an institution; communicating with the arbitral institution and parties; organizing meetings and hearings with the parties; Handling and organizing correspondence, submissions and evidence on behalf of the Arbitral Tribunal; researching questions of law; researching discrete questions relating to factual evidence and witness testimony; drafting procedural orders and similar documents; reviewing the parties' submissions and evidence, and drafting factual chronologies and memoranda summarizing the parties' submissions and evidence; attending the Arbitral Tribunal's deliberations; drafting appropriate parts of the award.

4.3 Undertaking administrative matters as necessary in the absence of an institution

An Arbitral Secretary may come in handy to handle a number of administrative matters in the absence of an institution's administrative assistance. The administrative tasks may include the preparation of the Arbitral Tribunal's statements of fees and expenses, coordination of funds, tax matters (i.e., VAT, Withholding Tax) related to the fees of the Tribunal and the distribution of submissions, orders and awards to the parties.

4.4 Communicating with the arbitral institution and parties

An arbitrator(s) may not be readily available due to demanding tight schedules and therefore a Tribunal Secretary acting as a point of contact for parties, he or she can help to expedite the resolution of purely administrative or procedural issues without having to involve the arbitrator(s). However, the Arbitral Secretary should inform the Arbitral Tribunal and the opposing party of any communication in order to alleviate any potential concerns the parties may have. In addition, it is imperative to note that any communications from the Arbitral Secretary that are made on behalf of the Arbitral Tribunal should clearly indicate that they are made on its behalf and should comply with the same rules that are applicable to communications between the parties and the Arbitral Tribunal, in particular any rules on ex parte communications.

4.5 Organizing meetings and hearings with the parties

The Arbitral Tribunal may legitimately task the Arbitral Secretary with the responsibility for coordinating and organizing meetings and hearings.

4.6 Handling and organizing correspondence, submissions and evidence on behalf of the Arbitral Tribunal

Parties in modern international arbitration prepare voluminous submissions and evidence and therefore an Arbitral Secretary can step in and provide significant value to the Arbitral Tribunal by handling and organizing the correspondence, submissions and evidence transmitted, whether electronically or physically. The Arbitral Secretary ensures that the Arbitral Tribunal has access to any document that is required at any given time. This helps the Arbitral Tribunal to be fully informed of the issues at hand when questions arise, whether before a hearing, in the hearing room or during deliberations.

4.7 Researching questions of law

The Arbitral Tribunal should be permitted to depend on an Arbitral Secretary to check legal authorities submitted by the parties in support of their positions and research further areas of law relevant to the Arbitral Tribunal's analysis. Having an Arbitral Secretary conduct time-consuming legal research will be advantageous in terms of cost saving which is desirable for all those involved in the arbitral process.

4.8 Researching discrete questions relating to factual evidence and witness testimony

The arbitrators should review all key documents relied on by the parties but, nonetheless, the assistance of an Arbitral Secretary to review the entire evidential record in order to research discrete questions, relating to the factual evidence and witness testimony that have been identified by the Arbitral Tribunal, can add value and efficiency to the process. The arbitrator should take caution not to rely solely on the Secretary's factual research.

4.9 Drafting procedural orders and similar documents

Drafting procedural orders or Terms of Reference can be a time-consuming process and the Arbitral Secretary can be of assistance to the Tribunal. Since procedural orders are short documents recording procedural background to the issue at stake, the same can be legitimately and appropriately entrusted to the Arbitral Secretary to draft, subject to subsequent review and approval by the Arbitral Tribunal.

4.10 Reviewing the parties' submissions and evidence, and drafting factual chronologies and memoranda summarizing the parties' submissions and evidence

Factual disputes and legal arguments are sometimes complex and parties at times file voluminous submissions and evidence. This can be overwhelming to the Arbitral Tribunal; Arbitral Secretaries can be very useful in assisting the Arbitral Tribunal in becoming better informed as to the substance of the case by helping to marshal the arguments and evidence presented by the parties during the course of the proceedings. The Arbitral Tribunal should not relinquish review of the parties' pleadings and evidence.

4.11 Attending the Arbitral Tribunal's Deliberations

An Arbitral Tribunal may use an Arbitral Secretary during Tribunal's deliberations to record the analysis of the members of the Tribunal and the numerous decisions. With this assistance, the Arbitral Tribunal is free to discuss and debate without having to record the entire discussion themselves. An Arbitral Secretary can be a useful resource to the Tribunal when considering specific questions concerning the factual background of the case, which inevitably arise during the course of the deliberations. However, while the Arbitral Secretary may be present during the deliberations, care should be taken by the Tribunal not to allow the Arbitral Secretary to participate in the deliberations.

4.12 Drafting appropriate parts of the Award.

A sought-after arbitrator with a demanding schedule of commitments can find drafting of awards to be a time-consuming process. The arbitrator therefore may justifiably use an Arbitral Secretary to prepare first drafts of certain sections of the award. The Young International Council for Commercial Arbitration (Young ICCA) guide suggested that the Tribunal should limit the Secretary's role to preparing a first draft of the award's procedural/factual background and description of the parties' positions. Tribunal Secretaries support arbitrators in the entire conduct of the arbitration up to the rendering of the arbitral award.

As described by the Young International Council for Commercial Arbitration (Young ICCA) Guide on Arbitral Secretaries[19]

> *"When used properly, arbitral secretaries can support arbitral Tribunals in performing their mandate with greater efficiency and effectiveness. However, when used improperly (eg, without the consent or knowledge of the parties, or the appropriate supervision of the arbitral Tribunal), the use of arbitral secretaries can undermine the legitimacy of the arbitral process. Ensuring that arbitral secretaries are used properly is an important step in encouraging the effective use of arbitral secretaries and protecting the integrity of the arbitral process."*

4.13 Hong Kong International Arbitration Centre (HKIAC) Guidelines on the use of a Secretary on the Arbitral Tribunal (Effective 1 June 2014)[20]

Hong Kong International Arbitration Centre (HKIAC) issued guidelines on the use of a Secretary to the Arbitral Tribunal which were effective on 1 June 2014. The guidelines issued on duties of a Secretary to the Tribunal are as follows; the Arbitral Tribunal shall instruct and strictly supervise the Arbitral Secretary; the Arbitral Tribunal shall not delegate any decision-making functions to a Tribunal Secretary, or rely on a Tribunal Secretary to perform any essential duties of the Tribunal.

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19 International Council for Commercial Arbitration [ICCA], '*The ICCA Reports No. 1: Young ICCA Guide on Arbitral Secretaries*', [2014]
20 Hong Kong International Arbitration Centre (HKIAC), *Guidelines on Use of Secretary to Arbitral Tribunal*, Effective 1 June 2014

Unless the Arbitral Tribunal directs otherwise, a Tribunal Secretary may perform the following organizational and administrative tasks; transmitting documents and communications on behalf of the Arbitral Tribunal; organizing and maintaining the Arbitral Tribunal's files and locating documents; organizing hearings and meetings; attending hearings and meetings; taking notes or minutes or keeping time; proofreading and checking citations, dates and cross-references in procedural orders, directions, and awards, as well as correcting typographical, grammatical or calculation errors; preparing, collecting and transmitting the Arbitral Tribunal's invoices; handling all other organizational and administrative matters which do not fall into the scope of responsibilities of Hong Kong International Arbitration Centre (HKIAC).

Unless the Arbitral Tribunal directs or the parties agree otherwise, a Tribunal Secretary may provide the following assistance to the Arbitral Tribunal, provided that the Arbitral Tribunal ensures that the Secretary does not perform any decision-making function or otherwise influence the Arbitral Tribunal's decisions in any manner: conducting legal or similar research; collecting case law or published commentaries on legal issues defined by the Arbitral Tribunal; checking on legal authorities cited by the parties to ensure that they are the latest authorities on the subject matter of the parties' submissions; researching discrete questions relating to factual evidence and witness testimony; preparing summaries from case law and publications as well as producing notes summarizing the parties' respective submissions and evidence; locating and assembling relevant factual materials from the record as instructed by the Arbitral Tribunal; attending the Arbitral Tribunal's deliberations and taking notes; preparing drafts of non-substantive letters for the Arbitral Tribunal and non-substantive parts of the Tribunal's orders, decisions and awards.

5. Case Laws on Challenges to Arbitration Awards based on misuse of Tribunal Secretaries

A Tribunal is appointed by parties to determine the dispute while a Tribunal Secretary is proposed to parties by the chairperson of the Tribunal and therefore the role of Tribunal Secretary in the arbitral process can be problematic. Parties must consent to the appointment of the Arbitral Secretary. Procedural ambiguity and lack of transparency have given rise to challenges to both the arbitrator and arbitration award.

5.1 La Societe pour la Recherche La Production Le Transport La Transformation et la Commercialisation des Hydrocarbures ("Sonatrach") SPA v Statoil Natural Gas LLC ("Statoil") [2014] EWHC 875 Comm[21]

Facts

Parties had expressly agreed the scope of the role of the Tribunal Secretary in the ICC arbitration between Statoil and the Algerian state oil company (Sonatrach). Sonatrach challenged the award under Section 68 of the Arbitration Act 1996 (AA 1996) and one of the grounds was whether the Tribunal Secretary had exceeded the agreed scope. Sonatrach sought to set aside the award, on the ground that the Tribunal inappropriately delegated its authority to the Tribunal Secretary and impermissibly allowed her to participate in its deliberations.

21 *Sonatrach v. Statoil* [2014] EWHC 875 (Comm

Sonatrach submitted that the Tribunal Secretary had exceeded her agreed responsibility by producing three notes for the Tribunal on substantive matters. It argued that this exceeded the agreed scope of the Tribunal Secretary's role. The parties had agreed that the Tribunal Secretary will assist the Tribunal and its Chairman in the administrative tasks for the proceedings, the organization of the hearings and the preparation of documents that may be useful for the decision. The parties further agreed that the Tribunal Secretary had no right to participate in the decision. The Tribunal declined to give Sonatrach the three notes, arguing that doing so would violate the confidentiality of the Tribunal's discussions. Consequently, Sonatrach alleged that the Tribunal Secretary must have taken part in the Tribunal's deliberations and therefore exceeding her agreed responsibility.

Court Decision

Mr. Justice Flaux held that there was no contradiction between the chairman's reference to the confidentiality of discussions and the Tribunal Secretary not surpassing the agreed responsibility. The judge noted that although the notes formed part of the Tribunal's discussions, the Tribunal had not stated that the Tribunal Secretary took part in those discussions. This ground of challenge was dismissed by the Judge observing that it was a serious allegation that lacked merit.

5.2 In P v Q and others [2017] EWHC 194 (Comm)[22]

Facts

The Claimant filed an application to remove the co-arbitrators appointed to a London Court of International Arbitration (LCIA) Tribunal on ground that the Tribunal had allegedly improperly delegated adjudicative functions to the Tribunal Secretary in relation to three procedural decisions made between year 2015 and 2016. In its application to remove all the members of the Tribunal, the Claimant set out 5 grounds of which 3 grounds related to the improper delegation of tasks to the Tribunal Secretary and the alleged failure of the Tribunal to discharge their decision-making duties. This application was prompted by an email from the chairman intended for the Tribunal Secretary but erroneously sent to a legal assistant at the Claimant's lawyer. In the content of the said email, the chairman referred to Claimant's correspondence received on the previous day and asked "*Your reaction to this latest from (Claimant)?*"

The Claimant further analyzed time records of the Chairman, the co-arbitrators and the Secretary and alleged improper delegation of duties to the Tribunal Secretary stating that the substantial time spent by him in relation to the three procedural decisions indicated so. The Claimant further alleged that the shorter amount of time spent by the co-arbitrators was a clear indication that they had failed to fulfil their obligations.

Court Decision

Popplewell J referred to London Court of International Arbitration (LCIA) Rules as regards to the proper conducting of proceedings and noted that Section 24 of Arbitration Act 1996 provides that "use of a Tribunal Secretary must not involve any member of the Tribunal abrogating or impairing his non delegable and personal decision-making function." Popplewell J concluded that receiving and considering opinion of others, including those of a Tribunal Secretary does not automatically prevent an arbitrator from arriving an independent decision based on their own reasoning and due diligence.

22 *P v Q and Others* [2017] EWHC 194 (Comm)

Further, Popplewell J referred to London Court of International Arbitration (LCIA) Rules that gives the Tribunal a wide discretion to discharge its duties noting that parties did not limit the permitted participation of the Tribunal Secretary neither did they limit the responsibilities and roles that the Tribunal Secretary might perform. Popplewell J stated that due to the increasing concerns in the international arbitration community that the use of Tribunal Secretaries risks them becoming "fourth arbitrators", the Tribunal should avoid involving a Tribunal Secretary in anything which could be considered as expressing an opinion on the substance of which the Tribunal is called upon to decide. This application did not succeed.

5.3 The Yukos set Aside Proceedings[23]

Facts

Russia moved to the District Court of the Hague to have the Tribunal's Awards[24] set aside on the ground that the arbitrators delegated their adjudicative functions to an assistant to the Tribunal and therefore failed to personally fulfil their mandate.[25] Russia also argued that the Tribunal was irregularly composed. Russia acknowledged that the position of the Tribunal Secretary should be distinguished from that of an assistant and that unlike a Tribunal Secretary, the powers of a Tribunal assistant is not anchored in Dutch legislation. Russia further argued that international practice defined the job description of a Tribunal Secretary to only support the Tribunal with administrative tasks relating to the organization of the arbitration.

Russia alleged improper and unauthorized delegation of arbitrators' personal mandate to the assistant given that the hours recorded by the assistant was 40 percent and 70 percent more than those of any member of the Tribunal, a clear indication that the assistant had participated in substantive work and deliberations. Russia also complained that parties did not consent to the appointment of the assistant and that the assistant was brought in at the request of the chairman to provide him with personal assistance in the proceedings. In order not to prejudice the secrecy of the Tribunal's deliberations, the Tribunal refused to disclose further details regarding the hours recorded by its assistant. Russia submitted a report from a linguistics expert who after analyzing the writing styles of the arbitrators and that of the assistant concluded that it was extremely likely that the assistant to the Tribunal wrote 79 percent of the preliminary objections section of the awards, 65 percent of the liability section and 71 percent of the damages section.

Court Decision

In 2016 the awards were set aside on alternative grounds by the District Court of the Hague. The District Court however did not address the Russia's grievances regarding the involvement of the assistant in the arbitral proceedings.

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23 *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA 227, Writ of Summons, 28 January 2015 [Yukos Set-Aside Petition]

24 *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005 -03/AA 226 *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA 227 *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-05/AA 228

25 Yukos Set-Aside Petition, Section V.

The 2016 District Court decision was overturned by the Court of Appeal in Hague on 18 February 2020. In arriving at this decision, the Court of Appeal addressed all the grounds advanced by Russia, including the involvement of the assistant to the Tribunal. While addressing Russia's allegation that the Tribunal had violated its mandate the Court of Appeal was of the view that unless parties agree otherwise, the Tribunal has a procedural right to use an assistant or Secretary for the drafting of an arbitral award as it sees fit. The Court of Appeal dismissed the report from a linguistics expert that was submitted by Russia citing that it did not justify the conclusion that the Tribunal had violated its mandate. The Court of Appeal dismissed the report from a linguistics expert that was submitted by Russia citing that it did not justify the conclusion that the Tribunal had violated its mandate. The Court of Appeal noted that what matters a lot is the fact that the Tribunal had accepted to assume the responsibility for the drafts made by its assistant. In addition, the Court said that Russia did not argue that the Tribunal accepted the drafts prepared by its assistant without a second thought. The Court of Appeal held that Russia had failed to convince the Court that the Tribunal had been improperly constituted. The Court of Appeal however, faulted the Tribunal for failing to fully inform parties on the nature and extent of its assistant's work, but the Court of Appeal noted that this did not amount to a major procedural violation.

6. An Overview of the Role of Tribunal Secretary in Kenya

The Arbitration Act, Chapter 49 of the Laws of Kenya and the general arbitration rules are all silent on the role of a Tribunal Secretary. In practice, many arbitrators engage their personal assistants, junior lawyers or mentees attached to them by the Chartered Institute of Arbitrators to help them with administrative works. The qualifications, the expertise and the roles assumed by these assistants are in most cases not disclosed to the parties.

The Chartered Institute of Arbitrators (Kenya) had on 2 September 2021 invited its members to participate in a course offered by Lagos Chamber of Commerce International Arbitration Centre (LACIAC) "*The Pathways to a career in arbitration – The duties and Responsibilities of an Arbitral Secretary.*" The Kenya International Chamber of Commerce conducted training for Arbitral Secretaries on 17 September 2021.

7. Conclusion

The arbitrator's mandate is considered personal in nature because parties and arbitral institutions choose arbitrators based on their personal characteristics. Both international and domestic arbitrations are growing complex each day and parties are filing voluminous submissions and evidence making it difficult for the Tribunal to effectively manage the arbitral proceedings without assistance. There is no doubt that an industrious Arbitral Secretary who is properly appointed and supervised will help in keeping the Arbitral proceedings organized and on schedule. The parties on the other hand greatly benefit from the cost savings achieved through appropriate use of an independent Arbitral Secretary.

This paper has demonstrated that both the Tribunal and the parties can derive immense benefits from proper use of the Arbitral Secretaries. However, improper use of Arbitral Secretaries can have an adverse effect like the awards being challenged on grounds that the Tribunal has violated its personal mandate by delegating their decision-making duty to a third person. Challenges on the basis of improper delegation may be successful if it can be established that the arbitrators delegated their decision-making to a third person.

Extensive use of the Arbitral Secretaries has been described as "enormously grey area" which has led to many instances of "abuse."[26] Concerns have been raised that some arbitrators are usually assisted by Arbitral Secretaries without any formal appointment process, or, in some circumstances, without identifying these assistants to the parties. The major area of disagreement lies in the nature of the tasks properly assigned to Arbitral Secretaries. Especially their role in the decision-making process has raised many concerns.

Regulation of Tribunal Secretaries based on a uniform standard developed by the arbitration community would enhance transparency and strengthen the legitimacy of the arbitral proceeding. International arbitrations have been faced with challenges of awards based on misuse of Tribunal Secretaries. Although, in Kenya, there are no reported cases where an award has been challenged due to improper use of Tribunal Secretaries, there is likely hood of future challenges of this nature due to the increasing concerns on the role of Arbitral Secretary. Even though in Kenya arbitration institutes are making their first step in embracing the legitimate use of Arbitral Secretaries by inviting arbitration practitioners to attend the ongoing trainings, there is dire need for the arbitration institutes in Kenya to conduct more training and create awareness in order to eliminate abuse of Arbitral Secretaries and the risk of diluting the Tribunal's personal mandate.

The challenges that come with the use of Tribunal Secretaries will be solved by complete transparency about the appointment, the role and remuneration of a Tribunal Secretary at the onset of the arbitral proceedings. Comprehensive uniformity among institutional rules drawing a clear line between the permissible and improper delegation of tasks to a Tribunal Secretary will also help to avoid the reputation of international and domestic arbitration becoming stained.

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26 Michael Polkinghorne, Charles B. Rosenberg, and White & Case LLP, *Different Strokes for Different Folks? The Role of the Tribunal Secretary*, Kluwer Arbitration Blog (17 May 2014) online at arbitrationblog.kluwerarbitration.com/2014/05/17/different-strokes-for-different-folks-the-role-of-the-tribunal-secretary-2/ (visited April 11, 2022)

The Evolving Alternative Dispute Resolution Practice: Investing in Digital Dispute Resolution in Kenya

By Dr, Kariuki Muigua*

Abstract

For the longest time, Alternative Dispute Resolution practice and infrastructure in Africa has been focusing on the traditional processes dealing with traditional commercial and investment related disputes. However, with the evolution of technology, many new areas of commerce have emerged, especially in the area of digital technologies and businesses. This paper makes a case for African countries to embrace digital dispute resolution mechanisms in addressing the emerging disputes related to digital commerce, in a timely and cost effective manner, through putting in place responsive legal and institutional infrastructure.

1. Introduction

A perusal through many of the African countries' legal, policy and institutional frameworks on Alternative Dispute Resolution (ADR) practice reveal that most of them are still focused on the traditional arbitral processes that are mainly physical in nature. However, with technological evolution, there has been emergence of new areas of commerce which naturally also come with related disputes. One such area is the digital commerce platforms. Consumer behavior and business models have changed dramatically as a result of digitalisation and technological disruption, which has been expedited by the effect of the COVID-19 pandemic.[1] Apart from pandemic impacts, the rise of information technology, globalization of economic activity, blurring of distinctions between professions and sectors, and increased integration of knowledge have all contributed to developments in the legal sector.[2] Technology has greatly impacted the way law and legal experts are operating in this era as far as enhancing efficiency is concerned.[3]

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1 'Digital Economy Agreements' <https://www.mti.gov.sg/Improving-Trade/Digital-Economy-Agreements> accessed 16 April 2022.
Kellogg Sarah, 'Cover Story: The Transformation of Legal Education' *From Washington Lawyer, May 2011*

2 <https://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/may-2011-legal-education.cfm> accessed 11 April 2022.

3 Abigail Hess, 'Experts Say 23% of Lawyers' Work Can Be Automated—Law Schools Are Trying to Stay Ahead of the Curve' (CNBC, 7 February 2020) <https://www.cnbc.com/2020/02/06/technology-is-changing-the-legal-profession-and-law-schools.html> accessed 10 April 2022; Alej, ro Miyar | February 06 and 2020 at 09:46 AM, 'Technology Trends That Will Affect the Legal Profession in 2020' *(Daily Business Review)* <https://www.law.com/dailybusinessreview/2020/02/06/technology-trends-that-will-affect-the-legal-profession-in-2020/> accessed 10 April 2022; Singapore Academy of Law, 'Deep Thinking: The Future Of The Legal Profession In An Age Of Technology' *(Medium, 19 July 2019)* <https://medium.com/@singaporeacademyoflaw/deep-thinking-the-future-of-the-legal-profession-in-an-age-of-technology-6b77e9ddb1e9> accessed 10 April 2022; 'Disruptive Technology in the Legal Profession' *(Deloitte United Kingdom)* <https://www2.deloitte.com/uk/en/pages/financial-advisory/articles/the-case-for-disruptive-technology-in-the-legal-profession.html> accessed 10 April 2022; 'New Technologies and the Legal Profession' *(nyujlb)* <https://www.nyujlb.org/single-post/2019/04/08/New-Technologies-and-the-Legal-Profession> accessed 10 April 2022; Tanya Du Plessis, 'Competitive Legal Professionals' Use of Technology in Legal Practice and Legal Research' (2008) 11 Potchefstroom Electronic Law Journal.

Furthermore, the rise of platforms and apps with multiple integrated services ranging from transportation to finance and telemedicine has altered how services are consumed, with businesses increasingly relying on electronic transactions and digital solutions for everything from sourcing to invoicing and payments. Secure and smooth cross-border data transfers are critical for the digital economy's growth and the protection of consumers' interests.[4] The traditional legal and institutional frameworks on arbitration cannot, arguably, respond to the related disputes as they currently are. This paper makes a case for African countries, with a focus on Kenya, to respond to this digital and technological evolution by putting in place corresponding infrastructure to address the disputes that are bound to arise from the same.

OECD points out that the digital transformation has decreased the costs of international commerce, facilitated the coordination of global value chains (GVCs), aided the diffusion of ideas and technology, and connected a larger number of firms and customers throughout the world.[5] It goes on to point out that even if international commerce has never been easier, the adoption of new business models has resulted in more complicated international trade transactions and policy changes.[6] As a result, Governments are confronted with new regulatory problems in today's fast-paced and linked world, not just in addressing concerns originating from digital disruption, but also in ensuring that the potential and advantages of digital commerce are realized and shared equally.[7]

Notably, Kenya is making positive steps towards enhancing the productivity of the digital economy as evidenced by the development of the 2019 Digital Economy Blueprint[8]. The Blueprint proposes five pillars as foundations for the growth of a digital economy which include: Digital Government; Digital Business; Infrastructure; Innovation-Driven Entrepreneurship and Digital Skills and Values.[9] The Blueprint sets clear results, recognizes open doors and regions that need further concentration, while outlining relating game plans for Government, private area and the citizens. By working together, citizens can partake in the chances of a developing, all around the world serious present day economy, empowered by innovation.[10]

The paper makes some comparative analysis borrowed from countries that have made reasonable progress in this area.

2. Nature of Digital Economy

With the fast development of the web beginning in the mid-1990s, the advanced scene has extended and changed how organizations work and how shoppers take part in exchanges with organizations and with one another.[11] It has been contended that the digital economy is

4 Ibid.
5 'Digital Trade - OECD' <https://www.oecd.org/trade/topics/digital-trade/> accessed 16 April 2022.
6 Ibid.
7 Ibid.
8 Republic of Kenya, *Digital Economy Blueprint*, 2019. Available at https://www.ict.go.ke/wp-content/uploads/2019/05/Kenya-Digital-Economy-2019.pdf [Accessed on 16 April 2022].
9 Ibid, chapter Two.
10 Ibid, p. 28.
11 Barefoot, K., Curtis, D., Jolliff, W., Nicholson, J.R. and Omohundro, R., 'Defining and Measuring the Digital Economy' (2018) 15 US Department of Commerce Bureau of Economic Analysis, Washington, DC, p.3.

fundamentally different from the traditional economy as it existed during the twentieth century, when many economic theories crystallized, and that traditional theories fail to capture the abstract, global, oligopolistic, intangible, and knowledge-driven nature of the digital economy as it has emerged in the twenty-first century.[12]

The digital economy has revolutionized the way we do business and live our lives, and the growth of digitized innovation, such as cloud, mobile services, and artificial intelligence, has accelerated this shift and given us with unprecedented services and benefits.[13] There are no universally accepted definitions of the terms 'digital economy' or 'digital trade'. The United States International Trade Commission (USITC) defines digital trade as the delivery of products and services over fixed-line or wireless digital networks. This includes both domestic and international trade, but excludes most physical goods, such as goods ordered online and physical goods with a digital counterpart, such as books and software, music, and movies sold on CDs or DVDs.[14] The United Kingdom Digital Dispute Resolution Rules defines a digital asset includes a cryptoasset, digital token, smart contract or other digital or coded representation of an asset or transaction; and a digital asset system means the digital environment or platform in which a digital asset exists.[15]

Physically delivered and digitalized purchases of digital services, such as remote cloud computing or architectural plans delivered on-line; or digitally enabled but physically delivered goods and services, such as the purchase of a good on an online marketplace or the booking of a hotel through a matching service. Because trade policy commitments and norms for goods (GATT) and services (WTO) differ, the trade policy environment will be determined by how the transaction is delivered and what sort of product is being transacted (GATS).[16]

Digitization minimizes marginal production and distribution costs while widening access to global commerce, lowering the cost of engaging in trade not only for major enterprises, but also for individuals, small businesses, and entrepreneurs. This is already causing business model innovations and the rise of micro-multinationals, micro-work, and micro-supply chains that may take advantage of international markets.[17]

3. Traditional Alternative Dispute Resolution Processes Versus Digital Disputes

ADR procedures have been linked to a number of benefits over litigation, including being quicker, cheaper, and less restrictive on procedural norms. In the twenty-first century, alternative dispute resolution (ADR) aims to develop a faster, more cost-effective, and more efficient approach than litigation, which is time-consuming and expensive.[18] Foreign investors

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12 Usman W Chohan, 'Some Precepts of the Digital Economy' [2020] SSRN Electronic Journal 1 <https://www.ssrn.com/abstract=3512353> accessed 16 April 2022.

13 Watanabe, C., Naveed, K., Tou, Y. and Neittaanmäki, P., 'Measuring GDP in the Digital Economy: Increasing Dependence on Uncaptured GDP' (2018) 137 Technological Forecasting and Social Change 226, at p. 226.

14 Lund S and Manyika J, 'How Digital Trade Is Transforming Globalisation' (by International Centre for Trade and Sustainable Development (ICTSD) 7 … 2016), 3.

15 Rule 2, *Digital Dispute Resolution Rules*, 2021.

16 González JL and Jouanjean M-A, "Digital Trade: Developing a Framework for Analysis OECD." *Trade Policy Papers* 205 (2017), at p. 13.

17 Lund S and Manyika J, 'How Digital Trade Is Transforming Globalisation' (by International Centre for Trade and Sustainable Development (ICTSD) 7 … 2016), at p.1.

18 Muigua, K., "Heralding A New Dawn: Achieving Justice Through Effective Application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya", Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Vol. 1, No 1, (2013), pp. 43-78 at p.55.

prefer mediation or arbitration over the national court system because they are concerned about the effectiveness of national courts in cross-border conflicts. In the context of cross-border commerce, dispute resolution through arbitration/ADR is not just a domestic but also an increasingly rising worldwide phenomena.[19]

Contemporary ADR methods and procedures are thought to be more efficient and constructive than traditional schemes for managing conflicts and settling disputes because they help parties collaborate by reducing animosity and diminishing competitive incentives during the process, and in part, allows for a more satisfactory process through the conflict management expertise of professional negotiators and state-of-the-art in the field.[20] The features of flexibility, cheap cost, absence of complex processes, collaborative issue solving, salvaging relationships, and familiarity with the general public are the core selling points of ADR methods.[21]

Digital disruption has been felt across all modes: digital versions of products or services compete with physically embodied versions, and digital distribution/facilitation business models compete with conventional distribution business models.[22] Technology has also crept into the realm of alternative dispute resolution thanks to advancements in the field. There is now online mediation, online arbitration, and even block chain arbitration, which employs the same block chain technology as cryptocurrencies. Alternative conflict resolution, sometimes known as "online dispute resolution," is becoming more popular.[23]

The United Kingdom's Digital Dispute Resolution Rules provide for an automatic dispute resolution process which means a process associated with a digital asset that is intended to resolve a dispute between interested parties by the automatic selection of a person or panel or artificial intelligence agent whose vote or decision is implemented directly within the digital asset system (including by operating, modifying, cancelling, creating or transferring digital assets).[24] It is, however, worth pointing out that these Rules have also created room for the traditional ADR mechanisms by providing that 'any dispute between interested parties arising out of the relevant contract or digital asset that was not subject to an automatic dispute resolution process shall be submitted to arbitration in accordance with the current version of these rules at the time of submission; however, any expert issue shall be decided by an appointed expert acting as such rather than as an arbitrator'.[25]

The emergence of Online Dispute Resolution (ODR) as a supplement to Alternative Dispute Resolution (ADR) might result in a meaningful paradigm shift in how conflicts are resolved outside of conventional court systems.[26] It has been argued that the traditional court system is

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19 Surridge & Beecheno, *Arbitration/ADR Versus Litigation*, September 4, 2006, Available at http://www.hg.org/articles/article_1530.html

20 Peters, S., "The evolution of alternative dispute resolution and online dispute resolution in the European Un." *CES Derecho* 12, no. 1 (2021): 3-17, at p.5.

21 Muigua, K., 'ADR: The Road to Justice in Kenya' Chartered Institute of Arbitrators (Kenya), Alternative *Dispute Resolution*, Vol. 2, No 1, (2014), pp. 28-95.

22 Ciuriak D and Ptashkina M, 'The Digital Transformation and the Transformation of International Trade' [2018] RTA Exchange. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and the Inter-American Development Bank (IDB), at p. 1.

23 Yeoh D, 'Is Online Dispute Resolution the Future of Alternative Dispute Resolution?' *(Kluwer Arbitration Blog*, 29 March 2018) <http://arbitrationblog.kluwerarbitration.com/2018/03/29/online-dispute-resolution-future-alternative-dispute-resolution/> accessed 17 April 2022.

24 Rule 2, United Kingdom Digital Dispute Resolution Rules 2021.

25 Ibid, Rule 5.

26 Peters S, "The evolution of alternative dispute resolution and online dispute resolution in the European Un." *CES Derecho* 12, no. 1 (2021): 3-17, at p. 3.

incapable of administering justice 'on a large scale,' and that ADR and ODR are more appropriate because they provide the architecture and tools to handle online disputes and can more proportionally handle functions that judicial authorities can no longer handle.[27] International commercial disputes may quickly grow into huge trade disputes with significant political and economic ramifications, necessitating the greater use of extrajudicial dispute settlement rather than litigation in national courts.[28] As a result of globalization, effective and dependable systems for resolving commercial and other general issues involving parties from several jurisdictions have become not only desirable but also essential.[29]

4. Kenya's Preparedness in Embracing Digital Dispute Resolution

While various factors have contributed to the Internet economy's rise, the growing rate of innovation in information and communication technology remains the most significant.[30] It has been observed that E-commerce has risen significantly in Kenya, owing to legislation regulating information and communications technology (ICT) services, e-commerce transactions, data protection, and information access.[31]

In April 2021, the UK Jurisdiction Taskforce published the Digital Dispute Resolution Rules which are meant to facilitate the rapid and cost-effective resolution of commercial disputes, particularly those involving novel digital technology such as cryptoassets, cryptocurrency, smart contracts, distributed ledger technology, and fintech applications.[32] They must be agreed upon in writing by both parties, either before or after a disagreement arises. The guidelines provide language for use in a contract, a digital asset (such as a cryptoasset, digital token, smart contract, or other digital or coded representation of an asset or transaction), or a digital asset system.[33]

There is need for African countries to consider investing in similar rues to enhance the growth of digital dispute resolution mechanisms.

4.1. Data Privacy Protection: Data Transfer, Processing, and Storage

Most modern enterprises are progressively bound by national and international data privacy laws, which require companies to know where they are storing Personally Identifiable Information (PII) and Personal Health Information (PHI) and to implement strict controls around the processing, use, and transfer of such PII and PHI.[34] Due to the considerable dangers

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27 Peters, S., "The evolution of alternative dispute resolution and online dispute resolution in the European Un." *CES Derecho* 12, no. 1 (2021): 3-17, at p.6.

28 Sagartz, A., "Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court," Ohio St. J. on Disp. Resol. 13 (1997): 675, at p. 675.

29 Alternative Dispute Resolution Methods, Document Series No. 14, page 2, Paper written following a UNITAR Sub-Regional Workshop on Arbitration and Dispute Resolution (Harare, Zimbabwe 11 to 15 September,2000) <http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document14/DocSeries14.pdf > accessed 17 April 2022.

30 Ahmed U and Aldonas G, 'Addressing Barriers to Digital Trade' (by International Centre for Trade and Sustainable Development (ICTSD) 7 … 2015), at p.1.

31 Kiriti-Nganga T and Mbithi M, 'The Digital Trade Era - Opportunities and Challenges for Developing Countries: The Case of Kenya' (2021), in book: Adapting to the Digital Era: Challenges and Opportunities (pp.92-109), World Trade Organization, at p.94 < https://www.wto.org/english/res_e/booksp_e/adtera_e.pdf> accessed on 16 April 2022.

32 United Kingdom, Digital Dispute Resolution Rules, April 2021 <https://35z8e83m1ih83drye280o9d1-wpengine.netdna-ssl.com/wp-content/uploads/2021/04/Lawtech_DDRR_Final.pdf> accessed on 16 April 2022.

33 'Ground-Breaking Digital Dispute Resolution Rules Published' *(Walker Morris)* <https://www.walkermorris.co.uk/publications/ground-breaking-digital-dispute-resolution-rules-published/> accessed 17 April 2022

34 Katharine Perekslis, 'Four Strategies to Navigate Data Privacy Obligations for Compliance, Litigation, and E-Discovery Professionals' *(Law.com)* <https://www.law.com/native/?mi=7bd540437dde4b60991f35c257adc521> accessed 3 June 2020.

and problems offered by technology in terms of such data, the impact of this will become even more apparent as businesses adopt technology.[35] Data breach notification procedures, Data Subject Access Requests (DSARs), and cross-border e-discovery projects are just a few examples of legal processes that demand extreme caution in identifying and managing PII and PHI while working under tight deadlines.[36] Data protection rules in one nation may not be as sophisticated as those in another, necessitating a significant investment in this area not only to earn the trust of clients and partners in another country, but also to avoid the legal ramifications that may result from a data privacy breach.[37]

Local businesses must make a deliberate decision to invest in data protection infrastructure that will allow them to function efficiently and secure their clients' data regardless of the state of local data protection regulations. As dispute resolution professionals and corporate legal departments seek more cost-effective ways to improve the delivery of legal services, they should look for paralegals and legal assistants with experience in technology-driven systems who can not only help the firm operate more efficiently but also ensure data privacy.[38]

It may be necessary for policymakers to collaborate closely with other stakeholders to reexamine existing data protection rules in order to improve their efficacy. Relevant personnel should also be prepared with the required data protection skills and knowledge. Information security management, for example, is a collection of rules and procedural controls that Information Technology (IT) and business organizations use to safeguard their informational assets against threats and vulnerabilities-security of information.[39] These professionals would be in charge of an institution's or company's Information Security Management System (ISMS). ISMS is essential to ensure that any data is kept secret, has integrity, and is conveniently accessible when needed. Regardless of whether the data is stored in a digital or physical format, the discipline of Information Security Management is essential for preventing illegal access or theft.[40] This is because any technology-driven business operation, including the legal profession, is vulnerable to security and privacy concerns.[41] The security controls can follow common security standards or be more focused on the industry.[42]

4.2. Training/Education in E-Literacy

To meet the needs of today's legal consumer, it has been correctly stated that "with the emerging concepts of artificial intelligence, Block chain, Education, and digital technology, capabilities and potential must develop, and efforts must be made at the school and university level for upgrading digital skills, running special basic and advanced skill-based programs."[43] Law schools must step in to bridge the knowledge and skills gap if attorneys are to stay relevant

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35 Ibid.
36 Ibid.
37 United Nations Conference On Trade And Development, 'Data protection regulations and international data flows: Implications for trade and development,' UNCTAD/WEB/DTL/STICT/2016/1/iPub, United Nations, 2016 <https://unctad.org/en/PublicationsLibrary/dtlstict2016d1_en.pdf >10 April 2022; 'How Organizations Can Stay Ahead of Changing Privacy Laws' (*Digital Guardian*, 22 August 2019) <https://digitalguardian.com/blog/how-organizations-can-stay-ahead-changing-privacy-laws> accessed 10 April 2022.
38 'Future Law Office 2020: Redefining the Practice of Law | Robert Half' <https://www.roberthalf.com/research-and-insights/workplace-research/future-law-office-2020-redefining-the-practice-of-law> accessed 10 April 2022.
39 'What Is Information Security Management?' (*Sumo Logic*) <https://www.sumologic.com/glossary/information-security-management/> accessed 10 April 2022.
40 Ibid.
41 'Introduction to Information Security Management Systems (ISMS) – BMC Blogs' <https://www.bmc.com/blogs/introduction-to-information-security-management-systems-isms/> accessed 10 April 2022.
42 Luke Irwin, 'ISO 27001: The 14 Control Sets of Annex A Explained' (*IT Governance UK Blog*, 18 March 2019) <https://www.itgovernance.co.uk/blog/iso-27001-the-14-control-sets-of-annex-a-explained> accessed 10 April 2022.
43 Raizada S and Mittal JK, 'Structural Transformation and Learning Paradigms-Global Strategic Approach in Clinical Legal Education' (2020) 20 Medico Legal Update 188, 189.

and on top of their game. Indeed, it has been correctly said that "the rivalry in the field of law has expanded tremendously to the point that it is now a worldwide platform and every student who steps into the shoes of a lawyer is required to manage many topics."[44]

To prepare the overall population, there is a requirement for the Government, through the Ministry of Information Communication Technology in a joint effort with the other significant partners to make it simple for general society to procure the applicable abilities in innovation through customized courses at all levels of the school educational program as well as through other improved on courses accessible to those all-around out of school and not liable to profit from work related phases of preparation nearby. This will also make it simpler for the general population to have meaningful interactions with the legal system.

This is especially relevant given that the judiciary is on the verge of incorporating technology into the administration of justice. The necessity for embracing justice—to allow efficient access to justice for all—will be defeated if the disseminators/facilitators of justice are empowered and the consumers of justice are excluded.

Leaving them out will instead encourage digital apartheid, which is the systematic exclusion of particular populations from digital access and experience as a result of political and commercial policies and practices.[45] With the increased digitization of government services, such as the Huduma Center service delivery model, a Government of Kenya initiative aimed at advancing citizen-centered public service delivery through a variety of channels, including deploying digital technology and establishing citizen service centers across the country, there is an urgent need to address digital illiteracy in order to improve access for all. The process will benefit from virtual access to justice.[46] The government can collaborate with the judiciary to establish Digital Villages Projects around the country to improve access to justice-related services.[47] Such centers should concentrate on providing digital training and education relating to access to justice.

In addition, the government should work with both domestic and international IT businesses to spread out internet access services across the country so that everyone has easy access. They should also collaborate with local mobile service providers to make mobile data accessible to the majority of Kenyans. Furthermore, all people should be able to afford electricity. The Kenyan government's efforts to guarantee that all Kenyans have access to power through the Last Mile Electricity Connectivity Project are noteworthy.[48]

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44 Ibid, 189.

45 Paula Barnard-Ashton and others, 'Digital Apartheid and the Effect of Mobile Technology during Rural Fieldwork' (2018) 48 South African Journal of Occupational Therapy 20.

46 Sarah aru and Moses Wafula, 'Factors Influencing the Choice of Huduma Centers' Services (A Case Study of Mombasa Huduma Centre)' (2015) 5 International Journal of Scientific and Research Publications; Amir Ghalib Abdalla and others, 'Effect of Huduma Centers (One Stop Shops) in Service Delivery – A Case Study of Mombasa Huduma Centre' (2015) 5 International Journal of Academic Research in Business and Social Sciences 102; 'Study Heaps Praise on Revolutionary Huduma Centres' *(Daily Nation)* <https://www.nation.co.kehttps://www.nation.co.ke/dailynation/news/study-heaps-praise-on-revolutionary-huduma-centres-89030> accessed 11 April 2022.

47 'Broadband in Kenya | Broadband Strategies Toolkit' <http://ddtoolkits.worldbankgroup.org/broadband-strategies/case-studies/broadband-kenya> accessed 11 April 2022.

48 'Last Mile Connectivity Program Kenya - Inclusive Infrastructure' <https://inclusiveinfra.gihub.org/case-studies/last-mile-connectivity-program-kenya/> accessed 11 April 2022; 'Kenya - Last Mile Connectivity Project II' <https://projectsportal.afdb.org/dataportal/VProject/show/P-KE-FA0-013> accessed 11 April 2022; African Development Bank, 'Kenya - Last Mile Connectivity Project - Project Appraisal Report' (*African Development Bank - Building today, a better Africa tomorrow*, 24 January 2020) <https://www.afdb.org/en/documents/kenya-last-mile-connectivity-project-project-appraisal-report> accessed 11 April 2022; 'Last Mile Project – Ministry of Energy' <https://energy.go.ke/?p=914> accessed 11 April 2022.

5. Digital Dispute Resolution: The Future of Commercial Alternative Dispute Resolution?

With the introduction of diverse social media platforms that allow interconnectivity beyond national boundaries and enable cross-border relationships between clients and their dispute resolvers, the experts can use technology to tap into the ever-growing international Alternative modes of Dispute Resolution such as international arbitration, mediation, and Online Dispute Resolution (ODR), especially in the face of rapidly growing networking and borderless legal practice.[49]

5.1. Online Mediation

Mediation is a negotiation process between two parties in the presence of a third party. Through a framework that will not force any solution that is not mutually acceptable, negotiation permits parties to fully control both the process and the outcome.[50] As an informal dispute resolution procedure, negotiation gives parties complete authority over the process of identifying and discussing their difficulties, allowing them to negotiate a mutually acceptable solution without the involvement of a third party. It focuses on the parties' similar interests rather than their respective strength or position.[51] It is linked to voluntariness, cost-effectiveness, informality, an emphasis on interests rather than rights, innovative solutions, personal empowerment, greater party control, addressing fundamental causes of conflict, non-coerciveness, and long-term results.

This makes it particularly applicable to normal life conflicts that would otherwise be exacerbated by any attempts to resolve them through litigation.[52] When participants in a negotiation reach a stalemate, they invite a third party of their choosing to assist them in resolving the issue, which is known as mediation.[53] Mediation has many of the same benefits as negotiating. However, because mediation has no enforcement mechanism and relies on the goodwill of the parties, it suffers from its non-binding character, which means that if compliance is necessary, one must go to court to acquire it.[54]

The added advantages of online mediation are that parties need not to travel and the cost of mediation is fixed and parties can prepare financially from the start.[55]

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49 Emmanuel Oluwafemi Olowononi and Ogechukwu Jennifer Ikwuanusi, 'Recent Developments in 21st Century Global Legal Practice: Emerging Markets, Prospects, Challenges and Solutions for African Lawyers' (2019) 5 KIU Journal of Social Sciences 31; Samuel Omotoso, 'Law, Lawyers And The Social Media In The 21st Century: Challenges And Prospects' Law, Lawyers And The Social Media In The 21st Century: Challenges And Prospects <https://www.academia.edu/40663364/LAW_LAWYERS_AND_THE_SOCIAL_MEDIA_IN_THE_21ST_CENTURY_CHALLENGES_AND_PROSPECTS> accessed 10 April 2022.

50 See generally, Muigua, K., Resolving Conflicts through Mediation in Kenya (Nairobi: Glenwood Publishers, 2017).
Rahwan, I., Sonenberg, L. and Dignum, F., "Towards interest-based negotiation." In *Proceedings of the second international joint conference on Autonomous agents and multiagent systems*, pp. 773-780, ACM, 2003.

51 Muigua, K., 'ADR: The Road to Justice in Kenya' Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Vol. 2, No 1, (2014), pp. 28-95.

52 Mwagiru, M., *Conflict in Africa: Theory, Processes and Institutions of Management* (Nairobi: Centre for Conflict Research, 2006), p. 115.

53 See generally, Muigua, K., 'Effective Justice for Kenyans: is ADR Really Alternative?' *The Law Society of Kenya Journal*, Vol. II, 2015, No. 1, pp. 49-62.

54 'The Benefits of Online Mediation' (*Mediation Center of Los Angeles* | MCLA, 2 November 2020) <https://www.mediationla.org/the-benefits-of-online-mediation/> accessed 17 April 2022.

5.2. Online Commercial Arbitration

Due to its clear benefits over litigation, arbitration has grown in favour as the preferred method of resolving disputes, particularly among businesses.[56] The most notable advantage of arbitration over litigation is its transnational application in international conflicts with low or no intervention from national courts, giving parties confidence that justice would be served in the most efficient manner possible. As a result, countries and regions all over the world are advocating international arbitration as the preferred method for resolving international conflicts.[57]

International commercial arbitration in Africa will assist the business and investment community because it provides a viable structure for resolving international and regional conflicts.[58] However, while commercial arbitration's inherent flexibility has allowed it to adapt well to recent global changes, particularly the Covid-19 pandemic, due to its familiarity with remote communications, videoconferencing, and the use of technology to drive efficiencies, holding proceedings entirely (or nearly entirely) virtually has posed its own set of challenges, including concerns about worries over fair treatment, straightforwardness, secrecy, security, data protection and management; the presentation of submissions in a different way; how to manage numerous time regions; screen weariness; and network issues.[59]

Thus, even as the world moves towards embracing online commercial arbitration, there is a need for countries and stakeholders to come up with ways of overcoming the above listed challenges.

5.3. Block Chain Arbitration

Blockchain is defined as a "open, distributed ledger that can efficiently and permanently record transactions between two parties." In its most basic form, a blockchain's functioning premise is built on the connection of each transaction or movement as a "block" to the system, allowing the platform to develop indefinitely. The whole system is updated with each new transaction, and the transaction is accessible to all parties involved anywhere in the globe.[60]

The self-executing, next generation contracts used in Smart Contracts, Blockchain, and Arbitration are designed to achieve preset conditions. By activating the arbitration clause embedded in the smart contract, Blockchain Arbitration can enable the storage and verification of rules, as well as automatic implementation (on a specific occurrence constituting a breach of the agreement).[61]

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56 See Sagartz, A., "Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court," *Ohio St. J. on Disp. Resol*. 13 (1997): 675 at p.678.

57 Karl P. S. and Federico O., *Improving the international investment law and policy regime: Options for the future*, Background report prepared for the Seminar on Improving the International Investment Regime Helsinki, April 10-11, 2013 hosted by The Ministry for Foreign Affairs of Finland, 25 March 2013. Available at http://www.formin.finland.fi/public/download.aspx?ID=113259&GUIDE

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

59 'Recent Trends in International Arbitration' *(Walker Morris)* <https://www.walkermorris.co.uk/publications/recent-trends-in-international-arbitration/> accessed 17 April 2022.

60 'Blockchain, Smart Contracts And Arbitration - Technology - Turkey' <https://www.mondaq.com/turkey/fin-tech/967452/blockchain-smart-contracts-and-arbitration> accessed 17 April 2022.

61 'Blockchain Arbitration: The Future of Dispute Resolution' (*Foxmandal*, 23 November 2021) <https://www.foxmandal.in/blockchain-arbitration-the-future-of-dispute-resolution/> accessed 17 April 2022.

If a disagreement arises, the smart contract will alert the Arbitrator via a blockchain-based dispute resolution interface. A party can digitize the conditions of an agreement, lock the cash in a smart contract, and condition the smart contract such that the work is completed and the monies are received. The smart contract's self-executing nature will automatically enforce the award and transmit the stipulated fee to the Arbitrator once the procedure is completed.[62]

Due to its decentralized nature, blockchain arbitration currently presents several incompatibilities with the existing arbitration legal framework, such as the cryptographic form of the arbitration agreement and the lack of a seat of arbitration, to name a few.[63] The notion of blockchain arbitration is one of the most recent advancements in ADR, and it aims to harness the benefits of the technology in dispute resolution. It is linked to the proliferation of e-contracts and smart contracts in commercial transactions throughout the world.[64] There is, however, need for independent and further research on the topic of blockchain arbitration even as the international community moves to embrace the process.

6. Conclusion

The expansion of digital trade and digitally enabled transactions has been tremendous in Kenya, and digitization has become a vital element of a wide range of daily activities and service delivery.[65] With more and more individuals throughout the globe engaged in immediate cross-border exchanges of digital commodities, and as the infrastructure that supports the Internet increases, obstacles of distance and cost that previously appeared insurmountable have begun to fall away.[66]

The transnational nature of this kind of commerce and the limitations that come with the traditional means of dispute resolution create the need for enhanced use of digital dispute resolution in Africa. 'The quality of an institute depends on the incorporation of current changing dynamics and environmental challenges, and if institutions fail to keep pace with these changes, they will be perceived as increasingly irrelevant, failing to add value to society and shaping and grooming future leaders who can contribute in creative ways to accelerating sustainable economic development,' it has been correctly stated.[67] This, therefore, calls for investment in institutional frameworks that will ably overcome the challenges that come with digital economy, as far as management of the digital trade disputes is concerned. Alternative Dispute Resolution practice is rapidly evolving-there is clearly a need to invest in Digital Dispute Resolution in Kenya and the rest of the world.

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62 Ibid.

63 Chevalier M, 'Arbitration Tech Toolbox: Is a Mexican Court Decision the First Stone to Bridging the Blockchain Arbitral Order with National Legal Orders?' (*Kluwer Arbitration Blog*, 4 March 2022) <http://arbitrationblog.kluwerarbitration.com/2022/03/04/arbitration-tech-toolbox-is-a-mexican-court-decision-the-first-stone-to-bridging-the-blockchain-arbitral-order-with-national-legal-orders/> accessed 17 April 2022.

64 Bansal R, 'Enforceability of Awards from Blockchain Arbitrations in India' (*Kluwer Arbitration Blog*, 21 August 2019) <http://arbitrationblog.kluwerarbitration.com/2019/08/21/enforceability-of-awards-from-blockchain-arbitrations-in-india/> accessed 17 April 2022.

65 Kiriti-Nganga T and Mbithi M, 'The Digital Trade Era - Opportunities and Challenges for Developing Countries: The Case of Kenya' (2021), in book: Adapting to the Digital Era: Challenges and Opportunities (pp.92-109), World Trade Organization, at p.94.

66 Lund S and Manyika J, 'How Digital Trade Is Transforming Globalisation' (by International Centre for Trade and Sustainable Development (ICTSD) 7 … 2016), at p.1.

67 Raizada S and Mittal JK, 'Structural Transformation and Learning Paradigms-Global Strategic Approach in Clinical Legal Education' (2020) 20 Medico Legal Update 188, 189.

Determination of the Forum for Resolving Disputes where Parties have an Agreement with Inconsistent Dispute Resolution Provisions or have Entered into a Number of Contracts

By Hazron Maira*

Abstract

This paper discusses the process of determining the forum for resolving disputes where parties have agreed to a dispute resolution clause with inconsistent provisions or have entered into a number of contracts. Where parties have entered into one contract with two superficially inconsistent dispute resolution provisions, the process of reconciling the two provisions is to give priority to the arbitration clause over the jurisdiction clause. Where parties have entered into more than one agreement with competing arbitration and jurisdiction clauses, the question of determining the forum for resolving disputes is one of construction of the agreements. The process of interpretation should focus on finding the commercially rational interpretation and giving effects to the intention of the parties, even if the effect would result in fragmentation of the overall process for the resolution of disputes.

1. Introduction

Parties to an international commercial relationship include a dispute resolution clause in their contract for the purpose of avoiding the expense and delay of having to argue about the applicable law and the dispute resolution mechanism to be invoked when a dispute arises.[1] As long as the general meaning of the clause is clear, ordinary businesspeople are not likely to give much attention to the precise language of a dispute resolution clause or how it has been interpreted in the numerous authorities, despite likely lack of consistency in the interpretations of such clauses.[2] Unsurprisingly, it has implicitly been suggested that this could be one of the reasons why parties seek judicial intervention on matters regarding construction of dispute resolution clauses on the appropriate forum for settlement of disputes.[3] Other explanations for this recourse have been attributed to issues

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1 *Fiona Trust Holding Corporation v Privalov* [2007] UKHL 40 at para 26

2 *ibid*

3 See *Sebastian Holdings Inc v Deutsche Bank AG* [2010] EWCA Civ 998 at para 57: "Jurisdiction clauses are rarely the subject of detailed negotiation and there is nothing to suggest that in these transactions any detailed attention was paid in the negotiations to the jurisdiction clauses."

in drafting,[4] or an attempt by a party with a weak case to postpone the day of reckoning, for example, in *UBS AG & UBS Securities Llc v HSH Nordbank AG*,[5] a case that concerned the construction of a jurisdiction clause and which was escalated up to the court of appeal, the only point why the claimant commenced the London proceedings was "to pre-empt any decision of the New York court in the proceedings brought there by the defendants in the English proceedings."

It has been said that an arbitration clause is a "kind of forum-selection clause"[6] and has been defined as a "clause in a contract, by which the parties to a contract undertake to submit to arbitration the disputes that may arise in relation to that contract."[7] An arbitration clause should be distinguished from an exclusive jurisdiction clause which is formulated with the object of identifying the national court or courts that will resolve any dispute,[8] or the country where arbitration would be seated.[9] An exclusive jurisdiction clause imposes a contractual obligation on the parties to litigate in the court or courts of the nominated country,[10] and non-exclusive jurisdiction clause confers jurisdiction on the identified court or courts in addition to the courts that have jurisdiction by virtue of the general rule regarding domicile and the special jurisdiction provisions.[11] Based on the definitions of an agreement to arbitrate and an exclusive jurisdiction clause, similarity between the two is notable in that in each case, the parties have agreed upon their chosen tribunal for resolution of disputes and the location of any proceedings.[12] Once these choices are made, neither of the parties can be heard to say that the agreement should not be enforced.[13]

In international contracts with an arbitration clause, it is standard for the parties to include a jurisdiction clause, the intention being to identify the courts that would exercise supervisory jurisdiction over the arbitration.[14] Where different agreements deal with distinct aspects of the parties' relationship or where it is convenient to apply a particular regime to some aspect of their relationship such as security, a rational choice is to provide for resolution of disputes by different tribunals,[15] for example, it has been observed that there is nothing unusual about submitting a contractual dispute to arbitration whilst referring matters relating to security to the jurisdiction of one or more courts.[16] This is frequently a feature of international

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4 See *The Yien Yieh Commercial Bank Limited v Kwai Chung Col Storage Co. Ltd. (Hong Kong)* [1989] UKPC 28. "… to reject one clause in a contract as inconsistent with another involves a rewriting of the contract which can only be justified in circumstances where the two clauses are in truth inconsistent. In point of fact, this is likely to occur only where there has been some defect of draftsmanship."

5 [2009] EWCA Civ 585 at para 7

6 *Scherk v Alberto-Culver Co*., 417 U.S. 506 (1974)

7 UNCTAD (2005), Dispute Settlement, Doc. UNCTAD/EDM/Misc.232/Add.39. Available at: https://unctad.org/system/files/official-document/edmmisc232add39_en.pdf. [Accessed on 04 April 2022]

8 *Tecnicas Reunidas Saudia for Services and Contracting Co Ltd v The Korea Development Bank* [2020] EWHC 968 (TCC) at para 10

9 Peter Ashford, 'Is an Asymmetric Disputes Clause Valid and Enforceable?'. *Arbitration: The Int'l J. of Arb., Med. & Dispute Mgmt* 86, no. 3 (2020): 347–364, 347

10 Garnett, Richard, Jurisdiction Clauses Since Akai (December 16, 2013). Australian Law Journal, Vol. 85, No. 2, 2013, U of Melbourne Legal Studies Research Paper No. 666, 3. Available at SSRN: https://ssrn.com/abstract=2368142. [Accessed on 18 April 2022]

11 *Perform Content Services Ltd v Ness Global Services Ltd* [2021] EWCA Civ 981 at para 40.

12 *Atlanska Plovidba & Anor v Consignaciones Asturianas SA* [2004] EWHC 1273 (Comm) at para 28

13 *ibid*

14 *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] A.C. 909. See also A v B [2006] EWHC 2006 (Comm) at para 111 for how the court exercises supervisory jurisdiction: "… an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy going to the existence or scope of the arbitrator's jurisdiction or as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of the arbitration." (Approved by Court of Appeal in C v D [2007] EWCA Civ 1282 at para 17)

15 *Amtrust Europe Ltd v Trust Risk Group SpA* [2014] EWHC 4169 (Comm) at para 31

16 *PT Thiess Contractors Indonesia v PT Kaltim Prima Coal & Anor* [2011] EWHC 1842 (Comm) at para 41

transactions, and the choice of jurisdiction in the security agreement may have to do with factors independent of the principal agreement.[17] These principles lead to a conclusion that at the time of concluding an agreement or agreements, the parties intended that different claims are to be the subject of different jurisdiction clauses.[18]

The object of this paper is to establish how the courts determine the appropriate forum for resolution of disputes where parties have an agreement with inconsistent (other terms used are conflicting or competing) dispute resolution provisions or have entered into a number of contracts. To this end, the discussion is in five parts. Following this introduction, in part two the paper discusses the *Fiona Trust* "one-stop" "one jurisdiction" presumption and in the third part, discussion is on where parties have agreed on two superficially inconsistent dispute resolution provisions within the same contract. In part four, the discussion turns to where there is more than one agreement between the same parties, each with a different provision for dispute resolution, and following a dispute, parties cannot agree on which dispute resolution clause is applicable, and part five concludes the discussion.

2. The Fiona Trust "one-stop" "one jurisdiction" presumption.

The *Fiona Trust* "one-stop" "one jurisdiction" presumption is derived from the UK House of Lords case of *Fiona Trust & Holding Corporation v Privalov*[19] which concerned the scope and effect of arbitration clauses in eight charterparties. The relevant issue before the court and which is relevant to this paper was whether, as a matter of construction, an arbitration clause which conferred jurisdiction on the dispute about repudiation of the contract was apt to cover the question of whether the contract was procured by bribery.

The Court approached the question of construction by first noting that it was necessary to inquire into the purpose of the arbitration clause. Noting that a contractual relationship may give rise to disputes, the parties want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction.[20]

Lord Hoffmann who read the main judgment speech noted that if there is acceptance that this is the purpose of an arbitration clause, then its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts. Noting that it appears to be generally accepted that there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding

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17 *Ibid*. See also *Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp.* [2010] SGHC 31, where the parties had agreed to refer disputes under the principal agreement between them (an offshore drilling contract) to arbitration, and disputes relating to escrow account to non-exclusive jurisdiction in favour of the Singapore Courts. The Court said at para 21, "… the parties had agreed to carve out escrow matters from the Drilling Contract and to put them in a separate agreement. That evinced a clear intention by the parties to subject claims arising from the Escrow Agreement to the dispute resolution clause found within that particular agreement."

18 See *PT Thiess Contractors Indonesia*, *(supra* fn. 16) at para 43

19 *Fiona Trust (supra* fn. 1)

20 *ibid* at para 6

that they must have had such an intention.[21] Therefore, a proper approach to construction requires the court to give effect, so far as the language used by the parties will permit, to the commercial purpose of the arbitration clause, and at para 13, his conclusion was in the following terms:

> *"… the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction."*

Having cited authorities from other jurisdictions, the Court observed that this approach of construction is now firmly embedded as part of the law of international commerce,[22] and it has also been held that the presumption applies as much to a jurisdiction clause as to an arbitration clause.[23]

The *Fiona Trust* presumption has been cited in several cases in different jurisdictions[24] and has been construed as broadly as possible, for example, in *Sulamerica CIA Nacional De Seguros SA & Ors v Enesa Engenharia SA & Ors*,[25] the court noted that although it is possible for parties to agree that quantum should be dealt with in one jurisdiction and liability in another, the two are not always clearly distinguishable, and all the authorities reveal a reluctance on the part of any court to decide that certain types of dispute are to be dealt with in one forum and others in another because the parties are most unlikely to have intended that, since it would be a recipe for confusion.[26]

3. Where there are two superficially inconsistent dispute resolution provisions within the same contract.

An inconsistent dispute resolution clause requires parties in a business relationship to pursue dispute resolution process for a single dispute in both arbitration and in courts. In *Melford Capital Partners (Holdings) Llp & Ors v Digby*,[27] the court cited from Volume one of the 33rd edition of Chitty on Contracts at [13.070] the following view in regard to interpretation of inconsistent terms of a contract:

> *"Where the different parts of an instrument are inconsistent, effect must be given to that part which is calculated to carry into effect the purpose of the contract as gathered from the instrument as a whole and the available background, and that part which would defeat it must be rejected.… When considering how to interpret a contract in the case of alleged inconsistency, the courts distinguish between a case where the contract makes provision for*

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21 *ibid* at para 7
22 *ibid* at para 31.
23 *Continental Bank N.A. v Aeakos Compania Naviera S.A.* [1994] 1 WLR 588 at pp. 592F to 593G (cited in *Monde Petroleum SA v Westernzagros Ltd* [2015] EWHC 67 (Comm) at para 34)
24 See examples: *Synergy Industrial Credit Limited v Cape Holdings Limited* [2020] eKLR, Civil Appeal no. 81 of 2016, *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5 at para 16 & *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA* [2016] SGCA 53 at para 30
25 [2012] EWHC 42 (Comm) at para 45
26 See the perspective of a commentator on international commercial arbitration at; Gary Born, *International Commercial Arbitration*, 2nd ed (2014), p 1403. "… 'pro-arbitration' presumption … provides that a valid arbitration clause should generally be interpreted expansively and, in cases of doubt, extended to encompass disputed claims. That is particularly true where an arbitration clause encompasses some of the parties' disputes and the question is whether it also applies to related disputes, so that all such controversies can be resolved in a single proceeding (rather than in multiple proceedings in different forums)." (Cited in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* (Rev1) [2020] UKSC 38 at para 107)
27 [2021] EWHC 872 (Ch)

the possibility of inconsistency and the case where there is no such provision. In the latter case the contract documents should as far as possible be read as complementing each other and therefore as expressing the parties' intentions in a consistent and coherent manner."

Where parties have concluded both an arbitration and a jurisdiction agreement which may overlap, they must be presumed to be acting commercially, and not to intend that any claim should be the subject of inconsistent dispute resolution clauses.[28] However, various case law indicate that when a dispute arises, it is not unusual for parties to be seen as reading from different scripts regarding which is the appropriate forum for resolution of the dispute that has arisen. In *Paul Smith Ltd. v. H & S International Holding Co. Inc.*,[29] a case that concerned a dispute arising from a licencing agreement, a dispute resolution clause was in the following terms:

"13. SETTLEMENT OF DISPUTES If any dispute or difference shall arise between the parties hereto concerning the construction of this Agreement or the rights or liabilities of either party hereunder the parties shall strive to settle the same amicably but if they are unable to do so the dispute or difference shall be adjudicated upon under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more Arbitrators appointed in accordance with those Rules.

14. LANGUAGE AND LAW This Agreement, is written in the English language and shall be interpreted according to English law. The Courts, of England shall have exclusive jurisdiction over it to which jurisdiction the parties hereby submit:"

Part of the submission by *Paul Smith Ltd.* ("the plaintiffs") was that one was driven to read clauses 13 and 14 as hopelessly inconsistent and accordingly insofar as those clauses provide for dispute resolution they must fall to the ground. In the court's view, that was a drastic and very unattractive result as it involved the total failure of the agreed method of dispute resolution in an international commercial contract.

In dismissing the case by the plaintiff, the court said clause 13 is a self-contained agreement providing for the resolution of disputes by arbitration and clause 14 specified the *lex arbitri* the curial law or the law governing the arbitration, which will apply to this particular arbitration. The law governing the arbitration is not to be confused with (1) the proper law of the contract, (2) the proper law of the arbitration agreement, or (3) the procedural rules which will apply in the arbitration. These three regimes depend on the choice, express or presumed, of the parties. In this case it was common ground that both the contract and the arbitration agreement were governed by English law. The procedural rules applicable to the arbitration are not rules derived from English law. On the contrary, the procedural regime was the ICC rules which applied by virtue of the parties' agreement. While admitting that the language was "not felicitous", the court said there was no inconsistency between clauses 13 and 14, and both clauses were valid and binding.

The decision in *Paul Smith* case marked a watershed moment in the determination of forum for resolution of dispute for contract with inconsistent provisions. Although it was not fully followed, it provided a useful guidance in *Shell International Petroleum Co Ltd v Coral Oil Co Ltd*[30] where an exclusive jurisdiction clause provided that the agreement was to be governed

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28 *UBS AG & UBS Securities* (*supra* fn. 5) at para 95
29 [1991] 2 Lloyd's L. Rep 127
30 [1999] 1 Lloyd's Law Rep 72

and construed in accordance with English law and any dispute was to be referred to the English Courts. An "Arbitration" clause provided that any dispute which may arise in connection with the Agreement should be finally settled by arbitration in London in accordance with the rules of the London Court of International Arbitration (LCIA). The court acknowledged that the *Paul Smith* approach was a helpful example of how to approach the problem and reconciled the two clauses by concluding that jurisdiction clause required any dispute about the proper law to be referred to the English courts, and the "Arbitration" clause as requiring referral of substantive disputes to arbitration.

The approaches in both *Paul Smith* and in the *Shell International v Coral Oil* cases were later followed in *Axa Re v Ace Global Markets Ltd*[31] where the court, having referred to the arbitration and the non-exclusive jurisdiction clauses that were before it said that it was perfectly possible to construe the two clauses in a harmonious manner. In its judgment, the court said the two clauses could be read together in such a way as to avoid both conflict and surplusage. The arbitration agreement envisages the possibility that the proceedings would take place in court, though only after arbitration, and the contract, when properly construed, demonstrates that the parties do not treat arbitration and court as mutually exclusive, but envisage arbitration as a step which may, or will, take place before any action in court.[32]

In a later case of *Ace Capital Ltd v CMS Energy Corporation*,[33] an insurance policy was to be governed by the laws of England and all disputes to be determined in arbitration at the LCIA. The Service of Suit Clause in respect of the United States Insured was a non-exclusive jurisdiction clause and provided for Underwriters to submit to a court of competent jurisdiction within the US.[34] An issue in court was whether the Service of Suit Clause operated so as to require the underwriters to submit to the jurisdiction of any competent US court if they failed to pay any money claim and were then requested to submit to such a court. Having cited authorities including from the US, the court concluded that the Service of Suit Clause did not operate so as to exclude from arbitration a money claim whenever the US insured requested the underwriters to submit to the jurisdiction of a competent US Court. It (the court) did not regard the "infelicity" in drafting to be no greater than that which applied in the *Paul Smith* case, so as to dictate a contrary conclusion, especially when the consequence of not doing so was to regard the arbitration clause, insofar as it related to money claims by the insured as being, at the insured's option, *pro non scripto*.[35] The Court also made the following observation:

> *"The principle of liberal interpretation in favour of arbitration encourages… not only an expansive reading of what an arbitration clause includes but also a restrictive reading of any other clause which is said, notwithstanding an arbitration clause providing for all disputes to be referred to arbitration, to exclude particular disputes from arbitration (either generally or at one party's option), without expressly saying so."*[36]

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31 [2006] EWHC 216 (Comm)
32 ibid at para 33
33 [2008] EWHC 1843 (Comm)
34 At para 32 of the case, the Court explained the purpose of the Service of Suit clause: "… to ease the difficulties which the insured might encounter in establishing jurisdiction over a foreign, i.e. non US, insurer for enforcement purposes; and that the assent of the insurer to jurisdiction does not prevent him from raising a defence that he has a right to arbitrate the dispute."
35 At para 82, the Court explained that the law's policy of interpretation in favour of arbitration would still leave the Service of Suit clause with meaningful scope, i.e., "It enables the assured to found jurisdiction in any US Court, including its home court, to declare the arbitrable nature of the dispute, to compel arbitration, to declare the validity of an award, to enforce an award, or to confirm the jurisdiction of US courts on the merits in the event that the parties agree to dispense with arbitration."
36 *ibid* at para 83

The principle in *Ace Capital Ltd v CMS Energy* case was considered in the *Sulamerica CIA Nacional*[37] case where an insurance policy contained a condition providing for any disputes arising under, out of or in connection with the Policy would be subject to the exclusive jurisdiction of the courts of Brazil. A separate condition provided for arbitration in London under the ARIAS Arbitration Rules if the insurer and the insured failed to agree on the amount to be paid under the policy. One of the questions before the court was whether there was such inconsistency between the exclusive Brazilian jurisdiction clause on the one hand, and the arbitration clause on the other, that they could not be reconciled. The court, having cited and adopted part of the reasonings in the *Ace Capital Ltd v CMS Energy* case said that giving priority to the arbitration clause over the exclusive jurisdiction clause was the only way of reconciling the two. To give full width to the exclusive jurisdiction clause, the court observed, would be to exclude the right to arbitrate altogether, and the only other option would be to allow both the right to litigate and the right to arbitrate to run in tandem, with the potential for a race to judgment between the two, and that was a most unlikely construction of the parties' intentions.

4. Where there is more than one agreement between the parties, each with a different provision for dispute resolution

The discussion on this theme is in two parts, where the agreements are reached concurrently, and where one occurs at a later stage than the other.

4.1 Where the agreements are reached concurrently

The case of *Sebastian Holdings Inc v Deutsche Bank AG*[38] concerned the construction of jurisdiction clauses in a series of agreements between a bank and its customer, and it offers useful guidance on the principles applicable when determining the forum for dispute resolution where series of agreements are reached concurrently.

First, it is generally to be assumed that just as parties to a single agreement do not intend as rational businessmen that disputes under the same agreement be determined by different tribunals, parties to an arrangement between them set out in multiple related agreements do not generally intend a dispute to be litigated in two different tribunals.[39] Secondly, where there are multiple related agreements, the task of the court in determining whether a dispute falls within the jurisdiction clauses of one or more related agreements, depends upon the intention of the parties as revealed by the agreements.[40] This would involve the process of construction, using the general principles and tools of contractual construction in the context of the principles relating to different jurisdiction clauses in related agreements.[41] The court then

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37 *Sulamerica CIA (supra* fn. 25)

38 *Sebastian Holdings (supra* fn. 3)

39 *ibid* at para 41. See also *Deutsche Bank Ag v Tongkah Harbour Public Company Ltd* [2011] EWHC 2251 (Comm), where a stay of court proceedings was issued in accordance with s.9 of the English Arbitration Act 1996 for a dispute in a contract with a jurisdiction clause on the basis that the dispute was closely connected to another one in a separate contract concluded concurrently and which had an arbitration clause and arbitral proceedings had commenced.

40 *ibid* at para 42

41 *See Surrey County Council v Suez Recyling And Recovery Surrey Ltd* [2021] EWHC 2015 (TCC) at para 49 for the principles of construction that involve construing provisions from separate agreements. "The object is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It is not a literalist exercise but requires consideration of the contract as a whole and the setting into which it is placed. Commercial common sense is a very important factor to take into account when interpreting a contract but should not lead to the rejection of what would otherwise be the natural meaning of a provision."

said that the overall task of the court is summarised in the 2010 supplement to *Dicey, Morris and Collins on the Conflict of Laws* at paragraph 12-094 in the following terms:

> *"But the decision in Fiona Trust has limited application to the questions which arise where parties are bound by several contracts which contain jurisdiction agreements for different countries. There is no presumption that a jurisdiction (or arbitration) agreement in contract A, even if expressed in wide language, was intended to capture disputes under contract B; the question is entirely one of construction.... The same approach to the construction of potentially-overlapping agreements on jurisdiction (but there will, in this respect, be no difference between the construction of agreements on jurisdiction, arbitration agreements and service of suit clauses) ... In the final analysis, the question simply requires the careful and commercially-minded construction of the various agreements providing for the resolution of disputes, the point of departure being that agreements which appear to have been deliberately and professionally drafted are to be given effect so far as it is possible and commercially rational to do so, even where this may result in a degree of fragmentation in the resolution of disputes. It may be necessary to enquire under which of a number of inter-related contractual agreements a dispute actually arises; this may be answered by seeking to locate its centre of gravity.*
>
> *The same approach, namely to focus on the commercially-rational construction, governs the interpretation of agreements on jurisdiction as exclusive or non-exclusive, and of agreements which specifically provide that the parties will not take objection to the bringing of proceedings if proceedings are brought in more courts than one."* [42]

Having cited and approved this authority, the appellate court then turned to the construction of the agreements in issue focusing on finding the commercially rational construction and giving effect to clear agreements, even if that was to result in a degree of fragmentation in the resolution of disputes between parties to the series of agreements.[43] This is despite an outcome of fragmentation having been an unlikely intention of sensible parties to a commercial relationship, all the more so if it is on an unclear and impractical basis.[44] The same parties could also not likely have intended to bear the consequential effects of fragmenting the dispute resolution process which include potential waste of resources and risk of inconsistent decisions.[45]

4.2 Where one agreement occurs at a later stage than the other

There are various strands that arise where parties enter into a separate agreement or agreements at a later stage.

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42 *Sebastian Holdings (supra* fn. 3) at para 49

43 *ibid* at para 50. See also Gillies, Peter S., Arbitration and Fragmentation of the Dispute Resolution Process into Competing Arbitral and Judicial Proceedings - The Court's Role (November 30, 2012). Available at SSRN: https://ssrn.com/abstract=2225630 or http://dx.doi.org/10.2139/ssrn.2225630. [Accessed on 14 April 2022]. The author argues that fragmentation of the dispute resolution process could occur by setting the scene for separate but overlapping arbitral and judicial proceedings. This might happen, for example if: "(1) the dispute involves issues only some of which are covered by the arbitral agreement, and/or (2) there is a third party involved in the dispute or related issues, who is not party to [the] arbitration agreement and who therefore cannot be compelled to participate in the arbitration."

44 *BNP Paribas SA v Trattamento Rifiuti Metropolitani SPA* (Rev 1) [2019] EWCA Civ 768, at para 91

45 *Konkola Copper Mines Plc & Anor v Coromin Ltd & Ors* [2006] EWCA Civ 5, at para 27

4.2.1 Where parties to a contract with a dispute resolution clause enter into a supplemental agreement or agreements but unlike in the original contract, no dispute resolution clause is incorporated.

In construction contracts, it is a standard practice for parties to enter into supplemental agreements, mostly in form of variations to the main contract. When negotiating terms of the variations, the parties' interests ordinarily focus on their rights and obligations, and not on how disputes relating to variations would be resolved. In *L Brown & Sons Ltd v Crosby Homes (North West) Ltd*,[46] the parties entered into a construction contract ("the Contract") that had a dispute resolution clause with adjudication as the first tier. During the progress of the works, the parties entered into separate oral agreements.

Following a dispute, one of the issues that arose in the adjudication was that claims from the oral agreements were not derived from the Contract and therefore would not be susceptible to adjudication.

The presiding Judge noted that it is quite common in the construction industry for parties to enter into side or supplemental agreements which add to or vary the terms when matters arise during the course of the works. Those agreements frequently do not have their own provisions for dispute resolution, including adjudication, and then went to say:

> *"If the officious bystander had asked such parties what dispute resolution methods applied, I consider that they would invariably assume that those in the underlying contract would apply. The idea that different or no provisions applied to such additional changed obligations would, in my judgment, be an impossible situation and make adjudication unworkable for such projects."*

It was held that the side agreements were variations to the Contract, and the disputes under those side agreements would be properly categorised as disputes under the Contract.

The approach in *L Brown & Sons* case was adopted in *McConnell Dowell Constructors (Aust) PTY Ltd v National Grid Gas PLC*[47] where the parties entered into a Supplemental Agreement which operated as a variation of the original contract. The Supplemental Agreement defined (a) which matters were covered by the increased contract sum and (b) which matters were not so covered and therefore may be the subject of a claim for additional payment under the terms of the original contract. *McConnell Dowell* contended that the Supplemental Agreement operated as a variation of the contract, and therefore, both were subject to the same adjudication provisions. *National Grid Gas* submitted that the Supplemental Agreement was "carved out" from the original contract, and was not covered by the adjudication clause, and matters compromised by the Supplemental Agreement ceased to be disputes referable to adjudication under the contract.

The court accepted that the officious by-stander test supported the conclusion that the contract and the Supplemental Agreement were mutually intertwined. In addition, it would not make commercial sense to have one procedure for resolving disputes under the contract and a different procedure for resolving disputes under the Supplemental Agreement. Therefore, the Supplemental Agreement operated as a variation of the original contract and was subject to the same adjudication provisions.

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46 [2005] EWHC 3503 (TCC)
47 [2006] EWHC 2551 (TCC)

4.2.2 Where a contract has an arbitration clause and parties enter into a subsequent settlement agreement providing for termination of the relationship, and which incorporate an exclusive jurisdiction clause

Unlike a supplementary agreement that varies the original contract, a settlement agreement serves a different purpose and potentially gives different results. The case of *Monde Petroleum SA v Westernzagros Ltd*[48] concerned a contract for consultancy services ("the CSA") concluded in 2006 and the dispute resolution clause provided for arbitration to be held in London under the ICC Rules. In 2007, the parties entered into a settlement agreement ("the Termination Agreement"), under which *Westernzagros Ltd* paid *Monde* all the disputed monies in full and there was a mutual release and waiver of all claims by each party against the other in respect of the CSA. The Termination Agreement contained a clause conferring exclusive jurisdiction on the courts of England and Wales.

In 2013, *Monde* commenced court proceedings by which it alleged that the Termination Agreement was induced by misrepresentation and/or duress. It claimed damages for misrepresentation and/or duress in an amount which it alleged it would have earned under the CSA. It contended that on the true construction of the jurisdiction clause in the Termination Agreement, the intention was to supersede the arbitration agreement in its entirety.

Having reviewed the authorities including the *Fiona Trust* presumption and the passage from the 2010 supplement to *Dicey Morris & Collins on the Conflict of Laws* at paragraph 12-094,[49] the court said that where the settlement/termination agreement contained a dispute resolution provision which was different from, and incompatible with, a dispute resolution clause in the earlier agreement, the parties are likely to have intended that it is the settlement/termination agreement clause which is to govern all aspects of outstanding disputes, and to supersede the clause in the earlier agreement. At para 38, the Court cited the following reasons:

> 1) It comes second in time and has been agreed by the parties in the light of the specific circumstances which have given rise to the disputes which are being settled and/or the circumstances leading to the termination of the earlier agreement.
>
> 2) It is the operative clause governing issues concerning the validity or effect of the termination/settlement agreement and therefore the only clause capable of applying to disputes which arise out of or relate to the termination/settlement agreement.
>
> 3) In considering any dispute about the scope or efficacy of a settlement or termination agreement, the tribunal is likely to have to consider the background, of which an important element will often be the circumstances in which the dispute arose and the rights of the parties under the earlier contract. There will therefore often arise a risk of inconsistent findings if the tribunal addressing the validity or efficacy of the termination/settlement agreement jurisdiction is not seized of disputes arising out of the earlier contract and the latter fall to be determined by a different tribunal.

In conclusion, the court said that in such circumstances, the dispute resolution provision clause in the Termination Agreement should be construed on the basis that the parties are likely to have intended that it should supersede the clause in the earlier agreement and apply to all disputes arising out of both agreements. Whether it does so in any particular case would depend upon the language of the clause and other surrounding circumstances.

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48 [2015] EWHC 67 (Comm)
49 See para with fn. 42

4.2.3 Where the overall agreement package contains two express choice of law and jurisdiction clauses, with one agreement having been concluded at a later stage than the other

It is not uncommon for parties in a commercial relationship to agree to an overall agreement package which contains two express choice of law and jurisdiction clauses. In establishing the jurisdiction clause which applies to the dispute, it may be necessary to review the purpose and construction of the underlying agreements.

In *Amtrust Europe Ltd v Trust Risk Group SpA*,[50] the claimant, *AmTrust Europe Ltd* (ATEL), was a UK based insurance group and the defendant, *Trust Risk Group SpA* (TRG), was an Italian insurance broker based in Milan. The parties were in a business relationship, and according to a Terms of Business Agreement (ToBA) dated July 2010, the ToBA dealt with premiums and provided for payment of commission by ATEL to TRG for brokering the insurance contracts. The ToBA incorporated a term providing that the *"Agreement shall be construed according to English law and any disputes arising under it shall, ... be determined in the English Courts"*. The *"Framework Agreement"* dated January 2011 provided for exclusivity in the Italian market and provided for a payment by TRG to ATEL as consideration for the exclusivity. It incorporated a clause providing that; *"This Agreement shall be governed by, and construed and enforced in accordance with Italian law"*, and two other clauses provided for arbitration of disputes according to Italian Law, the seat of the arbitration being Milan. The ToBA was exhibited as a Schedule to the Framework Agreement, and a clause in the Framework Agreement provided that *"This Agreement, including its Schedule, constitutes the entire agreement between the Parties with respect to the transactions contemplated herein, and supersedes any prior understanding, whether written or oral, with respect to such transactions or any other matter peripheral or ancillary thereto."*

Following a dispute related to the ToBA, a jurisdiction issue arose, and ATEL position was that the clause in ToBA applied to the claim. TRG disagreed and argued that upon the inception of the Framework Agreement, the parties intended their relationship to be subject to Italian law and jurisdiction, and that following the Framework Agreement, there was only one contract between the parties, and that the ToBA as a free-standing agreement had gone. The first instance court held that ATEL had a "good arguable case",[51] the ToBA continued as an agreement and was not superseded by the "Framework Agreement", and that the English courts had jurisdiction in relation to disputes arising out of that agreement. TRG appealed.

At the Court of Appeal,[52] the underlying question was whether the contractual arrangements between TRG and ATEL consisted of a single composite and overarching agreement, a "Framework Agreement" to which an earlier agreement, a "ToBA" was appended to it as a Schedule, was subordinate, or whether the Framework Agreement and the ToBA were two freestanding contracts.

In reviewing the authorities, the court observed that the *Fiona Trust* case concerned the scope of a single arbitration clause, unlike the case that was before it which concerned an overall agreement package with two express choice of law and jurisdiction clauses, one of English law and jurisdiction, the other of Italian law and arbitration. The court agreed with the submission

50 *Amtrust Europe Ltd (supra* fn. 15)

51 In expressing a view on jurisdiction, the Court must be astute not to express any view on the ultimate merits of the case, even if there is a close overlap between the issues going to jurisdiction and the ultimate substantive merit. (*See Kaefer Aislamientos SA De CV v AMS Drilling Mexico SA De CV & Ors* [2019] EWCA Civ 10 at para 76). The expression of a "good arguable case", imports "more than a prima facie case but less than a balance of probabilities", and "reflects … that one side has a much better argument on the material available." (*See Four Seasons Holdings Incorporated v Brownlie* [2017] UKSC 80 at paras 5 & 7).

52 *Trust Risk Group SPA v Amtrust Europe Ltd* [2015] EWCA Civ 437

that the *Fiona Trust* "one-stop"/"one jurisdiction" presumption remains a useful starting point and cited a provision in *UBS AG v HSH Nordbank AG (supra* fn. 5 at para 84) providing that, where the agreements are all connected and part of one package, "sensible businesspeople would not have intended that a dispute of this kind would have been within the scope of two inconsistent jurisdiction agreements". However, where the overall contractual arrangements contain. However, where the overall contractual arrangements contain two or more differently expressed choices of jurisdiction and/or law in respect of different agreements, the Fiona Trust presumption was subject to the qualification in the 14th edition of *Dicey, Morris and Collins on the Conflict of Laws* at 12-094 (which is similar to the provision in the 2010 supplement cited in *Sebastian Holdings Inc* case)[53] that related to agreement in contract A not intended to capture disputes in contract B, and the question is entirely one of construction.

But the decision in *Fiona Trust* has limited application to the questions which arise where parties are bound by several contracts which contain jurisdiction agreements for different countries. There is no presumption that a jurisdiction (or arbitration) agreement in contract A, even if expressed in wide language, was intended to capture disputes under contract B; the question is entirely one of construction. The court then cited and approved a provision from the (16th) edition of *Dicey, Morris and Collins* (at §12-110) that states:

> *"Where a complex financial or other commercial transaction is put in place by means of a number of interlinked contracts, and each has its own provision for the resolution of disputes, the point of departure will be that it is improbable that a jurisdiction clause in one contract, even expressed in ample terms, was intended to capture disputes more naturally seen as arising under a related contract. ...Even if the effect is that there will be a risk of fragmentation of the overall process for the resolution of disputes, this is not by itself sufficient to override the construction, and consequent giving of effect to, the complex agreements for the resolution of disputes which the parties have made."*

Summing it up, the court said that what is required is a careful and commercially minded construction of the agreements providing for the resolution of disputes. This may include enquiring under which of a number of inter-related contractual agreements a dispute actually arises, and seeking to do so by locating its centre of gravity and thus which jurisdiction clause is "closer to the claim". In determining the intention of the parties and construing the agreement, some weight may also be given to the fact that the terms are standard forms plainly drafted by one of the parties.[54] The fact that the Framework Agreement was not a well-drafted contract did not lead to a different approach to construction. “In interpreting the Framework Agreement and the ToBA, the court's job is to discern the intention of the parties, objectively speaking, from the words used, in the relevant context and against the factual background in which the documents were created.”[55]

The court concluded that the ToBA was an agreement dealing with the placement of business by TRG with ATEL, and for which ATEL was to pay commission to TRG. The Framework Agreement was one in which ATEL gave TRG exclusivity in the Italian market, for which TRG

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53 See para with fn. 42
54 *Trust Risk Group SPA, (supra* fn. 52) at para 48
55 *ibid* at para 62

paid ATEL. It thus dealt with a different aspect of the parties' relationship. The court was satisfied ATEL had much the better of the argument that the jurisdiction and choice of law provision in the ToBA applied to the dispute between the parties on the brokerage agreement.[56]

4.2.4 Where a long-term contract has an arbitration clause and parties enter into subsequent agreements incorporating exclusive jurisdiction clauses

Where parties are in a long-term contract, it is standard practice to enter into additional agreements with separate dispute resolution and/or exclusive jurisdiction clauses to accommodate changes in their circumstances. As to whether the dispute resolution and/or jurisdiction clauses supersede or are inconsistent with the provisions in the main contract, that would depend on the construction of the agreement and the intention of the parties as revealed by the additional agreements. The case of *Surrey County Council v Suez Recyling And Recovery Surrey Ltd*[57] concerned a long-term Private Finance Initiative (PFI) contract that was to last 25 years. In a Waste Disposal Project Agreement ("WDPA") concluded in June 1999, a multi-tiered dispute resolution clause in the WDPA provided for certain types of identified disputes to be resolved by Expert Determination, and others were to be "*...finally resolved by arbitration under the Rules of the London Court of International Arbitration ("LCIA") ...*" A separate clause provided that the WDPA was to be governed by and construed in accordance with the laws of England, and the parties had submitted to the exclusive jurisdiction of the courts of England and Wales.

Due to planning objections, it was not possible for all the works to be constructed, and the parties reached an agreement on a way to resurrect the affected works of the project using different sites. This agreement, dated 2007, was called a Deed of Variation and Clarification of the WDPA and in court, it was described as "DOV1". A Recital in DOV1 stated that: *"The parties have agreed .... that there should be a variation in accordance with the terms of the WDPA and clarification of a number of matters in the WDPA."* The variations related to a number of original clauses within WDPA and introduced some new ones. Subsequent to the DOV1, the parties concluded two additional agreements. The first was bearing the title of "Ecopark Development Project - Deed of Variation" and was described as "The August 2010 DOV". The second one was referred to as "Ecopark Development Project - Second Ecopark Deed of Variation" and was referred to as "Deed of Variation No.2" (DOV2). Recitals referred to each of the original WDPA, DOV1 (referred to as the Deed of Variation and Clarification) and the August 2010 DOV (referred to as the EcoPark Deed of Variation).

The three additional agreements were to be governed by and construed in accordance with English law, the Courts of England were to have exclusive jurisdiction in relation to any claim, dispute or difference concerning the Deeds and any matter arising therefrom. The WDPA remained in full force and effect and was to be read and understood subject to the new provisions which applied to it. Of special note is the Ecopark Development Project which was already an existing waste facility within the WDPA and arose first in the August 2010 DOV and was then re-affirmed in DOV2.

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56 *ibid* at para 71
57 [2021] EWHC 2015 (TCC)

Following complains by what Surrey referred to as considerable delays on the construction and commissioning of the new facilities at the EcoPark, which *Suez Recycling and Recovery Surrey Ltd* ("Suez") challenged, Surrey commenced court proceedings seeking declaratory relief against Suez arising out of a Waste Disposal Project Agreement, and in consequence, Surrey contended it had an entitlement to issue a Notice of Termination. Suez applied to Court for a stay of proceedings in accordance with s.9 of the English Arbitration Act 1996, contending that the disputes in the proceedings were subject to the arbitration provision contained in the WDPA, which continued to be applicable. The submission by Surrey was that any dispute concerning the construction of the EcoPark (and all works provided for within the scope of DOV2) was subject to resolution in Court.

Having reviewed the parties' submission and the authorities, the Court agreed with Suez and concluded that the parties intended the dispute resolution provisions of the WDPA to remain applicable for their substantive disputes arising in respect of the construction of the EcoPark, and reasoned as follows:

1. Each of the successive agreements, including DOV2, was described as a variation to the WDPA. The fact that DOV2 was described by the parties as a variation to the WDPA makes it different from, say, a settlement agreement, or a termination agreement. The relationship was ongoing. It made it more likely that the parties would have intended their substantive disputes to be dealt with in a single forum, namely the one first identified.[58] The Court accepted submission that characterised WDPA as the master agreement and the DOVs as its servants, to be performed in accordance with it.[59]

2. The arbitration clause in WDPA should continue to be broadly construed in keeping with the approach commended by Fiona Trust, and the approach to construction in the Ace Capital Ltd case of liberal interpretation in favour of arbitration; i.e., by reading the arbitration clause in WDPA in an expansive way and restricting the ambit of the Court's jurisdiction in DOV2.[60]

3. The jurisdiction clause of the WDPA probably fulfilled the role of assisting and supervising the arbitral process through the English Courts as suggested by the Paul Smith line of cases. It remained untouched by any of the subsequent agreements and there was no reason to think it was any less relevant for that purpose than it was when the WDPA was the only applicable agreement. It remained effective and required no further agreement that the Courts should have supervisory control over the arbitral process.[61]

4. In Court, Surrey accepted that any issues relating to the provision of Services concerning the EcoPark, once constructed, would fall within the WDPA and therefore be subject to arbitration.[62] By identifying that all substantive disputes about the construction and operation of the EcoPark were subject to arbitration under the WDPA, that was in accordance with the expectation of commercial businessmen than one which divides the fora for dispute resolution between the construction of the EcoPark on the one hand and its operation on the other.[63]

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58 *ibid* at para 82
59 *ibid* at para 84
60 *ibid* at para 92
61 *ibid* at para 96
62 *ibid* at para 98
63 *ibid* at para 99

5. As suggested in Fiona Trust, the parties must be taken to have agreed to arbitration under the WDPA for reasons of neutrality, expertise and privacy. The Court adopted the authority from the Sulamerica CIA Nacional case of looking to the strong legal policy in favour of arbitration. Pursuant to the WDPA, arbitration would have been the appropriate forum to resolve disputes of a technical nature, had they arisen, regarding the construction of the facilities built pursuant to the WDPA.[64]

6. There were no conflicting dispute resolution clauses and the provisions in both the WDPA and DOV2 were capable of reconciliation. The two fulfilled different purposes. Accordingly, the desirability of the one stop shop approach meant that substantive disputes other than, say, one about the very legitimacy of DOV2 itself, should fall within the dispute resolution clause of the WDPA. Even if the Court was to apply the "centre of gravity" test, it would conclude that the centre of gravity of this construction dispute lay within the WDPA.[65]

Suez were therefore successful in their application for an order to stay proceedings pursuant to s.9 of the English Arbitration Act 1996.

5. Conclusion

Inconsistency in arbitration and jurisdiction provisions in the same contract or in a series of contracts, whether entered into concurrently or after the main contract arise due to among others, inadequate consideration by the parties of the precise wording and construction of the dispute resolution provision when concluding contracts, or lack of appropriate expression of what they intended. The *Fiona Trust* "one-stop"/"one jurisdiction" presumption operates on the basis that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal, unless the language makes it clear that certain disputes were intended to be excluded from the arbitrator's jurisdiction. The principle applies where supplemental agreements intended to be variations of the main contract are entered into with intention of continuing the commercial relationship. However, it does not apply if the supplemental agreement was intended to terminate the main contract, in which case, the dispute resolution clause in the supplemental agreement supersedes the one in the main contract.

Where parties have entered into one contract with two competing dispute resolution clauses, they must be taken to have agreed on a single tribunal for the resolution of all disputes, and a liberal approach to the words in the arbitration clause should be adopted. The reconciliation of the dispute resolution provisions should be done on the basis that the competing clauses fulfil different purposes, with arbitration clause intended to be for resolution of disputes and the jurisdiction clause specifying the curial law or the law governing the arbitration.

Where there is more than one agreement between the same parties, each with its own dispute resolution provision, the parties will not be taken to have intended that a particular dispute would fall within the scope of the two dispute resolution clauses. The dispute resolution provisions are construed on the basis they are mutually exclusive in their application. The risk

64 *ibid* at para 100
65 *ibid* at para 102

of fragmentation of the overall dispute resolution process is not by itself sufficient to override the construction, and consequent giving of effects to the dispute resolution agreements which the parties have agreed to. In construing agreements providing for the resolution of disputes, it may be appropriate to enquire under which of a number of inter-related contractual agreements a dispute actually arises, and to do so by locating its centre of gravity and establishing which jurisdiction clause is "closer to the claim". If parties are in a contractual relationship with contracts that are not “part of one package”, it may be easier to conclude that the different jurisdiction clauses were chosen to deal with different aspects of their relationship.

Decolonizing Arbitration: A Case for Climate Change Arbitrators

By Henry K Murigi*

Abstract

The overarching question that the world is likely to face is whether it is possible to have a fair and culturally sensitive use of arbitration to resolve climate change disputes that have arisen or likely to occur. The three principles under scrutiny are decolonization, arbitration, and climate change. These seem to have been the ontological persuasion that the colonial project is still ongoing in the present practice of arbitration. The guiding principles of arbitration that are in place today ideally locate their conceptual origin within the colonial project. There are several ways in which arbitration needs to be decolonized. Closely examined, arbitration seem to be rigid in terms of allowing culturally sensitive approaches to dispute resolution. Climate change has been a dominant discourse in modern day due to the reality of the threat posed by possible effects. When coming up with the regime that guides the interactions around climate change, it appears that dispute resolution was not as contextualized. This creates a potential tension when trying to bring these two fields together to produce environmental justice. On one hand, a dispute has to be determined on the basis if the facts, evidence, and principles guiding the field. On the other hand, the effects of climate change will be felt irrespective of the existing legal requirements and considerations. This paper suggests that to avert this tension, since the threat posed by climate change cannot be abated, the practice of arbitration should be adaptable to respond to the real threat of climate change. Decolonization being a continuous project, it is imperative that arbitrators and dispute resolution actors be progressively evaluated to ensure that the liberation from ideological domination posed by colonialism is decisively exterminated. The paper highlights the nuances of decolonization by tracing the evolutionary journey that has led to its prominence. This will locate the origin of arbitration placing the context for the need to consider the decolonization project. The paper will place these in the context of climate change discourse and the type of disputes that have been resolved through arbitration. It is hoped that at the end of the paper it is clear that arbitration (as the ontological unit) should be decolonized to be able to become a solution to the climate change crisis.

1. Introduction

The central thesis of this paper is that although the idea of arbitration initially commenced as avenue of resolving disputes between merchants giving rise to the principle of lex mercatoria, the idea was captured by lawyers who took charge during the codification era and ensured that arbitrations were mainly conducted by lawyers.[1] To this end the paper argues that the project to highjack arbitration from merchants to determine their disputes was so successful that it made it somehow difficult for other professions to become

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1 Fraser, Henry "Sketch of the History of International Arbitration" Cornell Law Review, (1926) 179

arbitrators. This became so entrenched that in this papers view could only be equated to colonization of arbitration by lawyers.The colonization of arbitration, in this papers view, entrenched serious obstacles such as legal technicalities that made it difficult to for non-lawyers to easily cope with the nuances of arbitration. This paper then concludes that there is a clear need to embark on a decolonization project so that Arbitration can meaningfully contribute to the resolution of climate change disputes. Kariuki Muigua correctly argues that climate change disputes can benefit from the input of arbitration.[2] These ideas, while good and acceptable can be taken further by enhancing the role of climate change experts as arbitrators. The paper will make a case for the promotion of climate change expert to be arbitrator as opposed to only providing the expertise in arbitral proceedings. The legal and institutional framework governing arbitration in Africa has been extensively studied providing the requisite infrastructure needed for the successful practice of arbitration in Africa.[3]

2. Decolonization Premise

It is important to begin by addressing the thinking behind the title of this paper. The term decolonization has been understood in several prisms. First, most scholars look at this word from the context of history that led to the independence of states or put differently the clamor for independence of African or Asian States. The history of the word decolonization can be traced from different times in history most prominently after the colonial era.[4] It was believed that with the independence of States, then the decolonization project had been completed. However, with the idea espoused in the books such as Decolonization of the Mind[5] and Wretched of the Earth[6] among others doubt exists whether the word decolonization relates only to the events leading to or shortly after the colonial period. Second, there is a growing acceptance that the traditional dispute resolution mechanisms are some of the cultural practices that are relevant to modern day dispute resolution mechanism. This is a constitutional imperative under Article 159 of the Constitution of Kenya. The application of traditional dispute resolution mechanism must pass the repugnancy test.[7] This is part of the decolonization project that relates to alternative dispute resolution mechanism. Third, indigenous methods of conflict transformation are marginalized within the Western discipline of conflict resolution.[8] The western methods of resolving conflict that are often imported into indigenous processes based on diverse and often extremely different worldview. Societies power and willingness to implement their models without consideration of Indigenous worldviews perpetuates ontological violence, the forceful introduction of one worldview to the extent that it marginalizes or sup- presses another worldview. Decolonizing the discipline of conflict or dispute resolution involves developing a deeper understanding, respect for, and acknowledgement of subject specific worldviews as is expected in environmental law and themes such as climate change arbitration. The decolonizing process also involves creating support for subject specific experts to be able to utilize and employ dispute resolution or conflict transformation processes that are in alignment with subject specific paradigms which can be referred to as rethinking decolonization.[9] Fourth, studies conducted reveal that decolonization has undergone different reforms suggesting that there is a metamorphosis of

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2 Muigua, K The Viability of Arbitration in management of Climate Change Related Disputes in Kenya. Journal of Conflict Management and Sustainable Development, (2022)

3 Muigua, K. Promoting International Commercial Arbitration in Africa. Alternative Dispute Resolution. Alternative Dispute Resolution, (2017) 5(2).

4 Raymond F Betts "Decolonization A brief history of the word" In "Beyond Empire and Nation the Decolonization of African and Asian societies, 1930s-1970s: ELS BOGAERTS and REMCO RABEN, Brill

5 Ngugi wa Thiongo "Decolonising the Mind: The Politics of Language in African Literature" Heinemann Educational (1986)

6 Fanon, Frantz The Wretched of the Earth. New York: Grove Press (1986),

7 Muigua, Kariuki. "Institutionalizing Traditional Dispute Resolution Mechanisms and other Community Justice Systems." Alternative Dispute Resolution (2017) 1-80.

8 Polly O. Walker Decolonizing Conflict Resolution: Addressing the Ontological Violence of Westernization; American Indian Quarterly, Summer - Autumn, 2004, Vol. 28, No. 3/4,

the phenomenon based on the reality on the time.[10] Put differently an inquiry into the breadth and length of the study of decolonization needs to gain the knowledge that can be generated by institutions such as arbitration. This means that should we allow such a concept to be adopted in the thinking informing arbitration practices, there is a chance that the knowledge in that field will grow. Simply put, decolonization does not mean that arbitration has been colonized by westernized views or by a certain category of professional such as lawyers. Although there could be some truth to that, the argument here is that climate change experts should become more willing to participate in resolution of disputes as arbitrators and those within the arbitration community should encourage this practice.

Arbitration has been around for a long time. It has however changed in its format and stature. The evidence of its long existence can be traced in the medieval era with guiding principles such as *lex mercatoria* being one of the agreed legal norms for resolving trade disputes.[11] The principle was carried forward in the Roman Empire[12] which was, simply put, a body of commercial laws that were to govern disputes between individuals across borders.[13] Arbitration took from this body of laws and insisted that individuals should adhere to agreed rules that govern trade across borders. One of the challenges of this principles was that they were not codified as was the common law principles. This gave challenges to the Courts when determining how to resolve disputes. Jeremy Bentham[14] in one of his famous attacks of judges advocated for the codification of laws to simplify and give certainty to the approaches by judges.[15]

3. Evolution of Arbitration

Although the history of Arbitration is a whole subject that needs further serious and deliberate scholarly scrutiny, this part of the paper seeks to give a background of what such a study would consider. First, Arbitration as a system of settling disputes is as old as human civilization and can be traced from 3,500 years ago in Egypt and the Homers of Greece in the 9th Century BCE.[16] Second, the studies on arbitration began with the ancient Greeks for it was in Greece that the peaceful adjudication of international disputes had its true origin and earliest development.[17] The suggestion is that arbitration became frequent after the middle of the seventh century B.C when the great migrations had come to an end and separate states had been organized. The balance of power naturally instructed the need for a steady equilibrium between equally competent states since no Greek state was sufficiently strong to defy its neighbors, and consequently arbitration was called into play.[18] Also during the classical period

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9 A. G. Hopkins Rethinking Decolonization: Oxford University Press (2008), pp. 211-247
10 David Strang "Global Patterns of Decolonization, 1500-1987" International Studies Quarterly, (1991), Vol. 35, No. 4
11 Mary Elizabeth Basile et al. Lex Mercatoria and Legal Pluralism: A Late Thirteenth Century Treatise and Its Afterlife. Cambridge, MA: Ames Foundation, 1998.
12 Gibbon, Edward.. *The History of the Decline and Fall of the Roman Empire Vol 1* . New York : 1946 Fred de Fau and Company Publishers
13 W Mitchell, The Early History of the Law Merchant (Cambridge, 1904)
14 Jeremy Bentham "*General View of a Complete Code of Laws*"
15 Dean Alfange Jr "Jeremy Bentham and the Codification of Law" Cornell Law Review 1969 Vol 55 Issue 1
16 Trotta, M. S. *Arbitration of Labour-Management Disputes*. Amacon Publishers (1974)..
17 Fraser, H. S. Sketch of the History of International Arbitration. *Cornell Law Review*, (1926) 179.
18 Ibid
19 Ibid

arbitration was a model used to resolve disputes. An examination of arbitration during the paradigmatic case of the Hellenistic period (338–90 BCE) casts doubt on the existing literature about the origin of arbitration especially those who insist that it is a modern phenomenon.[19] They argue that hierarchy as opposed to anarchy better characterizes the political context in which arbitration took place. For instance, the Greeks often organized themselves into alliances or leagues in which a hegemon dominated decision making, or into federal states with a common foreign policy.[20] This hierarchical setting was a necessary condition for international arbitration where the practice of arbitration was a tool to legitimize hierarchical powers. An assembly of original shows that hierarchy was almost always a necessary condition for international arbitration. In the classical period arbitration as a particular means of dispute resolution was used as an ideological device to build and legitimize international order. We then analyze the contemporary record, finding a role for hierarchy in modern international arbitration. The history of arbitration, unlike the history of law, is not an account of the growth and development of principles and doctrines that have come, through long use, to have general validity and force.[21] This is due to the fluid nature of disputes that are resolved through arbitration as each case is *sui generis* and does not rely on the doctrine of precedent. The more the reason why the climate change debate must be accommodated.

Third the other significant account for the development of arbitration is in the John Jay Treaty of 1794–95 which gave rise to many things including diplomatic maneuver between Britain the former colonizer of the United States, but it also introduced the idea of a political party system in the United States.[22] When a dispute arose out of this treaty, it was referred to as adhoc arbitration and was resolved by an award in favor of the Americans giving rise to the new political dimension of arbitration as an influencer to hegemon.[23]

By way of illustration, when the relations between the United States and Britain was on the verge of an all-out war in 1794, and since the U.S. market was dominated by British exports, while American exports were blocked by British trade restrictions and tariffs, this dispute was uniquely presented to arbitration. This was done in the context of the Treaty of Paris where Britain still occupied northern forts (present day New York, part of Vermont, Detroit Michigan, and Ohio among others) that it had agreed to surrender in the treaty of Paris.[24] There was a proposal for a trade war which would lead to direct hostilities toward Great Britain. John Jay an American diplomat was sent as a special envoy to Great Britain to negotiate a new treaty.[25] This was to be referred to as the Jay Treaty. This treaty brought about an agreement to some of the issues that were remaining under the Paris treaty between King George (III) and the America. This treaty eliminated the control of Britain on America. Subsequently there was a dispute between the Americans and British over claims by Americans that the British had destroyed some of their union merchant ship. This gave rise to the Alabama claims by the Americans.[26] After continued negotiation a tribunal was formed that determined the claims by the Americans. The tribunal comprised of an American representative, British representative, an Italian, Switzerland, and Brazil representatives. The tribunal determined the claims by the Americans an award. The final award of $15,500,000

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20 Fraser, H. S. Sketch of the History of International Arbitration. *Cornell Law Review*, . (1926) 179.
21 Wolaver, E. S.. The Historical Background of Commercial Arbitration. *University of Pennsylvania Law Review and American Law Register*, (1959) 83, 132–146
22 Charles, J.. The Jay Treaty:The Origins of the American Party System. *The William and Mary Quarterly*, (1995) 581–630.
23 Balch, T. W. *The Alabama Arbitration*. (1900) Allen Lane & Scott. Rodgers, W. P.. War Arbitration and Peace. (1905) The Michigan Law Review Association, 91–108.
24 Fewster, Joseph M. "The Jay Treaty and British Ship Seizures: the Martinique Cases". William and Mary Quarterly(1988) 45(3): 426–5
25 Combs, Jerald, The Jay Treaty: Political Background of Founding Fathers (1970). A. (ISBN 0-520-01573-8)
26 Charles, Joseph. "The Jay Treaty: The Origins of the American Party System", in William and Mary Quarterly, (1955) pp. 581–630

was paid out by Great Britain in 1872 and British apologized for the destruction caused by the British-built Confederate ships, while admitting no guilt. The award formed part of the Treaty of Washington which aided in improved relations between America, Britain, and Canada. This established the principle of international arbitration and launched a movement to codify international law with hopes for finding peaceful solutions to international disputes.

4. Concepts of Arbitration

This paper takes the assumption that the reader is aware of the basic tenets of arbitration and no need to repeat them, However, briefly put, arbitration could be voluntarily entered into when parties to a controversy are freely invited to participate in arbitration without any reference to the law. In arbitration the parties volunteer to have a decision binding them to be made by a neutral person who is guided by the law appointed by the parties. In Arbitration lingo, the seat of arbitration. The authority of the parties is voluntarily donated to the arbiter to determine their outcome which is more Hobbesian or Kantian model of social contract. The other type of arbitration is compulsory mediation where the parties are compelled by the law or law enforcers to have a decision determined by an arbitrator other than the judicial process. Arbitration is highly legal process that is provided for in statutes and conventions. The arbitrator listen to disputes evaluates the evidence and decides based on the evidence and the guiding law. The determination of the arbitrator is final and cannot be appealed against which affirmed by the Supreme Court in the Nyutu case settling the principle of finality to arbitration.[27]

5. Legitimacy Climate Change Arbitration

Legitimacy can be defined in many prisms including ideological, structural, and personal. What is compelling for purpose of this study is that it is a generalized perception that actions of a unit are considered desirable, proper, or appropriate as they correspond to the socially constructed norms, values, and definitions of a given political system.[28] Max Weber set the foundation for consideration on legitimacy which takes the format of traditional, charismatic, and rational-legal authority.[29] Legitimacy is important since it helps to discern where parties decide to engage in an activity because of their free consent as opposed to where there exists dominant power to influence compliance with a directive. The proposal being advanced here is that when it comes to climate change there are certain ideals that must be attained for arbitration to gain its significance in this field. First ideological legitimacy of arbitration in climate change can be seen in the very nature of disputes that arise requiring quick resolution. In addition, it has been admitted that climate change disputes can be resolved with the help of experts who may aid the arbitrator to arrive at a fair determination of the dispute.

The structural legitimacy of international investment arbitration can be studied from three perspectives. First, from the dominant theory of Max Weber where the States ordinarily will engage in Arbitration because they recognize it as a genuine method of dispute settlement.[30] The issue with this thinking is that states will voluntarily enter into investment arbitration yet there exists no appellate mechanism to resolve obvious errors of the adhoc tribunals raising legitimacy concerns. Second, modern-day investment arbitration deals with matters of

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27 Nyutu Agrovet Limited Vs Airtel Networks Kenya Limited, Chartered Institute of Arbitrators Kenya Branch (Interested Party) 2019 eKLR

28 Easton, D. A Systems Analysis of Political Life. John Wiley & Son. Merelman, R. M. (1966). Learning Legitimacy. American Political Science Review, (1965). 548.

29 Weber, M. Political Writings (P. Lassman, Ed.). (1984)

30 Kaufmann-Kohler, G. In Search of Transparency and Consistency: ICSID Reform Proposal. Transnational Dispute Management, (2005). 2(5).

national policy and the public interest which raises questions whether they have such a mandate. The issue here is that investment arbitration should be incapable of handling matters that relate to the national interest.[31] Third, investment arbitration took an extreme position from the usual institutional frameworks by the adoption of adhoc tribunals which are not anchored in any traditional perspective of physical institutions. In other words, adhoc tribunals are very different compared to foreign policy departments that were in charge of foreign relations. Schreuer studies the issue of legitimacy of investment arbitration from an international investment law perspective and not international relations perspective.[32]

Personal legitimacy in investment arbitration is that states retain the sovereignty over the international system and arbitration is considered as one of the soft laws international law arenas.[33] This becomes a challenge as the States retain the autonomy to protect their national interest.[34] The twin aspect to this is that judicial systems do not always inspire confidence in the investors and do not always protect national interest . This shows that there is a need to focus on the question of legitimacy in the context of Kenya to see what investment arbitration has portended. Although it has been suggested that Investment arbitration has drastically reduced the potential for inter-state conflict[35] there is a need to investigate the extent to which Kenya has exploited this as an avenue of protecting its interest and attracting investors. It has also been argued that with the waning fortune of investment arbitration due to the crisis of legitimacy, there is a need for a likelihood of returning to the situation that obtained before the Alabama Claims against the United States.

It has been suggested that two factors will determine any future role for arbitration institutions: efficiency and legitimacy.[36] While efficiency is the prerequisite, addressing threats to legitimacy is the biggest challenge that arbitration institutions will face in the future.[37] Among many challenges, institutions will need to develop codes of conduct aimed at avoiding conflicts of interest on the part of arbitrators. The more institutions put in place transparent systems, the less susceptible they will be to encroachments by national courts.

Arbitration's status as a form of adjudication is a source of legitimacy for an arbitrator's exercise of power.[38] This view entails an understanding of arbitration as a form of governance capable of bringing a measure of the rule of law to the transnational space. Traditional theories emphasize party consent as the sole source of legitimacy in arbitration, one notable example of which is the 'law market' theory.[39] Law market theory advocates for decisions to be driven

31 Michael Waibel, A. K.-H. The Backlash Against Investment Arbitration: Perceptions and Reality. London: Kluwer Law International. (2010)
32 Schreuer, C. What is a Legal Dispute? In J. C. Isabelle Buffard, International Law Between Universalism and Fragmentation (2008) (pp. 959–980).
33 Kaufmann-Kohler, G. In Search of Transparency and Consistency: ICSID Reform Proposal. Transnational Dispute Management, (2005) 2(5).
34 Paulsson, J.. Enclaves of Justice. Trasnational Dispute Management, (2005) 4(5).
35 Schreuer, C. What is a Legal Dispute? In J. C. Isabelle Buffard, International Law Between Universalism and Fragmentation (2008) (pp. 959–980). Brill Nihoff. doi: https://doi.org/10.1163/ej.9789004167278.v-1086.295
36 Zaide, N. G. Reflections on the Role of Institutional Arbitration between the Present and the Future . Arbitration International, (2009) 427 - 430.
37 Schneiderman, D. Legitimacy and Reflexivity in International Invetment Arbitration; A New Self-Restraint. *Journal of International Dispute Settlement*, (2011) pp 471-495.
38 Gelinas, F. Arbitration as Transnational Governance by Contract. *Transitional Legal Theory*, (2016). Pp 181-198 .
39 Ibid

by the needs and realities of the market as opposed to ideal based on technical requirements. While consent is an important source of legitimacy, theories of legitimacy based solely on consent fail to reflect two realities demonstrated by empirical evidence. First, default rules shaped by a variety of public and private actors other than the parties usually govern arbitral proceedings. Second, arbitrators consider the decisions of their peers in similar cases and thus meet, in a general sense, the burden of rationality associated with legitimacy in adjudication.[40]

6. Climate Change Debates

Climate Change has been recognized as one of the most serious challenges facing mankind.[41] Climate change can be defined in two broad ways. First, a change of climate that is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and that is in addition to natural climate variability observed over comparable time periods United Nations Framework Convention on Climate Change (UNFCCC). Second, a broad range of global phenomena created predominantly by burning fossil fuels, which add heat-trapping gases to the earth atmosphere. These phenomena include the increased temperature trends described by global warming, but also encompass changes such as sea level rise; ice mass loss in Greenland, Antarctica, the Arctic and mountain glaciers worldwide; shifts in flower/plant blooming; and extreme weather events National Aeronautics and Space Administration (NASA).

Climate change is a typical example of a global commons problem. Everybody on the planet benefits from a stable climate, but that can only be achieved if everybody participates. There is now an established set of international agreements to deal with the problem of climate change. The development of the climate change regime in the late 1980s and early 1990s was a result of a wave of environmental activity, which began in 1987 with the discovery of the stratospheric "ozone hole" and 1992 United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro that birthed the United Nations Framework Convention on Climate Change.[42] An earlier wave of international environmental activity, culminating in the 1972 Stockholm Conference and the establishment several years later of the United Nations Environment Programme (UNEP), had tended to focus on local, acute, and relatively reversible forms of pollution—for example, oil spills and dumping of hazardous wastes at sea—by regulating particular pollutants.

One of the major gaps in the climate change regime is the lack of an appropriate dispute resolution clauses in the Conventions and agreements. This is evidenced in the brief history of climate change regime creation which can be summed as follows. First, in 1997 the third conference of parties (COP3),[43] when parties to the UNFCCC adopted the Kyoto Protocol. This agreement created the first and only legally binding targets for developed nations to reduce their emissions, as well as important international monitoring, reporting and verification mechanisms to enforce compliance. The Kyoto Protocol obliged developed nations to reduce their emissions to an average of 5.2 per cent less than their 1990 levels,

40 Gailard, E. Sociology of International Arbitration. *Arbitration International*, (2015). 1-17.
41 Mwirigi and Ongera The End of Humanity Weekly Citizen Vol.22 No. 8 of 25th February
42 Bach, Tracy & Justin Brown, , Recent Developments in Australian Climate Change Litigation, Sustainable Development Law & Policy 2008 8, 39–44.
43 Conference of parties or Minamata Convention on Mercury

between 2008 and 2012 (the protocol's first commitment period).[44] Second, to help countries meet their targets, the protocol created 'flexibility mechanisms' such as carbon trading and the Clean Development Mechanism, which allows industrialized nations to reach their targets by investing in emissions reductions in developing nations. The Kyoto Protocol entered into force in 2005. From that year onwards, each Conference of Parties (COP) has also served as the 'meeting of parties' to the Kyoto Protocol, meaning that there are two main sets of parallel negotiations taking place at each event. Two permanent subsidiary bodies that serve both the UNFCCC and Kyoto Protocol talks meet at least twice a year, once during the COP. One of these bodies focuses on implementation of the agreements while the other provides scientific and technological advice.

According to Article 7.2, the COP is responsible for reviewing the implementation of the Convention and any related legal instruments and has to make the decisions necessary to promote the effective implementation of the Convention. In particular, its role is to first, examine the Parties' commitments in light of the Convention's objective, new scientific findings and experience gained in implementing climate change policies. Second, promote and facilitate the exchange of information on measures adopted by Parties to address climate change and its effects. Third, facilitate the coordination of measures adopted by Parties to address climate change and its effects, if requested to do so by two or more Parties. Fourth, promote and guide the development and refinement of comparable methodologies for activities related to implementing the Convention, such as preparing inventories of Green House Gas (GHG) emissions and removals and evaluating the effectiveness of measures to limit emissions and enhance removals. Fifth, assess the implementation of the Convention by Parties, the effects of the measures taken by them, and the progress made towards achieving the ultimate objective of the Convention. Sixth, consider and adopt reports on the implementation of the Convention, and ensure their publication, Seventh, make recommendations on any matters necessary for the implementation of the Convention and eight, seek to mobilize financial resources. There appears to be silence on how disputes are to be resolved giving rise to the lack of clarity on how arbitration could come into force.

The central climate governance challenge is rooted in the complexity of the international system that requires cooperation for effectiveness juxtaposed with the interests and quest for power by states who seek to survive in an anarchic global landscape. There are several proposals that attempt to respond to this challenge. First, polycentric governance as suggested by Elinor Ostrom involves the use of different approaches in making policy at the international level.[45] It is not sufficient to assume that one approach works for all the climate change realities and demands. An all-hands-on deck approach is therefore critical to avert the serious climate challenge facing the globe. This may not be as easy as it seems. However, climate change arbitrators will be one step in the right direction. Secondly, according to O'Neill Kate, there is no need to go round about attempting cooperation that may not necessarily wok, instead, the traditional routes used for regime formation should be followed to the later.[46] The proposal is a more straightforward perspective towards the reality of the global system. O'Neill suggests realist, institutional and constructive perspectives should be adopted in attempting to formulate a global policy. Each situation will ideally call for either of these three perspectives. One might argue that Ostrom focuses on the liberalist approach while O'Neil adopts a multifaceted approach to international relations.

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44 Bach, Tracy & Justin Brown, , Recent Developments in Australian Climate Change Litigation, Sustainable Development Law & Policy2008 8, 39–44.

45 Ostrom, E.. A polycentric approach for coping with climate change. The World Bank (2009)

46 O'Neill, Kate. "Institutional Politics and Reform." In New Earth Politics: Essays from the Anthropocene, edited by Simon Nicholson and Sikina Jinnah, 157-181. Cambridge: The MIT Press, 2016

While there is no agreement on whether to adopt a traditional or polycentric approach to climate change, there are a myriad of additional challenges that dominate the process of designing a regime in the global arena. It all begins with responding to the question who is best suited to define environmental policy matters; the politician or the scientist. To take the question further who is best suited to resolve a climate change dispute? An Arbitrator trained in law or an expert in climate change matters. There are two prong approaches to framing a response to these question in the context of climate change. First, scientists are central in the formulation of the issues relating to climate change and as such form the epistemic community formulating policy.[47] Science is a major source of knowledge production in environmental politics since it aids in identifying the problem with precision which is critical in framing the solution.[48] This includes instances where disputes arise and the most appropriate resolution. Secondly there is also a network of professionals with recognized expertise and competence in a particular domain and are authoritative in a given area and form what is called epistemic community.[49] They go beyond the basic scientific expertise in a given field to define the problem based on epistemology and scholarly research. Arbitration can therefore benefit from these two groups in an attempt to resolve climate change disputes. The question remains why they are not prominent arbitrators. This paper makes the case for ensuring that they should be at the forefront.

Climate change arbitrators would be able to appreciate and resolve disputes that are produced by what Robert O' Keohene and David G Victor call 'regime complex' which is the fragmentation of ideas touching on climate change.[50] The suggestion here is that (1) there are global challenges to climate change with no single authority, (2) the negative effects of climate change are observable and (3) any change in approach would require everyone's effort. This calls for dispute resolution that is alive to the realities of this regime complex. Regime complex poses a serious challenge to formulation, implementation and resolution of disputes arising from regimes.

The current climate change regime is governed by the Kyoto Protocol and Paris Agreement. The first thing to note is that the Paris Agreement promises a more realistic path towards globally coordinated emissions reductions, mainly because it has managed to better align international climate policy with the realities of international climate politics by removing two major structural barriers to international cooperation. First, the agreement accepts that most major emitters are reluctant to tie themselves into a rigid set of predetermined emissions reductions that are legally binding. This reluctance was at the heart of the US decision not to ratify the Kyoto Protocol. Secondly, it sidesteps the distributional conflict that is inherent in any attempt to negotiate mitigation targets as part of a comprehensive international agreement.

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47 Jordan, A., Huitema, D., Schoenefeld, J., van Asselt, H., & Forster, J.). Governing Climate Change Polycentrically: Setting the Scene. In Governing Climate Change: Polycentricity in Action? (2018)

48 McAdam, Doug. "Social movement theory and the prospects for climate change activism in the United States." Annual Review of Political Science 20 (2017): 189-208.

49 O'Neill, Kate. "Institutional Politics and Reform." In New Earth Politics: Essays from the Anthropocene, edited by Simon Nicholson and Sikina Jinnah, 157-181. Cambridge: The MIT Press, 2016

50 Keohane, Robert, and David Victor. "The Regime Complex for Climate Change. "Perspectives on Politics 2011 9 (1): 7–23

Although the Kyoto Protocol created legally binding obligations for major industrialized countries when it entered into force in 2005, in reality it failed to play a significant role in driving most of these countries' domestic climate policies. The key difference is that they have chosen policies that reflect domestic, rather than international, priorities and circumstances. To some extent, therefore, the Paris Agreement offers a more realistic chance of government's implementation because climate change has become a firmly established part of public policy around the world. The Paris Agreement in its short timeframe has faced two significant challenges that undermine its effectiveness to combat climate change. The first was the announcement of President Trump in June 2017 that the United States would withdraw from the Paris Agreement (effective November 2020). The second is the ongoing deadlock amongst states to agree on the implementing guidelines also known as the "Paris rulebook" setting out fair and effective rules for all countries to achieve carbon neutrality and climate resilience.

With the regulatory framework there is an orchestration deficit that appears apparent in the face of the Climate change regime which is largely found in the climate change governance. The orchestration deficit arises due to the lack of a central state that would provide steering assistance for transnational governance.[51] Orchestration offers a way to attain transnational regulatory goals that are not achievable through domestic or international old governance. In this regard it may be important to ensure that climate change adherents are more informed about resolving disputes through arbitration. To achieve this, it would be important to approach the idea of orchestration in two major fronts namely directive and facilitative. Directive orchestration is a new governance ideal within the domestic setting which include existence of effective mechanism for the resolution of disputes that arise. Here it is important for climate change adherent to be more equipped to be able to handle disputes related to climate change. This would enable climate change practitioners to have substantial capacity for mandatory action on matters that they may influence directly. Facilitative orchestration is where state capacity is limited due to the international system. Facilitative orchestration leverages on the collaborative relationships in the middle tier of the governance triangle. This is part of the global thinking that assist the resolution of disputes through known mechanism such as arbitration. These two (facilitative and deliberative) categories are not distinct, but blend into one another.

Human action is one of the greatest factors that lead to climate change which is the chief threats to humanity today.[52] Climate change poses unpredictable effects on the world's water system. These include an increase in floods and droughts, causing in turn, an impact on food supply, displacement and conflict, seasonal shifts, extreme weather conditions, change in precipitation patterns caused by climate change is likely to affect farming and agriculture which is a primary basis for livelihood to the global population. The Kyoto Protocol did not deter free-riding and non-compliance which revealed the deficiencies on both efficiency criteria because it omits a substantial fraction of emissions.[53] No individual government has an incentive to police the agreement and the agreement can only work if it includes an elaborate and expensive international mechanism for monitoring and enforcement.

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51 Abbott, K., & Snidal, D. Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit. *Vanderbilt Journal of Transnational Law*, (2009) 501–578

52 Cox, R.. A climate change litigation precedent: Urgenda Foundation v The State of the Netherlands (2015).

53 McNamara, Karen E., and Carol Farbotko. "Resisting a 'doomed' fate: An analysis of the Pacific Climate Warriors." Australian Geographer 48.1 (2017): 17-26.

7. Climate Change Litigation

There is growing consensus that climate change is a serious issue that should be approached in all angles including litigation. The field of climate change litigation is developing rapidly.[54] Already, numerous climate change cases have been decided by international organizations and by national courts.[55] At the international level, there appear to be no adequate international organizations which have compulsory jurisdiction. This remains as one of the barriers to climate change litigation at the international level which is not surprising as it is expected in most environmental disputes. At the State level, there appear to be two sets of cases that touch on climate change. First, the civil cases brought against companies that are persistent violators of the greenhouse gas requirements. Second, there are the judicial review cases that seek to challenge administrative actions of governments institutions seeking to enforce the climate change obligations. There appear to be limited empirical evidence of how many disputes could be referred to arbitration and as such it is suggested that climate change arbitration should be given prominence.

Previous attempts to present litigation have been unsuccessful because of the vagaries of most trial. However, the Supreme Court of the Netherlands in 2019 made strides on how government efforts to curtail carbon dioxide emissions can be checked and enforced. Rodger Cox presents an analytical description of the implications of the Urgenda litigation in the Supreme Court of Netherlands.[56] In that case the Supreme Court considered the seriousness of the climate change problem by placing reliance on the consensus in science around climate change. The issue was whether the climate change question is serious enough to warrant intervention by the Courts. The Court found that there was an obligation placed on the State of Netherlands to reduce GHG emission. They based this argument on the open norm in the civil procedure books as well as precaution and proportionality argument.[57] The debate was whether this is a matter for Courts or matter for arbitrators or politicians. This was a milestone to climate change litigations.

Previous attempts have failed. For instance, in the first Norwegian climate change litigation was an attempt on litigating climate change compliance unfortunately the case was dismissed.[58] The argument made was that it was a litigation strategy problem to attempt to void a certificate issued to a petroleum mining company that confirmed compliance with Co2 emission. The Court found that the responsibility of ensuring Co2 emission oddly belonged to the company that had the mandate of producing petroleum. Although this litigation was not iron clad in terms of strategy, it is a reminder of the challenges relating to climate change litigation.[59] Another poignant point this litigation brings out is the role of the petroleum producers. Ninety companies globally dealing in petroleum producers' account for 63% of the global carbon emission and the rest is as a result of all the other emitters.[60] This effectively means that the globe is beholden to a few pollutants and that advocacy needs to take on this as an agenda issue.

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54 Burns, William, , A Voice for the Fish? Litigation and Potential Causes of Action for Impacts under the United Nations Fish Stocks Agreement, 48, Santa Clara Law Review, 2008 605–647.

55 Ibid

56 Cox, R.. A climate change litigation precedent: Urgenda Foundation v The State of the Netherlands. (2015) https://www.cigionline.org/publications/climate-change-litigationprecedent-urgenda-foundation-v-state-netherlands

57 Posner, Eric,, Climate Change and International Human Rights Litigation: A Critical Appraisal, *University of Pennsylvania Law Review*, 2007 1925–1945.

58 Ivar Alvik. The first Norwegian climate litigation. The Journal of World Energy Law & Business 2018 11(6):541-545.

59 Ibid

60 Heede, R. in Carbon Majors: Accounting for carbon and methane emissions 1854-- 2010 Methods & Results Report (2014)

8. Conclusion

The evolution of the actors of environmental politics continues to take place in tandem with the evolution of environmental issues. The first generation contains the conservation and preservation of various habitats in the pre- 1960's. The second generation is the modern environmentalism that focuses on the population surge, technology, and the onset of global warming. The third generation referred to in general as global issues.[61] These general issues consist of climate change, loss of biodiversity as well as pollution and its effects such as acid rain and even the depletion of the ozone layer. These three generations of environmental issues have shaped the types of action that states, and organizations have taken up to deal with them. The fundamental principles of environmental governance include participation, adherence to the rule of law, transparency, inclusiveness, consensus, efficiency, and accountability. The fourth generation of environmental governance must address dispute resolution. This paper recommends two things. One let all climate change experts be turned into arbitrators who will manage climate change disputes and two, dispute resolution clauses should be introduced into all agreements with arbitration as the imperative.

61 Orihuela, J. C. (2020). Embedded Counter movements: The Forging of Protected Areas and Native Communities in the Peruvian Amazon. New Political Economy, 25(1), 140155. doi:10.1080/13563467.2019.1570101

International Investment Protection and The Right of State to Intervene and/or Regulate: Case Study of the Kenya Energy Sector with Particular Emphasis on the WalAm Energy LLC Arbitration Case

By Ibrahim Kitoo* and Dr. Kariuki Muigua**

Abstract

The transition to renewable energy in Africa has been progressing impressively over the last decade, with many countries working to increase renewable energy capacity in recent years. This is informed by the inherent advantages of renewable sources of energy which include ensuring the security of energy supply. Renewable sources of energy have also been hailed for their role in climate change mitigation, adaptation and resilience in the quest towards sustainable development and zero carbon. African countries, including Kenya, have thus continued to invest heavily in renewable sources of energy such as geothermal, solar, wind, biomass, biological waste, hydro, ocean and tidal energy. Buoyed by existence of bilateral investment agreements, globalisation and the increase in international investments has seen African countries seek the services of multinational corporations to invest in the energy sector.

However, striking the right balance between the interests of Kenya as the Host State and investors in the treaty formulations has proved to be challenging. For instance, in the course of investments in the energy sector, disputes have arisen between investors and host states. Such disputes have taken various forms but generally concern cases of environmental pollution, human rights violation and allegations of breach of bilateral agreements by host countries. Using the case study of the seminal WalAm Energy LLC – Versus – Kenya Arbitration Case (ICSID Case No. ARB/15/7) this paper seeks to demonstrate the shift in international investor protection and state interference and right to regulate. It analyses some of the energy justice concerns arising from bilateral investment treaties and how they affect the quest towards energy security and affordable energy for all in Kenya. It argues a case for reform of bilateral investment treaties towards clean energy transition in Kenya under the principles of sustainable development. The conclusion is that it is necessary but no longer enough to benefit from international protections; an investor is expected to understand that what is in place is a partnership with the state and the investor is held accountable for investment conduct; that being allowed to invest in a foreign country is a case of noblesse oblige.[1] That to invest into a foreign country often means a partnership between the investor and the state; partnerships break down and international protections against unlawful takeover or interference are key, but they are part of a broader context of the investor's conduct in the host state as well as the global implications of the dispute.

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1 French meaning for ''nobility obliges'' the need to act nobly for granted privileges.

1. Journey Towards Clean Energy Transition

At the heart of realisation of sustainable development and global response to the climate change threat is the energy transition. Energy transition is a term of art in the industry that refers to the adaptation of energy systems to meet the challenges posed by carbon emissions. Often, the energy transition is synonymous with a shift to renewable energy.[2] Sustainable Development Goal 7 is one of 17 Sustainable Development Goals established by the United Nations General Assembly in 2015. It aims to ensure access to affordable, reliable, sustainable and modern energy for all.[3] Various ways towards achieving this goal include investing in solar, wind and thermal power, improving energy productivity, and ensuring energy for all.[4] The importance of the transition towards clean and renewable sources of energy was also upheld at the United Nations Climate Change Conference 2021 (COP26) as a key pillar towards climate change mitigation, adaptation, finance and collaboration.[5] Access to energy is a very important pillar for the wellbeing of the people as well as economic development and poverty alleviation.[6] It is also an important part of the journey towards achieving the sustainable development goals.[7]

The journey towards clean and affordable energy has also been embraced in Kenya. The Kenya Sustainable Energy for All (SE4All) Action Plan seeks to achieve 100% universal access to modern energy services, increase the rate of energy efficiency and increase to 80% the share of renewable energy in Kenya's energy mix, by 2030.[8] Kenya also has in place a *National Climate Change Action Plan (NCCAP)*.[9] The NCCAP 2018-2022 aims to further Kenya's development goals by providing mechanisms and measures that achieve low carbon climate resilient development.[10] The action plan sets out actions to implement the Climate Change Act 2016, and provides a framework for Kenya to deliver on its Nationally Determined Contribution (NDC) to the Paris Agreement.[11] Speaking to energy sector, priority Number 7 encourages electricity supply based on renewable energy that is resilient to climate change, promotes energy efficiency and climate proofs energy infrastructure.

Due to the importance of the right to energy and the need to transition to clean energy sources towards attaining the sustainable development goals, investment in clean energy infrastructure is of utmost importance. Consequently, Kenya has seen investments in the energy sector by Multinational Corporations under Bilateral Investment Treaties with other countries. The paper seeks to critically discuss the efficacy of bilateral investment treaties in delivering access to clean energy in Kenya. The paper begins by tracing the development of bilateral investment treaties. It then uses the case study of *WalAm Energy LLC – Versus – Kenya Arbitration Case (ICSID Case No. ARB/15/7)* to analyse the prospects, challenges and opportunities towards

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2 Noreen Kidunduhu, *Energy Transition in Africa: Context, Barriers and Strategies*, Published in Energy Transitions and the Future of the African Energy Sector, Law, Policy and Governance, page 73. Edited by Dr. Victoria R. Nalule.

3 United Nations Development Programme, Goal 7: Affordable and Clean Energy, available a thttps://www.undp.org/sustainable-development-goals#affordable-and-clean-energy (accessed on 22/04/2022)

4 Ibid

5 UN Climate Change Conference UK 2021., 'COP26: The Glasgow Climate Pact' available at WalAm Energy LLC – Versus – Kenya Arbitration Case (ICSID Case No. ARB/15/7) (accessed on 22/04/2022)

6 Muigua.K., 'Towards Energy Justice in Kenya' available at http://kmco.co.ke/wp-content/uploads/2020/02/Towards-Energy-Justice-in-Kenya-00000005.pdf (accessed on 22/04/2022)

7 Muigua.K., 'Delivering Clean and Affordable Energy for All' available at http://kmco.co.ke/wp-content/uploads/2021/05/Delivering-Clean-and-Affordable-Energy-for-All-Kariuki-Muigua-Ph.D-24th-April-2021-1.pdf (accessed on 22/04/2022)

8 Ministry of Energy and Petroleum, 'Sustainable Energy for All (SE4All)' available at https://www.seforall.org/sites/default/files/Kenya_AA_EN_Released.pdf (accessed on 22/04/2022)

9 Formal citation is Government of the Republic of Kenya (2018) National Climate Change Action Plan 2018 – 2022. Ministry of Environment and Forestry, Nairobi. This is a five (5) year plan that helps Kenya adapt to climate change and reduce greenhouse gas emissions.

10 Ibid

11 The Paris Agreement, formerly known as United Nations Framework Convention on Climate Change (UNFCC), is a legally binding international treaty on climate change. It was adopted by 196 Parties at Conference of the Parties 21 in Paris, on 12 December 2015 and entered into force on 4 November 2016.

attaining clean and affordable energy in Kenya under bilateral investment treaties. The paper concludes by proposing reforms aimed at delivering clean and affordable energy for all in Kenya through various ways including investments under bilateral investment treaties.

Given strains on public finances, engaging private sector capital remains key. To guarantee energy security and also environmental protection state intervention in the energy sector in Kenya is nothing new, but the environment has become more febrile around it. Indeed, Government intervention, where it is protective of national interests or national security, has increased significantly over the last decade. The companies who are affected by state intervention are not necessarily the ones that come to mind immediately. It is no longer just the usual in, for instance, the energy or extractive industries sectors, where much of the attention has been historically.

2. Tracing the Development and Essence of Bilateral Investment Treaties

2.1. The Calvo Doctrine

The *Calvo Doctrine* is a principle of international law developed by the Argentine jurist and diplomat and legal scholar Carlos Calvo.[12] It is a foreign policy doctrine which holds that jurisdiction in international investment disputes lies with the country in which the investment is located. As a policy prescription, the doctrine is an expression of legal nationalism. An investor, under this doctrine, has no recourse but to use the local courts, rather than those of their home country. The doctrine was espoused on three (3) fundamental pillars which were: ''that equality, sovereignty and independence are paramount rights of the States, (ii) that States, being equal, sovereign and independent, have the right to expect non-interference from other States; and finally, (iii) that aliens have to abide by the local law of the State wherein they reside without invoking diplomatic protection of their governments in the prosecution of claims arising out of contracts, insurrection, civil war or mob violence.''[13] Under this premise international mechanisms were viewed as an affront to an individual state's right to determine investment disputes using its own national laws exclusively.[14]

2.2. The 'Gun-Boat Diplomacy'

Initially, powerful states protected the commercial interests of their nationals overseas by so-called 'gun-boat diplomacy' ensuring satisfactory treatment through conspicuous military power. In the first half of the 20th century, and with the internationalisation of trade and commerce, attempts were made to protect investment through legal principles.[15]

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12 (1822–1906). The doctrine was first articulated in Calvo's *Derecho internacional teórico y práctico de Europa y América* (International law: Theory and practice in Europe and America), published in Paris in 1868.

13 Carlos Calvo, *Le Droit International Theoreque et Pratique*, 5th edition, (Paris, 1896), Vol, sec. 256, pp. 231 – 232 as referred by Manuel R. Garcia -Mora (1950) in his Marquette Law Review article: THE CALVO CLAUSE IN LATIN AMERICAN CONSTITUTIONS AND INTERNATIONAL LAW.

14 Refer to George Drammeh Akelola, *Investor – State Dispute Resolution in the Oil, Gas & Mining Sector*: Reflections from a Kenyan Perspective, p.9, LL.M Thesis, Nottingham Trent University, Nottingham Law School.

15 Tom Cummins & Ben Giaretta of Ashurst LLP, *Investment Treaty Arbitration* Chapter, page 225, Dispute Resolution in the Energy Sector, A Practitioner's Handbook, Published by Globe Law and Business.

2.3. The Era of Bilateral Investment Treaties & Investment Treaty Arbitration

International Investment Law evolved from centuries-old rules on diplomatic protection and the treatment of aliens to a distinct legal field granting procedural rights to investors to bring claims against host states for the breach of internationally recognised standards of treatment. In its initial or infancy stage, international investment law was preoccupied with granting broad protection to investors, while leaving little or no power for the state to regulate.[16] A growing network of BITs protect foreign direct investment (FDI). Most of these agreements contain mechanisms that give a foreign investor significant protection against the host state, and also clauses that offer an opportunity to claim damages if the host state violates an agreement.

A *Bilateral Investment Treaty* (BIT) is an agreement concluded between two States in which each offers certain protections to investors and foreign investment originating in the other State party.[17] Since the first BIT was concluded in 1959 between Germany and Pakistan, over 3.324 treaties (bilateral and multilateral) with provisions on investment protection have been signed or ratified.[18] BITs were designed to encourage the flow of foreign direct investments, primarily from capital-exporting States to capital-importing countries. By concluding such a treaty, host States present their territory as an attractive venue for investment, helping them to compete with other States for limited international capital.[19]

In order to resolve disputes involving Host States and foreign investors concerning ''covered investments and investors" many international investment agreements have identified investment treaty arbitration as the most preferred mode of dispute settlement.

Investment Treaty Arbitration is the process whereby a dispute relating to protection between an investor and a host state is determined by neutral arbitrators. Indeed, Investor-State dispute resolution provisions most commonly provide for arbitration under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID), but may also offer options such as ad hoc arbitration under the UNCITRAL rules, or institutional commercial arbitration under the Stockholm Chamber of Commerce or international Chamber of Commerce rules.

The energy industry has given rise to the highest proportions of ICSID disputes.[20] This reflects the scale of overseas investment in the sector and the economic pressures faced by host states to achieve a 'fair take' from energy projects. High profile investment treaty proceedings in the energy sector in recent years, most of which have been filed by companies from developed companies against host States include: -

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16 Anthea Roberts, ''*Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*'' (2013) 107 American Journal of Int'l Law 45. The author portrays the maturing of the international investment law system through three stages: infancy, adolescence and adulthood.

17 For further discussion of BITs, see generally KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE (1992); Jeswald W. Salacuse, BIT by BIT: *The Growth of Bilateral Investment Treaties and their impact on Foreign Direct Investment in Developing Countries*, 24 INT'L LAW. 655 (1990).

18 UNCTAD, World Investment Report – Investment and the Digital Economy, 111 (2017), available at http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf.

19 Jose Luis Siqueiros, *Bilateral Treaties on the Reciprocal Protection of Foreign Investment*, 24 CAL. W. INT'L L. J. 255, 257 (1994);

20 Statistics published by ICSID show that 38% of ICSID arbitrations have arisen from oil, gas, mining, electric power or other energy sectors. See *The ICSID Caseload – Statistics* (Issue 2011 – 2).

• Chevron's claim against Ecuador arising from Chevron's allegations that it had been deprived of an effective means of asserting claims and enforcing rights in Ecuador under the Ecuador – United States BIT;[21]
• Saipem's claim against Bangladesh arising from Saipem's allegations that Bangladeshi had expropriated its rights contrary to the Italy – Bangladesh BIT in relation to a gas pipeline construction contract after the Bangladesh courts had overturned a commercial arbitration award;[22]
• Exxon Mobil's claim against Venezuela arising from Exxon Mobil's allegations that its oil assets had been nationalised in Venezuela contrary to the Netherland's – US BIT;[23]
• Occidental Petroleum's claim against Ecuador arising from Occidental's allegations of various breaches of the Ecuador – US BIT;[24]
• Cortec Mining Kenya Limited and its majority shareholders Cortec (Pty) Limited (Cortec UK) and Stirling Capital Limited, both incorporated under the Laws of England and Wales, against the Government of Kenya alleging that Kenya's conduct in particular revocation of the mining licence was a breach of Kenya's obligation under the Kenya – UK BIT.[25]

Regarding the applicability of international investment treaties in Kenya, the Constitution of Kenya,[26] provides that any treaty or convention ratified by Kenya shall form part of the Laws of Kenya. Hence BITs acknowledged to be part and parcel of the Laws of Kenya. The Constitution of Kenya 2010 having enshrined BITs to form part the country's legal framework, goes on to adopt some provisions that give life to Fair and Equitable Treatment. For instance, Article 27(1) provides that every person is equal before the law and has the right to equal protection and equal benefit of the law.

3. A Review of the WalAm Energy LLC Investment Arbitration Case

3.1. Background of the Case

In July 2007, in a letter addressed to the Minister of Energy, the Claimant submitted an application for an authority to explore and develop the *Suswa geothermal concession*. On 5 September 2007, WalAm obtained a licence from Kenya's Ministry of Energy (MOE), granting the company exclusive rights to "*enter*, *explore*, *drill for and extract*, *produce*, *utilize and dispose of geothermal steam and associated geothermal resources.*" The letter gave various particulars relating to WalAm, including; its directors, beneficial ownership, the work program, the financing the technical capability, other various conditions and the costs.[27]

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21 Chevron Corporation (U.S.A) & Texaco Petroleum Company (U.S.A) – V – The Republic of Ecuador, UNCITRAL, PCA Case No. 34877. Accessible at https://www.italaw.com/cases/251.
22 Saipem S.p.A. V. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07. Accessible at https://www.italaw.com/cases/951.
23 Venezuela Holdings, B.V., et al (Case formerly known as Mobil Corporation, Venezuela Holdings, B.V. et al.) V. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27. Accessible at https://www.italaw.com/cases/713.
24 Occidental Petroleum Corporation and Occidental Exploration and Production Company – V. The Republic of Ecuador, ICSID Case No. 06/11. Available at https://www.italaw.com/cases/767.
25 Cortec Mining Kenya Limited, et al – V – Republic of Kenya, ICSID Case No. ARB/15/29 (Annulment Proceeding). Decision on Application for Annulment (19th March 2021) (Annulment Decision).
26 2010, Article 2(6).
27 Para 189.

In a letter dated 3 September 2007, but signed by the Minister on the same date as the licence *(5 September 2007)*, the Claimant was also provided with permission to explore the geothermal resources under *Section 6(1)*[28] *of the Geothermal Resources Act* (GRA).

In December 2007, the Claimant hired GeothermEx to prepare a "*Prospect Evaluation Report*"[29]

In February 2009, WalAm informed the Minister by letter that it had; "*completed the explorations of Suswa Geothermal Prospect and Pre-feasibility to the company's satisfaction*" and proposed to proceed "*with the geothermal licence rights and initial drilling up to five exploration wells*"[30]. At that time, WalAm also asked the government to discuss the possibility of entering into a Power Purchase Agreement (PPA) "*to provide comfort and safeguard investment in excess of $80 million that WalAm is contemplating in Kenya*".

In March, meetings between the government and WalAm representatives took place. Although Kenya engaged in preliminary discussions, a PPA was never concluded.

Also in March 2009, GeothermEx issued a feasibility report.[31] The report covered an analysis of the exploration date, estimation of recoverable geothermal energy reserves, well productivity consideration, site evaluation, well design and cost estimate, and development costs.[32]

The Claimant was then required to produce a work program to the MOE in 2009 however, WalAm did not provide a work program to the government until February 2011, the Minister then requested that they add timelines and budget allocations for each activity in the work program and for various other clarifications.

In the meetings and correspondence between February and March 2011 it is clear that WalAm was aware of the Minister's dissatisfaction with the lack of progress of the development and that the license was under threat of forfeiture.[33]

In March 2011, the work program was approved based on the understanding that the schedule would be *strictly followed*.[34] By the end of the year, however, WalAm's project had not progressed or and adhered to the program's plan for that year.[35]

By April 2012 there had been no communication between the parties since November 2011. WalAm had also not provided the required report to the MOE on the progress of work to be done in 2011 as was set out in the work program. By then, a first well had not been drilled and no work on the infrastructure necessary to enable drilling has even begun.

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28 *Section 6 (1) GRA-(1)* For the purposes of and subject to this Act, the Minister may authorize any person (including a public officer), in writing, to make surveys, investigations, tests and measurements in search of geothermal resources and for that purpose the authorized person may—(a) enter upon any land specified in the authority with such assistants, gear, appliances, and equipment as he thinks fit;(b) sink any bore on the land;(c) make geological surveys and geophysical surveys on the land; and (d) generally, do all things necessary in connection with the survey, investigation, test or measurement.

29 Para 215.

30 Para 219.

31 Para 216.

32 Para 217.

33 Para 253.

34 Para 256.

35 Para 267.

In April 2012, the government wrote a show cause letter, underlining that WalAm was in breach of the licence as it had not carried out sufficient work at Suswa, stating that; "*under normal practice, it takes five (5) years from geothermal resource exploration to construction of such power plants. However, it is noted that WalAm has not carried out sufficient work at Suswa despite the license running close to five (5) years now. It will not be possible for the company to construct the power plant within five years. WalAm is also in breach of Articles 9 and 17 of the license*".[36]

WalAm replied to the MOE stating that; "*it was agreed with the MOE that the Suswa exploration/ development drilling program and its high cost associated work program would not to be undertaken in the absence of a bankable PPA.*" They further stated that there were several items that could not be completed in 2011 because of large "*capital expenditures*" that were required and that could not be risked without an accepted and bankable PPA.[37]

After several correspondences between the parties on the 30 of October 2012, the Minister issued a forfeiture letter revoking WalAm's licence the letter stating as follows; "*I am concerned that despite having granted a Geothermal Resource License to WalAm Geothermal Inc on 5 September 2007, there have not been any apparent efforts made by the company to explore and exploit geothermal resources in the Suswa geothermal field and ultimately to construct a power plant. Under normal practice, it takes five (5) years from geothermal resource exploration to construction of a power plant which period has since been exceeded. This amounts to a direct violation by the company of its obligations under Clauses 7 and 9 of the said License. Given this untenable position, I hereby exercise the powers conferred on me by the Geothermal Resources Act, 1982 in Section 11 (1) (a) as the Minister for Energy and I forthwith revoke the License granted to WalAm Geopower Inc with effect from the date of this letter. This decision shall hereinafter be published in the Kenya Gazette as per the provisions of the Law.*"[38]

The forfeiture of the License was published in the Kenya Gazette Supplement no.169 Legal Notice n. 129 on the 1 of November 2012. The Ministry on the same date allocated Suswa's Geothermal field to Geothermal Development Company (GDC) under *Section 6 (1) of the GRA*.

WalAm stated that it did not receive the letter from the Ministry until the 28 of November 2012 because it had been set to the wrong address.[39] However there was no evidence to prove this allegation.

On the 5 of December 2012 WalAm wrote to the Minister regarding the forfeiture notice where they stated that from 22nd March 2011; "*WalAm… has considered that it has an understanding with the MOE that the capital-intensive drilling and infrastructure work program would not be undertaken until a bankable PPA was in place and that both sides would work towards a PPA in a timely manner. WalAm stood ready to receive a draft model PPA from KPLC.*"[40]

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36 Para 284.
37 Para 289.
38 Para 309.
39 Para 310.
40 Para 315.

They further stated that; *"it is not WalAm who has caused the delayed nor stopped work on the Suswa project. In fact, the company has been ready willing and able to perform but has been restrained to a large extent due to delays and lack of coordinated effort forthcoming."*[41]

The Ministry responded on the 19 of December 2012 and referred to "the facts that in respect of four matters- drilling as recommended by GeothermEx, MT survey as included in the SKM development Plan, drilling in accordance with the approved Work Program as in the letter dated 23 March 2021 and work on roads and water- WalAm had not undertaken work. The letter concluded by saying; *"the failure by WalAm to execute the above-mentioned critical milestones was a reflection of the inability of the company to meet its obligation under the license. Given the foregoing state of affairs the license remains terminated"*.[42]

After several correspondence between the parties to find a reasonable settlement of the dispute, WalAm filed for arbitration on the 26th of January 2015 against Kenya under the licence dispute resolution clause, claiming a breach of customary international law for unlawfully declaring the licence forfeited and seeking hundreds of millions of dollars in compensation and reinstatement of the licence.[43] The ICSID Secretary-General then registered the request in accordance with *Article 36(3) of the ICSID Convention.*[44]

3.2. Main Issues of the Case

i. Declaration of Forfeiture

Regarding the rightful declaration of forfeiture WalAm's arguments were as follows;

a) That the MOE had no basis to declare forfeiture as there was no breach of any obligations under the Licence. WalAm claimed that the Respondent was relying on a breach that was not under the licence i.e., to build a power plant. They further argued that in light of this the forfeiture was *"meritless" and "unlawful"*;[45]

b) That they were not in breach under Article 9 of the Licence that stated that the licensee shall provide periodic written reports on the progress of operations under the licence which the claimant argued are not required until *"operations"* have commenced;[46] and that the respondent could not rely on Section11(1)(a) of the GRA[47] or Article 7(1) of the licence to justify forfeiture of the licence because they did not cease work *"in or under the land"* for a continuous period of six (6) months.[48]

c) That as a matter of Kenyan Law and international law, the Respondent cannot declare the licence forfeited for any alleged breach that was in fact caused by its own wrong doing.[49]

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41 Para 316.
42 Para 318.
43 Para 320.
44 *Article 36(30 ICSID Convention-* (3) The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forth-with notify the parties of registration or refusal to register.
45 Para 369.
46 Para 370.
47 *Section 11(1)(a) Geothermal Resources Act-*(1) The Minister may, by notice to the licensee, declare a licence to be forfeited;(a) if the licensee ceases work in or under the land the subject of the licence during a continuous period of six months, without the written consent of the Minister.
48 Para 371.
49 Para 375.

d) That the Respondent was estopped at the time of the licence from claiming that the GRA and the Licence required physical work. They claimed that the Respondent did not ever suggest that failure to initiate work of a physical nature such as drilling could lead to licence forfeiture.[50]

e) That the Respondent's declaration of forfeiture was not proportional i.e., that the Minister had an obligation to exercise his discretion reasonably so that his response was proportionate to any alleged beach by WalAm.[51]

f) Finally, that under the Constitution of Kenya, 2010 the Minister was obligated to provide a notice of intention to exercise power to declare the licence forfeited under *Section 11 (1) (a) of the GRA* which did not occur.[52]

Furthermore, the Claimant interpreted the words "*in or under*" *to be read* "*merely as relational connectors to indicate the resource to which the 'work' should relate. in other words, assessing data, planning for development, conducting surveys- all with respect to the development of the resource beneath the licensed area- must satisfy the requirements*"[53]

The Claimant also argued that there were other greenfield projects in Kenya granted to private developers where drilling had not commenced for a period of at least six (6) months who had not forfeited their licences.[54]

The tribunal considered the three (3) points of contention brought forth by the Claimant;

a) The Claimant contended that "*the declaration of forfeiture*" was a "*repudiatory breach of the licence*". The tribunal stated that this terminology should not be considered in the determination of the legality of the forfeiture of the licence which is a public law issue which therefore requires consideration of the existence and lawful or unlawful exercise of statutory power;[55]

b) The Claimant further contended that Kenya was "*unjustly enriched*" by the forfeiture, the tribunal stated that this is not a recognised ground for challenge of an executive decision and is an inappropriate application of civil law principles;[56] lastly

c) The Claimant contended that the forfeiture of the licence was an unlawful taking, contrary to the protection of property rights by *Article 40 (3) of the Constitution*[57] of Kenya.[58]

The Tribunal dismissed all the above grounds raised by the Claimant.

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50 Para 376.
51 Para 377
52 Para 378.
53 Para 372.
54 Para 373.
55 Para 394.
56 Para 396.
57 *Article 40(3) Kenyan Constitution*-(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation— (a) Results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or (b) Is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—(i) Requires prompt payment in full, of just compensation to the person; and (ii) Allows any person who has an interest in, or right over, that property a right of access to a court of law.
58 Para 397.

ii. Ultra Vires

The Claimant challenged the declaration's validity on different grounds namely; on *ultra vires*; unjust enrichment; good faith; unreasonableness; proportionality; improper purpose; relevant and irrelevant considerations; procedural fairness; consent; estoppel, and reliance on own wrong. The tribunal rejected all allegations.[59]

WalAm first argued that the government acted beyond its legal power (i.e., *ultra vires*) when it declared the forfeiture of the licence on the basis that WalAm had failed to build the power plant in five years. The tribunal, however, reasoned that contrary to what WalAm argued, the notice of forfeiture should only be interpreted in light of the licence and the GRA. Therefore, it concluded that the Minister of Energy was entitled to rely on *Section 11(1)(a) of the GRA* and the licence if no exploration activities were carried out for a continuous period of six (6) months and expressly did so on the notice of forfeiture.[60] Failure to perform physical activity thus, triggers the right to forfeit. The tribunal found that the government had acted within its legal power.

iii. Factual Basis and interpretation of "in or under the land"

WalAm also contended that the Minister had no factual basis to rely on *Section 11(1)(a)* because the work WalAm had done before the forfeiture notice was served could be interpreted as work, considering work as any activity concerning the licence.[61] Furthermore *Section 8 of the GRA* also explicitly refers to physical activity occurring in the licence area. To determine whether the claimant had carried out any work, the tribunal turned to the interpretation and meaning of the words "*in or under the land*" in the GRA, *Section 11(1)(a)*, and "*in or under the licence area*" in the licence, *clause 7(1)(a)*.

The tribunal sided with the respondent's interpretation that both expressions required physical activity.[62] The tribunal further explained that this interpretation "*reads the forfeiture provision in the context*" and was therefore not narrow and literal as argued by WalAm but "*consistent with the object and purpose of the licence*" and the rights granted under it.[63] It was therefore concluded that revocation of the licence was in good faith, reasonable and proportional.

iv. Good Faith

WalAm also argued that the revocation of the licence was in bad faith because the government's main goal was to transfer the licence rights to a public entity. They further argued that the forfeiture was disproportionate and unreasonable under domestic law. These arguments were rejected by the tribunal on the basis that WalAm did not "*strictly adhere to*" the timetable. Furthermore, given WalAm's long history of inability to deliver since the work program's approval on September 7, 2007, and to acquire sufficient financial resources to do so, the licence's revocation was lawful and therefore reasonable and proportional.[64]

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59 Para 551.
60 Para 421- 428.
61 Para 429.
62 Para 438-440.
63 Para 441.
64 Para 449-452.

v. Relevant and Irrelevant Considerations

WalAm further argued that the government failed to take into account "*relevant considerations*" when it decided to declare the licence forfeited. It is well established under Kenyan law that the exercise of discretionary public power may be found to have failed if "*irrelevant considerations*" are taken into account or "*relevant considerations*" are disregarded. This argument was once again rejected by the tribunal as it indicated that as previously determined in its analysis, the reason for the forfeiture to be issued was that "*no apparent efforts to explore and exploit the geothermal resources*" had been made, and this was therefore not an irrelevant consideration.[65]

The tribunal further concluded that Kenya had not failed to take into account any "*relevant considerations.*" The Claimant's belief that its obligations under the licence were suspended came from the expectations arising from its repeated statements that it needed a PPA to raise the funds that the infrastructure required to progress the project. The claimant relied on two (2) cases[66] where the court stated;" *Failure to consider a legitimate expectation is a failure to consider a relevant consideration and this would in turn call for the courts intervention in assuming jurisdiction and giving the necessary relief.*"[67]

For the tribunal, such a claim was illegitimate because the Minister of Energy expressly rejected a PPA on several occasions. Firstly, it explicitly removed WalAm's reference to a PPA in its application when issuing the exploration licence. Secondly, when the 2011 work program was approved, government representatives did not adopt WalAm's timetable for a PPA. Therefore, the tribunal found that the claimant's inability to raise sufficient capital resulted from the WalAm's deficiencies and its inadequacy.[68]

vi. Consent and Estoppel

The tribunal found that regarding consent and estoppel: Kenya's conduct could not have formed the basis of an estoppel or waiver as alleged by the claimant. It stated that there was no consent by Kenya to the cessation of physical activities.[69]

WalAm further argued that Kenya consented in writing to them not performing work in or under the land until it had a PPA[70] or while negotiations for a PPA were ongoing and that Kenya should be estopped from relying on them to perform to trigger rights to forfeiture. The tribunal dismissed this claim because WalAm failed to prove that the government had expressly stated in any of its communications or letters that it had consented to the investor not performing work "*in or under the land*" until the conclusion of a PPA.

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65 Para 471.
66 See Keroche Industries Limited. V. Kenya Revenue Authority [2007] eKLR &Republic v The Agriculture Fisheries and Food Authority [2017] eKLR
67 Para 486.
68 Para 493.
69 Para 525.
70 Para 503.

vii. Legitimate Expectation

The concept of legitimate expectation is an international investment law principle. The concept is not provided for directly in investment contracts or bilateral investment treaties. Nevertheless, arbitration tribunals often consider the concept as inseparable element of fair and equitable treatment (FET) standard. The whole essence of this concept is to support stability and predictability of a host State policy and to ensure that the investors are treated fairly and equitably.[71]

The fair and equitable treatment (FET) standard has been described as the standard in investment treaty disputes that is the most important,[72] most frequently adjudicated[73] and most frequently found to be breached.[74] While historically the expropriation standard was more prevalent, FET claims have grown in popularity as mass nationalisations have become increasingly rare and states adopt less intrusive measures, alongside the development of investment-treaty arbitration. Hence FET protection is a standard feature in investment treaties. Commentators note that the concept of equity on the other hand suggests a balancing process between the protection granted to the investor and the state's regulatory decisions that may be taken in the public interest.[75]

WalAm argued that it had a legitimate expectation that it would not be required to begin drilling before a PPA was in place and that the failure to take that legitimate expectation into account affected the Ministers exercise of discretion.[76] The tribunal found that this argument was invalid and there were no legitimate expectations, as claimant failed to establish any evidential basis and support for its claim.[77]

The Court in Civil Appeal No. 180 of 2019; *Export Trading Company – Versus – Kenya Revenue Authority*,[78] held that it is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot of legal certainty. If the reason for the principle is for the challenged bodies or decision makers to demonstrate regularity, predictability and certainty in their dealings, this is, in turn enables the affected bodies to plan their affairs, lives and businesses with some measure of regularity, predictability, certainty and confidence.

In *Republic - Versus – Principal Secretary, Ministry of Transport, Housing, Urban Development Ex parte Soweto Residents Forum CBO*,[79] at paragraph 19, the Court in its judgement delivered on 1st February, 2019 held that statutory words override an expectation howsoever founded. Thus, a decision maker cannot be required to go against clear provisions of a statute just to meet one's expectations otherwise his decision would be outrightly illegal and a violation of the principle of legality, a key principle in rule of law. There cannot be legitimate expectation against the clear provisions of a statute.

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71 Bernard Kuria, *Legitimate Expectation of Investors in International Commercial Arbitration*, (2018) journal of cmsd Vol 2(2).
72 Christoph Schreuer, '*Fair and Equitable Treatment in Arbitral Practice*', *6 J. World Inv. & Trade* 358 – 359 (2005), P. 357
73 J Alvarez, *The Public International Law Regime Governing International Investment (Cambridge University Press*, 2011), p.177.
74 Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, Six Edition (Oxford University Press, 2015), Paragraph 8.96.
75 Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles*, Second Edition (Oxford University Press, 2017) Paragraph 7.24.
76 Para 526.
77 Para 527-528.
78 (2018) eKLR
79 (2019) eKLR

In Petition No. 353 & 505 of 2017 (Consolidated); *Pevans East Africa Limited & Another – Versus – Chairman Betting Control and Licensing Board & 7 Others*,[80] it was held that a legitimate expectation cannot be expectation against clear provisions of a statute and that a decision maker cannot be expected to act against the clear provisions of a statute as that would be illegal and a violation of the principle of law. As legislation that was lawfully enacted, the impugned legislation would override any expectation.

One of the more conclusive ICSID cases addressing the principle of legitimate expectation and the corresponding responsibilities of investors is that of *Parkerings - Compagniet AS – Versus – Republic of Lithuania*.[81] On December 30, 1999, the Lithuanian city of Vilnius ("the City") and the Egapris Consortium (a group of entities that included the Claimant's wholly- owned Lithuanian subsidiary) signed an agreement ("the Agreement") pursuant to which the Egapris Consortium would design, build and operate a "modern, integrated parking system" in the City. The Agreement required the Egapris Consortium to develop and secure City approval of a public parking plan; design, construct and operate multiple multi-storey car parks (MSCPs); collect parking fees and penalties; and transfer a portion of the sums collected and a separate fixed fee to the City. In turn, the Agreement obligated the City to, among other things, assign the Egapris Consortium the right to collect local charges and penalties for parking and provide the Egapris Consortium with information necessary to prepare the parking plan.

Subsequent to the Agreement's execution, multiple developments impaired its performance. In particular, (1) the National Government successfully challenged aspects of the Agreement in court on the grounds that allowing the Egapris Consortium to collect and retain a portion of the parking fees violated national law, (2) the National Government enacted a decree restricting municipalities' authority to enforce parking violations, (3) Parliament passed legislation limiting municipalities' power to contract with private entities and (4) various government agencies objected to the Egapris Consortium's proposed development of an MSCP in the City's historic Old Town, an area designated as a World Heritage site by the United Nations Educational, Scientific and Cultural Organization (UNESCO).

Due to those issues regarding the legality of various key activities contemplated by the Agreement, the parties attempted to renegotiate the deal. In January 21, 2004, after more than a year of negotiations, the City decided to terminate the Agreement.

The Claimant, Parkerings, initiated its ICSID action on the grounds that in negotiating, performing and terminating the Agreement, Lithuania (through its central and municipal authorities) breached its obligations to Parkerings under the governing BIT between Lithuania and Norway. More specifically, Parkerings argued that Lithuania violated its obligations under the BIT to (1) grant the investment equitable and reasonable treatment, (2) protect the investment, (3) treat the investor no less favourably than it treated investors from third states, and (4) pay compensation for indirectly expropriating the investor's property.

The consortium commenced arbitration proceedings citing expropriation, a breach of investor's legitimate expectations as espoused under the FET and MFN principles.[82]

> *When addressing the aspect of legitimate expectation, the Tribunal found that ''legislative changes, far from being unpredictable, were in fact to be regarded as likely. As any*

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80 (2017) eKLR
81 ICSID Case No. ARB/05/8. Available at https://www.iisd.org/itn/en/2018/10/18/parkerings-v-lithuania/
82 Case summary available at https://www.iisd.org/itn/en/2018/1018/parkerings - v - lithuania/

businessman would, the Claimant was aware of the risk that changes of laws would probably occur after the conclusion of the Agreement. The circumstances surrounding the decision to invest in Lithuania were certainly not an indication of stability of the legal environment. Therefore, in such a situation, no expectation that the laws would remain unchanged was legitimate. By deciding to invest notwithstanding this possible instability, the Claimant took the business risk to be faced with changes in laws possibly or even likely to be detrimental to its investment. The Claimant could (and with hindsight should) have sought to protect its legitimate expectation by introducing into the investment agreement a stabilisation clause or some other provision protecting it against unexpected and unwelcome changes.''[83]

The Parkerings case confirmed that the principle of legitimate expectation does not carry with it an unqualified right and privilege of investor protection. The investors retained the obligation to protect itself from any reasonably conceivable risks at the time of entering an agreement. Similar standards would naturally apply when dealing with developing states that are likely to enact continuous legislative improvements that are aimed at enabling their economies to adapt to increasing or evolving demands throughout the respective sectors.[84]

In conclusion, the determination of whether there has been a breach of legitimate expectations is fact specific. Nonetheless, the following considerations would be relevant in determining whether a breach of legitimate expectation, and thereby breach of FET, occurred:-

a) The more specific the commitments made by the State to the particular investor, the higher the chances of success. In contrast, general political or legislative statements or speeches are less likely to form the basis of an FET claim.[85]

b) The more drastic the alteration of the State's regulatory framework, the higher the prospects of success.[86] For instance, one of the factors that led to a successful FET claim in Eiser – Versus – Spain was the tribunal's finding that Spain's repeal of the existing legislation and decision to apply an entirely new method to reduce the remuneration for the claimant's existing plants deprived the claimants of essentially all of the value of their investments, in breach of their legitimate expectations.[87] The tribunal observed that the factual and legal situation in that case differed fundamentally from that addressed in Charanne – Versus – Spain,[88] which rejected investors' claims that changes to Spain's regulatory regime violated FET, as the measures complained of in Charanne had far less dramatic effects, reducing the profitability of plants by 8.5 percent to 10 percent.[89]

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83 Tribunal's award at paragraph 335 and 336 available at https://www.italaw.com/sites/default/files/case-documents/ita0619.pdf.

84 Refer to George Drammeh Akelola, *Investor – State Dispute Resolution in the Oil, Gas & Mining Sector: Reflections from a Kenyan Perspective*, p.18, LL.M Thesis, Nottingham Trent University, Nottingham Law School.

85 See e.g., *EL Paso – V – Argentina*, ICSID Case No. ARB/03/15 Award, 31 October 2011, Paragraph 395 (noting that presidential statements can persuade investors to invest but that it is not possible ''to rely on these proposals to claim legal guarantees')

86 See *Toto – V – Lebanon* , ICSID Case No. ARB/07/12 Award, 7 June 2012, Paragraph 224; Perenco Ecuador Ltd – Versus – Republic of Ecuador and Empresa Estatal Petroleos del Ecuador (Petroecuador), ICSID Case No. ARB/08/6, Decision on Remianing Issues of Jurisdiction and on Liability, 12 September 2014, Paragraph 599 (noting that Law 42, which increased the state's revenues in an oil concession to 50 precent, was not in breach of FET as it 'did not purport to fundamentally alter the structure of the contracts')

87 *Eiser Infrastructure Ltd and Energia Solar Luxembourg – V – Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, paragraph 418.

88 Charanne and Construction Investments – V - Spain, SCC Case No. V062/2012. Available at https://www.italaw.com/cases/2082.

89 Id., at Paragraphs 367 – 368.

90 See, e.g Blusun S.A., Jean-Pierre Lecorcier and Michael Stein – V – Italian Republic, ICSID Case No. ARB/14/3, Final Award, 27 December 2016, Paragraph 319.

91 See, e.g., National Grid, Paragraph 180 ('what would be unfair and inequitable in normal circumstances may not be so in a situation of economic and social crisis'); Mamidoil Jetoil Greek Petroleum Products Societe S.A. – Versus – Republic of Albania, ICSID Case No. ARB/11/24, Award, 30 March 2015, Paragraph 626 (an investor investing in a country that was in a crisis was not entitled to expect the same level of stability as in countries such as the UK, the US or Japan);

c) Tribunals may consider whether the state's changes to the legal framework are disproportionate to the state's aims,[90] taking into account the context in which the measures were taken, including the economic and social conditions of the host state.[91]

Thought may also be given to whether the investor has exercised due diligence, including considering industry practices and expectations, and whether its legitimate expectations were reasonable in light of the circumstances.

viii. Domestic Law and Customary International Law issues

Kenya's argument that only domestic law is applicable to the WalAm case was because it is the law of the State party involved i.e., the law of the State in which the investment was made, and the law under which the license was issued and thereafter forfeited.[92] They further argued that that a rule of international law is only applicable if a rule of Kenyan law is contrary to it or if the topic of the claims is not addressed by Kenyan law but addressed by international law. Furthermore, it claimed that international law plays no role in the merits of this particular case because the Claimant has not alleged that any Kenyan law is contrary to international law or that there is a lacuna in Kenyan laws.

The tribunal agreed with Kenya's argument that under *Article 42 (1) of the Convention*,[93] Kenyan law was the applicable law because that was the State party's law to the dispute and the law that applies to the legality of the licence. Also, the licence's existence and validity are derived from from domestic law as was issued by the government. The tribunal reiterated Kenya's argument that customary international law could only be relevant when examining particular issues through local law because "*customary international law is incorporated into Kenyan law [...], but that would not change the applicable law*" for a particular issue. Customary international law would only apply to ancillary or general rules incorporated in Kenyan domestic law. the tribunal also agreed that WalAm was correct in stating that the Tribunal's jurisdiction is in fact sourced in the ICSID Convention and that international law is applicable to questions of jurisdiction.

WalAm raised concerns of breaches of the customary international law minimum standard of treatment, arguing that Kenya had violated its duty to accord the claimant the minimum standard under *Article 47 of the Kenyan Constitution*[94] and customary international law. According to the claimant, the government's obstructive conduct and refusal to act in good faith to negotiate a PPA prevented WalAm from moving forward and bringing the project into production.[95] The tribunal concluded that there was no breach of the minimum standard of treatment.

The tribunal noted that all evidence put forward by WalAm capable of establishing unfair treatment in breach of the international law standard have been formerly considered in the

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92 Para 345.

93 *Article 42 (1) ICSID Convention*- (1) The tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the Dispute (including its rules on the conflict of laws. And such rules of international law as may be applicable.

94 *Article 47 Kenyan Constitution*--(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—(a)provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and (b)promote efficient administration.

95 Para 535

ix. Fair and Equitable Treatment – The Dominant View

Most tribunals deciding whether a government action violates the FET standard have adopted a straight forward interpretative treatment approach consonant with the general object and purpose of investment treaties.[96] Considering that these treaties' primary goal is to create favourable conditions for foreign investments and to reduce political risk, many tribunals have ruled that ''fair and equitable treatment'' is a standard intended to accord broad protections to qualifying investors, including a stable and predictable investment environment, in order to maximise the flow of foreign direct investments. The tribunal in *MTD – Versus – Chile* succinctly summarised this trend as hereunder:-

> *Fair and equitable treatment should be understood to be treatment in an even handed and just manner, conducive to fostering the promotion of foreign direct investment. [The BIT's] terms are framed as a pro-active statement – ''to promote,'' ''create,'' ''to stimulate'' - rather than prescriptions for a passive behaviour of the State or avoidance of prejudicial conduct to the investors.*[97]

According to this view, a State may violate its obligations to accord investments fair and equitable treatment should it substantially alter the legal or regulatory framework pursuant to which those investments were made. In particular, State measures that are contrary to express assurances made to investors as an inducement to invest and upon which investors relied may constitute a breach of the fair and equitable treatment standard. The obligation to safeguard pre – existing decisions that were relied upon by an investor to assume its commitments as well as to plan and launch its commercial and business activities appears central to the concept of fairness and equity within the meaning of modern investment treaties. This concept of investment stability was emphasised in the CMS award, in which the tribunal found that Argentina's alteration of the gas transportation regulatory regime was unfair and inequitable with the tribunal stating thus:-

> *''One principle objective of the protection envisaged is the fair and equitable treatment is desirable ''to maintain a stable framework for investments and maximum effective use of economic resources.'' There can be no doubt, therefore, that a stable legal and business environment is an essential element of fair and equitable treatment.''*[98]

While many investment treaties contain specific provisions ensuring the State's observance of contracts and other undertakings, the fair and equitable treatment standard has also been found to add force to the internationalisation of State contracts and their breach by host governments. As the NAFTA tribunal in *Mondev* noted,

> *[a] governmental prerogative to violate investment contracts would appear to be inconsistent with the principles [for example fair and equitable treatment] embodied in Article 1105.*[99]

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96 Art. 31(1), Vienna Convention on the Law of Treaties, in BASIC DOCUMENTS OF INTERNATIONAL LAW 349 (Ian Brownlie ed. 1983), available at http://www.un.org/law/ilc (treaties should be interpreted ''in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose'')

97 MTD *Equity Sdn. Bhd. and MTD Chile S.A. V – Chile*, *ICSID* Case No. ARB/01/7, Award of May 25, 2005, para. 113, available at https://www.italaw.com/cases/717.

98 *CMS Gas Transmission Co – V – Argentina*, *ICSID Case* No. ARB/01/8, Award of May 12, 2005, at para. 274.

99 *Mondev Int'al Ltd – V – United States of America*, ICSID Case No. ARB/(AF)/99/2, Award of Oct. 11,2002, 42 I.LM. 85 (2003), para. 134. NAFTA art. 1105(1) reads: ''Each Party shall accord to investment of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.''

Thus, the linkage between fairness and equity resonates very well with the *pacta sunt servanda* principle under international law. The rule of sanctity of contracts is a fundamental part of nearly all modern legal systems,[100] and is codified in article 26 of the Vienna Convention on the Law of Treaties. Thus, and consonant with the dominant approach to expropriation, the State may incur liability regardless of its motivation for taking the offending measures.[101]

Many observers agree that the law has evolved a great deal since the days of *Neer*[102], and that the modern treaty prohibition against unfair treatment is substantially robust than the customary norms of the 1920s. As the *Mondev* tribunal explained:

To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat a foreign investment unfairly and inequitably without necessarily acting in good faith….the content of the minimum standard today cannot be limited to the contents of customary international law as recognised in arbitral decisions in the 1920s.[103]

4. Implications of the WalAm Case to the Growth of Renewable Energy in Kenya

The WalAm arbitration has allowed the Ministry of Energy, Geothermal Development Company, and by extension, the Kenya Electricity Generating Company Plc and Kenya Government as a whole to freely exploit and further develop the geothermal resources that are available in the Suswa and other geothermal fields and grow the energy capacity of Kenya while free to engage only diligent and compliant investors to the licence terms and conditions.

The case has sensitised both the Government and future investors on the effects of not strictly adhering to the regulations in place that govern acquisition of licences in the energy sector.

It has also brought forth the importance of ensuring that investors are able to carry out the work that is required of them under the Kenyan law. It ensures that there are no incidents of companies investing in the acquisition of licences [for prospecting purposes] and contrary to public policy and interest only to sell them to another company after acquisition without meeting the necessary requirements under the law. Investors will now think twice before undergoing the vigorous process of acquiring an exploration licence they do not intend to use. Moreover, it cautions investors on the misuse of acquiring licences for future endeavours without strictly adhering to the provided regulations.

Just like the *Cortec Mining Case*, the WalAm case revolved around a complex regulatory framework raising questions of what the framework required, whether the investors had complied with it, and – in the absence of compliance what the appropriate consequences are under domestic and international law. A familiarity with investment treaties and the protections which they can offer can be invaluable for investors negotiating with host states. Investment treaty arbitration is an important part of the international investor's armoury.[104]

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100 BING CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 112 – 14 (1993)

101 CMS, Supra note 141, at para. 280.

102 *Neer Claim* (L.F.H. *Neer and Pauline Neer* (U.S.A) – *V – Mexico*) (U.S. – Mexico General Claims Commission, Decision of Oct. 15, 1926, 4 R.I.A.A. 60, 61, 62 (1926), available at http://law.dal.ca/kindred.intllaw/NEER.htm

103 Mondev, Supra note 88, at paras 116 and 123.

104 Tom Cummins & Ben Giaretta of Ashurst LLP, *Investment Treaty Arbitration* Chapter, page 243 - 244, Dispute Resolution in the Energy Sector, A Practitioner's Handbook, Published by Globe Law and Business.

As such, investors should take enough time to evaluate the possible risks and adjust their expectations with real conditions in the host country. Indeed, when investors decide to invest, they have an obligation to examine and abide by the licence conditions. An emerging trend in Africa is that States have advanced the cause for equal protection between investors and host states in international investment treaty arbitration. This ensures that, while the investor is entitled to the foregoing protections, the investor has some obligations towards the host state in case of violation of certain fundamental principles like human rights, rule of law, environmental rights, corruption and public policy including observation of the host state's law and tax obligations. This was the position in the Cortec Mining case where the tribunal confirmed that both the ICSID Convention and the BIT protected only lawful investments.[105] Investors thus have to comply with the protective regulatory framework in the host states.[106]

It provides guidance and will definitely assist potential power developers keen to invest in Kenya in terms of understanding the investment climate, legal and regulatory compliance, the extent of legitimate expectation and general power investment governance in promoting clean energy infrastructure. The decision does not give finality to all what a foreign investor will need to address in investing in clean power in Kenya nor does it follow a "one-size-fits-all" approach. Countries with different laws, at different phases of economic development and energy transition will find different issues more relevant to their specific situation as every context is different and thus need to be adapted to the needs of each country as well as specific issues and facts at hand. For instance, Article 71 of the Constitution of Kenya 2010 provides that a transaction relating to natural resources is subject to ratification by Parliament if it involves the grant of a right or concession by one or on behalf of any person, including the national government, to another person for the exploitation of any natural resource of Kenya; and is entered into on or after the effective date, in this case 27 August, 2010. The Article further provides that Parliament shall enact legislation providing for the classes of transactions subject to ratification under Clause (1).

5. Conclusion

The core of an enabling investment environment, whether in clean energy or in any other sector is the promotion of investment principles such as fair and equitable treatment, non-discrimination, investor protection and transparency.[107]

While the early stage of international investment law aimed to limit the sovereign's aleatory decision-making power over foreign investors, today international investment law is undergoing a marked shift towards granting states increasing regulatory space and powers, thereby abandoning an absolute interpretation of investor protection.[108]

It is the nature of the energy industry that investors are often reliant on the protection and cooperation of host states. In the oil, gas and energy sectors, resources are often found in politically unstable jurisdictions with relatively undeveloped legal systems. Power sector investors which have invested heavily in immovable and long-term infrastructure may find themselves vulnerable and exposed to aggressive host states seeking to redefine investment

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105 Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya, ICSID Case No. ARB/15/29.

106 Muigua.K., 'Africa's Role in the Reform of International Investment law and the Investor State Dispute Settlement (ISDS) System' available at http://kmco.co.ke/wp-content/uploads/2020/08/Africas-Role-in-the-Reform-of-International-Investment-law-and-the-Investor-State-Dispute-Settlement-ISDS-System-Kariuki-Muigua-August-2020.pdf (accessed on 22/04/2022)

107 United Nations Conference on Trade and Development., 'World Investment Report 2021' available at https://unctad.org/webflyer/world-investment-report-2021 (accessed on 22/04/2022)

108 Jose E. Avarez, ''*The Return of the State*'' (2011) 20 Minnesota Journal of Int'l Law 223.

bargains. Investors reliant on subsidies and favourable taxation regimes to justify their investments may be obvious targets for host states struggling with financial downturns and political pressure on governments to try recover more from a project than a foreign investor had previously bargained for.

Most clean energy infrastructure projects, in particular geothermal ones, require a set of complex and often interlinked negotiations, legal instruments, licences, other commitments and contractual arrangements between the private investor, Host State and power off-taker. Considering the number of risks faced by clean energy generation projects (for example late completion of exploration, completion of power plant development risk, legal and regulatory compliance risks among others) the ability of different actors to enforce these obligations is crucial. The failure to do so will affect the ability of the government to deliver clean power and also increase the cost of clean power.

Kenya and African countries at large should rethink their investment priorities towards an effective investment law and policy regime that promotes sustainable development.[109] Such a framework should also ensure minimal or no environmental damage and uphold human rights.[110] Recognising the growing importance of foreign direct investments in Africa and the desire of African states to promote an attractive investment climate that bolsters sustainable development, the African Arbitration Academy Model Bilateral Investment Treaty[111] sets out the investment policy framework for the promotion of foreign direct investments in Africa whilst recognising the right of state parties to regulate and to introduce new measures relating to investments in their territories in order to meet national policy objectives in accordance with the established principles of international law. The AAA Model BIT thus provides a unique approach to balancing the relationship between investment promotion and protection and sustainable development.[112] It makes balanced provisions on, among others, promotion of investments; non-discrimination standards; minimum standard of treatment; expropriation and compensation; essential security measures; investment and environment; investment, labour, human rights protection and gender equality; denial of benefits; compliance with domestic laws; rights of states to regulate; taxation; disputes prevention and settlement.

Investments in clean energy production should adhere to such a framework. The country should also on its own initiative continue investing in renewable sources of energy such as solar energy, wind energy, hydro energy and geothermal energy towards ensuring energy security.[113] Through this, the country will hasten the progress towards clean energy while ensuring that the principles of sustainable development are adhere to. The journey towards clean energy transition in Kenya under bilateral investment treaties is an ideal that can be achieved within the framework of sustainable development.

For multinationals often 'playing in the backyard' of a country, it is increasingly important to have a social licence to operate in that backyard. Prior to investing in a foreign country, an investor should carefully assess all the risks associated with the investment, including political

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109 Muigua. K., 'International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development' available at http://kmco.co.ke/wp-content/uploads/2018/11/International-Investment-Law-and-Policy-in-Africa-AILA-Conference-Paper-5-11-2018.pdf

110 Ibid

111 Otherwise referred to as The AAA Model BIT.

112 The AAA Model BIT was published in July 2022. It is not intended to be and is not a legally binding document but a model instrument, the adoption of which would depend largely on negotiations, domestic context, and adaptability by African states.

113 Muigua. K., 'Towards Energy Justice in Kenya' Op Cit

risks.[114] Investors should consider the legal structure of the host State. The investor should look for a well developed legal and regulatory framework, including favourable investment laws, tax and labor codes, property laws and competition policy.[115] Lacunae in important areas provide an opportunity for special interests within the host society to change or interpret existing rules in their favour. An independent judiciary that has developed substantial jurisprudence in administrative, procurement and State contracts can provide a very effective damper on political and related risks.

The investor should also consider economic, cultural, political, historical and legal aspects of the host State[116] that may affect political risk. Relevant economic issues include short-term economic stability, including analysis of inflation rates, price stability and exchange rates.[117] An analysis of the State's history regarding respect for the property of foreign investors is useful as well. As a matter of prudence and due diligence, any investor should be wise to consider state intervention as part of its upfront risk assessment and critically plan for it. An important aspect of this element of such planning is treaty structure, for instance, ensuring that your investment is protected at an international level against unlawful state interference. Its important to bear in mind that international law does not prevent state interference and that a sovereign can always 'kick a company out' but ensures that it is done in a non-discriminatory manner and against prompt and adequate compensation among other safeguards. Such safeguards include stabilisation clauses. The key objective of stabilisation clauses is to preclude the application to an agreement of any subsequent legislative (statutory) or administrative (regulatory) act issued by the government or the administration that modifies the legal situation to the detriment of the investor.[118]

Any potential investor is also advised to seek advice on various aspects of political risk from a competent local counsel and economic consultants who have first-hand experience in the State in which the investment is being considered. Indeed many multinational companies retain in-house political risk managers.[119] In addition to such counsel, the investor may consider using a political risk service. These are organisations that specialise in providing investors with up-to-date information regarding political (and other) risk, primarily in developing countries.

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114 Noah Rubins QC, Thomas-Nektarios Papapnaktasiou & N. Stephan Kinsella, *A Practitioners Guide*, Second Edition, , Page 40, Oxford International Arbitration Series

115 Malcom D. Rowat, *Multilateral Approaches to Improving the Investment Climate in Developing Countries: The Cases of ICSID and MIGA*, 33 HARV. INT'L L.J. 104 (1992)

116 otherwise referred to as regulatory arbitrage.

117 Rowat, *ibid*, at 104.

118 W. Peter, *Stabilization Clauses* in Arbitration and Renegotiation of International Investment Agreement (1995), p.214. In other words, stabilisation clauses accommodate the risk of regulatory changes for investors. Given their high level of protection, they may cause tensions with conflicting state's regulation to protect human rights or more generally work towards sustainable development. They often come in the form of freezing clauses, equilibrium clauses or hybrid clauses. For further detailed reading refer to Katja Gehne & Romulo Brillo, *Stabilization Clauses in International Investment Law: Beyond Balancing and Fair and Equitable Treatment*, Working Paper No. 2013/46, January 2014.

119 S. Linn Williams, *Political and Other Risk Insurance: OPIC, MIGA, Eximbank and Other Providers*, 5 PACE INT'L L. REV. 59, 63 (1993).

An Appraisal of the Right of Appeal of a High Court's Decision to Set Aside an Arbitration Award

By Jefferson Odhiambo Alela*

Abstract

This right to appeal a High Court's decision setting aside an arbitration award, to the Court of Appeal, has been an unsettled area of law. The Supreme Court of Kenya provided clarity in Synergy Industrial Credit Limited v Cape Holdings Limited,[1] and Nyutu Agrovet Limited v Airtel Networks Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party),[2] respectively, where the said court issued guidelines on how parties to an arbitration agreement may appeal High Court decisions that set aside arbitration awards to the Court of Appeal. Accordingly, this paper seeks to appraise the said judgments and to analyze the import of the guidelines thereof.

1. Introduction

To begin the discussion, it is important to understand the salient features of arbitration as a form of alternative dispute resolution mechanism. In arbitration, the parties present their arguments and evidence before an independent third party who finally gives a binding decision.[3] Therefore, when compared to litigation, arbitration saves time and costs relatively less in terms of money.[4] In the long run, arbitration helps reduce work-load and backlog of cases in courts since courts devote their time and energy to other cases, which are more complex.[5]

Arbitration is also a peculiar method of alternative dispute resolution because it recognizes the autonomy of the parties. In a recent decision, the Indian Supreme Court commented on party autonomy and described it as the "backbone of arbitration."[6] Notably, according to the said court, party autonomy allowed Indian citizens the liberty to designate the seat of their arbitration proceedings outside India.[7] It follows; parties in an arbitration proceeding have the latitude to decide the forum of the proceedings; choose the law applicable in the proceedings; choose the arbitrators, and to decide how the proceedings will be conducted.[8]

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1 Supreme Court Petition 2 of 2017.

2 Petition No. 12 of 2016.

3 Peter Muriithi, "Ramifications of the Decision of the Supreme Court in the case of; Nyutu Agrovet Limited (Petition No. 12 of 2016), (2020)," 8(1) *Alternative Dispute Resolution*.

4 Bernheimer, Charles L. "The Advantages of Arbitration Procedure," *The Annals of the American Academy of Political and Social Science* 124 (1926): 98–104. http://www.jstor.org/stable/1016251.

5 Ibid.

6 *PASL Wind Solutions Private Limited v GE Power Conversion India Private Limited*, Civil Appeal No. 1647 of 2021.

7 Ibid.

8 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; June2011, page 221.

2. The Role of the Courts in Arbitration Proceedings

Judicial authority in Kenya is vested in and exercised by the courts.[9] However, as it has already been discussed above, the courts' exercise of judicial authority is limited in arbitration matters.[10] Besides, Article 159(2) (c) states that the judiciary, in the exercise of its judicial authority, shall be guided by alternative forms of dispute resolution, including arbitration.[11] Therefore, the courts are bound to recognize Arbitration as a form of alternative dispute resolution. It is in that regard that arbitrators are seen as partners with Judges in the dispensation of justice.[12]

The foregoing notwithstanding, judicial control of arbitration is a reality we have to deal with. For instance, the Constitution grants the High Court supervisory jurisdiction over any person or authority exercising a judicial or quasi-judicial function, such as arbitrators and arbitration tribunals. It is for that reason that the Arbitration Act provides for instances where the Courts can intervene in arbitration matters. The courts are allowed to intervene in arbitration matters in the instances provided in the Arbitration Act.[13] For instance, the Act gives the High Court powers to *inter alia*: grant orders for stay of legal proceedings;[14] appoint arbitrators;[15] compel discoveries or subpoenas;[16] and enforce awards.[17]

The Courts also have the powers under the Act, to hear and determine Appeal from arbitration tribunals. Section 35 of the Arbitration Act provides for the right of an aggrieved party to make an application to the High Court to set aside the arbitration award[18]. While the Act expressly provides for the right to appeal an arbitration tribunal's decision to the High Court, it is silent on whether the aggrieved party has a right to challenge the High Court's decision at the Court of Appeal. This silence raises the pertinent question whether, under the provision, parties have the right to challenge the High Court's decision at the Court of Appeal.

It follows; this aspect of the finality or appealability of a High Court's decision on an application brought under Section 35 of the Arbitration Act is therefore a pertinent legal question, which needs further discussion and analysis. This paper shall therefore provide the legal framework for challenging arbitration awards in Kenya. In that respect, the paper will consider the legal framework for challenging arbitration awards in Kenya. It will also examine the tensions, contradictions, assumptions, biases, and challenges to the right of appeal to the Court of Appeal from a decision of the High Court arising from a finding under section 35 of the Arbitration Act. Next, the author will investigate the global best practices on the right of appeal in cases challenging arbitration awards. Lastly, the paper will recommend appropriate reforms on the right of appeal to the Court of Appeal from a decision of the High Court arising from a finding under section 35 of the Arbitration Act.

This paper has been informed by the need to provide clarity as to finality of the arbitration decision.[19] Finality of the arbitration award is an important feature of arbitration proceedings.

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9 Article 159 of the Constitution of Kenya, 2010.
10 Section 10, the Arbitration Act, 1995.
11 Ibid, Article 159(2)(c).
12 Bureau of National Affairs, Inc., "Arbitration 1982", Proceedings of the Thirty-Fifth Annual Meeting of the National Academy of Arbitrators, May 25-28, 1982.
13 Section 10, the Arbitration Act.
14 Ibid, Section 6.
15 Ibid, Section 12.
16 Ibid, Section 28.
17 Ibid, Section 36.
18 Section 35, the Arbitration Act 1995.
19 See Section 32A, the Arbitration Act.

This means that the parties to an arbitration agreement agree to be bound by the decision of the arbitrator(s). That notwithstanding, the Arbitration Act provides for specific instances where aggrieved parties may challenge an arbitration award at the High Court.[20] While Section 39 of the Arbitration Act recognizes Appeal to the Court of Appeal solely pursuant to a prior agreement of the parties to the arbitration, Section 35 of the Act is silent on the appealability of the High Court decision for an appeal brought thereunder.[21]

Besides, until *Synergy*[22] and *Nyutu*,[23] Kenyan Courts were unsettled on the right to lodge a Section 35 appeal to the Court of Appeal. For instance, in *Micro-House Technologies Limited v Co-operative College of Kenya*, the Court of Appeal held that it had no jurisdiction to hear an appeal from a High Court decision, where the respondent had challenged the validity of an arbitration award.[24] According to the Court, the doctrine of the finality of the High Court decision could only be challenged if the parties had agreed to appeal the High Court's decision; and either party had applied to the Court alleging a point of law of general importance.[25] On the other hand, the Court of Appeal in *DHL Excel Supply Chain Kenya Limited v Tilton Investments Limited* held that although Section 35 is silent on whether parties can challenge a High Court's decision at the Court of Appeal, the section does not expressly prevent the parties from appealing the High Courts' decision.[26]

Thanks to the Courts in *Synergy*[27] and *Nyutu*,[28] now there are rules regarding the right to appeal to the Court of Appeal for Appeal brought under Section 35. It follows; therefore, this research is timely, to appreciate the import of the said cases in the regime of arbitration law in Kenya.

The author observes that several contributions that have been made on the right to appeal arbitration awards. At this point, this paper will discuss the different arguments posed by researchers and scholars on this subject, which analysis will also identify the gaps to be filled.

Mwangi observes that the finality of High Court decisions on Appeal challenging arbitration awards has been recognized in different High Court decisions.[29] According to him, Kenyan jurisprudence on the finality of such High Court decisions is influenced by the U.S. decision in *Parsons Whittemore Overseas Co Inc v Société Générale de l'Industrie du Papier (RAKTA)*,[30] where the Court stated that parties to arbitration proceedings have given up their rights to bring their dispute(s) to Court. He proceeds to contend that the decision of the Kenyan Supreme Court in *Synergy* abrogated the principle of finality of High Court decisions that has been recognized in Kenya. He therefore stated that post *Synergy*, parties now pay more attention when drafting arbitration agreements where the parties can agree to limit court intervention. He also notes that the Supreme Court decision disfavors International Commercial Arbitration because it would subject the parties therein to the authority of the Courts. He therefore recommended an amendment of the Arbitration Act.

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20 Section 35, and 39, of the Arbitration Act.
21 Ibid
22 Supreme Court Petition 2 of 2017.
23 Petition No. 12 of 2016.
24 Civil Appeal No. 228 of 2014.
25 Ibid, at 8(b).
26 Civil Application No. Nai. 302 of 2015; [2017] eKLR.
27 Supreme Court Petition 2 of 2017.
28 Petition No. 12 of 2016.
29 Peter Muriithi, "Ramifications of the Decision of the Supreme Court in the case of; Nyutu Agrovet Limited (Petition No. 12 of 2016), (2020)," 8(1) Alternative Dispute Resolution, at 181-2.
30 508 F2d. 969.

Kariuki and Ng'etich argue that allowing Court intervention in arbitration matters other than in setting policy negates the reason why parties opt for arbitration.[31] They also observe that court intervention goes against the principle of party autonomy, which guarantees parties the right to choose the arbiter in their disputes. According to them, ADR mechanisms would lose their notable characteristics when the courts take over their administration.[32] They argue that ADR mechanisms can function on themselves, and that it does not take government intervention for ADR to be successful.

Muigua argues that although Courts have inherent authority to interfere with Arbitration proceedings, they have a tendency to overstep their authority.[33] He therefore notes that such intervention may interfere with the willpower of international investors to do business in Kenya.[34] With regards to appealing arbitration awards, Muigua observes that the tendency of parties to appeal to the highest Court on the land defeats the purpose of arbitration.[35] He therefore suggests that the misuse of the right of appeal can only be checked by setting up special courts to hear cases challenging arbitration awards, which courts shall have finality.

According to *Gakeri*, arbitration has often been perceived as challenging the authority the judicial powers of the courts.[36] However, he notes that the situation has changed and that currently, judges and arbitrators are partners in the dispensation of justice.[37] According to him, Kenyan law recognizes the principle of finality of arbitration awards, and has only one method to challenge an arbitration award; under Section 35 of the Arbitration Act. In that regard, he argues that the Court of Appeal have recognized the principle of finality on public policy grounds.[38]

Several theories may also help shed more light on the subject matter of this paper. This paper shall discuss the jurisdictional theory; contractual theory; hybrid theory; and autonomous theory.

2.1 Jurisdictional Theory

The jurisdictional theory provides that the law of the forum of arbitration (*lex aribtri*), supersedes the parties' agreement.[39] Accordingly, *lex aribtri* sets out the conduct of the arbitration proceedings; identifies the rights and duties of the parties to the arbitration agreement; and provides for the supervision by the courts over arbitration proceedings.[40] Accordingly, proponents of the jurisdictional theory posit that national law plays a major role in arbitration matters. They also hold the view that judicial authority, and the administration of justice, is a reserve of the State, through the Courts. Therefore, the conduct of arbitration is a public function, which the State must oversee.

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31 Francis Kariuki and Raphael Ng'etich, "The Promotion of Alternative Dispute Resolution Mechanisms by the Judiciary in Kenya and its Impact on Party Autonomy," 6(2) Alternative Dispute Resolution (2018), at 67

32 Ibid, at 71.

33 Kariuki Muigua, "Promoting International Commercial Arbitration in Africa," Paper Presented at the East Africa International Arbitration Conference, held on 28-29 July 2014, at 5.

34 Ibid

35 Ibid, at 10.

36 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; June2011, page 220.

37 Ibid

38 Ibid, at 235-6.

39 Hong-lin Yu, "Explore the void – an evaluation of arbitration theories: Part 1 ", Int. A.L.R. – 2004. – №7 (6), at 183.

40 Paul Smith Ltd. v H & S International Holding Inc. [1991] 2 Lloyd's Rep. 127 Queen's Bench Division(Commercial Court)

2.2 Contractual Theory

Proponents of the contractual theory posit that the arbitration agreement gives life to the arbitration award.[41] Accordingly, arbitration awards are a product of the parties' agreement under the arbitration agreement.[42] Therefore, the arbitration award is contractual hence binds the parties thereto. As opposed to the jurisdictional theory, *lex aribtri* should not interfere with the decision of the parties to the arbitration proceedings. In a nutshell, under the contractual theory, the consensus between the parties to the arbitration proceeding gives the arbitration award a contractual nature. Finally, proponents of the contractual theory hold that the State should only interfere with the arbitration awards to compel either party thereto, to perform their obligation(s) under the contract.

2.3 Hybrid Theory

The hybrid theory seeks to strike a balance between the jurisdictional and the contractual theories. Proponents of the hybrid theory posit that on one hand, arbitration proceedings are an expression of the parties' consent to settle their disputes through arbitration.[43] On the other hand, the arbitration proceedings must be subjected to the authority of the Courts in different aspects *inter alia*, in the recognition and enforceability of the arbitration awards.[44]

2.4 Autonomous Theory

Proponents of the autonomous theory posit that arbitration has an intrinsic autonomous nature and should therefore be considered as such.[45] Accordingly, the autonomous theory holds that arbitration should be detached from national law.[46] It is also argued that arbitration does not belong to the legal system because it involves many aspects that do not relate to law.[47]

3. Challenging Arbitral Awards in Kenya

Kenyan law provides an opportunity for aggrieved parties to challenge arbitration awards. Before embarking on the discussion, it is essential to note that the "right of appeal" is different from "the right to appeal".[48] While the "right to appeal" refers to the power of a court to hear appeals, the "right of appeal" means the right, which a party must prove that a law gives them the right to lodge an appeal.[49] This difference shall be covered in depth later on in this paper. In this section, the author shall focus on the Constitution of Kenya; Legislations, including the Arbitration Act;[50] and International Law including the UNCITRAL Model Law;[51] and the New York Convention.[52]

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41 Belohlavek, Alexander J., Arbitration and Basic Rights: Movement from Contractual Theory to Jurisdictional Theory (October 17, 2013). Ünnepi tanulmányok Keckskés László Professzor 60. születésnapja tiszteletére (Liber Amicorum prof. László Kecskés), Pecs, 2013, p. 62.

42 Ibid

43 Steven Menack, "Mediation/Arbitration: The Hybrid ADR Theory," New Jersey Law Journal, (August 14, 1995).

44 Ibid

45 Julian D.M. Lew, QC, "Achieving the Dream: Autonomous Arbitration," Volume 22 Issue 2 Arbitration International, (1 June 2006), Pages 179–204.

46 Ibid

47 Kenneth S. Carlston, "Theory of the Arbitration Process", 17(4) L. & CONTEMP. PROBS., 631, 636 (1952).

48 Nyutu Agrovet Limited v Airtel Networks Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party), Petition No. 12 of 2016, paragraph 33-4.

49 Ibid

50 No. 4 of 1995.

51 United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration.

52 The Convention on the Recognition and Enforcement of Foreign Arbitration Awards, 1958.

3.1 The Constitution of Kenya

The Constitution, which is the supreme law in Kenya,[53] guarantees the right of aggrieved persons to access justice in judicial institutions. Accordingly, the Constitution gives power to the High Court and the Court of Appeals, as shall be seen in the sections below.

The Constitution provides that judicial authority in Kenya is vested in the Courts.[54] It is also important to note that as the Courts have a mandate to promote alternative forms of dispute resolution, including arbitration, in the exercise of their authority.[55]

The Constitution grants jurisdiction to the Court of Appeals to hear appeals from the High Court.[56] The Court of Appeals is bound by an overriding objective to facilitate timely and just disposal of proceedings.[57] On the other hand, the High Court is granted, *inter alia*: jurisdiction to determine a question of violation of rights; appellate jurisdiction conferred on it by legislation;[58] and jurisdiction over cases raising substantial questions of law.[59] It follows; a party who disputes an arbitral award may challenge it in the courts.

The Constitution also obligates the state to ensure access to justice to all persons.[60] It follows; persons have a right to seek legal redress from institutions of justice. In its broadest sense, access to justice entails the right of persons to access the Courts for remedies.[61] Besides, the Constitution contains other provisions, which ensure persons get access to judicial institutions to adjudicate claims. For instance, Article 22 provides the right for every person to institute proceedings in court claiming infringement of their right(s).[62]

From the face of it, it appears that the Constitution, by granting jurisdiction to the High Court and Court of Appeals; and by guaranteeing the right to access justice, entitles aggrieved parties to freely appeal arbitral awards to either the High Court or the Court of Appeals. However, that is not the case. As much as the Constitution opens the litigation field to litigants, it does not guarantee an uncontrollable access to the Courts.[63] The Courts can only exercise their authority if the authority is conferred by law.[64] Therefore, as it shall be seen in the proceeding sections, there are regulations and requirements regarding the appeal of an arbitral award.

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53 Article 2(1), the Constitution of Kenya, 2010.
54 Article 159(1), Constitution of Kenya, 2010.
55 Article 159(2)(c), Constitution of Kenya, 2010.
56 Article 164(3)(a), Constitution of Kenya, 2010.
57 Sections 3A and 3B of the Appellate Jurisdiction Act, No. 12 of 2012.
58 Article 165(3)(e), Constitution of Kenya, 2010.
59 Article 165(3)(b) and (d), Constitution of Kenya, 2010
60 Article 48, Constitution of Kenya, 2010.
61 "Judicial Reforms and Access to Justice in Kenya: Realizing the Promise of the New Constitution," A Report by the Kenya Civil Society Strengthening Program, 2011.
62 Article 22(1), Constitution of Kenya, 2010.
63 See Mwera J., in Nyutu Agrovet Limited v Airtel Networks Limited [2015].
64 Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1.

3.2 Legislations

The Civil Procedure Act and Rules; and the Appellate Jurisdiction Act provide for the right to appeal High Court decisions to the Court of Appeals. For instance, Section 66 of the Civil Procedure Act provides in that regard that an appeal shall lie from a decision of the High Court to the Court of Appeals.[65] The Appellate Jurisdiction Act also states in that regard that the Court of Appeals shall have jurisdiction to hear and determine appeals from the High Courts.[66] However, the Arbitration Act[67] limits the intervention of Court of Appeals in arbitration matters. Section 10 of the Act provides that no court shall intervene in arbitration matters except as otherwise provided in the Act.[68] Notably, Sections 12(8) and 17(7) expressly provide that the decisions of the High Courts are final and not appealable.[69] It follows; therefore, this paper shall limit its scope under this Section, to the Arbitration Act.

3.3 The Arbitration Act[70]

There is only one instance where the Arbitration Act expressly provides for the right of appeal to the Court of Appeals, in domestic arbitration cases.[71] Under Section 39, an aggrieved party may apply to the High Court if the parties have agreed to apply to the court for a determination of a question of law; and to appeal to any court for a determination of any question of law arising from an award.[72] Further, the said section provides that any aggrieved party may appeal the High Court's decision if: the parties had agreed to appeal the High Court's decision, before the arbitral award was issued; and if the Court of Appeals grants leave to appeal, in the event the Court of Appeals holds the opinion that a point of law of general importance is involved.[73]

Section 35 of the Arbitration Act, which has been contentious, provides for the recourse to the High Court against an arbitral award.[74] Under the said section, an arbitral award may be set aside if the aggrieved party furnishes proof of any of the allegations stated in the section; and if the High Court decides that the enforcement of the award would be against public policy, or if the subject matter is incapable of enforcement in Kenya.[75] However, the section is silent on the right of an aggrieved party to appeal the High Court's decision to the Court of Appeals. Accordingly, Section 35 has raised pertinent questions. Most notably, from a plain reading of the Section, it is not clear whether the absence of an express right of appeal to the Court of Appeals precludes an aggrieved party from pursuing that course.

3.4 International Law

International law, Treaties and Conventions form part of the regime of laws applicable in Kenya pursuant to Article 2(5) and (6) of the Constitution.[76] In that regard, Kenya is signatory

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65 Section 66, Civil Procedure Act, CAP 21.
66 Section 3(1), the Appellate Jurisdiction Act, No. 12 of 2012.
67 No. 4 of 1995.
68 Section 10, the Arbitration Act.
69 Sections 12(8) and 17(7), the Arbitration Act.
70 Ibid
71 Section 39(3), the Arbitration Act, 1995.
72 Section 39(1), the Arbitration Act, 1995.
73 Supra, note 13.
74 Section 35, the Arbitration Act, 1995.
75 Section 35(b), the Arbitration Act, 1995.
76 Article 2(5) and (6), Constitution of Kenya.

to, and has ratified several treaties and conventions on arbitration, which form the legal framework of arbitration in Kenya, especially international arbitration. This section shall focus specifically on the right to challenge arbitration awards under the UNCITRAL Model Law;[77] and the New York Convention.[78]

3.5 The UNCITRAL Model Law

Kenya has adopted the UNCITRAL Model law (hereinafter "UNCITRAL") into her domestic laws on arbitration.[79] For instance Sections 10 and 39 of the Arbitration Act are adopted from UNCITRAL.[80] Generally, UNCITRAL applies only to commercial arbitrations.[81] It limits court intervention solely to the instances provided for under the law.[82] That notwithstanding, UNCITRAL recognizes the authority of Courts and authorizes every state that applies the Model laws to identify the Courts to perform the functions under the jurisdiction of the courts with respect to the arbitration matters.[83]

Regarding the setting aside of an arbitral award, UNCITRAL provides that parties seeking to set aside an arbitral award may do so by making an application to a court of competent authority as already identified above.[84] Interestingly, UNCITRAL authorizes Courts to stay the proceeding before it, upon a request by a party and were appropriate.[85] The stay would enable the arbitration tribunal to correct the ground for challenging the arbitral award.[86]

It is instrumental to note that UNCITRAL is silent on the finality of the Courts that first receive applications to set aside the arbitral awards. Therefore, the extent in which one can appeal an arbitral award is unclear in UNCITRAL, and it appears that UNCITRAL leaves that matter to the discretion of the states under Article 6.[87]

3.6 The New York Convention

Kenya became a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention, hereinafter "the Convention"), on February 10, 1989. The Convention seeks to provide a uniform legislation on the national courts' enforcement of foreign arbitral awards in international arbitration.[88] In a bid to prevent court interference with international arbitration, the Convention provides expressly that national courts should deny parties access to courts and refer the disputes back to the arbitration tribunals.[89] Further, the Convention removes stringent conditions that exist in national laws, which conditions are unfavorable to parties in arbitration proceedings; and allows state parties to continue applying conditions that favor the parties.[90] Therefore the Convention's intention is to encourage recognition of non-domestic arbitral awards in national courts of state parties.

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77 United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration.
78 The Convention on the Recognition and Enforcement of Foreign Arbitration Awards, 1958.
79 Jacob K. Gakeri, "Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR," Vol. 1 No. 6 International Journal of Humanitarian and Social Sciences, (June2011), page 219.
80 Sections 10 & 39, the Arbitration Act.
81 Article 1(1), UNCITRAL Model Laws.
82 Article 5, UNCITRAL Model Laws.
83 Article 6, UNCITRAL Model Laws.
84 Article 34(1), UNCITRAL Model Laws.
85 Article 34(4), UNCITRAL Model Laws.
86 Ibid
87 Article 6, UNCITRAL Model Laws.
88 Introduction: Objectives, the New York Convention, 1958.
89 Ibid
90 Article VIII (1), the New York Convention, 1958.

Notwithstanding the foregoing, the Convention recognizes the role of courts to set aside arbitral awards.[91] It also sets grounds upon which a party may challenge an arbitral award.[92] However, just like UNCITRAL, the Convention is silent on the finality of the courts where arbitral awards are challenged.

It follows; while international law provides for the right of aggrieved parties to challenge arbitral awards, it is silent on the right of aggrieved parties to appeal courts' decisions to set aside arbitral awards to higher courts within the state parties. Accordingly, international law appears to leave the matter at the discretion of the states.

4. Challenges Arising from the Right of Appeal to the Court of Appeal from A High Court Decision Under Section 35 of the Arbitration Act.[93]

Having no express right of appeal under Section 35 of the Arbitration Act[94] raises tensions, contradictions, biases, and challenges. The author has discussed some of the issues and contradictions namely: the finality of the Arbitration Award; the question of party autonomy in arbitration proceedings; and the issue of access to justice.

5. Right to Appeal versus Right of Appeal

The right to appeal refers to jurisdiction of courts to hear appeals. Jurisdiction is the authority or power, which a court has to hear and determine matters before it.[95] This authority is granted to the courts by Statutes or laws, which constitute the Courts.[96] The authority of the Courts may also be extended or restricted by the same statutes or law. In *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd*,[97] which is the *locus classicus* on jurisdiction, Justice Nyarangi observed that "jurisdiction is everything. Without it, a court has no power to make one more step." Jurisdiction also identifies the "sphere of the court's operations"[98]. It follows; without jurisdiction, a court would lack a basis to conduct its operations. A court would therefore stop handling a matter when it holds the opinion that it lacks jurisdiction over the matter. Interestingly, when a court hears and determines a matter, which it has no jurisdiction over, the court's decision is null and void.

The right to appeal is provided for in the Constitution. For instance, Article 164(3) mandates the Court of Appeals to hear appeals from the High Court.[99] Further, Section 3(1) of the Appellate Jurisdiction Act provides that the Court of Appeals have jurisdiction to hear and determine appeals from High Courts.[100] However the Act limits the jurisdiction only to cases "*in which an appeal lies to the Court of Appeal under any law*"[101].

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91 Article V (1)(e), the New York Convention, 1958.
92 Article V, the New York Convention, 1958.
93 No. 4 of 1995.
94 Ibid, Section 35.
95 John Saunders, "Words and Phrases Legally Defined", Butterworths, Volume 3: I – N, (1998), p. 113. Ernest Uwazie, "Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability," Africa Center for Strategic Studies, (30 November, 2011), p. 3.
96 Ibid
97 [1989] KLR 1.
98 Republic v Karisa Chengo & 2 others SC Petition No. 5 of 2015; [2017] eKLR.
99 Article 164(3), Constitution of Kenya.
100 Section 3(1), the Appellate Jurisdiction Act. CAP 4
101 Ibid

The right of appeal, on the other hand, means the right, which a party must prove that a law gives them such right to appeal a matter. The right of appeal can be conferred by both the Constitution and Statutes. For instance, under Article 50(2)(q) of the Constitution, a convicted person has a right of appeal for review to a higher court. The Arbitration Act also contains the right of appeal in Section 39(3), where it provides for the right of appeal to the Court of Appeal against a decision of the High Court, subject to restrictions under the section.[102]

The Appellate Jurisdiction Act proceeds further to point out the difference between the right of appeal and the right to appeal. Under Section 3(1), the Act provides: *"the Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and any other Court or Tribunal prescribed by an Act of Parliament in cases in which an appeal lies to the Court of Appeal under any law."* It follows; while the Appellate Jurisdiction Act recognizes the jurisdiction of the Court of Appeals, it places a check on the jurisdiction by limiting the exercise of jurisdiction to cases where the litigants are permitted to by various provisions of law.

It can therefore be said that jurisdiction does not confer a right of appeal. A litigant cannot rely on the jurisdiction of the Court of Appeal under Article 164(3) of the Constitution, to claim their right of appeal to the said court, under Section 35 of the Arbitration Act. In a nutshell, the right of appeal is not synonymous with the right to appeal. The jurisdiction of the Court of Appeal can only be exercised where there is a right of appeal.[103]

Another contention that arises in Section 35 of the Arbitration Act is that having a right of appeal under the section interferes with the principle of finality of the Arbitration Award. Arbitration Awards are considered final and binding.[104] In *Rashid Moledina and Company Ltd v Hoima Ginners Ltd*[105], the Court observed that Courts are low to interfere with an arbitration award because parties in the arbitration dispute chose arbitration as the method of settling their issues arising from their relationship.

The Court went further to observe that it is only in the interest of justice, or if the arbitrators misapplied the law to arrive at their decision; when the courts will interfere with arbitration awards.[106] It is argued that Courts should therefore avoid interfering with arbitration awards outside Section 37[107] on the grounds for recognition or enforcement of an award, and Section 39[108] on the issues of law arising out of arbitration awards in domestic arbitration.[109]

Besides, the principle of party autonomy in arbitration means that the courts should have minimal interference with an arbitration agreement, where the parties specifically refer their disputes to arbitration. Justice Visram in *Alfred Wekesa Sambu & Ors v Mohammed Hatimy & Others*[110], noted in that regard that:

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102 Section 39, the Arbitration Act.
103 Nyutu Agrovet Limited v Airtel Networks Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party), Petition No. 12 of 2016, paragraph 36.
104 Section 32A, the Arbitration Act.
105 [1967] EA 645.
106 Ibid
107 Section 37, Arbitration Act.
108 Section 39, Arbitration Act.
109 Githu Muigai, "Arbitration Law and Practice," LawAfrica, (2011), p. 100.
110 [2007] eKLR 2.

"Where members of an organization have chosen … to settle their disputes through arbitration, I see absolutely no reason why the courts should interfere in that process. It is not in the public interest…The courts should encourage as far as possible settlement of disputes outside of the court process. Arbitration is one of several methods of alternate dispute resolution and is certainly less expensive, expeditious, informal and less intimidating than the formal court system. This court will certainly encourage the use of alternate dispute resolution where it is appropriate to do so."

However, it should be observed that Section 35 creates an exception to the Finality of the Arbitration Award. Section 35(2) sets out grounds upon which the Court can set aside an arbitration award. These include *inter alia*, a party to the arbitration agreement was incapacitated; if the award was made under undue influence or corruption; or if the arbitration agreement is not valid under Kenyan law.[111] In *Kenya Shell Limited v. Kobil Petroleum Limited*[112], the Court of Appeal held that Courts should consider arbitration awards final and binding unless the disputing party satisfies the court that there is sufficient reason to set aside the award.

In light of the foregoing, although the law permits the courts to interfere in the Finality of the Award under special circumstances, it may be argued that reading in the right of appeal into Section 35 would offend the principle of Finality of Arbitration Awards.

It may also be argued that failure to recognize the right of appeal under Section 35 of the Arbitration Act would violate the right to access justice, under Article 48 of the Constitution.[113] Access to justice entails the right of an individual to access remedies and relief from the courts.[114] According to Justice Majanja in *Dry Associates Limited v Capital Markets Authority & Another Interested Party Crown Berger (K) Ltd*, access to justice includes equal protection of rights by the law; easy access to the justice system; availability of physical infrastructure for the redress of legal disputes; and expeditious disposal of cases.[115]

However, the right of access to justice does not mean that everybody has unfettered access to the courts.[116] Litigants must be subject to, and must respect the procedures set in various statutes and other applicable law regarding the access to judicial institutions. The Supreme Court decisions in *Synergy Industrial Credit Limited v Cape Holdings Limited*[117], and *Nyutu Agrovet Limited v Airtel Networks Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)*[118], provided clarity to the aforesaid issues. The Court in the two cases held that there is a limited right of appeal against a High Court decision made under section 35 of the Arbitration Act.

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111 Section 35, Arbitration Act.
112 (1999)KLR 574.
113 Article 47, the Constitution of Kenya.
114 Kenya Bus Service Ltd & another v Minister for Transport & 2 others [2012] eKLR.
115 High Court Constitutional Petition No.328 of 2011 [2012] eKLR
116 Nyutu Agrovet Limited v Airtel Networks Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party), Petition No. 12 of 2016, paragraph 40.
117 Supreme Court Petition 2 of 2017.
118 Petition No. 12 of 2016.

In *Synergy Industrial Credit Limited v Cape Holdings Limited*, the Court was faced with the question of whether the Court of Appeal had jurisdiction to hear a dispute brought pursuant to Section 35 of the Arbitration Act. In its judgment delivered on November 8, 2018, the Court held that it is the subject matter of a case that determines whether the case is appealable or not.[119] In this case, the respondent was aggrieved by the decision of an arbitrator following a dispute by the parties regarding agreements they made for the sale of parking and office space. Pursuant to Section 35 of the Arbitration Act, the respondent challenged the arbitrator's decision at the High Court. The High Court set aside the Award. Dissatisfied by the High Court's decision, the Appellant filed an appeal at the Court of Appeal, which appeal was challenged by the respondent. The Court of Appeal dismissed the Appeal and held that the Court lacked jurisdiction to hear matters that are subject to the Arbitration Act.

The Appellant further moved to challenge the Court of Appeal's decision at the Supreme Court. The Supreme Court recognized that the question before it "deserved a further and final authoritative input" of the Supreme Court.[120] The Court found that not all arbitration cases end at the High Court. According to the Court, Section 35 of the Arbitration Act ensures that any error in law that existed during the arbitration process is corrected and that the parties to the arbitration are duly accorded their right to access justice. Therefore, since there is no provision that expressly bars the Court of Appeal from hearing Appeal from the High Court for disputes brought under Section 35 of the arbitration Act, the Court of Appeal has residual jurisdiction over such Appeal. And that the Court of Appeal exercises such jurisdiction under limited and exceptional circumstances.

Also, in *Nyutu Agrovet Limited v Airtel Networks Limited*, the Supreme Court held that although Section 35 lacks an express right of appeal to the Court of Appeals, the Section should be interpreted in a manner that promotes the purpose and objectives of arbitration law.[121] In this case, an arbitrator had issued an award against the appellant in a dispute that concerned the distribution of telephone lines. Aggrieved by the decision, the appellant challenged the award at the High Court, which Court set aside the award. Consequently, the respondent appealed the High Court decision at the Court of Appeal. The Court held that the right of appeal to the Court of Appeal would be allowed under Section 35 of the Arbitration Act, if there were legitimate reasons to seek the appeal. The Court also observed that there was no express bar, preventing a party to appeal the High Court's decision to the Court of Appeal.

In that regard, the Court held that a decision of the High Court, which is made under Section 35 of the Arbitration Act is not immune from appeal to the Court of Appeals. The Court further cautioned that allowing a limited right of appeal under Section 35 would allow a floodgate of appeals. Therefore, the Court stated that the appeals would only be permitted if they address legitimate failure of the arbitration process, and not the merits of the arbitration award.

It follows; on one side, it may be argued that recognizing the right of appeal under Section 35 offends the principle of finality of arbitration awards and the principle of party autonomy in arbitration. It may also be argued that failure to recognize the right of appeal under the said Section would hamper the right to access to justice. However, according to the Supreme Court in *Synergy and Nyutu*, although the right of appeal is not expressly stated in Section 35 of the Arbitration Act, a limited right of appeal should be provided in limited circumstances.

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119 Supra, note 1, at paragraph 20.
120 Supra, note 1, at paragraph 18.
121 Supra, note 2.

6. Appealing Arbitral Awards in Ghana

The author provides a comparison between Kenya and Ghana on the right of appeal of High Court decisions regarding the setting aside of arbitration awards. The difference in practice between these two countries will provide pertinent lessons for the Kenyan regime of law regarding appeals brought under Section 35 of the Arbitration Act. Before appreciating the practice in Ghana, it is instrumental to first discuss the arbitration practice in Africa, in a bid to explain the author's choice of Ghana as a basis for comparison.

Before providing a comparative analysis of the right of appeal of arbitration awards in Ghana, it is instrumental to provide a general background of how African countries appreciate arbitration as a form of alternative dispute resolution. This conceptualization will challenge African countries to develop their regime of arbitration laws to meet international standards. First, for a long time, traditional alternative dispute resolution mechanisms have been used to settle disputes in many African communities because of the nature of ADR to reconcile the parties and to encourage peaceful settlement of issues[122]. Besides, the problems of inadequate Court's infrastructure and long delays have impeded the speedy settlement of disputes resulting to people shunning legal redress through the judicial system in most African countries[123].

Although many African communities seem to appreciate alternative dispute resolution mechanisms, few countries in Africa have established a legal framework and infrastructure of arbitration in their legal systems, which meet international standards.[124] For instance, some African countries are not signatories to multilateral treaties on arbitration.[125] The legal regime in South Africa, for example, is not modeled according to the UNCITRAL Model Law, which governs international commercial arbitration.[126] Besides, the arbitration law in South Africa bears significant difference with other jurisdictions.[127] Closer home, Kenya's neighbor Tanzania uses arbitration laws that are very old, which are also not modeled according to the UNCITRAL Model law. Notably, the main arbitration legislation in Tanzania is the Tanzania Arbitration Ordinance[128], whose provisions are similar to the English Arbitration Act of 1889.

The foregoing notwithstanding, some African countries have robust arbitration laws. One of such countries is Ghana, whose jurisprudence concerning the right of appeal of arbitration awards shall be the focus of this section. Ghana has had a notable experience with formal alternative dispute resolution. It has been argued, for instance, that Ghana's Alternative Dispute Resolution Act[129] is the most comprehensive legislation on ADR in Africa[130]. Besides, Ghana is party to bilateral and multilateral treaties on arbitration. For instance, Ghana is a contracting state of the New York Convention;[131] and the United Nations Commission on International Trade Law (UNCITRAL)[132]. Therefore, it is prudent to compare Ghana's arbitration practice to Kenya's, in a bid to observe how the West African nation provides for the right of appeal.

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122 Ernest Uwazie, "Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability," Africa Center for Strategic Studies, (30 November, 2011), p. 3.
123 Ibid, at p. 2.
124 Kariuki Muigua, "Promoting International Commercial Arbitration in Africa." Paper Presented at the East Africa International Arbitration Conference, held on 28-29 July 2014, at 6.
125 Ibid
126 United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration.
127 Supra, note 2.
128 Tanzania Arbitration Ordinance Cap 15.
129 ADR Act 798 of 2010.
130 Ernest Uwazie, "Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability," Africa Center for Strategic Studies, (30 November, 2011), p. 3.
131 The New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards.
132 It was established by the United Nations General Assembly in 1966.

Judicial reform in Ghana to increase reliance on ADR began in 2003 where the judiciary subjected a number of pending cases to mediation, which event was a huge success. Following the said success, the judiciary again followed up with another mediation exercise in 2007, which saw around 10 cases mediated. Consequently, in the following year, around 2500 cases were subjected to mediation.[133] Accordingly, courts in Ghana began incorporating court-annexed ADR programs.[134] The successes of the mediation exercises saw the laying out of the foundation of Ghana's arbitration regime, by the enactment of the Alternative Dispute Resolution Act in 2010.[135]

6.1 Ghana's Alternative Dispute Resolution Act, 2010

This is the main legislation governing arbitration in Ghana. While there are other laws regulating arbitration in Ghana, such as the rules of the Alternative Dispute Resolution Centre,[136] this work shall focus specifically on the ADR Act. Just like the Kenyan Arbitration Act, Ghana's Alternative Dispute Resolution Act is largely based on UNCITRAL Model Law.[137] The notable differences between the ADR Act and the UNCITRAL Model Law is that while the former is mostly concerned with domestic arbitration,[138] the latter's focus is on international commercial arbitration.[139] Also, the ADR Act provides for customary arbitration, which is absent in the UNCITRAL Model Law.[140] Customary arbitration may be understood as an informal arbitration, where parties to an arbitration agreement are permitted to appoint customary arbitrators who may be chiefs and elders of the clan, to determine the disputes.[141] The decision of the customary arbitrators is binding and does not need to be registered in Courts.[142]

It is worth noting that the ADR Act also recognizes court intervention in arbitration matters. For instance, under the Act, the High Court may make a determination regarding a preliminary question of law[143] and may enter an Order revoking the authority of an arbitrator upon a notice by a party to the arbitration proceeding.[144] Parties may also apply to the High Court if they are dissatisfied with the arbitrator(s)' decision on jurisdiction.[145] The Act also provides for the right to challenge an arbitration award to the Court,[146] which shall form the discussion in the next subsection.

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133 The Judicial Service of Ghana, "Strategic Plan for Judicial Service ADR Programme 2008–2013."
134 Supra, note 9, at p. 4.
135 ADR Act 798 of 2010.
136 Established under Part Four of the ADR Act.
137 United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration.
138 Section 1, ADR Act.
139 Article 1, UNCITRAL Model Law.
140 Part Three, ADR Act.
141 Ibid
142 Section 109, ADR Act.
143 Section 40, ADR Act.
144 Section 18, ADR Act.
145 Section 26, ADR Act.
146 Section 58, ADR Act.

An arbitration award under the ADR Act is final and binding between the parties to the Arbitration proceeding.[147] However, the Act provides for the right to challenge the arbitration award.[148] A party who is dissatisfied by the award has an express right of appeal to the High Court[149]. The Act further provides grounds for setting aside an arbitration award, which grounds are almost similar to the ones mentioned in the UNCITRAL Model Law.[150] It is interesting to note that under the Act, awards from the aforesaid customary arbitrators are also challengeable at the High Court.[151]

The most notable feature of the ADR Act, which is relevant to this paper, is the express right of appeal of a High Court decision to the Court of Appeals. The Act provides expressly that, "[a]n appeal from the Court lies to the Court of Appeal".[152] It follows; a party who challenges arbitration award to the High Court and is dissatisfied with the High Court's decision as the right of appeal to the Court of Appeals. This contrasts the Kenyan Arbitration Act, which is silent on the right of appeal to the Court of Appeals, for challenges to arbitration awards brought under Section 35 of the Arbitration Act.[153]

There are several case laws to explain how Ghanaian Court of Appeals allows, hears, and determines appeals from the High Courts, which appeals challenge arbitration awards. In Adisi v Construction & Furniture Co (W.A.) Ltd[154], the case involved an appeal against the High Court judge's decision refusing to set aside an arbitration award. The appellant's contention was that the arbitrator was biased; and that there was an error of law on the face of the award. The Court stated that its basis to set aside an arbitration award was guided by the decision in Hodgkinson v Fernie[155], where the Court stated in pertinent part that:

> *The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact . . . The only exceptions to that rule, are, cases where the award is the result of corruption or fraud, and one other, which, though it is to be regretted, is now, I think, firmly established, viz. where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established.*

Also, in Republic v High Court, (Probate and Administration Division) Accra; Ex-parte: Dogbeda and Others[156], the parties had a dispute regarding the installation of the Mankralo, who is a leader representing the people in local affairs. The parties submitted the dispute to customary arbitration pursuant to Section 109 of the ADR Act. An arbitration award was issued. The 6th interested party sought to have the award dismissed by the Ada Traditional Council, which was responsible for the installation of the Mankralo. The Ada Traditional

147 Section 52, ADR Act.
148 Supra, note 24.
149 Section 58(2), ADR Act.
150 Article 34(2), UNCITRAL Model Law.
151 Section 112, ADR Act.
152 Section 58(6), ADR Act.
153 Section 35, the Kenyan Arbitration Act, 1995.
154 [1963] GHASC 1
155 (1857) 3 C.B. (N.S.) 189 at p. 202; 140 E.R. 712 at p. 717
156 [2019] GHASC 26

Council granted the 6th interested party's application to set aside the arbitration award. Consequently, the Applicant appealed to the High Court to have the decision of the Traditional Council quashed. The High Court held that the arbitration award was a final, binding and conclusive decision from which no party had the right to rescind.

After tireless efforts to have the award set aside, the interested parties filed another application at the High Court to set aside the arbitration award on the ground of fraud. The applicant filed a preliminary objection thereof, which the High Court denied. Accordingly, the applicant filed an appeal at the Court of Appeals, challenging the High Court's decision. Although the Court of Appeals dismissed the applicant's appeal on other grounds, it affirmed that the applicant had the right of appeal against the High Court's decision to set aside the arbitration award.

It is evident that Ghana has a solid framework that provides for the right of appeal to the court of appeals from a high court decision setting aside an arbitration award. Notably, contrary to Kenya's Arbitration Act, Ghana's ADR Act expressly provides for the right of appeal under Section 58(6).[157] This poses a challenge to Kenya, to relook its laws on the right of appeals under Section 35 of the Arbitration Act.[158]

7. Conclusion and Recommendations

This research was carried out to shed more light on the right of appeal of a High Court's decision to set aside an arbitration award to the Court of Appeal, which has been an unsettled area of law. Accordingly, the paper observes that the right to hear and determine applications to set aside arbitration awards is one of the instances where courts exercise authority in arbitration matters.[159]

The paper also notes that the Constitution of Kenya grants judicial authority to the Courts[160], and provides for the right of individuals to access justice in the Courts in their pursuit of legal redress.[161] Further, Kenyan legislations specifically the Arbitration Act, provide for the right to challenge arbitration awards in the Courts.[162] The UNCITRAL Model Law and the New York Convention, which are applicable in Kenya under Article 2(6) of the Constitution, recognize the role of courts to set aside arbitral awards.[163]

Another important observation that was made in the paper is that the right of appeal does not exist under Section 35 of the Arbitration Act. Accordingly, there is need to probe whether having the right of appeal to the Court of Appeals under Section 35 would violate the principle of party autonomy in arbitration agreements; and whether having no express right of appeal under Section 35 of the Arbitration Act limits the right of access to justice.

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157 Section 58(6), ADR Act.
158 Section 35, Arbitration Act.
159 Section 35, the Arbitration Act 1995.
160 Article 159(1), Constitution of Kenya, 2010.
161 Article 48, Constitution of Kenya, 2010.
162 Supra, note 1.
163 Article 34(1), UNCITRAL Model Laws; and Article V (1)(e), the New York Convention, 1958.

The aforesaid issues were settled by the Supreme Court decisions in Synergy Industrial Credit Limited v Cape Holdings Limited[164] and Nyutu Agrovet Limited v Airtel Networks Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)[165]. In these landmark cases, the Court held that there exists a limited right of appeal under section 35, as much as the section does not expressly provide for the said right. The Court further observed that the lack of a right of appeal in Section 35 does not create a bar to appeal to the Court of Appeals. However, such appeals are only allowed if there are legitimate reasons to seek the appeals.

Ghana's regime of law regarding the right of appeal to the Court of Appeals for High Court decisions to set aside arbitration awards serves as an example for the Kenyan legal system. Notably, Ghana's ADR Act expressly provides for the said right of appeal.[166]

7.1 Future Directions

In light of the foregoing, this paper proposes that the Kenyan legislature amends Section 35 of the Arbitration Act by expressly providing for the right of appeal, in light of the Supreme Court's decisions in *Synergy and Nyutu*. The paper further suggests that to limit a floodgate of appeals in the event the right of appeals is included in Section 35 of the Arbitration Act, the Supreme Court should provide more clarity on what amounts to legitimate reasons to qualify an individual for the right of appeal. These reasons should be specifically stated in the amended Section of the Act.

164 Supreme Court Petition 2 of 2017.
165 Petition No. 12 of 2016.
166 Section 58(6), ADR Act 798 of 2010.

The Viability of Arbitration in Management of Climate Change Related Disputes in Kenya

By Kariuki Muigua*

Abstract

Climate change has affected many areas of the society ranging from environmental, economic, political and even social aspects. It has also brought about disputes and conflicts that have been associated with climate change, both directly and indirectly, as it is seen as a conflict multiplier. This paper discusses the disputes related to climate change implications, and how the same can be addressed using arbitration as a dispute settlement mechanism. The author argues that arbitration has certain advantages over litigation which makes it more viable in addressing the disputes in question.

1. Introduction

Climate change is considered to be one of the greatest challenges facing mankind in this century and beyond.[1] Climate change and conflict have been linked by some observers in both industrialized and poor countries, although the connection is deemed to be indirect.[2] Climate change's effects on poverty, mental health, food security, and migration further complicate the link between climate change and war.[3] As a result, the goals of the Conference of Parties Twenty Sixth session (COP 26), held in Glasgow from 31 October to 13 November 2021 included to: secure global net zero by mid-century and keep 1.5 degrees within reach; adapt to protect communities and natural habitats; mobilise finance; and work together to deliver,[4] where countries were expected to, inter alia accelerate action to tackle the climate crisis through collaboration between governments, businesses and civil society.[5] Achieving these will naturally require some adjustments by countries' leadership and other stakeholders. Arguably, climate change comes with a lot of conflicts and/or disputes that need sustainable means of handling them.[6]

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1 See Dervis, K., "Devastating for the World's Poor Climate Change Threatens the Development Gains Already Achieved," *UN Chronicle Online Edition* <https://www.uncclearn.org/wp-content/uploads/library/undp30.pdf> accessed 6 April 2022.

2 'Does Climate Change Cause Conflict?' (IGC, 2 June 2021) <https://www.theigc.org/blog/does-climate-change-cause-conflict/> accessed 6 April 2022.

3 Ibid.

4 'COP26 Goals' *(UN Climate Change Conference (COP26) at the SEC – Glasgow 2021)* <https://ukcop26.org/cop26-goals/> accessed 5 April 2022.

5 Ibid.

6 See Vally Koubi, 'Climate Change and Conflict' (2019) 22 Annual Review of Political Science 343 <https://www.annualreviews.org/doi/10.1146/annurev-polisci-050317-070830> accessed 11 April 2022.

Over the years, there has been an appreciation of the impact that climate may have in economic results, as well as rising public concern about climate change.[7] The term "climate" refers to observations of climatic factors such as temperature, rainfall, and water availability, as well as climate indices that serve as proxy measures for these variables.[8] While climatic circumstances do not generate conflict on their own, they can modify the environment under which particular social interactions take place, potentially altering the risk of conflict.[9] The environmental principle of polluter pays, which holds that polluters should be held accountable for destroying the environment, justifies the concept of resolving climate change disputes through restorative dispute management approaches.[10] It is, however, worth noting that despite the constitutional provisions that seek to promote the use of Alternative Dispute Resolution (ADR) Mechanisms in the country, Kenya's *Climate Change Act 2016*[11] is silent on the role of ADR in addressing climate change related disputes and conflicts and only provides for the role of Environment and Land Court.[12]

This paper critically discusses the nature of climate change related conflicts and disputes, and how arbitration, both domestic and international, can be used to address the disputes, in the context of achieving sustainability in Kenya. It is worth noting that the discussion leans more towards management of the disputes as against conflicts. The paper, in justifying the use of arbitration, will discuss the differences between conflicts and disputes, and why the climate change related disputes are more suitable for arbitration than the conflicts.

2. Nature of Climate Change Related Conflicts and Disputes

Climate is described as a region's averaged temperature and precipitation patterns, as well as their range of fluctuation, across time.[13] "Climate change" is defined by the UNFCCC as "a change in climate that is ascribed directly or indirectly to human activity that modifies the composition of the global atmosphere and is in addition to natural climate variability seen over comparable time periods."[14] Kenya's *Climate Change Act 2016* defines "climate change" to mean 'a change in the climate system which is caused by significant changes in the concentration of greenhouse gases as a consequence of human activities and which is in addition to natural climate change that has been observed during a considerable period'[15]. Climate change mitigation is one of the key environmental goals of the United Nations' 2030 Agenda for Sustainable Development Goals (SDGs),[16] as encapsulated in Sustainable Development Goal 13, which aims to help countries attain resilience and adaptability.[17]

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7 Marshall Burke, Solomon M Hsiang and Edward Miguel, 'Climate and Conflict' (2015) 7 Annual Review of Economics 577, 578 <https://www.annualreviews.org/doi/10.1146/annurev-economics-080614-115430> accessed 27 March 2022.

8 Marshall Burke, Solomon M Hsiang and Edward Miguel, 'Climate and Conflict' (2015) 7 Annual Review of Economics 577, 578 <https://www.annualreviews.org/doi/10.1146/annurev-economics-080614-115430> accessed 27 March 2022.

9 Ibid, 579.

10 K. Segerson, *Environment*, in Encyclopedia of Energy, Natural Resource, and Environmental Economics Volume 3, 2013.

11 Climate Change Act, No. 11 of 2016, Laws of Kenya.

12 Ibid, section 23.

13 '15.1: Global Climate Change' (*Geosciences LibreTexts*, 26 December 2019) <https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_(Johnson_Affolter_Inkenbrandt_and_Mosher)/15%3A_Global_Climate_Change/15.01%3A_Global_Climate_Change> accessed 20 March 2022.

14 Article 1(2), *UN General Assembly, United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly*, 20 January 1994, A/RES/48/189.

15 Section 2, Climate Change Act, No. 11 of 2016, laws of Kenya.

16 UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

17 Ibid, SDG 13.

There is no universally accepted definition of a climate change-related dispute.[18] Some authors have observed that climate change is a "threat multiplier," which can increase human security issues such as food and water scarcity while also leading to (violent) conflict in climate-vulnerable countries.[19] This is as a result of the fact that climate change's negative repercussions, such as water scarcity, crop failure, food insecurity, economic shocks, migration, and displacement, can exacerbate the risk of conflict and violence.[20] Environmental conflicts and disputes can be divided into two categories: first, access to environmental resources as a source of livelihood and as a foundation for economic activity, and second, conflicts over what are known as "side effects" of economic activity, such as biodiversity loss and pollution.[21]

3. Approaches to Management of Disputes and Conflicts

There are numerous techniques for preventing conflicts, resolving conflicts, settling disputes, and transforming conflicts.[22] The choice of mechanism chosen depends on whether one is dealing with conflicts or disputes, as both have different causes and underlying issues.[23]

3.1. Conflicts

Conflicts are concerns of non-negotiable ideals. The parties share these wants and ideals. Needs or values are inherent in all human beings and are at the foundation of conflict, whereas interests and issues are surface-level and are not at the root of conflict.[24] They're limitless. Conflicts develop as a result of the conflicting parties' non-negotiable wants or values not being met. As a result, if all requirements are addressed, the outcome is non-zero-sum, resulting in integrative and innovative solutions rather than a zero-sum answer.[25] A conflict usually involves at least two parties that disagree over the allocation of material or symbolic resources or who believe their underlying cultural values and beliefs are irreconcilable. Conflicts may also arise as a result of society's social and political makeup and structure, according to some theories.[26] This supports the viewpoint that conflict must be addressed on two levels: psychologically to overcome 'blocks' to positive communication and ontologically to discover the 'true' causes of conflict.[27]

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18 C. Mark Baker, Cara Dowling, Dylan McKimmie, Tamlyn Mills, Kevin O'Gorman, Holly Stebbing, Martin Valasek, "What are climate change and sustainability disputes? Key arbitration examples (Part 1 contractual disputes)", in James Rogers, London; Cara Dowling, Vancouver (eds), *International arbitration report*, Norton Rose Fulbright – Issue 16 – June 2021, p. 40. <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/publications/international-arbitration-report-issue-16.pdf?revision=40c8a703-6e1d-413c-8c7e-ac1201697383&revision=40c8a703-6e1d-413c-8c7e-ac1201697383> accessed 30 March 2022.

19 Froese, Rebecca, and Janpeter Schilling, "The Nexus of Climate Change, Land Use, and Conflicts." (2019).

20 'Tackling the Intersecting Challenges of Climate Change, Fragility and Conflict' <https://blogs.worldbank.org/dev4peace/tackling-intersecting-challenges-climate-change-fragility-and-conflict> accessed 30 March 2022.

21 Arild Vatn, *Environmental Governance: Institutions, Policies and Actions* (Paperback edition, Edward Elgar Publishing 2016) 2.

22 Corissajoy, 'Settlement, Resolution, Management, and Transformation: An Explanation of Terms' (Beyond Intractability, 29 June 2016) <https://www.beyondintractability.org/essay/meaning_resolution> accessed 6 April 2022.

23 See K. Muigua, *Resolving conflicts through mediation in Kenya*, Glenwood Publishers, Nairobi, 2nd Ed., 2017, Chapter Four.

24 Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *Journal of Peace Research*, Vol.32, No. 2 (May, 1995), pp.152-153.

25 Fetherston, A.B., "From Conflict Resolution to Transformative Peacebuilding: Reflections from Croatia", *Centre for Conflict Resolution-Department of Peace Studies:* Working Paper 4 (April, 2000), pp. 2-4.

26 See Serge, L, et al, "Conflict Management Processes for Land-related conflict", *A Consultancy Report by the Pacific Islands Forum Secretariat*, available at www.forumsec.org, [Accessed on 04/06/2012].

27 Fetherston, A.B., "From Conflict Resolution to Transformative Peacebuilding: Reflections from Croatia", op.cit.

Conflicts are usually resolved because they are about fundamental values, hence the term "conflict resolution." Resolution is the mutual development of a valid relationship in which each party's demands are met. It is the mutual construction of a conflict because conflict is dynamic, interactive, and ever-changing with different stages of escalation and de-escalation such as formation, escalation, crisis, and endurance, improvement and de-escalation, settlement or resolution, and finally reconstruction and reconciliation through political processes such as negotiation and mediation. As a result, conflict resolution is stated to probe into the roots or underlying causes of conflict and relationships, with the goal of resolving them completely.[28]

3.2. Disputes

When conflicts are not or cannot be adequately managed, disputes arise.[29] It's about an issue or a situation that interests you. Needs are not negotiable, divisible, or finite, while interests are. They aren't negotiable due to their intrinsic nature. They are not transferable or divisible. Needs are also inexhaustible, which means that the more security I have, the less security you have. When two or more persons or groups believe their rights, interests, or aims are incompatible, they communicate their perspective to the other person or group, which can lead to a dispute. Similarly, conflicts can arise from societal power imbalances, rights, or interests. These issues or interests can be discussed and even bargained over.[30]

Because a dispute can be based on interests, rights, or power, the approaches to resolving it vary. Negotiation and mediation are the best ways to resolve an interest-based dispute. If the issue is about rights, the best response is litigation; if the issue is about power, the best response is the use of force, threats, and violence, such as that used by the police and the army. Understanding the roots or grounds of a dispute is critical because if it is not addressed appropriately, the likelihood of escalatory responses grows, which can lead to violence and long-term societal fission.

It's worth noting that tensions tend to repeat in specific sorts of disputes, such as those concerning natural resource use and access. The recurrence of a disagreement over time could be a sign of a much deeper conflict in which people or organizations are involved.

In such circumstances, the responses used must take into account the greater context of the dispute's interests, rights, and power imbalances. As a result, answers must be tailored to the various levels of the conflict. Some solutions could be aimed at resolving the specific conflict, such as through adjudication processes like courts and arbitration.

Other intervention techniques might seek to address the dispute's underlying causes, which are frequently considerably broader. This can be done, for example, through political negotiations or mediation involving the entire community or perhaps a number of communities, with the goal of airing complaints and injustices seen by various groups in the region. Other intervention techniques might attempt to rebuild or restore the community's broken or damaged ties as a result of disagreements or conflicts.[31]

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28 Cloke, K., "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005.

29 Fenn, P., "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, *Workbook on Mediation*, (CIArb, London, 2002), pp.12-13.

30 Fetherston, A.B., "From Conflict Resolution to Transformative Peacebuilding: Reflections from Croatia", op.cit; Mwagiru, M., *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya*, op.cit, pp.36-38.

31 See Serge, L, et al, "Conflict Management Processes for Land-related conflict", *A Consultancy Report by the Pacific Islands Forum Secretariat*, op.cit.

Interests or concerns are only surface-level; they do not address the conflict's basic or primary causes. As a result, conflicts can be resolved, thus the term "conflict resolution." A settlement, according to eminent conflict management specialists, is an agreement on the dispute's issue(s), which frequently entails a compromise. A settlement aims to appease the opposing party without addressing the dispute's root causes. As a result, adjudicatory, legal, or coercive processes like courts and arbitration can be used to settle disputes. When it comes to disputes about interests rather than values, coercive means such as litigation and arbitration are useful.[32]

4. Arbitration Process and Management of Disputes

Arbitration is a mechanism for settling disputes that usually occurs in private, pursuant to an agreement between two or more parties, under which the parties agree to be bound by the arbitrator's decision based on law, or, if so agreed, other considerations, following a full hearing and such decision is enforceable at law.[33] Arbitration restricts appeals against decisions, which benefits the arbitral process' efficiency, and the arbitrator's award is final and binding on the parties save in the most glaring instances of incompetent arbitrating.[34]

As previously stated, adjudicatory, coercive, or legal procedures can be used to settle disputes, whereas non-legal, non-adjudicatory, or non-coercive approaches can be used to resolve conflicts. The key power- and rights-based mechanisms include litigation and arbitration. They're mechanisms for settling disputes. The parties in a disagreement have little or no autonomy, and the means for settling disputes are coercive. Legal tools like as courts, police, and the army, among others, are used to enforce a settlement.

Although the parties have considerable autonomy in choosing the venue and arbitrator in arbitration, one party will be offended when an award is made, despite the fact that the parties agree to be bound by the arbitrator's judgment at the outset. As a result, it becomes coercive because the parties must comply with the decision, diminishing its usefulness as a conflict resolution method but effective in settlement.[35]

Arbitration is viewed as a viable alternative to state court litigation with the purpose of getting a legally binding and enforceable outcome from a panel of legal and industrial experts.[36] Arbitration has great attributes which include: parties can agree on an arbitrator to decide the subject; the arbitrator has experience in the field of dispute; anybody can represent a party in the dispute; adaptability; cost-effective; confidential; quick; and the outcome is binding. Thus, unlike court procedures, which are accessible to the public, commercial arbitration proceedings are private, thus parties that want to keep their trade secrets confidential may select commercial arbitration while still benefiting from the binding character of court verdicts.

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32 Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, op. cit. pp. 109-114.
33 Barnstein, R. *The Handbook of Arbitration Practice: General Principles (Part 2)* (Sweet & Maxwell, London, 1998), p. 313.
34 Section 35-The Arbitration Act, 1995- Grounds of setting aside an arbitral award.
35 Mwagiru, M., *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya*, op.cit, pp.36-38.
36 'Arbitration in Africa | White & Case LLP' <https://www.whitecase.com/publications/insight/arbitration-africa> accessed 4 April 2022.

5. Using Arbitration as a Tool for Management of Climate Change Disputes: Challenges and Prospects

Disputes related to climate change may increase in future due to: actions of commercial entities giving rise to groups or affected individuals having rights of action; climate change inaction – failure by states to take measures in response to climate change, giving rise to potential inter-state and investor-state disputes, and claims by groups of concerned citizens; climate change action– taking response measures, giving rise to potential inter-state and investor-state disputes; dilution or revocation of responsive measures by states, giving rise to potential renewable energy treaty arbitrations; commercial contract enforcement –private sector is central to climate change mitigation, and there may be an increase commercial contracts relating to climate change mitigation and adaptation; coming into effect of the Paris Agreement, which may give rise to arbitration.[37]

While discussing the role of arbitration in addressing climate change disputes, some commentators have highlighted the following disputes: 1. cases brought to either mandate or change climate-related policy or conduct; 2. cases brought to seek financial redress for damages associated with the effects of climate change; 3. contractual disputes arising out of the industry transitions which the energy sector and all major industries are currently undergoing; 4. contractual disputes resulting from climate-related weather events; 5. related disputes between foreign investors and host states; and 6. related disputes between states, and between other transnational actors, while observing that a key reason for selecting these categories is that the potential role for arbitration varies significantly depending on the category of dispute, with arbitration having a greater role (in practice and in potential) in categories 3 to 6.[38]

Notably, Kenya's Environment and Land Court Act, 2011[39] provides for the jurisdiction of the Environment and Land Court as including power to hear and determine disputes relating to climate issues.[40] Also worth pointing out is the recognition of alternative means of dispute resolution and even affirming that where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court is mandated to stay proceedings until such condition is fulfilled.[41] While it is to be acknowledged that the judges appointed to head environment and land courts are appointed on the basis of having relevant knowledge in the area, it must also be acknowledged that they may not always be well versed with all matters that come before them. It is during such times, either on court's own motion, with the agreement of or at the request of the parties, that the court may consider any other appropriate means of alternative dispute resolution including arbitration especially in respect of technical issues relating to climate change disputes.

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37 'Resolving Climate Change Disputes through Arbitration' (Pinsent Masons) <https://www.pinsentmasons.com/out-law/analysis/resolving-climate-change-disputes-through-arbitration> accessed 7 April 2022.

38 C. Mark Baker, Cara Dowling, Dylan McKimmie, Tamlyn Mills, Kevin O'Gorman, Holly Stebbing, Martin Valasek, "What are climate change and sustainability disputes? Key arbitration examples (Part 1 contractual disputes)", in James Rogers, London; Cara Dowling, Vancouver (eds), *International arbitration report*, Norton Rose Fulbright – Issue 16 – June 2021, p. 41.

39 Environment and Land Court Act, No. 19 of 2011, Laws of Kenya.

40 ibid, section 13(2)(a).

41 *20. Alternative dispute resolution*

(1) *Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2) (c) of the Constitution.*
(2) *Where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall stay proceedings until such condition is fulfilled.*

The provisions of *Climate Change Act 2016*[42] acknowledge the role of courts in upholding rights relating to climate change and spells out the role of the court in the following words: "a person may, pursuant to Article 70 of the Constitution, apply to the Environment and Land Court, alleging that a person has acted in a manner that has or is likely to adversely affect efforts towards mitigation and adaptation to the effects of climate change".[43] In such applications, the court may make an order or give directions to: prevent, stop or discontinue an act or omission that is harmful to the environment; compel a public officer to take measures to prevent or discontinue an act or omission that is harmful to the environment; or provide compensation to a victim of a violation relating to climate change duties.[44]

While this is a commendable step towards empowering local courts in discharging their mandate in promotion of sustainable development, parties may not always be both citizens of Kenya and where the violating party is a foreign investor, there may be need to invoke international commercial or investment arbitration. In addition, it must be noted that parties may invoke section 20 (2) of the Environment and Land Court Act 2011 which provides that '*where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall stay proceedings until such condition is fulfilled*'. Such parties may opt to have the dispute settled by expert arbitrators in the area of climate change disputes and only go back to court for declaratory rights and enforcement of the outcome(s).

The advantages of arbitration highlighted above make it a viable alternative way of managing climate change related disputes as against litigation, while still ensuring that the outcome thereof can be enforced. Parties, even where they already filed a case before a court, may not always be willing to let out commercial secrets and may, therefore, wish to refer the matter to arbitration, court-annexed or otherwise.

The distinction between conflicts and disputes, as discussed above, is important in analyzing any disagreements that are attributable to climate change in a bid to decide the most viable mechanism of addressing them. Such analysis and management of disputes may require expertise in that particular area of law, namely environmental law and climate change. This is where arbitration becomes useful because, as already pointed out, parties in arbitration proceedings are allowed to pick the third party expert with the relevant experience and knowledge to help them settle the particular aspects of the dispute.

It has also been noted that local disputes over food and water supplies can spread to neighboring nations as people seek extra resources and safety, putting further strain on other countries' resources and perhaps escalating tensions.[45] In light of such possibilities, addressing such problems through local courts becomes impossible. However, in addition to the specialized expertise that is potentially available to parties through arbitration, there is also the advantage of the transnational nature of arbitration process unlike litigation, and the subsequent nature of ease of enforcement of arbitral awards across borders.

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42 Climate Change Act, No. 11 of 2016, Laws of Kenya.
43 Section 23(1), Climate Change Act, 2016.
44 Section 23(2), Climate Change Act, 2016.
45 UNESCO, 'Climate Change Raises Conflict Concerns' (UNESCO, 29 March 2018) <https://en.unesco.org/courier/2018-2/climate-change-raises-conflict-concerns> accessed 11 April 2022.

Article 14.1 of 1992 *United Nations Framework Convention on Climate Change* provides that 'in the case of a dispute between two or more Parties concerning the interpretation or application of the Convention, the Parties concerned should seek a settlement of the matter by discussion or any other peaceful measures of their own choice." Article 14.2(b) envisages the use of arbitration in accordance with procedures to be adopted by the Conference of the Parties as soon as practicable, in an annex on arbitration. Article 19 of *Kyoto Protocol* also provides that "the provisions of Article 14 of the Convention on settlement of disputes shall apply mutatis mutandis to this Protocol". Similarly, Article 24 of the *Paris Agreement*, a legally binding international treaty which entered into force on 4 November 2016, provides that "the provisions of Article 14 of the Convention on settlement of disputes shall apply mutatis mutandis to this Agreement".

While legislators should make climate change policy, courts and arbitral tribunals also have a role to play, as climate change disputes are on the rise and will likely continue to do so in the future, and disagreements over the proper interpretation and application of climate change legislation may arise.[46]

It has been observed that even where international dispute settlement mechanisms exist, they are deemed ineffective due to a lack of mandatory rules or enforcement procedures, so mechanisms like 'international adjudication are unlikely to provide effective relief, either in reducing emissions or compensating victims'.[47] Arbitration, on the other hand, has huge benefits over litigation in dealing with climate change disputes because arbitrators with the right mix of expertise can be picked, multiparty proceedings can be handled, and the New York Convention on the Enforcement of Arbitral Awards provides certainty pertaining award enforcement.[48] The Permanent Court of Arbitration (PCA) has been noted as a regular forum for dispute resolution under bilateral and multilateral treaties, contracts, and other instruments relating to natural resources and the environment, and provides specialized rules for arbitration and conciliation of these disputes.[49] Notably, PCA already has in place the *PCA Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources* ("Environmental Rules"), adopted in 2001[50], and the Rules are applicable where all parties have agreed in writing that a dispute that may arise or that has arisen between them shall be referred to arbitration under the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.[51]

It is also worth noting that the PCA Environmental Rules provide for the establishment of a specialized list of arbitrators considered to have expertise in this area, establishment of a list of scientific and technical experts who may be appointed as expert witnesses pursuant to these Rules, and parties to a dispute are free to choose arbitrators, conciliators and expert witnesses from these Panels but with the understanding that the choice of arbitrators, conciliators or experts is not limited to the PCA Panels.[52]

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46 'Resolving Climate Change Disputes through Arbitration' (Pinsent Masons) <https://www.pinsentmasons.com/out-law/analysis/resolving-climate-change-disputes-through-arbitration> accessed 11 April 2022.

47 'LSE Law Review Blog' <https://blog.lselawreview.com/2022/03/commercial-arbitration-fight-against-climate-change-role-actually-play> accessed 11 April 2022.

48 'Resolving Climate Change Disputes through Arbitration' (Pinsent Masons) <https://www.pinsentmasons.com/out-law/analysis/resolving-climate-change-disputes-through-arbitration> accessed 11 April 2022.

49 'Environmental Dispute Resolution' (*Permanent Court of Arbitration*, 2022) <https://pca-cpa.org/en/services/arbitration-services/environmental-dispute-resolution/> accessed 11 April 2022.

50 'Environmental Dispute Resolution' (*PCA Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources*, 2001) <https://docs.pca-cpa.org/2016/01/Optional-Rules-for-Arbitration-of-Disputes-Relating-to-the-Environment-and_or-Natural-Resources.pdf> accessed 11 April 2022.

51 Article 1 (1), *PCA Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources*, 2001.

52 'Panels of Arbitrators and Experts for Environmental Disputes' (*Permanent Court of Arbitration*, 2022) <https://pca-cpa.org/en/about/structure/panels-of-arbitrators-and-experts-for-environmental-disputes/> accessed 11 April 2022.

As a way of supporting and building capacity of States, States, international organizations, and private parties involved in the creation and administration of new, specialized environmental dispute settlement procedures can seek guidance and support from the PCA.[53] This is possible considering that the PCA is responsible for resolving disputes between States and non-State players that arise through a variety of bilateral and multilateral investment treaties, contracts, and other instruments.[54]

Just like PCA has special rules for arbitration of environmental and natural resource related disputes, there may be a need, going forward, for both domestic and international institutions (both courts and arbitral institutions) to build capacity in terms of expertise and legal framework in preparation for the climate change related disputes ranging from energy, finance and technology sectors, as follows: Energy – in particular, the transition away from fossil fuels to renewables, and the growth especially of the solar and wind sectors; Finance – carbon trading and green certificates; and Technology – the drive for efficient power grids, as well as low emission energy and data storage.[55] The other areas that may need special attention have already been identified by the International Chamber of Commerce Commission on Environment and Energy task force on "Arbitration of Climate Change Related Disputes" (the "Task Force") in their 2019 Report titled *Report on Resolving Climate Change Related Disputes through Arbitration and ADR* (the "Report")[56] where they observed that a number of specific features of international arbitration that may assist in resolving climate change related disputes going forward include utilization and optimization of: use of and recourse to appropriate scientific and other expertise; existing measures and procedures for expediting early resolution of disputes or providing urgent interim or conservatory relief; integration of climate change commitments and principles of international law, including arising out of the UNFCCC and Paris Agreement; enhanced transparency of proceedings; potential third-party participation, including through amicus curiae briefs; and costs, including advances and allocation of costs, to promote fair, transparent and appropriate conduct of climate change related disputes.[57]

As already observed, Kenya's Climate Change Act, 2016 does not make reference to the use of ADR mechanisms, including arbitration in addressing disputes that arise therefrom. However, it makes reference to Environment and Land Court Act 2011 (ELC Act) which empowers Environment and Land Court to hear and determine disputes relating to climate issues. The ELC Act, however, gives these courts the power to resort to ADR mechanisms. There is a need for policy makers and other stakeholders to borrow a leaf from the PCA Environmental Rules and the recommendations from the 2019 ICC Task Force Report to consider coming up with special rules and panel of experts that may either address disputes requiring specialized knowledge such as those relating to climate change or those who may offer specialized guidance to courts while dealing with these disputes. Arbitral institutions such as Chartered Institute of Arbitrators and Nairobi Centre for International Arbitration, among others, should also be left behind in building specialized capacity along the same lines. Climate change related disputes are unlikely to go away in the near future and stakeholders should, therefore, prepare adequately.

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53 'Environmental Dispute Resolution' (*Permanent Court of Arbitration*, 2022) <https://pca-cpa.org/en/services/arbitration-services/environmental-dispute-resolution/> accessed 11 April 2022.

54 ibid.

55 'Arbitrating climate change disputes | Actualités | DLA Piper Global Law Firm' (DLA Piper) <https://www.dlapiper.com/fr/france/insights/publications/2020/01/arbitrating-climate-change-disputes/> accessed 11 April 2022.

56 'ICC Arbitration and ADR Commission Report on Resolving Climate Change Related Disputes through Arbitration and ADR' (ICC - International Chamber of Commerce) <https://iccwbo.org/publication/icc-arbitration-and-adr-commission-report-on-resolving-climate-change-related-disputes-through-arbitration-and-adr/> accessed 11 April 2022.

57 *Report on Resolving Climate Change Related Disputes through Arbitration and ADR*, p. 19.

6. Conclusion

Climate change related disputes come with many implications across all sectors of economy from environmental, political, economic and even social, where they also come with disputes and conflicts. While different approaches to conflict management apply to conflicts and disputes due to the underlying issues therein, this paper has focused on disputes relating to climate change. As already pointed out by various commentators, this paper acknowledges that some of these disputes may be indirectly linked to climate change, which is seen as a multiplier of already existing causative factors. However, the settlement of these disputes may require specialized knowledge, may be of transnational nature and may require coercion in abiding by outcome. This paper argues that these features may not be met through litigation, hence the need to explore arbitration, both domestic and international, in addressing the said disputes.

Arguably, putting in place measures meant to address the related disputes is part of the mitigation and adaptation approaches to address climate change since while mitigation and adaptation policies have different goals and opportunities for implementation, many drivers of mitigation and adaptation are common, and solutions can be interrelated.[58] There is a need for local policy makers and conflict management institutions, including courts and arbitral institutions, to build capacity towards utilizing arbitration in management of climate change related disputes.

58 Grafakos, S., Pacteau, C., Delgado, M., Landauer, M., Lucon, O., and Driscoll, P. (2018), "Integrating mitigation and adaptation: Opportunities and challenges," In Rosenzweig, C., W. Solecki, P. Romero-Lankao, S. Mehrotra, S. Dhakal, and S. Ali Ibrahim (eds.), Climate Change and Cities: Second Assessment Report of the Urban Climate Change Research Network. Cambridge University Press, New York. 101–138, 102 <https://uccrn.ei.columbia.edu/sites/default/files/content/pubs/ARC3.2-PDF-Chapter-4-Mitigation-and-Adaptation-wecompress.com_.pdf> accessed 7 April 2022.

A Critical Analysis of the Suitability of Traditional Dispute Resolution Measures in Realization of Access to Justice in Kenya

By Job Owiro*

Abstract

This research work offers a critical analysis of the use of Traditional Dispute Resolution Mechanisms in Kenya. The main focus of this study is to show how it has impacted the Kenyan justice system positively and negatively. It will also look at different ways on how this Dispute Resolution method can be improved in order to attain its purpose. The paper will go ahead to look at various methods of Traditional Dispute Resolution Methods in Kenya which includes; negotiations, conciliation, mediation and arbitration and their progress at different levels. This study will bring to your attention the milestones of the Traditional Dispute Resolution Mechanisms and how far we have come as a country to ensure the success of this method and its effectiveness. The paper will also state on where we have failed as a country, Kenya, and the best ways to improve the Traditional Dispute Resolution Mechanisms. It is important to note also the comparability of the Success of the Traditional Dispute Resolution Mechanisms as compared to Litigation.

1. Introduction

Black's Law Dictionary defines Customary law as "consisting of customs that are accepted as legal requirements or obligatory rules of conduct, practices, beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws"[1]. Customary law has also been defined as belief, norms and rules that are locally recognized. These beliefs are transmitted orally and applied by a community in its governance.[2]

Tradition can be defined as a belief or way of acting of a particular group of individuals, which has been followed for a long period of time.[3] These beliefs are passed from one generation to another. Alternative Dispute Resolution is defined by the Black's Law Dictionary as procedures that are used to settle disputes other than litigation for example arbitration, mediation, negotiation and adjudication.[4]

Traditional Dispute Resolution Measures (T.D.R.M) can therefore be defined as alternative dispute resolution measures that rely on the customary laws of a community (beliefs and traditions) to settle disputes within the community. The customary laws must be in tandem with rules of natural justice, morality and the laws of Kenya.[5]

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1 Black's Law Dictionary ,6th Edition, 1990

2 Protection Rights over Traditional Knowledge: Implications of Customary Laws and Practices, Research Planning Workshop, Cusco, Peru, 20th -25th May, 2005

3 The Cambridge Advance Learners Dictionary,4th Edition, 2013

4 Id

5 Article 159 of The Constitution of Kenya, 2010.

2. Theories on Dispute Resolution

2.1 The Conflict Resolution Theory

This is a theory on dispute resolution that offers guidance on court and Alternative Dispute Resolution Measures. It argues that humans being emotional beings may not be able to amicably resolve a dispute without the involvement of a third-party that will calm the simmering emotions. This in essence allows for objectivity during decision-making process. Either of the parties will tend to hold dearly onto their own side of the story, which to them is the right point of view. We are ego-centric as humans in nature.

This theory argues that you need to bring a third-party that would use the correct tone to amicably settle a dispute at hand. Both parties have to explain their point of view separately and use evidence if necessary. A mediator will through this work with both the parties to come up with a non-binding decision that is meant to bring the dispute onto an end.[6]

2.2 Cooperative Model

As per Morton Deutsch, when resolving a dispute, you need to focus on a number of factors such as the nature of the dispute at hand and the goals of both parties to the dispute. These factors play a big role in determining the correct measure to be used as a negotiation tool when resolving a dispute. The third party to a dispute will be able to used two orientations when resolving dispute, that is the competitive and cooperative orientation.[7]

Competitive orientation brings out a scenario of win-loss outcome of the decision. A party will have to agree that he is on the wrong and therefore give the other party what is due to them. In cooperative orientation, an environment of trust is established and both parties agree to mutual benefit to the dispute at hand on the available options to resolving a dispute.

2.3 Principled Negotiation

This theory has a number of proponents among them being Roger Fisher and William Ury. They came up with four principles for an effective negotiation;

a) Separating individuals from their problems

The parties involved will look at the dispute at hand without focusing on what either of them will loose in such a situation. This will detach them from their emotions for an idea on how to resolve the dispute to be conceived.

b) Look at the interest forgetting about Position

c) Insist about Objectivity of the Dispute Resolution Procedure

A method on coming out with a good dispute resolution procedure is the core focus. Remember, there has to be emotions when resolving disputes so separating individuals from the problem at and becomes a task. Conflicts between groups mostly involve basic needs and therefore, you need to craft a good method to end the dispute.

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6 Dixit M, "Theories of Conflict Resolution: An Analysis," *Institute of Peace and Conflict Studies*,2004

7 Reuben, R," Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice," University of Missouri School of Law, page 4, 2017

2.4 Conflict Transmutation

It focuses on principles that are found in alchemy that is a set of contemplative practices which are meant to transform deeply held feelings and thoughts which form part of the destructive conflict behaviour of individuals.[8]

2.5 Historical Development of Traditional Dispute Resolution Measures in Kenya

In looking at traditional dispute resolution measures, it would be good if we go down in history on how the traditional dispute resolution measure was established. During the pre-colonial times, most of the African states had centralized and decentralized system of governance that established a dispute resolution mechanism. Africans in themselves as in the words of Mwalimu Julius Nyerere are communal in nature.

3.1 The Centralized System of Political Governance

It established kings and monarchs as the only custodians of power. Most of the centralized communities in Africa were multicultural with a king or a paramount chief as the head. For example, in South Africa, we had the Zulus and in Nigeria we had the Yorubas. Subordinates were appointed by the kings to prevent a situation of abuse of power that may arise. In essence, the subordinates offered checks and balances on the King by for example in Yoruba, a chief would be exiled if he misused his power. Contravention of the will of the people led to the removal of the chief as the head.[9]

3.2 Decentralised System of Political Governance

This occurred among the communities that were of similar culture. A good example was the Kenyan Agikuyu and the Luo, where a group of elderly men wielded the power of decision-making. Here, judgments to disputes were done through consensus, the popular opinion was ultimately upheld.

The non-centralized governance structures offered the people an opportunity to participate in the administration of justice unlike in the centralized governance system where only the members of the ruling family had the power of making decisions on disputes.[10]

Kenya became a British Protectorate in 1895. Initially there existed different communities with their own social beliefs and norms but with the coming of the British, they dismantled traditional governance mechanisms and established a central government with its own state laws which was in charge of the entire protectorate.[11]

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8 Dixit M, "Theories of Conflict Resolution: An Analysis," *Institute of Peace and Conflict Studies*,2004

9 Lloyd PC," The Integration of the New Economic Classes into Local Government in Western Nigeria," African Affairs ,1953

10 Aiyedun A, Ordor A, "Integrating the Traditional with the Contemporary in Dispute Resolution in Africa," *Law, Democracy and Development*, Vol.20, Iss, 2016, page 6

11 Mazrui, A, "Nationalism, Ethnicity and Violence, "in Wiredu Kwasi(ed) *A Companion to African Philosophy*, Blackwell Publishing Limited,2004, page 480

Laws established in the colonial Legislative Council in Kenya formed the part of Kenyan laws. There were also imported laws from England and India. A good example is the Indian Land Acquisition Act, 1894 that the British used for acquisition of the native Kenyan land. Part of the acquired land was used by the British to establish railway lines that connected Kenyan and Uganda.[12]

Customary law was viewed by the British to be repugnant in its entirety to justice and morality. Even though there existed a lot of positive side in the African traditional customs, the British faulted the practices as backward, even going to the extent of terming them as *witchcraft*.

Later on, as we would see in this paper, traditional measures of resolving disputes found back its way to Kenya. Later on, as we would see in this paper, traditional measures of resolving disputes found back its way to Kenya.

4. The Legal Framework of Traditional Dispute Resolution Measures in Kenya

4.1 The Constitution of Kenya, 2010

As per the Judicature Act, this is the Supreme Law of Kenya. It gives rise to all the other laws in Kenya including the Acts of Parliament. Any law that is inconsistent with it is declared void to the extents of the inconsistency, this includes even the customary law which establishes Traditional Dispute Resolution measures.[13] Articles 2 (5) and 2(6) stipulates that rules of international law and treaties which has been signed and ratified by Kenya forms part of our laws, this therefore means that some of the international treaties and conventions which has been ratified by Kenya and handles customary law, shall form part of our laws.

Article 159 (1) (c) states about promotion of alternative dispute resolution including mediation, reconciliation, arbitration and traditional dispute resolution provided that they do not contravene Bill of Rights, is not repugnant to justice and morality and not inconsistent to Constitution and any other written law.

The Constitution under article 67 (2) (f) gives the National Land Commission a mandate to use traditional dispute resolution mechanisms in land conflicts. This is recognition of diverse cultures of the Kenyan communities as a foundation of nation building. It is well brought under article 11 of the Constitution.

The Constitution has established a principle of encouraging settlement of land disputes under community initiatives before a matter is forwarded to Kenyan Courts for adjudication.[14] This means that a community has to establish elaborate measures of appropriately dealing with land disputes that arises within a community. This was indeed a good idea because land disputes form the largest bulk of disputes within a community.[15]

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12 Ngira D, "Examining the Role of Informal Justice Systems in Child Rights Protection in Kenya: A Case Study of the Kipsigis," *University of Utretcht*,4th November, 2019

13 Article 2 (4) of the Constitution of Kenya, 2010

14 Article 60 (1) (g) of the Constitution of Kenya, 2010

15 Ghebretekle, T, "Traditional Natural Resource Conflict Resolution Vis-a'-Vis Formal Legal Systems in East Africa: The Cases of Ethiopia and Kenya," *AJCR*, Vol.1

Article 48 brings out the concept of access to justice in Kenya. It states that the Kenyan government shall ensure access to justice for all persons and that it shall regulate fee required such that it is not too much to make it difficult for others to access justice. In promotion of access to justice the government need to give traditional measures of dispute resolution a lot of concern. It should therefore come up with measures to enhance.

Article 45 brings out Customary marriages as being part of Kenya. At article 45(4), it states that Parliament has to enact a legislation that recognizes marriages that are concluded under any tradition. These marriages have to be consistent to the Kenyan Constitution.

4.2 Industrial Court Act

Section 15 of this act gives Kenyan courts room to entertain Alternative Dispute Resolution Measures including Traditional Dispute Resolution Measures pursuant to article 159 of the Constitution of Kenya, 2010. Mediation and Arbitration has been previously widely used by Kenyan courts. There is also need to use Traditional Dispute Measures by the Kenyan Courts because they also resolve disputes at a fast rate and cheaply.

4.3 Marriage Act, 2014

Before this act was enacted, there existed quite a number of laws that regulated marriages in Kenya which were solely based on English laws that recognized only monogamous marriages. African Customary Laws in nature are polygamous. Rule 2 of the Customary Marriage Rules of 2017 defines Customary marriage as marriage contracted as per the customs of a certain community of which either of the parties is part of.

Section 43 of this Act avers those Customary marriages shall be celebrated in accordance with the customs of the communities of either of the parties. A dowry payment is required as proof of this marriage taking place.

Section 68 (1) of this Act indicates that you can only dissolve Customary marriages in a court after exhausting Customary Dispute Resolution measures available.

4.4 The National Land Commission Act

In actualization of article 67 (2) (f) of the Constitution of Kenya, 2010, section 5 (f) of this act gives the National Land Commission the mandate to use traditional dispute resolution measures. Land rights are so much integrated to the community norms such that we cannot detach them from traditional dispute mechanisms in case a dispute concerning the land arises.

4.5 The Judicature Act, 1967

It offers an emphasis on the importance of using customary laws in resolving civil disputes in Kenya.[16]

16 *Section 3(2) of the Judicature Act, 1967*

4.6 The Matrimonial Property Act, 2013

Allows usage of African Customary laws that are in line with the principles and values of the Kenyan Constitution from resolving disputes concerning matrimonial property. Principles that are to be taken into account entail;

a) Customary Law relating to dissolution of Customary marriage.
b) Protection of community rights for example ancestral lands.
c) Relating to access of ancestral land and cultural homes by wife or former wife.[17]

As we can see, the Customary laws have remained dominant in the Kenyan social strata. We can therefore not choose to ignore it but look for a way of enhancing it in the Kenyan society.

5. The Methods of Traditional Dispute Resolutions in Kenya

The Traditional dispute resolutions measures in Kenya entails; arbitration, mediation, adjudication, reconciliation and negotiation. It further comprises of usage of legal maxims with the sole aim of indicating to a party involved in a dispute, the consequences if he fails to heed to an advice given in the dispute resolution process.

5.1 Reconciliation

This mainly entailed peace-making after a dispute had been resolved. It was very common in traditional African homesteads to see a lit bonfire with a number of individuals surrounding it while having a feast. This was meant to indicate that the animosity between two waring communities or individuals had ceased and therefore they can live in harmony. Remember, the core reason why dispute resolution was used is to bring harmony in the society.

5.2 Negotiation

This method involved harmonizing interests of the parties to a dispute. A neutral person, therefore hears the side of disputants so that both of them can agree to compromise on certain aspects of their disputes. Recovery of a dissident member was seen as restoring the harmony and integrity of the community.[18]

5.3 Mediation

It involves a non-coercive intervention by a neutral party, herein called the mediator, for the disputants to peaceful settled their difference.

5.4 Adjudication

This involve calling on the disputing parties to a palace, court yard or a family compound for a dialogue on a possible dispute resolution.[19] This is an alternative Traditional dispute

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17 Section 77 of the Matrimonial Property Act, 2013.

18 Ajayi T. "Methods of Conflict Resolution in African Traditional Society," *African Research Review journal*, Vol.8, Issue 2, 2014, page 138-157, at page 151

19 Olaoba O.B, "The Ancestral Focus and the Process of Conflict Resolution in Traditional African Societies "; Albert, A.O (ed), *In Perspectives on Peace and Conflict in Africa in Essays in Honour of General (Dr) Abdul Salam A, Abubakar*, Ibadan; John Archers Limited.

resolution method provided to solve contractual disputes in a short time possible and at minimal cost as compared to other dispute resolution processes. It is an informal process operating under very tight time scales.

This process as a method of resolving dispute is familiar to the construction industry globally. It may be provided by statutory procedure or by an adjudication clause in the contract for swift interim dispute resolution. In fact, a number of commonly used standard forms of contracts contain adjudication clauses requiring adjudication as the first stage in the mechanism of dispute resolution prior to commencement of any arbitration proceedings or litigation.

At the regional level, there is no legal framework for adjudication of construction disputes. Municipal laws of the Partner states however, have adjudication proceedings regulated under their domestic legal regimes in form of Adjudication Guidelines issued by Institutions undertaking adjudication in construction disputes. For example, in Uganda, there are adjudication Guidelines issued by Uganda Institute of Professional Engineers (UIPE) that offer information and standards of performance to all parties engaged in adjudication process.

These guidelines show how an adjudication process is operated; commencement, appointment of an adjudicator, adjudication fees and costs, adjudication proceedings, adjudication decision, enforcement of adjudication decision, and process of appeal against adjudication decision. In Kenya, adjudication proceedings rely on the Contraction Adjudication Rules issued by the Chartered Institute of Arbitrators (CIArb- Kenya) with related provisions.

5.4.1 Advantages and Disadvantages of Adjudication as a Traditional Dispute Resolution Measure.

5.4.1.1 Advantages

a) The process is fast. Proceedings on usual occasions take 28 days.
b) Allows cash flow because it offers an interim solution as construction works are ongoing.
c) Parties have control over the proceedings (choose the dates, the adjudicator and are involved in decision making).
d) It maintains the relationship of the parties at the end of the proceedings.
e) It allows power imbalance in the relationship to be dealt with so that weaker subcontractors have a clear route to deal with powerful contractors.

5.4.1.2 Disadvantages

Decisions from this process are not final. They can still be challenged in arbitration proceedings or in court of law.

5.5 Conciliation

This method has similarity to mediation save that in this type of Alternative Dispute Resolution, a third-party known as a conciliator has the power to propose a solution to the disputants. A third-party offers a calm atmosphere for the disputing parties to resolve their differences or to air out their differences. It is from this that the third party comes out with a solution for the disputants.

6. The Necessity of the Traditional Dispute Resolution

This method of resolving dispute gave both parties a chance to present their case before members of the community who are seasoned and old enough to help in resolving a dispute. It offered a diplomatic way of resolving a dispute without involving of unflared words that would make it difficult to burry a hatchet. Most of those individuals who were organizing these dispute tribunals were third party, mostly rulers of the society.

It acts as a healing process in African societies. It offers a golden opportunity to examine the issue at hand and come up with a positive decision to resolve the difference. Failure to resolve conflicts in the traditional context might make it difficult for members of the community to access the scarce resources of the community.[20]

It offers a direct participation by the disputants. This gives room for emotional reconciliation. The dialogue between the disputants offers a golden chance for the disputants to pour out their hearts and view the issues at hand from each other's point of view.

It creates a higher level of confidentiality. Some of the disputes at hand might become embarrassing and create more animosity if it is left for the entire community to feed on them.[21]

7. The Demerits of Traditional Dispute Resolution Measures

These measures are not based on written law, mostly they are based on the beliefs and traditions of a community which might not be known by a majority of the current Kenyan population. This in turn creates a state of anarchy and confusion. It is very easy for some disputants to claim biasness more so on the women in the society. Some beliefs are still backward and yet they have not been done away with in the communities.[22]

The traditional measure of resolving disputes also operates on the good will of the members of a community to follow and obey the decisions made. There exist no well stipulated measures of enforcing the decision made, this makes it easy for contravention by the party who is dissatisfied.

Most of the traditional dispute resolution measures are male dominated thus pushing the women away from the centre of decision making. This in essence promotes male chauvinism that negatively impacts the women who may be interested in also seeking justice through the system. This simply implies that the women will be denied access to justice.[23]

African Customary practices have also been used for a long time to justify a number of norms which are an injustice to those meted on. For example, Female Genital and Mutilation (F.G.M) has been practiced by a number of Kenyan Communities as a right of passage of girls into women. This matter drew a lot of criticism and condemnation from Human Rights bodies such as Kenya Human Rights Commission (K.H.R.C) and the African Center for Open Governance (AfCOG). Even though, the Kenyan government has placed well-stipulated measures to end this menace, it has continued to be secretly practiced among certain communities. This is not the only African practice that is backward, we are still fighting factors such as wife- inheritance

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20 Punier, Gerard, "The Rwanda Crisis: History of Genocide," NewYork

21 Brown, S, Cervenak, C, Fairman, D, "Alternative Dispute Resolution Practitioners Guide," Part III, page 6

22 Mohamed K & Muriithi P," A Critical Analysis of Maslaha as a Traditional Dispute Resolution Mechanism in North Eastern Kenya, *Journal of CMSD*, Vol. 5, Issue 1, 2020, page 34.

23 Feseha, A, "Customary Dispute Resolution Mechanisms and the Rule of Law: Areas of Convergence, Divergence and Implications," in: Stebek, N & Muradu, A, "Law and Development and Legal Pluralism in Ethiopia, Addis Ababa, JLSRI *(Justice and Legal Systems Research Institute)* Publications, 2013

despite sustained enlightment on this. A lack of clarity on how the Traditional dispute resolution in Kenya, has made it difficult in integrating it with the formal justice system.

8. Traditional Dispute Resolution Among the Kenyan Communities

8.1 North Eastern

The North Eastern members, mostly the Somali's practice a traditional dispute resolution measure known as *maslaha*. This process, that can be loosely translated to English as "public interest", is used by members who proclaim the Islamic faith. It involves using a male relative of the perpetrator of an act and the male relative of the victim. The disputants are made to agree to resolve the dispute and the remedy involves mostly monetary compensation or giving livestock to the victim's family.[24]

This method has been criticized for making its focus more on maintaining a cordial relationship in the community but it has stood the test of time as its benefits have outweighed the demerits.

This method has been used by the North Eastern members for long because it is simple and it at least involves monetary compensation which is awarded fast rather than the long judicial system that might also affect the relationship in the community.

8.2 The Traditional Dispute Resolution Measure Among the Luo

8.2.1 The Luo Council of Elders

This body was brough into light by the implementation of the Cultural Structures Project (CSP). It comprises of elders who know the beliefs and traditions of the Luo Community. Besides, members of this body have undergone thorough training on matters pertaining to land issues, human rights and property rights. They are quite unique from the previous *Council of Jodongo*, who only had knowledge of the beliefs and consequences of not abiding to the traditions of the community. Members of this new outfight are learned, it is therefore not surprising to find a doctorate wielding individual as a member of this group. They are tasked with resolving disputes among disputants in the community which mainly entails; land cases and matters of domestic violence.[25]

This method has been effective as noted by a large in flow of new disputes brought willing by members of the society. For example, in 2016, this group received 363 cases from Homabay and Kisumu. 272 of these cases were resolved successfully by December of the same year.

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24 ibid
25 Maleche A, "Compendium of Cases by the Luo Council of Elders, ", 2017, KELIN Publishers, page 5

This is not a forced measure. It mostly involves relatives who want to restore the good relation among themselves and this can only be achieved by resolving the dispute amicably via a council of elders instead of running to court where the matter might escalate and become acrimonious.

In 2013, a method of documentation of the cases was established. These documented cases can be accessed by the council of elders, they act as a precedent when deciding future cases. This council has given effect to article 27(1) of the Constitution of Kenya, 2010 by offering men and women equal access to justice. Most of the cases as per the documented ones, involve domestic violence which are mostly meted on the women. This council has given the women an opportunity.

The council is cheaper and flexible as compared to the courts. Here a few stipends are offered by the disputing parties so that their matter can be resolved. Court processes are expensive and cannot therefore be afforded by a large number of the Kenyan population which in this case will be denied justice because they cannot afford the court process.

Any law including customary laws that contravenes the Constitution of Kenya is considered void. The Judicature Act includes Customary law as a source of law provided that it is not repugnant to the rules of morality and justice. L.A.O v In-Laws , KEL/ WPLR/ 01

8.2.2 Traditional Dispute Resolution in the Context of the Luo Customary Law

The Claimant in this matter was married under the Luo Customary Marriage. Upon the death of her husband, her in-laws forcefully wanted her to be inherited by one of her brothers-in-law. She refused and she was consequently chased out of her matrimonial home and all her property together with that of her late husband were taken away by her in-laws. She approached this Council of elders for assistance.

Among the issues that arose were;

a) Whether she had a right over her late husband's property?
b) Whether wife inheritance for her to inherit her husband's property was considered lawful?
c) Whether her in-laws had any right to her property?
d) Whether the practice of wife-inheritance is consistent with the Constitution of Kenya?

8.2.3 The Decision and Reasoning by the Council

The elders informed her in-laws about rights of women to property. Wife inheritance is not in line with the provisions of the Kenyan constitution, in fact it devalues and lowers the dignity of women. The in-laws welcomed back the Claimant to her matrimonial home at the end of the decision-making. They also returned her property.[26]

26 Maleche A, "Compendium of Cases by the Luo Council of Elders, ", 2017, KELIN Publishers, page 5

8.3 Dispute Resolution Among the Ameru

8.3.1 The Njuri-Ncheke

It is a Meru word that means in English "the thinned out" or a selected committee that has a specified social role. This just like the Council of Elders in Luo, are a governing council of the Ameru subgroups; Igembe, Tigania, Imenti, Tharaka, Mwimbi, Muthambi and Chuka[27] One of the chief founders of Njuri Ncheke was Kaura- O- Bachau. It is believed that before he died, he made a daring vow that the Njuri Ncheke will never cease to exist in the Ameru.[28] It is therefore widely believed among the Ameru that Njuri Ncheke has continued to exist because of the binding nature of the vow proclaimed by the leader by then.

8.3.2 Composition of the Njuri-Ncheke

a) The Njuri-Ncheke council has been compiled into three ranks namely;
b) Njuri- composed of general elders (the lowest rank).
c) Njuri-Ncheke- Composed of a ruling committee (the second rank).
d) Njuri Mpingere - Supreme Authority (Highest rank)

This group had seasoned and wise elders who had been initiated and passed through certain rites. They only become members after paying a specific fee required for membership.[29]

This group plays a significant role in dispute resolution among the Ameru and its neighbouring communities. It offers solutions to problems encountered at the local level such as land disputes, family and inter-community boundary disputes. This method is widely accepted by the community members because unlike the normal court process, they are cheaper and faster hence justice will be granted expediously.

9. Conclusion

I can argue that the traditional dispute resolution processes meet all the constitutional requirements and therefore they should be recognized by the government and upheld. Article 47 of the Constitution of Kenya, 2010 avers that an administrative process need to be expeditious, efficient, lawful, reasonable and procedurally fair.

Traditional dispute resolution mechanism has been stipulated as being one of the measures of resolving disputes under the Constitution of Kenya, 2010,[30] it is therefore a lawful process that has to operate as per the requirements of article 159(3) of the Constitution of Kenya, 2010, that is;

a) Not to contravene the Bill of Rights.
b) The dispute process is not repugnant to the rules of justice and morality.
c) To be consistent with the Constitution or any written law.

The Kenyan Government need therefore to recognize and institutionalize these traditional

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27 Ishida,S & Gichere , N, " The Indigenous Knowledge of the Ameru People of Kenya, Meru Museum, 2008
28 Ibid1
29 Kinyua, J.I, "A History of Njuri in Meru ,1910-1963," A Bachelor of Arts Dissertation at the University of Nairobi, 1970
30 Article 159(2) (c), The Constitution of Kenya, 2010; Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.

dispute resolution measures because as I have indicated above, they are of much importance to the common *mwananchi*, who needs justice and might not be able to afford the costs rquired in the Kenyan courts but need justice. It also helps those who need to maintain a cordial relationship with other members of the common, something that is not easy to achieve in the Kenyan courts.

Critiquing the Place of International Arbitration in Regional Courts in Africa.

By Peter Mwangi Muriithi*

Abstract

The objective this paper is to critique international arbitration practice in regional courts. This will include analyzing the functioning and role played by the regional courts in Africa in promoting international arbitration in Africa. To focus the discourse, the paper specifically makes reference to the international arbitration practice in the COMESA Court of Justice and the East African Court of Justice as regional international arbitral tribunals in Africa. The paper briefly analysis the jurisdiction of the COMESA Court of Justice and the East African Court of Justice as regional international arbitral tribunals in Africa, the legal framework forming the basis of the practice of international arbitration by both Courts, the challenges faced by both Courts in resolving disputes through arbitration and lastly suggest the way forward.

1. Introduction

Arbitration is a private system of adjudication. Parties who arbitrate are the ones who have made a deliberate choice to resolve their disputes outside of any judicial system. Succinctly, arbitration involves a final and binding decision, producing an award that is enforceable in a court.[1] This method of solving disputes has taken root mainly in the settling of commercial disputes.

The main focus of this discourse is *international arbitration* as practiced in regional courts in Africa. To this end, this paper cherry-picks the *COMESA Court of Justice and the East African Court of Justice (herein EACJ)* as examples of regional courts in Africa practicing international arbitration.

It is noteworthy that there is no given concrete definition of the term 'international arbitration'. Contrasting domestic or national arbitration with international arbitration gives an understanding of what constitutes international arbitration.

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1 Margaret L. Moses, The principles and practice of International Commercial Arbitration, page 1(Cambridge University Press)

National or domestic arbitration is one that is concerned purely with arbitration of matters within a country's jurisdiction. If everything concerned with the arbitration is related to that jurisdiction, then the arbitration is a domestic arbitration. By implication then, an arbitration process can be termed as international arbitration if the elements forming part and parcel of that arbitration process involve more than one country e.g the parties in the arbitration process have their places of business in different states.[2]

Ultimately, it is clear that in determining what constitutes *international arbitration*, one must focus on the elements of a particular arbitration process. In this regard, two elements ought to be considered. These are: The nature of the dispute in question and the nationality of the parties involved in the arbitration.[3]

This criterion of determining whether arbitration is international in nature is adopted by the United Nations Commission on International Trade Model Law on International Arbitration (hereinafter UNCITRAL Model Law).[4]

To this end Article 1(3) of the UNCITRAL Model Law[5] verbatim provides that: "*arbitration is considered to be international if:*

a) The parties to an arbitration agreement have, at the time of conclusion of that agreement, their places of business in different states; or
b) One of the following is situated outside the State in which the parties have their place of business:
i) The place of arbitration, if determined in, or pursuant to, the arbitration agreement;
ii) Any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or
c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country."

This discourse adopts this definition of international arbitration. International arbitration is considered to have a number of attributes which include confidentiality, the autonomy of parties, private and consensual process, flexibility and limitation of appeals.[6]

The allure of international arbitration mostly lies in the fact that it operates in the exclusion of national courts and its transnational applicability in international disputes with minimal or no interference from the national courts, thus boosting the parties' confidence in realizing justice in the best way achievable.[7] Over time, arbitration has been lauded over litigation as a faster and easier method of settling legal disputes.[8]

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2 Charles Manzoni, International Arbitration, The Key Elements; page 2-3 a presentation at 39 Essex Street on Wednesday 5th May 2004 <http://www.39essex.com/docs/articles/CMZ_International_Arbitration_050504.pdf >lastly accessed on 21/04/22
3 Ibid No. 2
4 UNCITRAL Model Law on International Commercial Arbitration 1985 (With amendments as adopted in 2006) <https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf>lastly accessed on 22/04/22
5 UNCITRAL Model Law on International Commercial Arbitration 1985 (With amendments as adopted in 2006) <https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf>lastly accessed on 22/04/22
6 Kariuki Muigua, Settling Disputes through Arbitration in Kenya *(Glenwood Publishers Ltd)* Page 3 to 6.
7 Kariuki Muigua, Promoting International Commercial Arbitration in Africa page 2(Published in CIArb Kenya, Alternative Dispute Resolution Journal Volume 5, Number 2 2017)
8 U.N. Conference on Trade and Development, New York and Geneva, 2005, Dispute Settlement : International Commercial Arbitration, 5.1 International Commercial Arbitration, 5, U.N. Doc. UNCTAD/EDM/Misc.232/ Add.38,<http://unctad.org/en/Docs/edmmisc232add38_en.pdf>lastly accessed on 21/04/22 [Hereinafter U.N. Conference on Trade and Dev. 5.1]

Unlike in litigation, where the judges are arbitrarily designated, arbitration allows parties to select their arbitrators, which means that they can choose individuals with particular expertise who are able to quickly comprehend complex technical issues.[9] This attribute makes international arbitration the preferred mechanism to resolve international disputes especially international commercial disputes where technical and complex matters may be the subject matter of the dispute.[10]

As Collier and Lowe correctly asserted, *"where the courts might appear remote, rigid, and slow and expensive in their procedures and the judges might seem unversed in the ways of commerce and the law, insensitive and ill-adapted to the exigencies of commercial life, arbitrators offered an attractive alternative. Arbitrators were originally drawn from the same commercial community as the traders, often experienced in the trade, capable of offering practical suggestions for the settlement of the dispute and of doing so informally, quickly and cheaply."*[11]

In international arbitration parties to a dispute have the autonomy to choose the arbitrators to arbitrate their dispute. This gives the parties an opportunity to choose arbitrators that are quick to grasp the complex issues at hand. In return the arbitrators will also be quick to dispense with the dispute, thus saving the parties' time and, more importantly, money.[12]

Another argument in favour of arbitration is that it gives parties control over the dispute resolution process by allowing them to determine by agreement, the forum, the applicable law, and the procedures to be adopted in arbitrating their dispute.[13]

Expounding further on the attributes of international arbitration, it is considered to be a means of settling disputes that is flexible. The flexibility lies in the fact that the parties can choose to by-pass certain procedural requirements associated with litigation that could potentially lengthen the settlement of the dispute. This flexibility also contributes to faster and cheaper resolution of disputes.[14] International arbitration further assures of confidentiality.[15]

The confidential character of arbitration was captured by the English Court of Appeals in: *Dolling-Baker v Merrett*, which stated that:

> *"As between parties to an arbitration, although the proceedings are consensual and may thus be regarded as wholly voluntary, their very nature is such that there must, in my judgment, be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and*

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9 Tsotang Tsietsi, International Commercial Arbitration: Case Study of the Experiences of African States inthe International Centre for Settlement of Investment Disputes (Source: The International Lawyer, Vol. 47, No. 2 (FALL 2013), page 250 to 251

10 Ibid No. 9

11 John G. Collier & Vaughn Lowe, The Settlement of Disputes in International Law: Institutions and Procedures 45-46 (1999).

12 Ibid No. 9

13 U.N. Conference on Trade and Development, New York and Geneva, 2005, Dispute Settlement : International Commercial Arbitration, 5.1 International Commercial Arbitration,5,U.N.Doc.UNCTAD/EDM/Misc.232/Add.38,<http://unctad.org/en/Docs/edmmisc232add38_en.pdf>lastly accessed on 22/04/22

14 [Hereinafter U.N. Conference on Trade and Dev. 5.1] Tsotang Tsietsi, International Commercial Arbitration: Case Study of the Experiences of African States in the International Centre for Settlement of Investment Disputes (Source: The International Lawyer, Vol. 47, No. 2 (FALL 2013), page 251

15 U.N. Conference on Trade and Development, Dispute Settlement: International Commercial Arbitration, 5.1 International Commercial Arbitration, page 7-8 <http://unctad.org/en/Docs/edmmisc232add38_en.pdf>lastly accessed on 22/04/22

indeed not to disclose in any other way what evidence had been given by any witness in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the court. That qualification is necessary, just as it is in the case of the implied obligation of secrecy between banker and customer."[16]

Further dispute resolution by way of arbitration is also commended for leading binding determination of a dispute and an award that is not subject to any appeal mechanism. The fact that an award is not subject to appeal on the merits gives the parties added security about the finality of the resolution process.[17]

International arbitration awards issued by international arbitral tribunals are also easier to enforce in foreign states than judicial judgment tends to be, because of the transnational nature of international arbitration.[18] These attributes make international arbitration an attractive means of solving disputes internationally especially commercial disputes.

International arbitration in Africa is not as developed as in other continents.[19] The development of arbitration in Africa highly relies on having on the establishment of permanent international arbitration institutions.[20] This is in order to enable the development of principles and practice of international arbitration.[21]

It is important to note that African states did not effectively participate in the formulation of the UNCITRAL Arbitration and Conciliation Rules and the Model Law.[22] The ICSID and UNCITRAL did not also absorb the African legal and commercial structure.[23] Therefore, African states did not subscribe wholeheartedly to the international arbitration process from the beginning. However, the latest data indicate that international arbitration has gained more popularity over time in Africa.[24]

While the rest of the world has tried to strengthen its legal capacity in international arbitration, Africa has been left behind in this journey. The reality of globalization that has downed on Africa has left it with no option but to try to catch up with the rest of the world. This has led to the formation of economic blocks such as the East African Community (EAC)[25] and Common Market for Eastern and Southern Africa (COMESA)[26], which have established legal institutions to address trade disputes within their regions.

It is on this basis that the *COMESA Court of Justice and the East African Court of Justice* were established as organs of the economic blocks of the Common Market for Eastern and Southern Africa (COMESA) and the East African Community (EAC) respectively.

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16 Dolling-Baker v Merrett, [1990] 1 W.L.R. 1205 A.C. at 1213 [Eng.]

17 U.N. Conference on Trade and Development, Dispute Settlement: International Commercial Arbitration, 5.1 International Commercial Arbitration, page 8 <http://unctad.org/en/Docs/edmmisc232add38_en.pdf>lastly accessed on 22/04/22

18 Tsotang Tsietsi, International Commercial Arbitration: Case Study of the Experiences of African States in the International Centre for Settlement of Investment Disputes page 253

19 Samson Sempasa,' Obstacles to International Commercial Arbitration in African Countries,' (1992) 41 The International and Comparative Law Quaterly, 'page 390

20 Ibid No.19

21 Samson Sempasa,' Obstacles to International Commercial Arbitration in African Countries,' (1992) 41 The International and Comparative Law Quaterly, 'page 390

22 Samuel Asante, 'The Perspectives of African Countries on International Commercial Arbitration,' (1993) 6 Leiden Journal of International Law, page 335

23 Ibid No. 22

24 Sadaff Habib,' 2018 in Review: A Review: A Tug of War for International Arbitration in Africa,' <http://arbitrationblog.kluwerarbitration.com/2019/01/17/2018-in-review-a-tug-of-war-for-international-arbitration-in-africa/> lastly accessed on 22/04/22

25 East African Community <https://www.eac.int/> lastly accessed on 22/04/22

26 Common Market for Eastern and Southern Africa <http://www.comesa.int/>lastly accessed on 22/04/22

2. Critiquing the Practice of International Arbitration in COMESA Court of Justice and the East African Court of Justice as Regional Arbitral Tribunals.

2.1.1 International Arbitration as practiced in the East African Court of Justice

EACJ, like the other organs of the East African Community, is established under Article Nine (9) of the Treaty for the Establishment of the East African Community, 1999 (herein EAC Treaty).[27]

Chapter Eight (8) of the EAC Treaty further expounds on, *inter alia*, the role of the Court, the appointment of judges of the court, the jurisdiction of the court, the official language of the court, and the seat of the court. EAC Treaty provides that the role of EACJ is to be a judicial body that ensures adherence to law in the interpretation and application of and compliance with EAC Treaty.[28]

As currently established EACJ has a threefold role: to decide, in accordance with treaty and rules of procedures, on contentious matters arising out EAC Treaty within the meaning of Article 27, paragraph 1, of the Treaty, to give an advisory opinion in accordance with Article 36 of the Treaty, and finally to *entertain arbitral matters in accordance with Article 32 of the Treaty and rules of arbitration.*[29]

Article 32 of the EAC Treaty in earnest makes the EACJ one of the arbitration institutions in the East African Community. Indeed, it is the jurisdiction vested upon EACJ by Article 32 of the EAC Treaty that is relevant to this particular discourse.

The EACJ's arbitral jurisdiction is an invaluable mechanism at the disposal of the business community within the East Africa region to settle any dispute arising from their cross-border business through arbitration.[30]

It is noteworthy that generally 'classic courts' (including most regional courts like the European Court of Justice) that entertain contentious matters don't entertain arbitral disputes. However, EACJ is unique because it has a hybrid function of entertaining both litigation and international arbitration. To many in the East African Community, it is a new but very important feature of the court.[31]

The EACJ arbitration jurisdiction under Article 32 of the EAC Treaty covers matters arising from arbitration agreements contained in a contract or agreement concluded by the Community or any of its institutions; and arbitration agreements contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court to deal with arising disputes.[32]

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27 Gathege P.S '*Dispute Settlement Within East African Community: The East African Court of Justice and its Jurisdiction*' Published LL.M Thesis, University of Nairobi, 2012, page 33

28 Article 23 of the Treaty for the Establishment of the East African Community, 1999

29 Fred K. Nkusi, Understanding the jurisdictional powers of the East African Court of Justice <https://www.newtimes.co.rw/section/read/207744> lastly accessed 24/4/22

30 Faustin Ntazilyayo F, 'The East African Court of Justice's Arbitral Jurisdiction over Commercial Contract Disputes' <http://blogaila.com/2016/03/18/the-east-african-court-of-justices-arbitral-jurisdiction-over-commercial-contract-disputes-by-dr-faustin-ntezilyayo/> lastly accessed on 23/04/22

31 Fred K. Nkusi, Understanding the jurisdictional powers of the EA Court of Justice <https://www.newtimes.co.rw/section/read/207744> lastly accessed on 23/04/22

32 Article 32 of the Treaty for the Establishment of the East African Community, 1999

To this end, Article 32 of *The Treaty for the Establishment of the East African Community of 1999* delimiting the arbitral jurisdiction of the court verbatim provides: The Court shall have jurisdiction to hear and determine any matter:

> *a) arising from an arbitration clause contained in a contract or agreement which confers such jurisdiction to which the Community or any of its institutions is a party; or*
> *b) arising from a dispute between the Partner States regarding this Treaty if the dispute is submitted to it under a special agreement between the Partner States concerned; or*
> *c) arising from an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court.*

The prima facie reading of Article 32[33] indicates that in order for the court to arbitrate over a matter, the parties must submit to its jurisdiction by way of an Arbitration Agreement or Arbitration Clause in a contract.[34] This retains one of the seminal features of arbitration; party autonomy; which involves the parties willingly submitting to an arbitral process, having autonomy over the arbitrator, and the process making the outcome mutually acceptable to the parties.[35]

It is noticeable that under *Article 32(c)of the EAC Treaty*, EACJ can handle matters originating from an arbitration clause agreement, and special agreements binding the disputing parties where there is a clause conferring jurisdiction on EACJ. This in effect grants EACJ, jurisdiction to arbitrate international commercial disputes, enormously widening the EACJ arbitral jurisdiction.[36]

EACJ has formulated the EACJ Arbitration Rules, 2012,[37] pursuant to provisions of Article 42 of the EAC Treaty to guide EACJ in the arbitration of disputes submitted before it. These EACJ Arbitration Rules 2012, apply to every arbitration reference to EACJ pursuant to Article 32 of the EAC Treaty except, where the parties to arbitration before EACJ agree to modify or waive the application of the EACJ Arbitration Rules 2012.[38]

Where the parties have agreed to submit to arbitration under the EACJ Arbitration Rules 2012, they are deemed to have submitted ipso facto to the EACJ Arbitration Rules 2012 in effect on the date of the commencement of the arbitration proceedings, unless they have agreed to submit to the EACJ Arbitration Rules 2012 in effect on the date of their arbitration agreement.[39]

EACJ arbitration is seen as a method of resolving cross-border commercial disputes in the East African region. Arbitration undertaken in EACJ has all the attributes of international arbitration. In fact, the EACJ Rules of Arbitration, 2012 are designed to make EACJ arbitration

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33 The Treaty for the Establishment of the East African Community of 1999

34 Faustin Ntazilyayo F, 'The East African Court of Justice's Arbitral Jurisdiction over Commercial Contract Disputes'<http://blogaila.com/2016/03/18/the-east-african-court-of-justices-arbitral-jurisdiction-over-commercial-contract-disputes-by-dr-faustin-ntezilyayo/> lastly accessed on 23/04/22

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

36 Article 32 (C)of the Treaty for the Establishment of the East African Community, 1999

37 East African Court of Justice Rules of Arbitration, EACJ, Arusha, Tanzania, March 2012. The Rules were made in exercise of the powers conferred on the East African Court of Justice by Article 42 of the Treaty for the Establishment of the East African Community.

38 Rule 1(2) of the East African Court of Justice Arbitration Rules, 2012 provides that unless the parties to arbitration agree otherwise: (a) these Rules shall apply to every arbitration under Article 32 of the Treaty; (b)the parties to any arbitration may agree in writing to modify or waive the application of these Rules; (c)where any of these Rules is in conflict with any provision of the law applicable to arbitration from which the parties cannot derogate, that provision shall prevail.

39 Rule 7(1), East African Court of Justice Rules of Arbitration.

efficient, cost-effective, flexible, confidential, neutral, binding, and expeditious. Moreover, the award rendered pursuant to EACJ arbitration is final and binding on the parties.[40]

Attributes of International Arbitration under the East African Court of Justice as an International Arbitral Tribunal.

Faustin Ntazilyayo, in his article, elaborates on the attributes of international arbitration as practiced under the EACJ. To this end he enumerates the following attributes:[41]

> *a) Confidentiality: The EACJ arbitral proceedings are not public. They are held privately. The confidential nature of the proceedings prevents the award or any deliberations from being published in the press without the express approval of the parties. This is captured under Rule 30(4) of the EACJ Arbitration Rules, 2012.*
> *b) Flexibility: as a consensual process, EACJ arbitration is flexible. Parties and arbitrators are free to adopt flexible procedures and rules which suit everybody. This is captured under Rules 1 (2) (b) of EACJ Arbitration Rules, 2012 which provides that "the parties to any arbitration may agree in writing to modify or waive the application of these Rules." Another part of the flexibility of arbitration before EACJ is captured under Rule 4 of the EACJ arbitration Rules, 2012 which provides that a party may appear in person or send a lawyer or representative or, indeed, anyone that he/she chooses.*
> *c) Finality: Subject to provisions of the EACJ Rules of Arbitration providing for the interpretation of the award, the correction of the award and the additional award and review of the Award, the arbitral award rendered by EACJ is final. This is captured under Rule 36, (1) of the EACJ Arbitration Rules, 2012.*
> *d) Neutrality: Under EACJ there is a possibility to set up a neutral arbitral tribunal, to choose a neutral place of arbitration.*
> *e) Appointment of arbitrators from amongst the EACJ judges: The panel or the sole arbitrator is appointed from among the Court's judges who are all certified arbitrators.*
> *f) Enforcement of awards pursuant to the country in which enforcement is sought: There is no pre-enforcement judicial review and arbitral awards are enforced in accordance with the enforcement procedures of the country in which enforcement is sought. This is saliently captured under Rule 36 (3) of the EACJ Arbitration Rules, 2012.*
> *g) Non-payment of fees to arbitrators: Rule 37(1) of the EACJ Arbitration Rules, 2012 states that "There shall be no fees payable to the arbitrators."*

2.1.2 International Arbitration as practiced in the COMESA Court of Justice

The COMESA Court of Justice is among many dispute resolution forums in Africa. This Court has not been analyzed a lot with regards to arbitration and not much scholarship has been developed on it.[42] It has not handled many trade cases. Most of the cases it has dealt with are on employment disputes.[43]

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40 Faustin Ntazilyayo , 'The East African Court of Justice's Arbitral Jurisdiction over Commercial Contract Disputes' <http://blogaila.com/2016/03/18/the-east-african-court-of-justices-arbitral-jurisdiction-over-commercial-contract-disputes-by-dr-faustin-ntezilyayo/> lastly accessed on 23/04/22

41 Ibid No.40

42 John Gathii,' The COMESA Court of Justice,' in Fabri Ulfsten & MZang (eds), The Legitimacy of International Trade Courts and Tribunals, Cambridge University Press, 2018

43 Ibid No.42

COMESA Court of Justice is established under *Article 7(c) of the Treaty Establishing the Common Market for Eastern and Southern Africa (herein COMESA Treaty)* as an organ of COMESA. The court was established to provide an efficient, independent, and accessible dispute resolution system. In the beginning, it was solely an adjudication court before its jurisdiction was expanded to handle arbitration matters.[44]

COMESA Court of Justice is tasked with adjudication of all matters that have been brought before it pursuant to the provisions of the COMESA Treaty. It has two divisions. These are the First Instance Division and the Appellate Division.[45] It has twelve judges who are appointed by the Heads of State/Government (the Authority).[46] Seven of them are for the First Instance Division and the remaining are appointed to the Appellate Division.[47] The court is headed by the President of the Court of Justice. All the judges have a five-year term which can be renewed by the Authority for five (5) years. They can only be removed from the Court on the grounds of unprofessionalism or inability to perform their work in cases such as mental infirmity.

The COMESA Court of Justice is mainly an adjudication court.[48] This can be a case between member states on breach of the COMESA Treaty or on a legality of a decision, act or directive of the Council of Ministers under the treaty.[49] COMESA's Secretary-General can also refer a case to the Court where a member state has infringed the treaty.

The Legal and natural persons can also bring a case against the Council or a member state on infringement of the Treaty. However, they have to exhaust all the local remedies first. The COMESA Court of Justice is the only court in the African region that has determined a trade dispute between African states, for instance, in the case of the *Republic of Mauritius vs. Polytol Paints and Adhesives Manufacturing Co. Ltd.*[50]

The other dispute it can determine is an employment dispute between COMESA and its employees. The COMESA Court of Justice's jurisdiction on arbitration emanates from Article 28 of the COMESA Treaty. In this regard, *Article 28 of the COMESA Treaty* provides that the COMESA Court of Justice has arbitral jurisdiction where;

> *a) There is an arbitration clause contained in a contract that confers such jurisdiction to the COMESA Court of Justice in which the Common Market or any of its institutions is a party; and*
> *b) There is a dispute between the Member States of COMESA regarding the COMESA Treaty and the dispute is submitted to the COMESA Court of Justice under a special agreement between the Member States of COMESA concerned.*

From the foregoing, It is noticeable that unlike the EACJ the COMESA Court of Justice does not attend to arbitration between private parties and/or individuals.[51]

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44 John Gathii,' The COMESA Court of Justice,' in Fabri Ulfsten & MZang (eds), The Legitimacy of International Trade Courts and Tribunals, Cambridge University Press, 2018
45 Article 19 of the COMESA Treaty
46 Articles 7 and 8 of the COMESA Treaty
47 Article 19 of the COMESA Treaty
48 Article 23 of the COMESA Treaty
49 Article 24 of the COMESA Treaty
50 COMESACJ 13, Application No. 1 of 2012
51 Article 28 of the COMESA Treaty

The COMESA Treaty does not provide for example for arbitration between an investor and a state. This highly limits the jurisdiction of the COMESA Court of justice. This is despite the fact that more than half of its members have been involved in investor-state arbitration. A majority of the investor-state arbitration involving COMESA member states have been determined under the International Centre for Settlement of Investment Disputes (ICSID).[52]

It is noteworthy that, before the transition of COMESA from Preferential Trade Area (herein PTA), there used to be the PTA Centre for Commercial Arbitration that was based in Djibouti and its function was to facilitate arbitration of investor-state commercial disputes. It functioned under the PTA Federation of Chambers of Commerce and Industry.[53]

The COMESA Treaty under Article 174 provides for the continuance of the Federation of Chambers of Commerce and Industry. However, there are programs being put up to have Djibouti set up an Arbitration Centre for COMESA.[54]

Even though the COMESA Treaty does not provide for investor-state arbitration, the COMESA's Investment Agreement for the COMESA Common Investment Area (herein CCIA) provides a guiding framework. The CCIA urges COMESA members to accede to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the International Convention on Settlement of Investment Disputes between States and National of Other States. Arbitration can be for disputes between member states or between a member state and an investor.

Article 27 of CCIA touches on disputes between member states. It provides that parties can use an independent Arbitral Tribunal or the COMESA Court of Justice Arbitral Tribunal as a forum for arbitration. Documents on interstate arbitration are public unless the Arbitral Tribunal deems it necessary that there is confidential business information.

Article 20 of CCIA provides for arbitration in matters where an investor feels that a taxation measure that is being imposed amounts to expropriation. This is the only issue in taxation that can be taken for arbitration. However, it requires the investor to first inform COMESA's Secretary-General who will ask the taxation authority to make a consideration whether it amounts to expropriation. If there is no agreement within six (6) months from the time the matter was referred to arbitration, then the investor can refer the matter to arbitration.

In arbitration, as analyzed in the rules below, the substantive merits of the disputes are determined by the substantive law that parties have designated under their contract. The Tribunal will apply private international law if parties did not designate a law.

The most crucial aspect in the choice of law is how it affects the resolution of disputes between parties.[55] The COMESA court of justice as an Arbitral Tribunal is a transnational actor and the choice of law has a significant effect on transnational contracts.

Another aspect that affects the COMESA court of justice as an Arbitral Tribunal is the role of national courts. National courts play a huge role in the effectiveness of international arbitration, especially in the enforcement of arbitral awards. Article 40 provides that the awards can only be enforced through the national courts.

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52 Samson Sempasa, Obstacles to International Commercial Arbitration in African Countries,' (1992) 41 International and Comparative Law Quarterly, page 397

53 Ibid No. 52

54 Oxford Business Group,' Examining Djibouti Current Legislation, <https://oxfordbusinessgroup.com/overview/stepping-examining-current-legislation>lastly accessed on 24/04/22

55 Craig Gertz,' The Selection of Choice of Law in International Commercial Arbitration: A Case for Contractual Depecage?' (1992) 12 North Western Journal of International law & Business, page 163

The enforcement has to follow the laws of enforcement of the national state. The National courts can also affect the function of the COMESA court of justice as an Arbitral Tribunal through pre-arbitration and post-arbitration reviews.[56] This is especially where the parties are forced to abide by the national proceedings.

Nature of International Arbitration under COMESA court of justice as defined by COMESA Arbitration Rules 2018.

The COMESA Court of Justice reviewed its arbitration rules in 2018 therefore replacing the Court's Arbitration Rules of 2003.[57] The COMESA's Arbitration Rules 2003 were not in line with best practice on international arbitration hence the need for its review.[58] This led to the formulation of the Arbitration Rules of the COMESA Court of Justice (2018). The rules provide the procedure for arbitration at the COMESA Court of Justice. This touches on aspects such as initiation of arbitration at the Court, composition of arbitrators, jurisdiction of the Arbitral Tribunal, conduct of proceedings, arbitral awards and costs.

The Comesa Court Arbitration Rules (2018) derive their power from Article 28 of the COMESA Treaty. Rule 2 of the Comesa Court Arbitration Rules (2018) gives parties' the liberty to determine the procedures and make modification to the rules as long as it is permissible under it. The arbitral Tribunal is selected from among the sitting judges of the Court by the President of the Court. The parties are accorded priority in deciding the number of arbitrators. If parties fail to agree, the President decides the number of arbitrators.

Rule 9 of the Comesa Court Arbitration Rules (2018) allows for the challenge of arbitrators for lack of impartiality or independence. However, Rule 9(2) of the Comesa Court Arbitration Rules (2018) requires the Judges to disclose any conflict of interest. Appointment of the arbitrators is provided under Rule 7 of the Comesa Court Arbitration Rules (2018). The arbitrators are selected from the judges who have been appointed to the court. They are assigned to the Arbitral Tribunal by the President of the COMESA Court of Justice. Parties agree on the number of arbitrators. The arbitrators and officers of the court are protected from liability as long as they were exercising their role in good faith.[59]

For the mode of service for notices, proposals have to be made personally as required under rule 3 of the Comesa Court Arbitration Rules (2018). If personal service is impossible, Rule 3 of the Comesa Court Arbitration Rules (2018) requires the party that is effecting the service to request the court to allow it to serve through the registered post, courier, facsimile or electronic communication.

Parties to arbitration have the freedom to designate the juridical seat for their arbitration proceedings. The Tribunal can also select the juridical seat if allowed by the parties. Any of COMESA's member states can be the juridical seat as provided by Rule 13 of the Comesa Court Arbitration Rules (2018). It is the role of the Tribunal to determine the locality of the seat in the member state that has been selected. The members of the Tribunal and the staff are protected from liability as long as they were exercising their role in good faith.

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56 Ibid No.54
57 COMESA, COMESA Court of Justice Holds Arbitration Rules Meeting <https://comesacourt.org/comesa-court-of-justice-holds-arbitration-rules-review-meeting/>lastly accessed on 24/04/22
58 Ibid No.57
59 Rule 7 of the Comesa Court Arbitration Rules (2018).

The form of pleading as provided under Rules 15 and 16 of the Comesa Court Arbitration Rules (2018) is the statement of claim and statement of defense. The pleadings can be amended as provided under Rule 17 of the Comesa Court Arbitration Rules (2018). Rule 19 of the Comesa Court Arbitration Rules (2018) provides the Tribunal with the power to rule on its jurisdiction which can be at the preliminary stage of its proceedings or at the end. It is through the pleadings that parties get to communicate their claim. If a party fails to communicate its claim to the respondent as required by the arbitral Tribunal, Rule 26 of the Comesa Court Arbitration Rules (2018) provides that the Tribunal can terminate the proceedings.

Rule 23 of the Comesa Court Arbitration Rules (2018) provides for conservative and interim measures of protection. The Tribunal can give interim measures it deems necessary depending on the matter in dispute. This touches on matters such as preservation of evidence or goods relevant to the resolution of disputes, maintaining the status quo, interim payments and providing security for costs. Rule 24 of the Comesa Court Arbitration Rules (2018) also provides for emergency arbitration as an interim measure. The President of the COMESA Court of Justice will appoint an emergency arbitrator.

Rule 25 provides for the appointment of experts to guide the Tribunal on specific issues. The Tribunal is required to give its decision within a period of sixty (60) days under Rule 29 of the Comesa Court Arbitration Rules (2018).

The award is in writing, final and binding on all the parties. Rule 30 of the Comesa Court Arbitration Rules (2018) provides that parties, by adopting the rules, have waived their right to appeal. After the award, a party, under rule 33, can request the Tribunal for interpretation of the award. This request must be made within thirty (30) days after a party has received the award. The Tribunal has forty-five (45) days within which to give the interpretation in writing. A party can also request for correction of an award within thirty (30) days if there are errors in computation, typographical, clerical or any other error. The Tribunal has thirty days to correct the error. Enforcement of the award is carried out under the national laws of the state as required under Article 40 of the COMESA Treaty. Rule 30 of the Comesa Court Arbitration Rules (2018) requires the parties to carry out the award without delay.

The Tribunal has a mandate under Rule 36 of the Comesa Court Arbitration Rules (2018) to fix the cost for arbitration. This touches on the fees for the Tribunal, logistical expenses such as travel expenses and cost for experts and legal representation.

Cost of the legal representation is awarded to the successful party. Under rule 37 of the Comesa Court Arbitration Rules (2018) cost of arbitration is borne by the unsuccessful party. However, the Tribunal will apportion the cost where it deems it reasonable based on the circumstance of the case. Parties can also agree before the dispute on who shall bear the cost after arbitration.In managing the cost, the Tribunal can request a party to deposit cost as provided under rule 38 of the Comesa Court Arbitration Rules (2018). A party under rule 39 of the Comesa Court Arbitration Rules (2018) can request for security for cost. The Tribunal will look at the prospects of success for the claim, ability of the claimant to comply with the cost awarded or if it is appropriate.

The Comesa Court Arbitration Rules (2018), coupled with other rules guiding procedures aid the COMESA Court of Justice in meeting its role as an international forum for arbitration. The law establishing the COMESA Court of Justice and its rules shows that it has parallel

jurisdiction with other regional and international arbitral courts and Tribunals. Parallel jurisdiction is mainly caused by similarity in economic activities and guiding instruments.[60]

3. Juxtaposing COMESA Court of Justice and the East African Court of Justice as Regional Arbitral Tribunals in Africa

Premised on the foregoing. it is clear there are similarities and differences between the COMESA Court of Justice and EACJ. The COMESA Court of Justice and EACJ as arbitral tribunals are similar in that both have jurisdiction to hear and determine disputes through arbitration between member states.[61]

The COMESA Court of Justice and EACJ as regional arbitral tribunals are also similar in that in arbitral proceedings before them judges operate as arbitrators.[62]

The COMESA Court of Justice and EACJ are also similar in that they both promote and uphold the finality of arbitral awards by limiting the appeal of the arbitral awards delivered.[63]

Lastly, the COMESA Court of Justice and EACJ as regional arbitral tribunals are similar in that they both provide for the challenge and replacement of arbitrators under their rules.[64]

However, despite these similarities, there are clear differences between the COMESA Court of Justice and EACJ as regional arbitral tribunals. The most significant difference between the COMESA Court of Justice and EACJ as regional arbitral tribunals is pegged on their jurisdiction. Unlike EACJ, the COMESA Court of Justice does not attend to arbitration between private parties and/or individuals.[65]

It is also apparent that the COMESA Court of Justice provides emergency arbitration services and EACJ does not.[66] EACJ has reduced costs of arbitration compared to the COMESA Court of Justice. This is because no fees is payable to the arbitrators in EACJ while fees is payable to arbitrators under the COMESA Court of Justice.[67]

4. Challenges being facing COMESA Court of Justice and the East African Court of Justice as Regional Arbitral Tribunals in Africa

The COMESA Court of Justice and EACJ as regional arbitral tribunals face a myriad of challenges to fulfilling their role as international regional arbitral tribunals which can be summarized as follows;

a) Existence of other well-established International Arbitration Institutions across the Globe;
b) Lack of or Inadequate Marketing;
c) Limited use of EACJ and COMESA Court of Justice by member states;
d) Perception of EACJ and COMESA Court of Justice as a Classic Courts rather than international regional arbitral tribunals and;
e) Varying Arbitration Legal Framework/Models governing the Member States.

60 Desire Kayihura,' Parallel Jurisdiction of Courts and Tribunals: The COMESA Court of Justice Perspective,' (2010) 36 Commonwealth Law Bulletin, page 583
61 See; Article 28 of the Comesa Treaty and Article 32 of the EAC Treaty
62 See; Rule 8 of the East African Court of Justice Arbitration Rules, 2012 and Rule 7of the Comesa Court Arbitration Rules (2018).
63 See; Rule 30 of the East African Court of Justice Arbitration Rules, 2012 and Rule 30 of the Comesa Court Arbitration Rules (2018).
64 See; Rule 17 of the East African Court of Justice Arbitration Rules, 2012 and Rule 9 of the Comesa Court Arbitration Rules (2018).
65 See; Article 28 of the Comesa Treaty and Article 32 of the EAC Treaty
66 See; Rule 24 of the Comesa Court Arbitration Rules (2018).
67 See; Rule 37 of the East African Court of Justice Arbitration Rules, 2012 and Rule 36 to 40 of the Comesa Court Arbitration Rules (2018).

5. Way Forward to Promote International Arbitration in COMESA Court of Justice and the East African Court of Justice as Regional Arbitral Tribunals in Africa.

For the EACJ and COMESA Court of Justice to be as effective as international arbitral tribunals in Africa, there is need to reform their administrative structure, amend their existing arbitral rules where necessary, and enact additional rules and regulations where necessary.

Succinctly stated; restructuring of the EACJ and COMESA Court of Justice should involve having a separate administration structure solely concerned with international arbitration of disputes.

This is by having regulations and rules enacted for the administration of the EACJ and COMESA Court of Justice as regional arbitral tribunals. The structure of the International Centre for Settlement of Investment Disputes as an international arbitral tribunal would offer the best guideline on how to restructure the EACJ and COMESA Court of Justice.

Further, there is need to amend the existing EACJ Arbitration Rules, 2012 and the Comesa Court Arbitration Rules (2018) to capture various seminal attributes. These include but are not limited to; the conduct of arbitrators and legal representatives, filing of documents, the constitution of the arbitral tribunal, emergency procedures, and law governing arbitration proceedings.

6. Conclusion

Over time globalization and an increase in foreign investment have led to the growth of commercial and investment disputes as different transacting parties interact with one another as they transact. Consequently, this has resulted in a demand for an effective dispute resolution mechanism that would solve these disputes.[68] Africa is not new to this reality.

The need for an effective, time-saving, reliable, and cost-effective mechanism has not only become desirable but also invaluable.[69] The existence of such a demand gap has made international arbitration as means of resolving disputes a viable and attractive mechanism. International arbitration has become the most preferred mechanism for settling international commercial and investment disputes.[70]

This presents an opportunity to institutions such as the EACJ and the COMESA Court of Justice as regional arbitral tribunals to exploit and enhance the growth of international arbitration practice in Africa.

Indeed, with the existence of institutions such as the EACJ and the COMESA Court of Justice as regional arbitral tribunals with jurisdiction over arbitration matters, the future is promising. All that is needed is to strengthen the capacity of these regional arbitral tribunals and address the challenges discussed above.

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68 Alternative Dispute Resolution Methods, Document series No. 14, page 2 (Harare Zimbabwe 11 to 15 Sept. 2000) available at <http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document14/DocSeries14.pdf> (accessed vide: Kariuki Muigua, Promoting International Commercial Arbitration in Africa page 1(Published in CIArb Kenya, Alternative Dispute Resolution Journal Volume 5, Number 2 2017) lastly accessed on 25/04/22

69 Ibid No. 68

70 Franck, S.D., "The Role of International Arbitrators," page 1. <https://www.international-arbitration-attorney.com/wp-content/uploads/Microsoft-Word-ILW-ILSA-Article.docsfranck2.pdf>lastly accessed on 23/04/22

Africa Continental Free Trade Area (AfCFTA): A Calamity or a Panacea for Investor-State Dispute Settlement Crisis in Africa

By Pressy Akinyi*

Abstract

While international investment has borne immense advantages for the Global South, it has dragged along its fair share of drudgery in form of the dreaded Investor-State dispute settlement (ISDS) which is gradually transcending into a crisis. Developing countries grapple with the unprecedented impact of International Investment Agreement (IIA) which have resulted in ISDS cases which in turn, highlight the crisis that threaten the sustainable use of ISDS in African States. With the equivocal and contradictory interpretations of ISDS Treaties, expensive arbitral costs, legitimacy issues which shed light on the deficiency of transparency and predictability of these processes, under-representation of African countries (among others) play a significant role in the stance taken against ISDS. On the other hand, there were expectations that Africa Continental Free Trade Area (AfCFTA) would offer redress to the ISDS crisis through its dispute settlement mechanism under Article 3(1) of the Protocol on Dispute Settlement. However, cogent arguments have been made to debunk this pipe dream and assert that by dint of AfCFTA's failure to provide clarity as to the use of ISDS by African Countries or its scope thereof, it potentially contributes to the ISDS menace that is already in existence in Africa. While this is the case, proponents of AfCFTA argue that all is not lost given the rapture of the upcoming Protocol on Investment which might provide for clarity pertaining the use of ISDS and eventually, aid in solving the crisis. This paper seeks to analyze the following issues.

1. Introduction

Investor-State dispute settlement crisis has not only permeated the investment landscape of developed states but also African countries.[1] Investor-State dispute settlement (ISDS) refers to a system where States can be sued by foreign investors for varying state actions which affect foreign direct investments (FDIs) in the form of international arbitration.[2] This arbitration system grants private parties the rights to sue a sovereign State through international investment agreements (IIAs) which were previously entered into by host

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1 Sornarajah, 'Starting Anew in International Investment Law' (2012) 74 Columbia University Libraries <https://academiccommons.columbia.edu/doi/10.7916/D8057Q6S> accessed on 15 February 2022.

2 Alan M Anderson and Ben Beaumont, *The Investor-State Dispute Settlement System: Reform, Replace or Status Quo?* 20 (2020).

State and the foreign investor (or the home State) and include bilateral investment treaties (BITs) or international trade treaties such as USMCA.[3] ISDS claims are normally subjected to rules of International Centre for Settlement of Investment Disputes (ICSID) or other international arbitral tribunals such as the International Chamber of Commerce (ICC), UNICTRAL Arbitration rules or London Court of International Arbitration (LCIA).[4]

There were expectations that Africa Continental Free Trade Area (AfCFTA) dispute settlement would resolve ISDS crisis in Africa but cogent arguments have been made against this.[5] Africa Continental Free Trade Area (AfCFTA Agreement) is the largest free trade area in the world that seeks to address the economic fragmentation experienced by African States by imposing measures to gradually reduce and eventually eliminate tariff and non-tariff barriers in trade.[6] African States have endorsed this Agreement as seen in their concurrence as signed by a majority of the states on March 2018 at the 10th Extraordinary Summit of the African Union: the agreement was entered into force in May 2019 following its ratification by 22 countries.[7] AfCFTA's estimated gross domestic product (GDP) is valued at US$3.4 trillion as its potential benefits are expected to alleviate poverty, contribute towards job creation and income distribution, economic empowerment of youth and women leading to the overall goal of trade liberalization.[8]

AfCFTA Agreement establishes the Protocol on Rules and Procedures on the Settlement of Disputes (DS Protocol) which provides for a legal framework for dispute settlement to be utilized by State Parties.[9] Article 3(1) of the DS Protocol provides for State-State dispute settlement,[10] and fails to make any mention of investor-state dispute settlement (ISDS) or provide a legal framework on the operationalization of ISDS.[11] This is problematic in the sense that State Parties have had a long history of ISDS in their cross-border trade transactions, both regionally and internationally: where majority of African countries are signatories to over 1000 Bilateral Investment Treaties (BITs) that prescribe ISDS as a means of conflict resolution.[12] This is seen in cases such as *ARB/15/29 Cortec Mining Kenya Limited*, *Cortec (Pty) Limited and Stirling Capital Limited and ARB/15/7WalAm Energy LLC from Kenya; ARB/00/4Salini Costruttori S.p.A. and Italstrade S.p.A* from Morocco and; *ARB(AF)/14/2Oded Besserglik* from both Mozambique and South Africa, among others.[13]

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3 Id 3.

4 United Nations Conference on Trade and Development (UNCTAD), 'Investor-State Dispute Settlement: UNCTAD Series on Issues in International Investment Agreement' (2014) < https://unctad.org/system/files/official-document/diaeia2013d2_en.pdf >accessed on 15th April 2022.

5 Dr. Kariuki Muigua, 'Investment-Related Dispute Settlement under the African Continental Free Trade Agreement: Promises and Challenges' (2020) p8-13 <http://kmco.co.ke/wp-content/uploads/2020/06/Investment-Related-Dispute-Settlement-under-the-African-Continental-Free-Trade-Agreement-Promises-and-Challenges-Kariuki-Muigua-June-2020.pdf> accessed 10 March 2022.

6 World Bank Group, 'The African Continental Free Trade Area: Economic and Distributional Effects' (2020) p11-15 <https://openknowledge.worldbank.org/bitstream/handle/10986/34139/9781464815591.pdf > accessed on 14 April 2022.

7 Id 7 p12.

8 Id 7 p12, 13.

9 Agreement Establishing The African Continental Free Trade Area (AfCFTA Agreement), Article 4.

10 Protocol on Rules and Procedures on the Settlement of Disputes (DS Protocol), Article 3(1). It stipulates that the Protocol shall only apply to disputes that arise between State Parties pertaining to their rights and obligations, see <https://www.tralac.org/documents/resources/african-union/2162-afcfta-agreement-legally-scrubbed-version-signed-16-may-2018.html#page=56. >accessed on 12 March 2022.

11 Muigua (n 3).

12 Ignacio Torterola and Bethel Kassa, 'Investor-state disputes in Africa' African Law and Business' (2019) <https://iclg.com/alb/9936-investor-state-disputes-in-africa> accessed on 9 March, 2022.

13 International Centre for Settlement of Investment Disputes, World Bank Group, Cases Data Base <https://icsid.worldbank.org/cases/case-database > accessed on 8 March 2022.

The use of ISDS by State Parties extends to Regional Economic Communities (RECs) which are the building blocks of AfCFTA,[14] where ISDS continues to be used cautiously an alternative means of conflict resolution.[15] For instance, even though Annex 1 of the Southern Africa Development Community (SADC) Finance and Investment Protocol has undergone amendments to limit the scope of foreign investors,[16] it preserves the right for Member States to entire into BITs which permit the use of ISDS but pursuant to conditions.[17] Further, BITs continue to be the governing law for investment related matters by African States[18] where in May 2017, 135 cases out of 613 cases that were brought under International Centre for Settlement of Investment Disputes (ICSID) involved African States: 45% were brought based on the State's consent.[19] More than half of the continent continue to engage in ISDS through ratification of various ISDS Conventions such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the 'New York Convention' which provides for ISDS framework.[20]

Against this backdrop, how then does AFCFTA DS under Article 3(1) which does not provide for an ISDS framework or any legal certainty in that respect, seek to resolve the overlap between these two types of arbitration? Could this therefore mean that in the absence of clear law to address not only the numerous overlapping BITs but also the dispute settlement mechanism, AfCFTA will be a further burden to the existing ISDS crisis? Given that Member States are already involved in ISDS and will continue to be involved owing to projected intra-regional and extra-regional trade within AfCFTA. Will AfCFTA address this legal challenge through the upcoming Protocol on Investment by providing an 'Africanized' ISDS arbitration to deal with the looming ISDS crisis, hence a panacea? This paper explores the above in three parts.

2. Investor-State Dispute Crisis in Africa

2.1 Historical context of the crisis

Sornarajah argues that a major contributor towards the ISDS crisis in Africa, is the Eurocentric model of BITs entered into by African countries as first instigated by European countries.[21] The first BIT was signed between France and Chad in 1960, followed by the German-Togo BIT signed in 1961, then the Switzerland-Niger BIT signed in 1962.[22] These paved way for numerous BITs between European States and (a) newly formed African countries that had obtained their independence and (b) colonizers that entered into BITs on behalf of these

14 Gerhard Erasmus, 'The meaning of building blocks for African integration is defined by the applicable legal instruments and subsequent practice' TRALAC <https://www.tralac.org/blog/article/15546-the-meaning-of-building-blocks-for-african-integration-is-defined-by-the-applicable-legal-instruments-and-subsequent-practice.html> accessed on 8 March, 2022.

15 L Paez, 'Bilateral Investment Treaties and Regional Investment Regulation in Africa: Toward a Continental Investment Area' (2017) Journal of World Investment and Trade 18, 379.

16 South African Development Community (SADC) Finance and Investment Protocol, Annex 1. The Preamble to the Amendment Agreement notes that prior provisions failed to adequately balance investor protection while securing the interests of the host States. It therefore limits such provisions, for instance, requiring exhaustion of domestic judicial remedies. However, it impliedly permits ISDS in BITs but pursuant to a set of conditions.

17 Lawrence Ngobeni, 'The Investor-State Dispute Resolution Forum under the SADC Protocol on Finance and Investment: Challenges and opportunities for effective harmonization' (2015) Law Democracy& Governance Journal Vol 19 < http://www.scielo.org.za/pdf/ldd/v19/09.pdf> accessed on 20 March 2022.

18 United Nations Economic Commission for Africa, 'Implications for Regional Integration' Investment Policies and Bilateral Investment Treaties in Africa <https://repository.uneca.org/bitstream/handle/10855/23035/b11559299.pdf?sequence=1&isAllowed=y> accessed on 25 March 2022.

19 Id 19.

20 United Nations Commission on International Trade Law, 'Arbitration Centres' <https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration/centres> accessed 10 April 2022.

21 Sornarajah M, 'The International Law on Foreign Investment' second edition Cambridge University Press 1.

22 Mmiselo Qumba, 'Africa and Investor-State Dispute Settlement: Mixed Reactions, Uncertainties and the Way Forward' (2021) South African Journal of International Affairs p.4.

African States.[23] African States were literally thrusted into a European model of BITs that were structured in a global economic order that would benefit the Europeans 'colonizers' and not the African States.[24] While African States were keen on concluding these BITs with a view to growing their economies, and adopting economic policies and plans that 'carved out regulatory economy' in favour of promotion of investment and protection standards.[25] Developed nations rode on these BITs to favour their economic position by advocating for principles such as free movement of capital out of African countries, protection against government expropriation and access to international arbitration (which is key to our discussion).[26] Further, authors such as Kinda Mohamadieh argue that African States were not permitted to attract FDI in the event they did not grant foreign investors rights to some aspect of independent adjudication: which is seen a form of subtle colonization.[27]

2.1.1 The current ISDS crisis in Africa

Albeit the popular use of ISDS by States across the world, including African countries, it has faced backlash from its users.[28] Scholars such as Makane Mbengue and Stefaine Schacherer argue that under-representation in international arbitration institutions and the lack of prioritization of Africa's issues in the policies constitute the consequences of the historical context of ISDS in Africa.[29] For instance, Onyema illustrates that even in cases where an African arbitrator sits in a panel (International arbitration institution such as ICSID) they are never the presiding officer or President of the Tribunal.[30] Furthermore, the United Nations Conference on Trade and Development (UNCTAD) attempts to unravel the causes of this backlash; inconsistent interpretation of treaty clauses, costly and lengthy procedures of arbitration, lack of transparency, political influence, institutional bias among other reasons.[31] In response to this, Mbegue and Schacherer advocate for the need of 'Africanisation' of international investment law and an Africanized dispute settlement that would be responsive to the needs of African States.[32]

South Africa, for instance, has backed away from the use of ISDS by declining to renew 12 BITs with European Union Member States in addition to establishing domestic legislation that nationalizes the governing of ISDS.[33] Tanzania and Morocco have followed suit by amending their legislations to exclude the use of ISDS.[34] Talkmore argues that African Countries have different approaches to ISDS which contributes to the crisis owing to lack of harmonization of these settlement disputes[35] which is key for the growth of AfCFTA. There were expectations hat

23 Id 23.
24 Talkmore Chidede, 'The Right to Regulate in Africa's International Investment Law Regime' Oregon Review of International Law 20, no. 1 (2019): 439. 'The Culture of Investment Arbitration: An African Perspective' (2019) ICSID Review-Foreign investment Law Journal 34, no. 2,413.
25 Qumba (n 73) p5.
26 Chidede (n 75) p4
27 Kinda Mohamadieh and Daniel Uribe, 'The Rise of Investor-State Dispute Settlement in the Extractive Sectors: Challenges and Considerations for African Countries' (2016) accessed on 2 May 2022.
28 Talkmore Chidede, 'Investor-state dispute settlement in Africa and the AfCFTA Investment Protocol' (2019) TRALAC <https://www.tralac.org/blog/article/13787-investor-state-dispute-settlement-in-africa-and-the-afcfta-investment-protocol.html > accessed on 26 February 2022.
29 Makane Mbengue and Stefaine Schacherer, 'The Africanization of International Investment Law: The Pan-African Investment Code and Reform of the International Investment Regime' The Journal of World Investment and Trade 18, no. 3 (2017): 401.
30 Emilia Onyema, 'African Participation in the ICSID System: Appointment and Disqualification of Arbitrators' ICSID Review-Foreign Investment Law Journal 34, no. 2 (2019): 466.
31 United Nations Conference on Trade and Development, 'Investment Policy Framework for Sustainable Development' (2015) 84 available at http://unctad.org/fr/PublicationsLibrary/diaepcb2012d5_en.pdf accessed 28th March, 2022) (hereafter UNCTAD IPFSD (2015)).
32 Id 32.
33 UNCTAD Investment Policy Hub available https://investmentpolicyhub.unctad.org/IPM/MeasureDetails?id=2828&rgn=&grp=&t=&s=&pg=&c=&dt=&df=&is Search=false accessed on 29 March, 2022.
34 Talkmore Chidede, 'Investor-state dispute settlement in Africa and the AfCFTA Investment Protocol' (2018) < https://www.tralac.org/blog/article/13787-investor-state-dispute-settlement-in-africa-and-the-afcfta-investment-protocol.html> accessed on 19 March 2022.
35 Id 35.

AfCFTA would not only harmonize the manifold bilateral treaties that African countries have been involved in, but that its dispute settlement would provide clarity and certainty to solve ISDS crisis.[36] However, its stipulation under Article 3(1) simply provides for a state-state dispute settlement and does not attempt to solve the ISDS crisis hence, it has been argued that it exacerbates an already recurring problem.[37]

African Countries are torn in between utilizing ISDS and retaining state-state arbitration. A number of States argue that the entire proceeding is expensive, given that a party seeking to simply lodge a claim will have to part with US$25 000104 as a non-refundable amount.[38] The Party must then pay a fee worth US$3 000 to the arbitrators on a daily basis which is exclusive of their travel and subsistence cost. These costly expenses dissuade African countries from engaging is ISDS as seen in the case of *Malicorp Limited v The Arab Republic of Egypt*, *ICSID Case No. ARB/08/18*,[39] where the Egyptian Government spent US$489000106 in arbitration proceedings, and in turn, has been keen on shunning ISDS as a result of this.[40] The costly expenditure is in addition to the long delays has a 'regulatory chill effect on African Governments' as African investment law experts assert.[41] Further, Notaras and Bartle relay their skepticism about ISDS owing to their technical nature and high costs surrounding arbitration as illustrated above, which they argue need dire reform.[42]

The possibility of incurring such high costs coupled with the long delays experienced when using the system had seen South Africa's Ambassador to the World Trade Organization Xavier Carrim, render his dissatisfaction with the system in relation to its legitimacy.[43] He questioned the legitimacy of the system regarding its failure to hear claims touching on public policy such as expropriation and regulation of sensitive industries in due time, and whether three individuals who are appointed on an ad hoc basis have capacity to hear these heavy matters.[44] The case of *Société Ouest Africaine des Bétons Industriels v Senegal*, *ICSID Case No. ARB/82/1* references the long delays that are prevalent in the system: the case was registered in November 1982 and was dragged for 5 years owing to resignation of two arbitrators and failure of tribunal to act efficaciously.[45] Such occurrences has predisposed South Africa's objection of ISDS by cancelling her investment treaties which are now regulated by domestic legislations and national courts.[46] This move was instigated by the case of *Foresti v South Africa (2007) Piero Foresti, Laura de Carli and others v Republic of South Africa (ICSID Case No. ARB(AF)/07/1)* where the claimant, Foresti (a company incorporated in Luxembourg) sued the South African Government for USD 340 million.[47] The claimant alleged that the respondent had infringed their mining rights through the legislative amendments in the mining charter that vested ownership of minerals in the State. The amendments also demanded percentages of

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36 Id 35.
37 Muigua (n 2).
38 Tsietsi Tsietsi T, 'International Commercial Arbitration: Case Study of the Experiences of African States in the International Centre for Settlement of Investment Disputes' (2013) International Commercial Arbitration 47:2 264.
39 Id 39.
40 Tsiesti (n 82) p 265.
41 Id 41.
42 A Notaras and J Bartle, 'Arbitration in Africa; High Stakes and big claims in resolving disputes', Legal Business, (July-August 2015), p. 104, at p. 108.
43 Carim X, 'International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa in Rethinking bilateral investment treaties critical issues and policy choices' (2016) 52.
44 Id 44.
45 Tsietsi (n 82) p267.
46 Carim (n 86) p53.
47 Foresti v South Africa (2007) Piero Foresti, Laura de Carli and others v Republic of South Africa (ICSID Case No. ARB(AF)/07/1).

shareholding by members of historically disadvantaged communities in respect to the mining companies as a means of compensation for infringement of their rights.[48] Even though the case was dismissed, it was indicative of an investor's ability to threaten the investment legislations and sovereignty of a State, prompting South Africa's move to bar ISDS.[49]

The suspension of the Southern African Development Community (SADC) Tribunal, following the judgement in *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe (2/2007) [2008] SADCT 2 (28 November 2008)*[50] bears the brunt of a faulty ISDS system that is not responsive to Member States. In this case, SADC Tribunal determined that the Government of Zimbabwe had illegally expropriated land. It is argued that the suspension of Southern African Development Community (SADC) Tribunal shortly after this judgment is attributable to failure to redress the overlaps in the dispute settlement.[51] Kudzai argues that the aftermath of this case is a quintessence of a faulty dispute settlement that can be rendered useless if it is not responsive to the needs of its users, he gives caution that AfCFTA needs to learn from past failures of African Regional Economic Communities' attempts at harmonizing a dispute settlement mechanism.[52]

The current ISDS crisis in Africa has been further exacerbated by cases such as *Process and Industrial Developments Limited v Federal Republic of Nigeria*[53] where the S$6.6billion award sparked backlash. Adekunbi argues that this case, for instance, illustrates all the problems that surround the use of ISDS. He argues that ISDS incur challenges such as the backdoor erosion of State's sovereignty when African countries participate as respondents in these proceedings, where he cites Bryan J in the case of P &ID, the arbitral judge downplayed the issue of Nigeria's sovereignty.[54] Gabrielle Kaufman-Kohle argues that many other African countries continue to be dissuaded by investor-state arbitration and hence, have resorted to re-evaluating their position and approaches to ISDS through international investment agreements such as BITs and varied chapters of Free Trade Agreements.[55]

2.1.2 Proliferation of Regional Economic Communities and Bilateral Investment Treaties

In an effort to fully maximize the economies of scale and draw profit margins from regional economic integration, RECs in Africa have developed their legal investment frameworks.[56] The Common Market for Eastern and Southern Africa (COMESA), Southern African Development Community (SADC) and Economic Community of West African States (ECOWAS) each have varying Protocols related investment which contributes towards the overlap in their various provisions.[57] For instance, States such as Madagascar, Democratic Republic of Congo and Malawi are parties to COMESA which has its own Investment Protocol: they are also Members

48 Id 48.
49 Id 48.
50 Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe (2/2007) [2008] SADCT 2.
51 Id 51.
52 Kudzai Mataba, 'Towards an Investment Dispute Resolution Regime for the African Continental Free Trade Area and Beyond' Faculty of Law University of Pretoria.
53 *Process & Industrial Developments Limited V Federal Republic of Nigeria and Ministry of Petroleum* Resources of the Federal Republic of Nigeria. Final Award is available to view at: https://pacer documents.s3.amazonaws.com/36/194469/04516479471.pdf.
54 For instance, in a ruling on the P & ID case (UK proceedings), Bryan J stated that he did not believe the fact that the defendant (Nigeria) was a sovereign state had any "real weight" and that Nigeria is a "litigant like any other litigant".
55 Gabrielle Kaufman-Kohler, 'Investor-State Dispute Settlement current framework and reform Options,' 5.
56 Paez L, 'Bilateral Investment Treaties and Regional Investment Regulation in Africa: Toward a Continental Investment Area' (2017) Journal of World Investment and Trade 18 394.
57 Id p 394.

of SADC which has its own Protocol and binds this Members at the same time.[58] In the event of an investment-related dispute which cuts across the RECs, Paez argues that would create a legal conundrum and is need of harmonization with the recent entry of AfCFTA.[59] For instance, The "Investment Agreement for the COMESA Common Investment Area" places reliance on domestic means of dispute settlement which is through the COMESA Court of Justice and only permits ISDS through ICSID processes and UNCITRAL upon agreement.[60]

On the other hand, ECOWAS, through the Regulation namely "The Supplementary Act Adopting Community Rules on Investment" concluded in 2008, provides for domestic dispute resolution through national courts and ECOWAS Court of Justice, it also provides for national mediation centers.[61] However, it makes no reference to ISDS.[62] SADC, on the other hand, through the Protocol on Finance and Investment provides for ISDS via domestic courts or tribunals of the host State.[63] South Africa was equally instrumental in advocating for its amendment.[64] International arbitration, in line with UNCITRAL rules, can be sought but after, exhaustion of the dispute settlement measures.[65] Furthermore, the Pan-African Investment Code (PAIC) which forms the guiding instrument on investment matters provides for arbitration through African arbitration institutions which mirrors UNCITRAL Arbitration rules which in itself is equally uncertain on the position of ISDS.[66]

In terms of BITs, there is a lack of harmonization regarding the numerous investment agreements that African States are party to.[67] African States have contributed towards the development of global investment law through the ratification of manifold multilateral and plurilateral agreements that regulate international investment. These include the World Trade Organisation (WTO) General Agreements on Trade in Services (GATS),[68] the WTO Agreement on Trade-Related Investment Measures (TRIMs),[69] the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA Convention). Key to our context, the ICSID Convention and the New York Convention. Furthermore, African States have been parties to numerous international investment agreements which harbour BITs and investment chapters of various Free Trade Agreements where a majority of these investment agreements had been concluded in early 2000s. African States had been involved in 897 BITs out of 2971 signed globally by December 2019, where 162 were intra-African BITs.[70] Hence, there is need for a dispute settlement that would be responsive to this 'spaghetti bowl' of BITs that African States find themselves in, to avoid a potential overlap of these laws. This paper argues that the 'system is broken' pertaining to ISDS given this fragmentation of investment laws that is in need of harmonization, especially now that there are efforts towards a single market. Authors such as Prof. Uche Ofodile cites the need for inclusion of a reformed ISDS under AfCFTA since it will

58 Id 58.
59 Paez (n 95) 395.
60 Paez (n 95) 396.
61 Paez (n 95) 397.
62 Paez (n 95) 410
63 Id 63.
64 Id 63.
65 Paez (n 95) 398.
66 Talkmore Chidede, 'Investor-state dispute settlement in Africa and the AfCFTA Investment Protocol' (2018) <https://www.tralac.org/blog/article/13787-investor-state-dispute-settlement-in-africa-and-the-afcfta-investment-protocol.html> accessed on 19 March 2022.
67 Mbengue (n 30) 461.
68 General Agreement on Trade in Services, Annex 1.
69 Agreement on Trade-Related Investment Measures, Annex 1A.
70 International Investment Agreement Database, UNCTAD< Error! Hyperlink reference not valid.> accessed on 14 May 2022.

provide for predictability as enunciated under the AfCFTA Preamble, in addition to being responsive to State Parties who already utilize ISDS.[71] He proceeds by arguing that African investors continue to use ISDS within Africa as seen in the cases of *Oded Besserglik v Republic of Mozambique ICSID Case No. ARB(AF)/14/2* and out of Africa as seen in the case of *Global Telecom Holding SAE vs Canada ICSID Case No. ARB/16/16*, hence there is need for a framework that will be responsive to their needs.[72]

Gaizzini argues that, given the increase in consciousness by African States regarding investment agreements as seen by the refusal of countries such as Cameroon and Nigeria (Cameroon-Canada BIT and Nigeria-Canada BIT) to instigate their BITs, this necessitates a study on how to accommodate investors while protecting States in order to curb this crisis.[73]

2.1.3 Attempted Reforms

Calls for reform can be dated back to the 1970s when scholars such as Akiwumi noted the overlap between various investment laws at national and sub-regional levels and their role in impeding economic development.[74] There have been attempted efforts aimed at reforming the ISDS system to address past legitimacy concerns as seen in July 2017 when Member States of the United Nations Commissions on International Trade, including African countries, came up with the Working Group III.[75] The discussions that led up to the formation of the Working Group III were significant since they tethered around factors that undermine ISDS which African States had confronted; length and costs of investment arbitration; structural inadequacies of ad hoc adjudicatory bodies from their bias against developing countries to the inequality in representation; foul interpretation of treaties; lack of impartiality and independence of investment arbitrators, among other reasons.[76]

However, the Working Group's failure to address the ISDS crisis is palpable since African countries are still grappling with ISDS challenges, as seen in their collective efforts to revamp ISDS on their own through the establishment of Pan-African Investment Code (PAIC). This is the first elaborative investment treaty model in Africa meant to Africanize international investment law and the dispute resolution mechanism by extension to respond to African's needs.[77] The challenge is that it does not solve the ISDS crisis in relation to investor-state dispute matters given that different States have different opinions on the same. Qumba argues that its provision pertaining to investment dispute settlement was the only provision where Member States could not reach a consensus owing to varied positions on the same.[78] On the

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71 Prof. Uche Odofile, 'The African Continental Free Trade Area and Investor State Arbitration: What Can Investors Expect and Why?' (2019) University of Arkansas School of Law <http://arbitrationblog.kluwerarbitration.com/2019/09/25/the-african-continental-free-trade-area-and-investor-state-arbitration-what-can-investors-expect-and-why/> accessed on 15 March 2022.

72 Id 72.

73 T Gazzini, 'Nigeria and Morocco move towards a "new generation" of Bilateral Investment Treaties', EJIL, (May 2017) <https://www.ejiltalk.org/nigeria-and-morocco-move-towards-a-new-generation-of-bilateral-investment-treaties/> accessed on 11 March 2022.

74 The World Bank Annual Report (2017).

75 UNCTAD's 'Investment Policy Framework for Sustainable Development,' (2015) <Error! Hyperlink reference not valid. > accessed on 12 May 2022.

76 Id 76.

77 Mmiselo Qumba, 'Africa and Investor-State Dispute Settlement: Mixed Reactions, Uncertainties and the Way Forward' (2021) South African Journal of International Affairs p 5.

other hand, there are a number of countries that envision the benefit of ISDS and were hell-bent on its inclusion in PAIC (even though moderately) in a way that would not be deleterious to Member States.[79] Authors such as Dr.Muigua argues that while reforms to address ISDS may have been considered through PAIC,[80] the ISDS crisis has been resolved yet.[81] Hence, there is need for a legal framework under AfCFTA that would be responsive to the ensuing ISDS crisis in Africa.

3. The Role of Africa Continental Free Trade Area in ISDS Crisis

3.1 Africa Continental Free Trade Area: A calamity?

Against the backdrop of ISDS crisis in Africa, there were expectations that AfCFTA would resolve this menace by introducing an 'Africanized' approach to international investment law and by extension, investor-related dispute settlement that would be responsive to African States.[82] However, cogent arguments have been made regarding AfCFTA dispute settlement mechanism which is not responsive to the ISDS issues that African countries continue to grapple.[83] Article 3(1) of the DS Protocol provides for state-state arbitration and fails to consider the unique dynamics of African investor-state legal framework which is in need of harmonization. Therefore, the omission of investor-state arbitration leads to manifold legal issues 'legal conundrum' which are addressed below.

3.1.1 Legal Conundrum as a Result of Numerous Bilateral Investment Treaties that provide for Investor-State Arbitration

AfCFTA under Article 3(1) of DS Protocol provides for state-state arbitration. On the other hand, the manifold BITs which State Parties continue to subscribe to provide for investor-state arbitration. The legal conundrum occurs in the event two State Parties have signed a bilateral investment treaty that permits use of international arbitration (such as ICSID) and one party reneges by seeking reprieve under AfCFTA DSM, would the latter dispute settlement trump the use of international arbitration?[84] For instance, the Morocco-Nigeria Bilateral Investment Treaty endorses an investor-state dispute settlement mechanism albeit cautiously, with the pre-requisite conditions where investors must be involved in consultations and negotiations and further exhaustion of local remedies before taking to international arbitration.[85]

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78 Mmiselo Qumba, 'South Africa's Move Away from International Investor-State: A Breakthrough or Bad Omen for Investment in the Developing World?' Dejure Law Journal 52, no. 2 (2019): 370.

79 Makane Moise Mbengue and Stefanie Schacherer, 'Africanization of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime' 18 J. WORLD I NV. & TRADE 414, 447–48 (2017).

80 Pan-African Investment Code, Article 42.

81 Muigua (n 2).

82 Mbengue (n 80).

83 Talkmore Chidede, 'Substantive Issues the AfCFTA Investment Protocol Should Address' Trade Law Centre, 27th March 2020 <https://www.tralac.org/blog/article/14468-substantive-issues-the-afcfta-investment-protocol-should-address.html.> accessed on 12th May, 2022.

84 Kariuki Muigua 'Investment-Related Dispute Settlement under the African Continental Free Trade Agreement: Promises and Challenges' (2020) <http://kmco.co.ke/wp-content/uploads/2020/06/Investment-Related-Dispute-Settlement-under-the-African-Continental-Free-Trade-Agreement-Promises-and-Challenges-Kariuki-Muigua-June-2020.pdf> accessed on 10 May 2022.

85 Morocco-Nigeria BIT (2016), Articles 26.1 and 26.5.

Both Morocco and Nigeria are State Parties to AfCFTA, in the event that there is a trade dispute and Morocco seeks reprieve through the international arbitration as provided for in the BIT while Nigeria seeks reprieve through AfCFTA DSM: how would this be resolved given that AfCFTA DSM Protocol does provide clarity as to this overlap.[86] Moreover, Dr. Muigua cites the possibility of an overlap between old intra-African BITs and the new regional Investment Agreements that are being entered into by African Countries, which even AfCFTA does not create clarity, which may lead to more problems.[87] UNCTAD World Investment Report also cited the possibility of an overlap of provisions from layering of different treaties which require dire reform.[88] There is need for revamping of ISDS in Africa to only meet global standards but deal with the loopholes which cripple ISDS since African states utilize it.

Second, in the absence of clarity, a corollary issue is raised as to whether AfCFTA dispute settlement board (DSM) can overrule a decision made by an international arbitral body in the event that Morocco and Nigeria agree to seek the services of the arbitral body, under the guise of regional expertise.[89] This is crucial in informing jurisdictional issues that may occur as a result of a State-Party opting for DSM while another investor-state dispute settlement, as I have illustrated above. Third, hierarchical issues are brought out pertaining to which settlement dispute mechanism is binding or more superior in the event of an overlap. Conventional practice shows that in such a situation, the latter party would be directed to exhaust all remedies before approaching the dispute settlement board but, in our instance, AfCFTA DSM does not give clarity as to the need of exhaustion of local remedies. Even if one would argue that AfCFTA DSM reigns supreme to international arbitration, what then does this mean for the relationship between international arbitration institutions and AfCFTA DSM? Consequently, floodgates will be open as a result of this: could State Parties revoke their past decision which were passed by international arbitration institutions and gain a fresh hearing from AfCFTA DSM (after all, it is superior to other arbitration bodies). Would this then taint the relationship between African Countries and its trade partners under different BITs which endorse investor-state arbitration and consequently, what would this mean for the future of AfCFTA which is solely based on trade?

In the absence of clarity, this legal conundrum is likely to occur given that according to the United Nations Economic Commission for Africa, Bilateral Investment Treaties (BITs) remain the leading governing law for investment related matters that have seen African States garner 853 BITs (157 intra-African and 696 with the rest of the world).[90] Talkmore Chidede argues that that there is need for a clear, definite, transparent legal and institutional framework that would be crucial in attracting foreign investment in AfCFTA.[91] He proceeds to suggest that AfCFTA Protocol on investment should be responsive to this by ensuring that barriers to investment entry are dealt with; from legal barriers such as fragmented legal framework; effective dispute settlement mechanisms; investment regulatory frameworks.[92]

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86 Muigua (n 82).
87 Muigua (n 2).
88 United Nations Conference on Trade and Development (UNCTAD), The World Investment Report 2017 (WIR17), 130.
89 Muigua (n 10).
90 United Nations Economic Commission for Africa. 'Investment Policies and Bilateral Investment Treaties in Africa' <https://www.uneca.org/sites/default/files/PublicationFiles/eng_investment_landscaping_study.pdf > accessed on 23 April 2022.
91 Talkmore Chidede, 'Leveraging AfCFTA as an investment incentive for Africa', Trade Law Centre Annual Conference, (2020) pp 1, 2 <https://www.tralac.org/documents/events/tralac/4096-2020-annual-conference-two-pager-chidede-leveraging-the-afcfta-as-an-investment-incentive-for-africa/file.html> accessed 27 February 2022.
92 Chidede (n 36).

3.1.2 Legal Conundrum as a result of different Regional Economic Communities

AfCFTA under Article 3(1) of the DS does not solve the crisis surrounding Regional Economic Communities (RECs) in Africa where on one hand, there are RECs that have repudiated the use of ISDS, and on the other hand, there are RECs that are accommodative towards the use of ISDS. Instead of resolving this, AfCFTA DS Protocol simply provides for a state-state dispute resolution and does not provide clarity as to the ISDS means of dispute resolution.

Regional Economic Communities in Africa are undoubtedly the building blocks upon which AfCFTA is hinged[93] and intends to 'preserve the acquis' and provide a vista upon which Member States shall build their regional initiatives.[94] While RECs such as SADC do not endorse ISDS, there have been arguments that others such as ECOWAS and COMESA are said to be cautiously accommodative regarding the use of investor-state arbitration.[95] For instance, ECOWAS, under Article 33 of ECOWAS Supplementary Act[96] and Article 36 of ECOWAS Protocol on Energy[97], provide for pre-requisite conditions for claims to arbitration in the event a State Party intends to use other forms of amicable settlement dispute mechanisms 'ISDS'. The same is seen under Article 27 of COMESA Common Investment Agreement[98] and Article 29 of SADC Model Bilateral Investment Agreement.[99] These pre-requisite conditions that permit ISDS include; investors must issue a notice to initiate arbitration proceedings and must adhere to a minimum time frame of three to six months pursuant to the issuance of the notice, before initiating any proceedings.[100] This period allows parties to make efforts in reaching an amicable settlement of disputes.[101]

Further, COMESA Common Investment Agreement and SADC Model BIT places a time limitation of three years to submit a claim, from the date the investor first acquired knowledge of the breach.[102] SADC Model BIT additionally encourages investors to exhaust local remedies before pursing international arbitration.[103] Another feature that endorses the cautious use of ISDS in these Regional Economic Communities is the insistence on transparency during these arbitral proceedings where under ECOWAS Supplementary Act, all procedural and substantive oral hearings are required to be made public.[104] This is in conjunction with COMESA Common Investment Agreement and SADC Model BIT where further publication of pleadings, evidence submitted and decisions are to be publicized.[105]

In a nutshell, it can be argued that these RECs permit the cautious use of ISDS, while on the other hand, AfCFTA does not endorse the same under Article 3(1) of DS Protocol.[106] Hence, there is a potential overlap between created. Take for instance, a State Party affiliated to COMESA and AfCFTA such as Kenya is involved in an investor-related dispute with Rwanda.

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93 AfCFTA, Article 5.
94 AfCFTA, Articles 3 and 5. The Abuja Treaty in 1991 already envisioned a gradual establishment of an African economic community built on the efforts of harmonization of the regional economic communities.
95 UNCTAD, 'IIA Issue Note, Reforming Investment Dispute Settlement: A Stocktaking' <https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d3_en.pdf> accessed on 25th April 2022.
96 ECOWAS Supplementary Act, Article 33.
97 ECOWAS Protocol on Energy, Article 26.
98 COMESA Common Investment Agreement, Article 27.
99 SADC Model BIT, Article 29.
100 For instance, under COMESA, COMESA Common Investment Agreement, Article 26; Amended Annex 1 SADC FIP, Article 28.
101 COMESA Investment Agreement, Article 26.
102 COMESA Common Investment Agreement, Article 28.2; SADC Model BIT, Article 29.4b.d.
103 SADC Model BIT, Article 29.4.b.i
104 ECOWAS Supplementary Act, Article 34.
105 COMESA Common Investment Agreement, Article 28.5 and 28.6; SADC Model BIT, Article 29.17.
106 AfCFTA Treaty, Article 2; Protocol on Rules and Procedures of Settlement of Disputes, Article 3.

Both parties have subscribed to COMESA Common Investment Agreement which provides for ISDS. Kenya, in resolving the disputes, seeks recourse from AfCFTA DSB created under Article 20 of AfCFTA Treaty, Rwanda uses international arbitration as per the investment agreement, how would this legal debacle be resolved? In the event AfCFTA DSB assumes authority in this respect, would this undermine the stipulations of COMESA Common Investment Agreement and in furtherance, denigrate COMESA's ability in adjudicating multifaceted conflicts? Nyombi and Mbegue endorse the need for a clear legal framework by denoting the overlap that exists between the dispute settlements in manifold Regional Economic Communities (RECs) and AfCFTA.[107] Further, Markowitz buttresses the need for harmonization of regional investment laws including a dispute resolution settlement that would be responsive to investors needs while enabling them have a wider access to a range of skills and resources that will be key in forming regional value chains.[108]

3.1.3 Legal Conundrum as a result of intervention of Government of a State Party

This paper concurs with Dr.Kariuki's frustration in pre-empting a legal debacle that would occur when a State Party (Kenya) and an investor from another State Party (Exxon Mobile in Nigeria) have consented to international arbitration (ICSID) in their investment agreement, but the Government of the Investor (Government of Nigeria) intervenes and instead, takes the matter to AfCFTA DSM.[109] AfCFTA DSM under Article 3(1) is not responsive to such a situation by omitting to provide clarity regarding the use of ISDS by Member States which leads to such a legal conundrum. J Seifi proceeds to point out this potential legal conundrum by stating that there is lack of clarity regarding the way forward as per the ambiguous stipulation of Article 3 of the Protocol.[110] Furthermore, authors such as Olabisi Akinkugbe argue that business actors within and out of Africa usually take to non-litigious means of dispute settlement while Governments tend to be hesitant in bringing matters before an international court and would rather exhaust its domestic means.[111] There is a critic as to why the drafters of the Protocol imagined that the reluctance of both business actors and Government would be any different in this treaty.[112]

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107 Nyombi C, 'A Case for a Regional Investment Court for Africa' (2018) 43 N.C. J. Int'l L. 68, 3. Mbengue M' 'Special Issue: Africa and the reform of the International Investment Regime' (2017) Journal of World Investment and Trade, pp 372.

108 Markowitz C & Langalanga, 'The Rise of Sustainable FDI: Emerging Trends in the SADC Region' 2017 World Commerce Review.

109 Kariuki Muigua 'Investment-Related Dispute Settlement under the African Continental Free Trade Agreement: Promises and Challenges' (June 2020) p8 <http://kmco.co.ke/wp-content/uploads/2020/06/Investment-Related-Dispute-Settlement-under-the-African-Continental-Free-Trade-Agreement-Promises-and-Challenges-Kariuki-Muigua-June-2020.pdf> accessed on 6 March 2022.

110 For instance, see, J Seifi, 'Investor-State Arbitration v State-State Arbitration in Bilateral Investment Treaties' (2004) 1 Transnational Dispute Management (TDM) <Error! Hyperlink reference not valid. >accessed 26 February 2022.

111 Olabisi D Akinkugbe, 'What the African Continental Free Trade Agreement Protocol on Dispute Settlement says about the culture of African States to Dispute Resolution' African International Economic Law Network (April 9, 2019) <https://www.afronomicslaw.org/2019/04/09/what-the-african-continental-free-trade-agreement-protocol-on-dispute-settlement-says-about-the-culture-of-african-states-to-dispute-resolution/> accessed on 18 March 2022.

112 James Gathii (n 30).

3.1.4 Legal Conundrum as a result of Exhaustion of Judicial Domestic Remedies

There is lack of clarity as to the legal recourse when a State Party in a dispute with another State Party under AfCFTA, decides to exhaust local remedies as per the bilateral treaty agreement, while the other party seeks reprieve from AfCFTA DSM. For instance, in the Morocco-Nigeria BIT permits exhaustion of domestic judicial remedies in the event of a dispute.[113] If Morocco and Nigeria are involved in a dispute and one of the State Parties takes to AfCFTA DSB, the other places insistence of local remedies, there shall be a legal debacle as to whether the decision rendered in AfCFTA DSB or the local courts in either states is enforceable.[114] There is need for the Protocol on Investment to create a synergy between exhausting local remedies alongside the need to adhere to AfCFTA DSB.

3.1.5 The Practical Challenges that Emerge as a result of the Legal Implications

This paper argues that these legal issues spill over into practical challenges that will undermine the future of AfCFTA. First, it is commonplace that AfCFTA is hinged on trade, given that it intends to cover a market of 1.2 Billion People and a gross domestic product of $ 2.5 trillion across the 55 Member States of African Union.[115] With the expected growth of intra-regional and extra-regional trade, foreign direct investment is expected to take an upward trajectory between State Parties.[116] Nyombi argues that foreign direct investment (FDI) is crucial for Africa's economic growth and self-determination.[117] Mbegue enunciates this line of argument by citing foreign investment as the key to a productive economy which generates employment opportunities while providing a massive landscape for higher per capita incomes.[118] AfCFTA is expected to attract an efficiency-seeking and a market-ready foreign direct investment following its economic growth, reduction of tariffs and non-tariff barriers including establishing proper governance structures including its dispute resolution mechanism.[119]

Countries such as Mexico have experienced a sharp rise in foreign direct in investment since becoming a part of NAFTA (North American Free Trade Agreement) from $US 12 billion in early 1990s to $US 54 in 2000-2003.[120] Kumar argues that quantitative studies have shown that there is a strong co-relation between Regional Trade Agreements (RATs) and high FDI inflows between states.[121] Against these prospective expectations, comes with anticipated investor-state disputes which require an efficient and responsive dispute settlement framework. Talkmore argues that one of the objectives of AfCFTA agreement is to provide a vista for "*settlement of disputes*" and has further delineated that it shall be central in "*providing security and predictability to the regional trading system*".[122] However, J. Seifi

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113 Morocco-Nigeria BIT (2016), Articles 26.1 and 26.5.
114 Morocco-Nigeria BIT (2016).
115 David Luke, 'Making the Case for the African Continental Free Trade Area,' (2019) Afronomicslaw <https://www.afronomicslaw.org/2019/01/12/making-the-case-for-the-african-continental-free-trade-area-2> accessed on 1 March 2022.
116 World Bank, 'The African Continental Free Trade Area' (2020).
117 Nyombi C, 'A Case for a Regional Investment Court for Africa' (2018) 43 N.C. J. Int'l L. 68.
118 Mbengue M, 'Special Issue: Africa and the reform of the International Investment Regime' (2017) Journal of World Investment and Trade, pp 372.
119 Talkmore Chidede, 'Substantive Issues the AfCFTA Investment Protocol Should Address' Trade Law Centre, 27th March 2020 <https://www.tralac.org/blog/article/14468-substantive-issues-the-afcfta-investment-protocol-should-address.html.> accessed on 26 March 2022.
120 Kose, M. Ayhan, Guy Meredith and Chris Towe, 'How has NAFTA affected the Mexican Economy? Review and Evidence' (2004) IMF WP/04/59.
121 Kumar, Nagesh (2000), 'Explaining the Geography and Depth of International Production: The Case of US and Japanese Multinational Enterprises' Weltwirtschaftliches Archive (Review of World Economics, Kiel), 136(3) 2000: 442-77.
122 Agreement Establishing the African Continental Free Trade Area, Article 4.

argues that intra-state dispute settlement mechanism provided for under the DS Protocol is not responsive to the needs of FDI and warrants modification in the upcoming Protocol on Investment.[123] This paper argues that given these gains from foreign direct investment, there is need for an efficient dispute resolution mechanism is fundamental in ascertaining investors of their security and in knowledge that in the event of a dispute, it shall be resolved in a fair and by a 'neutral forum'.[124]

Further, there is need to highlight the legal and practical problems that come with the replication of WTO institutional framework AfCFTA DSM is a different entity in comparison to WTO. James Gathii argues that there could be a potential overlap in the transplantation of WTO rules on to AfCFTA dispute settlement mechanism since investors or business actors in State Parties may prefer not to be tied to African international trade courts and instead opt for a non-judicial resolution.[125] How then will the current legal framework under Article 3 respond to this debacle if it lacks a clear and definite stipulation? Secondly, he pinpoints the stark institutional difference that exists between WTO and AfCFTA that the latter is not exclusively a dispute resolution system and hence, cannot operate like the former.[126]

4. Conclusion and Recommendations

Finally, this paper concludes that Article 3(1) of DS Protocol's failure to provide for an ISDS mechanism or address it, contributes towards the existing ISDS crisis in Africa. However, all is not lost. This paper's findings illustrate that this crisis can be salvaged through the upcoming AfCFTA Protocol on Investment which is expected to take on a Third world approach to international (investment) law (TWAIL), as shall be explained below.

4.1 Recommendations

4.1.1 The Protocol on Investment

This paper concludes that the upcoming Protocol on Investment is the proverbial 'last sling' that can solve the ISDS crisis in Africa. Therefore, it agrees with Qumba and recommends that there is need for the Protocol on Investment to address the ISDS crisis that has emerged as a result of the fragmented investment legal frameworks as a result of numerous BITs, Regional Treaties with varying investment provisions and domestic legislations with transnational implication on foreign investment.[127] This is an opportunity for the drafters of the AfCFTA Protocol on Investment to address these legal overlaps and inconsistencies that constitute an ISDS crisis and rectify the implications of Article 3 of DS Protocol, from an African outlook.[128]

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123 For instance, see, J Seifi, 'Investor-State Arbitration v State-State Arbitration in Bilateral Investment Treaties' (2004) 1 Transnational Dispute Management (TDM) <https://www.transnational-dispute- management.com/article.asp?key=112> accessed 26th February 2022.

124 Sornarajah M "The International Law on Foreign Investment" second edition Cambridge University Press 7, p 250.

125 James Gathii, 'Evaluating the Dispute Settlement Mechanism of the African Continental Free Trade Agreement', African International Economic Law Network, (2019) https://www.afronomicslaw.org/2019/04/10/evaluating-the-dispute-settlement-mechanism-of-the-african-continental-free-trade-agreement accessed on 25 April 2022.

126 Id 126.

127 M.F. Qumba, 'South Africa's Move Away from International Investor-State: A Breakthrough or Bad Omen for Investment in the Developing World?' Dejure Law Journal 52, no. 2 (2019): 370.

128 Id 128.

4.1.2 Means of Reform

Qumba argues that there are numerous options exposed to the drafters of the Protocol on Investment. First, ISDS can be provided for in conjunction to state-state arbitration.[129] Given the varying trajectory taken by African States regarding incorporation of ISDS and State-state arbitration, there are recommendations (which this paper endorses) that the Protocol on Investment should encompass features that are in the SADC Protocol on Finance and Investment and South African Protection of Investment Act.[130] This is in regards to the exhaustion of local remedies as a first recourse, then utilization of ISDS approach can be instigated: this will create a responsive dispute settlement that balances the interests of State Parties. Susan Franck argues that this is the best way to curb ISDS crisis in Africa since it will present a balanced means of approaching the dispute resolution in the scanty BITs, Multilateral Agreements in RECs and Plurilateral Agreements entered into my African states.[131] It will also serve as a means of reducing political opposition to ISDS while providing investors with access to ISDS in the event domestic remedies are inadequate.[132]

In order to deal with the overlaps and inconsistencies regarding ISDS, Katrin and Lisa Agutu recommend that African States should develop model clauses which will be incorporated into the Protocol on Investment, which contain provisions requiring the exhaustion of negotiations and/or conciliations before resorting to domestic litigation of ISDS.[133] Further, to counter issues related to transparency, these investment aspects that should be featured in the Protocol on investment include; setting limitations on the standing of foreign investors to bring ISDS claims; making it mandatory for public notices of ISDS complaints; ensuring public participation in ISDS proceedings and importantly, making it mandatory for ISDS awards to be public.[134]

To counter the challenge of costs, this paper concurs with Chidede's recommendation that the Protocol on Investment should contain clauses in respect to interim measures that create budgetary limits on the costs of ISDS, while addressing lengthy adjournments by stipulating specific timelines for the procedures.[135] Further, the procedural rules can be modified to provide for stay of ISDS Proceedings to permit state-state settlement where State Parties would wish for the alternative.[136]

This paper concurs with Uche Ofodile's recommendation that, that the Protocol on Investment can create a multilayered approach to solving ISDS challenges regarding absurd or unjust decisions by creating bilateral challenge committees.[137] These committees can be tasked with the mandate of hearing challenges to ISDS decisions on grounds such as denial of due process, since it will allow African States to redress the limitations that result because of ISDS while avoiding problems that may arise as a result of its rejection.[138]

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129 Qumba (n 150) p 370.
130 Id 130.
131 Susan Franck, 'Development and Outcomes of Investment Treaty Arbitration' (2009) Harvard Journal of International Law 50, no. 2:81.
132 Id 132.
133 Katrin Kuhlmann and Lisa Agutu, 'The African Continental Free Trade Area: Toward a new model for trade and Development' (2020)Georgetown Journal of International Law 51, no. 4:31.
134 Kuhlmann, Agutu (n 149).
135 Talkmore Chidede, How can the AfCFTA Investment Protocol advance the realisation of the AfCFTA objectives, <https://www.tralac.org/blog/article/14065-how-can-the-afcftainvestment-protocol-advance-the-realisation-of-the-afcfta-objectives.html > Accessed on 30 April 2022.
136 Id 136.
137 Uche Ofodile, 'Dispute Settlement under the Continental Free Trade Agreement: What do Investors need to know?' (2019) <http://arbitrationblog.kluwerarbitration.com/2019/09/29/disputesettlement-under-the-african-continental-free-trade-agreement-what-do-investors-need-toknow/ > accessed on 10 May 2022.
138 Id 138.

In order to ensure uniformity and consistency of investment legal framework, there will be need for consistent monitoring of the Protocol on Investment to ensure that its provisions are adopted and implemented regarding its interpretation by domestic courts and ISDS tribunals.[139] This is in addition to a regular evaluation of national policies and laws related to investment of different State Parties, to ensure that they comply with the provisions of the Protocol on Investment.[140]

Lastly, this paper asserts that, if these recommendations are taken into account, AfCFTA will play a significant role in addressing ISDS crisis and this will contribute to its efficacy and longevity.

139 Qumba (n 156).
140 Id 140.

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ISBN 978-9914-40-777-8

Nairobi Centre for International Arbitration
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