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ALTERNATIVE DISPUTE RESOLUTION JOURNAL

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EDITORIAL TEAM

Volume 3 **Number 3** **2023** **ISBN No. 978-9914-40-777-8**

EDITOR'S NOTE

We invite readership of the Alternative Dispute Resolution Journal Vol. 3 No. 3 2023, a publication of the Nairobi Centre for International Arbitration (NCIA). The Journal provides a platform for scholarly dialogue on pertinent issues relating to Arbitration and Alternative Dispute Resolution (ADR).

This journal series offers insights and perspectives into the practice of third-party funding (TPF) within international arbitration, discussing the concept of TPF as juxtaposed with similar common law doctrines of maintenance and champerty as well as making a case for the operationalization and regulation of TPF in Kenya while analyzing the widely circulated decision in the Essar vs Norscot case which has played an instrumental role in providing a foundational framework for the instigation of TPF in Kenya.

As the world's attention is drawn to renewables and reduction in carbon emission, this Journal explores the relationship between Environmental, Social and Governance (ESG) and arbitration. A strong case is made that arbitration represents a viable mechanism for managing ESG-related disputes while simultaneously promoting ESG tenets.

Other pertinent issues in this Journal include: an analysis of the arbitrability of corruption-tainted investment contracts in investor-state arbitration proceedings and examining the requisite standard and burden of proof to be employed by arbitral tribunals. Follows an in-depth consideration of the place of international Arbitration in driving globalization, the sanctions regime, the impact of economic sanctions on international arbitration, cross-border enforcement of foreign arbitral awards in the context of economic sanctions as well as recommendations on enforcement of foreign arbitral awards. Particular attention has been given to the HCCH 2019 Judgments Convention from an East African perspective while noting how the Convention provides a promising framework for the recognition and enforcement of foreign judgments.

On due process, it has been posited in this Journal that while the arbitral tribunal should be fair to the parties it must not sacrifice all efficiency to accommodate *unreasonable* procedural demands by a party.

The reader will also find interesting perspectives on ADR from an oft neglected topic of Counterterrorism. The article advances an ingenious discourse for a case for rehabilitative justice which is achievable when offenders in particular types of cases (offenses that are ideological and psychological in nature such as terrorism) are subjected to ADR mechanisms at the earliest instance as a "*Preventive Measure or Pre-emptive Strategy*" in Countering Violent Extremism.

This Journal offers perspectives from distinguished Authors on ADR mechanisms together with some 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
October 2023

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THIRD PARTY FUNDING AS AN INNOVATIVE SOLUTION TO ALTERNATIVE DISPUTE RESOLUTION FINANCING

By Dr. Kenneth Wyne Mutuma, PhD[1]

Abstract

The use of third party funding (TPF) in alternative dispute resolution (ADR) has been hailed for its ability to promote access to justice for parties with limited financial resources and to manage risk. While this innovative solution has the potential of enhancing inclusivity in the justice process, the practice is faced by legal and ethical challenges. This article examines the practice of TPF within international arbitration. It begins by discussing the concept of TPF as juxtaposed with similar common law doctrines of maintenance and champerty. It also assesses the legal and regulatory framework governing TPF across different jurisdictions and the components of a TPF contract. The article is based on a review of a variety of academic literature including books and articles on the subject. By investigating the viability of TPF in dispute resolution, this article seeks to contribute to the growing discourse on the use of TPF in ADR processes. It highlights the challenges affecting the practice as well as the ethical considerations that have arisen; and concludes by making recommendations for reform that may be adopted to ensure that third party funding is used effectively in arbitration proceedings as well as other forms of ADR.

Key words: *third party funding*, *international arbitration*, *access to justice*, *maintenance*, *champerty*

1. Introduction

The emergence, growth and entrenchment of third party funding (TPF) in international arbitration remains controversial notwithstanding its increasing influence over the past decade. This is due to its resemblance with the prohibited limbs of the common law doctrines of maintenance and champerty. However, the significance of TPF in international arbitration remains axiomatic.[2] Unlike champerty and maintenance,

1 *Dr. Kenneth Wyne Mutuma is an advocate of the High Court of Kenya and a Senior Lecturer at the University of Nairobi, where he teaches a wide range of courses including Alternative Dispute Resolution (ADR), Human Rights Accountability and Public International Law. Dr. Mutuma holds several academic qualifications including a Doctorate and Master of Laws from the University of Cape Town as well as a Bachelor of Laws from the University of Liverpool and a Bachelor's Degree in Architecture from the University of Nairobi. He has extensive senior management experience across local and international settings as well as practical knowledge of interdisciplinary issues.*

2 H Haeri, C Baró Huelmo & G Gasparotti, T*hird party Funding in International Arbitration* (Withers, 20 January 2021). online at https://globalarbitrationreview.com/guide/the-guide-ma-arbitration/3rd-edition/article/third party-funding-in-international-arbitration> Accessed November 29, 2022.

TPF seems to have found favor with international arbitration. In addition to increasing access to justice for parties with limited financial resources, it has been credited with increasing inclusivity in the justice process. For some commentators however, TPF is an unethical practice where unscrupulous investors make the most out of otherwise frivolous claims.[3] This article conceptualizes third party funding as an innovative solution to dispute resolution financing. It also examines the legal and regulatory landscape governing the practice, explores its benefits and challenges, and makes recommendations for reforms.

2. Conceptual Understanding of Third party Funding

The International Council for Commercial Arbitration defines third party funding as, "The provision of funding or other equivalent support for the conduct of arbitration proceedings by a person or entity that is not a Party to the Dispute (the "third party/ funder") to a Party to the proceedings, an affiliate of that Party or a representative of that Party, normally the claimant, on a non-recourse basis in the case of an unsuccessful claim, and exchange for an agreed return in the case of a successful claim"[4] The third party/funder is usually a specialized funder who has no close relationship with either of the disputing parties. Their sole interest in the matter is the potential profit from any future compensation.[5] Typically, the financial aid is intended to pay for the costs of the arbitration itself as well as any connected legal expenses. If the sponsored party is compelled to pay the opponent's costs, the third party may choose to pay such costs on behalf of the other party and offer security for said costs[6]

Third party funding is premised on necessity, risk management, and validation. Arbitration proceedings invariably involve onerous costs, including the cost of the award and referencing. Some parties, usually claimants, may not have the financial muscle to offset these costs.[7] Effectively, the disputing party must seek alternative ways of bearing the costs, such as the aforementioned mechanism where a third party bears the whole or part of the cost on their behalf. TPF is also a form of risk management as it enables the claimants to offset some of the financial risks associated with instituting arbitration proceedings. Lastly, it helps validate claims, as the funders are typically only interested in claims they consider meritorious.

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3 E Ronalds-Hannon and J Gittelsohn, Distressed Debt Is Dead; Long Live 'Opportunistic Credit (Bloomberg, November 17, 2021) online at https://www.bloomberg.com/news/articles/2021-11-17/distressed-debt-is-dead-long-live-opportunistic-credit-funds?leadSource=uverify%20wall> accessed November 30, 2022.

4 I Nyamasi Irene, *Third Party Funding In International Arbitration* (2023) 27(18) MAL online at <https://ncia.or.ke/wp-content/uploads/2021/03/Third party-Funding-In-International-Arbitration.pdf

5 B Thibault, *Third party Funding in International Commercial Arbitration* (2013-14) Faculty of Law Ghent University Academic year, online at https://www.international-arbitration-attorney.com/wp-content/uploads/2018/09/Thibault-De-Boulle-Thesis-On-Third party-Funding.pdf accessed November 4, 2022.

6 Arshurst, *Third Party Funding in International Arbitration*, Arshurst June 2022, online at <https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third party-funding-in-international-arbitration/> visited November 4, 2022.

7 P Muriithi, *Champerty and Maintenance: The Legality of Third party Funding in Arbitration in Common Law Jurisdictions* (2022) 10(1) Alternative Dispute Resolution Journal, Chartered Institute of Arbitrators - Kenya Branch.

2.1 Third Party Funding and Common Law Doctrines of Maintenance & Champerty

Third party funding in arbitration has been hailed as an innovative solution to dispute resolution financing. However, the practice has also been criticized due to the similarities it shares with the prohibited common law doctrines of maintenance and champerty. These two doctrines were aptly defined by Lord Justice Steyn in *Giles v Thompson*.[8] Champerty is the funding/maintenance of a party to a lawsuit in exchange for a share of the proceeds or an agreed percentage of the award. Maintenance, on the other hand, is providing financial support to another person in order to pursue a claim. The Judge observes a thin difference between the two doctrines, as champerty constitutes a more aggravated form of maintenance. Both were considered vicious and hence criminal because, in the words of Lord Mustill, "...the purchase of a share in a lawsuit presented an obvious temptation to the suborning of justices and witnesses and the exploitation of worthless suits which the claimant lacked the resources and influence to withstand."[9] Moreover, maintenance is prohibited since it is seen to be against public policy, thereby encouraging parties to settle their dispute amicably.[10]

TPF in arbitration shares many of the same features as those highlighted above as it involves a third party providing financial resources to a claimant in exchange for a share of the proceeds or an agreed percentage of the award. Due to its nature, concerns have been raised that funders may be encouraging claimants to pursue unmeritorious claims in order to make a financial gain.[11] However, there are some important differences between TPF and the common law doctrines of maintenance and champerty. Unlike maintenance and champerty, TPF is typically governed by a contract between the funder and the party to the arbitration which outlines the terms of the endeavor.[12] In addition to delineating the rights and obligations owed by the parties, the contract provides for enforcement mechanisms. Another difference is that funders in TPF arrangements are incentivized to pursue cases with high probability of success in order to maximize their financial gain.[13] As a result, they avoid highly speculative cases or those that involve a high degree of risk.

3. Third Party Funding Contracts

A TPF contract provides the terms of funding, including the obligations owed by the funder and the funded party.[14] The third party may typically be a company or an individual who is involved indirectly in the dispute and may require the funded party to provide security, such as a guarantee of payment or security over assets, in order to

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8 Giles v Thompson | [1994] 1 AC 142, as per Lord Mustill and Lord Steyn.

9 Id.

10 C Moore, *The mediation process: Practical strategies for resolving conflict* (2014) John Wiley & Sons.

11 J Kalajdzic, P Cashman & A Longmoore, *Justice for profit: A Comparative Analysis of Australian, Canadian And US Third Party Litigation Funding* (2013) 61(1) The American Journal of Comparative Law 93

12 J Lyon, *Revolution in progress: Third party Funding of American Litigation* (2010) 58 UCLA L. Rev 571

13 Hellmann T, *The Allocation of Control Rights In Venture Capital Contracts* (1998) *The Rand Journal of Economics* 57

14 M Amey and S Brecken, *Third Party funding in England and Wales: An overview*, available at https://uk.practicallaw.thomsonreuters.com/8-521-3304?transitionType=Default&contextData=(sc.Default)&firstPage=true, accessed in February 2023.

fund the costs. The third party may also require that they make frequent disclosure on the dispute and the progress of the case.

TPF contracts may be very complicated due to the dynamics and relationships at play. For instance, funding may be on a portfolio basis, where the funder extends money in a lump sum for use not just in one matter but several of them.[15] Portfolio funding may also include law firm financing, where a firm is financed to take on risks that it may not have the financial muscle for. In that case, the firm contracts with the funder and may, by itself become a third party funder of sorts to the clients whose matters are implicated, further compounding matters. Parties seeking funding must therefore be very cautious of the arrangement and hence the contract governing it.

While third party funding can be a great source of funds for businesses, in this case, resolution of commercial disputes, it is crucial for parties involved (that is, the funder on one hand and the funded party on the other), to have a clear understanding of the terms of the agreement. To ensure that all parties are adequately protected, TPF contracts ought to include certain key clauses that address the rights and responsibilities of the parties involved.

One important clause to include in a TPF contract is each party's contributions. This includes the amount of capital provided by the third party, as well as any other resources that may be provided, such as expertise or services.[16] It should also clarify the ownership rights and responsibilities of both parties, and specifically which party has the right to make business decisions.

A clause on repayment of the extended amount ought to also be included. Typically funders do not make gratuitous investments. Therefore, it is necessary to include the terms of repayment, including the amount payable and duration for payment, as well as any penalties and the rate of interest that may be charged. These can be based on court or commercial bank rates.[17] It can also provide the description of the collateral offered and the procedure in case there is default, such as in instances of non-payment or breach of contract.[18]

Other important terms include the dispute resolution clause with provision to refer the matter to ADR methods,[19] and the termination clause specifying the conditions under which the contract can be terminated, such as when payments are settled or in cases of breach.[20] The responsibilities that follow the end of a contract, such as returning any collateral or settling any unpaid debts, may also be included in this clause.

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15 S Petit & E Kajkowska, *Developments in third party funding in arbitration: A comparative analysis*, (2019) Norton Rose Fulfright online at https://www.nortonrosefulbright.com/en-ke/knowledge/publications/c015054d/developments-in-third-party-funding-in-arbitration accessed in February 2023.

16 Id, Lyon (n 12).

17 Id.

18 G Marceau, *WTO Dispute Settlement and Human Rights*, (2002) 13(4) European Journal of International Law 753.

19 M Pryles, Multi-Tiered Dispute Resolution Clauses (2001) , 18(2) *Journal of International Arbitration.*

20 B. Klein, *Transaction Cost Determinants of "Unfair" Contractual Arrangements* (1980) 70(2) The American Economic Review 35.

By including these key clauses in a third party funding contract, parties can be assured that their rights and responsibilities are adequately protected. A comprehensive contract ought to encompass many other issues in addition to the basics. Such issues include the computation of the funder's return on investment,[21] the extent to which the funder may be involved, and confidentiality obligations of either party. It is advisable that parties thoroughly review and negotiate the terms of the contract so as to avoid further disputes.[22]

4. Legality of Third Party Funding

The legal and regulatory framework governing third party funding in international commercial arbitration and even litigation is a complex and evolving one. The permissibility of TPF in law is an issue that is still hotly debated world over. Notably, courts are still reluctant to enforce TPF agreements due to preference for common law prohibition as well as arguments around public policy.[23] As such, the legality of TPF is based on the jurisdiction in which the dispute is conducted. In most jurisdictions, TPF is neither prohibited nor permitted.[24] It is typically subject to regulations, including those governing contracts and investments, as well as the rules of the relevant arbitration institution. The practice is also governed by the general principles of civil and commercial law.

Notably, TPF has been legislated upon in common law jurisdictions. Kenya's legal regime on arbitration, including the Arbitration Act No. 4 of 1995 and the Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules October 2020, are silent on the legal status of third party funding. Since some common law jurisdictions, including Kenya, have incorporated various international laws on arbitration as part of their domestic laws, recourse may be had to the substance of the said international law. However, the UNCITRAL Model Law on International Commercial Arbitration, the UNCITRAL Arbitration Rules 2013, and the ICSIDS do not outlaw third party funding either.

Owing to the underlying disadvantages of third party funding, the contingency funding mechanism is potentially illegal in Kenya. For instance, TPF potentially impeaches the parties' privacy and party autonomy and may encourage frivolous claims. While TPF cannot be challenged during arbitral procedures, the arbitral result may be set aside on the ground that the fact of third party funding is inconsistent with public policy. However, Kathy Mputha opines that Kenya is ripe for third party funding in arbitration and litigation, provided a proper mechanism exists to ensure it is used professionally.[25]

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21 M Morpurgo, *A comparative legal and economic approach to third party litigation funding* (2011) 19 Cardozo Journal of International and Comparative Law 343,

22 *S* Khouri et al, *Third party funding in England and Wales: Key Issues* UK Practical Law, online at https://uk.practicallaw.thomsonreuters.com/3-521-4443?transitionType=Default&contextData=(sc.Default)&firstPage=true accessed in February 2023.

23 Id Morpurgo (n 21) at 360.

24 Id, Lyon (n 12).

25 C Mputhia, *Kenya Is Ripe For Third Party Litigation Funding*, March 2021 Business Daily, online at < https://www.businessdailyafrica.com/bd/lifestyle/personal-finance/kenya-third party-litigation-funding-3323120)> accessed November 30, 2022.

5. Lessons from Other Jurisdictions

Third party funding in the context of litigation is said to have developed in Australia before it was adopted by other common law legal systems such as the United Kingdom, the United States and elsewhere.[26] In the United Kingdom, TPF is well established since the removal of the legislative fetters to maintenance and champerty to third party funding present in the English Criminal Law Act of 1967. It has evolved beyond commercial matters and into family and personal injury claims. The major justificationof the permission of third party funding in the UK is access to justice as well as legal aid, which were regarded as key public policy issues as far as the administration of justice was concerned during the time of these developments and still are. At present, the UK market has numerous litigation funding companies.[27]

In Australia, however, the practice was previously illegal under common law, but it is now permitted by statute.[28] Notably, the Australian TPF market still operates in a primarily commercial context. In the United States, the legality of third party funding is governed by state law and therefore differs from state to state as do most legal issues. The US TPF environment generally entails an arrangement of loans, which is how it developed, in the context of support for consumers of justice rather than investment.[29] Elsewhere, arbitral institutions such as the International Court of Arbitration[30], have also developed frameworks on TPF. The Rules essentially require the financed party to report the existence of TPF to the secretariat, arbitral tribunal and the other parties. Notably, the legal regime for third party funding is not harmonized in most jurisdictions, but trends show that the practice continues to gain traction and acceptance.

6. Benefits of Third Party Funding

The use of TPF in arbitration enhances access to justice by allowing the parties to meet the invariably onerous costs of arbitration, which can be prohibitive, particularly in cases involving large multinational corporations.[31] Third party funders can provide financial resources to claimants who would otherwise be unable to institute a case against a large corporation. This has enabled claimants to pursue justice in a wide range of cases, including those involving human rights and environmental violations.

With costs of litigation, arbitration, and mediation being prohibitively high, there is little access to justice as the bargaining imbalances between the disputing parties tip the scales of justice against the weaker party. However, third party funding offers a viable solution to the financial and bargaining imbalances.[32] It ensures that the public policy's idea of open access to justice is realized. In TPF, the disputing party has a genuine opportunity of vindicating their rights as it eliminates financial barriers, thereby

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26 Id Morpurgo (n 21) at 360.
27 Id.
28 Id.
29 Id.
30 The ICC Rules of Arbitration 2021, Article 11(7).
31 Garcia F, *Third party Funding as Exploitation of The Investment Treaty System* (2018) 59 BCL Rev 2911.
32 Id, Thibault (n 5).

enabling parties to pursue their rights on a level-playing field.[33] They are shielded from suffering from economic constraints that could adversely affect the sustainability of their businesses. [34] The claimant parties are empowered to push forward with their meritorious claims that would otherwise not be preferred for determination but for financial help.[35]

In addition, by eliminating the disputing parties' financial and bargaining power differences, third party funding ensures that the legal disputes are determined purely on their merits.[36] Access to justice is therefore the critical fulcrum that enables weaker parties, typically investors and claimants, to engage with the ISDS and international commercial arbitration process. Without this option of third party funding, such investors/claimants would be locked out with the result that the wealthy and deep-pocket institutions or states would have the monopoly of justice over them. This measure promotes inclusivity in the justice system and guarantees access to justice and is the key reason for TPF growth and development over the past decade.

Third party funding is also a form of risk management. Effectively, filing arbitration disputes in international tribunals constitutes high-risk endeavors that may be detrimental to potential claimant investors. Given the risks associated with high-stake arbitration disputes, an unsuccessful claim can adversely affect a company's long-term financial viability and stability. The TPF mechanism enables the claiming parties to offset some risks by pledging a portion of the expected proceeds to cater to the costs.[37] They can also retain enough cash flow, avoiding the potential liquidity and/or budgetary constraints that may come with the high costs of arbitration or failed claims.[38]

TPF also has the potential of improving arbitration proceedings.[39] The extra funding allows claimants to hire experienced lawyers and experts. Experienced lawyers have a better understanding of the relevant laws and procedures, allowing them to identify and navigate potential legal pitfalls more quickly. They can also narrow the issues in dispute, which can help the parties come to a resolution faster. They also have better access to resources that can help them prepare and present the case more effectively, such as expert witnesses. Lastly, experienced lawyers have the ability to negotiate better settlements, which can result in faster resolutions.

Notably, third party funding also helps claimants be more strategic in framing their claims to increase their chances of success. As the Texas Court of Appeals observed in the *Anglo-Dutch Petroleum v. Haskell case*,[40] funders/third parties are only interested in meritorious claims since their returns are contingent on the claim's success. They

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33 Id.

34 Gayner O, & Khouri S, *Singapore and Hong Kong: International Arbitration Meets Third Party Funding* (2016) *40 Fordham Int'l LJ 1033.*

35 Id, Gracia (n 34).

36 Id.

37 Id.

38 Id.

39 V Sahani, *Reshaping third party funding* (2016) 91 Tul. L. Rev 405.

40 Anglo-Dutch Petroleum Inter. v. Haskell, 193 S.W.3d 87 (Tex. App. 2006).

usually undertake meticulous due diligence on the merits of a claim or defence, then subsequently make a calculated risk assessment on the probability of a return on their proposed investment. The third parties tend to undertake an objective assessment and subsequently give an evaluation on the claim's or defense's strength, as the case may be.[41] Effectively, this helps reduce the filing of frivolous and vexatious suits. Further, third party funding may indicate to the opposing party that the claim/or defence has a reasonable chance of success, thereby inducing an early settlement.

7. Key Issues Surrounding Third Party Funding in Alternative Dispute Resolution

Although some jurisdictions have enacted or revised legislation in an effort to regulate third party funding, there is still a lot of uncertainty surrounding its legal status and implications. Confidentiality constitutes a key issue in TPF and its application in ADR processes including arbitration. As TPF is becoming increasingly popular, concerns have arisen over the disclosure of confidential information during the funding process.[42] The traditional view has been that TPF should be conducted in a confidential manner, with the objective of protecting any sensitive information revealed during the process.[43] On one hand, the debate over confidentiality centers on the need to keep private any confidential information revealed during the funding process. On the other hand, there is an argument that the confidentiality of TPF should be limited to protect the interests of the parties involved and to ensure that the TPF process is conducted in a fair and transparent manner.[44] Therefore, it is essential that parties involved in TPF have clear terms on the scope of disclosure required.

Cost is another important consideration in TPF and its application in ADR. Not only are there arguments for conducting TPF in a cost-effective manner, with the objective of protecting the interests of all parties involved;[45] but also there is a need for ensuring greater cost control to ensure that the process is conducted in a fair and equitable manner. To ensure that the latter is achieved, it is essential that parties involved in TPF are aware of the potential implications of the cost to the overall process. Equal consideration ought to also be accorded to the ethics surrounding third party funding. It is argued that the TPF process should be carried out ethically in order to safeguard not only the interests of all parties but also the justice system, from any negative repercussions that may result from the potential abuse of TPF by both funders and disputants.[46]

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41 C Rogers, *Gamblers, Loan Sharks & Third Party Funders'* (October 27, 2013). *Ethics in International Arbitration* (2014) Oxford University Press Penn State Law Research Paper No. 51-2013 online at https://ssrn.com/abstract=2345962 accessed November 7, 2022.

42 Frignati V, *Ethical Implications of Third party Funding In International Arbitration* (2016) 32(3) *Arbitration International*, 505.

43 C Menkel-Meadow, *Ethics In Alternative Dispute Resolution: New Issues, No Answers From The Adversary Conception Of Lawyers' Responsibilities*, In Mediation (2018) Routledge (pp. 429-476).

44 Id, Gracia (n 40).

45 M Sweify. *Third Party Funding in International Arbitration: A Critical Appraisal and Pragmatic Proposal* (2023) Edward Elgar Publishing.

46 E Sitkareva, Y Artemyeva, & S Mendosa-Molina, *Third Party Funding: Practical, Ethical and Procedural Issues* (2019) 6th International Conference on Education and Social Sciences 996

Ultimately, it is important to note that the concept of third party funding is still evolving and new issues are bound to arise. As such, it is imperative that the framework evolves alongside the practice.

8. Challenges Facing Third party Funding

One of the main challenges of third party funding is that it can be difficult to find suitable funders.[47] Many funders are risk-averse and prefer to invest in cases which have a high probability of success. As such, they are often unwilling to fund cases which are highly speculative or which involve a high degree of risk. This makes it difficult for claimants with complex claims to secure funding.

TPF also threatens the disputing parties' private and confidential interests. Privacy and confidentiality constitute critical elements in ADR, including arbitration. In some cases, they are the primary motivation for choosing arbitration over normal litigation. Typically, parties contemplating referring their matter to an arbitral tribunal often sign non-disclosure agreements. However, for the funders to finance the claim, they may require disclosure of material facts as a matter of due diligence.[48] This disclosure threatens the parties' privacy guarantee that has become synonymous with ADR processes.

In the absence of appropriate disclosure, TPF is also likely to result in a conflict of interest between the arbitrators and the disputed parties. For example, there is no disclosure system in common law jurisdictions where third party funding is not legislated upon. Effectively, the arbitrator(s) independence and/or impartiality may be hindered where they are affiliated with the funder. As stated by Lord Mustill in *Giles v Thompson*,[49] the purchase of a share in a potential arbitral award presents an obvious temptation on the funder to the suborn justices and witnesses to protect their investment.[50] The other party's right to withdraw would be jeopardized if third party funding and conflicts of interest were not disclosed.[51] TPF can create conflicts of interest between the funder and the claimant as well.[52] Funders typically have an incentive to pursue the case in a way which maximizes their financial gain. This can lead to a conflict between the funder's financial interests and the claimant's interests.

Additionally, TPF arguably diminishes the funded party's autonomy in the arbitral proceedings. De Boulle observes that party autonomy is a sacrosanct principle in alternative dispute resolution.[53] In the case of arbitration, the disputing parties retain their autonomy in determining the course of the arbitral proceedings, subject to mandatory arbitration and jurisdiction rules. Owing to their financial interests in the

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47 T Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact Of "Alternative Dispute Resolution* (2004) 1(3) Journal of Empirical Legal Studies 843

48 Id, Thibault (n 5).

49 Id *Giles v Thompson*.

50 Id.

51 D Tian-Yu DU, *Research on Conflicts of Interest Arising from Third party Funding in International Investment Arbitration*' (2018) Advances in Social Science, Education and Humanities Research, 423 online at https://www.atlantis-press.com/article/55912309.pdf> accessed November 4, 2022.

52 Id.

53 Id, Thibault (n 5).

cases, funders will naturally want to protect their investment by assuming some control over the procedures and outcome.[54] Such control and loss of party autonomy raise confidentiality and conflict of interest concerns because the funders' primary motivation is securing returns on their investment. The preceding notwithstanding, third party funding is a better option than the assignment of claims as far as party autonomy is concerned because, in the latter, the funded Party retains some autonomy. In contrast, the funded Party sells its rights to the claim in the assignment.

Further, due to the third party's economic power, they may insist on contract terms that are unfair to the funded party. Unscrupulous third parties may also unilaterally renegotiate terms to the latter's detriment.[55] The funded parties may be forced to consent to the unfair terms so as to secure funding. This is inconsistent with the ideal of open and accessible justice, which this finding mechanism seeks to achieve. The funded party may also be under undue pressure to adopt a position favoring the funder's interests, even if it's prejudicial to its own.

Lastly, TPF can be an expensive option for the funded party. In addition to service fees, funders may also require a share of the proceeds or an agreed percentage of the award. The funded party is additionally required to cover costs for the due diligence process. This further adds to the costs that are incurred by the claimants and they may even end up paying a large percentage of the award to the funder.

9. Ethical Implications of Third party Funding

The main ethical implications of third party funding is that it can create the perception that justice is being bought and sold because third party funders typically require a share of the proceeds or an agreed percentage of the award.[56] This lends to the criticism that rather than seeking justice, claimants are pursuing claims in order to make a financial gain.

The second ethical implication of third party funding is that it can encourage claimants to pursue frivolous or unmeritorious claims.[57] Funders typically have the incentive to pursue cases that have a high probability of success in order to maximize their financial gain, and this can be beneficial for claimants as it ensures that they are more likely to receive a successful outcome. However, it is important to ensure that claimants are not solely motivated by the potential of financial gain, and instead pursue cases that they genuinely believe have merit.

TPF can also create conflicts of interest between the funder and the claimant.[58] Funders typically have an incentive to pursue the case in a way which maximizes their financial

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54 V Shannon, *Recent Developments in Third party Funding*' (2013) 30(4) Journal of International Arbitration, 443.

55 C Bowman, *K Hurford & S Khouri, Third Party Funding In International Commercial And Treaty Arbitration - A Panacea Or A Plague? A Discussion Of The Risks And Benefits Of Third Party Funding (2011) 4 Transnational Dispute Management online* at < https://www.transnational-dispute-management.com/article.asp?key=1747> accessed November 7, 2022

56 Id, Lyon (n 12).

57 C Robertson, *The Impact of Third party Financing on Transnational Litigation* (2011) 44 Case W. Res. J. Int'l L 159.

58 Id Frignati (n 50).

gain. This can lead to a situation where the funder's interests are not aligned with those of the claimant and where the funder is pursuing the case in a way which is not in the claimant's best interests. In addition, TPF can contribute to high arbitration costs.[59] Typically, funders charge a fee for their services and also require a share or a percentage of the proceeds. This can increase the overall cost and reduce the amount that the claimant receives.

10. Recommendations for Third Party Funding

To mitigate the challenges faced by third party funding, specific reforms are required. There is a need for a legal framework to govern third party funding in Kenya. Specifically, it should prohibit unauthorized disclosure of sensitive information that infringes the parties' privacy and confidentiality rights. The framework should also clearly outline mechanisms for curbing cases of conflict of interest. Clearly outlined legal and policy provisions must protect the parties' autonomy in the arbitral proceedings.

TPF can also be governed by the same rules and regulations as other financial services providers. Funders may be required to comply with registration and capital adequacy requirements in order to conduct business. This will help to protect the integrity of the financial services industry and reduce the risk of fraud and other malpractices. It would also provide clear accountability mechanisms for third party funders, thereby ensuring that the financial system operates efficiently and in the best interests of consumers.

Further, the regulatory frameworks should be revised to impose the duty to disclose third party funding to all parties, so that conflict-of-interest can be avoided. The financed parties should also have adequate and effective remedies if third parties attempt to unilaterally change the terms and conditions of the financing arrangements. These recommendations are intended to provide greater protection for claimants and to ensure that third party funders are governed by the same standards of ethical conduct as other professionals. It will also ensure that the practice is conducted in a fair and transparent manner.

11. Conclusion

Third party funding is undoubtedly a welcome innovation in alternative dispute resolution financing. Although often compared to common law doctrines of champerty and maintenance, which prohibited outsider funding to protect the credibility of proceedings, TPF has evolved past its common law counterparts and is increasingly being used in ADR processes including arbitration. TPF has a number of benefits including promoting access to justice, managing financial risks and improving the quality and speed of ADR proceedings. The legality of TPF is not settled as it varies depending on the jurisdiction in which the dispute is conducted. In some jurisdictions, the legality of TPF is contingent on disclosure of third party funding to all parties involved. Elsewhere, the practice may be prohibited due to public policy reasons. Notably, this practice raises a number of legal and ethical concerns, as it can give the impression

59 Id, Sahani (n 48).

that justice is being bought and sold, or that it encourages frivolous/unfounded claims, or that it contributes to even higher arbitration costs. There are also potential threats to the parties' privacy, confidentiality, autonomy, and financial interests. This article offers recommendations not only for improving the regulatory framework, but also conduct amongst parties which is governed by TPF contracts; with the ultimate aim of improving the practice of third party funding.

THE PLACE OF ENVIRONMENTAL, SOCIAL AND GOVERNANCE (ESG) IN ARBITRATION

By Dr. Kariuki Muigua*

Abstract

The paper critically discusses the relationship between Environmental, Social and Governance (ESG) and arbitration. The paper argues that arbitration represents a viable mechanism for managing ESG related disputes while simultaneously promoting ESG tenets. It addresses some of the current concerns in ESG and the ability of arbitration to deal with these concerns. The paper further proposes recommendations towards embracing arbitration in management of ESG disputes for Sustainable Development.

1. Introduction

Environment, Social and Governance (ESG) is a concept that seeks to promote sustainable, responsible and ethical corporate behavior by incorporating Environmental, Social and Governance concerns in corporate decision making[1]. The growing threat of climate change and climate crisis has forced many investors to embrace sustainability as a key factor in investment decision-making[2]. Further, social concerns touching on issues such as human rights, diversity, consumer protection and welfare and protection of animals especially endangered species have led to many companies taking their social responsibilities and especially impact of their commercial activities on the local communities where they operate more seriously than ever[3]. In addition, there has been growing corporate governance awareness since the 2008 global economic recession which has led to increase shareholder and stakeholder activism in demanding more responsive management structure, better employee relations, and reasonable executive compensation in companies[4].

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1 Stuart. L.G et al., 'Firms and social responsibility: A review of ESG and CSR research in corporate finance.' Journal of Corporate Finance 66 (2021): 101889.

2 De Francesco. A.J., 'The impact of sustainability on the investment environment.' *Journal of European Real Estate Research* (2008)

3 Cedric.R., 'Accountability of Multinational Corporations for Human Rights Abuses." *Utrecht Law Review* 14.2 (2018): 1-5.'

4 Martin.C et al., 'Corporate governance and the 2008–09 Financial Crisis." *Corporate Governance: An International Review* 19.5 (2011): 399-404; See also Erkens. D.H, et al Corporate governance in the 2007–2008 financial crisis: Evidence from financial institutions worldwide." Journal of corporate finance 18.2 (2012): 389-411.

Consequently, how corporations handle environmental, social and governance issues is increasingly becoming a major concern especially for investors and other key stakeholders. Most investment decisions including assessment and valuation are incorporating ESG criteria with companies that are rated as having strong sustainability programs enjoying more preference from investors[5]. Matters touching on climate change and sustainability dominate current ESG focus[6]. In addition, human rights and especially the rights of indigenous peoples and governance structures of companies are enjoying prominent attention[7]. Many projects, investors and sponsors are also demanding more detailed identification and mitigation of environmental and social impacts of investment projects before making commitment or funding[8]. The importance of ESG tenets is evidenced by the change in the legal and regulatory landscape to reflect the expectations of investors, customers, employees and other stakeholders[9].

The public scrutiny of corporations and the need to operate within socially acceptable standards have resulted in many corporations incorporating ESG commitments in commercial contracts[10]. These commitments can take various forms including respect for the environment, human rights and labour laws.[11] ESG related disputes can arise where corporations violate such commitments. Such disputes can be managed through various mechanisms including arbitration.

The paper seeks to discuss the place of Environmental, Social and Governance (ESG) in arbitration. It brings out the nexus between ESG and arbitration. The paper further highlights and discusses the viability of arbitration in management of ESG related disputes. It also proposes interventions towards embracing arbitration in management of ESG disputes for Sustainable Development.

2. The Nexus between Environmental Social and Governance (ESG) and Arbitration

Arbitration is form of Alternative Dispute Resolution (ADR) mechanisms. ADR refers to a set of mechanisms that are applied in management of disputes without resort to adversarial litigation[12]. It has been described as a private and consensual process where parties to a dispute agree to present their grievances to a third party for resolution[13]. In Kenya, arbitration alongside other ADR mechanisms has been recognized under the Constitution[14].

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5 Muigua. K., 'Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya.' Available athttp://kmco.co.ke/wp-content/uploads/2022/07/Embracing-ESG-Principles-for-Sustainable-Development-in-Kenya.pdf (accessed on 28/09/2022)

6 *Ibid*

7 *Ibid*

8 Muigua. K., 'Realising Environmental, Social and Governance Tenets for Sustainable Development' available at http://kmco.co.ke/wp-content/uploads/2022/07/Realising-Environmental-Social-and-Governance-Tenets-of-Sustainable-Development-Kariuki-Muigua-July-2022.pdf (accessed on 28/09/2022)

9 *Ibid*

10 Von Wobeser., 'The Role of Arbitration in ESG Disputes' available at https://www.vonwobeser.com/index.php/publication?p_id=1650 (accessed on 28/09/2022)

11 *Ibid*

12 Muigua. K., 'Settling Disputes Through Arbitration in Kenya' Glenwood Publishers Limited, 4th Edition, 2022

13 *Ibid*

14 Constitution of Kenya, 2010, Article 159 (2) (c)

It is argued that ESG principles have become a model for sustainable business development through which a corporations' goal for solving environmental, social and governance problems is achieved[15]. Consequently, ESG considerations have an increasing impact in international business as evidenced by the incorporation of sustainability clauses in investment contracts[16]. In such contracts, investors are required to adhere to the concept of sustainable development as envisaged under the contracts and failure to do so may result in ESG related disputes.

In the wake of the climate change debate, there have been calls for responsible business practice towards climate change mitigation through measures such as reduction of carbon emissions[17]. The Paris Agreement on Climate Change has raised the awareness of the need for global efforts to combat climate change and the role of responsible and ethical corporate behavior towards achieving this goal[18]. Further, corporations are increasingly required to safeguard human rights as envisaged by 'S' pillar of ESG[19].

However, some corporations have been accused of violating these ESG concerns as a result of their business practices. Some corporations have been accused of failing to promote climate change mitigation through reduction of carbon emissions and transitioning to cleaner energy production[20]. Further, some corporations have been accused of violating fundamental human rights such as the right to a clean and healthy environment especially in the investment sphere in Africa[21]. These instances have resulted in an increasing number of ESG-related disputes.

The growth of ESG concerns has seen corporations being increasingly required to embrace ESG principles in their business practices. Consequently, ESG clauses are being adopted in commercial and investment contracts[22]. In case of violation of such clauses, ESG related disputes are bound to occur. It has been asserted that adoption of ESG-related practices into pre-existing social and governance models adopted by corporations would be disruptive[23]. The inclusion of ESG clauses in commercial contracts not only points to the importance of ESG concerns to companies but it also serves as potential source of disputes where such considerations are not complied with[24]. ESG issues are not only reshaping corporate behavior across the globe but

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15 Mazhorina. M.V., 'ESG Principles in International Business and Sustainable Contracts' available at https://aprp.msal.ru/jour/article/view/3223?locale=en_US (accessed on 28/09/2022)

16 *Ibid*

17 International Arbitration in 2022., 'The Rising Significance of ESG and the Role of International Arbitration' available at https://www.freshfields.com/en-gb/our-thinking/campaigns/international-arbitration-in-2022/the-rising-significance-of-esg-and-the-role-of-international-arbitration/ (accessed on 28/09/2022)

18 Von Wobeser., 'The Role of Arbitration in ESG Disputes' Op Cit

19 *Ibid*

20 *Ibid*

21 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 (accessed on 28/09/2022)

22 International Arbitration in 2022., 'The Rising Significance of ESG and the Role of International Arbitration' Op Cit

23 The ALP Review., 'The Importance of ESG and its effect on International Arbitration' available at https://www.alp.company/sites/default/files/ALP%20Review%20-%20The%20Importance%20of%20ESG%20and%20its%20effect%20on%20International%20Arbitration.pdf (accessed on 28/09/2022)

24 *Ibid*

can also be a potential battleground in international disputes[25]. This creates the need for an effective mechanism of management of such disputes in order to enhance ESG principles in the quest for Sustainable Development.

Arbitration has for a long time been the most viable mechanism for management of international commercial and investment disputes[26]. It offers a neutral forum for the management of disputes and addresses some of the concerns that parties may have in relation to the other parties' legal system[27]. In international commercial and investment arbitration, parties are reluctant to submit to the jurisdiction of the other party due to the likelihood of favoritism by the host judicial system[28]. Further, arbitration has the potential of facilitating expeditious management of disputes[29]. In international commercial and investment arbitration, there is need to manage disputes expeditiously in order to preserve the commercial interests of parties.[30] The viability of arbitration in management of international commercial disputes is further enhanced by the availability of a legal framework for the recognition and enforcement of foreign arbitral awards. The *New York*[31] Convention provides the legal framework for the recognition and enforcement of foreign arbitral awards across different jurisdictions.

Consequently, the adoption of ESG elements in international commercial and investment agreements has resulted in the use of arbitration to manage disputes arising from such agreements[32]. ESG concerns have become prominent in investor-state arbitration with arbitral tribunals having to determine issues relating to climate change, corruption and human rights[33]. It has been asserted that the growth of ESG will redefine the practice of arbitration as it seeks to adapt to the new concerns created by ESG[34]. However, the flexibility of arbitration and its ability to adapt to emerging concerns means that it is well positioned to manage ESG disputes[35]. However, there is need for reform in order to enhance the role of arbitration in managing ESG disputes.

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25 Hamilton. J & Coulet-Diaz. M., 'Arbitration & the ESG Era' available at https://www.whitecase.com/news/media/arbitration-esg-era (accessed on 28/09/2022)

26 *Ibid*

27 Moses. L.M, 'The Principles and Practice of International Commercial Arbitration' 2nd Edition, 2017, Cambridge University Press

28 *Ibid*

29 Muigua. K., 'Promoting International Commercial Arbitration in Africa' available at http://kmco.co.ke/wp-content/uploads/2018/08/PROMOTING-INTERNATIONAL-COMMERCIAL-ARBITRATION-IN-AFRICA.pdf

30 *Ibid*

31 United Nations Conference on International Commercial Arbitration, 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards' United Nations, 1958

32 Von Wobeser., 'The Role of Arbitration in ESG Disputes' Op Cit

33 Ross. A., 'We need talk about ESG' available at https://globalarbitrationreview.com/we-need-talk-about-esg (accessed on 28/09/2022)

34 Hamilton. J & Coulet-Diaz. M., 'Arbitration & the ESG Era' Op Cit

35 *Ibid*

3. Enhancing the Role of Arbitration in Management of Environmental Social and Governance (ESG) Disputes

Arbitration represents a viable mechanism for management of ESG disputes. The following can be done towards enhancing the use of arbitration in ESG disputes:

3.1. Knowledge in ESG Concerns

Statistics show that many ESG related disputes are being managed through arbitration[36]. According to the International Chamber of Commerce, engineering, construction and energy disputes represent the highest number of cases handled representing 38% of all cases registered in 2021[37]. Such disputes entail ESG components such as renewable energy projects, environmental protection and human rights concerns[38]. This demonstrates that ESG and arbitration are inextricably linked. Arbitration practitioners thus need to equip themselves with knowledge in ESG related matters in order to be better placed to manage ESG related disputes.

3.2 Promoting Sustainable Development

Sustainable Development has been defined as development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs[39]. This concept entails a combination of elements including environmental protection, economic development and social issues[40]. The importance of Sustainable Development has seen the adoption of the Sustainable Development Goals as the global blueprint of development[41]. Most of the Sustainable Development Goals entail aspects of ESG such as clean water and sanitation, affordable and clean energy, industry, innovation and infrastructure and climate action[42]. Arbitration practitioners should therefore promote the principles of sustainable development when managing ESG related disputes. This could entail requiring investors to comply with the host country environmental laws and ESG standards in mining, energy and construction disputes which have an ESG bearing[43].

3.3 Upholding Human Rights

The 'S' pillar in ESG seeks to promote responsible and ethical corporate behavior through aspects such as respect for human rights[44]. However, corporate behavior

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36 Von Wobeser., 'The Role of Arbitration in ESG Disputes' Op Cit

37 International Chamber of Commerce., 'ICC Dispute Resolution Statistics: 2020' available at https://iccwbo.org/publication/icc-dispute-resolution-statistics-2020/ (accessed on 28/09/2022)

38 *Ibid*

39 World Commission on Environment and Development, *Our Common future*. Oxford, (Oxford University Press, 1987).

40 Fitzmaurice, M., 'The Principle of Sustainable Development in International Development Law' *International Sustainable Development Law*, Vol. 1

41 United Nations., 'Sustainable Development Goals' available at https://sdgs.un.org/goals (accessed on 28/09/2022)

42 Ibid, Goals 6, 7, 9 and 13.

43 The ALP Review., 'The Importance of ESG and its effect on International Arbitration' available at https://www.alp.company/sites/default/files/ALP%20Review%20-%20The%20Importance%20of%20ESG%20and%20its%20effect%20on%20International%20Arbitration.pdf

44 Muigua. K., 'Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya.' Op Cit

especially in the investment sphere in Africa has resulted in gross violation of human rights[45]. Some corporations which have invested in oil exploration have been accused of human right abuses, environmental degradation and unsustainable peace due to their business culture[46]. In Kenya, a multinational corporation that has invested in the agricultural sector has been accused of human right abuses such as killings, rape, and other forms of sexual and gender-based violence allegedly committed by its guards, bad labour practices and land injustices against the neighbouring communities[47].

Some of these disputes have ended up in arbitration where tribunals are called upon to adjudicate on human rights issues[48]. Arbitrators should thus seek to uphold human rights in such disputes by rendering awards that are in line with human rights standards[49]. By promoting human rights, arbitrators will be embracing the 'S' pillar that is fundamental in the ESG debate.

3.4 Promoting Good Governance

The Governance pillar in ESG seeks to achieve good financial and accounting standards as well as legal and regulatory compliance, such as transparency, corporate structures and ethics in corporate conduct[50]. It also seeks to align Governance with the Sustainable Development Goals where governance issues include industry, innovation and infrastructure (Goal 9); peace, justice and strong institutions (Goal 16); and partnerships with public and private institutions (Goal 17)[51]. Good governance can be promoted through arbitration by rendering awards that adhere to good governance practices such as transparency, accountability, reporting and disclosure.

3.5 Seeking Expert Assistance in Complex ESG Matters

Arbitration has a significant role in promoting ESG tenets in areas such as climate change. Arbitrators play a significant role in shaping and adapting international law to respond to the climate crisis[52]. However, in some instances, arbitration has been slow to act to act in response to the climate crisis[53]. Some climate change concerns such as determining adherence to climate change commitments through low carbon

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45 Muigua. K., 'International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development' Op Cit

46 Maiangwa.B & Agbiboa.D., 'Oil Multinational Corporations, Environmental Irresponsibility and Turbulent Peace in the Niger Delta' Africa Spectrum 2/2013: 71-83

47 Kenya Human Rights Commission., 'Heavy price for… egregious human rights violations' available at https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/737-heavy-price-for-kakuzi-s-egregious-human-rights-violations.html (accessed on 29/09/2022)

48 Amao. O., 'Corporate Social Responsibility, Human Rights and the Law: Multinational corporations in Developing Countries.' Routledge, 2011.

49 Krajewski, M. 'Human Rights in International Investment Law: Recent Trends in Arbitration and Treaty-Making Practice.' Available at SSRN 3133529 (2018).

50 RL360, "Governance-The G in ESG," Available at: https://www.rl360.com/row/funds/investment-definitions/g-in-esg.htm (accessed on 29/09/2022)

51 Sustainable Development' available at https://sdgs.un.org/goals (accessed on 29/09/2022)

52 Greenwood. L., 'The Canary is Dead: Arbitration and Climate Change' *Journal of International Arbitration*, Volume 38, Issue 3 (2021)

53 *Ibid*

transition requires arbitrators to be fully informed and engaged in such concepts[54]. This may require expert analysis and guidance from persons with requisite knowledge in environmental matters[55]. Arbitrators should therefore seek expert assistance in such issues in order to be fully informed and render awards that promote ESG principles.

4. Conclusion

The relationship between Environmental, Social and Governance (ESG) and arbitration continues to grow. Adoption of ESG by corporations as a means of promoting responsible and ethical business practices and the wide use of arbitration in management of international commercial and investment disputes points to increased use of arbitration in management of ESG related disputes[56]. In managing such disputes, arbitrators should promote ESG considerations whilst balancing the needs and interests of parties involved in issues such as climate change[57]. Arbitration represents a viable mechanism for managing ESG disputes while simultaneously promoting Sustainable Development. There is need to enhance the viability of arbitration in management of ESG related disputes.

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54 Miles. W., 'BVI: A Frontline Focus for Resolving Future Climate Change Related Disputes' available at https://www.bviiac.org/Portals/0/Files/Publications/Wendy%20Miles%20QC_BVI_A%20Frontline%20Focus%20for%20Resolving%20Future%20Climate%20Change%20Related%20Disputes.pdf (accessed on 29/09/2022)

55 Cummins. T et al., 'ESG Litigation – How Companies Can Get Ready, Respond and Resolve Claims' available at https://www.emerald.com/insight/content/doi/10.1108/JOIC-07-2021-0032/full/html (accessed on 29/09/2022)

56 Von Wobeser., 'The Role of Arbitration in ESG Disputes' Op Cit

57 *Ibid*

THIRD-PARTY FUNDING IN AFRICA: A REALITY TO FACE NOT AN EVIL TO AVOID

By Juvenalis Ngowi, FCIArb*

Abstract

Third-party funding in litigation is not common in African jurisprudence despite its prevalent use in Europe, Asia, and America. Although, in most African jurisdictions, there is no specific legislation prohibiting third-party funding, the concept of champerty which is a common law principle, appears to influence the thinking of dispute resolution practitioners from the common law jurisdictions on the issue of third-party funding. The practice in other jurisdictions has proved that third-party funding has several advantages, but for this concept to be applied in Africa, there is a need to differentiate it from champerty as understood in the common law. Also, there are some controversial issues which have emerged in those jurisdictions where third-party funding is practised. African countries cannot run away from the use of third-party funding and therefore there is a need to create an environment which will address the challenges facing third-party funding globally in general and Africa in particular. This can well be done by enacting legislation and rules which will regulate third-party funding. This paper tries to look at the concept of champerty and third-party funding and suggests the way African jurisdictions should take in accepting the arrangement of third-party funding without compromising the benefits of arbitration as a preferred method of alternative dispute resolution.

1. Introduction

Third-party funding can be defined to mean an arrangement between a party to an arbitration and a private or corporate individual who is not connected to the dispute for the funding of the whole or partial financing of the expenses in an arbitration. [1] In other words, Third Party Funding (TPF) in arbitration is a financing arrangement by a party who has no direct interest in the dispute and such a person is not a litigant in the matter. Third-party funding in arbitration has been defined also to mean an arrangement in which someone who is not involved in arbitration provides funds

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1 Oluwaseun Philip-Idiok, The indirect reforms and regulations of third-party funding in African arbitration, (International Bar Association), https://www.ibanet.org/indirect-reforms-regulations-third-party-funding-African-arbitration (visited on April 14, 2023).

to a party in arbitration in exchange for an agreed return from the damages awarded.[2]

While in some jurisdictions TPF is well-regulated and there are several judicial decisions expounding the application and limitations of TPF and its legality, in most African jurisdictions the concept of TPF is not common and there are very few judicial decisions on TPF in arbitration in Africa which discuss the legality and applicability of TPF. The classic case on TPF in Africa is the case which was determined by the Supreme Court of Appeal of South Africain the case of *Price Water House Coopers* [3] in which the court stated categorically that an agreement in terms of which a person provides a litigant with funds to prosecute an action for a share of the proceeds of the action is not contrary to public policy or void.

The basis of this holding by the court was the right to access court which is enshrined in the Constitution of South Africa. The Court was truly clear that in exceptional cases, the court will close its doors to a litigant who abuses the process, but the doors will remain open for those with bona fide litigate their claims. This suggests that any jurisdiction which recognises the right to access justice can use the case of *Price Water House Coopers* to justify the TPF. Although the court was discussing the funding of litigation in a state court, the decision is particularly important as it provides validity and legality of TPF litigation which otherwise would have been categorised as champerty. The slow development of TPF in Africa may have probably been partly attributed to the doctrine of champerty and maintenance which is very famous in most of the common law jurisdictions.

Maintenance was defined as a support of litigation by a stranger without just cause and champerty is said to be the aggravated form of maintenance. [4] In most common law jurisdiction countries, champerty is a criminal offence. This offence covers also conditional or contingency fees. In *HKSAR v Mui Kwok Keung [2014] 1 HKLRD 116*, the Court of Appeal authoritatively hold that an act of a barrister who represented the claimant on the basis of "no win, no pay" was guilty of champerty. In this particular case, the Court held that champertous agreements have a risk to the integrity of the Court process on the ground that the interests of legal practitioners in the end result of the case may conflict with the legal practitioners' duties to the client and the Court.

However, in the case of *Unruh v Seeberger (2007) 10 HKCFAR 31*, the Court gave an exemption to the applicability of the doctrine of champerty and hold that where there is common interest under which groups or associations decide to pursue legitimate litigation to meet common objective then such action may be excluded from the doctrine of maintenance and champerty provided that common interest can be established. The second exemption of this doctrine is for cases involving access to justice. In this category, the test is whether litigants can access justice by pursuing a claim without funding. If it is found that the funding was necessary for the litigant to pursue

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2 Omonigho Brown and Arnaud Oulepo, "Third-Party Funding in International Arbitration," in Africa Arbitration Academy, 2019 Cohort (London: Africa Arbitration Academy)

3 PricewaterhouseCoopers In & Others v National Potato Co-Operative Ltd, Case No. 448/02

4 Peter Mwangi Muriithi, Champetry and Maintance: The Legality of Third-Party Funding in Arbitration in Common Law Jurisdiction, Alternative Dispute Resolution Journal Volume 10, Issue 1, 2022.

the legal claim, then one can establish an exception of the doctrine of maintenance and champerty. The third exception is the categories of cases in which principles like that of subrogation apply in insurance or where there is an assignment by a trustee.

2. Third-Party Funding and Champerty

It is important for courts in African jurisdictions to grasp the meaning and importance of TPF and differentiate it from champerty so that there is a clear demarcation under which circumstances funding may be considered unlawful and vice versa. Africa is a region which attracts a lot of Foreign Direct Investment (FDI). According to the United Nations Conference on Trade and Development (UNCTAD), investment in Africa hit a record of $83 billion in 2021[5]. According to The African Natural Resources Centre.

> *"Africa has unique resources. The region is home to the world's largest arable landmass; the second largest and longest rivers (the Nile and the Congo); and its second-largest tropical forest. The total value added of its fisheries and aquaculture sector alone is estimated at USD 24 billion. In addition, about 30% of all global mineral reserves are found in Africa. The continent's proven oil reserves constitute 8%of the world's stock and those of natural gas amount to 7%. Minerals account for an average of 70% of total African exports and about 28% of the gross domestic product.* [6]

We shall discuss later the advantages of TPF which African countries should comprehend for their economic development and smooth dispute resolution. It is not possible in today's world to speak of investment without speaking of dispute resolution mechanisms. It is unlikely that investors will agree to risk their capital when the protection of their interest is legally uncertain. While African countries need to attract investments in Africa, it is also important to ensure that the resources are used for the benefit of the local population. This may sometimes create conflicts between the host countries and the investors, particularly on how and where disputes should be resolved.

In Tanzania for example, International Arbitration related to investment natural resources disputes were restricted to institutions with the establishment in Tanzania and the reason advanced for this was that Tanzania had no confidence in International Arbitration Institutes.[7] One of the best ways to strike a balance in investments and avoidance of exploitation of natural resources in Africa on one hand and protecting the interest of the host state, on the other hand, is having a good dispute resolution mechanism which is harmonious with the globally accepted standards. TPF is one of the mechanisms used in dispute resolution and is growing fast globally. In International Arbitration Report Issue 7 – September 2016 one of the third-party funders is quoted to say that for the past 12 months, there was exponential growth in the use of third-party funding generally.

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5 United Nations, 2022, World Investment Report 2022: International Tax Reforms and Sustainable Investment, unctad.org/system/files/official-document/wir2022_en.pdf.

6 African Natural Resources Center, catalyzing growth and development through effective natural resources management, (African Development Bank 2016) www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/anrc/AfDB_ANRC_BROCHURE_en.pdf (visited on April 14, 2023).

7 Juvenalis Ngowi, Restoration of International Arbitration in Tanzania: The New Investment Act, (Alternative Dispute Resolution Journal Volume 2, Issue 2, 2023)

It is not in dispute that TPF is acceptable in international arbitration, however, the TPF arrangements are not recognised by law in most African Countries. In almost all African countries there are no specific provisions of law which either allow TPF or disallow it and there are very few court decisions from African Courts which discuss the whole issue of TPF. it is important also for TPF to be recognised with certainty in African jurisdictions so as to give confidence to funders and investors who want to use the arrangement. In the absence of clear rules established domestically, one may doubt if an Award obtained through TPF can be enforced in jurisdictions which have not categorically recognised the TPF and in which one may come up with the defence of the public policy to resist execution by connecting TPF and the doctrine of maintenance and champerty which may be seen going against public policy.

It should be noted that in most jurisdictions an award which is deemed to be against public policy will not be enforced in those jurisdictions. For example, in *Misc. Civil Cause No. 373B of 2020*, *The United Republic of Tanzania v Sunlodges Tanzania Limited and Another*, the High Court of Tanzania refused to recognise an Award issued by the Permanent Court of Arbitration on the basis that the Award was contrary to the public policy of Tanzania. In that matter, the Court was of the opinion that the Award of PAC was contrary to the land policy of Tanzania and proceeded to hold; "*… to allow PAC Award enforced in Tanzania, it will be inconsistence with the public policy, contrary to justice and inimical to the national interest of Tanzania regards to the ownership of land for non-citizens and valuation of land upon revocation or acquisition.*"

In modern times, although still, some courts' decisions and some legislation prohibit champerty, the genesis of its illegality might not be applicable in most cases. The champerty was considered illegal because it was associated with the unethical behaviour of wealthy persons who will buy an interest in litigation and use their influence to determine the outcome of the matter. Champerty was against the public policy of those jurisdictions which prohibited it. It was considered gambling and speculation in litigation.

A person would speculate a winning and opts to finance a party likely to win the case in consideration for taking shares in the outcome of the case. There was a fear that a person who has financed a litigation matter may do whatever possible to ensure the financed party wins the battle so that the financier does not suffer loss. Lord Denning commented as follows. "*The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses. These fears may be exaggerated, but, be that so or not, the law for centuries had declared champerty to be unlawful, and we cannot do otherwise than enforce the law, and I may observe that it has received statutory support, in the case of Solicitors, in Section 65 of the Solicitors Act 1957.*"[8]

8 Trepca Mines Ltd (No.2), Re [1963] Ch. 199 (30 July 1962)

It is difficult to differentiate TPF and champerty because they are related concepts in the sense that in both notions, a person not related to the dispute finance one of the parties to be able to litigate. However, based on the case of Price Waterhouse Coopers Inc, it would appear that the court suggests that for a TPF to be lawful, there must be bona fide litigation. In other words, if TPF is used to abuse the process, then such funding is unlawful. The court proceeded to explain that as a general rule, the legal process is effectively use when it is invoked for the vindication of rights or the enforcement of just claims, and it is abused when it is diverted from its true course so as to serve extortion or oppression or to exert pressure so as to achieve an improper end. In short, financing a bona fide claim should not be regarded as an illegal arrangement.

Since most jurisdictions globally have recognised TPF as a lawful means of funding litigation, and most international arbitration institutions have rules governing TPF and given the socio-economic conditions prevailing in the society, TPF is inevitable in African jurisdictions. There are a lot of economic activities between Africa and the rest of the world, particularly in investment including Foreign Direct Investment and other types of investments. Few jurisdictions in Africa have accepted the use of TPF in arbitration but no proper framework which has been put in place to regulate TPF. TPF appears to be a grey area in most jurisdictions in Africa.

There is no legislation expressly prohibiting it in most African countries, but also there is no legal framework which can be used to support the application of TPF in most African jurisdictions. In absence of a defined legal framework to allow TPF, some questions may arise which may include the legality of TPF itself, procedural issues related to TPF including issues related to costs in third-party funded proceedings, the disclosure of issues related to TPF, the position of the third part funder in the proceedings including issues of confidentiality. In Africa, we have the advantage of learning from those jurisdictions which have well-established procedures for TPF and see the challenges and advantages of the third-party funding arrangement and therefore be able to create our systems much better to support TPF.

If Africa wants to be among the good seats of arbitration, domestic laws should be enacted to recognise the best practice of arbitration globally including regulating TPF. It is likely that most investors will choose a seat of arbitration where they can confidently be assured that an Award obtained in proceedings funded by a third party will be enforceable because the trend of using TPF is increasing in international arbitrations including investment arbitrations. Most investors will definitely want to grasp the advantages obtained in TPF. There should be the preparation of a legal framework for the growth of TPF in African jurisdictions and soft application of the same.

If legislation is not established and the funding is not expressly legitimised, Africa will lag behind in international arbitrations and may take time before African countries are accepted as the good seat for international arbitration. In the absence of clear rules of procedures on TPF with legislative recognition, some funders may hesitate to invest in funding arbitration disputes in Africa which is detrimental to local persons of this jurisdiction and investors are likely not to choose seats of arbitration in African countries.

3. Advantages of Third Party Funding

The benefits of TPF are many. One of the greatest advantages of TPF is to assist genuine litigants who have no sufficient funds to enable them to finance arbitration proceedings. Unlike in normal civil cases, where a party can sue as a pauper, this is unlikely to happen in arbitral proceedings. Also, because funders will normally do case analysis before agreeing to fund the same, it is likely that in long run only genuine claims will be funded despite some research showing the increase of frivolous claims due to the availability of funds. As discussed in the case of Price Waterhouse Coopers, TPF gives access to the court which is the right to pursue claims which otherwise would not be accessed in the absence of the availability of TPF. It should also be noted that TPF can also be used by the Defendant/Respondent and therefore it would mean a party who is dragged into proceedings can get financial assistance in the form of TPF and enjoy the right to be heard which may have been difficult without such TPF.

Furthermore, TPF assists a party in its cash flow. Monies which are used in financing litigation can be used in other operations while a third party is funding proceedings. It appears also, it is more beneficial for a party who would have not been able to fund the litigation, to get part of the damages and share the other part with the funder than if it would have foregone the whole amount and recover nothing completely if the dispute would have not been litigated under TPF.[9] There is no doubt that third-party funding may have some challenges in the arbitral proceedings, nevertheless, what is required is to see how those challenges can be addressed by enacting laws and rules to regulate TPF.

4. Challenges of Third Party Funding

Some of the concerns regarding TPF have been identified by the United Nations Commission on International Trade Law (UNICITRAL) in one of its reports[10] ("UNICITRAL report"). The report addressed some concerns about TPF. These concerns include the impact of third-party funding on the proceedings such as conflicts of interest arising out of third-party funding. This makes it necessary to have rules which will describe the extent of disclosure of the party which funds the proceedings for purposes of conflict search. It will be important to ensure that the Arbitrator's impartiality is not affected by the funders or funding arrangements. This might not be a simple task particularly when the funder is a corporate entity.

The question might be to what extent it can be said that the arbitrator has an interest with the funder. Should it go to the extent of disclosing shareholders? In some instances, the shareholder may also be a corporate entity, how far should the disclosure be necessary? Furthermore, the Arbitrators may be related to some other independent institutions such as universities, law firms or other societies and the question may be whether a funder who is related to those institutions will affect the impartiality of the Arbitrator.

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9 Jacqueline Waihenya,Third Party Funding and Investment Arbitration -the Menage a Trois Conundrum of International Arbitration (Alternative Dispute Resolution Journal, Volume 9 No. 1, 2021)

10 United Nations Commission on International Trade Law, 2019, pp. 1–19, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Eighth Session (Vienna, 14–18 October 2019).

Obviously, the ultimate aim should be to ensure the neutrality of the tribunal.

Another difficulty which has to be addressed in regard to the disclosure of the information is the issue of confidentiality. This can be seen from two angles. First, the party who is being funded might be required by the funder to disclose certain information for the purposes of assessing the strength of the case before funding the proceedings. These might be confidential data between the party seeking funds and another person not a party to the proceedings. The intended third-party funder might need to share the information with his lawyers or another expert for purpose of making an informed decision. This may ultimately erode the benefit of confidentiality in arbitration and that of client-attorney privilege. There should be a defined limit on how much information can be demanded by parties. It should be noted that the party against which the funding is done, may also have the right to demand disclosure from the other party including some of the terms and conditions for the arrangement. TPF may raise the question of whether confidentiality between client-advocate can be jeopardised.

Also, it is important to observe and address the impact of third-party funding on the costs of the proceedings together with the issue of security for costs. Regarding the security for costs, there is an argument that a claimant who has sought assistance to be funded has shown an indication that the funded party has no assets of its own to be able to meet the costs of arbitration which may be awarded at the end in the event the funded party loses the claim. At the same time, the funder may not be accessible to pay the awarded costs and therefore an order for a deposit of cost by the funder or issuing security for costs may be the appropriate order to address this situation.[11]

It is debatable also whether the third-party funder should be entitled to recover costs in the event the funded party is successful in the proceedings. And if so, to what extent? Although there are several judicial decisions which have made a holding that third-party costs are recoverable, the limitation of what can be recovered and what cannot be is debatable. There is also an apprehension that if funds are freely available, people with no genuine claim might abuse the process. While it is unlikely for the funders to entertain claims with little chance of success, this situation can also be arrested by regulating the costs to be recovered and an order for depositing security for costs.

In an attempt to avoid frivolous claims that we may be worried about due to the availability of funds which may stimulate ungenuine litigants, rules can be established under which funders may be liable to pay costs for the successful Respondent. The principle to be applied on costs against an unsuccessful claim funded by TPF can be like the one established in *Arkin v Borchard Lines Ltd (Costs Order) [2005] EWCA Civ 655* in which the Court held that liability of a third party, when condemned to costs, is limited to the amount funded. This principle is known as the "*Arkin cap.*" If the third-party funders are aware of possible liability on costs in case of claim failure, such funders will be more careful in deciding which disputes to fund and which to avoid funding.

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11 Harwood, Miriam and Batifort, Simon and Trahanas, Christina, Third-Party Funding: Security for Costs and Other Key Issues (May 1, 2017). 2 The Investment Treaty Arbitration Review 103 (Barton Legum ed., Law Business Research), 2017, Available at SSRN: https://ssrn.com/abstract=3047873

TPF also brings up the issue of control or influence of third-party funders over the arbitration process. If there are no regulations in place, funders may influence the choice of representation of the funded party and even the choice of witnesses as this might have an impact on costs to be incurred during the proceedings and outcome of the dispute. This makes it necessary to have regulations to control TPF by limiting or excluding the powers of the funders in the proceedings. For example, it should be clear whether or not the funder is allowed to appoint counsel for the funded party or a funder have a meeting with the counsel for the funded party in the absence of the client and whether correspondence between the funders and the funded party in relation to the proceedings should be disclosed to the other party and the tribunal etc.

There is some guidance on TPF, for example, prohibiting a counsel to meet with the funder in the absence of the client. The Influence of the Funder on the Witnesses and selection of the Tribunal should be clear. Obviously, third-party funders should not be allowed to have an influence on the selection of the Tribunal, but the question is how can this be enforced? Generally, there should be regulations made in a manner that will prohibit the funder to have control and influencing the proceedings apart from financing it as a third party with no interest at all in the matter apart from payments agreed in the funding contract. These rules can operate well when there is legislative support for TPF.

TPF may also have a negative impact on the amicable resolution of disputes because a party who was willing to have a settlement because of a lack of funds to support the claim may opt to proceed with the matter provided that the same is being funded by a third party and may have little or nothing to lose even if the proceedings are not terminated in favour of the funded party. The impact of third-party funding on Investor-State Dispute Settlement (ISDS) as per the UNICITRAL report (supra) shows that there is an increase in the number of ISDS cases, in frivolous claims as well as in the number of damages claimed to mention but a few. The report shows that there has been an increase in disputes filed and some of those disputes are frivolous.

The report also noted that some disputants became reluctant to settle the dispute. This would mean that some parties, had it not been due to the availability of funds, would have agreed on an amicable settlement. TPF should be regulated in a manner that there will be sanction for those who are found that they did not prosecute their claims in a bona fide manner. While TPF is highly appreciated for assisting parties to access justice, due regard should also be given to ensure the opposite does not result. Access to justice should also be applied justly to all in the sense that arrangements for TPF should not only be available to disputes involving a huge amount of money but should really aim at assisting all people to access justice not only a section of it.

From what we have discussed, there is no dispute that TPF has several challenges and even some negative impacts on the dispute resolution mechanism. However, TPF is a way in which litigation and arbitrations are going to be financed given the fiscal impact of TPF on investors. This is a global trend that Africa cannot go against. The best way

to address these concerns is to discuss the challenges which have been experienced in those jurisdictions which have established TPF and see the best way to have regulations/ legislations which will respond to those challenges. State courts also have a role to play in interpreting existing rules and legislation to see how best TPF can be accommodated. It is for practitioners of arbitration to move the courts in proper cases so as to get judicial decisions interpreting different situations surrounding TPF.

In those jurisdictions where champerty is prohibited by legislation, it will be important to have an amendment of that legislation so as to exclude bona fide funding of the litigation to achieve ends of justice from being regarded as champerty. One respondent was quoted saying;

> *"Champerty and maintenance are historical relics of English common law that have no place in modern international arbitration between sophisticated and legally advised parties. As each year goes by, the number of jurisdictions that open up to litigation funding increases, and the number of jurisdictions that maintain restrictions based on champerty and maintenance decreases…"*[12]

TPF should always be looked at as a product available to investors just like credit facilities from the banks, insurance cover or any other product which aims at facilitating investment and stimulating production in the economy. Obviously, what makes TPF suspicious, is the possibility of the funder influencing the outcome of the dispute. Once, the funders are restricted from such influence, then there should be no fear, and this should be the objective of the rules to govern TPF. Given the high use of TPF in the developed world, Africa's jurisdiction cannot avoid TPF because of the intermingling of African economies and the rest of the world. It might be a matter of time but ultimately, given the recourses available in Africa and the growth of economic activities in Africa, funders shall be attracted to enter this jurisdiction. The best way for Africa to benefit from TPF is by preparing a conducive environment for TPF and being proactive to answer challenges identified by TPF in other jurisdictions globally.

In response to the worry that if there is the availability of funds to pursue claims, frivolous claimants may emerge and as shown in the UNICITRAL report, it can be said that this apprehension may be for a short period of time but with more established principles and rules governing TPF, the arrangement is becoming more professional and not just like gambling. Funders would do risk calculations before engaging in the funding of the particular matter. Funders will normally study the matter carefully and obtain a professional opinion on the chances of winning or losing the matter. It is unlike that a serious funder will gamble in frivolous claims probably if a study is done at the moment, data may show a decrease in frivolous claims funded by third parties. As such, in future, in different jurisdictions, there might be rules which will govern the conduct of third-party funders and therefore with time we should expect to see a code of conduct for third-party funders.

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12 Baker, Mark, et al., editors. International Arbitration Report Issue 7 – September 2016, (Norton Rose Fulbright, 2016), www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/international-arbitration-report---issue-7.pdf (visited on April 14, 2023).

5. Conclusion

Refusing TPF is not an option for any jurisdiction which wants to go at the same pace as other jurisdictions in the world. Countries of Africa are struggling to attract international arbitration and compete to be among the best seat of arbitration. As a step towards attracting international arbitration to be conducted in African jurisdiction, the issue of TPF cannot be ignored. The role of dispute resolution in the growth of the economy cannot be undermined and African countries must strive to ensure a favourable environment for dispute resolution is effectively put in place. The growth of African economies needs the existence of a well-established dispute resolution mechanism which includes funding of arbitration and/or court litigation. With the change of time, it is important to note that there is also a need to change some laws and rules because some concepts such as champerty must be redefined to reflect the development of changing jurisprudence globally.

Africa should not disassociate itself from global issues subject to putting in place sufficient safeguards to protect its interests. The High Court of South Africa in the case of *Dorothea De Bruyn v Steinhoff International Holdings N. V and Others*[13] gave guidance as to what should be criteria for determining suitability on funding arrangements. The Court among other issues held that funding arrangements should not in any way compromise the interests of the litigants. This means arrangements for funding should not be in a manner that the profits of funders are given priority over the real interest of litigation.

The benefits of litigation should not be for the funders in the first place but for litigants. In this, the judge emphasised the attorney should be independent of the funders and should exercise such independence in the interest of the litigant. The Court also emphasised that funding arrangements should be used when it is necessary to provide access to justice and arrangement should be fair and reasonable. Further, the arrangement for funding must not interfere with the duty of the lawyer while acting in the best interest of the clients. Although these conditions were given in a matter where the court was discussing funding of class action, the conditions can be used to fit any third-party funding.

While waiting for the enactment or amendment of legislation by relevant states, Arbitral Institutions in Africa should start making their own rules to see how even in the absence of legislation those rules can develop the growth of TPF in their institutions. Court actions may also be used in forging a path for TPF just like it has happened in South Africa. Without officially recognizing or prohibiting TPF in Africa, the area will remain a grey area because it is not expressly prohibited or allowed[14]

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13 Case No. 29290/2018

14 Omonigho Oyoma Brown and Arnaud Oulepo, Third-Party Funding in International Arbitration, (Africa Arbitration Academy, 2019).

ARBITRABILITY OF CORRUPTION TAINTED INVESTOR-STATE CONTRACTS IN INTERNATIONAL COMMERCIAL ARBITRATION.

By Job Owiro

Abstract

The World Duty Free Company Limited v Republic of Kenya case at the International Centre for Settlement of Investment Disputes (ICSID) became a leading authority for the proposition that claims based on corruption tainted contracts cannot be upheld. This is on the basis of international public policy. In line with this position, this research work is meant to analyze the Arbitrability of corruption tainted investment contracts in investor-state arbitration proceedings. It offers different case scenarios in the world involving investor-state disputes before arbitration with corruption tainted contracts. In addition, it argues about the requisite standard and burden of proof to be employed before arbitration tribunals when deciding on corruption allegations.

1. Introduction

> *Proverbs 29: 4 (New International Version).*
>
> *"By Justice a king gives country stability but those who are greedy for bribes tear it down."*[1]

The Black's Law Dictionary defines corruption as an act of an official or fiduciary person who wrongfully and unlawfully uses his station to procure some benefit for himself or for another person contrary to the duty and rights of others.[2] It can also be defined as a violation of fundamental rules policies or the exploitation of trust to offer illegal or unauthorized privileges and undue advantages in exchange for either personal or third-party gain, but to the detriment of public interest.[3]

1 Proverbs 29: 4 *New International Version Bible.*

2 Henry Campbell, Black's Law Dictionary, 2nd Edition, online at https://thelawdictionary.org/corruption/ (visited 2nd March 2023).

3 Corruption in International Arbitration , Penn State Law eLibrary online at https://icsid.worldbank.org/sites/default/files/parties_publications/C3765/Claimants%27%20Reply%20%28Redacted%20per%20PO8%29/Legal%20Authorities/CL-0052.PDF(Visited 12th Feb 2023).

Corruption is a vice that inhibits economic growth and negatively impacts on investment. It is an insidious plague with wide corrosive effects on societies. Furthermore, it undermines rule of law and results to violations of human rights.[4] It is for this reason that it needs to be fought at all costs. The United Nations Convention Against Corruption stipulates that State parties shall endeavor to establish and promote effective practices aimed at the prevention of corruption.[5]It is therefore prudent that States promote integrity, honesty and responsibility among its public officials in order to fight corruption.[6]

Similarly different States have adopted legislations aimed at curbing the vice of corruption such as the Anti-Corruption and Economic Crimes Act in Kenya.[7] In the case of *Himpurna California Energy Ltd (Bemuda) v PT (Persero) Perusahaan Listruk Negara (Indonesia)*[8], the Arbitral Tribunal made its holding with regards to non-derogable cardinal rule of law that;

> "*The members of the Arbitral Tribunal do not live in an ivory tower. Nor do they view the arbitral process as one which operates in a vacuum, divorced from reality…… The arbitrators believe that cronyism and other forms of abuse of public trust do indeed exist in many countries, causing great harm to untold millions of ordinary people in a myriad of insidious ways. They would rigorously oppose any attempt to use the arbitral process to give effect to contracts contaminated by corruption.*"[9]

2. The Concept of Arbitrability

Arbitrability indicates whether a dispute is capable of being settled by arbitration.[10]In the event a dispute is not arbitrable, an arbitration tribunal's jurisdiction is limited and the claim is thus submitted to the domestic courts.[11]

2.1 Objective Arbitrability

It relates to whether the subject matter in dispute can be arbitrated upon or whether the crux of it belongs to the dormain of the national courts.[12] The subject matter has to be arbitrable for an arbitration agreement to enforceable. In essence, it has to

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4 "Corruption, Fraud and Abuse of Process in Investment Treaty Arbitration," online at https://www.lexology.com/library/detail.aspx?g=4916b97f-95a2-43ed-ba7b-3ca8c3a912db (Visited 5th March, 2023)

5 Article 5(2), The United Nations Convention Against Corruption

6 Article 8, The United Nations Convention Against Corruption, Code of Conduct for public officials.

7 Anti-Corruption and Economic Crimes Act online at https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/98809/117654/F-1718951145/KEN98809.pdf (Visited 2nd March, 2023).

8 *Himpurna California Energy Ltd (Bemuda) v PT (Persero) Perusahaan Listruk Negara (Indonesia)*, Final Award, 4th May, 1999.

9 Lim K, Michael H, " Corruption in Arbitration- Law and Reality," online at https://cdn.arbitration-icca.org/s3fspublic/document/media_document/media013261720320840corruption_in_arbitration_paper_draft_248.pdf (Visited 6th March, 2023)

10 Online at https://jusmundi.com/en/document/publication/en-arbitrability#:~:text=A.-,Definition,impact%20on%20any%20States%20involved (Visited 2nd March, 2023).

11 The Concept of Arbitrability in Arbitration, online at https://www.acerislaw.com/the-concept-of-arbitrability-in-arbitration/ (Visited 2nd March, 2023)

12 Deskoski T, Dokovski V, " Notes on Arbitrability- Focus on Objective Arbitrability," online at https://repository.ukim.mk/bitstream/20.500.12188/9450/1/Deskoski%2C%20Dokovski%2C%20Notes%20on%20arbitrability.pdf (Visited 4th March, 2023)

be a subject that a State considers appropriate to be arbitrated upon.[13] Lawfully, any dispute that is capable of being resolved by private individuals can also be resolved by a judge of a national. However, arbitration is a form of private proceeding that has public consequences, therefore, there are certain matters that are prudent to be left for courts.[14]

If the subject matter in question is non-arbitrable than arbitration agreement cannot confer jurisdiction to arbitration tribunals to settle the dispute. The rationale behind this is that there are certain fundamental matters considered so important to the operation of justice such that they are exclusively reserved for national courts to make a determination of them.

In addition, there are certain limitations relating to international law and international public policy. This includes;

a. Limitations of transnational nature that emanate from public policy. This includes factors such as fraud and corruption.
b. Supranational limitations that arise from international and regional Statutes for example East African Community Treaty.
c. National limitations that arise from State law.[15]

2.2 Subjective Arbitrability.

It relates to the personal capacity of parties to a dispute, including the capacity to conclude an arbitration agreement. For subjective arbitrability to come into light, a person it refers to must be entitled to enter into an arbitration agreement through individual rights or in the event it is a state entity, have the legal capacity to enter into such an agreement.[16]

Certain disputes brought before arbitration tribunals may involve very sensitive public policy issues such as corruption. Such kind of disputes are left exclusively to the jurisdiction of the domestic courts to determine them by the domestic law.

Article II, paragraph 1, The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

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13 Moses M, "The Principles and Practice of International Commercial Arbitration," *Cambridge University Press*, Cambridge, 2008, page 31.

14 Blackaby N, Partasides C, Redfern A, Hunter M, "Redfern and Hunter on International Arbitration, Student Version," *Oxford University Press*, New York, 2009, page 124.

15 Pamboukis C, "On Arbitrability: The Arbitrator as a Problem Solver in Loukas A, Mistelis and Stavros L, Brekoulakis (eds), "Arbitrability: International and Comparative Perspectives," International Arbitration Law Library, Volume, *Kluwer Law International*, 2009, page 122

16 Freimane N, "Arbitrability: Problematic Issues of the Legal Term," Riga, 2012, page 21.

3. The Conventions and the Doctrine of Arbitrability

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards stipulates that;

> *"Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."*[17]

Similarly, Article V of the New York Convention provides for the grounds upon which recognition and enforcement of arbitral award may be refused vide a request by a party against whom it was invoked. This particular section of the Convention touches on different grounds to which I have limited the below grounds to the doctrine of arbitrability to be;

a. Parties to an arbitration agreement did not have the capacity to enter into such an agreement.
b. The arbitration agreement is invalid under the law to which the parties have subjected it or it fails any indication under the law of the country where the award was made.
c. The arbitral awards touches on matters that are beyond the scope of submission to arbitration.[18]

From the above, Article II and V of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides for the law of arbitrability as a ground for a domestic court to refuse recognition and enforcement of an arbitral award.[19]

4. Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID).

It makes no clear reference to the concept of arbitrability. Article 25 of this convention gives out the scope on matters to which ICSID arbitration Tribunal can entertain. Particularly, paragraph 4 that expressly excludes certain matters from the arbitration tribunal. It reads verbatim;

> *"Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre……."*[20]

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17 Article II, The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958.

18 Id, Article V.

19 Aceris Law LLC, " The Concept of Arbitrability in Arbitration," online at https://www.acerislaw.com/the-concept-of-arbitrability-in-arbitration/ (Visited 4th March, 2023)

20 Article 25(4), Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID)

Therefore, the issue of arbitrability under this Convention is purely on jurisdiction basis.

4.1 Arbitrability of Corruption

Allegations of corruption before an arbitral tribunal has procedural effects.

4.2 Corruption in Investor-State Contract

4.2.1 World Duty Free Company Limited v Republic of Kenya, ICSID [21]

The Claimant, a Company incorporated in the United Kingdom and the Respondent, Republic of Kenya entered into a 1989 contract according the Claimant duty to construct duty-free complexes at two Kenyan Airports.

The 1989 Agreement also had an arbitration clause providing that in case of a dispute between parties, it should be submitted to the International Centre for Settlement of Investment Disputes (ICSID) for resolution by the arbitration tribunal in accordance to the Convention on the Settlement of Investment Disputes between a Contracting State and nationals of other States.[22]

The Claimant instituted proceedings at the ICSID alleging that Kenya, the Respondent, had breached its contractual obligations and subsequently illegally took over its property. The Claimant stated that as a result of this, it lost profits and experienced exemplary damages. It therefore prayed for restitution and damages.

Furthermore, The Claimant filed a document in the arbitral proceedings in December 2002 indicating that the former Kenyan President Daniel Moi had been given covert payment in order to conclude the 1989 Agreement.

Kenyan on making this discovery sought that the ICSID should dismiss the Claimant's case as the Contract was procured through payment of a bribe and that the Contract was void and should be rendered unenforceable as a matter of public policy.

In December, 2004, the Tribunal stated that it had to address the issue on;

a. Whether the Claimant paid a bribe to the former President.
b. And if so, whether the 1989 Contract was procured through a bribe and
c. If the Contract was procured through a bribe whether it was still valid and can be enforced under the relevant domestic and international laws.

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21 *World Duty Free Company Limited v Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006

22 Investment Treaty News, "*World Duty Free v Kenya*, " online at https://www.iisd.org/itn/en/2018/10/18/world-duty-free-v-kenya/ (Visited 2nd March, 2023)

4.2.1.1 Held

The Claimant procured the 1989 Agreement through a bribe and it consequently did not have the right to pursue recovery in the said dispute which had arisen as a result of the 1989 Agreement.

This case supports the principle that investors have obligations to comply with international and domestic laws of host states that it invests in. In addition, this case showed how a misconduct of an investor can affect his or her right.[23]

Recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that;

a. Subject matter of the difference is not capable of settlement by arbitration under the law of that country.
b. The recognition or enforcement of the award would be contrary to the public policy of that country.[24]

4.2 Limitation of these Principles

This case was based on a Contract between the World Duty Free and Kenya as opposed to International Investment Agreement (IIA) or a bilateral investment treaty. This limits the applicability of these principles in other state-investor disputes.

4.3 General International Law Principles and Public Policy on Corruption

The significance of the above case is that it clearly brought out the fact that foreign investors apart from having rights in the countries they in invest in also have obligations. Furthermore, it stated that enjoyment of these rights by foreign investors is contingent to them complying with their obligations. This case was based on a dispute on a Contract and therefore, there was a lacuna on what would have been the holding if there was a claim on rights under a governing International Investment Agreement (IAA).

4.4 BSG Case in The World Bank International Centre for Settlement of Investment Disputes.

The arbitration tribunal ruled that BSG Resources obtained mining licenses to one of most prized natural resources through bribery. It was discovered by the arbiter that there was overwhelming evidence that the giant Simandou iron ore deposit granted BSG licenses to the natural resources through corrupt dealings.

The company has since been having financial woes and has been placed under administration. It has since claimed conspiracy by the Guinea State to seize its assets.

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23 Kabir D, Josephine H, "Transnational Policy," online at https://jusmundi.com/en/document/publication/en-transnational-public-policy (Visited 2nd March, 2023)

24 Article V, Paragraph 2, The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

ICSID renders its determination claiming that there was conclusive evidence that Toure received at least $9.42 mm from BSGR directly or indirectly between August of 2009 and May, 2012. $5.23mm of this could be traced via cheques and wire transfers.

It was further found that BSGR officials went to great length to using intermediaries to cover up their acts by bribing third parties and using improper accounting methods to making it difficult to trace their payments and tampering with the evidences before being presented to the tribunal. While ICSID found that it did not have jurisdiction to entertain the matter.

5. Corruption Involving Member of the Tribunal

The ICSID Convention provides that;

> "Either party may request annulment of the award by an application in writing addressed to the Secretary General on one or more of the following grounds;
>
> (c) that there was corruption on the part of a member of the Tribunal."[25]

5.1 Procedure for Application for the Annulment of the Arbitral Award

The application for the annulment of the arbitral award shall be made within 120 days after the date on which the award was rendered. In the event the annulment is sought on the ground of corruption such application shall be made within 120 days after discovery of the corruption and in any event within three years after the date on which the award was rendered.[26]

Upon receiving the request for annulment, the Chairman appoints from the panel of Arbitrators an ad hoc Committee of three persons. None of the members of this Committee shall be

a. Members of the Tribunal that rendered the award.
b. Shall be of the same nationality as any such member.
c. Shall be a national of the State party to the dispute or of the State whose national is a party to the dispute.
c. Shall have been designated to the Panel of Arbitrators by either of those States; or
d. Shall have acted as a conciliator in the same dispute.

The Committee shall have the authority to annul the award or any part thereof on any of the grounds set out under Article 52(1) including allegations of corruption and bribery on the part of one of the arbitrators.[27]

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25 Id 1 Article 52(1)(c)
26 Id 2 Article 52(2)
27 Article 52(3), Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ((ICSID).

5.2 The Doctrine of "Clean Hands"

It is also alluded to as doctrine of "dirty hands". It stipulates that court will not offer aid if the cause of action arose out of an unlawful act by the Claimant. This is in line with the equity maxim that "he who comes to equity must come with clean hands".[28]

5.2.1 African Holding Company of America, Inc. and Socie'te' Africaine de Construction au Congo SARL v Democratic Republic of Congo[29]

In this case, the ICSID tribunal declined to entertain a dispute pertaining to a failed construction contract between Democratic Republic of Congo (DRC) and two United States of America investors.

This case brought about "clean hands doctrine" in its holding that;

"*If some form of illegal or improper conduct is found on the part of the investor, his or her hands will be "unclean", his claims will be barred and any loss suffered will lie where it falls.*"

Arbitrators use this doctrine to avoid granting access;

"*To International Arbitration to resolve disputes, because it is evident that its act had a fraudulent origin and, as provided by the legal maxim, "nobody can benefit from his own fraud to absence".*

6. Powers and Functions of the Tribunal with Regards to Its Jurisdiction Pertaining to Corruption Allegations.

The tribunal is a judge of its own competence and any objection by a party to a dispute of its competence to entertain a matter shall be determined by the tribunal whether to deal with it as a preliminary question or to join it to the merits of the dispute. [30]This in essence may involve corruption allegation matters questioning the competency of the Tribunal to handle the matter.

7. Red Flag Technique in Determination of Corruption Cases Before Arbitration Tribunals.

Red flag techniques are a set of indicators or warning signs that suggest the presence of corruption or fraud in a transaction, activity, or relationship. These techniques are

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28 Camilla G, Tarek G, "Unclean Hands," online at https://jusmundi.com/en/document/publication/en-unclean-hands (Visited 2nd March 2023)

29 Nikiema S, " News Brief: Tribunal Declines Jurisdiction in African Holding Company of America, INC et Socie'te' Africaine de Construction au Congo SARL (SAFRICA) v Re'publique De'mocratique du Congo," Investment Treaty News, online at https://www.iisd.org/itn/en/2008/08/13/news-in-brief-tribunal-declines-jurisdiction-in-african-holding-company-of-america-inc-et-soci-233-t-233-africaine-de-construction-au-congo-sarl-safrica-v-r-233-publique-d-233-mocratique-du-congo/ (Visited 2nd March, 2023)

30 Section 3, Article 41 of Convention on the Settlement of Investment Disputes Between States and Nationals of other States.

used by French judges and investigators in the determination of corruption matters.[31]

In France, the concept of "red flags" is commonly referred to as "indices de corruption" or "indices de fraude." These indices are a set of indicators or warning signs that suggest the presence of corruption or fraud in a transaction, activity, or relationship. Some common red flags that may indicate corruption or fraud in a business transaction include:

1. Payments made to offshore or tax-haven accounts
2. Unexplained payments or payments that are not supported by documentation
3. Payments made to politically exposed persons (PEPs) or their family members or associates
4. Unusually high commissions or fees paid to intermediaries
5. Transactions involving high-risk countries or sectors
6. Lack of transparency or disclosure in transactions or relationships

French judges and investigators may also use a range of investigative techniques, including search and seizure, wiretapping, and undercover operations, to uncover evidence of corruption or fraud.[32]

It is important to note that the presence of one or more red flags does not necessarily indicate the presence of corruption or fraud, but rather suggests that further investigation and scrutiny may be warranted.

7.1 P ID v Nigeria[33]

The red flag technique was used to establish that corruption had taken place in the awarding of a gas supply and processing contract. The contract was awarded to a company called P ID, and Nigeria was ordered to pay over $9 billion in damages to the company as a result of a breach of contract.[34]

Nigeria argued that the contract was procured by fraud and corruption, and the red flag technique was used by the arbitration tribunal to examine the evidence put forward by both sides. The red flags that were considered included the fact that P ID had no prior experience in the gas processing industry, that the contract was awarded without a competitive bidding process, and that the payment structure was unusual. The arbitration tribunal concluded that the red flags were indicative of corruption, and that the contract had been procured by bribery. As a result, the tribunal ordered Nigeria to pay the damages awarded to PID.

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31 DiNapoli T, "Red Flags for Fraud", *State of Newyork Office*.

32 Virtual Assets Red Flag Indicators of Money Laundering and Terrorist Financing online at https://www.fatf-gafi.org/en/publications/Methodsandtrends/Virtual-assets-red-flag-indicators.html (Visited on 17th April 2023)

33 International Chamber of Commerce, online at https://iccwbo.org/ (Visited 17th April 2023).

34 *P and ID v. Nigeria*, Judgment of the High Court of Justice of England and Wales [2019] EWHC 2241, 16 online at https://jusmundi.com/fr/document/decision/en-process-and-industrial-developments-ltd-v-the-ministry-of-petroleum-resources-of-the-federal-republic-of-nigeria-judgment-of-the-high-court-of-justice-of-england-and-wales-friday-16th-august-2019ll (Visited 17th April 2023).

The case of P ID v Nigeria highlights the importance of using red flag techniques in international arbitration to establish the likelihood of corruption. It also emphasizes the need for transparency and fairness in the awarding of contracts to prevent corruption and fraud.

However, based on the available information and reports, some of the red flag techniques that may be relevant to this case include:

1. Review of the contract terms: The contract between P&ID and the Nigerian government has been subject to scrutiny, with some experts questioning the unusual terms of the agreement, such as the size of the award and the fact that P&ID did not put up any capital to build the facilities. These unusual terms may raise red flags about the legitimacy of the agreement and whether it was the result of corruption or other improper conduct.

2. Analysis of the parties involved: The identities and backgrounds of the individuals involved in the negotiation and signing of the contract may also be subject to red flag analysis. For example, the Nigerian government officials who signed the contract have been accused of receiving bribes from P&ID, and the identities and affiliations of the P&ID representatives may also be scrutinized to determine whether there are any indications of corrupt activity.

3. Examination of the payment arrangements: The payment arrangements in the contract, which involve the Nigerian government paying P&ID for the processing of gas, may also raise red flags. Some experts have questioned whether the payments were reasonable and whether they were structured to facilitate corrupt activity.

4. Analysis of the arbitration process: The arbitration process itself may also be subject to red flag analysis, particularly with regard to the selection of arbitrators and the conduct of the proceedings. In the P&ID case, the appointment of one of the arbitrators has been challenged on the basis of alleged conflicts of interest, and the conduct of the arbitration has been criticized by the Nigerian government.

It's important to note that the specific red flag techniques that may be relevant to the P&ID case will depend on the facts and circumstances of the case, and any analysis of red flags should be conducted with caution and with reference to applicable legal standards.

8. The Burden of Proving Corruption and the Requisite Standard of Proof.

8.1 Burden of Proof

It alludes to the allocation of the risk of not having claim considered as proven.[35] There is a general principle that each party in international arbitration bears the burden of the facts they rely on in support of their case.[36]

In *Antoine Biloune (Syria) and Marine Drive Complex Limited (Ghana) v Ghana* Investment Centre and the Government of Ghana[37], the Arbitration Tribunal noted that;

"*Under the UNCITRAL Rules, 'Each Party shall have the burden of proving the facts relied on to support his claim or defense.*"[38]

In *CalEnergy's Himpurna California Energy Limited and The Republic of Indonesia's State Electricity Corporation*[39] it was noted that;

"*……The arbitrators believe that cronyism and other forms of abuse of public trust do indeed exist in many countries, causing great harm to untold millions of ordinary people in a myriad of insidious ways. They would rigorously oppose any attempt to use the arbitral process to give effect to contracts contaminated by corruption.*"

But such grave accusations must be proven. There is in fact no evidence of corruption in this case. Rumours or innuendo will not do. Nor obviously may a conviction that some foreign investors have been unscrupulously justify the arbitrary designation of a particular investor as a scapegoat."

It is in the same vein that Parties that allege corruption in arbitration disputes have to prove the same before an Arbitration Tribunal. However, there exists exceptions to this rule and this includes;

Firstly, Parties can agree to allocate their burden of proof differently in their arbitral agreement. This is underpinned in parties' autonomy that allows a party to prove certain circumstances which are by nature hard to be proved by the Claiming or defending party to the suit. However, this comes about with its set of demerits. Arbitration proceedings are meant to maintain a long lasting relationship between the parties to a dispute. Therefore, a party can take advantage of this and behave opportunistically

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35 Carvalho P, Valle M, "Corruption Allegations in Arbitration: Burden and Standard of Proof, Red Flags, and a Proposal for Systematization," Journal of International Arbitration online at https://www.repository.cam.ac.uk/bitstream/handle/1810/343879/JOIA_39_0603.pdf?sequence=2 (Visited 6th March, 2023).

36 Article 27(1), UNCITRAL Arbitration Rules 2010.

37 *Antoine Biloune (Syria) and Marine Drive Complex Limited (Ghana) v Ghana Investment Centre and the Government of Ghana*, YCA 1994

38 "History and Modern Evolution of Transnational Commercial LAW," online at https://www.trans-lex.org/260700/_/ad-hoc-award-of-october-27-1989-and-june-30-1990-antoine-biloune-and-marine-drive-complex-ltd-v-ghana-investment-centre-and-the-government-of-ghana-yca-1994-at-11-et-seq/ (Visited 6th March, 2023)

39 *supra n21*

for self-seeking gains.[40]

To cure this, certain limitations are put in place by stipulating that private allocation of burden of proof should not be;

a. Unfair or unequal.[41]
b. Derogate mandatory substantive and procedural rules.
c. Harm public policy and good faith.

Secondly, legal provisions may reverse traditional rules of burden of proof.[42]

Thirdly and which is of special concern for corruption allegations is that Tribunal can differently allocate burden of proof by making adverse inferences from the parties' unjustified refusal to produce certain evidence after the Tribunal expressly orders them to do so. A good is example is a scenario where a document is not available to the Claiming party and the Defending party unjustifiably refuses to cooperate with the Tribunal by producing it. This adverse inference helps the incapacitated party to prove its case.[43]

8.2 Standard of Proof

It relates to idea on how evidence that is submitted to an arbitral tribunal will be weighted by the arbitrator. It is often assumed as balance of probabilities.

Most pundits have argued that arbitration tribunals need to make it easier for a Party to establish the existence of corruption.[44]The argument is that the Arbitration Tribunal does not have similar subpoena and enforcement powers as the national courts.

9. EDF (Services) Limited v Romania[45]

This case clearly brought about the challenge that parties encounter in an attempt to prove corrupt dealings in international arbitration. The facts of this case were that Romanian government official demanded for a bribe of USD 2.5 million to renew EDF Contract at the parking lot of Hilton hotel in Romania and also at Romanian State Secretary's private residence .

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40 Redfem etal, *supra n.81*: Carlos Alberto Carmona, "Arbitragem c Processo. Um Comentario a Lei N", 9307/96, 3rd edition, Atlas,2009

41 Article 18, UNCITRAL Model Law.

42 Redfem et al, *supra n.81*; Carreteiro, supra n. 78

43 Carvalho P, Valle M, "Corruption Allegations in Arbitration: Burden and Standard of Proof, Red Flags, and a Proposal for Systematization," *Journal of International Arbitration* online at https://www.repository.cam.ac.uk/bitstream/handle/1810/343879/JOIA_39_0603.pdf?sequence=2 (Visited 6th March, 2023)

44 Lim K, Michael H,M " Corruption in Arbitration- Law and Reality" online at https://cdn.arbitration-icca.org/s3fspublic/document/media_document/media013261720320840corruption_in_arbitration_paper_draft_248.pdf (Visited 6th March, 2023)

45 EDF(Services) Limited v Romania, ICSID Case No. ARB/05/13 online at https://jusmundi.com/en/document/decision/en-edf-services-limited-v-republic-of-romania-award-thursday-8th-october-2009 (Visited 8th April, 2023)

Tribunal in this matter relied on "clear and convincing evidence" standard. This is due to the seriousness of allegation of corruption provided that the dispute involved officials in the high rank of Romanian government.

From the above, it is difficult to prove conversation in a car park and a living room. The Tribunal could only rely on the testimony of Claimant's employee that alleged receiving bribery requests from the Respondent's officials.

In the case of *Republic of Philippines v Westinghouse Elec.*[46]

Tribunal demanded "clear and convincing evidence" of corruption that amounted to "more than a mere preponderance."[47]

In this case the arbitrators applied the standard of proof required in the three states i.e New Jersey, Philippines and Pennsylvania of the parties to the dispute. The United States of America in the parallel case applied a "lower" standard of proof, that permitted the court to conclude that agent's commissions were intended to be paid as bribery at least in part to President Marcos.

10. Balance of Probabilities

The case of *Vale v BSG Resources Limited*[48] stated explicitly that;"Balance of probabilities "standard be the starting point in determination of standard of proof.[49]

The ICSID held that the standard of proof on corruption that is applicable in arbitration should not be higher than standard that is applicable in other civil cases.[50]

10.1 Circumstantial Evidence

It is very rare in practice that direct proof of evidence is available. In *Spentex Netherlands B.V v the Republic of Uzbekistan*[51] the Tribunal adopted more flexible and holistic approach mixed with the use of the "connecting the dots" indicated in Methanex

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46 *Republic of Philippines v Westinghouse Elec*

47 Partasides C, "Proving Corruption in International Arbitration: A Balanced Standard for the Real World", *ICSID Review- Foreign Investment Law Journal*, page 51 online at https://icsid.worldbank.org/sites/default/files/parties_publications/C6106/2020-06-30%20Respondent_s%20Response%20to%20US%20Submission/Legal%20Authorities/RL-0077.pdf (Visited 17th February, 2023)

48 *BSG Resources Limited (in administration), BSG Resources (Guinea) Limited and BSG Resources (Guinea) SA'RL v Republic of Guinea* (ICSID Case No. ARB/14/22)

49 BSG Resources Won Guinea Mining Rights Through Bribery, Arbiter Says, *Financial Times online* at https://www.ft.com/content/81af7257-ebb7-48f8-832e-4263414e4eb6 (Visited 13th February 2023).

50 Proving Corruption Allegations in International Arbitration: A Return to the Balance of Probabilities Standard? Online at https://www.nortonrosefulbright.com/enke/knowledge/publications/3b94ac30/proving-corruption-allegations-in-international-arbitration (Visited 12th February 2023)

51 *Spentex Netherlands B.V v the Republic of Uzbekistan*, ICSID Case No. ARB/13/26 at "*Corruption, Fraud and Abuse of Process in Investment Treaty Arbitration*," online at https://www.lexology.com/library/detail.aspx?g=4916b97f-95a2-43ed-ba7b-3ca8c3a912db (Visited 5th March, 2023)

Corporation with the United States of America,[52] where the Arbitration Tribunal stated that;

> *"Connecting the dots is hardly a unique methodology; but when it is applied, it is critical, first, that all the relevant dots be assembled; and, second, that each be examined, in its own context, for its own significance, before a possible pattern is essayed. Plainly, a self-serving selection of events and a self-serving interpretation of each of those selected, may produce an account approximating verisimilitude, but it will not reflect what actually happened."*[53]

In *Azpetrol International Holdings BV, Azpetrol Group BV and Azpetrol Oil Services Group BV v Republic of Azerbaijan*[54] Director of the Claimants stated that he had provided funds to bribe Azerbaijan officials during the cross- examination before the Arbitration Tribunal. The Respondent thereafter filled an application for the dismissal of the claim due to international public policy. The claim was inadmissible as there was no "clear and conclusive evidence" to assert the corruption.

In the case of *Southern Pacific Properties (Middle East) Limited (Hong Kong) and Southern Pacific Properties Limited (Hong Kong) v The Arab Republic of Egypt*[55], the Respondents claim of corruption failed as stated below.

The facts of this case were that parties herein entered into a joint venture meant to develop two international tourist projects in Cairo, pyramid area. Dispute arose concerning duties of the Respond and compensation to the Applicant for cancellation of their investment project.

Respondent in its pleadings before the Tribunal repeatedly claimed that of the contract being irregular and marred by improper business connections by the Applicant. Furthermore, the Respondent alleged that Claimant by-passed normal government channels of communication and went to the top management. They therefore prayed that claims by the Claimant were unfounded as it was marred by corruption as per their conduct.

However, the tribunal in its findings held that;

"Allusions not supported by evidence and based on suppositions" are not sufficient to prove corruption.

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52 Kluwer W, "On Corruption in Investor- State Arbitration: The Case of Odebrecht Against the Peruvian State,", *Kluwer Arbitration Blog* online at https://arbitrationblog.kluwerarbitration.com/2020/04/02/on-corruption-in-investor-state-arbitration-the-case-of-odebrecht-against-the-peruvian-state/ (Visited 22nd February, 2023)

53 Kluwer Arbitration," Chapter 7. Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence, " online at https://icsid.worldbank.org/sites/default/files/parties_publications/C3765/Claimants%27%20Reply%20%28Redacted%20per%20PO8%29/Legal%20Authorities/CL-0050.PDF (Visited 6th March, 2023)

54 *Azpetrol International Holdings BV, Azpetrol Group BV and Azpetrol Oil Services Group BV v Republic of Azerbaijan* ICSID Case No. ARB/06/15 online at https://www.transnational-dispute-management.com/legal-and-regulatory-detail.asp?key=21911 (Visited 6th March, 2023)

55 *Southern Pacific Properties (Middle East) Limited (Hong Kong) and Southern Pacific Properties Limited (Hong Kong) v The Arab Republic of Egypt*, ICSID Case No. ARB/84/3 of May 1992

In addition, the Respondent admitted to not having sufficient evidence when the Tribunal requested for it by stating that;

"Nothing we have said in our memorials should be construed as an accusation, or allegation of misconduct regarding any particular Egyptian official referred to……"

11. Other Cases Where the Arbitration Tribunal Exercised its Power to Dismiss Suits Tainted by Corruption.

Inceysa Vallisoletana, S.L v Republic of El Salvador[56] It addressed the lacuna in its holding that since the investor had obtained investment through fraud there was no relief for them under a governing IIA or the Contract.

The Claimant in this matter alleged massive expropriation of its contractual rights involving vehicle inspection services which was awarded in a public bidding process. The state raised an objection as to the jurisdiction of the tribunal alleging incidences of fraud in the tender award.

The Tribunal held that the contract was tainted by forged financial documents regarding the financial position of the Claimant, intentional misrepresentation of information and concealment of an existing relationship to one of the bidders. Tribunal held that it lacked jurisdiction as the contract was tainted by fraud. The Claimant violated the principle of good faith by falsifying documents thus making the contract an illegality. The Claimant cannot benefit in an illegality which it created.

Niko Resources (Bangladesh) Limited v People's Republic of Bangladesh, BAPEX and PETROBANGLA[57]

The ICSID dismissed an objection on the Tribunals jurisdiction on this dispute brought by the Respondent noting that it related to alleged corruption. The dispute arose out of a contract between a subsidiary of Canadian owned energy company and Bangladesh state owned oil and gas companies' i.e Production Company Limited and Bangladesh Oil Gas and Mineral Corporation (Petrobangla) and Bangladesh Petroleum Exploration (BAPEX) pertaining to extraction and sale of gas in the northern Bangladesh.[58]

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56 *Inceysa Vallisoletana, S.L v Republic of El Salvador*, ICSID Case No. ARB/03/26 (2 August 2006).

57 *Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration and Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla").* ICSID Case No. ARB/10/18

58 ICSID Corruption Claims fails in Bangladesh Gas Payments arbitration (Niko Resources v Bapex and Petrobangla) online at https://www.lexisnexis.co.uk/legal/news/icsid-corruption-claim-fails-in-bangladesh-gas-payments-arbitration-niko-resources-v-bapex-and (Visited 12th February 2023)

12. Moving Away From the "Clear and Conclusive Evidence" Standard.

The United Nations noted in UN Anti-Corruption Toolkit that;

> *"Senior officials actively engaged in corruption are often in a position to impede investigations and destroy or conceal evidence, and pervasive corruption weakens investigative and prosecutorial agencies to the point that gathering evidence and establishing its validity and probative value becomes problematic at best."*[59]

In Conclusion, corruption is a vice that bedevils the society. It inhibits development and results to untold suffering to innocent masses. Therefore, measures need to be put in place to fight it at whatever cost even in arbitration tribunals. The "clear and conclusive evidence" standard makes it difficult to fight corruption in arbitration proceedings. Private parties cannot also admit to taking bribery due to the impending criminal prosecution if they were to do so. Furthermore, written evidence is equally hard to find to implicate one on bribery allegations.

Tribunals lack the requisite powers that courts have to seize documents and compel a witness to testify in arbitration proceedings. This heightened standard of proof in the proceedings renders plea of corruption unsustainable despite there being credible evidence to implicate a party. This has made arbitration tribunals to ignore the high standard of proof and apply a pragmatic approach in the proceedings. Therefore, this need to relooked in great detail as it would derail the fight against corruption at the arbitral tribunals.

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59 Online at https://www.unodc.org/documents/treaties/corruption/toolkit/toolkitv5_foreword.pdf (Visited 6th March, 2023)

CROSS BORDER ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN THE CONTEXT OF ECONOMIC SANCTIONS

By Beth Michoma, MCiArb*

Abstract

The world is increasingly volatile with the latest war taking place in the Ukraine due to the invasion by Russia and pockets of uprising happening in different Countries. Whilst war is ongoing, trade is also ongoing and international commercial contracts are still in place and must be performed. Further, due to the instability of the war, breaches to performance of the international commercial contracts will inevitably occur. On the other hand countries that go rogue may suffer sanctions by the United Nations or other Countries who are signatories to the United Nations. Ultimately a breach in performance that leads to an international commercial disputes whichever way it occurs; either due to war, military blockades or due to sanctions must be resolved.Trade has been a driving factor for the prosperity of Nations since time immemorial. Currently, for any Nation to prosper they must allow interconnectivity and embrace international trade.[1]

Globalization is key to driving the expansion of a Country's GDP and earning foreign reserves for Nations.[2] *Due to expansive trade, throughout the world there is an increased number of complex international contracts executed daily. Stemming from the international contracts, are proportional numbers of international commercial disputes.It is thus important, to proffer a solution to these international commercial disputes. Previously, international commercial disputes between persons, states and persons and States and states were solved through litigation. However, in recent times international commercial Arbitration has become the preferred dispute resolution system, for international commercial disputes.*

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1 Steven E. Daskal, Free Trade and Prosperity: A Global Approach, Saturday, February 1, 1986, <https://fee.org/articles/free-trade-and-prosperity-a-global-approach/>, accessed 6th March 2023

2 IMF Staff, Globalization: A Brief Overview, May 2008, <https://www.imf.org/external/np/exr/ib/2008/053008.html>, accessed 6th March 2023

Parties to international commercial disputes submit themselves to Arbitration as they are able to provide for their choice of tribunal and seat of arbitration and jurisdiction without the intervention of other entities.[3] *Also, parties require that any awards stemming from international Arbitration, may be recognized and enforceable in multiple jurisdictions. While, it is widely acknowledged that Arbitration is an effective tool towards instilling confidence in international trade, it is important to enumerate the challenges faced through the process, especially challenges that are of a geopolitical nature. Thus, this paper examines the place of international Arbitration in driving globalization, the sanctions regime, the impact of economic sanctions on international arbitration, cross border enforcement of foreign arbitral awards in the context of economic sanctions and gives recommendations on enforcement of foreign arbitral awards.*

Keywords: *international commercial disputes; international arbitration; sanctions regimes; recognition and enforcement; setting aside; arbitral awards; arbitrability; public policy*

1. Introduction

Globalization is a driving force for International trade. Goods such as Consumables, raw materials, food, and machinery can be sought and delivered to the international marketplace and dispatched to various countries. [4]

As international trade thrives and supply of goods and services grow, international commercial contracts (Contracts) of astronomical value are entered into. These contracts may be entered into by individuals, companies or Governments, seeking to obtain goods for trade or fulfilment of governmental responsibility to citizens. However, where contracts exist there is bound to be concurrent international commercial disputes (disputes). It is important to note that, disputes may result in serious trade conflicts with serious economic disruption and political repercussions if handled poorly.[5]

To forestall economic disruption and political repercussions, parties to the disputes must then hasten to reach a solution to the crisis. Traditionally, parties to the dispute would submit themselves to litigation as a first resort and seek a judgement of the court. However, it is increasingly being recognized that litigation may produce far reaching consequences especially where the dispute is between States or persons and states.

Difficulties and challenges that are apparent, in litigation, may include forum shopping, added costs for preparation of the suit and travel for witnesses, procedural complexities that occur, where one of the parties may not be aware of the courts' procedures,

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3 Paul Klaas, International Commercial Arbitration, https://shorturl.at/ivT57 , accessed 6th March 2023

4 Robinson, Romney, Bertrand, Trent J., Balassa, Bela, Allais, Maurice and Wonnacott, Paul. "International trade". Encyclopedia Britannica, Invalid Date, <https://www.britannica.com/topic/international-trade.> Accessed 16 April 2023.

5 Andrew Sagartz, Resolution of International Commercial Disputes: Surmounting Barriers Of Culture Without Going To Court, https://shorturl.at/bhtxD, accessed 6th March 2023

enforcement of the Court's judgement, and sovereign immunity. [6]

Naturally, parties to the dispute will be keen to control and understand the litigation process and the law in use. Therefore, parties' may be unwilling to cede control and have the matter litigated on either parties turf using laws that are understandable to one party. Further, the key relief of any litigation, is the enforcement of the judgement. Thus, parties to a dispute need assurance that they may be able to enforce the judgement in any foreign jurisdiction.

However, enforcement of judgements within jurisdictions other than where the judgement was rendered presents challenges. It is clear that, to enforce a court judgement in a foreign jurisdiction, parties will have to contend with, the availability or lack thereof of a mutual recognition agreement. In addition, the costs of litigation and thereafter enforcement are quite high and put off most parties to a dispute.[7]

The strictures of litigation in international commercial disputes have led parties to seek a more flexible and tailor-made solution to their disputes. In recent years, the popularity of International commercial Arbitration has risen.[8] The flexibility and freedom of choice of the parties, that is provided by the arbitration agreement is attractive to timely settling of disputes. Parties submitting to arbitration may provide for, the procedure for appointment of the tribunal, seat of arbitration and the jurisdiction and laws that will govern the Arbitration.

It is quite important to note that enforcement of the arbitral award is less hectic than enforcement of a court judgement in a foreign jurisdiction. In as much as there are a lot of positives to parties submitting their disputes to international commercial arbitration, it must be noted that International commercial arbitration does not occur in a vacuum. At all times, parties must be aware of the geopolitical nature of international trade and how this situations may affect arbitration procedures and processes. For instance, parties must at all times be aware of the effect of sanctions on their international commercial agreements and on any subsequent arbitration proceedings.

2. The Sanctions Regime

Traditionally, sanctions presented themselves in the use of force on countries that were disturbing the peace. The use of Military force sanctions led to the loss of lives and the decimation of Countries. This loss of lives led to the reimagining of the sanctions regime.

Economic Sanctions have been in force preceding the Institutionalisation of the sanctions regime in the United Nations Charter. For instance a study conducted by Hufbauer, Schott and Elliott demonstrated the use of non-force sanctions to change the policy of

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6 Six Key Differences Between Litigation and Arbitration<https://www.lexisnexis.com/community/insights/legal/b/thought-leadership/posts/six-key-differences-between-litigation-and-arbitration> accessed 17th April 2023

7 Id 6

8 2021 International Arbitration Survey: Adapting arbitration to a changing world,<https://arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/> accessed 17th April 2023

targets in Ancient Greece.[9]

The very purpose of the formation of the United Nations by Countries as set out in the preamble of the United Nations Charter, is to avoid the scourge of war as witnessed in the First and Second World War and bring uniformity to deterrence measures of war. Chapter VII of the United Nations Charter provides for, action to be taken with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression by Nations.[10]

Further, Chapter VII mandates the United Nations Security Council to take action to maintain or restore international peace. The United Nations Security Council may then as per the Charter at Art 41 impose economic or trade sanctions or as provided by Art 42 "*take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.*"

Bearing in mind, the United Nations' Core mandate to ensure international peace, the United Nations Security Council in most cases imposes sanctions as envisioned by Chapter VII, Art 41 of the United Nations Charter to coerce countries to adhere to well laid rules and customs of International Law.

Art 41 reads as follows;

> "*The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.*"

Sanctions envisioned under Article 41 do not require the use of armed force to compel offending Nations, but instead, the Security Council imposes, sanction regimes ranging from economic and trade sanctions, travel bans, and financial or commodity restrictions to offending Countries.

Since 1966, The United Nations Security Council has imposed sanctions on various Nations such as the then colony of Southern Rhodesia(modern day Zimbabwe),apartheid South Africa, the former Yugoslavia (2), Angola, Iraq (2), Haiti, Sierra Leone, Somalia and Eritrea, Eritrea and Ethiopia, Liberia (3), The Democratic Republic of Congo (DRC), Côte d'Ivoire, Sudan, Lebanon, Democratic People's Republic of Korea (DPRK}, Iran, Libya (2), Guinea-Bissau, Rwanda, Central African Republic, Yemen, South Sudan and Mali, as well as against ISIL (Da'esh) and Al-Qaida and the Taliban.[11]

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9 Gary Clyde Hufbauer, Jeffrey J. Schott, Kimberly Ann Elliott, Economic Sanctions Reconsidered: History and current policy, Institute for International Economics (U.S.), 1990

10 Charter of the United Nations, <https://legal.un.org/repertory/art41.shtml>, accessed 6th March 2023

11 United Nations Security Council, <https://www.un.org/securitycouncil/content/un-sc-consolidated-list>, accessed 6th March 2023

Presently, the United Nations Security Council maintains 14 sanction Regimes against Nations. It is important to note that the United Nations requires Member States to participate in enforcement of sanctions as prescribed by the Security Council. Further, the member states may issue complementary measures to the sanctions imposed by the Security Council. Member States may further impose sanctions Suo Moto. For example, Countries such as the United States[12] and the United Kingdom through legislation have prescribed the procedure through which they may impose sanctions, update sanctions and lift sanctions.[13]

For instance, the United Kingdom currently maintains sanctions against States, individuals and multinationals as provided for by the Sanctions Act.[14]It is important to note that the imposition of sanctions is not a Security Council, United States and United Kingdom affair only, all United Nations' member states and regional Blocs such as the European Union, African Union and the East African Community to name but a few, are required to ensure international peace and thus entitled to impose sanctions as envisaged by Art 41.

The imposition of economic sanctions whilst key to ensuring international peace, may inadvertently hurt the citizens of a country who have no part to play in causing the breach of peace in the first place. In fact, the ruling class who might be the cause of such breach thrive by trading on the black market and enriching themselves. Thus, in recent times it has become imperative to impose economic sanctions that do not hurt the citizenry. Such economic sanctions have been termed "smart sanctions'.[15] These economic sanctions may include targeted financial sanctions, arms embargoes, travel bans, and diplomatic restrictions.

3. The Effect of Economic Sanctions on International Arbitration

Economic Sanctions will always interfere with international trade and investment. Further, the imposition of economic sanctions against states and individuals will in turn give rise to disputes. There is a correlation between the imposition of economic sanctions and the nonperformance of international commercial contracts.[16]

Currently, the most notable case of economic and trade sanctions regime stems from the situation in Ukraine. Since 2014 Russia has been on the sanctions list due to the annexation of Crimea. Further, the aggression against the Ukraine as witnessed by the ongoing war has necessitated the United Nations Security Council and member states to escalate economic sanctions against Russia.

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12 Sanctions Programs and Country Information, <https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information>, accessed 6th March 2023

13 UK sanctions regimes, <https://www.gov.uk/government/collections/uk-sanctions-regimes-under-the-sanctions-act>, accessed 6th March 2023

14 Financial sanctions targets: list of all asset freeze targets, Updated 28 February 2023, <https://www.gov.uk/government/publications/financial-sanctions-consolidated-list-of-targets/consolidated-list-of-targets>, accessed 6th March 2023

15 TC Morgan, N Bapat, Y Kobayashi, 'Threat and Imposition of Economic Sanctions 1945-2005: Updating the TIES Dataset' [2014] Conflict Management and Peace Science 2.

16 KOTELNIKOV, A., Contracts affected by economic sanctions Russian and international perspectives., <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwj1je6F-8f9AhUQjqQKHViiDHsQFnoECBAQAQ&url=https%3A%2F%2Frgu-repository.worktribe.com%2FOutputFile%2F1778058&usg=AOvVaw1kd7L_x6ZoTIXHAKWAThPe>, accessed 6th March 2023

Economic sanctions are imposed against countries to prevent or halt wars and aggression, to discourage assistance to terrorist organisations and to address concerns against the abuse of human rights inside a state's territories.

Whilst economic sanctions coerce states to maintain international peace, they wreak havoc on international trade and to the settlement of international commercial disputes. In particular imposed economic sanctions impact on international arbitration, as they may contribute to the examination of arbitration proceedings through the lens of substantive law issues and the procedural issues.

In the first instance, the imposition of economic sanctions may be relevant to the substantive merits of a dispute. A party to an international commercial contract may seek to rely on the imposition of economic sanctions as the reason for nonperformance of the contract or seek to reduce liability in regards to damages.

A party may seek to apply legal grounds for nonperformance such as the doctrine of frustration, force majeure or the doctrine of impediment and hardship. Firstly, a contract may be discharged under the doctrine of frustration only when an unforeseen event renders contractual obligations impossible to perform. Thus, the party claiming nonperformance due to frustration, must prove that the economic sanctions imposed caused the contract to be frustrated.

A party seeking to rely on the doctrine due to the existence of economic sanctions must prove that (1) the sanctions were imposed after the contract was entered into, (2) the imposition of sanctions was not caused by the fault of either party to the contract, and (3) that the imposition of sanctions caused performance of the contract to become impossible or illegal. [17]

Bearing in mind that most countries or regional blocs such as the European Union forbid trade relations or entering into contracts with sanctioned states, parties may evoke the doctrine of frustration during the arbitration proceedings.

Secondly, a party may make use of the force majeure clause to defend against nonperformance of a contract due to sanctions. It is important whilst drafting a force Majeure clause to explicitly refer to sanctions or embargos as a basis for claiming force majeure. In cases where the Force Majeure clause does not explicitly state sanctions as one of the events that may trigger nonperformance of an international contract, interpretation and the applicable laws to the international commercial contract shall be examined.

Thirdly, where economic sanctions are imposed, a party to the contract may rely on the doctrines of impediment and hardship especially in civil law jurisdictions. Particularly, Article 79(1) of the United Nations Convention on Contracts for the International Sale of Goods provides as follows;

17 Craig Shepherd and Arnold Hoong Herbert Smith Freehills, Construction projects and the impact of sanctions,27 May 2022.< https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2023/article/construction-projects-and-the-impact-of-sanctions>, accessed 6th March , 2023

"*Art. 79 CISG*

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

(a) he is exempt under the preceding paragraph; and
(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention."

Thus, imposed economic sanctions in this instance, must have led the party to be unable to perform the contract due to circumstances beyond their control. In the event that a party, during the execution of the contract could predict that sanctions were inevitable they could not rely on the doctrine.

In the second instance, Economic sanctions may have an impact on the procedural issues of the arbitration. Firstly, the Arbitrability of the dispute may come in question. As per Art V(2) of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) an award may not be enforced where the dispute was not capable of being settled through arbitration in the first place under the law of that Country. In most cases disputes that are non-arbitrable are usually defined by national legislation and judicial decisions of the Country.

Thus, in regard to the settlement of a dispute where sanctions are involved, the question in the first instance would be, does the existence of sanctions render the dispute inarbitrable? Most courts have answered to the contrary. The prevailing view in arbitration practice is that disputes involving economic sanctions are arbitrable.

In the case of *Air France v Lybian Airlines*, the Quebec Court of Appeal ruled that the US sanctions against Libya did not affect arbitrability of the dispute.[18] In that case "*Compagnie National Air France ("Air France") and Libyan Arab Airlines ("LAA") entered into a supply and maintenance agreement that included an arbitration clause referring to the arbitration regulations of the International Air Transport Association. A dispute arose regarding the performance of the contract and was submitted to arbitration. The parties agreed that the seat of arbitration would be Montreal and that the arbitration would be conducted in accordance with the Arbitration Rules of the United Nations Commission for International Commercial Law ("UNCITRAL Rules"). A tribunal issued a partial award dismissing Air France's objections to jurisdiction based on the non-arbitrability of the dispute. Air France filed proceedings with the Cour supérieur du Québec (Quebec Superior Court) to annul the partial award. LAA filed a motion to dismiss the proceeding. The trial judge concluded that the issue of arbitrability could not be addressed except in the context of a motion to homologate or set aside an award. Air France appealed to the Cour d'appel du Québec (Quebec Court of Appeal) arguing, inter alia, that the arbitral tribunal had exceeded its jurisdiction and the partial award was against public policy. The Cour d'appel dismissed the appeal. It considered, inter alia, that arbitral tribunals enjoy a degree of autonomy, and unless an arbitration agreement is deemed invalid, state courts are obliged to decline jurisdiction over the dispute pursuant to Article II(3) NYC and other international instruments. The Cour d'appel also considered, without referring to the NYC, that Air France's argument that the arbitral tribunal had not respected transnational public policy was unfounded.*"

Further, in the case of *Fincantieri Cantieri Navali Italiani SpA et OTO Melara Spa v ATF* "two companies registered in Italy, entered into an agency agreement with M for the conclusion of contracts with the Republic of Iraq. Subsequently, a dispute arose and on 4 December 1989, M initiated arbitration proceedings under the International Chamber of Commerce (ICC). By interim award rendered in Geneva on 25 November 1991, the arbitral tribunal held that it had jurisdiction. The two Italian companies lodged a public law appeal against the award. They argued that the subject matter of the dispute was not capable of settlement by arbitration because of the commercial embargo put in place by the United Nations against Iraq. The Italian companies also requested that the award be set aside because, pursuant to Article V (2) New York Convention, as it will not be enforceable in *other jurisdictions. The Tribunal Fédéral (Federal Tribunal) dismissed the request. The Tribunal Fédéral ruled that the dispute was capable of settlement by arbitration under Swiss law. Regarding the argument that the award should be set aside as it would not be able to be enforced abroad pursuant to Article V (2) New York Convention, the Tribunal Fédéral considered that the fact that an award rendered in Switzerland might be unenforceable in other countries was not a valid reason to have it set aside.*"[19]

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18 Air France v. Libyan Airlines, Cour d'appel du Québec, Judgment of 31 Mar. 2003, Revue de l'arbitrage 1365 (2003)

19 Fincantieri Cantieri Navali Italiani SpA et OTO Melara Spa v. ATF, (Switzerland, 23 June 1992) Tribunal Fédéral. (25 November 1991) ICC Award Nr 6719 (Interim Award)

Increasingly, the courts are not quick to strip jurisdiction from an arbitration tribunal where economic sanctions are a component of the dispute, but have increasingly maintained that disputes involving sanctions may be subjected to arbitration and are arbitrable.

In the unlikely event that an arbitration tribunal orders a party to perform actions prohibited under an economic sanctions regulation to complete performance of the contract. The award creditor during enforcement proceedings may run into challenges as such performance may not be consistent with the Country's law. However, in this case the Courts are likely to refuse enforcement of the award as it is contrary to public policy rather question the arbitrability of the dispute.[20]

Secondly, in most cases where a key component of the dispute is that a party to the dispute is sanctioned, procedural issues arise especially in regard to payment of registration fees and payment of arbitrators where funds are frozen. In this event, Arbitrators must complete due diligence checks on the parties to the dispute. Moreover, Arbitrators may also be weary of certifying an award which can be used to provide an economic benefit to a sanctioned party.

The key for Arbitrators in this case is to put in place procedures to mitigate or eliminate the risk of sanctions breaches, the downside of putting in place these measures is that they may give rise to delays in the arbitration process.

Lastly, in most cases where sanctions are involved travel bans are put in place against individuals who maybe instrumental to the case, as a party to the proceedings or witnesses. In this particular scenario, it is important for arbitrators to be innovative and embrace the use of technology.

4. Recognition and enforcement of foreign arbitral awards

In the event that parties to the dispute have dealt with the hurdles that arose during the arbitration proceedings and an award rendered, the next step is the subsequent recognition and enforcement of the arbitral award.

It is key to note, that unlike a court judgment procured through litigation, where enforcement against a foreign party in a foreign jurisdiction requires that there be, mutual recognition agreements, cross border enforcement of a foreign arbitral award is rather easier. When the award is rendered, the party may apply to a domestic court in a foreign jurisdiction seeking to have the award recognized and enforced.

Further, enforcement of the arbitral award against a party in a foreign jurisdiction is governed by the UN Convention on the Recognition and Enforcement of Foreign

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20 KOTEL NIKOV, A., Economic sanctions arbitrability and public policy., <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwj1je6F-8f9AhUQjqQKHViiDHsQFnoECBAQAQ&url=https%3A%2F%2Frgu-repository.worktribe.com%2FOutputFile%2F1778058&usg=AOvVaw1kd7L_x6ZoTIXHAKWAThPe, accessed 6th March 2023

Arbitral Awards 1958 (New York Convention).[21]

In particular, Article 1 of the New York Convention states as follows;

"Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."

Currently, The New York Convention provides for the recognition and enforcement of foreign arbitral awards in 168 countries. Thus, parties may leverage and enforce their awards in foreign jurisdictions based on the New York Convention. However, in some cases recognition and enforcement may be refused as provided for by the New York convention. In particular Article V states as follows:

"Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."

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21 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), <https://www.newyorkconvention.org/english>, accessed 6th march 2023

Further, Art V (2) states as follows;

"2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
(b) The recognition or enforcement of the award would be contrary to the public policy of that country."

In light of Article V of the New York Convention, it is prudent to examine the issues that arise in recognition and enforcement of a foreign arbitral award where economic sanctions are at play.

Further, it must be determined whether a sanctioned Country or individual, may apply for recognition and enforcement of an arbitral award in a foreign jurisdiction or in the converse whether an individual or state may apply for recognition and enforcement of an arbitral award in a sanctioned foreign jurisdiction.

5. The Impact of Economic Sanctions on Enforcement of Cross Border Foreign Arbitral Awards

Economic sanctions have a major impact on the recognition and enforcement of the arbitral award. In the first instance, Art V of the New York Convention is quite clear as to when recognition and enforcement of arbitral awards may be refused. In particular, Art V 2(b) of the New York convention states that, an award may not be enforced where it is contrary to the public policy of the country. Further, Art. 34 (2) of the UNCITRAL Model Law on International Commercial Arbitration contains a similar provision.[22]

Understanding of public policy is not viewed from an objective measure of definition but more from the standpoint of a subjective definition.[23] So public policy may mean different things to different countries.

In that case, then, would the Courts refuse to enforce an award held by a sanctioned state or individual due to public policy? The proceedings are likely to be examined from a case to case basis. However, the defence of public policy should be applied restrictively.

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22 UNCITRAL Model Law on International Commercial Arbitration <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwi5kISO2rD-AhVJDOwKHRekCdkQFnoECBsQAQ&url=https%3A%2F%2Funcitral.un.org%2Fsites%2Funcitral.un.org%2Ffiles%2Fmedia-documents%2Funcitral%2Fen%2F06-54671_ebook.pdf&usg=AOvVaw00FSsGZPgv_M57tr4rlAee> accessed 17th April 2023

23 Nathee Silacharoen, David Beckstead and Sakolrat Srangsomwong and Norrapat Werajong, Public policy and its implications on the enforcement of arbitral awards in Thailand, < https://www.ibanet.org/public-policy-implications-enforcement-arbitral-awards-Thailand>, accessed 6th March 2023

In the context of economic sanctions, where a sanctioned party is the award creditor and seeks to enforce an award against the award debtor in a foreign jurisdiction challenges will arise. In some instances, the foreign jurisdiction where the award should be enforced, may have participated in imposing sanctions against the award debtor or is a member of the United Nations and they strictly adhere to the decision of the Security Council.

In this case the foreign jurisdiction may refuse to recognize or enforce the award as it goes against public policy, to facilitate the circumvention of the economic sanctions and offer liquidity to the sanctioned Nation.

In case of the *Ministry of Defence & Support for Armed Forces of the Islamic Republic of Iran v International Military Services Limited*,[24] *"the Iranian Ministry of Defence (MODSAF) obtained two arbitral awards against a government-owned English company (IMS). The dispute arose out of contracts concluded in the 1970s and terminated after the Iranian revolution. By the time the awards were issued and the proceedings to set them aside in the Netherlands (the seat of arbitration) came to a conclusion, MODSAF had been added to the list of sanctioned entities under the relevant EU Council Regulation. As it follows from the judgment, the Ministry's position was that there was no impediment to the English Court entering judgment in terms of the awards pursuant to sections 100-104 of the English Arbitration Act 1996 (the provisions implementing the New York Convention)."*

Secondly, where economic sanctions have been imposed by the United Nations Security Council and member states, funds and assets may be frozen. For example, due to sanctions imposed on Russia by governments including the US, UK and EU, funds belonging to the country's central bank's foreign currency reserves held within their jurisdictions have been frozen.[25]

Thus, it is difficult to access the funds and or assets to satisfy the arbitral award. As such the award creditors will be forced to apply to the sanctioning state to release the funds to satisfy the award. However, award debtors/ sanctioned states are not allowed to tap into their frozen funds unless sanctionS have been lifted.

In this particular case, whilst enforcing the award is difficult it is not impossible. A lengthy process to tap into the frozen funds and assets will ensue. The award creditor must proceed to seek prior authorization from a sanctioning state holding the funds, to perform a future attachment of the frozen funds and assets to satisfy the arbitral award. Once authorization has been granted the award creditor may then proceed to seek interim measures from the Court.

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24 Ministry of Defence & Support for Armed Forces of the Islamic Republic of Iran v International Military Services Limited

25 Richard Partington, Russia 'preparing legal action' to unfreeze $600bn foreign currency reserves,<https://www.theguardian.com/business/2022/apr/19/russia-preparing-legal-action-to-unfreeze-600bn-foreign-currency-reserves>, Accessed 6th March 202 3

In the case of *Bank Sepah v Overseas Financial Limited and Oaktree Finance Limited a request was made in proceedings between the Bank Sepah, "a company established in Tehran (Iran), and Overseas Financial Limited and Oaktree Finance Limited, established in the State of Delaware (United States), concerning the possibility of applying, without prior authorisation from the competent national authority, protective measures in respect of funds and economic resources that have been frozen in connection with restrictive measures against the Islamic Republic of Iran."*[26]

The European Court of Justice in the case made it quite clear that an award creditor must seek prior authorization from the national competent authorities before looking to obtain an interim protective measure on the frozen funds. The Court held as follows:

"concerning restrictive measures against Iran and repealing Regulation No 961/2010, read in conjunction with Article 1(j) and (k) of Regulation No 267/2012, must be interpreted as precluding the implementation of protective measures, without prior authorisation from the competent national authority, in respect of funds or economic resources that have been frozen in the context of the common foreign and security policy, which establish a right to be paid on a priority basis in favour of the creditor concerned in relation to other creditors, even if such measures do not have the effect of removing assets from the debtor's estate."

Thus the key is to obtain prior authorization from the authorities holding the funds who in most cases will be the Ministry of finance and subsequently apply to the courts to obtain interim protective measures In regard to access to the funds.

6. Conclusion

Economic Sanctions as a foreign policy tool to coerce states to uphold international peace raise a number of questions, in regard to the conduct of arbitration proceedings by arbitral tribunals and especially for the enforcement of the arbitral awards. With the ongoing war in Ukraine and the never ending imposition of Sanctions against Russia and other Countries, it is time to conclusively deal with the enforcement of foreign arbitral awards in foreign jurisdictions.

26 Bank Sepah v Overseas Financial Limited and Oaktree Finance Limited, (case C340/20) (2021)

DUE PROCESS IN ARBITRATION AND HOW TO BALANCE FAIRNESS AND EFFICIENCY

By Hazron Maira*

Abstract

It is well established that the concept of due process requires each party be given a notice of the proceedings and the case against it, and the parties be treated equally and be given a reasonable opportunity to present their case before an impartial tribunal. This paper examines due process in arbitration and considers its application to the arbitral process. It establishes that there is no requirement on the part of the arbitral tribunal to apportion hearing time equally between the parties or for a party to be given as much time as it wants. In conducting the arbitration, the arbitral tribunal should be fair to the parties, but must not sacrifice all efficiency in order to accommodate unreasonable procedural demands by a party. The paper also establishes that under the New York Convention, the grounds for setting aside an award arising from violation of due process safeguard the parties against procedural unfairness and policies that are of fundamental importance to the country. It also discusses suggestions on the measures available to an arbitral tribunal in ensuring the proceedings are conducted fairly, and in an expedient and cost effective manner.

1. Introduction

The term "due process" first appeared in the following statutory interpretation of the Magna Carta in 1354: "*no man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law*".[1] Several meanings have been formulated for the concept of due process, and at its most fundamental level, it "refers to the idea that no one should be deprived of his rights without due process of law."[2] Under different national laws, different terms used in reference to due process include natural justice, procedural fairness, the right or opportunity to be heard, the principle of contradiction (principe de la contradiction) and equal treatment.[3]

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1 Bernardo M. Cremades, The Use and Abuse of "Due Process" in International Arbitration, (2017) 83 Arbitration, Issue 2, 203 – 211

2 Matti S. Kurkela et al, *Due Process in International Commercial Arbitration*, Second Edition, 2010, Published by Oxford University Press, Inc. (New York), p.1

3 Gabrielle Kaufmann-Kohler, Globalization of Arbitral Procedure, 36 Vanderbilt Law Review 1313 (2021) Available at: https://scholarship.law.vanderbilt.edu/vjtl/vol36/iss4/7

Whatever term is referred to, the underlying conception of fairness is the same.[4]

It has been asserted that procedural unfairness comes in so many shapes and sizes, but there are some rules for arbitrators, in addition to the common law rules of natural justice, *nemo iudex in causa sua* (nobody should be a judge in his own cause) and *audi alterem partem* (both parties have the right to be heard, and in each other's presence). Examples of those other rules include (i) don't depart from the terms of your appointment; (ii) don't depart from your directions; (iii) don't go outside the arguments or the evidence; (iv) listen to the arguments and the evidence, (v) don't get cross; (vi) don't send an email to the parties without letting it lie there for ten minutes.[5] Explicitly or implicitly, these rules have been incorporated in the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 (Model Law),[6] and in arbitration laws of nations that have confirmed Ratification, Accession or Succession to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[7]

When there is a violation of due process in an arbitration, the aggrieved party is entitled to apply to a national court of competent jurisdiction or for some Investor-state arbitrations, to the appointing authority[8] for setting aside (or annulment) of the award. The process of setting aside an award is concerned with the "the structural integrity of the arbitration proceedings", is not an appeal, and the court does not address itself to the substantive merits of the dispute, or to the correctness or otherwise of the award, whether concerning errors of fact or law.[9] The setting aside of an award has the potential to cause adverse effects to both the aggrieved party (most likely the successful party in the arbitration) and the members of the arbitral tribunal. The aggrieved party would have to recommence the arbitration after incurring costs (including remuneration for the arbitrators), with a consequent delay or postponement of the day it would get remedy for breach of contract by the respondent. The court proceedings to set aside awards and the ensuing judgments are not private or confidential, and that can potentially cause reputational damage to the arbitrators.

To avoid the consequences of setting aside an award, arbitrators should act, and should be seen to act judicially (that is, respecting the rules of due process).[10] The duty to act judicially extends to all aspects of the arbitration, and at the hearing, the duty to act judicially means that parties are given a reasonable opportunity to present their cases.[11]

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4 The Hon James Allsop AO (Chief Justice of the Federal Court of Australia), The Authority of the Arbitrator, 2013 Clayton Utz University of Sydney International Arbitration Lecture. Available at: https://www.claytonutz.com/ialecture/previous-lectures/2013/speech_2013. [Accessed on 01 Feb 2023]

5 Lord Neuberger, Arbitration and the Rule of Law, Hong Kong Chartered Institute of Arbitrators Centenary Celebration Conference 2015, (2015) 81 *Arbitration*, Issue 3, 276 - 287

6 As at 13 February 2023, legislation based on the Model Law had been adopted in 85 States in a total of 118 jurisdictions: See https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status.

7 The New York Convention is described as the most successful treaty in private international law. As of 14 Feb 2023, it was adhered to by 172 nations. See https://www.newyorkconvention.org/countries, https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2. [Accessed on 14 Feb 2023]

8 See for example: ICSID / World Bank Group, ICSID Convention, Regulations and Rules, Article 52. Available at: https://icsid.worldbank.org/sites/default/files/documents/ICSID_Convention.pdf. [Accessed on 14 Feb. 2023].

9 *Pacific China Holdings Ltd (In Liquidation) v. Grand Pacific Holdings Ltd* [2012] HKCA 200, para 7

10 Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (6th Edition), Sept. 2015, Oxford University Press at 5.70

11 *ibid* at 5.71

It is also a requirement that in acting judicially, an arbitrator should base his decision upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined.[12]

The questions of whether the parties observed due process norms at the commencement of the arbitration, and whether an arbitral tribunal exercised procedural fairness in conducting the arbitration could determine whether the arbitration was a success or a failure. These are some of the issues that are addressed in this paper which discusses due process in arbitration and how to balance fairness and efficiency. To that end, the discussion is in five parts and following this introduction, in the second part, the discussion is on due process in arbitration proceedings followed by the third part which covers due process in the New York Convention. The fourth part discusses how to strike a balance between fairness and efficiency before conclusion on the fifth part.

2. Due process in arbitration proceedings

The powers of arbitrators are exercised subject to among others, constraints imposed by the due process norms.[13] On the basis that arbitrators issue binding decisions that determine parties' substantive rights, due process serves as a shield in protecting fundamental procedural rights against unfairness.[14] The due process requirements applicable in arbitration reflect certain mandatory rules that are consistent across national borders and from which parties cannot derogate,[15] and all leading international arbitration conventions indirectly recognize and give effect to those mandatory provisions.[16]

The common law rules of natural justice or procedural fairness encompasses two principles in legal proceedings, first, a party has the right to prior notice and an effective opportunity to make representations before a decision is made, and secondly, the party affected has the right to an unbiased tribunal.[17] These principles were modified, codified and included in the Model Law, national and international arbitration laws, and the first principle of notice and representation is generally described as equal treatment of the parties and giving full/reasonable opportunity for them to present their cases. The second principle generally describes the requirement for a tribunal to be impartial and independent.

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12 *A & Ors v Secretary of State for the Home Department* [2004] EWCA Civ 1123, para 427

13 Doug Jones, The Remedial Armoury of an Arbitral Tribunal: The Extent to Which Tribunals Can Look Beyond the Parties' Submissions, (2012) 78 *Arbitration*, Issue 2, 102 – 122, 115.

14 Simon Sloane et al, *Due Process and Procedural Irregularities: Challenges*, in, Global Arbitration Review, The Guide to Challenging and Enforcing Arbitration Awards – 1st Edition, Law Business Research Ltd, May 2019

15 S.I. Strong, *Limits of Procedural Choice of Law*, 39 Brook. J. Int'l L. (2014). Available at: http://brooklynworks.brooklaw.edu/bjil/vol39/iss3/4

16 Gary Born, *Principle of Judicial Non-Interference in International Arbitral Proceedings*, *The Anniversary Contributions - International Litigation & Arbitration*, 30 U. Pa. J. Int'l L. 999 (2009). Available at: https://scholarship.law.upenn.edu/jil/vol30/iss4/22

17 *Amec Capital Projects Ltd v Whitefriars City Estates Ltd* [2004] EWCA Civ 1418, para 14

2.1 Equal treatment of the parties and giving full/reasonable opportunity for them to present their cases

In the Model law, the principle of equal treatment of parties is given effects in Article 18 which provides that: *"The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."* The purpose of article 18 is to protect a party from egregious and injudicious conduct by the arbitral tribunal.[18] In order to succeed in an argument that a party has been denied an opportunity to present its case, that party must show that: (a) a reasonable party in the applicant's position would not have foreseen a reasoning on the part of the arbitral tribunal of the type laid down in the award, and (b) with adequate notice, it might have been possible to convince the arbitral tribunal to reach a different result.[19]

The complaints arising from violations of equal treatment of the parties and giving full/reasonable opportunity for them to present their cases come in different shapes and forms and based on case law, the three most common ones are discussed.

2.1.1 Failure to give a full/reasonable opportunity to present cases

The Model Law did not give express guidance on how the phrase *"full opportunity"* should be interpreted, thus leaving the question to commentators, scholars and the courts. Two leading commentators on the Model Law states that the terms 'equality' and 'full opportunity' are to be interpreted reasonably in regulating the procedural aspects of the arbitration. In this context, the arbitral tribunal must provide reasonable opportunities to each party, but that does not mean that it must sacrifice all efficiency in order to accommodate unreasonable procedural demands, such as obstructing the proceedings by dilatory tactics, for example, offering objections, amendment, or evidence on the eve of the award.[20] In the Departmental Advisory Committee Report (DAC Report) on the English Arbitration Law, the Committee replaced the phrase *"full opportunity"* with "*reasonable opportunity*", preferring the word "reasonable" because in their view, it removes any suggestion that a party is entitled to take as long as he likes, however objectively unreasonable that may be.[21]

In Singapore, the Model Law has force of law by virtue of s.3 (1) of the International Arbitration Act 1994, and in a case where a party claimed it was deprived of a full opportunity of responding to the opposite party's claim by the Tribunal's procedural mismanagement of the proceedings, the Court, having reviewed the authorities distilled the following principles about Article 18.[22]

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18 UNCITRAL secretariat, UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, Case law on article 18, p.98

19 *Ibid*

20 Howard Holtzmann and Joseph Neuhaus, *A Guide to The UNCITRAL Model Law on International Commercial Arbitration (Legislative History and Commentary)*, Published by Kluwer Law and Taxation Publishers 1989, 551

21 The Rt Hon Lord Justice Saville et al, Departmental Advisory Committee (DAC) Report on Arbitration Law, February 1996, paras 164/5

22 *China Machine New Energy Corp v Jaguar Energy Guatemala LLC* [2020] SGCA 12, para 104.

a. An award obtained in proceedings conducted in breach of Art 18 is susceptible to annulment.
b. The Article 18 right to a "full opportunity" of presenting one's case is not an unlimited one. It is impliedly limited by considerations of reasonableness and fairness.
c. What constitutes a "full opportunity" is a contextual inquiry that can only be meaningfully answered within the specific context of the particular facts and circumstances of each case. The overarching inquiry is whether the proceedings were conducted in a manner which was fair, and the proper approach a court should take is to ask itself if what the tribunal did (or decided not to do) falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done.
d. In undertaking this exercise, the court must put itself in the shoes of the tribunal. This means that: (i) the tribunal's decisions can only be assessed by reference to what was known to the tribunal at the time, and it follows from this that the alleged breach of natural justice must have been brought to the attention of the tribunal at the material time; and (ii) the court will accord a margin of deference to the tribunal in matters of procedure and will not intervene simply because it might have done things differently.

Unsurprisingly, most countries preferred to adopt the "*reasonable opportunity*" version, for example, in the Kenyan Arbitration Act 1995,[23] s.19 provides that: "*The parties shall be treated with equality and each party shall … be given a fair and reasonable opportunity to present his case.*" Unlike its "*mother*" *law*, Article 17 (1) of the 2021 UNCITRAL Arbitration Rules also provide that each party is to be given "*a reasonable opportunity of presenting its case*,"[24] and so do other Institutional Arbitration Rules.[25] The phrase "*reasonable opportunity*" is not without its share of controversy and there is a plethora of case law showing how various claimants have attempted to advance their cases with different interpretations despite the responses from courts from across the globe showing consistency on how the phrase should be interpreted.

In Australia, the Model Law has force of law and s.18(c) of the International Arbitration Act 1974 provides that: "*For the purposes of Article 18 of the Model Law, a party to arbitral proceedings is taken to have been given a full opportunity to present the party's case if the party is given a reasonable opportunity to present the party's case.*" In *Hui v Esposito Holdings Pty Ltd*,[26] a Federal Court dealt with a complaint on whether an arbitrator denied parties a reasonable or full opportunity to present their cases and said that the normative evaluation involved in deciding whether a party has been given a reasonable opportunity to put its case must necessarily be undertaken in the context that the parties have chosen arbitration as the relevant dispute mechanism, which necessarily entails some compromise in the choice of procedures dictated by efficiency and expedition. Further, taking into account that context, any consequence short of "*real unfairness*" or "*real practical injustice*" should be put to one side.[27]

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23 Revised Edition 2019 [1995]

24 UNCITRAL secretariat, UNCITRAL Arbitration Rules (2021)

25 See for example CIArb Kenya Arbitration Rules 2020, Rule 31, The NCIA Arbitration Rules, Revised Version (2019) Rule 14 (1) (a), ICC 2021 Arbitration Rules, Article 22 (4)

26 [2017] FCA 648

27 *Ibid*, para 118

The opportunity to be afforded only needs to be reasonable in the context of the arbitration itself, and in the context of a modern arbitration, a reasonable opportunity is a question of degree and may be satisfied provided the issue is somehow raised, even if only briefly.[28]

The English Arbitration Act 1996 is not based on the Model Law and s.33 (1)(a) provides that the tribunal shall "*act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent.*" In *Reliance Industries Ltd v. The Union of India*,[29] the allegation by the Claimant was that they did not have a fair opportunity to deal with all of the ultimately relevant arguments in support of their case. The court rejected the challenge and said, at para 32:

> "*It is enough if the point is "in play" or "in the arena" in the proceedings, even if it is not precisely articulated. To use the language of Tomlinson J, as he then was, in ABB AG v Hochtief Airport [2006] 2 Lloyd's Rep 1 at [72], a party will usually have had a sufficient opportunity if the "essential building blocks" of the tribunal's analysis and reasoning were in play in relation to an issue, even where the argument was not articulated in the way adopted by the tribunal. Ultimately the question which arises under s.33(a), whether there has been a reasonable opportunity to present or meet a case, is one of fairness and will always be one of fact and degree which is sensitive to the specific circumstances of each individual case.*"

According to Professor Jeffrey Waincymer, nothing should turn on the expressions a 'full' opportunity and a 'reasonable opportunity' to present a case as the key word is 'opportunity'. A full opportunity is not an open ended one.[30]

The principles that can be derived from the above authorities are summarised in the statement by The Hon James Allsop AO that; ""Equality" and "full opportunity" are to be interpreted reasonably. There should be no difference between a "full opportunity to be heard" and a "reasonable opportunity to be heard"; … These phrases refer to defining underlying conceptions of fairness, and they are linked to equality. Such notions are not likely to be finely circumscribed by adjectival or adverbial language."[31]

In countries where the phrases "*full opportunity*" or "*reasonable opportunity*" are not incorporated in the national arbitration laws, case law shows the approach in the decisions relating to the equality of parties is not different from decisions issued in countries that have incorporated either of the terms. In the United States, the courts often cite the proposition in the seminal decision of its Supreme Court in *Mathews v. Eldridge*[32] that the "fundamental requirement of due process is the opportunity to be heard "*at a meaningful time and in a meaningful manner.*"" In arbitrations, a

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28 *Ibid*, para 225

29 [2018] EWHC 822 (Comm)

30 Prof Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Wolters Kluwer, 2012), p.751 (cited in *China Machine New Energy Corporation* (fn. 22), para 97)

31 The Hon James Allsop AO (fn. 4)

32 424 U.S. 319, 96 S. Ct. 893 (1976)

fundamentally fair hearing has been defined as one that "*meets `the minimal requirements of fairness' — adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator.*"[33] In *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*,[34] a case that concerned enforcement of an ICSID arbitration award, one of the defence grounds raised by Venezuela was that it had been "*unable to present its case*" because the Tribunal did not apportion hearing time equally between the parties, thus establishing a denial of a "*meaningful opportunity to be heard*". Following the death of its Attorney General, Venezuela, requested for a push back of the commencement date of the proceedings and on account of its intention not to cross-examine the Gold Reserve's witnesses or experts, the Tribunal agreed to shorten the hearing from eight to five days. The Tribunal also determined that Gold Reserve was entitled to more than one-half of the five hearing days, since it intended both to present its own witnesses and experts and to cross-examine Venezuela. Venezuela objected but the Tribunal upheld its decision on the schedule. A US District Court rejected Venezuela's defence holding that it "*is not enough that Venezuela provides evidence of unequal time; it must show exactly what it needed more time for, and how the denial of extra time prevented it from presenting its case.*"

2.1.2 Failure by the tribunal to allow parties to put their case in relation to a finding in the award.

An arbitration award should not contain any unargued points of law or construction and equally, unargued questions of fact.[35] A failure to give the parties the opportunity of dealing with an issue in the award that was not advanced by any party is a misconduct on the part of the arbitral tribunal and result in unfairness to the party against whom such an award is adverse.[36] Where an arbitrator is of the view that parties have not adequately dealt with their cases and specific materials are needed, then the arbitrator should act fairly and allow the parties to put their case if such materials would be included in the award. Thus, in *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd*,[37] in a case that concerned an application to set aside an award, the arbitrator had made findings on matters which were never explored in the proceedings, never referred to either party, never put by the arbitrator to the parties, and which appeared for the first time in the award. The award was set aside, and the court formulated the following principle which continue to be cited by courts at all levels in the UK:

> "*… the rules of natural justice do require, … that matters which are likely to form the subject of decision, in so far as they are specific matters, should be exposed for the comments and submissions of the parties. If an arbitrator is impressed by a point that has never been raised by either side then it is his duty to put it to them so that they have an opportunity to comment. If he feels that the proper approach is one that has not been explored or advanced in evidence or submission then again it is his duty to give the parties a chance to comment. If he is to any extent relying on*

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33 *Generica Ltd. v. Pharmaceutical Basics*, 125 F.3d 1123 (7th Cir. 1997)
34 146 F. Supp. 3d 112 (D.D.C. 2015)
35 *OAO Northern Shipping Company v Remolcadores De Marin SL (Remmar)* [2007] EWHC 1821 (Comm), para 22
36 *Interbulk Ltd. v. Aiden Shipping Co. Ltd. (The 'Vimeira')* [1984] 2 Lloyd's Rep. 66, para 3 of the headnote
37 [1985] 2 EGLR 14, 15

his own personal experience in a specific way then that again is something that he should mention so that it can be explored. It is not right that a decision should be based on specific matters which the parties have never had a chance to deal with, nor is it right that a party should first learn of adverse points in the decision against him. That is contrary both to the substance of justice and to its appearance."

The same principles are reflected in the ICC Secretariat's Guide to ICC Arbitration, para 3-770 as follows:

"An arbitral tribunal should be very cautious about applying any provision of law on which the parties have not had an opportunity to comment or make submissions. Unlike judges in some civil law jurisdictions, arbitral tribunals that decide a case on the basis of legal concepts not raised by any of the parties will risk breaching due process requirements, rendering the award vulnerable to being set aside or difficult to enforce. If an arbitral tribunal is contemplating the application of legal concepts not argued by the parties, it should seek to uphold due process by presenting those concepts to the parties and inviting their comments."[38]

The principle in the *Zermalt Holdings* case was cited with approval by the Judicial Committee of the *Privy Council*[39] in the case of *RAV Bahamas Ltd & Anor v Therapy Beach Club Incorporated (Bahamas) (Rev 2)*[40] where the Court was dealing with an appeal concerning challenges to an arbitration award. In that case, the Bahamas Court of Appeal had allowed an appeal where the high court had set aside an award on the basis that the arbitrator had acted unfairly in not affording the respondent the opportunity to make representations on adjustments/deductions on awarded damages prior to issuing the award. The Privy Council set aside the appellate court's decision and in doing so adopted the provision from *Zermalt Holdings* decision that, it was "*not right*" that the decision should be based on specific matters that RAV had never had the chance to deal with and "*nor [was] it right that [RAV] should first learn of adverse points in the decision against [it].*" The Court also approved and adopted the provision from *Cameroon Airlines v Transnet Ltd* [2004] EWHC 1829 (Comm) that it was "fundamentally unfair" to [RAV] that "the Tribunal went its own way to a conclusion which neither [party] had contended for and did so unheralded."

The principle enunciated in the *Reliance Industries Ltd* [41] case (approved by the Privy Council in the *RAV Bahamas*) offers a useful guidance for determining that the parties have not had an opportunity to put their case on a finding or matter especially in disputes involving technical issues. For example, in the construction industry arbitrations, there are many findings other than those which the parties have invited the tribunal to

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38 Cited in *Gol Linhas Aereas SA v MatlinPatterson Global Opportunities Partners (Cayman) & Ors (Cayman Islands)* [2022] UKPC 21, para 100.

39 The Judicial Committee of the Privy Council (2023). Available at: https://www.jcpc.uk/. [accessed on 16 Feb 2023]. "The Judicial Committee of the Privy Council (JCPC) is the court of final appeal for the UK overseas territories and Crown dependencies. It also serves those Commonwealth countries that have retained the appeal to His Majesty in Council or, in the case of republics, to the Judicial Committee." In all but name, it's the UK Supreme Court.

40 [2021] UKPC 8

41 fn. 29

make.[42] Matters of quantification and valuation frequently lead to the tribunal taking a course which lies somewhere between finding in the award that is not one that a party has sought, and the tribunal taking a course which is not that put forward by either party, for example, adjusting a valuation based on an issue of fact that arose during the proceedings, but which has not been argued.[43] "Doing the best one can on the material provided" almost inevitably produces such a result, and provided that the finding is based on an issue that was "in play" or "in the arena", the tribunal will not have violated its duty of fairness and nor will its award be liable to challenge.[44]

2.1.3 Failure by the tribunal to give extension of time or grant adjournment before a scheduled hearing.

It has been observed that the nature of the arbitral process is a dynamic one and timelines may be short; arrangements may need to be made well ahead of time to accommodate multiple schedules; and each party has an interest in a reasonably expeditious process.[45] In this context, the contours of what constitutes fair and proper procedure cannot be found in any one rulebook but will be shaped by approvals and protests from the parties during the proceedings, and the fairness of that procedure can only be judged against what the parties themselves may be taken to have agreed to and expected, by what they contemporaneously communicated to the tribunal.[46] Therefore, when a party makes unexpected application for an extension of time or adjournment of a scheduled hearing, the application should be considered having regard to what had been agreed and the circumstances of the case.

The Singapore case of *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [47] concerned setting aside an arbitration award and was premised on among other provision Article 34(2) of the Model Law (reflected in s.35(2) of the Kenya Arbitration Act 1995). Following the Case Management Conference, the Tribunal emphasised to the parties in writing the need to strictly adhere to the timelines in the procedural timetable. After Xinyi had filed an expert witness statement, Triulzi requested for an order to allow it to engage an expert to inspect two machines at Xinyi's facility and to file an expert witness statement. Although the Tribunal did not give the requested extension as it would have been in conflict with the procedural timetable, Triulzi was granted ten days to file its own expert witness statement and report, but it did not do so, contending that time was insufficient. In court, one of the issues alleged by Triulzi was that the Tribunal failed to afford it a reasonable opportunity to file a meaningful expert witness statement in response to Xinyi's expert witness, thereby resulting in a denial of a fair hearing. Declining to set aside the award, the court made statements which are considered relevant to the discussion in this paper:

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42 *Weldon Plant Ltd v. The Commission for the New Towns* [2000] BLR 496, para 33
43 *Ibid*
44 *Ibid*
45 *China Machine New Energy Corporation* (fn. 22), para 101
46 *Ibid*
47 [2014] SGHC 220

a. Complaints against procedural orders or directions cannot give rise to the setting aside of an award unless the procedural orders or directions in question resulted in a breach of an agreed arbitral procedure or a breach of natural justice (i.e., the procedural nature of the right to be heard), as a result of which a party's rights have been prejudiced.[48]

b. Article 34(2)(a)(iv) of the Model Law is not engaged if the non-observance of the minimum procedural requirements of Article 18 is not due to circumstances attributable to the arbitral tribunal but is derived from the applicant's own doing.

c. The court cited an authority from the same jurisdiction which provides that: "The arbitrator is, subject to any procedure otherwise agreed between the parties as applying to the arbitration in question, master of his own procedure and has a wide discretionary power to conduct the arbitration proceedings in the way he sees fit, so long as what he is doing is not manifestly unfair or contrary to natural justice."[49]

The effect of these authorities is that while a court will set aside an award when there is a violation of due process requirements by the arbitral tribunal, the threshold is high, and the courts are slow to intervene in cases of technical and inconsequential breaches.[50] To use the words in the DAC Report, setting aside an award should be done "… in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected."[51]

2.2 The right to an impartial tribunal

It is well established that an arbitrator must be impartial and must not be biased in favour of or against any party. Bias has been defined as an attitude of mind which prevents an arbitrator from making an objective determination of the issues that he/she has to resolve[52] and it may be "actual" or "apparent". Actual bias may be applied where an arbitrator has been influenced by partiality or prejudice in reaching his/her decision, and where it has been demonstrated that an arbitrator is actually prejudiced in favour of or against a party.[53] Apparent bias describes the situation where circumstances exist which give rise to a reasonable apprehension that an arbitrator may have been, or may be, biased.[54]

Article 12 (1) of the Model Law provides that" "*When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.*" Article 12 (2) is also relevant, and it provides that: *"An arbitrator may be challenged only if circumstances*

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48 Para 19
49 Para 130 (citation from *Anwar Siraj v Ting Kang Chung* [2003] 3 SLR(R) 287 at [41])
50 CBS v. CBP [2021] SGCA 4, para 50
51 DAC Report (fn. 21), para 280
52 *Director General Of Fair Trading v Proprietary Association Of Great Britain & Ors* [2000] EWCA Civ 350, para 37
53 *Ibid*
54 *Ibid*

exist that give rise to justifiable doubts as to his impartiality or independence, …". These provisions are reflected in s.13 of the Kenyan Arbitration Act 1995 in similar terms. The terms "impartiality" and "independence" as incorporated in the Model Law are for assessing bias. The term "Independence" is generally considered to be concerned with questions arising out of the relationship between an arbitrator and one of the parties, and it is thought to be susceptible to an objective test, because it has nothing to do with an arbitrator's state of mind.[55] By contrast, the concept of 'impartiality' is considered to be connected with actual or apparent bias of an arbitrator (in favour of one of the parties, or in relation to the issues in dispute) and is thus a subjective concept in that it involves primarily a state of mind.[56]

In *Halliburton Company v Chubb Bermuda Insurance Ltd*,[57] the UK Supreme Court dealt with among others, the duty of impartiality in the context of arbitration and whether an arbitrator is under a legal duty to disclose particular matters, and the following principles have been distilled from the judgment.

It is settled law that the test for apparent bias was as stated in *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357, para 103:

> "*The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.*"

This objective test of the appearance of bias is similar to the test of "justifiable doubts" adopted in the Model Law Article 12(2).[58] The objective test of the fair-minded and informed observer applies equally to judges and all arbitrators. Once arbitrators are appointed, they owe a duty to act independently and impartially, and the duty involves owing no allegiance to the party appointing them. Once appointed they are entirely independent of their appointing party and bound to conduct and decide the case fairly and impartially. They are not in any sense a representative of the appointing party or in some way responsible for protecting or promoting that party's interests.[59]

One way of avoiding the appearance of bias is by making disclosures on matters which could give rise to a real possibility of bias. Such disclosure allows the parties to consider the disclosed circumstances, obtain necessary advise, decide whether there is a problem, and if so, whether to object or act to resolve the problem. Unless the parties have expressly or implicitly waived their right to disclosure, such disclosure is not just a question of best practice but is a matter of legal obligation.[60] It's a legal duty in the sense that an arbitrator is under the statutory duties to act fairly and impartially in conducting arbitral proceedings, in decisions on matters of procedure and evidence and in the exercise of all powers conferred on him or her. These statutory duties give

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55 Nigel Blackaby, et al (op. cit) at 4.77
56 *Ibid* at 4.78
57 [2020] UKSC 48
58 *Ibid*, para 54
59 *Ibid*, para 63
60 *Ibid*, para 70 -81

rise to an implied term in the contract between the arbitrator and the parties that the arbitrator will so act.[61]

Regarding the use of the words ''only if'' and ''justifiable doubts'' in s.13(3) of the Kenyan Arbitration Act 1995 (Article 12 (2) of the Model Law), the Kenyan high court has said that the words suggest the test for removal of an arbitrator following a challenge is stringent and objective in two respects: a) the Court must find that circumstances exist, and those circumstances are not merely believed to exist; and b) those circumstances are justifiable.[62]

3. Due process in the New York Convention

The main purpose of the New York Convention was to establish a single uniform set of international legal standards for the recognition and enforcement of arbitration agreements and awards.[63] The grounds for refusing enforcements of Convention awards are narrowly construed compared to enforcement of domestic arbitration awards, and this "pro-enforcement bias" is done while respecting the parties' commercial intentions,[64] which include determination of all disputes by one tribunal and that an arbitration agreement should be construed widely.[65] The defence provisions relating to violation of the due process are set out in Articles V(1)(b) which safeguards the parties against procedural unfairness, and Article V(2)(b), which "serves as an explicit catchall for the enforcement of a country's own vital interests."[66]

3.1. Article V(1)(b): Procedural unfairness

This Article provides that recognition and enforcement of the award may be refused if: *"The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case."* Procedurally, this provision requires the violation of due process be raised by the party against the enforcement of the award.[67] In *Gol Linhas Aereas SA v MatlinPatterson Global Opportunities Partners (Cayman) & Ors (Cayman Islands)*,[68] the Privy Council reviewed the approach of the national courts in the enforcement of New York Convention Awards, and having reviewed authorities from various jurisdictions concluded that the meaning and effect of Article V(1)(b) is a question to be decided by applying the law of the place of the enforcement.[69] The question of which system of law is to be applied when a party against whom an award is invoked relies on Article V(1)(b) is to be answered by applying local standards of what constitutes a fair

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61 *Ibid*, para 76

62 *Chania Gardens Limited v Gilbi Construction Company Limited* [2015] eKLR, para 28

63 *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* (Rev1) [2020] UKSC 38, para 126

64 Lord Justice Tomlinson, The Enforcement of Foreign Arbitral Awards, Paper presented at the CIArb London Branch AGM on 27 April 2015, (2015) 81 *Arbitration*, Issue 4, 398-403.

65 The Hon James Allsop AO (fn. 4)

66 S. I. Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, 30 U. Pa. J. Int'l L. 1 (2008). Available at: https://scholarship.law.upenn.edu/jil/vol30/iss1/1

67 Doug Jones (fn. 13), p.118

68 fn. 38

69 *Ibid*, para 74

procedure.[70] In interpreting and applying Article V(1)(b), as transposed into domestic law, the court should regard the domestic statutory provision as imposing a standard of due process capable of application to any international arbitration whatever the procedural law applicable and the nationality of the participants.[71] This means that the court should be seeking to identify and apply basic minimum requirements which would generally, even if not universally, be regarded throughout the international legal order as essential to a fair hearing.[72]

The main purpose of the Convention and the "pro-enforcement bias" object with the corollary that the grounds for refusing recognition and enforcement of awards should be narrowly construed means that Article V(1)(b) should be treated as infringed only if there has been a serious violation of fundamental and generally accepted requirements of due process.[73] The only qualifications are that a court might properly exercise its discretion not to refuse enforcement if it is clear beyond doubt that the arbitral decision could not have been different if the violation had not occurred,[74] or in those cases in which the violation is *de minimis*.[75]

3.1.1 Giving of proper notice of the appointment of the arbitrator or of the arbitration proceedings

In the context of Article V(1)(b), an English court formulated a meaning for the term "proper notice" and said it is an aspect of the wider notion that the party contesting enforcement was unable to present its case, so that lack of proper notice suggests some unfairness. [76] In the same context, "proper notice" is likely to bring the relevant information to the attention of the person notified, taking account of the parties' contractual dispute resolution mechanism, including any applicable institutional arbitration rules.[77] The onus of proving there was no proper notice of the appointment of an arbitrator or of the arbitral proceedings is on the party opposing enforcement, and the evidence must meet the Convention's high threshold of demonstrating insufficient notice caused prejudice. As explained by one court, "the test is whether a party was in fact precluded from presenting its case in arbitration."[78]

The US case of *Ceeg (Shanghai) Solar Science & Technology Co. v. LUMOS LLC*[79] gives a good insight on the burden of proof required of the party seeking setting aside a New York Convention award. CEEG filed an arbitration notice and although the parties had communicated exclusively in English to that point, the notice was written in Chinese language. LUMOS did not immediately realize what the notice was about, and it worked diligently to secure a Chinese counsel. The process was complicated

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70 *Ibid*, para 75
71 *Ibid*, para 76
72 *Ibid*
73 *Ibid*, para 77
74 *Ibid*, paras 77/78
75 *Pacific China Holdings Ltd* (fn. 9), para 104
76 *Ekran OAO v Magneco Metrel UK Ltd* [2017] EWHC 2208 (Comm), para 12
77 *Ibid*
78 *Pacific China Holdings Ltd* (fn. 9), para 91
79 829 F.3d 1201 (10th Cir. 2016)

and took several weeks to complete. Meanwhile, arbitrators were appointed without input from LUMOS, the proceedings proceeded, and an award was drawn in favour of CEEG, who moved to court seeking enforcement under the New York Convention. LUMOS argued that the notice of the arbitration proceedings was insufficient, and it violated the Convention's due process exception. The US Court of Appeals, Tenth Circuit agreed that LUMOS met its heavy burden of demonstrating that insufficient notice caused prejudice by rendering LUMOS unable to participate in appointing the arbitration panel, rendering the proceedings invalid under the Convention.

3.1.2 The right to present one's case.

Any complaint about the inability to present one's case must not be due to a party's own failure to participate or act during the proceedings, and such conduct is considered to be a waiver of the due process objection, or there was no violation.[80] A party must be prejudiced by the lack of opportunity to be heard for an enforcement refusal to be granted,[81] and the conduct complained of must be sufficiently serious or egregious so that it can be said a party has been denied due process.[82] Thus, in *Kanoria & Ors v Guinness*,[83] the respondent failed to attend an arbitration hearing due to a serious illness but had written a letter disputing a certain fact. The arbitration was seated in India and on the basis of oral submissions made in the respondent's absence, and for which no notice was given to him, an award was made. Enforcement was sought in England under a statutory provision reflecting Article V(1)(b), and the Court of Appeal upheld a decision refusing to enforce the award on the basis that the respondent was unable to present his case.

By contrast, in *Minmetals Germany GmbH v Ferco Steel Ltd*,[84] a Tribunal awarded damages to the claimants which were quantified by reference to an award which it had already made in a related arbitration involving the claimant but which the defendant had not seen. At the seat of the arbitration in China, the defendant applied for the award to be set aside. The court remitted the case and at the resumed hearing, the Tribunal requested the defendant to explain the basis of their application to set aside the award, but their counsel refused to do so. The defendant attempted to enforce the award in England invoking a statutory provision reflecting Article V(1)(b), and the application failed on the basis that the defendant had been given an opportunity to present its case at the resumed hearing but failed to do so.

3.2 Article V(2)(b): Public policy

Article V(1)(b) has some interaction and overlap with article V(2)(b) which provides that a court of the country where enforcement is being sought may refuse to recognise or enforce an award if it finds that the "*recognition or enforcement of the award*

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80 Doug Jones (fn. 13), p.119
81 *Ibid*
82 *Pacific China Holdings Ltd* (fn. 9), para 94
83 [2006] EWCA Civ 222
84 [1999] 1 All ER (Comm) 315

would be contrary to the public policy of that country." Across all jurisdictions, due process is a well-recognised public policy concern,[85] and in reviewing an application for recognition or enforcement of an arbitral award under Article V(2)(b), courts also review the procedures leading to the making of the award.[86] In this context, what is applicable is procedural public policy which has been described as the policy that guarantees parties the right to an independent judgment based on their submissions and the facts submitted to the arbitral tribunal in accordance with the applicable procedural law.[87] Procedural public policy concerns may be raised by the parties or by the court ex officio,[88] for example, where in the enforcement of an award a violation of Article V(1)(b) is not raised in defence - perhaps because the respondent has not participated in the enforcement proceedings - but it appears to the court that a fundamentally unfair procedure had been adopted, the court could in such a case refuse to enforce the award under Article V(2)(b) of its own motion.[89]

What may be considered to be a violation of due process in the enforcement of an award and contrary to procedural public policy differ from country to country. For example, in France, a violation of due process in international commercial arbitration is deemed to be a breach of the country's international public policy.[90] In *Commercial Caribbean Niquel v Overseas Mining Investments Ltd*,[91] in an arbitration where the claimants had sought damages based on "loss of profits" but the Arbitral Tribunal awarded damages based on "loss of chance" without giving the respondent an opportunity to adduce evidence and/or advance submissions, the award was set aside on the grounds that the Tribunal denied the parties due process, and thereby defied international public policy by failing to invite comments from parties in connection with the award of damages. In a case with almost similar facts, *albeit* with minor differences in wording, an English Court partly set aside the award on that issue on the basis of breaching s.33 of the 1996 Arbitration Act because it was a London arbitration, but had the arbitration been seated outside England, the setting aside would have been due to a breach of a statutory provision reflecting Article V(1)(b).[92]

4. Balancing fairness and efficiency

Efficiency in the context of managing an arbitration has been defined as conducting the proceedings expeditiously in a cost effective manner without compromising fairness.[93] Therefore, the inability on the part of an arbitral tribunal to conduct arbitration efficiently would result in prolonged proceedings and increased costs.

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85 Doug Jones (fn. 13), p.119

86 United Nations, *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958), 2016 Edition, p.252 para 34

87 English translation of the decision of the Swiss Supreme Court ("Federal Tribunal") of March 8, 2006, in the case of *Tensaccia S.P.A v. Freyssinet Terra Armata R.L.* 4P.278/2005.

88 S.I. Strong, Enforcing Class Arbitration in the International Sphere (fn. 66), p.65

89 Gol Linhas Aereas SA (fn. 38), para 108

90 See Denis Bensaude and Jennifer Kirby, Commentary: A View From Paris - June 2010, *MEALEY'S International Arbitration Report* Vol. 25, #6 June 2010, p.2. "As a matter of both French international arbitration law and French international public policy, all parties must be afforded due process throughout the arbitration."

91 Case No. 08/23901, Paris Cour d'Appel, 25 March 2010

92 *Republic of Kazakhstan v World Wide Minerals Ltd* [2020] EWHC 3068 (Comm)

93 Kaufmann-Kohler, Gabrielle. Substantive new concepts to improve arbitral efficiency. *The journal of world investment & trade*, 2004, vol. 5, p. 69-72

It has been argued that one of the reasons why the issue of efficiency has been a topic of discussion in recent years was the now well established view that arbitration has become complex, slow and expensive, and that is attributed to, among other factors, the need by the tribunal to comply with due process requirements.[94] This proposition was corroborated by the 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration by Queen Mary University of London (2015 QMUL Survey).[95] In the Survey, interviewees often expressed the view that some of arbitration's more prevalent problems, such as lack of speed and increased cost, are partly rooted in "*due process paranoia*", which "*describes a reluctance by tribunals to act decisively in certain situations for fear of the arbitral award being challenged on the basis of a party not having had the chance to present its case fully.*" In the view of a leading Practitioner/Scholar, due process protects the right of defence, and nowadays, there is an added function of an aggressive sword through the use of the magic words "due process" to force the tribunal to accept certain procedural claims.[96] The pressure on the tribunal may also come from Institutional Arbitration Rules, for example, in 2021 ICC Rules, Article 42 provide that "*… the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law.*"

Subject to any procedure agreed between the parties as applying to the arbitration, arbitral laws give arbitrators powers to determine rules of procedure,[97] and the courts afford them the widest discretion in exercising these powers and "to ensure the just, expeditious, economical and final determination of the dispute".[98] A court in Singapore affirmed why an arbitral tribunal should not be reluctant to be decisive in exercising procedural powers when necessary, and said that the parties' right to be heard is impliedly limited by considerations of reasonableness and fairness, and that the right of each party to be heard does not mean that the Tribunal must "sacrifice all efficiency in order to accommodate unreasonable procedural demands by a party".[99] It thus behoves arbitrators to deal with what one commentator described as the "tension or "never-ending battle" between the interests of justice or fairness on the one hand and finality and efficiency on the other."[100]

A violation of the requirements for efficiency does not lead to setting aside an award, but in deciding the appropriate procedure for resolving a dispute, an arbitrator should strive to strike a balance between fairness and efficiency.[101] The balancing process is not amenable to prescriptive rules and each case turns on its precise facts and

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94 Karl Pörnbacher and Alexander Dolgorukow, 'Reconciling Due Process and Efficiency in International Arbitration – The Arbitrator's Task of Achieving the One without Sacrificing the Other', *Belgrade Law Review*, Year LXI, 2013, No. 3, 50-62

95 Queen Mary University of London, 2015 International Arbitration Survey: *Improvements and Innovations in International Arbitration*. Available at: https://arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf. [Accessed on 21 Feb 2023]

96 Bernardo M. Cremades (fn. 1), p. 210

97 See for example Model Law Article 19, Kenya Arbitration Act 1995 s.20, English Arbitration Act 1996 s.34

98 Klaus Peter Berger and J. Ole Jensen, Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators, Arbitration International, 2016, 32, 415–435, doi: 10.1093/arbint/aiw020. Advance Access Publication Date: 20 July 2016, p.423

99 *China Machine New Energy Corporation* (fn. 22), para 97

100 E.D.D. Tavender, Q.C., Considerations of Fairness in the Context of International Commercial Arbitrations, *Alberta Law Review*, Vol. XXXIV, No 3. 1996, 509 – 556, 512.

101 *Kalmneft v Glencore International AG* [2001] EWHC QB 461, para 83

circumstances,[102] and the discussion that follows reviews various ways of how that process may be achieved.

4.1 Preliminary meeting / Case management conference

The starting requirements would be to ensure the parties are effectively represented. Timelines for what parties are to do should be recorded in clear terms and the tribunal should ensure all issues are exhaustively discussed. Failure to include all issues may create a fertile ground for a party with a week case to take advantage and attempt to drag the process. Flexibility should be exercised, and all parties must be given an opportunity to contribute to what would be recorded as agreed. It may be appropriate to record an agreement that any application to deviate from the agreed timelines would require consent of all parties,[103] after all, the proceedings and the dispute are theirs and they can tailor the arbitration the way they want [104] as long as it is done within the confines of fairness and reasonableness. The ensuing procedural order should clearly reflect all agreed issues and timelines.

4.2 Pre-hearing meeting

Before the pre-hearing meeting, members of the arbitral tribunal should ensure they fully understand the issues in the case including the complexity, for example, in a construction arbitration, whether experts would be required, whether to undertake remeasurements etc. That is one way of ensuring the arbitrators remain in charge and are not caught off guard by a party that is not keen on getting the dispute resolved. At the pre-hearing meeting, the main agenda is to firm organisational and procedural rules for the hearing phase of the arbitration. Again, timelines should be clearly spelt out, and to cater for unexpected events, the tribunal should provide for what in construction is referred to as "float" ("...the amount of time by which an activity or group of activities may be shifted in time without causing delay to completion"[105]). It has been argued that allocation of costs can also be a useful tool to encourage efficient behaviour and discourage unreasonableness, and the tribunal should therefore consider informing the parties at the outset that it intends to take into account the manner in which each party has conducted the proceedings and to sanction any unreasonable behaviour when deciding on costs.[106]

4.3 Institutional arbitration rules

Beside the constraints imposed by the due process norms, an arbitral tribunal should also consider other competing factors including the adopted arbitration rules. It is axiomatic that having chosen certain set of rules to regulate how the arbitration should

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102 *CBSv. CBP* [2021] SGCA 4, para. 68

103 Based on the fact that by allowing a party to submit any materials after the set deadline is a basis for a claim by the other party; that it was not given a reasonable opportunity to present its case.

104 Klaus Peter Berger and J. Ole Jensen (fn. 98), p.418

105 Society of Construction law Delay and Disruption Protocol, 2nd Ed., Feb. 2017, p. 28

106 International Chamber of Commerce (ICC) (2018), ICC Commission Report, Controlling Time and Costs in Arbitration, p. 15. Available at: https://iccwbo.org/content/uploads/sites/3/2018/03/icc-arbitration-commission-report-on-techniques-for-controlling-time-and-costs-in-arbitration-english-version.pdf. [Accessed on 24 Feb 2023]

be conducted, the parties are bound by such rules. In the Triulzi Cesare case,[107] the arbitration was conducted under the ICC Rules and by Art 22(1) of the 2012 Rules, the Tribunal was obligated to "make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute." The court referred to that provision and noted that weight must be accorded to "the practical realities of the arbitral ecosystem such as promptness and price."[108]

In an English case where a party had an application for adjournment denied and the LCIA Arbitration Rules in force as of January 2013 had been adopted, the court referred to Article 14 that provided for the conduct of the proceedings.[109] Having referred to the provision covering the tribunal's "general duties at all times" and Article 14.2, the court applied the provisions to the case and said the Tribunal was bound to act fairly and impartially as between the parties but to adopt procedures which would avoid unnecessary delay or expense in order to provide a fair and efficient means for resolving the parties' dispute. It was entitled to have regard to any failure on the part of any party to do everything necessary for the fair, efficient and expeditious conduct of the arbitration and, particularly, if a party failed to avail itself of the opportunity of presenting its case, to proceed with the arbitration and make an award as it had done.

The decisions in the above two cases corroborates the finding in the 2015 QMUL Survey where some interviewees expressed the view that most institutional rules offer the mechanisms for arbitrators to be firm and decisive, but these tools are often not used effectively. It was therefore suggested that rather than there being a "lack of effective sanctions during the arbitral process", the issue is more a "lack of effective use of sanctions" by arbitrators.[110]

4.4 Separation of issues

In a complex arbitration where stakes are high, it may be appropriate to identify specific issues to be dealt with as separate issues rather than proposing bifurcation of the proceedings. According to the authors of Redfern and Hunter on International Arbitration, after the parties have made their submissions, the arbitral tribunal should be satisfied that it has been adequately informed of all of the issues that are relevant or likely to be relevant to its decision.[111] The learned authors cite the case of *Government of the State of Kuwait v The American Independent Oil Co.* that concerned nationalisation of an oil concession granted by the Government of Kuwait to Aminoil and many hundreds of millions of dollars were at stake. After the meeting before the hearing convened to consider various procedural matters, the Tribunal issued an order and identified among other things, seven specific issues that the parties should address, the order in which they would be taken, and which party should speak first on each issue. That's how the hearing was conducted, and the learned authors say that intervention

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107 *Triulzi Cesare* (fn. 47), para 131

108 Cited from *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [103])

109 *Konkola Copper Mines v U&M Mining Zambia Ltd* [2014] EWHC 2374 (Comm), paras 63/64

110 2015 QMUL Survey (fn. 95), p.10

111 Nigel Blackaby *et al (op. cit.)* at 6.60

by the Tribunal no doubt "led to a significant saving in time and money for both parties, and, in the end, to an outcome that both parties regarded as fair."[112]

4.5 Technology

The extent of which technological aspects should be adopted by an arbitral tribunal largely depend on the circumstances of the case and accessibility to technology by the parties. According to 2021 QMUL Survey, the use of technology e.g., videoconferencing, hearing room technologies, cloud-based storage, artificial intelligence etc increases efficiency to the arbitral process.[113] In an ICC Commission Report, 93% of respondents agreed that technology has improved the efficiency and cost-effectiveness of the arbitral process.[114]

5. Conclusion

The due process norms impose constraints to the discretionary powers of arbitrators to conduct an arbitration by protecting the parties' procedural rights against unfairness. The procedural safeguards of due process, including that each party be given notice of the proceedings and of the case it has to meet, and a fair opportunity of presenting its case before an impartial tribunal cannot be waived, and are applied in order to ensure the fairness of the arbitral proceedings by which the parties' substantive rights are determined.[115] The threshold for setting aside an award following complaints of violation of due process is high, and it is only in those cases where it can be said that the conduct of the arbitral tribunal was so far removed from what could reasonably be expected that the court should take action.[116]

Where parties have not agreed on the procedure for conducting the arbitration, arbitration laws empower the arbitral tribunal to determine rules of procedure. It has been argued that in determining the rules of procedure, the arbitrators should be encouraged by the phrase "*reasonable* opportunity to present its case" in the arbitration laws and institutional arbitration rules to balance opportunity with efficiency in determining appropriate arbitral procedures.[117] [emphasis in original] Where that phrase is not provided in the laws or rules, the tribunal should use its discretion to formulate rules that would ensure fairness and efficiency of the proceedings.

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112 *Ibid* at 6.61/6.62

113 Queen Mary University of London, 2021 International Arbitration Survey: Adapting arbitration to a changing world. Available at: https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf. [Accessed on 28 Feb 2023]

114 International Chamber of Commerce (ICC) (2022), ICC Commission Report: Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings. Available at: https://iccwbo.org/content/uploads/sites/3/2022/02/icc-arbitration-and-adr-commission-report-on-leveraging-technology-for-fair-effective-and-efficient-international-arbitration-proceedings.pdf. [Accessed on 14 Mar 2023]

115 China Machine New Energy Corporation (fn. 22), para 1

116 DAC Report (fn. 21), para 280

117 Nigel Blackaby, et al (op. cit.) at 6.14

ADR FROM A COUNTERTERRORISM CONTEXT: EXAMINING THE UTILITY OF ALTERNATIVES TO PROSECUTION IN COUNTERING VIOLENT EXTREMISM IN KENYA.

By Michael Sang* & Tali Israel Tali**

Abstract

Article 159(2)c of the Constitution of Kenya 2010, calls for the promotion of Alternative Dispute Resolution (ADR) in resolving cases. Although the provision is not restricted to any particular type of case, the applicability of ADR to criminal cases has elicited enormous debate and criticism. On one hand, most of the critics are of the view that ADR mechanisms do not serve appropriate justice to offenders and that it is not in the interest of the public to subject criminal cases to ADR. On the other hand, ADR proponents hold the view that criminal justice should not only be viewed from the retributive prism but also from a restorative angle. To them, ADR mechanisms are vehicles for restorative justice. This article introduces the third voice to this debate. It makes a case for rehabilitative justice which is achievable when offenders in particular types of cases (offenses that are ideological and psychological in nature such as terrorism) are subjected to ADR mechanisms at the earliest instance as a "Preventive Measure or Pre-emptive Strategy" in Countering Violent Extremism before the occurrence of any Terrorism Act. Therefore, underscoring the fact that as an institution bound by Article 159(2)c, the Director of Public Prosecution is obligated to promote the use of ADR mechanisms. This article examines how ADR mechanisms available in the criminal justice sector promote access to justice. It seeks to investigate the use of Alternatives to Prosecution as applicable ADR tools used in counter-terrorism related cases. The article looks into the nature of terrorism offenses as ideological offenses committed out of a radicalized and conditioned mind. Therefore, it argues that employing alternatives to prosecution such as diversion where appropriate, can allow for psychosocial support and deradicalization of offenders thus giving them a chance for rehabilitation and reintegration into society. The article also discusses the Psychosocial assessment report as a key tool that aids prosecutors, law enforcement officers, courts and other criminal justice actors in adding value to decision making while countering violent extremism before employing alternatives to prosecution such as diversion to the Deradicalization, Rehabilitation and Reintegration Program (DRR).

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1. Introduction

Crimes are viewed as wrongs that transcend the injured victim to an injury against the public.[1] This explains the reluctance in the use of ADR mechanisms in criminal cases, especially those that seek to promote reconciliation between the parties. Nevertheless, the DPP is obligated to embrace ADR mechanisms in criminal cases not only because of being bound by Article 159(2)c of the constitution but also because ADR is proven to promote access to justice even in criminal cases.

This article discusses the utility of Alternatives to prosecution as ADR mechanisms in terrorism cases. It begins with a brief discussion on the applicability of ADR mechanisms in criminal cases, before discussing the concept of alternatives to prosecution, and analyzing the legal framework in support thereof. This is followed by a discussion on the nature of terrorism offenses as ideological offenses mostly committed out of a radicalized mind. On this basis therefore, the psychosocial assessment report is a tool to aid prosecutors, law enforcement officers, and courts in deciding to subject a terrorism case to alternatives to prosecution such as diversion to the Deradicalization, Rehabilitation and Reintegration Program (DRR). The study concludes by discussing diversion as the best alternative to prosecution in terrorism cases.

2. Applicability of ADR Mechanisms in Criminal cases

The use of ADR mechanisms in civil cases has been widely embraced in Kenya in the post-2010 dispensation. Various initiatives which promote ADR in civil cases such as court creation of court-annexed mediation and the establishment of the Nairobi Center for International Arbitration have been put in place.[2] In the contrast, the practice of ADR in criminal matters remains scanty and heavily criticized where used. This is because the criminal justice system in Kenya is majorly retributive in nature with a few restorative elements.[3] The system is traditionally oriented toward the ends of convictions for the guilty and acquittals for the innocent.

A case in point that has been subject to criticism for almost a decade now is the case of *Republic V Mohamed Abdow Mohamed.*[4] In the case, the court allowed the prosecution's application to withdraw murder charges against the accused following an out-of-court settlement between the families of the deceased and the accused. The deceased's family had received some form of compensation in terms of camels, goats, and other traditional ornaments. They had also performed rituals that they believed paid for the deceased's blood under Islamic Law and customs. The deceased's family was thus content and wished to pursue the case no further. Confronted with this situation, Justice Korir Lagat found that it would meet the ends of justice to allow

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1 Kennedy, J Crimes as Public Wrongs (2021), Legal Theory, 27(4), 253-284.

2 Established through the Nairobi Center for International Arbitration Act, 2013

3 Diana Orago, Alternative Dispute Resolution in the Criminal Justice system in Kenya, Thesis Submitted to the University of Nairobi. Available at: http://erepository.uonbi.ac.ke/bitstream/handle/11295/154149/Final..A.D.R%20Dissertation%20Nov%20 2020%20(1).pdf?sequence=1 Visited on 28 February 2023.

4 *Republic V Mohamed Abdow Mohamed* [2013] eKLR.

rather than disallow the application to withdraw the case.[5]

This decision was perhaps the first in the post-2010 dispensation where article 159(2) c was engaged. It has however been the subject of heavy criticism as critics question the discontinuance of a capital criminal offense without the trial being conducted and concluded. [6] Concerns have also been raised as to whether customary law and Islamic law should apply to resolving criminal cases in Kenya.

The criticism notwithstanding, courts have gotten the opportunity to express themselves on the applicability of Article 159(2)c to criminal matters in subsequent cases. For instance, in *Republic v Abdulahi Noor Mohamed (alias Arab)*[7] the court observes that the recognition of ADR mechanisms under Article 159(2)c is not to the exclusion of criminal cases. The court however decries the lack of policy guidelines to incorporate alternative justice systems in handling criminal matters. It thus calls for direction to be achieved through the formulation of policy guidelines that would see alternative justice systems utilized appropriately in criminal cases.[8]

It is incumbent upon the courts to promote the use of ADR mechanisms as a means of enhancing access to justice even in criminal cases. In *Mary Kinya Rukwaru v Office of the Director of Public Prosecutions & another [2016] eKLR* the court reiterates that justice, as recognized by the constitution, is not only about prosecution, conviction, and acquittals. The court goes ahead to call for the embracing of ADR mechanisms.

Therefore, good practices call for embracing of ADR mechanism even in criminal cases as this enhances the right of access to justice which is a core tenet of democracy and a basic Human Right.[9] It must however be noted that the DPP is the custodian of prosecutorial powers. Where the DPP opposes an application for submission to ADR with just cause, they are within their powers as they enjoy autonomous functions over prosecutions. The DPP is expected to exercise prosecutorial powers on behalf of the public for the preservation of public interest and therefore has a say in the application of an ADR Mechanism to a criminal case. This is true from the dicta in the 2004 case of *Gregory & Another v Republic thro' Nottingham & 2 Others [2004] 1KLR 547*: where the court observes:-

> *"The process of criminal law is a vital aspect of the administration of justice, and is one of the key spheres of public policy and public interest, in the overall conduct of national governance. In this domain of the public interest, we believe, the dictates of public order would require that the Attorney–General should function as the primary decision–maker, of course, subject to the legislative directions of the Parliament and*

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5 Id.

6 For instance, Pravin Bowry, 'High Court opens Pandora's Box on criminality' available at https://www.standardmedia.co.ke/article/2000085732/high-Court-opens-pandora-s-box-on-criminality Visited on 28 February 2023.

7 *Republic v Abdulahi Noor Mohamed (alias Arab)* [2016] eKLR 22.

8 Id.

9 Access to Justice Advisory Committee, Access to justice: an action plan, AGPS, Canberra, 1994. See also Louis Schetzer, et. al., *Access to Justice & Legal Needs: A project to identify legal needs, pathways and barriers for disadvantaged people in NSW*, p. 7, Background Paper, August 2002,
Available at www.lawfoundation.net.au/ljf/site/articleIDs/.../$file/bkgr1.pdf Accessed on 28th February 2022.

the oversight of the High Court.[10]

3. Alternatives to Prosecution - The Legal Framework

The Kenyan, criminal justice system is principally governed by the Criminal Procedure Code, which details the procedural aspects of the law;[11] and the Penal code as well as other penal legislations such as the Sexual Offenses Act which gives specific penal provisions.[12] There are also various actors each differently mandated to ensure that wrongdoers are brought to book.[13] These actors include the state, the accused, the investigators, the DPP, the judiciary, the probation, and aftercare services among others.

The DPP is vested with the authority to prosecute by the Constitution under Article 157(6). This authority includes the power to institute and undertake criminal proceedings before the court, take over criminal proceedings and continue with them as well as the power to discontinue any criminal proceedings at any time before the court renders its judgment. In all criminal cases, the DPP will bear the burden of providing proof beyond a reasonable doubt to the Court that an offense was committed.[14] In exercising their functions and powers, the DPP is not under the direction or control of any person. Moreover, by Article 157(11), the DPP must ensure that in the exercise of their powers, they pay regard to the interests of the public, the administration of justice, and the need to prevent the legal process from being abused.

The functioning of the DPP in Kenya is further supplemented by the Office of Director of Public Prosecution Act, 2013, and various guidelines prepared by the ODPP such as the National Prosecution Policy, the Guidelines on the Decision to charge, 2019, the Plea-bargaining guidelines, the Diversion guidelines among others.

Upon receipt of a complaint and evidence from an investigator, a prosecutor is empowered to make the Decision to Charge. This is the determination that is made by the prosecutor on whether the evidence that the investigator has availed, is sufficient to initiate a case in a court of law against the accused. In so doing, the prosecutor will ensure that both the evidential test and the public interest test are met. The evidential test considers whether there is sufficient evidence for a realistic prospect of conviction while the public interest test considers whether charging the suspect is in the interest of the wider administration of justice.

There are instances where the prosecutor has sufficient evidence to sustain a charge but proceeding with a prosecution is not the best course of action. The prosecutor, therefore, opts not to prefer a charge on the accused but refers them to a different institution or form of penalty. This is what is referred to as alternatives to prosecution. They include administrative remedies, asset forfeiture, confiscation and diversion before

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10 *Gregory & Another v Republic thro' Nottingham & 2 Others* [2004] 1KLR 547

11 Judiciary of the Republic of Kenya, Criminal Procedure Bench Book (February 2018) < http://kenyalaw.org/kl/fileadmin/pdfdownloads/JudiciaryCriminalProcedureBenchBook.pdf> Visited on 28 February 2023.

12 The Penal Code Chapter 63 Laws of Kenya

13 International Commission of Jurists(ICJ), Criminal Justice Reforms: Issues And Options For Kenya' (ICJ 2018) <https://icj-kenya.org/news/latest-news/184-criminal-justice-reforms-issues-and-options-for-kenya> Visited on 28 February 2023.

14 Id.

charges, Warnings, surcharges, fines, demotion as well as psychosocial support. These alternative measures are aimed at promoting accountability and deterring unlawful conduct while minimizing the need for formal criminal proceedings.[15]

There are also in place alternatives to trial which are measures adopted where an accused is charged but later admits to the charges and agrees to an alternative form of prosecution as a means of punishment. These include; plea negotiation, reconciliation, and diversion after charge. The scope of this article's discussion is limited to alternatives to prosecution that are employed as ADR mechanisms in criminal cases.

3.1 Administrative Actions

Administrative action involves the use of disciplinary measures or other non-criminal sanctions against individuals who have committed misconduct or breached administrative rules. Examples of administrative actions include suspension, demotion, or termination of employment. In Kenya, administrative action is typically taken against government officials who have breached public service regulations or engaged in misconduct.[16]

Administrative actions against government officials may be initiated by a supervisory body, such as the Public Service Commission. For instance, the National Police Service Act, of 2011 provides for administrative action against police officers who commit offenses. Section 87 of the Act establishes the National Police Service Commission, which is responsible for investigating complaints against police officers and taking appropriate action. The Commission may recommend suspension or dismissal from service, among other administrative actions.

3.2 Asset Forfeiture and Confiscation

Asset forfeiture and confiscation involve the seizure and transfer of assets, such as money or property, that were obtained through illegal activities. The asset forfeiture process typically involves a court order that directs the forfeiture of assets, which are then sold or transferred to the state. In Kenya, asset forfeiture and confiscation are primarily used to recover assets that were obtained through corruption or other economic crimes.[17]

Asset forfeiture and confiscation proceedings typically involve a court order that directs the forfeiture of assets.[18] Section 55 of the Act empowers the court to make orders for forfeiture or confiscation of property that is derived from or intended for use in the commission of a crime. The court may also make orders for the forfeiture of any property that is reasonably suspected to be the proceeds of a crime.

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15 Mwenesi, K, *Exploring Alternatives to Prosecution in Kenya*, International Journal of Law, Crime, and Justice, 47 (2016), 128-145.

16 Ndung'u, F. K, *Exploring the use of Administrative Actions as Alternatives to Prosecution for Police Misconduct in Kenya*', Journal of African Law, 63(2) (2019), 269-284.

17 Omondi, B, *Alternatives to Prosecution in Kenya*: *An Overview of Asset Forfeiture*',Journal of Financial Crime, 24(2) (2017), 165-175.

18 Chege, M. N. and Mugweru, G. M, *Asset Forfeiture in Kenya: An Analysis of the Legal and Practical Framework*', International Journal of Law, Crime and Justice, 48

The Proceeds of Crime and Anti-Money Laundering Act, 2009 (POCAMLA): POCAMLA provides for the forfeiture and confiscation of proceeds of crime. Section 54 of the Act provides for the forfeiture of property that is derived from or intended for use in the commission of a crime. This section allows for the recovery of assets obtained through corruption or other criminal activities.[19] This provision gives the Director of Public Prosecutions (DPP) the discretion to discontinue criminal proceedings against an accused person if there are good reasons to do so, such as when the accused person agrees to comply with specific conditions set by the prosecutor, such as compensation, rehabilitation, or community service. The provision also allows for the use of diversionary measures, such as mediation and reconciliation, as alternatives to prosecution in appropriate cases. Overall, this provision aims to ensure that the criminal justice system in Kenya is fair, efficient, and effective.

3.3 Deferred Prosecution Agreements

Deferred Prosecution Agreements (DPAs) are an alternative to the traditional criminal prosecution process in which a company or individual charged with a crime agrees to fulfill certain conditions in exchange for the government's agreement to defer prosecution. Under a DPA, the accused organization must consent to several conditions, which may include cooperating with investigations, acknowledging certain facts, and/or paying fines, penalties, restitution, or taking other corrective measures. It is considered an acknowledgment that the ODPP may prosecute the suspect entity for all crimes committed, including those covered by the DPA, if it commits comparable offenses while the DPA is in effect or violates its provisions.[20]

3.4 Diversion

Diversion as an alternative to prosecution refers to a process that allows an accused person to avoid the formal criminal justice system by participating in rehabilitative programs or completing other requirements as determined by a diversion program.[21] Diversion programs aim to address the underlying causes of criminal behaviour and prevent future criminal activities by providing counselling, treatment, and other services. It has been recognized as an effective tool in the criminal justice system in Kenya, particularly in cases involving minor offenses or first-time offenders. Diversion programs are designed to provide offenders with the necessary support and guidance to help them address the underlying issues that may have led to their criminal behavior. This may involve participation in counselling, treatment, community service, or other rehabilitative programs.[22]

In Kenya, diversion is recognized as a key component of the criminal justice system under the Children's Act of 2022, which provides for the diversion of children who

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19 The Proceeds of Crime and Anti-Money Laundering Act, 2009, *s* 54.

20 Oundo, P. *The Emergence of Deferred Prosecution Agreements in Kenya: A Review of the Anti-Corruption and Economic Crimes Act.* (2018) East African Journal of Peace and Human Rights, 24(2), 261-283.

21 Director of Public Prosecutions, *Guidelines on diversion for minor offenses in the criminal justice system in Kenya*' (2014). Available at: https://www.odpp.go.ke/wpcontent/uploads/2022/04/DIVERSION-POLICY.pdf Visited on 28 February 2022.

22 African Policing Civilian Oversight Forum, *Diversion in the criminal justice system in Kenya*. (2019)

commit offenses. The Act defines diversion as the "suspension of formal charges and the referral of a child to a program of guidance and assistance". Diversion under the Act aims to provide an opportunity for the child to be rehabilitated and reintegrated into society, rather than being subject to the formal criminal justice system.[23]

However, diversion is not limited to children only. The Criminal Procedure Code also provides for diversion for adult offenders. Section 176A of the Criminal Procedure Code provides for the diversion of first-time offenders accused of minor offenses. The section allows the prosecutor to divert the offender from prosecution by offering them a caution or referring them to a community service program, counselling, or any other program as deemed fit.[24]

The procedure for diversion in Kenya can vary depending on the nature of the offense and the jurisdiction involved. However, here is a general overview of the steps involved in the diversion process:[25]

i. *Identification of eligible cases:* The first step in the diversion process is the identification of eligible cases. Typically, diversion is only available for minor offenses or first-time offenders.
ii. *Referral to diversion program:* Once a case is identified as eligible for diversion, the offender may be referred to a diversion program. This may involve participation in counselling, treatment, community service, or other rehabilitative programs.
iii. *Assessment and screening:* Before being admitted to a diversion program, the offender may be assessed and screened to determine their eligibility and the type of program that would be most appropriate for them.
iv. *Agreement to participate:* If the offender is deemed eligible for diversion and a suitable program is identified, they may be asked to sign an agreement indicating their willingness to participate in the program.
v. *Completion of the program:* The offender must complete the diversion program to avoid formal prosecution. This may involve meeting certain requirements, such as attending counselling sessions or completing community service hours.
vi. *Review and dismissal:* Once the offender has completed the diversion program, the case may be reviewed by the prosecutor or the court. If the program was completed, the case may be dismissed without further action.

There are four categories of diversion as provided for under the General Prosecution Policy. The first one is a diversion for adult offenders and petty offenses, for example, a traffic offense such as driving with an expired insurance sticker is enough to subject someone to a criminal justice system however this is termed as a petty offense by adults. The second is a diversion for children. A child is defined under Article 260 of the Constitution of Kenya 2010 as an individual who has not attained the age of 18 years. Whether or not a child has committed a petty offense or in circumstances where a child has committed a felony, it is a general provision that children should not be

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23 The Children's Act, 2022 *s* 231.

24 The Criminal Procedure Code, Chapter 75 Laws of Kenya.

25 Director of Public Prosecutions, *Guidelines on diversion for minor offenses in the criminal justice system in Kenya*' (2014). Available at: https://www.odpp.go.ke/wpcontent/uploads/2022/04/DIVERSION-POLICY.pdf Visited on 28 February 2023.

prosecuted.[26] The Prosecution must be the last option. The public Prosecutor must have considered all other ways of disposing of cases against children unless the seriousness of the offense or the circumstances of the child concerned dictate otherwise.[27]

The third category of diversion is a diversion for vulnerable persons. A vulnerable person is any person due to age, gender, disability, or any other special characteristics, who may require the provision of special justice and support. They include persons with a physical challenge or disability, persons with a mental disorder, persons with a mental impairment, women and men in abusive situations, or an addict under the influence of alcohol.[28] Under these circumstances, the Public Prosecutor is under an obligation to consider diversion for vulnerable persons irrespective of the nature of the offense.[29]

The last category is a diversion for special-category offenses. This refers to those offenses where only the DPP can decide to divert a case. For example, where the offense is a felony, where the offender is a repeat offender, where the offender has previously been subjected to diversion, and where a mandatory or minimum punishment has been provided by parliament.

4. The rationale for embracing Alternatives to Prosecution in Kenya

Alternatives to prosecution can provide several advantages over formal criminal proceedings. For instance, they can be less costly and time-consuming and can avoid the need for a trial. The Kenyan criminal justice system is often burdened by a high number of cases, which can be costly to handle through traditional prosecution and punishment. The use of diversion programs, community service, and other alternatives can help to reduce the cost of handling such cases, thereby freeing up resources for more serious crimes.[30] They thus lead to quicker resolution of cases and more efficient use of resources. This can benefit both the accused person and the victims of the crime, as they do not have to endure lengthy court proceedings. For instance, administrative actions or asset forfeiture proceedings can be resolved more quickly than a criminal trial, allowing for a timelier resolution of the matter.[31]

Additionally, alternatives such as administrative actions or asset forfeiture can be less burdensome on the accused person, since they do not result in a criminal record. They also promote public trust in the justice system by demonstrating that unlawful conduct will not be tolerated, even if a criminal prosecution is not pursued.

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26 The National Prosecution Policy, Available at : http://www.odpp.go.ke/wp-content/uploads/2016/11/National-Prosecution-Policy.doc Visted on 28 February 2022.

27 Id, Clause 20

28 Jonathan Herring, *Criminal Law and the Protection of Vulnerable Adults*' [2016] Vulnerable Adults and the Law 183

29 The National Prosecution Policy, Available at : http://www.odpp.go.ke/wp-content/uploads/2016/11/National-Prosecution-Policy.doc Visted on 28 February 2022.

30 Boersig, M , and Lekkas, N, *Advancing diversion and alternatives to prosecution: A critical review* (2021) 32 Criminal Justice Policy Review 276

31 Brogden, M , and Zernova M , *'Alternatives to prosecution: Reconsidering models of criminal justice*' (2018) 15 European Journal of Criminology 436.

Furthermore, alternatives to prosecution can provide increased flexibility in addressing criminal behaviour in Kenya. This is especially important in cases where the underlying causes of the behaviour need to be addressed. For instance, a youth offender may be diverted to a rehabilitation program that addresses issues such as drug abuse, lack of education, or unemployment. Such an approach can help to address the root causes of the behaviour and prevent future offending.[32]

Alternatives to prosecution thus promote rehabilitation and restoration of the offender, which can contribute to reducing recidivism and promoting public safety. This can be particularly important for first-time or minor offenders who may not necessarily require the full force of the criminal justice system to address their behaviour. Additionally, alternatives to prosecution can be used to address misconduct that may not rise to the level of a criminal offense, thereby providing a means of addressing a wider range of unlawful conduct.

Alternatives to prosecution can also help to reduce stigmatization in Kenya. Traditional prosecution and punishment can have significant negative consequences for the offender, including social stigma and isolation. The use of diversion programs, counselling, and other alternatives can provide a more positive and constructive response that does not stigmatize the offender or label them as a criminal.[33]

Finally, alternatives to prosecution can promote transparency and accountability in the justice system by demonstrating that unlawful conduct will be addressed fairly and effectively, regardless of whether a criminal prosecution is pursued. As such, alternatives to prosecution, therefore, promote access to justice by providing a more efficient and effective means of addressing unlawful conduct.

5. The Nature of Terrorism offenses as ideological and psychologically driven offenses

Terrorism ought to be understood from a psychological and ideological perspective. That is to say, offenders of terrorism cases commit such acts owing to their psychological orientation occasioned by possession of extremist ideals. Becoming a terrorist is a process and not an abrupt event.[34] It takes much persuasion and ideological influence on an individual. However, critical questions such as how and why individuals become part of remain or quit terrorist organizations have to be asked to understand the nature of terrorism offenses. As per Horgan and Taylor, it is seldom that one makes a conscious decision to be part of a terrorist group or possess terrorist ideologies. Instead, it is a result of constant exposure and socialization embodying extreme behavior.[35] Martha Crenshaw on their part identifies four categories of motivating factors among terrorist organizations. These include: "(1) the opportunity for action, (2) the need to belong,

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32 Johnstone, G , and Lind, E. A , '*The use of restorative justice alternatives to formal criminal justice: A critical review*' (2015) 658 The Annals of the American Academy of Political and Social Science 191.

33 Worrall, J. L, *Prosecutorial discretion and its limits* (2016) 12 Annual Review of Law and Social Science 421.

34 Anneli Botha, Political Socialisation and Terrorist Radicalisation among Individuals who joined Al-Shabaab in Kenya in Alamin Mazrui, Kimani Njogu, Paul Goldsmith, *Countering Violent Extremism in Kenya: Between the Rule of Law and the Quest for Security* (Twaweza Communications Ltd 2018)

35 Horgan, J. and Taylor, M. *The making of a terrorist Jane's Intelligence Review.* 2001; 13(12):16-18.

(3) the desire for social status, and (4) the acquisition of material reward."[36]

Earlier studies of terrorists from a psychological and sociological perspective veered more into profiling trying to find abnormalities that would be used to categorize and characterize terrorists.[37] This led to a large number of psychoanalytic theories on terrorism with most mentioning the existence of a causal link between mental illness (which also includes mental disorders, insanity, or sociopathic tendencies) and terrorism.[38] Modern studies however have ascertained that such a link does not exist.[39] The modern approach has moved from only assessing the individual before their affiliation with the terrorist group to focusing on the process by which one becomes a terrorist.

Ideological factors seem to play a huge role in influencing terrorist behavior; theoretically certain psychological traits or environmental factors may influence terrorists to terrorism and especially to certain sub-strands of terrorism[40]. Stemming from criticisms of earlier psychoanalytic methods, there are arguments that terroristic behavior is irrational, especially in achieving the goals sought after.[41] This coupled with the proposal that engaging in terrorism is rarely a conscious decision may intimate that radicalization and group dynamics play a huge role in making one a terrorist or at the very least in understanding the psychological underpinnings of terrorism.

Humans generally tend to seek social identity, that is, finding and associating with those of similar characteristics and/or beliefs as theirs. This would be intertwined with the concept of social categorization where there would be a need to create social categories. Family and peer pressure, for example, are often seen as large factors in influencing radicalization.[42] General disillusionment forms a fundamental reason for terrorists to join terrorist organizations where the perpetrators often feel like members of a minority that is under attack.[43]

This forms quite a huge understanding of terroristic groups, especially in terms of us versus them approach. Terrorism for most is associated with the process of radicalization with a deep depersonalization experience. Over time us versus them agenda is pushed and entrenched leaving the terrorist leading to a sort of abandonment of self in favor of the group. The identity and the feeling of comradery persist over time such that the more entrenched one is in the group, the more one relate to the goals and actions within the terroristic group.[44] A study conducted in Kenya shows that there was a 32% increase in feeling a sense of belonging by al-Shabbab members comparing the period

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36 Crenshaw, A*n organizational approach to the analysis of political terrorism* Orbis. (1985)29(3):465

37 Post, J.M, *Notes on a psychodynamic theory of terrorist behaviour* Terrorism,(1984) 7, 241-256.

38 Andrew Silke ,*Cheshire-Cat logic: The recurring theme of terrorist abnormality in psychological research*, Psychology, Crime & Law. Vol 4(1) Apr 1998, 51-69.

39 Charles Ruby, *Are terrorists mentally deranged? Analyses of Social Issues and Public Policy*, Vol. 2 (1) 2002, pp. 15-26.

40 Reich, W. , Understanding terrorist behaviour: the limits and opportunities of psychological inquiry. In W. Reich (Ed.) *Origins of terrorism: psychologies, ideologies, theologies, states of mind* (pp.261 279). New York: Cambridge University Press.

41 Id.

42 Crenshaw, M, Current research on terrorism: *The Academic Perspective* Studies in Conflict and Terrorism, 1992 15, 1-11

43 Fried, R, The psychology of the terrorist . B. M. Jenkins (Ed), *Terrorism and beyond: An international conference on terrorism and low-level conflict* (1982), (pp. 119-124). Santa Monica, CA: Rand.

44 Id.

of joining the group and the period of receiving membership.[45] In evidence of us versus them category, a majority viewed the "us" as members of the organization, 32% related to the Muslim religion as the "us" and none related to all Kenyan nationals as the "us". [46]Furthermore, a majority saw their religion being under physical threat where the war for their religion was an ongoing war or an all-out war.[47]

These studies, therefore, show that while there is no causal link between insanity and terrorism, there exists a link, especially in radicalization and group dynamics. Derived from the verb radicalize, radicalization is basically, causing an individual to take radical positions on political, religious, or social issues.[48] Extremism, on the other hand, is the adoption of a particular ideology to use violence to remove the state or ruling structure and its elites. This means that violence is committed in the name of an ideology to further social or political agenda. Schmid holds the opinion that while radicalization seeks to make changes to the political and social structures, it does not necessarily lead to violence.[49] Many have resonated with this position and agreed that as long as one keeps their radical positions to themselves, then such radical behavior is not criminal. Radicalized individuals will possess various symptoms easily identifiable to them.[50] These include; conversion of religion based on radicalized religious ideologies, embracing new ideologies, such ideologies turning into violent extremism and commission of violence allegedly in pursuance of the ideology and possession of the basic narrative is "us versus them (we must stand up against them. We are righteous).

Therefore, unlike other offenders, the mind of a terrorist offender is ideologically driven. Their psychology has been oriented into offending based on the ideological lines following radicalization with violent extremism. This thus explains the rationale for understanding terrorism from a psychological perspective. With such understanding, a decision maker is invited to consider the psychosocial assessment of a terrorism offender as an aid to establishing their risk of reoffending. This justifies the application of the psychosocial assessment evaluation as a mechanism to guide the decision of an alternative to prosecution to be adopted in a particular terrorism case.

6. Psychosocial Assessment as a risk evaluation tool in Countering Violent Extremism cases

Psychosocial assessment of terrorism offenders is an evaluation of risk used to inform a decision on the likelihood of a particular outcome. It is an examination of the psychological status of a terrorism offender to establish their level of radicalization and probability of reoffending. In establishing the level of radicalization, a risk assessment of the offender is conducted. The risk assessment is thus used as a data collection tool that

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45 Id.

46 Id.

47 Id.

48 See Faiza Patel, *Rethinking Radicalization*, Brennan Center for Justice (2011).

49 Alex P. Schmid, *Violent and Non-Violent Extremism: Two Sides of the Same Coin?* (2014)

50 National Counterterrorism Centre of the United States of America *Foreign Terrorist Organizations Community Awareness Briefing* 2016; see also Office of Partnership Engagement FBI Unclassified Report *Preventing Violent Extremism in Schools* 2016.

aids in making decisions on how to proceed with suspected offenders.[51] They inform the making of decisions such as which offenders are to be subjected to trial and which ones should be subjected to alternatives to prosecution such as diversion. Moreover, they help after a sentence in designing appropriate mechanisms for reintegration. From a counter-terrorism perspective, a risk assessment is useful in the likelihood of engaging in future violence. The tool is based on a set of characteristics that are demonstrated by extremist offenders. They entail attributes such as belief, experience, and appearance among others. According to Monahan the variables which inform offenders radicalized with extremism include; (1) ideology, (2) affiliations, (3) grievances, and (4) moral emotions.[52]

Kenya's risk assessment tool is known as a 'Psychosocial Assessment Report'. The report is anchored on the Constitution of Kenya 2010, and the need to dispose of cases expeditiously and promote access to justice, the statutes applicable in criminal law such as the ODPP Act and the *Interagency Guidelines on Cooperation and Collaboration in the Investigation and Prosecution of terrorism and terrorism financing*," which were validated and adopted on Tuesday, 12 April 2022. Guidelines 4.20 to 4.24 make provision for the Psychosocial assessment of persons arrested on suspicion of terrorism.

This is a risk assessment that helps in identifying the risks and needs of terror suspects to establish the level of radicalization. A psychosocial assessment is a tool for objective assessment conducted by a qualified and licensed professional (Under the statutory requirements of the Counsellors and Psychologists Act, 2014). It adds value to decision-making allowing investigators, prosecutors, and judicial officers to take appropriate steps depending on the level of radicalization of any terror suspect.

The psychosocial assessment is conducted by the National Counter Terrorism Center (NCTC) which may work in collaboration with the ODPP and the DCI-ATPU to conduct psychosocial assessment of persons suspected of terrorism or terrorism financing and prepare a psychosocial assessment report. The psychosocial assessment can be done voluntarily when the suspect submits to the evaluation. It can also be sanctioned by a court order where the court deems it appropriate to establish the level of radicalization of the suspect before proceeding with the appropriate action. The psychosocial assessment report is expected to identify the risk factors, protective factors, motivational factors, and three basic psychological needs, which will help in establishing the level of radicalization.

Under guideline 7, the ODPP can recommend persons deemed appropriate to the voluntary Disengagement, Rehabilitation, and Reintegration (DRR) Program. This program is not a terminal solution since there is always a possibility of relapse or terror suspects reoffending. It is also important to note that it is a voluntary process. Terror Suspects are not forced into the DRR Program, because it is not possible to force a suspect into rapidly changing their radical views.

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51 Bonta, J , *Offender risk assessment: Guidelines for selection and use*, Criminal Justice and Behavior (2002) 29(4), 355-379.

52 Monahan, J, *The individual risk assessment of terrorism* Psychology, Public Policy, and Law(2012) 18, 167-205.

7. Diversion to the DRR Program - the Best Alternative to Countering Violent Extremism

Where a psychosocial assessment report indicates low levels of radicalization, the ODPP in the exercise of its powers might embrace alternatives to prosecution for such an offender. The best alternative for such an offender is a diversion into the DRR program. Such an offender will be subjected to de-radicalization which refers to the efforts which are taken toward radicalized individuals to transform and make them reject their violent extremist ideologies. Such offenders will also be put into a rehabilitation program that aims at providing counseling, critical reasoning tools, and knowledge to those disengaged and deradicalized to help them shift their mindsets. The offenders will then be subjected to a reintegration program that entails actions that support the social, ideological, psychological, and economic well-being of rehabilitated individuals as they return to live with their families and communities, and that ensures that they remain peaceful and law-abiding in the long run.

The inter-agency guidelines provide that: -

> "*Where, upon the consideration of the psycho-social assessment report and in consultation with the investigating agency, it appears to the ODPP disengagement is the best appropriate measure to take against a person suspected of terrorism or the terrorism financing, the ODPP shall refer such a person to the NCTC for admission into the Disengagement, Rehabilitation, and Reintegration (DRR) program.*"

Therefore, with the use of the Psychosocial assessment report as a risk evaluation tool, Kenya embraces diversion of low-risk terrorism offenders to the DRR program. This accords them a second chance for rehabilitation and has enormous benefits to the criminal justice system from a multi-dimensional point of view and further on, in building trust with, at risk communities.

The use of diversion as an alternative to prosecution has several benefits. It helps to reduce the burden on the formal criminal justice system, which is often overwhelmed with cases. The main rationale behind diversion in criminal cases is to alleviate excessive court loads. The United Nations Guidelines on the Role of the Prosecutor recognizes the aspect of, alleviation of excessive court loads as one of the reasons why states should consider diversion programs in criminal cases. It is obvious that the Kenyan court system has a backlog of cases. According to Mohamed Ahmed, petty offenses commonly create a case backlog in African courts.[53] They are either economically driven (such as theft or lack of business licenses) or are a form of social disturbance such as drunk and disorderly behaviour or loitering. As a result of weak institutional capacity, citizens encounter difficulties resolving such or similar disputes.

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53 Mohamed Ahmed, *Petty Offenders creates backlog in African Courts*, Available at: https://icj-kenya.org/news/petty-offences-create-backlogs-in-african-courts-report-shows/ Visited on 28 February 2023.

Diversion can be less costly than traditional prosecution, particularly when offenders are required to pay restitution or participate in community service programs. Diversion can provide an opportunity for offenders to address underlying issues that may have contributed to their criminal behaviour.[54]

One of the key benefits of diversion is that it can help reduce recidivism or the likelihood that an offender will commit another crime. By addressing the root causes of criminal behaviour, diversion programs can help offenders develop the skills and strategies they need to avoid future criminal activity. This, in turn, can reduce the burden on the formal criminal justice system, as fewer individuals may be subject to formal prosecution and imprisonment.[55]

In addition to reducing recidivism, diversion programs can also be less costly than traditional prosecution. By providing offenders with the opportunity to complete community service or participate in other rehabilitative programs, diversion can reduce the costs associated with incarceration and formal criminal proceedings. This can help free up resources that can be used to support other aspects of the criminal justice system, such as investigations, victim support, and crime prevention.[56]

Secondly, overcrowded prisons are a sufficient justification for diversion in criminal cases. Prisons in Kenya cannot handle inmates and detainees in their facilities.[57] Conditions are poor. The Kenya Prison Service's human and financial resources are stretched despite various efforts to increase prison capacity and initiatives to reduce congestion. This becomes even more of a challenge in terrorism cases as the law requires terrorism offenders to be detained separately from other offenders. Diversion provides a practical solution to reducing the number of remands in custody, while also achieving broader justice-based goals for victims and the community.

Conclusion

This article has established that in calling for the embracing of ADR Mechanism in Dispute resolution, the Constitution of Kenya 2010 does not exclude criminal cases. To that end, there exist alternatives to prosecution which are an avenue that further the quest for access to justice in the criminal sector. Moreover, considering the ideological and psychological nature of terrorism offenses, the article finds that the diversion of low-risk offenders to the DRR Program is the best approach to furthering access to justice in terrorism cases.

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54 Olang', F.O, *The Law and Practice of Diversion in the Criminal Justice System in Kenya* (2015) 3(2) Kenya Law Review 84.

55 Government of Kenya, *National policy on the administration of juvenile justice in Kenya*' (2017)

56 Kenya Law Reform Commission, 'A report on diversion programs in Kenya' (2016)

57 Id.

THE HCCH 2019 "JUDGEMENTS CONVENTION" AND THE FUTURE OF INTERNATIONAL COMMERCIAL ARBITRATION: A VIEW FROM EAST AFRICA

By L. Obura Aloo* & Dr. Kariuki Muigua**

1. Introduction

On the 1st of September 2023, just a few months from now, The Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (HCCH 2019 Judgments Convention) will enter into force.[1] The European Union (EU) became the first contracting party when it deposited its instruments so accession on the 29th of August 2022.[2] Ukraine deposited its instruments of ratification soon thereafter.[3] With this accession by the European Union and ratification by Ukraine, the HCCH 2019 Judgments Convention has two contracting parties which, in accordance with article 28 and 29 of the Convention, will trigger its entry into force on the 1st of September 2023. The HCCH 2019 Judgments Convention was developed under the auspices of the Hague Conference on Private International Law.[4] It seeks to simplify the enforcement of foreign judgments which has, due to the diversity and complexity of national laws, up to now "proven to be challenging, if not impossible".[5]

In addition to the European Union and the Ukraine, the Convention has been signed by Uruguay, Costa Rica, Israel, the Russian Federation and by the United States of America.[6] The fact that European Union, a large economic block, is a contracting

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1 *Convention of 2nd July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters https://www.hcch.net/en/instruments/conventions/full-text/?cid=137*

2 For the consultative process in the European Union see Proposal for a Council Decision on the accession by the European Union to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters" Brussels 16.7.2021 Com (2021) 388 Final https://ec.europa.eu/info/sites/default/files/proposal_eu_accession_judgments_convention_and_annex_en.pdf

3 Hague Conference on private International Law (HCCH) "The EU and Ukraine join the 2019 Judgments Convention" https://www.hcch.net/en/news-archive/details/?varevent=870

4 Convention of 2nd July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters https://www.hcch.net/en/instruments/conventions/full-text/?cid=137

5 HCCH "Outline of HCCH 2019 Judgments Convention 2019" https://assets.hcch.net/docs/36b240ac-8228-481d-a33b-3716baf4c656.pdf

6 The countries signed the convention on the following dates Uruguay 2/7/2019, Ukraine 4/3/202, Israel 3/3/2021, Costa Rica 16/9/2021, Russian Federation 17/11/2021 see https://www.hcch.net/en/instruments/conventions/status-table/?cid=137

party and that the world's largest economy, the United States, has signed the convention suggests a bright future for the HCCH Judgments Convention. It has been predicted by at least one commentator that the HCCH 2019 Judgments Convention will reach its critical mass of 40 plus contracting states within a decade.[7] It may therefore be useful for Kenya and other East African countries to take note for these developments.

Heretofore, one of the most formidable arguments in favour of international commercial arbitration as against litigation in courts has been that the landscape for enforcement of foreign arbitral awards is less scattered and more easily ascertainable than that for the enforcement of foreign judgments. This has been the position for the last six decades since the coming into force of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention").[8] The New York Convention now has over 165 state parties which makes the enforcement of arbitral awards follow a similar path almost all over the world.[9] The argument that foreign arbitration awards are easier to enforce than foreign judgments has been a great argument in favour of international arbitration. This argument is likely to be much less portentous on account of the ease of enforcement of foreign judgments that The Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters 2019 ("HCCH 2019 the Judgements Convention") promises.[10] The HCCH 2019 Judgments Convention is designed as an answer to the challenges that face the recognition and enforcement of foreign judgements and which, in effect, make international commercial arbitration attractive.

Apart from the relative ease of recognition and enforcement of awards, other arguments in favour of international commercial arbitration, though less formidable, are well documented. Some of these include the fact that arbitral proceedings are usually private and confidential. The flexibility of the procedure utilised potentially makes arbitration quicker and, at times, less expensive. The ability of the parties to determine the composition of the tribunal allows for specialist arbitrators. Arbitration also has restricted avenues of appeal when compared to litigation.[11] However, many of these advantages are subject to debate. For example, it has been debated whether the attribute of privacy and confidentially is advantageous in every instance.[12] Indeed in investor state arbitration, due to the public interest involved, the confidential in camera proceedings have been questioned since at least the start of the current century.[13]

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7 Pertegas Sender M (2020) The 2019 Hague Judgments Convention: its conclusion and the road ahead In Asia Academy of International Law (ed) Sinergy and Security: the Key to Sustainable Global Investment: Proceedings of the 2019 Colloquium on International Law (pp 181-190) Asian Academy of International Law Limited.

8 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention") 1958

9 https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2

10 The Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters 2019(the Judgements Convention") 2019 https://assets.hcch.net/docs/36b240ac-8228-481d-a33b-3716baf4c656.pdf .

11 Kariuki Muigua. *Settling Disputes Through Arbitration in Kenya*. 4th edition Glenwood Publishing Nairobi 2022 p. 3-10 for characteristics and advantages of arbitration.

12 L. Obura Aloo and Edmond Wesonga Kadima "What is there to hide? Privacy and Confidentiality versus Transparency: Government Arbitrations in Light of the Constitution of Kenya, 2010" ADR Vol 3 Issue 2 (2015) pp 1-29 –arguing that confidentiality in arbitration may, in some instances, actually be a disadvantage
Wilfred A. Matubwa "Confidentiality in Arbitration under the Constitution of Kenya 2010 An Illusory Myth or Valid Attribute"(2016) 4(2) Alternative Dispute Resolution 72 –arguing that confidentiality in arbitration in Kenya after the 2010 Constitution is not so straight forward

13 OECD (2005), "Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures", OECD Working Papers on International Investment, 2005/01, OECD Publishing. http://dx.doi.org/10.1787/524613550768

The real reason for the overwhelming use of arbitration to resolve international commercial disputes is that there has been no realistic alternative when it comes to enforcement of the outcome of the proceedings. The difficulties with enforcement for foreign arbitral awards were greatly reduced by the 1958 New York Convention. The New York Convention has been described as "the most successful multilateral instrument in the field of internal trade law."[14] It is considered the "centrepiece in the mosaic of treaties and arbitration laws that ensure acceptance of arbitral awards and arbitration agreements."[15] The New York Convention has two main objects: (1) the recognition and enforcement of arbitral agreements provided for at article II and (2) the recognition and enforcement of foreign arbitral awards provided for at article III. The New York Convention restricts the grounds for refusal of the award to seven as enumerated at article V. The burden of proof is on the party resisting enforcement to fit within one of these grounds.

The other key pillar of the global arbitration law system is the UNCITRAL Model Law on International Commercial Arbitration issued in 1985 as amended in 2006.[16] The UNCITRAL Model Law provides a model which countries can adopt with or without modification so that their international commercial arbitration law accords to global standards. So far, 85 states have adopted the model law in various forms.[17] This widely accepted twin scheme of the New York Convention and the UNCITRAL Model law has led to the popularity of arbitration internationally. The international enforcement of court judgments has, so far, not been able to keep up.

Attempts at creating a global enforcement regime for foreign judgments have been faltering. Attempts at a global judgments convention to rival the New York Convention began with the 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.[18] Few states ratified the convention. Regional efforts fared a little better. The most successful regional regime is the 2007 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ("the Lugano Convention") and the European Union Council Regulation (EC) No 44/2001 on jurisdiction and the enforcement of judgments in civil and commercial matters. These provide for giving effect to choice of court agreements and for the enforcement of judgments that come out of the courts. They are however of limited regional application.[19]

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14 Pieter Senders Forward in ICCA Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges. ICCA The Hague 2011. p. V

15 Pieter Senders Forward in ICCA Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges. ICCA The Hague 2011. p. V

16 UNCITRAL Model Law on International Commercial Arbitration issued in 1985 as amended in 2006 https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status

17 https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status

18 The Convention of 1st February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters https://www.hcch.net/en/instruments/conventions/full-text/?cid=78

19 The Lugano Convention applies in the EU and also in Denmark, Norway, Switzerland and Iceland. The Council Regulation 44/2001 applies in the EU and Denmark.

The first significant global steps at a multilateral framework were made by the Hague Conference on Private International Laws with the 2005 Hague Convention on Choice of Court Agreements ("HCCH 2005 Choice of Court Convention").[20] The convention, like the Lugano convention, provides for the giving effect to choice of court agreements.[21] Negotiating parties failed to reach full consensus on the enforcement of judgments.[22] The HCCH 2005 Choice of Court Convention however did not attract widespread ratification.[23] Fresh attempts and a more compressive judgements convention culminated in the HCCH 2019 Judgments Convention.

Early signs suggest that the HCCH 2019 Convention may be more successful than its predecessors. It may therefore be useful for dispute resolution practitioners around the world to take note. There is now a growing body of literature on the HCCH 2019 Judgments Convention. Most notably are the public consolation documents such as the European Union consultation.[24] These consultation documents present the Convention from a developed country perspective. Academic writing has also come mainly from the global north. Michel Wilderspina and Lenken Vyola for example analyse the convention through European Lenses concluding that the success of the convention will depend on which countries join it, how liberal their current recognition regime is and how often the convention is applied in practice.[25]

Shun-Hsiang Chen considers the current complexities in enforcing Chinese judgments in the United States and vice versa before analysing the changes that HCCH 2019 Judgments Convention would bring. He concludes that in order to provide assurance between business people in the two countries both China and the United States should ratify the convention.[26] Prof Louise E. Teitz writing in 2019 critically considered the Convention from a United States perspective concluding then that the United States was unlikely to ratify the convention.[27] Marthan Pertegas speculates on the future of the convention from a European perspective.[28] She concludes, in terms that are relevant for this paper, that the ratification of the convention is dependent on practitioners noting that "ratification of the convention takes place beyond academic circles" and "there sometimes appears to be a disconnect about in-depth studies produced by and for the

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20 Earlier attempts that did not meet with much success is the Convention of 1st February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters https://www.hcch.net/en/instruments/conventions/full-text/?cid=78

21 Convention of 30th June 2005 on Choice of Court Agreements https://www.hcch.net/en/instruments/conventions/full-text/?cid=98

22 Louise Ellen Teitz. "Another Hague Judgments Convention? Bucking the Past to Provide for the Future" https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1552&context=djcil

23 Only Denmark, The European Union, Mexico, Montenegro, Singapore and the United Kingdom see Status Table Convention of 30th June 2005 on Choice of Court Agreements https://www.hcch.net/en/instruments/conventions/status-table/?cid=98 see also Louise Ellen Teitz. "Another Hague Judgments Convention? Bucking the Past to Provide for the Future" https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1552&context=djcil for history of the "Judgments Project"

24 European Commission Proposal for a Council Decision on the accession by the European Union to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0388

25 Michwel Wilderspin and Lenkn Vyola. "The 1019 Hague Judgments Convention through European Lenses". 2020 AFI 1 NIPR https://www.nipr-online.eu/pdf/2020-138.pdf

26 Shun-Hsiang Chen "Signed, Sealed & Undelivered: Unsuccessful Attempts of Foreign Judgments Recognition Between the U.S. and China" Brooklyn Journal of Corporate, Financial & Commercial Law Vol 16 Issue 2 pp 167-189

27 Louise Ellen Teitz. Another Hague Judgments Convention? Bucking the Past to Provide for the Future" 2019 Duke Journal of Comparative and International Law Vol 29:491-511

28 Marthan Pertegas "The 2019 Hague Judgments Convention: The Road Ahead" 16th Regional PIL Conference https://cris.maastrichtuniversity.nl/ws/portalfiles/portal/52601891/MPS_Judgments_Convention_May_2020.pdf

academic community and the needs of officials in Ministries tasked with the study and ratification of the international treaties." [29]

Those who have considered the HCCH 2019 Judgments Convention from an African perspective include Egyptian Prof Yehya Ibarhim Bardr.[30] Indian Prof S. Khanderia considers drafts of the convention and whether South Africa should endorse them.[31] Prof Khanderia suggests that endorsement may be advantageous for countries like South Africa whose regime "is archaic and confined to a narrow set of precepts." This paper considers the convention from a Kenyan, East African perspective. The paper builds on this area by providing an East African and Kenyan perspective to the analysis.

In this paper we consider the future of international commercial arbitration from an East African perspective if the HCCH 2019 Judgments Convention turns out to be globally successful. The paper's overall hypothesis is that even though the success of the HCCH 2019 Judgments Convection would lead to a proportionate decline in the attractiveness of international commercial arbitration, the complexity of the convention suggests it will not be easily adopted in East Africa. Should East Africa continue with the status quo or does adoption the HCCH 2019 Judgments Convention represents the lex ferenda? The paper argues that the regime proposed by the HCCH 2019 Judgements Convention is complex and ratification of the convention should be approached cautiously.

In this regard, the paper addresses a number of questions. What is the current state of the law on enforcement of foreign judgments and arbitral awards in Kenya? What are the similarities and differences in the approach of the New York Convention and the HCCH 2019 Judgments Convention? How do international arbitration and litigation compare from a Kenyan perspective and will the HCCH 2019 Judgments Convention affect this?

The paper is informed by traditional doctrinal legal research. This approach has been described as "mothers milk to academic lawyers" and a prerequisite for further analysis of law.[32] We adopt the approach in order to describe the law in the area of enforcement of foregoing judgments and arbitral awards.[33] Without this description further analysis would be impossible as the some of the law particularly relating to enforcement of foreign judgments is complex and unsettled. The paper will initially focus on a descriptive analysis of the legal rules based on applicable conventions, statutes and case law. The aims will be to assemble, organise and describe the law before commenting

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29 Marthan Pertegas "The 2019 Hague Judgments Convention: The Road Ahead" 16th Regional PIL Conference p 13-14. https://cris.maastrichtuniversity.nl/ws/portalfiles/portal/52601891/MPS_Judgments_Convention_May_2020.pdf

30 Yehya Ibrahim Badar. "The Hague 2019 Convention for the Recognition and Enforcement of Foreign Judicial Decisions: A Comparative Study" International Journal of Doctrine, Judiciary and Legislation 2021 Vol 2 No 2 pp 427-468 (The abstract of Prof Badar's comparative study is promising. Unfortunately, the paper is in Arabic and the translation was not available to the authors at the time of preparation of this paper. Communication has been initiated with Prof Badar to try and secure a translated copy or obtain his views)

31 Sonil Khanderia. "The Hague Conference on Private International Law's Proposed Draft Text on the Recognition and Enforcement of Foreign Judgements: Should South Africa Endorse it?" 2019 Journal of African Law 63(3) 1-21

32 Christopher McCruddle "Legal Research and the Social Sciences" Law Quarterly Review 122 (2006) 632 at 634

33 Jan M. Smits "What is Legal Doctrine? On Aims and Methods of Legal-Dogmatic Research" M-EPLI Working Paper No. 2015/06 –suggesting that the main goals of doctrinal legal research are to describe the existing law, prescribe solutions for problems in the system and justification for the existing law

on it and seeking underlying themes. "This approach is beneficial by providing a solid structure for crafting a thesis, organising the paper and enabling a thorough definition and explanation of the rule. The drawbacks of this approach are that it may be too formalistic, and may lead to oversimplification of the legal doctrine." [34] To meet this criticism, The paper however acknowledges it is necessary to capture a much broader context and backdrop against which legal changes are taking place and the contexts within which the law is applied.[35]

The article begins by exploring the problem of enforcement of foreign decisions. Using Kenya as the focus, it considers the legal regime governing the recognition and enforcement of foreign judgements. East Africa. Part III considers the solution to it in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the legal regime governing recognition and enforcement of foreign arbitral awards in Kenya. In Part IV, then examines the provisions of the HCCH 2019 Judgments Convention and the effect that adopting the convention would have on the recognition and enforcement of the judgements. Part V of the paper evaluates the what the rise of the HCCH 2019 judgments Convention would mean for international commercial arbitration from an East African perspective. Part VI concludes.

2. Recognition and Enforcement of Foreign Judgements in Kenya

In this part of the paper we briefly discuss the problems of recognition and enforcement of foreign judgments from a Kenyan law perspective.[36] The complex state of the law will be compared with the regime for enforcement of foreign arbitral awards.

Laws tend to have force within the national borders of the state.[37] Enforcement of a foreign judgment is an exception to this. A number of theories are advanced at common law for the enforcement of the foreign judgments. These theories include the comity and reciprocity. Comity has been as "neither a matter of absolute obligation on the one hand nor of mere courtesy and good will…it is the recognition which one nation allows within its territory to the legislation, execution or judicial acts of

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34 Indiana Jerome Halll Law Library. Legal Dissertation: Research and Writing Guide https://law.indiana.libguides.com/dissertationguide#:~:text=Doctrinal%20legal%20research%20methodology%2C%20also,%2C%20statutes%2C%20or%20regulations).

35 The paper is informed by what has been termed "thick description" to evaluation of legal phenomena see James Thuo Gathii. Introduction to the Performance of Africa's International Courts: Using Litigation for Political, Legal and Social Change at 16-19 (James Thuo Gathii.(ed) The Performance of Africa's International Courts: Using Litigation for Political, Legal and Social Change 2020 discusses use of think description in analysis; See also James Thuo Gathii "Reform and Retrenchment of International Investment Law" *Keynote Remarks prepared for the Santander Roundtable Discussions on International Economic Law, co-hosted by Kenyatta University School of Law, (Nairobi); Riara Law School, (Nairobi); and the International Investment Law Center, at University of Cologne, January 13, 2021. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3765169 - Arguing suggest that "one cannot tell a single story that ignores, excludes and silences these complex realities"; see also Harrision Mbori "Case Commentary on the British American Tobacco v Attorney General of Uganda (EACJ) and GETMA International v The Republic of Guinea (OHADA CCJA) African Journal of International Economic Law Volume I 2020 p. 342 arguing that The thick description approach avoids a decontextualized, "plain vanilla or colour-blind scholarship and practice." H. Mbori uses the Thick description approach for his case commentary.

36 For an older but very sound account of the law in this area see generally Thanawalla S. "Foreign Inter Parties Judgments: Their Recognition and Enforcement in the Private International Law of East Africa" (1970) 19 ICLQ 430-446

37 McClean, David. *Morris: The Conflict of Laws* 5th ed London Sweet & Maxwell. 2000 p. 533 sighting Ulrich Huber (1636-1694) as the source of this maxim.

another…"[38] Reciprocity involves a state recognizing the decisions of another sates courts if that other state also gives recognition to the decision of the state in question.

Apart from comity and reciprocity, it is sometimes viewed that enforcement of foreign judgments is due to the private law relations (obligations) between the parties are enforced. This theory focuses less on the states and more on the private rights acquired by the parties. It is strong in common law jurisdictions. For example, the English House of Lords in *Schibsby v Westenholz* (1870) LR 6 Q.B. 155, 159 stated

> *"the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation to pay the sum for which judgment is given, which the courts on this country are bound to enforce…"*[39]

Enforcement has also been supported by the vested rights theory.This theory was championed in the United States by judges such as Justice Holes and Cardozo.This theory suggests that what is enforced is not the judgment but the vested rights. As framed by Dicey, "the courts never in strictness enforce foreign law, when they ae said to do so, they enforce not foreign laws, but rights acquired under foreign law."[40]

Criticisms of the theories include the argument that the unrestricted sovereignty presents undue limits, comity is too vague and reciprocity too hard to determine, theory of obligation or vested rights ask the question of when such obligations or rights have been duly acquired. As a results of these issues countries have turned to treaties.[41] France and Swiss Treaty of 1715 was the first such treaty. Latin America has a regional treaty from 1889 (Treaty of Montevideo). In the EU the judgments in civil and commercial matters are enforced under the Brussels I Regulations of 2000 in the European Economic area, the Brussels regime is supplemented by the Lugano Convention of 1988. In the Commonwealth Countries enforcement of foreign judgment is founded on legislation mainly based on the English Foreign Judgments (Reciprocal Enforcement) Act of 1933.[42]

The Kenyan Act, which is based on the 1933 English Act, is the Foreign Judgments (Reciprocal Enforcement) Act (Cap 43) Laws of Kenya.[43] Reciprocity underlies the provisions of the Act. For the Act to apply, it is necessary that the foreign country give similar recognition to Kenyan judgments

Section 13 of the Act provides that the Minister may by order declare to which countries' decisions the Act applies. The Schedule to the Act provides a list of just eight countries: Australia, Malawi, Seychelles, Tanzania. Uganda, Zambia, The United Kingdom and

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38 Hilton v Guyot 159 U.S. 113 (1895) refusing recognition to a French judgment Micahels, Ralf. "Recognition and Enforcement of Foreign Judgments" Max Planck Institute of Comparative Public International law www.mpepil.com p. 2 Theory was developed by Duth Authors Voet and Huber.

39 *Schibsby v Westenholz* (1870) LR 6 Q.B. 155, 159 per Blackburn J echoing *Gordard v Grey* (1870) L.R. 6 Q.B. 139 at 148-149 (Blackburn and Miller JJ)

40 McClean, David. *Morris: The Conflict of Laws* 5th ed London Sweet & Maxwell. 2000 p. 535

41 Micahels, Ralf. "Recognition and Enforcement of Foreign Judgments" Max Planck Institute of Comparative Public International law www.mpepil.com p1-2

42 Foreign Judgments (Reciprocal Enforcement) Act of 1933 (c13 23&24 Geo5)

43 Foreign Judgments (Reciprocal Enforcement) Act (cap 43) Laws of Kenya

Republic of Rwanda.[44] It is noteworthy that three of the East African Community member states, Burundi, South Sudan and the Democratic Republic of Congo are not yet included in the list.

Reciprocity has its history in the common law. In the English case of *Adams and others v Cape Industries PLC* and another [45] the Court observed:

> *I can conveniently start by identifying the basis on which English Courts will enforce the in personam judgments of foreign courts. In Russell v Smyth (1842) 9 M&W 818, 818, Lord Abinger C.B. said: "Foreign judgments are enforced in the courts because parties liable are bound by duty to satisfy them." Parker B expressed the same principle at p. 819: "where the court of a foreign county imposes a duty to pay a sum certain, there arises an obligation to pay, which may be enforced in this country" in Goddard v Gray (1870) L.R. 6Q.B. 139, 148-149, Blackburn J said: "But in England and in those states which are governed by the common law, such judgments are enforced, not by virtue of any treaty, nor by virtue of any statute, but upon a principle very well sated by Parker B. Willaims v Jones (1845) 13 M&W 628,633 'where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay the sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgment of foreign and colonial courts are supported and maintained.*

A foreign judgment brought to Kenya can be recognized and enforced in at least three ways. First, it can be enforced under the Foreign Judgments (Reciprocal Enforcement) Act. Second, it can be used as a shield against an action brought against the party wishing to rely on it. Third, the foreign judgment can be basis for a civil suit to obtain a local judgment on the basis of the rights in the judgment. These can be considered briefly below.

3. Enforcement under Foreign Judgments (Reciprocal Enforcement) Act

The Foreign Judgments (Reciprocal Enforcement) Act sets out the criteria a foreign decree is to meet before it can to be recognized and enforced. The procedure for enforcement of a foreign judgment under the Foreign Judgments (Reciprocal Enforcement) Act has been explained by Gikonyo J in the case of *Elizabeth Namutebi v Threways Shilling Services (K) Limited*[46]. Gikonyo J indicated that the judgment will be enforced: (a)If the judgment is for a sum of money payable and is obtained from the superior courts of the counties in the schedule and (b)It has to be final and conclusive between the parties. (c)The judgment should not be for a sum payable or an item of movable property deliverable in respect of taxes or other charges of a similar nature or in respect of a fine or other penalty.

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44 Foreign Judgments (Reciprocal Enforcement) Act (cap 43) Laws of Kenya Schedule

45 *Adams and others v Cape Industries PLC and another* (1990) 2 Weekly Law Reports, 657, 678 per Scott J.

46 *Elizabeth Namutebi v Threways Shilling Services (K) Limited* [2014] eKLR; see also Githinji j in *Ssebagala & Sons Electric Ltd v Kenya National Shipping Lines Ltd* [2002] eKLR enforcing a Ugandan judgement in Kenya

The issue of what is a final and conclusive judgment often arises in the applications. In the English case of *Beatty v Beatty*[47] answering the question as to what is a final judgment the English Court of Appeal stated:

> *The principle which we have to apply was stated by Lord Hersechell in Nouvion v Freeman 15 A.P. 1,9 "I think that in order to establish that such a judgment has been pounced' [that is a final judgment which this court can enforce], 'it must be shown that in the Court which it was pronounced it conclusively, finally and forever established the existence of the debt of which it is could to be made conclusive evidence in this county, as to make it res judicata between the parties. If it is not conclusive in the same court which it is pronounced it, so that notwithstanding the judgment the existence of the debt may between the parties be afterwards contested in that court, and, upon proper proceedings being taken and such a contest being adjudicated upon, it may be declared that there existed no obligation to pay the debt at all, then I do not think that a judgment which is of the character can be regarded as finally and conclusively evidencing the debt and so entitling the person who has obtained the judgment to claim a decree from our courts for the payment of that debt. (emphasis added)*[48]

The application of this principle in Kenya is illustrated by the case of *Heman Phillip Steyn v Charles Thys*[49] In this case, the Applicant had secured a judgment of US$ 150 million against the Respondent in the High Court in Arusha Tanzania and sought to enforce the judgment in Kenya. The Respondent successfully opposed the application on the grounds that there was an appeal before the courts in Tanzania and the Respondent had obtained a stay pending appeal in the Tanzania courts.

Any judgment creditor may apply to the High Court at any time within six years after the date of the judgment to have the judgment registered by the High Court.[50] The initial application is made ex-parte [51]. Upon satisfying the requirements of the Act and the rules, the judgment will be registered.[52] Section 6 of the Act provides various reasons why registration of a judgment may be refused. The registration of the judgment will be refused where the judgment has been wholly satisfied or where the judgment could not have bene enforced in the court so the country of origin of the judgment.[53]

Even after registration, the registration of the judgment may, in certain circumstances, be set aside. Section 10(2) provides that registration must be set aside in the following cases: (i) the judgment was not which the act applies; (ii) the judgment was registered in contravention of the act; (ii) the foreign court had no jurisdiction; (iii) the judgment debtor did not receive notice of the proceedings (iv) the judgment was obtained by

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47 *Beatty v Beatty* (1924) 1 K.B. 807, 815
48 See also *Harrop v Harrop* [1920] 3 K.B. 3865
49 *Heman Phillip Steyn v Charles Thys* [2011] eKLR
50 s. 5 Foreign Judgments (Reciprocal Enforcement) Act (cap 43) Laws of Kenya
51 s. 5 Foreign Judgments (Reciprocal Enforcement) Act (cap 43) Laws of Kenya
52 S. 6(1) Foreign Judgments (Reciprocal Enforcement) Act (cap 43) Laws of Kenya
53 S. 6(2) Foreign Judgments (Reciprocal Enforcement) Act (cap 43) Laws of Kenya

fraud, other than fraud which was put or could have been put the court which heard the original matter (v) the enforcement of the judgment would be contrary to Kenyan public policy and (vi) the rights of the judgment are not vested in the person applying for registration

In the English case of *Sydal v Heyward* [54] it was has held that it did not matter that the allegations of fraud had been investigated and rejected by the foreign court. The matter could be reopened. Here an Indian money lender had obtained judgment in India against and English officer and sought to enforce the judgment in England. The fraud must be fraud on the court. In *Owens Bank Ltd v Etoile Commercial Sa* [55], Owens Bank alleged fraud on a guarantee when Etoile Commercial bank ought to enforce in St. Vincent a judgment delivered in Paris. The bank had not raised the fraud in the guarantee until the case came to the Court of Appeal. The Court of Appeal held that the Bank's defence based on fraud should be struck out as an abuse of the court process with regard to the history of the litigation. On further appeal to the Privy Council, it was held:

> *Where allegations of fraud have been made and determined abroad, summary judgments or striking out in subsequent proceedings are appropriate remedies in the absence of plausible evidence dislocating at least a prima faice case of fraud.*

Public policy was considered in the English case of *Re Marcatney*[56] where Astbury J refused to recognize a Maltese judgment on grounds that the cause of action was unknown to the English law and that indefinite award would be contrary to the law. In the English case of *Israel discount Bank v Hadjipateras*[57] it was held that the defence of the matter being against public policy should be raised in the foreign court.

Public policy is wide and malleable term. The term was considered in the case of *Sanjay Shah v Kamlesh Bid & another*[58] and in the case of *East African Development Bank Ltd v Dari Limited & 5 others*.[59] In the case of *Sanjay Shah v Kamlesh Bid & another*[60] The Respondent/Decree Holder had obtained a judgment in England and filed an application seeking to have the judgment registered in Kenya. The court granted leave and the Notice of Registration was served upon the two Judgment Debtor/Applicants.

The Applicants moved the court under s. 10(2) (a), (b) and 10(4) of the Act seeking to have the registration set aside on grounds that the judgment was not one to which the Act applied and secondly that enforcement would be contrary to Kenyan public policy. The applicant's contention was that the final judgment delivered in the Chancery Court had no orders as to costs and was not the judgment registered in Kenya. Lady Justice O. Sewe held that the applicants should have sought orders for review before the

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54 *Sydal v Heyward* [1948] 2 KB 443 (CA)

55 *Owens Bank Ltd v Etoile Commercial Sa* (1995) 1 WLR 44

56 *Re Marcatney* [1921] 1 Ch 522

57 *Israel discount Bank v Hadjipateras* [1984] 1 WLR 137

58 *Sanjay Shah v Kamlesh Bid & another* [2017] eKLR

59 *East African Development Bank Ltd v Dari Limited & 5 others Civil Case* 1/2020 [2020] eKLR; see also Majanja J in *Dac Aviation (EA) Ltd & 2 others v Amra Leasing Limited* [2021] eKLR

60 *Sanjay Shah v Kamlesh Bid & another* [2017] eKLR

Chancery Court in England if they were unhappy with it. She however noted that the amounts of costs were manifestly higher that what would be payable in Kenya and ordered that it would be in the interest of justice if the registrar of the High Court in Kenya assessed the costs. This last aspect of the judgment is interesting because the Act does not appear to contemplate changes to the foreign judgment but just a decision whether it is to be enforced or not.

The more convincing position appears to be the one taken by the High Court in the case of *East African Development Bank Ltd v Dari Limited & 5 others*[61]. Here the applicant brought an application seeking to register and enforce a judgment obtained in England against the 1st Respondent and the other respondents who were guarantors to loan. The respondents raised allegations of bias against the judge of the English court. Lady Justice Okwany held that the mandate of the court, under the Act is limited to the enforcement of the judgment but does not extend to reviewing, interrogating or analyzing the procedure before the court or the substance of the dispute before the foreign court.

It should be noted that a Kenyan Court will not recognize an agreement to compromise a suit between parties in an application for enforcement of a foreign judgment if the agreement was not adopted by the foreign court. In the family division court case of *NM v AM*[62] an application was brought under the Foreign Judgments (Reciprocal Enforcement) Act purportedly to enforce an agreement between the parties relating to divorce proceeding filed in New York. State. In the course of the divorce proceedings the parties entered into a comprehensive settlement in which a number of issues were agreed. The Respondent defaulted on the agreement which the Applicant felt were detrimental to the child of the marriage. Lady Justice Achode held that what is contemplated to be enforced is a final judgment and does "not include agreements entered it not between the parties, unless such agreements have been adopted by the court and have become orders of the court."

Despite the technical issues on the law that arise, the major hurdle with enforcement under the Act is the limited number of reciprocating countries in the schedule. The issue that raises is what is the effect of foreign judgments that do not emanate from reciprocating countries. There are two possible effects of such judgments. First, they are conclusive as to the matters handled in them and secondly, the judgments can be the basis for a suit in Kenya.

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61 *East African Development Bank Ltd v Dari Limited & 5 others Civil Case* 1/2020 [2020] eKLR; see also *Majanja J in Dac Aviation (EA) Ltd & 2 others v Amra Leasing Limited* [2021] eKLR

62 *NM v AM* [2015] eKLR

Conclusive Judgments

A foreign judgment even if not directly recognized and enforceable may be conclusive as to the matter thereby directly adjudicated upon between the same parties litigating in the same capacity. The foundation for this is Section 9 of the Civil Procedure Act.[63]

The provisions of section 9 of the Civil Procedure Act only provides that the foreign judgment is conclusive but not recognized. The foreign judgment which is deemed conclusive does not extinguish the original cause of action, the original action does not merge into the foreign judgment. The holding that the foreign judgment is conclusive can be utilized as a shield, a defence, to an action brought in Kenya on the same facts. To enforce the judgment from a non-reciprocating country one would have to file a suit.

Proceed by way of suit

Where the judgment is from a non-reciprocating country, the foreign judgment gives rise to an obligation in the nature of a simple contract. This is illustrated by the case of Nagina Singh v Tarlochan Singh [64] In this case, the Plaintiff sued the defendant in Kenya on a judgment of an Indian Court. In the proceedings in India the Defendant and two others had been sued on a promissory note, and judgment was entered against all three. One of the parties had admitted the claim. Justice Web held that it had not been a judgment on the merits and hence could not found the basis of the claim.

This decision was considered by Justices Githinji, Mohamed & Otieno-Odek the Court of Appeal in the case of *Jayesh Hasmukh Shah v Navin Harian*[65] The court of appeal analyzed how a final judgment from a non-reciprocating state can be enforced. In this case the Plaintiff filed suit in Kenya seeking to enforce a judgment of Ethiopian Birr 4,839.161/40 obtained from the Federal High Court of Ethiopia. The Defendant, in its defence indicated that Ethiopia was a non-reciprocating country and the judgment could not be enforced. The Plaintiff applied for summary judgment before the High Court. The High Court refused to grant the application for summary judgment holding that there were issues that needed to be canvassed at full trial. The Plaintiff appealed to the Court of Appeal.

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63 Section 9 of the Civil Procedure Act (Chapter 21) Laws of Kenya. "A foreign judgement shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim, litigating under the same title. Except-
   a. where it has not been pronounced by a court of competent jurisdiction
   b. where it has not been given on the merits of the case
   c. where it appears on the face of the proceedings that it is founded on an incorrect view of international law or a refusal to recognize the law of Kenya in cases in which such law is applicable;
   d. where the proceedings in which the judgment was obtained are opposed to natural justice;
   e. where it was obtained by fraud
   f. where it sustains a claim founded on a breach of any law in force in Kenya."

64 *Nagina Singh V Tarlochan Singh* (1937) 37 KLR see also *Mohamedalo Mulla Ebramji v Alibahi Juranji Marmuji* (1917) Vol VII EALR 89

65 *Jayesh Hasmukh Shah v Navin Harian* [2016] eKLR

The Court of Appeal relied on the statement of the common law principle as stated in the English Case of *Adams & others v Cape Industries PLC*[66] as read with section 9 of the Civil Procedure Act of the laws of Kenya. The court stated the principles as including that the judgment of a competent foreign court creates a legal obligation on the part of the Defendant to pay the amount and that sum can be recovered in an action for debt.[67]

The Court of Appeal cited with approval the case of *Keshavii Ramii Ladha v Bank of Credit and Commerce International-SA (BCCI)*[68] where the court had earlier observed:

> *It is now trite in civil litigation in this jurisdiction that a judgment of whatever nature, whether foreign or otherwise, is good until otherwise declared. But it is not in its form as a judgment per se that it is capable of being enforced. It has to take the shape of another procedural document before it can reach any execution stage.*[69]

However, the Court of Appeal held that summary judgment could not be grated as the issues regarding the Ethiopian judgment needed to proceed to full trial. The Appeal therefore failed.

In a later case, the High Court in Mombasa in the case of *Raw Bank PLC v Yusuf Shaa Mohammed Omar*[70] considered the situations in which a foreign judgment from a non-reciprocating country under the Foreign Judgments (Reciprocal Enforcement) Act can be enforced. The Plaintiff had obtained a judgment of US$ 150,000 in the courts in the Democratic Republic of Congo against the Defendant who was a resident of Mombasa in Kenya.

The Plaintiff used various methods to try and recover the funds including involving Interpol and having the Defendant arrested. In the present suit the Plaintiff applied to have the Defence struck out and in the course of considering the application Chepkwony, J considered the situations in which foreign judgment from a non-reciprocating country can be enforced in Kenya. The judge cited the English case of *Adams & Others v Cape Industrials PLC*[71] that had been cited with approval in *Jayesh Hasmukh Shah v Navin Harian*[72] and restated the position in Kenya as following the common law and s. 9 of the Civil Procedure Act. The court indicated that to enforce a foreign judgment in Kenya from a non-designated country, the following requirements must be fulfilled:

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66 *Adams & others v Cape Industries PLC* (1990) Ch 433

67 *Jayesh Hasmukh Shah v Navin Harian* [2016] eKLR para 22-23 see also reference of the Court of Appeal to the Ugandan Case of *Christopher Sales & another v The Attorney General of Uganda Uganda HCC* No 91 of 2011 where the issue involved the enforcement of a New York Judgment in Uganda. and ; *Accredo Ag & 3others v Steffano Uccelli & another* [2017] eKLR Court of Appela Visra, Karanja and Koome JJA enforcement of an Italian, non reciprocatiry county, judgment in Kenya at para 18 quoting *Jayesh Hasmukh Shah v Navin Harian* [2016] eKLR

68 *Keshavii Ramii Ladha v Bank of Credit and Commerce International-SA* (BCCI) Civil Appeal No 44 of 2004

69 *Jayesh Hasmukh Shah v Navin Harian* [2016] eKLR

70 *Raw Bank PLC v Yusuf Shaa Mohammed Omar* Mombasa Civil Suit No 10 of 2014 [2020] eKLR

71 *Adams & Others v Cape Industrials PLC* (1990) Ch 433

72 *Jayesh Hasmukh Shah v Navin Harian* [2016] eKLR

a. A party must file a plaint at the High Court of Kenya providing a concise statement of the nature of the claim, claiming the amount of the judgment debt, supported by a verifying affidavit, list of witnesses and bundle of documents intended to be relied upon. A certified copy of the judgment should be exhibited to the Plaint
b. It is open to the defendant to challenge the validity of the foreign judgement under the grounds set out in Section 9 of the Civil Procedure Act
c. A judgement creditor is entitled to summary judgment under Order 36 unless the defendant judgement debtor can satisfy the Court that there is a real prospect of establishing at trail one of the grounds set out in Section 9 of the Civil Procedure Act.
d. If the foreign judgement creditor is successful after trail. The judgment creditor will have the benefit of a High Court judgment and the judgment creditor will be entitled to use the procedures of the Kenyan courts to enforce the foreign judgment which will now be executed as a Kenyan judgment.
e. The money judgment in the foreign judgment must be final and conclusive. It may be final and conclusive even though it is subject to an appeal. Under Section 9 of the Civil Procedure Act, a foreign judgment is conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim, litigating under the same title except:

    i. where it has not been pronounced by a court of competent jurisdiction;
    ii. where it has not bene given on the merits of the case
    iii. where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of Kenya in cases in which such law is applicable;
    iv. where the proceedings in which the judgment was obtained are opposed to natural justice;
    v. where it has been obtained by fraud; or
    vi. where it sustains a claim founded on a breach of any law in force in Kenya.

f. Under Section 4(4) of the Limitation of Actions Act, (Cap 22 of the Laws of Kenya) an action for enforcement of a foreign judgment must be brought in Kenya within 12 years of the date of that judgement.
g. The foreign court must have had jurisdiction, (according to the Kenyan rules of conflict of laws) to determine the subject matter of the dispute and the parties to the foreign court's judgement and the enforcement proceedings must be the same or must derive their title form the original parties.
h. The Kenyan High Court will generally consider the foreign court to have had jurisdiction where the person against whom the judgment was given:

    i. Was, at the time the proceedings were commenced, habitually resident or incorporated in or having a principle place of business in the foreign jurisdiction or
    ii. Was the claimant or counterclaimant in the foreign proceedings or
    iii. Submitted to the jurisdiction of the foreign court or
    iv. Agreed, before commencement, in respect of the subject matter of the proceedings to submit to the jurisdiction of the foreign court.

vi. Where the above requirements are established to the satisfaction of the Kenya High Court, the High Court will not re-examine the merits of the foreign court judgment. The foreign judgment will be enforced on the basis that the defendant has a legal obligation as a matter of common law, recognized by the High Court, to satisfy the money decree of the foreign judgment.[73]

1. It can be enforced through the provisions of the Foreign Judgments (Reciprocal Enforcement) Act (Cap 43) Laws of Kenya
2. The foreign judgment can be raised as a defense of res judicata to a claim by the other party.

As is immediately evident, the law on recognition and enforcement of foreign judgments is a complex patch work of statutory and common law provisions. The provisions on enforcement of arbitration awards is, as will be seen below, much less complex.

3. Enforement of Foreign Arbitral Awards in Kenya [74]

The law governing the recognition and the enforcement of foreign arbitral awards in Kenya is currently much less complex than the law on enforcement of foreign judgments discussed above. The recognition and enforcement of the arbitral awards is governed by Part VII of the Arbitration Act , 1995 until 2009[75] s 36 provides that

> *"An arbitration award irrespective of the state in which is it is made shall be recognized as binding and upon application in writing to the High Court shall be enforced subject to section 37*"

The Act provides a distinction between domestic and international arbitrations. Domestic arbitration awards are enforced under the provisions of s. 36 of the Arbitration Act. The award may be enforced unless it in breach any of the requirements of s. 37. S. 37 provides a list of about then exclusive ground upon which the recognition and enforcement of an arbitral award may be refused. The section applies to both local and foreign awards.

Foreign arbitral awards are provided for under s 36(2) of the Arbitration Act. Under section 36(2) of the Arbitration Act, 1995 as amended in 2009, international arbitral awards are recognized and enforced in accordance with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958[76] or any other Convention to which Kenya is a signatory and relating to arbitration awards.

The New York Convention is aimed at creating a uniform system whereby an arbitration award is made enforceable but it does not provide a procedure for enforcement.

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73 *Raw Bank PLC v Yusuf Shaa Mohammed Omar* Mombasa Civil Suit No 10 of 2014 [2020] eKLR

74 See generally Regeru, N. 'Recognition and Enforcement of Arbitration Awards" in Muigai G.(ed) *Arbitration Law and Practice in Kenya.* Law Africa, Nairobi, 2011. chapter 7 p. 121 Muigua, K. *Settling Disputes Through Arbitration in Kenya* 4th ed Glenwoods Publishing 2022 pp 237-240

75 The Arbitration (Amendment) Act, 2009 Act No 11 of 2009 amended s. 36

76 www.uncitral.org/uncitral/en/index.html - Uncitral Texts and Statutes

The procedure for enforcement is determined by the domestic law of the country.

The Convention itself provides simple formalities for obtaining recognition and enforcement. The New York Conventions is based on two tenets. First, the recognition and enforcement of arbitral agreements.[77] Second, the recognition and enforcement of foreign arbitral awards.[78]

Regarding the recognition and enforcement of the arbitral agreement, the New York Convention obliges the Contracting states to recognise and enforce the arbitral agreement.[79] The arbitration agreement has two effects a positive effect and negative effect. The positive effect of the agreement creates and obligation of the parties to submit to arbitration and thereby confers jurisdiction on the arbitral tribunal. The negative effect prevents them from submitting their dispute to any other dispute resolution mechanism such as courts.[80] A court which is approached to decide a matter where the parties have an arbitration agreement, will on application of a party stay the proceedings and refer the parties to arbitration.[81]

Once an arbitration is concluded, an award rendered by the arbitration tribunal, if a party seeks recognition and enforcement, the following have to be produced to the relevant court:

1. the duly authenticated original award or a duly certified copy
2. the original agreement referring the dispute to arbitration or a duly certified copy.[82]

Certified translations will be required if the agreement and award are not in the official language of the country in with recognition and enforcement is required.[83] Once the court has the documents it will grant recognition and enforcement unless any of the grounds for refusal as set out in the Convention exist. These grounds are similar to the grounds set out in s. 37 of the Arbitration Act.

The specific grounds on which enforcement can be refused under article IV 2 of the Convention include:

1. the parties to the arbitration agreement were under a law applicable to them under some incapacity, or the agreement is not valid under the law to which the parties have subjected it or the law of the country where the award was made.

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77 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 Article II

78 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 Article III

79 *International Council for Commercial Arbitration. ICCA's Guide to the Interpretation of the 1958 New York Convention*, The Hague 2011 p. 8

80 *International Council for Commercial Arbitration. ICCA's Guide to the Interpretation of the 1958 New York Convention*, The Hague 2011 p. 8

81 s. 6 of the Arbitration Act

82 s. 36 (3) Arbitration Act

83 s. 36 (4) Arbitration Act

2. the party against whom the Award is invoked was not given proper notice of appointment of the Arbitrator.
3. the award deals with a difference not contemplated or falling within the terms of submission to arbitration or contains matters beyond the scope of the arbitration award.
4. the composition of the arbitration tribunal was not in accordance with the agreement of the parties or the law of the country where the arbitration took place.
5. The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country where the award was made

Recognition and enforcement can also be refused on the grounds that:

- the subject matter of the difference is not capable of settlement by arbitration under the law of the country where its enforcement is sought
- the recognition and enforcement would be contrary to the public policy of that country.

The approach of the courts in most countries is a narrow interpretation of the grounds in favour of enforcement. This approach and the relative simplicity of the provisions has established the New York Convention a key aspect of the reliability of international business transactions.[84]

The recognition and enforcement of foreign arbitral awards is therefore much less complex than the regime governing that of foreign judgments. However the regime is not problem free.[85] The two problems that are universal are the issues of which disputes are arbitrable and the question of whether enforcement should be refused on grounds of public policy.

Arbitrability refers to whether disputes care capable of being referred to arbitration. Under various national laws, some disputes by their nature are not to be referred to arbitration and only courts can make pronouncements on them. However, in view of the fact that international trade involves contract it is unlikely to be affected by this provision. Also, in view of the provisions of Art 159(2)(c) of the Constitution of Kenya which provides the principle of promotion of alternative dispute resolution the extent of non- arbitratibility may be limited.

Public Policy, and what can conflict with it, is a wide and not easily defined term. Ringera J in *Christ for All Nations v Apollo Insurance Co Limited* [86] was of the view that a matter would be against public policy if it was inconsistent with the constitution or

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84 *International Council for Commercial Arbitration. ICCA's Guide to the Interpretation of the 1958 New York Convention*, The Hague 2011 p. 7

85 See Richard Frimong Oppong "The East African Court of Justice, Enforcement of Foreign Arbitration Awards and the East African Community Integration Process" Vol 63 Issue 1 *Journal of African Law* February 2019 pp. 1-23 and also Francis Kariuki "Challenges Facing the Recognition and Enforcement of International Arbitral Awards within the East African Community" http://kmco.co.ke/wp-content/uploads/2018/08/Paper-on-Recognition-and-Enforcement-of-Foreign-Arbitral-Awards.pdf

86 *Christ for All Nations v Apollo Insurance Co Limited* [2002] EA 366

other laws of Kenya whether written or unwritten; inimical to the nation interest of Kenya or contrary to justice or morality.

Onyancha J in *Glencore Grain Ltd v TSS Grain Millers Ltd* [87] stated that:

> *"A contract or arbitral award will be against public policy, in my view, if it is immoral or illegal or that it would violate in clearly unacceptable manner basic legal and/or moral principles or values in Kenyan society …*

Onguto J in the case of *Open Joint Stock Company Zambezntony Technology v Gibb Africa Limited* [88] stated that:

> *I may perhaps add that Public Policy, in my view, generally refers to the set of Socio-cultural, Legal Political and Economic values, Norms and Principles that ate deemed so essential that no departure therefrom can be entertained. Public Policy acts as a shield for safeguarding the Public good, upholding Justice and Morality and preserving the deep rooted interest of a given Society.*

In *Tanzania National Roads Board v Kudan Singh Construction*[89] Tanzania National Roads Board sought to enforce an arbitration award of a tribunal sitting in Sweden against Kudan Singh Construction Limited in Kenya. Muya J held that the Arbitral Tribunal incorrectly had failed to apply Tanzanian law and, as such, the award could not possibly be enforced in Tanzania and therefore enforcement in Kenya would be contrary to public policy. On appeal, the Court of Appeal in Mombasa Justices Okwengu, Makhandia and Sichale refused to entertain the appeal on grounds of lack of jurisdiction in that the appellant had not sought and been granted leave to appeal.[90]

Despite the complexities around arbitrability and public policy, enforcement of foreign arbitral awards in more straight forward than the enforcement of foreign judgments. This is due to the simplicity of the 1958 New York Convention regime. The HCCH 2019 Judgements Convention seeks likewise to simplify enforcement of foreign judgments. Below we consider the HCCH 2019 Judgements Convention and the possible effect if Kenya adopts and ratifies it.

4. The HCCH 2019 Judgments Convention

The HCCH 2019 Judgments Convention has been said to mark a "crucial milestone in the area of international dispute settlement."[91] It is a major development in private international law. The HCCH Convention's objective is to make enforcement of foreign judgments between State Parties easier and to harmonise any retained

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87 *Glencore Grain Ltd v TSS Grain Millers Ltd* [2002] 1 KLR 606, 626

88 *Open Joint Stock Company Zambezntony Technology v Gibb Africa Limited* [2001] eKLR

89 *Tanzania National Roads Board v Kudan Singh Construction High Misc Civil App* 171 of 2012 Mombasa [2013] eKLR

90 *Tanzania National Roads Board v Kudan Singh Construction* [2014] eKLR CA Mombasa. The matter countined making its rounds in the courts see *Kudan Singh Construction v Tanzania National Roads Board* [2019] eKLR

91 Pertegas Sender M (2020) The 2019 Hague Judgments Convention: its conclusion and the road ahead In Asia Academy of International Law (ed) Sinergy and Security: the Kenya to Sustainable Global Investment: Proceedings of the 2019 Colloquium on International Law (pp 181-190) Asian Academy of International Law Limited.

restrictions.[92] The Convention, if successful, will it is envisaged, result in a simpler and more predictable system for recognition and enforcement of foreign judgments in civil and commercial matters which will promote international trade and investment.[93] The HCCH Judgments Convention may ensure a stronger position for courts in international dispute resolution, in times where commercial law practitioners may welcome a realistic alternative to arbitration."[94] The other challenger to arbitration may come from the growth of mediation should the Convention on International Settlement Agreements Resulting from Mediation 2020 (Singapore Convention on Mediation) meet with global success.[95]

Certain challenges inherent in arbitration may have caused commercial law practitioners to consider alternatives. Judicial attitudes to arbitration differ and this affects the enforcement prospects. The cost and time utilised in arbitration are of increasing concern. For example, a study carried out by the Commonwealth in 2020 amongst member countries noted that respondents were of the view that arbitration is not necessarily as time or cost efficient as usually claimed.[96]

The HCCH 2019 Convention provides a minimum standard for acceptance of foreign judgements. Judgments that are within its scope, have to be accepted for recognition and enforcement unless one of the discretionary grounds for refusal in Article 7 is invoked. The HCCH 2019 Judgments Convention also allows a court to utilize more liberal national rules or regional economic integration organisations where they exit.[97] The main provisions of the Convention are to be found at article 4 to 7 of the Convention.

Article 4(1) of the HCCH 2019 Convention sets out the basic obligation of state parties to the convention. It provides that "[a] judgment given by a court of a Contracting State (state of Origin) shall be recognised and enforced in another Contracting State (request State) in accordance with their provisions of this Chapter. Recognition and enforcement shall be refused only on grounds specified in this Convention."[98] Under the equivalent provisions of the New York Convention the obligation of the state is first to enforce arbitral agreements (art II) and second to recognise and enforce arbitral award (art III).

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92 Diana A.A. Reisman. "Breaking Bad: Fail Safes to the Hague Judgments Convention." The Georgetown Law Journal Vol 109: 879, 881; Louise Ellen Teitz. Another Hague Judgments Convention? Bucking the Past to Provide for the Future" 2019 Duke Journal of Comparative and International Law Vol 29:491-511

93 For the consultative process in the European Union see Proposal for a Council Decision on the accession by the European Union to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters" Brussels 16.7.2021 Com (2021) 388 Final https://ec.europa.eu/info/sites/default/files/proposal_eu_accession_judgments_convention_and_annex_en.pdf

94 Pertegas Sender M (2020) The 2019 Hague Judgments Convention: its conclusion and the road ahead In Asia Academy of International Law (ed) Sinergy and Security: the Kenya to Sustainable Global Investment: Proceedings of the 2019 Colloquium on International Law (pp 181-190) Asian Academy of International Law Limited. p. 182-184

95 Kariuki Muigua, K. "The Singapore Convention on International Settlement Agreements Resulting from Mediation: Challenges and Prospects for African States." 2020 Journal of CMSD Vol 4(3) May 2020

96 Petra Butler and Dhashun Prasad. A Study of International Commercial Arbitration. Commonwealth. 2020 p. 47 https://production-new-commonwealth-files.s3.eu-west-2.amazonaws.com/migrated/key_reform_pdfs/A%2BStudy%2Bof%2BInternational%2BCommercial%2BArbitration_PDF_-compressed.pdf

97 Art 15 Art 23(4)

98 Art 4(1)

The conditions for recognition and enforcement of the judgment under the HCCH 2019 Convention are explained under this convention this is unlike the recognition and enforcement of an award under the New York Convention. The HCCH Convention article 5 provides for what are termed "bases of recognition and enforcement."[99] The act as "filters" for the recognition of judgments.[100] The judgment is eligible for recognition and enforcement is one of the thirteen bases are met. These requirements are not as simple as one would have wished. The approach taken by some of them would be unfamiliar to the Kenyan commercial lawyer. Among the clearer ones is the requirement that the judgments shall be recognised and enforced only if it has effect in the State of Origin. The requirement that the defendant expressly consented to the jurisdiction in the court of origin and that the defendant argued the merits before the court without raising jurisdictional objections are also clear.[101]

Once the judgment falls under one of the bases, the grounds for recognition and enforcement may be refused if it falls within one of the grounds for refusal under article 7. These six grounds include (a) there was insufficient notice of the proceedings to the defendant (b) the judgment was obtained by fraud (c) the judgment is manifestly incompatible with the public policy of the requested State (d) the judgment conflicts with a choice of court agreement and (e) and (f) the judgment is inconsistent with a prior judgement.[102] These grounds are not dissimilar to the grounds upon which the the recognition and enforcement of a foreign arbitral award can be refused under article IV 2 of the New York Convention.[103]

Recognition or enforcement of a judgment under the HCCH 2019 Convention may be postponed or refused if proceedings between the same parties on the same subject matter are pending before a court of the requested State, where – (a) the court of the requested State was seized before the court of origin; and (b) there is a close connection between the dispute and the requested State. A refusal under this paragraph does not prevent a subsequent application for recognition or enforcement of the judgment.

Article 18 of the 2019 HCCH Judgments Convention allows a State party to exclude certain matters from the scope of application of the convention. These can include consumer, employment, insurance matters, commercial leases and immovable property. Article 19 allows exclusion of judgments in civil and commercial matters involving States or State Parties.

Article 29 of the Convention provides for an opt out provision under which a State Party can upon ratification suspend the application of the treaty between itself and another contracting state. A State can also suspend application between itself and another new State Party. The State Party can later withdraw its opt out provision. The provision is intended to shield Contracting States from recognition and enforcement of judgements

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99 Art 5

100 Alocolea, Lucas Clover. "The 2005 Hague Choice of Court and 2019 Hague Judgments Convention versus the New York Convention: Rivals, Alternatives or Something Else?" Vol 6 (2019-2020), No 6 McGill Journal of Dispute Resolution 187-214, 194

101 Art 5(1)(e) and (f)

102 Article 7

103 See Part III above.

from legal systems which they view as not having the same standards as their own. The assumption is one of developed and less developed systems. This provision, though perhaps understandable historically, ought not be viewed uncritically. It can be the source of what may be termed treaty apartheid where State Parties to a treaty treat other state parties differently based on a perceived development of the legal systems.

Article 29 of the HCCH 2019 Judgments Convention is likely to be its Achilles' heel of the Convention because it allows for discriminatory application. Without reciprocity the convention is unlikely to be attractive to the nations of the less developed countries like Kenya. State Parties are essentially permitted wot be party to the convention but still decide which other State Party judgments to enforce.

A reading of the HCCH 2019 Judgments Convention against the New York Convention indicates that the New York Convention sets out the basis of recognition and enforcement of foreign arbitral awards in simpler terms than those set out for a foreign judgment under the HCCH 2019 Convention. The HCCH 2019 Convention under article 5 provides a series of "filters" regarding the types of judgments to that will the recognised and enforced.

The Kenyan law on recognition and enforcement of foreign judgments as it currently stands also contains a series of "filters" for the recognition and enforcement of foreign judgments. Some of the provisions of the 2019 HCCH Judgments Convention may be unfamiliar to the Kenyan lawyer. Whereas the New York Convention scheme is simple to understand the same cannot be said of the HCCH 2019 Judgements Convention. The Convention at initial reading introduces even more complexities than the existing Kenyan law on recognition and enforcement of the foreign judgments.

4. Conclusion

The success of the New York Convention led to the growth of international commercial arbitration by providing a simplified and a globally understood system of recognition and enforcement of foreign arbitral awards. The global arbitration regime now has challenges such as the 2019 Singapore Convention on Mediation and the HCCH 2019 Judgments Convention. The law on enforcement of foreign judgments has, as illustrated by Kenyan law discussed above been a complex affair. The law on enforcement of foreign arbitration awards in countries which apply the twin pillars of the New York Convention and the UNCITRAL Model Law has been much less complex.

The HCCH 2019 Judgments Convention provides a promising framework for the recognition and enforcement of foreign judgements. However, some of the provisions of the HCCH 2019 Judgments Convention are complex and would be unfamiliar to the Kenyan lawyer. These complexities along with the opt out provisions inbuilt into the 2019 HCCH Judgements Convention are likely to hinder its global adoption.

Despite the challenge to international commercial arbitration raised by the HCCH 2019 Judgments Convention, the place of international commercial arbitration appears from the East African lenses' to be secure for the foreseeable future. If the current standing

international commercial arbitration is to be challenged that challenge from a Kenyan perspective is likely to come from elsewhere and not from the adoption of the HCCH 2019 Judgments Convention.

THE BRIDGE FOR THE ONE AFRICAN MARKET AGENDA: A CASE FOR APPLICATION OF THE UNIDROIT PRINCIPLES ON INTERNATIONAL COMMERCIAL CONTRACTS IN AFRICA.

By Eunice Lumallas, FCIArb*

Abstract

There is a dream in Africa; one in which the peoples of Africa and their goods and services will move cross borders seamlessly and joyously; this is the vision of the one African Market held by the African Union. The diversity inherent in the African continent manifests in various forms such as in language, culture and of special significance, different legal systems and laws, a significant barrier the realization of the African Free trade arena!. The diversity in laws relating to commercial trade hamper the realization of the desired AU dream of increased regional trade. This paper, seeks to make out a case for the use of the UNIDROIT principles, tailored for the African region as a tool towards the harmonization of contract law with regards to trans national trade. It argues that the nature of the principles ranging from the fact that they are soft law to their neutrality and their attempt at being a comprehensive point of reference for international commercial contracts, are among their attractive attributes making the rules an effective fit, and potential potent bridge towards realization of more effective inter-Africa commerce. It further suggests that economic growth within the continent will be realized within its corners by common accord and not from outside Africa and that by leveraging on Africa's own resources and networks and properly harnessing unified trade practices and policies beyond national borders, the goal of economic development is certainly attainable, it is within reach!

1. Introduction

The answer to Africa's dream of sustained economic growth and improved livelihoods for her vast majority has always been known, it is an open secret and is within reach! The answer lies in increased intra-African trade. The Time is ripe to leverage on the African Union's (AU's) one African Market agenda to take measures to break down barriers to free trade and leverage on her diversity to enhance capital creation and retention through regional transnational trade. With over 1.4 billion people[1],

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1 https://www.nationsonline.org/oneworld/africa.htm, Nations online. Org , assessed in March, 2023

and being the second largest continent globally, the potential is immense and the capacity, both intellectual and material is within its four (4) corners.

The diversity of Africa extends to legal cultures and spoken languages, there is francophone and anglophone Africa practicing civil and common law as a result of colonial and post-colonial influences. In terms of languages, there are approximately three thousand (3,000)[2] different languages in Africa and each of the sovereign fifty-four (54) Nations have different contract law statutes. While this diversity of language and legal systems contributes to the richness of African culture, it is not without its challenges. This diversity means that commercial interaction is not without bumps. This scenario as painted presents a number of challenges from the practicality of free-flowing trade to commonly understood contract language and a certainty and consistency in dispute resolution framework.

With respect to legal systems, it is well understood that the common law system is less prescriptive than a civil law system with notable common law system attributes such as non-codification of the constitution and statutes and more reliance of judge made law, extensive freedom to contract, binding nature of decisions being in contrast with the roman civil law system concepts such as codification of laws, courts are specific to underlying civil codes and more restrictive freedom of contract[3]. Indeed, in many civil law jurisdictions, the contracting authority in contracts may modify contracts unilaterally where it is in the interest of the public to do so or similarly cancel it unilaterally. This is not the case in common law jurisdictions.

It has been argued that International Trade rules are skewed against nations that have less financial strength[4] and that the legal wheel in the general bus of inter-Africa trade has been the slowest in hastening trade; for this reason, the UNIDROIT principles on International Commercial Contracts are being proposed for thorough review, adoption and ownership as the answer to increased transnational trade within Africa and between Africa Nations. This is because the fact that they are a product of the efforts of independent experts acting under the auspices of an intergovernmental organization free of the influence of governments gives them a sense of impartiality. This makes them more likely to appeal to African nations which may feel alienated by International Trade Rules which seem tailored to encourage and advance the already existing imbalance in commercial relations between the economically stronger global north and the relatively less developed south.

These principles, therefore, can be applied during contract execution and with respect to dispute resolution more specifically in Arbitration or courts. Typically, the choice to use them or not ought to be availed to African Nations where parties have not provided for governing law elect to use them as substantive law on contract, or when

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2 Why African languages matter, the New Africa Magazine, 15th March, 2022, https://newafricanmagazine.com/27937/

3 World Bank Toolkit (2006) - Approaches to Private Participation in Water Services, presentation to IFC on Some Differences between Civil Law and Common Law in a "nutshell" - Gide Loyrette Nouel 2007

4 Africa Renewal, Intra-Africa trade: going beyond political commitments, Masimba Tafirenyika, August, 2014 "The problem is not that international trade is inherently opposed to the needs and interests of the poor, but that the rules that govern it are rigged in favour of the rich-Mr. Trevor Manuel, Finance Minister, South Africa

it is undesirable to use any of the National laws and it is desirable to adopt these rules to interpret the contract meaning and terms. They accord parties that flexibility and neutrality so much needed in instances of dispute resolution.

2. UNIDROIT Principles on International Commercial Contracts

There are just over two hundred and eleven (211) rules, of the category of soft law, on International Commercial Contract law compiled over a period of over thirty- five (35) years by over one hundred and fifty (150) International experts.[5] They were put together by the International Institute for the Unification of Private Law (UNIDROIT) which is an independent intergovernmental Organization with its seat in Rome. The institute is mandated to study needs on a transnational level and come up with methods for coordinating, modernizing and harmonizing private commercial law as between States and groups of States and to formulate uniform law instruments, principles and rules.

The Institute was first established in 1926 and then re-established following the demise of the league of Nation in 1940. In spite of its long history, it has 63 member states with only four (4) of these being African Nations. These four are Egypt which joined in 1951, South Africa a member since 1971, Nigeria joined in 1964 and Tunisia which became a UNIDROIT member in 1980. The map below demonstrates the spread of membership across five (5) continents.

Map of UNIDROIT Member States[6]

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Green – Unidroit members
Gray- Non Unidroit member states

5 https://www.unidroit.org/

6 Accessed from UNIDROIT website on 6th March, 2023, https://www.unidroit.org/instruments/commercial-contracts/upicc-model clauses/#:~:text=The%20UNIDROIT%20Principles%20provide%20a,obligees%2C%20as%20well%20as%20the

7 This map is provided solely as a visual aid

The map demonstrates the fact that a majority of African states are not members of UNIDROIT or may not have seen the need to be members. It further highlights the fact that UNIDROIT as an institute has little impact on Africa and inter-Africa Trade. But a different case exists for the UNIDROIT principles on International Commercial contracts.

The UNIDROIT Principles of International Commercial Contracts (hereinafter "the UNIDROIT Principles"), first published in 1994 and now with a fourth edition in 2016 (hereinafter "UNIDROIT Principles 2016"), represent a non-binding codification or "restatement" of the general international contract law. The principles have been hailed as significant in consolidating legal thinking[8] and have received endorsements from the United Nations Commission for International Trade law (UNCITRAL) with a recommendation for their use, by academics and have been referred to in several International Arbitral awards and in select court decisions.

The principles as a whole, demonstrate great effort at statute harmonization across all global legal systems and evidences compromises between different legal approaches, languages and jurisdictions on how to solve contractual issues and ease International Commerce.

3. The Origins of The UNIDROIT Principles

In 1994 towards the primary mandate of the organization, a group of experts having gathered together and drawing from their different skill sets, the knowledge they had amassed as experts in their fields of contract and commercial law both from their respective jurisdictions which were diverse in legal and commercial culture and internationally, they put their heads together and codified the set of principles that is today known as UNIDROIT principles. As are the origins of these principles, so is their nature. That is they attempt, and so far it seems effectively, to take from diverse domestic law and compact into themselves most if not all the provisions necessary for a foolproof contract, comprehensively. They also anticipate challenges that may arise in contracts of an international nature and preempt them by incorporating in themselves provisions for dispute resolution. In a nutshell, the UNIDROIT principles try to solve the problem that results from the diversity of legal and commercial culture across nations. Moreover, the principles are available in nearly all the major languages of the world and therefore also bridge the lingual gap. This aspect of it is what makes it perfectly suited to Africa and the goal that is transnational trade and ultimately, one African Market.

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8 Unidroit website, 6th March 2023, https://www.unidroit.org/instruments/commercial-contracts/upicc-model clausesThe%20 UNIDROIT%20Principles%20provide%20a,obligees%2C%20as%20well%20as%20the

4. Benefits of The UNIDROIT Principles

4.1 Harmonization of legal systems

The diversity of legal Systems as aforementioned necessarily means that contract law from state to state, especially within those different legal systems, vary. The UNIDROIT principles present an opportunity for the harmonization of contractual principles[9]. The principles consist of universally accepted and recognized rules that are familiar to both civil and common law jurisdictions and create, in a sense, a contractual and commercial legal system that is comprehensive enough to address the needs of most if not all nations when it comes to international commercial contracts. The effect of this harmonization is uniformity, certainty and a sense of inclusion for nations from these varying systems of law. The outcome is a level playing field for the nations that opt to adopt these principles and incorporate them into their cross border commercial interactions. For example, the principles can bridge that gap that is created by incompatible trade regulations and procedures such as varying tariff forms hence eliminating unnecessary technicalities and enhancing the willingness of nations to engage in trans national trade.

4.2 Elimination of language barrier

The principles, being as they are translated into most if not all of the common global languages eliminate the issue of language barrier. Individual nations that choose to adopt these principles into use are able to read the rules in their own language and thereby have a clearer grasp of their implications. Subsequently they may use them in a language understood to all parties to a potential contract.

4.3 Neutrality

As with all contracts, parties typically have interests that are potentially adverse to each other. This element is more pronounced in international contacts; the uncertainty being exacerbated by the fact that the parties may have varying domestic law with regards to contracts. It is therefore to be expected that each party would have a level of apprehension concerning the true motives of the other party and would be reluctant to employ the other party's domestic law. It is prudent, therefore, that parties to cross border commercial contracts employ the use of a neutral piece of law in order to avoid potential exploitation. This is where the UNIDROIT rules prove helpful. They are neutral and not tailor made for one country and are therefore less susceptible to give a party undue advantage over the other and thereby facilitate exploitation of a party by another. They therefore enhance trust in trans national commercial interactions as they give off a sense of neutrality at the contact stage and prospective impartiality in the event that a dispute arises[10].

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9 Dessemontet, F. (2002). Use of the UNIDROIT Principles to interpret and supplement domestic law. ICC Publishing SA.

10 Rosett, A. (1997). UNIDROIT Principles and Harmonization of International Commercial Law: Focus on Chapter Seven. Unif. L. Rev. ns, 2, 441.

4.4 Streamlining of policy on cross border trade in Africa

Towards the goal of economic development, each nation has its own priorities and on the basis of the same they have opted for different approaches and come up with policies accordingly. The harmonization of these policies is a necessary prerequisite to the creation of an integrated African market. The UNIDROIT principles while having not been tailored for this purpose can form a point of reference and inference for possible compatible policy approaches between the nations that want to enter into contractual commercial relations[11]. They can form the basis for the harmonization of policies on crucial areas such as taxation, competition and investment. These nations will this be enabled to approach economic development in unity.

4.5 Flexibility and adaptability

While the nature of these principles as soft law is seen more as a challenge with regards to their enforceability, there is an advantage on this front. The principles are flexible and adaptable and capable of being refined through means simpler than would have to be employed with regards to hard law. They also need not be employed directly or in their entirety but can be used to fill in gaps existing in a country's domestic law and thereby stand that country in better stead where cross border commercial transactions are concerned. They can also be complementary to a country's domestic law. In summary this flexibility means that countries can employ these rules to diagnose specific issues of contract and commerce in their domestic law and cure those particular issues. It also means that these principles can be oriented to the unique needs of various markets and, relevant to this discussion, the African Market. Their nature as being soft law also means that the principles have respect for the concept of contractual freedom and that parties may adopt them in a way suitable to their specific needs while retaining a level of control over the terms of their agreements.

4.6 Comprehensiveness

The UNIDROIT principles are extensive and comprehensive covering not just the area of contract law but reaching out into principles of Sale of goods and international trade law. In this way, they are an all-rounded set of rules that anticipate and then intercept potential challenges. They attempt to seal all possible loopholes and are built to safeguard against contractual failure. They also have been revised and refined overtime to cater for needs that arise with the evolving nature of contract law especially in light of the dynamic nature of cross border interactions. They seek to address each and every possible issue that may arise in the area of transnational trade.

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11 Piers, M., & Erauw, J. (2012). Application of the Unidroit principles of international commercial contracts in arbitration. Journal of Private International Law, 8(3), 441-472.

4.7 Encourage investment

The UNIDROIT principles were not the prerogative of one particular nation. This means that they cannot be claimed by any specific nation or jurisdiction to the exclusion of others. This fact therefore in turn means that they form a transparent legal framework. This transparency alleviates the danger of fraud in transactions making cross border interactions safe and predictable[12]. This encourages investment as it increases confidence in investors that they are likely to have good returns on their input. Greater investment, in turn, is a stimulant for economic growth within Africa. The adoption of the principles, therefore, can mean the creation of an environment conducive for investment and hence economic growth and development.

5. The Incorporation of The UNIDROIT Principles into Commercial Contracts

In *international commercial arbitration*, subject to any restrictions at the seat of the arbitration, parties may choose the UNIDROIT Principles as the applicable law instead of domestic law to govern their contract. As a soft law instrument, UNIDROIT Principles are not binding upon parties of a contract, unless they expressly agree to it. The principles often apply in International Arbitrations and contracts before or after a dispute arises where parties expressly provide for their applicability or fail to provide for a governing law. Where for instance two companies are local but one is a branch or subsidiary to an international company, Tribunals and courts have held that such a contract or Arbitration is International as was the case in *Bottling Companies v Pepsi Cola Panamericana* (1997)[13] which involved two Venezuelan companies with one having a subsidiary in the USA, the Supreme Court of Venezuela held that the Arbitration Clause in a contract which stipulated that the arbitration seat would in New York, was valid and that the contract was international. In support of the broad interpretation of the concept of international contracts, the Supreme Court referred to the Preamble, Commentary 1, of the UNIDROIT Principles.

In an Argentinian case, an Arbitral Tribunal made the UNIDROIT principles prevail over the applicable Argentine law, by holding that they constitute international commercial usage and practices that should prevail over any domestic law notwithstanding the fact that both parties had designated Argentinean law as applicable, the Arbitral Tribunal resorted to the UNIDROIT Principles as international commercial usage and practices reflecting the solutions of different legal systems and international contract practice, stating that, as such, according to Article 28(4) of the UNCITRAL Model Law on International Commercial Arbitration, they should prevail over any domestic law.[14]

In a multi-cultural and legal region such as ours, Africa, the acceptability of the UNIDROIT Principles generally poses an exciting possibility of their promotion for use in contracts involving African parties across borders.

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12 Vogenauer, S., & Kleinheisterkamp, J. (Eds.). (2015). Commentary on the UNIDROIT principles of international commercial contracts (PICC) (pp. 232-233). Oxford: Oxford University Press.

13 *Bottling Companies vs. Pepsi Cola Panamericana, cited in www.unilex.info*

14 Ad Hoc Arbitral Award of 10.12.1997, accessible at www.unilex.info, parties unknown.

6. Key Provisions of The UNIDROIT Rules on International Commercial Contracts

Readings through the UNIDROIT principles, one has a feeling that they are truly international in outlook and incorporate several contractual terms and provisions while expressly acknowledging International mercantile trade usages, customs and practices[15]. The rules technically provide that there is no specific form of contract required[16]. This however, this does not suggest in any way doing away with a deliberate review of the principles under the auspices of the African Union for applicability, sensitization and use in Africa.

They principles include rules on several practical cross-border trade issues and cover matters that parties in International commercial contracts and arbitrations often overlook such as rules on available defenses of a jointly and severally liable obligor[17], suspension of proceedings, voidability of contracts and limitation of liability towards third-party beneficiaries[18]. They have mandatory rules[19] inherent in International Contracts including the good faith concept[20] which emphasize fair dealings as foundation on any contractual arrangements, bad faith is demonstrated by among other examples a trader engaging in good faith negotiations with no intention to reach an agreement.[21] The provisions lay out general provisions and mandatory rules such as freedom to contract[22], public interest and mandatory rules such as on fraud, threat, gross disparity good faith, illegality, price determination, payment for non-performance and modification of limitation periods. Where there are findings of Fraud, threats, Gross Disparity and Illegality in Contract, the principles provide for avoidance of the contract,

With respect to contract interpretation[23], the principles direct that the common intention of the parties should be considered and where such intention is not clear, the interpretation of the said contract should be subjected to the reasonable man's test. Other terms include those relating to the form of Contract and provides that an *international contract may take any form*.[24] Consequently, contracts may be evidenced in any way unless national law or international instruments impose specific restrictions as to the form of contract or to individual terms. Some state laws provide that contracts are meant to be in writing to be valid such as the Kenyan law of Contract Chapter 23 this is not true in other Nation's contract laws for example.

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15 See art. 1.9 of the principles
16 Art. 1.1 of the Principles
17 Chapter 9 and 11 of the UNIDROIT Principles
18 Chapter 10 of the Principles
19 Art. 1.4 of principles
20 Art. 1.7 of the principles
21 Also see article by Mwangi Karume, in Primerus, Analysis of the Unidroit Principles of International Commercial Contracts (2010),
22 Art 1.1 of the principles
23 Art. 1.6 Principles
24 See article 1.2

The principles are unique in the masterful manner they transcend both civil and common law traditions on proof of validity of contract by not emphasizing the prominence of consideration in proof of validity and instead emphasizes parties' agreement as sufficient for conclusion, modification and termination of any contract.[25]

Another interesting and useful provision relates to the contract limitation period where the principles emphasize parties' freedom to contract and provide that the general and maximum limitation period for international commercial contracts is three (3) years and ten (10) years respectively and that such time can be modified by the parties but that the general limitation period should not be less than one (1) year nor the maximum limitation period to less than four (4) years. The maximum period is limited to not more than fifteen (15) years.

The other key provision is on how the International commercial contract is terminated, and it provides that a contract may be terminated on issuance of a relevant termination notice, or in situations of either non-performance or anticipatory breach, the contract may be terminated and that once a contract is terminated, each party is released from its obligations. The principles further provide that the termination does not affect the contractual terms with respect to dispute resolution.

7. UNIDROIT Principles and International Commercial Arbitration

Parties to transnational contracts often tend to distrust the application of the domestic law of other parties due to barriers of lack of knowledge, inherent perception of suspicion and general mistrust and lack of uniformity in state laws. They prefer a "neutral law", sometimes this has had to be the law of a third Country not a party to the dispute. This choice often leads to apparent inconveniences since the chosen law is still often foreign to both parties. Indeed, understanding its content may require time-consuming research or costly consultations with lawyers on the selected law. The UNIDROIT Principles of International Commercial Contracts would accordingly be helpful in such circumstances.[26]

The principles would potentially offer parties and arbitrators a set of rules that can be applied to international commercial contracts when no specific national law applies or when parties deliberately choose to apply the UNIDROIT Principles.

For Africa, a case is made for these principles for use or choice by parties in International Commercial Arbitrations in Africa due to the fact that the rules as seen are balanced and do not respect a party's legal or political traditions or a Nation's economic or political situation, further, UNIDROIT Principles may apply even if a contract is silent as to the applicable law. Further, where parties have for any reason not provided for governing law their contracts, Arbitral Tribunals are permitted to determine what the governing law will be what private international law would be most relevant and appropriate

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25 UNIDROIT International Institute for the Unification of Private Law Principles of International Commercial Contracts 2016

26 Unidroit Principles and International Commercial Arbitration, Feb 2023, Aceris Law, https://www.acerislaw.com/unidroit-principles-and-international-commercial-arbitration/

based on the circumstances of the case, in which case, a good case is made for the neutral codified UNIDROIT principles[27]

In May 2012, UNIDROIT suggested four categories of model UNIDROIT principles clauses[28] that parties can adopt to use in their transnational contracts and in international dispute resolution as follows

i. to incorporate the UNIDROIT Principles as terms of the contract (see Model Clause No. 2, infra p. 14 et seq.)

ii. to choose the UNIDROIT Principles as the rules of law governing the contract (see Model Clauses No. 1, infra p. 4 et seq.)

iii. to refer to the UNIDROIT Principles to interpret and supplement the CISG when parties chose the latter to govern their contract (see Model Clauses No. 3, infra p. 16 et seq.), or

iv. to refer to the UNIDROIT Principles to interpret and supplement the applicable domestic law, including any international uniform law instrument incorporated into that law (see Model Clauses No. 4, infra p. 20 et seq.).[29]

Of importance to note is that the purpose of the Model Clauses as can be deduced from the manner of their proposed use is to allow parties to specify the way they wish the UNIDROIT Principles to be used during the performance of the contract or when a dispute arises. Accordingly, even if parties decide not to use these Model Clauses, judges and arbitrators may still apply the UNIDROIT Principles according to the circumstances of the case especially where it is felt that their adoption would best resolve parties' issues.

8. Conclusion

The UNIDROIT Principles of International Commercial Contracts, like international commercial arbitration are a culmination of the dreams and ambitions of international business men and lawyers to facilitate cross-border commercial relations by going beyond confines of domestic laws and legal principles. Select data and evidence demonstrate that the principles are important for use right from the process of drafting agreements to contract administration and during the period of dispute resolution whether in Court or in Arbitration. Apart from the key rules in the principles heighted in this paper, it ought to be remembered that the principles also make room for use of Alternative dispute resolution in the process where agreement of parties is obtained.

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27 UNIDROIT International Institute for the Unification of Private Law, UNIDROIT Principles of International Commercial Contracts, https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-i.pdf (last accessed 26 February 2023).

28 https://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses/

29 https://www.unidroit.org/

Undoubtedly, the UNIDROIT principles are not well known or even applied in Africa, consequently their potential in the area of transnational contract negotiations and dispute resolution practice are yet to be realized in the continent. The African Continental Free Trade Area (AfCFTA)[30] came into force on 1 January, 2021. It is designed as a free trade area for African States which have had fragmented economies and was established pursuant to the African Continental Free Trade Agreement. AfCFTA brings together about 55 Countries and 8 regional economic blocs, making it the largest free-trade area by number of member states, after the World Trade Organization[31] and the largest in population and geographic size, spanning 1.3 billion people across the world's second largest continent.[32] The principles seem to be specifically made for the free trade area owing to how well they address the issue of diversity among other challenges specific to African legal and commercial culture. They are a good idea and carry within themselves boundless transformative potential.

However, as with any good idea, it remains just that unless a framework is put in place and action taken towards its realization. Despite having first been codified in 1994 and having evolved through three editions, knowledge concerning the existence of these rules is limited. While they have been well received, this reception is by a small minority. Accordingly, much remains to be done to raise awareness among the international business and legal communities in Africa about the UNIDROIT principles and how these rules can be applied in international trade within Africa. It must be remembered that the UNIDROIT Principles being non-binding and in the category of "soft law" offer a greater range of possibilities for use and adoption to fit parties' needs.

This also however means that they are generally non-binding and merely persuasive. Their spread therefore among the international legal and business communities is completely dependent on how persuasive they are to parties to trans national commercial contracts. This persuasion is realized by them proving themselves an effective instrument when it comes to the drafting of contracts and the resolution of disputes when they arise. That is, their incorporation will be facilitated primarily by parties expressly requesting their use either at the contract making stage or at the point of dispute resolution. The time is ripe for Africa under the auspices of the African Union, by way of a commission or task force to a review of these rules to determine their mode of applicability within Africa for use in International Commerce and thereafter all efforts made to support their knowledge and application. The review process ought to cover the question of enforceability as well, so that in spite of the fact that these are soft law, where parties have specifically elected to use them, they will be enforced as any other binding laws.

A present shortcoming of the UNIDROIT principles is that there lacks a definitive published substantial body of cases interpreting them to allow certainty in the understanding and interpreting their provisions.

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30 Loes Witschge (March 20, 2018). "African Continental Free Trade Area: What you need to know". Al Jazeera.

31 https://au-afcfta.org/

32 Beatrice Oforiwaa Dankyi, George Boateng How Africa's Free Trade Agreement Would Reduce COVID-19's Impact, July 1, 2020

Available data indicate that there have only been one hundred and forty two (142) published court decisions indexed in the UNILEX database[33] that involve the UNIDROIT Principles and a substantial number of these decisions only mention the principles in passing without analysis. There are less than 200 reported arbitral decisions in the UNILEX data base as well[34]

A thoughtful assessment of the above information will lead to the conclusion that the advantages of use of the uniform principles whether as exists or with amendments far outweighs benefits of not using them in transnational trade; the offer of one unified body of laws that is neither civil or common, that allows for usages and trade practices as chosen by parties to apply[35], that reflects parties expectations in International trade, and favours substance over form by overlooking technicalities and focusing on contract validity[36] and emphasizes on bringing honour to handshakes by making broad good faith provisions[37] is certainly attractive. Invariably, the principles would best apply in International Commercial Arbitration where domestic law may not meet the expectations of international law and parties have freedom to choose applicable law to their contract. Similarly, Legal representatives will have the advantage of knowing what this law is in advance. With this knowledge, counsel will be able to understand what rules would best apply to dispute and better represent their clients. Indeed, a case has been made for rallying of the legal and business community into working on uniform substantive contract rules or principles to spur inter-Africa trade, a good place to start, I suggest is the UNIDROIT principles of International Commercial!

Another significant shortcoming is that the principles fail to address the issue of intellectual property rights and their place in international contract law. The importance of the same in this dynamic and constantly evolving world of technology cannot be overemphasized as trade is facilitated by and sometimes even directly involves intellectual property. There is need for research to be undertaken in this area and the same incorporated into the UNIDROIT principles.

With regards to the attainment of the potentially revolutionary one market agenda, the adoption of the UNIDROT principles by African nations in their commercial interactions would demonstrate a serious commitment to see the agenda through. It would also encourage regional integration as there would be a uniform and certain law underpinning trans national commercial transactions; this would be an excellent bridge, a great passage way towards shared prosperity!

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33 1 (http://www.unilex.info/case.cfm?id=1060) The UNILEX database is edited by UNDROIT, and it is currently the best resource for a comprehensive list and analysis of all published court cases and arbitral decisions on UNIDROIT Principles

34 The Use of the UNIDROIT Principles as Neutral Law in Arbitration Henry Deeb Gabriel, Journal of Arbitration Studies, Vol 23, No. 3, September 2013

35 Principles 1.9,7.3.1

36 Chapter 3, section 2 of the principle

37 See principle 2.9

THE ESSAR CASE EFFECT IN KENYA: REGULATION OF THIRD PARTY FUNDING IN ARBITRATION

By John M Ohaga, SC C.Arb, FCIArb[1] and Pressy Akinyi[2]

Abstract

This paper makes a case for the operationalization and regulation of third party funding in Kenya. More importantly, it responds to the questions: (a) why now; and (b) how? From the onset, it forestalls the importance of third party funding in relation to access to justice for impecunious parties. It further analyzes the widely circulated decision in the Essar vs Norscot case which has played an instrumental role in providing a foundational framework for the instigation of third party funding in Kenya, what the paper dubs 'the Essar case effect'. This case is significant given that it established a precedent regarding the recoverability of third party funding costs. The Arbitral Tribunal held that 'other costs' and 'legal costs' incurred as a result of arbitration proceedings constitute third party funding costs and therefore, these costs can be recovered as part of the award as per Sections 59(1), 61(1) read with 62 and 63 of the English Arbitration Act (1996). Similarly, the English High Court upheld this decision and the reasoning thereof following applications to set aside. Similarly, Kenya's Arbitration Act (1995) has the same language construction as the provisions relied on in the English Arbitration Act. In effect, can arbitral tribunals seated in Kenya and courts derive legal persuasion from the interpretation of the English High Court that 'other costs' constitute third party funding costs? Might there be a potential legal quandary or could this be an opportunity for an amendment of the Arbitration Act to permit the operationalization of third party funding? This paper addresses these issues and proffers recommendations regarding regulation of third party funding borrowing best practices from Singapore and Hong Kong which are leading international arbitration centres. Lastly, it explores emerging trends that may

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challenge the Essar case effect arising from the recent United Kingdom Supreme Court decision on litigation funding.

Key words: *Third Party Funding Regulation in Kenya*, *International Commercial Arbitration*, *Amendment of the Arbitration Act*, *Arbitration in Hong Kong and Singapore*

This paper has been divided into four parts where: part 1 covers the concept of third party funding; part 2 tackles the regulation of third party funding; part 3 covers the conclusion; and part 4 addresses the latest emerging trend.

Part 1: Introduction

1.1 The Concept of Third Party Funding

Dispute funding has transcended the fringes of a few common law jurisdictions and asserted prominence in global commercial and litigation markets.[3] It commenced in Australia in the twentieth century then migrated to the United Kingdom and subsequently pervaded the rest of the States that have in turn established successful dispute funding markets.[4]

The growth and eminence of international arbitration has seen tremendous benefits across States, but has equally been met with manifold complexities owing to its exorbitant attendant costs and the increasingly overwhelming demand from its users.[5] Parties have to incur costs related to the arbitrator's fees, costs of hiring the venue of arbitration, stenography costs where contracted, legal fees of the advocates employed to provide counsel on legal issues and expert fees, costs of the awards, disbursements and other allowances.[6] These costs tend to be exceedingly high to the extent that parties with meritorious claims are dissuaded from pursuing their claims in arbitral proceedings or fail to pursue the claims entirely.[7] As a result, access to justice is impeded and parties resort to innovative mechanisms of pursuing their claims.[8] It is continually argued that there can be no equal justice where the type of trial a man gets depends on the amount of money he has: this paper argued that this truism spans international commercial arbitration since an impecunious party is deprived of their rights to access justice owing to inability to meet arbitral proceedings costs.[9] In turn, third party funding is seen as a means of overcoming financial difficulties which emerge in arbitration. The key participants are the claim holders, third party funders (funders), lawyers and in some

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3 International Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third Party Funding in International Arbitration* (The ICCA Reports No.4 2018) p.30 online at https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Third-Party-Funding-Report%20.pdf (visited on March 25, 2023).

4 Chiann Bao, *Third Party Funding in Singapore and Hong Kong: The Next Chapter*, 34 Journal of International Arbitration (2017, Issue 3) pp. 387-400; Matthew Secomb, Philp Tan and Thomas Wingfield, 'Third Party funding for Arbitration: An Opportunity for Singapore to Lead the Way in Regulation, 16 Asian Dispute Review (2016, Issue 4) pp. 182-188.

5 Von Goeler, *Third-Party Funding in International Arbitration and its Impact on Procedure*, International Arbitration Law Library, Volume 35 (Kluwer Law International 2016) pp. 1-2.

6 Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya*, 3rd Edition (Glenwood Publishers Ltd) p 154.

7 Von Goeler, *Third-Party Funding in International Arbitration and its Impact on Procedure* (Wolters Kluwer, 2016) p 1.

8 Von Goeler, *Third-Party Funding in International Arbitration and its Impact on Procedure*, International Arbitration Law Library, Volume 35 (Kluwer Law International 2016) pp. 1-2.

9 Derains Yves. ICC Digital library, 2013, p. 5 [cit. 10. 5. 2018]. iccwbo.org [online]: Hugo Lafayette Black, an American politician and a former judge of the Supreme Court of the United States of America.

instances, funding brokers.[10]

Third party funding refers to a scheme where a party that is not affiliated to a claim finances wholly or partly one of the parties' arbitration costs (usually the claimant) with the expectation of remuneration by an agreed percentage of the proceeds of the award if the claim succeeds.[11] Essentially, the third party funder expects to make profit in the event the arbitration succeeds, and in the event of an unfavourable award, the funder's investment is lost.[12]

It has been reported that its rapid expansion was predisposed by the economic downturn in 2008 where numerous corporations and investors experienced financial instability and were impeded from proceeding with meritorious claims owing to reduced cash flow.[13] Simultaneously, investors sought alternative capital outlets where returns would not be pegged to traditional markets and this arguably, occasioned the steady rise of third party funding. In the following years, the rise in international arbitration costs[14] and the additional constraints placed on corporations legal budgets have escalated the demand for third party funding.[15] Professors Victoria Shannon Sahani and Lisa Bench Nieuwveld have cited the following as the major contributors of third party funding: increasing access to justice; corporations that seek a means to pursue a meritorious claim while maintaining sufficient cash flow to continue conducting their operations; global market turmoil and economic uncertainty that has forced investors to seek investments that have lower affiliation to predictable financial markets; using third party funding as a corporate finance where corporations enter bespoke arrangements to raise capital for operational expenses or business expansions;[16] and the global economic slowdown that has predisposed companies facing bankruptcy or insolvency to seek third party funding to pursue claims that may in turn, generate cash flow for their businesses.[17]

Cremades argues that whether one appreciates the instrumental impact of third party funding in both litigation and arbitration or not, it is an undeniable and significant reality.[18] This is underscored by the Financial times statistics that delineate that the global market for dispute funding in both litigation and arbitration is currently estimated as exceeding ten billion dollars and is yet to surpass this.[19] The business of law is in a cyclical changing trend and dispute funding forms a primary part of the future of global

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10 International Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third Party Funding in International Arbitration* (The ICCA Reports No.4 2018) p.30 online at https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Third-Party-Funding-Report%20.pdf (visited March 25, 2023).

11 Derains, p.5.

12 *Ibid.*

13 International Council for Commercial Arbitration, p.30.

14 Von Goeler, *Third-Party Funding in International Arbitration and its Impact on Procedure*, International Arbitration Law Library, Volume 35 (Kluwer Law International 2016) p. 8.

15 International Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third Party Funding in International Arbitration*, p19 (The ICCA Reports Number 4) online at https://cdn.arbitration-icca.org/ (visited January 8, 2023).

16 Bench Nieuwveld and Shannon Sahani, *Third-Party Funding in International Arbitration*, 2nd edn. (Kluwer 2017), p. 11; Christopher Bogart, Third Party Financing of International Arbitration, The European Arbitration Review 2017 (GAR Special Report 2016).

17 Bench Nieuwveld and Shannon Sahani, *Third-Party Funding in International Arbitration*, p. 11.

18 Bernardo Cremades, *Third-Party Funding in International Arbitration*, Chapter 12 (ICC Dossier) (Kluwer 2013) p. 153.

19 Financial Times, *Arbitration academics are living in the dark ages*, (19 November 2017); See also Burford Capital's Quarterly Summer 2017 Overview, online at https://www.burfordcapital./insights/insights-container/arbitration-academics-are-living-in-the-dark-ages/ (visited February 24, 2023).

arbitration and litigation markets.[20] There is therefore need for the arbitral community to instigate an equilibrium between innovative approaches to dispute financing of legal matters while upholding the sanctity of the arbitral process and the eventual enforceability of awards.

As mentioned earlier, the significance of third party funding is palpable in risk allocation and permitting access to justice to its users.[21] Conversely, dissidents have made their case against its usage owing to the following reasons; (i) the extent of control exercised by the funder over the arbitration and the claimant's decision-making is a major concern; (ii) issues of confidentiality and privilege emerge given that funding would necessitate disclosure of information of the arbitration; (iii) conflict of interest issues arise as a result of the conflict regarding duties of the claimant's legal team to the claimant and its relationship with the funder; and (iv) the legality of third party funding in light of the common law doctrine of maintenance and champerty.[22]

This backlash has in turn fueled Kenya's arbitral stance in relation to third party funding, especially the long-standing argument that the concept of third party funding is similar to champerty and is therefore illegal and inconsistent with public policy. Further contention is brewed as to the interpretation of third party agreements and whether they would be construed as champertous agreement and not in line with the laws of contract.

1.2 Third Party Funding in Kenya

From a historic vantage point, third parties who were unassociated with the dispute were barred from funding a party's litigation owing to the common law doctrines of maintenance and champerty.[23] Maintenance is defined as a funding model where financial assistance is provided by a funder to a party who is not involved in the dispute or lacks any valid interest in the matter, to enable the claim to be legally pursued.[24] Champerty is a form of maintenance where the funder has a direct financial interest in the outcome of the claim hence, the funder provides financial advances in exchange of a portion of the damages in the event the claim prevails.[25]These forms of funding were first introduced in medieval England and later prohibited on grounds that they were considered contrary to public policy considerations as they were associated with fraudulent and vexatious claims with a view to making profit,[26] while manipulating

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20 International Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third Party Funding in International Arbitration* (The ICCA Reports No.4 2018) p.30 online at https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Third-Party-Funding-Report%20.pdf (visited March 25, 2023).

21 Id p31.

22 Id p26-29.

23 Sherina Petiti, *Maintenance and Champerty*, Norton Rose Fulbright (September 2016) online at nortonrosefulbright./en/knowledge/publications/bf0fd6fe/maintenance-and champerty#:~:text=Maintenance%20refers%20to%20an%20unconnected,a%20share%20of%20the%20proceeds (visited on January 22, 2023).

24 Lisa Bench Nieuwveld, Kluwer Arbitration, (November 2011) online at https://arbitrationblog.kluwerarbitration./2011/11/07/third-party-funding-maintenance-and-champerty-where-is-it-thriving/ (visited on February 4, 2023)

25 Id.

26 Sherina Petiti, *Maintenance and Champerty*, Norton Rose Fulbright (September 2016).

means to obtain favourable judgement.[27] Nobles and Royal officials made them illegal to prevent abuse of justice.[28] This stance is palpable in modern times where the prohibition of third party funding is hinged on public policy considerations: that the ban would protect the 'purity of justice' as enunciated by Lord Denning.[29]

Manifestly, States such as Kenya have upheld the common law trajectory regarding the ban against maintenance and champerty and in turn, engendered the perceived prohibition against third party funding. The Constitution of Kenya (2010) and the Arbitration Act (1995) together with accompanying arbitration rules give third party funding a wide berth by failing to expressly address its operation or its ban in Kenya.[30]

However, Kenya's Advocates Act (Chapter 16) 2012 under Section 46, is the most prominent given that it mandates legal practitioners to uphold professional ethics and in turn, prohibits Advocates from engaging in and/or benefiting from contingency fees which is perceived as a form of champerty and is therefore illegal.[31] This is seen in the case of *JMM v Mohamemd Ismael Jin & 2 others* [2005] eKLR, where the High Court held that contingency fee arrangements are not permitted in Kenya.[32] This was further underpinned by the Court of Appeal in the case of *Njogu & Company Advocates v National Bank of Kenya Limited* [2016] eKLR (Appeal) 21 where the court prohibited the use of contingency agreements as they would infringe section 46 of the Advocates Act.[33] Conclusively, the Advocates Act and corollary case laws have underscored the ban against the practice of third party funding in Kenya.

1.3 Seismic shift: A wind of change in Third Party Funding perception

In modern times where access to justice has been hailed as pivotal, these antiquity common law doctrines have been rendered bygones by the widespread recognition of third party funding. Lord Neuberger, the President of the United Kingdom Supreme Court, addressed this issue in 2013 and mentioned that access to court is a right afforded to parties and the State should not bar individuals from enjoying this right.[34] These doctrines have been relaxed in manifold jurisdictions including England, Wales, Australia, Canada, Hong Kong, Singapore[35] and recently, Nigeria.[36] The major approach taken by courts in these jurisdictions is that the threshold for an arrangement that amounts to maintenance or champerty must consist of impropriety which

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27 Jern-Fei Ng, *The Role of the Doctrines of Champerty and Maintenance in Arbitration*, Volume 76, Issue 2 (2010), Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, pp. 208-213.

28 Id.

29 Oliver Gayner and Susanna Khouri, *Singapore and Hong Kong: International Arbitration Meets Third Party Funding*, Volume 40. Issue 3 (2017), Fordham International Law Journal, p.1033, Re Trepca Mines (No 2) [1963] Ch 199).

30 Peter Mwangi Muriithi, *Champerty and Maintenance*: The Legality of Third-Party Funding in Arbitration in Common Law Jurisdictions, SSRN

31 Kenya's Advocates Act (Cap 16) 2012, section 35.

32 *J M M v Mohamemd Ismael Jin & 2 others* [2005] Eklr.

33 *Njogu & Company Advocates vs National Bank of Kenya Limited* [2016] eKLR (Appeal) 21.

34 Sherina Petiti, *An End to Historic Rules Preventing Third Party Funding?* Norton Rose Fulbright (September 2016) online at https://www.nortonrosefulbright/en-ke/knowledge/publications/bf0fd6fe/maintenance-and-champerty (visited on June 5, 2023).

35 Id.

36 Abayomi Okubote, *A New Era for Arbitration in Nigeria: The Arbitration and Mediation Act 2023*, Afronomicslaw, online at https://www.afronomicslaw.org/category/analysis/new-era-arbitration-nigeria-arbitration-and-mediation-act-2023 (visited on July 29, 2023).

constitutes disproportionate profit or excessive control in the dispute by the funder.[37] If an arrangement does not consist of these elements, it falls short of commission of maintenance and champerty.[38]

In England and Wales, the doctrines of maintenance and champerty have been relaxed and hence, permitting the practice of third party funding with the limitation that they shall not afford a funder unreasonable returns or the right to control the dispute.[39] The growing landscape of third party funding in England and Wales had been fronted by progressive court decisions from 2002 to 2005 as a means of improving access to justice.[40] It is reported that the practice of third party funding has been on a steady rise both in terms of the number of cases that are funded in addition to the number of specialists offering this funding.[41] In Australia, these archaic doctrines have been abolished as a crime and a tort by legislation in South Australia, Victoria, New South Wales and the Australian Capital Territory.[42] Furthermore, the landmark case of *Campbells Cash and Carry Pty Ltd against Fostif Pty Limited* enunciated that third party funding is not contrary to public policy or an abuse of justice.[43] Third Party funding is permitted in Hong Kong given that on 1 February 2019, the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 was entered into force officially.[44] The Ordinance amended the common law doctrines of maintenance and champerty and permitted third party funding in arbitration.[45]In Singapore, third party funding is permitted in international arbitrations seated in Singapore and court-related proceedings including mediation since 2018.[46] Further, Singapore's Minister of Law made an announcement on 10 October 2019 that third party funding shall be extended to domestic arbitrations in 2019 besides certain proceedings in the Singapore International Commercial Court (SICC) and mediations related to those proceedings.[47] In Nigeria, the newly enacted Arbitration and Mediation Act (2023) has incorporated provisions that impose an express ban on the doctrines of maintenance and champerty and therefore permitting the practice of third party funding in Nigerian-seated arbitrations.[48] The third party funding laws in these jurisdictions shall be discussed comprehensively in Part 3 below.

International Arbitral Rules such as the 2021 International Chamber of Commerce (ICC) Rules of Arbitration have equally joined the wagon by permitting third party funding in

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37 Sherina Petiti, *An End to Historic Rules Preventing Third Party Funding?* Norton Rose Fulbright (September 2016) online at https://www.nortonrosefulbright/en-ke/knowledge/publications/bf0fd6fe/maintenance-and-champerty (visited on June 5, 2023).

38 Id.

39 Dr. Dean Lewis and Jason Hambury, Jurisdiction *Guide to Third Party Funding in International Arbitration*, Pinsent Masons online at https://www.pinsentmasons./out-law/guides/third-party-funding-international-arbitration#England-and-Wales (visited on March 26, 2023).

40 Id.

41 Id.

42 Id.

43 Id.

44 Can Eken, *A Detailed Comparison of Third-Party Funding Regulations in Hong Kong and Singapore*, Asia Pacific Law Review, 2022, online at https://doi.org/10.1080/10192557.2021.1979799 (visited on March 3, 2023).

45 Id.

46 Id.

47 Id.

48 Abayomi Okubote, *A New Era for Arbitration in Nigeria: The Arbitration and Mediation Act 2023*, Afronomicslaw, online at https://www.afronomicslaw.org/category/analysis/new-era-arbitration-nigeria-arbitration-and-mediation-act-2023 (visited on July 29, 2023).

ICC-related arbitrations.[49] It came into force on 1 January 2021 and makes a reference to third party funding while providing in Article 11(7) a disclosure requirement to elude any potential conflict of interest.[50] The ICC Note to Parties provides supplemental guidance on the category of persons that would fall within the definition of a 'non-party' to a funding agreement in an instance where the funder had an economic interest in the outcome of the arbitration.[51]

Part 2: Regulating Third Party Funding in Kenya

Taking into account the merits of third party funding as intimated earlier in the paper, while considering the opportunities it presents for Kenya's international arbitral scene, this paper endorses the practice of third party funding. It further argues that given Kenya's intent on wielding an international arbitration presence, there is need to become a bellwether in this field: and accommodating third party funding in arbitration is a means to this end. Therefore, the discussion should not be based on whether or not to permit third party funding but the manner in which third party funding can be incorporated in Kenya: in a fashion that would afford its users optimum access to justice while minimizing concerns that dissuade its reception.

It is against this backdrop that this paper further endorses a mechanism that will regulate third party funding efficaciously. This paper argues that regulation of third party funding shall take place in a two-pronged sequential step. The first step is predisposed by the Essar Case and is particularly hinged on the reasoning and the decision of the case 'the Essar Case Effect' as shall be explained below.

1.1 Essar case and Recoverability of costs

- **The case before the Arbitral tribunal**

The third party funder Woodsford Litigation Funding had entered into an agreement with Norscot in 2011 whereby it advanced to it a sum of approximately £647,000 in order to instigate an arbitration proceeding.[52] The agreement entitled Woodsford Litigation Funding to a fee of 300 per cent of the funding or 35 per cent of the discovery, in the likelihood of Norscot's success.[53] In this regard, Norscot claimed a total sum of slightly over £1.94 million as against Essar, which was in turn being claimed as the sum being owed to Woodsford Litigation Funding, the third party funder.[54] In essence, it sought costs for litigation funding (third party funding costs) hinging its arguments on section 59(1)(c) and Section 61 and 63 of the English Arbitration Act which was argued

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49 Can Eken, *A Detailed Comparison of Third-party Funding Regulations in Hong Kong and Singapore*, Asia Pacific Law Review, 2022, online at https://doi.org/10.1080/10192557.2021.1979799 (visited on March 3, 2023).

50 International Chamber of Commerce (ICC) Rules of Arbitration (2021).

51 International Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third Party Funding in International Arbitration* (The ICCA Reports No.4 2018) p.30 online at https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Third-Party-Funding-Report%20.pdf (visited March 25, 2023).

52 *Essar vs Norcsot ICC Case* No. 15790/VRO), Award (17 December 2015) online at https://www.acerislaw.com/wp-content/uploads/2022/02/*Essar-Oilfields-Services-Ltd-v-Norscot-Rig-Management-Pvt-Ltd*-2016-EWHC-2361-Comm.pdf (visited on February 2, 2023) *Essar Oilfields Services Ltd v. Norscot Rig Management Pvt Ltd*, Queen's Bench Division(Commercial Court) 15 September 2016, [2016] EWHC 2361 (Comm).

53 Id.

54 Id p2.

provided for recoverability of legal and other costs which included third party funding costs.[55] On the other hand, Essar repudiated this argument and averred that the costs of litigation were not recoverable and that "other costs" could not mean all types of economic loss that would be sustained in litigation.[56]

- **The Arbitral Tribunal's reasoning and decision**

The Arbitrator held that he was entitled to use his discretion to make an order pertaining to the costs since the cardinal sources of jurisdiction were the Act and the ICC Rules and noted that the scope of costs within the Act was not merely restricted to legal costs, but extended to reasonable other costs.[57] Essentially, the Arbitrator concluded that such litigation funding costs were "other costs" for the purpose of section 59(1)(c) of the Act which makes reference to "legal or other costs of the parties".[58] That the provisions of section 61(1) which provides that a tribunal may make an award allocating costs of the arbitration between the parties; section 61(2) which provides that costs will then follow the event except where the tribunal will deem it inappropriate; section 63 which provides that parties are permitted to agree on what costs of the arbitration are recoverable and in the absence of such a provision, the arbitral tribunal may determine by an award the recoverable costs and in doing this, may specify the basis on which it has acted and the items of recoverable costs together with the amount.[59]

The tribunal, in rendering its decision, further placed reliance on additional circumstances tied to the conduct of the Respondent.[60] The Arbitrator considered Essar's reprehensible conduct that exceeded technical breaches of contract (crippling Norscot financially) which had predisposed the claimant to seek redress through funding.[61] In conclusion, he noted that he was satisfied that Essar forced the claimant into a situation that would warrant third party funding, and further mentioned that his discretion to award this was well within the Arbitration Act and the overarching consideration of 'what justice requires'.[62]

- **The case before the High Court**

An application was made before the high court under section 68 of the Arbitration Act 1996 ("the Act") to set aside the decision of the sole arbitrator, Sir Philip Otton, made on 17th December 2015 and was clarified on 3rd March 2016 dubbed "the Award".[63] The Award was concerned with the matters explicated above, pertaining to the question of interests and costs. The present position was that Essar was now liable to Norscot for the total sum of approximately US$12m which included US$4min in

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55 Id p2 and 3.

56 Id p3.

57 *Essar vs Norscot ICC* Case No. 15790/VRO), Award (17 December 2015) p.5 online at https://www.acerislaw.com/wp-content/uploads/2022/02/*Essar-Oilfields-Services-Ltd-v-Norscot-Rig-Management-Pvt-Ltd*-2016-EWHC-2361-Comm.pdf (visited on February 2, 2023).

58 Id, pp7-9.

59 Id.

60 International Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third Party Funding in International Arbitration* (The ICCA Reports No.4 2018) online at https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Third-Party-Funding-Report%20.pdf (visited on March 25, 2023).

61 Id p 157-158.

62 Id p 6.

63 Id.

respect of the costs order that formed the crux of the issue.[64]

Essar approached the high court to set aside the award of the arbitrator.[65] Essar's submissions were at first blush regarding the construction of section 59(1)(c) that "other costs" do not constitute third party funding costs as claimed by Norscot hence, the Arbitrator had no power to incorporate them in his costs order.[66] Essar went further and averred that given this, there was a grave irregularity under section 68(2) (b) of the Act owing to the Arbitrator's act of exceeding his powers and given that payment of the amount ordered would occasion substantial injustice to Essar.[67]

On the other side, Norscot contended that the reasoning fronted by Essar for setting aside the award was baseless owing to a number of reasons but these two are pertinent to this paper.[68] That there was no serious irregularity within the meaning of section 68(2)(b) of the Act in holding that the costs of third party funding "litigation funding" would constitute "other costs" and that the Arbitrator was entitled to exercise his powers to award costs under section 61(1) of the Act.[69]

- **Issues**

The underlying substantive point of Essar's claim is that the expression of 'other costs' did not, as a matter of construction and context include costs of litigation funding in respect of arbitration as a result of the Act and the ICC Rules.[70]

- **The High Court's decision and reasoning**

The High Court upheld the decision of the arbitral tribunal and concluded by stating that as a matter of language, context and logic, "other costs" can constitute the costs of obtaining litigation funding.[71] Further, it relied on section 59 of the English Arbitration Act that provided that costs of the arbitration shall encompass the arbitrator's fees and expenses, fees and expenses of any arbitral institutions and the legal or other costs of the parties.[72] The court equally reiterated the provisions of Article 31(1) of the ICC Rules that essentially provides the same terms and stipulates that the costs of arbitration shall encompass other reasonable legal costs and other costs incurred by the parties in the arbitration.[73]

The court not only upheld the decision of the Arbitral Tribunal but also agreed with the Arbitrator's interpretation regarding 'legal costs' and 'other costs' constituting third party funding costs, and that the tribunal had the power to issue these awards.[74]

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64 Id.

65 *Essar Oilfields Services Ltd v. Norscot Rig Management Pvt Ltd*, Queen's Bench Division (Commercial Court) 15 September 2016, [2016] EWHC 2361 (Comm) p7 par 36 online at https://www.acerislaw.com/wp-content/uploads/2022/02/Essar-Oilfields-Services-Ltd-v-Norscot-Rig-Management-Pvt-Ltd-2016-EWHC-2361-Comm.pdf (visited on February 2, 2023).

66 Id.

67 Id.

68 Id.

69 Id.

70 Id p 8-10.

71 Id p10, par 68.

72 Id p.11, par 69.

73 Id p8, par.48.

74 Id p 11 par 70.

2.3 The impact of the Essar Case

The major impact of the Essar Case is seen in the increased number of claims for recovery of third party funding costs within the arbitration landscape. Arbitral tribunals seating under different arbitral rules and national laws have followed suit by holding that they have the power to award third party funding costs. For instance, the recent publicly reported case of *Blair James Speers & Graham Paul Johnson v Makemytrip Limited & Hotel Travel Limited SIAC* Case No. ARB169/16/AB, a Singapore-seated arbitral tribunal held that a provision in the Singapore International Arbitration Centre (SIAC) Rules regarding the power of the tribunal to order legal or other costs of a party included the power to award recovery of the Claimant's legal and other costs which included third party funding costs: provided that these costs are incurred in relation to the arbitration.[75] Similarly Omni Bridgeway reports that it funded a party in a recent Singapore-seated arbitration under the ICC Rules and the same reasoning as the Essar case was relied on by the tribunal in rendering its award.[76]

The effect of the Essar case is seen in subsequent cases such as the widely discussed *Tenke Fungurume Mining SA v Katanga Contracting Services SAS* [2021] where the English High Court upheld an award by a London-seated ICC Tribunal: that stipulated that third party funding costs constituted 'other costs'.[77]Other trends that have arisen include the emphasis on disclosure in arbitration involving third party funding agreements.[78] For instance, the legal professional conduct codes and rules in jurisdictions such as Singapore and Hong Kong require such disclosure for the arrangements to suffice.[79] This means that the details regarding the funding arrangement including the funder's name in previous action correspondence should be disclosed immediately after a funding contract has been instigating.[80] Failure to disclose the funding arrangement in due course may be discerned as placing the other party at a disadvantageous position by denying them knowledge at a significant stage which would make them privy to their potential exposure in case of an adverse third party funding costs award.[81]

2.4 The Impact of the Essar Case in Kenya's Arbitral Scene

As seen above, the major ramification resulting from the Essar Case is seen in the decisions of arbitral tribunals and domestic courts where third party funding costs have been rendered recoverable.[82] In Kenya, neither arbitral tribunals nor courts have rendered their decision on recoverability of third party funding costs given that a matter in this respect has not arisen: at least not yet. However, given the influx of foreign direct investments in Kenya and the subsequent resort to international arbitral institutions for

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75 *Blair James Speers & Graham Paul Johnson v Makemytrip Limited & Hotel Travel Limited* SIAC Case No. ARB169/16/AB, Final Award dated 9 June 2020, at [159].

76 Adam Silverman and Camilla Godman, *The Current Approach to Recovering Third Party Funding Costs in Arbitration*, (January 2022) online at https://omnibridgeway./insights/blog/blog-posts/blog-details/global/2022/01/12/the-current-approach-to-recovering-third-party-funding-costs-in-arbitration (accessed on March 15, 2023).

77 *Tenke Fungurume Mining SA v Katanga Contracting Services* SAS [2021] EWHC 3301 (Comm).

78 Id.

79 Id.

80 Id.

81 Id.

82 Adam Silverman and Camilla Godman.

dispute resolution, disputes related to third party funding are anticipated.

This paper makes the case that the Essar decision is imperative in Kenya's arbitral landscape since it lays the foundation under which third party funding can be incorporated in to the country, in the following way.

As explained earlier in the paper, the Arbitral Tribunal in the Essar case relied on Sections 59 (1), 61(1) read with 62, and 63 of the English Arbitration Act (1995) in making a determination that the claimant's legal costs constituted third party funding costs. The English Court upheld this decision and the reasoning thereof. This paper argues that a similarity exists between these provisions and the stipulations of Section 32B of Kenya's Arbitration Act (1995).

The provisions of the English Arbitration Act that were relied on by the arbitral tribunal and the court in the Essar case, that bear the same meaning as section 32B of Kenya's Arbitration Act include:

Section 59 which provides for costs of arbitration:
"(1) References in this Part to the **costs of the arbitration** are to—
(a) the arbitrators' fees and expenses;
(b) the fees and expenses of any arbitral institution concerned, and
(c) **the legal or other costs of the parties**.

(2) Any such reference includes the costs of or incidental to any proceedings to determine the amount of the recoverable costs of the arbitration (see section 63)"[83]

Section 61(I) provides for award of costs:

"(1) The **tribunal may make an award allocating the costs of the arbitration** as between the parties, subject to any agreement of the parties."[84]

Section 63 provides for recoverable costs of the arbitration.
"(1) The parties are free to agree what costs of the arbitration are recoverable.
(2) If or to the extent there is no such agreement, the following provisions apply.
(3) The **tribunal may determine by award the recoverable costs of the arbitration** on such basis as it thinks fit. If it does so, it shall specify—
(a) the basis on which it has acted, and
(b) the items of recoverable costs and the amount referable to each"[85]

To buttress this further, Sections 61(1) and 63(3) give the Arbitrator the power to determine the costs of the arbitration as he deems fit[86] while section 59(1)(c) then proceeds to deliberately stipulate what constitutes costs of the arbitration which

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83 Section 59 of the English Arbitration Act (1996).
84 Section 61(1) of the English Arbitration Act (1996).
85 Section 63 of the English Arbitration Act (1996).
86 Sections 61(1) and 63(3) of the English Arbitration Act.

includes 'legal or other costs of the parties'.[87] The Arbitral Tribunal and Court relied on the context and the language construction of these sections to conclude that these legal or other costs of the parties constitute third party funding costs.

Section 32B of Kenya's Arbitration Act provides:

> (1) Unless otherwise agreed by the parties, **the costs and expenses of an arbitration, being the legal and other expenses of the parties**, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration, **shall be as determined and apportioned by the arbitral tribunal in its award** under this section, or any additional award under section 34(5).
>
> (2) Unless otherwise agreed by the parties, in the absence of an award or additional award determining and apportioning the costs and expenses of the arbitration, each party shall be responsible for the legal and other expenses of that party and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration."[88]

There are striking similarities in the context and language construction of these provisions.

First, both Acts prescribe that the legal costs of parties shall constitute costs (or expenses) of an arbitration as seen under Section 59(1) of the English Arbitration Act and section 32B (1) of Kenya's Arbitration Act.[89] Second, both Acts stipulate that these costs shall be determined by the Arbitral Tribunal seen under Section 61(1) which is seemingly read together with section 63(1) of the English Arbitration Act, as the same is seen under Section 32B (1) of Kenya's Arbitration Act.[90] There is indeed a semblance in the construction of wordings between these two Acts.

This therefore begs the next significant question, given the similarity in the construction, might there be a similarity in the interpretation thereof? The Essar case has steered the interpretation of these legal provisions to include recoverability of third party funding costs, where other arbitral tribunals and courts have followed suit as discussed earlier on. Consequently, could this interpretation serve as a form of legal persuasion for Kenyan-seated Arbitral Tribunals and courts, to make a determination that third party funding costs can be recovered as legal costs, akin to the trending practice? With this legal quandary, this paper argues that this is a clarion call for the murky issues tethering around third party funding to be addressed sufficiently through regulation. It is upon this premise and the dire need to instigate third party funding practice in Kenya, that this paper provides a framework on regulation of third party funding as discussed below.

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87 Section 59 (1) of the English Arbitration Act.

88 Section 32B of Kenya's Arbitration Act (1995).

89 Section 59(1) of the English Arbitration Act and Section 32B (1) of the Kenya Arbitration Act.

90 Sections 61(1) and 63(1) of the English Arbitration Act and Section 32B(1) of Kenya's Arbitration Act.

2.5 How to regulate third party funding in Kenya

a. Amendment of the Arbitration Act

First, this paper proposes an amendment of Section 32B of the Kenya's Arbitration Act (1995).[91] It further proposes that the language construction of section 32B be made clear to coincide with the context of recoverability of third party funding costs. This is the proposed stipulation:

"32B. Costs and expenses

> (1) Unless otherwise agreed by the parties, the costs and expenses of an arbitration, being the legal and other expenses of the parties, including **third party funding costs**, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration, **shall be as determined and apportioned by the arbitral tribunal in its award** under this section, or any additional award under section 34(5)"[92]

In the alternative, this paper equally proposes creation of an additional provision 'Section 32 D' to build up on Section 32 C of the Arbitration Act by explicitly including recoverability of third party costs by the parties to be issued by the arbitral tribunal. This provision can be borrowed from Section 63 of the English Arbitration Act but emphasis shall be made to the inclusion of third party costs:[93]

"Section 32 D: The recoverable costs of the arbitration

> (1) The parties are free to agree what costs of the arbitration are recoverable **including third party funding costs** which shall be determined and apportioned by the arbitral tribunal in its award"[94]

While these amendments will be crucial in introducing or legitimizing the practice of third party funding in Kenya, the buck does not stop here. This paper further proposes a complementary regulatory framework that would engender the operationalization of third party funders with a view to protecting prospective consumers while endorsing innovation in arbitration.

b. Proposed Third Party Funding Regulatory Framework

These proposals have been predisposed by best practices from leading international arbitration centers such as Hong Kong and Singapore that have robust third party funding legal frameworks. They are the first jurisdictions in the world to inculcate regulation of third party funding through legislation.[95]In terms of timing of legislation, Singapore is leading given that Singapore's Parliament passed the third party funding

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91 Section 32B, Kenya's Arbitration Act.

92 Section 32B, but with a proposed provision for an amendment.

93 Section 59, English Arbitration Act.

94 Suggested amendment of Section 32D.

95 Oliver Gayner and Susanna Khouri, *Singapore and Hong Kong: International Arbitration Meets Third Party Funding*, (2017) 40(3) Fordham International Law Journal 1033, 1046; Rebecca Mulder and Marc Krestin, *Third-Party Funding in International Arbitration: To Regulate or Not to Regulate?* Young ICCA Arbitration Blog (visited on September 28, 2020.

legislation in January 2017 while the Legislative Council in Hong Kong passed its legislation in June 2017.[96]

Singapore's third party funding laws

Singapore passed its third party funding law in Parliament on 10 January 2017 via the Civil Law (Amendment) Act (2017) and later, the Civil Law (Third Party Funding) Regulations (2017) which were published on 24 February 2017 and effected on 1 March 2017,[97] permitting third party funding in international arbitration in Singapore.

- **The Civil Law (Amendment) Act 2017 (CLAA)**

The CLAA sets a clear background for the operation of third party funding as seen in sections 5A and 5B which abolish the doctrines of maintenance and champerty and paves way for the permitted practice of third party funding.[98] Section 5B of the CLAA provides that when a third party funder funds a case regarding dispute resolution proceedings, it cannot be discounted as "*contrary to public policy or otherwise illegal by reason that it is a contract for maintenance or champerty*".[99] It provides that third party funders must adhere to certain requirements: that the Ministry may prescribe these requirements related to qualifications of third party funders and scope of their application in Section 5B.[100] Kenya's prospective laws on third party funding can adopt this provision.

The CLAA provides for sanctions directed at funders for failing to comply with the prescribed requirements.[101] In line with the relevant section, it provides that where there is non-compliance by funders, the rights of the funder arising out of the contract shall be unenforceable.[102] Hence, any third party funder who intends to operate in Singapore must adhere to the requisite requirements provided by the CLAA and the Ministry. Section 5B (5) of the CLAA takes cognizance of the need for relief in light of the section by the funder from compliance and hence provides that a third party funder may seek recourse from the court or an arbitral tribunal.[103] This paper endorses this trajectory for Kenya's prospective third party funding laws.

Even though from the onset, it is palpable that Singapore has adopted a light-touch approach to third party funding regulation akin to Hong Kong given that the Act only contains only three articles and does not delve deeply into third party funding, this is for flexibility purposes.[104] In turn, it can be argued that the secondary legislation (the Regulation) provides a more comprehensive insight as to the regulation of third party funding.[105] It is equally lucid that the Act does not provide for a code to be published to

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96 Singapore's parliament passed the legislation in January 2017 accessed 25 September 2020. The Legislative Council of Hong Kong passed the legislation in June 2017 accessed 19 November 2020.

97 Singapore Civil Law (Third-Party Funding) Regulations 2017 (hereinafter 'Singapore Regulations'), Section 1.

98 Singapore's Civil Law (Amendment) Act 2017, Sections 5A and 5B.

99 Singapore Civil Law (Amendment) Act 2017 (hereinafter 'CLAA').

100 Singapore's Civil Law (Amendment) Act 2017, Section B.

101 Singapore's Civil Law (Amendment) Act 2017, Section 5B (4).

102 Id.

103 Singapore's Civil Law (Amendment) Act 2017, Sections 5B(4) and (5).

104 Can Eken, A detailed comparison of third-party funding regulations in Hong Kong and Singapore, Asia Pacific Law Review, 2022, online at https://doi.org/10.1080/10192557.2021.1979799 (visited on March 3, 2023).

105 Id p5.

regulate lawyers, arbitrators and funders but reputable stakeholders have undertaken the task of self-regulation by developing their own guidelines.[106]

- **Civil Law (Third Party Funding) Regulations 2017**

The Regulations were issued by the Minister for Law on 1 March 2017 alongside with the CLAA.[107] From the outset, it delineates that the scope of dispute resolution proceedings shall not only constitute international arbitration proceedings, but also court and mediation proceedings in any way connected with international arbitration proceedings as an application for stay of proceedings and enforcement of an arbitration agreement under the International Arbitration Act.[108]

The most salient feature pertaining to Section 3 of the Regulations is that third party funding is permitted provided that it is related to international arbitration proceedings.[109]This is a quintessential demonstration that Singapore has officially abolished doctrines of maintenance and champerty for international arbitration and any other proceeding affiliated to international arbitration as highlighted in the Regulations.[110]

This Regulations have instigated certain standards for qualification of third party funders in Singapore.[111] First, it is a requirement that they must carry on the principal business of funding the dispute resolution proceedings where the funder is not a party.[112] Second, they must have not less than SGD5 Million or the equivalent amount in a foreign currency in paid-up share capital or the same amount in managed assets.[113] Imperatively, the Regulations do not require a third party funder to carry on the principal business of funding in Singapore and hence, the third party funder is permitted to carry on its principal business elsewhere.[114]

- **Amendment of the Singapore's Legal Profession Act**

Akin to the Kenyan Advocates Act, the Legal Profession Act consists of further rules regarding funding by lawyers apart from the additions of the CLAA.

The CLAA under Section 5B delineates the definitions of 'arbitral tribunal', 'dispute resolution proceedings', 'third-party funder', 'funded party' 'qualifying third-party funder' and 'third funding contract'.[115] The Legal Profession Act in Singapore has undergone amendments in Section 107 predisposed by the CLAA whereby it clarifies the role of lawyers in the funding process and in helping a client obtain a suitable

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106 Id p5.

107 Can Eken, *A Detailed Comparison of Third-party Funding Regulations in Hong Kong and Singapore*, Asia Pacific Law Review, 2022, p.7 online at https://doi.org/10.1080/10192557.2021.1979799 (visited on March 3, 2023).

108 Singapore Regulations, Section 3.

109 Singapore Regulations Section 3.

110 Can Eken, A detailed comparison of third-party funding regulations in Hong Kong and Singapore, Asia Pacific Law Review, 2022, online at https://doi.org/10.1080/10192557.2021.1979799 (visited on March 3, 2023).

111 Singapore Regulations Section 4.

112 Singapore Regulations Section 4(1) (a).

113 Id section 4(1) (b).

114 Can Eken, p.7.

115 Singapore's Civil Law (Amendment) Act 2017, Section 5B.

funder.[116] The Amendment indicates that a lawyer is not barred from conducting the following: (i) Introducing or making reference of a third party funder to the lawyer's client provided that the lawyer does not obtain direct financial gain from the introduction or referral; (ii) Providing counsel or drafting a third party funding contract for the lawyer's client or negotiating the contract on behalf of the client; (iii) Acting on behalf of the lawyer's client in any dispute that arises from a third-party funding contract.[117] Further, Subsection 3B of the same section highlights that direct financial benefits do not constitute fees, disbursements or expenses payable by the lawyer's client for the legal services provided by the lawyer to the client.[118] . In essence, solicitors are prohibited from deriving interest from their client's case or entering into contingency fee agreements with the clients. This is further buttressed by subsection 2 of the same section where validity shall not be afforded to a purchase or agreement prohibited in subsection 1 as mentioned previously while subsection will apply to law corporations and limited liability partnerships. This then sets the operation of third party funding in Singapore.

It is palpable that the Legal Profession Act underwent amendments which addressed the bone of contention that exists between legal practitioners and third party funders including lawyer's obligations to disclose third party funding agreement.[119]

It is imperative to highlight that the import of the Legal Profession Act is not to bar the practice of third party funding as many countries misconstrue including Kenya with the Advocates Act. Rather, the intent is to bar lawyers from funding parties and instead simply facilitate by helping clients with funding options. This type of help is permitted in Singapore but subject to certain conditions as highlighted in Section 107(3) of the Legal Profession Act.[120] It is equally key to note that lawyers will not claim any direct benefits for their role in introducing or making referrals for their clients to a third party funder. Hence, there may be need to amend Kenya's Advocate's Act to reflect these progressive provisions that endorse the practice of third party funding.

- **Code of Practice**

While the CLAA and the Regulations are the main third party funding legal instruments in Singapore, there is no specific third party funding code issued by the Minister for Law in comparison to the Code of Practice in Hong Kong.[121] Regardless, three institutions have set standards for lawyers, arbitrators and funders that engage in third party funding proceedings and in turn, published their guidelines.[122]

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116 Singapore Legal Profession Act (Ch 161), S 107(3A).

117 Singapore Legal Profession Act (Ch 161), Section 107(3A).

118 Singapore Legal Profession Act, section 107(3B).

119 Can Eken, A Detailed Comparison of Third-Party Funding Regulations in Hong Kong and Singapore, Asia Pacific Law Review, 2022, online at https://doi.org/10.1080/10192557.2021.1979799 (visited on March 3, 2023)

120 Section 107(3) of the Legal Profession Act.

121 Can Eken, A detailed comparison of third-party funding regulations in Hong Kong and Singapore, Asia Pacific Law Review, 2022, online at https://doi.org/10.1080/10192557.2021.1979799 (visited on March 3, 2023).

122 Id, p9.

First, the Singapore Institute of Arbitrators (SIArb) Third-Party Funding Guidelines (18 May 2017) have been published where thirteen funders had already pledged their support for the guidelines.[123] Second, the Singapore International Arbitration Centre (SIAC) which hinges its application to arbitrators and not funders provides for cases that are administered by SIAC under the SIAC Rules.[124] Third, the SIAC has equally published investment arbitration rules which provide rules related to third party funding.[125] SIAC Investment Arbitration Rules (2017) under Articles 24(1L), 33(1) and 35 provide for third party funding stipulations.[126] The SIAC's Investment Arbitration Rules 2017 (IAR) provides the tribunal with the discretion to order full disclosure of the third party funding arrangement in addition to whether he funder has committed to undertake an adverse costs order.[127] The tribunal shall equally consider the third party funding arrangement when apportioning arbitration costs.[128]

The Law Society of Singapore has further instigated a guideline for lawyers for best practice purposes.[129] Even though they are not mandatory, they are instrumental in creating a uniform practice for the funding market in Singapore. In order to promote best practices in relation to third party funding. Industry stakeholders have supplemented the law above with soft law instruments. Given that the Law Society of Singapore, the Singapore Institute of Arbitrators and SIAC have guidelines and practice recommendations which are intent on strengthening the third party funding legal framework, Kenya can borrow from this.

Hong Kong Third Party Funding Laws

Unlike in Singapore where there is a flurry of separate guidelines issued by different arbitral institutions on third party funding, the primary legislation is the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance (2017) which was effected on 23rd June 2017.[130] The significant provisions which legitimize the validity and legality of third party funding came into force on 1st February 2019 in conjunction with the Code of Practice: which is an annex to the Ordinance (known as Division 4).[131]

- **Arbitration and Mediation Legislation (Third Party Funding) (Amendment) (Ordinance 2017)**

The first division sets out the purpose of the Legislation in arbitration as seen in Section 98E. It stipulates that the purposes are to: (a) ascertain that third party funding is not prohibited by common law doctrines; and (b) provide for measures and safeguards

123 Singapore Institute of Arbitrators (SIArb) Third Party Funding Guidelines (18 May 2017) online at https://siarb.org.sg/index.php/resources/third-party-funding (visited on April 15, 2023).

124 Id.

125 SIAC, Investment Arbitration Rules of the SIAC and SIAC Investment Rules.

126 The Law Society of Singapore Guidance Note 10.1.1 Third-Party Funding, online at https://www.lawsociety.org.sg/wp-content/uploads/2020/03/ Third-Party-Funding-GN-10.1.1.pdf (visited on March 21, 2023).

127 SIAC's Investment Arbitration Rules 2017.

128 Id.

129 The Law Society of Singapore Guidance Note 10.1.1.

130 The Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017.

131 Id.

related to third party funding to arbitration.[132] These common law offences referred to are champerty and maintenance and hence, the Legislative Council of Hong Kong lifted the obstacles to third party funding by abolishing them.[133] This paper argues that Kenya's Third Party Funding Party Legislation should include these provisions at the outset for clarity and certainty purposes. This paper observes the Ordinance applies to both arbitration and mediation but it dissuades against adopting this trajectory at first instant: in order to discern the impact of the regulation on third party funding first before spanning to other forms of dispute resolution mechanisms. As seen, the second purpose is to establish safeguards for third party funding through the creation of a Code of Practice for Third Party Funding of Arbitration which was effected on 1st February 2019 and is further elucidated Division 4 Section 98O.[134] This is a trajectory Kenya's prospective legislation should adopt.

Division 2 delineates the interpretation of key concepts related to third party funding. Significantly, it stipulates that arbitration shall constitute: (i) court proceedings; (ii) proceedings before an emergency arbitrator; and (c) mediation proceedings. The import of this provision is that provided that a dispute is related to arbitration, then the ancillary proceedings related to arbitration shall permit the use of third party funding.[135]For instance, in the event the third arty funding arrangement of a specific arbitration proceeding requires the enforcement of award in court, the enforcement proceedings can be financed by a third party funder.[136] It is further explained that third party funding is permitted in enforcement of arbitration award in court or mediation proceedings as long as they are related to arbitration.

The provision defines costs as 'costs and expenses of the arbitration' including (a) pre-arbitration costs and expenses; (b) fees and expenses of the Arbitral body.[137] Moreover, Section 98J the definition of a third party funder is equally outlined as: (i) a party to a funding agreement for the provision of arbitration funding for an arbitration to a funded party by the very person; and (ii) one who does not bear an interest recognized by law in the arbitration apart from under the funding agreement.[138] This paper argues that this instigates a clarification on an important limitation on the categories of entities that act as third party funders. Lawyers are therefore barred from acting as third party funders since they would have already engaged in another interest other than the funding agreement hence, conflict of interest issues would emerge.[139] In essence, the funder should be an external party who does not bear any involvement in the arbitration proceeding other than the funding agreement.[140] This is clarified under

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132 Arbitration and Mediation Legislation (Third Party Funding) (Amendment) (Ordinance 2017) 7 (hereinafter 'Ordinance' section 98E.

133 Can Eken, *A detailed comparison of third-party funding regulations in Hong Kong and Singapore*, Asia Pacific Law Review, 2022, online at https://doi.org/10.1080/10192557.2021.1979799 (visited on March 3, 2023).

134 The Ordinance, Section 98O.

135 Can Eken, *A Detailed Comparison of Third-Party Funding Regulations in Hong Kong and Singapore*, Asia Pacific Law Review, 2022, online at https://doi.org/10.1080/10192557.2021.1979799 (visited on March 3, 2023).

136 Id.

137 The Ordinance, Section 98F.

138 The Ordinance, Section 98J (1).

139 Can Eken, p.11.

140 Ibid.

section 98J(2) of the Ordinance.[141] In the event a funder bears another interest in the matter other than the funding agreement, prior to or after the arbitration proceeding, the party would not be entitled to the funder.[142]

Third Party Funding is equally defined by the Ordinance under this section. It is defined as the provision of arbitration funding for an arbitration: (i) under a funding agreement; (ii) to a funded party; (iii) by a third party funder; and (iv) in return for a third party funder obtaining a financial benefit on the basis that the financial agreement is successful in line with the meaning of the funding agreement.[143] This is a simple definition that describes the agreement but despite this, it provides significant limitations. For instance, in a situation where a funder advances finances to a case without any return in the award in the form of a donation, this will not amount to a third party funding arrangement under arbitration. Corollary to the definition provision, the funding agreement must adhere to the following: (i) must be in writing; (ii) instigated between a funded party and a third party funder; and (iii) made on or after commencement date of Division 3.[144]

Division 3 provides for abolition of the common law doctrines of champerty and maintenance under Sections 98K and 98L Section 98M of the Ordinance provides a safeguard for these provisions, by stipulating that these sections do not affect any rule of law in relation to cases where a contract is deemed to be against public policy or otherwise illegal.[145] To illustrate this, if a contract is treated as contrary to public policy by any other means apart from the doctrine of maintenance and champerty, it will remain illegal.[146] The provision further prohibits lawyers from participating in funding and benefiting from the exemption of the doctrine of maintenance and champerty thereof, in the same way funders would.[147]

Division 4 provides a Code of Practice for Third Party Funding of Arbitration (hereinafter referred to as 'Code of Practice') and stipulates that this code shall be issued by an authorized body.[148] The purpose of the Code of Practice is to delineate practices and standards for third party funders in Hong Kong, what constitutes third party funding agreement, terms that should be laid out and the complaint procedures against funders.[149] These include making it a requirement for funders to ensure that promotional material pertaining to third party funding is clear and not misleading, and that funding agreements set out their instrumental features, risks and terms as prescribed.[150] Section 98R prescribes the process of issuing the Code of Practice and more importantly, Section 98S sets out the ramifications of non-compliance.[151] It provides

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141 The Ordinance, 98J(2).
142 Carl Eken, p.11.
143 The Ordinance, 98G(1).
144 The Ordnance, Section 98H.
145 The Ordinance, 98K, 98L and 98M.
146 Carl Eken, p13.
147 Id.
148 The Ordinance, Section 98O.
149 Carl Eken, p13.
150 The Ordinance, Sections 98O, 98P and 98Q.
151 The Ordinance, Section 98R.

that non-compliance will not necessarily attract personal liability in respect to judicial or other proceedings.[152] However, Sub-section 2 provides that the code of practice is admissible in evidence before any court of arbitral tribunal and the same shall be taken into account by a court or a tribunal provided it is relevant to the proceeding.[153] From the outset, it can be argued that Hong Kong took a cautious approach regarding sanctions levied against persons who contravened compliance provisions: an intricate balance between protecting consumers by instigating slightly stringent provisions while endorsing funders. Kenya's prospective legislation may consider taking this trajectory at first stance and tightening it up later depending on the weight of issues that will arise as a result of non-compliance.

Division 5 provides for other measures and safeguards that would protect consumers such as Section 98T which necessitates disclosure of information pertaining to third party funding.[154] The Ordinance seems to take cognizance of the dicey nature of disclosure in arbitration and therefore, stringent regulation is observed in this respect. Section 98U provides that if a funding agreement has been created, the funded party should provide a written notice of the fact that it has been made and the name of the funder. In the same vein, in the event the funding ends before the arbitration proceedings are completed, this bit has to be disclosed by a written notice and it should indicate the date the funding agreement ended.[155] An additional significant provision pertains to the ramifications of non-compliance with the disclosure obligation. While non-compliance does not render a person liable, Section 98W provides that the arbitral tribunal or a court shall take this into account in rendering its decision. It is palpable that Hong Kong laws do not place a mandatory emphasis on the need to disclose a third party funding arrangement owing to the delicate issues that may arise, however, the same will be considered by an arbitral tribunal or a court. The jury is out as to whether this is the best way to tackle the issue regarding disclosure requirements and whether Kenya's Third Party Funding legislation should take this light-touch approach or inculcate a more stringent approach.

Nigeria's Arbitration and Mediation Act (2023)

The Arbitration and Conciliation Act, 1988 Chapter A.18, Laws of the Federation of Nigeria, 2004 (ACA) had been Nigeria's governing legislation on arbitration for more than three decades.[156] Given the ever-changing demands of arbitration in Nigeria and the complexities that chaperone these exigencies, there was need for a new responsive legislation that would among other things, coincide Nigeria's arbitration practice with international standards.[157] Subsequently, the Arbitration and Mediation Act 2023 (AMA) "the Act" was enacted on 26th May 2023 and has since set an immense milestone for

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152 Id.

153 The Ordinance, Section 98R.

154 The Ordinance, Section 98T.

155 The Ordinance, Section 98U and 98V.

156 Abayomi Okubote, *A New Era for Arbitration in Nigeria: The Arbitration and Mediation Act 2023*, Afronomicslaw, online at https://www.afronomicslaw.org/category/analysis/new-era-arbitration-nigeria-arbitration-and-mediation-act-2023 (visited on July 29, 2023).

157 Abayomi Okubote, *A New Era for Arbitration in Nigeria: The Arbitration and Mediation Act 2023*, Afronomicslaw online at https://www.afronomicslaw.org/category/analysis/new-era-arbitration-nigeria-arbitration-and-mediation-act-2023 (visited on July 29, 2023).

arbitration proceedings in Nigeria.[158] This includes its inculcation of third party funding under Sections 61 and 62,[159] that has seen Nigeria join countries such as Singapore and Hong Kong in prohibiting the common law doctrines of champerty and maintenance that were considered illegal and hence, an impediment to the practice of third party funding.[160]

The Act has been hailed as progressive given that it provides a statutory framework for incorporation of third party funding in international arbitrations seated in Nigeria and as a result, the practice is presently fully enforceable.[161]

Section 61 of the Act expressly prohibits the doctrines of champerty and maintenance by stipulating that they do not apply to third party funding arbitrations in Nigeria.[162] Further, Section 62 provides for a mandatory disclosure obligation on the funded party.[163] It obligates the funded party to provide a written notice regarding the funding arrangement to other parties including the arbitral tribunal and arbitral institution where applicable.[164] Moreover, the Act mandates disclosure of funding where a respondent seeks security for costs: it stipulates that the funded party shall present an affidavit to the tribunal in order to confirm whether the funder shall cover adverse costs orders.[165] In turn, the tribunal shall consider the divulged facts in the affidavit and reach its decision.[166]

Conclusively, the new Nigerian Arbitration and Mediation Act legitimizes the practice of third party funding in Nigerian-seated arbitrations and provides a further obligation regarding disclosure of funding arrangements.[167] This accentuates the principles of impartiality and fairness in arbitral proceedings which shall not be infringed by failure of disclosure of third party funding arrangements.[168]

In this regard, this paper commends Nigeria's progressive strides and posits that Kenya should follow suit as discussed in the paper. It further recommends that Nigerian legislators should consider instigating a supplemental regulation that would provide a clear framework on the operationalization of third party funding practice similar to Singapore and Hong Kong's trajectory.

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158 Id.

159 Timi Balogun and Letizia Ceccarelli, *Nigeria Reform of Arbitration Law: A Closer Look at the Major Legislative Changes*, Lexology, online at https://www.lexology.com/library/detail.aspx?g=d526a052-e020-435f-987e-0f4e7945b608 (visited on July 30, 2023).

160 Laura Alakija, *Nigeria's New Arbitration Act: What You Need to Know*, *Kluwer Arbitration*, online at https://arbitrationblog.kluwerarbitration/2023/06/25/nigerias-new-arbitration-act-what-you-need-to-know/ > visited on July 29, 2023).

161 Id.

162 Nigeria's Arbitration and Mediation Act 2023, Section 61, online at https://www.lawyard.org/wp-content/uploads/2023/05/Arbitration-and-Mediation-Act.pdf (visited on July 29, 2023).

163 Id.

164 Id.

165 Id.

166 Id.

167 Abayomi Okubote, *A New Era for Arbitration in Nigeria: The Arbitration and Mediation Act 2023*, Afronomicslaw online at https://www.afronomicslaw.org/category/analysis/new-era-arbitration-nigeria-arbitration-and-mediation-act-2023 (visited on July 29, 2023).

168 Timi Balogun and Letizia Ceccarelli, *Nigeria Reform of Arbitration Law: A Closer Look at the Major Legislative Changes*, Lexology, June 2023, online at https://www.lexology.com/library/detail.aspx?g=d526a052-e020-435f-987e-0f4e7945b608 (accessed on July 30, 2023).

Part 3: Conlcusion

The Essar case has played an instrumental role in revolutionizing the concept of recoverability of third party funding costs globally. In Kenya, the Essar effect has been palpable in laying a foundation for inculcation and operationalization of third party funding through an amendment of the Arbitration Act. Moreover, this paper has made a case for instigation of laws on third party funding to bolster its practice in the country. This is in recognition of the need to span access to justice for aggrieved parties and the need to establish Kenya as a global arbitral center given the surge in foreign direct investments and the need to contrive a responsive and sophisticated arbitral centre that would cater to the international clientele. The time is ripe for Kenya to scale up and inculcate third party funding: this paper demonstrates the incipient steps to be followed to achieve the same.

Part 4: Emerging Trend

4.1 Does the recent United Kingdom Supreme Court decision contradict the Essar case?

The recently decided United Kingdom Supreme Court case of *R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents)*, [2023] UKSC 28 delivered on 26 July 2023,[169] has predisposed varying views on the stance of third party funding practice. While the decision was made within the scope of litigation and has predisposed a wave of uncertainty with respect to existing and future litigation funding arrangements, its ramifications will undoubtedly span the arbitration landscape. Will this decision therefore debilitate the strides made in third party funding practice as a result of the Essar case effect? Part 4 of this paper seeks to discuss this.

Summary of the R v Competition Appeal Tribunal (2023) case

The case commences from the European Commission where it rendered its decision on 19 July 2016.[170] It held that five major European Truck Manufacturing Groups had entered into an unlawful agreement that resulted in a breach of the European Competition Law.[171] Consequently, the matter was brought before the United Kingdom Competition Appeals Tribunal (CAT) by the United Kingdom Trucks Claim Ltd ("UKTC") and Road Haulage Association ("RHA") to pursue the claim while seeking damages on behalf of a number of truck drivers.[172] Both UKTC and RHA made applications to the CAT to instigate collective proceedings.[173] There was a condition set by the CAT where for the

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169 R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents), [2023] UKSC 28 The case https://www.bailii.org/ew/cases/EWCA/2021/299.html (visited on August 2, 2023).

170 Doug Watson, Piers Plumptre et. al '*UK Supreme Court Rules That Many Litigation Funding Agreements Are Unenforceable in England & Wales*, ' Gibson Dunn, August 2023, online at https://www.gibsondunn./uk-supreme-court-rules-that-many-litigation-funding-agreements-are-unenforceable-in-england-and-wales/#:~:text=In%20a%20greatly%20anticipated%20judgment,statutory%20definition%20of%20damages%2Dbased (visited on August 3, 2023).

171 Id.

172 Id.

173 R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents), [2023] UKSC 28.

claims to proceed, one had to obtain a Collective Proceedings Order.[174] Further, UKTC and RHA must have satisfied the CAT that they had sufficient funding arrangements that adhered to the applicable legislation, among other requirements.[175]

Hence, UKTC and RHA entered into Litigation Funding Agreements (LFAs) with their funders: where the funders would obtain a share of the damages awarded.[176] Moreover, they ascertained that such LFAs were not Damaged Based Agreements (DBAs) which are barred from being used in collective proceedings before the CAT.[177] The Defendants in the case objected the lawfulness of the LFAs and argued that they were in fact DBAs and hence, did not comply with the regulatory conditions stipulated by the CAT.[178] The CAT and the Court of Appeal ruled in favour of UKTC and RHA and held that LFAs were not DBAs.[179]

The issue before the Supreme court was whether LFAs could be classified as DBAs and hence, should be subject to the UK legislation that governs DBAs which includes the Courts and Legal Services Act 1990 (the "CLSA") and the Regulation.[180] Essentially, the question before court was whether the principles that govern DBAs should extend to litigation funding agreements.[181] That is, should litigation funding agreements between a funder and a client be regarded the same agreement as a client-lawyer damage based agreement in spite of the fact that the funder would be a third party to the proceedings?[182]

Rendering its decision on 26 July 2023, the Supreme Court overturned the Court of Appeal's decision and held that LFAs fell within the statutory interpretation of DBAs and hence, a litigation funding agreement has to comply with the CLSA and DBA Regulations for it to be enforceable.[183] Consequently, the Court held that Parties that are involved in litigation in the United Kingdom and are further supported by a third party funding agreement will be required to make an assessment whether their existing Litigation Funding Agreements (LFAs) constitute Damaged-Based Agreements (DBAs) and compliance with the requisite Regulations shall be necessitated if they are considered DBAs.[184]

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174 Id.

175 Id.

176 Id.

177 Id.

178 R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents), [2023] UKSC 28.

179 Id.

180 Id.

181 Id.

182 Raif Hassan, William Obree et. al , *Upheaval in the Litigation Funding Industry: UK Supreme Court Rules that Many Litigation Funding Agreements are Unenforceable*, White & Case, August 2023, online at https://www.whitecase.com/insight-alert/upheaval-litigation-funding-industry-uk-supreme-court-rules-many-litigation-funding (visited on August 2, 2023).

183 R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents), [2023] UKSC 28.

184 Id.

What is the effect of the Supreme Court case in light of the Essar case effect?

From the onset, the Supreme Court case has been imperative in revealing the stance that the litigation funding industry has taken for years: that litigation funding agreements have not been regarded as Damaged-Based Agreements (DBAs).[185] The general practice was that such agreements would be enforced as ordinary binding contractual arrangements and hence, compliance with the conditions stipulated in the applicable regulatory regime was not necessitated.[186] The case has debunked this assumption.

In turn, it is predicted that funders and claimants in the United Kingdom will be forced to engage in a comprehensive review of their funding arrangements to ascertain their compliance with the DBA Regulations.[187] It is reported that some funding institutions have downplayed the prospective impact of the Supreme Court's decision on the funding industry claiming that "*the decision is not generally expected to impact the economics of legal finance and will not deter our members' willingness to finance meritorious claims. It will only affect how legal finance agreements are structured so that they comply with the regulations*".[188]

On the other hand, funders have nevertheless expressed their concerns regarding funds that have already been advanced under unenforceable arrangements and the palpable risk of accruing losses as a result of non-compliance with the DBA Regulations.[189] According to a White & Case, one funder has already estimated that "hundreds" of funded litigation law suits may be affected by the ruling.[190] Moreover, it has been predicted that funders may have to consider restructuring their arrangements to meet this compliance.[191] Consequently, in the event this new restructured funding arrangement does not disclose a risk/reward portfolio, the claimant or funder may be forced to abandon the claim and this could predispose a substantial adverse costs claim against the claimant.[192] More complexities may be observed for instance, in cases where the funding arrangements will not be subject to restructuring, defendants may make applications for security for costs.[193]

In general, it has been estimated that the Supreme Court's decision will instigate "a substantial upheaval" in the third party funding litigation industry where adherence to the DBAs regulation has not been customary.[194]

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185 Doug Watson, Piers Plumptre et. al, *UK Supreme Court Rules That Many Litigation Funding Agreements Are Unenforceable in England & Wales*, 'Gibson Dunn August 2 2023, online at </uk-supreme-court-rules-that-many-litigation-funding-agreements-are-unenforceable-in-england-and wales/#:~:text=In%20a%20greatly%20anticipated%20judgment,statutory%20definition%20of%20damages-based (visited on August 3, 2023).

186 Id.

187 Id.

188 Robert Wheal, Charles Balmain et.al ,*Upheaval in the Litigation Funding Industry: United Kingdom Supreme Court Rules that many Litigation Funding Agreements are Unenforceable*' White & Case August 2023, online at https://www.whitecase.com/insight-alert/upheaval-litigation-funding-industry-uk-supreme-court-rules-many-litigation-funding (visited on August 4, 2023).

189 Id.

190 Id.

191 Id.

192 Id.

193 Id.

194 Id.

In terms of English-seated arbitrations, a specific calibration of the potential impact of the decision is uncertain given that on one hand,[195] there has been a tremendous surge in the utilization of third party funding predisposed by the Essar Case (as mentioned earlier on). On the other hand, skeptics may argue that the Supreme Court's decision albeit in litigation might pierce the arbitral veil and complicate the regime of third party funding in arbitration. Again, this is mere speculation given that the regulatory regimes that govern third party funding arrangements in the United Kingdom is complex and there is doubt as to whether it spans arbitration.[196] However, it would be judicious for funders and arbitration practitioners in English-seated arbitrations to adopt a conservative approach to the Supreme Court's decision and consider restructuring their arrangements in line with requisite DBAs regulations.[197]

4.2 Conclusion

In this regard, this paper nevertheless endorses the practice of third party funding amidst the nuances that might be instigated as a result of the recent United Kingdom Supreme Court case. While having regard to the ramifications of the decision is prudent in predicting the latitude and longevity of third party funding practice, this paper equally concludes that it would be too premature to dismiss the practice or water down the strides made in the industry as a result. Akin to all things, only time will tell.

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195 Doug Watson, Piers Plumptre et. al, *UK Supreme Court Rules That Many Litigation Funding Agreements Are Unenforceable in England & Wales*, Gibson Dunn August 2023, online at https://www.gibsondunn./uk-supreme-court-rules-that-many-litigation-funding-agreements-are-unenforceable-in-england-and-wales/#:~:text=In%20a%20greatly%20anticipated%20judgment,statutory%20definition%20of%20damages%2Dbased (visited on August 3, 2023).

196 Id.

197 Robert Wheal, Charles Balmain et.al, *Upheaval in the Litigation Funding Industry: United Kingdom Supreme Court Rules that many Litigation Funding Agreements are Unenforceable*, White & Case 2nd August 2023, online at https://www.whitecase/insight-alert/upheaval-litigation-funding-industry-uk-supreme-court-rules-many-litigation-funding (visited on August 4, 2023).

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