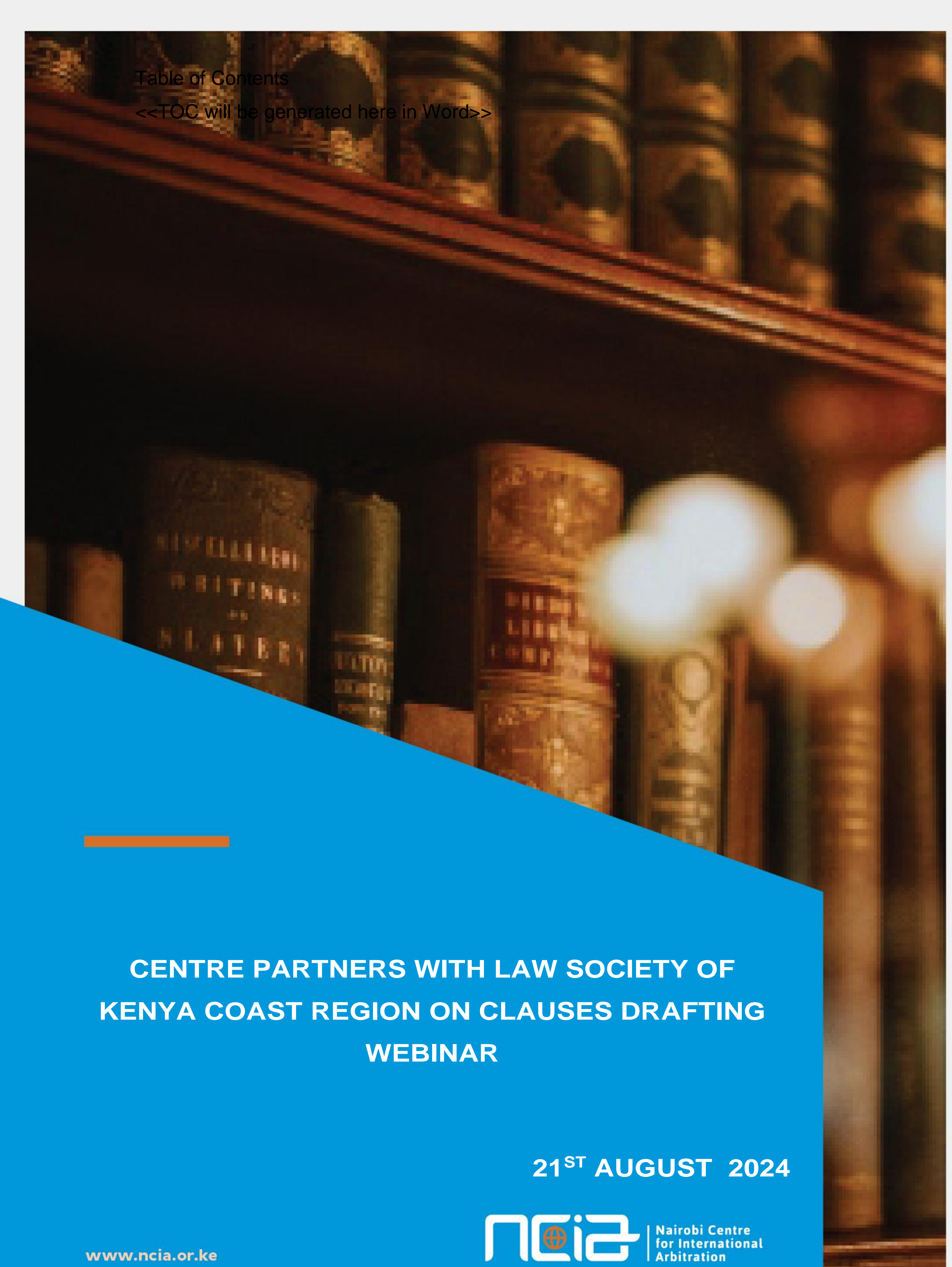

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CENTRE PARTNERS WITH LAW SOCIETY OF KENYA COAST REGION ON CLAUSES DRAFTING WEBINAR

21ST AUGUST 2024

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NCIA AND LAW SOCIETY OF KENYA COAST REGION   WEBINAR SERIES

As part of the Centre's webinar sensitization series, the Centre in partnership with the LSK Coast Region hosted a free Webinar on 21st August 2024 targeting members of the Law Society of Kenya in the region titled **"Drafting an effective Dispute Resolution Clause''.** The webinar attracted members of the Law Society of Kenya including advocates, ADR practitioners and students.

The panelists and the moderator were alternative dispute resolution experts and professionals who included Ms. Benette Nzamba, a Certified Mediator and Advocate of the High Court of Kenya who was also the moderator, Ms. Mumtaz Khan ,a *Certified Mediator,*Ms. Eunice Lumallas,Mr. Calvin Nyachoti, Advocate of the High Court of Kenya and a Certified Corporate Secretary and Ms. Wanjiru Ngige a mediator and *Partner at Ngige Aluvale and company Advocates LL)-Panelist*

The topics for the day included *Key ingredients of a well written Arbitration agreement, multi-tiered Dispute resolution clauses and common pitfalls of drafting and the use of technology in Arbitration today.*

Mr. Calvin Nyachoti began the discussion by tackling the topic '***Key ingredients of a well written Arbitration agreement***' where he noted that good legal drafting is more than just putting words on paper as it is about precision, clarity, and foresight.

Co-operative Bank House,
8th Floor, Haile Selassie Ave
P.O. Box 548-00200
Nairobi, Kenya
Tel: +254 020-222 4029
Mob: +254 771 293 055
info@ncia.or.ke
www.ncia.or.ke

He observed that before drafting, one should create a visual map of the key clauses and their relationships as this helps to ensure that there is logical flow and avoids contradictions. He noted that the drafter should have the end in mind while considering how the document will be interpreted in court or arbitration.

A Midnight clause can be included and is drafted before or after main contract

He noted that the key Ingredients include clearly defining the disputes submitted to arbitration and should include the subject matter. Another consideration he noted is the scope of arbitration. This is the nature of the disputes agreed to by the parties for settlement by arbitration and should be as broad as possible, such as covering "all claims arising from or relating to the contract and/or the relationship between the parties.

Another important consideration is the seat of arbitration/procedural law. This should specify the seat of the arbitration in the arbitration agreement. The seat of arbitration is the legal place of arbitration, which consequently determines the procedural framework of the arbitration (Lex-*arbitri*). He noted that it may sometimes coincide with the physical place where the hearing takes place, other times not. He noted that consideration should also be given for virtual arbitrations

On the g**overning law, he noted that it may s**ometimes be part of or a separate clause from the arbitration agreement. The laws that will govern the arbitration agreement should be defined and applied to the arbitral proceedings and specify the jurisdiction for any disputes. **This he noted** prevents legal ambiguities, especially in cross-border transactions, and ensures that disputes are handled in a preferred legal environment.

On the number of arbitrators, he cited the provisions of the Arbitration Act, 1995 adding that the parties to the agreement should ideally specify the number of arbitrators that are to be appointed for arbitration and the procedure that is to be adopted for such an appointment. Typically for large arbitrations, the parties to an arbitration agreement appoint three arbitrators, two of whom are to be chosen by the parties, i.e. one arbitrator per party. He added that the two arbitrators appointed by the parties appoint the third arbitrator, known as the presiding *arbitrator/Umpire*.

For institutional arbitration, he noted that the third Arbitrator is appointed by the appointing authority, adding that it usually serves parties to go with one Arbitrator as a way of managing cost and efficiency. Occasionally, he noted that parties have agreed even on the individual Arbitrator.

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He advised that If parties set the number to one, they may by consent when the stakes are very high because having more arbitrators (perhaps with differing specialties or backgrounds) would have been advantageous. On occasion, arbitral institutions have a very good sense of when three arbitrators are better than one and they will take a determination only when an arbitration has commenced.

On l**anguage and currency, he advised that to** avoid ambiguity with respect to cross boundary transactions, and arbitral proceedings, arbitration agreements should state the language in which the proceedings are to be conducted.

The arbitrators and the parties he noted should be well-versed in this language for the convenience of proceedings. Currency if not stated in the contract, may also be stated in the dispute resolution clause.

On the Institution, he noted that parties can always opt for either ad hoc or institutional arbitration. If institutional, then the parties select the preferred arbitral institution in the arbitration agreement. e.g. NCIA, LCIA, ICC etc. Typically, he noted that the rules of the institution that the parties choose will automatically apply to arbitral proceedings. However, it is preferable for the agreement to specify that the rules of the preferred institution shall apply to the proceedings.

On the Use multi-tiered dispute resolution clauses with prudence, he noted that multi-tiered clauses usually provide for an escalation of dispute resolution mechanisms.

In conclusion, he observed the following key points.

- It is important to ensure clarity and precision in drafting arbitration clauses particularly across multiple related agreements to ensure that all potential disputes, especially those involving intricate financial, operational or legal arrangements, are clearly addressed.
- This reduces instances where the first dispute is about the arbitration clause, rather than the main dispute itself. This promotes efficiency in dispute resolution and reduces the likelihood of protracted legal battles over jurisdictional issues and the associated costs.

Ms. Eunice Lumallas took participants through the topic ***'multi-tiered dispute resolution clauses and common pitfalls of drafting'*** where she noted that dispute Resolution clauses, crucial clauses in any agreement, often forgotten or left out or otherwise negotiated last minute and are often referred to as "*midnight clauses"* adding that not one size fits all and being an art, one should put some thought when

drafting this clause

She observed that badly drafted clauses can lead to complications in resolving the dispute, increased time and cost. She observed that the joy and art of a well drafted clause is disclosed when a dispute arises, and the commercial relationship is threatened.

She observed that language use is equally important with common phrases such as "in connection with", "arising out of", "under" or "related to" all have different meanings, some broader than others. The drafter should therefore **cover all and Limit/Carve outs:** Trying to carve out certain types of disputes often results in unforeseen consequences and should be avoided wherever possible; and on the parties she observed that the right parties should be identified. The arbitration agreement, he noted, should include the party against whom any award will be enforced. Sime of the considerations when drafting dispute resolution clauses, she noted includes whether the drafter will be the party defending against a claim, whether a party likely to initiate a claim and consideration of the relationship between parties.

Other are the country where enforcement will be sought and implications if mediation or arbitration and the complexity of the dispute and whether the dispute relates to several related agreement/parties so that there may be joinder or consolidation of suits. She advised that the drafter should avoid copy pasting as any practice of copy pasting is abhorrent, clarity in drafting, being precise as it helps with certainty, simplicity, and identifying any pre-court/ arbitral processes and use appropriate language e.g. mandatory. Others are incorporating a time frame, ensuring that the decision makers are identifiable and that the state -arbitral award shall be final and binding. Ms. Lumallas also provided an in-depth review of Tiered dispute resolution clauses and diabolical arbitration clauses.

The last presentation was by Ms. Wanjiru Ngige who took participants through the topic "***The use of technology in Arbitration today*"**. While making her presentation, she noted that the Arbitrator wore the hat of a Case Manager, Master of the Facts and counsel for the parties. She noted that as a Case Manager, the arbitrator is responsible for running the proceedings efficiently and fairly and as the master of the facts, he is responsible for evaluating the evidence both oral and documentary,

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assessing witnesses and determining the facts to arrive at a just award.

As a Counsel for the Parties she observed that the arbitrator has the duty to aid in the administration of justice.

She highlighted the following as the drivers of Technology in Arbitration.

- COVID-19 pandemic - shift to online platforms and remote operations.
- Complex disputes with complex facts and bulky evidence
- Multi-party disputes with parties in different jurisdictions – International Arbitration
- The drive to go “paperless”
- Common in international arbitrations
- Key advancements include online case filing, collection of electronic evidence and remote hearings. How is Technology changing Arbitration

The following were highlighted as the advantages of Technology in resolving disputes.

- Efficiency and Ease of Speed – the Tribunal can efficiently set up mentions, pre-trial sessions easily and with speed
- Cost Saving – no traveling/accommodation costs for sessions
- Transparency – recorded sessions mean that the record is accessible, referable and cross checkable
- Real time collaboration – multi-user access
- Remote Accessibility – persons who cannot travel can participate in the proceedings regardless of where they are.
- Document Management-large/bulky documents can be organized & stored in a structured manner easing retrieval
- Case-Preparation & evidence presentation
- Note-taking features can ease stenography
- Streamlined and effective case management

There following were highlighted as drawbacks and concerns in the use of technology as a facilitator of arbitration.

- Complex – more advanced software is complex to use; often requires familiarity to use effectively

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- Reliability – software glitches, compatibility issues can disrupt presentations and lead to delay
- Internet/Infrastructure dependent – without internet or adequate infrastructure such as video conferencing equipment, software will not be as effective or as impressive
- Costly – installing effective software is not cheap and may include initial installation and subscription costs
- Errors – manual interventions are necessary. For instance, with note-taking software, proofing is still required
- Confidentiality - Online platforms are not always secure and there is always a risk of security breaches. Undermines confidentiality which is a key pillar of arbitration Additional investments in cybersecurity and data protection measures

In her conclusion, she noted that navigating technology effectively, integrity of arbitration is as important as its efficiency. The objective should be to maximize benefits and minimize drawbacks - Arbitration works best when it is hybrid, using technology for case management and non-hearing sessions. She advised that practice makes perfect. If an arbitrator is unfamiliar with a platform, he should research it ahead of time and learn its features. She noted that it is also important to deliberately consider settlement options throughout the proceedings.

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