

Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR

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Abstract

This paper examines the efficacy of the arbitral law and ADR of Kenya. It postulates that while various reasons may be advanced to justify the poor utilization of the arbitral and ADR processes, the fact that from its inception in 1914, the legal framework disregarded local dispute resolution mechanisms is discernible as the main exposition. Second, domestication of international conventions has not engendered arbitration since it was adopted without the necessary policy framework, modifications or adaptation of the law to local circumstances. The Arbitration Act 1968 illuminates this postulation succinctly. The existing legal framework is oblivious to ADR mechanisms, is replete with omissions and encapsulates no decipherable policy. In a nutshell, the legal regime can neither enhance nor endear arbitration or ADR. There is a compelling case for comprehensive reforms and revision of the Arbitration Act, 1995.

Key Words: Arbitration, ADR, Legal Framework, Kenya.

INTRODUCTION

Kenya has had laws on Arbitration from as early as 1914,¹ is a signatory to both the New York² and the Washington Conventions³ and adopted UNCITRALs Model Law in 1995. Nevertheless, arbitration has yet to win the confidence of traders and others as one of the basic dispute resolution mechanisms in the country. The level of utilization of this important method of resolving civil disputes is disconcerting and there is an overwhelming case for a paradigmatic shift of emphasis from litigation to arbitration. The most basic hallmark of arbitration is the liberty enjoyed by the parties in fashioning the proceedings. They have capacity to tailor the scope of the submission. They enjoy wide latitude in selecting the persons who will serve as arbitrators. This is a form of security that has no parallel in litigation. Essentially, arbitration is a private process with a significant degree of autonomy and self sufficiency. It is characterized by countless advantages; notably, neutrality, finality, binding nature of decisions, speed and confidentiality.⁴ Although the arbitral process has several shortcomings⁵ and is unsuitable in circumstances in which the dispute involves many parties, it is commonly a perfect substitute for litigation. It does not deny the parties the right to seek judicial redress if they so desire and more importantly, if a party is dissatisfied with the arbitral award, it is entitled to challenge the award in the High court which has jurisdiction to set the award aside.

Amazingly, parties to contracts and other economic undertakings prefer ordinary courts in dispute resolution. As a consequence, court diaries are perpetually clogged and cases take far too long to conclude. On average, civil cases take between four and eight years to conclude. Land disputes may take as long as twenty years.⁶ Most litigants are unaware of other cost effective and reliable alternatives. A writer with one of the most authoritative Business Newspapers in Kenya recently remarked that: "When arbitration is fully embraced as an alternative solution to resolving intriguing commercial disputes, a great deal of workload in the judiciary will be eased"⁷ The upshot of these words is that arbitration has yet to attain the level of acceptance and utilization necessary to make it an important dispute resolution mechanism in Kenya. Against this background, the centrality and importance of arbitration in dispute resolution cannot be gainsaid.

¹ Arbitration Ordinance, 1914

² This is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

³ This is the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965.

⁴ See ICC International Court of Arbitration, "International Dispute Resolution Services: Introduction to Arbitration" at <http://www.iccwbo.org/English/arbitration/introduction.asp>, (last visited on Feb.18th 2009).

⁵ For example the process can be more expensive than ordinary courts and arbitral awards have no precedential value.

⁶ See *George Njau Maichibu v. Mungai Maichibu & Joseph Kimani Waithima* (2007)eKLR which was filed in 1981 but was not concluded until 2008

⁷ Benson Wambugu, *Kenya: Arbitration Cuts Backlog in Courts*, BUSINESS DAILY June 23, 2008 at 2.

But why has arbitration not been embraced even by the business community and those involved in commerce? The answer to this fundamental question lies partly in the manner in which arbitration was introduced and adopted before and after independence. For introductory purposes, this paper argues that one of the reasons why the impact of arbitration has yet to be felt is that it was presented as an exotic concept foreign to the experiences of the local population and business community. This hypothesis is exemplified below. Second, it is discernible that there has never been a clearly defined policy to promote arbitration and ADR. Third, neither courts of law nor the legislature have actively promoted arbitration as a dispute resolution mechanism. Fourth, the legal framework has not played the requisite facilitative or supportive role for arbitration. For purposes of clarity in this paper, arbitration is not treated as an integral part of ADR.

Until recently, courts appear to have been guided by the traditional view that they had exclusive jurisdiction in dispute resolution. This notion is predicated on the conception that judicial power is the exclusive preserve of the state and arbitrators exercise powers delegated to them by the state. Being a private and consensual procedure, arbitration has been perceived as competition with the courts in the administration of justice⁸. Judicial control of the arbitral process has been imperious hanging like the proverbial Sword of Damocles. However, with time, courts have grudgingly accepted that they cannot cope with their ever increasing work load, and they are slowly embracing arbitration and ADR, even though it is not out conviction that it is a positive alternative. Sir John Donaldson's observation that arbitrators and judges are partners in the business of dispensing justice; the judge in the public sector and the arbitrator in the private sector has been proved to be counterfactual.⁹

Courts of Law have not been instrumental in the popularization and promotion of arbitration as a dispute resolution mechanism. Although the Court of Appeal for Eastern Africa appear to have recognized the role of arbitration in the 1960s,¹⁰ courts have not been proactive in encouraging and enabling litigants appreciate the benefits of arbitration yet it is expressly provided for by the Civil Procedure Rules.¹¹

Rather belatedly, the words of Justice Visram in *Alfred Wekesa Sambu & Ors v. Mohammed Hatimy & Ors*¹² encapsulate the role courts should have been playing in promoting the utilization of arbitration and ADR in dispute resolution. He observed:

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

In this case, the National Executive Committee of the Kenya Football Federation (KFF) had passed a resolution removing the plaintiffs from various offices of the association. The plaintiffs applied for an injunction to restrain the defendants from implementing the resolution. They also sought a declaration that the purported removal was contrary to the Constitution and Rules of KFF. Astoundingly, although the constitution of the Kenya Football Federation provided for resolution of disputes by arbitration, neither party had contemplated the option. The High Court invoked section 6 of the Arbitration Act 1995 paving the way for the arbitral process. This section is dealt with in detail in Part Three of the paper. It confers upon the High court jurisdiction to refer a dispute to arbitration on application by the defendant if the agreement between the parties provide for the resolution of disputes by arbitration. Importantly, the defendants had not sought a stay of the proceedings. This decision is exceedingly sagacious since it places the arbitral process in its rightful place in dispute resolution.

It is instructive to note that currently there is no statutory framework for a court mandated arbitration or ADR before litigation.¹³ We intend to demonstrate that over the years the legal structure in Kenya guaranteed that courts retained ultimate control over the arbitral process and did not accommodate ADR.

⁸ See JULIAN D.M.LEW, THE APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 51-61 (1978).

⁹ See JOHNSON DONALDSON, ARBITRATION 98 (1982).

¹⁰ Duffus J A in *Rashid Moledina v. Hoima Ginnors* (1967) E.A. 645 at 650 quoting *Nauman v. Nathan* (1930) 37 Lloyds Rep. 250

¹¹ Order XLV

¹² (2007) e KLR

¹³ See supra note 6. Records indicate that as of early June 2008, the Alternative Dispute Resolution Sub-committee of the Rules Committee of the High Court had started working with the local chapter of the Chartered Institute of

Background

Arbitration is an adjudicative process in which the parties present evidence and arguments to an impartial and independent third party who has the authority to hand down a binding decision based on objective standards. An arbitral award is final and binding. It is equivalent to judgment of a court of law and is recognized as such.¹⁴ It is an important method of deciding disputes other than litigation and is regulated by fairly well established principles of law. Although the law on arbitration has been part of the statutory framework for many years, it is only recently that the practice of arbitration has attracted serious attention and attempts are now being made to ensure that it takes its rightful place in the dispute resolution hierarchy. Adoption of the UNCITRAL Model Law on international commercial arbitration in 1995 showed the way. Today Kenya has a local chapter of the Chartered Institute of Arbitrators with a membership of about 200 arbitrators. Lamentably, most of the arbitrators are based in Nairobi. Although these developments have raised the profile of arbitration as a dispute resolution mechanism, the level of utilization of this mechanism remains dismal. In our view this state of affairs is traceable to the manner in which arbitration was introduced and the shortcomings of the successive legal frameworks.

The transplantation of English law through the Orders-in-Council 1900 and 1907 saw the beginning of a new historical epoch in dispute resolution in colonial Kenya.¹⁵ It heralded the demise of customary practices of dispute resolution. But surprisingly, arbitration was re-introduced by the Arbitration Ordinance 1914 as an extrinsic concept. The Ordinance was based on the English Arbitration Act 1889 whose central feature was the absolute control of the arbitral process by courts of law.¹⁶ The English statute was amended in 1950 but retained the main provisions of its predecessor. After independence, Kenya's parliament promulgated a new Arbitration Act, Chapter 49 (now repealed). This Act was a carbon copy of the English Arbitration Act of 1950 and remained the operative statute until 1995 when the current Arbitration Act was proclaimed. Noteworthy, none of the successive statutes ever made reference to customary arbitration or alternative dispute resolution mechanisms.

It is thus imperative to examine the suitability of the legal framework on arbitration and make the necessary recommendations for reforms. As arbitration and other ADR become increasingly institutionalized, it is essential that the law encapsulates the necessary policy changes, and reflect societal and global dynamics. This is inevitable if the country is to take advantage of international investment and commerce. Undeniably, investors and traders attach a high premium on the availability of effective dispute resolution mechanisms as an alternative to the court system. Arbitration and ADR are the preferred options. These mechanisms encourage investment and engender growth. Our recommendations in this paper could assist policy makers and legislators in formulating the future policy and legal framework on arbitration and ADR.

Part One of the paper is a brief demonstration of how pre-colonial African communities resolved disputes by institutions and principles analogous to arbitration and mediation. This is intended to illustrate that dispute resolution practices similar to arbitration and mediation as understood in a modern context characterized many pre-colonial societies. In the same vein, it will show the propinquity of the arbitral process to practices of the local population as opposed courts of law which represented a foreign concept yearning for demystification.

Part Two is a description of the international aspects of the law on arbitration in Kenya. It seeks to elucidate the international background against which Kenyan law on arbitration is based. This part postulates that although Kenya has to some considerable extent kept pace with global developments in the law on arbitration and practice, and has even domesticated a significant part of the law, this has not engendered resort to the arbitral process as the mechanism remains largely unutilized.

Part Three is an examination of the statutory framework on arbitration and its enforcement by courts of law. This part assumes a historical and analytical approach because it examines the provisions of the Arbitration Act, Chapter 49 (now repealed) and the Arbitration Act, 1995 which is the operative statute. The essence of this part is to demonstrate how the law on arbitration has evolved. Decisions of the High Court and Court of Appeal are used to exemplify the judicial philosophy in dealing with disputes involving arbitration agreements. The analysis also highlights how the judicial philosophy has espoused or frustrated the arbitral process. The last part embodies our conclusion and recommendations for reform.

Arbitrators to develop a framework for a court mandated arbitration or ADR before litigation. In addition, Order 45 Rule 3 provides that a court of law can order arbitral proceedings only if the parties file consent order to that effect.

¹⁴ See ENCYCLOPEDIA OF FORMS AND PRECEDENTS Vol3 (1) para. 2.

¹⁵ This is the precursor to the Judicature Act, Cap 8 Laws of Kenya.

¹⁶ Section 21 of the Act gave the court power to direct an arbitrator or umpire to state any question of law arising in the course of the reference or an award or part thereof in the form of a special case for the decision of the court.

From the analysis in part three, it follows that there is a defensible argument for reforming the law on arbitration. It is our hypothesis that one of the most effective ways of institutionalizing the arbitral process is to recognize arbitration as a profession and provide for a professional body of arbitrators to *inter alia* spearhead the popularization and utilization of the arbitral process in dispute resolution. The import of this would be that experts in particular fields for instance transport, co-operative societies, horticulture and micro finance would be in a position to become arbitrators. Such a body should in addition be vested with power to prescribe rules of etiquette and punish errant arbitrators. The fact that the current statute does not prescribe the basic obligations of arbitral tribunals does not augur well with the arbitral process. It is critically important that the obligations be expressly defined. Moreover, their liability, if any, or immunity should be explicit. An argument is also made for further minimization of the instances in which the High Court can intervene in the arbitral process.

Customary Arbitration

Before the advent of colonialism and establishment of the modern state, pre-colonial societies in Africa had indigenous methods of resolving disputes. Many ethnic groups had evolved sophisticated dispute resolution mechanisms including mediation and arbitration though not described in such majestic terms. These mechanisms were characterized by overlap rather than clear boundaries. Mediation and arbitration were preferred because of their capacity to promote cohesion even after disruptive disputes. Restoration of the pre-dispute cordiality was an integral part of African culture founded on the principle that everyone was his brother's keeper.¹⁷

Kikuyu and Kamba Customs

It is important to appreciate from the outset that African customary jurisprudence did not distinguish criminal and civil cases. For instance, under the customs of the Kamba community, whenever a person was accused of rape, the dispute between the families involved would be resolved by a Council of Elders which had mandate to determine how many cows or goats the offending family would give the aggrieved family. This resolved the dispute in totality. Among the Kikuyu, discounting minor disputes within a homestead which were resolved by the head of the house as a "judge," all other disputes were resolved by a Council of Elders (referred to as "*Kiama*").¹⁸ If a family dispute was serious, all the heads of families within the kinfolk (referred to as "*Mbari*") would be invited by the head of the family involved to participate in the resolution.¹⁹ The power to resolve all land disputes was vested in the Council of Elders, which also conducted all land transactions.²⁰ In a typical dispute, disputants would take a customary oath to affirm the veracity of their testimony, present their evidence and call witnesses, if any, to testify on their behalf. The elders would then consult between themselves and decide the matter. Almost invariably, the Council of Elders would decide what the party whose rights had been violated would receive as compensation, which ordinarily took the form of cows or goats. The decision was typically announced by the senior-most elder. The disputants would then be asked if they agreed with the decision of the elders.²¹ If either of the parties disagreed with the decision, the matter would be postponed to another day for reconsideration and the decision of the Council of Elders at this stage would be final. The Council of Elders made all its decisions by consensus and they were rarely contested by the disputants.²²

Customs of the Kipsigis

Among the Kipsigis which is a sub-ethnic group of the larger Kalenjin community, dispute resolution operated at two levels depending on the gravity of the dispute. The lower level was the *kotigonet* which literally means giving advice. This institution was used to resolve minor disputes, mostly in a household or between neighbors. In these instances, the neighbors acted as arbiters by exhorting and persuading the disputants to live amicably. Ordinarily, 4-5 adult males took part. The eldest man in the group acted as the chairperson to maintain order. Although the *kotigonet* had no structured procedure, it mollified parties and resolved many minor disputes. The more serious disputes and those that the *kotigonet* could not resolve were resolved by the *kokwet* or *kiruogik* which literally means judgment. At least fifteen persons participated in decision making. Unlike the *kotigonet*, the *kokwet* had a formal procedure and was presided over by a volunteer who had to be a senior male.

¹⁷ See generally Andrew Chukwuemerie, *The Internationalization of African Customary Law of Arbitration*,

14 AFRI. J. INTL. COM. L., 143-175 (2006).

¹⁸ JOMO KENYATTA. FACING MOUNT KENYA 205 (1938).

¹⁹ *Id.* at 206.

²⁰ *Id.* at 26.

²¹ *Id.* at 208.

²² *Id.*

The person presiding was obligated to maintain order and facilitate resolution of the dispute. Proceedings took place at the place where the dispute occurred, such as land or the particular homestead. The disputants would give evidence and call witnesses to provide further testimony. They would then be excused for the *kokwet* to deliberate on the matter. Those present were now free to give their views on the dispute. The eldest person spoke first to set the tone and others followed. More often than not, the views of the eldest person, who had the privileged of speaking first, carried the day. Decisions were unanimous.²³ Once the decision was made, the disputants would be recalled and the chairperson would formally announce it to them. If they were agreeable, the matter was deemed resolved. In the event of any dissent, another meeting would be scheduled to reconsider the matter. The dispute resolution mechanisms of the Kipsigis were eminently intended to ensure that settlement was as non-disruptive as possible. It is evident that dispute resolution was contingent on negotiation rather than adjudication.

The approach to dispute resolution employed by the three ethnic groups relied upon establish beyond controversy that customary arbitration and mediation were principal dispute resolution mechanisms. The arbitral approach to dispute resolution was well entrenched in the social fabric of many African communities during the pre-colonial era. With the advent of colonization, these institutions were progressively dismantled by, *inter alia*, being denied legal recognition and ultimately ceased to function. It is arguable that had these practices been recognized, legitimized and thus elevated as national approaches to dispute resolution, with necessary modifications, this would have placed arbitration on a different platform in the dispute resolution matrix.²⁴ For many years arbitration has been viewed suspiciously and only a few had the temerity to go for it even where it was expressly provided for in the contract. Emphasis has exclusively been on litigation. It is therefore not surprising that utilization of arbitration as a dispute resolution mechanism remain inauspicious to this day.²⁵

The foregoing discussion has demonstrated that arbitration and alternative dispute resolution mechanisms are neither exotic nor imported as portrayed. It is palpable that their non-recognition and legitimization by the operative legal framework partly explains their limited utilization in dispute resolution. Faced with such an unsatisfactory state of affairs, it becomes imperative to illuminate the origins and justifications of the legal framework. We now propose to focus on the international background against which Kenya's arbitral law is based. This will enable us contextualize the operative statutory framework.

International Aspects of Arbitral Laws

Kenya is a Contracting Party to the New York and Washington Conventions and has domesticated the UNCITRAL Model Law which addresses different aspects of arbitration in disputes resolution. Indisputably, International Conventions play an important role in the transnational legal environment. With regard to arbitration, they engender predictability by establishing common approaches to the enforcement of arbitral agreements and awards.²⁶ Although the Washington Convention was designed to facilitate foreign investment, its contribution in popularizing and furtherance of international commercial arbitration has been phenomenal. However, the New York Convention and the UNCITRAL Model Law are regarded as the mainstays of international commercial arbitration. Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention")

The ICSID Convention became operational on October 14th 1966 with about 28 members states; today 144 countries have ratified the convention to become contracting parties. Kenya signed the Convention on May 24th 1966, deposited the instrument of ratification on January 3rd 1967, and the Convention came into force on February 2nd 1967. The convention, which was promulgated under the auspices of the World Bank, establishes a specialized and relatively comprehensive arbitral regime. It provides the basic procedural framework for arbitration of investment disputes arising between member countries and investors who qualify as nationals of other countries. In addition, a plethora of regulations support the convention.²⁷ The Convention establishes the International Center for Settlement of Investment Disputes (ICSID) whose principal mandate is to provide facilities for conciliation and arbitration between contracting states and nationals of other contracting states.²⁸

²³ See generally MICHEAL SUTTON, *THE KIPSIGIS: A CASE STUDY IN CHANGING CUSTOMARY LAW*, (1977).

²⁴ See Senyo Adjabeng, *Alternative Dispute Resolution in Ghana* mhtml: file:///H:/Alternative Dispute Resolution in Ghana.mht. See also, Adedoyin Rhodes-Vivour: *Arbitration and Alternative Dispute Resolution as an instrument for Economic Reform*, http://www.ciarbnigeria.org/Exco_Adedoyin_Rhodes_Vivour, last visited on March 12th 2009

²⁵ See HENRY J.B. & ARTHUR L. M. *ADR PRINCIPLES AND PRACTICES* 80 (2005).

²⁶ JACK J.C. *INTERNATIONAL COMMERCIAL ARBITRATION: AMERICAN PRINCIPLES AND PRACTICE IN A GLOBAL CONTEXT* (2007).

²⁷ See <http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR>. (last visited of March 5th 2009)

²⁸ Article 1

The Center does not conciliate or arbitrate disputes but provides the institutional and procedural framework for independent arbitrators constituted in each case to resolve the dispute.²⁹ Thus, the purpose of the center is to provide facilities for arbitration of investment disputes. The Convention confers upon the Center jurisdiction over disputes arising directly out of an investment. Although the arbitral procedures conducted under the aegis of ICSID are not mandatory, because of the profile of the Center, which though autonomous is an integral part of the World Bank system, contracting parties and their nationals have frequently utilized its services in investment disputes³⁰. Arbitral proceedings are instituted by a written request to the Secretary General.³¹ The Convention contains detailed rules on the constitution,³² powers and functions of the Arbitral tribunal,³³ the award,³⁴ replacement and disqualification of arbitrators,³⁵ as well as recognition and enforcement of awards.³⁶

One of the most striking features of the ICSID arbitral process is the inviolable character of the award. It is insusceptible to the jurisdiction of domestic courts of the contracting parties. Contracting parties are required to recognize and enforce the arbitral award.³⁷ This is an unmatched attribute of the ICSID arbitral process. Apart from facilitating arbitration and conciliation, ICSID has since 1978 enforced the Additional Facility Rules, which authorize the ICSID Secretariat to administer certain categories of proceedings between states and nationals that are *ultra vires* the Convention.³⁸ It is evident that Contracting Parties and their nationals have over the years made use of the ICSID facilities in the resolution of investment disputes. A review of the disputes filed, awards made, and pending cases create the picture of a system that has won the confidence of investors and Contracting Parties in every part of the globe.³⁹

But, like the municipal arbitral processes, investors in Kenya have not utilized the ICSID facilities. Since 1967 when Kenya became party to the Convention, only one dispute has been registered and determined under the auspices of ICSID. In the *World Duty Free Co Ltd. V Republic of Kenya*,⁴⁰ the claimant, a company incorporated in United Arab Emirates had won a concession to operate duty free shops at the Jomo Kenyatta and Moi International Airports in Nairobi and Mombasa respectively, but the Government of Kenya terminated the contract unprocedurally. The claimant referred the dispute to ICISD and an award was made in its favor. Although it is prohibitively expensive⁴¹ to arbitrate under the aegis of ICSID, this cannot be the sole reason for the non-utilization of these facilities. Many foreign investors continue to rely on Kenyan courts in dispute resolution.⁴² Undoubtedly, the ICSID arbitral process has helped in the popularization and utilization of arbitration particularly on the international plane. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) The growth in international commercial arbitration and the need to harmonize arbitral laws led to the adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁴³ The “New York Convention,” as it is ordinarily referred to, was adopted by a diplomatic Conference on June 10th 1958, prior to the establishment of the United Nations Commission on International Trade Law (UNCITRAL). It came into force on June 7th 1959. The Convention is recognized as one of the foundational instruments of international arbitration. It obligates courts of Contracting Parties to give effect to arbitral jurisdiction whenever proceedings are instituted pursuant to a contract containing an arbitration clause.⁴⁴

²⁹ See ICSID Web page, <http://ICSID.worldbank.org/ICSID/Index.jsp>. (Last visited on Jan.29th 2009).

³⁰ In 2008 for instance, a total of 145 disputes were filed. This was the highest number of cases since the establishment of the center. See ICSID Annual Report 2008 at 3.

³¹ Article 36

³² Article 37-40

³³ Article 41-46

³⁴ Article 48-49

³⁵ Article 56-38

³⁶ Article 53-54

³⁷ Article 54

³⁸ In 2008 for example, two cases were registered under the Additional Facility Rules. See supra note 14

³⁹ See, <http://icsid.worldbank.org/ICSID/frontservlet>, (Last visited on March 16th 2009). The 2008 Annual Report of ICSID shows that more than 268 disputes have been registered with the Center.

⁴⁰ ICSID Case No: ARB/00/7 registered on July 17th 2000. The award was rendered on October 4th 2006.

⁴¹ Excluding panel charges which amount to USD.3, 000 per day unless otherwise agreed, the requesting party must pay a minimum of \$ 55, 000.

⁴² A review of reported cases for the last 15 years show that most of the foreign owned companies, e.g. Kenya Breweries Ltd, Barclays Bank Ltd Kenya Shell Ltd and Standard Chartered Bank Ltd appear to prefer courts of law in dispute resolution.

⁴³ See HENRY & ARTHUR supra note 12 at 69

⁴⁴ RONALD B. HANDBOOK OF ARBITRATION PRACTICE 348 (1987). See also http://www.uncitral.org/uncitral/en/instrument-text/Arbitration/NY_Convention.html. See also Article 11

In addition, it requires courts to recognize and enforce foreign awards without reviewing the merits of the arbitral decision, subject to a few exceptions; e.g. the arbitrator exceeded jurisdiction or failed to accord the complaining party an opportunity to present its case.⁴⁵ A ratifying nation may elect to limit the application of the New York Convention in two ways; (i) First, it may insist on reciprocity i.e. declare that it will accord convention treatment only to awards made in the territory of another contracting party (ii) Second, it may declare that it will apply the convention only to disputes arising from relationships characterized as “commercial” under its national law.⁴⁶ UNCITRAL, whose mandate is harmonization and unification of International Trade Law has been actively involved in promoting the Convention.⁴⁷

Kenya ratified the New York Convention on February 10th 1989 and it became operational on 11th May 1989. The country’s membership to UNCITRAL expires in 2010. Inexplicably, Kenya adopted its first Arbitration Act in 1968 in total disregard of the New York Convention. Rather than incorporate the Articles of the Convention directly or even indirectly, the Arbitration Act, Chapter 49, Laws of Kenya, adopted the General Protocol on Arbitration Clauses 1923 and the Convention on the Execution of Foreign Awards 1927⁴⁸ as its First and Second Schedules respectively. Both the Protocol and the Convention were repealed by the New York Convention.⁴⁹ The General Protocol on Arbitration Clauses required Contracting Parties to recognize agreements to refer existing or future disputes in commercial matters to arbitration.⁵⁰ Disputes not contemplated by the phrase “commercial matters” were not arbitrable. The Protocol did not specify the character of the agreement. Although the Convention on the Execution and Enforcement of Foreign Awards required Contracting Parties to recognize and enforce foreign arbitral awards, the relevant Article was not couched in mandatory language. Second, it gave courts plenary power to refuse enforcement.⁵¹

Admittedly, the New York Convention internationalized commercial arbitration by *inter alia* requiring courts in member states not only to recognize but also to enforce arbitral awards.⁵² Contracting Parties are constrained to recognize written arbitration agreements to refer disputes from contractual and other defined legal relationships to arbitration. However, the subject matter of the dispute must be capable of resolution by arbitration.⁵³ This is a limitation on arbitrability of disputes. The Convention recognizes the substratum of arbitration which is autonomy of the parties. If an action founded on an arbitration agreement is instituted in a court of law, the court is enjoined to refer it to arbitration should one of the parties so request unless the agreement is inoperative, void or incapable of being performed.⁵⁴ This Article reduces the discretion of courts to decline a stay of proceedings. Arguably, one of the most serious drawbacks of the New York Convention is Article V which enumerates various grounds on which recognition and enforcement of an arbitral award may be refused. Some of the circumstances are too enveloping, such as “... the award would be contrary to the public policy of that country.” Although the Convention provides that an arbitral award is amenable to being set aside, judicial authority in different jurisdictions show that an award can only be set aside by “the competent authority of the country in which or under which law that award was made.”⁵⁵

Closely allied to this argument is the fact that the Convention confers sweeping powers on domestic “competent authorities” to refuse to recognize and enforce foreign awards.⁵⁶ This Article appears to give competent domestic authorities power to question the substantive law of other jurisdictions and this could stifle international commercial arbitration. The phrase “public policy” is too indeterminate, imprecise and susceptible to multiple interpretations. Arguably, it is possible for courts to frustrate enforcement of awards. However, it is irrefutable that the New York Convention is one of the most important multilateral Conventions on arbitration and many countries have domesticated some of its major articles.⁵⁷

⁴⁵ Article V

⁴⁶ Supra note 24 at 61

⁴⁷ See <http://www.uncitral.org/uncitral/en/arbitration.html> (last visited on Jan.24th 2009).

⁴⁸ These were documents concluded under the auspices of the League of Nations.

⁴⁹ Article VII (2)

⁵⁰ Para. 1

⁵¹ Article I & II

⁵² Article III

⁵³ Article 2

⁵⁴ *Id.*

⁵⁵ See *International standard Electric Corp. v. Bridas Sociedad Anonima Petrolera* 745F. Supp.172 (1990) US District Court of the Southern District of New York, *Croatian Company.v. Swiss Company*, 2 CROATIA ARB’N YEARBOOK 205(1995)Croatian High Commercial Court (1986), *Oil 7& Natural Gas Commission v. Western Co. of North America* 1986 74 A.I.R. S.C. 674 (1987)

⁵⁶ Supra note 34. This Article catalogues the circumstances in which a domestic court can refuse to recognize and enforce a foreign award.

⁵⁷ The Arbitration Act, Act No.4 of 1995 embodies Articles 1-V of the Convention.

This assertion is reinforced by the fact that the UNCITRAL Model Law on arbitration embraces the concept of the Convention and indeed adopts language. It is important to emphasize that in addition to the international conventions, Kenya has entered into bilateral investment agreements which provide for the resolution of disputes by arbitration. The most conspicuous is the Overseas Private Investment Corporation (OPIC) an insurance company is owned by the United States Government. Kenya has signed an executive agreement under the auspices of OPIC which authorizes the company to insure approved investments by United States nationals in the Kenya. For our purpose, the most important precept of the agreement is that it provides for the resolution of any disputes arising between the parties by arbitration under the sponsorship of the International Center for the Settlement of Investment Disputes (ICSID). This is adequate testimony that the Government of Kenya appreciates the centrality of arbitration in the resolution of investment disputes.

UNCITRAL Model Law on International Commercial Arbitration

The “UNCITRAL Model law” as it generally known, was the culmination of a comprehensive study by the United Nations Commission on International Trade Law on ways of harmonizing of laws on international commercial arbitration. It was adopted by the Commission on June 21st 1985. The endorsement was an acknowledgment that domestic arbitral laws were inappropriate in many respects and were characterized by disparities. Most domestic arbitral laws lacked pertinent provisions and were couched in permissive terms, something that did not augur well for international commercial arbitration. It was thus imperative to improve on the New York Convention to consolidate the gains of harmonization. The Model law is a framework Convention intended to guide countries in adopting domestic arbitral laws. The law is emphatic that an arbitration agreement must be written.⁵⁸ For the first time, the law provided a definition of international arbitration. The law encapsulates the policy of autonomy of the parties and restricts the involvement of courts of law in the arbitral process. This however should not be construed as indicative that the courts have no role. On the contrary they have a substantial role to play, such as, appointment of arbitral tribunals,⁵⁹ challenging the appointment of an arbitrator,⁶⁰ termination of mandate of the arbitrator⁶¹, challenging the jurisdiction of the arbitral tribunal,⁶² and setting aside of the arbitral award.⁶³ The Model Law is explicit that courts of law cannot intervene in the arbitral process except in the circumstances provided by the law.⁶⁴ The law envisages a situation in which courts of law play a supportive role in the arbitral process. It requires courts to refer to arbitration any claim based on an arbitration agreement unless the arbitration agreement is void, inoperative or incapable of being performed.⁶⁵

Noteworthy, it embodies the fundamental doctrines of Competence-competence and severability of arbitration clauses.⁶⁶ In addition, the law catalogues an exhaustive list of the circumstances in which an arbitral award may be set aside. The list mirrors the one contained in article V of the New York Convention. But the model law goes further; it recognizes the same grounds as the basis on which a court of law may decline to recognize and enforce an arbitral award.⁶⁷ Incontrovertibly, the Model law was prompted by the need to promote international commercial arbitration and harmonize national laws on arbitration. Many countries have remodeled their national laws on the basis of the Model law. Sight must not be lost of the fact that the law was also intended to champion the use of arbitration domestically and on the international plane. The upshot of the foregoing discussion is that the Model Law is an improvement on the New York Convention. Although Kenya became a Contracting Party to the New York Convention in 1989, and has been a member of the United Nations Commission on International Trade Law and was aware of the adoption of the model law in 1985, it was not until January 1996 that the moribund Arbitration Act was effectively abrogated following the promulgation of the Arbitration Act, 1995. The statute is an unimaginative replication of UNCITRAL Model Law. The foregoing analysis is intended to show that although Kenya has been incorporating international developments in its arbitral law and effecting amendments over time, and has been involved in several initiatives, these developments and initiatives have not engendered domestic arbitration as it is for the most part unutilized. The international aspects of the law have failed in enabling arbitration to carve a niche in the dispute resolution hierarchy in the country.

⁵⁸ Chapter II is devoted to the arbitration agreement.

⁵⁹ Article 11

⁶⁰ Article 12

⁶¹ Article 13

⁶² Article 16

⁶³ Article 34

⁶⁴ Article 5

⁶⁵ Article 8. This article reproduces Article 11 (3) of the New York Convention with minor modifications.

⁶⁶ Section 16 (1)

⁶⁷ Article 34

Statutory Framework on Arbitration in Kenya

The Charter given to the Imperial British East Africa Company (I.B.E.A.) in 1888 gave the company administrative and economic power over what is now Kenya. Subsequently, Kenya was declared a British Protectorate in 1895. The last decade of the nineteenth century and the early part of the twentieth century witnessed an influx of settlers in Kenya and because there were no laws to govern the new Protectorate, English laws were transplanted to the country by Orders-in-Council 1900 and 1907.⁶⁸ The genesis of the legal framework on arbitration was the Arbitration Ordinance 1914 which was a reproduction of the English Arbitration Act 1889. The principal attribute of this Act was that it accorded courts of law ultimate control over the arbitral process in Kenya. Since the court system was at its infancy then, the Arbitration Ordinance 1914 made little if any headway in promoting resolution of disputes by arbitration. The English Parliament promulgated a new Arbitration Act in 1950 which repealed the Arbitration Act 1889.⁶⁹ Disappointingly, the Act retained the main provisions of the Arbitration Act 1889. Most notable was Section 21 which gave courts of law plenary jurisdiction over arbitral processes. The section was finally repealed by the English Arbitration Act 1979. The Kenyan Arbitration Act 1968 retained the provision until the Act was repealed in 1995.

Legal Regime under the Arbitration Act, 1968-1995

The center piece of the legal framework for arbitration in Kenya has been policy, problem resolution, and the application of the substance of common law and the doctrines of equity as ordained by the Judicature Act, Chapter 8 of the laws of Kenya.⁷⁰ African customary law has played an insignificant role in the resolution of land disputes. Before January 1996, the legal framework on arbitration was contained in the Arbitration Act, Chapter 49 Laws of Kenya. This Act was a mirror image of the English Arbitration Act 1950 and came into force on November 22, 1968. The preamble to the Act was emphatic that it was "An Act of Parliament to make provision in relation to the settlement of differences by arbitration." The Act defined an arbitration agreement as a written agreement to refer present or future differences to arbitration.⁷¹ The definition was unclear as to the character of the required writing. This was the only definition embodied in the Act and has been modified by the Arbitration Act 1995. The scope of the Act was restricted in that it could only be relied upon in the resolution of domestic disputes. It had no application to international disputes.

Role of Courts in Arbitration

One of the hallmarks of the Arbitration Act was the enormous power and latitude it gave courts of law in the arbitral process. The powers were too intrusive and had debilitating effects on its growth as a dispute resolution mechanism. The High Court had power to influence arbitral process in the following ways: (i) stay of proceedings; (ii) appointment of arbitrators and umpires; (iii) assist with the conduct of the reference such as issuing of *subpoenas* or compel discovery where the arbitrator had ordered it; (iv) enlargement of time for making award; (v) supervisory jurisdiction by removing arbitrators, special cases, allowing appeals, extension of time for commencing arbitral proceedings and refusing to enforce awards that have been improperly obtained; and (vi) enforcement of the awards. With such panoply of powers, the arbitral process was more of a court process than an independent proceeding.

Stay of Legal Proceedings

Judicial power to stay proceedings was contained in section 6 of the Act. If a party to an arbitration agreement or a person is claiming through or under him instituted legal proceedings in a court of law against any other party to the agreement or a person claiming through or under such party, the defendant could apply for the proceedings to be stayed pending arbitration. The application had to be made at any time after appearance, but before delivery of any pleadings or taking any other steps in the proceedings. The court was obligated to satisfy itself that:

- there was no sufficient reason why the matter could not be referred to arbitration in consonance with the agreement.
- the applicant was ready and willing to do all things necessary for the proper conduct of the arbitration.

It is apparent from the wording of the section that the application for stay could be made at any time after appearance. This section guaranteed courts sufficient discretion to frustrate arbitration agreements by refusing to order a stay of proceedings.

⁶⁸ See generally YASH P. GHAI & J.P.W.B. Mc AUSLAN, PUBLIC LAW AND POLITICAL CHANGE IN KENYA: A STUDY OF THE LEGAL FRAMEWORK OF GOVERNMENT FROM COLONIAL TIMES TO THE PRESENT (1970).

⁶⁹ § 44(3)

⁷⁰ See § 3 (1) (c)

⁷¹ § 2

There was intermittent litigation on this section. For example, In *Rift Valley Textiles Ltd. V. Cotton Distributors Incorporated*,⁷² the issues before the court coalesced around the construction of the phrase “arbitration agreement” in section 6(1) and “reference to arbitration” in section 6(2) of the Act. The court held that the former meant submission or reference to arbitration while the latter signified the actual reference of an existing dispute to arbitration and an agreement to refer future disputes.⁷³

The principles governing the granting of a stay of proceedings under Section 6 of the Arbitration Act were enunciated by the Court of Appeal in *Esmailji v. Mistry Shamji Lalji & Co.*⁷⁴ The appellant had applied for a stay of proceedings for the dispute to be referred to arbitration in accordance with the agreement but the trial court declined. The applicant appealed against the decision on the ground that the court had exercised its discretion improperly. The Court of Appeal was unequivocal that an applicant under Section 6 of the Arbitration Act had to satisfy the court that he was at all times willing to do everything necessary for the proper conduct of arbitration. On a preponderance of evidence, the court was not persuaded that the court had exercised its discretion improperly. Relying on the English decision in *Eleftheria*,⁷⁵ the court enunciated the principles applicable in determining whether to grant a stay of proceedings.⁷⁶ Highlighting the discretion of the court in such cases, Madan J.A. (as he then was) observed, “Under Section 6, it lies within the discretion of the court whether a stay of proceedings will be ordered...the contractors successfully showed strong cause why the matter should not be referred to arbitration. This was not a proper case for granting a stay and the refusal of stay was a proper exercise of the judge discretion.”⁷⁷

Another interesting Court of Appeal decision on this point is *East African Power & Lighting Co Ltd. V. Kilimanjaro Construction Ltd.*,⁷⁸ where the contract between the parties had an arbitration clause. The appellant had contracted with the respondent to erect transmission lines but terminated the contract without notice and ordered the respondent to discontinue performance. The respondent sued to collect damages for breach of contract. After entering appearance, the respondent applied for a stay of proceedings for the dispute to be referred to arbitration. The claimant opposed the application arguing that the appellant had *in lieu* of initiating arbitral proceedings elected to terminate the contract unilaterally. The appellate court held that there was sufficient reason not to refer the dispute to arbitration and affirmed the decision of the High Court. The court reasoned that since the appellant had not taken active steps to initiate arbitral proceedings, an obligation the law thrusts on both parties, as the court explicitly acknowledged, it had not demonstrated its readiness and willingness to go to arbitration.

This reasoning is incompatible with the provisions of section 6 which provided that a party could apply for a stay of proceedings “at any time after appearance.” The court was indirectly suggesting that there should be no application for stay of proceedings because the applicant ought to take active steps by referring the dispute to arbitration in the first place. The court was in fact exacerbating the onerous burden of proof exacted on the applicant by the law. In the words of Madan JA

“Before the court will exercise its discretion and make an order staying the proceedings, the applicant must satisfy the court not only that he is, but also that he was at the commencement of the proceedings ready and willing to do everything necessary for the proper conduct of the arbitration.”

What emerges is that the applicant must discharge the onerous burden of proof before the court can exercise its discretion in his favor.⁷⁹

These Court of Appeal decisions show that courts of law did not hesitate to stymie the arbitral process by exercising their discretion against the applicants for a stay. In our estimation, the optimal course would have been to allow the parties to proceed with arbitration in accordance with their agreements. In *Alividza v. L Z Engineering Construction Ltd.*,⁸⁰ the agreement between the parties contained an arbitration clause but the plaintiff instituted judicial proceedings. The defendant applied for a stay which the plaintiff resisted on the ground that the defendant had refused to refer the dispute to arbitration.

⁷² (1980) KLR 56

⁷³ See *The Merak* (1965) 1 All E. R. 230 at 233.

⁷⁴ (1984) KLR 150

⁷⁵ (1969) 1 Lloyd’s Rep. 237 at 242

⁷⁶(i) The court is not bound to grant the stay but has discretion to grant or not to grant (ii) the discretion to grant should not be exercised when strong cause for doing so is shown (iii) the burden of proving such strong cause is on the plaintiff (iv) in exercising its discretion, the court should take into account the circumstances of the particular case.

⁷⁷ See *RKNS v.Co. Provincial Insurance Co. Ltd.*(1982) e KLR

⁷⁸ (1983) e KLR

⁷⁹ See *Willesford v. Watson*(1873) 8 Ch. App. 473

⁸⁰ (1990) KLR 143

The court granted a stay. In *RKNS v. Provincial Insurance Co Ltd*,⁸¹ where the plaintiff did not initiate arbitral proceedings within the duration prescribed by the insurance policy and argued that the defendant had waived its right to plead the arbitration clause, it was held that since the defendant was not obligated to invite the plaintiff to refer the matter to arbitration, it was not estopped from pleading the arbitration clause. The court reasoned that there was no conduct on the part of the defendant to justify any waiver or estoppel. Unfortunately, no crystalline judicial philosophy on the construction of section 6 is decipherable. What is notable is that courts have in many instances exercised their illimitable discretion in a manner detrimental to the arbitral process. The only instance in which the court had no discretion in referring a matter to arbitration was where the parties to the suit applied that the matter be referred.⁸² In such circumstances, the equitable doctrine of estoppel restrains the parties from challenging the order of reference.⁸³

Special Case and Remission

The most draconian power of the High court over the arbitral process was embodied in section 22 of the Act which was a reduplication of section 21 of the English Arbitration Act 1950. Under this section, the court had jurisdiction to compel an arbitrator or umpire to state any question of law in the course of the reference or the award, interim award or any part of an award as a special case for the decision of the court. The court was vested with power to remit the matters referred, or any part thereof to the arbitrator or umpire for reconsideration.⁸⁴ A decision of the court under this section was deemed to be a decree and could only be appealed against with leave of the High Court or Court of Appeal. The effect of this section was to subordinate the entire arbitral process to the High Court.

Appointment and Removal of Arbitrators and Umpires

The Arbitration Act conferred upon the High Court power to appoint arbitrators and umpires in certain circumstances at the instance of either party.⁸⁵ Section 26 empowered the court to appoint an arbitrator or umpire on application by either party whenever it removed an arbitrator or umpire from office. In addition, this section gave the court exceptional power to declare the arbitration agreement inoperative.⁸⁶ It had jurisdiction to set aside the appointment of a sole arbitrator by either party if the other party had failed to appoint one within seven days of receipt of the appointing party's notice to do so.⁸⁷ However, good cause had to be shown. Curiously, the High Court had jurisdiction to convert an umpire to a sole arbitrator.⁸⁸ The Act also enabled the court to remove an arbitrator or umpire for failure to use reasonable dispatch in entering on and proceeding with the reference and making an award.⁸⁹ Section 24 gave the court power to remove the arbitrator if he had misconducted himself or the proceedings. It is arguable that the term "misconduct" is exceedingly imprecise.

Other Powers

In addition to the powers outlined above, the Act empowered the High Court to, issue summons to persons whose attendance was required to give evidence or produce documents. Second, it had capacity to make orders in respect of security for costs, discovery of documents and interrogatories, the giving of evidence by affidavit, examination of witnesses before an officer of the court or any other person, securing the amount in dispute in the reference or interim injunctions or appointment of receiver.⁹⁰ Section 28 gave the court power to extend the time for commencement of arbitral proceedings if it was of the opinion that hardship would be occasioned on the part of either party. In the same vein, the court was empowered to provide relief when a party to the arbitration agreement sought leave to revoke the authority of the arbitrator. Moreover, it could grant injunctive relief to restrain the arbitrator from acting if there was evidence of partiality or the dispute involved questions of fraud. With regard to arbitral awards, the High Court was invested with jurisdiction to, enlarge the duration within which an arbitrator or umpire could make an award.⁹¹

⁸¹(1982)e KLR

⁸² See *Kihuni v. Gakunga and Another* (1986) KLR 572

⁸³ See Lord Wilberforce in *Moorgate Mercantile Co.v.Twitchings* (1971) A.C. 890 at 903.

⁸⁴ §23

⁸⁵ Under § 12 the power was exercisable, if the parties could not agree who the sole arbitrator shall be or fail to replace an arbitrator in the event of death or incapacity or the two arbitrators appointed by the parties fail to appoint a third arbitrator or umpire or the third arbitrator or umpire dies or is incapable of acting.

⁸⁶ Under § 26(2) where the authority of an arbitrator or arbitrators or umpire was revoked by the High Court or the sole arbitrator or arbitrators or an umpire who had entered on a reference was removed by the court, the court could on application order that the arbitration agreement shall cease to have effect with respect to the dispute referred.

⁸⁷ § 9

⁸⁸ § 10

⁸⁹ § 14 (3)

⁹⁰ § 13 (4) and (5)

⁹¹ See supra note 62 subsection 2

In addition, costs payable under the award were taxable in the High Court.⁹² The provisions of the Arbitration Act 1968 referred the setting aside of arbitral awards rather perfunctorily. Under the Act, an award could only be set aside if it was proved that (i) the arbitrator or umpire had misconducted⁹³ himself or the proceedings or (ii) the arbitration or award was improperly procured.⁹⁴ It is difficult to discern whether this provision had its justification on the principle of finality of arbitral awards. Assuming that it was, then the section gave the High Court the unenviable task of ascertaining what these phrases meant.

One of the challenges of having an award set aside was the use of amorphous words, such as misconduct. Judicial authority is replete with illustrations that this term has no definitive meaning in law.⁹⁵ Its exact scope is difficult to ascertain. A better phrase would have been “serious irregularity.”⁹⁶ In *Muhindi & Anor v. Mugendo*,⁹⁷ Masime JA (as he then was) was categorical that denying a party liberty to adduce evidence material to the issues before the arbitral panel amounted to misconduct on the part of the arbitrator. Whereas it may be possible to particularize what would constitute misconduct of arbitral proceedings, it is burdensome to itemize how an arbitrator could misconduct himself. We endorse the notion that although the law should not provide for the setting aside of arbitral awards on frivolous or superficial grounds, clarity of the prescribed circumstances is paramount. The few reported decisions of the High Court and Court of Appeal show a general propensity towards upholding arbitral awards. In *Kibutha v. Kibutha*, for example, the High Court dismissed an application to set aside the arbitral award and the Court of Appeal affirmed the decision.⁹⁸ Lastly, the Act invested the High Court with authority to grant leave for the enforcement of local⁹⁹ and foreign awards. Additionally, it prescribed specific grounds on which the court could refuse to enforce a foreign award.¹⁰⁰ Section 33 (1) of the Act placed a formidable burden on applicants who sought to enforce foreign awards. Strikingly, it also gave the court power to re-open the dispute at the instigation of the respondent.¹⁰¹ Judicial attitude on the enforcement of awards espouse the jurisprudence of non-interference other than in the interest of justice.¹⁰² As early as 1967, the Court of Appeal for Eastern Africa had articulated the basic principles in *Rashid Moledina v. Hoima Ginnors*, where Duffus JA observed:

“Generally speaking, the courts will be slow to interfere with the award in an arbitration having regard to the fact that the parties to the dispute have chosen this method of settling their dispute and having agreed to be bound by the arbitrator’s decision, but the courts will do so whenever this becomes necessary in the interest of justice”¹⁰³

In this case, the court intervened on the premise that the arbitrator based the award on a misapprehension of the law. Similar sentiments were expressed by Justice Nyarangi (as he then was) in *Re Jaswantrai Aggarwal & Anor*,¹⁰⁴ where an applicant who was dissatisfied with the arbitral award contended that the arbitrator had not only misconducted the proceedings but had also acted in an *ultra vires* manner. The court refused to set aside the award. The upshot of the foregoing paragraphs is that under the Arbitration Act, Chapter 49, Law of Kenya, the High court had monstrous power over many aspects of the arbitral process and conceivably, this not only emasculated the process but had a debilitating effect on its growth as a dispute resolution mechanism. Moreover, although the Act gave the arbitrator or umpire certain powers, such as administering oath to witnesses¹⁰⁵, applying to the court for extension of time to make an award as well as power to order specific performance of contracts other than those relating to immovable property, it did not recognize arbitration as a profession. It had no definition of the term arbitrator and prescribed no qualifications, duties, powers or liability of arbitrators. For many years, only retired judges and members of the London Institute of Arbitrators could act as arbitrators. The Arbitration Act, Chapter 49, Law of Kenya did not recognize the basic principles of Competence- competence and separability of the arbitration clause.

Law Making Power Section 37 of the Act conferred upon the Chief Justice power to make laws to facilitate the arbitral process. However, the power was so circumscribed that the Chief Justice could only make rules of the court in relation to challenging or filing of awards, hearing of special cases, staying of any suit or proceedings instituted in contravention of the arbitration agreement or all proceedings in court.

⁹² § 25 (1) and (2)

⁹³ § 23 (2) Arbitration Act, 1950

⁹⁴ § 24 (2)

⁹⁵ See HALSBURY'S LAWS OF ENGLAND, 4th Edition Vol.2 at 622. The definition given has been criticized for being too wide.

⁹⁶ This phrase was considered by Donaldson J. in *Thomas Borthwick v. Faure Fairclough* (1968) 1 Lloyd's Rep.16 at 29.

⁹⁷ (1991) KLR 78

⁹⁸ (1984) KLR 244

⁹⁹ § 27

¹⁰⁰ § 33

¹⁰¹ *Id.* Sub-section 2

¹⁰² See JUDITH G. & MATHEW G., RUSSELL ON ARBITRATION, 352 (2007).

¹⁰³ *Supra* note 9 at 650

¹⁰⁴ (1976-8) KLR 1650

§ 13 (3)

Arguably, the Chief Justice had no statutory power to promote arbitration. It is noteworthy that both legally and administratively, the Chief Justice enjoys immense power and has capacity to influence the administration of justice generally. The holder of the office has wide latitude to promote arbitration by urging courts to implore parties to disputes to explore the possibility. Such a requirement would have become a full grown rule of the court. For the over 27 odd years that the Arbitration Act was the operative statute, the arbitral process remained in the shadows of litigation and no significant attempts were made to promote its employment in dispute resolution. It is plausible to argue that provisions and omissions of the Act played a central role in discouraging the exploitation of arbitration for a long time in Kenya. The fact that the statute disregarded international commercial arbitration is to some extent indicative of the lukewarm support the legislature had for the arbitral process. However, in 1995, Kenya adopted the UNCITRAL Model law and the New York Convention under the Arbitration Act (Act No 4 of 1995) which abrogated the Arbitration Act 1968. The Act came into force on January 2nd 1996.

Legal regime under the Arbitration Act 1995

Although the imperfections of the Arbitration Act, Cap 49 Laws of Kenya, were glaring for a longtime, the legislature took no meaningful steps to ameliorate the situation. Even after the announcement of the Model law on international commercial arbitration by the United Nations Commission on International Trade Law (UNCITRAL) in June 1985, the legislature demonstrated lack of enlightenment by failing to appreciate the benefits of adopting such progressive laws without delay. The crusade for a new Arbitration Act which was spearheaded by the Kenya Association of Manufacturers (KAM) did not come to fruition until December 1995 when the Arbitration Act (Act No 4 of 1995) (herein after referred to as the "Act") was promulgated. It is for all intents and purposes a replica of the UNCITRAL Model law on international commercial arbitration albeit with a few modifications that generally reflects the domestication of the country's obligations under the New York Convention. Having embraced such a law and domesticated the New York Convention, Kenya could be regarded as having a fairly modern legal system on arbitration and enforcement of awards.

The preamble of the statute states succinctly that it is "An Act of Parliament to repeal and re-enact with amendments the Arbitration Act and to provide for connected purposes." Although these words are broad enough, a more comprehensive statute had been envisioned. One of the most conspicuous deficiencies of the Act is that it does not recognize ADR. Its title is a graphic exemplification of this fact.¹⁰⁶ However, to give credit where it is deserved, the Act was an improvement of the previous statute. Among its salient attributes are clarity and simplicity. This is partly attributable to the fact that the parliamentary draftsman played an insignificant role in its adoption as it was a plain reproduction of existing material. For the first time, the law provided for international commercial arbitration.¹⁰⁷ It is inexplicable why it took this long to assimilate such forward looking principles into a domestic statute. This is perhaps because there was no comprehensive policy on the place of arbitration and ADR in the domain of dispute resolution.

Unlike the previous Act whose interpretation section contained a single definition, the new Act embodies several definitions, including, arbitration, party, arbitral award and a few others.¹⁰⁸ However, the definition of the term "arbitration" is nebulous.¹⁰⁹ The Act defines an arbitration agreement as "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship whether contractual or not." In the same breath, the Act, does not insist that the contract must be written. However, there is some incongruence between the interpretation section and the provisions of section 4(2) which ordain that an arbitration agreement must be written. The apparent contradiction between these sections may be reconciled by postulating that while an oral agreement to submit disputes to arbitration is valid and enforceable at common law, it is not an arbitration agreement in the context of section 4 (2) of the Arbitration Act. The provisions of the Act reflect the flexible character of arbitral proceedings which is predicated on the principle of party autonomy. It has aptly been observed that "an integral part of supporting party autonomy is the recognition of the rule and importance of arbitral institutions."¹¹⁰ The Arbitration Act confers plenary powers on the parties to the arbitral process which accentuates the principle of party autonomy and the private character of the arbitral process. The Act gives full recognition and effect to the agreement between the parties to arbitrate according to the institutions.

¹⁰⁶ § 1 of the Act provides that: "This Act may be cited as the Arbitration Act." Expectations were that Act would at least recognize conciliation.

¹⁰⁷ § 2

¹⁰⁸ § 3

¹⁰⁹ Arbitration means "any arbitration whether or not administered by a permanent institution"

¹¹⁰ JOHN T. & ARTHUR M., BERNSTEIN'S HANDBOOK OF ARBITRATION AND DISPUTE RESOLUTION PRACTICE 33 (4th Ed. 2003).

For instance, the Act does not prescribe a fixed and certain procedure for the arbitral process. On the contrary, it encourages the parties and the arbitrator to adopt procedures appropriate to their circumstances subject only to the rules of natural justice. This policy is in accord with international practice. Most of the powers of the arbitral tribunal are default powers. The other attribute is that the parties are free to organize their proceedings as they desire.¹¹¹ They are free to appoint the arbitral tribunal directly or indirectly as long as they agree. Additionally, the Act recognizes the cardinal principle of arbitral proceedings i.e. equal treatment of the parties and giving each party full opportunity to present its case.¹¹² Furthermore, the Act prohibits the court from interfering with the arbitral process except in the circumstances specifically provided by the Act.¹¹³ This is intended to discourage the use of the residue powers conferred on courts by other domestic statutes.

This statement of principle is a clear manifestation of the policy of party autonomy underlying the Act and the desire to limit and define the role of courts in the arbitral process so as to give effect to the policy.¹¹⁴ Importantly, the Act recognizes the fundamental principle of Competence-competence and the doctrine of severability of the arbitral clause. Admittedly, although the Act did away with the more meddlesome powers of the court in the arbitral process, it retained innumerable instances in which courts of law have a substantial role to play in the arbitral process. For example, the High Court retains jurisdiction to: (i) grant interim measures,¹¹⁵ (ii) stay judicial proceedings,¹¹⁶ (iii) hear a challenge on the question whether the arbitral tribunal has jurisdiction in the matter¹¹⁷, (iv) assist in taking evidence,¹¹⁸ (v) set aside the arbitral award,¹¹⁹ (vi) recognize and enforce awards,¹²⁰ (vii) hear an appeal on questions of law,¹²¹ and (viii) appoint arbitrators.¹²² A rather surprising innovation of the Act is that it fashions a new role for the office of the Attorney General something not envisaged by the former Act.¹²³ It is incomprehensible why a supposedly progressive statute would subject the arbitral process to the vagaries of officialdom. Under Article 13 of the UNCITRAL Model Law from which this section is extracted, the power is vested in the court. It would be imprudent to argue that the Attorney General could vest the mandate to decide the challenge on any other body whose decision would be final. By subjecting arbitral proceedings to the bureaucracy of the office of the Attorney General, this section does not espouse the arbitral process.

The High Court has decided several cases on different aspects of the Arbitration Act 1995 and to its credit it has generally enforced arbitration clauses in accordance with the desires of the parties.¹²⁴ However, only a handful of decisions have been appealed against in the Court of Appeal for a more authoritative interpretation of the Act.

Powers of the Court

Although courts have no inherent jurisdiction to control the arbitral process, there are countless instances in which the Arbitration Act 1995 permits their intervention at the instigation of the parties.

Stay of Legal Proceedings

Where there is an arbitration agreement and a dispute arises, one of the parties may in disregard of the arbitration agreement institute judicial proceedings. The other party may apply to the court in which the proceedings have been commenced to stay the proceedings for the dispute to be referred to arbitration. The court is required to grant a stay unless the provisions of section 6 of the Arbitration Act apply. We shall reproduce the salient parts of section 6 to demonstrate the modifications it has undergone and evince how courts have interpreted it. The section provides, *inter alia*:

¹¹¹ §§ 20-24

¹¹² § 19

¹¹³ § 10

¹¹⁴ DAVID J. S. JUDITH G & MATHEW G. RUSSELL ON ARBITRATION 293 (2003).

¹¹⁵ § 7

¹¹⁶ § 6

¹¹⁷ § 17

¹¹⁸ § 28

¹¹⁹ § 35

¹²⁰ § 36-37

¹²¹ § 39

¹²² § 12

¹²³ Under §14 of the Act, parties are free to agree on a procedure for challenging an arbitrator failing which the party challenging the arbitrator must within 15 days of becoming aware of the composition of the arbitral tribunal or the circumstances justifying rise the challenge notify the arbitral tribunal. Unless the arbitrator being challenged withdraws or the other party agrees, to the challenge, the arbitral tribunal is required to determine the challenge. If the challenge fails, the party may within 30 days of receipt of notice of the failure apply to the competent authority designated by the Attorney General whose decision is final.

¹²⁴ In *William Oluande v. American Life Insurance Co. (Kenya) Ltd* (2006)eKLR the defendant had resisted all attempts by the plaintiff to refer the dispute between them to arbitration as ordained by the agreement. The court referred the matter to arbitration. See also *Don- Woods Co. Ltd v. Kenya Pipeline Co. Ltd* (2005) e KLR ; *Seca Africa ltd v. KirLoskar Kenya Ltd & 3 Others* (2005) e KLR

“A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party applies not later than the time when that party enters appearance or files any pleadings or takes any other step, stay the proceedings and refer the parties to arbitration unless: (a) the arbitration agreement is null and void, inoperative or incapable of being performed or there is in fact no dispute between the parties with regard to the matters agreed to be referred to arbitration.”

Parties have liberty to commence or continue with arbitration notwithstanding the pendency in court of an application for a stay of proceedings. Part of this section is a reproduction of Article II (3) of the New York Convention. The current formulation modifies the previous section significantly. Previously, an application for a stay could be made at any time after the applicant had entered appearance in the proceedings. Under its current formulation, the application cannot be made after entering appearance.¹²⁵ The jurisprudence in this area of law is that a party ought to make the application immediately after filing the memorandum of an appearance.¹²⁶ The Court of Appeal has been unequivocal on this point¹²⁷ and underscored it in *Niazsons (K) Ltd v. China Road & Bridge Corporation*.¹²⁸ The contract between the parties contained an arbitration clause. When the appellant sued the respondent in damages for breach, the respondent entered appearance but did not file a defense and proceeded to apply for a stay of the proceedings. The application was declined on the ground that it had been made after entering appearance contrary to the provisions of Section 6 of the Act. It is pertinent to observe that the Section restricts the discretion of the High Court to decline an application for a stay of proceedings. As the Court of Appeal rightly acknowledged in *Charles Njogu Lofty v. Bedouin Enterprises Ltd*¹²⁹, the Section is couched in mandatory terms. It was held that a court should only decline an application to stay proceedings if there was overwhelming circumstances militating against it.¹³⁰ The court was authoritative on the steps an applicant must take in order to be entitled to a stay of proceedings. Critically important, the application must be made promptly and the court must decipher the following:

- whether the applicant has taken any step in the proceedings other than those permitted by the Act;
- whether there are any legal impediments on the validity, operation or performance of the arbitration agreement; and
- whether the suit concerns matters agreed to be referred.

An unwarranted question has arisen as to who among the parties to the proceedings can invoke the provisions of Section 6(1) of the Act. The Section uses the phrase “...if a party applies not later than the time when that party enters appearance or files any pleadings...” These words appear to suggest that only a person who is required to enter an appearance in the proceedings can apply for a stay under this section.

In *Majidoon Kenya Ltd v. Kenya Old Co Ltd*,¹³¹ Justice Fred Ochieng posited that the right to apply for a stay of proceedings was not exclusively vested on the defendant or respondent. He suggested that there was no bar on the plaintiff to seek a stay of proceedings which he has instituted. It is difficult to follow the reasoning of the learned judge as he does not focus on the question of interpretation of the wording of the section. Although this would signify a change of mind on the part of the plaintiff and could facilitate arbitral jurisdiction, it is inconceivable that such application can be made in compliance with the provisions of Section 6 (1) of the Act. This is principally because the plaintiff does not enter appearance in civil proceedings. In *Pamela Akora Imeje v. Akore ITC International Ltd & Bart Jan Roze Boom*,¹³² the plaintiff applied for a stay of proceedings for the dispute to be referred to arbitration but the High Court declined on the premise that Section 6(1) could only be invoked by the defendant.

¹²⁵ See *Tread Setters Tire Ltd v. Elite Earth Movers Ltd.* (2007) e KLR, *Kisumu Walla Industry Ltd v. Pan Asiatic Commodities PTE Ltd. And Another* (1995-98) EALR 150, where it was held that a defendant who filed a defense in a matter dependent on an agreement providing for arbitration clause waived his right to ask for arbitration.

¹²⁶ Nambuye J in *Agricultural Finance Corporation Agricultural Development Corporation v. Lutsman & Co.* (1990) Ltd. (2004) e KLR

¹²⁷ In *Corporate Insurance Ltd v. Loise Wanjiru Wachira*, (2003) e KLR the court observed: “While we agree with the proposition that a *Scott v. Avery* arbitration clause can provide a defense to a claim, we cannot accept the submission that the party relying on it can circumvent the statutory requirement to apply for a stay of proceedings. In the present case, if the appellant wished to take the benefit of the clause, it was obliged to apply for a stay after entering appearance and before delivering any pleadings. By filing a defense, the appellant lost its right to rely on the clause.” See also MUSTILL and BOYD: THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND 165 (2nd Ed. 2004).

¹²⁸ (2001) KLR. 12

¹²⁹ (2005) e KLR

¹³⁰ In *Achells Kenya Ltd v. Phillips Medical Systems Nederland B.V. Diederik Zeven* (2007) e KLR, Justice R.N. Nambuye construed the term “shall” as a command.

¹³¹ (2006) e KLR

¹³² (2007) e KLR

Justice Hatari Waweru was categorical that: “That provision is available only to the defendants. The very wording of the sub-section makes this plain and obvious. Having made her bed, as it were, the plaintiff must lie on it. She chose to file suit, she must fall or stand on it.” It is our submission that the reasoning of Justice Waweru is more persuasive than that of Justice Ochieng.¹³³

Other than the filing of a defense which acts as a waiver of the respondents’ right to seek a stay of proceedings under section 6(1) of the Act, the Court of Appeal has yet to enunciate other circumstances that would estop a party to an arbitration agreement from making the application.¹³⁴ The closest the High Court has come was the decision in *Timothy Rintari v. Madison Insurance Co Ltd*,¹³⁵ where the plaintiff had invoked the arbitration clause in the agreement but the defendant declined. Subsequently, the plaintiff commenced proceedings in the High Court and the defendant applied for a stay of the proceedings. The court struck off the application holding that the defendant was estopped by his conduct from relying on the provisions of section 6(1) of the Act.

As indicated elsewhere, the pendency of an application for a stay of proceedings does not interfere with the arbitral process under the Act. The Court of Appeal has enforced this provision strictly to give effect to arbitral proceedings. In *Joab Henry Onyango Omino v. Lalji Megji Patel & Co Ltd*,¹³⁶ the pertinent question was whether the defendant was still obligated to file a defense in the suit after making the application for a stay of proceedings. The court was unambiguous that Section 6 of the Act did not permit parallel proceedings to be dealt with simultaneously. Once the application for a stay of proceedings is made, the respondent’s duty to file a defense is deferred. The court justified its decision on the ground that public policy discountenanced concurrent proceedings before two or more *fora*. In summation, a compelling argument may be made that the modifications of Section 6 of the Arbitration Act 1995 ameliorated the burden of proof imposed on the applicant by the Arbitration Act 1968. But more importantly; it reduced judicial discretion in the determination of the application.

Other Powers

In addition to the power to stay judicial proceedings, the High Court has jurisdiction to interfere or play a supportive role in the arbitral process. For example, under section 7 of the Act, the Court has jurisdiction to issue interim orders, such as an injunction at the instance of either party. This may be justified by the need to maintain the *status quo* pending the determination of the dispute. To the credit of this provision, the court relies on any finding of fact made by the arbitral tribunal on the issues before the court. Similarly, the High Court may on application of the arbitral tribunal or either party with sanction of the tribunal order a party to take such interim measures as are necessary.¹³⁷

With regard to appointment of arbitrators, the court can intervene at the option of the parties but only in the circumstances prescribed by section 12 of the Act and the court’s decision is final.¹³⁸ Without belaboring the point, this section is facilitative of the arbitral process. Closely allied to this power is the competence of the High Court to determine any question arising in the event of termination of the mandate of the arbitral tribunal.¹³⁹ Section 17 confers jurisdiction to hear an application challenging decisions of the arbitral tribunal on preliminary questions and the court’s decision is final.¹⁴⁰ A further supportive role of the High Court is embodied in section 28 of the Act. This section mandates the court to assist in taking of evidence if an application to that effect is made by the arbitral tribunal or either party with countenance of the tribunal. The High Court may execute the request within its competence and according to its rules of taking evidence. Although the court is not constrained to act, this provision is inherently supportive of the arbitral process. The fact that the arbitral tribunal ultimately determines the course of action is illustrative of an approbation of the principle of autonomy of the parties and mandate of the arbitral tribunal.

One of the ingenuities of the Act in connection with the exercise of these powers by the High Court is that applications under the various sections do not defer arbitral proceedings. Regrettably, there is no judicial authority from which to expound the jurisprudence emerging from the exercise of the powers exemplified above.

¹³³ See ENID A. M. & GILL: THE LAW OF ARBITRATION, 8 (2001) ; See also Supra note 105 at 300

¹³⁴ In *Bahari Transport Company v. A.P.A. Insurance Co. Ltd*, the defendant had filed a defense and then applied for a stay of proceedings. The High Court dismissed it with costs.

¹³⁵ (2005) eKLR

¹³⁶ (1999)KLR 574

¹³⁷ §18

¹³⁸ § 12 (5)

¹³⁹ §15

¹⁴⁰ § 17 (7)

Setting Aside of Arbitral Awards

In accord with the philosophy of the UNCITRAL Model law,¹⁴¹ and the principle of finality of arbitral awards, the Arbitration Act provides only one method of challenging an arbitral award in a court of law. This can only be by an application to the High Court for the award to be set aside. Section 35(2) enumerates the circumstances in which an arbitral award may be set aside. Superfluously, this section is a carbon copy of Article 34 of the Model law, and Article V of the New York Convention which sets forth the grounds on which recognition and enforcement of an arbitral award may be refused. The only difference between section 35(2) of the Act and Article V is that whereas the former applies to domestic awards, the latter applies to foreign awards. This section is deficient in originality. For example, it fails to recognize that serious procedural irregularities could affect an arbitral award.¹⁴² The party seeking to have the arbitral award set aside must rely on at least one of the circumstances recapitulated by the section. But over and above the circumstances recited by section 35(2), the High Court has jurisdiction to set aside an arbitral award if it is satisfied that the award is in conflict with the “public policy of Kenya” or the subject matter of the dispute was not capable of settlement by arbitration under the laws of Kenya. The judicial philosophy emerging from the application of section 35(2) is that courts are generally disinclined from interfering with arbitral awards predominantly on the grounds of public policy. And as we proceed to illustrate, the Court of Appeal has been unambiguous in several seminal cases that precept of public policy ordain that there should be an end to litigation.

Before analyzing how courts have applied section 35(2) of the Act, it is imperative to acknowledge that the phrase “public policy” used by the section is problematic as it is not amenable to an absolute definition.¹⁴³ In years of yore, it was branded an “*unruly horse and when you get astride it, you never know where it will carry you.*”¹⁴⁴ English Courts have interpreted the phrase to include, fraud, illegality, bribery and other forms of corruption.¹⁴⁵ The question of what constitutes “public policy of Kenya” was addressed in fairly sufficient detail by Justice Ringera in *Christ of All Nations v. Apollo Insurance Co Limited*.¹⁴⁶ The court conceded the nebulous character of the phrase and affirmed that its meaning vacillated with the circumstances of the case. The court observed:

“A comparison between the two pieces of legislation underscores an important message introduced by the latter, (Arbitration Act 1995) the finality of disputes and a severe limitation of access to court. Sections 6, 10, 12, 15, 17, 18, 28, 35 and 39 of the Act are particularly relevant in that regard. This message we think is a pointer to the public policy the country takes at this stage of its development. Public policy which is a factor we may consider in the exercise of our discretion is of course an indeterminate principle or doctrine... it is variable and must fluctuate with the circumstances of the time.”

In this case, the appellant company sought to have an arbitral award set aside on the ground that the arbitrators had exceeded their mandate. Both the High Court and Court of Appeal were satisfied that there was no compelling reason to interfere. The former dismissed the application to set aside while the latter disallowed the appeal. The Court of Appeal predicated its decision on public policy reasoning that the provisions of the Arbitration Act accentuated the policy that there should be an end to litigation. In the same breath, the court emphasized the finality of arbitral awards. It was categorical that; “in this case, the decision was final.” The fact that public policy oscillates with the circumstances of the time may or may not portend well for the arbitral process as it leaves the matter open to the court’s interpretation of the circumstances.¹⁴⁷ As mentioned above, arbitral awards are final unless set aside under the provisions of section 35 of the Arbitration Act. This explains the lack of enthusiasm by courts to interfere with them. In order to succeed, the applicant must satisfy the stringent requirements imposed by the Act. An applicant must strictly bring himself within the provisions of section 35 or fail. While underscoring the finality of arbitral awards in *Transworld Safaris Ltd v. Eagle Aviation & 3 Ors*,¹⁴⁸ Justice Nyamu observed; “Awards have now gained considerable international recognition and courts especially, commercial ones have the responsibility to ensure that the arbitral autonomy is safeguarded by the court as arbitral awards are surely and gradually acquiring the nature of a convertible currency due to their finality.”

¹⁴¹ Article 34

¹⁴² The UK Arbitration Act 1996 provides for the challenging of arbitral awards on the ground of serious irregularities.

¹⁴³ *Richardson v. Mellish* (1824) 2 Bing 229

¹⁴⁴ *Id.*

¹⁴⁵ JUDITH & MATHEW supra note 103 at 389.

¹⁴⁶ (2002) 2 E A 336. According to the judge, an act is contrary to public policy if it was either (a) inconsistent with the constitution or other laws of Kenya whether written or unwritten (b) inimical to the national interests of Kenya (c) contrary to justice or morality.

¹⁴⁷ See *Richardson v. Mellish* (1824) 2 Bing 229. See also Ransley J in *Giovanni Gaida and 79 Others v. Mahican Investment Limited and 4 Others* (2005)e KLR

¹⁴⁸ (2003)e KLR

In *Giovanni Gaida & Ors v. Mohican Investment Limited & Ors*,¹⁴⁹ the learned judge was emphatic that judicial interference with arbitral awards should be discouraged as it effectively made the High Court a court of appeal in relation to awards. According to the judge, this would be inconsistent with the objects of the Arbitration Act 1995 which sought to bring finality to disputes between parties.

The jurisprudence of treating arbitral awards as final appears to be well embedded in judicial reasoning. The Court of Appeal has placed the matter beyond question in two seminal decisions involving the same appellant. In *Kenya Shell Limited v. Kobil Petroleum Limited*,¹⁵⁰ a dispute between the two companies was referred to arbitration in accordance with the terms of the contract and the arbitral tribunal made an award in favor of the respondent on November 17th 2003. The applicant sought to have the award set aside on the ground that the arbitral tribunal had misunderstood or misapplied the law in the interpretation of the agreement, but the court declined. On appeal, the Court of Appeal was satisfied that the High Court had exercised its discretion sagaciously and affirmed the decision. The court reiterated that an arbitral award was final unless either party satisfied the court that there was sufficient justification to set it aside. A similar holding was made in *Kenya Shell Limited v. Century Oil Trading Co Limited*,¹⁵¹ where the appellant terminated a distributorship agreement with the respondent and the dispute was referred to arbitration. The arbitral tribunal made an award of 258 million Kenya shillings in favor of the respondent. The High Court dismissed the application to set aside the award and the Court of Appeal affirmed the decision.

The High Court has taken the cue from the Court of Appeal and seldom interferes with arbitral awards. The decision in *Mahican Investment Ltd & Ors v. Giovanni Gaida & 80 Ors* is a case in point. In *Chrysanthus B. Okemo v. APA Insurance Co Ltd*,¹⁵² the respondent applied for the award to be set aside but the High Court declined. A further application to have the award varied failed.

A rather interesting holding was in *Pentecostal Assemblies of God v. Reverend John Malwenyi & Ors*.¹⁵³ The applicant sought to have the award set aside on the premise that it had no date, signatures of all arbitrators, designation of the place where it was made and no reasons had been given. The court upheld the award. This holding is incomprehensible bearing in mind that the Arbitration Act is explicit that an arbitral award must not only be written but must be dated and signed by all arbitrators or a majority of them.¹⁵⁴ Moreover, it must state the place of arbitration and the reasons upon which it is based. The judge makes no attempt to determine the legal effect of noncompliance with the Act and its effect on the case. These judicial authorities demonstrate that so great is the proclivity towards upholding arbitral awards that courts extraordinarily interfere.¹⁵⁵ However, courts have not hesitated to set aside an arbitral award if it was shown that there was sufficient legal justification to do so. For instance, in *Siginon Maritime Ltd v. Gitutho Associate & Ors*,¹⁵⁶ where the arbitral tribunal failed to keep a written record of the proceedings contrary to the agreement between the parties to the arbitration agreement, the court was persuaded that the failure vitiated the arbitral award and it was set aside.

A further hurdle an applicant has to surmount appertains to time. The application to set aside may not be made after three months have elapsed from the date on which the party making the application received the arbitral award or if a request had been made under section 36, from the date on which the request was disposed of by the arbitral tribunal.¹⁵⁷ Although the section is couched in non-mandatory terms, courts have construed it strictly. The section has been interpreted to mean that an application to set aside cannot be made after three months have elapsed from the date the applicant was notified that the arbitral award was ready for collection.¹⁵⁸ According to the High Court, the words “delivery” and “receipt” used in sections 32(5) and 36 respectively, have similar meanings. Any other construction would introduce unnecessary delay and deny the arbitral process the virtue of finality. The upshot of this interpretation is that the person wishing to set aside an arbitral award cannot wait indefinitely before collecting it.¹⁵⁹ In *Giovanni Gaida & Ors v. Mahican Investment & Ors*, the court applied this interpretation and held that the applicant had not discharged the burden of proof imposed by the section.

¹⁴⁹ *Id.*

¹⁵⁰ *Supra* note 136

¹⁵¹ (2008)e KLR

¹⁵² (2006) e KLR

¹⁵³ (2006)e KLR

¹⁵⁴ § 32

¹⁵⁵ See *Tekie Michael t/a speedy Studio v. UPA Provincial Company Ltd* (2006) e KLR

¹⁵⁶ (2005)e KLR

¹⁵⁷ § 35 (3)

¹⁵⁸ See Nyamu J, *supra* note 138

¹⁵⁹ See *Bulk Transport Corporation v. Sissy Steamship Co. Ltd* (1979) 2 Lloyds Rep. 289. See also Nyamu J in *supra* note 138.

The learned judge wrongly asserted that in order to succeed, the applicant had to show “beyond doubt” that the arbitrator had gone on a frolic of his or her own to deal with matters not related to the subject matter of the dispute. Although the judge could not have been insinuating that the standard of proof is similar to that in criminal cases, the use of the phrase “beyond doubt” is puzzling. In the final analysis, it is arguable that courts of law have played an instrumental role in giving effect to the provisions of the Arbitration Act 1995 in conformity with the principle of finality of arbitral awards. They have generally been unrelenting in upholding arbitral awards thus emphasizing the autonomous character of the arbitral process.

Enforcement of Arbitral Awards

The Arbitration Act recognizes all arbitral awards as binding and provides for their enforcement by the High Court. The party seeking to enforce the award must lodge a formal application which must be accompanied by (a) the duly authenticated original award or certified copy; (b) the original arbitration agreement or certified copy; and (c) a certified translation of the arbitration agreement if it is not in the English language.¹⁶⁰ Rule 4(1) of the Arbitration Rules 1997 is explicit that any party may file an arbitral award in the High Court. The filing must be notified to all other parties and if no application to set aside the award is made, the applicant may apply *ex parte* by summons for leave for confirmation of the award as a decree. Whereas the Act prescribes no other requirements, an arbitral award will not be recognized as binding or be enforced if any of the circumstances set forth by section 37 apply. Section 37 replicates section 35(2) of the Act.

Judicial authority is unqualified that as long as the relevant provisions of the Act have been complied with, an arbitral award will be enforced. Courts have also affirmed that the provisions of section 36 are mandatory.¹⁶¹ Several decisions of the High Court illustrate this position. For instance, in *Adrian Mambili Meja v. Trident Insurance Company Ltd*,¹⁶² the applicant had sought leave to enforce an arbitral award as a decree of the court under section 36 of the Act and Rules 4 and 6 of the Arbitration Rules 1997. In summation, Justice Waweru observed, “I am satisfied that all the necessary provisions of law have been complied with.” A similar holding was made in *Francis K. Hinga v. George B. Nyanja*.¹⁶³ In *Structural Construction Co. Ltd v. International Islamic Relief*,¹⁶⁴ the applicants sought the reading and recognition of an arbitral award under the provisions of the Arbitration Act and Rule 6 of the Arbitration Rules. The defendant objected alleging that it had not been heard by the arbitral tribunal. The court dismissed the argument and recognized the award as binding.

On the other hand, courts have not hesitated to repudiate attempts to enforce arbitral awards in circumstances in which the provisions of the Act have not been complied with or the refusal was justifiable in law. In *Busuru Richard Mark t/a Busuru R. M. & Partners Architects v. Nzoia Sugar Company Ltd*,¹⁶⁵ the applicant sought to have the arbitral award recognized as binding and adopted as a judgment of the court but neither the arbitration agreement nor the award had been annexed to the application as required by section 36 of the Act. The application was dismissed with costs. The court was of the view that the section 36(2) was mandatory. Similarly, in *Kenfit Ltd v. Consolata Fathers*,¹⁶⁶ the plaintiff applied for an order to enforce an arbitral award as a judgment of the court. The defendant claimed that the award was incomplete as the arbitrator had not provided for costs. The court was satisfied that the application was premature because the arbitrator had not determined all the questions referred to him including the matter of costs.

These decisions authenticate the argument that courts have endeavored to enforce arbitral awards in accordance with the provisions of the Arbitration Act. It is informational to point out that to the extent that statutory provisions are not ambiguous, courts of law will enforce them in consonance with the intention of the legislature.

Arbitral Tribunal

The Arbitration Act appears to recognize the centrality of the institution of arbitrator in the arbitral process. However, it does not define the term arbitrator. It instead defines the phrase “arbitral tribunal” to mean; a sole arbitrator or a panel of arbitrators.

Appointment

Section 12 provides for the appointment of arbitral tribunals.¹⁶⁷ Amazingly, there are no statutory restrictions on the person who may be appointed arbitrator.

¹⁶⁰ § 36 (1) & (2)

¹⁶¹ See Osiemo J in *Busuru Richard Mark t/a Busuru R.M. & Partners Architects v. Nzoia Sugar Company Ltd* (2007) e KLR (2005) e KLR

¹⁶² (2006) e KLR. See also *Ernie Campbell and Company Ltd v. Githunguri Dairy Plant Co. Ltd* (2005) e KLR

¹⁶³ (2007) e KLR

¹⁶⁴ *Supra* note 154

¹⁶⁵ (2005) e KLR

¹⁶⁶ This may be by the parties or a third party as agreed upon by the parties or the High Court on application by either party.

It is ambiguous whether persons who are not of full legal capacity, for instance, infants, persons of unsound mind and corporations can be appointed. Similar doubts exist about persons who have been declared bankrupt. The Act does not recognize arbitration as a profession although it is increasingly becoming common for some individuals to practice exclusively as arbitrators. It is a feature of the Kenyan arbitral process that non-lawyers may become arbitrators in specialized fields. It is maintained that since the arbitral tribunal derives its mandate from the contract between the parties who have complete freedom to choose their tribunal, there is no need for minimum qualifications. In fact it is further postulated that the powers of the arbitral tribunal are subject to the agreement between the parties. While this hypothesis is sustainable in so far as the scope of the arbitration agreement is concerned, it is untenable as it obfuscates the underlying argument that the Arbitration Act contains no general statement on the duties or obligations of arbitral tribunals.

It is axiomatic that arbitration involves professional training, discipline, independence responsibility, integrity, expertise and commitment to certain appropriate values. These are attributes generally peculiar to professionals. Arguably, arbitrators have every right to be considered as professionals in the field of dispute resolution. In our view, recognizing arbitration as a profession would be a significant paradigmatic shift that would not only enhance the profile of arbitration as a dispute resolution mechanism but would herald an epoch of accountability and greater utilization of the arbitral process. Additionally, it would provide the necessary institutional framework to popularize arbitration and ADR.

Despite the fact that impartiality of arbitrators is elemental to the entire arbitration process,¹⁶⁸ the closest that the Arbitration Act comes to imposing a substantive duty on the arbitral tribunal is section 19 which provides *inter alia*: “parties shall be treated with equality and each party shall be given full opportunity of presenting his case.” The significance of this provision is among other things that an arbitral tribunal must not receive evidence or argument from one party in the absence of the other.¹⁶⁹ Although this formulation is consistent with the UNCITRAL Model Law, it is important to recall that this was a framework convention which could not have been expected to be exhaustive in every respect. States adopting the Model law are free to modify and supplement its articles for more inclusivity and relevance to local circumstances. The Act imposes no general duty on the arbitral tribunal to act fairly and impartially or avoid conflict of interest or unnecessary delay or expense. There is no positive duty to use reasonable dispatch in conducting the proceedings or making the award. Parties are free to impose upon arbitral tribunals whatever time limit they may deem appropriate for completion of the arbitral proceedings and making of the award. The arbitral tribunal is duty bound to adhere to any timetable agreed upon. In the absence of an agreement, the Arbitration Act imposes no specific time frame within which the award may be made. The consequence of any delay by an arbitral tribunal is negative. The High Court has jurisdiction to remove dilatory arbitral tribunals.¹⁷⁰ Moreover, there is no explicit duty on the part of the arbitral tribunal to attend hearings and participate or not to exceed its jurisdiction or power. Similarly, there is no obligation to conduct arbitral proceedings in accordance with the procedure agreed upon by the parties¹⁷¹ or even deal with all the issues raised. Although section 30 provides that in the absence of an agreement between the parties the decision shall be made by a majority of the arbitrators, it imposes no duty on the tribunal to act judicially, make an award or even ensure that the award is neither ambiguous nor uncertain. It is our presupposition that had the Act imposed these as minimum duties on arbitral tribunals, arbitration would have been more entrenched in the dispute resolution matrix in the country.

Liability of Arbitrators

The Laws of Kenya have long recognized the traditional principle that judicial officers are immune from suit at the instance of a dissatisfied litigant or accused in criminal proceedings. This practice engenders independence of the judiciary. Doubt exists on whether this principle applies to arbitrators. The Arbitration Act is silent on whether arbitral tribunals enjoy immunity for acts and omissions committed or omitted in the course of the arbitral process.¹⁷² In the United Kingdom, arbitrators enjoy statutory immunity for their acts and omissions, but may be sued for professional negligence.¹⁷³ It is arguable that extending this principle to arbitration would enable arbitral tribunals’ discharge their obligations more effectively as it would protect them from harassment by frivolous and vexatious actions.

¹⁶⁸ See generally supra note 104

¹⁶⁹ See *Renown Investments v. Mecca Leisure* (1984) 271 E.G. 989 CA.

¹⁷⁰ § 15 (1) (a)

¹⁷¹ § 20 (1) of the Arbitration Act is explicit that parties are free to agree on the procedure to be followed by the arbitral tribunal in the conduct of the proceedings. However, the section is silent on whether the arbitral tribunal is bound by the procedure. The duty can however be implied because under the provisions of section 35 (2), an arbitral award may be set aside if the arbitral procedure was not in accordance with the agreement of the parties. See *Joseph W. Karanja & Another v. Geoffrey Ngari Kuria* (2006) e KLR

¹⁷² § 29 of the Arbitration Act 1996

¹⁷³ See DAVID JUDITH & MATHEW supra note 114 at 176

Additionally, it would reinforce impartiality and independence. According to Lord Morris in *Sutcliff v. Thackrah*,¹⁷⁴ the fact that the arbitrator's functions are judicial in character is sufficient to confer immunity. It is our contention that extending immunity to arbitral tribunals would undoubtedly strengthen the arbitral process.

Relief and Remedies

The Arbitration Act 1995 is inarticulate on the character of the arbitral award. Unlike the Arbitration Act, Chapter 49, Laws of Kenya, which made perfunctory reference to remedies,¹⁷⁵ the current Act has no explicit provision. It is dubitable whether parties are free to agree on the powers exercisable by arbitral tribunals with regard to remedies.¹⁷⁶ No provision is implicit in this respect. This omission can only be understood in the context of the general powers of arbitral tribunals. Since the Act does not bestow upon arbitral tribunals basic powers such as, administration of oaths or compel attendance of witnesses or production of documents, it is not fortuitous that their powers in relation to remedies are not explicit. But this still begs the question. What remedies can an arbitral tribunal dispense?

The closest that the Act comes to remedies is a stipulation that the arbitral tribunal may at the request of a party order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute.¹⁷⁷ Implicitly, the order under this provision may also include injunctive relief. The Act should have been more elaborate on whether arbitral tribunals may make a declaration on matters before it, order payment of a sum of money in any currency, order a party to do or refrain from doing anything, order specific performance or rectification. It is redundant to observe that a provision on the relief and remedies would have amplified the arbitral process. It is our argument that the failure of the Act to affirm the powers of arbitral tribunals with regard to remedies is antithetical to the enhancement of arbitration as a dispute resolution mechanism.

Costs, Fees and Expenses

The Arbitration Act 1995 eliminates the traditional distinction between "costs of the reference" and "costs of the award" by merging the two. While the former describes the costs incurred by the parties in putting their respective cases before the arbitral tribunal, the latter denotes the administrative costs of the reference including the tribunal's fees and expenses.¹⁷⁸ The two types of costs were an integral part of the previous legislation.¹⁷⁹ Under the relevant provision, unless the parties otherwise agreed, such costs were at the discretion of the arbitrator and were taxable in the High Court.¹⁸⁰ Surprisingly, the previous legislation rendered any provision to the effect that the parties or any party to the agreement would bear their own or its own costs of the reference or of the award or any part thereof void. The above phraseology has been replaced by section 32 of the Arbitration Act which uses the phrase "costs and expenses of arbitration" to signify the legal and other expenses of the parties, expenses of the arbitral tribunal and any other expenses in the arbitration. None of these terms is defined by the Act. In its current formulation, unless parties manifest a different intention, the costs and expenses are determined and apportioned by the arbitral tribunal in the award absent which each party bears its legal and other expenses as well as an equal share of the fees and expenses.¹⁸¹

Appeals against Arbitral Awards

Incomprehensibly, the Arbitration Act 1995 provides for appeals against arbitral awards. It is not implausible to argue that the genesis of this power appear to have been section 22 of the Arbitration Act 1968 which gave courts draconian powers over the arbitral process. Under section 39 of the Act, an award may be appealed against on questions of law but only if the parties have so agreed. The appeal must be lodged in the High Court, and a further appeal lies to the Court of Appeal, if the parties have so agreed. In addition, the High Court or Court of Appeal must accord the appellant special leave to appeal. On appeal, the court has jurisdiction to vary the award. The varied award becomes the award of the arbitral tribunal concerned. This section appear to contradict section 35 of the Act which provide for the setting aside of arbitral awards. Although section 39 is restricted to "questions of law," it would not be unreasonable to surmise that the High Court has jurisdiction to determine such questions in an application to set aside an arbitral award.

¹⁷⁴ (1974) A.C. 727, (1974) 1 All E.R. 859

¹⁷⁵ § 16

¹⁷⁶ The English Arbitration Act 1996 has a provision to that effect

¹⁷⁷ § 18 (1)

¹⁷⁸ *Supra* note 108 at 320

¹⁷⁹ § 19 (1) made reference to "the cost of the reference and award"

¹⁸⁰ *Id.*

¹⁸¹ § 32 (6) (a-b)

The foregoing review exhibits a substantial dysfunction between certain provisions of the Arbitration Act 1995 and enhancement of the arbitral process. This antagonism can only be mitigated by developing a coherent policy on arbitration and ADR coupled with a comprehensive review and revision of the Act.

Conclusion and Recommendations

This paper sought to illustrate that the legal framework on arbitration in Kenya is responsible for the inadequate utilization of the arbitral process and ADR in dispute resolution. Using the dispute resolution mechanisms of the Kikuyu, Kamba and Kipsigis ethnic groups, we have demonstrated that customary arbitration and mediation, though not described by such charismatic terms characterized dispute resolution in many pre-colonial societies. We have shown that the legal framework transplanted to the country by the colonial power at the beginning of the last century failed to take cognizance of these customary practices which characterized the people's culture in dispute resolution. The purported introduction of the arbitral process by the Arbitration Ordinance 1914 was doomed to fail as it did not appreciate local circumstances in addition to other weaknesses. There was discordance between the law and local practices in dispute resolution. It was not an astonishment that the Ordinance fell into desuetude as soon as it was enacted.

There is no gainsaying that the arbitral law has largely been deficient in local content, and this has acted as a disincentive to the embracement arbitration by the local population. As underscored elsewhere, the Arbitration Act 1968 was a carbon copy of the English Arbitration Act 1889 and 1950. Its drafters used undefined heavy legal terminology and convoluted sentences and this did not bespeak well for the arbitral process. We have demonstrated how the Arbitration Act 1968 placed an arduous burden on persons who applied for a stay of proceedings and gave courts boundless discretion in determining such applications. This had an attenuating effect on the applicant's case. The Court of Appeal decision in *Esmailji v. Mistry Shamji Lalji & Co* exemplifies this point. The position was ameliorated by the Arbitration Act 1995 which made the grant of a stay of proceedings almost automatic.¹⁸² Like its predecessor, the Arbitration Act 1968 was ill-equipped to bolster the arbitral process. For the most part, it played a symbolic role in promoting arbitration.

Evidently, the Act remained in the statute books for many years notwithstanding the availability of more progressive laws, such as the New York Convention and the UNCITRAL Model law. And when the time was ripe for comprehensive reforms, the legislature adopted the model law without any attempt to supplement or localize it. Although the Arbitration Act 1995 is indisputably an improvement on the previous Act, and augments arbitration in certain respects, its omissions hinder it from playing the catalytic role it was supposed to play in promoting arbitration. From the analysis, it is evident that the country adopted crucial legal reforms belatedly and in a manner less than comprehensive. For example, Kenya ratified the New York Convention in 1989; thirty years after it became operational; however, no attempt was made to domesticate the convention. The model law was adopted in 1995, ten years after it was promulgated.

The analysis has laid it bare that adoption of the model law was more of an anticlimax because it has neither engendered nor endeared the arbitral process to the local population. However, courts have enforced all arbitral awards filed in compliance with the provisions of the Act. Both the High Court and Court of Appeal have shown a remarkable disinclination to interfere with arbitral awards. Although the Arbitration Act 1995 is much simpler than the previous legislation, and breaks new grounds in various matters, it is inadequate in many respects. For example, it does not consider arbitration a profession or semi-profession and this explains the absence of minimum qualifications for appointment and detailed obligations for arbitral tribunals. Perhaps the most conspicuous omission of the Act is the failure to recognize ADR mechanisms. This is exacerbated by the fact that it makes no provision for the requisite institutional framework to promote arbitration and other dispute resolution mechanisms. Undeniably, the Act fell short of expectations.

It is acknowledged that in the recent past courts have enforced the provisions of the Arbitration Act with exceptional diligence and this portends well for the arbitral process. While this is laudable, it cannot singularly enhance arbitration. Admittedly, it is a positive beginning. From the discussion it is incontestable that there has never been a comprehensible policy on the place and role of arbitration and ADR mechanisms in dispute resolution. This evinces the absence of a robust legal framework on arbitration and ADR mechanisms and the inexcusable omissions in the legal regime. Arguably, it is inexplicable why it has taken so long for the legislature to provide for arbitration and ADR in other relevant statutes. The possibility of having done so many years ago is exemplified by the provisions of the Labor Relations Act 2007 which is explicit that a collective agreement between an employer, group or employers or employers organization and a trade union may provide for conciliation or arbitration of any category of trade disputes between the parties.¹⁸³

¹⁸² Applications have only been denied in circumstances in which they were not filed on time.

¹⁸³ § 58 (1)

Inevitably, this irresolute approach has not engendered the arbitral process. Having come to the conclusion that the current legal regime on arbitration is inadequate in many respects, it is imperative to make recommendations for reform.

If arbitration and ADR mechanisms are to be espoused in Kenya, it is necessary to institutionalize and popularize the processes. First, it is incumbent on the Government to formulate a systematic policy on methods of settlement of civil disputes otherwise than by litigation. Emphasis should now be on arbitration and the alternative mechanisms. The policy would give the legal framework the necessitous paradigmatic shift as it would constrain amendments to the Arbitration Act in several ways. Second, the Act should expressly provide for ADR mechanisms, such as mediation. Third, it should recognize arbitration as a profession or semi-profession, prescribe minimum qualifications for members, duties, immunity and clearly articulated standards of conduct. Third, courts should be mandated to require parties to civil proceedings to utilize arbitration or any other form of ADR before proceeding with the case. Lastly, the Act should create an institution with authority to popularize arbitration and ADR mechanisms. This body should be vested with legislative power to make rules germane to the professions etiquette and other matters pertinent to the enhancement of arbitration and ADR. The body should be mandated to consult with the Chief Justice for purposes of formulating rules to institutionalize court mandated arbitration.

Finally, the legislature should be more pro-active in promoting arbitration and ADR. It should expressly provide that parties to disputes under different statutes such as, Insurance Act, Retirement Benefits Act, Capital Markets Act, and others may refer them to arbitration or mediation in the first instance. Such innocuous provisions would assist in popularizing and institutionalizing arbitration and ADR. It is submitted that only a multifaceted approach to reforms can elevate arbitration and ADR mechanisms to their rightful place in the dispute resolution matrix of the country.