THE RIGHT OF APPEAL UNDER SECTION 35 OF THE ARBITRATION ACT IN KENYA: AN ANALYSIS OF THE SUPREME COURT DECISION IN *NYUTU AGROVET v AIRTEL NETWORKS (2019) eKLR*

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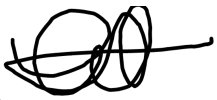
Declaration

I, **VIANNEY SEBAYIGA**, do hereby declare that this research is my original work and that to the best of my knowledge and belief; it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.



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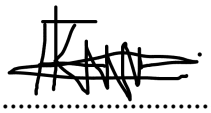

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Abstract

An arbitral award is final and binding on the parties but may be set aside for failure to adhere to due process requirements. Section 35 of the 1995 Arbitration Act (*the Act hereinafter*) provides grounds for setting aside an arbitral award by the High Court. It does not state whether decisions of the High Court on setting aside an arbitral award are final. Similarly, the said section does not expressly state that a decision thereunder is not subject to appeal. This ambiguity has led to uncertainty among lower courts. In *Nyutu Agrovet Limited v Airtel Networks Limited (2019) eKLR,* the Supreme Court interpreted Section 35 to allow appeals on High Court decisions of setting aside an arbitral award where (i) the High Court, in setting aside an arbitral award, has made a decision so manifestly wrong; and (ii) it has gone outside the grounds under the Act.

This dissertation critiques the Supreme Court decision by arguing that it abrogated from the internationally recognised arbitration principles of limited court intervention, finality of the outcome, and limited court intervention. The dissertation also advances that Section 35 does not allow appeals on High Court decisions on setting aside arbitral awards.

Furthermore, the dissertation discusses the Act and various international instruments to show that finality of arbitral awards is modelled on the international framework governing arbitration. The methodology used is a review of literature on arbitration principles and a comparative study on best practice jurisdictions like Singapore, Sweden, Switzerland, and England.

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With God, everything is possible. I would like to thank God for giving me the strength and zeal in my education endeavours. Also, I wish to thank my supervisor Dr. Francis Kariuki for his patience, insightful guidance, and mentorship throughout my degree. He has been a pillar of strength and wisdom to me. Special thanks go out to my parents and grandmother who have always supported and encouraged me to study. Lastly, I would like to extend my gratitude to my friends Michael Butera, Badbess Khalil, and Christine Njane for their support and encouragement.

List of Abbreviations

AA- Arbitration Act.

ADR- Alternative Dispute Resolution.

DAC- Department Advisory Committee.

CIArb- Chartered Institute of Arbitrators.

ECJ- European Court of Justice.

ECtHR- European Court of Human Rights.

IAA- International Arbitration Act.

PILA- Private International Law Act.

TDRM- Traditional Dispute Resolution Mechanisms.

UNCITRAL- United Nations Commission on International Trade Law.

List of International Instruments

Arbitration Act (Singapore).

Arbitration Act (Sweden).

Arbitration Act (United Kingdom).

Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

International Arbitration Act (Singapore).

UNCITRAL Model Law on International Commercial Arbitration.

List of National Instruments

Appellate Jurisdiction Act (Act No 12 of 2012).

Arbitration Act (Act No. 4 of 1995).

Arbitration Act 1968 (repealed).

Arbitration Rules (Legal Notice 58 of 1997).

Civil Procedure Act (Act No. 12 of 2012).

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Alhadha Trading Company v Tradigrain SA and Others (2002), The High Court of England and Wales.

*Amec Civil Engineering Limited v Secretary of State for Transport(*2002), The Commercial Court of England.

Anne Mumbi Hinga v Victoria Njoki Gathara, Civil Appeal No 8 of 2009.

Apa Insurance Company v Vincent Nthuka (2018)eKLR.

Ashwander v Tennessee Valley Authority (1936), The Supreme Court of the United States of America.

Athletic Union of Constantinople v National Basketball Association and *Others* (2002), the United Kingdom Commercial Court.

Baku Raphael v Attorney General (2015), The Supreme Court of Uganda.

Baxter Student Housing Ltd v College Housing Co-operative (1975), The Supreme Court of Canada.

Eco Swiss v Benetton, ECJ of 1 June of 1999.

*Benjoh Amalgamated & Another v Kenya Commercial Bank (*2014)eKLR.

Moch v Nedtravel (Pty) Ltd American Travel Express Service (1996), South African Court of Appeal.

Mwai Kibaki v Daniel Toroitich Arap Moi (2008) KLR.

National Cereals & Produce Board v Erad Suppliers & General Contracts Limited (2014)eKLR.

National Union of Metal Workers of South Africa v Fry's Metal (Pty) Ltd (2005), the Supreme Court of Appeal of South Africa.

Nova Chemicals Ltd v Alcon International Ltd, HC Misc Application 1124/2002.

Nyutu Agrovet v Airtel Network Kenya Limited (2016) eKLR.

Nyutu Agrovet Limited v Airtel Network Kenya Limited (2019) eKLR.

Pentecostal Assemblies of God v Reverend John Malwenyi & Others (2006)eKLR.

Petroships Pte Limited v Petec Trading Investment Corporation and Others (2001), The High Court of England and Wales.

Prof Lawrence Gumbe v Mwai Kibaki, High Court Miscellaneous No. 1025 of 2004.

R v High Court (General Jurisdiction) Accra; *Exparte Magna International Transport Limited (*2018), The Supreme Court of Ghana.

R v Mohamed Abdow Mohamed (2013)eKLR.

Republic v Karisa Chengo (2017) eKLR.

S v Mhlungu (1995), The Constitutional Court of South Africa.

Sadrudin Kurji & Another v Shalimar Limited (2006)eKLR.

Samuel Kamau Macharia v Kenya Commercial Bank (2012) eKLR.

*Soh Beng Tee & Co Pte Ltd v Fairmount Development Limited (*2007*), The Court of Appeal of Singapore.*

South African Broadcasting Corporation Ltd v National Director of Public Prosecutions (2006), Constitutional Court of South Africa.

Tabanne v Switzerland, ECtHR of 31 March 2016.

Taylor v Lawrence (2002) ALL ER.

Tjong Very Sumito v Antig Investments Pte Ltd (2008), The Court of Appeal of Singapore.

Triulizi Cesare SLR v Kinyi Group Glass Limited (2015), The High Court of Singapore.

TSJ v SHSR (2019)eKLR.

*Warborough Investment Limited v Robinson and Sons Limited (*2003), The Court of Appeal of England and Wales.

Wilson Kanyi Kareithi v Mount Pleasant Limited & 2 Others (2016)eKLR.

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CHAPTER ONE

Introduction to the Study

1.1. Background

Arbitration is a private consensual process where parties in dispute present their grievance to a third party for resolution.[1] A neutral third party(an arbitrator) is appointed by the parties or an appointing authority to determine the dispute and give a final and binding award.[2] Arbitration is preferred over litigation because of the finality of the outcome. Additionally, the arbitral process is flexible and is determined by the parties. This reflects the principle of party autonomy which allows parties to tailor the process to meet their needs. Furthermore, arbitration boosts of limited court intervention which leads to the speedy resolution of disputes.[3]

Globally, the friction between arbitral tribunals and courts has existed from time immemorial.[4] Whereas the losing party may voluntarily comply with the arbitral award, arbitration is also dependent on the underlying support of courts. A party who seeks to defy compliance with the resultant award can only be compelled by a court of law.[5] The debate, however, has been based on the extent to which courts can interfere with an arbitral award.

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[1] Muigua K, Alternative Dispute Resolution and Access to Justice in Kenya, *Glenwood Publishers Limited*, Nairobi,2015,34.Section 3 of the *Arbitration Act* (Act No 4 of 1995) defines arbitration as any arbitration whether or not administered by a permanent arbitral institution. This definition is not satisfactory in understanding the meaning of arbitration.

[2] Ombati J, 'Independence and Impartiality in Arbitration Practice in Kenya: Demystifying the Reasonable Third Person Test' 6(3) *Alternative Dispute Resolution*,2018, 138. *Section 12* of the Act provides that the parties have the power to appoint arbitrators and determine the procedure to be followed.

[3] Muigua K, 'Promoting International Commercial Arbitration in Africa' East Africa International Arbitration Conference, Fairmont the Norfolk, Nairobi, 28-29 July 2014,3.

[4] Renaud S, 'The Influence of the New York Convention on the UNCITRAL Model Law on International Commercial Arbitration' 2(1) *Dispute Resolution International*,2008,35.

[5] Redfern A and Hunter M, *Redfern & Hunter on International Arbitration*, 6th ed, Oxford University Press, Oxford,2015,416.

Proponents of court intervention argue that it serves as a check and balance and countermeasure where arbitrators abuse their authority.[6] In doing so, judicial scrutiny gives the losing party the right to challenge awards for the violation of the basic procedural due process.[7]

The antagonists, on the other hand, stress that court intervention undermines the independence of arbitration. Moreover, the length of the litigation process in an attempt to set aside the arbitral award removes the essence of arbitration as a speedy settlement. Similarly, antagonists assert that there is no clear limit to court intervention and that courts have extended their intervention beyond the grounds specified in legislation.[8]

By choosing arbitration, parties choose finality in principle. This means that an arbitral award is not intended to be a mere proposal as to how the dispute might be resolved nor is it intended to be the first step on a ladder of appeals through national courts.[9] An arbitral award is final and binding.[10]

The finality of an arbitral award has been entrenched in international instruments, that is, the United Nations Commission on Trade Law (UNCITRAL) Model Law and the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Awards (*hereafter the New York Convention*). The New York Convention is said to have inspired the drafters of the UNCITRAL Model Law. This is seen in the instances where the Model Law quotes

[6] Nurhayati Y, 'The Finality of Arbitration: The Pros and Cons of the Court's Power to Set Aside Arbitral Awards in Indonesia' The 5th International Conference for Legal Reconstruction based on Human Rights, Sultan Agung Islamic University, Semerang, Indonesia, 2019,379.

[7] Bassler W, 'The Symbiotic Relationship between International Arbitration and National Courts' 7(2) *Dispute Resolution International*, 2013,118.

[8] Nurhayati Y, 'The Finality of Arbitration: The Pros and Cons of the Court's power to Set Aside Arbitral Awards in Indonesia' 380.

[9] Redfern A and Hunter M, *Redfern & Hunter on International Arbitration*, 570.

[10] Redfern A and Hunter M, *Redfern & Hunter on International Arbitration*, 27.

directly from the New York Convention.[11] In addition, the Model law was put in place to amplify the work and fill the shortcomings in the New York Convention.[12]

The New York Convention aims at providing for mutual recognition and enforcement of arbitral awards made in countries that are parties to it. Article V of the Convection provides limited grounds within which a convention state can refuse to recognise and enforce an arbitral award.[13] It is argued that this is so because a party to a cross-border agreement who has won the award might find self-litigating in a foreign court difficult due to unfamiliar court practices. As such, the New York Convention ensures the finality of arbitral awards.[14] Kenya ratified the New York Convention in 1989 which means that Kenya is bound by the obligations under that Convention, for instance, the enforcement of international arbitral awards.[15]

The Model Law was adopted in 1985 to assist states in reforming and modernizing their arbitration laws.[16] The main objectives of the Model Law are to limit court intervention and to ensure the expeditious and efficient settlement of commercial disputes.[17] The Act largely adopted the provisions of the Model Law. Article 5 of the Model Law disallows courts to intervene in arbitration matters unless authorised. The policy of limited court intervention is

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[11] Renaud S, 'The Influence of the New York Convention on the UNCITRAL Model Law on International Commercial Arbitration' 27. Article 35 and 36 of the UNCITRAL Model Law on the recognition and enforcement of arbitral awards are quoted directly from Article V of the New York Convention.

[12] Renaud S, 'The Influence of the New York Convention on the UNCITRAL Model Law on International Commercial Arbitration'28.

[13] Article V, *The United Nations Convention on the Recognition and Enforcement of Foreign Awards*, 10 June 1958, UNTS 330. These grounds include arbitrability, incapacity, fairness, equal opportunities to present the case, lack of jurisdiction, and set aside awards as reasons for refusal of recognition and enforcement when such arguments are brought by one party.

[14] Adams C and Crammer P, *Drafting Contracts in Legal English*, Wolters Kluwer, Netherlands,2013,251-259. *Section 36 (2) of the Arbitration Act* provides that an international arbitration award shall be recognised as binding and enforced in accordance with the provisions of the New York Convention and any other convention to which Kenya is a signatory in relation to arbitral awards.

[15] Article 2(6) of *the Constitution of Kenya* (2010) provides that any treaty or convention ratified by Kenya forms part of laws under the Constitution.

[16] *The United Nations Commission on Trade Law Model Law*, 1985. See also Connerty A, *A Manual of International Dispute Resolution*, Commonwealth Secretariat, 207.

[17] Greenberg S, Kee C, and Weeramantry R, *International Commercial Arbitration: An Asia-Pacific Perspective*, Cambridge University Press, Sydney,2011,16.

replicated in Section 10 of the Kenyan Arbitration Act.[18] The Hansard of the National Assembly during the debate about the Act indicates that the strict time limits and finality of the High Court decisions were to ensure that neither party frustrates the arbitration process. Furthermore, it was stated that the limited court interference was to ensure an efficient resolution of commercial disputes.[19]

Although international instruments and the Act provide for the finality of the arbitral award, they also provide for recourse against the arbitral award in courts.[20] Section 35 of the Act provides for instances in which a party may apply to the High Court to set aside an arbitral award.[21] On the one hand, Section 35 of the Act does not explicitly state whether such a decision can be appealed to the Court of Appeal.[22] On the other hand, it does not have an explicit provision that a decision of the High Court thereof is final and shall not be subject to appeal.[23] This conundrum led to two conflicting positions by the Court of Appeal.

In the case of *Nyutu Agrovet Limited v Airtel Networks Limited*, the Court of Appeal held that the decision of the High Court in setting aside an arbitral award is final and that the Court of Appeal has no jurisdiction to hear that appeal.[24] However, in the case of *DHL Excel Supply Chain Kenya Limited v Tilton Investments Limited*, the Court of Appeal held that lack of an express limitation against appeals under Section 35 meant that the decision was appealable. These opposing views created uncertainty regarding the proper interpretation of Section 35 of the Act. The High Court was left in a dilemma of choosing the view to associate itself with when faced with the question of granting leave to appeal.[25]

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[18] Section 10, *Arbitration Act* (Act No 4 of 1995). Section 10 provides that no court shall intervene in matters governed under that law unless as authorised.

[19] National Assembly Hansard Report,27 July 1995,1759.

[20] Article 36 of the Model Law contains the same grounds of setting aside an award as found in Article V of the New York Convention.

[21] Section 35, *Arbitration Act* (Act No 4 of 1995). These include arbitrability, incapacity, unfairness, denial of opportunities to present the case, lack of jurisdiction, corruption and bribery.

[22] Section 35, *Arbitration Act* (Act No 4 of 1995).

[23] Section 35, *Arbitration Act* (Act No 4 of 1995).

[24] *(2015)eKLR.*

[25] In the case of *Mwai Kibaki v Daniel Toroitich Arap Moi* (2008) KLR, it was emphasized that decisions of higher courts bind lower courts because of the doctrine of stare decisis whether they agree with it or not.

Aggrieved by the Court of Appeal decision, Nyutu Agrovet filed an appeal to the Supreme Court. Nyutu Agrovet contended that the Court of Appeal had failed to appreciate that the right to appeal is conferred by Article 163(4) of the Constitution of Kenya (*Constitution hereinafter*).[26] They faulted the holding by the Court of Appeal that the said article provides for the jurisdiction to hear appeals and not the right of appeal. The main issue before the Supreme Court was whether there is a right of appeal under Section 35 of the Act.

The Supreme Court found that the Act does not expressly bar appeals to the Court of Appeal. In addition, it held that according to the dictates of the Constitution, Section 35 of the Act should be interpreted in a generous way that promotes its purpose, the objectives of arbitration, and the purpose of an expeditious yet fair dispute resolution legal system.[27] Furthermore, it stated that in exceptional circumstances, the Court of Appeal ought to have residual jurisdiction to enquire into instances where the High Court has stepped outside the grounds set out in the said section and thereby made a decision so manifestly wrong.[28]

While it is just that unfair determinations by the High Court should not be immune from appellate review, the Supreme Court decision is problematic. First, the only right of appeal is provided under Section 39 of the Act on points of law based on the consent of the parties before the delivery of the arbitral award. Second, the Supreme Court acknowledged that jurisdiction is only exercised where the right of appeal exists[29] and that Section 35 does not grant this right; however, it held that the Court of Appeal can exercise its residual jurisdiction to allow appeals. It is debatable as to whether the invocation of such jurisdiction is legally correct. This study will show that the invocation of residual jurisdiction is misplaced because it cannot be invoked to conflict law or a rule.[30] The specific rule is that the right of appeal is granted by law. Section 3 of the Appellate Jurisdiction Act states that the Court of Appeal shall have jurisdiction to hear appeals from the high court and any other court or tribunal

[26] Article 164(3) of the Constitution provides that the Court of Appeal has jurisdiction to hear appeals from – a) the High Court; and b) any other court or tribunal as prescribed by an Act of Parliament.

[27] Nyutu Agrovet v Airtel Network Kenya Limited (2019) eKLR, para 71.

[28] *Nyutu Agrovet Limited v Airtel Network Kenya Limited (2019) eKLR.*

[29] *Nyutu Agrovet Limited v Airtel Network Kenya Limited (2019) eKLR,* para 36.

[30] In the case of *Elephant Soap Factory Ltd v Nahashob Mwangi & Sons* Nairobi HCCC No.913 of 1971, it was held that the court will not invoke its inherent jurisdiction when there is an express provision dealing with the matter since the court cannot nullify an express provision by invoking its inherent powers. Also, in the case of *Republic v Karisa Chengo* (2017) eKLR, para 110, the Supreme Court held that jurisdiction goes to the root of any litigation. Its absence renders a court's decision void as opposed to it being merely voidable.

prescribed by an Act of Parliament in cases where an *appeal lies to the court of appeal under the law (emphasis mine).*[31] It follows that Section 35 of the Act neither grants appellate jurisdiction or the right of appeal.[32]

1.2. Statement of the Problem

As a matter of principle, arbitral awards are final and binding on the parties. This means that there are limited grounds for interfering with an arbitral award. However, the Supreme Court decision in *Nyutu Agrovet v Airtel Networks Limited (2019)eKLR* in essence allows appeals of the High Court decision on setting aside of arbitral awards under Section 35 of the Act. Yet, the said section does not expressly provide for appeals on setting aside an arbitral award. This research critiques the Supreme Court decision and evaluates its impact on arbitration practice in respect of party autonomy and the finality of arbitral awards.

1.3. Justification of the Study

The study should be conducted because the decision of the Supreme Court is to the effect that there are appeals under Section 35 of the Act against High Court decisions on setting aside arbitral awards. As such, this decision has a negative impact on the finality of arbitral awards and arbitration practice in Kenya because arbitral awards are final and binding as a matter of principle. Considering that this decision binds lower courts, it follows that there is a need to critically analyse the reasoning of the Supreme Court. This research will benefit academicians, policymakers, arbitrators, judges, Alternative Dispute Resolution practitioners, and arbitral institutions. It recognises the strengths and identifies the weaknesses in the decision of the Supreme Court as well as the ambiguities in the Act. Furthermore, it proposes better approaches of interpreting Section 35 of the Act.

1.4. Research Objectives

The study aims at analysing the decision of the Supreme Court in *Nyutu Agrovet v Airtel Networks Limited* (2019)eKLR to show that it abrogated from the internationally recognised arbitration principles of party autonomy and the finality of arbitral awards.

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[31] Section 3, *Appellate Jurisdiction Act* (Act No 12 of 2012).

[32] In the case of *Samuel Kamau Macharia v Kenya Commercial Bank* (2012) eKLR, the Supreme Court held that the right of appeal is granted by statute and is not absolute, it may be ousted or circumscribed. A court of law cannot assume appellate jurisdiction where none has been specifically granted by statute.

The objectives of the study include the following:

1. To assess whether Section 35 of the Act allows appeals to the Court of Appeal to show that there are no appeals on High Court decisions on setting aside an arbitral award.
2. To critique the Supreme Court decision in *Nyutu Agrovet v Airtel Networks Limited (2019)eKLR* to show that it abrogated from the internationally recognised arbitration principles, that is, party autonomy and the finality of arbitral awards.
3. To make recommendations on the proper interpretation of Section 35 of the Act.

1.5. Hypothesis

The study assumes the following hypothesis.

1.That Section 35 of the Act does not have an express provision for the right of appeal against the decisions of High Court on setting aside arbitral awards.

1.6. Theoretical Framework: Theories of Arbitration

The understanding of the theories of arbitration is very important because the scope and limits of court's intervention in the arbitral process is largely influenced by the theories accepted by a particular jurisdiction.[33] Similarly, a decision whether to select litigation or arbitration mainly focuses exclusively on the efficiency of the arbitral procedure and the restriction of judicial intervention.[34] The theories include the jurisdictional theory, the contractual theory, and the hybrid theory.

1.6.1. The Jurisdictional Theory

The jurisdictional theory asserts that a State has complete authority and supervisory power to regulate arbitration within its territory.[35] The theory does not dispute that arbitration originates from arbitration agreements; rather, it maintains that the validity of arbitration

[33] Amazu A, 'Arbitration and Judicial Powers in Nigeria' 18(6) *Journal of International Arbitration*, Kluwer Law International, Netherlands,2001, 61.

[34] Reode R, 'Litigation or Arbitration: The Influence of the Dispute Resolution Procedure on Substantive Rights' 19(53) *Pace International Law Review*,2007,54. He argues that confidentiality and the finality of the arbitral award may be undermined b judicial review.

[35] Koca E, 'Possibility of autonomous International Commercial Arbitration' Unpublished Master of International and Comparative Law, Transcultural Business Law,2017,14.

agreements and arbitration procedures need to be regulated by national laws.[36] Gergios Zekos argues that it is the domestic law of a State that gives the arbitrator his autonomy, and not the parties' agreement.[37] Every right or power enjoyed by a private person is inexorably conferred by or derived from a system.[38] Maniruzzaman Adul argues that the jurisdictional theory localises arbitration in every respect. He asserts that international commercial arbitration should be understood in the context of public international law, which guarantees sovereignty and territorial jurisdiction; each state has the power to determine the affairs in its jurisdiction.[39]

The jurisdictional theory finds support in the fact that an arbitral award unless voluntarily enforced by the parties, is not self-executing and will most likely always need to be enforced by the courts.[40] Also, the theory finds support in the area of subject matter arbitrability. A state will not uphold an arbitration agreement that is over a subject matter that is not arbitrable.[41] Furthermore, the fact that an arbitrator's powers are drawn partly from the state is substantiated by the fact that the arbitrator must comply with the mandatory provisions on public policy.[42] The jurisdictional theory views arbitrators as persons possessing delegated authority from the state. Relying on this delegation, the proponents of this theory deny that the arbitrator's power originates from the parties' arbitration agreement. Instead, they posit that the state relies on public interest to permit private individuals to decide disputes when the parties have agreed.[43]

Since this theory allows for extensive intervention by courts, it advocates for the appeal of decisions of the High Court on setting aside arbitral awards. It is relevant to this study

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[36] Yu H, 'A theoretical Overview of the Foundations of International Commercial Arbitration' 1(2) *Contemporary Asia Arbitration Journal*,2008,257.

[37] Zekos G, 'Problems of Applicable Law in Commercial and Maritime Arbitration' 16(4) *Journal of International Arbitration*, Kluwer Law International, Netherlands,1999,177.

[38] Maniruzzaman A, 'State Contracts and Arbitral Choice of Law, Process, and Techniques' 15(3) *Journal of International Aritration*,1998,67.

[39] Maniruzzaman A, 'State Contracts and Arbitral Choice of Law, Process, and Techniques' 68.

[40] Semakula S, 'The Legal Developments of Arbitration in England and Wales' 1(1) *International Academic Journal of Law and Society*,2016,63.

[41] Onyema E, *International Commercial Arbitration and the Arbitrator's Contract*, Routledge, London,2010,33.

[42] Onyema E, *International Commercial Arbitration and the Arbitrator's Contract*,37.

[43] Mustil M, 'Transnational Arbitration in English Law' 37(1) *Current Legal Problems*,1984,133-152.

because this research seeks to critique the Supreme Court decision that essentially allows appeals of decisions of the High Court on setting aside arbitral awards.

1.6.2. The Contractual theory

The Contractual theory posits that arbitration is based on an agreement of the parties rather than the will of the state.[44] This theory is a construct of the liberalism movement of the 19th century which underscored the doctrine of freedom of contract.[45] The theory stresses that parties have the freedom to decide the relevant issues about the arbitration procedures, and this freedom should not be generally interfered with by the state.[46] Party autonomy assumes that parties to an arbitration agreement are knowledgeable and informed about the arbitral process.[47] The contractual theory underscores that an arbitral tribunal serves the interests of the parties rather than the state's control.[48] Its proponents reject the delegation idea which holds that arbitrators resemble judges of national courts.

According to Emilia Onyema, the contractual theory does not dispute that arbitration can and is influenced by national law but denies that the state exercises a controlling power over arbitration.[49] She disputes the notion that an arbitrator is an agent of the parties, instead, the arbitrator contracts with the parties in his own capacity.[50] Furthermore, she asserts that an arbitral award, though emanating from the arbitration agreement, does not have the status of a mere contract between the parties. The arbitral award is enforced in theory and practice as a final judgment of the court.[51] Similarly, she observes that the voluntary compliance of a resultant arbitral award does not change the status and nature conferred on the arbitral award as the equivalent of a final judgment of the court.[52] Lastly, she argues that the contractual

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[44] Koca E, 'Possibility of autonomous International Commercial Arbitration' 3.

[45] Maniruzzaman A, 'State Contracts and Arbitral Choice of Law, Process, and Techniques' 15(3) *Journal of International Aritration*,1998,69.

[46] Bashayreh M, 'The Separability Doctrine in English Arbitration Law' Unpublished Degree of Doctor of Philosophy, University of Oxford,2002,14.

[47]Semakula S, 'Party Autonomy Doctrine is the Cornerstone of Arbitral Provisional Measures' 1(1) *International Academic Journal of Law and Society*,2016, 30. The expression "*unless otherwise as agreed by the parties*", reflects the free will of the parties.

[48] Zekos G, 'Problems of Applicable Law in Commercial and Maritime Arbitration'177.

[49] Onyema E, *International Commercial Arbitration and the Arbitrator's Contract*,36.

[50] Onyema E, *International Commercial Arbitration and the Arbitrator's Contract*,37.

[51] Onyema E, *International Commercial Arbitration and the Arbitrator's Contract*,35.

[52] Onyema E, *International Commercial Arbitration and the Arbitrator's Contract*, 37.

theory does not adequately explain situations where the losing party fails to comply with the resultant award.[53]

Paulsson Jan criticizes the contractual theory by arguing that it would be intolerable if the country of the seat could not override whatever arrangements the parties have made. In addition, he posits that the local sovereign does not yield to them except as a result of freedoms granted by himself.[54] He illustrates that an arbitral tribunal's constitution and functioning are mostly defined and controlled by the judges and the law of the place of arbitration.[55]

The contractual theory is relevant to this study because it underscores the principle of party autonomy and consent which are the hallmarks of arbitration. This theory will aid the research in assessing the impact of the Supreme Court decision on party autonomy by investigating whether Section 35 of the Act allows appeals of decisions of the High Court on setting aside arbitral awards.

1.6.3. The Hybrid Theory of Arbitration

The last theory is the hybrid theory which emerged as a compromise between the contractual theory and the jurisdictional theory. Under the hybrid theory, an arbitrator serves the interests of the parties as permitted by the domestic law.[56] Professor Sauser propounds that on the one hand, a contractual element in arbitration is reflected in the idea that the arbitration originates from private contracts. This enables parties to choose the arbitrators and the rules of procedure.[57] On the other hand, he agrees with the jurisdictional theory that arbitration has to be conducted within the national law regimes to determine the powers of the parties, the validity of the arbitration agreement, and the enforceability of arbitral awards.[58]

Amazu Asouzi observes that the arbitral process commences as a private agreement between the parties. It continues by way of private proceedings wherein the wishes of the parties are

[53] Onyema E, *International Commercial Arbitration and the Arbitrator's Contract*, 39.

[54] Jan P, 'Arbitration Unbound: Award Detached from the Law of its Country of Origin' 30(2) *International Comparative Law Quarterly*,1981,360.

[55] Jan P, 'Arbitration Unbound: Award Detached from the Law of its Country of Origin' 361.

[56] Zekos G, 'Problems of Applicable Law in Commercial and Maritime Arbitration'177-178.

[57] Semakula S, 'Party Autonomy Doctrine is the Cornerstone of Arbitral Provisional Measures' 37.

[58] Yu H, 'A theoretical Overview of the Foundations of International Commercial Arbitration' 274.

of great significance. Lastly, the arbitral process ends with an arbitral award with a binding legal force but has to be recognised and enforced by a court.[59]

Hunter and Redfern agree with Professor Sauser's views by recognising the interplay between an arbitration agreement and the courts in enforcing the arbitral awards. They argue that the outcome from private arbitral proceedings can only be enforced with assistance from the courts.[60] According to them, national courts could exist without arbitration but arbitration cannot exist without the courts.[61] They posit that ideally, they should be no conflict between the partnership between the courts and the arbitral tribunals.[62] At the beginning of an arbitration, the national courts (not the arbitrators) have the task of enforcing the agreement to arbitrate if one of the parties attempts to avoid it.[63] During the arbitral process, the arbitrators (not the courts) must take charge of the proceedings, organise the meetings, consider the arguments by the parties, and make an arbitral award. At the end of the arbitral process, national courts (not the arbitrator) must also enforce the arbitral award if the losing party is not prepared to comply with it voluntarily.[64]

They argue that the real issue is to determine the point at which the reliance of arbitration on the national courts begins and where it ends.[65] The hybrid theory is the most appealing and that is supported by the UNCITRAL Model Law and the New York Convention, both of which favour limited court intervention.[66]

This theory is central to this study as it shows the interplay between the courts and arbitral tribunals. For arbitration to be effective, the courts have a role to play, though their involvement has to be limited so as to safeguard arbitration principles. The Act has numerous provisions on the role of the court in arbitration. This study will assess whether Section 35 of the Act allows appeals on decisions of the High Court on setting aside arbitral awards

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[59] Amazu A, 'Arbitration and Judicial Powers in Nigeria'62.

[60] Redfern A and Hunter M, *Law and Practice of International Commercial Arbitration*, Sweet and Maxwell, London,2004,8-10.

[61] Redfern A and Hunter M, *Redfern & Hunter on International Arbitration,415.*

[62] Redfern A and Hunter M, *Redfern & Hunter on International Arbitration,* 416.

[63] Redfern A and Hunter M, *Redfern & Hunter on International Arbitration*, 419.

[64] Redfern A and Hunter M, *Redfern & Hunter on International Arbitration*, 417.

[65] Redfern A and Hunter M, *Redfern & Hunter on International Arbitration*, 416.

[66] Chukwutoo I, 'Public Policy and Privatised Justice : Setting Aside Arbitral Awards by National Court of the Arbitral Seats' Unpublished LLM, University of British Columbia,Vancouver,1997,47.

1.7. Literature Review

Different local and international scholars have written about the appellate review of arbitral awards. Their views have been categorised in themes:

1.7.1. Tension between Courts and Arbitral tribunals

Emilia Onyema explains the origin of the jurisdictional tensions between courts and arbitral tribunals. In her view, this tension originated from comparing arbitrators to judges. Whereas both arbitrators and judges make binding decisions over the disputes submitted by the parties in the respective fora, the two are distinct; they play different roles and have dissimilar powers.[67] Onyema's paper discusses the foundations of the tension between courts and arbitral tribunals. However, it does not look specifically at the Kenyan tension between courts and arbitral tribunals. More so, it does not look at the recent Supreme Court decision which this study seeks to do.

Michael Muyala maintains that arbitration cannot function without assistance from courts. He observes that only courts have the coercive powers to enforce agreements and arbitral awards. His paper gives a general overview of the role of national courts.[68] This study focuses on setting aside an arbitral award and appellate intervention on High Court decisions of setting aside arbitral awards under Section 35 of the Act. Other roles of courts like granting interim measures, challenging the appointment of an arbitrator, and enforcement of arbitral awards will not be discussed in this study.

Khan Ali asserts that parties give up the right to litigate disputes identified in the arbitration agreement when they choose arbitration. He dissects the difference between the right to litigate and the obligation to litigate. He argues that an aggrieved party whose interests have been injured has the right but not the obligation to seek remedies through litigation. He accents that rational litigants consider the transaction cost of litigation and may not pursue a claim if the cost exceeds the expected benefit.[69] Khan's views will help in assessing the impact of the Supreme Court decision on party autonomy, specifically the question of

[67] Onyema E, 'The Jurisdictional Tensions between Domestic Courts and Arbitral Tribunals' in Manaker A (eds), *International Arbitration and the Rule of Law: Contribution and Conformity*, Kluwer International Law, Netherlands, 2017, 482-483.

[68] Muyala M, 'Role of National Courts in Arbitration in Kenya' 6(3) *Alternative Dispute Resolution*, 2018,187.

[69] Khan A, 'Arbitral Autonomy' 74(1), *Louisiana Law Review*, 2013.

whether the courts can impose an appeal where the parties elected in the arbitration agreement to disallow appeals against decisions of the High Court on setting aside.

1.7.2. The Benefits and Detriments of a Lack of an Appeal Mechanism

Redfern and Hunter evaluate the risks of having a legal system that leaves arbitral awards entirely free from appeals. First, there is a high likelihood of unprofessional conduct by arbitral tribunals since the arbitral awards are not subject to scrutiny. Second, there is the risk of inconsistent decisions as the same or similar points come before different tribunals each one of which is independent of the other.[70]

However, Redfern and Hunter also note the serious disadvantages of having a system of arbitration that gives an unrestricted right of appeal from arbitral awards. First, the decision of a national judge may be substituted for the decision of the arbitral tribunal voluntarily selected by the parties. Besides, there is a breach of privacy since the party that agreed to arbitration as a private method of resolving disputes may find itself brought unwillingly before courts that hold their hearings in public. Lastly, the appeal process may be used to postpone the day on which payment is due.[71]

They acknowledge that it is difficult to strike a balance between the need for the finality of arbitral awards and the wider public interest through judicial scrutiny to ensure consistency and predictability of the law. According to them, the balance has come down internationally in favour of finality against judicial review, except in the very limited circumstances as set out in Article 5 of the Model Law. This research will contextualise and give the Kenyan experience by assessing whether Section 35 of the Act expressly allows appeals on High Court decisions on setting aside arbitral awards.

Noam Zamir and Peretz Segal assert that appeals lead to legal uncertainty and undermine party autonomy. According to them, lack of appeal mechanisms boosts efficiency and saves costs of appeal proceedings. However, they note that too much finality undermines the legitimacy of arbitration. They note that parties resort to international arbitration because they want transnational enforcement and to avoid the use of national courts which they do

[70] Redfern A and Hunter M, *Law and Practice of International Commercial Arbitration*, 592.

[71] Redfern A and Hunter M, *Law and Practice of International Commercial Arbitration*, 593.

not trust. In support of appeal mechanisms, they argue that it improves the execution of the award owing to the exhaustion of windows for challenging the said award, especially where the dissatisfied party loses on appeal. They propose that an efficient appeal mechanism will boost international arbitration.[72] Their views are important to this study because the Supreme Court expressed that there is a need to come up with a leave mechanism in allowing appeals to the Court of Appeal. However, it did not offer guidance on the factors that will be included in such a mechanism. It instructed the Court of Appeal to come up with the various determinants.

Andrew Tuck, on other hand, argues that rights of appeal water down the finality of the award, predictability, and neutrality. He advocates for the United States approach where parties can exclude judicial review under the Federal Arbitration Act hence enhancing the finality of the arbitral award.[73]

The scholars above gave a general overview of the benefits of allowing or disallowing appeals on an international level. This study contextualises their views by looking at the Kenyan position. The Supreme Court did not propose a leave mechanism after holding that a right of appeal lies under Section 35 of the Act. This is likely to open flood gates for appeals under the said section, thus frustrating finality of the arbitral award.

1.7.3. The Reasoning of Judges in Decision Making

Gad Kiragu observes that judges are influenced by many factors in making decisions, however, he emphasizes that they should be sufficiently trained in the area of law before them to come up with well-reasoned decisions.[74] He also discusses the positivist views of Hart and Kelsen to show that in some cases, judges make law when deciding cases before them. They either state the law as it is or depend on sociological factors. Gad Kiragu's article

[72] Naom Z and Peretz S, 'Appeal in International Arbitration – an efficient and affordable arbitral appeal mechanism' 1(1) *Arbitration International*, Oxford, University Press, 2009, 85.

[73] Tuck A, 'The Finality Question: Appellate Rights and Review of Arbitral Awards in Americas Law' 14(3) *Law and Business Review of the Americas*, 2008, 588.

[74] Kiragu G, 'Judicial Enforcement of Arbitral Awards: A Theoretical Perspective' 4(2) *Alternative Dispute Resolution*, 2016.

gives the general jurisprudential underpinnings that influence decision making by judges, however, it does not narrow down to a specific court as this study seeks to do.

Nonetheless, his views will be vital in advancing that judges should be sufficiently trained in understanding arbitration principles like the finality of arbitral awards, limited court intervention, and party autonomy. Additionally, Kiragu's views will assist in understanding the factors that could have influenced the judges to reason that there appeals under Section 35 of the Act on the setting aside of arbitral awards.

1.7.4. The Right of Appeal under Section 35 of the Arbitration Act

Irfan Kassam dissertates whether the silence under section 35 of the Act grants the right of appeal. He discusses the rationale behind the silence in statutory provisions. According to him, this silence can be attributed to complete oversight by the legislator during the drafting process. Drawing from different tools of statutory interpretation, he argues that the silence does not grant a right of appeal. Kassam connotes that to understand the meaning of silence, one has to consider the objectives of the statute in question. Furthermore, he stresses that the legislature intended to minimise court intervention to ensure the speedy resolution of disputes. His research was based on the conflicting Court of Appeal decisions.[75] This study explores the recent decision by the Supreme Court to investigate whether Section 35 of the Act allows appeals against the decisions of the High Court on setting aside arbitral awards.

Eric Muchiri discusses the split in the Court of Appeal regarding Section 35 of the Act. He asserts that in the *Nyutu Agrovet v Airtel Networks*, the Court of Appeal took a restrictive interpretation of Article 164(3) of the Constitution which enshrines the jurisdiction of the court of appeal.[76] In analysing the *DHL Excel Supply Chain Kenya Limited v Tilton Investments Limited*, he argues that the Court of Appeal broadly interpreted the said article and held that a constitutional right of appeal can only be denied by an express provision.[77] He concludes by suggesting an amendment of the Act to bring it in conformity with the Constitution.[78] Eric Muchiri's paper lays the foundation for a contextual discussion in the

[75] Kassam I, 'Interpreting the Silence of Section 35 of the Arbitration Act 1995: A Judicial Dilemma for the Kenyan Courts' Unpublished LLB Thesis, Strathmore Law School, 2020.

[76] (2015)eKLR.

[77] (2017)eKLR.

[78] Muchiri E, 'Revisiting the Right of Appeal to the Court of Appeal under the Arbitration Act' 6(1)*Alternative Dispute Resolution*, 2018.

split in the Court of Appeal. This study focuses on the Supreme Court decision in its attempt to resolve the split in the Court of Appeal. It does so by investigating whether there is a right of appeal under Section 35 of the Act.

Githu Muigai in his book, *Arbitration Law and Practice in Kenya*, draws a distinction between the right of appeal under the English Arbitration and the Kenyan Act. In the former, an appeal is allowed of right while in Kenya, the right of appeal is granted by law and can be circumscribed. Githu Muigai's work will aid in understanding the difference between the English and Kenyan Arbitration Act. This then will help in evaluating the reliance of the Supreme Court on the provisions of the English Arbitration Act which allows the right of appeal, to decide that Section 35 of the Kenyan Act allows appeals from decisions of the High Court on setting aside. His book gives a general overview of the two pieces of legislation but lacks cases that have interpreted the sections on the appeal of arbitral awards in the said Acts. This research examines the provisions on setting aside of arbitral awards by courts in England and Kenya.

Wilfred Mutubwa comments on the decision of the Supreme Court. His central thesis is that the Supreme Court ought to have read the Act wholly. With this approach, he argues that the Supreme Court would have concluded that section 35 read together with Section 10 of the Act do not allow appeals to the Court of Appeal. He faults the court for relying on the English Arbitration Act to allows appeals, yet this legislation is not *pari materia* with the Kenyan Act.[79] In his earlier works, he wrote a paper highlighting the institutional and statutory problems that have hindered enforcement of arbitral awards. He canvasses that Section 35 has been expanded by losing parties to set aside arbitral awards.[80] Additionally, he opines that there is no matter of general public importance in a private process like arbitration to warrant certification by the Court of Appeal in allowing an appeal. Peter Murithi, another scholar, discusses the ramifications of the Supreme Court decision. He argues that the decision abrogated the principle of finality of arbitral awards. Second, he notes that the said holding will have an adverse effect on international commercial arbitration. In his paper, he

[79] Mutubwa W,'Is Nairobi a Safe Seat for International Arbitration? A Review of the Latest Decision from the Supreme Court of Kenya and Its Possible Effects' 8(1) *Alternative Dispute Resolution*, 2020, 55.

[80] Mutubwa W, 'Enforcement of Arbitral Awards in Kenya: Statutory and Institutional Bottlenecks' 6(1) *Alternative Dispute Resolution*, 2018.

concludes that there is a need to amend Section 35 of the Act to capture the opinion of the Supreme Court.[81]

This study is similar to the works of Peter Muriithi and Wilfred Mutubwa, however, both scholars do not investigate whether Section 35 of the Act provides for the right of appeal. Also, they do not discuss the doctrine of residual jurisdiction. Additionally, they do not propose better approaches in interpreting Section 35 of the Act.[82] This research will extensively examine whether Section 35 of the Act provides for the right of appeal.

1.8. Limitation of the Study

The study is limited to the Supreme Court decision in *Nyutu Agrovet v Airtel Networks Limited* (2019)eKLR. Similar cases like *Synergy Industrial Credit Limited v Cape Holdings Limited* (2019)eKLR will not be analysed because both cases in essence allow appeals under Section 35 of the Act. Additionally, the study is specific to arbitration practice in Kenya. However, this shall not limit lessons that can be learnt from foreign jurisdictions on the appellate review of arbitral awards. Furthermore, the study recognises that Section 35 of the Act was enacted before the promulgation of the Constitution. As such, this section did not contemplate appeals to the Court of Appeal.

1.9. Research Methodology

The study will employ qualitative analysis of the primary and secondary sources of information by doing desktop research. The primary sources are statutes, international conventions and instruments, and case law. Most important among the primary sources are the Constitution of Kenya, the Act, the Model law, and the New York Convention. These state the legal framework governing the finality of arbitral awards as well as the instances of court intervention. The approaches by Kenyan courts in interpreting Section 35 of the Act will be important in evaluating whether Section 35 provides for the right of appeal. However, this study will centrally focus on the Supreme Court decision in *Nyutu Agrovet v Airtel Networks* (2019)eKLR.

Secondary sources like textbooks and journal articles on arbitration are used to understand the conceptual and theoretical foundations of concepts like the right of appeal in relation to

[81] Muriithi P, 'Ramifications of the Decision of the Supreme Court in the case of; Nyutu Agrovet Limited (Petition No 12 of 2017' 8(1) *Alternative Dispute Resolution*, 2020.

[82] Section 4, Nairobi Centre for International Arbitration (Act No 26 of 2013).

setting aside arbitral awards. Also, secondary sources analysing the benefits of either allowing or disallowing appeals under Section 35 of the Act. To this end, both physical and online libraries are used in accessing the secondary sources. Online sources like Jstor, Wolters Kluwer, HeinOnline, Oxford Academic Journals are used to access journal articles. There will be no fieldwork and information gathering.

Furthermore, a case study on the provisions of setting aside in the English Arbitration Act is also used to compare and contrast with Section 35 of the Kenyan Arbitration Act that deals with setting aside arbitral awards. This is because the Supreme Court referred to the English Arbitration Act in arriving at its decision that there are appeals of the decisions of setting aside by the High Court. Additionally, England has a more developed arbitration system and as such, it will be important to identify the lessons that Kenya can learn from England. The primary and secondary sources will be evaluated by analysing the main arguments propounded by their authors. This will help anchor the analysis of the Supreme Court decision.

Besides this, at a comparative level, an analysis and review of courts' attitude towards arbitration in best practice jurisdictions such as Singapore, Sweden, and Switzerland is undertaken. Singapore has been chosen because it is one of the most preferred and widely used seats in the world. Additionally, it is the most improved arbitration seat owing to its impartial legal system, supportive national courts, and a high track record in enforcing arbitral awards. Furthermore, the Singaporean arbitration laws are inspired by the Model Law, just like Kenya.

Sweden has been chosen because its courts are supportive towards arbitration. Swedish courts distinguish between serious irregularities and minor irregularities in applications of setting aside arbitral awards. Irregularities in the arbitral process which do not affect the outcome of the case, although serious, may not be grounds on setting aside arbitral awards thus sustaining the finality of awards. This lesson is important because Section 35 of the Act does not distinguish between the effect of existence of any ground of setting aside therein. All grounds are treated equally and have the same effect- the setting aside of an arbitral award.

Lastly, Switzerland has been chosen because it is the third most preferred arbitration seat in the world. Swiss Courts are supportive of arbitration principles like party autonomy, finality of the arbitral award, and limited court intervention. Moreover, Swiss Courts have held that

limitations to access to courts and appeals to higher courts does not violate the right of access to justice. This is important to the study because there are views that suggest that denying appeals under Section 35 of the Act on decisions of the High Court on setting aside an arbitral award, infringe on the right of access to justice.

1.10. Chapter Breakdown

Chapter One: Introduction to the Study

It has introduced the study by discussing the international and domestic framework governing the finality of arbitral awards. It has briefly outlined the relationship between courts and arbitral tribunals by discussing the theories of arbitration. Furthermore, it states the objectives, hypotheses, literature review, theoretical framework as well as the methodology and limitations of the study.

Chapter Two: Existence or Non-Existence of the Right of Appeal under Section 35 of the Arbitration Act

This chapter provides the working definition of the right of appeal and then investigates the right of appeal under section 35 of the Act. In addition, it discusses the legal framework of the principle of the finality of arbitral awards. This is achieved by looking at the domestic and international framework that enshrine the principle of finality of arbitral awards. Furthermore, this chapter analyses the Supreme Court decision by laying down the background of the case. It then identifies the strengths and weaknesses of the said holding in relation to the finality of arbitral awards, limited court intervention, and party autonomy. Lastly, it discusses the doctrine of residual jurisdiction identifying instances when it can be invoked and its limitations. This is aimed at illustrating that the Supreme Court should not invoked the said doctrine.

Chapter Three: Comparative Study between Section 67 of the English Arbitration Act and Section 35 of the Kenyan Arbitration Act

This Chapter seeks to highlight the differences between the provisions on setting aside an arbitral award under the English Arbitration Act and the Kenyan Arbitration Act. It begins by discussing the setting aside of arbitral awards under the Kenyan Arbitration Act. Then, the chapter identifies the loopholes under the Act. Thereafter, the chapter explores sections of the English Arbitration Act on challenging arbitral awards. Additionally, it analyses the provisions of setting aside arbitral awards in the two legislations. This is aimed at emphasizing that the English Arbitration Act is a home-grown arbitration legislation and as

such, it is different in content and is not inspired by the Model Law like the Kenyan Arbitration Act. Consequently, the chapter argues that the Supreme Court of Kenya should not have relied on the provisions of the English Arbitration Act to interpret Section 35 of the Act.

Chapter Four: Towards a Better Approach in the Interpretation of Section 35 of the Arbitration Act

This chapter discusses how the courts should interpret Section 35 on the setting aside of arbitral awards. It attempts to fill the weaknesses in the Supreme Court decision in *Nyutu Agrovet v Airtel Networks Limited* (2019)eKLR. The chapter begins by outlining the constitutional mandate on courts to promote Alternative Dispute Resolution mechanisms. Courts should interpret Section 35 with a view of promoting arbitration, and not to defeat core arbitration principles. Second, the chapter discusses the doctrine of constitutional avoidance, a doctrine which dictates that courts should determine a constitutional issue when a matter may be properly decided on another basis. This is aimed at encouraging courts to avoid setting aside arbitral awards on constitutional grounds when they can be set aside within the Act. Third, it proposes that Section 35 should be interpreted based on the internationally recognised arbitration principles; namely, finality of the award, limited court intervention, and party autonomy. The Chapter proceeds by giving illustrations from the best practice jurisdictions such as Singapore, Sweden, and Switzerland.

Chapter Five: Conclusion and Recommendations

This chapter will present the findings, propose recommendations, and conclude the study.

CHAPTER TWO

Existence or Non-existence of the Right of Appeal Under Section 35 of the Act

2.0. Introduction

This chapter seeks to define appeals generally before focusing on determining the existence or non-existence of the right of appeal under Section 35 of the Act. The first part of this chapter distinguishes between appeals that exist as of right and appeals that exist by leave of court as provided by the Civil Procedure Code. This is aimed at illustrating that the provisions of the Civil Procedure Code on appeals do not apply to the provisions of the Act. The second and third parts discuss the international and domestic legal frameworks governing the finality of arbitral award. These parts argue that Section 35 of the Act is modelled on the wider international legal regime on the finality of arbitral awards, namely, the UNCITRAL Model which limits court intervention while safeguarding the finality of arbitral awards. Therefore, the said principles apply to Kenya and ought to have been promoted by the Supreme Court.

The fourth part of this chapter analyses the Supreme Court decision in *Nyutu Agrovet v Airtel Networks Limited (2019) eKLR*. It begins by outlining the facts of the facts then evaluates the strengths and weaknesses of the decision. Part Four argues that the Supreme Court decision greatly undermines the finality of arbitral awards by permitting appeals of High Court decisions on setting aside arbitral awards under Section 35 of the Act. The fifth part of this chapter explores the doctrine of residual jurisdiction. The majority judgement held that the Court of Appeal can exercise residual jurisdiction to allow appeals under Section 35 of the Act. This part discusses the scope and limitations of the doctrine of residual jurisdiction to show that its invocation by the Supreme Court was misplaced.

This chapter concludes by maintaining that Section 35 of the Act does not provide for the right of appeal on High Court decisions of setting aside arbitral awards.

2.1. Right to Appeal

Appeals are substantive proceedings by an aggrieved party against a decision of a court to a hierarchically superior court with appellate jurisdiction seeking a reconsideration in his

favour.[83] Generally, appeals exist either as of right or by leave of court.[84] The right to appeal is then a statutory right that enables one to seek recourse to a higher court when aggrieved by a decision of a lower court.[85] Where the right to appeal is vested in a litigant; it is a substantive right in that it enables the right holder to exercise and claim that right.[86]

2.1.1. Appeals as of Right and Appeals by Leave of Court in Kenya

The Kenyan Civil Procedure Code lists orders from which an appeal exists as of right. These include: (a) an order superseding an arbitration where the award has not been completed within the period allowed by the court; (b) an order on an award stated in the form of a special case; (c) an order modifying or correcting an award; (d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration; (e) an order filing or refusing to file an award in an arbitration without the intervention of the court; (f) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree; and (h) any order made under rules from which an appeal is expressly allowed by rules.[87]

In furtherance of proviso (h), the Civil Procedure Rules outline more orders that are appealable as of right. For example, general orders on pleadings, summary procedure, judicial review orders, and enlargement of time.[88] It is noteworthy that all other orders that are not listed under Section 75 and Order 43, appeals therein lie only with the leave of court. Additionally, it is important to observe that some arbitrations may be commenced by an order in a suit.[89] When the court orders parties in a suit to go for arbitration, the proceedings and orders thereunder are subject to the Civil Procedure Act and Civil Procedure Rules.[90]

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[83] *Kakuta Hamisi v Pesi Pesi Tobiko (2013) eKLR.*

[84] Section 75, *Civil Procedure Code* (Cap21 of 1924).

[85] Kumar B, 'Right to Appeal in Arbitration under Indian laws: An Interpretive Critic of Judicial Response' 38(2) *Commonwealth Bulletin*,2012,301.

[86] Kumar B, 'Right to Appeal in Arbitration under Indian laws: An Interpretive Critic of Judicial Response'305.

[87] Section 75, *Civil Procedure Code*.

[88] Order 43, *Civil Procedure Rules* (Legal Notice 151 of 2010).

[89] Order 46, Rule 1 of the Civil Procedure Rules (2010) provides that where the parties agree to refer their suit for arbitration, they may at any time before judgement is pronounced, apply to the court for an order of reference.

[90] Section 59, *Civil Procedure Code* (Cap 21,1924).

Arbitration under the order of court generally allows the court slightly more intervention than the arbitration allowed under the 1995 Arbitration Act. For instance, the court must fix a time within which the arbitral award must be made.[91] Furthermore, arbitrators are obligated to file their awards in courts and once the award is filed, it must be read by the Registrar.[92] This kind of arbitration may discourage parties because of the lack of confidentiality and the dominance of the court in the arbitral process.[93] Arbitrations commenced through an arbitration agreement under the Arbitration Act are governed by that Act, a statute which limits court intervention.[94] The limited access to courts has been interpreted to mean that there is a public interest in bringing an end to litigation.[95] The Arbitration Rules provide for the application of the Civil Procedure Rules in so far as it is appropriate.[96]

In answering the question of whether the provisions of the Civil Procedure Code and Civil Procedure Rules apply to the Arbitration Act, the High Court in *Anne Mumbi Hinga vs Victoria Njoki Gathara* held inter alia that:

> *".....A careful look at all the provisions cited in the heading in the application and invoked by the appellant in the superior court clearly shows that all the provisions including the Civil Procedure Act and rules do not apply to arbitral proceedings because Section 10 of the Arbitration Act makes the Arbitration Act a complete code and rule 11 of the Arbitration Rules cannot override Section 10 of the Arbitration Act. The provision of the Arbitration Act makes it clear that it is a complete code except as regards the enforcement of the award/decree where Arbitration Rules 1997 apply the Civil Procedure Rules where appropriate. In our view, Rule 11 of the Arbitration Rules 1997 has not imported the Civil Procedure Rules line, hook, and sinker to regulate arbitrations under the Act. It is clear to us that no application of the Civil Procedure Rules would be regarded as appropriate if its*

[91] Order 43, r3, *Civil Procedure Rules* (Legal Notice 151 of 2010).

[92] Order 46 r10 and r11, *Civil Procedure Rules* (Legal Notice 151 of 2010).

[93] Muigai G and Kamau J. 'The Legal Framework of Arbitration in Kenya' in *Arbitration Law and Practice in* Kenya, Law Africa, Nairobi,2011,9.

[94] Section 2, *Arbitration* Act (Act No 4 of 1995) provides the provisions of the Act apply to domestic arbitration and international arbitration unless otherwise provided.

[95] *Kenya Shell Limited v Kobil Petroleum Limited*, Civil Appeal (Nairobi) No. 57 of 2006. The Court of Appeal stated that where parties provide for arbitration in contractual obligations; the Arbitration Act applies and the courts take a back seat. The finality and severe limitation of access to courts underscores the public policy that there should be an end to litigation.

[96] Rule 11, *Arbitration Rules* (Legal Notice 58 of 1997).

effect would be to deny an award finality and speedy enforcement both of which are major objectives of arbitration."[97]

The court further noted that the Act is a complete code except as regards the enforcement of the award/decree where Arbitration Rules 1997 apply the Civil Procedure Rules where appropriate.[98] Therefore, it follows that the provisions on appeals as of right and leave as stipulated in the Civil Procedure Code do not apply to arbitrations under the Arbitration Act.[99] It is imperative to look at other provisions in law about appeals. The Constitution outlines the jurisdiction of the Court of Appeal to hear appeals from the High Court and any other court or tribunal as prescribed an Act of Parliament.[100]

The Appellate Jurisdiction Act empowers the Court of Appeal to hear and determine appeals from the High Court or a tribunal prescribed by an Act of Parliament where an appeal lies to the Court of Appeal under law.[101] The Appellate Judication Act was amended by inserting the words "*and any other Court or tribunal prescribed by an Act of Parliament*" immediately after the words of the High Court. There has been the argument that the Appellate Jurisdiction Act was enacted before the Constitution and that it ought to be interpreted with adaptations and alterations.[102] However, it should be noted that the amendment of Section 3 was done by the *Statute Law (Miscellaneous Amendments) Act, 2012* which introduced the stricture on the right of appeals; there has to be a provision in statute granting a litigant the right of appeal.[103]

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[97] (2006)eKLR.

[98] *Anne Mumbi Hinga vs Victoria Njoki Gathara* (2006)eKLR.

[99] In *National Oil Corporation of Kenya Limited v. Prisko Petroleum Network Limited(2014) eKLR,* the Court of Appeal held that the Arbitration Act is a self-sufficient statute and that one need not look elsewhere on matters dealing with the arbitral process.

[100] Article 164(3), *Constitution of Kenya* (2010).

[101] Section 3, *Appellate Jurisdiction Act* (Cap 9, 2010)

[102] Muthiri E, 'Revisiting the Right of Appeal under the Arbitration Act' 7. Clause 7 of the Sixth Schedule to the Constitution provides all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications, and exceptions necessary to bring it into conformity with the Constitution.

[103] *Statute Law (Miscellaneous Amendments) Act*, 2012.

2.1.2. Nature of the Right of Appeal

In the case of *Samuel Macharia Kamau v Kenya Commercial Bank*, the Supreme Court outlined the core features of an appeal.[104] First, an appeal is granted in specific terms by the constitution or statute. Second, the scope of appellate jurisdiction is delimited by the legal source from which it derives its existence. Lastly, a court of law cannot assume appellate jurisdiction where none has been specifically granted by the constitution or statute.[105]

The right of appeal has been interpreted to go to the root of jurisdiction as it is so fundamental. In the *Kakuta Hamisi v Pesi Pesi Tobiko*, the Court of Appeal held that the absence of statutory donation or conferment of the right of appeal is not a mere procedural technicality to be ignored by the parties or a court by pitching a tent at Article 159(2)(d) of the Constitution. It goes to the very heart of the substantive validity of court processes.[106] This was also illustrated in the case of *Nova Chemicals Ltd v Alcon International Ltd* where Justice Ringera stated that: "*the right of appeal, with or without of leave, must be conferred by statute and must never be implied*".[107]

Similarly, in the case of *Apa Insurance Company v Vincent Nthuka*, it was held that the court's inherent jurisdiction is not a substitute for the jurisdiction conferred upon the court under the constitution or by statute. The court's inherent jurisdiction is a reserve upon which the court draws to ensure that the ends of justice are met and to prevent abuse of the court process. *Where the court has been deprived of jurisdiction, it will not draw upon its reserve under the inherent jurisdiction to confer upon itself such non-existent jurisdiction* (emphasis mine). [108]

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[104] *(2012)eKLR.*

[105] (2012)eKLR, para 50.

[106] (2013)eKLR.

[107] HC Misc Application 1124/2002. The Nova case has been affirmed by courts post 2010 as the correct position of the law. In *Wilson Kanyi Kareithi v Mount Pleasant Limited & 2 Others (2016*)eKLR, para 33, the court upheld the Nova case and held that jurisdictional issues do not fall within procedural technicalities, they proceed to the route of the matter.

[108]*(2018)eKLR.*

This study argues that the Court of Appeal was deprived of jurisdiction under Section 35 of the Act and as such, it cannot confer upon itself the jurisdiction to hear appeals under the said section.

2.2. International Framework governing the Finality of Arbitral Awards

An arbitral award is an arbitrator's final decision on particular claims or disputes. A tribunal's oral or written statement of what conclusion it has reached and will later set forth is not itself an award. Rather, it is merely an advance indication of what the award will say.[109] The delivery of an arbitral award renders a tribunal *functus officio;* it ceases to have further jurisdiction over the dispute and the special relationship that exists between the arbitral tribunal and the parties during arbitration ends. Nonetheless, the court may remit the arbitral award for reconsideration and to correct errors.[110]An arbitration must be as a result of the implementation of an agreement to arbitrate rather than an agreement to do something like mediate.[111]

Many arbitration agreements and most arbitration rules stipulate that arbitral awards that result from arbitrations under those agreements are final and binding. Yet, there is almost always the possibility for a party to challenge the award. A successful challenge will usually result in an arbitral award being set aside, vacated, and therefore ceasing to exist, at least within the jurisdiction of the courts setting it aside.[112] An action to set aside is designed to ensure that a state, through its courts, exercises a minimum level of control over the procedural and jurisdictional integrity of international arbitration in its territory.[113]

The finality of the arbitral award is entrenched in the New York Convention and the Model Law. The purposes of the New York Convention are to encourage arbitration and simplify the enforcement of arbitral awards globally.[114] This is by providing common legislative standards for the recognition of arbitration agreements and court recognition and

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[109] Born G, *International Arbitration Law and Practice*, 289.

[110] Imende G and Ngige W, 'The Award' in Muigai G(eds), *The Arbitration Law and Practice in Kenya*,

[111] Born G, *International Arbitration Law and Practice, 287.*

[112] Mcllwrath M and Sarage J, *International Arbitration and Mediation: A Practical Guide*, Kluwer Law International, New York,2010,328.

[113] Mcllwrath M and Sarage J, *International Arbitration and Mediation: A Practical Guide*,332.

[114] Matipe P.A and Olokotor C, 'Judicial Attitude Towards the Enforcement of Annulled Awards' in Onyema E (ed) *Rethinking the Role of African National Courts in Arbitration*, Kluwer Law International, New York,98.

enforcement of foreign arbitral awards.[115] Further, the Convention eliminated the Double Exequatur requirement. This requirement necessitated the confirmation of an arbitral award in the courts of the arbitral seat (the first exequatur) before it could be recognised abroad at the second exequatur. This was eliminated to make international arbitration awards more readily available.[116] Furthermore, the Convention imposes a general obligation on contracting states to recognise and enforce arbitral awards.

Article III of the New York Convention requires contracting states to presumptively recognise arbitral awards made in other countries, subject to procedural requirements no more onerous than those of domestic awards.[117] To this end, the Convention provides limited and exclusive grounds for non-recognition with the burden of proof on Award-Debtor.[118] In this regard, Article V sets forth a limited set of grounds for non-recognition of an arbitral award. These grounds are exclusive and exhaustive; recognition of a Convention award can be denied only when one of the grounds under Article V is proved. The grounds under Article V are narrowly defined, and most importantly, the party resisting recognition, bears the burden of demonstrating that one of the exceptions applies.

An award may be challenged on jurisdictional grounds - that is, the non-existence of a valid and binding arbitration agreement – or other grounds relating to the admissibility of a claim determined by the tribunal. For example, issues of capacity, invalid agreements to arbitration, arbitrability, and the tribunal's excess of powers. Additionally, an arbitral award may be challenged on procedural grounds such as denying parties an equal opportunity to be heard and issues relating to the composition of the arbitral tribunal. Lastly, an arbitral award may be challenged on substantive grounds on the basis that the arbitral tribunal made a mistake of law, mistakes of fact, and public policy.[119]

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[115] Muigai G and Kamau J, The Legal Framework of Arbitration in Kenya' in *Arbitration Law and Practice in Kenya*, Law Africa, Nairobi,2011,10.

[116] Born G, *International Arbitration Law and Practice*, 2nd ed, Kluwer Law International,2015,284.

[117] Article III, *The United Nations Convention on the Recognition and Enforcement of Foreign Awards*,1958.

[118] Article V, *The United Nations Convention on the Recognition and Enforcement of Foreign Awards*,1958. These grounds include arbitrability, incapacity, fairness, equal opportunities to present the case, lack of jurisdiction, and set aside awards as reasons for refusal of recognition and enforcement when such arguments are brought by one party.

[119] Blackaby N, Partasides C, Redfern A & Hunter M, *Redfern and Hunter on International Arbitration*, 6th ed Oxford University Press, New York, 2015, 582-583.

The Convention does not require non-recognition of an award even if one of Article V's grounds permitting non-recognition is satisfied. Rather, both Article V and VII permit a contracting state to voluntarily recognise an award, in accordance with its local law, even if one of Article V's exceptions applies and the Convention does not require recognition.[120] Kenya acceded to the New York Convention on 10 February 1989, reserving it to arbitral awards made in the territory of other contracting states. This implies that Kenya is only obliged to recognise and enforce arbitral awards made in the contracting states.[121]

Another important international instrument is the Model Law which seeks to promote the uniformity of national laws in the application of international commercial arbitration.[122] The form of the Model Law was preferred to treaties and conventions because of its flexibility for adaptation. The Model Law is a template for countries when drafting their national laws on international arbitration.[123] The declared aims of the Model Law are the liberalization of the international arbitration by emphasizing party autonomy and allowing the parties the freedom to choose how their disputes should be determined while reducing the role of national courts in arbitration.

Furthermore, it establishes a defined core of mandatory provisions to ensure fairness and due process providing for the recognition and enforcement of the award.[124] Although the Model Law is specifically designed for international commercial arbitration, the drafters recognised that states were free to adopt the provisions of the Model Law for the domestic arbitrations as well. This implies that the application of the Model Law will depend on the wording of the national legislation adopting it.[125]

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[120] Blackaby N, Partasides C, Redfern A & Hunter M, *Redfern and Hunter on International Arbitration*,584.

[121] Thiankolu M and Waris A, International Commercial Arbitration, in Muigai G, *Arbitration Law and Practice in Kenya*, 197.

[122] Torgbor E, 'A Comparative Study of Law and Practice of Arbitration in Kenya, Nigeria and Zimbabwe with Particular Reference to Current Problems in Kenya' Unpublished LLD Thesis, University of Stellenbosch, 2013,80.

[123] Torgbor E, 'A Comparative Study of Law and Practice of Arbitration in Kenya, Nigeria and Zimbabwe with Particular Reference to Current Problems in Kenya'84.

[124] Torgbor E, 'A Comparative Study of Law and Practice of Arbitration in Kenya, Nigeria and Zimbabwe with Particular Reference to Current Problems in Kenya'84-85.

[125] Torgbor E, 'A Comparative Study of Law and Practice of Arbitration in Kenya, Nigeria and Zimbabwe with Particular Reference to Current Problems in Kenya'87.

The Model Law disallows courts to intervene in arbitration matters unless authorized.[126] The drafters urged that the limited court intervention should not be construed as showing hostility to court intervention but as ensuring a measure of certainty as to the circumstances when court intervention is appropriate and permissible. As such, drafters of arbitration statutes were obliged to state the instances in which judicial control is justified to exclude the general residual powers of a court other than those conferred by the Model Law.[127] Since the substance of Article 5 of the Model Law is reproduced in Section 10 of the 1995 Arbitration Act of Kenya, it may be inferred that interpretation of Article 5 as urged by the drafters of the Model Law applies *mutatis mutandis*.[128]

Kariuki Muigua argues that Section 10 epitomizes the recognition of the policy of party autonomy which underlie the arbitration generally. This principle guarantees that the parties are satisfied with the results of arbitration.[129] According to him, Section 10 of the Act permits two possibilities where the court can intervene in arbitration. The first interpretation is where the Act expressly provides for or permits the intervention of the court. Then, in public interest where substantial injustice is likely to be occasioned even though a matter is not provided for in the Act.[130] Moreover, in the case of *Prof. Lawrence Gumbe & Another vs Honourable Mwai Kibaki & Others***,** the court held that such intervention by the Court can only be *"supportive and not obstructive or usurpation-oriented"*[131]

The position on appeals against decisions of the court under the Model Law is not entirely consistent. Where the Model Law allows judicial intervention during the arbitral

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[126] Article 5, UNCITRAL Model Law on International Commercial Arbitration, (United Nations Document A/40/17, Annex 17), as adopted by the United Nations Commission on trade and law on June 21, 1985.

[127] Christie RH, 'Arbitration: Party Autonomy or Crucial Intervention' 5(1) *South African Law Journal*,1994,362-365.

[128] Torgbor E, 'A Comparative Study of Law and Practice of Arbitration in Kenya, Nigeria and Zimbabwe with Particular Reference to Current Problems in Kenya'102.

[129] Muigua K, Role of the Court under the Arbitration Act 1995: Court Intervention Before, Pending and Afrter Arbitration in Kenya' Chartered Institute of Arbitrators Course on Advocacy in Mediation and Arbitration Proceedings on 5th February 2009,3.

[130] Muigua K, Role of the Court under the Arbitration Act 1995: Court Intervention Before, Pending and Afrter Arbitration in Kenya'4.

[131] *High Court Miscellaneous No. 1025 of 2004*.

proceedings, there is usually no right of appeal against the court's decision.[132] For example, the decision of the court on the failure or impossibility of the arbitrator to act is not subject to appeal.[133] Additionally, the court's decision on the jurisdiction of the arbitral tribunal is not subject to appeal.[134] However, there is no bar to the right of appeal from a court decision on setting aside an arbitral award under Article 34 or regarding the recognition and enforcement of an arbitral award under Articles 35 and 36.[135]

2.3. The Domestic Legal Framework of the Finality of Arbitral Awards

2.3.1. History of Arbitration Laws in Kenya

The initial legislation on arbitration was the Arbitration Ordinance of 1914, which was a replica of the English Arbitration Act of 1889. The second legislation was the Arbitration Act of 1968 which was modelled along the English Arbitration Act of 1950.[136] The essential features of both Acts were the excessive leeway they allowed courts to have over arbitral proceedings. For instance, the Arbitration Act of 1968 gave the High Court supervisory jurisdiction and unfettered discretion over the appointment and removal of arbitrators and umpires; extension of the time for commencing arbitral proceedings and rendering awards; ordering discovery in the course of arbitral proceedings, and enforcement of arbitral awards.[137] That fact rendered arbitration more of a court process than an independent proceeding thus robbing it of the main advantages of speed and effectiveness.[138]

The 1995 Arbitration Act was enacted and it repealed the Arbitration Act of 1968. Unlike the 1968 Act, the 1995 Arbitration Act cushions arbitral proceeding from court interference.

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[132] Torgbor E, 'A Comparative Study of Law and Practice of Arbitration in Kenya, Nigeria and Zimbabwe with Particular Reference to Current Problems in Kenya'106.

[133] Article 14, *UNCITRAL Model Law on International Commercial Arbitration*, 1985.

[134] Article 16(3), *UNCITRAL Model Law on International Commercial Arbitration*, 1985.

[135] Torgbor E, 'A Comparative Study of Law and Practice of Arbitration in Kenya, Nigeria and Zimbabwe with Particular Reference to Current Problems in Kenya'107.

[136] Muigua K, *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers Limited,2015,75.

[137] Section 24, *Arbitration Act* CAP 49, 1968 empowered the Court to remove an arbitrator if he had misconducted himself. Additionally, Section 19 conferred on the court jurisdiction to convert an umpire into a sole arbitrator. 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

[138] Gakeri J, 'Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR' 1(6) *International Journal of Humanities and Social Sciences*,2011,220.

To this end, the Act provides that *"except as provided in this Act, no court shall intervene in matters governed by this Act."*[139] The 1995 Act is modelled on the Model Law. This is evidenced from the provisions of the Arbitration Act which are *pari materia* with the provisions of the Model Law.[140] The 1995 Arbitration Act provides for the finality of the arbitral award, which is final and binding upon the parties to it and that no recourse against the arbitral award unless as provided in the Act.[141] Further, international arbitration awards are recognised as binding and should be enforced in accordance with the provisions of the New York Convention.[142]

2.3.2. Further Legal Provisions Entrenching Arbitration

The Constitution guarantees the right of every person to access justice.[143] The definition of access to justice was defined in *Dry Associates Limited v Capital Markets Authority*. The court was of the view that access to justice includes the enshrinement of rights in the law; awareness of and understanding of the law; access to information; equality in the protection of rights; access to justice systems particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay.[144] To guarantee access to justice, the Constitution avails both formal and informal justice system mechanisms.[145]

The Constitution recognises the use of Alternative Dispute Resolution (ADR) and Traditional Dispute Resolution (TDRM) mechanisms in addition to the court process.[146] Additionally, the Constitution outlines the principles that must be adhered to when exercising judicial authority. These include justice to be done to all irrespective of status,

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[139] Section 10, *Arbitration Act* (1995).

[140] See for example, the provisions on the extent of court intervention are word for word. Similarly, Article 5 of the Act on waiving the right to object is *pari materia* with Article 4 of the UNCITRAL Model Law.

[141] Section 32A, Arbitration Act (1995).

[142] Section 36(2), *Constitution of Kenya* (2010).

[143] Article 48, *Constitution of Kenya* (2010).

[144] Nairobi Petition No. 358 of 2011(Unreported).

[145] See Muigua K and Francis K, 'ADR, Access to Justice and Development in Kenya' Strathmore Annual Law Conference, Nairobi, 3rd-4th July 2014, 5. They argue that access to injustice include the use of alternative dispute resolution mechanisms to bring justice closer to people by relieving court congested dockets and ensuring expedited resolution of disputes thus leading to development.

[146] Article 159, *Constitution of Kenya* (2010).

justice shall not be delayed, and promotion of ADR mechanisms including reconciliation, mediation. arbitration, and TDRM subject to Clause 3.[147]

Francis Kariuki has argued that the said Article is mandatory and must be upheld by the judiciary in exercising judicial authority.[148] Moreover, the Constitution requires the national and county governments to enact a legislation to provide procedures for settling inter-governmental disputes through alternative dispute resolution mechanisms.[149] John Ambani and Tom Kabau argue that Article 2(5) and 2(6) of the Constitution dispensed with the requirement of the domestication of the convention, treaties, and other international instruments that Kenya has ratified by providing that such instruments form part of the laws of Kenya.[150] This implies that Kenyan courts can apply international conventions and treaties, including those on arbitration without requiring that they first be adopted as acts of Parliament.

2.4. The Supreme Court Decision in *Nyutu Agrovet v Airtel Networks*

2.4.1. Brief history and facts

The parties entered into a distribution agreement in terms of which Nyutu was contracted to distribute various telephone handsets on behalf of Airtel. The dispute arose when an agent of Nyutu, one George Chungu, placed orders for Airtel's products totalling Ksh 11 million for which Airtel made payment. Upon delivery, Airtel realized that the orders were made fraudulently. Meanwhile, Nyutu had also failed to pay the said amount, and the agreement between the parties was thus terminated and the dispute arose. The parties referred the

[147] Article 159, *Constitution of Kenya* (2010) Clause 3 thereof provides that TDR mechanisms shall not be used in a way that is (a) contravenes the Bill of Rights, (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality, or (c) is inconsistent with the Constitution or any written law.

[148] Kariuki F, 'Applicability of Traditional Dispute Resolution Mechanisms in Francis Kariuki 201 Criminal Cases in Kenya: Case Study of *Republic v Mohamed Abdow Mohamed* [2013] eKLR' 2(1) *Alternative Dispute Resolution*,2014,202.

[149] Article 189, *Constitution of Kenya* (2010).

[150] Kabau T and Ambani J, 'The 2010 Constitution and the Application of International Law in Kenya : A Case of Migration to Monism or Regression to Dualism'1(1) *Africa Nazerene Law Journal*,2013,39. See also Luis Franceschi who argues that the 2010 Constitution establishes a monist legal system since 'legislative approval of a treaty is not required at any instance, except as provided for by art 71 on agreements relating to natural resources. Franceschi L, 'Constitutional Regulation of International Law in Kenya' in Lumumba PLO, Mbondenyi MK and Odero SO (eds), *The Constitution of Kenya: Contemporary Readings*, LawAfrica, Nairobi,2011,245.

dispute to Fred Ojiambo as the sole arbitrator who after the arbitral proceedings awarded Nyutu Kshs 541,005,922.81 with most of the claims under the tort of negligence.[151]

Airtel applied to the High Court under Section 35 of the Act to set aside the arbitral award on the ground that the said arbitral award had dealt with a dispute not contemplated by the parties. Justice Kimondo set aside the arbitral award on the basis that it contained decisions on matters outside the distributorship agreement and terms of reference to arbitration.[152] Nyutu thereafter appealed to the Court of Appeal to challenge the ruling and orders of Justice Kimondo .

A constituted five bench of the Court of Appeal held that decision of the High Court under Section 35 of the Act was final and unappealable.[153]

Aggrieved by the finding of the Court of Appeal, Nyutu appealed to the Supreme Court on grounds the main of which were that the appellate court had adopted a wrong and restrictive interpretation of Article 164(3) of the Constitution. Second, that the Court of Appeal had misinterpreted Article 164(3) of the Constitution by holding that it only provides for the jurisdiction of the Court of Appeal to hear appeals and not the right of appeal. Further, that the appellate court had failed to appreciate that the right of appeal is conferred by the Constitution.[154]

The main issue for determination was whether there is a right of appeal to the Court of Appeal under Section 35 of the Act. The Court found that the Act and the Model Law do not expressly bar appeals to the Court of Appeal. It was the view of the majority that the Constitution dictates that Section 35 of the Act should be interpreted in a way that promotes its purpose, the objectives of arbitration, and the purpose of an expeditious yet fair dispute resolution legal system.[155]

Also, the majority judgement stated that an unfair determination of the High Court should not be immune from the appellate review. As such, they opined that in exceptional circumstances, the Court of Appeal ought to have residual jurisdiction to enquire into such unfairness. Such circumstances arise where the High Court, in setting aside an arbitral award,

[151] *Nyutu Agrovet v Airtel Network Kenya Limited (2016)* eKLR, 1.

[152] *Nyutu Agrovet v Airtel Network Kenya Limited (2016)* eKLR, 2.

[153] *Nyutu Agrovet v Airtel Network Kenya Limited (2016*) eKLR, 9.

[154] *Nyutu Agrovet v Airtel Network Kenya Limited (2019)* eKLR, para 8.

[155] Nyutu Agrovet v Airtel Network Kenya Limited (2019) eKLR, para 71.

has stepped outside the grounds set out in the said section and thereby made a decision so manifestly wrong.[156] In his dissenting opinion, the Chief Justice David Maraga emphasized that the right of appeal is granted by statute. He observed that Sections 10, 32A, and 35 read together, limit the appellate court intervention to domestic arbitrations, and only by the consent of the parties under Section 39.[157]

2.4.2. Strengths of the Supreme Court Decision

2.4.2.1. The Remission of the matter back to the Court of Appeal

Having set aside the arbitral award in the *Nyutu Agrovet v Airtel Networks*, the High Court failed to give directions leaving the parties uncertain about their rights. In addition, when the matter was before the Court of Appeal, the court struck out the application citing lack of appellate jurisdiction. Nyutu Agrovet was not given an opportunity to challenge the finding of the High Court.[158] The Supreme Court remitted the case back to the Court of Appeal to determine whether the appeal meets the threshold, that is, the High Court judge in setting aside an arbitral award went outside the grounds under Section 35 and thereby made a decision so manifestly.[159] The remission of the case to the Court of Appeal will give the parties certainty.

2.4.2.2. Identification of loopholes in the Act

The Supreme Court decision is a reminder to Parliament to expressly indicate its intention when enacting provisions of law. As noted by the Supreme Court, Section 35 does not expressly state that the decision of the High Court on setting aside is appealable. Similarly, there is no explicit provision that the decision of the High Court on setting aside is final and shall not be subject to appeal. This is different from Sections 12 (8), 14 (6), 15 (3), 16A (3), 17 (7), 32B (6) of the Act which have such express provisions.[160] Consequently, this decision may task the Parliament to amend Section 35 of the Act to indicate their express intention.

In his paper titled *Constitutional Supremacy over Arbitration*, Kariuki Muigua identifies areas in the Act that ought to be brought in tandem with the Constitution. First, the waiving of the right to object under Section 5. The said section provides that a party who knows that

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[156] *Nyutu Agrovet Limited v Airtel Network Kenya Limited (2019) eKLR.*

[157] Nyutu Agrovet v Airtel Network Kenya Limited (2019) eKLR, para 107.

[158] *NyutuAgrovet v Airtel Network Kenya Limited* (2019) eKLR, para 16.

[159] *Nyutu Agrovet v Airtel Networks Limited* (2019) eKLR.

[160] Muchiri E, 'Revisiting the Right of Appeal under the Arbitration Act'5.

any provision of the Act from which the parties may derogate or any requirement under the Arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is prescribed, within such time, is deemed to have waived the right to object.[161]

Although the provision intends to ensure expediency in arbitration proceedings, Kariuki Muigua stresses that this provision is problematic because the Constitution provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.[162] As such, Section 5 cannot oust the jurisdiction of the High Court because it assumes that parties are reasonably expected to know any derogations from the Act. He poses the question: where does that leave those who were genuinely ignorant of the foregoing? According to him, they could justifiably raise objections, especially where fundamental rights and freedoms are concerned, notwithstanding the time limit prescription.[163]

Secondly, he observes that an arbitrator is not under any legal obligation to supply their arbitrator's notes to the parties. He compares this observation to the guarantee of every citizen the right of access to information held by the State; and information held by another person and required for the exercise or protection of any right or fundamental freedom.[164] Kariuki Muigua then poses the question of whether an arbitrator can be compelled under the right to access information to provide a copy of the arbitrator's notes to any party who insists on his or her right to access information as a constitutionally guaranteed right?[165] He analyses Clause 7 of Article 165 of the Constitution which provides that in exercising supervisory jurisdiction over subordinate courts and tribunals, the High Court may call for

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[161] Section 5, *Arbitration Act* (Act No 4 of 1995).

[162] Article 22(1), *Constitution of Kenya* (2010).

[163] Muigua K, 'Constitutional Supremacy over Arbitration' 4(1) *Alternative Dispute Resolution*, 2016,129. See also Kiragu G, 'Expanding the Limits of Court Intervention in Arbitration Through Judicial Review, The Constitution of Kenya 2010 and the Fair Administrative Act'6(1) *Alternative Dispute Resolution*,2018,26. He argues that the wording of section 10 of the Act is at best misleading or meaningless and at worst unconstitutional. It is misleading and meaningless because courts can intervene in arbitration through judicial review contrary to the provisions of the Arbitration Act. It is unconstitutional in so far as a plain reading of the same indicates an attempt to fetter the right to fair administrative action as provided for as provided for under article 47 of the Constitution

[164] Article 35(1), *Constitution of Kenya* (2010).

[165] Muigua K, 'Constitutional Supremacy over Arbitration'135.

the record of proceedings before any subordinate court or person to make an order to ensure the fair administration of justice. According to him, the record of proceedings may include the arbitrator's notes.[166]

Aloo Obura and Edmond Wesonga similarly argue that the touted virtues of privacy and confidentiality in arbitration are at odds with the constitutional values specifically, transparency and accountability. They urge that the scope of confidentiality in arbitration is defined and informed by international rules on transparency that have been adopted by international investment arbitrations.[167]

Lastly, there has been an increasing outcry about the costly nature of arbitration fees.[168] Section 32B of the Act empowers the arbitral tribunal to determine the expenses related to the arbitration.[169] Further, the arbitral tribunal can withhold the delivery of an arbitral award until the full payment of arbitration fees.[170] Kariuki Muigua argues that the problem arises when arbitration involves persons who do not have the financial muscle as against a party who would not have any problem settling their share of the fees charged as the Act requires. He illustrates that where a person enters into arbitration with a body corporate, there is the risk of one party failing to access justice due to lack of finances. Basing on the right of access to justice, he asserts that the question becomes who determines the reasonableness of the arbitration fees since some of the fees are set by particular institutions.[171]

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[166] Muigua K, 'Constitutional Supremacy over Arbitration' 136. Also see Article 47 of the Constitution outlines the right to administrative action and Section 6 of the Fair Administrative Action, 2015 which provides that every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review

[167] Obura A and Wesonga E, 'What is there to Hide? Privacy and Confidentiality versus Transparency : Government Arbitrations in Light of the Constitution of Kenya 2010' 3(2) *Alternative Dispute Resolution*,2015,29.

[168] Ng'etich R, 'The Current Trend of Costs in Arbitration: Implications of Costs in Arbitration: Implications on Access to Justice and the Attractiveness of Arbitration' 5(2) *Alternative Dispute Resolution*, 2017,111. Ng'etich argues that arbitration used to be attractive because it was presumed to be less expensive than litigation. However, arbitration has become increasingly costly. He argues that if costs are unchecked, they will make arbitration unattractive and violate the right to access to justice because of hindering affordability of legal representation.

[169] Section 32B, *Arbitration Act* (Act No 4 of 1995).

[170] Section 32B, *Arbitration Act* (Act No 4 of 1995).

[171] Muigua K, 'Constitutional Supremacy over Arbitration'137.

He poses the question of whether the withholding of an arbitral award in absence of proper determination of the 'reasonableness' of the fees charged amounts to a violation of the right of access to justice? Kariuki Muigua explores subsection (4) of Section 32B which provides that if the arbitral tribunal has, under subsection (3), withheld the delivery of an award, a party to the Arbitration may, upon notice to the other party and the arbitral tribunal, and after payment into court of the fees and expenses demanded by the arbitral tribunal, apply to the High Court for an order directing how the fees and expenses properly payable to the arbitral tribunal shall be determined.[172]

According to him, this provision makes it even harder for the aggrieved/affected party to access justice if the Court comes in after payment into court of the fees and expenses demanded by the arbitral tribunal. He asks the question that what if a party failed to pay the money due to lack of the same? Then, according to Kariuki Muigua, arbitration becomes expensive and violates the right of access to justice.[173] Conclusively, he argues that arbitration must operate within the parameters of the Constitution and adhere to its values and principles because of its supremacy.[174]

The quality of arbitral awards from good arbitrators is one that compels court support for their acceptability and enforcement. The arbitration process creates three basic and enabling expectations. First, to the parties, enabling them to conduct the arbitration and make the award. Second to the impartial arbitrators, by enabling them to conduct the arbitration and make the arbitral award, and lastly, to the competent courts to monitor arbitration's basic procedural integrity when needed. When these expectations are fulfilled, arbitration purports to uphold the rule of law in its broader sense under the court's duty to balance the competing

[172] Section 32B(4), *Arbitration Act* (Act No 4 of 1995).

[173] Muigua K, 'Constitutional Supremacy over Arbitration' 137-138.

[174] Muigua K, 'Constitutional Supremacy over Arbitration'140. Article 2 of the Constitution Clause (1) is to the effect that the Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government. Clause (3) also provides that the validity or legality of the Constitution is not subject to challenge by or before any court or other State organ. Further, clause (4) provides that any law, including customary law, that is inconsistent with the Constitution, is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid. Article 2, Constitution of Kenya (2010).

interests of the parties within the limits of their contractual commitments and public policy.[175]

In *Sadrudin Kurji & Another v Shalimar Limited*, the court stated that:

> *"Arbitration is intended to facilitate the quicker resolution of settling disputes "Arbitration is intended to facilitate the quicker resolution of settling disputes without the u due regard to technicalities. This however does not mean that the Courts will stand and ignore where cardinal rules of natural justice are being breached by the process of arbitration. Hence, in exceptional cases in which the rules are not adhered to, the courts will be perfectly entitled to step in and correct obvious errors."*[176]

2.4.2.3. Increasing Substantive and Procedural Concerns in Arbitration

Recourse to courts may be necessary due to some unique characteristics of arbitration which, though positive, may also adversely affect the certainty of one party to access justice. These include lack of a harmonized framework for supervision or accountability of arbitrators, a relaxation of evidentiary rules, decreased opportunities for thorough discovery, insufficient or non-existent explanations of arbitrators' reasoning in decisions, and limited protections for vulnerable parties. [177]

The Constitution recognizes alternative forms of dispute resolution (ADR) including reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms, subject to clause (3).[178] It further dictates that Traditional Dispute Resolution mechanisms shall not be used in a way that: contravenes the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality or is inconsistent with the Constitution or any written law.[179] Therefore, it follows that arbitration must be carried out in a manner that is consistent with constitutional principles and values.[180]

Khan argues that by choosing arbitration, parties forego several rights accompanying litigation for example the right to access courts, the right to due process of law, and equal protection of the law. He adds that these rights are surrendered to acquire expedition and

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[175] Torgbor E, 'Overview of the Disposition of Courts Towards Arbitration in Africa' in Onyema E, Rethinking the Role of African National Courts in Africa,53.

[176] (2006)eKLR.

[177] Muigua K, 'Constitutional Supremacy over Arbitration'123.

[178] Article 159(2)(c), *Constitution of Kenya* (2010).

[179] Article 159(2)(c), *Constitution of Kenya* (2010).

[180] Muigua K, Constitutional Supremacy over Arbitration'125.

finality of the arbitral award.[181] While Khan's views are persuasive to some extent, the same cannot stand under the 2010 constitutional dispensation. This is because the Constitution guarantees the right to a fair trial which is absolute and cannot be limited.[182] He argues that by choosing arbitration, obligated parties give up the right to litigate disputes identifiable in the arbitration agreement.

However, in practice parties may not completely abandon litigation and their arbitration may be interspersed with litigated disputes. To this end, he introduces a concept of arbitral litigation, a process that occurs where an arbitration party undercuts the arbitration agreement and revivifies litigation. The opposite of this concept is arbitral autonomy which according to him, recognises that there is a right to litigate but parties forego this right through an arbitration agreement.[183] The judicial review of arbitral awards poses a systemic threat to party autonomy because it leads to inevitable arbitral litigation.[184]

In the case of *Hinga v Gathara*, the applicant applied to set aside an arbitral award on grounds that he had not been notified of the delivery of the award. However, in rejecting the application to set aside the award, the court held that a failure to notify Hinga of the delivery of the award was not one of the prescribed grounds under the Act for setting aside. Furthermore, the court held that a party cannot apply to set aside an award after three months of delivery of the award even if it was for a valid reason. The court observed that '*in entering an arbitration agreement, parties gave up most of their rights of appeal and challenge to the award in exchange for the finality of arbitral award*.'[185]

In another case *Pentecostal Assemblies of God v Reverend John Malwenyi & Others*, the applicant sought to have the arbitral 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.[186] This decision has been criticized for abrogating the explicit provisions of Section 32 of the Arbitration Act that require an arbitral award not only to be written but must equally be dated and signed by all arbitrators or a majority of

[181] Khan A, 'Arbitral Autonomy'10.

[182] Article 50 and 25, *Constitution of Kenya* (2010)

[183] Khan A, 'Arbitral Autonomy'13.

[184] Khan A, 'Arbitral Autonomy'42.

[185] *Court of Appeal Civil Application No. 285 of 2008 (UR 187/2008).*

[186] (2006)eKLR.

them. Additionally, it must state the place of arbitration and the reasons based on by the arbitrator in arriving at his determination.[187]

Eric Muthiri notes that the Arbitration (Amendment) Act No. 11 of 2009 introduced new grounds for setting aside awards in section 35. These were fraud, bribery, undue influence, or corruption.[188] *The Court in National Cereals & Produce Board v Erad Suppliers & General Contracts Limited* held that the High Court would be exercising its original jurisdiction while it takes evidence in proof of such grounds. The court stated as follows,

> *'In order to arrive at a decision whether an arbitral award was induced or affected by fraud, bribery, undue influence or corruption, the High Court must, in our view, be guided by evidence. For that purpose, it is open for parties to present evidence before the High Court and for the High Court to take and consider such evidence. In doing so and to that extent, we consider for purposes of Rule 29 that the High Court is called upon to exercise original jurisdiction.'*[189]

According to Eric Muthiri, when the High Court is exercising original jurisdiction, such a decision is appealable to the Court of Appeal.[190]

Additionally, the Act provides for the appointment of the arbitral tribunal but does not set restrictions on who may be appointed an arbitrator.[191] 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. Gakeri Jacob argues that recognising arbitration as a profession would mean that the arbitrators conduct themselves in a professional manner because they are being held to a higher standard.[192]

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[187] Gakeri J, 'Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR'1(6) *International Journal of Humanities and Social Sciences*, 2011,236. Gakeri Jacob argues that the court failed to determine the legal consequences of the non-compliance of the Act.

[188] Muthiri E, 'Revisiting the Right of Appeal under the Arbitration Act' 7.

[189] (2014) eKLR.

[190] Muthiri E, 'Revisiting the Right of Appeal under the Arbitration Act'8.

[191] Section 12, Arbitration of Kenya (Act No 4 of 1995).

[192] Gakeri J, 'Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR'238.

2.4.3. Weaknesses of the Supreme Court Decision in respect of Finality of the Arbitral Award and Party Autonomy

2.4.3.1. Setting Aside an Arbitral Award on Constitutional grounds

In the case of *Christ for All Nations v. Apollo Insurance Company Limited*, Justice Ringera noted that 'public policy is a most broad concept incapable of precise definition', and he likened it to 'an unruly horse' that 'once one got astride of it you never know where it will carry you. The court was of the view that an award that is inconsistent with the public policy of Kenya is one that is inconsistent with the Constitution or other laws of Kenya, inimical to the national interests of Kenya (including interests of national defence, security, good diplomatic relations with friendly nations and the economic prosperity of Kenya), and contrary to justice and morality (including corruption, fraud or an award founded on a contract that is contrary to public morals).[193]

The *Christ for All Nations v Apollo Insurance Company Limited* decision has been used as the *locus classicus* on setting aside arbitral awards on the public policy ground. From Justice Ringera's elaboration, constitutional matters fall within the ambit of public policy. However, the Supreme Court stated that where an arbitral award has been set aside under constitutional grounds, the Court of Appeal can exercise appellate jurisdiction to allow and hear the appeal. The challenge with this view is that constitutional grounds have always been raised under the public policy ground. As such, it is ambiguous what the Supreme Court meant. Similarly, matters of manifest wrongness can be encompassed within the public policy ground.

2.4.3.2. Contradictions in the Majority Judgement

The Supreme Court decision has many contradictions. First, the majority judgment acknowledges that Section 10 of the Act was enacted in line with the international policy of limited court intervention under the Model Law. Furthermore, it stated that Section 10 was enacted to ensure predictability and certainty by specifying instances where a court may intervene.[194] To this end, the Supreme Court rejected Nyutu Agrovet's contention that Section 10 is unconstitutional to the extent that it limits the Court of Appeal's jurisdiction to hear appeals arising from decisions of the High Court on setting aside arbitral awards.

[193] [2002] 2 EA 3

[194] *Nyutu Agrovet Limited v Airtel Network Kenya Limited (2019) eKLR, para 57.*

However, the majority judgment observed that Section 10 cannot be used to explain whether an appeal lies against a decision of the High Court setting aside an arbitral award.

According to them, by the time an appeal is preferred, the High Court would have already assumed jurisdiction under Section 35 and made a determination. As a result, by assuming jurisdiction under Section 35, the High Court would conform to Section 10 by ensuring that the Court's intervention is only on instances that are specified by the Act hence ensuring predictability.[195] Consequently, it was their view that just like Section 35 of the Act, Section 10 does not answer the question.

The view taken by the majority judgment can be criticized. First, it interprets Sections 10 and 35 separately yet a holistic reading of the said sections would reveal that appellate intervention is limited in the Act. This dissertation associates itself with the minority opinion wherein Chief Justice David Maraga stated that Sections 10, 32A, and 35 when read together, limit the appellate court intervention. He emphasized that Sections 10 and 35 restrict judicial intervention in the arbitral process to expedite dispute resolution while maintaining the sanctity of the principle of finality in the arbitral process. The Court of Appeal is only permitted to intervene under Section 39 of the Act.[196]

Using the principle of harmonization of constitutional interpretation, the minority opinion maintained that Articles 164(3) and 159(2)(c) are complimentary and do not contradict each other. While Article 164(3) provides for the appellate jurisdiction of the Court of Appeal, Article 159(2)(c) entrenches arbitration in Kenya as an ADR mechanism with its strictures. According to him, this entrenchment means that Section 10 is not unconstitutional for limiting the intervention of courts in the arbitral process.

2.4.3.3. Reference to Section 67 of the 1996 United Kingdom Arbitration Act

The majority judgment relied on Section 67 of the UK Arbitration Act to hold that the Court of Appeal has residual jurisdiction to enquire into the unfair determination of the High Court on setting aside arbitral awards. The challenge with this approach is that Section 67 of the UK Arbitration Act is not *pari materia* with Section 35 of the Kenyan Arbitration Act. This will be extensively discussed in the next Chapter.

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[195] *Nyutu Agrovet Limited v Airtel Network Kenya Limited (2019) eKLR,58.*

[196] *Nyutu Agrovet Limited v Airtel Network Kenya Limited (2019) eKLR*,107.

2.4.3.4. The Finality of an Arbitral Award

Party autonomy is the driving force of arbitration; to give effect to this principle, most of the provisions in national arbitration laws are default positions. They only apply in the absence of any agreement to the contrary by the parties.[197] The gravity of the decision is that it undermines the finality of the arbitral award which the parties sought as the final determination of their rights. This undermines the place of an arbitral award in arbitration because an award is principally the conclusive determinant of parties' rights and duties. Pursuing subsequent proceedings automatically extinguishes this finality. The arbitral award in Nyutu Agrovet was issued in 2007 but because of court interference, the case took about 12 years from the High Court to the Supreme Court. This interference defeats the quick resolution of disputes, a feature that separates arbitration and litigation.

Traditional litigation before court is costly, time-consuming, cumbersome, and inefficient. This delays the quick resolution of business disputes.[198] Nyutu Agrovet argued that the principle of finality is limited to the arbitral award and not the subsequent civil proceedings. The majority decision did not address this assertion. However, the minority opinion dismissed this argument by stating that if this were the case, the objectives of arbitration would be defeated and arbitration will be a precursor to litigation. This is because subsequent civil proceedings affect the award which is the determinant of the parties' rights and obligations; the two are inter-connected.[199]

2.4.3.5. Nairobi as a Safe Arbitration Seat

It is debatable whether Nairobi is a safe arbitration seat following the Supreme Court decision. The Queen University of London is famous for carrying out international arbitration surveys. In its 2018 survey, 97% of the respondents indicated that enforceability of awards continued to be the most valuable characteristic of arbitration. The survey reported that the five most preferred seats are London, Paris, Singapore, Hong Kong, and Geneva. Preference for a given seat is primarily determined by its general reputation and recognition. This is followed by the user's perception of its formal legal infrastructure, neutrality, and

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[197] Kayihura D and Munyetwari U, 'Striking a Balance Between Assistance and Interventionism; The Role of Courts in Rwanda-Seated Arbitrations' 37(1) *Journal of International Arbitration*, Kluwer Law International,2020,143-158.

[198] Onyema E, *The Transformation of Arbitration in Africa: The Role of Arbitration Institutions*, Kluwer Law International, Netherlands, 2016.

[199] *Nyutu Agrovet v Airtel Networks Limited (2019) eKLR*, para 107.

impartiality of the legal system, the national arbitration laws, and its track record in enforcing agreements and arbitral awards.[200]

In the 2019 survey, the ability of courts to support the arbitration process is very vital for a place to be considered a safe arbitration seat. 66% of the respondents identified that limited court intervention denoted efficiency.[201] Other characteristics of a safe arbitration seat include reduced grounds of review, the ability to waive all review advances, and arbitral matters appear before a specialized court. All these factors show that investors may reconsider their decision whether Nairobi is a safe arbitration seat because of the expanded court intervention.

2.4.3.6. The Supreme Court Failed to give Instances that Warrant Appeals

The majority judgment held that the Court of Appeal can exercise jurisdiction where the High Court in setting aside an arbitral award has made a decision so manifestly wrong. However, it did not set out the exceptional circumstances that warrant appeals. Manifest wrongness is vague as well broad; it is likely to become an unruly horse. The court failed to give a way forward, it instead instructed the Court of Appeal to come up with a leave mechanism, thus restating the appeal.[202]

2.5. The Doctrine of Residual Jurisdiction

The Supreme Court acknowledged that jurisdiction is only exercised where the right of appeal exists and that section 35 does not grant this right, however, it held that the Court of Appeal can exercise its residual jurisdiction to allow an appeal. [203] The invocation of residual jurisdiction is arguably misplaced because such jurisdiction cannot be invoked to conflict law or a rule. This section examines the doctrine of residual jurisdiction and its limitations to show that the Supreme Court abrogated the well-known principle of law that the right of appeal is granted by law, and not assumed.

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[200] Queen Mary University of London, *International Arbitration Survey*,2018,2.

[201] Queen Mary University of London, *International Arbitration Survey-Driving Efficiency in International Construction Dispute*, 2019.

[202] William Mutubwa, 'CIArb Debate, Arbitration Act Section 35: Interpretation, ADR Practice and the Supreme Court decision in Nyutu Agrovet v Airtel' Nairobi, Fair View Hotel, 13 February 2020.

[203] *Nyutu Agrovet Limited v Airtel Network Kenya Limited (2019) eKLR,* para 36.

2.5.1. Origin of the Doctrine and its Application

Residual jurisdiction is used interchangeably with inherent jurisdiction.[204] Sir Jack Jacob defines inherent jurisdiction as the reserve fund of powers which may be invoked by a court whenever it is just or equitable to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between parties, and to secure a fair trial between the parties. [205] In the case of *Taylor v Lawrence,* Lord Woolf extensively explained the inherent jurisdiction of the Court of Appeal. He stated inter alia:

> *"The Court of Appeal was established with a broad jurisdiction to hear appeals; it was not established to exercise an originating as opposed to an appropriate jurisdiction. It is therefore appropriate to state that in that sense, it has no inherent jurisdiction. It is however wrong to say that it has no implicit or implied jurisdiction arising out of the fact that it is an appellate court. As an appellate court, it has implicit powers to correct wrong decisions to ensure that justice between the litigants involved. Second, to ensure public confidence in the administration of justice not only by remedying the wrong decision but also clarifying and developing the law.*
>
> *The residual jurisdiction which we are satisfied is vested in the Court of Appeal to avoid real injustice in exceptional circumstances is linked to a discretion which enables a court to confine the use of that jurisdiction to cases in which it is appropriate for it to be exercised. There is tension between a court of having residual jurisdiction and the need to have finality in litigation. The ability to re-open proceedings after the ordinary appeal process has been concluded can also create injustice. Therefore, there needs to be a procedure that will ensure that the proceedings will only be re-opened when there is a real requirement for this to happen i.e bias, breach of natural justice. This makes it imperative that there should be a remedy*."[206]

From Lord Woolf's observation, the Court of Appeal can re-open appeals where there is an injustice. This has been illustrated in the Kenyan context in the case of *Benjoh Amalgamated & Another v Kenya Commercial Bank* wherein the Court of Appeal held that it had the jurisdiction to review its decisions to which there is no appeal to correct errors of law that have occasioned real injustice or failure or miscarriage of justice thus ending public confidence in the administration of justice. Residual jurisdiction will not be invoked where

[204] Black's Law Dictionary, 7 ed.

[205] Qaiser J, 'Inherent Jurisdiction' Training Course for Second Batch of Additional District and Session Judges, Punjab Judicial Academy, 28 October 2009,1. See also Sanam G, Halsbury's Laws of England, 4th ed

[206](2002) ALL ER.

there are laches or where legal rights of innocent third parties have vested during the intervening period, and such interference would occasion a further injustice [207]

It is important to highlight that in the cases above, the courts are re-opening cases they had decided; they had jurisdiction in the first place. This is different from our present inquiry because Section 35 of the Act neither grants the Court of Appeal appellate jurisdiction nor donates the right of appeal to any litigant in decisions of setting aside an arbitral award by the High Court. This means that the invocation of inherent jurisdiction where no jurisdiction was provided in the first place is problematic.

2.5.2. Limitations of the doctrine of Inherent Jurisdiction

William Charles argues that inherent jurisdiction can be limited. *He contends that a court's resort to its inherent jurisdiction must be employed within a framework of principles relevant to the matter in issue (emphasis mine)* He maintains that it is primarily a procedural concept and courts should not invoke it to make changes in substantive law. Inherent jurisdiction cannot be exercised to conflict with a rule/statute. Moreover, it does not empower a judge to make an order negating the unambiguous expression of the legislative will.[208] Another restriction on the doctrine of inherent jurisdiction is that it cannot be used to create new rules of substantive law.[209]

Similarly, Ferrere argues that inherent jurisdiction is inapplicable to appeals. He posits that by definition, appeals do not involve the inherent jurisdiction of the court at all, but rather arise where the legislature has specifically granted jurisdiction to the court to review a decision of a tribunal. Invoking such jurisdiction undermines and is against legislative intent. He concludes by urging that establishing powers of inherent jurisdiction in a statutory appellate contest is conceptually confused.[210]

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[207] (2014)eKLR.

[208] *Baxter Student Housing Ltd v College Housing Co-operative (1975*), The Supreme Court of Canada.

[209] Qaiser J, 'Inherent Jurisdiction'3.

[210] Ferrere M, 'The Inherent Jurisdiction and Its Limits' 13(1) *Otaga Law Review*,2013,123. In *National Union of Metal Workers of South Africa v Fry's Metal (Pty) Ltd (2005),* the Supreme Court of Appeal of South Africa held that a court cannot use inherent jurisdiction and power to assume jurisdiction that it does not otherwise have.

Another scholar, Yihan has developed a three-stage test to determine when a court can and should invoke its inherent jurisdiction. He states that the courts should ask themselves three questions:

a) Whether there is expressive legislative exclusion of the jurisdiction.

b) If not, whether legislative exclusion can be implied.

c) Whether there is sufficient need to exercise jurisdiction.[211]

In the first case, where there is an express exclusion of the court's exercise of some kind of jurisdiction or power, there is no scope for such exercise. This is based on the sovereignty of parliament in making law leaving the courts with a duty to apply the legislation. For example, a court has no residual or inherent jurisdiction to enlarge timelines laid down by statute.[212]

If there is no express prohibition, the second question to ask is whether parliament has impliedly excluded the court's inherent jurisdiction or power in the matter concerned. He argues that exclusion can be discerned by implication from the text by reading the statute as a whole. Furthermore, he observes that where the jurisdiction or power of the courts is statutory in origin, such jurisdiction or power has to be exercised within the legislative ambit of such legislative intent.[213] Moreover, he maintains that where parliament has not spoken about the court's jurisdiction, its silence is more likely to be interpreted as implied exclusion.[214]

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[211] Yihan G, 'The Inherent Jurisdiction and Inherent Powers of the Singapore Courts' *Singapore Journal of Legal Studie*s,2011,201-209.

[212] *Makula International Limited v His Eminence Cardinal Nsubuga (1981), Court of Appeal of Uganda*.

[213] Yihan G, 'The Inherent Jurisdiction and Inherent Powers of the Singapore' 204. Pinsler also argues that whether the court exercises its inherent relation to the procedure prescribed by statute depends on the interpretation of the relevant positions and the legislative intention in Pinsler J, '*The inherent Powers of the Court'* 1(1) Singapore Journal of Legal Studies, 1997,33. In *Universal City Studios and Others v Video (Pty)Ltd Networ*k cited with approval Yihan's works and held that a court does not have an inherent power to create substantive.

[214] Yihan G, 'The Inherent Jurisdiction and Inherent Powers of the Singapore' 206. See also Ananis-Welsh R, '*The Inherent Jurisdiction of Courts and the Fair Trial*' 41(4) Sydney Law Review, 2019, 428. She argues that inherent jurisdiction is limited in scope of the underlying statute. Additionally, she posits that such jurisdiction is susceptible to either express or implied statutory curtailment.

Applying this criteria to the Supreme Court decision, Section 10 of the Act provides that the court shall only intervene where authorized by the Act. Section 35 provides for the setting aside of an arbitral award. It is silent about appealing the High Court decision on setting aside an arbitral award. Using Yihan's test, this section does not expressly exclude the inherent jurisdiction of the Court of Appeal to hear appeals from the High Court. This being the case, we ask ourselves the question of whether legislative intent can be implied from this section. The answer is Yes; implied exclusion can be implied because of three reasons.

First, inherent jurisdiction cannot be invoked to substitute existing law and rules. For example, it is trite law that the right to appeal is granted by statute and not merely assumed.[215] Second, a contextual interpretation of the provisions of the Act shows that one of its overarching threads is limited court intervention. Under section 10, courts only intervene where authorized by the Act. This donates jurisdiction to the courts in arbitration matters. It follows that the jurisdiction of the courts is statutory. Consequently, such jurisdiction should be exercised in a manner that conforms with the legislative intent of the whole Act.

Parliament aimed at limiting court intervention and ensuring quick resolution of commercial disputes by reducing the fora of appealing arbitral awards. Ferrere equally underscores that inherent jurisdiction cannot be invoked to allow appeals. With due respect, the highest court legally erred by acknowledging that there is no right of appeal, but then stated that the court of appeal has inherent jurisdiction to allow appeals even where such right existed.

2.5.3. Regional Decisions on the Doctrine of Residual Jurisdiction

It is important to look at how other courts have outlined the limits of residual or inherent jurisdiction. In the case of *Baku Raphael v Attorney General*, the Supreme Court of Uganda held that a right of appeal is a creature of statute and that there is no such thing as inherent appellant jurisdiction. It further emphasized that appellate jurisdiction must be specifically provided under law.[216] Similarly, in the case of *R v High Court (General Jurisdiction) Accra*; *Exparte Magna International Transport Limited*, the Supreme Court of Ghana held that where there is a clear statutory provision that conflicts with the court's inherent jurisdiction,

[215] In *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions* (2006), The Constitutional Court of South Africa found that the exercise of inherent jurisdiction to create new rights would open the door to uncertainty and potential chaos.

[216] (2015), The Supreme Court of Uganda.

the statute law will prevail.[217] In *Moch v Nedtravel (Pty) Ltd American Travel Express Service*, the South African Court of Appeal declined to entertain under its inherent jurisdiction an appeal against an order that was not otherwise appealable. It held that inherent jurisdiction does not extend to the assumption of jurisdiction not conferred upon by statute.[218]

2.6. Conclusion

This chapter reveals that the finality of arbitral awards is inspired by the general international framework governing the finality of arbitral awards and the limited court intervention policy. As such, courts cannot intervene in the arbitral process unless authorized. Section 35 of the Act does not provide for the right of appeal and appellate intervention of the Court of Appeal on decisions of the High Court on setting aside arbitral awards. Consequently, the analysis shows that the invocation of the doctrine of residual jurisdiction by the Supreme Court is arguably misplaced. While the decision has some strengths, it is outweighed by its weaknesses as illustrated above.

[217] (2018), The Supreme Court of Ghana.

[218] (1996), The South African Court of Appeal.

CHAPTER THREE

Comparative Study Between the Provisions of the English Arbitration Act on Setting Aside an Arbitral Award and Section 35 of the Kenyan Arbitration Act

3.1. Introduction

The Supreme Court of Kenya relied on the provisions of the English Arbitration Act to hold that leave to appeal may be given where the High Court, in setting aside an arbitral award, has stepped outside the grounds under the Arbitration Act. Additionally, in setting aside an arbitral award, the High Court has made a decision so manifestly wrong.[219] In its reasoning, the Supreme Court referenced provisions of the English Arbitration Act on challenging an arbitral award as well as cases decided by English courts. This chapter seeks to highlight that the provisions on setting aside an arbitral award under the English Arbitration Act and the Kenyan Arbitration Act are different. It also argues that the Supreme Court should not have relied on the English Arbitration Act to interpret the Kenyan Arbitration Act.

The chapter begins with a discussion on setting aside an arbitral award in Kenya while identifying the loopholes under the Kenyan Arbitration Act. It then proceeds with a brief drafting history of the English Arbitration Act to show that the said legislation is not modelled on the Model Law. This is aimed at illustrating that unlike the Model Law, the English Arbitration Act is a homegrown legislation that reflects the United Kingdom's arbitration history. In addition, it distinguishes between grounds of challenging an arbitral award namely, substantive jurisdiction and serious irregularity. The English Arbitration Act provides for appeals on decisions of setting aside an arbitral award although with permission of court. Consequently, this chapter argues that the Supreme Court of Kenya erred by relying on provisions of the English Arbitration Act to allow appeals under Section 35 of the Arbitration Act. Yet, the provisions of the two legislations are not *pari materia*.

3.2. Setting Aside an Arbitral Award under Section 35 of the Act in Kenya

The Act provides for grounds on setting aside an arbitral award; these grounds are carbon copies of the grounds under the Model Law.[220] An arbitral award may be set aside only if a party furnishes proof that (i) a party to the arbitral agreement was under some incapacity, (ii) the arbitration agreement was invalid, (iii) the party making an application was not given

[219] *Nyutu Agrovet Limited v Airtel Networks Limited (2019)eKLR*, para 61-77.

[220] Section 34, *UNCITRAL Mode Law*,1985.

proper notice on the appointment of an arbitrator or of the arbitral proceedings and as such, they were unable to present their case, (iv) the arbitral award deals with a dispute not contemplated or submitted for reference by the parties or is beyond the scope of reference to arbitration,(v) the composition of the arbitral tribunal and arbitral procedure was not in accordance with the agreement of the parties, and (vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption.[221]

An arbitral award may also be set aside where the High Court finds that (i) the subject matter of the dispute is not capable of settlement by arbitration under the laws of Kenya.[222] or (ii) the award is in conflict with the public policy of Kenya.[223] The specification that arbitral awards may be set aside 'only' in the circumstances espoused illustrates that the list of grounds is exhaustive.[224]

The High Court may suspend proceedings of setting aside the arbitral award to give the arbitral tribunal an opportunity to resume the arbitral proceedings, or a chance for the arbitral tribunal to eliminate the grounds for setting aside an arbitral award.[225] Alternatively, the High Court may set aside the arbitral award on any of the grounds above.[226]

3.3. Loopholes Under Section 35 of the Act on Setting Aside an Arbitral Award

The Act does not differentiate between the consequences of each ground that warrants the setting aside of an arbitral award. Grounds under the Act are treated equally and have the same consequence – the arbitral award being set aside. It only requires a party to furnish proof on any of the grounds to set aside an arbitral award.[227] This implies that an arbitral

[221] Section 35(2)(a), *Arbitration Act (*Act No 4 of 1995).

[222] Section 35(2)(b), Arbitration Act (Act No 4 of 1995). This provision mirrors Article V(2)(a) of the *New York Convention* which disallows the setting aside of arbitral awards that deal with non-arbitrable subject matters.

[223] Section 35(2)(b), *Arbitration Act* (Act No 4 of 1995).

[224] Ortolani P, 'Application for Setting Aside as Exclusive Recourse against Arbitral Award' in Bantekas I (eds), *UNCTRAL Model Law on International Commercial Arbitration*, Cambridge University Press,2020,865.

[225] Section 35(4), *Arbitration Act* (Act No 4 of 1995).

[226] Section 35, *Arbitration Act* (Act No 4 of 1995).

[227] Section 35(2), *Arbitration Act* (Act No 4 of 1995).

award may be set aside on a ground which does not seriously affect or prejudice the rights of the parties.

Secondly, the Act does not explicitly state whether a decision of the High Court on setting aside an arbitral award, is appealable to the Court of Appeal.[228] Moreover, it does not expressly state that the decision of the High Court is final and non-appealable.[229] Unlike the provision on setting aside an arbitral award, most of the provisions where the High Court is given authority in the Act, its decisions are final and not subject to appeal. For instance, the decision of the High Court on an application challenging the appointment of the arbitrator is final and not subject to appeal.[230] In addition, the decision of the High Court on the failure or impossibility of the arbitrator to act is final and not subject to appeal.[231] Also, the decision of the High Court on the arbitral tribunal's ruling on jurisdiction is final and not subject to appeal.[232]

An application for setting aside an arbitral award may not be made after 3 months have elapsed from the date on which the party making the application had received the arbitral award.[233] This provision does not provide for the loss of the right to object and restrictions on the right to apply to set aside an arbitral award.[234] Lastly, the Act provides for only two recourses on the success of an application of setting aside an arbitral award. The High Court may set aside an arbitral award or suspend the proceedings on setting aside on request by a party to give a tribunal an opportunity to resume the arbitral proceedings.[235] This provision implies that the High Court cannot exercise its discretion to suspend the proceedings where a party has not requested. Similarly, the High Court may also take such other action which, in the opinion of the arbitral tribunal, will eliminate the grounds for setting aside the arbitral

[228] Section 35, *Arbitration Act* (Act No 4 of 1995).

[229] Muchiri T, 'Revisiting the Right of Appeal to the Court of Appeal'5.

[230] Section 14(6), *Arbitration Act* (Act No 4 of 1995).

[231] Section 15(3), *Arbitration Act* (Act No 4 of 1995).

[232] Section 17(7), *Arbitration Act* (Act No 4 of 1995).

[233] Section 35(3), *Arbitration Act* (Act No 4 of 1995).

[234] It is unclear whether the waiver to object under Section 5 of the Arbitration Act applies to Section 35 of the Act.

[235] Section 35(4), *Arbitration Act* (Act No 4 of 1995).

award.[236] The Act does not specify 'such course of action' that may be invoked by an arbitral tribunal thus making the provision ambiguous.

3.4. Drafting of the English Arbitration Act and the Rejection of the Model Law

The 1996 English Arbitration Act came into force on 31 January 1997 and applies to all arbitrations after that date even though it can be applied to those commenced before through an agreement.[237] The English Arbitration Act is a follow-up to the Departmental Advisory Committee (DAC) report published in June 1989. The report is commonly known as the Mustill Report named after Lord Mustill, the chairman of the DAC which was appointed in 1984 to advise whether the United Kingdom should enact the Model Law.[238]

The United Kingdom participated in the drafting of the Model Law. It was a member of the Working Group and its delegation took part in all the proceedings of the drafting sub-committee of the Model Law.[239] The United Kingdom consistently supported the Model Law project, however, it emphasized that the balance of advantage was much more difficult to strike in the case of a state like the United Kingdom, which already has a highly-developed and long-established law and practice of arbitration, than in a country where arbitration is a comparative innovation.[240]

Mustill's Committee observed that given the nature of the Model Law, member countries are under no obligation to enact legislation in accordance with its terms. Thus, neither issues of ratification nor membership to the Working Group entail an obligation to enact provisions of the Model Law.[241] Furthermore, the Committee emphasized that it was not to be expected that all states, whatever the characteristics of their arbitral procedures, and of their laws directly or indirectly bearing on arbitration, would necessarily find it advantageous or even

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[236] Section 35(4), *Arbitration Act* (Act No 4 of 1995).

[237] Section 2, *Arbitration Act* (United Kingdom).

[238] Muigua K, 'Arbitration Act 1995 and Arbitration Act 1996 of UK Lecture' Chartered Institute of Arbitrators-Kenya Branch Entry Course held at College of Insurance, Nairobi, on 25-26th August 2008,22.

[239] Steyn J, 'England's Response to the UNCITRAL Model Law of Arbitration' 10(1) *Arbitration International Volume*,1994,3.

[240] The Mustill Committee, *The United Kingdom and the UNCITRAL Model Law Consultative Document*,1987,281.

[241] The Mustill Committee, *The United Kingdom and the UNCITRAL Model Law Consultative Document*,1987,280.

practicable to adopt the Model Law in its entirety.[242] According to the DAC, the Model Law was primarily directed at; states with no developed arbitration law, states with outdated arbitration laws, and lastly, states with reasonable up-to-date arbitration laws but have not greatly used them in practice.[243]Consequently, the Committee recommended the rejection of the UNCITRAL Model Law and proposed the enactment of a legislation which represented the English arbitration history thence the 1996 Arbitration Act.[244]

In rejecting the Model Law, the DAC reasoned that its introduction into England would lead to a divorcing of arbitral regimes; domestic and international. The former being governed by the English Arbitration Act and the latter by the Model Law.[245] Also, the second concern related to the existing legal framework and experience of lawyers and arbitrators. The DAC felt that the Model Law did not resemble a typical English statute, and as a result, those involved in the arbitral procedure would be required to substantially revise their existing wealth of knowledge and established practice.[246] In addition, the whole sale adoption of the Model Law would remove the existing power of English Courts to correct errors of law. The consequence of such was thought unsatisfactory, leaving those aggrieved by an error in law without a sufficient remedy.[247]

Lastly, judicial intervention under the English Arbitration Act was deemed necessary by the drafters as a means of both providing assistance to the arbitral process and securing fairness and legitimacy of the system. As such, the English system involves greater supervision of the arbitral process than is envisaged under the Model Law.[248] Under the English Arbitration

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[242] The Mustill Committee, *The United Kingdom and the UNCITRAL Model Law Consultative Docume*nt,1987,280.

[243] Department Advisory Committee on Arbitration Law, *A Report on the UNCITRAL Model Law on International Commercial Arbitration*,10.

[244] The *Mustill Committee, The United Kingdom and the UNCITRAL Model Law Consultative Document*,1987,285.

[245] Lemba S, 'The 1996 United Kingdom Arbitration Act and the UNCITRAL Model Law: A Contemporary Analysis' Unpublished PHD Thesis on Internal and International Arbitration, Universita Luiss Guido Carli, Faculty of Law,2010,32.

[246] Lemba S, 'The 1996 United Kingdom Arbitration Act and the UNCITRAL Model Law: A Contemporary Analysis' 33.

[247] Department Advisory Committee on Arbitration Law, *A Report on the UNCITRAL Model Law on International Commercial Arbitration*,9.

[248] Steyn J, 'England's Response to the UNCITRAL Model Law of Arbitration'3.

Act, an arbitral award can be challenged on grounds of substantive jurisdiction and serious irregularity.[249]

3.5. Challenging an Arbitral Award under the English Arbitration Act

A party to arbitral proceedings can challenge an award on the ground that the tribunal lacked substantive jurisdiction.[250] It should be recalled that the English Arbitration Act recognizes the doctrine of *kompetenz-kompetenz*; a tribunal is authorized to rule on its jurisdiction either in a separate award on jurisdiction or in the award on the merits.[251] The ruling of the tribunal is not final; it is reviewable by the courts where the award is challenged by a party. The right to challenge an award for lack of substantive jurisdiction is a mandatory provision which means that parties cannot contract out of it.[252]

The English Arbitration Act further provides that an award may be challenged on the ground of serious irregularity affecting the tribunal, the proceedings or the award.[253] This is a mandatory provision of the Act; thus, parties cannot contract out of their right to challenge an award on this ground.[254] This provision reflects the internationally accepted view that the court should be able to correct serious failure to comply with the due process of arbitration proceedings.[255]

In *Alhadha Trading Company v Tradigrain SA* and Others, it was held that a provision in the arbitration rules that a tribunal should have absolute discretion in admitting or not admitting a claim, and that any decision so made should be final and binding, cannot exclude any right to challenge such a decision for serious irregularity.[256]

The grounds which constitute serious irregularity are (a) failure of the tribunal to comply with its general duty of impartiality; (b) the tribunal exceeding its powers; (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

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[249] Chukwumerije O, 'Judicial Supervision of Commercial Arbitration; The English Arbitration Act 1996' 15(2) *Arbitration International Volume*,1999,177.

[250] Section 67, *Arbitration Act* (United Kingdom).

[251] Section 32(4), *Arbitration Act* (United Kingdom).

[252] See Schedule 1 and Section 4, *Arbitration Act* (United Kingdom).

[253] Section 68(1), Arbitration Act (United Kingdom).

[254] Chukwumerije O, 'Judicial Supervision of Commercial Arbitration; The English Arbitration Act 1996'184.

[255]Harris B, Planterose R and Tecks J, *The Arbitration Act 1996: A Commentary*,4th ed, Blackwell Publishing, Oxford,2007, 315.

[256] (2002).

(d) failure by the tribunal to deal with all the issues that were put to it; (e) any arbitral or other institution or person exceeding its powers conferred by the parties; (f) uncertainty or ambiguity as to the effect of the award; (g) the award being obtained by fraud or the award or the manner in which it was procured being contrary to public policy; (h) failure to comply with the requirements as to the form of the award; and (i) an admitted irregularity in the conduct of the proceedings.[257] Where the irregularity alleged is that of the tribunal exceeding its substantive jurisdiction, an application challenging substantive jurisdiction is appropriate.[258]

In order for a party to challenge an award for serious irregularity, the complaint must fall within one of the grounds listed above. The DAC, in its report, set out various considerations that must be adopted by courts on applications claiming serious irregularity.[259] First, the court must be satisfied that the irregularity is of a kind which has caused or will cause substantial injustice to the applicant.[260] The requirement of 'substantial injustice' is aimed at reinforcing the autonomy of the arbitral process and restricting the degree of judicial intervention therein. Moreover, it must be applied by way of support of the arbitral process, and not interference. [261]

In addition, the Committee emphasized that the test is not what would have happened had the matter been litigated.[262] In their view, applying such a test would be ignoring the fact that the parties have agreed to arbitrate, not litigate. Having chosen arbitration, the parties cannot validly complain of substantial injustice unless what has happened simply cannot on any view be defended as an acceptable consequence of that choice.[263]

The recommendations by the DAC were summarized in the case of *Petroships Pte Limited v Petec Trading Investment Corporation and Others* wherein the High Court of England and Wales upheld the recommendations of the DAC. The Court held that courts will only take

[257] Section 68(2), Arbitration Act (United Kingdom).

[258] Harris B, Planterose R and Tecks J, *The Arbitration Act 1996: A Commentary*, 316. See also Section 67(2), Arbitration Act (United Kingdom).

[259] The Mustill Committee, *The United Kingdom and the UNCITRAL Model Law Consultative Document*,1987,196.

[260] Section 68 (2), Arbitration Act (United Kingdom).

[261] Chukwumerije O, 'Judicial Supervision of Commercial Arbitration; The English Arbitration Act 1996'185.

[262] Department Advisory Committee, *Report on the Arbitration Bill*,1996, para 279.

[263] Department Advisory Committee, *Report on the Arbitration Bill*,1996,para 280.

action only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the process. The High Court further emphasized that a challenge of serious irregularity is available only in extreme cases. These arise where the tribunal has gone so wrong in its conduct of arbitration in one of the grounds that justice calls out for it to be corrected. Lastly, the High Court stated that the ground of serious irregularity must not be used as a means of circumventing the restrictions upon the court's power to intervene in arbitral proceedings.[264]

In the case of *Warborough Investment Limited v Robinson and Sons Limited*, the appellant sought an order that an arbitral award be remitted for reconsideration on the ground of serious irregularity. In addition, the appellant contended that the arbitrator had reached his determination by adopting an approach to rent valuation which was neither advocated for by the parties nor was any party given an opportunity to submit on the correctness of that approach. The Court of Appeal, in dismissing the appeal, held that courts will not allow any challenge under the ground of serious irregularity to be a vehicle for abuse by, for instance, allowing it to stand as a substitute for what should be an appeal on a point of law under Section 69.[265]

The decision of the High Court or County Court on setting aside can only be appealed with the leave of court.[266] In *Amec Civil Engineering Limited v Secretary of State for Transport*, the High Court of England and Wales held that the permission to appeal might be refused where, for instance, both the judges and arbitrator have reached the same result for the same reason. Moreover, where the High Court does not give permission to appeal, the Court of Appeal has no jurisdiction to grant the permission to appeal.[267] Nonetheless, the Court of Appeal has residual jurisdiction for reviewing on appeal the misconduct or unfairness of a first instance judge's determination concerning the grant or refusal of leave to appeal.[268]

The drafters of the English Arbitration Act rejected the approach of the Model Law in completely foreclosing the option of appeals. In their view, the Model Law approach harshly

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[264] (2001), The High Court of England and Wales.

[265] (2003), The Court of Appeal of England and Wales.

[266] Section 68(4), *Arbitration Act* (United Kingdom). See also Section 105 which defines court to mean either the High Court or the County Court.

[267] *(*2002), The Commercial Court of England.

[268] *CGU International Insurance plc and Others v AstraZeneca Insurance Company Limited (2006),* The United Kingdom Commercial Court.

implies an irrebuttable presumption that parties to arbitration assume the risk that their arbitral awards might contain substantive errors.[269]

The English Arbitration Act provides for several recourses when courts are presented with applications on challenging an arbitral award on substantive jurisdiction and serious irregularity. The High Court may a) remit the award to the tribunal in whole or in part for reconsideration, b) declare the award to be of no effect in whole or in part, or c) set aside the award in whole or in part.[270] Where the award is varied, the variation becomes part of the tribunal's award.[271] On remission of the award in whole or in part, for consideration, the tribunal is required to make a fresh award in respect of the matters remitted within three months of the date of the order for remission.[272] The Court is barred from exercising its power to set aside or declare an arbitral award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.[273]

If a party takes part, or continues to take part, in the proceedings without making any objection, he may not raise that objection later before the tribunal or court. However, such an objection may be raised where one can show that at the time, he did not know and could not with reasonable diligence have discovered the grounds for the objection.[274]

3.6. Notable Differences between the provisions of the English Arbitration Act and the Kenyan Arbitration Act on Setting Aside an Arbitral Award

Under the English Arbitration Act, a party must first exhaust any available arbitral process of appeal or review before applying to the High Court.[275] The arbitral tribunal must be given an opportunity to correct the errors in an arbitral award; the parties are free to agree on the powers of the tribunal correct an award or the tribunal may on its own initiative correct an

[269] Department Advisory Committee, *Report on the Arbitration Bill*,1996, para 285. See also Harris B, Planterose R and Tecks J, *The Arbitration Act 1996: A Commentary*,319-321.

[270] Sections 68(3) and 67(3), *Arbitration Act* (United Kingdom).

[271] Section 71(2), *Arbitration Act* (United Kingdom).

[272] Section 71(3), *Arbitration Act* (United Kingdom).

[273] Section 68(3), *Arbitration Act* (United Kingdom).

[274] Section 73(1), *Arbitration Act* (United Kingdom).Some of the objections include that the tribunal lacks substantive jurisdiction, that the proceedings were improperly conducted, that there was an irregularity affecting the tribunal.

[275] Section 70(2)(a), *Arbitration Act* (United Kingdom).

arbitral award.[276] Under the Kenyan Arbitration Act, there is no requirement that a party exhausts the available fora provided by the arbitral tribunal.

An application to the High Court on setting aside an award or appeal under the English Arbitration Act must be brought within 28 days of the date of the arbitral award.[277] If on an application or appeal, it appears that the award does not contain the tribunal's reasons or that they were not sufficiently set out, the court may order the tribunal to state the reasons for its award.[278] An application for setting aside an arbitral award under the Kenyan Arbitration Act must be brought within 3 months.[279]

A party may lose the right to object and challenge an arbitral award under the English Arbitration Act where they take part, or continue to take part in the proceedings. The provision on setting aside an arbitral award under the Kenyan Arbitration Act does not provide for the loss of the right to object.[280]

Under the English Arbitration Act, an appeal from the decision of the court on setting aside may be made only with permission.[281] Where the Court does not give permission, the Court of Appeal cannot give that permission.[282] However, the Court of Appeal can exercise residual jurisdiction to review the misconduct and unfairness of the judge's determination of the grant or refusal of leave to appeal.[283] The Kenyan Arbitration Act, on the other hand, does not explicitly provide for appeals on decisions of the court on setting aside arbitral awards.[284] This makes it unclear as to whether the High Court decisions on setting aside an arbitral award are appealable.

As illustrated earlier in this chapter, the provisions of the English Arbitration Act are not modelled on the Model Law. As such, there are different in content and phrase. The

[276] Section 57, *Arbitration Act* (United Kingdom).

[277] Section 70(3), *Arbitration Act* (United Kingdom).

[278] Section 70(4), *Arbitration Act* (United Kingdom).

[279] Section 35(3), *Arbitration Act* (United Kingdom).

[280] Section 73(1), *Arbitration Act* (United Kingdom) and Section 35, *Arbitration Act* (Act No 4 of 1995).

[281] Article 67(4), *Arbitration Act* (United Kingdom).

[282] *Athletic Union of Constantinople v National Basketball Association* and *Others* (2002), the United Kingdom Commercial Court.

[283] *CGU International Insurance plc v Astrazeneca Insurance Co Ltd* (2007), The United Kingdom Commercial Court.

[284] Section 35, *Arbitration Act* (Act No 4 of 1995).

provisions on setting aside under the Kenyan Arbitration Act are *pari materia* with the provisions on setting aside an arbitral award under the UNCITRAL Model Law.[285]

3.7. Conclusion

This Chapter has shown the differences between the provisions on setting aside an arbitral award under the English Arbitration Act and the Kenyan Arbitration Act. The most significant difference is that the English Arbitration Act was not entirely modelled on the Model Law while the Kenyan Arbitration Act is a carbon copy of the Model Law. Similarly, the English Act provides for appeals on decisions of the court on setting aside an arbitral award with permission of court. This gives courts more interference not envisaged in the Model Law which was rejected by the United Kingdom.

The Kenyan Arbitration Act is modelled on the Model Law and as such, it does not provide for appeals on decisions of the High Court on setting aside arbitral awards. In its reasoning, the Supreme Court of Kenya held that the Court of Appeal can exercise residual jurisdiction to allow appeals where the decision of the High Court on setting aside an arbitral award is manifestly wrong. It drew analogy from the residual jurisdiction exercised by the Court of Appeal of England in reviewing the misconduct of a High Court judge in granting leave to appeal. These rules are different because in the former, the Kenyan Arbitration Act does not provide for appeals or leave to appeal on decisions of the High Court on setting aside an arbitral award. Moreover, the latter deals with misconduct in the decision to grant leave to appeal by the High Court of England and Wales.

The Supreme Court of Kenya should not have relied on the provisions of the English Arbitration Act and English cases to hold that leave to appeal may be given where the High Court in setting aside an award has stepped outside grounds under the Arbitration Act. This is because unlike the English Arbitration Act, the Kenyan Arbitration Act does not provide for leave to appeal or an appeal for that matter.[286] It follows therefore that the Supreme Court erred by relying on provisions of the English Arbitration Act thus undermining the Kenyan Arbitration Act which governs arbitration matters in Kenya.

[285] Section 35, *Arbitration Act*, 1995. See also Section 34, *UNCITRAL Mode Law*,1985.

[286] *Nyutu Agrovet Limited v Airtel Networks Limited (2019)eKLR*, para 61-77.

CHAPTER FOUR

Towards a Better Interpretation of Section 35 of the Act

4.1. Introduction

The previous chapters identified the weaknesses of the decision of the Supreme Court as well as the loopholes in the Act. The discussions and analyses in the said chapters faulted the interpretation of Section 35 by the Supreme Court which allowed appeals on decisions of the High Court on setting aside arbitral awards. This chapter seeks to propose better approaches that should be adopted in the interpretation of Section 35 of the Act on setting aside arbitral awards. It begins by outlining the constitutional mandate on courts to promote Alternative Dispute Resolution mechanisms (*ADR hereinafter*) including arbitration. As such, courts should interpret Section 35 of the Act with a view to promote arbitration, and not to defeat core arbitration principles.

The chapter then proceeds by advancing the doctrine of constitutional avoidance, a doctrine which dictates that courts should not determine a constitutional issue when a matter may be properly decided on another basis. This is aimed at encouraging courts to avoid setting aside arbitral awards on constitutional grounds when they can be set aside within Section 35 of the Act. Thereafter, the chapter proposes that Section 35 should be interpreted based on the internationally recognised arbitration principles; namely, finality of the award, party autonomy, and limited court intervention. To this end, Kenyan courts should respect those principles since the Act is modelled on the Model Law which details the said principles.

Lastly, the chapter proceeds by giving illustrations from best practice jurisdictions such as Singapore, Sweden, and Switzerland where arbitration principles are recognised and respected. Moreover, their courts are supportive of the arbitral process thus explaining the robust growth of arbitration in the said jurisdictions. Finally, the Chapter concludes by encouraging Kenyan courts to adopt the proposed suggestions in interpreting Section 35 of the Act.

4.2. Interpretation Based on Article 159 of the Constitution

The Constitution provides that one of the guiding principles in exercising judicial authority is ADR which includes reconciliation, mediation, arbitration, and traditional dispute resolution mechanism. Courts must be guided by ADR.[287] ADR mechanisms, including

[287] Article 159(2), *Constitution of Kenya* (2010).

arbitration are central to the realisation of access to justice given the increased backlog of cases.[288]

The constitutional mandate of promoting ADR mechanisms is imperative and as such, courts must support, as opposed to cripple the realization of such mechanisms.[289] In *TSJ v SHSR*, the Court of Appeal held that courts are obligated by Article 159(2) of the Constitution to promote arbitration and other dispute resolution mechanisms when exercising judicial authority.[290] Moreover, courts have relied on this constitutional mandate to allow the applicability of Traditional Dispute Resolution Mechanisms in criminal cases.[291]

The Constitution provides for arbitration as an ADR mechanism, which implies that it is entrenched with its strictures.[292] One of the core tenets of arbitration is limited court intervention, a feature which gives arbitration an advantage over litigation. This tenet does not contradict the Constitution by failing to provide for appellate intervention on decisions of the High Court on setting aside arbitral awards. On the contrary, it seeks to sustain one of its core features-finality of the arbitral award. It follows that the Supreme Court of Kenya ought to have obeyed their constitutional mandate of promoting arbitration. This requires respecting the core tenets of arbitration since allowing appeals on decisions of the High Court on setting aside arbitral awards defeats the tenets of finality of awards and limited court intervention. The Majority judgement's interpretation of Section 35 of the Act is arguably a violation of the Constitution which entrenches arbitration as one of the ADR mechanisms.

4.3. Interpretation Based on the Doctrine of Constitutional Avoidance

The Interested Party, the CIArb, raised an argument that since arbitral awards are being set aside on grounds that they do not comply with constitutional principles, appeals should lie under Section 35 of the Act. The Supreme Court was persuaded by that argument and observed that where an award is set aside on constitutional grounds, then it is one of the

[288] Wabuke E, 'Enhancing Access to Justice: The Imperative of Adopting the Alternative Dispute Resolution Approach' 3(1) *Alternative Dispute Resolution*,2015,216-217.

[289] Kariuki F, 'Redefining Arbitrability: Assessment of Articles 159 and 189 (4) of the Constitution of Kenya' 1(1)*Alternative Dispute Resolution*,2013,183.

[290] (2019)eKLR.

[291] *R v Mohamed Abdow Mohamed* (2013)eKLR.

[292] *Nyutu Agrovet v Airtel Networks*, para 100 (Minority Judgement of Chief Justice Maraga).

grounds in which an appeal lies against the decision of the High Court on setting aside an arbitral award.[293] This study advances that Kenyan courts should be guided by the doctrine of constitutional avoidance.

The doctrine of constitutional avoidance dictates that courts should not determine a constitutional issue when a matter may be properly be decided on another basis.[294] In *Ashwander v Tennessee Valley Authority*, the Supreme Court of the United States of America *(USA hereinafter*) held that it would not decide a constitutional issue properly before it, if there was also another basis upon which the case could be decided.[295] The court further laid down rules that should guide courts. First, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the court will decide on the latter.[296] Second, the court will not formulate a rule of constitutional law broader than is required by the facts to which it is to be applied.[297] Third, the court will not anticipate a question of constitutional law in advance of the necessity of deciding it. This is because it is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to the decision of the case.[298]

The above rules of constitutional avoidance have been upheld by the Supreme Court of Kenya in *Communications Commission of Kenya v Royal Media Services*.[299] As such, the rules bind lower courts, including the High Court which deals with applications of setting aside arbitral awards. Applying the doctrine of constitutional avoidance, the High Court should not be quick to set aside an arbitral award on constitutional grounds when the said award can be rectified by remitting it to the tribunal or being set aside under the grounds in the Act. Moreover, the High Court should stay within the grounds provided under the Act on setting aside an arbitral award. This way, arbitral awards will be protected from appeals

[293] *Nyutu Agrovet v Airtel Networks*, para 75.

[294] Minority Opinion of Kentridge JA in *S v Mhlungu* (1995), The Constitutional Court of South Africa, para 59.

[295] (1936), The Supreme Court of the United States of America.

[296] *Ashwander v Tennessee Valley Authority*, para 69.

[297] *Ashwander v Tennessee Valley Authority*, para 68.

[298] *Ashwander v Tennessee Valley Authority*, para 67.

[299] 2014)eKLR. See also *Jorum Kabiru Mwangi v Co-operative Bank of Kenya* (2016) eKLR. The High Court held that the doctrine of constitutional avoidance is alive in the Kenyan legal system.

on High Court decisions on setting aside since they are not set aside on constitutional grounds.

4.4. Interpretation Based on Internationally recognized Arbitration Principles

4.4.1. Party Autonomy

Arbitration is based on the respect of private arrangements; people are free to arrange their private affairs as they see fit provided that they do not offend public policy or mandatory law.[300] Party autonomy has gained universal acceptance in most developed legal systems. Its origin lies in the express or determinate intention of parties to agree on how best their disputes should be resolved. Moreover, party autonomy is now recognised as a right in itself because it has gained transnational and universal character. As such, it has binding effect because it has been agreed to and adopted by many states and persons.[301]

According to the first report of the United Nations Secretariat, the most important principle on which the Model Law should be based, is the freedom of parties to tailor the rules of the game.[302] Subsequently, the principle of party autonomy was enshrined in the Model Law; parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.[303] The principle is reflected throughout Model Law by the phrase "*unless otherwise agreed by parties*". It enables parties to determine the substantive laws and rules applicable to the merits of the disputes to be resolved by arbitration. Consequently, it equips contracting parties with a mechanism of avoiding applications of an unfavourable or inappropriate law to an international dispute.[304]

The principle of party autonomy offers a degree of psychological satisfaction to the parties that they may have chosen the best arbitrators, the form, forum of arbitration, and the governing law. It provides aspirations that their arbitration will proceed according to their

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[300] Williams D, 'Balancing Party Autonomy' in Kaplan N and Moser M (eds) *Jurisdiction, Admissibility, and Choice of Law in International Arbitration*, Kluwer Law International, Alphen aan den Rijin,2018,88.

[301] Lew MD and Mistelis L, *Comparative International Arbitration*, Kluwer Law International, Alphen aan den Rijin,2013,415.

[302] UN Secretariat, *The First Secretariat Note on the UNCITRAL Model Law*, 1981,para 17.

[303] Article 19(1), *Model Law*,1985.

[304] Lew MD and Mistelis, C*omparative International Arbitration*, 414.

wishes.[305] This in turn, makes the process more certain, predictable, and uniform thus enabling parties to prepare their argumentations and predict the outcome of the dispute.[306] Where party autonomy is balanced with other foundational concepts including the right to be heard, the principle of equal treatment; the resultant award should be upheld.[307]

Section 35 of the Act should be interpreted by giving effect to the principle of party autonomy. This is because parties voluntarily choose arbitration as their preferred method of dispute resolution. Parties who choose to be governed by the Act anticipate that the arbitral award will not be affected by unexpected decisions of the arbitrators and courts.[308] Interpreting Section 35 to permit appeals on the decision of the High Court on setting aside arbitral awards is contrary to the legitimate expectation of parties that their choice of the mode of dispute of resolution and governing law will be respected. Moreover, it brings about uncertainty and unpredictability.[309] This is because parties did not anticipate that decisions on setting aside will be appealed against since the provision does not state whether decisions of the High Court on setting aside arbitral awards are appealable.

4.4.2. Finality of an Arbitral Award

Arbitration is chosen freely by parties when they incorporate an arbitration agreement into their contract, and at times even include the finality clause. When they do so, they send the message that they do not wish to be subjected to the long, tedious, expensive, and sometimes inconvenient journey that commercial litigation entails. They want the resultant award to be final and binding.[310]

The finality of an arbitral award is discernible at two levels namely, finality which implies that no right of appeal lies, and finality on the merits of an arbitral award.[311] By choosing arbitration, parties have waived their right to appeal in favour of the speedy and efficient

[305] Chatterjee C, 'The Reality of the Party Autonomy Rule in International Arbitration' 20(6) *Journal of International Arbitration*,2009,551.

[306] Mourre Alexis and Brozolo L, 'Towards Finality of Arbitral Awards: Two Steps Forward and One Step Back' 27(1) *Arbitration International*,2011,15.

[307] Williams D, 'Balancing Party Autonomy' 88.

[308] Lew MD and Mistelis L, *Comparative International Arbitration*,415.

[309] Mutubwa W, 'Consistency and Predictability versus Finality under the Kenyan Arbitration Act' 83(3) *The International Journal of Arbitration, Mediation, and Dispute Management*,2017,303.

[310] *Anne Mumbi Hinga v Victoria Njoki Gathara*, Civil Appeal No 8 of 2009.

[311] Mutubwa W, 'Consistency and Predictability versus Finality under the Kenyan Arbitration Act' 306.

dispute resolution method. The principle of finality of arbitral awards is supported by the principle of *dubio pro validate* which implies that national courts in uncertain cases should uphold awards instead of setting them aside.[312]

Although the principle of finality implies that arbitral awards cannot be challenged on substantive grounds, there are procedural grounds upon which awards could be challenged to ensure minimum standards of objectivity, fairness, and justice.[313] However, only serious procedural errors or mistakes should serve as a basis for challenging an award on procedural grounds.[314]

In *Hall Street Associates v Mattel Inc*, the Supreme Court of the USA struck out an arbitration agreement that allowed courts to overturn an arbitration award which contained legal errors or factual findings that were not supported by 'substantial evidence'. The court held that enhanced court review of arbitration awards opens the door to the full-bore evidentiary appeals that render arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.[315] Other courts all over the world have upheld the finality of award. In *AJU v AJT*, the Court of Appeal of Singapore held that even if an arbitral tribunal's findings of law and /or fact are wrong, they are binding on the parties and may not be set aside or appealed against except in situations provided under the International Arbitration Act of Singapore.[316]

For many business users of international arbitration, justice delayed is justice denied. The core value of expeditious dispute resolution would be undermined if national courts were to re-examine the arbitrator's decision on the merits.[317] It follows that interpreting Section 35

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[312] Hakansson E, 'Arbitrator's Application of the Wrong Substantive Law – a Ground for Challenge?' Unpublished Master's Thesis in Arbitration, Department of Law, Uppsala Universitete,2013,22.

[313] Hakansson E, 'Arbitrator's Application of the Wrong Substantive Law – a Ground for Challenge?'21.

[314] *Janson v Retrotype AB* (1975), The Supreme Court of Sweden. See also the European Court of Justice in *Eco Swiss v Benetton* wherein it stated that, 'it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances'. ECJ Judgment of 1 June 1999.

[315] (2008), The Supreme Court of the United States of America.

[316] (2011), The Court of Appeal of Singapore. Article 24 of the International Arbitration Act of Singapore provides for grounds that warrant setting aside arbitral awards.

[317] Helmut O and Schuch Y, 'The Award and the Courts: How to Apply the Applicable Law in International Arbitration' *Austrain Yearbook on International Arbitration*, 2017, 207.

of the Act to allow appeals lengthens the arbitral process and defeats the finality of the outcome.

4.4.3. Limited Court Intervention

The law of arbitration admits the notion that the role of the court in arbitration is inevitable and almost universally provides for it. This was emphasized by *Lord Mustil in Coppee-Lavin NV v Ken-Ren Chemicals and Fertilisers Limited*:

> *'Whatever view is taken regarding the correct balance of the relationship between international arbitration and national court, it is impossible to doubt that at least in some instances the intervention of the court may not only be permissible but highly beneficial'*[318]

Importantly, the law of arbitration also appreciates the need to limit court intervention in arbitration to a basic minimum.[319]Courts should supervise with a light touch but assist with a strong hand.[320] The Model Law limits the scope of the role of the court in arbitration only to situations that are contemplated thereunder. This provision is to the extent that except where the law specifically provides for court intervention, the court has no recognised basis for intervening in the arbitration process.[321] The provision of the Model Law limiting court intervention is reflected in the Act which provides that, "*Except as otherwise provided in the Act, no court shall intervene in matters governed by the Act.*[322]

In *Prof Lawrence Gumbe v Mwai Kibaki*, the High Court stated inter alia:

> "*Our Section 10 is based on the UN Model Law on arbitration and all countries have ratified it recognise and enforce the autonomy of the arbitral process. Courts of law can only intervene in specific areas stipulated in the Act and in most cases, intervention is usually supportive and not obstructive or usurpation oriented. If the Kenyan courts refused to recognise this autonomy, we would become a pariah state and could be isolated internationally*".[323]

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[318] (1994), The High Court of England and Wales.

[319] Abwuor J, 'Role of Courts in Arbitration: A Critical Analysis of the Kenyan Arbitration Act No.4 of 1995' Unpublished LLM Thesis, University of Nairobi,2012,13.

[320] Hwang M, 'Commercial Courts in International Arbitration – Competitors or Partners? 31(193) *Arbitration International*, 194.

[321] Abwuor J, 'Role of Courts in Arbitration: A Critical Analysis of the Kenyan Arbitration Act No.4 of 1995' 13.

[322] Section 10, Arbitration Act (Act No 4 of 1995).

[323] *High Court Miscellaneous No. 1025 of 2004*.

Other courts have discouraged intervention which is not provided for in arbitration legislations. In *Soh Beng Tee & Co Pte Ltd v Fairmount Development Limited*, the Court of Appeal of Singapore held that aggressive judicial intervention can only result in the prolonging of the arbitral process and encourage myriad unmeritorious challenges to arbitral awards. Left unchecked, an interventionist approach can lead to indeterminate challenges, cause indeterminate costs to be incurred thus leading to indeterminate delays.[324]

The Singaporean Court of Appeal further recognized that in dealing with claims of breach of natural justice in arbitral awards, the threshold is high. A party challenging an arbitral award on breach of natural justice must establish (i) which rule of natural justice was being breached, (ii) how it was breached, (iii) in what way the breach is connected to the arbitral award, and (iv) how the breach prejudiced its rights. It is not enough for a party to allege that there was a breach of natural justice, they must show how it prejudiced their rights and affected the outcome of the case.[325]

The Singaporean courts have also addressed challenges on equal treatment of parties. In *Triulizi Cesare SLR v Kinyi Group Glass Limited*, the Singaporean Court of Appeal observed that whereas one of the fundamental rules of natural justice requires arbitrators to treat parties equally and give each of them the full opportunity to present their case, equality of treatment does not require identity of treatment. Thus, the fact that a party was not afforded the exact same amount of time as the other party to prepare and file an expert report was not a breach of natural justice.[326] Moreover, neither poor reasoning on the part of the tribunal nor a misunderstanding of the party's argument, are grounds to set aside an arbitral award on the basis of natural justice. Furthermore, where it is found that the tribunal has committed a breach of natural justice, it does not mean that an arbitral award should be set aside in its entirety. The Singaporean courts will, where the, impugned issue or amount is capable of being separated, only set aside the issue or amount.[327]

[324] (2007), The Court of Appeal of Singapore.

[325] *Soh Beng Tee & Co Pte Ltd v Fairmount Development Limited (*2007*), The Court of Appeal of Singapore.*

[326] (2015), The High Court of Singapore.

[327] *AKN and another v ALC (2015*), The Court of Appeal of Singapore

4.5. Interpretation Based on some of the Best Practice Jurisdictions

4.5.1. Singapore

The Supreme Court of Kenya can draw lessons from the Singaporean courts whose approach to arbitration is pro-arbitration. It is underpinned by the policy of minimal court intervention based on considerations of party autonomy and finality of the arbitration process.[328] Singapore is one of the most preferred and widely used seats. It ranks third out of the five most preferred seats namely, London, Paris, Singapore, Hong Kong, and Geneva.[329] Moreover, Singapore is the most improved arbitral seat owing to its impartial legal system, supportive national courts as well as a high track record in enforcing arbitral awards.[330]

In November 1991, a sub-committee of the Law Reform Committee of Singapore was appointed, to recommend, reform or revise the existing laws relating to commercial arbitration in light of developments in international commercial arbitration. The Committee recommended the adoption of the Model Law in its 1993 report on the basis that the Model Law represents an internationally accepted model.[331] The recommendations by the Committee were accepted by the Law Reform Committee and led to the passing of the International Arbitration Act (IAA) in October 1994 which came into force on 27 January 1995.[332]

Singapore has a dual track arbitration regime, with one principally for international arbitrations, IAA and the other for domestic arbitrations governed by the Arbitration Act Cap 10 (*AA hereinafter*). The key intervention between the two regimes is the degree of court intervention and supervision to which the arbitral process is subject to. The courts retain a greater degree of judicial involvement under the Arbitration Act.[333]

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[328] Hwang M and Yin Wai C, 'Case Law of the Supreme Court of Singapore in the Field of Arbitration' 2(1) *Belgian Law Review of Arbitration*, 2019,630.

[329] Queen Mary University of London, *International Arbitration Survey: The Evolution of International Arbitration*,2018,8.

[330] Queen Mary University of London, *International Arbitration Survey: Improvements and Innovations in International Arbitration*,2015,2.

[331] Pillay M, 'The Singapore Arbitration Regime and the UNCITRAL Model Law' 20(4) *Arbitration International*,2004,359.

[332] Pillay M, 'The Singapore Arbitration Regime and the UNCITRAL Model Law'360.

[333] Hwang M and Yin Wai C, 'Case Law of the Supreme Court of Singapore in the Field of Arbitration'632

While Singapore has a dual track arbitration regime, the two tracks are nevertheless broadly consistent with each other given that the legislative intent of the AA was to "*align our domestic laws with the Model law and is largely based on the Model Law*". It should be recalled that the Model law already forms the basis of the Singapore IAA.[334] *In LW Infrastructure Pte Ltd v Limchin San Contractors Pte Ltd*, the Singaporean Court of Appeal held that where similar provisions are found in the AA and the IAA or Model Law, the court is entitled of and indeed even required to have regard to the scheme of [IAA or the Model Law] for guidance in the interpretation of the AA.[335] Moreover, in *Tjong Very Sumito v Antig Investments Pte Ltd, the Court of Appeal of Singapore stated*;

> "*There was a time when arbitration was viewed disdainfully as an inferior process of justice. Those days are now behind us; an equivocal judicial policy of facilitating and promoting arbitration has firmly taken root in Singapore. The need to respect party autonomy, manifested by their contractual bargain, in deciding the method of dispute resolution to govern the contract, has been accepted as the cornerstone underlying judicial non-intervention. In essence, the court ought to give effect to the parties unless it offends the law.*"[336]

It follows that the intervention of courts is supportive and limited since both tracks are inspired by the Model Law. Notwithstanding the parallel regimes for international and domestic arbitrations, parties to an arbitration in Singapore may, in fact, elect with regime they wish to subject themselves to. Parties to an international arbitration may, therefore, elect to opt-out of the IAA regime and apply the AA instead. Conversely, parties to a domestic arbitration may elect to opt into the IAA regime.[337]

In *AKN v ALC*, the High Court of Singapore had unusually set aside an award in its entirety, holding that there were one or more breaches of natural justice. The High Court had reasoned that the arbitral tribunal had misunderstood the award debtor's and had failed to engage with a number of the latter's submissions and evidence.[338]

On appeal, the Court of Appeal provided guidance on the proper relationship between tribunals and courts. The court reiterated that courts do not and must not interfere in the

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[334] Hwang M and Yin Wai C, 'Case Law of the Supreme Court of Singapore in the Field of Arbitration'633.

[335] (2013), The Court of Appeal of Singapore.

[336] *Tjong Very Sumito v Antig Investments Pte Ltd (2008),* The Court of Appeal of Singapore.

[337] Section 15(1), *International Arbitration Act* (Singapore) and Section 5(1), *International Arbitration Act* (Singapore).

[338] (2015), The Court of Appeal of Singapore.

merits of an arbitral award and, in the process, bail out parties who have made choices that they might come to regret, or offer them a second chance to canvass the merits of their respective cases. Additionally, courts must resist the temptation to engage with what is substantially an appeal on the legal merits of an arbitral award, but which, through the ingenuity of counsel, may be disguised and presented as a challenge to process failures.[339]

An arbitral award is final and binding under Singaporean law.[340] No court has jurisdiction to confirm, vary, set aside, or remit an arbitral award except as provided in the Act.[341] An appeal is only available on questions of law with the agreement of the parties and with leave of court.[342] This right, can however be excluded by agreement.[343]

As earlier observed, the Kenyan courts can learn from how the Singaporean Courts approach arbitration; the latter do so with a facilitating hand. This limited intervention explains why Singapore has grown to become one of the best arbitration seats in the world. Additionally, Kenyan courts should draw attention to the approach by the Singaporean Court because arbitration laws in their countries are both inspired by the Model Law. While the Singaporean courts have upheld and respected internationally recognised principles (party autonomy, finality of the award, and limited court intervention), the Kenyan courts have been inconsistent in respecting the said principles. Moreover, their intervention has been unfavourable to arbitration. This is evidenced by the reasoning of the Supreme Court of Kenya by allowing appeals on decisions of setting aside an arbitral award thus expanding the level of court intervention, a move which diminishes the finality of the arbitral awards.

4.5.2. Sweden

An arbitral award in Sweden is binding even if the arbitral tribunal has manifestly disregarded the law or grossly misjudged the merits. An arbitral award can only be challenged on procedural grounds such as due process.[344] Flowing from the principle of finality of arbitral awards, an award cannot be set aside based on substantive irregularity in

[339] (2015), The Court of Appeal in Singapore.

[340] Section 19B, *International Arbitration Act* (Singapore) and Section 44, *Arbitration Act* (Singapore).

[341] Section 47, *Arbitration Act* (Singapore).

[342] Section 49, *Arbitration Act* (Singapore).

[343] Section 49(2), *Arbitration Act* (Singapore).

[344] Gisela K, 'Recourse to the Courts against an Arbitral Award' in Magnusson A (eds), *International Arbitration in Sweden: A Practitioner's Guide*, Kluwer Law International, Alphen aan den Rijin,2013,238.

Sweden.[345] Moreover, courts should not review procedural irregularities based on how courts would have handled the procedure; rather, courts should grant arbitrators the flexibility to conduct the proceedings at their own discretion. Hence, courts should respect the arbitrator's discretion provided that no instructions from the parties, procedural rules of the arbitration statute or due process is infringed.[346]

In Sweden, minor procedural irregularities or errors are not considered in setting aside an arbitral award. In *Paul J v Reprotype Aktiebolag*, the Supreme Court of Sweden focused on whether procedural rules has been disregarded to a significant extent. The Court held that procedural irregularities must have involved a degree of seriousness in order for the award to be set aside.[347]

The Swedish Arbitration Act provides for grounds on setting aside an arbitral award. These are: the dispute is not covered by a valid arbitration agreement, where the arbitrator has made an award after the expiration of the period decided on by the parties, where the arbitral proceedings took place in Sweden, as otherwise agreed by the parties, or where the arbitrator has been appointed contrary to the agreement of the parties, and lastly, an irregularity that occurred in the course of the proceedings which probably influenced the outcome of the case.[348]

Regarding the irregularity, it must have been committed by the arbitrator. The party challenging the award must not have negligently caused the irregularity. Moreover, it must be likely that the irregularity has affected the outcome. This implies that where the irregularity occurred but did not affect the outcome of the case, the arbitral will not be set aside.[349] If a procedural irregularity is the product of wrongful application of substantive law, the award may not be challenged. For example, erroneous evaluation of evidence is a substantive misjudgement, while incorrectly refusing to accept evidence is considered a procedural irregularity.[350] The Swedish Court of Appeal, upon request by a party, can stay

[345] Gisela K, 'Recourse to the Courts against an Arbitral Award'239.

[346] Gisela K, 'Recourse to the Courts against an Arbitral Award'239.

[347] (1975), The Supreme Court of Sweden

[348] Section 34, *Arbitration Act* (Sweden).

[349] Gisela K, 'Recourse to the Courts against an Arbitral Award'254.

[350] Gisela K, 'Recourse to the Courts against an Arbitral Award'255.

proceedings of setting aside arbitral awards to give arbitrators the opportunity to eliminate the grounds for setting aside.[351]

The Supreme Court of Kenya and lower courts can learn from how the Swedish courts distinguish between serious and minor irregularities. In the former, an award may be set aside by courts while in the latter, an arbitral award will not be set aside. Moreover, the irregularity must have affected the outcome of the case. This implies that irregularities that do not affect the outcome of the case, although serious, may not be set aside. This lesson is important for Kenyan courts when dealing with applications on setting aside arbitral awards. The courts should not be quick to set aside arbitral awards just because there are irregularities. They should distinguish between serious and minor irregularities. This is important for sustaining the principle of finality of awards since Section 35 of the Act does not distinguish between serious or minor irregularities. As stated in the previous chapter, the said section treats all grounds equally and with the same consequence – setting aside an arbitral award.

4.5.3. Switzerland

Switzerland stands out as a pro-arbitration jurisdiction; international businessmen choose at least one Swiss City or Switzerland itself as the arbitration seat. Geneva is the third most preferred and widely used seat in the world.[352] Judicial approach to arbitration determines the level of neutrality of the courts towards arbitration and the subsequent arbitral awards.[353]

International arbitration is governed by Chapter 12 of the Private International Law Act (PILA hereafter).[354] PILA is not based on the Model Law, however, there are no fundamental differences between the two laws. While the Model Law contains a comprehensive set of provisions, PILA only contains a few fundamental rules and instead leaves the setup of

[351] Section 35, *Arbitration Act* (Sweden).

[352] Queen Mary University of London, *International Arbitration Survey: The Evolution of International Arbitration*,2018,9. Zurich follows cue as the second preferred Swiss city.

[353] Queen Mary University of London, *International Arbitration Survey: The Evolution of International Arbitration*,2018,11.

[354] Chapter 12, Private International Law Act (Switzerland).

proceedings in the hands of the parties. This guarantees party autonomy, a core principle of international arbitration.[355]

An arbitral award is final under Swiss Law, however, it can be set aside by the Federal Supreme Court.[356] The grounds for setting an arbitral award are: (i) where the sole arbitrator has been improperly appointed or where the arbitral tribunal has been improperly constituted, (ii) where the arbitral tribunal has wrongly accepted or denied jurisdiction, (iii) where the arbitral tribunal has ruled beyond the claims submitted or failed to decide on one of the claims, (iv) where the principle of equal treatment of the parties or their right to be heard has not been observed, and lastly, (v) where the award is incompatible with public policy.[357]

The parties may exclude the grounds for setting aside or choose the grounds that they wish to apply the arbitral award.[358] The possibility of excluding one or more grounds for setting aside only applies if two conditions are fulfilled; (i) the parties have no connection with Switzerland in that none of the have their domicile, habitual residence, or business establishment in Switzerland. (ii) They have entered into an exclusion agreement to that effect.[359] The exclusion of grounds for setting aside is therefore particularly important for foreign parties when considering Switzerland as an arbitration seat. It enables them to tailor the rules of the game to avoid unnecessary court interference which would defeat the finality of the awards and quick resolution of disputes.[360]

The waiving of the setting aside proceedings under Swiss law was confirmed by the European Court of Human Rights to be compatible with the right to access to justice. In *Tabanne* v *Switzerland*, the European Court of Human Rights noted that the right to access justice is not absolute and that in any case a distinction should be made between "voluntary arbitration" and "compulsory arbitration imposed by law".[361] In the former, to which Article 192 of PILA applies, parties are free to waive their right to have their dispute heard by

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[355] Baizeau D, 'Commentary on Chapter 12: Waiver of Annulment' in Arreyo M (eds), *Arbitration in Switzerland*: *A Practitioner's Guide*, 2nd ed, Kluwer International Law, Alphen aan den Rijin,2018,372.

[356] Article 191, *Chapter 12*, PILA (Switzerland).

[357] Article 190, *Chapter 12*, PILA (Switzerland).

[358] Article 192, *Chapter 12*, PILA(Switzerland).

[359] Article 192, *Chapter 12*, PILA (Switzerland).

[360] Baizeau D, 'Commentary on Chapter 12: Waiver of Annulment' 372-373.

[361] *Tabanne v Switzerland*, ECtHR of 31 March 2016,para 22.

ordinary courts in favour of arbitration, in which case, they voluntarily waive their right to rely on certain guarantees provided under the European Convention on Human Rights. Such a waiver is not incompatible with the Convention since it is freely decided, lawful and unequivocal. Moreover, the parties are not obliged to waive their right to challenge an award, but are merely given the choice to do so if they fulfil the requisite criteria.[362]

Furthermore, the Court observed that Article 192 of PILA reflects a legitimate political choice by Switzerland to increase the attraction efficiency of international arbitration by avoiding double control of arbitral awards. Additionally, leaving a choice to parties without any link to Switzerland to opt out of the recourse to ordinary courts otherwise available by default. As such, there is no infringement of the right to access to justice.[363]

The Supreme Court of Kenya can draw inspiration from Swiss Courts, especially their guarantee and respect for party autonomy. As earlier stated, the Swiss courts as well as the ECtHR have categorically stated that when parties voluntarily choose arbitration, they accept it with its strictures and waive some of the guarantees of access to justice as provided in national laws and international conventions. Drawing analogy from these views, Section 35 of the Act should not be expanded to allow appeals on decisions of setting aside arbitral awards. This is because the parties, in choosing arbitration, are aware that they will not be treated like litigants who have avenues for appeals. Moreover, expanded appellate intervention in setting aside arbitral awards affects the finality of the outcome thus making arbitration a pre-cursor to litigation.

4.6. Conclusion

This chapter has considered better interpretations that should be adopted by the Kenyan courts in interpreting Section 35 of the Act. In doing so, the finality of arbitral awards will be achieved while safeguarding the procedural fairness in the arbitral process. Moreover, examples of best practice jurisdictions have been given to enable Kenyan courts draw lessons. This will improve the arbitration climate and growth of Nairobi as an arbitration seat.

[362] *Tabanne v Switzerland*, ECtHR, para 23.

[363] *Tabanne v Switzerland*, ECtHR, para 24.

CHAPTER FIVE

Findings, Recommendations, and Conclusion

5.1. Introduction

This chapter presents the findings of the study and proposes recommendations on how best the interpretations of Section 35 of the Act suggested in the previous chapter can be achieved. Finally, this chapter will reflect on the objectives, the statement of the problem, the hypothesis, and discern how each has been addressed.

5.2. Findings

Section 35 of the Act does not have an express provision on whether decisions of the High Court on setting aside are appealable. Similarly, it does not have an express provision stating that decisions of the High Court on setting aside an arbitral award are final, and not subject to appeal. The Court of Appeal decision in *Nyutu Agrovet v Airtel Networks Limited* had been heralded as the guardian of arbitration principles. In the said decision, the Court of Appeal held that there was no appeal on decisions of the High Court on setting aside an arbitral award under Section 35 of the Act. The Supreme Court overturned this decision by interpreting Section 35 to allow appeals on decisions of the High Court on setting aside arbitral awards.

Despite having a few strengths, the Supreme Court decision is challengeable on grounds that it abrogated from the core internationally recognised principles of arbitration such as finality of the award, party autonomy, and limited court intervention. Moreover, the reliance of the Supreme Court on the provisions of the English Arbitration Act which permit leave to appeal on High Court decisions of setting aside, is arguably unfounded in law. The Supreme Court interpreted Section 35 of the Act based on the provisions of the English Arbitration Act. This approach is contestable because the English Arbitration Act is different in content and history from the Kenyan Arbitration Act. Moreover, the former is not modelled on the Model Law like the latter.

The Supreme Court stated that the Court of Appeal can exercise residual jurisdiction to allow appeals on setting aside arbitral awards when the High Court in setting aside arbitral awards, has made a decision so manifestly wrong. The invocation of the doctrine of residual jurisdiction is legally debatable because the doctrine cannot be invoked where there is an express provision of statute, which is, the right of appeal must be granted by statute and not

implied.[364] Notwithstanding the absence of an express provision on whether the decisions of the High Court on setting aside are appealable, the Supreme Court should not have invoked the doctrine of residual jurisdiction.

On a positive note, the Supreme Court decision brought to light some loopholes in the Act. These ambiguities have been identified and the study has recommended the amendment of the Act to bring it in tandem with the Constitution. The study has suggested better approaches of interpreting Section 35 of the Act by drawing lessons from best practice jurisdictions, internationally recognised principles, and the constitutional mandate of promoting ADR including arbitration.

The study has also found that there is a limited understanding of arbitration principles among some judges, legal practitioners, and arbitrators. They view arbitration as a rival to litigation. Moreover, they apply litigation tactics to defeat the arbitral process and arbitral awards.

In the analyses of the best jurisdictions, the study has found that the level of court intervention in the arbitral process and arbitral awards is a key determinant in the popularity of an arbitration seat. Countries with courts that have a supportive attitude towards arbitration are the most preferred seats.

Furthermore, the study found that in some best practices like Sweden, minor irregularities are not grounds for setting aside an arbitral award. An irregularity, however serious but does not affect the outcome of the case, is no ground for setting aside an arbitral award.

Lastly, the study also found out that a limitation on the right to access of courts through barring appeals to higher courts, does not infringe on the right of access to justice.

5.3. Recommendations

The study proposes the following:

First, the Respondent (Airtel Networks) or the Interested Party (the CIARB) may apply to the Supreme Court to review its decision. The Supreme Court Rules provide that the Supreme Court may review any of its decisions which the court considers meritorious, exceptional, and in the public interest. The Supreme Court do so on its own motion or upon

[364] Section 3, *Appellate Jurisdiction Act* (Act No 12 of 2012).

application by a party.[365] The decision in *Nyutu Agrovet v Airtel Networks* (2019)eKLR is reviewable because it abrogates from the practice of arbitration and the internationally recognised arbitration principles as illustrated by this study. Given the grave impact of the decision on arbitration, it is meritorious, exceptional, and in the public interest to review this decision.

Second, there should be regular training of judges and their administrative staff in arbitration law and process. This will equip them with the knowledge and understanding of the arbitral process and the respect of arbitration principles like party autonomy, limited court intervention, and finality of the arbitral awards. Also, there should be sessions where Kenyan judges benchmark and interact with judges from best practice jurisdictions. This will equip them with practical experiences from other judges on how to promote arbitration and safeguard its principles.[366]

Third, arbitration institutions and organizations should set out specifically and stringently a fit for purpose criteria and credentials to guide the appointment of a suitable arbitrator for a particular dispute. In addition, there should be regular training and re-training of arbitrators to enable them to appreciate due process requirements and understanding internationally recognised arbitration principles. This will enable them to resolve disputes between parties in while taking into account the rules of the natural justice as well as using their powers in accordance with the Act. Consequently, there will be reduced applications of setting aside arbitral awards to the High Court.

Fourth, there should be specialised training of arbitrators, for example, training arbitrators in investment and energy disputes, training of arbitrators in family disputes. This will ensure that arbitrators who are appointed, are experts in the specific fields thus promoting party satisfaction with the resultant award.[367]

Lastly, Section 35 of the Act can be amended to clarify whether there are appeals on decisions of the High Court on setting aside an arbitral award. This will still be in line with the constitutional mandate of Parliament to enact or amend legislation. Moreover, there should be amendments to the Act to bring it in conformity with the Constitution. This will

[365] Rule 28(5), *Supreme Court Rules* (No 6 of 2020). According to Rule 2, the party includes a petitioner, respondent, or an interested party.

[366] Torgbor E, Overview of the Disposition of Courts Towards Arbitration in Africa,42.

[367] Torgbor E, Overview of the Disposition of Courts Towards Arbitration in Africa,62.

minimise instances of attacking arbitral awards and the arbitral process on grounds that they do not conform to the Constitution.[368]

5.4 Conclusion

The study sought to achieve the following objectives. First, to assess whether Section 35 of the Act allows appeals on decisions of the High Court on setting aside an arbitral award. This objective was achieved in chapter two where it is argued that Section 35 is modelled on the wider internationally recognized Model Law. The Model Law limits court intervention in arbitration matters unless where expressly authorized. This is reflected in Section 10 of the Act which replicates the position of the Model Law on court intervention. Section 10 read together with Section 35 of the Act do not allow appeals on decisions of the High Court on setting aside arbitral awards.

Second, to critique the Supreme Court decision in *Nyutu Agrovet v Airtel Networks (2019) eKLR*. This objective was met in chapter two which analysed both the strengths and weaknesses of the decision. Some of the weaknesses include contradictions in the majority judgments, reliance on foreign laws and cases to interpret Section 35 of the Act, failure to give instances that warrant appeals, abrogation from the internationally recognised arbitration principles, and lastly, the invocation of the doctrine of residual jurisdiction. This objective was also dealt with in chapter three which carried out a comparative study between the provisions of the English Arbitration Act on setting aside an arbitral award and Section 35 of the Act. This was aimed at critiquing the Supreme Court reliance on the provisions of the English Arbitration Act. Yet, the two legislations are different in content and inspired differently.

The third objective of the study was to make suggestions on the proper interpretations of Section 35 of the Act. This was done in chapter four and other recommendations have been discussed in this chapter.

The study through identifying the weaknesses in the Supreme Court decision and proposing better interpretation approaches, advances that there are no appeals on decisions of the High Court on setting aside arbitral awards. The Supreme Court erred by holding that there are appeals on decisions of the High Court on setting aside an arbitral award. Having analysed

[368] Torgbor E, 'A Comparative Study of Law and Practice of Arbitration in Kenya, Nigeria and Zimbabwe with Particular Reference to Current Problems in Kenya'106.

the provisions of the Act in totality and proposing better interpretations of Section 35 of the Act, the study has answered the hypothesis that Section 35 of the Act does not have an express provision for the right of appeal against decisions of the High Court on setting aside an arbitral award.

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