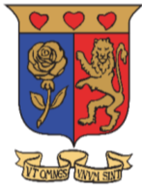

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Arbitration Of Oil and Gas Disputes in The Upstream Petroleum Sector in Kenya: A Critical Appraisal

By

Connie Nkirote Ngachu

131367

Submitted To Strathmore Law School in partial fulfilment of the requirements for the award of Master's in Law, Oil and Gas
Strathmore University, Kenya.

Strathmore Law School

Strathmore University

Nairobi, Kenya

May 2022

DECLARATION AND APPROVAL

I hereby declare that this thesis is my original work and has not been previously submitted and approved for the award of a degree by this or any other University. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

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Connie Nkirote Ngachu

5th May 2022

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DEDICATION

I dedicate this research work to the Almighty God, family and loved ones. Without their patience, understanding, support and inspiration, the completion of this work wouldn't have been possible.

ACKNOWLEDGEMENT

I would like to give special gratitude to the Lord Almighty for giving me the courage and fortitude to undertake this research work.

Exceptional appreciation goes to my supervisor Dr. Francis Kariuki for his constructive guidance and recommendations that shaped this research project to be what it is. I sincerely thank you for being my guide. On a very special note, I wish to thank the Dean of LLM Studies Dr. Peter Kwenjera, all our lecturers and the Strathmore University community for being instrumental in my learning process.

I also wish to thank my family, friends, for their material and moral support, encouragement and understanding during the times I was absent as I worked on this research project. Special appreciation to the love of my life Gitau and wonderful daughter Kanana for being the wind beneath my wings.

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Abbreviations/Acronyms

BIT – Bilateral Investment Treaty

ECT – Energy Charter Treaty

ICSID – International Centre for Settlement of Investment Disputes

ICC – International Chamber of Commerce

UNDROIT - International Institute for the Unification of Private Law

IOC – International Operating Company

ISDS - Investor State Dispute Settlement

NAFTA – North American Free Trade Agreement

NCIA – Nairobi Center for International Arbitration

PA – Petroleum Agreement

PSA – Production Sharing Agreement

PSC – Production Sharing Contract

UNCITRAL – United Nations Commission on International Trade Law

ABSTRACT

Arbitration is a private mechanism for dispute resolution that is selected and controlled by parties and the final determination made by an arbitral tribunal is final and binding. Upstream petroleum operations are regulated by petroleum contracts that contain dispute resolution clauses which outline the arbitral system that guides the arbitral process.

This study was a critical appraisal on arbitration as a way of settling oil and gas disputes in the upstream petroleum sector in Kenya. The study was guided by two main objectives namely: to examine the suitability of the arbitration provisions provided in the Model Petroleum Agreement in the settlement of upstream petroleum disputes in Kenya and to interrogate the effectiveness of arbitration provisions in international instruments in resolving upstream petroleum disputes in Kenya.

The data reviewed was journal articles, Kenyan laws the provisions of the UNCITRAL Arbitration Rules, the ICSID Arbitration Rules, New York Convention and notable international case law on arbitration. The study was aimed at providing important pointers that will help stakeholders better understand the suitability of the arbitration provisions contained in the model petroleum agreement anchored in the Kenyan Petroleum Act.

This study has found that international law is suitable for the settlement of upstream petroleum disputes because they anchor the cardinal principle of party autonomy and thus promote mutual acceptance and cooperation between parties.

The study has also found that arbitration may not be tenable in resolving differences and disputes that include third parties to a petroleum agreement. The study recommends that a policy should be developed by the Kenyan Government to guide negotiations between the state and an investor in petroleum agreements.

Table of Contents

DECLARATION AND APPROVAL i

DEDICATION ii

ACKNOWLEDGEMENT iii

List of Statutes iv

List of International Instruments iv

List of Cases iv

ABSTRACT vii

CHAPTER ONE 1

INTRODUCTION TO THE STUDY 1

1.1 Background 1

1.2 Statement of the Problem 8

1.3 Purpose of the study 8

1.4 Objectives of the Study 9

1.5 Research Questions 9

1.6 Justification of the Study 9

1.7 Scope and limitations of the Study 10

1.8 The Methodology 10

1.9 Theoretical framework 10

(a) Delocalisation theory of arbitration 11

(b) Autonomous theory of arbitration 15

1.10 Literature Review 16

(a) Applicable law and international arbitration 17

(b) Party Autonomy 21

(c) Negotiations of petroleum contracts 24

1.11 Chapter Summary 25

CHAPTER TWO 28

LEGAL FRAMEWORK OF THE ARBITRATION SYSTEM PROVIDED FOR SETTLING STATE AND INVESTOR DISPUTES IN UPSTREAM PETROLEUM OPERATIONS IN KENYA. 28

2.2 Constitution of Kenya, 2010 28

2.3 Petroleum Act, No.2 of 2019 32
2.4 Model Petroleum Agreement, Schedule 1 of the Petroleum Act, No.2 of 2019 32
2.4.1 Party Autonomy/Agreement to Arbitrate 33
2.4.2 Scope of Arbitration 33
2.4.3 Institution chosen 34
2.4.4 Seat of Arbitration 35
2.4.5 Number, method of selection and qualifications of arbitrators 36
2.4.6 Conduct of proceedings to be followed 36
2.4.7 Applicable law 37
2.5.1 Rules of procedure 40
2.5.2 Effect of arbitral awards 40
2.5.3 Recognition and enforcement of arbitral awards 40
2.5.5 Finality of Awards 41
2.6 Conclusion 41
CHAPTER THREE 43
THE ROLE OF INTERNATIONAL LAW IN SETTLING STATE AND INVESTOR DISPUTES IN UPSTREAM PETROLEUM OPERATIONS THROUGH ARBITRATION. 43
3.1 Introduction 43
3.2 UNCITRAL Arbitration Rules 45
3.2.1 Party autonomy/Consent of parties 46
3.2.3 Applicable law 47
3.3 ICSID Arbitration Rules 48
3.3.1 Part autonomy/Consent to arbitration 51
3.3.2 Applicable law 55
3.3.3 ICSID Proceedings 56
3.3.4 Annulment under ICSID Convention 58
3.4 Non ICSID investment arbitration 59
3.5 ICSID Additional Facility 59
3.6 The Convention on the Recognition of Arbitral Awards (New York Convention) 60
3.7 Conclusion 62
CHAPTER FOUR 64
FINDINGS ON THE SETTLEMENT OF THIRD-PARTY PETROLEUM DISPUTES IN KENYA 64
4.1 Introduction 64

4.2 Domestic settlement of upstream petroleum disputes in Kenya 64
4.3 International settlement of upstream petroleum disputes 66
4.3.1 ICSID Arbitration cases 70
4.4 Conclusion 72
CHAPTER FIVE 73
RECOMMENDATIONS AND CONCLUSIONS. 73
5.1. Introduction 73
5.3 Recommendations 77
5.4 Conclusions 78
BIBLIOGRAPHY 79
Books 79
Journal Articles 79
Internet Resources 81
APPENDICES 83
Appendix A: Plagiarism Report 83
Appendix B: Ethical Clearance Report 84

CHAPTER ONE

INTRODUCTION TO THE STUDY

1.1 Background

In Kenya, the legislation guiding upstream petroleum operations is the Petroleum Act[1] which is fairly recent. The upstream petroleum industry has been in existence since the 1800's and the guiding principles and consequent legislation on the same has developed progressively around the world. Upstream activities are composed of exploration, appraisal, determination of commerciality or relinquishment and development/production stages[2].

In Kenya, a Model Petroleum Agreement is contained in the Petroleum Act[3] to set out the terms of engagement between the state and investors in upstream petroleum operations in Kenya. The Model Petroleum agreement prescribed in the Petroleum Act[4] contains an arbitration clause which defines the procedure of arbitration as a way of settling upstream petroleum disputes. The arbitration clause found in the Petroleum Agreement defines the structure of arbitration to be used by parties in case of a dispute[5]. Arbitration is provided as a means of settling disputes when parties are unable to resolve their disputes amicably or in lieu of expert determination. According to the Model Petroleum Agreement, either party may call for arbitration when a dispute cannot be resolved by amicable settlement or expert determination[6].

The Kenyan Model Petroleum Agreement is a creature of the law and thus may be referred to a model contract with prescribed terms. Prescribed terms are terms and conditions, guarantees and warranties which an Act or any other law expressly provides that may not in respect of the contract be excluded, restricted, or modified, or may be excluded, restricted or modified only to a limited

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[1] Petroleum Act, No.2 of 2019.
[2] https://www.extractiveshub.org/topic/view/id/30/chapterId/324.
[3] Petroleum Act, No.2 of 2019.
[4] Petroleum Act, No.2 of 2019.
[5] Clause 53(3), Model Petroleum Agreement, Schedule 1, Petroleum Act, 2019.
[6] Clause 53(3), Model Petroleum Agreement, Schedule 1, Petroleum Act, 2019.

extent[7]. Considering the foregoing, the arbitral process as a way of settling disputes in the upstream petroleum sector is guided by prescribed terms rather than mutual consent of parties submitting to arbitration by way of an arbitration agreement and thus may fall under the ambit of statutory arbitration. Statutory arbitration is basically arbitration without an arbitration agreement exclusively prepared and agreed on by parties but rather outlined by statute through legislative norms[8].

The Petroleum Act[9] has prescribed arbitration as a means of settling disputes in upstream petroleum operations. The Model Petroleum Agreement is anchored in the Petroleum Act[10] and thus has been given legal status as the authorized contract for execution by the Cabinet Secretary on behalf of the Government of Kenya for upstream petroleum operations.

The Petroleum Act provides that it is mandatory for the Cabinet Secretary to negotiate, award and execute a petroleum agreement in the prescribed form as outlined in the schedule of the Act[11]. The use of model contracts anchored in law reduces the need for lengthy negotiations and increases the State's leverage by fixing provisions that would otherwise be up for negotiation[12]. The arbitration clause provided in the model petroleum agreement is provided in legislation unlike conventional arbitration where an arbitration agreement is mutually agreed upon, prepared, and executed by disputing parties.

The Petroleum Act stipulates that any upstream petroleum operations shall be conducted in accordance with the provisions of the Act and the terms and conditions of the prescribed petroleum agreement[13]. Furthermore, the Petroleum Act defines a petroleum agreement as any agreement, license, contract or other agreement between the Government and a contractor to conduct upstream operations in accordance with the provisions of the Act[14].

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[7] https://www.lawinsider.com/dictionary/prescribed-terms
[8] Johansson T, 'Statutory Arbitration in the Context of Arbitrability – New Possibilities for an Old Concept' University of Helsinki, Faculty of Law, M.L Thesis, (2019).
[9] Petroleum Act, No.2 of 2019, Laws of Kenya.
[10] Petroleum Act, No. 2 of 2019, Laws of Kenya.
[11] Section 18, Petroleum Act, 2019, Laws of Kenya.
[12] Natural Resource Governance Institute, Legal Framework, Navigating the Web of Laws and Contracts Governing Extractive Industries, NRGI Reader March 2015, page 3.
[13] Section 2 of the Petroleum Act, No.2 of 2019, Laws of Kenya.
[14] Section 2 of the Petroleum Act, No.2 of 2019, Laws of Kenya.

The Model Petroleum Agreement is prescribed by law because the Petroleum Act and stipulates that the Cabinet Secretary shall negotiate, award, and execute a petroleum agreement on behalf of the national government in the form prescribed in the schedule of the Act[15]. The legal meaning of the word prescribed in this context means to specify with authority expressly by statute or regulation. The question that begs an answer is how then does one negotiate a contract whose guiding provisions are prescribed in law? Secondly, does it mean that the agreement of parties because of negotiations contrary to the provisions stated in the prescribed contract will override the prescribed provisions? Thirdly, does legislating contractual provisions impede or facilitate negotiations?

As witnessed in the model petroleum agreement contained in the Petroleum Act[16], it may be inferred that the preferred system of arbitration is institutional arbitration as opposed to ad hoc arbitration because of the request of commencement of arbitration proceedings sent to UNCITRAL by either disputing party. Ad hoc arbitrations are guided by the Arbitration Act[17] only when the Arbitration Agreement is silent on the arbitration system selected by parties and if the arbitration agreement provides expressly or by implication for arbitration to take place in Kenya. The arbitration clause in the model petroleum agreement as drafted is ambiguous because one cannot determine whether the arbitration system is preferably institutional or ad hoc arbitration.

The Arbitration Act[18] stipulates the rules and procedures of domestic and international arbitration, be it institutional or ad hoc arbitration and the same ought to be interrogated against what is provided under the Petroleum Act[19] regarding arbitration. It is noteworthy that the Petroleum Act[20] stipulates that in upstream, midstream, and downstream petroleum operations, the Petroleum Act shall prevail. The Arbitration Act will only be invoked in arbitration proceedings in petroleum operations if the provisions do not conflict with the Petroleum Act.

[15] Section 2 of the Petroleum Act, No.2 of 2019, Laws of Kenya.
[16] Petroleum Act, No. 2 0f 2019, Laws of Kenya.
[17] Arbitration Act, No. 4 of 1995, Laws of Kenya.
[18] Arbitration Act, No. 4 of 1995, Laws of Kenya.
[19] Petroleum Act, No. 2 0f 2019, Laws of Kenya.
[20] Section 4 of the Petroleum Act, No. 2 0f 2019, Laws of Kenya

State and investor disputes are inevitable in upstream petroleum operations and international arbitration is the most preferred method of resolving disputes in the industry[21]. Upstream petroleum investments are lucrative in nature to both the state and investors who need to resolve these disputes within a short period and fast track the implementation of the upstream petroleum projects. Regarding upstream petroleum operations, transnational rights of parties are in focus because even though the exploration of oil is in the host state, most times it is an International Operating Company that conducts the operations which includes exploration, production and development of the oil. In production sharing contracts, the contractor takes up the financial risks of exploration production and development.

The Kenyan Model Petroleum Agreement envisages that the Contractor is a Company incorporated in Kenya. In the petroleum industry, IOC's have extensive expertise and capital to undertake upstream petroleum operations. An IOC interested in conducting upstream petroleum operations will therefore need to incorporate a Company in Kenya. Most states require that investments are made through locally incorporated companies to prevent the local companies from being qualified as foreign investors and thus inhibit their protection from international investment law[22].

This position has however been abandoned by various international tribunals such as the ICSID Tribunal which has held that a juridical person incorporated in a host state but controlled by nationals of another state may be treated as a foreign national based on their agreement. It is also astounding that the Kenyan Model Petroleum Agreement submits to the jurisdiction of international bodies such as UNCITRAL and ICSID on arbitration matters[23].

The model petroleum agreement provides that an arbitration procedure shall commence by a written request of either party to the UNCITRAL[24]. It further states that the UNCITRAL shall be notified once a party appoints an arbitrator[25]. Furthermore, it provides that either party to an

[21]https://globalarbitrationreview.com/guide/the-guide-energy-arbitrations/3rd-edition/article/upstream-oil-and-gas-disputes.

[22] Dozler R, Schreuer C,' Principles of International Investment Law,2 ed, Oxford University Press, 2012, 50.

[23] *Champion Trading Vs Egypt,* Decision on Jurisdiction, 21 October 2003 and *Aguas del Tunari Vs Bolivia*, Decision on Jurisdiction, 21 October 2005.

[24] Clause 53(3) of the Model Petroleum Agreement, Schedule 1, Petroleum Act, 2019.

[25] Clause 53(4) of the Model Petroleum Agreement, Schedule 1, Petroleum Act, 2019.

arbitration agreement may write to the ICSID for the appointment of a third arbitrator when the two appointed arbitrators fail to select a third arbitrator. It should also be noted that Kenya is a signatory to the ICSID Convention and thus is bound by the same. This brings about some level of confusion as to whether the arbitration system as envisaged in the model petroleum agreement is domestic or international and whether it is institutional or ad hoc arbitration and yet the quality and effectiveness of any law is dependent on astute drafting.

This thesis will be examining the suitability of the arbitration clause as drafted and whether parties can vary the terms of the arbitration clause by way of negotiations. It is an arguable fact that contractual obligations cannot be legislated and purported to allow negotiations because the essence of legislation is to give authority for purposes of enforcement. A contract is a mutual agreement between parties that creates obligations which are enforceable. They are basically promises that the law will recognize and enforce. This is a common law principle adopted in Kenya. The model petroleum agreement is prescribed in legislation, and it would be interesting to examine if the same provisions can truly be negotiated by parties if the purpose of legislation is to create a state of affairs that can only be changed or brought to an end by legislation[26].

It is important to examine whether the arbitration provisions of the model petroleum agreement in legislation interfere with the agreement of parties to arbitrate. The selection, intentional or inadvertent, of a particular arbitration system demonstrates the parties' intention which relates to the cardinal principle of party autonomy.

In most upstream petroleum operations between a state and investor, the state insists on the use of national laws because petroleum is extracted from their territory, however investors often argue that national laws are not properly developed to address issues in the petroleum industry. This is because the petroleum industry has adopted the concept of *lex petrolea* which encompasses rules of customs, treaties, regional laws, principles of intergovernmental organisations, non-governmental organisations, codes of conduct and guidelines of industry associations which

[26] https://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/legislation-handbook/context/why-its-needed.aspx on 25th April 2022.

together regulate the various facets of oil exploration, production, transport, consumption, and trade[27].

Lex petrolea is established from decisions arising from disputes within the international oil and gas sector where contracts, legislation and treaties that impact the petroleum sector are tested. The concept of *lex petrolea* has anchorage in the principles of International Investment law in the settlement of petroleum industry disputes[28]. The Kenyan model petroleum agreement seems to adopt a nationalistic approach in the recognition of parties and the settlement of disputes through arbitration which could be prohibitive and problematic in the real sense

In the context of arbitration, it is equally important to note the various types of arbitration. There is ad hoc arbitration which is arbitration that is not governed by any institution selected by parties whereby institutional arbitration is arbitration that is governed by an institution selected by parties.[29]The arbitration clause in the model petroleum agreement seems to favour institutional arbitration because the UNCITRAL and the ICSID are invited to assist in the selection of arbitral tribunal. The dispute resolution clause also provides that if parties decide to resolve their dispute through arbitration, they should do so in accordance with the UNCITRAL arbitration rules adopted by the United Nations Commission on International Trade Law.

Arbitration can further be classified as domestic arbitration or international arbitration. An arbitration is domestic when the arbitration agreement provides by implication or expressly for arbitration in Kenya, parties to an arbitration are Kenyan nationals or are habitually resident in Kenya, parties to an arbitration are body corporates incorporated in Kenya or have their central management is in Kenya[30].

An arbitration is international if the parties are nationals of different states, the juridical seat selected by parties is outside the state in which parties have their places of business, where the substantial part of the obligations of the commercial relationship are to be performed in another

[27] Wawryk A, 'Petroleum Regulation in an International Context: The Universality of Petroleum Regulation and the Concept of *Lex Petrolea*'2015.
[28] Wawryk A, 'Petroleum Regulation in an International Context: The Universality of Petroleum Regulation and the Concept of *Lex Petrolea*'2015.
[29] Lew J, Mistelis L, Kröll S, Comparative International Commercial Arbitration, Wolters Kluwer Law and Business, 2003.
[30] Section 3(2), Arbitration Act, No.4 of 1995.

state or where parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one state[31].

The model petroleum agreement provides that the applicable law of the arbitration clause is Kenyan law. To this extent the arbitration would be confined to the application of domestic law. The quagmire that exists is that sometimes investors are foreign companies that have incorporated national companies for the purposes of bidding for upstream petroleum agreements and are in a joint venture with international corporations. In the context of upstream petroleum operations, the contractor is usually a joint venture which includes an operator who is issued with a license for petroleum business[32] and non-operators who have participatory interests regulated by a joint operating agreement. The non-operators include parties that spread the risk of the upstream petroleum operations that offer technical and financial support.

The reality is that these international corporations have their places of business is in other states and the national companies are subsidiary companies with limited financial control and thus to this extent the arbitration may be international.

According to Deshpande international arbitration is described as follows[33]:

> "International arbitration is distinct from national arbitration basically because national arbitration is subject to a law while international arbitration is not excepted in so far as the parties by their agreement make the law of a particular nation applicable to the contract or to any part of the contract. Even when the parties agree or the rules of conflict of laws decide which national law is to apply to such a contract in preference to some other national law, further refinements have been made to this concept of the national law or the proper law applicable to the contract by virtue of the agreement of parties or by the application of the rules of conflict of laws. Consideration of these refinements will form the subject-matter of this article."

[31] Section 3(3), Arbitration Act, No. 4 of 1995, Laws of Kenya.
[32] Section 74 of the Petroleum Act, No. 2 of 2019
[33] Deshpande, V.S. "The Applicable Law in International Commercial Arbitration." *Journal of the Indian Law Institute* 31, no. 2 (1989)127.

Most contractors of upstream petroleum operations consist of joint ventures with foreign companies and thus would prefer international arbitration in the settlement of their disputes because of its wider scope of applying international laws that protect transnational rights of parties.

1.2 Statement of the Problem

This study is aimed at examining the suitability of arbitration provisions provided in the model petroleum agreement set out in the Petroleum Act[34] in settling state and investor upstream petroleum disputes in Kenya. The model petroleum agreement prescribes legislative norms that prescribe an arbitration system that may interfere with party autonomy and eventually the suitability of arbitration.

The model petroleum agreement provides that the arbitration procedure shall commence by a written request of either party to UNCITRAL and with a notification to the other party and the proceedings shall commence within sixty days after receipt of request by UNCITRAL[35]. The arbitration clause also provides that the International Centre for Settlement of Investment (ICSD) can appoint an arbitrator when parties do not agree[36].The clause as drafted seems to submit parties to international bodies that will consider international law practice at all stages of arbitration proceedings even where there is a conflict between domestic and international law. This presents a conflict in the application of domestic law or international law because one cannot categorically derive the intention of the legislators.

1.3 Purpose of the study

The purpose of the study is to examine the suitability of the arbitration provisions in the model petroleum agreement that guide the settlement of disputes in upstream petroleum operations in Kenya. This will involve the analysis of arbitration provisions in the model petroleum agreement to establish whether they are practical and best suited in the context of upstream petroleum

[34] Petroleum Act, No. 2 of 2019, Laws of Kenya.
[35] Clause 53(4) of the Model Petroleum Agreement, Schedule 1, Petroleum Act, 2019.
[36] Clause 53(4)(e) of the Model Petroleum Agreement, Schedule 1, Petroleum Act, 2019.

operations. The study will focus on arbitration provisions contained in the model petroleum agreement in comparison with international arbitration provisions.

This analysis will point out the problematic areas and potential gaps in the Kenyan legal framework and possible solutions.

1.4 Objectives of the Study

1. To examine the suitability of the arbitration provisions provided in the Model Petroleum Agreement in the settlement of upstream petroleum disputes in Kenya.
2. To interrogate whether arbitration provisions contained in international instruments are apt in the settlement of upstream petroleum disputes in Kenya.
3. To recommend policy and legislative interventions that would enhance the settlement of disputes in the upstream petroleum industry in Kenya.

1.5 Research Questions

1. How congruent are the arbitration provisions provided in the model petroleum agreement in the settlement of upstream petroleum disputes in Kenya?
2. How do the arbitration provisions contained in international instruments facilitate the settlement of upstream petroleum disputes?
3. What proposals can be recommended to enhance the settlement of upstream petroleum disputes in Kenya?

1.6 Justification of the Study

The research will establish whether the arbitration provisions of the model petroleum agreement are functional as drafted. It will in a nutshell establish whether the arbitration provisions provided are suitable in the settlement of disputes in the upstream petroleum industry in Kenya. The research will also identify gaps in the arbitration provisions that impede the settlement of disputes in upstream petroleum operations. As it would be expected, the study will be useful to the policy makers in the upstream petroleum industry in providing insights to policy and legislation formulation.

1.7 Scope and limitations of the Study

The study will review the current Kenyan laws that guide the settlement of upstream petroleum disputes through arbitration between the state and an investor. These laws include the Petroleum Act[37] and the Arbitration Act[38]. This will entail the analysis of substantive and procedural provisions established by legislation and how the same affects the settlement of upstream petroleum disputes through arbitration.

The study will also analyse the international arbitration in accordance with the UNCITRAL Arbitration Rules and the ICSID Convention.

The theories that will be discussed in this study will be the delocalisation theory in arbitration and the autonomous (sui juris) theory of arbitration.

1.8 The Methodology

The methodology to be used in this research is the doctrinal research methodology because there is need for an in-depth analysis of the current arbitration provisions in law that govern the settlement of upstream petroleum disputes in Kenya,

The doctrinal research methodology is the most suited for this study because the focus will be on the analysis of statute, case law and legal sources. The doctrinal research methodology will provide a systematic exposition of the effectiveness of the existing arbitration provisions in Kenya that guide the settlement of upstream petroleum disputes.

This study is a library and desktop study which will rely on published and unpublished materials that include relevant primary and secondary sources in addressing the research questions. The study will rely on Kenyan laws and policies, international investment law, UNCITRAL Arbitration Rules, ICSID Convention Arbitration Rules, journal articles and legal position papers.

1.9 Theoretical framework

[37] Petroleum Act, No. 2 of 2019, Laws of Kenya.
[38] Arbitration Act, No. 4 of 1995, Laws of Kenya.

This thesis identifies two key theories in relation to the examination of arbitral provisions adopted for the settlement of upstream petroleum disputes. The first key theory is the delocalisation theory of arbitration and the second one is the autonomous theory of arbitration. These theories help to explain the juridical nature of arbitration.

(a) Delocalisation theory of arbitration

The delocalisation theory of arbitration proposes that the role of arbitrators in arbitral proceedings is immense, inherent and of great importance[39]. It also supports the view that an arbitrator is not a substitute to a national court judge but according to one of its proponents Pierre Mayer (1995) as one who administers justice in the name of the international community of merchants. This theory sees arbitration as floating arbitration without restrictions of domestic laws[40]. This kind of arbitration is detached from substantive and procedural laws of the seat of arbitration and national laws of any specific jurisdiction.

The delocalisation theory argues that arbitration is a private matter and judicial intervention is not required and unwarranted. Judicial intervention is seen to endanger delocalisation of arbitration. This theory however acknowledges the supervisory role of national courts in the enforcement of arbitral awards. Arbitration is removed from national systems which claim that arbitration is free and provides that domestic law will only be applied to fulfil the enforcement of awards. In essence this means that arbitrators are not bound by rules of forum and are allowed to select the appropriate rules of forum.

According to Saghir, Zaherah and Ngondi, the delocalisation theory views the arbitration procedure and any award issued to be independent and autonomous to the national law which is also recognized by contemporary systems such as the UNICITRAL Model Law[41]. They observe

[39] Kaznu O, 'The significance of delocalisation Theory in the history of international Arbitration' Bulletin, (2015).
[40] Mayer P, 'The Trend towards Delocalisation in the Last 100 Years' Martin Hunter and Marriot, V. Veeder the Internationalisation of International Arbitration // the LCIA Centenary Conference, Graham Trotman/ Martinus Nijhoff, (1995), 37.
[41] Saghir, Zaherah, and Chrispas Nyombi. 'Delocalisation in international commercial arbitration: a theory in need of practical application.' (2016).

that the arbitration agreement is key to the arbitral process whereby the right to arbitrate originates from the arbitration agreement rather than *lex loci arbitri ((law of seat of arbitration)***.**

Saghir, Zaherah and Ngondi note that the delocalisation theory is also a far-fetched reality because it places arbitration in a legal vacuum[42]. They opine that the arbitration procedure should be regulated by *lex loci arbitri (law of seat of arbitration)* and that judicial intervention safeguards justice by providing the requisite checks and balances by monitoring the qualities of decisions made by arbitrators. They state that it would be impractical to oust judicial intervention where a party would like to challenge the arbitral process due to procedural impropriety. This was witnessed in the case of *Fiona Trust &Holding Corp v Privalov* [43] where assistance from the court was sought to determine whether the arbitration clauses were wide enough to include whether the contract that comprises the arbitration clauses was obtained because of bribery. The English court held that arbitral clauses should be liberally construed, an approach that was echoed in *Premium Nafta Products Ltd v Fili Shipping Co Ltd*[44].

According to Dejan, the delocalization theory of arbitration supports a species of arbitration that is not derived or based on a national law order[45]. Delocalized arbitration is basically centered on the parties' agreement whereby procedure must not violate fundamental norms of the arbitration procedure. He states that as per the delocalisation theory, the arbitrator has no right to act as an *amiable compositéur* and the procedural rules are subject to party autonomy which is a cardinal principle of arbitration. Furthermore, he notes that delocalized arbitration does not put into question the sovereignty of the state because the fact that an arbitration took place in a particular territory cannot be denied by anyone. The delocalisation theory however propagates the concept of non-commanding state whereby the function of the state should be supportive and not controlling of the arbitration process.

[42] Saghir, Zaherah, and Chrispas Nyombi. 'Delocalisation in international commercial arbitration: a theory in need of practical application.' (2016).
[43] *Fiona Trust &Holding Corp v Privalov* [2007] *EWCACiv20; [2007]1AllE.R.(Comm)891; [2007] Bus.L.R.686*
[44] *Premium Nafta Products Ltd v Fili Shipping Co Ltd [2007] UKHL40; [2007] 4AllE.R.951; [2007] Bus.L.R.1719.*
[45] Janićijević D, 'Delocalisation in International Commercial Arbitration', Faculty of Law, University of Niš, Niš, Law and Politics, Vol. 3 No.1, (2005), 63 – 71.

Dejan opines that delocalized arbitration is part of a much wider principle of party autonomy where parties are free to designate any seat of arbitration or not. State courts have limited supervisory jurisdiction which is not absolute and automatic because they have limited grounds of intervention into the parties' mechanisms of dispute resolution[46]. This underlines the significance on parties' autonomy where parties agree on the substantive and procedural mechanisms of dispute resolution. According to Dejan dispute cannot be taken to a national court just because the arbitration takes place in that country[47]. The court will be limited to statutory provisions pertaining to arbitrations of an international nature. The arbitration clause that construes delocalized arbitration will take effect because the cardinal principle of party autonomy must be appreciated. A national court cannot assume supervisory jurisdiction if parties have not agreed on the same. He also argues that delocalized arbitration is not domestic or international arbitration subject to national laws. It is attached to international arbitration practice only on the basis of party autonomy which allows parties to avoid the application of the law of any country.

According to James and Tayo, the innovation brought by the delocalisation theory of arbitration is challenged in several areas including the reluctance to embrace substantive and procedural laws[48]. Despite the increasing significance of the theory, the major difficulty is the inability to understand the concept of completely detaching arbitration from a national legal order and thus it does not enjoy significant growth and development.

The delocalisation theory of arbitration has provided liberation from judicial constraints imposed by national legislation. It has also become popular at the wake of the drafting of the Convention on the recognition and enforcement of foreign arbitral awards (New York Convention) which emphasizes the superiority of national laws in contradistinction to laws at the international arena[49]. The delocalisation theory of arbitration has become superiorly prevalent in the 21st Century as witnessed in the International Chamber of Commerce, International Court of Arbitration where emphasis is made on transnationalisation and party autonomy.

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[46] Janićijević D, 'Delocalisation in International Commercial Arbitration'63 – 71.
[47] Janićijević D, 'Delocalisation in International Commercial Arbitration'63 – 71.
[48] Dinchi L and Bello T, 'Delocalization of Arbitration: Dynamic Change in International Commercial Arbitration', SSRN 3724941, (2020).
[49] Wetter G, 'Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges', International Court of Arbitration of the ICC, (2011).

James and Tayo allude that delocalisation is a shield that enables an arbitral process to be independent of national laws at the seat of arbitration. The delocalisation theory of arbitration propagates the reduction of involvement of national courts resulting in an award that floats in a transnational arena[50]. Party autonomy is paramount in selecting substantive and procedural law in arbitration. International law such as UNCITRAL Model Laws were drafted with the cardinal principle of party autonomy in mind that states "subject to the provisions of this law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting proceedings."[51].

James and Tayo state that delocalisation provides that disputes are resolved through mutual understanding and co-operation of parties and arbitral tribunals. Furthermore, they observe that an award may be declined recognition if the procedure was not in accordance with the agreement of parties or failing such agreement, the procedure was not in accordance with the law of the country where the arbitration took place[52]. This shows that fragments of the delocalisation of arbitration theory are progressively being assimilated. They also observe that the delocalisation theory of arbitration has been misunderstood to mean an attempted escape from national laws of the seat of arbitration. In the true sense the theory propagates the non-reliance of national laws in so far as they introduce restrictions from the seat of arbitration.

The UNCITRAL Model Law provides the composition of UNCITRAL Arbitration Rules which outline international arbitration practice. International arbitration practice comes into play at all stages, not only as a separate source but also to interpret the arbitration agreement, the chosen arbitration and applicable national law[53] .The UNCITRAL Arbitration Rules reflected what the drafters believed to be accepted and desired independent standards for use in international

[50]Wiener J, 'The "Transnational" Political Economy: A Framework for Analysis', http://www.jus.uio.no/sisu, accessed 27 March 2020.
[51]Article 1, UNCITRAL Arbitration Rules, (2010), A/65/465
[52] Article V (1) (d), New York Convention, (10th June 1958).
[53] Lew J, Mistelis L, Kröll S, Comparative International Commercial Arbitration, Wolters Kluwer Law and Business, 2003, 29 2-46.

arbitration[54]. Notably, among its contribution is the supportive roles of court and the augmentation of party autonomy[55].

The delocalization theory of arbitration outlined in this thesis will help to demonstrate whether the domestic arbitration provisions in the petroleum agreement are suitable for the settlement of upstream petroleum operations.

(b) Autonomous theory of arbitration

The autonomous theory envisages the arbitral process to be self-regulating whereby parties adhere to the procedural laws which they have selected. The parties mutually resolve to settle their disputes in a manner that is compliant to international arbitration practices. The autonomous theory strongly promotes the cardinal principle of party autonomy where parties agree to subject their disputes to arbitration and their consent is provided by way of a direct agreement. The arbitration agreement guides the arbitration process, and it is mutually agreed on by parties for future and existing disputes. The autonomous theory emphasizes that arbitration should focus on the goal of arbitration and not the process of arbitration.

The autonomous theory of arbitration is the most recent theory which presumes that arbitration evolves in an emancipated regime and hence is of an autonomous character[56]. According to Julian, Loukas and Stefan the autonomous theory is an enlightened development of the mixed theory of arbitration which has added modern forms of non-national, transnational and delocalized arbitration. This theory does not give emphasis to the seat of arbitration and its law[57].

Julian, Loukas and Stefan note that international arbitration has developed because parties sought a flexible, non-national system regulation of their commercial dispute[58]. National law is seen to have little significance to the international commercial community, and it has little influence in the conduct of international arbitration. They also note that international commercial arbitration is

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[54] Lew J, Mistelis L, Kröll S, Comparative International Commercial Arbitration, Wolters Kluwer Law and Business, 2003, 26.
[55] Lew J, Mistelis L, Kröll S, Comparative International Commercial Arbitration, 27.
[56] Lew J, Mistelis L, Kröll S, Comparative International Commercial Arbitration, 81.
[57] Lew, Mistelis, Kröll, Comparative International Commercial Arbitration, 81.
[58] Lew, Mistelis, Kröll, Comparative International Commercial Arbitration, 81.

used by the international business world because it can be and has been tailored for their particular needs[59].

In this context, the development of international commercial arbitration has been developed from the process and its users and not due to national interest. The autonomous theory appreciates the jurisdictional and contractual theory of arbitration but shifts the focus from the seat of arbitration to reflection on the marketplace. They note that this theory will inevitably dominate arbitration in the future because it promotes the autonomy of parties to select a regime that reflects their commercial interests. It is noteworthy that the contractual theory emphasizes that arbitration has a contractual character, and it has its origins in and depends, for its existence and continuity, on the parties' agreement[60]. The jurisdictional theory emphasizes that state power controls and regulates arbitrations taking place within its jurisdiction[61].

According to Rubellin-Devich "To allow arbitration to enjoy the expansion it deserves, while all along keeping it within its appropriate limits, one must accept, I believe, that its nature is neither contractual nor jurisdictional nor hybrid but autonomous"[62]. The autonomous theory of arbitration propagates emphasis on the goal and intention of arbitration. The intention will give the distinction between arbitration and other sources of dispute resolution. This theory also states that the analysis of how forum rules are developed and applied is largely a descriptive process.

The autonomous theory of arbitration outlined in this thesis will help to demonstrate whether the domestic arbitration provisions in the petroleum agreement are flexible and efficient enough to will guide the arbitration process in a flexible and efficient manner regarding the settlement of upstream petroleum operations.

1.10 Literature Review

The literature is reviewed thematically into three themes that include applicable law and international arbitration, party autonomy and negotiations for petroleum contracts which are relevant in the study

[59] Lew, Mistelis, Kröll, Comparative International Commercial Arbitration, 81.
[60] Lew, Mistelis, Kröll, Comparative International Commercial Arbitration, 77.
[61] Lew, Mistelis, Kröll, Comparative International Commercial Arbitration, 74.
[62] Rubellin-Devichi, 'L'arbitrage: nature juridique', (2011).

(a) Applicable law and international arbitration

According to Croff, parties may willingly choose not to embody an applicable law clause because they have divergent economic and political backgrounds, and they may not be familiar or confident in the respective national laws[63]. In such a case, the arbitrator will have the task of determining the applicable law. He may apply a conflict of law system of the country which would have jurisdiction in the absence of the arbitration clause.

If the applicable law provision is missing, an arbitral tribunal may also select the conflict of laws system where it has a seat or the conflict of laws connected to the parties, the dispute or the arbitral tribunal. The arbitral tribunal may also apply an international conflict of laws system or apply a substantive law that does not have recourse to any conflict of law. When parties select a set of rules to regulate international trade in the merchant community, no conflict of laws of any selects a non-national legal system such as *lex mercantoria*[64].

Contracting parties are familiar with their contractual rights and obligations and can determine aspects that govern their relationship[65]. The freedom of contracting parties is what is described as party autonomy and when parties determine the applicable law governing their arbitration agreement, they can freely exercise this right at any point whether before or after a dispute ensues[66].

According to Mukherjee, a dispute referred to international commercial arbitration can be subject to the law governing performance of obligations under a contract, law governing the arbitration agreement and the law governing the arbitration proceedings (*lex arbitri*)[67]. When called upon by parties to select the applicable law, an arbitral tribunal must be suitably equipped to make this determination. If the parties fail to make an express choice of law, the arbitral tribunal may apply the law the parties had intended to have chosen. Arbitrators usually adopt the guiding principles

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[63] Croff, "The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?", (1982).
[64] Croff, "The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?", (1982).
[65] Al-Fadhel, Faisal M. "Respect for Party Autonomy under Current Saudi Arbitration Law." *Arab Law Quarterly*, vol. 23, no. 1, (2009), 31–57.
[66] Al-Fadhel, Faisal M. "Respect for Party Autonomy under Current Saudi Arbitration Law.", 31–57.
[67] Mukherjee, D. "Proper Law in International Arbitrations Involving Contractual Claims: When Parties Fail to Choose.", National Law School of India Review, vol. 20, no. 1, (2008), 62–75.

anchored in the Rome Convention which states that a choice of law must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case[68].

If parties have not indicated their choice of law, the governing law of the country which is most closely connected may be applied. This is usually the law of the country where the transaction in question is closely related. Another options that an arbitral tribunal may consider is the place of the contract's performance, the place where parties reside or carry business and the subject matter of the contract[69]. In international commercial arbitration, a presumption is made that such a connection is established with the law of the corporate seat or principal seat of business of parties whose performance characterize the contract[70].

In international arbitration the choice of law is the choice of forum as provided by the maxim *qui indicem forum eligit ins*[71]. The place of arbitration may be selected based on the geographical convenience and the reputational of arbitration services provided by the institution and it is not connected to the law of the place. An arbitral tribunal makes a choice of law guided by the conflict of laws rules of the seat of arbitration[72]. Whenever feasible, the arbitral tribunal should ask parties to delve into the matter and suggest the law they deem appropriate for governing the contract, if they have not already done so[73].

An international arbitral tribunal may also use international conventions to guide on the selection of applicable law if a party whose law is identified as applicable to the dispute is a party to a particular treaty or convention.

Some scholars opine that an arbitral tribunal seated within a certain state act under the legal order of that state, and he must apply the local conflict of law rules of that state. This is a contradictory

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[68] Rome Convention on the Law Applicable to Contractual Obligations, (June 19, 1980), 19 I.L.M. 1492.
[69] Mukherjee, D. "Proper Law in International Arbitrations Involving Contractual Claims: When Parties Fail to Choose.",62-75
[70] Mukherjee, D. "Proper Law in International Arbitrations Involving Contractual Claims: When Parties Fail to Choose.",62-75
[71] Mukherjee, D. "Proper Law in International Arbitrations Involving Contractual Claims: When Parties Fail to Choose.",62-75
[72] Mukherjee, D. "Proper Law in International Arbitrations Involving Contractual Claims: When Parties Fail to Choose.",62-75
[73] Engle R, "Party Autonomy in International Arbitration: Where Uniformity Gives Way to Predictability", 15 Transnational Law 323, 347 (2002), 348.

to an accepted principle in international arbitration that an arbitral tribunal does not get its authority from a national legal order like a national judge. However, according to Greenberg, international arbitration has *lex fori* at the place of arbitration[74]. International arbitration is seen to be "floating in the transnational firmament" detached from the municipal system of law[75].

In international arbitration a tribunal needs to ascertain whether the conflict of law rules of various national systems connected with a particular case converge towards a single domestic law and to apply such law to the substance of the dispute[76]. An arbitral tribunal may also resort to the law of the country that would have been able to exercise jurisdiction in the absence of an arbitration agreement. This requires a comprehensive analysis of the various conflict of laws rules to determine the country that has jurisdiction.

The Washington Convention 1965 requires an arbitral tribunal to apply the law of the contracting state along with other applicable rules of international law[77]. According to the European Convention of 1961 an arbitral tribunal has the freedom to apply the rules of conflict of laws that it deems applicable[78]. The UNCITRAL Arbitration rules provide that when parties fail to designate the applicable law the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers to be applicable[79].

According to Mukherjee, in determining the proper law of the dispute in international commercial arbitration, an arbitral tribunal may also have regard for customary international law or *lex mercantoria. Lex mercantoria* evolved from a body of rules relating to commercial transactions of traders living in the roman empire. The sources of *lex mercantoria* include general principles of international conventions, acts of international organisations, codes of conduct, customs and usages of trade. In 1994, the International Institute for the Unification of Private Law (UNDROIT) gave form and substance to *lex mercantoria* by publishing the "Principles of International

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[74] Greenberg S, "The Law applicable to the Merits of International Arbitration", 8.V.J 315, 319 (2004)
[75] *Bank Mellat v. Helliniki Techniki S. A., [1984] Q.B. 291, 301, cited in Greenberg, supra note 30, at 319.*
[76] Derains Y, "Public Policy and the Law Applicable to the Dispute in International Commercial Arbitration ', ICCA Council for Commercial Arbitration Congress Series, No.3 227, 233 (Pieter Sanders ed., 1987).
[77] Article 42, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, (1965), 575 U.N
[78] Article 7, European Convention on International Commercial Arbitration, (April 21, 1961), 484 U.N.T.S. 349.
[79] Article 28(2), UNCITRAL Model Law on International Commercial Arbitration, (June 21, 1985), 24 I.L.M. 1302.

Commercial Contracts"[80]. The UNDROIT principles are frequently referred to in international commercial arbitration[81].

Muigua opines while there are those who argue for a third legal order to be *lex mercantoria*, international arbitration has gained popularity as the primary way through which international companies resolve their transnational problems[82]. The growth in international commercial arbitration is mainly attributed to globalization and the impracticability of traditional justice system[83]. He observes that the international legal regimes for international commercial and investment arbitrations have been established, and progressively refined with the express goal of facilitating international trade and investment by providing a stable, predictable, and effective legal framework in which these commercial activities may be conducted[84]. This is justified on the grounds that enforcement of international arbitral agreements promotes the smooth flow of international transactions by removing the threats and uncertainty of time-consuming and expensive litigation[85].

If parties do not expressly provide for the applicable law in an arbitration clause, the arbitral tribunal is invited to decide on the same and the outcome can be varied depending on the selection of the conflict of law rules adopted by the arbitral tribunal. The express provision of a domestic applicable law may not favour international contracts because of transnational rights of parties. The parties should choose the applicable law because they can determine the law that suits their commercial relationship.

The choice of applicable law in arbitration is therefore fundamental because it guides the arbitral tribunal in knowing the intention of parties on the issue of the governing law of the contract, the

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[80] Mukherjee, D "Proper Law in International Arbitrations Involving Contractual Claims: When Parties Fail to Choose." *National Law School of India Review*, vol. 20, no. 1, (2008), 62–75

[81] Fabrizio Marrella, "Choice of Law in Third-Millennium Arbitrations: The Relevance of the UNIDROIT Principles of International Commercial Contracts", 36 V and. J. Transnational L. 1137, 1157 (2003).

[82] Muigua K., "Effective management of Commercial Disputes: Opportunities for the Nairobi Centre for International Arbitration", *Journal of cmsd*, vol.1(1), (2017), 92.

[83] Muigua K., "Effective management of Commercial Disputes: Opportunities for the Nairobi Centre for International Arbitration",93

[84] Muigua K.: Nurturing International Commercial Arbitration in Kenya", 2021, http://kmco.co.ke/wp-content/uploads/2021/10/Nurturing-International-Commercial-Arbitration-in-Kenya.pdf

[85] Muigua K.: Nurturing International Commercial Arbitration in Kenya", 2021, http://kmco.co.ke/wp-content/uploads/2021/10/Nurturing-International-Commercial-Arbitration-in-Kenya.pdf

governing law of the arbitration agreement and the law that governs the arbitration proceedings. The express provision of the applicable law by the parties makes this determination easier by an arbitral tribunal who cannot go against the agreement of parties.

(b) Party Autonomy

According to Al-Fadhel, arbitration plays an important role in settling disputes arising from commercial parties[86]. He writes that countries have worked on accepting the establishment of arbitration to work in parallel with courts to protect party autonomy. The basic standards of party autonomy adopted in legislation ought to promote an efficient modern legislation in the arbitration field. The supportive role of courts in arbitration is paramount in the arbitration process because it facilitates the recognition and enforcement of arbitral awards when called upon to do so by parties. The whole approach of party autonomy is consistent with public policy notion that parties to an arbitration agreement should have freedom to choose how their arbitral tribunal should be structured and how their cases are conducted, and arbitral awards issued.

The doctrine of party autonomy finds an agreement to arbitrate fundamental to commercial arbitration as it records parties 'agreement to submit to arbitration. Courts usually derive their authority from statutory provisions and arbitral tribunals derive their authority from arbitration agreements. The parties to an arbitration agreement ought to have full capacity while concluding the agreement. The Egyptian Arbitration law has assured that it anchors the doctrine of party autonomy by providing that judicial action that has not been sanctioned by parties to an arbitration agreement will be precluded.

Croff in his writings opines that international commercial arbitration has been successful because it provides an alternative to a court process in international contracts[87]. He also states that the need for a neutral and effective system has led parties to find that international commercial arbitration as suitable in resolving disputes and differences[88]. International arbitration does not derive its

[86] Al-Fadhel, Faisal M. "Respect for Party Autonomy under Current Saudi Arbitration Law." Arab Law Quarterly, vol. 23, no. 1, (2009), 31–57.
[87] Croff J. "The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?" *The International Lawyer*, vol. 16, no. 4, (1982), 613–645.
[88] Croff J. "The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?" *The International Lawyer*, 613–645.

authority from a nation but from the agreement of parties. He argues that all international legal systems accept the doctrine of party autonomy without any restrictions. Parties should select the applicable law that governs their contract and arbitration agreement[89].

Some authors conclude that an arbitrator must apply the law chosen by parties without checking if any conflict of laws rule limits that freedom. It is noted that parties cannot endow themselves with requirements that are unobtainable under the law that has the closest connection with their agreement. The choice of law selected by parties should therefore be applied without limitation by arbitrators as it respects the doctrine of party autonomy.

Croff also notes that party autonomy sometimes is limited in application even if it is generally acceptable in most jurisdictions but opines that this argument is irrelevant because in international practice the law with the closest connection of the agreement is usually applied. It would be inappropriate for an arbitrator not to apply the law chosen by parties.

Party autonomy is a doctrine that is widely accepted in most jurisdictions, and it has also been entrenched in domestic legislation of some countries. This position is firmly supported by international law and its application is not limited and thus the reason why parties prefer the application of international law in commercial arbitration. In some jurisdictions the application of the doctrine of party autonomy is limited in application by legislation where a court may interfere in an arbitration process. The interference of a national court may slow down the settlement of a dispute by way of arbitration. In addition, most domestic laws do not support the application of the conflict of laws rules in arbitration as witnessed in the Kenyan Arbitration Act[90].

According to Mukherjee a choice of law is a choice of forum. The applicable law provision in an arbitration clause is therefore important because it guides the arbitral tribunal in identifying the law that guides the conduct of proceedings, which conflict of laws rules are to be applied if they are sanctioned by domestic law and the role of national courts in the recognition and enforcement of arbitral awards.

[89] Croff J. "The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?" *The International Lawyer*, 613–645.
[90] Arbitration Act, No. 4 of 1995, Laws of Kenya.

The drafting of arbitration provisions is therefore critical because this determines whether they are suitable and applicable in context of the industry. This study focuses on the upstream petroleum industry and accesses whether the arbitration provisions in the Kenyan model petroleum agreement are suitable and interrogates whether international arbitration facilitates the settlement of upstream petroleum industry and what Kenya can borrow from international systems of arbitration.

According to Muigua, there is the need to draft arbitration clauses in a clear manner to avoid misinterpretation and uncertainty which always draws the attention of courts leading to unnecessary interference[91]. It has been noted that even when an African state has become a party to a relevant treaty such as UNCITRAL Law, there might still be the perception that its courts could not be relied on to apply the text correctly or in good faith, with a further argument that national legal frameworks are not conducive for the constitution of arbitral tribunals and to the conduct of arbitration, permitting the 'local court' to interfere unduly in arbitral proceedings[92].

In Kenya, the model petroleum agreement is the essential instrument to be negotiated by the state and investor who are desirous of entering into an agreement for upstream petroleum operations. There is limited study on the legal status of the arbitration provisions in the model production sharing contracts anchored in law and whether they are suitable enough to facilitate negotiations between parties. Given the nature of upstream petroleum operations, dispute resolution mechanisms are critical because the level of investment is high, and time means money in this industry. It is therefore critical that differences and disputes are concluded in an efficient and expeditious manner.

Party autonomy is a cardinal doctrine in arbitration according to Croff and Al- Fadhel, and it should not be limited in application even by domestic law. Most scholars support the notion that party autonomy promotes the success of arbitration because it gives power to the parties to mutually determine how they will resolve their disputes and differences. Based on various scholarly writings it is also evident that arbitration provisions in a model petroleum agreement should advocate for mutual agreement regarding the selection of the applicable law.

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[91] "Muigua K.: Nurturing International Commercial Arbitration in Kenya", 2021, http://kmco.co.ke/wp-content/uploads/2021/10/Nurturing-International-Commercial-Arbitration-in-Kenya.pdf

[92] Muigua K., "Role of The Court Under Arbitration Act 1995: Court Intervention Before, Pending and Arbitration in Kenya", *Kenya Law Review,* (2010),10.

(c) Negotiations of petroleum contracts

It is important to understand the nature of the negotiation processes in petroleum contracts to establish whether the cardinal principle of party autonomy is adopted by parties. According to Radon, "negotiation processes in petroleum contracts are not only about distributing rents, but also about distributing risk. Decisions to invest are made in environments of uncertainty. This implies that actors use judgment and make trade-offs and that no single model result can be achieved. Three factors influencing negotiation processes can be identified: Geological factors, political risks and market context. Contracts are formulated based on actors' relative bargaining strengths, influenced by these three factors[93]".

Radon also notes that the more general literature on petroleum contract negotiations in Africa tends to focus on the unequal relations between governments and international oil companies due to asymmetry of information and negotiation experience in favor of the oil companies[94] .

Pederson however points out that the relations between a government and an oil company are dynamic and shift over the course of a project cycle once an oil company has invested heavily in infrastructure for exploration and production because the government has the upper hand, pointing to the reemergence of an 'obsolescing bargain'[95].He points out that information on contract negotiation processes is sparse in literature and that in Tanzania, only one of the contracts has been disclosed under disclosure requirements for Canadian listed Companies: Pan African Energy[96]. This disclosure, however, does not include the negotiations before the signing of the Production Sharing Contract and exploration license.

Amade and Amana in their writings note that the effectiveness of a petroleum agreement is achieved only through host state control and vigilance[97]. They observe that a petroleum agreement

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[93] Radon J., "The ABCs of Petroleum Contracts. License-Concession Agreements, Joint Ventures and Production-Sharing Agreements", A Reporter's Guide to Energy and Development, (ed), (2005), 61-80.
[94] Radon J.," How to Negotiate an Oil Agreement." In Escaping the Resource Curse, *Columbia University Press*, New York, 2007.
[95] Pedersen H.R., "The politics of gas contract negotiations in Tanzania: a review", *Danish Institute for International Studies,* (2015).
[96] Pedersen H.R., "The politics of gas contract negotiations in Tanzania: a review", *Danish Institute for International Studies,* (2015).
[97] Amade R. and Amana S., "State Objectives and Petroleum Development Contracts", *The Journal of International Issues*, Vol. 17, No. 2, (2013), 80-107.

involves the inflow of foreign credit with repayment secured on future oil production and that the choice of PSCs by an evolving economy is often influenced by the wish to avoid risk agents and the absence of petroleum technology[98].

In the case of the petroleum agreement between Nigeria and Ashland, the state lacked technical expertise in geology, petroleum engineering and business management[99]. The overall objective of a state as a party to a petroleum agreement is to secure corporate development and a continuous search for achieving this should be explored[100]. Institutional reforms aimed at removing the dependence of a host state on foreign capital and skill will provide control and management of petroleum contracts[101].

From the scholarly writings it is evident that negotiations in petroleum contract shift depending on the bargaining power of the host state or the contractor which could oust party autonomy. Negotiations are dynamic and policy direction would be instrumental in creating a negotiating equilibrium.

1.11 Chapter Summary

Chapter One - Introduction to the study

This is the first chapter of the study which contains an overview of the background, statement of the problem, purpose of the study, objectives of the study and research questions. It outlines the justification of the study, the scope and limitations of the study. This chapter also describes the methodology and theoretical framework used in the study. It contains a literature review on two thematic areas in line with the objectives of the study: party autonomy and applicable law in arbitration. The chapter summary of the study is also included in this chapter.

Chapter Two: Legal framework of the arbitration system provided for settling state and investor disputes in upstream petroleum operations in Kenya.

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[98] Amade R. and Amana S., "State Objectives and Petroleum Development Contracts",103.
[99] Amade R. and Amana S., "State Objectives and Petroleum Development Contracts",103.
[100] Amade R. and Amana S., "State Objectives and Petroleum Development Contracts",105-106.
[101] Amade R. and Amana S., "State Objectives and Petroleum Development Contracts",106.

This chapter describes and analyses the legal framework of the arbitration system provided in the Petroleum Act regarding upstream petroleum operations. This chapter on one hand explains the petroleum legal framework in Kenya which includes the Constitution of Kenya 2010, The Petroleum Act and the Model Petroleum Agreement. The Model Petroleum Act is discussed in the context of the arbitration clause and a comparison is given with the provisions of the Arbitration Act which is the substantive legislation of arbitration in Kenya.

Chapter Three: The role of international law in settling state and investor disputes in upstream petroleum operations through arbitration.

This chapter describes and analyses two types of international arbitration systems as provided in the ICSD Convention and the UNCITRAL Arbitration Rules. The description is centered on the cardinal principle of arbitration which is party autonomy and the applicable law that guides an arbitration proceeding and its outcome. It also discusses the Convention on the Recognition and Enforcement of foreign arbitral awards which binds parties to recognize and enforce arbitral awards made from a different territory through their domestic courts.

Chapter Four: Findings on the Settlement of Petroleum Disputes in Kenya.

This chapter discusses and analyses the settlement of petroleum disputes in Kenya as outlined in Chapter two and three. It also discusses and analyses how petroleum disputes can be resolved in Kenya and how the arbitration provisions of the model petroleum agreement should be adjusted to support the same.

Chapter Five: Recommendations and Conclusions.

This chapter discusses the existing arbitration system provided in the Model Petroleum Agreement in Kenya *vis* a *vis* the international arbitration system provided in the ICSID Convention and the UNCITRAL Arbitration Rules. The focus of the discussions will be in relation to party autonomy and applicable law in arbitration. Due to the nature of upstream petroleum operations which involve transnational rights of parties due to the existence of joint ventures on the part of the Contractor, the discussions will be guided by the theoretical framework which supports a delocalized and autonomous arbitration system. It outlines the gaps in the arbitration system outlined in the Kenyan Model Petroleum Agreement in comparison with the international

arbitration outlined in the ICSID Convention and UNCITRAL rules and gives recommendations on how to cure those gaps.

CHAPTER TWO

LEGAL FRAMEWORK OF THE ARBITRATION SYSTEM PROVIDED FOR SETTLING STATE AND INVESTOR DISPUTES IN UPSTREAM PETROLEUM OPERATIONS IN KENYA.

2.1 Introduction

This chapter describes and analyses the legal arbitration framework of upstream petroleum operations in Kenya. According to the Natural Resource Governance Institute, a well-designed legal architecture should provide rules for how state institutions are structured; how companies acquire and manage licenses; the fiscal terms governing payments between companies and the state; environmental management; relationships between extractive projects and neighboring communities; the behavior of public officials active in the sector; public information disclosure and accountability; and how the government will manage natural resource revenues.

In the Kenyan context, the exploitation of petroleum is governed by the Constitution of Kenya, 2010, Petroleum Act, No. 2 of 2019 and the Model Petroleum Agreement. Moreover, whilst examining the legal framework of the arbitration system provided for the settlement of upstream petroleum disputes between the state and the investor, it is also important to interrogate the Arbitration Act, No. 4 of 1995.

The legal framework for upstream petroleum operations has been described and analysed in a hierarchical manner as follows: the Constitution of Kenya, 2010, the Petroleum Act, No.2 of 2019, the Model Petroleum Agreement, Schedule 1 of the Petroleum Act, No.2 of 2019 and the Arbitration Act No. 4 of 1995.

2.2 Constitution of Kenya, 2010

The Constitution is the supreme law of Kenya which provides the fundamental principles of governance that binds all persons and state organs at both levels of Government[102]. To appreciate the exploitation of petroleum in Kenya, it is paramount to examine the provisions of the

[102] Article 2, Constitution of Kenya, 2010

Constitution of Kenya, 2010 regarding the same. The exploitation of petroleum is for the purposes of economic growth, and this includes the exploration, development, and production of oil.

According to the Constitution all land belongs to the people of Kenya collectively as a nation, as communities and as individuals and the same is classified as either public, private or community land[103]. It is noteworthy that the Constitution of Kenya, 2010 stipulates that all minerals and mineral oils are public land[104]. The key national values and principles of governance that guide the exploitation of petroleum are citizen participation, non-discrimination, protection of marginalized groups, protection of human rights, social justice, equity, transparency, accountability, and sustainable development[105].

The exploitation of petroleum ought to be done in a sustainable way without a negative impact on the environment. The Constitution of Kenya, 2010 strongly affirms the foregoing because it provides that every person has a right to a clean and healthy environment and that the environment should be protected for the benefit of both the current and future generations. In addition, the state must ensure that there is sustainable exploitation, utilization and management of the environment and natural resources whilst ensuring equitable sharing of the accruing benefits[106].

The state is required to enact legislation that ensures that the investment in land use benefits the local community and their economies[107]. Upstream petroleum investments in Kenya are done through petroleum agreements that are entered into by the Cabinet Secretary on behalf of the Government of Kenya and an investor. These petroleum agreements must also be ratified by parliament which is the supervisory arm of Government that ensures that the principles of the Constitution regarding exploitation of natural resources are adhered to[108].

The Constitution of Kenya helps to safeguard petroleum as a natural resource by ensuring that the exploitation of natural resources does not cause depletion. This helps to advance sustainable development through economic, social, and environmental pillars. The economic pillar supports the creation of jobs, growth in Government revenue, growth in gross domestic product and poverty

[103] Article 61(1), Constitution of Kenya, (2010).
[104] Article 61(1), Constitution of Kenya, (2010).
[105] Article 10, Constitution of Kenya, (2010).
[106] Article 69, Constitution of Kenya, (2010).
[107] Article 66, Constitution of Kenya, (2010).
[108] Article71(1), Constitution of Kenya, (2010).

eradication. Secondly, the social pillar supports provision of basic infrastructure needed for human development such as food, education, healthcare, electricity and motorable roads. Lastly, the environmental pillar supports the protection of land, air, water and natural resources from degradation and pollution.

Arbitration is an alternative dispute resolution mechanism that is recognized by the Constitution of Kenya which shall be promoted in the exercise of judicial authority[109]. Judicial authority is derived from the people of Kenya because the sovereign power belongs to the people of Kenya[110].

Arbitration is a private mechanism for dispute resolution that is selected and controlled by the parties. The recognition of arbitration in the Constitution helps to cement the supportive role of courts in the finality and enforcement of arbitral awards. This position was supported by the Supreme Court of Kenya in the case of *Geochem Middle East v Kenya Bureau of Standards* where the court upheld the decision made by the high court which stated *inter alia*:

> "It is not the function nor the mandate of the High Court to re-evaluate such decisions of an arbitral tribunal, when the Court was called upon to determine whether or not to set aside an award…if the Court were to delve into the task of ascertaining the correctness of the decision of an arbitrator, the Court would be sitting on an appeal over the decision in issue. Considering the public policy of Kenya, which loudly pronounces the intention of giving finality to arbitral awards, it would actually be against the said public policy to have the Court sit on an appeal over the decision of the arbitral tribunal" [Paras. 39-41]"[111].

Article 159(2) provides that the judiciary shall be guided by the principles of reconciliation, arbitration, mediation, and traditional dispute mechanisms. To this extent, the principles of arbitration that promote the finality of arbitration awards ought to be supported by the judiciary in recognizing and enforcing arbitral awards. This position was taken by the Court of Appeal in the case of *Nyutu Agrovet Limited -vs- Airtel Networks Limited* where the court dismissed an appeal to set aside an arbitral award under Section 35 of the Arbitration Act. The court held:

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[109] Article 159 (1)(c), Constitution of Kenya, (2010).
[110] Article 1, Constitution of Kenya, (2010).
[111] *Geochem Middle East v Kenya Bureau of Standards [2020] eKLR.*

"'The principle on which arbitration is founded, namely that the parties agree on their own, to take disputes between or among them from the courts, for determination by a body put forth by themselves, and adding to all that as in this case, that the arbitrators' award shall be final, it can be taken that as long as the given award subsists it is theirs. But if it is set aside as was the case here, that decision of the High Court is final remains their own. None of the parties can take steps to go on appeal against the setting aside ruling. It is final and the parties who so agreed must live with it unless, of course, they agree to go for fresh arbitration. The High Court decision is final and must be considered and respected to be so because the parties voluntarily choose it to be so. They put that in their agreement. They desired limited participation by the courts in their affairs and that has been achieved. Despite the loss or gain either party may impute to, the setting aside remains where it falls. The courts, including this Court, should respect the will and desire of the parties to arbitration (emphasis added)."[112]

Furthermore, in the case of *Anne Mumbi Hinga -vs- Victoria Njoki Gathara*, the Court of Appeal expressed that the right of appeal does not accrue automatically under Section 35 of the Arbitration Act considering challenging an arbitral award but only in the circumstances provided in Section 39 of the Arbitration Act. The Court of Appeal opined that:

> "We therefore reiterate that there is no right for any court to intervene in the arbitral process or in the award except in the situations specifically set out in the Arbitration Act or as previously agreed in advance by the parties and similarly there is no right of appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in Section 39 of the Arbitration Act."[113]

In contrast to settling disputes and differences through arbitration as provided in the Model Petroleum Agreement, the Constitution provides a different pathway for addressing potential human rights claims. 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[114]. This is a constitutional provision that cannot be derogated by any other law and can be exercised by any party who claims a human rights violation as a result

[112] *Nyutu Agrovet Limited -vs- Airtel Networks Limited, Civil Appeal No.61 of 2012 (2015) eKLR.*
[113] *Anne Mumbi Hinga -vs- Victoria Njoki Gathara, Civil Appeal No. 8 of 2009; [2009] eKLR.*
[114] Article 22(1), Constitution of Kenya, (2010).

of petroleum activities. In such a case the court would have to entertain the matter and exercise judicial authority as outlined in the Constitution[115].

2.3 Petroleum Act, No.2 of 2019

The Petroleum Act[116], consolidates the entire petroleum value chain which includes upstream, midstream, and downstream operations. The Act prevails over any other law on matters upstream, midstream & downstream operations[117]. According to the Petroleum Act, all disputes between parties to a petroleum agreement arising from upstream petroleum operations are required to explore alternative dispute resolution mechanisms in first instance as provided in the petroleum agreement which include amicable settlement, expert determination, and arbitration[118]. Any other disputes from an upstream regulated function may be submitted before the Energy & Petroleum and Regulatory Authority (EPRA) in first instance for determination. If a party is dissatisfied with decision of the Authority he may appeal to Energy &Petroleum Tribunal.[119]

2.4 Model Petroleum Agreement, Schedule 1 of the Petroleum Act, No.2 of 2019

The Petroleum Act provides that the Cabinet Secretary shall negotiate, award, and execute a petroleum agreement on behalf of the government of Kenya in the form prescribed in the Schedule to the Act[120]. The model petroleum agreement prescribed in the schedule of the act is also referred to as a model Production Sharing Contract. It outlines the rights and obligations of a successful contractor and the state regarding upstream petroleum operations. The parties to a production sharing contract are the state and a contractor. In the petroleum industry, the contractor is usually a joint venture that spreads the financial and operational risks of upstream petroleum operations. The relationship between the parties to a joint venture is regulated by a joint operating agreement that outlines the participatory interest of parties in form of shares. [121]

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[115] Article 160(1), Constitution of Kenya, (2010).
[116] Petroleum Act, No. 2 of 2019, Laws of Kenya.
[117] Section 4, Petroleum Act, No.2 of 2019.
[118] Section 117(1), Petroleum Act, No.2 of 2019.
[119] Section 117(2), Petroleum Act, No.2 of 2019.
[120] Section 18, Petroleum Act, No.2 of 2019.
[121] Petroleum Act, No.2 of 2019.

This study is examining the arbitration provisions[122] outlined in the model petroleum agreement. According to the model petroleum agreement, a party may resolve a dispute through arbitration if it is not resolved amicably or through expert determination. The arbitration clause set out in the petroleum agreement provides the arbitration system selected by Kenya in resolving state and investor disputes in upstream petroleum operations.

Whilst developing arbitration clauses, it is important to include the essential ingredients such as agreement to arbitrate, scope of arbitration, institution chosen, seat of arbitration, number and method of selection of arbitrators, procedure to be followed and enforcement of awards. The preceding ingredients will be analysed hereunder in relation to the arbitration clause provided in the model petroleum agreement.

2.4.1 Party Autonomy/Agreement to Arbitrate

The arbitration clause in the petroleum agreement does not expressly provide the agreement to arbitrate. This is because the petroleum agreement is prescribed by law and the terms and conditions are mandatory and thus require compliance from parties. The agreement to arbitrate usually expresses the parties' intention to subject their disputes to arbitration rather than a national court which is in line with the cardinal principle of party autonomy.

2.4.2 Scope of Arbitration

The dispute resolution clause outlines that any differences or disputes may be referred to amicable settlement in the first instance. If the dispute is not settled amicably, it may be referred to expert determination or arbitration. This means the scope is regarding upstream petroleum operation disputes that are not settled amicably and may be addressed through arbitration. It is noteworthy, however that there are upstream petroleum operation disputes that are not arbitrable such as disputes that emanate from third parties to a Petroleum Agreement such as the community who may be affected by the upstream petroleum operations. Other dispute resolution mechanisms such as mediation, reconciliation and traditional dispute resolution mechanism would therefore be

[122] Clause 53(3) of the Model Petroleum Agreement, Petroleum Act. No. 2 of 2019, Laws of Kenya.

suitable, and this is not provided under the dispute resolution clause in the model petroleum agreement.

2.4.3 Institution chosen

The arbitration clause provides that an applicant party is required to send a written request to UNCITRAL as a way of commencing arbitration proceedings with a notification to the defending party. The arbitration proceedings are expected to commence sixty days after the request is sent to UNCITRAL. It is however not clear why the proceedings commence without the approval of UNCITRAL. It would be expected that a request is done by an applicant party to receive some form of approval. Nonetheless, the arbitration clause stipulates that the arbitration process will be done in line with the UNCITRAL Arbitration Rules. The UNCITRAL Arbitration rules were formulated to guide ad hoc arbitration where parties have not selected an institution to conduct the arbitration proceedings. They are however also used by certain institutions that administer arbitration such as the International Chamber of Commerce.

The disputing parties are also required to inform the secretariat of the UNCITRAL about their appointment of an arbitrator. An applicant party may also request the UNCITRAL to appoint an arbitrator when the defending party fails to appoint one within thirty days after the notice to commence arbitration proceedings is received by UNCITRAL. According to the UNCITRAL Arbitration rules, the Secretary General may be selected by disputing parties to appoint an arbitrator. Moreover, a disputing party may request the ICSID to appoint a third arbitrator when the two appointed arbitrators fail to mutually select a third arbitrator.

The ICSID may also be selected as an appointing authority by disputing parties according to the ICSID convention. The center maintains a panel of conciliators and a panel of arbitrators. According to the ICSID Convention an arbitral tribunal is formed once a request is made to the center and it is always subject to the agreement of parties who may want a sole arbitrator or an uneven number of arbitrators[123]. If parties fail to agree on this, then they are required to each select

[123] Article 37, ICSID Convention.

an arbitrator and the third one who is the chairman has to be appointed by the agreement of parties[124].

2.4.4 Seat of Arbitration

The arbitration clause provides that the applicable law of the arbitration clause is Kenyan law which implies that the seat of arbitration shall be Kenya. The seat of arbitration governs the arbitration proceedings and has a bearing on the national courts that would exercise supervisory jurisdiction over the arbitration. The seat of arbitration also helps to determine the nationality of the arbitral award issued by an arbitral tribunal. In this context, the Kenyan courts would exercise supervisory jurisdiction and the arbitral award would be enforceable in Kenya. The concept of *lex arbitri* is synonymous with the seat of arbitration and subject to the consent of parties and the same is explained by Deshpande as follows[125]:

"Strangely enough, a distinction has developed between the substantive law applicable to the contract and the law applicable to the conduct of the arbitration called *lex arbitri*. The only explanation for such a distinction seems to be that the situs of the arbitration may be outside the country the legal system of which is the proper law of the contract. No other explanation for the development of the concept *of lex arbitri* is available. How has this result come about? The explanation seems to be historical. International commercial arbitration developed under the influence of the commercially advanced nations and the international arbitral institutions established by them. Among such institutions are the International Chamber of Commerce, Paris, the American Arbitration Association and the London Court of Arbitration, the International Chamber of Commerce (ICC) Paris being the oldest and more widely used than the others till recently.

The basic practice of the ICC was that the arbitral tribunal was formed of three arbitrators. Two arbitrators were nominated by the two parties to the dispute and the chairman was appointed by the ICC Court of Arbitration. To ensure neutrality and impartiality the chairman would be chosen from a country other than the countries of the two disputants. The place of arbitration would be in

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[124] Article 37(2)(b), ICSID Convention.

[125] Deshpande, V.S. "The Applicable Law in International Commercial Arbitration." *Journal of the Indian Law Institute* 31, no. 2, (1989),127.

the country from which the chairman was chosen. Thus, the choice of the place of arbitration by the arbitral tribunal and by the ICC Court of Arbitration was purely accidental. Such a choice could not be attributed to the intention of the parties."

The Arbitration Act, No. 4 of 1995 provides that parties are free to select the seat of arbitration and the location of the hearing. If they fail to do so the same shall be determined by the arbitral tribunal having regard to the circumstances of the case and the parties. In essence the arbitral tribunal will first determine whether the arbitration is domestic or international to identify the seat of arbitration which will determine the rules of forum[126]. The model petroleum agreement does not have a seat of arbitration provision however it states that the applicable law of the arbitration clause is Kenyan law. This implies that the seat of arbitration is Kenya.

2.4.5 Number, method of selection and qualifications of arbitrators

The arbitration clause provides that the number of arbitrators shall be three and each disputing party shall appoint an arbitrator and notify the other party and UNCITRAL. The two appointed arbitrators shall subsequently appoint a third arbitrator by mutual consent. If the defending party does not appoint an arbitrator thirty days after receiving the notice of intention to commence arbitration proceedings, the applicant party may request the UNCITRAL to appoint the third arbitrator. If the applicant party does not appoint an arbitrator within 30 days after issuing the notice to commence arbitration proceedings it will be deemed as if he has withdrawn his application. The arbitration clause is silent on the qualifications of arbitrators however stipulates that they should not be of the same nationality as either the applicant or defending party.

2.4.6 Conduct of proceedings to be followed

The conduct of proceedings to be followed during arbitration proceedings has not been expressly stipulated in the arbitration clause. The applicable law however is the Kenyan law and therefore the conduct of proceedings may be guided by the Civil Procedure Act to regulate the proceedings and the Evidence Act to regulate witness or documentary evidence. It is however noteworthy that the model petroleum agreement provides that disputes resolved by arbitration should be done in

[126] Section 21, Arbitration Act, No. 4 of 2005, Laws of Kenya.

accordance with the UNCITRAL arbitration rules adopted by the United Nations Commission on international Trade Law[127]. The rules that will guide the arbitral proceedings will therefore be in accordance with the UNCITRAL arbitration rules.

2.4.7 Applicable law

The choice of applicable law is fundamental in arbitration because it determines the legal rules to be applied in arbitral conduct, arbitral proceedings, the governing law of the contract and the choice of law rules in selecting the law, whether domestic or international law. The arbitration clause in the model petroleum agreement provides that the applicable law is Kenyan law[128]. The arbitral conduct and proceedings will therefore be guided by Kenyan Law.

There is however a conflict as to which applicable law is selected because the model petroleum agreement also provides that a dispute to be resolved by arbitration should be in accordance with the UNCITRAL arbitration rules adopted by the United Nations Commission on International Trade[129].

In most model petroleum agreements, the applicable law provision is not provided in the arbitration clause. In the case of the Seychelles petroleum agreement, the applicable law is not provided in the arbitration clause.

> "Arbitration Clause. (1) Where the Government or any authority of the Government and the Company fail to settle a dispute touching on or concerning the interpretation or performance of this Agreement or the rights or liabilities of any of the Parties under this Agreement, the Government and the Company hereby consent to submit the dispute for arbitration in accordance with the rules of the [International Chamber of Commerce] [International Centre for Settlement of Investment Dispute {ICSID}] before a board of one, or more than one (but not being an even number) arbitrator appointed in accordance with the said rules.

[127] Clause 53(1) Petroleum Agreement, Schedule 1 of the Petroleum Act, No. 2 of 2019.
[128] Clause 53(3)(8) Petroleum Agreement, Schedule 1 of the Petroleum Act, No. 2 of 2019.
[129] Clause 53(1) Petroleum Agreement, Schedule 1 of the Petroleum Act, No. 2 of 2019.

(2) Any reference in this Agreement to the effect that a matter constitutes a dispute under this Clause shall not be construed as in any way derogating from the generality of subclause (1).

(3) Any award rendered pursuant to subclause (1) shall be binding upon the Parties submitting the dispute to such arbitration"[130].

In the case of the Model Petroleum Agreement of Ghana, the applicable law in the arbitration clause is also not provided.

> "Arbitration Clause 24.1 Except in the cases specified in Article 26.4 any dispute or difference arising between the State and G-NPC or either of them on one hand and Contractor on the other hand in relation to or in connection with or arising out of any terms and conditions of this Agreement shall be resolved by consultation and negotiation. In the event that no agreement is reached within thirty (30) days after the date when either Party notifies the other that a dispute or difference exists within the meaning of this Article or such longer period specifically agreed to by the Parties or provided elsewhere in this Agreement, any Party shall have the right subject to Article 24.8 to have such dispute or difference settled through international arbitration under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce, Stockholm, Sweden.
>
> 24.2 The tribunal shall consist of three (3) arbitrators. Each Party to the dispute shall appoint one (1) arbitrator and those so appointed shall designate an umpire arbitrator. If a Party's arbitrator and/or the umpire arbitrator is not appointed within the periods provided in the rules referred to in. Article 24.5 below, such Party's arbitrator and/or the umpire arbitrator shall at the request of any Party to the dispute be appointed by the Arbitration Institute of the Stockholm Chamber of Commerce.
>
> 24.3 No arbitrator shall be a citizen of the home country of any Party hereto and shall not have any economic interest or relationship with any such Party.
>
> 24.4 The arbitration proceedings shall be conducted in Stockholm, Sweden, or at such other location as selected by the arbitrators unanimously. The proceedings shall be conducted in the English language.

[130] http://petroseychelles.com/index.php/legal-issues/model-petroleum-agreement on 25th April 2022.

24.5 The arbitration tribunal shall conduct the arbitration in accordance with the arbitration rules of the United Nations Commission on International Trade Law ("UNCITRAL") of December 15, 1976, except as provided in this Article. For purposes of Article 33.1 of said UNCITRAL rules, the arbitration tribunal shall decide in accordance with the provisions of this Agreement.

24.6 If the opinions ions of the arbitrators are divided on issues put before the tribunal, the decision of the majority of the arbitrators shall be determinative. The award of the tribunal shall be final and binding upon the Parties.

24.7 The right to arbitrate disputes arising out of this Agreement shall survive the termination of this Agreement"[131].

2.5 Arbitration Act No. 4 of 1995

The Arbitration Act[132] is the substantive law that guides the arbitration process in Kenya. Regarding petroleum agreements, the Petroleum Act prevails over any other law however when it is silent on matters arbitration, the Arbitration Act[133] ought to be activated to give legislative direction. The Arbitration Act[134] would be invoked in its entirety if the arbitration is a domestic ad hoc arbitration.

To identify the type of arbitration, one must deduce whether the arbitration is ad hoc or institutional and consequently whether the arbitration is domestic or international by analysing the arbitration provisions in the arbitration clause. By doing this the rules of forum can be identified and applied accordingly. The Arbitration Act therefore helps parties to identify the nature of their arbitration and the rules that apply accordingly.

The Arbitration Act states the extent of court's role in arbitration matters and provides that the court shall not intervene on matters regulated by the Act[135]. In support of this provision the Arbitration Act enumerates the recourse one has when an arbitral award is issued. An aggrieved party may proceed to the high Court to set aside an arbitral award however the court must be satisfied that the subject matter of the dispute is not arbitrable or the arbitral award is against public

[131] https://www.resourcedata.org/dataset/rgi-ghana-model-petroleum-agreement on 25th April 2022.
[132] Arbitration Act, No.4 of 1995, Laws of Kenya.
[133] Arbitration Act, No. 4 of 1995, Laws of Kenya.
[134] Arbitration Act, No.4 of 1995, Laws of Kenya.
[135] Section 10, Arbitration Act, No. 4 of 2005, Laws of Kenya.

policy in Kenya[136]. The court will not be looking at the correctness of the arbitral award because it would then be sitting as an appellate court but rather the arbitrability of the dispute. This position is supported by the High Court in the case of *Nyutu Agrovet Limited v Airtel Networks Kenya Limited and Chartered Institute of Arbitrators where* it stated inter alia*:*

"[77] In concluding on this issue, we agree with the Interested Party to the extent that the only instance that an appeal may lie from the High Court to the Court of Appeal on a determination made under Section 35 is where the High Court, in setting aside an arbitral award, has stepped outside the grounds set out in the said Section and thereby made a decision so grave, so manifestly wrong and which has completely closed the door of justice to either of the parties. This circumscribed and narrow jurisdiction should also be so sparingly exercised that only in the clearest of cases should the Court of Appeal assume jurisdiction."[137]

2.5.1 Rules of procedure

The Arbitration Act provides that parties are free to select the rules of procedure. If parties fail to select the same, the choice of law will be construed by the arbitral tribunal as the substantive law of that state and not the conflict of laws rules[138]. The rules of procedure usually regulate the arbitration proceedings in the collection of evidence and conduct of proceedings.

2.5.2 Effect of arbitral awards

The Arbitration provides that an arbitral award shall be final and binding upon parties unless otherwise agreed on by parties[139]. This provision prescribes that one cannot appeal against an arbitral award because it is final and binds all parties.

2.5.3 Recognition and enforcement of arbitral awards

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[136] Section 35(b), Arbitration Act, No. 4 of 2005, Laws of Kenya.
[137] *Nyutu Agrovet Limited v Airtel Networks Kenya Limited and Chartered Institute of Arbitrators [2015] eKLR.*
[138] Section 32A, Arbitration Act, No. 4 of 2005, Laws of Kenya.
[139] Section 32A, Arbitration Act, No. 4 of 2005, Laws of Kenya.

A domestic arbitration shall be recognized as binding and upon application in writing to the High Court[140] shall be enforced[141].An international arbitral award shall be recognized as binding and enforced in accordance with the provisions of the New York convention or any other convention to which Kenya is a signatory[142].It is noteworthy that Kenya is a contracting party to the New York Convention having acceded to the same on 10th February 1989[143].

These provisions support the principle of the supportive role of domestic courts in recognizing and enforcing domestic and foreign awards when called upon to do so.

2.5.5 Finality of Awards

The petroleum agreement stipulates that the decision made by majority of the arbitrators shall be final and binding to all parties and shall also be enforceable under the laws of Kenya[144]. The arbitral awards issued to parties should therefore be complied with by parties and the national courts can enforce them when called upon to do so by any party. This position was supported by the Supreme Court of Kenya in the case of *Geochem Middle East v Kenya Bureau of Standards*[145] where the court upheld the decision of the high court which stated that it did not have the mandate to re-evaluate the decision of an arbitral tribunal due to the public policy in Kenya that gives finality to arbitral awards.

2.6 Conclusion

The Constitution of Kenya supports the exploitation of petroleum in a sustainable way to the benefit of current and future generations. It also supports arbitration as an alternative dispute resolution mechanism which shall be promoted in the exercise of judicial authority. The courts play a supportive role in the recognition and enforcement of arbitral awards. Equally the Constitution being the supreme law of Kenya provides that any person can institute court proceedings for the enforcement of human rights. This means that human rights violations that

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[140] Section 36(1), Arbitration Act, No. 4 of 2005, Laws of Kenya.
[141] Section 37 of the Arbitration Act, No. 4 of 1995, Laws of Kenya.
[142] Section 36(2), Arbitration Act, No. 4 of 2005, Laws of Kenya.
[143] https://www.newyorkconvention.org/countries
[144] Clause 53(6) Petroleum Agreement, Schedule 1 of the Petroleum Act, No. 2 of 2019
[145] *Geochem Middle East v Kenya Bureau of Standards [2020] eKLR.*

arise from upstream petroleum activities can be addressed by the courts without limiting them to the dispute resolution mechanisms provided in the model petroleum agreement.

The Petroleum Act consolidates the upstream, midstream, and downstream operations and prevails over any other law. It also provides the tiered dispute resolution mechanisms in the settlement of disputes and differences. The model petroleum agreement anchored in the Petroleum Act is the essential contract to be negotiated for upstream petroleum operations. The arbitration clause contained in the model petroleum agreement is however ousts the principle of party autonomy. This is because it provides express fundamental provisions that should be left to the decision of parties. The applicable law provision should be decided by parties and should not be expressly provided because it may hinder negotiations if the state is a party to a petroleum agreement and the applicable law is the law of the state.

The arbitration clause provides that the arbitral proceedings will be conducted in compliance with UNCITRAL Arbitration rules and provides that the applicable law for arbitration is Kenyan law. This provides an international legal system and domestic legal system for the conduct of arbitral proceedings which may be a complex issue for an arbitral tribunal to deal with in an investor-state upstream petroleum dispute.

CHAPTER THREE

THE ROLE OF INTERNATIONAL LAW IN SETTLING STATE AND INVESTOR DISPUTES IN UPSTREAM PETROLEUM OPERATIONS THROUGH ARBITRATION.

3.1 Introduction

This chapter describes the UNCITRAL Arbitration Rules and the ICSID Arbitration Rules that are used in international arbitration. It also analyses the role these international instruments have played a role in the settlement of upstream petroleum disputes such as the New York Convention.

State and investor disputes in the petroleum industry are usually inevitable. This is because a state which intends to exploit its petroleum reserves usually attracts investors using favourable terms to conduct the upstream petroleum operations and thereafter abandons those very terms. This scenario is not new in the petroleum industry and has been witnessed around the world which is the biggest source of state and investor disputes. The likely circumstance is that a State has no technical expertise to conduct upstream petroleum operations and thus seeks this expertise from a qualified and experienced investor.

The disputes that arise between a state and an investor are usually financial and non-financial disputes. Financial disputes arise when the state feels that they should get a greater percentage from the profit petroleum whereas the investor feels that he has taken a higher risk and thus needs to be properly compensated[146]. The non-financial disputes are those that involve an imbalance between the benefits accruing to the local community and the state which include the environmental, health, safety, labour, and employment rights[147].

Regarding the Kenyan context, the relationship between the state and an investor is regulated by the petroleum agreement which is also referred to as the production sharing contract. Production sharing contracts were introduced in the petroleum industry in 1960's as a way of giving the state

[146] Doeh D, "International Oil and Gas Industry Disputes." Arbitration Journal, 20th June 2019 https://journal.arbitration.ru/reviews/international-oil-and-gas-industry-disputes on 25th April 2022.
[147] Doeh D, "International Oil and Gas Industry Disputes." Arbitration Journal, 20th June 2019 https://journal.arbitration.ru/reviews/international-oil-and-gas-industry-disputes on 25th April 2022.

more control and direct participation in petroleum production[148]. Upstream petroleum operations usually involve multiple contracts and parties. This is because other than having the right to mine, the investor may enter multiple service contracts to undertake the upstream petroleum operations.

The technical expertise required for upstream petroleum operations usually involves international companies who enter into joint operating agreements with the investor to conduct the same. The investor enters into these joint operating agreements to spread the risk associated to the upstream petroleum operations and thus the transnational nature of the rights of parties cannot be ignored. The nature of disputes that may arise are cross border and involve multiple parties and contracts with a wide range of claims under joint operating agreements, cost recovery disputes, service contract disputes, insurance/re-insurance cover disputes, petroleum price reviews, pre-emption rights, expropriation, and environmental damage[149].

The multiplicity and transnational nature of such investments has since the late 1950's led many states to enter into bilateral investment treaties (BIT's) for Investor State Dispute Settlement (ISDS)[150]. The BIT's enables an investor to seek international arbitration to avoid domestic courts of the host state which may be unfavourable to the investor. The development of ISDS has been managed by the International Center for the settlement of Investment Disputes (ICSID). Due to the globalization of the petroleum business and the signing of BIT's the ISDS claims have increased since the 1990's[151]. An investor who initiates international arbitration under a BIT or other similar treaty has a choice to do so under the ICSID or UNCITRAL arbitration rules[152].

A substantial percentage of international arbitration cases are energy cases. According to the London Court of International Arbitration, about 22% of the disputes before it is energy related

[148] Doeh D, "International Oil and Gas Industry Disputes." Arbitration Journal, 20th June 2019 https://journal.arbitration.ru/reviews/international-oil-and-gas-industry-disputes on 25th April 2022.

[149] Doeh D, "International Oil and Gas Industry Disputes." Arbitration Journal, 20th June 2019 https://journal.arbitration.ru/reviews/international-oil-and-gas-industry-disputes on 25th April 2022.

[150] Doeh D, "International Oil and Gas Industry Disputes." Arbitration Journal, 20th June 2019 https://journal.arbitration.ru/reviews/international-oil-and-gas-industry-disputes on 25th April 2022.

[151] Doeh D, "International Oil and Gas Industry Disputes." Arbitration Journal, 20th June 2019 https://journal.arbitration.ru/reviews/international-oil-and-gas-industry-disputes on 25th April 2022.

[152] Doeh D, "International Oil and Gas Industry Disputes." Arbitration Journal, 20th June 2019 https://journal.arbitration.ru/reviews/international-oil-and-gas-industry-disputes on 25th April 2022.

disputes[153] .This goes to show that international arbitration is favoured by most parties in the energy sector which includes the petroleum industry.

The existence of an investment is a cornerstone of ICSID's jurisdiction, yet the ICSID convention does not describe the term investment[154]. Several tribunals have however settled for a list of descriptors that are typical to investments which include: a substantial commitment, a certain duration, an element of risk and the significance for the host state's development[155].

3.2 UNCITRAL Arbitration Rules

The UNCITRAL Model Law 1985 was introduced to create uniformity in the standards of International Arbitration by introducing the concepts of party autonomy and the supportive role of courts to the arbitration process. The model law has been domesticated and adopted in several jurisdictions whereby new legislation is influenced by the model law. The United National Commission on International Trade Law (UNCITRAL) developed the UNCITRAL Arbitration rules for ad hoc arbitration because of the need for a neutral based arbitration[156].

The UNCITRAL Arbitration Rules were developed to be suitable for a capitalistic and socialist, developed and developing, common law and civil law jurisdictions[157].The UNCITRAL Arbitration Rules have achieved international recognition and are used widely and have been adopted in institutional arbitration by some institution because of their autonomous nature[158].These rules deal with everything in an arbitration process from the formation of an arbitral tribunal to the rendering of an award.

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[153][153] Doeh D, "International Oil and Gas Industry Disputes." Arbitration Journal, 20th June 2019 https://journal.arbitration.ru/reviews/international-oil-and-gas-industry-disputes.

[154] Rudolf Dolzer and Christoph Schreuer, "Principles of International Investment Law", Second Edition, Oxford University Press, 2012.

[155] Rudolf Dolzer and Christoph Schreuer, "Principles of International Investment Law", Second Edition, Oxford University Press, 2012.

[156] Lew J, Mistelis L, Kröll S, Comparative International Commercial Arbitration, Wolters Kluwer Law and Business, (2003), 26, 2-34.

[157] Lew J, Mistelis L, Kröll S, Comparative International Commercial Arbitration, Wolters Kluwer Law and Business, (2003), 26, 2-34.

[158] Lew J, Mistelis L, Kröll S, Comparative International Commercial Arbitration, Wolters Kluwer Law and Business, (2003), 26, 2-35.

The UNCITRAL Arbitration Rules are a comprehensive set of rules that may be selected by parties to regulate their arbitration proceedings to resolve disputes that are arising out of their commercial relationship. They were initially adopted in 1976 for the settlement of a wide range of disputes which include private commercial disputes where parties have not selected an institution to conduct their arbitration proceedings, investor-state disputes, state to state disputes and institutional arbitration. They were revised in 2006 and consequently in 2010 and have been effective since August 2010. The innovations that were included in the last revised version were rules on multi-party arbitrations, joinder, liability, procedure to object experts appointed by an arbitral tribunal, reasonableness of cost of arbitration and treaty-based arbitration.

The salient features of arbitration in relation to the UNCITRAL Arbitration Rules are discussed below:

3.2.1 Party autonomy/Consent of parties

The UNCITRAL Arbitration Rules were developed in line with the concept of party Autonomy. These Rules embody the spirit of party autonomy as they recognise the need for parties to agree that their disputes whether contractual or not be referred to arbitration under the rules[159]. The guiding principle is the consent by parties to subject their future and existing disputes to arbitration in line with the UNCITRAL Arbitration Rules. The consent of parties is expressed through an arbitration agreement or an arbitration clause which expressly states that the arbitration process will be guided by the UNCITRAL Arbitration Rules.

The pertinent questions in relation to party autonomy have always been: Do parties actually have absolute freedom to determine the arbitration process? To what extent has this been achieved in the resolution of disputes having international concerns? And lastly, is party autonomy a myth or reality?[160]. The consent is indispensable to any process of dispute resolution outside the national courts[161].

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[159] https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules-revised-2010-e.pdf

[160] Sunday F. "The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?" Afe Babalola University Journal of Sustainable Development Law & Policy (2015), 6.

[161] Allan Redfern and others, Law and Practice of International Arbitration, 4th edn, London: Sweet and Maxwell, (2004) 131.

3.2.3 Applicable law

Regarding the applicable law, the UNCITRAL Arbitration Rules provide that an arbitral tribunal will apply the applicable law designated by parties to the substance of the dispute[162]. An arbitral tribunal is at all times expected to decide matters in accordance with the terms of the contract of parties and takes into account applicable trade practices. The arbitral tribunal shall only decide the applicable law that applies to a dispute by agreement of parties. It becomes an *amiable compositeur* or *ex aequo et bono* by agreement of parties or when it applies the conflict of laws rule in international law.

The UNCITRAL does not conduct arbitration because the same is no within its mandate. It however developed the UNCITRAL Arbitration Rules to guide ad hoc arbitration proceedings. Some countries have domesticated some aspects of the UNCITRAL Arbitration Rules in their arbitration laws.

The United Nations Commission on International Trade Law (UNCITRAL) from the outset manifested great interest in the subject of international commercial arbitration and included this subject as a priority topic in the programme of work adopted in 1968 at its first session[163]. In 1975, the UNICITRAL discussed and gave special attention to the relationship between the UNCITRAL Arbitration Rules and institutional arbitration. This was because in 1974, the rules were developed for ad hoc arbitration and institutional arbitration. Due to the prevailing views that supported the removal of institutional arbitration from the scope of UNCITRAL Arbitration Rules, UNCITRAL complied with these views but allowed for parties to appoint an institution or a person to be an appointing authority as specified in the rules.

The Iranian settlement referred to the use of UNCITRAL rules for disputes involving banks and other parties while seeking the return of Iranian assets of the late Shah and the obligations of the United States government[164]. The UNCITRAL Arbitration Rules were developed to create a useful mechanism for resolving international commercial disputes because they can be applied in

[162] https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules-revised-2010-e.pdf
[163] UNCITRAL, Report on First Session (1968) para. 40; I Yearbook.
[164] Coulson R. "Iranian Settlements Use UNCITRAL Arbitration Rules." Business Law Memo, vol. 1, no. 4, (1981), 4.

different economic, legal, and social systems. The rules also dictate that an arbitral tribunal should respect the choice of applicable law selected by parties. This notion supports the doctrine of party autonomy and would lead to an increase in their use in international contracts with foreign parties[165].

3.3 ICSID Arbitration Rules

The ICSID arbitration rules are contained in the ICSID convention which was adopted on 18th of March 1965 in Washington and entered into force on 14th October 1966. This convention created the ICSID whose aim is to promote economic development through creation of a favourite investment climate. The ICSID provides institutional support for investment arbitration cases which includes provision of a hearing venue, selection of arbitrators, conducting arbitration proceedings and facilitating financial arrangements surrounding the arbitration administered by ICSD.

Petroleum investments are usually considered to be large scale investments that involve both the interests of the stare and the investor. The kinds of interests in these investments cannot be sufficiently addressed by domestic legislation due to the nature of the projects which involve transnational interests. Over a period, the desire of a host state to control its resources has led to the adoption of production sharing contracts. In production sharing contracts, states can exercise their permanent sovereignty over natural resources and transfer the risk of failure to find suitable oil to investors. The investor's incentive however is the recovery of exploration costs where commercially usable reserves are found. The state and the investor negotiate on a formula which often leads to the decrease of the rights of the investor over the oil. Parties in such an investment agreement may agree to subject their future or existing disputes to the ICSID for international investment arbitration.

The ICSD has a comprehensive set of procedural rules that guide investment arbitration which contains financial regulations, institutional rules and administrative rules. These rules and regulations were adopted by the ICSID's Administrative Council[166]. For ICSID to assume

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[165] Coulson R. "Iranian Settlements Use UNCITRAL Arbitration Rules." Business Law Memo, vol. 1, no. 4, (1981), 4.

[166] International Commission for Settlement of Investment Disputes Convention, Revised version, adopted by Un GA Res 65/22, (2010).

jurisdiction over an investment arbitration, there must exist an investment dispute of a legal nature between a state party which is a contracting party to the ICSID Convention and an investor of another sate that is also a contracting party to the convention. The state party and the investor must also consent to the jurisdiction of the ICSID which can be by way of a direct agreement, consent by national legislation of a host state, treaty between host state and the investor's state of nationality, consent through BIT's and consent through multilateral treaties.

According to the ICSID convention, parties can only proceed to investment arbitration if an amicable settlement has initially been sought by parties. The parties to an investment dispute are the host state and a foreign investor. The jurisdiction of the ICSID extends to contracting parties who give consent to submit to the center's jurisdiction. The host state must fulfil certain requirements of a contracting state before the call of arbitration. The foreign investor deals with a central organ of Government and any acts of violation which will be attributable to the central government even if they are committed by territorial entities. It is noteworthy that Kenya is a contracting party to the ICSID Convention having ratified the same on 3rd January 1967[167].

The foreign investors are usually juridical persons (corporations) or individual persons. To gain access to dispute resolution under ICSID convection the host state must be a party to the BIT and the investor must demonstrate it is a national of the other party state. In the case of individual investor, he must demonstrate he is a national of a contracting state at the parties' consent to the center's jurisdiction and that a request for arbitration has been registered by the center. The individual's nationality is usually determined by domestic legislation[168]. Investors who hold nationality of the host state are barred from bringing claims before the center for determination,

In regard to a juridical person, it must have nationality of a contracting state party to the ICSID convention on the day the parties consented to submit to ICSID jurisdiction. This is usually determined by the place of incorporation and the seat of business. Locally incorporated companies that are under foreign control can also have an investment dispute settled by the ICSID. A foreign shareholder of the locally incorporated company can institute an international claim before the center.

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[167] https://icsid.worldbank.org/about/member-states/database-of-member-states

[168] *Telenor v Hungary, Award, 13 September 2006. At paragraph 65.*

The domestic courts of parties do not have influence over the ICSID proceedings in that they cannot stay proceedings, influence proceedings, compel for evidence or set aside an ICSID award. The proceedings of the ICSID are also not threatened by non-cooperation of a party and their awards are final and binding and cannot be reviewed except as provided by the ICSID convention. The ICSID has its own enforcement mechanisms and breach leads to the revival of the right to diplomatic protection by the investor's state of nationality[169].

The jurisdiction of ICSID can only be activated if there is an existence of a legal dispute concerning an investment. In *RDC v Guatemala* a dispute was described to be a conflict of views on points of law and fact that requires sufficient communication between parties for each of them to know the others' views and oppose them[170]. The legal nature of the dispute concerns the existence or scope of a legal right or obligation and the same was outlined in the case of *Suez v Argentina*[171].The dispute must also relate to an investment, and this was held by the ICSID Tribunal in the case of *Fedax v Venezuela*[172] and *CSOB v Slovakia*[173]. An investment has not been specifically described by the ICSID convention however the descriptors are a substantial commitment for a certain duration which involves an element of risk and has a significance for the host state's development[174].

Arbitration is a dispute resolution mechanism that is accepted world over and was initially preferred as a mechanism that could stimulate growth and investment in developing countries by providing a degree of assurance to businesses contemplating investment in the region[175]. This premise was accepted worldwide, and the availability of formal arbitration proceedings mushroomed for the settlement of commercial and investment disputes particularly in the

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[169] Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law, Second Edition, Oxford University Press, 237.

[170] *Railroad Development Corp (RDC) v Guatemala, Second Decision on Jurisdiction, 18 May 2010 at Paras 129, 126-38*

[171] *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v Argentina, Decision on Jurisdiction, 16 May 2006, paras 34-7 at 37.*

[172] *Fedax v Venezuela, Decision on Jurisdiction, 11 June 1997, para 24 See also Siemens v Argentina, Decision on Jurisdiction, 3 August 2004, para 150.*

[173] *CSOB v Slovakia, Decision on Jurisdiction, 24 May 1999, para 72.*

[174] Rudolf Dolzer and Christoph Schreuer, "Principles of International Investment Law", Second Edition, Oxford University Press, 2012.

[175] Luke Eric Peterson, "Bilateral Investment Treaties and Development Policy-Making", International Instruments for Sustainable Development, (2004), 9,21-37.

development world[176]. In the 1950's many states incorporated arbitration into Bilateral Investment treaties because this offered an alternative to seeking a remedy from a host country's domestic court which was frequently biased or ineffective[177]. Due to this, arbitration allowed an investor to bring international cause of action against a state.

The world bank created the International Centre for Settlement of Investment Disputes (ICSID) under the auspices of the ICSID Convention to conduct handle investment disputes[178]. The ICSID Arbitration Rules were particularly developed to guide arbitration matters which were brought before the ICSID Tribunal. which was more claims were brought by investors because arbitration was seen to be favourable. ICSID would be a neutral forum for dispute resolution for investment disputes and an alternative to an investor bringing a claim before a domestic court. It was generally accepted that domestic courts in many developing countries because they were unreliable, bias when the complainants lodged a complaint against the government itself[179]. The proliferation of BIT's led to the use of ICSID arbitration. A BIT is "an agreement made between two or more sovereigns that safeguards investments made in the territory of the signatory countries[180]. Investors had a high level of success as complaining parties with extremely large damage awards that domestic courts of host state were internationally obliged to enforce the arbitral awards[181].

The salient features of an investment arbitration as per the ICSID arbitration rules are briefly described below:

3.3.1 Part autonomy/Consent to arbitration

Party autonomy is a cardinal principle that requires parties to agree on the settlement of their existing and future disputes through arbitration. The ICSID tribunal cannot establish its own

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[176] Kownacki, Nicolle E. "Prospects for ICSID Arbitration in Post-Denunciation Countries: An 'Updated' Approach." UCLA Journal of International Law and Foreign Affairs, vol. 15, no. 2, (2010), 529–560.
[177] Kownacki, Nicolle E. "Prospects for ICSID Arbitration in Post-Denunciation Countries: An 'Updated' Approach." UCLA Journal of International Law and Foreign Affairs, vol. 15, no. 2, (2010), 529–560.
[178] The International Center for the Settlement of Investment Disputes, Bretton Woods Project, (July 10, 2009).
[179] Carlos G. Garcia, All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the necessary Evil of Investor-State Arbitrations, 16 FLA.J. International L. 301, (2004), 313-314.
[180] Jean E. Kalicki, ICSID Arbitration in the Americas, The Arbitration Review of the Americas, (2007).
[181] Carlos G. Garcia, All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the necessary Evil of Investor-State Arbitrations, 16 FLA.J. International L. 301, (2004), 313-314.

jurisdiction and thus is determined by either consent by direct agreement of parties, consent through host state legislation, consent through BIT's and consent through multilateral treaties.

Consent by direct agreement involves the inclusion of a compromissory clause in a contract stating that future and existing disputes arising from the investment will be subjected to international arbitration through the ICSID. The parties are also free to give a scope of the consent to arbitration an investment dispute by delimiting the consent to arbitration. Consent through host state legislation may offer consent to arbitration to foreign investors in general terms however not all reference to investment arbitration in domestic legislation amounts to consent to jurisdiction. If domestic legislation is not express it shows that further action is required by the host state to express the host state's consent to international arbitration, and this is supported by the case of *Tradex V Albania*[182].

Consent though Bilateral Investment Treaties requires that the contracting host state to the BIT offers consent to arbitration to the investors who are nationals of the other contracting party. The arbitration agreement is perfected through the acceptance of that offer by the eligible investor[183].The scope of consent to arbitration in BIT's varies and may provide consent to "all disputes concerning investments" or "any legal dispute concerning an investment[184].An arbitral tribunal is not limited in applying the BIT substantive provisions because the consent clauses envisage disputes that are in connection to an investment contract. In the case of *Salini v Morocco*[185], Article 8 of the applicable BIT defined ICSID's jurisdiction in terms of the difference of an investment[186]. The Tribunal noted that the terms of this provision were very general and included not only a claim for violation of the BIT but also a claim based on contract: Article 8

[182] *Tradex v Albania, Decision on Jurisdiction, 24 December 1996, 5 ICSID Reports 47, 63; Zhinvali v Georgia, Award, 24th January 2003, para 331.*
[183] Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law, Second Edition, Oxford University Press, Page 257.
[184] Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law, Second Edition, Oxford University Press, Page 260.
[185] *Salini v Morocco, Decision on Jurisdiction, 23 July 2001, Journal de Droit International 196 (2002), 6 ICSID Reports 400,61.*
[186] Italy-Morocco BIT, Art 8.

obliges the State to respect the jurisdictional choice arising by reason of breaches of the bilateral agreement and of any breach of a contract which binds it directly[187].

Equally in the case of *Compania de Aguas del Aconquija, SA & Vivendi Universal*[188] *the ad hoc committee held that:*

*"*Article 8 deals generally with disputes relating to investments made under this Agreement between one contracting party and an investor of the contracting party. It is those disputes which may be submitted, at the investors option, either to national or international adjudication. Article 8 does not use a narrower formulation, requiring that the investor's claim allege a breach of the BIT itself. Read literally, the requirements for arbitral jurisdiction in Article 8 do not necessitate that the claimant allege a breach of the BIT itself: it is sufficient that the dispute relate to an investment made under the BIT. This may be contrasted, for example, with Article 11 of the BIT dealing with state-state dispute settlement, which refers to disputes concerning the interpretation or application of his agreement, or with Article 1116 of the NAFTA, which provides that an investor may submit to arbitration under Chapter 11, a claim that another party has breached an obligation under specified provisions of that Chapter. *"*[189]

The conditions for institution proceedings by the ICSID include the consent for investor-state arbitration without exhausting local remedies such as domestic courts and the same is supported by the ICSID Tribunal in the case of *Amco v Indonesia*[190], *Lanco v Argentina*[191], *IBM v Ecuador*[192], *AES v Argentina*[193] *and Saipen v Bangladesh*[194]. In these cases, the jurisdiction of ICSD's jurisdiction on matters brought before it by an investor before exhausting local remedies was challenged. The ICSD tribunal held that Article 26 of the ICSD Convention excludes the requirement of exhausting local remedies before a claim on behalf of the investor is brought before

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[187] *Salini v Morocco, Decision on Jurisdiction, 23 July 2001, Journal de Droit International 196 (2002), 6 ICSID Reports 400,61.*
[188] *Compania de Aguas del Aconquija, SA & Vivendi Universal v Argentina, Decision on Annulment, 3 July 2002.*
[189] *Compania de Aguas del Aconquija, SA & Vivendi Universal v Argentina, Decision on Annulment, 3 July 2002,55.*
[190] *Amco v Indonesia, Decision of annulment, 16 May 1986, para 63.*
[191] *Lanco v Argentina, Decision on Jurisdiction, 8 December 1998, para 39.*
[192] *IBM v Ecuador, Decision on Jurisdiction, 22 December 2003, paras 77-84.*
[193] *AES v Argentina, Decision on Jurisdiction, 26 April 2005, paras 69, 70.*
[194] *Saipen v Bangladesh, Award, 30 June 2009, paras 174-84.*

it for determination and thus pronounced that it had jurisdiction to hear the cases. This means that an investor who has an investment claim against a state may proceed to the ICSID Tribunal without exhausting local remedies. What are the pros and cons of this?? An investor including one in upstream petroleum activities may proceed directly to the ICSID Tribunal for arbitration against an ICSID member state without pursuing domestic dispute resolution mechanisms. The ICSID Tribunal however requires that both parties give consent before proceedings commence because they are not automatically bound to arbitration in every conceivable dispute against them[195].

Proceeding directly to the ICSID Tribunal could be beneficial to an investor who prefers to settle a dispute through international arbitration which would consider the transnational rights of the investor. Conversely, proceeding directly to the ICSID Tribunal would be unfavorable to a state party when domestic dispute mechanisms such as mediation, reconciliation and traditional dispute resolution mechanisms are suitable in settling disputes involving third parties who are affected by the upstream petroleum operations and not parties to a petroleum agreement.

African states have generally accepted ICSID jurisdiction by ratifying the ICSID convention and agreeing to specific investment contracts and bilateral treaties to submit disputes to ICSID[196]. Under the ICSID convention the jurisdiction is based on the written consent of parties to a contract to submit disputes to the center[197]. The two types of clauses that show consent by parties may be identified as a state agrees with an investor in a specific investment contract that they will submit all their disputes to ICSID arbitration or whereby a state expresses unqualifies willingness to submit investment disputes to ICSID arbitration[198]. The initiative is thus with the investor to take advantage of the unqualified willingness of the state to bring an investment claim before ICSID.

There also instances where a state may show reluctance to submitting to ICSID for arbitration as witnessed in the case of *Holiday Inns/Occidental Petroleum v Government of Morocco*. The Government of Morocco had entered into investment contracts with Holiday Inns SA of Glarus (Switzerland) and Occidental Petroleum Corporation and their mother companies, Holiday Inns of

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[195] Kownacki, Nicolle E. "Prospects for ICSID Arbitration in Post-Denunciation Countries: An 'Updated' Approach." UCLA Journal of International Law and Foreign Affairs, vol. 15, no. 2, (2010), 529–560.
[196] Agyemang, AA. "African States and ICSID Arbitration." *The Comparative and International Law Journal of Southern Africa*, vol. 21, no. 2, (1988), 177–189.
[197] Article 25(1), ICSID Convention.
[198] Agyemang, AA. "African States and ICSID Arbitration." The Comparative and International Law Journal of Southern Africa, vol. 21, no. 2, (1988), 177–189.

America, and Occidental Petroleum (OPC) for the establishment of a joint venture for the construction of hotels[199] for the construction of hotels. On 5th December 1966 the Moroccan Government and Holiday Inn of Glarus and Occidental Petroleum Corporation which contained an ICSID arbitration clause.

Due to performance issues of the joint venture, Holiday Inns of Glarus and Occidental Petroleum Corporation invoked the ICSID jurisdiction. The Government of Morocco challenged the jurisdiction of ICSID stating that Switzerland, the nationality of Holiday Inns Glarus had not ratified the ICSID convention at the time thy executed the contract on 5th December 1966. Furthermore, they stated that the Company was not incorporated in Switzerland at the time they signed the agreement and thus could not be a national of Switzerland. The tribunal emphatical rejected the arguments of Morocco and held that:

"The tribunal is of the opinion that the convention allows parties to subordinate the entry into force of an arbitration clause to the subsequent fulfilment of certain conditions, such as the adherence of the states concerned to the Convention, or the incorporation of the company envisaged by the agreement. On this assumption, it is the date when the conditions are definitely satisfied, as regards one of the Parties involved, which constitutes in the sense of the Convention the date of consent by that party. As for the date of consent contemplated by Article 25(2) (b) of the Convention, it will automatically be the date on which the two corresponding consents coincide"[200].

The ICSID tribunal concluded that the only reasonable interpretation of the Basic Agreement is to hold that parties when signing the Agreement envisaged that all necessary conditions for the Center would be fulfilled and their consent would at that time become fully effective[201].

3.3.2 Applicable law

Foreign investments are regulated by domestic and international law. The substantive international law that protects foreign investments is BIT's, multilateral treaties (NAFTA & ECT) and

[199] Lalive, "The first 'World Bank' Arbitration (Holiday Inns v Morocco), Some Legal Problems" (1980), 51 BYIL 123 142 147.
[200] The Comparative and International Law Journal of Southern Africa, Vol. 21, No. 2 (July 1988), 177-189.
[201] The Comparative and International Law Journal of Southern Africa, Vol. 21, No. 2 (July 1988), 177-189.

customary international law that includes the doctrine of denial of justice, the law on expropriation and the rules relating to the nationality of individuals and corporations[202].

In most foreign investments the domestic legal order of the host state will regulate the commercial relationship between parties in relation to commercial law, company law, property law, administrative law, labour laws and tax laws. The applicable law is however agreed upon by parties and they may opt to include national laws which will be guided by the hierarchical order of laws of the host state. The ICSID convention has provided that the tribunal will apply the law designated by parties and this firmly supports the cardinal principle of party autonomy[203]. If the agreement does not state, the choice of law the ICSID Tribunal will make this determination considering the circumstances of the investment.

The ICSID convention provides that the tribunal will apply the host state law and applicable rules of international law. Where the result of application of domestic law and the application of international law is the same, the ICSID tribunals are usually comfortable with applying either law[204]. Whereas, when the result of application of domestic law is different from application of international law, the doctrine of the supplemental and corrective function of international vis-à-vis domestic law is invoked and this argument is buttressed in the decision of the tribunal in the case of *Amco v Indonesia*.

Article 42(1) of the Convention authorizes an ICSID tribunal to apply rules of international law only to fill up the lacunae in the applicable domestic law and to ensure precedence to international law norms where the rules of the applicable domestic law are in collision with such norms[205].

3.3.3 ICSID Proceedings

[202] Lew J, Mistelis L, Kröll S, Comparative International Commercial Arbitration, Wolters Kluwer Law and Business, (2003).
[203] Lew J, Mistelis L, Kröll S, Comparative International Commercial Arbitration, Wolters Kluwer Law and Business, 2003,
[204]Lew J, Mistelis L, Kröll S, Comparative International Commercial Arbitration, Wolters Kluwer Law and Business, 2003.
[205] *Amco v Indonesia, Decision on annulment, 16 May 1986, para 20.*

ICSID proceedings are self-contained and denationalised because they are independent of any national law including the tribunal's seat[206]. The proceedings are usually initiated by a request for arbitration directed to the Secretary General of ICSID[207] which is made by either the investor or host state. The request must be in the official language of ICSID i.e., either English, Spanish or French and a prescribed fee of US$ 25000 is payable upon lodging the request. A determination of the center's jurisdiction is thereafter made by the Secretary General of ICSID and if satisfactory, the request is registered, and a notification issued to parties.[208]

The arbitral tribunal is then constituted which is usually of three arbitrators. Each part is required to appoint an arbitrator and the third one is selected by both parties and is usually the president of the arbitral tribunal. If the parties are unable to constitute the arbitral tribunal in 90 days, either party may request the Chairman of the ICSID's Administrative Council[209] to make the outstanding appointments. The arbitrators who are appointed to serve in the arbitral tribunal must not be nationals of the state party or co-nationals of the investor whichever the case may be even in party appointed arbitrators.

The arbitrators who are appointed must have the proper competence and capacity to discharge their duties and they must have the proper independence from the parties and suffer no conflict of interest. A party may propose the disqualification of an arbitrator on the grounds of conflict of interest. The unchallenged arbitrators are the ones who decide on the disqualification and when they fail to agree, the Chairman of ICSID's Administrative Council makes that determination.

The existence of a professional relationship with a party however does not automatically disqualify an arbitrator. In the case of *Compania de Aguas del Aconquija, SA & Vivendi Universal v Argentina,* the adhoc committee held that:

"The mere existence of some professional relationship with a party is not an automatic basis for the disqualification of an arbitrator or committee member. All circumstance needs to be considered

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[206] Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law, Second Edition, Oxford University Press, Page 278.
[207] http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp
[208]Lew J, Mistelis L, Kröll S, Comparative International Commercial Arbitration, Wolters Kluwer Law and Business, 2003.
[209] Under Article 5 of the ICSID Convention, the President of the International Bank for Reconstruction and Development is ex officio Chairman of ICSID's Administrative Council.

to determine whether the relationship is significant enough to justify entertaining reasonable doubts as to the capacity of the arbitrator or member to render a decision freely and independently."[210].

3.3.4 Annulment under ICSID Convention

ICSID awards are final and not subject to annulment or scrutiny from any domestic court because the institution has its own review mechanism that can be exercised by parties. A party that makes a request for annulment of an ICSID award to the Chairman of ICSID's Administrative Council[211] who constitutes an ad hoc committee. The ad hoc committee comprises of three persons who determine the application for annulment that is made by a party.

The request for annulment must be made within 120 days after the award is issued. The ad hoc committee may stay the execution of the arbitral award pending the determination of the application for annulment[212]. The stay of execution of the arbitral award is automatic if it is included in the application for annulment before the constitution of the ad hoc committee. A party may apply for a partial or full annulment of the arbitral award.

An annulment is concerned about the legitimacy of the process of the decision and not the substantive correctness of the arbitral award[213]. The effect of an annulment is merely removing the decision of the arbitral tribunal without replacing it. Conversely an appeal of an arbitral award is concerned about the legitimacy of the arbitral process and the substantive correctiveness of the arbitral award. An ad hoc committee under the ICSID convention is unable to determine the merits of a case like in an appeal process and thus would limit itself to an annulment of an arbitral award. After annulment parties are free to resubmit their dispute before a different arbitral tribunal for determination.

In the case of *CDC v Seychelles,* the function of annulment was described as:

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[210] *Compania de Aguas del Aconquija, SA & Vivendi Universal v Argentina, Decision on Annulment, 3 July 2002, 27.*
[211] The President of the World Bank holds this office *ex officio*.
[212] Article 52(5) of the ICSID Convention.
[213] Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law, Second Edition, Oxford University Press, Page 302.

"This mechanism protecting against errors that threaten the fundamental fairness of the arbitral process (but not against incorrect decisions) arises from the ICSID Convention's drafters desire that awards be final and binding, which is an expression of customary law based on the concepts of *pacta sunt servanda* and *res judicata* and is in keeping with the object and purpose of the Convention. Parties use ICSID arbitration (at least in part) because they wish a more efficient way of resolving disputes rather than is possible in a national court system with its various levels of trial and appeal, or even in non-ICSID Convention arbitrations (which may be subject to national courts review under local laws and whose enforcement may also be subject to defenses available under, for example, the New York convention."[214].

The ICSID convention provides five grounds for annulment, and they are contained in Article 52(1) of the ICSID Convention, and they are inter alia: improperly constituted arbitral tribunal, arbitral tribunal acting *ultra vires*, corruption on the part of an arbitrator, gross departure from fundamental rules of procedure and when the award fails to state its *ratio decidendi.*

3.4 Non ICSID investment arbitration

The settlement of state and investor disputes is mainly handled by the ICSID however this is not the only institution that handles investment arbitration because not all parties are contracting parties to the ICSID Convention. Other international institutions such as the International Chamber of Commerce or the London Court of International Arbitration handle state and investor arbitration. Theses arbitrations are conducted under the UNCITRAL Arbitration Rules of 1976 (revised in 2010) and under the International Chamber of Commerce Arbitration Rules of 1998 (revised in 2011). The common elements in the arbitral procedures conducted by the International Chamber of Commerce and the London Court of International Arbitration are that parties can control the composition of the arbitral tribunal and the applicable law in the proceedings. The arbitral tribunals can also decide on their own competence and may determine the arbitral procedures when parties fail to prescribe the same.

3.5 ICSID Additional Facility

[214] *CDC v Seychelles, Decision on Annulment, 29th June 2005, para 36.*

In 1978, the Administrative Council of ICSID created the Additional Facility open to parties that submit to its jurisdiction in certain cases which are outside the ICSID's jurisdiction[215]. The ICSID additional Facility handles cases where either the host state or the investor is not a contracting party to the ICSID Convention. The Additional Facility arbitration proceedings receive support from ICSID, and the proceedings are not governed by the ICSID Convention but the Additional Facility rules.[216]

3.6 The Convention on the Recognition of Arbitral Awards (New York Convention)

The New York convention was developed by the UNCITRAL Secretariat and came into effect on 7th June 1959. The convention seeks to provide uniform legislative standards for the recognition and enforcement of arbitral awards. It seeks to provide legislative standards for recognition of arbitration agreements, recognition and enforcement of foreign awards by domestic courts[217]. In doing so the convention, obliges parties to ensure that foreign awards are generally acceptable and can be enforced within their jurisdictions by their domestic courts. A contracting state while consenting to be bound by the convention may declare that the application of the convention is in respect to awards made in the territory of another state and commercial relationships that are legal in nature.

The New York Convention has outlined seven grounds in which a foreign award will not be recognized. These grounds include incapacity of parties, invalidity of arbitration agreement, due process, scope of arbitration, jurisdiction of the arbitral tribunal, arbitrability and public policy[218]. This goes a long way in guiding contracting states on reasons that render foreign award to be unenforceable.

Parties are also required to recognize all arbitral awards as binding and enforceable under their jurisdiction when called upon to enforce them under *lex fori*. The convention has facilitated the removal of stringent conditions for recognition and enforcement of foreign awards by domestic

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[215] Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law, Second Edition, Oxford University Press, Page 240.

[216] Lew J, Mistelis L, Kröll S, Comparative International Commercial Arbitration, Wolters Kluwer Law and Business, (2003).

[217] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

[218] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

law in comparison with it[219]. It has also ensured that parties prescribe procedures for the enforcement and recognition of foreign awards where the convention is silent.

The New York Convention is applied to enforce foreign awards in various jurisdictions as witnessed in the case of *Sté. européenne v. Yugoslavia, Sté. Européenne* where the Government of Yugoslavia had appealed against a decree of the District Court at Rotter dam which denied recognition and enforcement of the arbitral award rendered in Lausanne on the ground of Yugoslavia's sovereign immunity[220]. The Court of Appeal at the Hague at Netherland overturned the decision of the district court stating that the New York Convention does not exclude arbitral awards made against a state when the other party is a physical or legal person[221]. It held that Yugoslavia cannot plead sovereign immunity because the same would only occur when both parties were states and the context of their dispute involved government acts.

This rationale was confirmed by the Supreme Court of the Netherlands on 26 October 1973. 44 As stated in the decision:

> " it is possible to observe in international treaty practice, doctrine and local case law a tendency to limit the cases in which a state can invoke immunity before a foreign court; this development has notably been caused in part by the fact that the governments of many countries have increased their activities in a sector of social relations which is governed by private law, and, in connection therewith, have entered into transactions with private individuals on a basis of equality; in such cases, it appears to be reasonable to grant to the party dealing with the state the same measure of protection under the law as when such party would have dealt with a private individual; on the ground of these considerations, it must be assumed that the immunity from jurisdiction to which a foreign state is entitled under current international law does not extend to cases in which a state has acted in a manner as meant above; The request for permission of enforcement of the award in question could only then be considered to conflict with the immunity from execution to

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[219] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).
[220] Cappelli-Perciballi, Lionello. "The Application of the New York Convention of 1958 to Disputes Between States and Between State Entities and Private Individuals: The Problem of Sovereign Immunity." *The International Lawyer*, vol. 12, no. 1, (1978), 197–207.
[221]Article 1(1) Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

which a foreign state is entitled under international law if it had to be decided that international law opposes every execution of foreign state assets situated in the territory of another state; however, such rule of international law does not exist; consequently, the ground cannot lead to cassation, whatever may be the meaning of the Court of Appeal's reasoning of this point"[222];

These decisions have shown the application of the New York convention in recognizing and enforcing arbitral awards even in cases where a state does not want to effect a foreign arbitral award by invoking the state immunity principle under international law. This is a milestone in the protection of private individuals in commercial transactions with states[223]

3.7 Conclusion

The UNCITRAL Arbitration Rules and ICSID arbitration rules have embedded the cardinal principle of party autonomy which is critical in the settlement of disputes through arbitration. The comprehensive set of rules sustain the principle of agreement of parties in the conduct and selection of the applicable law of their arbitration proceedings that promotes the autonomous nature of arbitration.

ICSID arbitration includes investment disputes that widens the scope for dispute resolution and does not limit it to commercial disputes. It also provides a neutral ground for an investor to bring a claim because the proceedings are self-contained and denationalized. ICSID arbitral awards are final and are not subject to scrutiny to domestic courts because they have their own review mechanisms. It is also noteworthy that the ICSID tribunal applies domestic law and applicable rules of international law and thus the risk of bias to international law is reduced.

The New York convention is applied to promote the supervisory role of courts in the recognition and enforcement of foreign arbitral awards in domestic jurisdictions. This is a milestone in creating confidence in the international arbitration process because foreign arbitral awards become

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[222] *Sté. européenne v. Yugoslavia, Sté. Européenne, International Legal Materials, Cambridge University Press, Volume 60, Issue 4, [2021], 75.*

[223] Cappelli-Perciballi, Lionello. "The Application of the New York Convention of 1958 to Disputes Between States and Between State Entities and Private Individuals: The Problem of Sovereign Immunity." *The International Lawyer*, vol. 12, no. 1, (1978), 197–207.

enforceable without limitation. International law is robust in application because of its comprehensive rules and procedures that prevents rigidity of arbitration that promotes the delocalized nature of arbitration.

CHAPTER FOUR

FINDINGS ON THE SETTLEMENT OF THIRD-PARTY PETROLEUM DISPUTES IN KENYA

4.1 Introduction

This chapter will discuss other suitable dispute settlement mechanisms that facilitate the settlement of upstream petroleum disputes in Kenya. It will also draw its findings from chapter two and three. Chapter two has described and analysed the legal and institutional framework of the arbitration system used in the settlement of upstream petroleum disputes in Kenya while chapter three has described and analysed the role of international law in the settlement of upstream petroleum disputes through arbitration. The findings from these chapters will be discussed in line with the settlement of third-party disputes.

4.2 Domestic settlement of upstream petroleum disputes in Kenya

In Kenya, the settlement of upstream petroleum disputes is outlined in the model petroleum agreement. A scrutiny of the provisions in the Petroleum Act show that a contractor could be a corporation that is incorporated in Kenya. By this description the parties to a petroleum agreement would therefore be nationals of Kenya and as per the Arbitration Act, the arbitration would be domestic in nature. When an arbitration is domestic, the applicable law would be Kenyan law. To this extent the arbitral awards issued by an arbitral tribunal would be recognized and enforced by the national courts of Kenya.

It is also noteworthy that the dispute resolution clause in the model petroleum agreement only provides for amicable settlement, expert determination, and arbitration for the settlement of all differences and disputes in relation to upstream petroleum operations. Mediation and conciliation are alternative dispute resolution mechanisms which have been left out in the model petroleum agreement. These alternative dispute resolution mechanisms usually advocate for soft bargaining, and they are suitable for differences and disputes of a social nature.

In upstream petroleum operations, it should be noted that the contractor requires a social license to operate to prevent operational disruptions. The discovery of petroleum in a country raises the

expectations of the citizenry who expect to benefit directly from the exploitation of the natural resources. If these expectations are not handled correctly by the state and the contractor, this could lead to human rights violations and stoppage of exploration activities.

According to the United Nations guiding principles the management of human rights risks ought to be integrated during state and investor negotiations. To identify, prevent, mitigate and account for how business enterprises address human rights issues, they should carry out human right's due diligence[224]. The human rights due diligence should cover adverse human rights impacts that the business enterprise may cause or contribute to during its operations or business relationships and the same should be ongoing due to the dynamic nature of human rights risks which may evolve over time[225].To achieve this the parties should adequately prepare and have the capacity to address human rights implications of projects during negotiations. The responsibilities for the prevention and mitigation of human rights risks should be clarified and agreed upon before conclusion of the contract.

An upstream petroleum project should have an effective community engagement plan through its life cycle starting at the earliest stages. Individuals that are impacted by the project activities but not party to the contract should have access to an effective non-judicial grievance mechanism[226]. These non-judicial mechanisms should include negotiation, mediation and conciliation which are suitable for disputes of a social nature.

These mechanisms are recognized by the Constitution of Kenya and can empower communities who are often in a weaker bargaining position compared to the government and investor[227]. Social issues are best handled with the participation of all concerned citizens through the provision of a grievance mechanism which is a routinised state based or non-State-based, judicial or non-judicial

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[224] Principle 17, United Nations Guiding Principles on Business and Human Rights, HR/PUB/11/04, (2011).
[225] Principle 17, United Nations Guiding Principles on Business and Human Rights, HR/PUB/11/04, (2011).
[226] Principle 31, United Nations Guiding Principles on Business and Human Rights, HR/PUB/11/04, (2011).
[227] Kariuki F, Kerecha G, Kirwa J, "Handling Extractives Related Grievances in Kenya: A guide for Judicial Officers." Extractives Baraza, (2019).

process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought[228].

International dispute resolution mechanisms however bring a dispute to a forum far beyond the reach of domestic, administrative, or legal systems. The absence of a requirement to exhaust domestic remedies risks erroneous interpretations of domestic law without the benefit of a domestic courts interpretation if the applicable law selected by parties is international. The international tribunals that conduct international arbitration for example are closed to the public and individuals from a host state. This means thy cannot access the tribunals with ease and this hinders participation of the affected persons. In Kenya we have the NCIA whose function includes administering domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices[229]. NCIA is more accessible to third parties affected by upstream petroleum operations to participate in international dispute mechanisms.

4.3 International settlement of upstream petroleum disputes

The petroleum industry prefers international arbitration in the settlement of upstream petroleum disputes. It is considered suitable in addressing transnational rights of parties in international commercial transactions. International arbitration allows parties to select international arbitration instruments to regulate their arbitration proceedings. According to this study, the international instruments for arbitration include the UNCITRAL Arbitration Rules and the ICSID Arbitration Rules which promote the principle of party autonomy. These international instruments allow parties to select an applicable law that is suitable for their arbitral proceedings. International law is wide enough to protect transnational rights of parties because international arbitration instruments were developed due to the globalization of commercial activities.

An ad hoc arbitration system is an arbitration that is not conducted by an institution. The model petroleum agreement has outlined that all differences and disputes of parties may be resolved through arbitration and in accordance with the UNCITRAL Arbitration rules adopted by the United Nations on International Trade Law[230]. The UNCITRAL arbitration rules were developed for ad

[228] Principle 25, United Nations Guiding Principles on Business and Human Rights, HR/PUB/11/04, (2011).
[229] Section 5(b), Nairobi Center for International Arbitration Act, No. 26 of 2013, Laws of Kenya.
[230] Clause 53(1), Model Petroleum Agreement, Petroleum Act No.2 of 2019, Laws of Kenya.

hoc arbitration and to this extent the preferred arbitration system to be used by parties is ad hoc arbitration[231].

The UNCITRAL Arbitration Rules were developed with the cardinal principle of party autonomy and the realization of the globalization of commercial transactions that would require a flexible and robust arbitration system[232]. The Kenyan model petroleum agreement's arbitration clause provides that arbitration shall commence when a party sends a request to the UNCITRAL secretariat[233]. Moreover, the parties are required to send a notification to the UNCITRAL secretariat when they appoint an arbitrator, and the applicant party may request UNCITRAL to appoint an arbitrator when the defending party fails to do so[234]. This shows that the legislator has appointed UNCITRAL as an appointing Authority which is allowable under the UNCITRAL Rules[235].

Institutional arbitration is also a preferred system of arbitration because the settlement of disputes is governed by the arbitration rules adopted by the institution that is selected by parties. This makes it easier for parties because the institutions conducting the arbitration proceedings have predetermined arbitration rules and this need not be expressly provided. Parties who submit to the jurisdiction of institutions also benefit from the experience of the arbitral tribunal in settlement of disputes. The decisions made by the arbitral tribunals usually are consistent because previous decisions have a persuasive effect notwithstanding that the arbitral awards issued are case and parties' specific.

Some institutions also use the UNCITRAL Arbitration rules, and this widens the arbitration system that can be used by the arbitral tribunal. The jurisdiction of the ICSD Tribunal is invited during the selection and appointment of arbitrators. It is not clear which arbitration system is preferred whether ad hoc or institutional arbitration however one can note that the legislator appreciates international arbitration systems to facilitate the settlement of petroleum disputes.

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[231] UNCITRAL, Report on First Session (1968) para. 40; I Yearbook

[232] Lew, Mistelis, Kröll, Comparative International Commercial Arbitration, 2012.

[233] Clause 53(1), Model Petroleum Agreement, Petroleum Act No.2 of 2019, Laws of Kenya.

[234] Clause 53(4)(c), Model Petroleum Agreement, Petroleum Act No.2 of 2019, Laws of Kenya.

[235] Dietz, John P. "Introduction: Development of the UNCITRAL Arbitration Rules." *The American Journal of Comparative Law*, vol. 27, no. 2/3, (1979),449–452.

The applicable law in the arbitration clause of the Kenyan model petroleum agreement if Kenyan law[236]. This provision is usually a fundamental provision and an express selection by legislation can hinder party negotiations. It is unlikely that a state would concede the application of its own law and therefore the arbitration clause found in the Kenyan model petroleum agreement ought to provide that parties should agree on the applicable law that governs their arbitration process. This will help to cement party autonomy by giving the parties the freedom to agree upon the suitable applicable law.

Some international treaties have their own applicable law clauses in case parties do not prescribe their choice of law preference. If an arbitration agreement does not state, the applicable law concisely this may lead to the application of domestic law interpretation as witnessed in some cases as hereunder:

"In the case of *Shenzhen Food Group Co Ltd v Noble Resources Co Ltd (Singapore) (2010), 26* the parties agreed that disputes arising from the performance of the contract shall be submitted to arbitration by either side. If the purchaser is the defendant, the dispute shall be submitted to the Hong Kong International Arbitration Centre; if the vendor is the defendant, the dispute shall be submitted to The Grain and Feed Trade Association in London for arbitration. Disputes arising out of the contract shall be resolved in accordance with English law. The Supreme People's Court found that because there was neither stipulation concerning the laws applicable to the validity of the arbitration agreement nor a specific stipulation to the place of arbitration, pursuant to Article 16 of the Supreme People's Court's Interpretation of the People's Republic of China Arbitration Law (2006), the laws of the forum – i.e., the laws of the People's Republic of China would apply. It further found that while the main contract's arbitration clause referred to two arbitration institutions, the clause was still valid because it clearly identified which one of the two would be used. Thus, the People's Courts did not have jurisdiction over those disputes that were subject to the valid arbitration agreement"[237]

[236] Clause 53(8), Model Petroleum Agreement, Petroleum Act No.2 of 2019, Laws of Kenya.

[237] *Shenzhen Food Group Co Ltd v Noble Resources Co Ltd (Singapore), No 22 of the Fourth Civil Tribunal of the Supreme People's Court (9 June 2010).*

In the case of foreign investments, it is witnessed that both domestic and international law regulates arbitration. This is because the investment transactions occur in the host state's jurisdiction and equally the host state's legal system. The application of international law gives the investor confidence that the international minimum standards in the investment transactions will be observed[238]. In combining the host state law and international law in dealing with the applicable law, most bilateral investment treaties apply a formula list: (a) the host state's law: (b) the Bilateral Agreement itself as well as other treaties: (c) any contract relating to the investment: and general international law[239]. If a host state is bound by international law obligations an arbitral tribunal could rule that international law is applicable as witnessed in the case of *Antoine V Burundi*[240] where the tribunal held that:

"A complimentary relationship must be allowed to prevail. That the Tribunal must apply Burundian law is beyond doubt since this is also cited in the first place by the relevant provision of the Belgium-Burundi treaty. As regards international law, its application is obligatory for two reasons. First, because, according to the indications furnished by the Tribunal by the claimants, Burundian law seems to incorporate international law obligations which it freely assumed under the Treaty for the protection of investments"[241].

An arbitral tribunal may also apply the host state and international law taking into account the provisions of the agreement, the terms of other agreements concluded by parties, the law of the contracting party whose territory the investment was made, including its rules on the conflict of laws, and general principles of international laws[242]. In the case of *Maffezini v Spain*[243] the tribunal applied the host state law in some questions and international law in some questions. The tribunal applied international law for the question of attribution[244], and the Spanish Law on Public Administration and Common Administrative Procedure to elucidate the structure and functions of

[238] Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law, Second Edition, Oxford University Press, Page 288.
[239] Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law, Second Edition, Oxford University Press, Page 290.
[240] *Antoine Goetz v Burundi, Award, 10 February 1999.*
[241] *Antoine Goetz v Burundi, Award, 10 February 1999, 98.*
[242] *Argentina-Spain Bilateral Investment Treaty, 13 November 2000.*
[243] *Maffezini v Spain, Award,13 November 2000.*
[244] *Maffezini v Spain, Award,13 November 2000, 50,52,57,77,83.*

the entity[245]. On the issue of an environmental impact assessment, the tribunal applied international law[246], Spanish legislation,[247]a European Community directive,[248] and the Bilateral Investment Treaty.

The development of third-party participation in the arbitral process, the submissions of amicus curiae briefs, has occurred in ICSID arbitrations[249]. ICSID arbitration is governed by the ICSID Convention and ICSID Arbitration Rules. The recognition of the need to harmonize trade and environmental objectives and to encourage public discussion and debate regarding these issues has led investment treaty arbitration to depart from rules and practices that govern international commercial arbitration[250].

4.3.1 ICSID Arbitration cases

1. *Aguas del Tunari, SA v Republic of Bolivia*[251]

"The dispute arose out of Bolivia's privatization of water and sewage services, the concession for which was awarded to the claimant. The claimant commenced the project, but soon faced strong opposition and protests by citizens and eventually abandoned the project. The claimant then filed the claim arguing, inter alia, that the Bolivian government breached various provisions of the Netherlands/Bolivia BIT through various acts and omissions including the rescission of the concession. In August 2002, several environmental NGOs and individuals filed petitions for status as amicus curiae.48 Their requests included: (a) standing to participate as parties; (b) submission of amicus curiae briefs; (c) attendance at all hearings; and (d) public disclosure of the materials of the case. However, the tribunal rejected all these requests. In a letter from the president of the tribunal,49 he stated that the tribunal unanimously decided that the requests were 'beyond the power or the authority of the Tribunal to grant'. According to the tribunal, 'it is manifestly clear' that it does not have the power to grant the request for access to hearings and the documents of the

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[245] *Maffezini v Spain, Award,13 November 2000,47-49.*
[246] *Maffezini v Spain, Award,13 November 2000,67.*
[247] *Maffezini v Spain, Award,13 November 2000,68,69*
[248] *Maffezini v Spain, Award,13 November 2000,69*
[249] Ishikawa T., "Third Party Participation in Investment Treaty Arbitration", *The International and Comparative Law Quarterly,* Vol. 59, No. 2, (2010), 373-412
[250] Ishikawa T., "Third Party Participation in Investment Treaty Arbitration", *The International and Comparative Law Quarterly,* Vol. 59, No. 2, (2010), 373-412
[251] *Aguas del Tunari, SA V Republic of Bolivia ICSID case No. ARB/02/3*

proceedings without the agreement of the parties. As for the request for the amicus curiae submission, the arbitrators were of the view that 'there is not at present a need to call witnesses or seek supplementary non-party submissions at the jurisdictional phase of its work'. The proceedings of this case were discontinued in March 2006 at the request of both parties, following the settlement of the dispute”[252].

2. *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v Argentine*[253]

“This is the first case in which the tribunal acknowledged that it has the power to accept amicus curiae submissions under the ICSID Convention. The dispute related to the privatization of the public service of water provision. The claimants argued that certain measures the Argentine government adopted in response to Argentina's economic and financial crisis injured their investments. Five NGOs filed a 'Petition for Transparency and Participation Amicus Curiae', in which they made several requests to the tribunal including: (a) access to the hearings; (b) an opportunity to submit amicus curiae briefs; and (c) unrestricted access to the materials of the case. The tribunal issued an order on 19 May 2005 and concluded that it had the power to accept amicus curiae sub missions under article 44 of the ICSID Convention. The tribunal explained the virtue of accepting *amicus curiae* submissions as follows: The acceptance of amicus submissions would have the additional desirable consequence of increasing the transparency of investor-state arbitration. Public acceptance of the legitimacy of international arbitral processes, particularly when they involve States and matters of public interest, is strengthened by increased openness and increased knowledge as to how these processes function...through the participation of appropriate representatives of civil society in appropriate cases, the public will gain increased understanding of ICSID processes”[254].

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[252] Ishikawa T., “Third Party Participation in Investment Treaty Arbitration”, *The International and Comparative Law Quarterly,* Vol. 59, No. 2, (2010), 382

[253] *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v Argentine (Order in response to a petition for Transparency and Participation as Amicus curiae of 19 May 2005) ICSID Case No. ARB/03/19.*

[254] Ishikawa T., “Third Party Participation in Investment Treaty Arbitration”, *The International and Comparative Law Quarterly,* Vol. 59, No. 2, (2010), 382-383

4.4 Conclusion

The domestic settlement of third-party disputes is preferable in the context of petroleum disputes because aggrieved parties can access local institutions with ease as opposed to an international institution which may be far away and difficult to access. There is also comfort that local institutions are better placed at interpreting and domestic law that would reduce the risk of bias. It is also notable that international tribunals such as ICSID Tribunal have embraced the participation of a third party as an *amicus curiae* but the same is not automatic and is limited to public interest.

The settlement of third-party petroleum disputes is preferable through alternative dispute resolution mechanisms such as mediation, reconciliation, and traditional dispute mechanisms because it allows active participation of third parties affected by the activities under a petroleum agreement. Equally, in Kenya, the Constitution provides that the judiciary shall be guided by the principles of reconciliation, arbitration, mediation, and traditional dispute mechanisms[255]. This enhances the supportive role of courts in applying alternative dispute resolution mechanisms in settling disputes.

[255] Article 159(2), Constitution of Kenya, 2010, Laws of Kenya.

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSIONS.

5.1. Introduction

This chapter presents the findings and analysis of data reviewed, conclusions and recommendations for this research. The methodology and objectives of this research were recognized during the review of data and implemented. The data reviewed was journal articles, Kenyan laws that guide upstream petroleum operations and arbitration, the provisions of the UNCITRAL Arbitration Rules, the ICSID Arbitration Rules, the Convention on the Recognition and enforcement of Foreign Arbitral awards and notable international case law on arbitration. The findings will further be conferred to identify if the study questions and objectives were adequately addressed and satisfied. The findings are presented in two sections as follows: applicable law and party autonomy.

The research was based on a critical analysis of the arbitration provisions contained in the model petroleum agreement anchored in the Petroleum Act. It also involved a critical analysis of the UNCITRAL Arbitration Rules, ICSID Arbitration rules and the New York Convention. The research was divided into five chapters for logical flow of the study.

The first objective of the study was to examine the suitability of the arbitration provisions provided in the model petroleum agreement in the settlement of upstream petroleum disputes in Kenya. The preferred arbitration that is provided is ad hoc arbitration because there was no selection of a specific institution to conduct the proceedings. This study found that the arbitration clause invites the UNCITRAL and ICSID tribunal to select arbitrators. Firstly, The UNCITRAL can be selected by parties to be an appointing authority, however it does not conduct arbitration proceedings.

The need to send a non-specific request before the commencement of arbitral proceedings to UNCITRAL is unclear. Secondly, this study has established that institutional international arbitration may be suitable for the settlement of upstream petroleum disputes however the selection of the arbitration system should be left to the agreement of parties. Moreover, institutions that conduct international arbitration such as ICSID have a set of existing rules that guide arbitration proceedings and therefore there is also no need of outlining the rules or conduct of proceedings.

This study has found that the arbitration provisions in the model petroleum agreement are not suitable because the preferred arbitration system cannot be categorically construed.

This study finds that the arbitration clause provision outlining the applicable law as Kenyan law fails to recognize the nature of upstream petroleum operations which is usually between a state and a contractor who is a joint venture. A joint venture may include a national corporation as the lead operator and international corporations as non-operators. Joint ventures are established to spread the high risk of upstream petroleum operations to parties who own a participating interest in the joint venture. The petroleum industry is global in nature, and it requires parties to adhere to internationals standards in the exploration, production, and development of petroleum for it to attract a viable market. The oil that goes for production is also sold in the international market and the benefits accrue to the state and the contractor as per the production sharing contract.

This study established that delocalising arbitration would help prevent the application of stringent provisions of domestic law. The parties to a petroleum agreement should therefore determine and agree upon the applicable law which would be preferable to all parties taking into consideration their interests in the suitable arbitration system that would facilitate the settlement of upstream petroleum operations in a flexible and expeditious manner.

The Petroleum Act[256] provides that all differences and disputes should be solved amicably in the first instance. If amicable resolution does not work, parties may call for expert determination or arbitration in lieu of expert determination. This study has established that there are disputes or differences which are not amenable for resolution through arbitration. This includes disputes include third parties such as disputes between the community and the contractor. An arbitration process is a private process between parties to a particular contract and does not involve third parties. Disputes between the community and the contractor are inevitable and there ought to be a dispute resolution mechanism that address such disputes and differences.

This study also finds that the Kenyan model petroleum agreement is an essential model agreement to be negotiated by the state and an investor who is desirous of undertaking upstream petroleum operations. As much as there is a possibility of the parties departing from what has already been provided after negotiations, there are some arbitration provisions which are difficult to negotiate.

[256] Section 53, Petroleum Act, Kenya Laws of Kenya.

A choice of law provision is a fundamental arbitration provision that guides an arbitration process. If this arbitration provision is already pre-determined in a model petroleum agreement, it would be difficult to derogate from what is provided. The state is a party to this petroleum agreement and would therefore champion the law of the state.

Conversely, the investor usually gets an upper hand during negotiations because he shoulders the total financial burden and risk of the upstream petroleum operations and thus has a higher bargaining power. The ability of the investor to fundamentally change the arbitration provisions in the model petroleum agreement brings into question the legal status of the model petroleum agreement anchored in legislation. It also brings into questions whether the arbitration provisions in the model petroleum agreement are suitable as drafted and would be generally acceptable to both the contractor and state in the context of upstream petroleum activities.

The second objective was to interrogate whether arbitration provisions contained in international instruments are apt in the settlement of upstream petroleum disputes in Kenya. The study established that international arbitration is preferred in the petroleum industry because it is a dynamic dispute resolution mechanism. Notwithstanding, the principle of party autonomy is extensively anchored in international law which is universally accepted by parties.

The UNCITRAL arbitration Rules and the ICSID arbitration rules selected as sources of international law discussed in the study show that party autonomy takes center stage in arbitration because the agreement of parties' guides everything in the arbitration process from the selection of an arbitral tribunal, the rules of forum applied by the arbitral tribunal in conducting proceedings and the final determination made by the arbitral tribunal.

The use of international law for the settlement of petroleum disputes according to the autonomous theory of arbitration will create a flexible and non-national system regulation of the commercial dispute by way of arbitration. The goal should be the settlement of a dispute in a flexible and timely manner and by mutual acceptance and cooperation of parties. This supports the autonomous theory of arbitration which looks at this as the goal of arbitration and opines that international law can be tailored to fit the needs of parties because it respects the cardinal doctrine of party autonomy.

This study has found that party autonomy helps to protect transnational rights of parties where a contractor is a joint venture that constitutes international corporations. The agreement by parties

facilitates the suitability of arbitration provisions and makes them effective in the settlement of disputes in upstream petroleum disputes. The settlement of existing and future disputes is expedited because party autonomy promotes co-operation of parties whilst protecting their interests.

International law provides a wider set of rules that would facilitate the settlement of upstream petroleum disputes because it does not confine parties to domestic law provisions and interpretations. International bodies that apply international law in the settlement of upstream petroleum disputes have also adjudicated upon numerous cases that expose them to the real issues faced by the industry.

This study also finds that international arbitration instruments are developed with party autonomy principles in mind and thus are preferred by disputing parties. An arbitration agreement should therefore include the agreement of parties on all issues such as the selection of the rules of forum, the selection of the applicable law, the selection of the arbitral tribunal, the conduct of proceedings, the place of arbitration and the seat of arbitration.

This study has found that the applicable law is fundamental in arbitration proceedings because it influences the legal order used by the arbitral tribunal in conducting the arbitration proceedings d. It also influences the recognition and enforcement of arbitral awards. The applicable law is also fundamental where parties have not expressly provided certain terms and conditions in the arbitration agreement because the same influences the arbitral tribunal when it becomes an *amiable compositeurs*.

The applicable law clause should therefore provide that parties will agree upon the applicable law to be applied regarding the arbitration agreement to cement party autonomy. Prescribing an applicable law in the arbitration clause of the model petroleum agreement would interfere with party autonomy and consequently the delay negotiations between parties because the same is a fundamental provision in an arbitration agreement. The applicable law guides the arbitral tribunal in the interpretation of the arbitration provisions that are espoused in the arbitration agreement.

Nonetheless, this study also established that the New York Convention which is a source of international law, provides for the recognition and enforcement of foreign awards. This means that awards made outside the territory of a state are recognized as final and binding and domestic courts

would enforce them when called upon. This flexibility allows parties to have their seat of arbitration in any place and the awards made by an arbitral tribunal will be recognized and enforced by domestic courts of states who are parties to the New York Convention.

This study also finds that international bodies such as UNCITRAL and ICSID are selected as appointing authorities in the arbitration clause of the model petroleum agreement. The need to choose these international bodies instead of local arbitration centers that undertake or facilitate international arbitration is still unclear. It is noteworthy that there exists the Nairobi Center for International Arbitration established under the Nairobi Center for International Arbitration Act whose role includes facilitating international arbitration by offering parties technical and administrative assistance[257] .

5.3 Recommendations

The third objective of the study was to recommend proposals to the arbitration provisions contained in the model petroleum agreement and policy interventions that would enhance the settlement of disputes in the upstream petroleum industry in Kenya. The study recommends the following:

1. The arbitration clause should be amended to include a provision which states that parties will agree upon whether they will undertake ad hoc arbitration or institutional arbitration for the settlement of their differences or disputes and the corresponding legal instrument that will regulate the arbitral proceedings.
2. The arbitration clause should also be amended to prescribe that parties will agree upon the applicable law that will regulate their arbitration agreement.
3. The Petroleum Act should be amended to prescribe that differences and disputes in relation to or in connection with the contract that involves a third party shall be resolved through negotiations, mediation, or conciliation in the first instance.
4. A policy should be developed by the Kenyan Government to guide negotiations between the state and an investor in petroleum agreements.

[257] Section 5(j), Nairobi Center for International Arbitration Act, No. 6 of 2013, Laws of Kenya.

5. The Kenyan Government should undertake institutional reforms to remove dependence of the state on foreign capital and technical skills to provide better management of petroleum contracts.
6. Further research is required to scrutinize the legal status of the model petroleum agreement anchored in legislation.

5.4 Conclusions

The conclusion of this chapter is based on the findings of chapters based on the literature reviewed in previous chapters and in particular chapter one, two and three and four. From the study it can be concluded that party autonomy is very fundamental in attaining a successful arbitration process because of mutual agreement and cooperation of parties. The nature of upstream petroleum operations involves transnational rights of parties, and this helps to determine the suitable applicable law for arbitration clauses. Parties to an arbitration agreement should select the arbitral system and the choice of law that will be applied by an arbitral tribunal during arbitration.

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APPENDICES

Appendix A: Plagiarism Report

Ouriginal

Document Information

Analyzed document	ARBITRATION OF OIL AND GAS DISPUTES IN THE UPSTREAM PETROLEUM SECTOR IN KENYA A CRITICAL APPRAISAL.docx (D135683034)
Submitted	2022-05-06T16:50:00.0000000
Submitted by	
Submitter email	Connie.Ngachu@strathmore.edu
Similarity	5%
Analysis address	library.strath@analysis.urkund.com

Sources included in the report

Appendix B: Ethical Clearance Report

15th November 2021

Ms Ngachu Connie,
connie.ngachu@strathmore.edu

Dear Ms Ngachu,

RE: Arbitration of Oil and Gas Disputes in the Upstream Petroleum Sector in Kenya: A Critical Appraisal

This is to inform you that SU-IERC has reviewed and **approved** your above **SU-master's** research proposal. Your application reference number is **SU-IERC1220/21**. The approval period is **15th November 2021 to 14th November 2022**.

This approval is subject to compliance with the following requirements:

i. Only approved documents including (informed consents, study instruments, MTA) will be used

ii. All changes including (amendments, deviations, and violations) are submitted for review and approval by SU-IERC.

iii. Death and life-threatening problems and serious adverse events or unexpected adverse events whether related or unrelated to the study must be reported to SU-IERC within 48 hours of notification

iv. Any changes, anticipated or otherwise that may increase the risks or affected safety or welfare of study participants and others or affect the integrity of the research must be reported to SU-IERC within 48 hours

v. Clearance for export of biological specimens must be obtained from relevant institutions.

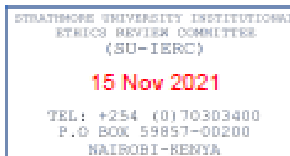
vi. Submission of a request for renewal of approval at least 60 days prior to expiry of the approval period. Attach a comprehensive progress report to support the renewal.

vii. Submission of an executive summary report within 90 days upon completion of the study to SU-IERC.

Prior to commencing your study, you will be expected to obtain a research license from National Commission for Science, Technology, and Innovation (NACOSTI) https://research-portal.nacosti.go.ke/ and obtain other clearances needed.

Yours sincerely,

for: Prof Fred Were,
Chairperson; SU-IERC



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