

**DISSENTING OPINIONS IN ARBITRAL AWARDS IN KENYA: POTENTIAL
BENEFITS AND CHALLENGES**

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Declaration

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

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

[Supervisor's Name]

Abstract

Dissenting opinions are a common feature of multipartite common law and International tribunals. More often than not they are expressions of disagreement by members of the tribunal and they seek to convince the majority of the existence of a different logicity. Although they lack the force of law, dissenting opinions have played a role in the development of law by informing future generations, furthermore, dissenting opinions allow judges to exercise; intellectual integrity and judicial independence. The benefits of dissenting opinions in superior state courts and international adjudicatory bodies are obvious. What is much less obvious are the benefits of dissenting opinions in arbitration, especially domestic multipartite arbitration. This research paper proposes that the process of arbitration may actually benefit from dissenting opinions rendered in multipartite tribunals. Furthermore, this research explores the challenges posed by dissenting opinions in arbitration.

This research will seek to look at the various statutes and instruments in Kenya and how dissenting opinions in arbitral awards can be rendered within that framework. It will also move a step further and look into how other jurisdictions and international arbitration institutions response to dissenting opinions in arbitral awards.

The research methodology applied in this paper is the review of literature dealing with dissenting opinions and awards. It will also employ the use of historical analysis and comparative analysis.

As will be revealed by the paper embracing dissenting opinions in multipartite arbitration does offer potential benefits such as improved awards, maintenance of intellectual integrity and they have proved beneficial to parties challenging awards and appellate courts. The challenges posed by dissenting opinions in arbitral awards include an increase in the likelihood that the losing party will challenge the award, they also risk violating the secrecy of violations and there is the risk that party appointed arbitrators will misuse them to appease their appointing parties. the paper will recommend that these risks can be offset by a comprehensive code of ethics and that dissenting opinion should be expressly provided for.

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List of Abbreviations

CIArb- Chartered Institute of Arbitrators

I.C.A-International Court of Arbitration

I.C.C- International Chamber of Commerce

I.C.J-International Court of Justice

I.C.S.I.D- International Centre for Settlement of Investment Disputes

L.C.I.A-London Court of Arbitration

U.N.C.I.T.R.A.L- United Nations Commission on International Trade Law

W.I.P.O- World Intellectual Property Organisation

List of International Instruments

Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Convention on the Settlement of Investment Disputes between states and nationals of other states

UNCITRAL Model Law on International Commercial Arbitration

International Chamber of Commerce Arbitration Rules

List of National Instruments

Arbitration Act (Act No. 4 of 1995)

Arbitration Act 1968 (repealed)

Civil Procedure Act (Act No. 12 of 2012)

Constitution of Kenya, (2010)

The Investment Disputes Convention Act (Act No. 31 of 1966)

List of Cases

B v A [2010] EWHC 1626

Brown v Board of Education 347 U.S. 483 (1954)

Cargill International S.A. Antigua and Another v Sociedad Iberica De Molturacion S.A. And Others [1998] 1 Lloyd's Rep. 489

Certain Norwegian Loans, (France v Norway), Judgment, Jurisdiction [1957] ICJ Rep 9.

F v M [2009] EWHC 275 (TCC)

Fraport AG Frankfurt Airport Services Worldwide v Philippines ICSID Case No. ARB/03/25, (Aug. 16, 2007) (Award)

CGU v AstraZeneca [2006] EWCA 1340

Helnan International Hotels A/S v Arab Republic of Egypt ICSID Case No. 05/19, 125, (July 3, 2008)

Kenya Oil Company Limited & Anor v Kenya Pipeline Company Limited [2014] eKLR

Kundan Singh Construction (Kundan) v Tanzania National Roads Agency (the Agency) [2013] eKLR

Nyutu Agroviet Limited v Airtel Networks Limited [2015] eKLR

Mytilineos Holdings SA v The State Union of Serbia & Montenegro and Republic of Serbia (I), Permanent Court of Arbitration

Plessey v Ferguson 163 U.S. 537 (1896)

SA Chopee-Lavalin NV and Voest-Alpine AG v Ken-Ren Chemicals and Fertilisers Limited (in liquidation in Kenya) [1995] 1 A.C. 38

Schweizerisches Bundesgericht, Judgment of 25 May 1992, 4P.23/1991

Schweizerisches Bundesgericht, Judgment of 18 March 2010, 4A_584/2009

Stanbic Bank Kenya Limited v. Kenya Revenue Authority [2009] eKLR

Stinnes Interoil GmbH v Halcoussis & Co [1982] 2 Lloyd's Rep 445

S.S. Lotus (France v Turkey), 1927 P.C.I.J. (series A) No. 10 (Sept. 7)

X and Y v Z, Schweizerisches Bundesgericht, decision of 19 June 2006, 4P.74/2006

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CHAPTER ONE

Introduction to the Study

1.1.Introduction

Arbitration has been described as a private consensual process where parties in dispute agree to present their grievances to a third party for settlement.¹ Several benefits have been attributed to arbitration chief of which is that it accords the parties a substantial amount of control over the proceedings.² One of the ways in which the parties exercise this control by determining the composition of the arbitral tribunal.³ Section 12 of the Arbitration Act envisions a tribunal with either three or two arbitrators, or a sole arbitrator. Where there is tribunal consisting of three arbitrators, each of the parties shall select an arbitrator and the two arbitrators shall select the third member of the tribunal. Where the tribunal is made up of two arbitrators, each party shall select one arbitrator.⁴ Section 30(1) of the Arbitration Act recognizes majority decisions of the tribunal; if majority of the tribunal is convinced by a parties argument an award is delivered in their favour.⁵ The recognition of a majority's decisions and not unanimous decisions leaves room for dissenting opinions by the minority. A dissenting opinion is defined as an opinion in which a judge (in this case an arbitrator) announces his dissent from the conclusions held by the majority of the court and expounds his own views.⁶ Such a separately expressed opinion can differ from the majority opinion for its reasoning, or reasoning and the conclusion.⁷ The legislation governing arbitration in Kenya provides no express exclusion of dissenting opinions by arbitrators. Although Article 48 of the Investment Disputes Convention Act⁸ (which is an act

¹ Khan F, 'Alternative Dispute Resolution', A paper presented Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.

²Muigua K, 'Emerging Jurisprudence in the Law of Arbitration in Kenya: Challenges and Promises' available at <http://www.kmco.co.ke/attachments/article/122/Emerging%20Jurisprudence%20in%20the%20Law%20of%20Arbitration%20in%20Kenya.pdf>, 7 on 23 February 2016.

³ Section 11, *Arbitration Act* (Act No. 4 of 1995).

⁴ Section 12, *Arbitration Act* (Act No. 4 of 1995).

⁵Section 12(1), *Arbitration Act* (Act No. 4 of 1995) states "Unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members."

⁶ Black H C and Nolan J R, '*Black's Law Dictionary*' 5ed, West Publishing Company, St Paul Minnesota, 1990,385.

⁷ Peltzer O, 'Dissenting opinion in arbitration', *Lang*, 2000, 17.

⁸ *The Investment Disputes Convention Act* (Act No. 31 of 1966).

enacted to give legal effect to provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of other States) does recognize the right of the arbitrator to issue individual opinion to the award, whether he dissents from the majority or not.⁹

It is undeniable that dissenting opinions in international and domestic courts can contribute to the development of law but unlike the arbitration tribunals which are not bound by precedent thus it is less obvious how dissenting opinions could serve any such purpose in arbitration, where the principle of confidentiality, is usually thought to weigh against publication of awards and dissenting opinions.¹⁰ What is then the role of dissent in arbitration? Should this be encouraged, tolerated or altogether prohibited?

By reviewing relevant literature, laws both domestic and international and finally best practices from other jurisdictions on arbitration. This paper will explore the potential role of dissents in arbitration. Furthermore, the paper shall investigate the challenges that may be attributed to dissents in arbitration.

1.2. Background to the problem

Dissenting opinions in domestic courts are common in courts of superior record, especially tribunals not constituted by one member. Where the tribunals have more than one adjudicator the principle of majority applies, for example Order 42, rule 30 of the Civil Procedure Act provides that where the court is composed of more than one judge the decree of the court shall be drawn in accordance with the conclusions of the majority.¹¹ This leaves the dissent issued without the force of law and thus they cannot be binding in nature. Arguments have been made that such dissents do have a role to play in developing the law. Dissenting opinions offer judges a means of exercising their judicial independence. Former Court of Appeal Justice, Joseph Nyamu reiterated this fact in *Stanbic Bank Kenya Limited v. Kenya Revenue Authority* by stating:

“First in my view, dissenting judgments constitute an expression of independence, freedom of thought and intellect and, second, they may lay the basis for future

⁹Article 48, *The Investment Disputes Convention Act* (Act No. 31 of 1966).

¹⁰ Mosk R and Ginsburg T, ‘Dissenting Opinions in International Arbitration’ *Liber amicorum Bengt Broms: celebrating his 70th birthday, 16 October 1999*, Finnish Branch of the International Law Association (1999), 259-284, 268.

¹¹ Order 42, Rule 30, *Civil Procedure Act* (Act No. 12 of 2012).

development of the law. Third, they may provide a firm base for future generations not to contain themselves in strait jackets, but to always remember that at the end of the day, that much sought justice might after all not be in the thunder of the majority judgment, but in the silent breeze of the minority judgment!”¹²

On the importance of dissenting opinions to future generations, Chief Justice Hughes, a former U.S. Supreme Court Judge stated the following:

“A dissent in a Court of last resort is an appeal . . . to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.”¹³

The American Supreme court case of *Plessey v Ferguson*¹⁴ illustrates this notion of “intelligence of the future.” In the decision, the majority invalidated a federal law entitling “citizens of every race and colour” to the “full and equal enjoyment” of modes of transportation and places of public accommodation. Justice Harlan in his dissenting, he wrote,

“There cannot be, in this republic, any class of human beings in practical subjection to another class.”¹⁵

Justice Harlan’s dissent was a vital component of the decision to desegregate schools in America in the case of *Brown v Board of Education*.¹⁶ Justice Scalia commented that such dissenting opinions “augment rather than diminish the prestige of the Court.”¹⁷

He explained: “When history demonstrates that one of the Court’s decisions has been a truly horrendous mistake, it is comforting . . . to look back and realize that

¹² [2009] eKLR.

¹³ Chris Hughes, *The Supreme Court of the United States*, 1936, 68.

¹⁴ 163 U.S. 537 (1896).

¹⁵ 163 U.S. 537 (1896).

¹⁶ 347 U.S. 483 (1954).

¹⁷ Scalia A, ‘Dissents’, 13 *Organization of American Historians Magazine of History* (1998), 19, available at <http://www.oah.org/pubs/magazine/judicial/scalia.html> on 23 February 2016.

at least some of the Justices saw the danger clearly and gave voice, often eloquent voice, to their concern.”¹⁸

In England, such dissents have also contributed to the development of law. Lord Mustill’s dissenting opinion in *SA Chopee-Lavalin NV and Voest-Alpine AG v Ken-Ren Chemicals and Fertilisers Limited (in liquidation in Kenya)*¹⁹ illustrates this fact. The contention of the case was whether or not the court could make orders for security for costs in an International arbitration held under the International Chamber of commerce arbitration rules. The majority of the Justices were in consensus that the court possessed the discretionary power to make an order for cost .In His dissenting opinion Lord Mustill, presented the view that such an order was contrary to the procedure that the parties had chosen to ensure the protection of their rights and that an application that was in breach of such party autonomy should be denied.²⁰ A year later this dissenting view was reflected in the English Arbitration Act of 1996.²¹

In the sphere of international law, the situation becomes more complex. Unlike domestic courts which are governed by one particular legal system civil law or common law, international courts and instruments are not bound by one particular legal system. As illustrated in the paragraph above dissenting opinions in common law have a role to play in developing the law, allow judges to exercise their judicial independence. In civil law countries, it is quite different, decisions are usually very short and declaratory of the law rather than explanatory. In countries such as France, Belgium, Netherlands, Italy and most other civil law countries, dissents are prohibited.²² Such a distinction between the two legal systems fails to reflect the reality of international courts and tribunals which embrace the diversity of the two legal systems in their judicial procedure.²³ Article 9 of the International Court of Justice statute codifies this fact as it provides “At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the

¹⁸Scalia, ‘Dissents’, 19.

¹⁹ [1995] 1 A.C. 38.

²⁰ [1995] 1 A.C. 38.

²¹Section 61 (2) , Arbitration Act 1996 (United Kingdom), “Unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs.”

²² Kirby M D, ‘Judicial Dissent-Common Law and Civil Law Traditions’, 123 *Law Quarterly Monthly* (2007), 382-423, 389.

²³ Kirby, ‘Judicial Dissent-Common Law and Civil Law Traditions’, 389.

representation of the main forms of civilization and of the principal legal systems of the world should be assured.”²⁴ Dissenting opinions as featured in international law reflect this diversity. Dissenting opinions featured in the decisions of the International Court of Justice have also led to the development of international law.²⁵ For example in the *lotus case*²⁶, the Justices of The permanent Court of International justice were greatly divided which led to the realization that international law was deficient in nature as concerns extension of national liability to crimes committed in the high seas which eventually led to the development of law.²⁷ Another example of the persuasive power that dissents possess is seen in the *Norwegian loans case*; Judge Lauterpacht’s denounced the “automatic” reservations in the declarations accepting the International Court’s compulsory jurisdiction. This altered the attitudes of governments stopping the trend of including such reservations in new declarations even resulting in several states abandoning them from their declarations.²⁸

The Arbitration Act, 1995 defines arbitration to mean any arbitration whether or not administered by a permanent arbitral institution.²⁹ This definition is very nebulous and fails to capture the essence of arbitration; a more appropriate one would be that arbitration is a private dispute resolution mechanism where parties in dispute consensually agree to present their grievances to a neutral third party who will subsequently make a binding decision.³⁰ It is undeniable that dissenting opinions in international and domestic courts can contribute to the development of law. However, it is less obvious how dissenting opinions could serve any such purpose in arbitration where confidentiality of proceeding is essential and there is no formal system to publish the awards rendered. Furthermore, the review of arbitral decisions is done on very limited grounds.

²⁴ Article 9, *The Statute of The International Court of Justice* (1945).

²⁵ Anand, ‘The Role of Individual and Dissenting Opinions in International Adjudication’, 14 *International And Comparative Law Quarterly*, (1965), 788-808, 802.

²⁶ *S.S. Lotus (France v Turkey)*, 1927 P.C.I.J. (series A) No. 10 (Sept. 7).

²⁷ Anand, *The Role Of Individual And Dissenting Opinions In International Adjudication*, 725.

²⁸ *Certain Norwegian Loans, (France v Norway)*, (1957) ICJ Rep 9.

²⁹ Section 3, *Arbitration Act* (Act No. 4 of 1995).

³⁰ Khan F, *Alternative Dispute Resolution*, A paper presented Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.

1.3. Problem Statement

It is undeniable that dissenting opinions in international and domestic courts can contribute to the development of law. What is less obvious is the potential benefits of dissenting opinions in arbitration, where the proceedings are predominantly confidential and awards are generally not published. Furthermore, the review of arbitral decisions is done on very limited grounds.

1.4. Theoretical Framework

The process of arbitration involves; referring an identifiable dispute or controversy between parties to one or more persons for final decision.³¹ Arbitration can be divided into two forms, *ad hoc* and institutional. Institutional arbitration is arbitration administered by arbitral institution while *ad hoc* arbitration is administered by the arbitral tribunal itself.³² The nature of arbitration has been greatly discussed and two main theories have been elaborated; the contract theory and the judicial theory.

1.4.1. Contract Theory

The basic assumption of this theory is that the basis of an arbitrator's power to hear and resolve disputes is the consent and agreement of the parties.³³ This approach posits that unlike courts arbitral tribunals do not interpret or articulate the law rather they attempt to determine the will of the parties arising from the corresponding contractual relationship which is the source of the dispute.³⁴ This theory proposes that the arbitrator's powers are derived from the legal nexus between the contracting parties. Therefore, party autonomy is essential in determining both the substantial and procedural law governing arbitration according to this thesis.

1.4.2. Judicial Theory

The Judicial theory is the opposite of the contract theory. According to the judicial theory, arbitration is akin to litigation and the purpose of such proceedings is the determination of laws

³¹ Carlston K S, 'Theory of the Arbitration Process', 17 *Law and Contemporary Problems*, (1952), 631-652, 631.

³² Sammartano M R, '*International Arbitration: Law and practice*', 1ed, Kluwer Law International, Hague, 2001, 4.

³³ Belohlavek A, 'The legal nature of international Commercial Arbitration and the Effects of Conflict Between Legal Cultures', 2, *Law Legal Journal of Ukraine*, , (2011), 18-30, 18.

³⁴ Belohlavek, 'The legal nature of international Commercial Arbitration and the Effects of Conflict between Legal Cultures', 18.

after which an authoritative conclusion is arrived at.³⁵ It is based on the idea that arbitration is an adversarial proceeding similar to litigation and that the arbitrator's power is donated by the state.³⁶ This theory does seem to have some foundation since the state retains a regulatory function with respect to arbitration, for example, their power to enforce awards and appellate powers in setting aside of awards. Furthermore, this thesis supports the idea that arbitration tribunals despite their private nature derive their power from the constitution of Kenya 2010 as with all other dispute resolution mechanisms and therefore are bound by the principles enshrined within.

1.5. Literature Review

1.5.1. Dissenting opinions in international arbitration

Richard M. Mosk and Tom Ginsburg push forward the argument that dissenting opinions can improve the legitimacy of international arbitration and thus they do offer significant benefits that offset the risks posed.³⁷ Noting the prevalence of dissenting opinions in international arbitration they conclude by saying that they should be addressed in the procedural rules and codes of ethics.

Veit Öhlberger and Christoph Stippl address several challenges that arise in multipartite arbitral tribunals internationally and domestically in Austria.³⁸ In the article they the lack of unanimity in such tribunals may be attributed to disagreement on the outcome or disagreement on the reason for the outcome.³⁹

Ioan Schiau addresses the issue of the legal fate of dissenting opinions (in terms of usefulness, effects and procedural aspects), as provided for in various arbitration regulations. He states that

³⁵ Belohlavek, 'The legal nature of international Commercial Arbitration and the Effects of Conflict between Legal Cultures', 19.

³⁶ Belohlavek, 'The legal nature of international Commercial Arbitration and the Effects of Conflict between Legal Cultures', 19.

³⁷ Mosk and Ginsburg, 'Dissenting Opinions in International Arbitration', 28.

³⁸ Öhlberger V and Stippl C, 'Rendering of the Award by Multipartite Arbitral Tribunals, How to Overcome Lack of Unanimity?', *Austrian Arbitration Yearbook 2008*, (2008), 371-399.

³⁹ Öhlberger and Stippl, 'Rendering of the Award by Multipartite Arbitral Tribunals, How to Overcome Lack of Unanimity?' 372.

there is a requirement for more precise rules regarding the delivery, recording, communication and effects of dissenting opinions.⁴⁰

International Chamber of Commerce's Commission on International Arbitration through the Working Party on Dissenting Opinions addresses the issue stating that it was it is neither practical nor desirable to attempt to suppress dissenting opinions in ICC arbitrations.⁴¹

Alan Redfern also addresses the issue stating that dissenting opinions risk breaching the confidentiality of the tribunal's deliberations. Furthermore, they also risk undermining the authority of the tribunal's award and in the process add little or nothing to the reputation of international commercial arbitration.⁴² He does acknowledge that there is a relaxed attitude towards dissenting opinions in tribunals and by arbitrators.⁴³

1.5.2. Dissent in Investment tribunals

Albert Jan Van Den berg is critical of dissenting opinions in investment tribunals citing empirical evidence that party-appointed arbitrators are more likely to issue dissenting opinions. This work is important in evaluating some of the challenges presented by the dissenting opinions by party-appointed arbitrators⁴⁴

Catherine Rogers analyses the limitations and potential contributions of empirical research to the development of investment arbitration.⁴⁵ 'This article analyses the empirical evidence provided by Albert Jan Van Den Berg in 'Dissenting opinions by Party-Appointed Arbitrators'.

Charles Brower and Charles Rosenberg react to a study published in 2009 by Albert Van Den Berg in which he reported that 100 per cent of the dissenting opinions issued in investment

⁴⁰ Schiau I, 'Disagreeing on Parties' Disagreement: The Arbitral Award and the Dissenting Opinion', *Legal Practice and International Laws*, WSEAS Press, (2011), 141-146, 146.

⁴¹Final Report on Dissenting and Separate Opinions of the Working Party on Dissenting Opinions and Interim and Partial awards of the ICC Commission on International Arbitration, Adopted by the Commission on April 21, 1988. Available at www.iccdri.com on 23 February 2016.

⁴² Redfern A, 'Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly, 20 *Arbitration International*, (2004), 223-242, 223.

⁴³ Redfern, *Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly*, 242.

⁴⁴ Van den Berg A, 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration', *Looking To the Future: Essays on International Law in Honour of W. Michael Reisman* (2011),821-843, 824.

⁴⁵ Rogers A C, 'The Politics of International Investment Arbitrators', 12 *Santa Clara Journal of International Law* 223 (2013), 230-262, 230.

arbitration have been issued by the arbitrator appointed by the losing party.⁴⁶ Albert Van Den Berg issued a reply to this reaction⁴⁷ These two articles are important in shedding light on the potential roles of dissenting opinions in Investment arbitration tribunals and their limitations.

Shore and Figueroa in their article support the view dissenting opinions do have a role to play in investment arbitration tribunals. They state that,

“When serving as an arbitrator on an investment treaty tribunal, one should take a different approach. The development of international investment law is usually tied to a treaty case. So an arbitrator on that side of the divide must be prepared to do precisely the opposite – and not bend his or her view to achieve unanimity. Instead, an arbitrator should state his or her view both to develop the law...”⁴⁸

Pedro J. Martinez Fraga and Harout Jack Samra also support this view furthermore, they inspect the theories of dissent, address the critics of dissent all while examining the potential role that dissent could play in developing the law.

1.6. Objectives

The objectives of the study are:

1. To assess the potential role of dissenting opinions and awards in arbitration.
2. To analyse the legal framework of arbitration in Kenya focusing on dissenting awards and opinions.
3. To explore how other jurisdictions deal with dissenting opinions in arbitration.
4. To propose recommendations

1.7. Hypothesis

The following hypothesis will guide this study:

⁴⁶ Brower C N and Rosenberg C B, ‘The Death Of The Two-headed Nightingale: Why The Paulsson-Van Den Berg Presumption That Party-Appointed Arbitrators Are Untrustworthy Is Wrongheaded’, 29 *Arbitration international* (2013), 7-44, 7.

⁴⁷ Van den Berg A, ‘Charles Brower's Problem with 100 per cent-Dissenting opinions by party-appointed arbitrators in investment arbitration’ 31 *Arbitration International* (2015), 381-391.

⁴⁸ Shore L and Figueroa K, ‘Dissents, Concurrences and a Necessary Divide Between Investment and Commercial Arbitration’, 3 *Global Arbitration Review* (2008), 20-45, 28.

1. Dissenting opinions do have a potential role in arbitration in Kenya.

1.8. Methodology

The research methodology applied in this paper is the review of literature dealing with dissenting opinions and awards. It will also employ the use of historical analysis and comparative analysis.

1.8.1. Historical analysis

The history is traced from the formal introduction of arbitration in Kenya to the present. In tracing the history, the study will use both primary and secondary sources of data. Primary data include the statutes (both the repealed and new statutes), Constitution of Kenya, Institutional guidelines, relevant treaties and conventions. Primary sources will be useful to this study as they outline the legal and institutional framework governing arbitration in Kenya. Secondary sources include online journal articles, travaux préparatoires, conference papers and textbooks. Scholarly journals and books will be accessed by visiting various libraries such as the Strathmore University Library, online access through the Social Sciences Research Network, Journal Storage (JSTOR), and LexisNexis library among others.

1.8.2. Comparative analysis

This study uses the comparative method by studying what exists in other jurisdictions and institutions that are member states of similar arbitration conventions with a view of recommendation of the best practices that can be adopted from these jurisdictions as regards dissenting opinions and awards.

1.9. Chapter Breakdown

1.9.1. Chapter One

This chapter contains the structure and contents of the research proposal. It states out the research questions, objectives, hypothesis, literature review, theoretical and conceptual framework as well as the methodology.

1.9.2. Chapter Two

This chapter will deal with the legal framework of arbitration in Kenya focusing on dissenting awards and opinions.

1.9.3. Chapter Three

This chapter explores the best practices from other jurisdictions and institutions.

1.9.4. Chapter Four

This chapter will involve an analysis of the potential advantages and disadvantages of dissents in arbitration.

1.9.5. Chapter Five

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

CHAPTER TWO

Legal Framework of Arbitration in Kenya

2.1. Introduction

Arbitration is a private consensual process where parties in dispute agree to present their grievances to a third party for a binding decision on the dispute.⁴⁹ The history of alternative dispute resolution in Kenya dates back to the pre-colonial days. However, arbitration began with the coming of colonialists at the end of the 19th century. When the British arrived in Kenya at the end of the 19th Century they found African customary law, which they regarded as an inferior form of law. In response to this they imposed the English legal system; such laws are referred to as the “Received English Laws”.⁵⁰ These “Received English Laws” operated concurrently with local customary laws with primacy given to the former in most cases.⁵¹ The dawn of arbitration in Kenya can be traced to the Arbitration Ordinance 1914 which was based on the English Arbitration Act 1889.⁵² Kenya has come a long way in terms of arbitration legislation which can be primarily attributed to globalization, increased complexity of transactions and international law. To understand arbitration in the proper context, the chapter traces the development of the legal framework from the colonial era to the current legal framework while illustrating how dissenting opinions are dealt with within the framework.

2.2. Domestic Legislation

2.2.1. Arbitration Ordinance 1914 (repealed)

This was the first arbitration law in Kenya. The Arbitration Ordinance, 1914 was a reproduction of the English Arbitration Act, 1889. It was used in resolution of commercial disputes as an alternative to litigation.⁵³ The principal attribute of this Ordinance is that it

⁴⁹ Khan F, Alternative Dispute Resolution, A paper presented Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.

⁵⁰ Oboarenegebe P, ‘The Legal Regime of International Commercial Arbitration’, UNPUBLISHED PhD Thesis, University of Jos, April 2002, 2.

⁵¹ Oboarenegebe, ‘The Legal Regime of International Commercial Arbitration’, 2.

⁵² Gakeri Jacob K., ‘Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR’, 6 *International Journal of Humanities and Social Science*, (2011), 219-241,227.

⁵³ *Nyutu Agrovet Limited v Airtel Networks Limited [2015] eKLR*.

accorded courts excessive control over the arbitration process in Kenya.⁵⁴ This judicial control discouraged locals from embracing arbitration both according to the law and arbitration conducted according to customary law.⁵⁵

2.2.2. Arbitration Act 1968 (repealed)

As at the time of political independence in 1964, the 1914 Ordinance was the principle legislation on arbitration. In 1968, the Arbitration Act, Chapter 49 of the laws of Kenya was enacted.⁵⁶ The delay in legislation can be attributed to the fact that England did not modify their arbitration law until 1950, with the enactment of the English Arbitration Act 1950. The 1968 law was a reproduction of the English Arbitration Act, 1950.⁵⁷ The Preamble⁵⁸ provided that it was ‘An Act of Parliament to make provision in relation to the settlement of differences by arbitration.’ Since the 1968 Act was a carbon copy of the 1950 English Arbitration Act it was susceptible to similar criticisms, the main one being that the powers of the court were too extensive.⁵⁹ The 1968 Act did not provide any specifications on the form or content of the award but it did provide that where the matter has been referenced to three arbitrators the award of any two arbitrators is binding.⁶⁰

2.2.3. Arbitration Act 1995

In 1985 the United Nations Commission on International Trade Law (UNCITRAL) developed the UNCITRAL Model Law on International Commercial Arbitration.⁶¹ This law was not binding but individual states could choose to adopt the law by domesticating it. In Kenya, this model law was adopted through the 1995 Arbitration Act. The Act, (Act No. 4 of 1995), was assented to on 10th August 1995 and came to force on 2nd January 1996. The 1995 Act was a mirror image of the UNCITRAL Model Law except for some provisions in the Act that

⁵⁴Tugee J, ‘Overview of Arbitration in Kenya’, Available at <http://www.academia.edu/3057430/Overview_Of_Arbitration_In_Kenya.html> on 8 June 2016

⁵⁵ Mutuku P, ‘International Commercial Arbitration in Kenya: Is Arbitration a Viable Alternative In Resolving Commercial Disputes In Kenya?’ UNPUBLISHED LLM, University of Cape Town, 13th February 2014.

⁵⁶ *Arbitration Act*, chapter 49 of the laws of Kenya, now repealed.

⁵⁷Muigua K, ‘Emerging Jurisprudence in the Law of Arbitration in Kenya: Challenges and Promises’, 8.

⁵⁸ Section 2, *Arbitration Act*, chapter 49 of the laws of Kenya.

⁵⁹ Muigua K, ‘Emerging Jurisprudence in the Law of Arbitration in Kenya: Challenges and Promises’, 8.

⁶⁰ Section 11(2), *Arbitration Act 1968 (repealed)*.

⁶¹ 14UNCITRAL Model Law on International Commercial Arbitration, (United Nations Document A/40/17, Annex 17), as adopted by the United Nations Commission on trade and law on June 21, 1985.

domesticated the New York Convention.⁶² It applied to both domestic and international arbitration.⁶³ In 2009, the Arbitration Act, 1995 was amended.⁶⁴ One of the reasons the amendments were made was to accommodate the amendments made to the UNCITRAL Model Law in 2006.⁶⁵ The constant evolution of international commercial arbitration practice warranted these amendments. To supplement the substantive provisions of the Arbitration Act, procedural rules, The Arbitration rules 1997, were enacted in accordance with section 40⁶⁶ of the Arbitration Act.

A dissenting opinion is a discursive address that differs from the reasoning and conclusions expressed by the other members of the tribunal.⁶⁷ It can be considered a reactionary expression attempting to persuade the rest of the existence of a different legitimacy or logicity.⁶⁸ The Arbitration Act does not provide any express recognition for dissenting opinions but section 30 (1) of the Act provides that only the decision of the majority is recognised.⁶⁹ This means that an award is presented in favour of the party that convinces the majority of the tribunal. The lack of legal status and recognition in the substantive Act may point to either their illegitimacy or perceived lack of importance. Section 31 (2) states that the signatures of the majority of the panel are sufficient and that the reasons for an omitted signature should be given, thus we may conclude that the dissenter should not sign the award. The UK Act of 1996 provides that the parties may agree on the form of an award.⁷⁰ If no such agreement exists, the award should be made in writing and signed by all the arbitrators or all those assenting to the award.⁷¹ Therefore,

⁶² Gakeri K., 'Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR', 230.

⁶³ Section 2, *Arbitration Act* (Act No. 4 of 1995).

⁶⁴ Arbitration (Amendment) Act, 2009, laws of Kenya.

⁶⁵ Amendments to articles 1 (2), 7, and 35 (2), a new chapter IV A to replace article 17 and a new article 2 A were adopted by UNCITRAL on 7 July 2006.

⁶⁶ Section 40(1), *Arbitration Act* (Act No. 4 of 1995) "The Chief Justice may make rules of Court for—

- a) the recognition and enforcement of arbitral awards and all proceedings consequent thereon or incidental thereto;
- b) the filing of applications for setting aside arbitral awards;
- c) the staying of any suit or proceedings instituted in contravention of an arbitration agreement;
- d) Generally all proceedings in court under this Act."

⁶⁷ Bhatia V, Candlin C and Gotti M, *Discourse and practice in international commercial arbitration: Issues, Challenges and Prospects*, Ashgate publishing Ltd, Farnham, 2012, 114.

⁶⁸ Bhatia V, Candlin C and Gotti M, *Discourse and practice in international commercial arbitration: Issues, Challenges and Prospects*, 114.

⁶⁹ Section 30(1), *Arbitration Act* (Act No. 4 of 1995).

⁷⁰ Section 52(3), *Arbitration Act 1996* (United Kingdom).

⁷¹ Section 52(4), *Arbitration Act 1996* (United Kingdom).

dissenting arbitrators have no obligation to sign the award. Under English law, dissenting opinions do not have to be included in the award and their inclusion is to be decided by the arbitrators in the majority.⁷² They are, however, provided to the parties as a matter of practice.⁷³

2.2.4. Institutional rules (Chartered Institute of Arbitrators Kenya Branch rules)

The Chartered Institute of Arbitrators Kenya Branch was established in 1984. It is one of the branches of the Chartered Institute of Arbitrators, which was founded in 1915 with headquarters in London.⁷⁴ The Chartered institute of arbitrators issued a set of rules in accordance with the provisions of the Arbitration (amendment) Act, 2009 which are applicable to arbitration taking place within the jurisdiction of the Republic of Kenya.⁷⁵ Parties to a contract who wish to have a dispute subject to the arbitration rules are recommended to insert in the arbitration clause the words "...Shall be referred to arbitration under the rules of the Chartered Institute of Arbitrators (Kenya Branch)."⁷⁶

Chartered Institute of Arbitrators Kenya Branch rules do not have any particular provisions on dissenting opinions, although it does provide that reason upon which the award is based should be given if the parties have agreed.⁷⁷ The reasons contained in an award demonstrate the basis on which the tribunal reached its decision and it has been argued it increases the likelihood that the parties will voluntarily abide by the decision.⁷⁸

2.2.5. Constitution of Kenya, 2010

In 2010, Kenya conducted a Referendum and a new Constitution was promulgated. The constitution of Kenya, 2010 accords alternative dispute resolution mechanisms a great deal of support. Article 159 of the constitution provides that the promotion of Alternative dispute resolution mechanisms is a principle that should guide the judiciary in exercise of their judicial

⁷²*Cargill International S.A. Antigua and Another v. Sociedad Iberica De Molturacion S.A. And Others* [1998] 1 Lloyd's Rep. 489.

⁷³Lew J, Mistelis L and Kröll S, *Comparative International Commercial Arbitration*, Kluwer Law International, The Hague, 2003, 642.

⁷⁴<http://www.ciarkkenya.org/about.html> on 20th June 2016.

⁷⁵ Arbitration Rules, Chartered institute of arbitrators (Kenya Branch)

⁷⁶ 2nd Note, Arbitration Rules, Chartered institute of arbitrators (Kenya Branch).

⁷⁷ Rule 11(5), Chartered Institute of Arbitrators (Kenya Branch) Arbitration rules

⁷⁸ Turner P and Mohtashami R, *A Guide to The LCIA Arbitration Rules*, 1ed, Oxford University Press, Oxford, 2009, 115.

authority.⁷⁹ Recognition of alternative dispute resolution mechanisms is particularly important in fulfilling Article 48⁸⁰ which guarantees access to justice. Further, by taking such a position the constitution ensures that the courts do not have a monopoly on dispute resolution in Kenya.⁸¹

2.3. International Framework

2.3.1. New York Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the "New York Convention", is one of the key instruments in international arbitration. The Convention entered into force on 7 June 1959⁸² The Convention's principal objective of the convention is to ensure that foreign arbitral awards will not be prejudiced against and it obliges Parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction.⁸³ Kenya acceded to the New York Convention the 10th of February 1989. The provisions of this convention were domesticated by section 36 (2) of the Arbitration Act 1968.⁸⁴

2.3.2. Convention on the Settlement of Investment Disputes between states and nationals of other states (ICSID convention)

The ICSID Convention is a multilateral treaty formulated by the Executive Directors of the World Bank.⁸⁵ The ICSID Convention entered into force on October 14, 1966. Kenya signed the convention on 24th May 1966. The convention was domesticated by the Investment Disputes Convention Act⁸⁶ The investment disputes tribunal Act expressly recognizes the rights of arbitrator to issue individual opinion and in particular a dissenting opinion: "Any member of the

⁷⁹ Article 159 (2) (c), *Constitution of Kenya (2010)* 'alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause.'

⁸⁰ Article 48, *Constitution of Kenya, (2010)* 'The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.'

⁸¹ Mutuku P, 'International Commercial Arbitration in Kenya: Is Arbitration a Viable Alternative In Resolving Commercial Disputes In Kenya?', 23.

⁸² Article VII, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* Adopted 7 June 1959 , 'The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.'

⁸³ http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html on 20th June 2016.

⁸⁴ Section 36 (2), *Arbitration Act 1968 (repealed)*

⁸⁵ <https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/default.aspx> on 20 June 2016

⁸⁶ *The Investment Disputes Convention Act* (Act No. 31 of 1966).

Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.”⁸⁷

2.3.3. UNCITRAL Model Law on International Commercial Arbitration

The UNCITRAL Model Law on International Commercial Arbitration was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21st June 1985. The Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration.⁸⁸ The model law was not binding but parties could domesticate the act by enacting a replica of the model law as Kenya did in 1995 with the Arbitration Act 1995.

The model law has no specific provision for dissenting opinions but under Article 31, a dissenting arbitrator may withhold their signature. The issue on the omission of signatures was discussed in the 328th meeting of the United Nations Commission on International Trade Law on the drafting of the model law on international commercial Arbitration.⁸⁹ Mr Lavina, from the Philippines, had suggested that the provision on the omission of signature in Article 31 be deleted from the text, questioning the effect it would have on enforcement if the reasons for omission were not given.⁹⁰ In reply, the Chairman (Mr Loewe from Austria), stated that the position was a compromise between the fact that arbitrators were free to make any decision as regards the matters before them and that arbitrators were obliged to sign the award. During the drafting of the Model Law (on which the Arbitration Act is based), the issue on dissenting opinions under Article 31 was also raised by the Secretariat and they noted there are those who, based on their legal systems and practice who wanted a specific provision on dissenting opinions and awards.⁹¹ The Secretariat, suggested that the Commission should look into whether the provision on omission of signatures should be retained as is and whether the model law should

⁸⁷ Article 48, *The Investment Disputes Convention Act* (Act No. 31 of 1966).

⁸⁸ http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html on 20th June 2016

⁸⁹ *Summary meetings on the UCITRAL model law on International Commercial Arbitration*, Yearbook of the United Nations Commission on International Trade Law Volume XVI (1985), 328th meeting, *Tuesday, 18 June 1985*, A/CN.9/246 Article 31 (1), para 25.

⁹⁰ *Summary meetings on the UCITRAL model law on International Commercial Arbitration*, Article 31 (1), para. 25.

⁹¹ *Summary meetings on the UCITRAL model law on International Commercial Arbitration*, Article 31 (1), para. 26.

take a stand on dissenting opinions i.e. whether they should be explicitly recognized or expressly prohibited.⁹² The Commission took no action.⁹³

2.4. Conclusion

This chapter clearly reveals that within the legal framework there is room for presenting dissenting awards. The Arbitration Act 1995⁹⁴ and the Chartered Institute of Arbitrators Kenya Branch rules⁹⁵ provide that an arbitrator may omit his signature from the award which has to be justified. During the deliberations of this clause in the UNICITRAL model law it was considered a compromise between an arbitrators obligation to sign an award and their freedom to make any decision appropriate to the matter.⁹⁶ Within the local framework only the the Investment Disputes Convention Act expressly recognizes the right of an arbitrator to dissent.⁹⁷ What is noteworthy is that the substantive statues give no clear form or procedure for presenting dissenting awards in multipartite arbitral tribunals. This may point to a reluctance to expressly recognize them or a deliberate suppression.

⁹² *Report of the Secretary-General, Analytical commentary on draft text of a model law on international Commercial arbitration, A/CN.9/264, Article 31, para. 2.*

⁹³ *United Nations Conference on Trade and Development, Dispute Settlement: International Commercial Arbitration, Making the Award and Termination of Proceedings, UNCTAD/EDM/Misc.232/Add.41, 20*

⁹⁴ Section 30(1), *Arbitration Act* (Act No. 4 of 1995).

⁹⁵ Rule 11(5), *Chartered Institute of Arbitrators (Kenya Branch) Arbitration rules.*

⁹⁶ *Summary meetings on the UCITRAL model law on International Commercial Arbitration, Article 31 (1), and para. 25.*

⁹⁷ Article 48, *The Investment Disputes Convention Act* (Act No. 31 of 1966).

CHAPTER THREE

A Comparative study on Dissenting Opinions in Arbitral Awards

3.1 Introduction

This chapter explores how other jurisdictions and international arbitral institutions deal with dissenting opinions in arbitral awards. The jurisdictions to be considered are England and Switzerland. These jurisdictions are chosen since their state courts have made significant comments on the legal status of dissenting opinions. The international arbitral institutions that shall be considered are the International Chamber for Commerce (ICC) and Convention on the Settlement of Investment Disputes between states and nationals of other states tribunal.

3.2 Dissenting Opinions in English Arbitration Law

Arbitration in England is regulated by the Arbitration Act 1996 (English Arbitration Act).⁹⁸ It came into force on 31 January 1997. The English Arbitration act is considered progressive⁹⁹ since it brought English arbitral law in line with internationally recognised principles of arbitration law, is intended to be user-friendly; it has a logical structure and is written in plain English, it limits judicial intervention and increases the scope of party autonomy.¹⁰⁰ Like most modern arbitration Acts it is broadly-based on the Model Law (1985) which applies to both domestic and international arbitration.¹⁰¹ Arbitration in England can also be conducted under the LCIA (formerly known as the London Court of International Arbitration) which is a renowned international arbitration institution with popular rules, which will also acts as an appointing and administrative authority in respect of arbitrations under its own Rules or the United Nations Commission on International Trade Law Rules.

Dissenting opinions are not expressly mentioned in either the Arbitration Act 1996 or the LCIA Arbitration Rules. In the spirit of party autonomy the Arbitration Act allows the parties to agree

⁹⁸ Preamble, *Arbitration Act 1996 (United Kingdom)*, “An Act to restate and improve the law relating to arbitration pursuant to an arbitration agreement; to make other provision relating to arbitration and arbitration awards; and for connected purposes.”

⁹⁹ Muigua K, ‘The Arbitration Acts: A Review Of Arbitration Act, 1995 Of Kenya Vis-A-Viz Arbitration Act 1996 Of United Kingdom’, *lecture on Arbitration Act, 1995 and Arbitration Act 1996 of UK delivered at the Chartered Institute of Arbitrators-Kenya Branch Entry Course held at College of Insurance on 25-26th August 2008 (Revised on 2nd March 2010)*, on 6 January 2016, 2.

¹⁰⁰ Guy P and Bridge D, 'Arbitration in England and Wales' 1 *CMS Guide to Arbitration*, (2012),297-327,299.

¹⁰¹ Guy P and Bridge D, 'Arbitration in England and Wales', 299.

on the form and contents of the award, if they fail to agree the default rules apply.¹⁰² The Arbitration Act default rule require that the award must be in writing and signed by all the arbitrators or all those assenting to the award.¹⁰³ It must contain the reasons for the award, the seat of the arbitration and the date that the award was made.¹⁰⁴ Therefore, if an arbitrator wishes to dissent from the award they need only to abstain from signing the award. The LCIA rules provide that where there are three arbitrators the decision of the majority is sufficient.¹⁰⁵ Under the LCIA Rules if an arbitrator fails or refuses to sign the award, the signature of the majority is sufficient provided that reasons for the admission are provided.¹⁰⁶

The foremost English authority of how dissenting opinions should be treated is the case of *Cargill International S.A. Antigua and Another v. Sociedad Iberica De Molturacion S.A. and Others*¹⁰⁷ In this case the Court of Appeal had to decide whether a dissenting arbitrator in GAFTA arbitration (under the Grain and Feed Trade Association Rules) could insist on his dissent being included in the award. On its proper construction, Rule 7.1 of the GAFTA Rules, required that 'all awards of arbitration shall be in writing on an official form issued by the Association and shall be signed by all members of the tribunal', meant that only reasons in favour of an award had to be stated and that it had to be signed by all three arbitrators including the dissenter. The dissenting arbitrator had refused to sign because he was not allowed to express his own dissenting reasons in the award which resulted in his replacement. When rendering his decision in the case, *Waller J* quoted *Bingham J's* decision in *Stinnes Interoil GmbH v Halcoussis & Co.*¹⁰⁸ *Bingham J* stated as follows,

"The dissenting opinion has of course no value so far as findings of fact are concerned, the relevant findings being those of the majority. The dissenting opinion is no more than at best persuasive so far as questions of law are concerned. I nonetheless formed the view that it would be unreasonably formalistic for the Court to decline to look at a document which the tribunal

¹⁰² Section 52(1), Arbitration Act 1996 (United Kingdom).

¹⁰³ Section 52(3), Arbitration Act 1996 (United Kingdom).

¹⁰⁴ Section 52(3), Arbitration Act 1996 (United Kingdom).

¹⁰⁵ Article 26.3, LCIA Arbitration rules 2012.

¹⁰⁶ Article 26.3, LCIA Arbitration rules 2012.

¹⁰⁷ [1998] 1 *Lloyd's Rep.* 489.

¹⁰⁸ [1982] 2 *Lloyd's Rep.* 44.

clearly intended that the Court should see. I should, however, emphasise that the existence and content of this dissenting opinion cannot alter the fundamental task of the Court, whatever that may be in respect of any particular summons."

Based on Judge Bingham's interpretation, Lord Justice Waller came to the conclusion that a dissenting opinion is not formally part of the award but the reasons of the dissenting arbitrator are published as a matter of courtesy to that dissenting member and perhaps as a matter of courtesy to the parties.¹⁰⁹ As to whether the courtesy should normally be extended to an arbitrator who dissents, *Waller J* stated it would depend on the type and circumstances of the arbitration.¹¹⁰ He did note that the courtesy was often extended since dissenting opinions are a natural response by one of the arbitrators to resolve the dispute juridically, furthermore they could be of use to the losing party and the appellate tribunal.¹¹¹ To summarise dissenting arbitrators cannot insist on the inclusion of their reasons into the award, rather their reasons should be annexed to the award out of professional courtesy.

3.3 Dissenting Opinions in Swiss Arbitration Law

Arbitration in Switzerland is regulated by either; Chapter 12 of the Federal Private International Law Act (hereinafter referred to as PIL Act) or Part 3 of the Swiss Civil Procedure code. Chapter 12 of the PIL Act applies to any arbitration where the seat of the arbitral tribunal is in Switzerland or if before the arbitration agreement is concluded at least one of the parties was not domiciled in or had habitual residence in Switzerland.¹¹² Chapter 12 PIL Act is not based on the UNCITRAL Model Law since it was drafted before the model law was adopted that notwithstanding there are no fundamental differences between Chapter 12 and the Model Law.¹¹³ Part 3 of the Swiss Civil Procedure code applies to any arbitration based Switzerland, unless the provisions of the Twelfth Chapter of the PIL Act apply.¹¹⁴

¹⁰⁹ [1998] 1 *Lloyd's Rep* 489 at 496.

¹¹⁰ [1998] 1 *Lloyd's Rep* 489 at 496.

¹¹¹ [1998] 1 *Lloyd's Rep* 489 at 497.

¹¹² Article 176(1), Chapter 12, *Federal Private International Law Act*, "The provisions of this chapter shall apply to all arbitrations if the seat of the arbitral tribunal is in Switzerland and if, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland."

¹¹³ Ritter D, Brown-Berset D and Vallée-Grisel D, 'Arbitration in Switzerland', <http://globalarbitrationreview.com/jurisdiction/1000208/Switzerland>, on 8 January 2017.

¹¹⁴ Article 353 (1), Part 3, *Swiss Civil Procedure code*, 'The provisions of this Part apply to the proceedings before arbitral tribunals based in Switzerland, unless the provisions of the Twelfth Chapter of the IPLA apply.'

Both Chapter 12 of the PIL Act and Part 3 of the Swiss Civil Procedure code do not expressly provide for dissenting opinions. Under Chapter 12 of the PIL Act¹¹⁵ and Part 3 of the Swiss Civil Procedure code¹¹⁶ only the decision of majority of the tribunal is recognized. In the absence of a majority, the signature of the chairperson shall suffice.¹¹⁷ The result of these provisions is that dissenting arbitrators are free to dissent but the statutes give no guidance on their form or admissibility. According to the Swiss Federal Tribunal, dissenting opinions are separate from the award and therefore do not affect the reasons on which the award is based.¹¹⁸ Even though it is communicated to the parties, the dissenting opinion remains independent and extraneous to the award.¹¹⁹ Where the parties to the proceedings have not excluded dissenting opinion, the decision to append a dissenting opinion lies with the majority of members of the tribunal.¹²⁰

3.4 Dissenting Opinions under the Convention on the Settlement of Investment Disputes between states and nationals of other states (ICSID convention)

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States was formulated by the Executive Directors of the International Bank for Reconstruction and Development. As of May 2016, 153 countries had ratified the Convention to become Contracting States.¹²¹ The ICSID Convention, facilities conciliation and arbitration of investment disputes between contracting states and nationals of other contracting states. The jurisdiction of ICSID is elaborated in Article 25(1) of the Convention.¹²² The provisions of the Convention are complemented by the Rules of Procedure for the Institution of Conciliation and Arbitration

¹¹⁵ Article 189, *Federal Private International Law Act*.

1. The arbitral award shall be rendered in conformity with the rules of procedure and in the form agreed upon by the parties.
2. In the absence of such an agreement, the arbitral award shall be made by a majority, or, in the absence of a majority, by the president alone. The award shall be in writing, supported by reasons, dated and signed. The signature of the president is sufficient.

¹¹⁶ Article 384 (1), Part 3, *Swiss Civil Procedure code*.

¹¹⁷ Article 384 (1), Part 3, *Swiss Civil Procedure code*.

¹¹⁸ Schweizerisches Bundesgericht, Judgment of 25 May 1992, 4P.23/1991 at 2b.

¹¹⁹ Schweizerisches Bundesgericht, Judgment of 18 March 2010, 4A_584/2009.

¹²⁰ Schweizerisches Bundesgericht, Judgment of 25 May 1992, 4P.23/1991 at 2b.

¹²¹ Database of ICSID Member States, <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx>, On 8 January 2017.

¹²² Article 25(1), *Convention on the Settlement of Investment Disputes between states and nationals of other states (Washington Convention)*, 14 October 1966, 575 UNTS 159 “The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.”

Proceedings (Institution Rules); Rules of Procedure for Conciliation Proceedings (Conciliation Rules); and Rules of Procedure for Arbitration Proceedings (Arbitration Rules).

Unlike other current commercial arbitration rules such as; the ICC arbitration rules, LCIA rules, World Intellectual Property Organisation rules and UNCITRAL arbitral rules that neither encouraged nor prohibit dissenting opinions, the arbitral rules for the ICSID Convention expressly recognise the right of an arbitrator to issue a dissenting opinion. This right is elaborated in Article 48(4)¹²³ of the convention and Article 52(3)¹²⁴ of the ICSID Arbitration (Additional Facility) Rules. Under the convention the dissenting arbitrator is free to render detailed opinions that address every question before the tribunal or focus on specific points of the majority's argument.¹²⁵

An informal system of precedent has developed within investment arbitration.¹²⁶ Even though arbitrators are not bound by prior published awards they are obliged to take them into account in order to stabilize investment arbitration and contribute to the harmonious development of investment law¹²⁷ Due to this informal system of precedence dissenting opinions have a greater role in investment arbitration and seem to seem to have an influence on the development of international investment law.¹²⁸ For example, in the case *Helnan International Hotels A/S v Arab Republic of Egypt*¹²⁹ to justify its ruling¹³⁰ the tribunal referred to a passage in the dissenting opinion in *Fraport AG Frankfurt Airport Services Worldwide v Philippines*.¹³¹

¹²³ Article 48(4), *Washington Convention*, "Any member of the Tribunal may attach his individual opinion to the Award, whether he dissents from the majority or not, or a statement of his dissent"

¹²⁴ Article 52(3), *ICSID Arbitration (Additional Facility) Rules*, "The award shall be signed by the members of the Tribunal who voted for it; the date of each signature shall be indicated. Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent."

¹²⁵ Schreuer C and Schreuer C, *The ICSID Convention*, Cambridge University Press 2009,833.

¹²⁶ Weidemaier M, 'Toward of Theory of Precedent in Arbitration', 51 *William & Mary Law Review*, (2010), 1895-1959, 1895.

¹²⁷ Cheng T, 'Precedent and Control in Investment Treaty Arbitration', 30 *Fordham International Law Journal*, (2006), 1014-1039, 1016.

¹²⁸ Redfern A and Hunter M, *International Arbitration*, 2ed, Oxford University Press, Oxford, 2009, 187.

¹²⁹ ICSID Case No. 05/19, 125, (July 3, 2008).

¹³⁰ ICSID Case No. 05/19, 125, (July 3, 2008) (Decision on Award) "An international tribunal must accept the *res judicata effect* of a decision made by a national court within the legal order where it belongs."

¹³¹ ICSID Case No. ARB/03/25, (Aug. 16, 2007) (Award).

3.5 Dissenting Opinions under the International Chamber of Commerce Arbitration Rules

Arbitration under the International Chamber of Commerce is conducted under the International Chamber of Commerce rules and administered by the International Court of Arbitration. Arbitration under the ICC Arbitration Rules is a formal procedure leading to a binding decision from a neutral arbitral tribunal, susceptible to enforcement pursuant to both domestic arbitration laws and international treaties such as the 1958 New York Convention. The Court does not resolve disputes itself rather it administers the resolution of disputes by arbitral tribunals.¹³²

The issue on dissenting opinion in international arbitration was addressed by the International Chamber of Commerce's Commission on International Arbitration through the Working Party on Dissenting Opinions.¹³³ The first Interim Report of the Working Party, dated 1 October 1986, stated the following on dissenting opinions;

“It was agreed that it is neither practical nor desirable to attempt to suppress dissenting opinions in ICC arbitrations. A minority opinion was expressed to the effect that the ICC should seek to minimise the role of dissenting opinions, but the prevailing view was that the ICC should neither encourage nor discourage the giving of such opinions.”¹³⁴

The commission suggested that focus should be extended to regulation of the practices of the Court of Arbitration and the Secretariat rather than providing expressly on dissenting opinions.¹³⁵ Under the ICC rules, only the decision of the majority is recognised and if there is no majority

¹³² Article 1(2), *International Chamber of Commerce Arbitration rules*.

¹³³ *Final Report on Dissenting and Separate Opinions of the Working Party on Dissenting Opinions and Interim and Partial Awards of the ICC Commission on International Arbitration*, Adopted by the Commission on April 21, 1988, Available at www.iccdri.com/itemContent.aspx?XSL=arbSingle.xsl&XML=\COMMISSION_REPORTS\CR_0003.xml&CONTENTTYPE=COMMISSION_REPORTS&TITLE=Final%20Report%20on%20Dissenting%20and%20Separate%20Opinions&LOC=19 on 17 September 2016

¹³⁴ *Final Report on Dissenting and Separate Opinions of the Working Party on Dissenting Opinions and Interim and Partial Awards of the ICC Commission on International Arbitration*.

¹³⁵ *Final Report on Dissenting and Separate Opinions of the Working Party on Dissenting Opinions and Interim and Partial Awards of the ICC Commission on International Arbitration*. “It was agreed that it is not necessary or desirable to introduce any new article relating to dissenting opinions into the ICC Rules of Arbitration. It was considered that the existing problems currently facing the Court of Arbitration in relation to dissenting opinions could be best handled by the creation of guidelines for the Court of Arbitration and the Secretariat; it may be desirable to introduce new Internal Rules in due course, but without urgency.”

the chairperson decision would suffice.¹³⁶ In practice under ICC arbitration, the dissenting arbitrator submits their opinion to the other arbitrators and to the ICC court.¹³⁷ The ICC Court of Arbitration has sometimes insisted on a short summary indicating how many of the arbitrators agreed with the decision, instead of long detailed opinions and in some cases has struck out opinions that appear to violate the principle of confidentiality of deliberations.¹³⁸

3.6 Conclusion

In the jurisdictions analysed in this chapter; England and Switzerland, neither of their domestic statutes expressly recognise dissenting opinions. In both jurisdictions decisions in multipartite arbitral tribunals are made by the majority. From the precedent generated by state courts in both countries it is apparent that dissenting opinions are not formally part of the award and that their inclusion into the award depends on the decision of the majority or the agreement of the parties to the arbitration. The ICC Arbitration Rules also require a majority decision.¹³⁹ Within ICC arbitration both the award of the tribunal and the dissenting opinion are submitted to the International Court of Arbitration for scrutiny before they are issued to the parties. When offered a chance to comment on dissenting opinions in ICC arbitration, the working Party on Dissenting Opinions and Interim and Partial Awards, took the ambivalent route ruling that they could neither encourage nor discourage the giving of such opinions. Unlike the statutes of the jurisdictions analysed within this chapter and the ICC rules, the ICSID Convention is the only that expressly provides for an arbitrators right to dissent. An arbitrator may exercise this right either by rendering an opinion on the issues raised by the parties or by addressing specific arguments made by the majority of the tribunal.

¹³⁶ Article 31, *International Chamber of Commerce Arbitration rules*, “When the arbitral tribunal is composed of more than one arbitrator, an award is made by a majority decision. If there is no majority, the award shall be made by the president of the arbitral tribunal alone.”

¹³⁷ Schäfer E, Verbist H and Imhoos C, *ICC Arbitration in Practice*, 1ed, Kluwer Law International, The Hague 2005, 120.

¹³⁸ Donovan F P, ‘Dissenting Opinions’, 7 *ICC International Court of Arbitration Bulletin*, (1996), 76-101, 77.

¹³⁹ Article 31, *International Chamber of Commerce Arbitration rules*, “When the arbitral tribunal is composed of more than one arbitrator, an award is made by a majority decision. If there is no majority, the award shall be made by the president of the arbitral tribunal alone.”

CHAPTER FOUR

Potential Benefits and Challenges of Dissenting Opinions in Domestic Arbitration

4.1 Introduction

In common law countries, dissenting opinions are a normal part of the litigation process in superior courts.¹⁴⁰ It is accepted that all judges cannot be of the same opinion in adjudication especially in complex trials and the openness of the administration of justice demands the publication of the dissenting opinions.¹⁴¹ These dissenting opinions are often herald as a voice of the future.¹⁴² Former Court of Appeal Judge, Joseph Nyamu on dissenting opinions stated that:

“First in my view, dissenting judgments constitute an expression of independence, freedom of thought and intellect and, second, they may lay the basis for future development of the law. Third, they may provide a firm base for future generations not to contain themselves in strait jackets, but to always remember that at the end of the day, that much sought justice might after all not be in the thunder of the majority judgment, but in the silent breeze of the minority judgment!”¹⁴³

The role played by dissenting opinions in the development of law within domestic courts is undeniable. The benefits that could accrue from dissenting opinions in arbitration are not as obvious considering that there no system of precedent in arbitration and the proceedings are often confidential. Furthermore the review of arbitral decisions is done on very limited grounds. This chapter seeks to highlight potential benefits that may accrue from dissenting opinions in domestic arbitration. This chapter will also analyse the challenges posed by dissenting opinions in arbitration which might explain the reluctance to expressly recognise them within the law.

¹⁴⁰Laffranque J, ‘Dissenting Opinion and Judicial Independence’, 8 *Juridical International*, (2003), 162-172,164.

¹⁴¹Laffranque J, ‘Dissenting Opinion and Judicial Independence’, 164.

¹⁴²L'Heureux-Dube C, ‘The Dissenting Opinion: Voice of the Future?’ 38 *Osgoode Hall Law Journal*, (2000), 496-516,504.

¹⁴³*Stanbic Bank Kenya Limited v. Kenya Revenue Authority [2009] eKLR.*

4.2 Potential Benefits of Dissenting Opinions

4.2.1 Dissenting opinions can produce better awards

Section 32 (3) of the Arbitration Act of 1995 provides that the arbitral award shall state the reasons upon which it is based unless the Parties have agreed that no reasons are to be given. Similarly, the Chartered Institute of Arbitrators Kenya Branch rules provide that reasons upon which the award is based should be given if the parties have agreed.¹⁴⁴ Article 48 of the Investment Disputes Convention Act also provides that the award shall state the reasons upon which it is based. Where parties have agreed on reasoned awards in multipartite arbitral tribunals, dissenting opinions may improve the quality of the reasoning in the final award provided that the majority receives the dissenting opinion before the award is finalized.¹⁴⁵ First, the dissenting opinion can help ensure the majority has properly addressed all the issues before them.¹⁴⁶ Second, dissents seek to persuade the majority of a different logicity and legitimacy, dissenting opinions may improve the quality of the reasoning in the final award since the majority will be inclined to rebut the reasons given by the dissenting arbitrator and to show why they did not justify a different outcome of the decision on the merits.¹⁴⁷ A well authored dissent helps the majority refine and clarify their initial propositions.¹⁴⁸ Third, on producing better awards, Dissenting opinions may increase the accountability of the individual decision maker for every individual aspect of the decision.¹⁴⁹ As a prominent United States Supreme Court Justice said, dissent "safeguards the integrity of the judicial decision-making process by keeping the majority accountable for the rationale and consequences of its decision."¹⁵⁰

Well-reasoned awards ensure quality resolution of the present dispute and may improve enforceability.¹⁵¹ The *X and Y v Z* case in the Swiss Federal Supreme Court demonstrates this fact. In this 2006 case, a partial award rendered by an ICC tribunal seated in Zurich was

¹⁴⁴ Rule 11(5), Chartered Institute of Arbitrators (Kenya Branch) Arbitration rules.

¹⁴⁵ Schroeder H and Pfitzner T, 'Recent Trends Regarding Dissenting Opinions In International Commercial Arbitration', *Year Book on International Arbitration*, 2 (2012), 133-149,137.

¹⁴⁶ Mosk and Ginsburg, 'Dissenting Opinions in International Arbitration', 30.

¹⁴⁷ Öhlberger and Stipl, 'Rendering of the Award by Multipartite Arbitral Tribunals, How to Overcome Lack of Unanimity?' 371.

¹⁴⁸Ginsburg R B, 'The Role of Dissenting Opinions', Presentation to the Harvard Club of Washington, D.C, on December 17, 2009, 3.

¹⁴⁹Smit H, 'Dissenting Opinions in Arbitration', 15 *ICC International Court of Arbitration Bulletin*, (2004), 1-37, 37.

¹⁵⁰ W J Brennan, "In Defense of Dissents", 37 *Hastings Law Journal* (1986), 427.

¹⁵¹ Mosk and Ginsburg, 'Dissenting Opinions in International Arbitration', 371.

challenged on liability in principle.¹⁵² The challenging parties claimed that their right to be heard had been violated by the majority of the tribunal since they purportedly ignored the contents of a witness statement. The challenge was dismissed by the court, stating that the mere fact that a document was not mentioned in the reasoning of the award did not justify the conclusion that the document had been disregarded by the tribunal. To support this argument the court noted that the witness statement had actually been mentioned by the dissenting arbitrator leading them to conclude that the statement had been considered by the tribunal during deliberations. This case illustrates a situation where the contents of the dissenting opinion led to the dismissal of the challenge by convincing the judge that all the issues had been adequately been considered which had the effect of improving the award's enforcement.

4.2.2 Intellectual Integrity and the conscience or duty of the Arbitrator

Dissenting opinions can allow arbitrators to preserve intellectual integrity and to allow them to act in accordance with their conscience.¹⁵³ If multipartite tribunals were bound to strict rules of unanimity arbitrators would be compelled to conform to the majority even where there are fundamental conscientious indifferences. Dissenting opinions offer arbitrators an opportunity to preserve their intellectual honesty and their legal and professional conscience. Furthermore, the constitution of Kenya provides for freedom of conscience, thought, belief and opinion and issuing a dissent in accordance with the facts and the law could be considered an exercise of this right¹⁵⁴

Arbitrators have a professional and ethical duty to inform the parties of their legal opinion and the arguments that prevented them from accepting the arbitral award.¹⁵⁵ Such intellectual independence is important for an arbitrator to maintain his professional reputation and integrity. It should be noted that arbitrators who issue dissents should do so in a manner that preserves the

¹⁵² *Schweizerisches Bundesgericht, decision of 19 June 2006, 4P.74/2006, ASA Bulletin, 24 (2006) 4, 761.*

¹⁵³ Kwast J.P, 'Prohibitions of dissenting Opinions in international Arbitration', *What's Wrong With International Law: Liber amicorum A.H.A Soons*, Brill Nijhoff, (2015), 128-154, 133.

¹⁵⁴ Article 32(1), Constitution of Kenya (2010), "Every person has the right to freedom of conscience, religion, thought, belief and opinion."

¹⁵⁵ *Mytilneos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia (I)*, Permanent Court of Arbitration, Dissenting Opinion by Dobrosav Mitrovi (Partial Award on Jurisdiction), 8 September 2006.

integrity of the process of arbitration, namely in a manner that does not jeopardize enforcement and recognition of the award.

4.2.3 Dissenting Opinions and Challenging awards

Arbitration awards have been subject to some form of judicial review for as long as arbitration has been an alternative means of dispute resolution.¹⁵⁶ The Arbitration Act of Kenya prescribes limited scope for the courts in Kenya to set aside an arbitral award. An arbitral award may only be set aside if one or more of the following grounds are proved, namely:

- a) Incapacity of a party;
- b) Invalidity of an agreement;
- c) Insufficient notice of appointment of an arbitrator or of the arbitral proceedings;
- d) Where an arbitrator exceeds the scope of his or her reference;
- e) Where an award is induced or influenced by fraud or corruption;
- f) Where the dispute is not capable of being resolved by arbitration; or
- g) Where the arbitral award is against public policy.¹⁵⁷

It must be emphasized that a dissenting arbitrator must never dissent for the purpose of frustrating the recognition or enforcement of an award but a dissenting opinion may be beneficial to parties seeking judicial review of arbitral awards considering how limited the scope for review is. Another ground under which an award may be set aside is where there is an apparent error in law or of fact. Kenyan courts will not set aside an arbitral award even if it is shown to be affected by an error of fact or an error of law unless the error of law is manifest on the face of the record.¹⁵⁸ Jurisprudence from the United Kingdom and a recent Kenyan case has suggested that parties and the courts could rely on dissenting opinions when challenges on such grounds are brought forward.

The first of these cases is *CGU v AstraZeneca*.¹⁵⁹ The Court of Appeal was seized with an application for leave to appeal against an English arbitral award under Section 69¹⁶⁰ (appeal on a

¹⁵⁶ Van den Berg, A, 'Should the Setting Aside of the Arbitral Award Be Abolished?' 29 *ICSID Review*, 263-288, (2014), 265.

¹⁵⁷ Section 35(2), *Arbitration Act* (Act No. 4 of 1995).

¹⁵⁸ *Kenya Oil Company Limited & Anor v. Kenya Pipeline Company Limited* [2014 eKLR].

¹⁵⁹ *CGU v AstraZeneca* [2006] EWCA 1340.

point of law) and section 67¹⁶¹(Challenging the award: substantive jurisdiction) of the English Arbitration Act 1996. The arbitral tribunal had issued a "Partial Award on Preliminary Issue", the issue being the substantive law applicable to the merits. The arbitrators could not agree on the substantive law to be used. The majority of the arbitrators supported the application of the law of Iowa (USA), whereas the dissenting arbitrator in his dissenting opinion came to the conclusion that, under English conflict of law rules, English law applied to the substantive issues. In first instance, *Cresswell*, J, allowed the appeal from the tribunal because he agreed with the dissenting arbitrators analysis and even directly referenced it in his decision. The successful party in the arbitration proceedings attacked that ruling and requested permission to appeal the High Court's decision. The Court of Appeal rejected this request and, thus, effectively upheld the decision rendered by *Cresswell*, J. In summary, the view expressed by the dissenting arbitrator, in the dissenting opinion had a direct effect on the reversal of the majority's decision on the applicable law since the dissenting opinion was not only referenced in Judge *Cresswell's* ruling but also adopted in the decision.¹⁶²

The second is *F v M*¹⁶³ where the High Court had to address a request by the claimant to remit parts of an ICC award in a construction case to the arbitral tribunal. The request was based on the reasoning expressed in a dissenting opinion which claimed a serious irregularity under Section 68(2) (a)¹⁶⁴ of the English Arbitration Act 1996. The issue was with respect to a head of damages, which the claimant was entitled to claim according to the arbitral award. The majority applied a discount of approximately one million euros to respondent's obligation. The reason given by the majority for this discount was an unpaid balance in respondent's favour that had

¹⁶⁰ Section 69, *Arbitration Act 1996 (United Kingdom)*, "Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings."

¹⁶¹ Section 67, *Arbitration Act 1996 (United Kingdom)*, "A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court—

- a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or
- b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.

¹⁶² Schroeder H and Pfitzner T, 'Recent Trends Regarding Dissenting Opinions In International Commercial Arbitration', 140.

¹⁶³ *F v M* [2009] EWHC 275 (TCC).

¹⁶⁴ Section 68(2)(a), *Arbitration Act 1996 (United Kingdom)* , "Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant..."

presumably arisen under the different agreements between the parties. The dissenting opinion pointed out that the claimant never owed that sum to the respondent "as a matter of fact". *Coulsson, J*, found that the dissenting arbitrator was correct in there was no basis for this unpaid balance. Commenting on the weight to attach to a dissenting opinion in such a case he stated that,

“A comment or observation in a dissenting opinion, to the effect that an important point has been decided by the majority without reference to the parties, will be a factor to which the court will attach weight in dealing with an application under section 68. Depending on the circumstances, such an observation may have considerable weight, although it is unlikely that it could, on its own, prove determinative.”¹⁶⁵

Judge Coulson reviewed the merits of the dispute in their entirety by taking into account the position of the dissenting arbitrator.

The third case is the English case of *B v A*¹⁶⁶ where the High Court had to decide an appeal against an award rendered by an arbitral tribunal seated in London. On the basis of this dissenting opinion, B challenged the award, alleging that a serious irregularity under Section 68 of the English Arbitration Act 1996 had occurred. B argued that the majority had not applied the law chosen by the parties. In his opinion, *Tomlinson, J*, first quoted the precedent of *F v M* and confirmed that a dissenting opinion could be evidence of procedural unfairness to one of the parties, although it was not formally part of the award.¹⁶⁷

The fourth and most recent is a Kenyan case, *Kundan Singh Construction v Tanzania National Roads Agency*.¹⁶⁸ The high court had to decide whether or not the arbitral award should be recognized and enforced as a decree of the Court. The arbitration proceedings were conducted by a panel of three Arbitrators, with two arbitrators rendering a majority award and one arbitrator dissenting. The applicant’s case was that the application should be allowed since they had furnished the Court with the necessary documents required under section 36(2) of the Arbitration

¹⁶⁵ *F v M* [2009] EWHC 275 (TCC), para.16.

¹⁶⁶ *B v A* [2010] EWHC 1626.

¹⁶⁷ *B v A* [2010] EWHC 1626, para.21, Tomlin J, “might be admissible as evidence in relation to procedural matters, as where for example it is alleged that some aspect of the procedures adopted in the arbitration worked unfairly to the disadvantage of one party.”

¹⁶⁸ *Kundan Singh Construction (Kundan) v. Tanzania National Roads Agency (the Agency)* [2013] eKLR

Act. The respondents, on the other hand, argued that the award could not be recognized or enforced because the majority arbitrators went beyond their scope and decided on matters beyond the scope of reference to arbitration. Furthermore, they argued that the majority decision completely ignored to apply the Tanzanian legislation which was the law governing the contract. The respondents were relying on Section 37 of the Arbitration Act which provides grounds for non-enforcement. Therefore, the main issue for determination by the court is whether the applicant had satisfied the Court that it had met the conditions stipulated in the arbitration Act for the enforcement of a foreign arbitral award or whether the Respondent had placed before the Court a case for refusal or rejection of the enforcement and recognition. The essence of the Respondents case is that the majority Award was arrived at by wrongly applying English Law and not Tanzanian Law as specifically provided in the contract. Muya J, agreeing with the dissenting opinion held that the decision of the majority as set out in the award was made contrary to the laws of Tanzania¹⁶⁹ and that the court could not condone such a breach. Therefore, it would be contrary to public policy to enforce such an award.

To summarize, the cases above have illustrated how beneficial dissenting opinions have been to courts and parties as evidence in proceedings challenging arbitral awards. Such proceedings are important since they ensure that awards that are unjust or against public policy are not enforced or recognized.

4.3 Challenges Posed by Dissenting Opinions in Domestic Arbitration

4.3.1 Dissenting opinions risk violating the secrecy of deliberations

Dissents in arbitral awards risk disclosing the secrecy of deliberations.¹⁷⁰ Although not expressly codified in the law, confidentiality in deliberations is applied as a matter of practice. As an

¹⁶⁹ *Kundan Singh Construction (Kundan) v. Tanzania National Roads Agency (the Agency)* [2013] eKLR, Muya J, “I have perused the material on the Tanzanian law as relates to the case at hand and I am of the considered view (as that held by the Respondents) that had the majority two considered the provisions of the public procurement (works) Regulation 2005, first regulation 123 (1) and then regulation 123 (2) as was done by Mrs. Ufot SAN in her dissenting opinion then they too would have come to the same holding as she did. Instead as alleged in paragraphs 300 to 302 of the majority award, the majority two offered an interpretation of regulation 123(2) which was not in tandem with the scheme of the said regulations. This resulted in a wrong finding, unlike Mrs Ufot san that the Engineer was not an agent of the Employer. That had the majority two read the provisions of regulation 123(2) in the context of the management of the works, they would have most certainly have reached the conclusion that the Engineer was indeed the agent of the procuring entity on the other hand Mrs. Ufot in her dissenting opinion at paragraphs 5.35 to 5.37 correctly held that the Engineer is the agent of the procuring entity.”, 10.

¹⁷⁰ Mosk and Ginsburg, ‘Dissenting Opinions in International Arbitration’, 274.

example of this the Chartered Institute of Arbitrators Kenya Branch Rules provide that an arbitrator's note remain confidential to preserve the integrity and confidentiality of proceedings.¹⁷¹ The secrecy of deliberations should be maintained so as to enable members of the tribunal to freely exchange their views and arguments. Dissenting opinions may reveal the discussions that took place between the arbitrators as the dissenting arbitrator attempts to counter the views of the majority. Such revelations may be contrary to the wishes of the majority of the arbitrators. Furthermore, it runs the risk of a party appointed arbitrator being questioned by the appointing party on certain deliberations that were adverse to the party's interests.¹⁷² To prevent this it is essential that the dissenting arbitrator limit their reasons for not signing to alternative views of the facts and law, and ought not to discuss the substance of deliberations between the arbitrators.¹⁷³

4.3.2 Dissents increase the likelihood that awards will be challenged

Dissenting opinions may encourage the unsuccessful party to challenge the award. Finality in arbitration ensures procedural neutrality, certainty, confidentiality and efficiency in dispute resolution all of which are compromised if the winner must re-litigate the case in a public forum.¹⁷⁴ Jurisprudence exists to support the view that dissenting opinions do have persuasive power in the courts when challenging awards and their enforcement. Dissenting opinions can therefore motivate unsuccessful parties to challenge awards based on the alternative views expressed by the dissenting arbitrator. This compromises the binding nature of arbitral awards contemplated in section 32A of the arbitration act.

As stated before, arbitrators should never render dissenting opinions for with the intention of frustrating the enforcement of an award or attracting a challenge to the award. It is a legitimate concern but it should not be used to restrict the benefits provided by dissenting opinions. If a dissenting opinion does lead to non-enforcement of an award on legitimate grounds, then it has served a useful purpose by preventing an unjust award.¹⁷⁵ Brower and Rosenberg, however, directly challenge the contention, rightfully noting that "Unjust arbitral awards based on manifest

¹⁷¹ Rule 10, Chartered Institute of Arbitrators (Kenya Branch) Arbitration rules.

¹⁷² Baker S and Davis M, *The UNCITRAL Arbitration Rules In Practice*, 1ed, Kluwer Law and Taxation Publishers, The Hague 1992, 157.

¹⁷³ Mosk and Ginsburg, 'Dissenting Opinions in International Arbitration', 274.

¹⁷⁴ Park W W, 'Why Courts Review Arbitral Awards', *Festschrift für Karl-Heinz Böckstiegel*, (2001), 595-606/596.

¹⁷⁵ Mosk and Ginsburg, 'Dissenting Opinions in International Arbitration', 274.

violations of the parties' procedural rights, for example, deserve no such protection from annulment or non-enforcement.”¹⁷⁶

4.3.3 The worrying nexus between party appointed arbitrators and dissenting opinions

Party Autonomy is an essential characteristic of arbitration as a means of dispute resolution. One way parties may exercise this autonomy is by appointing arbitrators to the tribunal. Section 12 of the Arbitration Act envisions a tribunal with either three or two arbitrators, or a sole arbitrator. Where there is tribunal consisting of three arbitrators, each of the parties shall select an arbitrator and the two arbitrators shall select the third member of the tribunal who shall be the umpire. One of the arguments made against dissenting opinions in multipartite tribunals is Dissenting opinions may threaten the independence of the party-appointed co-arbitrators who might feel obliged to dissent out of loyalty to the party who had appointed them.¹⁷⁷

It is worrying that non neutral arbitrators could potentially use dissenting opinions to prove fidelity to the party that appointed them. Party-appointed arbitrators offer assurance to the parties that the third arbitrator “fully understands the issues and background of the case, the contentions of each party, and the possible implications of the award before it is issued.”¹⁷⁸ In some sense, party-appointed arbitrators can be viewed as playing a dual role, where they serve as both judge and advocate.¹⁷⁹ Therefore, is not entirely surprising that they would issue favorable opinions to the party appointing, since they tend to see the facts similar to their appointing parties. Though the possibility exists of such misuse of dissenting opinions, Christoph Stippl and Veit Öhlberger suggest that the “pressure on arbitrators to inappropriately support their nominating party obviously is quite low.”¹⁸⁰

¹⁷⁶ Brower. C.N and Rosenberg C.B, ‘The Death Of The Two-headed Nightingale: Why The Paulsson-Van Den Berg Presumption That Party-Appointed Arbitrators Are Untrustworthy Is Wrongheaded’, 43.

¹⁷⁷ Alan Redfern, “The 2003 Freshfields - Lecture Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly”, 232.

¹⁷⁸ Rau S A, ‘Integrity in Private Judging’, 38 *South Texas Law Review*, (1997), 485-529,498.

¹⁷⁹ Stone s and Won J, “Arbitrator Impartiality in the Context of a Tripartite Tribunal”, http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2013_corporate_counselcseminar/9_2_arbitration_impartiality_in_context.authcheckdam.pdf , on 8 December 2016.

¹⁸⁰ Öhlberger V and Stippl C, ‘Rendering of the Award by Multipartite Arbitral Tribunals, How to Overcome Lack of Unanimity?’, *Austrian Arbitration Yearbook 2008*, (2008).

4.4 Conclusion

This chapter has considered arguments for and against dissenting opinions in domestic arbitration. The potential benefits of embracing dissenting opinions include; dissenting opinions can improve the quality of arbitration by ensuring the production of better awards, they may aid challenging parties and appellate bodies during judicial review of awards and finally they ensure maintenance of intellectual integrity on the part of the arbitrators. The risks posed by embracing dissenting opinions include violation of the confidentiality of deliberations; they increase the likelihood of the award being challenged and they may be used by arbitrators to appease their appointing parties.

CHAPTER FIVE

Conclusion, Findings and Recommendations

5.1 Introduction

This chapter seeks to present the findings of the study and propose recommendations on how to address the challenges presented by dissenting opinions can be addressed. Finally this chapter will conclude the study by reflecting on the objectives, the statement of the problem and the hypothesis and discern if each has been addressed.

5.2 Findings

Through careful consideration adjudicatory bodies should essentially arrive at an objectively sound conclusion. In some cases owing to their complexity of some the members of adjudicatory bodies may not reach similar conclusions. This disagreement in conclusions is expressed by means of dissenting opinions. In a judicial system which relies on prior jurisprudence, these dissenting opinions may inform future adjudicators and are often cited as a means of developing the law. Arbitration cannot accrue such a benefit from dissenting opinions since there is no system of precedent due to the confidential nature of its proceedings and the fact that awards are hardly published. The value of dissenting opinions to the arbitration process is less obvious, which might explain the general reluctance to expressly recognise them in most arbitration statutes and rules. There is a lack of consensus on whether they should be encouraged or discouraged resulting in statutory provisions that do not give any guidance as to their legal status or effect. The courts in the jurisdictions analysed are in consensus, stating that dissenting opinions are not part of the award but this should not preclude an arbitrator who wishes dissent as long this right has not been excluded by the agreement of the parties.¹⁸¹ The most common means by which an arbitrator may issue his dissent is by omitting his signature from the awards and then subsequently justifying the omission.¹⁸² These reasons may be appended to the award if the majority of the tribunal agrees.¹⁸³

¹⁸¹ See Chapter Three.

¹⁸² See Chapter Two and Three.

¹⁸³ See Chapter Three.

Notwithstanding the lack of legal status and express recognition, this paper contends that the process of arbitration can still accrue some benefits from dissenting opinions.¹⁸⁴ Dissenting opinions may help produce better awards by since the majority will address the issues raised by the dissenting opinions resulting in a comprehensive and refined award. Dissenting opinions may also help parties come up with better arguments when challenging awards and also provide insight to the appellate body when addressing the challenge. Furthermore, dissenting opinions allow an arbitrator to maintain their intellectual integrity where they disagree with the majority; dissenting opinions give them an option of non-conformity. The risks often cited with dissenting opinions in arbitration include¹⁸⁵; violation of the confidentiality of deliberations; they increase the likelihood of the award being challenged and they may be used by arbitrators to appease their appointing parties. Although the arguments against dissenting opinions raise legitimate concerns, many of these can be dealt with through codes of ethics or other such mechanisms, and need not lead to a blanket prohibition of all dissenting opinions.¹⁸⁶

5.3 Recommendations

For dissenting opinions in arbitral awards to be embraced the challenges they pose must first be addressed. First, is the potential misuse of dissenting opinions by party-appointed arbitrators to appease their appointing parties. Mosk and Ginsburg suggest that a comprehensive code of ethics could offset such unwarranted behaviour.¹⁸⁷ In the words of Laurent Levy: “It is preferable to eliminate or penalize abuses rather than the means, otherwise useful, which are used to commit them.”¹⁸⁸ Kenya should take a step to come up with such a code of ethics that delineates the obligations of party appointed arbitrators. Obligations binding party appointed arbitrators to neutrality may discourage the arbitrators from misusing dissenting opinions.

A code of ethics might also address the risk that dissenting opinions may violate the secrecy of deliberations. Dissenting opinions should be limited to the points of law and should not in any way reveal the particulars of the deliberation process. The American Association of Arbitrators has addressed this concern in its Code of Ethics and Procedural Standards for Labour-

¹⁸⁴ See Chapter Four.

¹⁸⁵ See Chapter Four.

¹⁸⁶ Mosk and Ginsburg, ‘Dissenting Opinions in International Arbitration’, 30.

¹⁸⁷ Mosk and Ginsburg, ‘Dissenting Opinions in International Arbitration’, 30.

¹⁸⁸ Laurent Levy, ‘Dissenting Opinions in International Arbitration in Switzerland’, 5 *Arbitration International*, , (2014), 35-42,41.

Management Arbitration. The code of ethics provide that dissenting opinions should be based on the arbitrators' views on the evidence and legal principles, and not on the deliberations which took place between the sessions of the tribunal.¹⁸⁹

The fact that dissenting opinions increase the likelihood of challenging the award is a major concern for many opponents.¹⁹⁰ There are no guarantees that can be made that losing parties will not be motivated by dissenting opinions to support their challenges. The solution to this would be a blanket ban on dissenting opinions which would be undesirable and would still not guarantee that the losing party will not challenge the award. The best solution to this is that a dissenting arbitrator should submit their dissenting opinions to the majority before communicating it to the parties. The majority should then consider the arguments in the dissent. This will help the majority refine their arguments and produce a conclusive and comprehensive award that is more immune to challenge.

5.4 Conclusion

The study sought out to achieve the following objectives; first, to highlight the potential benefits of dissenting opinions in arbitral awards in arbitration. This objective was achieved in chapter four which highlighted potential benefits such as producing better arbitral awards; they are helpful to parties and appellate courts in judicial review of awards and finally they allow an arbitrator to maintain their intellectual integrity. Second, to analyse the legal framework of arbitration in Kenya focusing on dissenting opinions in arbitral awards, this objective was met in chapter two which analysed the provisions within statute that allow an arbitrator to dissent. The third objective was to look into how other jurisdictions deal with dissenting opinions in arbitral awards. This objective was achieved in chapter three where a comparative analysis of English, Swiss, ICC and ICSID arbitration was done. The fourth objective of the study was to propose recommendations on how to deal with dissenting opinions in arbitration which was done in chapter five. The study recommends a comprehensive code of ethics.

¹⁸⁹ Article 8, American Association of Arbitrators Code of Ethics and Procedural Standards for Labour-Management Arbitration.

¹⁹⁰ Poudret J, Basson S, Berti, S and Ponti A, *Comparative law of international arbitration*, Sweet & Maxwell, 2007 678.

The problem the study sought to address was whether dissenting opinions in arbitral awards could provide any potential benefits. The benefits highlighted include; producing better awards, aiding parties and appellate courts during judicial review of awards and finally allowing arbitrators to maintain their intellectual integrity. Having accentuated these potential benefits the study has answered the hypothesis that dissenting opinions in arbitral awards do have a potential role in arbitration.

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