

**THE ARBITRATION ACTS: A REVIEW OF ARBITRATION ACT, 1995 OF KENYA VIS-  
A-VIZ ARBITRATION ACT 1996 OF UNITED KINGDOM\***

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**1.0 INTRODUCTION**

This paper is essentially a review of the statutory arbitration law applicable in Kenya and United Kingdom. It embodies an extensive review of the Arbitration Act, Act No. 4 of 1995, Laws of Kenya (hereinafter the Act or 1995 Act) and a brief overview of the basic provisions of Arbitration Act 1996 of United Kingdom (1996 Act).

The main aim is to outline the statutory law on arbitration in Kenya. The overview of the Arbitration Act 1996 is meant as a case study for the reader to gauge the provisions of the Kenyan arbitration law. In addition, the overview of the UK law is justified by the increased popularity of the Arbitration Act 1996 as the preferred law in international arbitration. It is also expected that the review of the Kenyan arbitration law alongside the admitted progressive UK 1996 Act will provoke comparison between the two systems and the Kenyan system will be the ultimate beneficiary. Such comparison is wont to yield proposals for reforms that would otherwise have been hard to come by.

**2.0 ARBITRATION LAW IN KENYA**

**2.1 A BRIEF HISTORY OF ARBITRATION LAW IN KENYA**

The first Arbitration Act in Kenya was enacted in 1968. This 1968 Act is the now repealed Arbitration Act (Cap. 49) Laws of Kenya, which was describable as a near exact replica of the Arbitration Act 1950 of United Kingdom. The 1968 Act, like the Arbitration Act 1950 of UK, generally laid the framework for court's intervention in arbitrations. Arbitration stakeholders sought

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repeal of the Act for allowing courts such excessive leeway to interfere in arbitration.<sup>2</sup> This, they argued, meant arbitration based on the Act did not enjoy the main advantages of arbitration of speed and cost effectiveness. It is that clamour, combined with the emergence of UNICITRAL MODEL ARBITRATION LAW- which provided parliaments an easy fix in enacting an arbitration Act, led to legal reforms repealing the 1968 Arbitration Act and replacing it with the Arbitration Act, 1995.

## **2.2 ARBITRATION ACT, 1995**

### **2.2.1 Preliminary**

The Arbitration Act, 1995 was assented on 10<sup>th</sup> August, 1995 and came to force in on 2<sup>nd</sup> January, 1996. It repealed and replaced Chapter 49 Laws of Kenya, which had governed arbitration matters since 1968.<sup>3</sup> The 1995 Act is made of 42 sections and is divided into 8 parts. The Act is based on the Model Arbitration Act of the United Nations Commission on Trade Law.

Subsequently, the 1995 has been amended vide the Arbitration (Amendment) Act 2009 which was assented to on 1<sup>st</sup> January 2010 (hereinafter referred to as the Amending Act).

### **2.2.2 Domestic arbitration and international arbitration**

The Arbitration Act 1995 is applicable to both domestic and international arbitration save as limited by its provisions.<sup>4</sup> Section 3(2)<sup>5</sup> of the Act defines what arbitration is domestic while section 3(3) stipulates the requisite conditions for an arbitration to qualify as an international one.<sup>6</sup>

Arbitration is domestic;<sup>7</sup>

- a) where the arbitration is between individuals, the parties are nationals of Kenya or are habitually resident in Kenya;

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<sup>2</sup> Farooq Khan (2002) “Introduction to Arbitration” A paper presented at Chartered Institute of Arbitrators-Kenya Branch entry course held at Nairobi on 11<sup>th</sup> and 12<sup>th</sup> of February, 2002

<sup>3</sup> Section 42 of the 1995 Act

<sup>4</sup> Section 2 of the 1995 Act

<sup>5</sup> As amended by Section 2 of the Amending Act.

<sup>6</sup> Subparagraph (b) of the Act has been amended to read “the juridical seat of arbitration is determined by or pursuant to the arbitration agreement; ”

<sup>7</sup> Sec. 3 (2) of the 1995 Act as amended by the Amending Act.

(b) where the arbitration is between bodies corporate, the parties are incorporated in Kenya or their central management and control are exercised in Kenya;

(c) where the arbitration is between an individual and a body corporate

i) the party who is an individual is a national of Kenya or is habitually resident in Kenya; and

(ii) the party that is a body corporate is incorporated in Kenya or its central management and control are exercised in Kenya; or

(d) the place where a substantial part of the obligations of the commercial relationship is to be performed, or the place with which the subject-matter of the dispute is most closely connected, is Kenya.

### **2.2.3 Arbitration agreement**

An arbitration agreement or arbitration clause must be concluded in writing. An arbitration agreement is in writing if signed by parties or involves an exchange of letters, telex, telegram, facsimile, electronic mail or other telecommunication means providing a record of the agreement. Even better, it is enough that an arbitration agreement is alleged in the statement of claim and not denied by the other party. An arbitration agreement by reference is also possible provided the contract making the reference is in writing and the reference makes the clause referred to part of that contract.<sup>8</sup> Where there is no binding agreement to arbitrate, parties to dispute willing to arbitrate usually enter into an “ad hoc” agreement to arbitrate the same. In essence, arbitration in Kenya is a matter of contractual arrangement between parties breach of which entitles the aggrieved party file a stay of proceedings filed in breach thereof.

### **2.2.4 Stay of proceedings**

Applications for stay of the legal proceedings are provided for under section 6 of the Arbitration Act. It avails an avenue to a party to an arbitration agreement to give it effect when the opposite party has preferred court process in breach. Essentially, an arbitration clause or arbitration agreement in a

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<sup>8</sup> Section 4 of the Act 1995

contract is not an impediment to resolving disputes in court until a party objects.<sup>9</sup> However, if one of the parties is desirous of effectuating the arbitration agreement when the other has gone to court, then the former party may seek an order of the court under section 6 of the Arbitration Act staying the court proceedings. The grant of the order of stay of legal proceedings under section 6 leaves the initiator of the court proceedings with no option but to follow the provisions of the arbitration agreement if he wishes the dispute to be resolved.

In granting stay of proceedings, the courts generally have regard to the following conditions. One, the applicant must prove the existence of an arbitration agreement which is valid and enforceable.<sup>10</sup> The applicant for stay must also be a party to the arbitration agreement or at least a person claiming through a party e.g. a personal representative or trustee in bankruptcy.<sup>11</sup> In addition, it is necessary that the dispute which has arisen fall within the scope of the Arbitration Clause. The court is bound to stay the proceedings unless, *inter alia*, it finds: “that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.”<sup>12</sup>

The party making the application for stay must also not have taken steps in the proceedings to answer the substantive claim. For instance, the party must not have served defence or taken another step in the proceedings to answer the substantive claim.<sup>13</sup> Under section 6 of the Arbitration Act, a party wishing to enforce the arbitration agreement in a situation where the other party has initiated court proceedings must apply to the court not later than the time when that it enters appearance or “takes the appropriate procedural step to acknowledge the legal proceedings against that party”.<sup>14</sup>

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<sup>9</sup> See Peter Muema Kahoro & Another-v-Benson Maina Githethuki [2006] HCCC(Nairobi) No. 1295 of 2005 and Rawal-v-The Mombassa Hardware Ltd [1968] E.A. 398

<sup>10</sup> In fact, section 6(1) (a) of the Act stipulates that court refuse to grant stay of proceedings where ‘the arbitration agreement is null and void, inoperative or incapable of being performed’.

<sup>11</sup> Chevron Kenya Limited-v-Tamoil Kenya Limited HCCC (Milimani) No. 155 of 2007. See also Pamela Akora Imenje-v-Akora ITC International Ltd & Another HCCC (Milimani) No. 368 of 2005

<sup>12</sup> Section 6(1) (b) of the Arbitration Act 1995. The section received an interpretation in TM AM Construction Group (Africa) v. Attorney General HCCC (Milimani) No. 236 of 2001

<sup>13</sup> Russell on Arbitration (supra) p. 301

<sup>14</sup> In *Eagle Star Insurance Company Limited-v-Yuval Insurance Company Limited* [1978] Llods Rep. 357, Lord Denning MR was of the view that to merit refusal of stay, the step in the proceedings must be one which “impliedly affirms the correctness of the [Court’s] proceedings and the willingness of the defendant to go along with the determination by the courts instead of arbitration”. See *Chevron Kenya Ltd-v-Tamoil Kenya Limited and Kenya Seed Co. Limited-v-Kenya Farmers Association Limited* HCCC (Nairobi) No. 1218 of 2006.

#### 2.2.4 Interim measures by court

The courts have wide powers to make orders relating to interim orders for the purpose of preserving the status *quo* pending and during arbitration. The jurisdiction to make such orders is the preserve of the High Court of Kenya.<sup>15</sup>

The courts have jurisdiction to make orders to preserve the status quo of the subject-matter of the arbitration. The powers could include making orders for attachment before judgment; interim custody or sale of goods (e.g. perishables), appointing a receiver and interim injunctions. However, the law discourages the parties from making parallel applications before the arbitral tribunal and/or the High Court by having section 7 (2) enjoin the court to adopt any ruling or finding on any relevant matter to the application as conclusive.

In *Don-wood Co. Ltd-v-Kenya Pipeline Ltd*<sup>16</sup> Ojwang J, granting the orders sought, held that the jurisdiction to grant the injunctive relief under section 7 of the Arbitration Act was meant to preserve the subject matter of the suit pending determination of the issues between the parties.

#### 2.2.5 Court's limited role in arbitration<sup>17</sup>

In Kenya, the general approach on the role and intervention of the court in arbitration in Kenya is provided in section 10 of the Arbitration Act 1995. The section provides that **‘Except as provided in this Act, no court shall intervene in matters governed by this Act.’**

That section, in mandatory terms, restricts the jurisdiction of the court in intervening in arbitration to such matters as are provided for by the Act. The section is a codification of the principle of parties' autonomy which underlies the arbitration generally and in particular under the Arbitration Act, 1995.<sup>18</sup> Section 10 permits two possibilities where the court can intervene in arbitration. First is where the Act expressly provides for or allows the intervention of the court. Intervention may also be permissible in public.

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<sup>15</sup> Sec. 7 of the Act.

<sup>16</sup> HCCC No. 104 of 2004. See also *Forster-v-Hastings Corporation* (1903) 87 LT 736

<sup>17</sup> See Kariuki Muigua (2008) “Role of Courts in Arbitration in Kenya” An unpublished paper available at the CIArb-K Library.

<sup>18</sup> See Sutton D.J et al (2003), *Russell on Arbitration* (Sweet & Maxwell, London, 23<sup>rd</sup> Ed.) p. 293

### 2.2.6 Appointment of arbitrator<sup>19</sup>

Generally the arbitration agreement specifies the number of arbitrators and the mode of appointing the arbitral tribunal they would prefer to arbitrate their disputes.<sup>20</sup> The parties can agree on any of several types of arbitral tribunals including sole arbitrator; a tribunal of two arbitrators, with an umpire in reserve; a tribunal of three arbitrators; a tribunal of more than three arbitrators; and an umpire.<sup>21</sup>

Where each of two parties to an arbitration agreement is to appoint an arbitrator and one party (“the party in default”) has indicated that he is unwilling to do so;<sup>22</sup> fails to do so within the time allowed under the arbitration agreement,<sup>23</sup> or fails to do so within a reasonable time (where the arbitration agreement does not limit the time within which an arbitrator must be appointed by a party),<sup>24</sup> the other party, having duly appointed an arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.

If the party in default does not, within fourteen days after notice under subsection (3) has been given make the required appointment and notify the other party that he has done so, the other party may appoint his arbitrator as sole arbitrator, and the award of that arbitrator shall be binding on both parties as if he had been so appointed by agreement.<sup>25</sup> Where a sole arbitrator has been appointed under subsection (4), the party in default may, upon notice to the other party, apply to the High Court within fourteen days to have the appointment set aside.<sup>26</sup>

Section 12 of the Arbitration Act 1995 further stipulates the extent of the courts’ power in making appointments of arbitral tribunals in Kenya. The jurisdiction to make appointment to arbitral tribunal

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<sup>19</sup> See generally Jackie Kamau J and Farouk Khan (2007) “Appointment of an Arbitrator” A paper presented at Chartered Institute of Arbitrators-Kenya Branch special member course Held at Nairobi on 8<sup>th</sup> and 9<sup>th</sup> of March, 2007

<sup>20</sup> Section 11(1) and 12(2) of the Act

<sup>21</sup> For an in-depth discussion of each of the tribunals see Sir Mustill M.J and Boyd S.C (1989) *The Law and Practice of Commercial Arbitration in England* (Butterworths, London and Edinburgh, 2<sup>nd</sup> Edition) p. 171-192

<sup>22</sup> Sec. 12(3) (a) as amended by the Amending Act

<sup>23</sup> Sec. 12(3) (b), *supra*.

<sup>24</sup> Sec. 12 (3) (c), *supra*.

<sup>25</sup> Sec. 12(4) (a) and (b), *supra*.

<sup>26</sup> Sec. 12(5), *supra*.

is vested exclusively in the High Court of Kenya. The High Court may grant an application under subsection (5) only if it is satisfied that there was good cause for the failure or refusal of the party in default to appoint his arbitrator in due time. The High Court, if it grants an application under subsection (5), may, by consent of the parties or on the application of either party, appoint a sole arbitrator. A decision of the High Court in respect of a matter under this section shall be final and not be subject to appeal.<sup>27</sup>

The High Court is enjoined in making such appointment to consider the qualifications required of the arbitrator by the agreement of the parties.<sup>28</sup> The court is also bound to make sure it secures appointment of independent and impartial tribunal. The court is also to take account the wisdom of appointing an arbitrator other than fellow national of the parties or one of the parties. The decision of the High Court shall not be subject to appeal.<sup>29</sup>

### **2.2.7 Challenging of arbitration tribunal<sup>30</sup>**

Parties are free to agree on how to challenge the arbitral tribunal. Where the parties fail so to agree, a party may within 15 days of becoming privy to the appointment of the tribunal or circumstances that merit its challenge write to it stipulating the reasons for the challenge. If the challenged tribunal does not withdraw from office or the other party agree to the challenge, the tribunal shall decide the matter.<sup>31</sup> If a challenge under agreed procedure or under subsection (2) is unsuccessful, the challenging party may, within 30 days after being notified of the decision to reject the challenge, apply to the High Court to determine the matter. On an application under subsection (3), the arbitrator who was challenged shall be entitled to appear and be heard before the High Court determines the application. The High Court may confirm the rejection of the challenge or may uphold the challenge and remove the arbitrator.<sup>32</sup>

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<sup>27</sup> Sec. 12 (6), (7) and (8) respectively as amended by the Amending Act.

<sup>28</sup> Sec. 12 (9)

<sup>29</sup> *Ibid.* This is for instance requisite in international arbitration where if the arbitrator comes from one party's country, there is likelihood that his/her impartiality will not be guaranteed.

<sup>30</sup> See generally Njeri Kariuki (2007) "Jurisdiction of Arbitrator" An paper presented at Chartered Institute of Arbitrators-Kenya Branch special member course held at Nairobi on 8<sup>th</sup> and 9<sup>th</sup> of March, 2007

<sup>31</sup> Sec. 14 (1) and (2) of the Act.

<sup>32</sup> Sec. 14 (3), (4) and (5) as amended by the Amending Act.

The decision of the High Court on such an application shall be final and shall not be subject to appeal. Where an arbitrator is removed by the High Court under this section, the court may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid. While an application under subsection (3) is pending before the High Court, the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided, and such an award shall be void if the application is successful.<sup>33</sup>

An arbitrator may be challenged on basis of various factors provided for under the Arbitration Act. First, an arbitrator may be challenged if there is reason to justifiably doubt his/her impartiality and independence or if he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so. The fact that an arbitrator does not possess qualifications agreed to by the parties is also a potent reason for a challenge. However, a party who has appointed an arbitrator may only challenge him on basis of reasons that he becomes seized of after such appointment. The rationale here is to avoid a situation where a party appoints an arbitrator intending to challenge him/her later in the course of the arbitral proceedings as a delaying tactics. Hence the need to be cautious in making arbitrator appointments as the chance to challenge ones appointment is restricted.<sup>34</sup>

In the same vein, an arbitrator's office is to terminate in the event of his/her inability to perform the functions of the office of arbitrator or for any other reason fails to conduct the proceedings properly and with reasonable dispatch. In alternative, where an arbitrator resigns or parties agree to terminate his/her mandate, his office shall terminate. But in the instances where the above grounds are contested, recourse is to be had to the High Court upon application of a party for a decision on the termination. Such decision shall be final and not subject to appeal.<sup>35</sup>

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<sup>33</sup> Section 14 (6), (7) and (8) of the Act as amended by the Amending Act.

<sup>34</sup> Section 13 of the Act as amended.

<sup>35</sup> Section 15 of the Act as amended.



### **2.2.8 Special powers and duties of an arbitrator<sup>36</sup>**

The arbitration Act, 1995 makes a number of provisions touching on the powers of the arbitrator. The most important ones are the following:

#### **(a) Kompetenz kompetenz<sup>37</sup>**

Most importantly, the arbitral tribunal may rule on its own jurisdiction. Such ruling may encompass matters including existence or validity of the arbitration agreement. The fact that a party has appointed or participated in appointing an arbitrator is not a bar to challenging the jurisdiction of the arbitral tribunal. The Act requires that a plea of lack of jurisdiction be raised latest at submission of defence. Where the plea is exceeding of jurisdiction, the same should be raised as soon as the matter alleged to be in excess of authority is raised in the proceedings. However, the arbitral tribunal has the discretion to admit a later plea where it considers the delay justified.<sup>38</sup>

The arbitral tribunal has two options open to it when the question of jurisdiction is raised by a party. The arbitral tribunal may rule on the matter as a preliminary question or wait to address it in an arbitral award on the merits. The ruling of the arbitral tribunal in the former instance may be challenged by the aggrieved party by way of an application to the High Court. Such application must be made within 30 days of notice of the award and the decision of the High Court shall be final. But while the application is pending before the superior court, the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided, and such award shall be void if the application is successful.<sup>39</sup>

#### **(b) Order interim measures**

Unless the parties otherwise agree, an arbitral tribunal may, on the application of a party order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject- matter of the dispute, with or without an ancillary order requiring the provision of appropriate security in connection with such a measure; or order any party to provide

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<sup>36</sup> See generally Richard Mwongo, “The jurisdiction and powers of an Arbitrator” A paper presented at Chartered Institute of Arbitrators-Kenya Branch entry course held at Nairobi on 11<sup>th</sup> and 12<sup>th</sup> of February, 2002

<sup>37</sup> This is the German expression of the doctrine of Competence/Competence i.e. short for an arbitrator has competence to rule on its own competence.

<sup>38</sup> Section 17 of the Act as amended.

<sup>39</sup> Ibid.

security in respect of any claim or any amount in dispute; or order a claimant to provide security for costs.<sup>40</sup>

The Act gives the High Court power to enforce the peremptory orders of protection given by the arbitral tribunal. In order to enforce such protective measure or generally to exercise the power associated with the interim protective measures, the tribunal or a party with approval of the arbitral tribunal may apply for assistance of the High Court.<sup>41</sup> The High Court has equal powers as possessed by the arbitral tribunal with regard to interim measures of protection under the Act. In particular, the High Court's power shall be the equivalent the one it wields in civil proceedings before it. However, the arbitral proceedings shall continue regardless of the fact that such an application is pending in the High Court except where the parties agree otherwise.<sup>42</sup>

### **(c) Arbitrator 'master of procedure'**

The arbitrator is given latitude to conduct the arbitration proceedings as s/he deems fit, having regard to the desirability of avoiding unnecessary delay or expense, in event of default by parties to agree on arbitral procedure.<sup>43</sup> The only condition guarding this freedom of the tribunal is the requirement of equal treatment of all parties and the need to give parties a fair and reasonable opportunity to present their case. The implication is that arbitrators are not bound procedural laws same way as they are by substantive laws. But even with the provision, most arbitration proceedings still ape the court procedures. There is need to change this state of affairs if arbitrations are to guarantee parties expeditious arbitral process.

The arbitrator is also given powers to deal with issue of amendment of pleadings unless parties have otherwise agreed. Section 24(3) of the Act gives the arbitrator power to decline or allow amendments or supplements to pleadings. The arbitral tribunal is further given discretion to decline amendments where they are likely to result in delay in the arbitral proceedings.

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<sup>40</sup> Sec. 18 (1) (a) (b) and (c) of the Act.

<sup>41</sup> Section 18 (2) of the Act

<sup>42</sup> Section 18 (3) of the Act

<sup>43</sup> Section 20, as amended.

#### **(d) Admissibility of evidence**

The power to determine procedure is crowned with the discretion given the arbitrator in determining matters of admissibility, relevance, materiality and weight of evidence. In essence, the arbitrator has the power to determine the applicable rules of evidence.<sup>44</sup> In exercising this evidentiary discretion, the arbitral tribunal enjoys freedom from the reins of the provisions of the Evidence Act<sup>45</sup> which ordinarily regulate matters of procedure in judicial proceedings. Application of the Evidence Act is excluded as regards proceedings before an arbitrator by section 2(1) of the Act.

#### **(e) Ex-parte arbitration proceedings**

Arbitration may proceed ex-parte where a party fails to appear despite grant of adjournments by the arbitrator and notices of hearings being served.<sup>46</sup> This power aims to ensure a party who senses defeat does not frustrate the arbitration. As such, the arbitrator must exercise due caution and ensure all reasonable effort is expended to give the absconding party an opportunity to attend. Where even after such reasonable efforts the party persists in absence or failure to produce, the arbitrator may make an award based on evidence available notwithstanding the absence or the failure by such party.

#### **(f) Power to request assistance in taking evidence**

The power of the arbitrator is limited in that s/he cannot compel a witness to give evidence. However, the arbitrator or a party can seek assistance of the High court in taking evidence for use at the arbitral hearing. In such circumstances, the High Court has discretion to execute the request within its competence and its rules on taking evidence.<sup>47</sup> The High Court's assistance in this instance includes issuing summons to the witness to secure attendance of the witness if the witness is within Kenya and refuses to attend and give evidence. If such a witness refuses to attend even after such summons, he will be liable to be punished for contempt of court. The High Court may also order examination of a witness on oath before an officer of the court or any other officer. Where the witness is outside the jurisdiction, the court may order the issue of order for taking of evidence by commission or request for examination of a witness outside the jurisdiction.<sup>48</sup>

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<sup>44</sup> Section 20(3) of the Act

<sup>45</sup> Cap. 80, Laws of Kenya

<sup>46</sup> Section 26(c) of the Act.

<sup>47</sup> Order XVII of the Civil procedure Rules

<sup>48</sup> Section 28 of the Act

### **(g) Powers to act on the arbitral award**

The arbitrator may correct an error in an award on his/her own motion or upon request by any party.<sup>49</sup> The aim of this power is to eliminate the necessity to constitute a new tribunal just to tackle an error that does not go to the substance of the award.<sup>50</sup> This power is reserved for accidental additions or omissions and clerical errors. In the same vein, and based on agreement of the parties, an arbitrator may be called by either party to give an interpretation to a specific part of award. The arbitral tribunal also has power upon request by a party to make an additional award as to the claims presented but omitted from the main award within 60 days of the request. In addition, arbitral tribunal is given power under section 34(6) of the Act to extend time limits provided under the Act for correction, interpretation and additional awards.

### **2.2.9 Termination of arbitration proceedings**

The arbitral tribunal is enjoined under section 26 of the 1995 Act to terminate arbitration proceedings where the claimant defaults in communicating his/her claim. If the respondent is the party in default, the tribunal is to continue the proceedings without taking the default as admission. Thus the tribunal will require the claimant to prove its case as against the respondent and forbids summary awards.

If during proceedings the parties reach a settlement, the arbitral tribunal is under a duty to terminate the proceedings without more. Upon unopposed request by either party, the tribunal shall record the settlement in the form of an arbitral award on agreed terms. Such award is to state that it is an arbitral award and shall be in accordance with rules of formality under the Act.<sup>51</sup>

### **2.2.10 Costs and interest<sup>52</sup>**

The arbitration process invariably involves costs and expenses and the questions of who bears the costs, how much is payable and at when costs are to be awarded are very delicate questions. The power of the arbitrator to award costs is provided for under section 32 B of the Act, as amended by the amending Act. The arbitrator must satisfy himself that the arbitration agreement is silent on costs and the legal provision on award of costs is subject to party autonomy to stipulate otherwise. Thus

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<sup>49</sup> Section 34(3) of the Act

<sup>50</sup> The civil procedure equivalent is the power given to courts to correct minimal errors in judgements after issue

<sup>51</sup> Section 31 of the Act

<sup>52</sup> F.Khan (2007) 'Costs and Interest' An paper presented at Chartered Institute of Arbitrators-Kenya Branch special member course held at Nairobi on 8<sup>th</sup> and 9<sup>th</sup> of March, 2007

barring agreement as between parties, cost and expenses of arbitration are to be determined and apportioned by the arbitral tribunal. The section defines costs as legal and other expenses of the parties, fees and expenses of the arbitration and legal and other expenses of the arbitral tribunal. The arbitral tribunal may also exercise discretion to determine and award other expenses related to the arbitration.

The law provides for award of costs at award stage or after the award but not before. The arbitral tribunal may also be award costs by way of supplementary award where omitted in the main award. In default of award of costs and expenses, each party is responsible for the costs and expenses of the arbitration.

Unless otherwise agreed by the parties, to the extent that the rules of law applicable to the substance of the dispute permit, an arbitral award may include provision for the payment of simple or compound interest calculated from such date, at such rate and with such rests as may be specified in the award.<sup>53</sup>

### **2.2.11 Security for costs**

Given that costs are awardable in arbitration and the costs that attend arbitration, the law allows the arbitrator, in limited instances, to require security for costs from a party on application by the opposite party. The security could take the form of cash or bond or a guarantee and like in court proceedings serves to ensure award of costs are not turn out to be unenforceable.

The Arbitration Act 1995 did not have an express provision for security for costs until the amendment of S. 18 of the Act in 2009. The new S.18 (1) provides that unless the parties otherwise agree, an arbitral tribunal may, on the application of a party -

- (a) order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject- matter of the dispute, with or without an ancillary order requiring the provision of appropriate security in connection with such a measure; or
- (b) order any party to provide security in respect of any claim or any amount in dispute; or
- (c) order a claimant to provide security for costs.

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<sup>53</sup> Sec. 32C of the Act.

In addition to section 18, the Arbitration Rules 16(C) 9 gives the tribunal jurisdiction to make orders for security of a party's costs. There is nothing that forbids parties from agreeing on the matter of orders for security for costs or even consent to allow the arbitrator to make the orders.

### **2.2.12 The arbitral award<sup>54</sup>**

Essentially, the arbitrator's bears the primary duty under section 29 of the Act to decide the dispute under reference in accordance with the rules of law chosen by the parties and in default the laws of Kenya. Deciding the dispute inevitably boils down to making an award on addressing all issues raised in reference. An award not addressing all issues may be challenged either through a request for an additional award addressing issues not already addressed or by mounting a challenge against the award in court based on the ground of serious irregularity.<sup>55</sup> Generally, an award can be challenged in court under section 13, 14 and 35 of the Act.

There is no provision in Arbitration Act 1995 specifying which remedies an arbitrator may award except on interim applications where section 18 sets out orders which the an arbitrator may make for protection of the subject matter of arbitration. As for formality required of awards, section 32(1) set out the formal requirements of an award which apply where parties have not agreed otherwise. The award has to be in writing, signed, state the juridical seat of arbitration and the date when it was made and where it is a partial award specify the issues addressed in it. Section 32 (3) requires that an award contain reasons unless it is a consent award or the parties have agreed to dispense with the requirement. The Act does not stipulate the fate of an award not containing the foregoing formal ingredients. But section 34(4) allowing correction of minor slips and clerical error is anything to go by, minor error of formality will not invalidate an award especially where its import is clear.

### **2.2.13 Setting aside of an award<sup>56</sup>**

Setting aside of an award is the only recourse in the High Court against an arbitral award permitted by the Arbitration Act, 1995.<sup>57</sup> The instances when the High court may set aside an arbitral award are

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<sup>54</sup> K.I. Laibuta "Arbitration Awards" An paper presented at Chartered Institute of Arbitrators-Kenya Branch special member course held at Nairobi on 8<sup>th</sup> and 9<sup>th</sup> of March, 2007

<sup>55</sup> Serious irregularity is defined as 'an irregularity which the court considers has caused or will cause substantial injustice'.

<sup>56</sup> K.I. Laibutta, *supra*\_note 45

<sup>57</sup> Section 35(1) of the Act

specifically stipulated in the Act.<sup>58</sup> First, the arbitral award may be set aside where it is proved that a party to the arbitration agreement was under incapacity.<sup>59</sup> The second ground under which an arbitral award may be set aside is invalidity of the arbitration agreement under the laws governing the dispute.<sup>60</sup> A further ground for setting aside arbitral award is if proper notice of appointment of an arbitrator or arbitral proceedings was not given or the making of the award was induced or affected by fraud, bribery, undue influence or corruption;<sup>61</sup> The ground will have met if the applicant can show that s/he was unable to present his case for any other reason. The High Court may also set aside the award if it deals with a dispute not contemplated by or falling within scope of the terms of reference to the arbitration. Similarly, an award may be set aside if it contains decisions on matters beyond the scope of the arbitration reference.<sup>62</sup>

In addition, the fact that the composition of the arbitral tribunal or the procedure during the proceedings was not as per the parties' agreement furnishes a ground for setting aside arbitral awards. However, if the agreement was in conflict with a provision of the Act which the parties are not allowed to derogate from or there was no agreement on derogation, then the award shall not be set aside.<sup>63</sup>

An arbitral award may also be set aside where the High Court finds that the dispute is incapable of settlement by arbitration under the law of Kenya. The court will also set aside an award that is in conflict with public policy of Kenya.<sup>64</sup> These were the grounds relied upon in *Macco Systems India PVT Limited-v-Kenya Finance Bank Limited*.<sup>65</sup> Ringera J (as he then was), after examining several authorities, in *Christ For All Nationals vs. Apollo Insurance Co. Ltd*<sup>66</sup> and formed the view that: -

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<sup>58</sup> Section 35(2) of the Act, as amended by the amending Act.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> Section 35 (2) (b) of the Act

<sup>65</sup> HCCC (Milimani) No. 173 of 1999

<sup>66</sup> [2002] 2 EA 366

**“Although public policy is a most broad concept incapable of precise definition...an award could be set aside under section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that either it was:**

- a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten or**
- b) inimical to the national interest of Kenya or**
- c) contrary to justice and morality.”**

The law requires that an application for setting aside an arbitral award be made within three months of receipt of the award by the applicant. If the application is made pursuant to an application for recognition of award the same must be within 3 months of the award.<sup>67</sup>

A party to the arbitral proceedings whose award is sought to be set aside may apply suspension of the setting-aside proceedings. The High court may exercise the discretion to suspend such proceedings where it deems the same appropriate and if so requested by a party. A suspension shall be for such determined time and for the purpose of giving the arbitral tribunal an opportunity to resume the arbitral proceedings or take a remedial action for purging the grounds for setting aside the arbitral award.<sup>68</sup>

#### **2.2.14 Recognition and enforcement of awards**

A domestic arbitral award shall be recognised as binding and on application in writing to the High Court, it shall be enforced subject to S. 36 and 37 of the Arbitration Act, 1995.<sup>69</sup> Any party may apply for enforcement of arbitral award.<sup>70</sup> The law requires that the High Court be furnished with a duly authenticated original arbitral award or duly certified copy thereof, by the party applying for its enforcement thereof.<sup>71</sup> In addition, the party should supply the original arbitration agreement or a certified copy of it to the superior court. However, the High Court may order otherwise where a party seek indulgency on compliance with these requirements to supply those documents. The arbitration

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<sup>67</sup> Section 35(3) of the Act

<sup>68</sup> Section 35 (4) of the Act

<sup>69</sup> Section 36 (1) of the Act, as amended.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*



award furnished must be in English and if the original was not English, the law requires a duly certified translation to be availed to the court.<sup>72</sup>

Section 37 provides the ground on which the High Court may refuse to recognise an arbitral award irrespective of the state of origin. At the request of the party against whom the award is sought to be invoked the court refuse to enforce award if the party proves any of the following: that the party to the agreement was under incapacity, that the arbitration agreement is not valid under the applicable law, that proper notice of appointment or arbitral award was not given the party or otherwise the party was unable to present his case, that the award does not fall within or is incurably beyond the scope of the reference to the arbitration or that the composition of the arbitral tribunal was not as per the parties agreement or was afoul the law applicable to the arbitration.

A proof that the arbitral award has not yet become binding on the parties or has been set aside or suspended is also a ground for refusal to enforce the award, at least temporarily.<sup>73</sup> Recognition or enforcement may also be refused where the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence.<sup>74</sup>

The High court may also, on its own motion or upon request by a party, refuse to enforce an arbitral award on the grounds provided for in section 37 (1) (b) of the Act. Here, the court has to find that subject matter of the dispute is not referable to arbitration under the laws of Kenya. Whether or not the matter was capable of settlement by arbitration in the country of origin of the award is not a valid consideration of the court. In alternative, the court will refuse to enforce an arbitral award where its recognition or enforcement would be contrary to the public policy in Kenya. These grounds are in recognition of the court's role as custodian of the laws and public interest in Kenya and the resultant duty on the courts to uphold the same.<sup>75</sup>

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<sup>72</sup> *Ibid.* See Kundan Singh Construction Ltd-v-Kenya Ports Authority HCCC(Milimani) No. 794 of 2003

<sup>73</sup> Section 37 (1) (a) of the Act

<sup>74</sup> *Ibid*; as amended by the amending Act.

<sup>75</sup> Section 37 (1) (b) of the Act

### **2.2.15 Recognition of foreign awards**

Previously, the Arbitration Act did not make a distinction between domestic and foreign awards. However, a repeal of Section 36 and replacement of the same introduced a new S. 36 (2) which provides that;

“An international arbitration award shall be recognised as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is a signatory and relating to arbitral awards.”

However, a foreign award will not be taken as final if proceedings contesting its validity are pending in the country of its making.

### **2.2.16 Appeals/determination of questions of law**

The parties to a domestic arbitration may agree that application be made by a party to the High Court for determination of questions of law arising in arbitration.<sup>76</sup> The parties may also agree that appeal be available to aggrieved party on questions of law arising out of the award. Such appeal shall be to the High Court.<sup>77</sup>

On such application or appeal the High Court has two options available to it. It can either determine the question of law arising or confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re-consideration.<sup>78</sup> Where another tribunal has been appointed, remittance of the matter to this latter arbitral tribunal is permitted.<sup>79</sup>

The decision of the High Court is subject to appeal to the Court of Appeal if the following two conditions being met. The parties must have agreed to appeal and the High Court grants leave to appeal.<sup>80</sup> A party aggrieved by the High Court’s refusal of leave to appeal may seek special leave to appeal from the Court of Appeal.<sup>81</sup> The Court of Appeal has jurisdiction on such appeal to exercise

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<sup>76</sup> Section 39 of the Act

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

<sup>80</sup> Section 39(3) of the Act, as amended by the amending Act.

<sup>81</sup> *Ibid.*

any of the powers exercisable by the High Court on application for determination of questions of law in arbitration.<sup>82</sup>

### **2.2.17 Provisions for incidental matters**

Firstly, section 8 of the Act perpetrates the authority of the arbitral tribunal despite death of a party. In other words, the authority of the arbitrator is not revoked by death of any party to the arbitration or party who appointed the arbitrator. Under section 15, however, the authority of the arbitrator will cease if he fails to act or proceed.

The arbitrator is enjoined under section 19 of the Act to treat the parties with equality. This section in conjunction with sections 12 and 13 requiring an arbitrator to maintain independence and impartiality have been interpreted as aimed to guarantee fair hearing in arbitration proceedings.<sup>83</sup>

Previously, there were no provisions in the 1995 Act for the immunity of the arbitrator and his/her associates. However, the insertion of a new S. 16B vide the amending Act ensures that an arbitrator shall is not held liable for anything done or omitted to be done in good faith in the discharge or purported discharge of his functions as an arbitrator. This immunity shall extend to apply to a servant or agent of an arbitrator in respect of the discharge or purported discharge by such a servant or agent, with due authority and in good faith, of the functions of the arbitrator.<sup>84</sup> However, nothing in this section affects any liability incurred by an arbitrator by reason of his resignation.<sup>85</sup> Section 20(4) of the Act secures the privileges and immunities of persons appearing before an arbitrator in a fashion similar to those appearing in court proceedings.

The arbitrator is enjoined, in default of parties' agreement, to give directions on certain administrative matters of the arbitration preferably at the preliminary stages of the arbitration. As per section 21, the arbitrator is given the wherewithal to decide the juridical seat of arbitration and

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<sup>82</sup> *Ibid.*

<sup>83</sup> See Githinji JA's dissenting judgment in *EpcO Builders Limited-v-Adam S. Marjan-Arbitrator & Another Civil Appeal No. 248 of 2005*

<sup>84</sup> Sec. 16B (2)

<sup>85</sup> Sec. 16B (3)

the location of any hearing or meeting. The arbitrator also decides the language of the arbitration if the parties fail to agree and may order translations where necessary.<sup>86</sup>

The arbitrator also sets time limits for submission of claims and defences if parties default in agreeing on the matter.<sup>87</sup> On its part, section 25 (1) and (2) of the Act bind the arbitrator to determine what type of submissions, oral or written, the arbitration shall take. The arbitrator is required to give sufficient notices of any hearing, meeting or inspection. Nevertheless, a party may require holding of oral proceedings at any time unless parties have agreed to hold no hearings. A party to arbitral proceedings may appear in person or be represented by any other person of his or her choice.<sup>88</sup> This is unlike in court proceedings where a party can only be represented by an advocate having a valid practicing certificate.<sup>89</sup> It is also within an arbitrator's discretion to mandate an expert to report on specific issues in the dispute and to require either party to permit such expert access to relevant records or property. However, this discretion is limited and/or may be overtaken by parties' agreement on involvement of experts in the dispute.

### **2.2.18 Arbitration rules**

The Arbitration Act, 1995 does not pretend to be exhaustive on matters of procedure for invoking court intervention in arbitration matters. Thus section 40 empowers the Chief justice of Kenya to make court procedure rules for matters not prescribed in the rules including recognition and enforcement of arbitral awards, setting aside of, stay of proceedings and generally any proceedings in court under the arbitration Act.<sup>90</sup> In exercise of the powers under section 40, the arbitration rules 1997 were made on 6<sup>th</sup> May 1997.

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<sup>86</sup> Section 23 of the 1995 Act

<sup>87</sup> Section 24(1) of the 1995 Act

<sup>88</sup> Section 25 (5) of the 1995 Act

<sup>89</sup> Section 13 of the Advocates Act, Cap. 16, Laws of Kenya

<sup>90</sup> Laibutta Supra\_note 45

### 3.0 ARBITRATION LAW IN UNITED KINGDOM

#### 3.1 HISTORY OF ARBITRATION LAW OF UK

Arbitration statutory law is a recent development in United Kingdom. In Saxon times, arbitration was largely informal as courts were loath to enforce arbitration awards. Parties intending to arbitrate took to launching a suit in court and then requesting reference to arbitration. That way, arbitration was seen, at least by the judicial officers of the time, as a step in the action in court. The court used the leverage to exert control over arbitration. Then, arbitration was essentially viewed as an optional part of the court process and the award a sub-judgment given by an arbitrator acting on behalf of a judge.

This insistence by parties, especially disputants in commercial dispute, on arbitration besides indifference by the court against it led to passage of the Arbitration Act 1698. The Act objective was ‘rendering award of arbitrator more effectual ...for determination of controversies referred to them ...’ The courts responded to the Act by allowing arbitration agreements to be turned into ‘a rule of the court’ with the effect that a reference to arbitration pursuant to an arbitration agreement between the parties had the same effect as if the reference was achieved by a court order. The effect was that arbitrations subsequent to arbitration agreement had the same status as before the Act. The courts enforced arbitral awards save where ‘procured by corruption or other unique means.’<sup>91</sup>

The emergent problem in the post 1698 Act was that after conclusion of arbitration, arbitrators became *functus officio* (that is, discharged of his/her office). In case of need for revision of awards, the parties had to start all over again. This situation was remedied in 1850’s with court’s holding that the arbitrators’ duty was to issue a valid award and until then he could not be discharged. The Common Law Procedure of 1854 gave courts power to stay proceedings pending reference to arbitration and power of remission of awards to arbitrator(s) for reconsideration.

The Arbitration Act 1989 repealed the Act of 1698 and for the first time made provisions for appointment of arbitrators by court and set out terms to be universally implied into every arbitration agreement. It is worthy of note that courts were also assisting development of the law on arbitration through case law. The Arbitration Act 1934 also went a long way in filling gaps in the arbitration law in an attempt to make it more efficient and comprehensive.

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<sup>91</sup> This phraseology created difficulties of interpretation as it admitted a wide definition as to ground for court to withhold enforcement.

On its part, the Arbitration Act 1950 was a consolidation of the gains of the Arbitration Acts of 1889 and 1934. This Act set out in much simple language than its predecessors, powers of an arbitral tribunal and granted the court power to appoint one in default and whenever desirable. The Act also made provisions for making and enforcing awards. The powers of the court to remove arbitrators upon challenge were also consolidated. The Arbitration Act 1975 sought to give effect to the New York Convention. Finally, at least until enactment of Arbitration Act 1996, the Arbitration Act 1979 regulated the powers of the court to review arbitral awards and determine questions of law arising in the course of arbitrations.

### **3.2 BACKGROUND TO THE ARBITRATION ACT 1996**

The Arbitration Act 1996 came to force in January 31, 1997 and applies to all arbitration after that date even though it can be applied to those commenced before by agreement. The Act is a follow-up to the Departmental Advisory Committee (DAC) published in June 1989. The Report is commonly known as Mustill Report after Lord Mustill who was the Chairman of the DAC which had been appointed in 1984 to advise on whether the UNICITRAL Model Law should be enacted.<sup>92</sup>

The Mustill Report recommended against England adopting the Model Law as to do so would lead to loss of arbitration practice heritage which was England's common law. The report also highlighted the uncertainty attending English arbitration at the time pointing that remedying that would render London the heart of international commercial arbitration.<sup>93</sup> The report pointed that there was needed 'a rational, logical, comprehensive exposition of the more important contents of the existing statute law [in England at the time]'. Thus the committee recommended:

**“In the circumstances we recommend an intermediate solution, in the shape of a new Act with a subject-matter so selected as to make the essentials of at least the existing statutory arbitration law tolerably accessible, without calling for a lengthy period of planning and drafting, or prolonged parliamentary debate. It should in particular have the following features: (a) ... comprise a statement in statutory form of the more important principles of the English law of arbitration, ...(c) ...set out in a logical order, and expressed in language which is sufficiently clear and free from technicalities to be readily comprehensible to the layman (d)...in general apply to domestic and international arbitration alike, ...(e) ...not be limited to the subject matter of the Model**

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<sup>92</sup> The Model Law has been enacted in a number of jurisdictions especially in developing world and influenced the content and structure of many legislations including Arbitration Act 1995.

<sup>93</sup> Paragraph 109 of the DAC Committee Report

**Law ... (g) ... so far as possible, have the same structure and language as the Model Law, so as to enhance its accessibility to those who are familiar with the Model Law.”**

### **3.3 THE ARBITRATION ACT 1996: AN OVERVIEW**

#### **3.3.1 Preliminary**

The Act was passed on 17<sup>th</sup> June 1996 and came to force in January 31, 1997. The initial intention of the efforts that led to enactment of the 1996 Act had been merely to have a consolidating Act incorporating Arbitration Act of 1950, 1975 and 1979 with amendments. This was altered before July 1995 Report so that the new Act was, in addition, ‘to restate and improve the law relating to arbitration’.

The 1996 Act has been hailed as an Act which ‘provides the most exciting of challenges to arbitrators and those practicing around them’<sup>94</sup> and as ‘a statute without precedent in English arbitration law’... [which] by standards of traditional English parliamentary drafting... [is] radically and unconventional ...’<sup>95</sup> The 1996 Act extends only to England and Wales and North England and thus does not apply to Scotland.<sup>96</sup>

#### **3.3.2 General principles of the Arbitral Process**

This is the most profound aspect of this Arbitration Act in that at the very first section the Act it states the principles which are to apply to every facet of arbitration. The general key principles of arbitration as stated in section 1 of Arbitration Act, 1996 of United Kingdom are as follows:

**“1. ...**

**(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;**

**(b) the parties [shall] be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.**

**(c) ...the Court [shall] not intervene except as provided in this part. ...”**

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<sup>94</sup> Gato DM, Arbitration Practice and Procedure (Vol. II): Interlocutory and Hearing (London: LLP Limited, 2<sup>nd</sup> ed., 1997) p. IX

<sup>95</sup> Bernstein R, The Handbook on Arbitration Practice (London: Sweet & Maxwell, 1998) p. 21

<sup>96</sup> Section 108(4) of the 1996 Act

The most important of these principles is that party autonomy is not to be restricted unnecessarily by courts except in public interest. In essence, it is left to the parties to agree on the extent of involvement of the court in their arbitration. However, the parties and the arbitral tribunal are bound to ensure that the arbitration process results in fair resolution of the instant disputes without

### **3.3.3 The arbitration agreement**

Arbitration agreement is defined in section 6 of the 1996 Act to mean agreement to submit to arbitration present or future disputes whether contractual or otherwise. The definition is substantiated especially by provisions of section 5 and 6 of the Act. It suffices to say that any recording including a verbal recording constitutes writing which is one of requirements for a valid arbitration agreement under the Act.<sup>97</sup> An oral agreement to arbitrate is also enforceable under the common.

### **3.3.4 Stay of proceedings**

Stay of proceedings under the 1996 Act is dealt with under section 9, 10 and 11. These sections apply regardless of the applicable substantive law or underlying agreement. The effect is that the English courts are given extraterritorial jurisdiction to award stay even where the arbitral proceedings are not to be held under the English law and even in United Kingdom. The conditions for stay of proceedings are essentially similar to the Kenya's with minor variation and especially the provisions on when the court must stay proceedings.<sup>98</sup>

### **3.3.5 Appointment and removal of arbitrators**

The provisions of the 1996 Act on appointment of arbitrators stipulated in section 15-22 thereof are similar to those in the Kenyan arbitration Act. However, unlike in 1995 Act, in a tribunal of three arbitrators one will be chairperson.<sup>99</sup> The arbitration Act also specifies the power the court has upon application for appointment of arbitral tribunal.<sup>100</sup> With regard to removal of arbitrators, section 24 provides for the specific grounds to justify application of the power.<sup>101</sup>

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<sup>97</sup> Section 6(2) of the 1996 Act

<sup>98</sup> Section 9(4) of the 1996 Act

<sup>99</sup> Section 20 of the 1996 Act

<sup>100</sup> Section 18(3) of the 1996 Act

<sup>101</sup> Section 24 (1) of the 1996 Act



### **3.3.6 Challenge of Jurisdiction**

In an effort to remedy the abuse of the avenue to challenge jurisdiction, the doctrines of separability and *kompetenz kompetenz* are secured and established in the 1996 Act. The provisions of section 7 give survival to arbitration clauses where parent agreement is found invalid, non-existent or ineffective. In the same vein, arbitral tribunals are given jurisdiction to rule on their jurisdiction in section 30 of the 1996 Act. In addition, section 31 of the 1996 Act provides the applicable procedure for challenge of jurisdiction. Lastly, section 67 provides as a ground to challenge award made by a tribunal lacking substantive jurisdiction.

### **3.3.8 Procedural freedom**

The 1996 Act does not prescribe the applicable procedure in arbitral proceedings.<sup>102</sup> The Act directs arbitrators and parties alike to adopt “procedures suitable to the circumstances of the case avoiding unnecessary delay or expense.”<sup>103</sup> Thus, arbitrators and parties are not bound to pursue the adversarial route or to apply any rules strictly but only to avoid such procedure as occasion unnecessary delay or undue expense.

### **3.3.9 Evidence**

Section 43(2) (f) of the Arbitration Act 1996 gives the arbitral tribunal jurisdiction on whether or not to apply strict evidentiary rules. This is, of course, subject to the right of parties to agree on rules of evidence. Additionally, a tribunal may latitude to decide whether the evidence is to be oral or written and the nature of submissions.

### **3.3.10 Costs and interest**

Generally, costs of arbitration are dealt with in sections 59-65 of the 1996 Act. What is meant by costs is detailed in section 59 of the 1996 Act. Section 61(2) of the UK Act provides ‘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 inappropriate ....’ The arbitrator also has discretion to leave determination of costs payable to the court but the popular practice is the arbitrator to determine costs in the award

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<sup>102</sup> Bernstein 27

<sup>103</sup> Section 33 (b) of the 1996 Act.

The 1996 Act deals with award of interest in section 49 thereof. In absence of agreement of the parties as to interest payable and/or rate payable, section 49 gives the tribunal wide discretion to award interest even on compound basis.

### **3.3.11 Arbitral awards**

The 1996 Act deals with awards in sections 46-58 of the Act. The award must be according to the substantive law chosen by the parties. The tribunal has equivalent powers under the 1996 Act as those under the Kenyan Act as to formality<sup>104</sup> and power to effect corrections<sup>105</sup> except that the UK provisions are comprehensive and logically well arranged and articulated. In addition, the tribunal under section 56 of the UK Act is given power to withhold award in case of non-payment. The effect of an award is, subject to contrary agreement, final and binding on parties and persons claiming through or under them. This does not however affect the power to challenge such award as provided in the Act.

Section 48 of the UK Act provides for the remedies which a tribunal may award. Thus an arbitrator may, unless the parties otherwise agree, award any or a combination of any of the following remedies: order for payment of money, specific performance, a declaration, order rectification of instruments and where appropriate issue any type of injunction.<sup>106</sup>

### **3.3.12 Recognition and enforcement of awards**

An arbitral award upon leave of the court is enforceable as if it were a judgment of the court. The court giving leave has discretion to enter judgment in terms of the award. The leave shall be denied where it is shown by the party opposing enforcement that the award was given by a tribunal lacking substantive jurisdiction. But even then, the party must not have lost the right to object on the ground as provided in section 73 of the Act.

### **3.3.13 Setting aside awards and appeals**

The Act provides for challenging award claiming lack on the part of the arbitral tribunal of ‘substantive jurisdiction’ or in specifying circumstances that involve ‘serious irregularity’. This latter

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<sup>104</sup> Section 52, 53, and 55 of the 1996 Act

<sup>105</sup> Section 57 of the Act

<sup>106</sup> Injunctions are orders requiring a party to or refrain from doing a specified activity for the benefit of the other party.

basis of challenge is provided for in section 68 of the Act while the former is catered for in section 67. An appeal on a point of law is also permissible within section 69 of the Act. The right of appeal and is only available where court's jurisdiction to hear the appeal has not been excluded by the parties. In any case where there is no exclusion, appeal is available with leave of the court unless parties agree to it.

### **3.3.14 Court Procedure under 1996 Act**

With the 1996 Act came into force the new Order 73 of the revised Rules of the Supreme Court. This Order 73 which provides the applicable procedure in court application under the Act. The procedure applies to proceedings in both the High Court of England and Central London Court Business List. Order 73 aims to streamline procedure for court applications under the 1996 Act.

## **4.0 CONCLUSION**

If anything, the foregoing review has shown the difference between the two Acts which were both in response to legal reform efforts aims at achieving a universal goal: to reduce court interference in arbitration and expand party autonomy while rendering arbitration more expeditious and, as such, more just. The English Act succeeded where the Kenyan Act failed. However, several amendments to the 1995 act vide the amendment Act of 2009 have attempted to bring it to par with the UK Act of 1996.

The 1996 Act rendered the law of arbitration in U.K clear and unambiguous and therefore easy to apply and less prone to challenge in court. In its turn, the 1995 Act domesticated the UNICITRAL Model law but allowed ambiguity to sneak in providing ready fodder for parties' intent on delaying the arbitral process.

The effect is that the 1996 Act has managed to expand party autonomy in arbitration while checking to ensure that it does not fall prey to abuse by limiting instances of court intervention to a basic minimum. On its part, the 1995 Act has given autonomy to parties to arbitration together with unlimited opportunities for court involvement in arbitration. The result now is that parties abuse their autonomy by resorting to court process to delay and complicate the arbitral process. The 1996 Act is evidence what wide consultation of stakeholders affected by a given a proposed statute can yield. Its progressive provisions adequately meet the needs of the stakeholders in the Arbitration industry both in United Kingdom and in other jurisdiction considering London as the seat of arbitration. Until the 2009 amendments, the 1995 Act could hardly be said to have been progressive or catering to the

changing trends in the arbitration industry. The efforts to repeal the Arbitration Act, 1995 culminating in the Arbitration Bill 2007 were thus timely and welcome.<sup>107</sup> The outcome however was that several sections were amended by repeal or insertion of new sections but a total overhaul was never undertaken as envisaged by the draft formulated by the stakeholders.

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<sup>107</sup> The Arbitration Bill 2007, which proposed to repeal and replace the Arbitration Act, 1995, was a result of the joint efforts of the Law Reform Commission, Chartered Institute of Arbitrators-Kenya Branch and other arbitration and legal reform stakeholders. It has since been given presidential assent (on 1<sup>st</sup> January 2010) but some proposals were omitted.