

Emerging Jurisprudence in the Law of Arbitration in Kenya: Challenges and Promises

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ABSTRACT

In this paper, the writer identifies and critically discusses the emerging jurisprudential issues in the law of arbitration in Kenya. Central to this discussion is identifying the challenges and suggesting the way forward in realizing the promise that arbitration will become effective as a means of settling disputes outside the Courts. The writer observes that Courts are entering an era where they are required as a matter of law to increasingly incorporate ADR mechanisms in settling some disputes, and this expanded arbitrability scope has the implication of integrating more matters into the scope of ADR. Consequently, there are more issues and new problems to deal with. This is because even as arbitration takes root in Kenya, it must be consistent with the other laws of the land. This Paper identifies the possible areas of conflict and how they are likely to affect arbitration. The Article concludes that, while the future of arbitration as a means of dispute settlement is bright, substantive and procedural reforms that address the raised issues might be desirable.

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1. Introduction

This Paper identifies and critically discusses the emerging jurisprudence in the law of arbitration in Kenya. Central to this discussion is identifying the challenges and suggesting the way forward in realizing the promise that arbitration will become effective as a means of settling disputes outside the Courts.

2. Background

Arbitration is classified as one of the mechanisms under what are commonly referred to as Alternative Dispute Resolution mechanisms (ADR) and involve a neutral third party in the settlement of disputes. The *Arbitration Act, 1995*¹ defines arbitration to mean —*any arbitration whether or not administered by a permanent arbitral institution.*² This definition is not an elaborate one and hence regard has to be had to other sources. Arbitration has been described as a private consensual process where parties in dispute agree to present their grievances to a third party for settlement.³ However, it is important to note at the earliest that Kenya's *Arbitration Act* contemplates both institutional and *ad hoc* arbitration as seen in the definition. Lord Justice Raymond's defined an arbitrator as 'a private extraordinary judge between party and party, chosen by their mutual consent to determine controversies between them and arbitrators are so called because they have arbitrary power: for if they observe the submission and keep within their due bonds their sentences are definite from which there lies no appeal.'⁴ Arbitration between states has been defined as the procedure for the settlement of disputes between states by a binding award on the basis of law and as a result of an undertaking voluntarily accepted.⁵

Arbitration falls within the category of coercive mechanisms under ADR and after the final award by the third party neutral umpire, parties therein are bound by it and cannot depart therefrom except on very limited grounds of appeal, as will be discussed in this paper.⁶ ADR in general is hailed as having numerous advantages over litigation and some of these also extend to arbitration. Arbitration is usually heralded as being *inter alia* expeditious, cost effective and lenient on procedural

¹ No. 4 of 1995, Laws of Kenya ,Revised Edition 2012 [2010]

² Sec. 3, No. 4 of 1995 (2009)

³ Farooq Khan, *Alternative Dispute Resolution*, A paper presented Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.

⁴ B. Totter dill, *An Introduction to Construction Adjudication: Comparison of Dispute Resolution Techniques*, (Sweet & Maxwell, London, 2003), p. 21.

⁵ R.M.M Wallace, *International Law; A student Introduction*, (Sweet and Maxwell, London, 1997), p. 282

⁶ Non-coercive ADR mechanisms include negotiation, mediation and conciliation.

rules. Indeed, ADR mechanisms are internationally recognised in conflicts management.⁷ Article 33 of the Charter of the United Nations⁸ outlines the various conflict management mechanisms that parties to a conflict or dispute may resort to.⁹ It provides that *the parties to any dispute shall, first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.*¹⁰

The above mentioned advantages have, from the earliest, made arbitration and ADR in general popular amongst disputants and especially business persons. However, ADR, including arbitration, is not without disadvantages. It is noteworthy that there are limitations that emerge in the application and practice of the law of arbitration in disputes settlement in Kenya. These limitations range from mere technicalities to core ones, touching on the substantive as well as procedural law on arbitration.

Though the advantages of ADR outweigh the disadvantages thereof, it is important that any challenges that threaten the effectiveness of ADR mechanisms be addressed as this is imperative especially in the face of the current Constitution of Kenya 2010, which has reaffirmed the elevated status of arbitration and ADR mechanisms in general, in the management of disputes in Kenya.¹¹ Article 159(3) of the Constitution of Kenya 2010 recognizes promotion of ADR mechanisms as one of the guiding principles of the Judiciary in the exercise of their constitutionally conferred judicial authority, and from this they cannot depart. Courts are entering an era where they are required to increasingly incorporate ADR mechanisms in settling some disputes, and this is reflected in various laws. It has been argued that although ADR had been used by human society since antique times, it only got wide acceptance and recognition in countries' laws recently.¹²

This expanded arbitrability scope has the implication of dragging more matters into the scope of ADR.¹³ Consequently, there emerge more issues and new problems to deal with. This is because even as arbitration takes root in Kenya, it must be consistent with the other laws of the land. It

⁷ For a general discussion on how arbitration can be applied widely, see Rebecca Keim, 'Filling the Gap Between Morality and Jurisprudence: The Use of Binding Arbitration to Resolve Claims of Restitution Regarding Nazi-Stolen Art', 3 *Pepp. Disp. Resol. L.J.* (2003) available at <http://digitalcommons.pepperdine.edu/drlj/vol3/iss2/6> [Accessed on 02 March, 2014]

⁸ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at: <http://treaties.un.org/doc/Publication/CTC/uncharter.pdf> [Accessed on 17th February 2014].

⁹ See generally Eunice R. Odder, *Alternative Dispute Resolution*, paper presented by author at the Annual Delegates Conference of the Nigerian Bar Association, 22nd - 27th August 2004, Abuja, Nigeria. Available at <http://www.nigerianlawguru.com/articles/arbitration/ALTERNATIVE%20DISPUTE%20RESOLUTION.htm> Accessed on 17 April, 2013; See 'The Role of Private International Law and Alternative Dispute Resolution', Available at http://www.wipo.int/copyright/en/e-commerce/ip_survey/chap4.html [Accessed on 17th February 2014].

¹⁰ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

¹¹ Sec. 3 of the *Arbitration Act 1995* defines "arbitration agreement" to mean an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a *defined legal relationship, whether contractual or not*. The fact that the 'defined legal relationship' need not be contractual already expanded arbitrability scope in Kenya.

¹² Esthete, T., and Getup, M., 'Alternative Dispute Resolution, Teaching Material' *Justice and Legal System Research Institute*, Pg. 3, Available at www.joptc.gov.et/joptc/LinkClick.aspx?fileticket...203.. [Accessed on 02 March, 2014]

¹³ Ibid.

is against this reality that this discourse identifies the emerging jurisprudence in the law of arbitration in Kenya and the various challenges that threaten to defeat the effective application of the same as well as its development as a preferred dispute settlement mechanism in Kenya; opportunities for improvement of the same are examined and analysed.

3. Advantages and Disadvantages of Arbitration

3.1 Advantages of arbitration

Several benefits have been attributed to Arbitration as an alternative dispute resolution mechanism. Firstly, Arbitration accords the parties a considerable amount of control over the proceedings. Unless parties agree otherwise in an Arbitration agreement or choose later to resort to court, all the aspects of the case are confidential. Secondly, Arbitration is a private and consensual process. For instance, they can select one or more neutral arbiters to hear their dispute.¹⁴

Arbitration is considered to be less expensive when compared to litigation due to a number of factors. Firstly, the process is generally regarded as semi-formal in that it does not restrict itself to the strict procedural rules and technicalities associated with courts. Secondly, arbitration, unlike courts, usually operates within specified timeframe including constrained timelines for appeals by discontented parties.¹⁵ It is noteworthy that cost effectiveness of arbitration does not necessarily mean that arbitration is cheap. It only means that unlike courts where matters can drag for years thus leaving the litigants with huge bills to settle, arbitration is expedient thus making it less expensive. Arbitration cost hugely depends on the number of arbitrators and the other players and their willingness to dispose of the matter expediently.¹⁶

Arbitration is potentially much faster than litigation. Arbitration, unlike litigation, normally allows for limited grounds of appeal. Usually, there must be express agreement of the parties to appeal.¹⁷ Even

¹⁴ See Muigua K., *Settling Disputes Through Arbitration in Kenya*, pp.3-4, (Glenwood Publishers Ltd, Nairobi, 2012); Chartered Institute of Arbitrators, 'Arbitration', Available at <http://www.ciarb.org/dispute-resolution/resolving-a-dispute/arbitration/> [Accessed on 2 March, 2014]; Tribunal Arbitral De Barcelona, 'Advantages of arbitration', Available at http://www.tab.es/index.php?option=com_content&view=article&id=22&Itemid=65&lang=en [Accessed on 2nd March, 2014].

¹⁵ However, appeals only lie where there was pre-existing agreement between the parties that any party who is not satisfied with the outcome will be free to appeal to court

¹⁶ The President of the Australian Centre for International Commercial Arbitration, Mr. Doug Jones, has been quoted as making the following observation: '*domestic arbitration is still...expensive and hugely inefficient, forcing many companies to prefer expert determination – due to a combination of arbitrators failing to insist on processes different to courts, and lawyers continuing to insist on intricate pleadings, excessive discovery and prolonged hearings. We need reform to distinguish arbitration from court processes.*' (Reported in '*Call for much simpler Arbitration*', Australian Financial Review, 7 November 2008, p.51. and reproduced in New South Wales Government, ADR Blueprint, Discussion Paper, April 2009, Framework for the Delivery of Alternative Dispute Resolution(ADR) Services in NSW,PG 18, Available at http://www.courts.lawlink.nsw.gov.au/agdbasev7wr/_assets/cats/m40265213/adr_blueprint.pdf [Accessed on 2nd March, 2014].

¹⁷ See United Nations Conference on Trade and Development (UNCTAD), 'Dispute Settlement, International Commercial Arbitration: Arbitration Agreement' (2005) UNCTAD/EDM/Misc.232/Add.39; Sec. 39 of the *Arbitration Act* 1995 provides that questions of law arising in domestic arbitration where in the case of a domestic arbitration, *the parties have*

then, disgruntled parties can only appeal on grounds of arbitral awards going against public policy or an award in favour of a matter not capable of being settled through arbitration. Court litigation, however, allows parties to appeal on a wider range of grounds and occasionally several times to the highest court on land. Huge backlog of cases compel parties to wait a longer time to secure hearings and ultimately get the final decision. Court procedures must be strictly followed unlike in arbitration where there is minimum emphasis on procedural formalities. This arguably makes arbitration much faster as it depends on the goodwill of the parties to push it forward. Courts in Kenya and even elsewhere in the world have encountered a number of problems related to access to justice. These include high court fees, geographical location, complexity of rules and procedure and the use of legalese.¹⁸

The court's role is also 'dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves'.¹⁹ Conflict management through litigation can take years before the parties can get justice in their matters due to the formality and resource limitations placed on the legal system by competing fiscal constraints and public demands for justice. Litigation is so slow and too expensive and it may at times lose the commercial and practical credibility necessary in the corporate world.²⁰

Litigation should however not be entirely condemned as it comes in handy for instance where an expeditious remedy in the form of an injunction is necessary. Criminal justice may also be achieved through litigation especially where the cases involved are very serious. Litigation is associated with the following advantages: the process is open, transparent and public; it is based on the strict, uniform compliance with the law of the land; determination is final and binding (subject possibly to appeal to a higher court).²¹

agreed that: an application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or an appeal by any party may be made to a court on any question of law arising out of the award, such application or appeal, as the case may be, may be made to the High Court. (Emphasis ours)

¹⁸ *Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the Judiciary in the new Constitution*, ICJ Kenya, Vol. III, May, 2002; See also Kariuki Muigua, *Avoiding Litigation through the Employment of Alternative Dispute Resolution*, pp 6-7, a Paper presented by the author at the In-House Legal Counsel, Marcus Evans Conference at the Tribe Village Market Hotel, Kenya on 8th & 9th March, 2012.

Available at <http://www.chuitech.com/kmco/attachments/article/101/Avoiding.pdf>

¹⁹ Ojwang, J.B., "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29: 29

²⁰ See Mbote, P.K., et al., *Kenya: Justice Sector and the Rule of Law*, Discussion Paper, A review by AfriMAP and the Open Society Initiative for Eastern Africa, March 2011,

Available at <http://www.opensocietyfoundations.org/sites/default/files/kenya-justice-law-discussion-2011> [Accessed on 27th February, 2014].

²¹ See generally Mazirow, A., 'The Advantages And Disadvantages Of Arbitration As Compared To Litigation' *Presented to The Counselors of Real Estate*, April 13, 2008, Chicago, Illinois, Available at http://www.cre.org/images/MY08/presentations/The_Advantages_And_Disadvantages_of_Arbitration_As_Compared_to_Litigation_2_Mazirow.pdf [Accessed on 2nd March, 2014]; Chartered Institute of Arbitrators, *Litigation: Dispute Resolution*, Available at <http://www.ciarp.org/dispute-resolution/resolving-a-dispute/litigation> [Accessed on 27th February, 2014].

Another advantage of arbitration over litigation is the finality of arbitral awards and their binding nature upon the parties.²² Due to the limited number of appeals, the arbitrator's decision is usually final and binding on the parties.

While it is generally agreed that arbitration does have adversarial aspects, it is normally less adversarial than court litigation. This may help preserve relationships between parties depending on the nature of their dispute. Arbitration is typically a private process as it does not admit the general public into its hearings or proceedings. This is advantageous to the parties who, most of the time, do not desire to wash their dirty linen in public.²³

Another advantage of arbitration over litigation is its flexible nature. Parties in arbitration are allowed to agree on the timeframes within which pleadings are to be filed or amended.²⁴ In court proceedings, the timelines for filing pleadings are usually fixed by the Civil Procedure Rules. This flexibility allows parties to appoint arbitrators that have specific expertise in their area of business or nature of their dispute. Most court systems, on the other hand, do not have expert judges for specific areas of law and so the parties may have a presiding judge with no specific knowledge of their industry. Thus, in cases where specific knowledge in an area of business or law is important, parties in court do not enjoy such freedom of deciding which judge or magistrate gets to listen to what matter. Further, Parties can often choose either a complex procedure or a simpler one. With court litigation, the parties must follow the legal procedures, as laid down.²⁵ The fact that arbitration is a private process makes it enjoy confidentiality, an important aspect in private matters. Unlike litigation where there is official law reporting, arbitral awards or proceedings are never published without the parties' approval. The foregoing advantages make arbitration more appealing to disputants as compared to litigation. However, arbitration also carries some disadvantages with it, as discussed herein under.

3.2 Disadvantages of arbitration

As already noted elsewhere, although arbitration is generally less expensive than litigation, it can still become too expensive in the long run in case of any dragging. The parties must pay for the arbitrator's time, the fee of the arbitration forum, as well as all the normal litigation fees like legal fees and related costs.²⁶ The cumulative cost may end up being more than litigation especially where arbitration takes longer to conclude. Since arbitration depends on the goodwill of the parties therein, there is a greater likelihood of non-compliance with the arbitral award unlike the court judgement

²² Section 32A (via the 2009 amendments) also provides that unless parties agree otherwise, arbitral awards are final and binding on the parties.

²³ Awards, unlike court judgments, are not published in the official Kenya Law Reports unless with the express consent of the parties.

²⁴ Section 24(1) and (3) of the *Arbitration Act, 1995*(2009)

²⁵ See Mazirow,A., 'The Advantages And Disadvantages Of Arbitration As Compared To Litigation' *Presented to The Counselors of Real Estate*, April 13, 2008, Chicago, Illinois, op. cit. page 3

²⁶ Sec. 32B, *Arbitration Act, 1995*

which is usually backed with sanctions. Therefore, the parties may end up spending more on to pursue judicial enforcement of the arbitral award.

Further, while arbitration is potentially better in preserving the parties' relationship than litigation, if any party is dissatisfied with the award and decides to resort to court this advantage may be defeated.²⁷ Section 39(1) of the Act confers the High Court the power to determine any question of law arising in the course of the arbitration if a party makes an application in that regard. Further, an appeal by any party may be made to the court on any question of law arising out of the award for determination. However, this section is to the effect that prior to any application being made, parties must have agreed that such applications can be made to the court. Such appeals are likely to sever any business or personal relationships.

4. Brief History of law of Arbitration in Kenya

The first Arbitration law in Kenya came in the form of the Arbitration Ordinance, 1914 was a reproduction of the English Arbitration Act, 1889. This Ordinance accorded courts in Kenya ultimate control over the arbitration process in Kenya. Kenya acquired its first Arbitration Act in 1968.²⁸ The 1968 Act was almost a replica of the *Arbitration Act* 1950 of United Kingdom. Similar to the *Arbitration Act* 1950 of UK, this Kenyan Act this provided generally the for court's intervention in arbitrations. Essentially, Courts were afforded too much intrusive powers and this affected the efficiency of arbitration as dispute settlement mechanism. The adoption of UNCITRAL Model Arbitration Law led to legal reforms repealing the 1968 *Arbitration Act* and replacing it with the Arbitration Act, 1995. The Act is based on the Model Arbitration Act of the United Nations Commission on Trade Law.

The Model of the United Nations Commission on International Trade Law (UNCITAL) was adopted in 1985 with a view to encouraging arbitration and processes that would have global recognition.²⁹

Later, the 1995 was been amended vide the *Arbitration (Amendment) Act* 2009 which was assented to on 1st January 2010 (hereinafter referred to as the Amending Act).

The Arbitration Act 1995 is applicable to both domestic and international arbitration except as limited by its provisions.³⁰

²⁷ Under sec. 39, *Arbitration Act* 1995, parties may appeal all the way to Court of Appeal where they feel dissatisfied with the outcome of the arbitral process.

²⁸ the now repealed Arbitration Act (Cap. 49) Laws of Kenya,

²⁹ The Arbitration Agreement, Kenya Law Resource,

Available at <http://kenyalawresourcecenter.blogspot.com/2011/07/arbitration-agreement.html> [Accessed on 24 February, 2014]

³⁰ Section 2, No. 4 of 1195(2009)

5. Legal and Institutional Framework on Arbitration in Kenya

Arbitration in Kenya is governed by various laws which include the Constitution, *The Arbitration Act* 1995³¹ (hereinafter the Arbitration Act), the *Arbitration Rules, Civil Procedure Act*³² and the *Civil Procedure Rules* 2010³³. Article 159(2) (c) of the Constitution provides that in the exercise of judicial authority, the Courts and tribunals must be guided by the principle of *inter alia* promotion of alternative forms of dispute resolution (ADR) including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3). Notable are the provisions of Clause (3) thereof which are to the effect that Traditional dispute resolution mechanisms shall not be used in a way that: contravenes the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with the Constitution or any written law. The effect of this is that arbitration must be carried out in a way that is Constitutional failure to which it would be seen as invalid.

Article 189 of the Constitution provides for cooperation between national and county governments. Article 189(4) thereof provides that National legislation shall provide procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration. Section 59 of the *Civil Procedure Act*³⁴ provides that all references to arbitration by an order in a suit, and all proceedings thereunder, shall be governed in such manner as may be prescribed by rules. Further, Order 46 of the *Civil Procedure Rules* provides *inter alia* that at any time before judgment is pronounced, interested parties in a suit who are not under any disability may apply to the Court for an order of reference wherever there is a difference.

The *Arbitration Act* 1995 generally provides for arbitral proceedings and the enforcement of the arbitral awards by national courts. Section 3(1) of the Act attempts to define the scope of the Act and defines “arbitration” to mean any arbitration whether or not administered by a permanent arbitral institution. The Act thus applies to a wide range of arbitration matters. Arbitration practice in Kenya has been said to have increasingly become more formal and cumbersome due to lawyers’ entry to the practice of arbitration.³⁵ This has had the effect of seeing more matters referenced to the national Courts due to the disputants’ dissatisfaction. The referrals have been based on matters touching on substantive as well as procedural aspects of the arbitration.

³¹ No. 4 of 1995(As amended in 2009)

³² Cap 21, Laws of Kenya

³³ Legal Notice No. 151 of 2010, Rules under Section 81, Cap 21

³⁴ Cap 21, Laws of Kenya; Section 59D of the Act provides that *all agreements entered into with the assistance of qualified mediators shall be in writing and may be registered and enforced by the Court.*³⁴

³⁵ Muigua K., *Settling Disputes Through Arbitration in Kenya*, page 10, (Glenwood Publishers Ltd, Nairobi, 2012)

6. Emerging Jurisprudential Issues in Arbitration in Kenya

6.1 Role of Courts in Arbitration

Section 10 of the Act provides for the extent of court intervention in arbitration proceedings. It provides that *except as provided in this Act, no court shall intervene in matters governed by this Act*. On the face of it, the Act seems to keep to the minimal the number of instances when the national courts will intervene in arbitral matters. However, there are exceptions provided for under the Act where courts will come in either to determine issues where parties fail to agree or to assist the arbitral tribunal in some other way. To begin with, Section 6 of the Act confers the High court powers to stay legal proceedings and refer the matter to arbitration where there is pre-existing agreement to refer the matter for arbitration.

Section 11(1) of the Act gives High court the power to determine the number of arbitrators if parties fail to agree on the same. With regard to the appointment of arbitrators, Section 12 of the Act gives the court the power to appoint the arbitrator(s) where parties fail to agree on the procedure of appointing the arbitrator(s). Section 7 of the Act gives the High Court the power to grant interim measures of protection where a party so requests. However, the section provides that where the arbitral tribunal has already ruled on such an application, then the High court will treat such a ruling as a conclusive outcome of that application. In relation to an application by a party for challenging an arbitrator, Section 14(1) of the Act grants the High Court the power to decide on an application by a party in arbitration proceedings challenging an arbitrator. Further, Section 15(2) grants the High Court powers to decide on the termination of the mandate of an arbitrator who fails to act or whom it becomes impossible to act, where party are unable to do so.

It is also important to note that section 17 thereof gives the High court the powers to make the final decision on the question of jurisdiction of the arbitral tribunal. Section 28 provides that the arbitral tribunal, or a party with the approval of the arbitral tribunal, may request from the High Court assistance in taking evidence, and the High Court may execute the request within its competence and according to its rules on taking evidence.

Section 35 confers the High court powers to set aside an arbitral award under the circumstances provided under that provision. Section 35(1) is to the effect that recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3). This implies that the Court will not act in such matters unless a discontented party invites it to do so. Subsection (2) sets out the grounds upon which the High Court will set aside an arbitral award. The grounds which the applicant must furnish proof for the arbitral award to be set aside are: incapacity of one of the parties; an invalid arbitration agreement; Lack of proper notice on the appointment of arbitrator, or of the arbitral proceedings or where the applicant was unable to present

its case; where the award deals with a dispute not contemplated by or one outside the terms of reference to arbitration or matters beyond the scope of reference; where the composition of the arbitral tribunal or the arbitral procedure was contrary to the agreement of the parties except where such agreement was in conflict with provisions of the Act and the parties cannot derogate from such; or where fraud, undue influence or corruption affected the making of the award.

Apart from the above, the High Court may also set aside arbitral awards where it finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or the award is in conflict with the public policy of Kenya.³⁶

The Act however limits the time frames within which the disgruntled party may lodge their applications with the High Court for setting aside of arbitral awards. Section 35(3) of the Act provides that where three months have lapsed since the award was entered the court will not entertain any applications to set the same aside. This limitation may serve to prevent such applications to be made in bad faith and also to ensure that such decided matters are put to rest. This was also observed in the Kenyan case of *Nancy Nyamira & Another V Archer Dramond Morgan Ltd*³⁷, where it was observed that ‘...Given the objectives of the Arbitration Act stated above, it is important that Courts enforce the time limits articulated in that Act – otherwise Courts would be used by parties to underwrite the undermining of the objectives of the Act’.

Concerning recognition and enforcement of arbitral awards section 36(1) of the Act confers the High Court powers to recognize and enforce domestic arbitral awards as binding upon application by parties for the same. Section 36(2) provides for the recognition of international arbitral awards as binding and enforceable in accordance to the provisions of the *New York Convention* or any other convention to which Kenya is signatory and relating to arbitral awards. The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* was adopted by the United Nations General Assembly in New York on the 10th June, 1958, and acceded to by Kenya on the 10th February, 1989, with a reciprocity reservation.³⁸ The Convention, in principle, applies to all arbitral awards (Article I, paragraphs (1) and (2)). However, Article I paragraph (3) allows states to make reservations:

When ... acceding to this Convention ... any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention

³⁶ S. 35(2) (b), Act No. 4 of 1995

³⁷ Civil Suit 110 of 2009, [2012]eKLR

³⁸ Section 36 (5), Act No. 4 of 1995, (Act No. 11 of 2009, s. 27) “(5) In this section, the expression “New York Convention” means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations General Assembly in 10th June, 1958, and acceded to by Kenya on the 10th February, 1989, with a reciprocity reservation.

only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.³⁹

The effect of the above are the two reservations commonly referred to as the reciprocity reservation and the commercial reservation.⁴⁰

In the Kenyan case of *Glencore Grain Ltd V TS.S.S Grain Millers Ltd*,⁴¹ an international award that was entered in England and the applicant sought to have it recognised and enforced by Kenyan Courts. However, the courts were not willing to enforce the same on technical grounds of non compliance. The award took more than ten years before recognition and enforcement could be realized. Section 37 provides for grounds upon which the High Court may decline to recognize and/or enforce an arbitral award at the request of the party against whom it is invoked, if that party furnishes to the High Court proof of: party's incapacity; legally invalid arbitration agreement; party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or it contains decisions on matters beyond the scope of the reference to arbitration; the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made.

The High Court may also decline recognition and/enforcement of an award if its making was affected by fraud, corruption or undue influence. Further, an award arising out of matter not capable of settlement by arbitration under the Kenyan law or one whose recognition or enforcement would be against public policy will not be recognised or enforced by the Court.⁴²

6.2 Court Practice

Although the Act provides for minimal intervention or interference by courts, the situation on the ground has been a mixed one where on the one hand courts seem to recognise and acknowledge that arbitration should bear minimum court interference while on the other hand they appear to violate this important objective of the Act of minimal court interference. The aforementioned instances of court intervention are at times stretched too much as to defeat the essence of the process of arbitration.

³⁹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Reservations, Available at <http://interarb.com/nyc/reservations> [Accessed on 24th February, 2014]

⁴⁰ Ibid.

⁴¹ Civil Case 388 of 2000 [2012] eKLR

⁴² S. 37(1)(vii), No. 4 of 1995

This is especially well demonstrated when it comes to the issue of recognition and enforcement of arbitral awards.

The court has no legal right to intervene in the arbitral process or in the award except in the situations specifically set out in the Arbitration Act or as previously agreed in advance by the parties and similarly there is no right of appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in Section 39 of the Arbitration Act. This was observed and upheld in the Kenyan case of *Anne Mumbi Hinga V Victoria Njoki Gathara*.⁴³ Indeed, the Court of Appeal made an important observation that most of the applications going to court to have the award set aside will be on grounds of public policy. It however stated that one of the underlying principles in the *Arbitration Act* is the recognition of an important public policy in enforcement of arbitral awards and the principle of finality of arbitral awards. Secondly, although public policy can never be defined exhaustively and should be approached with extreme caution. Failure of recognition on the ground of public policy would involve some element of illegality or that it would be injurious to the public good or would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the State's powers are exercised.⁴⁴

The court of Appeal in this case held that it was wrong for the High court to have entertained a challenge to an arbitral award aimed at reviewing or setting aside an award outside the provisions specifically set out in the Arbitration Act 1995. The position clearly indicates that courts will not interfere with arbitration unnecessarily. Courts in their facilitative role have affirmed that the provisions of section 36 are mandatory. However, other cases give conflicting signs. This is especially where courts decline enforcement of awards on grounds of public policy. This may cause delay in enforcement of awards. In the foregoing case of Hinga, the Court of Appeal observed that had the superior court played a supportive role as contemplated in section 10 of the Arbitration Act and the other provisions in the Act which invite courts intervention, the consequential delay of close to 10 years in enforcing the award the subject matter of this appeal would have been avoided. The Court also stated that '*it follows therefore all the provisions invoked except Section 35 and 37 do not apply or give jurisdiction to the superior court to intervene and all the applications filed against the award in the superior court should have been struck out by the court suo moto because jurisdiction is everything as so eloquently put in the case of Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd 1989 KLR 1.*'

In the Indian case of *Renusagar Power Company Ltd vs. General Electric Company* (1994) AIR 860, the Supreme Court of India observed;

⁴³ Court of Appeal at Nairobi, Civil Appeal 8 of 2009 [2009] eKLR

⁴⁴ Ibid.

“While observing that “from the very nature of things the expressions ‘public policy’, ‘opposed to public policy’ or ‘contrary to public(sic) policy’ are incapable of precise definition”, this court has laid down: . . . Public Policy is some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time.”(Emphasis added)

In Kenya, public policy was defined by Ringera J (as he then was), in ***Christ For All Nationals vs. Apollo Insurance Co. Ltd*** in the following words: -

“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 lack of a clear meaning of public policy gives courts more opportunities to interfere with arbitration proceedings. This uncertainty in court intervention discourages and intimidates local as well as foreign investors who carry on business in Kenya from settling their commercial disputes in Kenya but instead opt for foreign jurisdictions. It has been argued that arbitration is the backbone for protecting international commercial arrangements. In case of a dispute commercial parties can resolve their differences without having to resort to the courts in the other party's country of residence or incorporation.⁴⁵ Further, International arbitration has been regarded as being very effective in the international business arena since arbitral awards are readily enforceable under the New York Convention in most of the world's key economic nations and the awards can only be challenged on very limited grounds.⁴⁶

Effective and reliable application of international commercial arbitration has the capacity to encourage investors to carry on business with confidence knowing their disputes will be settled expeditiously. This can enhance economic development for Kenya and the region. However, all is not lost because as recently as January, 2013 a new Act was enacted as an effort to lay a further legal framework for international arbitration in Nairobi, Kenya.⁴⁷

⁴⁵ Leah Ratcliff, Investors beware - Indian Supreme Court asserts jurisdiction to set aside foreign arbitral awards, *International Arbitration Insights*, 18 June 2008, Available at http://www.claytonutz.com/publications/newsletters/international_arbitration_insights/2008

⁴⁶ Ibid.

⁴⁷ *Nairobi International Centre for Arbitration Act*, No 26 of 2013

6.3 Rights of parties in Arbitration

The *Arbitration Act, 1995* defines the scope, responsibilities, and limitations of the arbitral tribunals, to allow parties to determine disputes in a manner consistent with law.

Besides the choice of arbitrators, parties can control aspects of the proceedings as well. In Arbitration agreements, parties can spell out certain procedural changes to the operation of the tribunal, lay down the level of formality of discussion, and most notably, oblige arbitrators to follow their choice of law.⁴⁸ Since parties can exercise control and because proceedings tend to be less formal than in court trials, Arbitration often creates a less tense atmosphere for dispute settlement. Awards arising out of Arbitration can be binding or nonbinding on the parties, depending on the Arbitration agreement. The *Arbitration Act* allows Arbitration parties to resort to courts only where the parties have agreed that an appeal can be filed.⁴⁹ In the absence of such an agreement the arbitrators' decision will be binding on the parties and enforceable by courts.

Arbitration practice in Kenya has been said to have increasingly become more formal and cumbersome due to lawyers' entry to the practice of Arbitration.⁵⁰ This has had the effect of seeing more matters being referred to the national Courts on due to the disputants' dissatisfaction. The referrals have been based on matters touching on substantive as well as procedural aspects of the Arbitration. Recourse to Courts may be necessary due to some unique characteristics of Arbitration which, though positive, may also adversely affect the certainty of one party to access justice. These include lack of a harmonized framework for supervision or accountability of arbitrators,⁵¹ a relaxation of evidentiary rules, decreased opportunities for thorough discovery,⁵² insufficient or nonexistent explanations of arbitrators' reasoning in decisions,⁵³ and limited protections for vulnerable parties.

6.4 Grounds of Appeal

The *Arbitration Act* allows Arbitration parties to resort to courts only where the parties have agreed that an appeal can be filed.⁵⁴ In the absence of such an agreement the arbitrators' decision will be binding on the parties and enforceable by courts. Courts exercise authority over arbitration matters either as a matter of statutory or inherent powers. As seen in the foregoing discussion, there are the instances when the Arbitration Act gives the national courts the powers to intervene in arbitration proceedings. However, these powers sometimes are exercised far beyond what the Act provides. This often happens where the courts decide that there existed illegality, fraud, incapacity or the award is

⁴⁸S. 20

⁴⁹ S. 39, No. 4 of 1995

⁵⁰ Muigua K., *Settling Disputes Through Arbitration in Kenya*, op. cit. page 10

⁵¹ Supervision is mostly Institution-based.

⁵² Limited timeframes are usually allocated for this.

⁵³ Parties may agree on whether they will expect an award with reasons thereof or otherwise.

⁵⁴ S. 39, No. 4 of 1995

against public policy. Though public policy has been defined in the Kenyan context⁵⁵, the lack of clear cut definition of the same can sometimes be applied with disastrous results. This is not only a problem of Kenya but the world all over. For instance, in the Indian case of *Phulchand Exports Ltd v OOO Patriot*⁵⁶, the Supreme Court decided that a foreign award can be set aside under section 48(2) of the Act if it is considered to be patently illegal. They gave the meaning of public policy a wider meaning to include morality and justice as a test. This is another controversial concept and thus it complicates the understanding of what is to be regarded as being against public policy.⁵⁷

Court interference intimidates investors since they are never sure what reasoning the court might adopt should it be called upon to deliberate on such commercial disputes. Even the locals can no longer appreciate the perceived advantages of arbitration over litigation.

6.5 Scope of Arbitration in Kenya

The *Arbitration Act* 1995 generally provides for arbitral proceedings and the enforcement of the arbitral awards by national courts. Section 3(1) of the Act attempts to define the scope of the Act and defines “Arbitration” to mean any Arbitration whether or not administered by a permanent arbitral institution. The Act thus applies to a wide range of Arbitration matters.

The scope of application of Arbitration has been widening day by day.⁵⁸ Article 189 of the Constitution provides for cooperation between national and county governments. Article 189(4) provides that National legislation shall provide procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and Arbitration.

In fact this is not restricted to Kenya alone but has been the trend in many jurisdictions around the world. In the American case of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 23⁵⁹ the US Supreme Court again overturned prior precedent, emphasizing the importance of arbitration to international trade. Quoting from an earlier opinion in a case involving a forum selection clause, the Court in *Mitsubishi case* emphasized:

The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.⁶⁰

⁵⁵ *Christ for all Nations v Apollo Insurance Company ltd*, Civil Case No. 477 of 1999

⁵⁶ Civil Appeal 3343/2005 - 12 October 2011)

⁵⁷ Robert Cutler, et al., India: a widening scope to avoid enforcement of foreign awards, *Clayton Utz Insights*, 08 December 2011, ‘The move towards widening the possibilities for rejecting claims for enforcement of foreign arbitral awards means that there is less certainty for those who contract with Indian companies.’

⁵⁸ For a detailed discussion on this, see Kariuki, F., ‘Redefining “Arbitrability”’: Assessment of Articles 159 & 189(A) of the Constitution of Kenya’ (2013) 1 *Alternative Dispute Resolution*, Chartered Institute of Arbitrators(Kenya Branch) publication

⁵⁹ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

⁶⁰ *Ibid.* at 407 U. S. 9.

6.6 Arbitration and Constitutional Supremacy

The law of Arbitration in Kenya has also not been without challenge as to its unconstitutionality in its application due to alleged violation of the rules of natural justice. One such instance occurred in the case of *Epco Builders Limited v Adam S. Marjan-Arbitrator & Another*⁶¹ where the Appellant had filed a constitutional Application under sections 70 and 77 of the Constitution of Kenya⁶², section 3 of the *Judicature Act* and section 3A of the *Civil Procedure Act*. The Applicant argued that their constitutional right to a fair Arbitration had been violated by a preliminary ruling of the arbitrator. The Applicant argued that it was unlikely to obtain fair adjudication and final settlement of the dispute before the arbitral tribunal due to the arbitrator's "unjustified refusal to issue summons to the Project Architect and Quantity Surveyor" who would have allegedly played an important role as witnesses in ensuring fair and complete settlement of the matters before the Tribunal. Counsel for the Chartered Institute of Arbitrators-Kenya Branch (CIArb), an interested party, submitted that while CIArb did not refute the application under section 77(9) of the Constitution, it argued that the procedure laid down under the *Arbitration Act* should be exhausted first before such an application. Justice Deverell, while supporting the view of the majority stated:

If it were allowed to become common practice for parties dissatisfied with the procedure adopted by the arbitrator(s) to make constitutional applications during the currency of the Arbitration hearing, resulting in lengthy delays in the Arbitration process, the use of alternative dispute resolution, whether Arbitration or mediation would dwindle with adverse effects on the pressure on the courts. This does not mean that recourse to a constitutional court during Arbitration will never be appropriate. Equally it does not mean that a party wishing to delay an Arbitration (and there is usually one side that is not in a hurry) should be able to achieve this too easily by raising a constitutional issue as to fairness of the "trial" when the *Arbitration Act* 1995 itself has a specific provision in section 19 stipulating that "the parties shall be treated with equality and each party shall be given full opportunity of presenting his case," in order to secure substantial delay. If it were to become common, commercial parties would be discouraged from using ADR.⁶³

Justice Deverell's assertion was therefore that Alternative Dispute Resolution should be encouraged while reducing the instances where disputants sought court's intervention. This was supposedly to make the process 'expedient'. The dissenting judge, Justice Githinji, was however of the opinion that Arbitration disputes are governed by private law and not public law and by invoking section 84(1) of the constitution, the Appellant was seeking a public remedy for a dispute in private law.⁶⁴

The foregoing argument may however not be compelling under the current *Constitution of Kenya* 2010. The repealed Constitution is fundamentally different from the current Constitution of

⁶¹ Civil appeal No. 248 of 2005 (unreported)

⁶² Repealed by the Constitution of Kenya, 2010

⁶³ Ibid

⁶⁴ Ibid

Kenya with regard to such matters as fundamental rights and freedoms with the latter having substantive and elaborates provisions on the same.

Justice Githinji's opinion that private matters cannot be decided in the sphere of public law would probably not hold under the current Constitution of Kenya. For instance, Article 10(1) provides that the national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them *inter alia*: enacts, applies or interprets *any* (emphasis ours) law; or makes or implements public policy decisions. This clause binds all persons and demands that any law (including private law) must be consistent with its provisions. The Bill of Rights and Fundamental Freedoms binds all persons and applies to all law⁶⁵ and requires equal treatment of every person⁶⁶ including *persons/parties to a private law governed dispute settlement process. (Emphasis ours)*

The law cannot restrict itself to those disputes that only involve public law but must also protect the constitutionally guaranteed rights of even those transacting under the sphere of private law.⁶⁷ Apart from facilitating and giving effect to private choice, the law must also protect the interests of the members of the society.⁶⁸ Failure to do so would create the impression of selective application of such law.

6.7 Party Rights and Arbitration

With regard to the *Arbitration Act*, section 5 provides that a party who *knows* that any provision of this Act from which the parties may derogate or any requirement under the Arbitration agreement has not been complied with and yet proceeds with the Arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is prescribed, within such period of time, is deemed to have waived the right to object. This provision is well meant for ensuring expediency and fair play in an Arbitration. However, the wording of the section has not ousted the jurisdiction of the constitutional Court. It deals with situations where such an aggrieved party was reasonably expected to have known or was well aware of such derogation or statutory requirements under the Act. Where does that leave those who were genuinely ignorant of the foregoing?⁶⁹ They could justifiably raise objections especially where fundamental rights and freedoms are concerned, notwithstanding the time limit prescription.

⁶⁵ Article 20(1), See also Article 2(4) of the Constitution

⁶⁶ Article 27 on Equality and freedom from discrimination

⁶⁷ See Cherednychenko. O.O., 'Fundamental rights and private law: A relationship of subordination or Complementarity?' *Utrecht Law Review*, Volume 3, Issue 2 (December, 2007), Available at <http://www.utrechtlawreview.org/> [Accessed on 23rd February, 2014]

⁶⁸ See Burnett, H., *Introduction to the legal system in East Africa*, East African Literature Bureau, Kampala, 1975, pp267-412

⁶⁹ Though ignorance of the law is no defence (*Ignorantia juris non excusat or Ignorantia legis neminem excusat*)

Article 22(1) provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Further, Article 23(1) provides that the High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Notably, clause (3) thereof further provides that in any proceedings brought under Article 22, a court may grant appropriate relief, including: a declaration of rights; an injunction; a conservatory order; a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; an order for compensation; and an order of judicial review.

6.7.1 Natural justice

The principles of natural justice entail the right to be heard (*Audi alteram partem*)⁷⁰ and the right to a fair and unbiased administrative process (*Nemo iudex in re causa sua*).⁷¹ The common law rules of natural justice or procedural fairness ensures that administrative decision makers follow a fair and unbiased procedure when making decisions.

Natural justice requires that the decision maker must provide sufficient opportunity for the affected person to present their case and respond to the evidence and arguments being advanced by other side or in the knowledge of the decision maker.

A number of disadvantages justify the need for constitutional regulation of administrative tribunals. These are: they are at times held in private so the basic requirements for justice may be ignored; parties are sometimes not permitted to be represented by lawyers; rights of appeal are sometimes limited; there is a wide discretion of a tribunal at times, which may lead to inconsistent and illogical decisions; and the officials do not act impartially in most of the cases.⁷²

Indeed, in the case of *David Onyango Oloo vs The Attorney general*,⁷³ it was held *inter alia* that rules of natural justice apply to an administrative act in so far as it affects the rights of the appellant and the appellant's legitimate expectation to benefit application of a law. A decision maker must also discharge their administrative duties in an independent and unbiased manner.

This position is also supported by the English case of *Breen Vs Amalgamated Engineering Union*⁷⁴ where the court noted that 'as regards the right to a hearing, the crucial question seems to be not whether a person is or is not an office holder but whether a statutory or other requirement

⁷⁰ Latin for 'hear the other side; hear both sides'

⁷¹ Latin for 'no man should be a judge in his own cause'

⁷² ICJ Kenya, 'Strengthening Judicial Reforms in Kenya: Public Perceptions of the Administrative Tribunals in Kenya' Vol. VI, page 6 (2003)

⁷³ [1987] K.L.R 711

⁷⁴ (1971) 2 QB 175

provides or is to be interpreted as providing the elementary safeguard of a right to a hearing.’ It held that ‘...[I]f he is a man who has some right or interest, or some legitimate expectation, of which it would not be fair to deprive without a hearing, or reasons given, then these should be afforded him according as the case may demand.’ Lord Hewart, in *Rex v Sussex Justices; Ex parte McCarthy* had earlier expanded the scope of natural justice by holding that “... *it is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done.*”⁷⁵

The current Constitution of Kenya has taken the foregoing standards a notch higher by incorporating natural justice principles into the constitutional rights. Article 47 deals with fair administrative action. Clause (1) thereof provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Article 48 provides that 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. This provision is not biased towards people dealing with public law only but also protects those dealing with private law.

6.7.2 Fair hearing

Another important provision is Article 50 of the Constitution which provides for the right to a fair hearing. Clause (1) provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. Such persons or parties to a dispute also have a right to *inter alia* have adequate time and facilities to prepare a defence and to adduce and challenge evidence. The information disclosed to the person must be satisfactorily accurate to facilitate the person to properly present his or her case. Section 19 of the *Arbitration Act*, dealing with equal treatment of parties, provides that the parties shall be treated with equality and each party shall subject to section 20, be given a fair and reasonable opportunity to present their case. This provision would be subject to Articles 27 and 50 of the Constitution on equality and fair hearing respectively. Justice Deverrel’s argument in the *Epcoco case* that the *Arbitration Act* conclusively provides that ‘parties shall be treated with equality and each party shall be given full opportunity of presenting his case’ and thus application for upholding of constitutionally guaranteed rights should not be ‘easily’ allowed could be challenged.

It is noteworthy that the *Arbitration Act*’s provision on fair trial does not in itself suffice to guarantee this right. Any provision on fair and/or equal treatment that apparently contradicts other provisions therein renders it ineffective in realisation of justice. The Constitution requires that such

⁷⁵ ([1924] 1 KB 256, [1923] All ER Rep 233)

a hearing must be guided by *inter alia* transparency, rule of law, inclusion, human rights and non-discrimination.⁷⁶ Any deviation from such would make it unconstitutional.

6.7.3 Fundamental Rights and Freedoms

One cannot give up their constitutionally guaranteed rights and fundamental freedoms. If Arbitration is to be regarded as one of the options or means to access justice as guaranteed under Article 48 and 159 of the Constitution, then it must conform to the general principles of fairness, impartiality and equality, to mention but a few. Justice requires that both substantive and procedural aspects of the administrative process demonstrate fairness. Granting arbitrators the right to choose unconstitutional laws to govern the proceedings is similar to delegation of legislative authority, something that would normally be subject to Constitutional scrutiny. Arbitration statutes generally provide for limited rights of review by superior courts from arbitral awards. For instance, the Kenyan *Arbitration Act*, 1995 provides for court intervention through on limited grounds. One such possibility is where the *Arbitration Act* expressly provides for intervention of the court under section 10.⁷⁷ The other instance is where the Court intervenes on grounds of public interest if substantial injustice is likely to be occasioned. While the State should continue to respect the role of private Arbitration and the need to avoid recourse to the courts in private dispute settlement, they must not permit private arbitrators to use laws that are likely to violate constitutional principles. The Rule of law is the foundation of democracy in Kenya.⁷⁸

In the case of *Sadrudin Kurji & another v. Shalimar Limited & 2 others* the Court held *inter alia* that:

"...Arbitration process as provided for by the *Arbitration Act* is intended to facilitate a quicker method of settling disputes without undue regard to technicalities. This however, does not mean that the courts will stand and watch helplessly where cardinal rules of natural justice are being breached by the process of Arbitration. Hence, in exceptional cases in which the rules are not adhered to, the courts will be perfectly entitled to set in and correct obvious errors."⁷⁹

Law making bodies must set reasonably clear and specific standards in circumstances where the grant of an unfettered discretion would lead to arbitrary, discriminatory, or otherwise unconstitutional restrictions. A limit on Constitutional rights must be clearly determinable. A limit must set an intelligible standard. Limitations on rights cannot be left to the unregulated discretion

⁷⁶ Article 10, Constitution of Kenya 2010

⁷⁷ S. 10, 'Except as provided in this Act, no court shall intervene in matters governed by this Act'

⁷⁸ Preamble, Constitution of Kenya, 2010

⁷⁹[2006] eKLR

of administrative bodies, in this case arbitral tribunals.⁸⁰ Indeed, Article 24(1) of the Constitution provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including *inter alia*: the nature of the right or fundamental freedom; the importance of the purpose of the limitation; the nature and extent of the limitation;...and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

It is important to note that Article 25 provides for those rights and freedoms that may not be limited under any circumstances. These are: freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; the right to a fair trial; and the right to an order of *habeas corpus*. It therefore follows that the rights contemplated under Article 25 must be upheld and promoted in all proceedings and instances including Arbitration.

6.7.4 Arbitrator's Notes

Generally, arbitrators are not under legal obligation to supply their arbitrator's notes to the parties. Any party who wishes to have the proceedings of the Arbitration must hire a stenographer at their own cost. The constitutional question that arises here is the right of the parties to obtain information necessary for realization of justice. Article 48 of the Constitution obligates the State to ensure that justice is done and the same is not defeated by a requirement for any fee to be paid. Article 35(1) of the constitution provides that every citizen has the right of access to: information held by the State; and information held by another person and required for the exercise or protection of any right or fundamental freedom. Would the arbitrator be thus compelled under this constitutional provision to provide a copy of the arbitrator's notes to any party who insists of his or her right to access information as a constitutionally guaranteed right?

6.7.5 Jurisdiction of High Court

Article 165(3) of the Constitution defines the High Court's jurisdiction and provides that subject to clause (5),⁸¹ the High Court shall have *inter alia*: jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or

⁸⁰ Chotalia, S. P., 'Arbitration Using Sharia Law in Canada: A Constitutional and Human Rights Perspective' *Const. F.*, 2006 at page 68

⁸¹ Art. 165(5) 'The High Court shall not have jurisdiction in respect of matters— (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the courts contemplated in Article 162 (2)'

threatened;⁸² and jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of: the question whether any law is inconsistent with or in contravention of this Constitution; the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution.⁸³

Article 165(6) further provides that the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court. Clause (7) thereof is to the effect that for the purposes of clause (6), the High Court may call for the *record of any proceedings*(emphasis ours) before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

Going by the wording of clause (7), the record of proceedings would probably include the arbitrator's notes.

Arbitration and ADR generally, has undoubtedly been gaining popularity especially the court-annexed Arbitration. Arbitration has been recognised under various statutes and most importantly under the Constitution as a viable option for settlement of disputes. Its higher degree of formality as compared to other mechanisms under the ADR makes it closely resemble litigation and thus requires law's intervention to ensure that the rights of all parties are not only upheld but also promoted. This is because it is susceptible to the procedural rules and technicalities that are synonymous with courts. Indeed, Arbitration is not merely a mechanism to provide for private dispute settlement, but rather, is a means of providing quasi-judicial, comprehensive dispute management.⁸⁴ Arbitration proceedings are subject to the foregoing provisions particularly Article 165.

It has been said that one of the advantages of Arbitration is that private parties are entitled to choose the Arbitration law to govern their private relationships. The Act assumes that the parties have equal bargaining power and therefore disregards the likelihood of violation of any constitutional rights in the process. However, it is already settled law that persons cannot contract out of constitutional and human rights protections.⁸⁵

⁸² Art. 165(3)(b)

⁸³ Art. 165(3)(d)

⁸⁴ See *Bremer (Handelsgesellschaft mbH) vs. EtsSoules* [1985] 1 Lloyd's Rep 160; [1985] 2 Lloyd's Rep 199. Sir Nicolas Browne-Wilkinson V-C *inter alia* stated: "...On appointment, the arbitrator becomes a third party to that Arbitration agreement, which becomes a trilateral contract....Under that trilateral contract, the arbitrator undertakes his quasi-judicial functions in consideration of the parties agreeing to pay him remuneration. By accepting appointment, the arbitrator assumes the status of a quasi-judicial adjudicator, together with all the duties and disabilities inherent in that status."

⁸⁵ Article 19(2) provides that 'the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individual and communities and to promote social justice and the realisation of the potential of all

6.8 Access to justice

Section 32B of the *Arbitration Act* 1995 provides for the Arbitration Costs and expenses in an Arbitration proceeding. Subsection (1) thereof is to the effect that unless otherwise agreed by the parties, the costs and expenses of an Arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal and any other expenses related to the Arbitration, shall be as determined and apportioned by the arbitral tribunal in its award under this section, or any additional award under section 34(5). The arbitral tribunal is thus mandated to determine their fees.

Arbitration fees are mostly determined by the arbitral tribunal and where the Arbitration is institutional, there exist institutional guidelines on how this should be done. The parties thus have little if any say on the amount to be charged. Lately, there have been public concerns on the actual cost effectiveness of Arbitration with some arguing that Arbitration is becoming more expensive than litigation.⁸⁶ The *Constitution of Kenya* 2010 provides under Article 48 that in accessing justice, if any fee is required, it shall be reasonable and shall not impede access to justice. The problem comes in when Arbitration involves persons who do not have the financial muscle as against a party who would not have any problem settling their share of the fees charged as the Act requires. A good example is where an individual person enters into Arbitration with a body corporate. There is the risk of one party failing to access justice due to lack of finances. Indeed, section 32B (3) provides that (3) the arbitral tribunal may withhold the delivery of an award to the parties until full payment of the fees and expenses of the arbitral tribunal is received. The question that arises is whether Article 48 applies selectively and who determine the reasonableness of the arbitrator's fees as some of them are fixed by the particular institutions involved. It is noteworthy that arbitrators are paid on hourly basis and according to their level of experience and/or expertise. Would withholding of the award in absence of proper determination of the 'reasonableness' of the fees charged amount to violation of the constitutional right of access to justice? Subsection (4) thereof provides that if the arbitral tribunal has, under subsection (3), withheld the delivery of an award, a party to the Arbitration may, upon notice to the other party and to the arbitral tribunal, and after payment into court of the fees and expenses demanded by the arbitral tribunal, apply to the High Court for an order directing the manner in which the fees and expenses properly payable to the arbitral tribunal shall be determined. This provision makes it even harder for the aggrieved/affected party to access justice if the Court comes in *after*

human beings.' Clause (3) further provides that 'the rights and fundamental freedoms in the Bill of Rights: belong to each individual and are not granted by the State;...and are subject only to the limitations contemplated in this constitution.'

⁸⁶Daily Nation, *Business Daily*, "Is Arbitration of disputes better than litigation?" Sunday, March 24 2013, Available at <http://www.businessdailyafrica.com/Is-Arbitration-of-disputes-better-than-litigation/-/539546/1729318/-/rm6n5az/-/index.html> [Accessed on 25th February, 2014]; See also International law Office, *Arbitration may no longer be viable as an ADR method*, August 09 2012.

Available at <http://www.internationallawoffice.com/newsletters/detail.aspx?g=70d89bd9-87cc-45e4-a73d-b740f96797d0> [Accessed on 25th February, 2014]

payment into court of the fees and expenses demanded by the arbitral tribunal. What if a party failed to pay the moneys due to lack of the same? Arbitration then becomes expensive and violates the right of access to justice since such a person, if litigating in courts, would probably have access to pauper brief scheme.⁸⁷

This remains a contentious issue as to how it should be approached since it seems to be beyond the parties' autonomy in the process if section 32B (7) is anything to go by. The provisions of this section are to the effect that the provisions of subsections (3) to (6) have effect notwithstanding any agreement to the contrary made between the parties.

6.8.1 Class Action Arbitration

Would a group/class of persons be allowed to join forces and enter into Arbitration especially where corporations are involved so as to do cost sharing? If not, how is the power imbalance in individual versus corporation arbitration to be handled in order to facilitate access to justice for the weaker party? In the American case of *American Express Co. et al. v. Italian Colors Restaurant et al.*,⁸⁸ it was held that The *Federal Arbitration Act* (FAA) does not permit courts to invalidate a contractual waiver of class Arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery.⁸⁹ The plaintiffs in *American Express* had claimed that American Express used monopoly power in the market for charge cards to extract higher rates for processing American Express credit cards. When American Express moved to compel individual Arbitration pursuant to the Arbitration agreement, plaintiffs had protested, alleging that a class action was essential because the costs of their expert reports alone would run into the hundreds of thousands of dollars, and each individual merchant could hope to recover only a fraction of that amount. A class action thus was essential, plaintiffs argued, to "effectively vindicate" their claims. This argument was rejected by the Supreme Court and had observed that one could not be coerced into class litigation in absence of agreement to that effect.

The effect of such a decision, though in foreign jurisdiction would be incapacitation of vulnerable persons to access justice especially where they would be seeking justice against large corporations or companies. It is therefore unlikely that an individual would afford the costs of

⁸⁷ No legal aid scheme is available in Arbitration

⁸⁸ Certiorari to the United States Court Of Appeals for the Second Circuit, No. 12-133, Argued February 27, 2013—Decided June 20, 2013

⁸⁹ *Ibid.*, Pp. 3-10.

Arbitration with companies and especially where purportedly ‘estopped’ from seeking justice through courts due to an Arbitration clause in a contractual agreement.⁹⁰

6.9 Democracy and Arbitration

Democracy is believed to exist in three basic forms namely direct, representative and constitutional. Direct/participative democracy is defined to mean a form of government in which the right to participate in making political decisions is exercised directly by all citizens, acting under procedures of majority rule. Representative democracy is used to refer to a form of government in which the citizens exercise the right of participation in making political decisions through elected representatives. Constitutional democracy is a form of representative democracy in which the powers of the majority are enshrined in constitutional provisions designed to guarantee the individual and collective rights of all citizens.⁹¹ The discussion herein however focuses on constitutional democracy only, which seeks to promote the protection of the rights of the marginalised and minority in society⁹², constitutional safeguards for basic civil liberties, and an independent judiciary. Constitutional democracy seeks to protect the individual rights or liberties against the exercise of state power.⁹³

Richard C. Reuben rightly observes that since arbitration as a dispute settlement process that is often sanctioned by the government that sometimes inextricably intertwines governmental and private conduct, and that derives its legitimacy from the government,⁹⁴ it is appropriate, our responsibility to ask whether arbitration furthers the goals of democratic governance.⁹⁵ He further argues that it is only sensible that state-supported dispute resolution in a democracy should strengthen, rather than diminish, democratic governance and the civil society that supports it.⁹⁶ One of the issues that ought to be submitted to this democracy test, according to Reuben Richard, and rightly so, is

⁹⁰ Ibid. ‘An agreement between American Express and merchants who accept American Express cards, demands that all of their disputes be resolved by Arbitration and provides that there “shall be no right or authority for any Claims to be arbitrated on a class action basis.”

⁹¹ Bale, R., ‘Concepts of Democracy’, Available at <http://www.abc.net.au/civics/democracy/concepts.htm> [Accessed on 4th March, 2014].

⁹² For instance, Article 56 of the Constitution of Kenya provides for the State’s duty to put in place affirmative action programmes designed to ensure that minorities and marginalised groups *inter alia* participate and are represented in governance and other spheres of life.

⁹³ Ibid.

⁹⁴ He argues that the history of arbitration and the ouster doctrine demonstrate how the willingness of the courts to participate in and enforce the results of so-called “alternative” or “appropriate” dispute resolution methods has been essential to the legitimacy of these processes.

⁹⁵ Reuben, R.C., ‘Democracy and Dispute Resolution: The Problem of Arbitration’ *Law And Contemporary Problems*, Vol. 67:279, Winter/Spring 2004] Pg. 280, Available at <http://www.law.duke.edu/journals/67LCPReuben>. [Accessed on 4th March, 2014].

⁹⁶ Ibid.

“mandatory arbitration”⁹⁷, that is, the imposition of binding arbitration through contracts of adhesion, employee handbooks, consumer terms and conditions, and other unilaterally drafted documents, under the authority of the US Federal Arbitration Act and related state laws. He argues that mandatory arbitration impacts on the most fundamental of democratic virtues: individual liberty, the rule of law, and fundamental fairness.⁹⁸

Although the above argument draws largely from U.S. constitutional democracy, it is impossible to ignore such implications in arbitration practice in the Kenyan context since the current constitution of Kenya also seeks to promote these key principles of an ideal constitutional democracy. This is well highlighted in Article 10 of the constitution, as already noted elsewhere in this discourse, as national values and principles of governance which include *inter alia* democracy, rule of law and human rights.⁹⁹ Further, Article 19(1) thereof is to the effect that the Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies. Further, clause (2) thereof provides that the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings. More importantly, clause (3) asserts that the rights and fundamental freedoms in the Bill of Rights: belong to each individual and are not granted by the State; do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with the Chapter four; and are subject only to the limitations contemplated in the Constitution.

Reuben Richard in his work,¹⁰⁰ concludes that arbitration as a dispute-resolution process, is generally undemocratic, but it acquires democratic legitimacy when parties actually agree to arbitrate their disputes because it furthers the unifying democratic value of personal autonomy. He observes that when involuntary, however, arbitration only frustrates the larger goals of democratic governance.¹⁰¹ Indeed, it has been posited that the worth and dignity of each individual must be recognized and respected by all other individuals, and by all of society, at all times.¹⁰² Further, it has been argued that the two individual freedoms that are most sacred are freedom of expression and

⁹⁷ He uses the term mandatory arbitration to refer to arbitration imposed upon an employee or consumer as a condition of employment or the provision of services, the results of which are binding upon the parties and enforceable in court under the US Federal Arbitration Act.

⁹⁸ *Ibid*, pg. 281.

⁹⁹ Article 10(1) of the Constitution of Kenya provides that the national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them *inter alia*: enacts, applies or interprets *any* (emphasis ours) law; or makes or implements public policy decisions. This clause binds all persons and demands that any law (including private law) must be consistent with its provisions.

¹⁰⁰ Reuben, R.C., ‘Democracy and Dispute Resolution: The Problem of Arbitration’ *Law And Contemporary Problems*, op.cit. 282

¹⁰¹ *Ibid*.

¹⁰² ‘Basic Concepts of Democracy (from Magruder’s, Chapter 1)’

Available at <http://cuip.uchicago.edu/~ldernbach/msw/xgconcepts.pdf> [Accessed on 4th March, 2014].

freedom of thought and that these two must be jealously guarded for democracy to survive.¹⁰³ These are advanced through promoting the rule of law which protects the rights of citizens, maintains order, and limits the power of government.¹⁰⁴ It has further been observed that courts promote public participation in the development and administration of the rule of law by allowing parties to bring actions to enforce legal rights.¹⁰⁵

Regarding mandatory arbitration, the Kenyan position seems to be a mixed one. The *Arbitration Act* 1995, under section 3(1) arbitration to mean *any arbitration whether or not administered by a permanent arbitral institution*. Further, the Act defines “arbitration agreement” to mean *an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not*. What is lacking from the definitions section is the term ‘agreement’. It is not clear whether this agreement involves express or implied agreement. Implied agreement would arise where a party enters into a defined legal relationship through contracts of adhesion, employee handbooks, consumer terms and conditions, and other unilaterally drafted documents. In such instances, there is likelihood of power imbalance especially where it involves individuals and corporations or employers and employees. Such individuals are ‘forced’ into arbitration, a process that is likely to demand lots of funds to source qualified arbitrators. The Act may therefore be interpreted as allowing for mandatory arbitration.

It is noteworthy that section 32B (2) of Kenya’s *Arbitration Act* provides that unless otherwise agreed by the parties, in the absence of an award or additional award determining and apportioning the costs and expenses of the arbitration, each party shall be responsible for the legal and other expenses of that party and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration. The detriment in such a situation may be to the ‘weaker’ party since they may not have had much say in the appointment of the arbitrator. Further, the corporation or the party with better bargaining power may have gone for a more qualified arbitrator, the implication of which is higher fees. Important in this discussion is subsection (3) thereof which is to the effect that the arbitral tribunal may withhold the delivery of an award to the parties until full payment of the fees and expenses of the arbitral tribunal is received. This complicates the situation and access to justice is likely to be defeated especially where the weaker party in the power imbalance is the one to benefit from the award and they have limited access to funds for settlement of the required fees.

¹⁰³ Ibid

¹⁰⁴ ‘What is Democracy?’ Lecture at Hilla University for Humanistic Studies, January 21, 2004, Available at <http://www.stanford.edu/~ldiamond/iraq/WhaIsDemocracy012004.htm> [Accessed on 4th March, 2014].

¹⁰⁵ Reuben, R.C., ‘Democracy and Dispute Resolution: The Problem of Arbitration’ *Law and Contemporary Problems*, op.cit. 293

Some statutes in Kenya however seem to depart from the *Arbitration Act's* position and to some extent prohibit mandatory arbitration. Section 88(1) of Kenya's *Consumer Protection Act, 2012*¹⁰⁶ is to the effect that any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the High Court given under this Act. This provision is arguably in conflict with section 6(1) of the *Arbitration Act* which provides that a court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds: that the arbitration agreement is null and void, inoperative or incapable of being performed; or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration. Further, subsection (2) thereof provides that proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined. Although the *Arbitration Act* contemplates such situations where arbitration agreement may not hold, it creates confusion as to whether the law seeks to protect persons under the subject of certain statutes and leaves others exposed through, for example, mandatory arbitration. There are also other laws which provide that the court may require parties to explore Alternative Dispute Resolution (ADR), including arbitration, before proceeding on the matters.¹⁰⁷

The Constitutionality of mandatory arbitration is an issue that is likely to be challenged in courts owing to perceptions of violation of the right to self determination and that of access to justice.¹⁰⁸ Article 25 of the Constitution of Kenya 2010 provides that despite any other provision in the Constitution, among others, the right to a fair trial shall not be limited. The question seeks an answer is how the power imbalances and other injurious factors should be addressed [by courts?] in mandatory arbitration so as ensure procedural and substantive justice in the process.

¹⁰⁶ *Consumer Protection Act*, No. 46 of 2012 [Rev. Edition 2013], Laws of Kenya

¹⁰⁷ Sec. 20 of *Environment and Land Court Act*, No. 19 of 2011 provides that the Court may adopt Alternative dispute resolution in management of disputes. Subsection (1) thereof is to the effect that nothing in the Act may be construed as precluding the Court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2) (c) of the Constitution. Further, subsection (2) provides that where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall stay proceedings until such condition is fulfilled.

¹⁰⁸ For a fuller discussion on this, see Sternlight J.R., 'Creeping Mandatory Arbitration: Is It Just?' *Stanford Law Review*, Vol. 57, No. 5, 2005 *Stanford Law Review Symposium: (The Civil Trial: Adaptation and Alternatives)* (Apr., 2005), pp. 1631-1675, Available at <http://www.jstor.org/stable/40040228> [Accessed: 28th February, 2014]

7. Promises

There is need to ensure that even as parties enjoy autonomy and other advantages that are associated with Arbitration, the weaker party's interests in the process are protected. Anything less would only delay the process, the very problem that ADR seeks to cure, as the party would resort to constitutional court to seek justice. Courts are seen as capable of promoting equality, due process, and rationality by operating according to specific rules of procedure, evidence, and substantive law that have been enacted pursuant to statutory or administrative prescription, or which have evolved over time at common law.¹⁰⁹

The *Arbitration Act* needs to be reviewed to seal such loopholes and/or vacuum as relating to the procedural fairness and the manner of conducting the Arbitration process. It is important to note that in this era of human rights as well as the supreme constitution of Kenya 2010, any law, practice, or conduct including *Arbitration Act* which does not reflect the gains made in the constitution would easily be challenged in Court as being unconstitutional. In a society that is increasingly becoming litigious, it is important that such concerns be addressed. Otherwise, references from Arbitration would not only be on the now common ground of public policy but would perhaps see new cases being based on the Bill of rights and alleged violation of fundamental freedoms. Arbitrators and ADR Practitioners must be cognizant of the constitutional rights of the parties that appear before them. The Constitution of Kenya reigns supreme over Arbitration and its practice. The *Arbitration Act* does not have satisfactory procedural and substantive safeguards against violation of the constitutional Bill of rights and fundamental freedoms. The Supremacy clause in Article 2 of the Constitution means that application of any law in violation of the national values and principles of governance as well as the Bill of Rights and fundamental freedoms would be challenged in Court and even held unconstitutional.

The issues discussed in this paper are more likely to arise in court-annexed arbitration where courts direct parties to resort to arbitration and have the court enforce the outcome thereof as its final decision on the matter.¹¹⁰ Parties therein are more often than not left with little choice as to whether they should engage in the arranged arbitration or not. Again, the question of power imbalances between the parties arises.

¹⁰⁹ Reuben, R.C., 'Democracy and Dispute Resolution: The Problem of Arbitration' *Law and Contemporary Problems*, op.cit. 294

¹¹⁰ See generally Bernstein, L., 'Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs', *University of Pennsylvania Law Review*, Vol. 141, No. 6 (Jun., 1993), pp. 2169-2259 Available at <http://www.jstor.org/stable/3312494> [Accessed on 28th February, 2014]; See also generally, Sternlight J.R., 'Creeping Mandatory Arbitration: Is It Just?' *Stanford Law Review*, Vol. 57, No. 5, 2005 Stanford Law Review Symposium: (The Civil Trial: Adaptation and Alternatives) (Apr., 2005), pp. 1631-1675, op. cit.

The constitution of a nation state has been said to be the Supreme Act within the hierarchy of regulatory instruments and must thus reign over all other laws.¹¹¹ Arbitrators must be fair, observe the rules of natural justice and comply with Constitutional provisions especially the Bill of Rights. The other issues of mandatory arbitration and limited appeals in the process must be delicately balanced against the constitutional requirement of fair trial, equality and equal protection before the law.

8. Conclusion

The discourse has focused on the emerging jurisprudence in the law of arbitration in Kenya. If arbitration is to retain its preference as a dispute settlement mechanism, then the foregoing issues need to be addressed in law. Arbitrators must consider these issues with a view to finding the way forward. It is important to note that even as ADR becomes more popular, failure to address these concerns would impede its active growth in the country as a means of accessing justice. The challenges highlighted in the discussion are surmountable. Arbitration is still key to settlement of disputes as well as economic development in Kenya.

¹¹¹ Tanchev, E., 'Supremacy of Constitutions in the Context of Constitutional Pluralism' page 1, available at <http://www.enelsyn.gr/papers/w4/Paper%20by%20Prof.%20Evgeni%20Tanchev.pdf> [Accessed on 4th March, 2014].

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