

Looking into the Future: Making Kenya a Preferred Seat for International Arbitration

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Abstract

With the ever increasing globalisation and international trade and investments, territorial boundaries have increasingly become irrelevant as far as businesses are concerned. However, with the ever present commercial disputes, international arbitration has continued to play a critical role in their management. Developing countries have been working hard to position themselves to tap into the economic benefits that come with the practice of international arbitration. This paper offers an analysis of the prospects and challenges of international arbitration practice in Kenya and what the country can do to sell itself as the preferred seat and venue for international arbitration.

1. Introduction

Some authors have rightly argued that international arbitration has undergone a self-sustaining process of institutional evolution that has steadily enhanced arbitral authority.¹ It has undergone both judicialization and delocalization. Delocalization, that is, detachment from national procedural and substantive law of the place of arbitration, or any other national law, and underlines the principle of party autonomy as the guiding idea pertaining to the process of delocalization,² also recognises the choice of parties for the seat of arbitration, which defines the law that will govern the arbitration; it is about which courts have supervisory power over your arbitration and the scope of those powers.³

This judicialization process, it has been observed, was sustained by the explosion of trade and investment, which generated a steady stream of high stakes disputes, and the efforts of elite arbitrators and the major centres to construct arbitration as a viable substitute for litigation in

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¹ Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press 2017) <<https://hal-univ-paris10.archives-ouvertes.fr/hal-01647263>> accessed 1 August 2020.

² Dejan Janićijević, 'Delocalization in International Commercial Arbitration' (2005) 3 *Facta Universitatis - Law and Politics* 63.

³ 'The Seat of Arbitration Is Important. It's That Simple.' (*Kluwer Arbitration Blog*, 10 June 2018) <<http://arbitrationblog.kluwarbitration.com/2018/06/10/seat-arbitration-important-simple/>> accessed 1 August 2020.

domestic courts.⁴ In addition, state officials (as legislators and treaty makers), and national judges (as enforcers of arbitral awards), have not just adapted to the expansion of arbitration; they have heavily invested in it, extending the arbitral order's reach and effectiveness.⁵ It is against this background that many states around the world have been working on the domestic legal and institutional frameworks geared towards enhancing the practice of international arbitration within their jurisdictions. This paper critically discusses Kenya's preparedness for the ever-growing field of international arbitration practice. The author discusses the existing challenges but also offers some recommendations on how the country can position itself to tap into this field of international dispute settlement.

2. The Place of International Arbitration in Global Economy: Prospects and Challenges

Over the past century, international arbitration has grown to become an autonomous legal order.⁶ It has been growing in its importance especially in settling international disputes within the international commercial circles. Globalization has led to an influx of international contracts, and the resultant increased complex commercial disputes.⁷

These have been instrumental in the development of international arbitration as the preferred choice of businessmen for the settlement of their disputes.⁸ They have further led to a denationalization of arbitration, both procedurally and substantively, as well as to a convergence of national legislation and institutional rules, based on a consensus on a greater liberalization of the process.⁹ It has also been documented that the forces of globalization have also opened the door to the application by arbitral tribunals of general principles of international commercial law,

⁴ Ibid; See also Dimitropoulos, Georgios. "Constructing the independence of international investment arbitrators: past, present and future." *Nw. J. Int'l L. & Bus.* 36 (2016): 371; Sweet, Alec Stone, and Florian Grisel. "The Evolution of International Arbitration: Delegation, Judicialization, Governance." *Studies* 31 (1999): 147-184; Stromberg, Winston. "Avoiding the full court press: International commercial arbitration and other global alternative dispute resolution processes." *Loy. LAL Rev.* 40 (2006): 1337.

⁵ Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press 2017) <<https://hal-univ-paris10.archives-ouvertes.fr/hal-01647263>> accessed 1 August 2020.

⁶ Ibid; See also Gaillard, Emmanuel. "International Arbitration as a Transnational System of Justice." In *Arbitration—The Next Fifty Years (ICCA Congress Series 16)*. Kluwer Law International, pp. 66-73. 2012.

⁷ Bernard Hanotiau, 'International Arbitration in a Global Economy: The Challenges of the Future' [2010] 2010 Herbert Smith Freehills-SMU Arbitration Lecture Series <https://ink.library.smu.edu.sg/hsmith_lect/2/> accessed 1 August 2020.

⁸ Ibid; 'The Globalization of International Arbitration' (*Global Arbitration News*, 13 June 2017) <<https://globalarbitrationnews.com/the-globalization-of-international-arbitration/>> accessed 1 August 2020.

⁹ Ibid; Katherine Lynch and Katherine L Lynch, *The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration* (Kluwer Law International BV 2003).

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common to all nations, and have contributed to the development of an international arbitration culture.¹⁰

There is however a group that feels that international arbitration has also come with its fair share of challenges. There is an increased concern over its judicialization, its time and cost efficiency and various ethical issues.¹¹ Some feel that the mechanism of international arbitration has lost a stronghold in the global justice arena despite its continuous growth, and a consensus among scholars, businesses, and parties across the world is also mounting that the mechanism has completely lost feasibility.¹² It has been argued that generally argued that international arbitration has lost its complete efficiency and seen to be equating with litigation-based mechanisms, where parties' ultimate goals are no longer realized and justified as the ends of international arbitration.¹³ It has been noted that even as the debate on the pros and cons of international arbitration ranges on, there are those who view it as a developed versus developing world issue. One author has rightly pointed out that the success story has been relatively regionally celebrated given that some regions like Africa, Latin America, as well as Asia, except the Asian Pacific, are still grappling with how to mainstream and take their share of global international arbitration growth.¹⁴

Despite these challenges, it is not in question that both developed and developing countries have actively promoted international arbitration practice as the best option for settling global disputes, and have manifestly substantiated their efforts by massively embracing pro-arbitration laws or

¹⁰ Bernard Hanotiau, 'International Arbitration in a Global Economy: The Challenges of the Future' [2010] 2010 Herbert Smith Freehills-SMU Arbitration Lecture Series <https://ink.library.smu.edu.sg/hsmith_lect/2/> accessed 1 August 2020; 'The Globalization of International Arbitration' (*Global Arbitration News*, 13 June 2017) <<https://globalarbitrationnews.com/the-globalization-of-international-arbitration/>> accessed 1 August 2020.

¹¹ Ibid; See also Gu, Weixia. "Looking at Arbitration through a Comparative Lens: General Principles and Specific Issues." *The Journal of Comparative Law* 13, no. 2 (2018): 164-188.

¹² Nwedu, Cosmos Nike, 'Spotlight on International Arbitration: A Study of Emerging Trends and Challenges to Its Practice' *YB on Int'l Arb.* 6 (2019): 23

<https://www.researchgate.net/publication/332104324_Spotlight_on_international_arbitration_A_study_of_emergin_g_trends_and_challenges_to_its_practice> accessed 4 August 2020; Seen, Things Not. "Achieving Access to Justice through ADR: Fact or Fiction?."

https://www.fordham.edu/download/downloads/id/13894/law_review_colloquium_2019_cle_materials.pdf accessed 4 August 2020.

¹³ Ibid; ABA Journal, 'International Arbitration Loses Its Grip' (*ABA Journal*) <https://www.abajournal.com/magazine/article/international_arbitration_loses_its_grip> accessed 4 August 2020; Fabricio Fortese and Lotta Hemmi, 'Procedural Fairness and Efficiency in International Arbitration' (2015) 3 *Groningen Journal of International Law* 110; William W Park, 'Arbitrators and Accuracy' (2010) 1 *Journal of International Dispute Settlement* 25.

¹⁴ Ibid; International Bar Association, 'The Current State and Future of International Arbitration: Regional Perspectives,' IBA Arb 40 Subcommittee < www.ibanet.org > Document > Default> accessed 4 August 2020.

statutes, as well as ratifying key international and regional arbitration legal instruments.¹⁵ Most African countries, including Kenya, may be said to be at this stage where they are still trying to make their jurisdictions attractive to business community and international arbitration practitioners.

3. Emerging Issues and Trends in International Arbitration

3.1 Costs and time efficiency

Some authors have argued that although individual parties and businesses traditionally believed that one of the advantages of international arbitration is costs and time efficiency, they have begun to realize clearly that this is not certainly true at all times.¹⁶

It is well known within international arbitration practice that practitioners' hourly rates and venue charges are usually high especially for the well-established institutions.¹⁷ Sometimes, parties spend hugely to have their disputes conducted, even paying higher than what they would have ordinarily spent in litigation, due to inordinate delays in the conduct of arbitral proceedings.¹⁸ This has therefore raised doubt on the effectiveness of international arbitration as the preferred choice for management of commercial disputes.

¹⁵ Nwedu, Cosmos Nike, 'Spotlight on International Arbitration: A Study of Emerging Trends and Challenges to Its Practice' *YB on Int'l Arb.* 6 (2019): 26 <https://www.researchgate.net/publication/332104324_Spotlight_on_international_arbitration_A_study_of_emerging_trends_and_challenges_to_its_practice> accessed 4 August 2020; see also 'Commercial Arbitration in Africa: Present and Future | Herbert Smith Freehills | Global Law Firm' <<https://www.herbertsmithfreehills.com/latest-thinking/commercial-arbitration-in-africa-present-and-future>> accessed 4 August 2020.

¹⁶ Nwedu, Cosmos Nike, 'Spotlight on International Arbitration: A Study of Emerging Trends and Challenges to Its Practice' *YB on Int'l Arb.* 6 (2019): 26 <https://www.researchgate.net/publication/332104324_Spotlight_on_international_arbitration_A_study_of_emerging_trends_and_challenges_to_its_practice> accessed 2 August 2020.

¹⁷ Herbert Smith Freehills, 'Inside Arbitration Perspectives on Cross-Border Disputes,' Issue 3 February 2017; White & Case LLP, '2018 International Arbitration Survey: The Evolution of International Arbitration,' <<http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf>> accessed 2 August 2020.

¹⁸ Nwedu, Cosmos Nike, 'Spotlight on International Arbitration: A Study of Emerging Trends and Challenges to Its Practice' *YB on Int'l Arb.* 6 (2019): 29 <https://www.researchgate.net/publication/332104324_Spotlight_on_international_arbitration_A_study_of_emerging_trends_and_challenges_to_its_practice> accessed 2 August 2020.

3.2 Third party funding

In the last decade, the efficiency of arbitration has become a concern. Some of the arbitration advantages that have always been highlighted include the speed and the reduced costs of this alternative method of dispute resolution.¹⁹

International arbitration, while potentially cost effective, can have its costs growing exponentially expensive. To arrest this situation, major players and practitioners have been coming up with creative means of financing the process. One such means is third party funding which is defined as an arrangement where someone who is not involved in arbitration provides funds to a party to that arbitration in exchange for an agreed return.²⁰ The third party funding or financing usually covers the funded party's legal fees and expenses incurred in the arbitration and the funder may also agree to pay the other side's costs and provide security for the opponent's costs if the funded party is so ordered.²¹

While third party funding is not new, and was originally designed to support companies that did not have the means to pursue claims, its use has become a feature of the litigation landscape in several jurisdictions, including in international arbitration, where it has attracted the funders due to the high-value claims, perceived finality of awards, and the enforcement regime provided by the New York Convention.²² Initially, the funding focused on investor-state arbitration, but now spreading to commercial international arbitration.²³

While third party funding comes with some risks, it can also enhance access to justice for under-resourced parties (especially in investor–state disputes) enabling them to pursue proceedings which a lack of financing would otherwise have prevented.²⁴ On the other hand, for parties that are adequately resourced, funding can offer a more convenient financing structure, allowing capital

¹⁹ Florescu, Cristina Ioana. "Emerging tools to attract and increase the use of international arbitration." *Juridical Tribune/Tribuna Juridica*, Jun2020, Vol. 10, Issue 2, p255-278.

²⁰ 'Third Party Funding in International Arbitration' <<https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/>> accessed 1 August 2020.

²¹ Ibid.

²² 'Third Party Funding in International Arbitration' <<https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/>> accessed 1 August 2020.

²³ Ibid.

²⁴ 'The Third-Party Funding Debate - We Look at the Risks | Global Law Firm | Norton Rose Fulbright' (<https://www.nortonrosefulbright.com/en/knowledge/publications/imported/2018/07/18/05>) <<https://www.nortonrosefulbright.com/en/knowledge/publications/6c843d32/the-third-party-funding-debate---we-look-at-the-risks>> accessed 1 August 2020.

which would otherwise be spent on legal fees to be allocated to other areas of their business during the proceedings.²⁵

3.3 Changing Arbitration Rules

It has been reported that most of the major international arbitration institutions have been considering their arbitration rules as a way of embracing the emerging trends and practice in international arbitration. For instance, as at 2020, the rules of the London Court of International Arbitration (LCIA) were updated, with a particular focus on cybersecurity and data protection.²⁶ Also noteworthy is the fact that the International Centre for the Settlement of Investment Disputes (ICSID) has also refined its rules –a code of conduct for tribunal members, the need for transparency in third party funding, and a new advisory centre on investor-state dispute settlement, and addressing common criticisms of investor-state dispute settlement by addressing costs, the quality and consistency of decisions, and access to justice.²⁷

4. The Practice of International Arbitration in Kenya: Prospects and Challenges

In the last few years, the setting up of legal and institutional frameworks specifically meant to promote the growth and practice of international arbitration in Kenya has picked up. The *Nairobi Centre for International Arbitration Act*²⁸ establishes the Nairobi Centre for International Arbitration (NCIA) whose functions include, inter alia, to promote, facilitate and encourage the conduct of international commercial arbitration in accordance with the Act; to administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices; to ensure that arbitration is reserved as the dispute resolution process of choice; and, to develop rules encompassing conciliation and mediation processes.²⁹ NCIA is administered by a Board of Directors as provided for under the Act.³⁰ There is also an Arbitral Court established under the

²⁵ Ibid.

²⁶ ‘International Arbitration: Current Trends and What to Expect In 2020 And the Years Ahead - Litigation, Mediation & Arbitration - Worldwide’ <<https://www.mondaq.com/uk/arbitration-dispute-resolution/880988/international-arbitration-current-trends-and-what-to-expect-in-2020-and-the-years-ahead>> accessed 1 August 2020.

²⁷ Ibid.

²⁸ *Nairobi Centre for International Arbitration Act*, No. 26 of 2013, Laws of Kenya (Government Printer, Nairobi, 2013).

²⁹ Ibid, Sec. 5 (a)-(d).

³⁰ Ibid, Sec.6.

Act, which court has exclusive original and appellate jurisdiction to hear matters that are referred to it under the Act.³¹

Its capacity to handle domestic and international arbitration requires to be constantly improved, and it can only be hoped that this potential will be exploited to its maximum in the years to come so as to prominently place Kenya on the global map of international arbitration.

Despite the efforts by stakeholders in Alternative Dispute Resolution (ADR) and especially arbitration to invest in making Kenya a more receptive destination for international arbitration, the country still faces a number of challenges that have slowed down the progress. These include: real or perceived national courts interference; perception of corruption/ government interference; inadequate marketing of the country; inadequate capacity of existing institutions; and endless court proceedings, among others.³²

5. Making Kenya a Preferred Seat for International Arbitration

5.1 Enhanced Capacity

Kenya has qualified and experienced arbitrators who are arbitrating commercial disputes around Africa. Indeed, following the revival of the East African Community and the expansion of regional trade, the possibility of Nairobi becoming a regional centre for arbitration is very high. Therefore, the prospects of international commercial arbitration in Kenya are really promising. However, with the changing trends at the global scene, there is a need for the practitioners and the judges to stay abreast with what is happening. In addition, with the international commercial arbitration taking root in Kenya in recent years and the ever increasing institutional capacity, there is a need to equip students and practitioners with the basic knowledge in their quest for expertise in the area.³³

5.2 Marketing and Arbi-Tourism

The stakeholders in arbitration sector in the country can utilise arbi-tourism to market Kenya as a preferred seat and venue for international arbitration. Arbi-tourism (arbitration tourism) may be

³¹ Ibid, Sec.21.

³² Muigua, K., *Making East Africa a Hub for International Commercial Arbitration: A Critical Examination of the State of the Legal and Institutional Framework Governing Arbitration in Kenya*, Arbitration workshop for EAC region 24th-25th May 2013. Available at <http://www.kmco.co.ke/index.php/publications>.

³³ See Muigua, K., *Settling Disputes through Arbitration in Kenya*, 3rd Ed., Glenwood Publishers, Nairobi, 2017.

defined as the promotion of arbitration alongside tourism.³⁴ Kenya is known globally for its tourism sector and thus, the stakeholders in the arbitration and dispute resolution sector should make use of this fame. While marketing Kenya as a tourist destination, there is a need for the ADR stakeholders to consider working with the ministry of tourism and all other relevant ministries to market Kenya as a friendly seat and venue for international arbitration. This could be done by providing incentives in terms of subsidized hotel and park rates for those who are in the country for international arbitration. The relevant government and private stakeholders should also take advantage of international conferences and seminar forums to market the country as a friendly and viable seat and venue for international arbitration.

5.3 Security

Over the last several years, Kenya has had an unprecedented level of insecurity from both internal and external forces such as the Somali Islamist group, al-Shabaab.³⁵ This has negatively affected the image of Kenya as a safe destination for tourism and business due to this increased insecurity.³⁶ While the government has done much in improving security over the years, the perception that the larger horn of Africa is insecure still affects Kenya's rating. If effort towards marketing Kenya as a preferred seat and venue for international arbitration are to bear fruits, then there is a need for the stakeholders in the security department to work closely with other regional leaders to eradicate the insecurity or the perception for the same since security is paramount for both local practitioners and the foreign ones, together with their clients.

5.4 Adherence to the Rule of law

The Constitution of Kenya, 2010 provides under Article 259(1) that the Constitution should be interpreted in a manner that: promotes its purposes, values and principles; *advances the rule of law*, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance.

³⁴ See Muigua, K., 'Promoting International Commercial Arbitration in Africa,' Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Volume 5, No 2, (2017), pp. 1-27, p. 13.

³⁵ Atta-Asamoah, A. "The nature and drivers of insecurity in Kenya." *East Africa Report 2* (2015) <<https://www.files.ethz.ch/isn/190658/East-Africa-Report-2-Kenya.pdf> > accessed 1 August 2020.

³⁶ 'Tourism Activity, Terrorism and Political Instability within the Commonwealth: The Cases of Fiji and Kenya | Request PDF' <https://www.researchgate.net/publication/227843064_Tourism_activity_terrorism_and_political_instability_within_the_Commonwealth_The_cases_of_Fiji_and_Kenya> accessed 1 August 2020.

While international arbitration has developed over the years to stand as a transnational legal order, its outcomes still heavily rely on national courts and laws in conservatory orders as well as recognition and enforcement of arbitral awards. There is thus a need for continued reforms and fidelity to the rule of law in the country so as to win the confidence of investors as well as practitioners who may wish to designate Kenya as their preferred seat and venue for arbitration but would otherwise be wary of the status of respect for rule of law in the country.

5.5 Supportive Institutional Framework and Informed Judges

International arbitration is an important component of the right of access to justice especially in commercial disputes. There have been efforts over the years to ensure that the legal and institutional framework on access to justice in Kenya achieves that: fulfilment of the right of access to justice. Notably, this right comes with several components as a means to an end.³⁷ In the case of *Dry Associates Limited v Capital Markets Authority & Another; Interested Party Crown Berger (K) Ltd*³⁸, the High Court outlined some of the components of access to justice as follows: [110] “Access to justice is a broad concept that defies easy definition. It includes the enshrinement of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to one’s rights; equal right to the protection of those rights by the law enforcement agencies; easy access to the justice system particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay.”

Further, in *Kenya Bus Service Ltd & another v Minister for Transport & 2 others* [2012] eKLR, the Court affirmed that “the right of access to justice protected by the Constitution involves the right of ordinary citizens being able to access remedies and relief from the Courts.

The Supreme Court also elaborated on the confines of access to justice in the case of *Francis Karioko Muruatetu & another v Republic*³⁹, in the following words: [57] Thus, with regard to access to justice and fair hearing, the State through the courts, ensures that all persons are able to ventilate their disputes. Access to justice includes the right to a fair trial. If a trial is unfair, one

³⁷ See generally, Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi, 2015.

³⁸ *Dry Associates Limited v Capital Markets Authority & Another; Interested Party Crown Berger (K) Ltd*, High Court Constitutional Petition No.328 of 2011 [2012] eKLR.

³⁹ *Francis Karioko Muruatetu & another v Republic*, SC Petition No. 15 of 2015; [2017] eKLR.

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cannot be said to have accessed justice. In this respect, when a murder convict's sentence cannot be reviewed by a higher court, he is denied access to justice which cannot be justified in light of Article 48 of the Constitution.

The effect of court intervention on arbitral proceedings depends on three critical factors, namely the provisions of the law on court intervention, the general policy and attitude of the court towards its role in arbitration and finally, the approach of lawyers and their clients on court intervention.⁴⁰

The legal provisions on court intervention are mainly found in the Arbitration Act, 1995 and the Arbitration Rules thereunder, the Civil Procedure Act⁴¹ and the Civil Procedure Rules 2010⁴². There are chances of conflict of rules and uncertainty in the laws on court intervention especially because of the fact that there is no one-stop source of law on the matter. However, all the instances of court intervention provided for in the legal framework as demonstrated above are justified and necessary. For instance, stay of proceedings applications are meant to give effect to the arbitration agreement where one party has filed a suit in court in breach of the agreement.

The interim measures of protection before arbitration, offer an opportunity for a party to an arbitration agreement to take measures to maintain the *status quo* of the subject matter of the intended arbitration. This is clearly an appreciation of the reality that reference to arbitration does not happen overnight.⁴³

The court intervention measures during arbitration as provided for under the law are similarly based on demonstrable logic and rationalization. The provisions on court involvement in the appointment of the arbitral tribunal offer a default measure where the parties' efforts to pursue the agreed modes of appointment have hit a dead end. On its part, the opportunity to challenge

⁴⁰ Muigua, K., *Settling Disputes through Arbitration in Kenya*, 3rd Ed., Glenwood Publishers, Nairobi, 2017, Chapter Ten; See also Lew, Julian DM. "Does national court involvement undermine the international arbitration process." *Am. U. Int'l L. Rev.* 24 (2008): 489; Allahi, Nahal. "The Optimization of Court Involvement in International Commercial Arbitration." PhD diss., University of Manchester, 2016.

⁴¹ See Sec. 59 of the Civil Procedure Act Chapter 21, which 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.

⁴² Ibid, see generally Order 46 of the Civil Procedure Rules 2010.

⁴³ *Alison Jean Louis v Rama Homes Limited* [2020] eKLR, Miscellaneous Application E235 of 2019; *Coast Apparel Epz Limited v Mtwapa Epz Limited & another* [2017] eKLR, Commercial Suit 12 of 2017; Muigua, K., 'Role of the Court Under Arbitration Act 1995: Court intervention before, pending and after Arbitration in Kenya,' *Kenya Law Review Journal*, 2008-2010; '10 – Provisional Measures In International Arbitration |' <<https://lawexplores.com/10-provisional-measures-in-international-arbitration/>> accessed 7 August 2020.

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arbitrators/the arbitral tribunal, just like the opportunity to challenge the bench in civil proceedings, is meant to ensure that justice is not only done but seen to be done.⁴⁴

It also avoids the likelihood of the disgruntled party opting to later challenge the arbitral award on grounds he could have raised as preliminary matters as that would imply extra expenses and delay in holding fresh arbitration proceedings if the challenge succeeds.⁴⁵ It is universally accepted that jurisdiction is everything⁴⁶ and a party should thus not be compelled to put up with an award of a tribunal whose jurisdiction he would rather challenge, whether on the basis of substance or procedure. This is the basis for the provisions on challenging the jurisdiction of the arbitral tribunal.⁴⁷

The court is also afforded an opportunity to facilitate and aid the arbitration especially in matters that, as an emanation of a private arrangement, the arbitral tribunal cannot undertake and or purport to compel.

The opportunities for limited court intervention after the award are even more justified and necessary. The need to set aside arbitral awards that visit manifest injustices on a party cannot be admitted to debate.⁴⁸ In the same breath, arbitral awards, being a result of private contractual arrangements, cannot attain immediate force of law until they are adopted by the court. The court, being the custodian of public policy in Kenya, cannot reasonably be expected to perform a mere rubber-stamping role.⁴⁹ The High Court is thus afforded an opportunity to scrutinise the arbitral

⁴⁴ Muigua, K., 'Role of the Court Under Arbitration Act 1995: Court intervention before, pending and after Arbitration in Kenya,' *Kenya Law Review Journal*, 2008-2010; Muigua, K., *Settling Disputes through Arbitration in Kenya*, 3rd Ed., Glenwood Publishers, Nairobi, 2017, Chapter Ten.

⁴⁵ Muigua, K., 'Role of the Court Under Arbitration Act 1995: Court intervention before, pending and after Arbitration in Kenya,' *Kenya Law Review Journal*, 2008-2010.

⁴⁶ Nyarangi, JA in *Owners' of the Motor Vessel "Lillian S"-v-Caltex Oil Kenya Ltd.* [1989] KLR 1.

⁴⁷ Muigua, K., 'Role of the Court Under Arbitration Act 1995: Court intervention before, pending and after Arbitration in Kenya,' *Kenya Law Review Journal*, 2008-2010; Muigua, K., *Settling Disputes through Arbitration in Kenya*, 3rd Ed., Glenwood Publishers, Nairobi, 2017, Chapter Ten; Barraclough, Andrew, and Jeff Waincymer. "Mandatory rules of law in international commercial arbitration." *Melbourne Journal of International Law* 6, no. 2 (2005): 205-245.

⁴⁸ See the decisions of the Kenyan courts in *Kenyatta International Convention Center v Congress Rental South Africa* [2020] eKLR, Civil Application 231 of 2018; *Manyota Limited v Muranga University College* [2020] eKLR, Miscellaneous Application E132 of 2019; *Synergy Industrial Credit Limited v Cape Holdings Limited* [2019] eKLR, Petition No. 2 of 2017; *Synergy Industrial Credit Limited v Cape Holdings Limited* [2020] eKLR, Civil Appeal No. 81 Of 2016; *Nyutu Agrovet Limited v Airtel Networks Kenya Limited*; *Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [2019] eKLR, Petition No. 12 of 2016.

⁴⁹ Muigua, K., 'Role of the Court Under Arbitration Act 1995: Court intervention before, pending and after Arbitration in Kenya,' *Kenya Law Review Journal*, 2008-2010.

award. No doubt this also helps secure the party, adversely affected by the arbitral award, a right to be heard in the interest of natural justice.⁵⁰

But while the instances of court intervention are rationally justified, the provisions relating to them are far from being perfect and unambiguous. For instance, the provisions on stay of proceedings are beset with unnecessary conditions that even a well-meaning court is disadvantaged in expediting the application especially when the Plaintiff is not receptive.⁵¹ For instance, there is nothing that a judge can do when an application for stay of proceedings is inadvertently lodged a day after entry of appearance except to dismiss it.⁵² In such an instance, there is no room for equity when the law is strict in its stipulations.⁵³ The uncertainty of the arbitration law on the issue of setting aside arbitral awards even within the allowed timelines has given rise to a myriad of constitutional applications in arbitration proceedings.⁵⁴

⁵⁰ Prakash Pillai and Umer Chaudhry, 'The Singapore Approach to Scrutiny of Arbitral Awards' (*Kluwer Arbitration Blog*, 24 December 2014) <<http://arbitrationblog.kluwerarbitration.com/2014/12/24/the-singapore-approach-to-scrutiny-of-arbitral-awards/>> accessed 7 August 2020; Brady, Daniel. "Review of arbitral awards for breach of natural justice: an internationalist approach." (2013) <<https://core.ac.uk/download/pdf/41338459.pdf>> accessed 7 August 2020.

⁵¹ Muigua, K., 'Role of the Court Under Arbitration Act 1995: Court intervention before, pending and after Arbitration in Kenya,' *Kenya Law Review Journal*, 2008-2010; MITS Electrical Company Limited v Mitsubishi Electric Coporation [2018] eKLR, Civil Suit 132 of 2016; Darius Chan, 'Stay of Proceedings in Favour of Arbitration under the Court's Inherent Jurisdiction' (*Kluwer Arbitration Blog*, 15 August 2012) <<http://arbitrationblog.kluwerarbitration.com/2012/08/15/stay-of-proceedings-in-favour-of-arbitration-under-the-courts-inherent-jurisdiction/>> accessed 7 August 2020.

⁵² Muigua, K., 'Role of the Court Under Arbitration Act 1995: Court intervention before, pending and after Arbitration in Kenya,' *Kenya Law Review Journal*, 2008-2010; Eunice Soko Mlagui versus Suresh Parmar & 4 others [2017] eKLR; Adrec Limited versus Nation Media Group Limited [2017] eKLR; Mt. Kenya University v Step Up Holding (K) Ltd [2018] eKLR, Civil Appeal 186 of 2013.

⁵³ See court's decision in *Manyota Limited v Muranga University College [2020] eKLR, Miscellaneous Application E132 of 2019*, where the High Court at Nairobi stated as follows:

From the authorities it is clear that the Court can only deal with Arbitration matters as encapsulated by the Arbitration Act. The Court's jurisdiction is limited by Section 10 of Arbitration Act that prescribes that the Court's intervention is/can only be to the extent provided by the Act. Section 35(3) Arbitration Act does not employ an opportunity for the Court to exercise discretion and extend the period to file an application to set aside the Arbitral award beyond the statutory 3 months from the date of receipt of the Award. The cited authority of Anne Hinga case supra ousts the application of Civil Procedure Act & Rules 2010 as the Arbitration Act is a complete Code.

⁵⁴ See *Alison Jean Louis v Rama Homes Limited [2020] eKLR, Miscellaneous Application E235 of 2019*; See also *Kenyatta International Convention Center v Congress Rental South Africa [2020] eKLR, Civil Application 231 of 2018*; *Manyota Limited v Muranga University College [2020] eKLR, Miscellaneous Application E132 of 2019*; *Synergy Industrial Credit Limited v Cape Holdings Limited [2019] eKLR, Petition No. 2 of 2017*; *Synergy Industrial Credit Limited v Cape Holdings Limited [2020] eKLR, Civil Appeal No. 81 Of 2016*; *Nyutu Agrovot Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR, Petition No. 12 of 2016*.

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With regard to the court's approach to intervention in arbitration, the same has considerably changed from indifference to a perception of the process as being facilitative of arbitration. The sentiments of the court of appeal in the *EpcO Builders Limited-v-Adam S. Marjan-Arbitrator & Another*,⁵⁵ and *Kenya Shell Limited v Kobil Petroleum Limited*⁵⁶ are indicative of this change of heart. The courts now see arbitration as an opportunity to wrestle the backlog of cases and yield justice on the parties' terms. If such a positive attitude could be coupled with the necessary reforms as proposed herein, much ground would be covered in making court intervention a friend, rather than a foe, of arbitration.

Courts have also continually demonstrated their commitment to upholding arbitration awards and making their recognition and enforcement in the country as easy as possible. This was recently affirmed in the case of *Kenya Bureau of Standards v Geo-Chem Middle East [2017] eKLR*⁵⁷ where Ochieng, J. stated as follows:

39. As regards the finding that the Kenya Bureau of Standards was liable for the payments to Geo-chem, that is a decision on the merits of the case. It is not the function nor the mandate of the High Court to re-evaluate such decisions of an arbitral tribunal, when the court was called upon to determine whether or not to set aside an award.

40. If the court were to delve into the task of ascertaining the correctness of the decision of an arbitrator, the court would be sitting on an appeal over the decision in issue.

41. In the light of the Public Policy in Kenya, which loudly pronounces the intention of giving finality to Arbitral Awards, it would actually be against the said public policy to have the court sit on an appeal over the decision of the arbitral tribunal.

42. When the court is called upon to decide whether or not to set aside an arbitral award, issues such as the justice, morality and fairness do not come into play, unless they were so perceived within the confines of Section 35 of the Arbitration Act.

43. The court cannot set aside an arbitral award on the grounds that it was unfair, unreasonable or non-feasible.

.....

54. Regrettably, this court does not have authority to make an assessment on the merits of the arbitral award. The jurisdiction of the High Court, when called upon to set aside an award, is limited to what is permissible pursuant to Section 35 of the Arbitration Act.

⁵⁵ *EpcO Builders Limited-v-Adam S. Marjan-Arbitrator & Another*, Civil Appeal No. 248 of 2005 (unreported).

⁵⁶ *Kenya Shell Limited v Kobil Petroleum Limited*, Civil Appeal (Nairobi) No. 57 of 2006.

⁵⁷ *Kenya Bureau of Standards v Geo-Chem Middle East [2017] eKLR*, Miscellaneous Cause 455 of 2016.

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55. Any other intervention by the Court is expressly prohibited by Section 10 of the Act; and I therefore decline the invitation to ascertain if there were any contradictions in the various aspects of the decision made by the arbitral tribunal.

In the above matter, the Respondent filed an appeal to the Court of Appeal in *Civil Appeal No. 259 of 2018*. The Court of Appeal, in allowing the appeal and setting aside the ruling of the High Court held *inter alia*; that the reference and the subsequent constitution of the arbitral tribunal was done outside the time limits prescribed in the contract. The appellate Court further held that the issues determined by the arbitral tribunal fell outside its scope pursuant to Section 35(2)(iv) of the Arbitration Act and that the award which imposed a liability on the Respondent, a state corporation, to pay from public funds over Kshs.1Billion without proof of liability was against public policy. The decision was appealed to the Supreme Court which pronounced itself as follows:

[48] In the premises, we have no option but to hold that the Judgment of the Court of Appeal, to the extent to which it purported to interrogate the merits of an arbitral award, in the absence of the High Court's pronouncement on the same, was rendered in excess of jurisdiction. This means that even if we had found that we had jurisdiction to decide the appeal on its merits, this jurisdictional conundrum would have stopped us in our tracks.

[49] In conclusion, having declined to delve into the merits of the Court of Appeal Judgment for the reasons stated, and having also found that the Appellate Court prematurely, and in excess of its jurisdiction, sat on an appeal that was not ripe, instead of remitting the same to the High Court for determination, what course of action is open to us? To answer this question, we must first address the issue as to whether the leave that triggered these proceedings in the first place, ought to have been granted. Or put another way, had the application for leave to appeal been made after the delivery of Nyutu and Synergy, would such leave have been likely granted by the Court of Appeal? It is to this question that we must now turn.

[50] Towards this end, we have already made two critical observations, firstly, that in granting leave on 31st May 2018, the Court of Appeal did not interrogate the substance of the intended appeal and whether it fell within the said Section (read, Section 35 of the Arbitration Act). Secondly, that in granting leave, the Court of Appeal appeared to suggest or must be taken to have been suggesting that such appeals were open-ended. At that time there were two divergent schools of thought at Court of Appeal; the one which argued that appeals lay to the Court from decisions of the High Court and the other which was categorical that no such appeals could lie to the Court. And then came our decisions in Nyutu and Synergy of which we shall say no more, save that the window to appeal is severely restricted.

[51] The applicable law is now settled regarding the vexed question as to whether an appeal lies or not, under Section 35 of the Arbitration Act and if so, under what circumstances. We appreciate the fact that at the time leave was granted, the Supreme Court was yet to pronounce itself on the issue. However, the law as enunciated must now henceforth be the yardstick for granting or refusing to grant leave to appeal in such matters. After our pronouncements in Nyutu and Synergy, it is not possible that the Court of Appeal can grant leave to appeal from a Section 35 Judgment of the High Court without interrogating the substance of the intended appeal, to determine whether, on the basis of our pronouncement, such an appeal lies. A general grant of leave to appeal would not suffice. Yet this is exactly what happened in the instant case before us.

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[52] In conclusion, having declined to delve into the merits of the substantive Judgment of the Court of Appeal for the reasons stated, and having further determined that the said Judgment was nonetheless rendered in excess of jurisdiction, and finally having determined that the initial leave to appeal was granted without interrogating the substance of the intended appeal, the only course of action open to us is to maintain the Ruling of the High Court.

In the highlighted cases of Synergy⁵⁸ and Nyutu, the Supreme Court had been called upon to decide the fate of parties' right to appeal the decision of the High Court made under section 35 of the Arbitration Act, Kenya, on recognition and enforcement of arbitral awards. In *Synergy Industrial Credit Limited v Cape Holdings Limited [2019] eKLR* at the Supreme Court, the majority held as follows:

[90] In the circumstances, various questions would necessarily arise; would a Judgment that leaves a party in such a precarious position be said to create confidence in the administration of justice" Would the principle of minimal courts' intervention in arbitration matters supersede the need to correct an injustice" Our position is that where allegations of such manifest unfairness have been made, they should not be left incapable of a higher Court's review. And it is on that basis that, we hold that in this case, the Court of Appeal should have assumed jurisdiction to hear the Petitioner's appeal arising from the decision of the High Court under Section 35 of the Arbitration Act limited to the relevant consideration expressed above.

[91] As we conclude on this issue, we affirm that arbitration should and ought to drastically reduce courts' intervention and in this regard, we find favour in the words of the Court of Appeal in CGU (supra) where it stated that: "the Courts will not permit the residual jurisdiction, which exists to ensure that injustice is avoided, to become itself an unfair instrument for subverting statute and undermining the process of arbitration." These words ring true if we are to protect the integrity of the arbitration process. But in this case, as we have shown, justice must be done and that necessitates that the Court of Appeal ought to relook at the decision of the High Court in the manner we have explained above.

The dissenting opinion of Justice D.K. Maraga, CJ & P was as follows:

[146] Taking all these factors into account and given its wording, I find no warrant whatsoever to imply that the silence in Section 35 of the Kenyan Arbitration Act should be understood as a tacit right of appeal against a decision made thereunder.

⁵⁸ Synergy Industrial Credit Limited v Cape Holdings Limited [2019] eKLR, Petition No. 2 of 2017.

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[147] Following the shift it made with the repeal of Arbitration Act of 1968 and the enactment of the Arbitration Act of 1995, Kenya would backpedal if the appellant's argument that Article 164(3) ipso facto grants both the jurisdiction and right of appeal against all High Court decisions, including those made in arbitral proceedings, is accepted. That would also jettison out of the window the principle of finality in arbitral proceedings.

[149] Because the Kenyan Arbitration Act of 1995 puts emphasis on the concept of finality in arbitration and the above stated public policy to promote arbitration as encapsulated in Article 159(2)(c), save as stated in the Arbitration Act, awards should be impervious to court intervention as a matter of public policy. Unwarranted judicial review of arbitral proceedings will simply defeat the object of the Arbitration Act. The role of courts should therefore be merely facilitative otherwise excessive judicial interference with awards will not only be a paralyzing blow to the healthy functioning of arbitration in this country but will also be a clear negation of the legislative intent of the Arbitration Act.

[150] In commercial transactions, disputes are often about money, and more often than not, large sums of money. “[A]nd where money is concerned there are not many good losers....” In an adversarial system as ours, to open unwarranted doors to court intervention in arbitral proceedings, as the Singaporean Court of Appeal observed in the said case of *AKN & Another v. ALC and Others* and other appeals (supra) “*through the ingenuity of counsel,*” we shall have appeals on literally all issues “*disguised and presented as ... challenge[s] to process failures during the arbitration.*” And we know what that means: arbitral awards or decisions on them shall be subject to court challenges on every issue. Arbitration will therefore be an extra cog in the gears of access to justice through litigation or “a precursor to litigation.” By the time the court determines the issue, the matter will have dragged in court for years. Arbitrations will thus prolong dispute resolution and be self-defeating. In such a scenario, it would be more efficacious to abandon arbitration altogether and litigate all disputes in courts of law.

[151] As stated, timelines in the performance of contracts and speed in the disposal of disputes are the hallmarks of the current competitive commercial environment. The importance of arbitration as an ADR mechanism cannot be over-emphasized. “Parties enter into arbitration agreements for the very reason that they do not want their disputes to end up in court.” The common thread that runs through most arbitration statutes based on the UNCITRAL Model Law is the restriction of court intervention except where necessary and in line with the provisions of the Acts of various jurisdictions.

[152] Kenya's boasting as the arbitration centre in the East African region cannot hold if Kenyan courts do not reflect on the effect of their decisions in arbitral proceedings. The words of Andrew P. Tuck, in his treatise, *The Finality Question: Appellate Rights and Review of Arbitral Awards in the Americas* are particularly apposite with regard to the appellate jurisdiction in arbitral proceedings. He observes that in the selection of the seat of arbitration, parties often pay regard to, inter alia, the right of appeal and judicial review in that jurisdiction; and also finality of an arbitral award and whether the jurisdiction is a signatory to the New York Convention on the Recognition and Enforcement of Foreign

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Arbitral Awards. This is because, in his view, which I share, the rights of appeal and review;

“can seriously frustrate the advantages of international arbitration ... over the vicissitudes and uncertainties of international business litigation.”

[153] And as Christa Roodt, in her article titled Reflections on finality in arbitration, warned, “If a state’s judicial institutions fail to accord respect for rights established under international law, their judicial decisions cannot demand pluralist respect.” In other words if decisions of Kenyan courts disregard established principles of international arbitration law, Kenya will be shunned as both an investment destination and a seat of arbitration. In the words of Nyamu J. (as he then was) in Prof. Lawrence Gumbe & Anor v. Hon. Mwai Kibaki & Others^[37], that will reduce Kenya into “a pariah state” and cause it to “be isolated internationally”.

[154] In the circumstances, allowing appeals where the Arbitration Act states otherwise would in my view, as stated, turn arbitration into “a precursor to litigation.” The Kenyan courts must therefore, “as a matter of public interest”^[39], interpret the provisions of the Arbitration Act in a manner that seeks to promote and embellish arbitration, rather than emasculate and thus render it redundant. As the United States’ Second Circuit of the Court of Appeal stated in Parsons Whittemore Overseas Co Inc v. Société Générale de l’Industrie du Papier (RAKTA),

“By agreeing to submit disputes to arbitration, a party relinquishes his courtroom rights ... [including the appellate process] in favor of arbitration with all of its well-known advantages and drawbacks”

[156] The dispute in this matter has been raging for over 10 years. That alone is clear testimony of the danger we will be exposing arbitration to in this country if we allow unwarranted court intervention. Failure to adhere to the prescriptions in the Arbitration Act will hinder investment, as foreign firms and their agents will not be assured of an expeditious clear-cut dispute resolution mechanism in line with international standards.

[157] Given the history of the practice of arbitration in this country and the clear and unambiguous wording of Section 10 of the Kenyan arbitration Act, we would, in my humble view be amending the Arbitration Act if we allow appeals from High Court decisions on Section 35 which, as the explanatory notes by the UNCITRAL Secretariat state was intended to be final.

While the dissenting opinion holds valid points regarding the subject at hand, the Synergy matter had to be referred back to the Court of Appeal under *Synergy Industrial Credit Limited v Cape Holdings Limited* [2020] eKLR⁵⁹ where the Court of Appeal held as follows:

⁵⁹ Synergy Industrial Credit Limited v Cape Holdings Limited [2020] eKLR, Civil Appeal No. 81 of 2016.

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Where the terms of the arbitral agreement are clear and unrestricted, it is not open to the court to look for and impose its own strictures and restrictions on the arbitral agreement. If the parties wished to restrict the arbitration to only the written agreements, we would have expected them to state so expressly in the arbitral agreement itself. Furthermore, a look at how the learned judge dealt with the question leaves no doubt in our minds that he did not confine himself to the real question, namely the terms of the arbitral agreement, but instead went into a determination that amounts to saying the arbitral award was erroneous under the law of contract.

This was tantamount to undertaking a merit review of the arbitral award, based on consideration of provisions of the written agreements far removed from the arbitral agreement itself, so as to reach a different finding from the arbitral tribunal, which we think the learned judge was not entitled to do.

As for the Nyutu case⁶⁰, the Supreme Court was called upon to address itself to a Ruling of the Court of Appeal which had dismissed an appeal against the decision of the High Court in *Nyutu Agrovet Ltd v Airtel Network Kenya Ltd Nairobi H.C.C.C. No.350 of 2009*, where the Court of Appeal in its Ruling had found that there is no right of appeal to that Court following a decision made under Section 35 of the Arbitration Act 1995 (the Act), and so struck out the entire appeal to it.

At the High Court, Airtel had filed an application under Section 35 of the Act seeking to set aside the award in its entirety. Kimondo J, in *Nyutu Agrovet Ltd v Airtel Networks Kenya Ltd* (supra), had to decide inter alia whether the arbitral award had dealt with a dispute not contemplated by the parties; whether it had dealt with a dispute outside the terms of reference to arbitration and whether the said award was in conflict with public policy. The entire arbitral award was then set aside purely on the ground that the award contained decisions on matters outside the distributorship agreement, the terms of reference to arbitration or the contemplation of the parties and for other reasons and deliberations contained in the learned Judge's Ruling.

The Supreme Court had to deal with, inter alia, the following issues for determination: Whether Sections 10 and 35 of the Act contravene a party's right to access justice under Articles 48, 50(1) and 164(3) of the Constitution and are therefore unconstitutional to that extent; and Whether there is a right of appeal to the Court of Appeal following a decision by the High Court under Section 35 of the Arbitration Act.

The Supreme Court pronounced itself as follows:

[69] The above comparative review thus shows circumstances where a decision challenging an award may be appealable. With regard to jurisdictions that grant leave to appeal, Courts have held that leave to appeal may be granted where there is unfairness or

⁶⁰ *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [2019] eKLR, Petition No. 12 of 2016.

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misconduct in the decision making process and in order to protect the integrity of the judicial process. In addition, leave would be granted in order to prevent an injustice from occurring and to restore confidence in the process of administration of justice. In other cases, where the subject matter is very important as a result of the ensuing economic value or the legal principle at issue. An appeal may also arise when there is need to bring clarity to the law by settling conflicting decisions. However as cautioned by the Singapore Courts, an intervention by the Courts should not be used as an opportunity to delve into the merits of the arbitral award but rather that the intervention should be limited to the narrowly circumscribed instances for reviewing or setting aside an award.

[71] We have in that context found that the Arbitration Act and the UNCITRAL Model Law do not expressly bar further appeals to the Court of Appeal. We take the further view that from our analysis of the law and, the dictates of the Constitution 2010, Section 35 should be interpreted in a way that promotes its purpose, the objectives of the arbitration law and the purpose of an expeditious yet fair dispute resolution legal system. Thus our position is that, as is the law, once an arbitral award has been issued, an aggrieved party can only approach the High Court under Section 35 of the Act for Orders of setting aside of the award. And hence the purpose of Section 35 is to ensure that Courts are able to correct specific errors of law, which if left alone would taint the process of arbitration. Further, even in promoting the core tenets of arbitration, which is an expeditious and efficient way of delivering justice, that should not be done at the expense of real and substantive justice. Therefore, whereas we acknowledge the need to shield arbitral proceedings from unnecessary Court intervention, we also acknowledge the fact that there may be legitimate reasons seeking to appeal High Court decisions.

[72] Furthermore, considering that there is no express bar to appeals under Section 35, we are of the opinion that an unfair determination by the High Court should not be absolutely immune from the appellate review. As such, in exceptional circumstances, the Court of Appeal ought to have residual jurisdiction to enquire into such unfairness. However, such jurisdiction should be carefully exercised so as not to open a floodgate of appeals thus undermining the very essence of arbitration. In stating so, we agree with the High Court of Singapore in AKN and another (supra) that circumscribed appeals may be allowed to address process failures as opposed to the merits of the arbitral award itself. We say so because we have no doubt that obvious injustices by the High Court should not be left to subsist because of the 'no Court intervention' principle.

[74] Whereas the above proposals are clearly progressive and well thought out, if adopted as they are, they may considerably broaden the scope of the exercise of the limited jurisdiction under consideration. As we have stated above, there has to be exceptional reasons why an appeal should be necessary in a matter arising from arbitration proceedings which by its very nature discourages court intervention. Thus, we do not think as suggested by the Interested Party that an issue of general public importance should necessarily deserve an appeal. This is because such an issue cannot be identified with precision because of its many underling dynamics. To that extent we reject that proposal.

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

[81] We have answered the question whether there is a right of appeal from the High Court to the Court of Appeal under Section 35 of the Arbitration Act but have delimited the circumstances under which the right can be exercised....

Thus, the Supreme Court's position in the above matters is that the window to appeal is severely restricted.

The above decisions by the Supreme Court on the implication of appeals under Article 35 had come against the background of conflicting decisions from the Court of Appeal such in *DHL Excel Supply Chain Kenya Limited v Tilton Investments Limited Civil Application No. Nai. 302 of 2015; [2017] eKLR*, where the Court of Appeal had rendered itself as follows:

“In our view, the fact that Section 35 of the Act is silent on whether such a decision is appealable to this Court by itself does not bar the right of appeal. The Section grants the High Court jurisdiction to intervene in arbitral proceedings wherein it is invoked. It follows therefore that the decision thereunder is appealable to this Court by virtue of the Constitution.”

This confusion was aptly captured by the Supreme Court in Nyutu case as follows:

[51] Thus, it is evident that there is no consensus by the Court of Appeal both before and after 2010 on how Section 35 should be interpreted. There is need therefore to properly interrogate the matter and establish why, unlike other provisions in the Arbitration Act, Section 35 does not specifically state that decisions of the High Court are final, and unlike Section 39, it does not also state that an aggrieved litigant may appeal to the Court of Appeal. We shall also need to understand the import of Section 10 of the Act and its relevance, if at all to the interpretation before us. A proper interpretation would also require a broader understanding of the principles of arbitration vis-a-vis the lingering powers of the Courts to intervene in arbitral proceedings. And finally, any interpretation adopted should not negate the fundamental purpose for which the Arbitration Act was enacted.

There is also a need to curb lawyers and parties bent on abusing court intervention to clog the arbitration process. The problem with the adversarial system is that it often forces the court to

stand aside and watch parties obviate each other's cause of action with all imaginable tricks like a lame duck. The few remedies fashioned to prevent abuse of court process do not offer much help, especially when lawyers get into the fray with their bagful of tricks. Soon, what was a simple issue is reduced into complex legal affair.⁶¹ This was aptly captured in *Synergy Industrial Credit Limited v Cape Holdings Limited* [2019] eKLR at the Supreme Court, in the dissenting opinion of Justice D.K. Maraga, CJ & P as follows:

[150] *In commercial transactions, disputes are often about money, and more often than not, large sums of money. "[A]nd where money is concerned there are not many good losers...." In an adversarial system as ours, to open unwarranted doors to court intervention in arbitral proceedings, as the Singaporean Court of Appeal observed in the said case of AKN & Another v. ALC and Others and other appeals (supra) "through the ingenuity of counsel," we shall have appeals on literally all issues "disguised and presented as ... challenge[s] to process failures during the arbitration." And we know what that means: arbitral awards or decisions on them shall be subject to court challenges on every issue. Arbitration will therefore be an extra cog in the gears of access to justice through litigation or "a precursor to litigation." By the time the court determines the issue, the matter will have dragged in court for years. Arbitrations will thus prolong dispute resolution and be self-defeating. In such a scenario, it would be more efficacious to abandon arbitration altogether and litigate all disputes in courts of law.*

Arbitration is part of the justice system in Kenya and the fates of each of the two are inseparably tied together and interdependent. The general duty of advocates as officers of the court needs to be addressed. So is counsel's allegiance and compliance to clients' whims. The two are matters belonging to the realm of professional ethics. Undoubtedly, they go to the training and orientation of the lawyers. Local law schools will do better to impress upon their students on the role of ADR and arbitration in general and the fact that the two are not 'mechanisms designed by non-legal professionals to drive legal practitioners out of business.' Also, professional organizations like Law Society of Kenya and the Chartered Institute of Arbitrators-Kenya branch need to continually and adequately orient their members on ADR and adopt specific policies for the members to follow when involved in litigation affecting arbitration through continuous professional training.

The foregoing discussion renders it clear that court intervention in Kenya cannot be dismissed as detrimental to the ideals of arbitration. No doubt, the role of the court so far exonerates it from

⁶¹ Gaillard, Emmanuel. "Abuse of process in international arbitration." *ICSID Review-Foreign Investment Law Journal* 32, no. 1 (2017): 17-37.

being a foe of the arbitral process in Kenya.⁶² As demonstrated by the decisions above, the confusion is slowly but surely being addressed by the courts in Kenya especially in relation to the perceived constrictions that are imposed by the provisions of the Arbitration Act.⁶³ Thus, there is need for continued reforms if the role of the court is to become facilitative of arbitration and to shake off such challenges as we have seen above which unnecessarily render arbitration inexpedient and cumbersome, thus discouraging parties especially those of foreign origin from picking Kenya as their preferred seat for international arbitration.

5.6 International Cooperation

As already pointed out, international arbitration developed over the years to achieve the status of a transnational legal order. As such, its development and continued acceptance heavily relies on cooperation amongst various states in both developing and developed world to recognise and enforce the outcome of international arbitration in their jurisdictions. There is therefore a need for Kenya work closely with other likeminded states in Africa and beyond in order to build its capacity and have a ready market for its institutions.

5.7 Finality

The question of finality of arbitral decisions in Kenya is one that has attracted a heated debate with a recent court case having gone all the way to the Supreme Court of Kenya. In *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR*⁶⁴, an appeal to the Supreme Court of Kenya from a Ruling of the Court of Appeal which had dismissed an appeal against the decision of the High Court in *Nyutu Agrovet Ltd v Airtel Network Kenya Ltd* Nairobi H.C.C.C. No.350 of 2009. The Court of Appeal

⁶² See *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR*, Petition 12 of 2016; *Alison Jean Louis v Rama Homes Limited [2020] eKLR*, Miscellaneous Application E235 of 2019.

⁶³ See issues raised in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR*, Petition 12 of 2016; *Synergy Industrial Credit Limited v Cape Holdings Limited [2020] eKLR*, Civil Appeal No. 81 Of 2016. **Notably, *Civil Appeal No.61 of 2012 (Nyutu) was referred back to the Court of Appeal in December, 2019 by the Supreme Court in Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR to be determined on an expeditious basis.***

⁶⁴ *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR*, Petition 12 of 2016.

in its Ruling had found that there is no right of appeal to that Court following a decision made under Section 35 of the Arbitration Act 1995 (the Act), and so struck out the entire appeal to it.

The High Court had set aside the entire arbitral award *purely on the ground that the award contained decisions on matters outside the distributorship agreement, the terms of reference to arbitration or the contemplation of the parties and for other reasons and deliberations contained in the learned Judge's Ruling.*⁶⁵ At the Court of Appeal level, the Court of Appeal unanimously held that the decision by the High Court made under Section 35 of the Act was final and no appeal lay to the Court of Appeal; thus striking out the appeal and awarding costs to Airtel.⁶⁶ The question for determination as framed by the Court of Appeal was whether there is any right of appeal to the Court of Appeal upon a determination by the High Court under Section 35 of the Act.⁶⁷

The Supreme Court set out to address the following issues: whether Sections 10 and 35 of the Act contravene a party's right to access justice under Articles 48, 50(1) and 164(3) of the Constitution and are therefore unconstitutional to that extent; whether there is a right of appeal to the Court of Appeal following a decision by the High Court under Section 35 of the Arbitration Act; what are the appropriate reliefs; and who should bear the costs of the Appeal.⁶⁸

While commenting on the finality of arbitral awards, the Supreme Court observed as follows:

[52] We note in the above context that, the Arbitration Act, was introduced into our legal system to provide a quicker way of settling disputes which is distinct from the Court process. The Act was also formulated in line with internationally accepted principles and specifically the Model Law. With regard to the reason why some provisions of the Act speak to the finality of High Court decisions, the Hansard of the National Assembly during the debate on the Arbitration Act indicates that, *"the time limits and the finality of the High Court decision on some procedural matters [was] to ensure that neither party frustrates the arbitration process [thus] giving arbitration advantage over the usual judicial process."* It was also reiterated that the limitation of the extent of the Courts' interference was to ensure an, *"expeditious and efficient way of handling commercial disputes."*

[53] Similarly, the Model Law also advocates for "limiting and clearly defining Court involvement" in arbitration. This reasoning is informed by the fact that *"parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and prefer the "finality and expediency of the arbitral process."* Thus, arbitration was intended as an alternative way of solving disputes in a manner that is expeditious, efficient and devoid of procedural technicalities. Indeed, our Constitution in Article 159(2) (c) acknowledges the place of arbitration in dispute settlement and urges all Courts to promote it. However, the arbitration process is not absolutely immune from the Court process, hence the present conundrum.

⁶⁵ Para. 4.

⁶⁶ Para. 6.

⁶⁷ Para. 7.

⁶⁸ Para. 29.

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[54] The Model Law indeed advises that all instances of courts intervention must be provided for in legislation. That is the explanation that the Model Law accords to Article 5 which is in *pari materia* with Section 10 of the Act. The said Section 10 provides, “*Except as provided in this Act, no Court shall intervene in matters governed by this Act.*” On the other hand, Article 5 provides, “*In matters governed by this Law, no court shall intervene except where so provided in this Law.*”

[55] In illuminating the meaning of Article 5, the explanatory notes of the Model Law provide that, beyond the instances specifically provided for in the law, no Court shall interfere in matters governed by it. That further, the main purpose of Article 5 is to ensure predictability and certainty of the arbitral process. That understanding is also discerned in the Court of Appeal decision of Singapore in the case of *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2012] SGCA 57 where the Court stated that:

“The effect of art 5 of the Model Law is to confine the power of the Court to intervene in an arbitration to those instances which are provided for in the Model Law and to ‘exclude any general or residual powers’ arising from sources other than the Model Law....The raison d’être of art 5 of the Model Law is not to promote hostility towards judicial intervention but to ‘satisfy the need for certainty as to when court action is permissible’.”

.....

[57] Thus, it is reasonable to conclude that just like Article 5, Section 10 of the Act was enacted, to ensure predictability and certainty of arbitration proceedings by specifically providing instances where a Court may intervene. Therefore, parties who resort to arbitration, must know with certainty instances when the jurisdiction of the Courts may be invoked. According to the Act, such instances include, applications for setting aside an award, determination of the question of the appointment of an arbitrator and recognition and enforcement of arbitral awards amongst other specified grounds.

[58] Having stated as above therefore we reject Nyutu’s argument that Section 10 is unconstitutional to the extent that it can be interpreted to limit the Court of Appeal’s jurisdiction to hear appeals arising from decisions of the High Court determined under Section 35 of the Act. We have shown that Section 10 is meant to ensure that a party will not invoke the jurisdiction of the Court unless the Act specifically provides for such intervention. With regard to Section 35, the kind of intervention contemplated is an application for setting aside an arbitral award only. However, Section 10 cannot be used to explain whether an appeal may lie against a decision of the High Court confirming or setting aside an award. This is because by the time an appeal is preferred, if at all, a Court (in this case the High Court) would have already assumed jurisdiction under Section 35 and made a determination therefore. Thus, by the High Court assuming jurisdiction under Section 35, it would conform to Section 10 by ensuring that the Court’s intervention is only on instances that are specified by the Act and therefore predictability and certainty commended by Article 5 of the Model Law is assured. The question whether an appeal may lie against the decision of the High Court made under Section 35 thus still remains unanswered because, just like Section 35, Section 10 does not answer that question.

The Supreme Court went on to affirm the need for limited court intervention by stating as follows:

[69] The above comparative review thus shows circumstances where a decision challenging an award may be appealable. With regard to jurisdictions that grant leave to appeal, Courts have held that leave to appeal may be *granted where there is unfairness or misconduct in the decision making process and in order to protect the integrity of the judicial process.* In addition, leave would be

granted in order to prevent an injustice from occurring and to restore confidence in the process of administration of justice. In other cases, where the subject matter is very important as a result of the ensuing economic value or the legal principle at issue. An appeal may also arise when there is need to bring clarity to the law by settling conflicting decisions. However as cautioned by the Singapore Courts, an intervention by the Courts should not be used as an opportunity to delve into the merits of the arbitral award but rather that the intervention should be limited to the narrowly circumscribed instances for reviewing or setting aside an award.

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

[78] In stating as above, we reiterate that Courts must draw a line between legitimate claims which fall within the ambit of the exceptional circumstances necessitating an appeal and claims where litigants only want a shot at an opportunity which is not deserved and which completely negates the whole essence of arbitration as an expeditious and efficient way of delivering justice. The High Court and the Court of Appeal particularly have that onerous yet simple task. A leave mechanism as suggested by Kimondo J. and the Interested Party may well be the answer to the process by which frivolous, time wasting and opportunistic appeals may be nipped in the bud and thence bring arbitration proceedings to a swift end. We would expect the Legislature to heed this warning within its mandate.

[79] Having held as above, does the case at hand justify the Court of Appeal's intervention" In answer to that question, it will be noted that the High Court (Kimondo J) set aside the arbitral award on the grounds *inter alia* that the award contained decisions on matters outside the distributorship agreement, the terms of the reference to arbitration or the contemplation of parties. In granting leave to appeal, the learned Judge washed his hands of the matter and left it to the Court of Appeal to determine the question of the right to appeal to that Court. It so determined hence the present Appeal.

[80] The Court of Appeal, it is now clear, never determined the substantive complaint by Nyutu as to whether the learned Judge properly applied his mind to the grounds for setting aside an award under Section 35 of the Act. We have clarified the circumscribed jurisdiction of the Court of Appeal in that regard. Without a firm decision by the Court of Appeal on that issue, we cannot but direct that the matter be remitted back to that Court to determine whether the appeal before it meets the threshold explained in this Judgment or in the words of Kimondo J, the "*journey was a false start*".

In conclusion, the majority held as follows:

[109] Consequent upon our findings above, we make the following orders:

(a) *The Petition of Appeal dated 15th July 2016 is hereby allowed as prayed.*

(b) *The Order of the Court of Appeal made on 6th March 2015 is hereby set aside in its entirety.*

(c) *The Notice of Motion Application dated 3rd May 2012 in Civil Appeal No.61 of 2012 Nyutu Agrovat Limited v Airtel Networks Kenya Ltd. is hereby dismissed.*

(d) *Civil Appeal No.61 of 2012 aforesaid shall be heard and determined by the Court of Appeal on an expeditious basis.*

(e) *Each party shall bear its own costs.*

However, it worth pointing out that in a dissenting opinion by Justice D.K. Maraga, CJ & P, the Chief Justice held as follows:

[104] Arbitration does not deny access to the Courts. Courts are but one of the means of resolving societal dispute. The other modes of dispute resolution, as stated in Article 159(2)(c) include “*reconciliation, mediation, arbitration and traditional dispute resolution mechanisms....*” Every litigant has the right to choose which mode best serves his or her interests. As AM Gleen posited, “*Parties enter into arbitration agreements for the very reason that they do not want their disputes to end up in court.*”[6] Once one has made that choice, one cannot be heard to claim that one’s right of access to justice has been denied or limited. As the United States’ Second Circuit of the Court of Appeal also stated in *Parsons Whittemore Overseas Co Inc v. Société Générale de l’Industrie du Papier (RAKTA)*,

“By agreeing to submit disputes to arbitration, a party relinquishes his courtroom rights ... [including the appellate process] in favor of arbitration with all of its well-known advantages and drawbacks.” [7]

[105] Finally, the appellant argued that the principle of finality in arbitrations applies only to an arbitration award itself and not to any Court proceedings founded on it. I do not think this is correct.

[106] One of the main objectives of preferring arbitration to Court litigation is the principle of finality associated with doctrine of *res judicata* that is deeply rooted in public international law. Section 32A captures this principle: “*Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it....*” Most parties, especially those engaged in commercial transactions, desire expeditious and absolute determinations of their disputes to enable them go on with their businesses.[8] They require a final and enforceable outcome. That is why the Section goes on to limit recourse “*against the award otherwise than in the manner provided by this Act.*”

[107] In the circumstance, I concur with the respondent that, read together, Sections 10 and 35 of the Arbitration Act restrict judicial intervention in the arbitral process to expedite dispute resolution while maintaining the sanctity of the principle of finality in the entire arbitral process. If the principle of finality is limited to the arbitral awards only and not to any court proceedings founded on them as the appellant contended, then the objectives of arbitration would be defeated and arbitration will be “*a precursor to litigation.*”[9] This is because any Court proceedings that render an award unenforceable affects the principle of finality.

[108] For these reasons, I would myself dismiss this appeal with no order as to costs. However, as the majority holds a contrary opinion, the final orders of the Court shall be as set out in their Judgment.

It is therefore worth noting that the Supreme Court did not decide the question as to whether parties have a right to appeal the decision of the High Court under section 35 of the Arbitration Act but

instead it referred the question back to the Court of Appeal for determination. It however provided useful but progressive principles on what factors the Court of Appeal should consider in making such determination.

However, In the *Synergy Industrial appeal*, the Supreme Court of Kenya specifically stated:

“[86] For the avoidance of doubt, we hereby restate the principle that not every decision of the High Court under Section 35 is appealable to the Court of Appeal. It also follows therefore that an intended appeal, which is not anchored upon the four corners of Section 35 of the Arbitration Act, should not be admitted. In this regard, an intended appellant must demonstrate (or must be contending) that in arriving at its decision, the High Court went beyond the grounds set out in Section 35 of the Act for interfering with an Arbitral Award.”

It can therefore be safely be concluded that the Supreme Court (and more so Justice Maraga’s dissenting opinion) in the *Nyutu case* and even more clearly in the *Synergy case* and *GEO Chem Middle East v Kenya Bureau of Standards [2020] eKLR* affirmed the finality of arbitral awards. However, it is also noteworthy that we would have to wait for the decision of the Court of Appeal in the *Nyutu case* as the final position of the Kenyan courts on the issue. What is however encouraging is the positive attitude this case demonstrates towards ensuring that the court’s role and intervention is limited for purposes of promoting finality of arbitral processes, thus, promoting the growth and usage of arbitration in the country.

5.8 Easy Access and Travel to Kenya

One of the factors that make any country to lag behind in attracting international arbitration practitioners and parties’ preference for a country as their preferred seat for their arbitration is difficulty in accessing the same physically, should they require traveling there. As recently as June 2020, it was reported that Government officials are in the process of finalising a free trade agreement (FTA) that, if signed, is set to ease the entry of established US companies into the local market.⁶⁹ If concluded, the reciprocal trade deal would grant the US government unfettered entry for its companies into nearly all segments of Kenya’s economy including the heavily guarded ones.⁷⁰ While this may come with intended and unintended repercussions for the job market for

⁶⁹ Wednesday, June 3 and 2020 0:01, ‘America Seeks Easy Access in New Trade Pact with Kenya’ (*Business Daily*) <<https://www.businessdailyafrica.com/economy/America-seeks-easy-access-in-new-trade-pact-with-Kenya/3946234-5569764-yvybkl/index.html>> accessed 4 August 2020.

⁷⁰ *Ibid.*

Kenyans and local companies, the same is also likely to bring some work for the local arbitrators and institutions, if they are ready to grab the opportunity and well prepared for the same.

As for foreign parties that may not have their businesses running local subsidiaries, they can benefit from government to government agreements on either complete waiver of visas or convenient arrangements that might allow business persons entering the country to get their visas on arrival. Kenya is among the very few states in the world that offer visa exemption to quite a number of particular nationalities. Currently, the citizens of 43 states can travel to Kenya without a visa, only a passport is necessary to enter the country, and there's no need to get a Kenyan visa.⁷¹ The only exceptions to this rule involve the citizens of Rwanda and Uganda, part of the East African Agreement, who can travel to Kenya only with their Identity Cards.⁷² As a way of promoting Kenya as a preferred seat for international arbitration, Kenyan stakeholders in arbitration may consider approaching the Government for either visa free entry or specialized processes for visa processing for parties who choose to carry out their arbitration in the country or choose Kenya as their preferred seat and decide to visit the country for business.

5.9 Effective Supporting Institutions

As already mentioned elsewhere, Kenyan courts have shown a positive attitude towards ADR and arbitration and are willing to minimise court intervention as envisaged under the relevant laws. There is a need for ensuring that this continues and also ensuring that lawyers and judicial officers are not used by parties to frustrate the arbitration process. Only then will the practice of international arbitration in the country grow and attract international clientele. The Nairobi Centre for International Arbitration (NCIA) is commendably rising and making itself known for international arbitration and ADR.⁷³ There is a need for all stakeholders including the Government of Kenya, arbitration practitioners and learning institutions to support NCIA in its quest to compete competitively with the global international arbitration institutions.

⁷¹ 'Kenya Visa-Free Countries-Can I Travel Just With My Passport?' <<https://www.ivisa.com/kenya-blog/kenya-visa-free-countries-can-i-travel-just-with-my-passport>> accessed 4 August 2020; 'Countries Whose Nationals Do Not Require a Visa to Kenya' <<http://www.kenyaembassy.nl/index.php/consular/country-information>> accessed 4 August 2020.

⁷² Ibid.

⁷³ admin, 'Permanent Court of Arbitration Signed Cooperation Agreement with NCIA' (*Nairobi Centre for International Arbitration*, 18 March 2019) <<https://www.ncia.or.ke/court-arbitration/>> accessed 28 December 2020; 'CRCICA & NCIA MoU - Nairobi Centre for International Arbitration' <<https://www.ncia.or.ke/crcica-and-ncia-memorandum-of-understanding-mou/>> accessed 28 December 2020.

5.10 Modern Arbitration Law

Arbitration matters in Kenya are mainly governed by the *Arbitration Act*⁷⁴ and the Rules therein. However, arbitration is also conducted under the *Civil Procedure Act*⁷⁵, which allows a suit to be referred to any other method of dispute resolution where the parties agree or the Court considers the case suitable for such referral.⁷⁶ The provision also provides that where an award is reached under the section and the same is entered as the court's judgement, no appeal shall lie against it. Further, Order 46 of the Civil Procedure Rules, 2010 provides for arbitration under order of a court and other alternative dispute resolution mechanisms. It provides that parties can apply to court to have a matter referred to arbitration.⁷⁷ It provides for the procedural guidelines therein. Section 59D of the Act further demonstrates the courts' supportive role in arbitration and ADR mechanisms in the pursuit of justice. It 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.*⁷⁸

The practice of arbitration in Kenya has also been enhanced through Article 159 of the Constitution of Kenya, 2010⁷⁹ which provides for promotion of alternative forms of dispute resolution as one of the guiding principles of the Kenyan courts while exercising judicial authority. These forms include reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.

The current law on Arbitration, *Arbitration Act*⁸⁰, repealed the colonial *Arbitration Ordinance of 1914* which was a replica of the English Arbitration Act of 1889. The Ordinance was later replaced by the now repealed *Arbitration Act*, Cap 49. These two Acts gave immense powers to courts with little or no regard to the parties' autonomy. *Arbitration Act*, Cap 49 was drafted along the English *Arbitration Act* of 1950. This was later repealed by the current *Arbitration Act*, Act No. 4 of 1995. This Act was substantially amended in 2009 in order to reflect the main principles of the UNCITRAL Model law to which Kenya is a signatory⁸¹, amongst others, minimal court intervention in matters of arbitration.⁸² Regarding the scope of the Act, section 2 thereof provides

⁷⁴ Arbitration Act, 1995, No. 4 of 1995(Amended in 2009).

⁷⁵ Cap 21, Laws of Kenya.

⁷⁶ S.59C(1), Cap 21, Laws of Kenya

⁷⁷ R. 46, Civil Procedure Rules, 2010

⁷⁸ Section 59D, Cap 21, Laws of Kenya.

⁷⁹ Government Printer, Nairobi, 2010.

⁸¹ Kenya acceded to the law in 1989 but with reservation on reciprocity.

⁸² Section 10, Arbitration Act, No. 4 of 1995

that except as otherwise provided in a particular case, the provisions of this Act shall apply to domestic arbitration and international arbitration. ‘Arbitration’ is defined under section 2 to mean any arbitration whether or not administered by a permanent arbitral institution.

As observed above, various jurisdictions and global arbitral institutions have been amending their rules and laws periodically in order to capture the new trends in the area of arbitration. There is thus a need for Kenya and the local institutions such as the Nairobi Centre for International Arbitration to ensure that their laws and rules are always up to date and reflect the global trends in the sector.⁸³ This is one of the ways of ensuring that they improve their marketability globally and attract not only investments but also practitioners and parties wishing to pick Kenya as their seat for international arbitration.

5.11 Enhanced Access to Internet and Cybersecurity

With the world becoming global village due to the advancement in technology, it is possible for parties to carry out their international arbitration proceedings from different parts of the world. Technology has also become a valued part of arbitration proceedings and has been embraced by all the major arbitral institutions across the world.⁸⁴ The corona virus pandemic has forced many professions to resort to the use of virtual forums to conduct meetings.⁸⁵ While Kenya has made considerable steps in enhancing access and the use of internet in the country, the same cannot be said to be satisfactory.⁸⁶ The country has also made some progress in putting in place cybersecurity

⁸³ Norton Rose Fulbright, *International arbitration report*, Issue 11, October 2018 <<https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/international-arbitration-review---issue-11.pdf?la=en-be&revision=>> accessed 7 August 2020; ‘6 Trends Will Shape Future International Commercial Disputes | Insights | DLA Piper Global Law Firm’ (*DLA Piper*) <<https://www.dlapiper.com/en/us/insights/publications/2018/08/6-trends-will-shape-future-international-commercial-disputes/>> accessed 7 August 2020.

⁸⁴ See Muigua, K. & Ombati, J., ‘Achieving expeditious Justice: Harnessing Technology for Cost Effective International Commercial Arbitral Proceedings,’ Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, 7(1):1-32, (April, 2019).

⁸⁵ Martha C White, ‘For Conference Planners, Virus Means a “Huge Learning Curve”’ *The New York Times* (18 May 2020) <<https://www.nytimes.com/2020/05/18/business/coronavirus-business-travel-conferences.html>> accessed 5 August 2020; ‘COVID-19: How Companies Are Responding’ (*World Economic Forum*) <<https://www.weforum.org/agenda/2020/03/how-are-companies-responding-to-the-coronavirus-crisis-d15bed6137/>> accessed 5 August 2020; ‘Will the Coronavirus Make Online Education Go Viral?’ (*Times Higher Education (THE)*, 12 March 2020) <<https://www.timeshighereducation.com/features/will-coronavirus-make-online-education-go-viral>> accessed 5 August 2020; Michael Price Apr. 28, 2020 and 4:20 Pm, ‘As COVID-19 Forces Conferences Online, Scientists Discover Upsides of Virtual Format’ (*Science / AAAS*, 28 April 2020) <<https://www.sciencemag.org/careers/2020/04/covid-19-forces-conferences-online-scientists-discover-upside-virtual-format>> accessed 5 August 2020.

⁸⁶ Muigua, K., ‘Virtual Arbitration Amidst Covid-19 : Efficacy and Checklist for Best Practices,’ *A Discussion Paper for the Chartered Institute of Arbitrators Kenya Branch (CIArb-K) Webinar ADR Talk Series 8 held on 28th*

law, a step towards enhancing trust for dispute resolvers and their clients.⁸⁷ There is however a need for the local arbitration practitioners and institutions to borrow a leaf from their international counterparts and invest in the appropriate software and hardware necessary for virtual arbitration.⁸⁸ Technology can save parties valuable time and resources and still achieve justice.

5.12 Perception of Corruption

Kenya's justice sector and its key players have consistently been rated poorly as far as corruption index is concerned.⁸⁹

Section 35 confers the High court powers to set aside an arbitral award under the circumstances provided under that provision. Notably, Section 35(2) sets out the grounds upon which the High Court will set aside an arbitral award upon the applicant furnishing proof. These grounds include, inter alia: where fraud, undue influence or corruption affected the making of the award. The High Court may also decline recognition and/enforcement of an award if its making was affected by fraud, corruption or undue influence.⁹⁰

There is a need to fight corruption in order to create conducive environment for international arbitration and eliminate any notion or perception that the government is likely to interfere with private commercial arbitration matters.⁹¹

May 2020 < <http://kmco.co.ke/wp-content/uploads/2020/05/Virtual-Arbitration-Proceedings-Amidst-COVID-19-Efficacy-and-Checklist-for-Best-Practices69523-Revised.pdf> > accessed 5 August 2020; Muigua, K., 'Legal Practice and New Frontiers: Embracing Technology for Enhanced Efficiency and Access to Justice,' < <http://kmco.co.ke/wp-content/uploads/2020/06/Legal-Practice-and-New-Frontiers-Embracing-Technology-for-Enhanced-Efficiency-and-Access-to-Justice-Kariuki-Muigua-Ph.D-June-2020.pdf> > accessed 5 August 2020.

⁸⁷ Muigua, K., 'Legal Practice and New Frontiers: Embracing Technology for Enhanced Efficiency and Access to Justice,' < <http://kmco.co.ke/wp-content/uploads/2020/06/Legal-Practice-and-New-Frontiers-Embracing-Technology-for-Enhanced-Efficiency-and-Access-to-Justice-Kariuki-Muigua-Ph.D-June-2020.pdf> > accessed 5 August 2020.

⁸⁸ Muigua, K., 'Virtual Arbitration Amidst Covid-19 : Efficacy and Checklist for Best Practices,' *A Discussion Paper for the Chartered Institute of Arbitrators Kenya Branch (CI Arb-K) Webinar ADR Talk Series 8 held on 28th May 2020* < <http://kmco.co.ke/wp-content/uploads/2020/05/Virtual-Arbitration-Proceedings-Amidst-COVID-19-Efficacy-and-Checklist-for-Best-Practices69523-Revised.pdf> > accessed 5 August 2020.

⁸⁹ Hope Sr, Kempe Ronald, 'Kenya's Corruption Problem: Causes and Consequences: Commonwealth & Comparative Politics: Vol 52, No 4'

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⁹⁰ S. 37(1), No. 4 of 1995.

⁹¹ 'Advantages Of International Commercial Arbitration - International Law - Worldwide'

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6. Conclusion

Kenya has a promising future as the preferred seat and venue for international arbitration. All that is required is for the stakeholders to work closely in order to eliminate the challenges identified in this paper as well as ensuring that the law and institutional practice stays up to date as far as international trends in international arbitration are concerned.

Making Kenya a preferred seat for international arbitration is a valid dream that can be realized in the very near future.

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