

**Management of Disputes at the Domestic and International
Levels Through Alternative Dispute Resolution (ADR)
Mechanisms: Challenges and Opportunities**

Kariuki Muigua, Ph.D.

*Panel Discussion paper for the Chartered Institute of Kenya Branch
International Conference held from 7-9 of November 2018 at Diani, Kenya*

Management of Disputes at the Domestic and International Levels Through Alternative Dispute Resolution (ADR) Mechanisms: Challenges and Opportunities

Management of Disputes at the Domestic and International Levels Through Alternative Dispute Resolution (ADR) Mechanisms: Challenges and Opportunities

Kariuki Muigua*

1. Introduction

This paper critically discusses the opportunities that come with using Alternative Dispute Resolution (ADR) Mechanisms as well as the challenges that also arise in the context of domestic and international disputes management. Notably, the paper goes beyond the legal and institutional issues surrounding the practice of ADR to look at the contemporary issues that arise therefrom.

2. Need for Effective Management of International Commercial Disputes

International commercial disputes can escalate into major trade conflicts with serious political and economic repercussions, hence the increased need for fast and efficient dispute resolution through extra judicial means rather than litigation in national courts.¹ Globalization has made the need for effective and reliable mechanisms for management of commercial disputes as well as other general disputes involving parties from different jurisdictions not only desirable but also invaluable.²

3. Spectrum of ADR Mechanisms at the International Level: Merits and Demerits

ADR mechanisms have been associated with a number of advantages over litigation, and are generally hailed as expeditious, cost effective and lenient on procedural rules. While it is to be acknowledged that in some jurisdictions such as the United Kingdom ADR is purely alternative

* PhD in Law (Nrb), FCIArb (Chartered Arbitrator), LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. In Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, School of Law [November, 2018].

¹ Sagartz, A., "Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court," *Ohio St. J. on Disp. Resol.* 13 (1997): 675, at p. 675.

² *Alternative Dispute Resolution Methods*, Document Series No. 14, page 2, Paper written following a UNITAR Sub-Regional Workshop on Arbitration and Dispute Resolution (Harare, Zimbabwe 11 to 15 September 2000). Available at

http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document14/DocSeries14.pdf

Management of Disputes at the Domestic and International Levels Through Alternative Dispute Resolution (ADR) Mechanisms: Challenges and Opportunities

to litigation, ADR mechanisms form an important part of conflict management mechanisms in Kenya and Africa in general.³

At an international level, the legal basis for the application of alternative dispute resolution mechanisms in disputes between parties be they states or individuals is Article 33 of the Charter of the United Nations⁴ which outlines the various conflict management mechanisms that parties to a conflict or dispute may resort to.⁵ It provides that *the parties to any dispute shall, first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice* (emphasis added).⁶ ADR in this era of the 21st Century seeks to find domestically and internationally, a faster, economical and more efficient system that contrasts with litigation which is time consuming and expensive.⁷ Concerned about efficiency of national court system in cross border disputes, foreign investors normally prefer mediation or arbitration. Dispute settlement through Arbitration/ADR is not only domestic but also an increasingly growing international phenomenon in the context of cross border transactions.⁸

The ADR mechanisms are mainly intended for conflict resolution and have, as their major selling point, their attributes of flexibility, low cost, lack of complex procedures, mutual problem solving, salvaging relationships and their familiarity to the common people.⁹ For instance,

³ See generally, Muigua, K., 'Effective Justice for Kenyans: is ADR Really Alternative?' *The Law Society of Kenya Journal*, Vol. II, 2015, No. 1, pp. 49-62.

⁴ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at: <http://treaties.un.org/doc/Publication/CTC/uncharter.pdf>

⁵ See generally Eunice R. Oddiri, *Alternative Dispute Resolution*, paper presented by author at the Annual Delegates Conference of the Nigerian Bar Association, 22nd - 27th August 2004, Abuja, Nigeria. Available at <http://www.nigerianlawguru.com/articles/arbitration/ALTERNATIVE%20DISPUTE%20RESOLUTION.htm>; See 'The Role of Private International Law and Alternative Dispute Resolution', Available at http://www.wipo.int/copyright/en/ecommerce/ip_survey/chap4.html

⁶ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

⁷ Muigua, K., "Heralding A New Dawn: Achieving Justice Through Effective Application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya", Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Vol. 1, No 1, (2013), pp. 43-78 at p.55.

⁸ Surridge & Beecheno, *Arbitration/ADR Versus Litigation*, September 4, 2006, Available at http://www.hg.org/articles/article_1530.html

⁹ Muigua, K., 'ADR: The Road to Justice in Kenya' Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Vol. 2, No 1, (2014), pp. 28-95.

Management of Disputes at the Domestic and International Levels Through Alternative Dispute Resolution (ADR) Mechanisms: Challenges and Opportunities

negotiation allows parties to fully control both the process and the outcome through a mechanism which will not impose any outcome which is not mutually acceptable.¹⁰ Negotiation, as an informal process of conflict resolution, offers parties maximum control over the process to identify and discuss their issues enabling them to reach a mutually acceptable solution without the help of a third party. Its focus is on common interests of the parties rather than their relative power or position.¹¹ It is associated with voluntariness, cost effectiveness, informality, focus on interests and not rights, creative solutions, personal empowerment, enhanced party control, addressing root causes of the conflict, non-coerciveness and enduring outcomes. This makes it very applicable to everyday life disputes which would otherwise be aggravated by any attempts to litigate them.¹² If parties in a negotiation hit a deadlock, then they invite a third party of choice to help them resolve their matter and this becomes mediation.¹³ Mediation is associated with same advantages as negotiation. However, it suffers from its non-binding nature so that where compliance is required, one would have to resort to courts to obtain the same since mediation does not have enforcement mechanism but relies on parties' goodwill.¹⁴ Conciliation on the other hand involves a third party, called a conciliator, who restores damaged relationships between disputing parties by bringing them together, clarifying perceptions, and pointing out misperceptions.¹⁵ Conciliation is useful in reducing tension, opening channels of communication and facilitating continued negotiations.¹⁶ It therefore follows that where there are already severed relationships which need restoration, conciliation would work best instead of litigation or any other mechanism such as arbitration which would exacerbate the situation.¹⁷

¹⁰ See generally, Muigua, K., *Resolving Conflicts through Mediation in Kenya* (Nairobi: Glenwood Publishers, 2017).

¹¹ Rahwan, I., Sonenberg, L. and Dignum, F., "Towards interest-based negotiation." In *Proceedings of the second international joint conference on Autonomous agents and multiagent systems*, pp. 773-780, ACM, 2003.

¹² Muigua, K., 'ADR: The Road to Justice in Kenya' Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Vol. 2, No 1, (2014), pp. 28-95.

¹³ Mwangi, M., *Conflict in Africa: Theory, Processes and Institutions of Management* (Nairobi: Centre for Conflict Research, 2006), p. 115.

¹⁴ See generally, Muigua, K., 'Effective Justice for Kenyans: is ADR Really Alternative?' *The Law Society of Kenya Journal*, Vol. II, 2015, No. 1, pp. 49-62.

¹⁵ Hajdú, J., *The methods of alternative dispute resolution (ADR) in the sphere of Labour law*. na, 1998. Available at http://acta.bibl.u-szeged.hu/6976/1/juridpol_054_fasc_008_001-078.pdf

¹⁶ Hajdú, J., *The methods of alternative dispute resolution (ADR) in the sphere of Labour law*. na, 1998, op cit., p.16.

¹⁷ Muigua, K., 'Effective Justice for Kenyans: is ADR Really Alternative?' op cit.

Management of Disputes at the Domestic and International Levels Through Alternative Dispute Resolution (ADR) Mechanisms: Challenges and Opportunities

3.1 International Commercial Arbitration

Arbitration has gained popularity over time as the choice approach to conflict management especially by the business community due to its obvious advantages over litigation.¹⁸ Perhaps the most outstanding advantage of arbitration over litigation is its transnational applicability in international disputes with minimal or no interference by the national courts, thus boosting the parties confidence of realizing justice in the best way achievable. Countries and various regions around the world have thus embarked on promoting international arbitration as the best dispute settlement approach in international disputes.¹⁹

The business and investment community stands to benefit from international commercial arbitration in Africa as the same provides a viable system offering a proper mechanism for the settlement of international and regional disputes.²⁰ The system is cost efficient with venues in close proximity thus offering convenience. The existence of such a system has the capacity to boost cross-border trade and investment.²¹ Effective and reliable application of international commercial arbitration has the capacity to encourage investors to carry on business with confidence knowing their disputes will be settled expeditiously.²²

3.2 Conciliation

This process is similar to mediation except for the fact that the third party can propose a solution. Its advantages are similar to those of negotiation. It has all the advantages and disadvantages of negotiation except that the conciliator can propose solutions making parties lose some control over the process. Conciliation works best in trade disputes.²³

¹⁸ See Sagartz, A., "Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court," *Ohio St. J. on Disp. Resol.* 13 (1997): 675 at p.678.

¹⁹ Karl P. S. and Federico O., *Improving the international investment law and policy regime: Options for the future*, Background report prepared for the Seminar on Improving the International Investment Regime Helsinki, April 10-11, 2013 hosted by The Ministry for Foreign Affairs of Finland, 25 March 2013. Available at <http://www.formin.finland.fi/public/download.aspx?ID=113259&GUIDE>

²⁰ Muigua, K., 'Promoting International Commercial Arbitration in Africa,' *Chartered Institute of Arbitrators (Kenya), Alternative Dispute Resolution*, Volume 5, No 2, (2017), pp. 1-27.

²¹ Africa ADR – a new African Arbitration Institution, Op. Cit.

²² Suvanpanich, T., "International commercial arbitration in Laos, Thailand and Vietnam: comparative perspectives in the light of the UNCITRAL model law, and the reference to the arbitration laws of England and People's Republic of China," PhD diss., 2001. Available at <https://qmro.qmul.ac.uk/jspui/handle/123456789/1608>

²³ Sgubini, A., Prieditis, M. and Marighetto, A., "Arbitration, Mediation and Conciliation: differences and similarities from an International and Italian business perspective," *Bridge Mediation LCC* (2004). Available at <https://www.mediate.com/articles/sgubinia2.cfm>

Management of Disputes at the Domestic and International Levels Through Alternative Dispute Resolution (ADR) Mechanisms: Challenges and Opportunities

Conciliation is different from mediation in that the third party takes a more interventionist role in bringing the two parties together.²⁴ In the event of the parties are unable to reach a mutually acceptable settlement, the conciliator issues a recommendation which is binding on the parties unless it is rejected by one of them. While the conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, it is not a determinative role. A conciliator does not have the power to impose a settlement.²⁵ This is a reflection of the *Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law*.²⁶

4. Management of International Commercial Disputes: Challenges and Opportunities

Commercial and international trade disputes are unavoidable. Because of this, efficient mechanisms for their management are essential. The mechanisms now universally used for their management are negotiation, mediation, arbitration and conciliation. These mechanisms work best when a well-resourced, neutral and credible body administers the process.²⁷ However, there are a number of potential hurdles that the dispute resolvers should be aware of to ensure successful management of these disputes, as discussed herein.

4.1 Overcoming Cultural Barriers

It has been argued that international commercial disputes occur for a number of reasons, most of which stem from difficulties in communication especially when parties come from different countries due to cultural differences.²⁸ The more dissimilar their cultures of origin, the greater

²⁴ Sgubini, A., Prieditis, M. and Marighetto, A., "Arbitration, Mediation and Conciliation: differences and similarities from an International and Italian business perspective," op cit.

²⁵ Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution*, July 2008, Op cit. p. 49; See also Office of the Information Commissioner, "Understanding the conciliation process: External review guide for parties", *Understanding the conciliation process – External review guide* (Jan 2018), available at <https://www.oic.wa.gov.au/Materials/ExternalReviewGuides/Understanding%20the%20conciliation%20process.pdf>

²⁶ Article 6 (4) of the Model law states that —The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute, UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002 (United Nations 2002). Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html

²⁷ "Africa ADR – a new African Arbitration Institution", available at <http://www.lexafrica.com/news-africa-adr-a-new-african-arbitration-institution>

²⁸ Sagartz, A., "Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court," *Ohio St. J. on Disp. Resol.* 13 (1997): 675, at p. 676; See also Mills, K., "Cultural Differences & Ethnic Bias in International Dispute Resolution an Arbitrator/Mediator's Perspective," *Transnational Dispute Management (TDM)* 3, no. 4 (2006).

Management of Disputes at the Domestic and International Levels Through Alternative Dispute Resolution (ADR) Mechanisms: Challenges and Opportunities

the potential for inaccurate perceptions, strong emotions and misunderstandings between parties when they attempt to form a relationship or negotiate a dispute.²⁹

In addition, business people new to international commerce are at an enormous disadvantage if they are unaware of the cultural sensitivities of those with whom they conduct business, since cultural mistakes can affect profitability and competitiveness.³⁰

Culture, including language, is the acquired knowledge that members of a given community use to subconsciously interpret their surroundings and guide their interaction with others. Individuals from the same culture use their shared background to decipher each other's statements and actions.³¹ This may thus affect the choice or appointment of dispute resolvers since, despite there being individuals with the relevant knowledge, skill and experience needed for international dispute resolution and the institutions, which specialize in, or are devoted to, facilitating alternative dispute resolution (ADR), there has been a general tendency by parties to a dispute doing business in Africa to go back to their home turfs to appoint arbitrators or other dispute resolvers. This is so because parties are given the autonomy to appoint their arbitrators, conciliators or representatives and cannot be forced to accept the choice of arbitrator involuntarily unless under very limited and special circumstances. Arbitration is intended to be a voluntary process.³²

Non-African disputants have always been wary of the African international commercial arbitrators especially where one of the disputants is African due to cultural differences.³³ These differences may be in reference to economic, political and/or legal developments thus creating varying opinion of issues, prejudices and conflicts of interests especially in international

²⁹ Sagartz, A., "Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court," *op cit.*, at p. 676; see also Gray, S., "A study of Negotiation Styles: Between business managers from UK and Indian cultural backgrounds." (2012). Available at <https://www.theseus.fi/bitstream/handle/10024/48611/Culture%20Dissertation%20by%20Sasha%20Gray.pdf?sequence=1&isAllowed=y>

³⁰ Sagartz, A., "Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court," *op cit.*, at pp. 676-677; See also Deari, H., Kimmel, V. and Lopez, P., "Effects of cultural differences in international business and price negotiation." (2008). Available at <http://www.diva-portal.org/smash/get/diva2:206119/fulltext01>

³¹ *ibid*, at p. 676.

³² Lew, J., 'Comparative International Commercial Arbitration', 237, [London: Kluwer Law International, 2003]; See also generally, Fagbemi, Sunday A. "The doctrine of party autonomy in international commercial arbitration: myth or reality?" *Journal of Sustainable Development Law and Policy (The)* 6, no. 1 (2015): 202-246.

³³ Muigua, K., 'Promoting International Commercial Arbitration in Africa,' Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Volume 5, No 2, (2017), pp. 1-27.

Management of Disputes at the Domestic and International Levels Through Alternative Dispute Resolution (ADR) Mechanisms: Challenges and Opportunities

economic relations. Some may seek to subject their dispute to another arbitrator who may not share a culture with either of the disputants but one aware of international best practices in arbitration.³⁴

Some scholars have argued that international commercial disputes are best resolved through use of Alternative Dispute Resolution (ADR) methods that are compatible with the cultural backgrounds of the disputants, and secondly, that, no matter which ADR method- negotiation, conciliation, arbitration or a hybrid process-is ultimately selected, a third-party facilitator well socialized in the cultures of the disputants can best help the disputants quickly reach an amicable agreement.³⁵ However, there is a need for the careful consideration of ADR methods and choice of facilitator to fit the cultural backgrounds of the parties.³⁶ The efficacy of a particular method of dispute resolution largely depends upon the cultural backgrounds of the disputants.³⁷

4.2 Need For Regulation of Cost?

There have not been very clear guidelines on the remuneration of arbitrators and other dispute resolvers especially in Africa and foreigners are not always very sure on what they would have to pay if and when they engage African international arbitrators to arbitrate their commercial disputes. This is because the issue is more often than not left to the particular institutional guidelines, which institution may not be favorable to the parties. For instance, the Kenyan branch of Chartered Institute of Arbitrators has its own rules and guidelines on the remuneration of its arbitrators. However, these are only applicable to those who practice arbitration under the Institute and thus have limited applicability.³⁸

The major selling point of the ADR approaches of dispute resolution is their attributes of flexibility, low cost and lack of complex procedures. These attributes may no longer be tenable in arbitration as it is gradually becoming as expensive as litigation, especially when the arbitral

³⁴ See Russell J. Leng and Patrick Regan, 'Social and Political Cultural Effects on the Outcome of Mediation in Militarized Interstate Disputes', Available at <http://cdp.binghamton.edu/papers/socialeffects-full.pdf>

³⁵ Sagartz, A., "Resolution of International Commercial Disputes: Surmounting Barriers of Culture without Going to Court," *Ohio St. J. on Disp. Resol.* 13 (1997): 675, at p. 675.

³⁶ Ibid, at p.675.

³⁷ Sagartz, A., "Resolution of International Commercial Disputes: Surmounting Barriers of Culture without Going to Court," *Ohio St. J. on Disp. Resol.* 13 (1997): 675, at p. 677.

³⁸ See CI Arb Kenya Website Available at www.ciarbkenya.org

Management of Disputes at the Domestic and International Levels Through Alternative Dispute Resolution (ADR) Mechanisms: Challenges and Opportunities

process is challenged in court.³⁹ When the matter goes to court, it is back to the same old technicalities that are present in civil proceedings.

This challenge also brings in the other factor that is changing the face of arbitration; interference by courts. Ordinarily, courts are not supposed to inquire into the arena of the arbitral proceedings, even where the same are court mandated. Courts are entertaining all manner of applications by parties' intent on derailing the arbitral proceedings and thus delaying justice for all concerned.⁴⁰ This means then that parties are slowly losing confidence in the arbitral process as it makes no sense to engage in arbitration for years only for the dispute to end up in courts of law for determination. Different countries have different attitudes to the place of courts in ADR practice.⁴¹

4.3 ADR and Its Applicability in Protection of Human Rights

The modern concept of human rights is based on various instruments considered as the international Bill of Rights, including: *Universal Declaration of Human Rights* (UDHR, 1948)⁴²; *International Covenant on Civil and Political Rights* (ICCPR, 1966)⁴³ and its two Optional Protocols; and *International Covenant on Economic, Social and Cultural Rights*⁴⁴ (ICESCR, 1966).

Scholars have rightly observed that while it is now accepted that well-functioning, efficient court systems will incorporate and promote the use of ADR, it must be remembered the human rights

³⁹ Muigua, K., "Overview of Arbitration and Mediation in Kenya", A Paper Presented at a Stakeholder's Forum on Establishment of Alternative Dispute Resolution (ADR) Mechanisms for Labour Relations In Kenya, held at the Kenyatta International Conference Centre, Nairobi, on 4th – 6th May, 2011, p.11, Available at [http://www.chuitech.com/kmco/attachments/article/83/Overview%20of%20Mediation Kenya.pdf](http://www.chuitech.com/kmco/attachments/article/83/Overview%20of%20Mediation%20Kenya.pdf)

⁴⁰ Muigua, K., "Overview of Arbitration and Mediation in Kenya," Stakeholder's Forum on Establishment of Alternative Dispute Resolution (ADR) Mechanisms for Labour Relations in Kenya, held at the Kenyatta International Conference Centre, Nairobi, on 4th – 6th May, 2011. (Available at <http://www.kmco.co.ke/index.php/publications>); cf. *Republic v Architectural Association of Kenya & 3 others Ex Parte Paragon Ltd* [2017] eKLR, Miscellaneous Application 466 of 2016.

⁴¹ Alimant, R.J., "Alternative Dispute Resolution in International Business Transactions," *Brief* 38 (2008): 12; See also Kathy M.B. A., "Court referral to ADR: Criteria and research." (NADRAC, 2003); See also Nosyreva, E., "Alternative Dispute Resolution in the United States and Russia: A Comparative Evaluation," *Ann. Surv. Int'l & Comp. L.* 7 (2001): 7; Bathurst, TF., "The role of the courts in the changing dispute resolution landscape," *UNSWLJ* 35 (2012): 870.

⁴² UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

⁴³ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

⁴⁴ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

Management of Disputes at the Domestic and International Levels Through Alternative Dispute Resolution (ADR) Mechanisms: Challenges and Opportunities

for which it is a tool are: the right to a fair hearing by an independent tribunal, and the right to an effective remedy by an appropriate national tribunal.⁴⁵ Thus, if the ADR process does not operate consistently with these rights, it has ceased to be a tool, and has become an obstacle.⁴⁶ In addition, it is of critical importance always to remember that ADR, like all rules of practice and procedure, is intended to further the end of justice and recognised human rights by enabling a fair and equitable hearing.⁴⁷

Also of importance in this discourse is the fact that family law practitioners have frowned upon the use of ADR in resolving domestic violence for a number of reasons, perhaps with the exception of mediation.⁴⁸ Mediation, with its focus on communication and private resolutions that are specially tailored to the needs of individual parties, is considered closer to a therapeutic model than the method of adversarial dispute resolution embraced by the courts.⁴⁹ However, even mediating in the shadow of violence may well be impossible.⁵⁰ Those who oppose the use of ADR to resolve disputes involving spousal abuse do so based on the following potential problems: the power imbalance between men and women; the mediators' inability to provide to abused women (or men) the type of relief they need most, such as protection from violence, compensation, possession of home without the batterer, and security for children; and (3) ADR's more general societal consequences.⁵¹

It is perhaps in recognition of these reasons that Kenya's *Protection against Domestic Violence Act, 2015*⁵² makes no provision for the use of ADR in resolving the matters falling within its scope, despite its enactment after the Constitution of Kenya 2010 which encourages the use of ADR and TDR in easing access to justice for all.

⁴⁵ Australian Human Rights Commission, "ADR: an essential tool for human rights," Address by *The Hon. John von Doussa, QC at the National Mediation Conference*, 30 June 2004.

Available at <https://www.humanrights.gov.au/news/speeches/adr-essential-tool-human-rights>

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Cf. Wendy K., "It's Arbitration, But Not As We Know It: Reflections on Family Law Dispute Resolution," *International Journal of Law, Policy and the Family*, Volume 30, Issue 1, 1 April 2016, Pages 1–31, <https://doi.org/10.1093/lawfam/ebv017>

⁴⁹ Imgrogo, A.R., "Using ADR to Address Issues of Public Concern: Can ADR Become an Instrument for Social Oppression," *Ohio St. J. on Disp. Resol.* 14 (1998): 855 at p. 858.

⁵⁰ Ibid, p. 864.

⁵¹ Imgrogo, A.R., "Using ADR to Address Issues of Public Concern: Can ADR Become an Instrument for Social Oppression," p. 860; 865.

⁵² *Protection against Domestic Violence Act*, Act No. 2 of 2015, Laws of Kenya. The Act was enacted to provide for the protection and relief of victims of domestic violence; to provide for the protection of a spouse and any children or other dependent persons, and to provide for matters connected therewith or incidental thereto.

Management of Disputes at the Domestic and International Levels Through Alternative Dispute Resolution (ADR) Mechanisms: Challenges and Opportunities

The use of ADR in human rights issues that may emerge in some commercial disputes is thus not well established and may face legal hurdles in different jurisdictions.⁵³ However, if ADR mechanisms could be applied in a way that conforms to International Human Rights standards they can play a major role in the management of disputes. ADR mechanisms focus on the interests and needs of the parties to the conflict as opposed to positions, which approach is contrary to the formal common law and statutory law practices.⁵⁴ These are capable of ensuring that justice is done to all by addressing the concerns of the poor and vulnerable in the society through legally recognized but more effective means.

4.4 The Challenge of Arbitrability

Arbitrability is used to refer to the determination of the type of disputes that can be resolved through arbitration and those which are the domain of the national courts. It deals with the question of whether specific classes of disputes are barred from arbitration because of the subject matter of the dispute.⁵⁵ Courts often refer to “public policy” as the basis of the bar.⁵⁶

The challenge arises when a matter that is arbitrable in one jurisdiction fails the test of arbitrability in a different jurisdiction.⁵⁷

Arbitrability may either be subjective or objective.⁵⁸ National laws often restrict or limit the matters, which can be resolved by arbitration. Subjective arbitrability refers to a situation where states or state entities may not be allowed to enter into arbitration agreements at all or may require a special authorization.⁵⁹ Objective arbitrability refers to restrictions based on the subject matter of the dispute.⁶⁰ Certain disputes may involve such sensitive public policy or national

⁵³ “Alternative Dispute Resolution In Rights-Based Disputes: Mediation In Britain Today,” available at http://www.equineteurope.org/IMG/pdf/Mediation_White.pdf

⁵⁴ See Roger Fisher, William Ury & Bruce Patton, *Getting to Yes-Negotiating Agreement Without Giving in*, (3rd Ed. (Penguin Books, United States of America, 2011) p.42.

⁵⁵ Laurence S., “Defining ‘Arbitrability’-The United States vs. the rest of the world”, *New York Law Journal*, 2009, available at <http://www.gibsondunn.com/publications/Documents/Shore-DefiningArbitrability.pdf>

⁵⁶ *Ibid*, p. 1.

⁵⁷ Baron, P.M. and Liniger, S., "A Second Look at Arbitrability: Approaches to Arbitration in the United States, Switzerland and Germany," *Arbitration International* 19, no. 1 (2003): 27-54.

⁵⁸ Sajko, K., "On arbitrability in comparative arbitration-an outline," *Zbornik Pravnog fakulteta u Zagrebu* 60, no. 5 (2010): 961-969.

⁵⁹ Hanotiau, B., "The law applicable to arbitrability," *SAC LJ* 26 (2014): 874.

⁶⁰ *Ibid*.

Management of Disputes at the Domestic and International Levels Through Alternative Dispute Resolution (ADR) Mechanisms: Challenges and Opportunities

interest issues that it is accepted that they may be dealt only by the courts, for instance criminal law.⁶¹

4.5 Code of Ethics

There is likelihood that there is going to be a flood of mediators, arbitrators and conciliators if training efforts are enhanced. The major problem will be regulating Independent practitioners unless it is made compulsory that every practitioner must belong to a professional body. This way it will be easier to come up with an effective code of ethics and with better mechanisms of enforcement for their regulation.⁶²

Unlike legal practice that is usually regulated by a professional body and generally locks out foreigners, ADR practice may not enjoy such protection and direct regulation thus presenting a challenge on how practitioners should be regulated to maintain high quality and protect parties from malpractice.⁶³

6. Way Forward

⁶¹ Buchanan, M.A., "Public policy and international commercial arbitration," *American Business Law Journal* 26, no. 3 (1988): 511-531; Mourre, A., "Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator." *Arbitration International* 22, no. 1 (2006): 95-118.

⁶² See Gislason, A.F., "Demystifying ADR neutral regulation in Minnesota: the need for uniformity and public trust in the twenty-first century ADR system," *Minn. L. Rev.* 83 (1998): 1839; See also Clapshaw, D. and Freeman-Greene, S., "Do we need a mediation Act? Part 1," *ADR Bulletin* 6, no. 4 (2003): 1; Haertling, J., "Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads," *European Business Organization Law Review* 13, no. 4 (2012): 639-642; See also Sourdin, T.M., "Legislating for Alternative Dispute Resolution: A Guide for Government Policy Makers and Legal Drafters," (NADRAC, 2006). Available at <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Legislation%20for%20Alternative%20Dispute%20Resolution.PDF> ; Menkel-Meadow, C., "Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to the 'Semi-formal'." (2013). Available at <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=2300&context=facpub>

⁶³ See Nolan-Haley, J.M., "Lawyers, non-lawyers and mediation: rethinking the professional monopoly from a problem-solving perspective," *Harv. Negot. L. Rev.* 7 (2002): 235.

Management of Disputes at the Domestic and International Levels Through Alternative Dispute Resolution (ADR) Mechanisms: Challenges and Opportunities

ADR mechanisms such as negotiation, conciliation and mediation bear certain attributes that can be tapped and lead to justice and fairness especially in commercial disputes. These attributes include party autonomy, flexibility of the process, non-complex procedures and low cost.⁶⁴

There is a need to employ mechanisms that will help promote and encourage higher uptake of ADR mechanisms in management of disputes at both national and international levels, especially in the management of international commercial disputes. While there is a need to put in place adequate legal regimes and infrastructure for the efficient and effective management of international commercial disputes, ADR practitioners and institutions should be aware of the aforementioned potential pitfalls as they may affect the effectiveness of the different processes both at the national and international levels.

The Law Commission in Dublin observes that ‘Alternative dispute resolution must be seen as an integral part of any modern civil justice system. It must become such a well-established part of it that when considering the proper management of litigation it forms as intrinsic and as instinctive a part of our lexicon and of our thought processes, as standard considerations like what, if any, expert evidence is required.’⁶⁵ They go on to state that while litigation must always remain available for clients, this can be a very stressful undertaking and should be seen as the final place for resolving a dispute.⁶⁶

It is essential that in the application of ADR and to achieve a just and expeditious resolution of disputes, the Bill of rights as enshrined in the constitution must at all times be kept in mind and upheld.⁶⁷

⁶⁴What is Alternative Dispute Resolution (ADR)? - African Mediation And Community Service. Available at <http://www.metros.ca/amcs/international.htm>; See also Muigua, K., *Reflections on ADR and Environmental Justice in Kenya*, p.1.

Available at <http://www.chuitech.com/kmco/attachments/article/97/Reflections.pdf>

⁶⁵ Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution*, July 2008, P. 34. Available at <http://www.lawreform.ie/20papers/cpADR.pdf>.

⁶⁶ Ibid.

⁶⁷ Articles 19-51, Constitution of Kenya, 2010

7. Conclusion

Domestic and international commercial disputes ought to be resolved expeditiously in order to ensure that the business community and investors can smoothly carry on business. However, while there are legal and institutional issues relating to ADR practice that must be streamlined to ensure effective management of commercial disputes through ADR, there are always other indirect factors that must be taken care of, as highlighted in this paper. This paper has highlighted and examined some of these factors that come with the use of ADR mechanisms in managing domestic and international commercial disputes. There is a need for ADR practitioners as well as the ADR institutions to pay attention to these potential pitfalls as they may affect the effectiveness of ADR processes and outcomes despite the existence of efficient infrastructural and legal frameworks.

ADR mechanisms can rightly be referred to as Appropriate Dispute resolution mechanisms instead of alternative as the use of the word 'alternative' makes them appear inferior to litigation while this is not the case. The reality is that these mechanisms should at least be treated as equal if not better mechanisms when compared to litigation. These have the potential for being made applicable in all walks of life wherever there exist possibilities of any dispute, a potential only waiting to be tapped. This is the time to recognize that alternative dispute resolution mechanisms stand independently and not as an alternative to any adjudicatory process.⁶⁸

Management of disputes at the domestic and international levels through ADR mechanisms despite its challenges is an exercise worth pursuing.

References

SImgrogn, A.R., "Using ADR to Address Issues of Public Concern: Can ADR Become an Instrument for Social Oppression," *Ohio St. J. on Disp. Resol.* 14 (1998): 855.

'The Role of Private International Law and Alternative Dispute Resolution', available at http://www.wipo.int/copyright/en/ecommerce/ip_survey/chap4.html

⁶⁸ Laxmi Kant Gaur, *Why I Hate 'Alternative' in "Alternative Dispute Resolution"*, p. 4. Available at http://delhicourts.nic.in/Why_I_Hat1.pdf

Management of Disputes at the Domestic and International Levels Through Alternative Dispute Resolution (ADR) Mechanisms: Challenges and Opportunities

“Africa ADR – a new African Arbitration Institution”, available at <http://www.lexafrica.com/news-africa-adr-a-new-african-arbitration-institution>

“Alternative Dispute Resolution In Rights-Based Disputes: Mediation In Britain Today,” available at http://www.equineteurope.org/IMG/pdf/Mediation_White.pdf

Aliment, R.J., "Alternative Dispute Resolution in International Business Transactions," *Brief* 38 (2008): 12.

Alternative Dispute Resolution Methods, Document Series No. 14, Paper written following a UNITAR Sub-Regional Workshop on Arbitration and Dispute Resolution (Harare, Zimbabwe 11 to 15 September 2000). Available at http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document14/DocSeries14.pdf

Australian Human Rights Commission, “ADR: an essential tool for human rights,” Address by *The Hon. John von Doussa, QC at the National Mediation Conference*, 30 June 2004. Available at <https://www.humanrights.gov.au/news/speeches/adr-essential-tool-human-rights>

Baron, P.M. and Liniger, S., "A Second Look at Arbitrability: Approaches to Arbitration in the United States, Switzerland and Germany," *Arbitration International* 19, no. 1 (2003): 27-54.

Bathurst, TF., "The role of the courts in the changing dispute resolution landscape," *UNSWLJ* 35 (2012): 870.

Buchanan, M.A., "Public policy and international commercial arbitration," *American Business Law Journal* 26, no. 3 (1988): 511-531.

CI Arb Kenya Website Available at www.ciarbkenya.org

Clapshaw, D. and Freeman-Greene, S., "Do we need a mediation Act? Part 1," *ADR Bulletin* 6, no. 4 (2003): 1.

Constitution of Kenya, 2010 (Government Printer, Nairobi, 2010).

Deari, H., Kimmel, V. and Lopez, P., "Effects of cultural differences in international business and price negotiation." (2008).

Management of Disputes at the Domestic and International Levels Through Alternative Dispute Resolution (ADR) Mechanisms: Challenges and Opportunities

Available at <http://www.diva-portal.org/smash/get/diva2:206119/fulltext01>

Fagbemi, Sunday A. "The doctrine of party autonomy in international commercial arbitration: myth or reality?" *Journal of Sustainable Development Law and Policy (The)* 6, no. 1 (2015): 202-246.

Gislason, A.F., "Demystifying ADR neutral regulation in Minnesota: the need for uniformity and public trust in the twenty-first century ADR system," *Minn. L. Rev.* 83 (1998): 1839.

Gray, S., "A study of Negotiation Styles: Between business managers from UK and Indian cultural backgrounds." (2012). Available at

<https://www.theseus.fi/bitstream/handle/10024/48611/Culture%20Dissertation%20by%20Sasha%20Gray.pdf?sequence=1&isAllowed=y>

Haertling, J., "Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads," *European Business Organization Law Review* 13, no. 4 (2012): 639-642.

Hajdú, J., *The methods of alternative dispute resolution (ADR) in the sphere of Labour law.* na, 1998. Available at http://acta.bibl.u-szeged.hu/6976/1/juridpol_054_fasc_008_001-078.pdf

Hanotiau, B., "The law applicable to arbitrability," *SAC LJ* 26 (2014): 874.

Karl P. S. and Federico O., *Improving the international investment law and policy regime: Options for the future*, Background report prepared for the Seminar on Improving the International Investment Regime Helsinki, April 10-11, 2013 hosted by The Ministry for Foreign Affairs of Finland, 25 March 2013. Available at <http://www.formin.finland.fi/public/download.aspx?ID=113259&GUIDE>

Kathy M.B. A., "Court referral to ADR: Criteria and research." (NADRAC, 2003).

Laurence S., "Defining 'Arbitrability'-The United States vs. the rest of the world", *New York Law Journal*, 2009, available at <http://www.gibsondunn.com/publications/Documents/Shore-DefiningArbitrability.pdf>

Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution*, July 2008. Available at <http://www.lawreform.ie/20papers/cpADR.pdf>.

Management of Disputes at the Domestic and International Levels Through Alternative Dispute Resolution (ADR) Mechanisms: Challenges and Opportunities

Laxmi Kant Gaur, *Why I Hate 'Alternative' in "Alternative Dispute Resolution"*. Available at http://delhicourts.nic.in/Why_I_Hat1.pdf

Lew, J., 'Comparative International Commercial Arbitration', 237, [London: Kluwer Law International, 2003].

Menkel-Meadow, C., "Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to the 'Semi-formal'." (2013). Available at <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=2300&context=facpub>

Mills, K., "Cultural Differences & Ethnic Bias in International Dispute Resolution an Arbitrator/Mediator's Perspective," *Transnational Dispute Management (TDM)* 3, no. 4 (2006).

Mourre, A., "Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator." *Arbitration International* 22, no. 1 (2006): 95-118.

Muigua, K., 'ADR: The Road to Justice in Kenya' Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Vol. 2, No 1, (2014), pp. 28-95.

Muigua, K., 'Effective Justice for Kenyans: is ADR Really Alternative?' *The Law Society of Kenya Journal*, Vol. II, 2015, No. 1, pp. 49-62.

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

Muigua, K., "Heralding A New Dawn: Achieving Justice Through Effective Application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya", Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Vol. 1, No 1, (2013), pp. 43-78 at p.55.

Muigua, K., "Overview of Arbitration and Mediation in Kenya," Stakeholder's Forum on Establishment of Alternative Dispute Resolution (ADR) Mechanisms for Labour Relations in Kenya, held at the Kenyatta International Conference Centre, Nairobi, on 4th – 6th May, 2011. (Available at <http://www.kmco.co.ke/index.php/publications>).

Management of Disputes at the Domestic and International Levels Through Alternative Dispute Resolution (ADR) Mechanisms: Challenges and Opportunities

Muigua, K., *Reflections on ADR and Environmental Justice in Kenya*. Available at <http://www.chuitech.com/kmco/attachments/article/97/Reflections.pdf>

Muigua, K., *Resolving Conflicts through Mediation in Kenya* (Nairobi: Glenwood Publishers, 2017).

Mwagiru, M., *Conflict in Africa: Theory, Processes and Institutions of Management* (Nairobi: Centre for Conflict Research, 2006).

Nolan-Haley, J.M., "Lawyers, non-lawyers and mediation: rethinking the professional monopoly from a problem-solving perspective," *Harv. Negot. L. Rev.* 7 (2002): 235.

Nosyreva, E., "Alternative Dispute Resolution in the United States and Russia: A Comparative Evaluation," *Ann. Surv. Int'l & Comp. L.* 7 (2001): 7.

Oddiri, E.R., *Alternative Dispute Resolution*, paper presented by author at the Annual Delegates Conference of the Nigerian Bar Association, 22nd - 27th August 2004, Abuja, Nigeria. Available at <http://www.nigerianlawguru.com/articles/arbitration/ALTERNATIVE%20DISPUTE%20RESOLUTION.htm>

Office of the Information Commissioner, "Understanding the conciliation process: External review guide for parties", *Understanding the conciliation process – External review guide* (Jan 2018), available at <https://www.oic.wa.gov.au/Materials/ExternalReviewGuides/Understanding%20the%20conciliation%20process.pdf>

Protection against Domestic Violence Act, Act No. 2 of 2015, Laws of Kenya.

Rahwan, I., Sonenberg, L. and Dignum, F., "Towards interest-based negotiation." In *Proceedings of the second international joint conference on Autonomous agents and multiagent systems*, pp. 773-780, ACM, 2003.

Republic v Architectural Association of Kenya & 3 others Ex Parte Paragon Ltd [2017] eKLR, Miscellaneous Application 466 of 2016.

Management of Disputes at the Domestic and International Levels Through Alternative Dispute Resolution (ADR) Mechanisms: Challenges and Opportunities

Roger F., Ury, W. & Patton, B., *Getting to Yes-Negotiating Agreement Without Giving in*, (3rd Ed. (Penguin Books, United States of America, 2011).

Russell J. Leng and Patrick Regan, 'Social and Political Cultural Effects on the Outcome of Mediation in Militarized Interstate Disputes.' Available at <http://cdp.binghamton.edu/papers/socialeffects-full.pdf>

Sagartz, A., "Resolution of International Commercial Disputes: Surmounting Barriers of Culture without Going to Court," *Ohio St. J. on Disp. Resol.* 13 (1997): 675.

Sajko, K., "On arbitrability in comparative arbitration-an outline," *Zbornik Pravnog fakulteta u Zagrebu* 60, no. 5 (2010): 961-969.

Sgubini, A., Prieditis, M. and Marighetto, A., "Arbitration, Mediation and Conciliation: differences and similarities from an International and Italian business perspective," *Bridge Mediation LCC* (2004). Available at <https://www.mediate.com/articles/sgubinia2.cfm>

Sourdin, T.M., "Legislating for Alternative Dispute Resolution: A Guide for Government Policy Makers and Legal Drafters," (NADRAC, 2006). Available at <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Legislating%20for%20Alternative%20Dispute%20Resolution.PDF>

Surridge & Beecheno, *Arbitration/ADR Versus Litigation*, September 4, 2006, Available at http://www.hg.org/articles/article_1530.html

Suvanpanich, T., "International commercial arbitration in Laos, Thailand and Vietnam: comparative perspectives in the light of the UNCITRAL model law, and the reference to the arbitration laws of England and People's Republic of China," PhD diss., 2001. Available at <https://qmro.qmul.ac.uk/jspui/handle/123456789/1608>

UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

Management of Disputes at the Domestic and International Levels Through Alternative Dispute Resolution (ADR) Mechanisms: Challenges and Opportunities

UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002 (United Nations 2002). Available at

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html

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

United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at:

<http://treaties.un.org/doc/Publication/CTC/uncharter.pdf>

Wendy K., “It’s Arbitration, But Not As We Know It: Reflections on Family Law Dispute Resolution,” *International Journal of Law, Policy and the Family*, Volume 30, Issue 1, 1 April 2016, pp. 1–31, <https://doi.org/10.1093/lawfam/ebv017>

What is Alternative Dispute Resolution (ADR)? - African Mediation and Community Service.

Available at <http://www.metros.ca/amcs/international.htm>.