Utilising Alternative Dispute Resolution Mechanisms to Manage Commercial Disputes

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Abstract

Commercial disputes that arise in the course of doing business are inevitable. However, owing to their special nature and the parties involved, litigation often presents insurmountable challenges making it inappropriate as a choice mechanism for addressing such disputes. On the other hand, Alternative Dispute Resolution Mechanisms (ADR) present opportunities due to their perceived advantages over litigation. This paper critically discusses the place of ADR mechanisms in management of commercial disputes in Kenya.

1. Introduction and Background

Commercial disputes often arise between the parties and are indeed considered inevitable by the international business community.[1] Notably, there are various areas of commercial law in Kenya that are governed by different legislation. However, apart from the statutes that act as a source of commercial law, Kenya has ratified a number of international conventions, model laws, among others, which acquire the force of law under 2010 Constitution of Kenya[2] once ratified, except model laws which only provide guidelines, and they influence how commercial transactions and disputes are handled. It is however worth pointing out that some of the national statutes are silent on dispute management while others provide for litigation before national courts.

Informal dispute resolution has its roots in many of the world's societies.[3] For instance, regionally most African countries still hold onto customary laws under which the application of traditional dispute resolution mechanisms is common. It has been observed that throughout Africa the traditions have, since time immemorial, emphasized harmony/togetherness over individual

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[1] See Fischer, R.D. and Haydock, R.S., "International Commercial Disputes Drafting an Enforceable Arbitration Agreement." *William Mitchell Law Review* 21, no. 3 (1996): 942-987, at 942.
[2] See Article 2(5)(6); Treaty Making and Ratification Act, No. 45 of 2012, Laws of Kenya.
[3] Fischer, R.D. and Haydock, R.S., "International Commercial Disputes Drafting an Enforceable Arbitration Agreement," at 944.

interests and humanness expressed in terms such as *Ubuntu* in South Africa and *Utu* in East Africa. Such values have contributed to social harmony in African societies and have been innovatively incorporated into formal justice systems in the resolution of conflicts.[4]

This paper discusses how ADR can optimally be utilized to manage commercial disputes, essentially moving them from the courtroom to the boardroom.

The paper examines how negotiation, mediation, arbitration and other ADR mechanisms can be utilized to deal with commercial disputes in the boardroom rather than the courtroom.

2. Access to Justice in Kenya

The right of access to justice is one of the internationally acclaimed human rights which is considered to be basic and inviolable. It is guaranteed under various human rights instruments. Justice has been conceptualized as existing in at least four forms namely: Distributive justice (economic justice), which is concerned with fairness in sharing; Procedural justice which entails the principle of fairness in the idea of fair play; Restorative justice (corrective justice); and Retributive justice.[5] This arises from the idea that justice does not apply in a blanket form and what is considered as justice to one person may be different from another.

The term 'access to justice' has been widely used to describe a situation where people in need of help, find effective solutions available from justice systems which are accessible, affordable, comprehensible to ordinary people, and which dispense justice fairly, speedily and without discrimination, fear or favour and a greater role for alternative dispute resolution.[6] It refers to judicial and administrative remedies and procedures available to a person (natural or juristic)

[4] Mkangi K, *Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contexualised Paradigm for Examining Conflict in Africa*, Available at www.payson.tulane.edu; Ikenga K. E. Oraegbunam, The Principles and Practice of Justice in Traditional Igbo Jurisprudence, *African Journal Online*, p.53. Available at http://www.ajol.info/index.php/og/article/download/52335/40960 Accessed on 26th April, 2018.

[5] 'Four Types of Justice' Available at http://changingminds.org/explanations/trust/four_justice.htm [17/4/2018].

[6] M.T. Ladan, 'Access to Justice as A Human Right Under the Ecowas Community Law' A Paper Presented at: The Commonwealth Regional Conference On the Theme: - The 21st Century Lawyer: Present Challenges and Future Skills, Abuja, Nigeria, 8 – 11 APRIL, 2010.Available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=16&cad=rja&uact=8&ved=0CFcQFjAFOAo&url=http%3A%2F%2Fwww.abu.edu.ng%2Fpublications%2F2009-07- [Accessed on 17/4/2018].

aggrieved or likely to be aggrieved by an issue. It refers also to a fair and equitable legal framework that protects human rights and ensures delivery of justice.[7]

Although the concept of access to justice does not have a single universally accepted definition, usually the term is used to refer to opening up the formal systems and structures of the law to disadvantaged groups in society and includes removing legal and financial barriers, but also social barriers such as language, lack of knowledge of legal rights and intimidation by the law and legal institutions.[8]Access to justice is said to have two dimensions to it namely: procedural access (fair hearing before an impartial tribunal) and substantive justice (fair and just remedy for a violation of one's rights).[9]

The concept of 'access to justice' involves three key elements namely: Equality of access to legal services, that is, ensuring that all persons, regardless of means, have access to high quality legal services or effective dispute resolution mechanisms necessary to protect their rights and interests; National equity, that is, ensuring that all persons enjoy, as nearly as possible, equal access to legal services and to legal service markets that operate consistently within the dictates of competition policy; and Equality before the law, that is, ensuring that all persons, regardless of race, ethnic origins, gender or disability, are entitled to equal opportunities in all fields, use of community facilities and access to services.[10]

It has further been argued that in the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable.[11]It is noteworthy that access to justice is an essential component of rule of law. Rule of law has been said to be the foundation for both justice and security.[12] The United Nations Secretary-General (A/59/2005)[13] has been quoted as saying: "The protection and promotion of the

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[7] Ibid.
[8] Global Alliance Against Traffic in Women (GAATW), Available at http://www.gaatw.org/atj/ [Accessed on 17/4/2018]
[9] Ibid.
[10] Access to Justice Advisory Committee, *Access to justice: an action plan*, AGPS, Canberra, 1994. See also Schetzer, L. and Henderson, J., 'Access to Justice & Legal Needs: A project to identify legal needs, pathways and barriers for disadvantaged people in NSW', page 7, Background Paper, August 2002,
Available at www.lawfoundation.net.au/ljf/site/articleIDs/.../$file/bkgr1.pdf [Accessed on 21/4/2018]
[11] United Nations Development Programme, 'Access to Justice and Rule of Law'
Available at
http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_justice_law/
[Accessed on 21/4/2018]
[12] Ibid.
[13] Report of the *Secretary-General* on in larger freedom: towards development, security and human rights for all [A/*59/2005*].

universal values of the rule of law, human rights and democracy are ends in themselves. They are also essential for a world of justice, opportunity and stability."[14]

A comprehensive rule of law is said to be inclusive in that all members of a society must have equal access to legal procedures based on a fair justice system applicable to all. It promotes equality before the law and it is believed that rule of law is measured against the international law in terms of standards of judicial protection.[15] Furthermore, rule of law is said to encompass *inter alia*: a defined, publicly known and fair legal system protecting fundamental rights and the security of people and property; full access to justice for everyone based on equality before the law; and transparent procedures for law enactment and administration.[16]Therefore, without the rule of law, access to justice becomes a mirage. If the rule of law fails to promote the foregoing elements, then access to justice as a right is defeated.

Realization of the right of access to justice requires an effective legal and institutional framework not only internationally but also nationally. Access to justice can only be as effective as the available mechanisms to facilitate the same. It has been rightly noted that a right is not just the ability to do something that is among your important interests (whatever they are), but a guarantee or empowerment to actually do it, because it is the correct thing that you have this empowerment.[17]

It has been pointed out that among the most significant obstacles to rule of law are lack of infrastructure (i.e., the presence of legal institutions), high costs of advocacy, illiteracy and/or lack of information.[18] Any interference with the rule of law (in the context of promoting justice for all) greatly affects people's ability to access justice.

The challenges facing access to justice encompass: legal, institutional and structural challenges; Institutional and procedural obstacles; Social barriers; and practical and economic challenges.[19]

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[14] Ibid.

[15] Dag Hammarskjold Foundation, 'Rule of Law and Equal Access to Justice', page 1, Discussion Paper, January 2013. Available at http://www.sida.se/PageFiles/89603/RoL_Policy-paper-layouted-final.pdf [21/4/2018].

[16] Ibid.

[17] The Hendrick Hudson Lincoln-Douglas *Philosophical Handbook*, Version 4.0 (including a few Frenchmen), page 4, Available at http://www.jimmenick.com/henhud/hhldph.pdf [Accessed on 21/4/2018].

[18] Dag Hammarskjold Foundation, 'Rule of Law and Equal Access to Justice', op. cit. page 1; See also Ojwang', J. B. "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29: 29.

[19] Access to Justice–Concept Note for Half Day General Discussion Endorsed by the Committee on the Elimination of Discrimination against Women at its 53rd Session, page 9. Available at

Closely related to these are high court fees, geographical location, complexity of rules and procedure and the use of legalese.[20]

Justice has for the longest time been perceived to be a privilege reserved for a select few in society, who had the financial ability to seek the services of the formal institutions of justice. This is because many people have always taken litigation to be the major conflict management channel widely recognized under the laws as a means to accessing justice. The absence of an efficient system to facilitate the rule of law also contributes to this situation as people are usually out of touch with the existing legal and institutional frameworks on access to justice.[21]

The concept of 'access to justice' involves three key elements namely: E*quality of access to legal services*, *national equity* and *equality before the law* (emphasis ours).[22] Equality of access to legal services, means ensuring that all persons, regardless of means, have access to high quality legal services or effective dispute resolution mechanisms necessary to protect their rights and interests.[23] National equity is ensuring that all persons enjoy, as nearly as possible, equal access to legal services and to legal service markets that operate consistently within the dictates of competition policy.[24] Equality before the law means ensuring that all persons, regardless of race, ethnic origins, gender or disability, are entitled to equal opportunities in all fields, use of community facilities and access to services.[25] A framework that does not guarantee these may therefore not facilitate access to justice.

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http://www.ohchr.org/Documents/HRBodies/CEDAW/AccesstoJustice/ConceptNoteAccessToJustice.pdf [21/4/2018]

[20]*Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the Judiciary in the new Constitution*, ICJ Kenya, Vol. III, May, 2002; See also Kariuki Muigua, *Avoiding Litigation through the Employment of Alternative Dispute Resolution*, pp 6-7, a Paper presented by the author at the In-House Legal Counsel, Marcus Evans Conference at the Tribe Village Market Hotel, Kenya on 8th& 9th March, 2012.
Available at http://www.chuitech.com/kmco/attachments/article/101/Avoiding.pdf [21/4/2018].

[21] See Toope, S. J., "Legal and Judicial Reform through Development Assistance: Some Lessons", McGill *Law Journal / Revue De Droit De McGill*, [Vol. 48, 2003] , pp. 358-412, p. 358.Available at http://pdf.aminer.org/000/266/603/bringing_it_support_for_legislative_drafting_one_step_further_from.pdf[Accessed on 21/4/2018].

[22] Access to Justice Advisory Committee, *Access to justice: an action plan*, AGPS, Canberra, 1994. See also Schetzer, L. and Henderson, J., 'Access to Justice & Legal Needs: A project to identify legal needs, pathways and barriers for disadvantaged people in NSW', p.7, Background Paper, August 2002,
available at www.lawfoundation.net.au/ljf/site/articleIDs/.../$file/bkgr1.pdf [Accessed on 24/04/2018].

[23] Ibid.

[24] Ibid.

[25] Ibid.

3. Management of Commercial Dispute Management in Kenya

A number of mechanisms and forums are provided for within the Kenyan law and adopted international legal instruments for the management of commercial disputes.

The *Arbitration Act, 1995* provides for domestic arbitration and international arbitration of mainly commercial nature.[26]

The *Investment Disputes Convention Act*[27] was enacted to give legal sanction to the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of other States. Section 1 of the Act adopts *Article* 1 of the ICSID Convention which established the International Centre for Settlement of Investment Disputes whose purpose is provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of the Convention.

The *Consumer Protection Act, 2012*[28]was enacted to provide for the protection of the consumer prevent unfair trade practices in consumer transactions and to provide for matters connected with and incidental thereto. One of the purposes of this Act is to promote and advance the social and economic welfare of consumers in Kenya by providing a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions.[29]

The Consumer Protection Act also provides for class proceedings and states that a consumer may commence a proceeding on behalf of a class of persons or may become a member of such class of persons in a proceeding in respect of a dispute arising out of a consumer agreement despite any term or acknowledgment in the consumer agreement or other agreement that purports to prevent or has the effect of preventing the consumer from commencing or becoming a member of a class proceeding.[30] In addition, when a dispute that may result in a class proceeding arises, the consumer, the supplier and any other person involved in it may agree to resolve the dispute using any

[26] Arbitration Act, 1995, sec. 3(2)(3).
[27] Investment Disputes Convention Act, Cap 522, No. 31 of 1966, Laws of Kenya.
[28] No. 46 of 2012, Laws of Kenya.
[29] Sec. 3(4) (g), *Consumer Protection Act, 2012.*
[30] Sec. 4(1), *Consumer Protection Act, 2012.*

procedure that is available in law.[31] A settlement or decision that results from the procedure agreed to under subsection (2) should be binding on the parties.[32]

The Consumer Protection Act 2012 however provides that 'any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the High Court given under this Act.'[33] It also provides that 'despite subsection (1), after a dispute over which a consumer may commence an action in the High Court arises, the consumer, the supplier and any other person involved in the dispute may agree to resolve the dispute using any procedure that is available in law'.[34] 'A settlement or decision that results from the procedure agreed to under subsection (2) is as binding on the parties as such a settlement or decision would be if it were reached in respect of a dispute concerning an agreement to which this Act does not apply'.[35]

The Act also established[36] the Kenya Consumers Protection Advisory Committee whose functions include, *inter alia:* creating or facilitating the establishment of conflict resolution mechanisms on consumer issues, investigation of any complaints received regarding consumer issues, and where appropriate, referring the complaint to the appropriate competent authority and ensuring that action has been taken by the competent authority to whom the complaint has been referred; and working in consultation with the Chief Justice, County governors and other relevant institutions on the establishment of dispute resolution mechanisms[37].

The *Tax Procedures Act, 2015*[38] was enacted to harmonise and consolidate the procedural rules for the administration of tax laws in Kenya, and for connected proposes. The Act allows out of court or tribunal settlement of tax disputes and provides that 'where a Court or the Tribunal permits the parties to settle a dispute out of Court or the Tribunal, as the case may be, the settlement shall be made within ninety days from the date the Court or the Tribunal permits the settlement'.[39]

[31] Sec. 4(2), *Consumer Protection Act, 2012.*
[32] Sec. 4(3), *Consumer Protection Act, 2012.*
[33] Sec. 88(1), *Consumer Protection Act, 2012.*
[34] Sec. 88(2), *Consumer Protection Act, 2012.*
[35] Sec. 88(3), *Consumer Protection Act, 2012.*
[36] Sec. 89(1), *Consumer Protection Act, 2012.*
[37] Sec. 90(f)(g), *Consumer Protection Act, 2012.*
[38] No. 29 of 2015, Laws of Kenya.
[39] Sec. 55(1), *Tax Procedures Act, 2015*.

Where parties fail to settle the dispute within the period specified in subsection (1), the dispute should be referred back to the Court or the Tribunal that permitted the settlement.[40]

These are some of the statutes that govern domestic commercial matters in the country and they demonstrate that they envisage the use of both litigation and ADR mechanisms in addressing commercial disputes and related matters. However, in Kenya, access to justice has been greatly hampered by the fact that most disputes, especially those of commercial nature take a long time to be resolved by the court system.

3.1 Settlement of Commercial Disputes through Litigation

It has been argued that if parties do not expressly choose an alternative dispute resolution method in a transaction or agreement, then they impliedly select litigation to resolve any disputes.[41] Litigation however does not guarantee fair administration of justice due to a number of challenges related to access to justice. These include high court fees, geographical location, complexity of rules and procedure and the use of legalese.[42] In commercial disputes, there is also the problem of differing legal systems.

The court's role is also considered 'dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves'.[43] Conflict management through litigation can take years before the parties can get justice in their matters due to the formality and resource limitations. Litigation is so slow and too expensive and it may at times lose the commercial and practical credibility necessary in the corporate world.[44] Litigation should however not be entirely

[40] Sec. 55(2), *Tax Procedures Act, 2015*.
[41] See Fischer, R.D. and Haydock, R.S., "International Commercial Disputes Drafting an Enforceable Arbitration Agreement," at 944.
[42]*Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the Judiciary in the new Constitution*, ICJ Kenya, Vol. III, May, 2002; See also Kariuki Muigua, *Avoiding Litigation through the Employment of Alternative Dispute Resolution*, pp 6-7, a Paper presented by the author at the In-House Legal Counsel, Marcus Evans Conference at the Tribe Village Market Hotel, Kenya on 8th & 9th March, 2012.
Available at http://www.chuitech.com/kmco/attachments/article/101/Avoiding.pdf [15/05/2018].
[43] Jackton B. Ojwang, "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," Op cit.
[44] Ibid, p. 7; See also Patricia Kameri Mbote et al., *Kenya: Justice Sector and the Rule of Law*, Discussion Paper, A review by AfriMAP and the Open Society Initiative for Eastern Africa, March 2011, Available at

condemned as it comes in handy for instance where an expeditious remedy in the form of an injunction is necessary. Criminal justice in some of the very serious cases may also be achieved through litigation especially where the cases involved are very serious. Litigation is associated with the following advantages: the process is open, transparent and public; it is based on the strict, uniform compliance with the law of the land; determination is final and binding (subject possibly to appeal to a higher court).[45] However, the many shortcomings associated with litigation means that it should not be the only means of access to justice especially where parties wish for expeditious results and at times continued working relations Litigation is not a process of solving problems; it is a process of winning arguments.[46]

However, if parties in a commercial dispute were to engage in litigation, there are likely to be losses in terms of the direct cost on business, eroded public confidence, low morale, among others. They therefore try as much as possible to avoid the adverse publicity that may come with institution or involvement in a lawsuit. This therefore makes ADR an important part of management of commercial disputes. Whether formally or informally, business partners have thus always negotiated, mediated and arbitrated their disputes.

3.2 Managing Commercial Disputes Through ADR Mechanisms: Legal and Institutional Framework on ADR Mechanisms in Kenya

In the past, litigation has been the major conflict management channel widely recognised under our laws as a means to accessing justice. As recognition of the challenges associated with litigation, the Constitution under article 159 now provides that alternative forms of dispute resolution including reconciliation, mediation, arbitration and Traditional Dispute Resolution Mechanisms should be promoted as long as that they do not contravene the Bill of Rights and are not repugnant to justice or inconsistent with the Constitution or any written law.[47]

To facilitate this, it provides that in exercising judicial authority, the courts and tribunals are to be guided by the principles of *inter alia*: justice is to be done to all**,** irrespective of status; justice is

http://www.opensocietyfoundations.org/sites/default/files/kenya-justice-law-discussion-2011 Accessed on 27th April, 2013

[45] Chartered Institute of Arbitrators, Litigation: Dispute Resolution, Available at http://www.ciarb.org/dispute-resolution/resolving-a-dispute/litigation Accessed on 27th April, 2013

[46] Advantages & Disadvantages of Traditional Adversarial Litigation, Available at http://www.beckerlegalgroup.com/a-d-traditional-litigation Accessed on 27th April, 2013

[47] Article 159(3)

not to be delayed; alternative forms of dispute resolution including *reconciliation, mediation, arbitration and traditional dispute resolution mechanisms* are to be promoted, subject to clause (3)[48] (emphasis added); justice is to be administered without undue regard to procedural technicalities; and the purpose and principles of this Constitution are to be protected and promoted.[49]

Alternative dispute resolution refers to all those decision-making processes other than litigation including but not limited to negotiation, enquiry, mediation, conciliation, expert determination, arbitration and others.[50] One of the major reasons that Alternative Dispute Resolution Mechanisms (ADR) found their way into the current Constitution of Kenya 2010 was to expand channels through which justice, which was largely perceived to be a privilege reserved for a select few who had the financial ability to seek the services of the formal institutions of justice, could be dispensed to all without discrimination.

The Constitution of Kenya guarantees the right of every person access justice.[51] Access to justice also includes the use of informal conflict management mechanisms such as ADR and traditional dispute resolution mechanisms, to bring justice closer to the people and make it more affordable.[52] ADR mechanisms mainly consist of negotiation, conciliation, mediation, arbitration and a series of hybrid procedures. The Constitution of Kenya 2010 also recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.[53] The traditions, customs and norms of a particular community have always played a pivotal role in conflict resolution and they were highly valued and adhered to by the members of the community.[54]

Article 159 (1) of the Constitution provides that judicial authority is derived from the people and is vested and exercised by courts and tribunals established under the constitution. In exercise of

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[48] Art. 159(3 "*Traditional dispute resolution mechanisms shall not be used in a way that—(a) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with this Constitution or any written law*."

[49] Art. 159(2).

[50] See also *Alternative Dispute Resolution*.
Available at http://www.law.cornell.edu/wex/alternative_dispute_resolution [accessed on 07th March, 2014]

[51] Art. 48.

[52] See Muigua, K. and Kariuki F., 'ADR, Access to Justice and Development in Kenya'. Paper Presented at Strathmore Annual Law Conference 2014 held on 3rd& 4th July, 2014 at Strathmore University Law School, Nairobi.

[53] Art. 11(1).

[54] Muigua, K., *Resolving Conflicts through Mediation in Kenya, op. cit.*, p. 35.

that authority, the courts and tribunals are to ensure that justice is done to all, is not delayed and that it is administered without undue regard to procedural technicalities.[55]

Article 159(1) echoes the right of all persons to have access to justice and also reflects the constitutional spirit of every person's equality before the law and the right to equal protection and equal benefit of the law.[56]

For this constitutional right of access to justice to be realized, there has to be a framework based on the principles of: *expedition*; *proportionality*; *equality of opportunity*; *fairness of process*; *party autonomy*; *cost-effectiveness*; *party satisfaction* and *effectiveness of remedies*(emphasis ours).[57]

Recognition of ADR and traditional dispute resolution mechanisms is thus predicated on these cardinal principles to ensure that everyone has access to justice (whether in courts or in other informal fora) and conflicts are to be resolved expeditiously and without undue regard to procedural hurdles that bedevil the court system.[58]

a. Negotiation

Negotiation is considered the most basic dispute resolution mechanism with parties having autonomy over the process of reaching a mutually acceptable decision without assistant from third parties. Negotiation is one of the mechanisms that bring about conflict resolution and are non-coercive in that the parties have autonomy about the forum, the process, the third parties involved and the outcome. Non-coercive methods allow parties to work through their conflict, address its underlying causes, and reach a resolution to that conflict. Resolution means that the conflict has been dealt with and cannot re-emerge later.[59]

Within negotiations disputants meet to discuss mutual or opposing interests despite the parties having equal or unequal powers to reach a win-win solution. Negotiation is the first step to

[55] Article 159(2) (d).
[56] Article 27.
[57] See Maiese, M., "*Principles of Justice and Fairness,*" in Burgess, G. and Heidi Burgess, H. (Eds.) "Conflict Information Consortium", *Beyond Intractability,* University of Colorado, Boulder (July 2003).
[58] Muigua, K., *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, p. 6. Available at http://www.kmco.co.ke/attachments/article/111/Paper%20on%20Article%20159%20Traditional%20Dispute%20Resolution%20Mechanisms%20FINAL.pdf [21/4/2018]
[59]Cloke, K., "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005.

mediation. The negotiation phase is the one during which the parties hammer out an agreement, or even agree to disagree and it is during this stage that the core issues of the conflict are negotiated or bargained.[60]

The aim of negotiation is to harmonize the interests of the parties concerned amicably. This mechanism involves the parties themselves exploring options for resolution of the dispute without involving a third party. In this process, there is a lot of back and forth communication between the parties in which offers for settlement are made by either party. If agreed upon by the other party, the dispute is deemed to have been resolved amicably.

There are two extreme styles of negotiating; there is what is referred to as the competitive bargaining or hard bargaining style and there is the co-operative bargaining style or soft negotiating.[61]

The competitive negotiators are so concerned with the substantive results that they advocate extreme positions. They create false issues, they mislead the other negotiator, they even bluff to gain advantage. It is rare that they make concessions and if they do, they do so arguably, they may even intimidate the other negotiator.[62]

Cooperative negotiators are more interested in developing a relationship based on trust and cooperation they are therefore more prepared to make concessions on substantive issues in order to preserve that relationship.[63]

Negotiations between parties in commercial disputes can go a long way in pre-empting a full-fledged dispute by helping parties resolve them before they become too complicated.

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[60] Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), p. 115.
[61] Ogilvie, J.R. and Kidder, D.L., "What about negotiator styles?" *International Journal of Conflict Management* 19, no. 2 (2008): 132-147.
[62] McKibben, H.E., "Negotiator Discretion and Winning Concessions in International Negotiations: The Case of EU Decision-Making,"
available at http://wp.peio.me/wp-content/uploads/PEIO9/102_80_1443221726199_McKibben25092016.pdf
[63] 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; Maiese, M., "Negotiation: What is Negotiation?" October 2003. Available at
https://www.beyondintractability.org/essay/negotiation

Negotiation leads to mediation in the sense that the need for mediation arises after the conflicting parties have attempted negotiation but have reached a deadlock.[64]

b. Mediation

Mediation is a voluntary, informal, consensual, strictly confidential and non-binding dispute resolution process in which a third party helps the parties to reach a negotiated solution.[65] It is also defined as a method of conflict management where conflicting parties gather to seek solutions to the conflict, with the assistance of a third party who facilitates discussion and the flow of information, and thus aiding in the processes of reaching an agreement.[66] Mediation allows parties to have autonomy over the choice of the mediator, the process and the outcome. The process is also 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.[67]

The central quality of mediation is its capacity to reorient the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship.[68] In conflict resolution processes like mediation, the goal, then, is not to get parties to accept formal rules to govern their relationship, but to help them to free themselves from the encumbrance of rules and to accept a relationship of mutual respect, trust, and understanding that will enable them to meet shared contingencies without the aid of formal prescriptions laid down in advance.[69]

The salient features of mediation are that it emphasizes on interests rather than (legal) rights and it can be cost - effective, informal, private, flexible and easily accessible to parties to conflicts. These features are useful in upholding the acceptable principles of justice: *expedition*;

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[64] Makumi, M., *Conflict in Africa: Theory Processes and Institutions of Management.* Op.cit. p. 15.
[65]Fenn, P., "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, *Workbook on Mediation*, (CIArb, London, 2002), p. 10.
[66]Bercovitch, J., "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution,* Vol.7.289, p. 290.
[67] Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006); See also See generally Muigua, K., "Resolving Environmental Conflicts through Mediation in Kenya" Ph.D. Thesis, 2011, *Unpublished,* University of Nairobi.
[68] Fuller, L.L., *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971) [Quoted in Ray, B., 'Extending The Shadow of the Law: Using Hybrid Mechanisms to Develop Constitutional Norms in Socio-economic Rights Cases' *Utah Law Review,* (2009) [NO. 3] op. cit. pp. 802-803]
[69] Ibid.

proportionality; *equality of opportunity*; *fairness of process*; *party autonomy*; *cost-effectiveness*; *party satisfaction* and *effectiveness of remedies (*emphasis ours), thus making mediation a viable process for the empowerment of the parties to a conflict.[70]

The biggest advantage of mediation has been identified as its ability to ensure that the entire process is strictly confidential. In addition, mediation saves time and financial and emotional cost of resolving a dispute, thereby, leads to reestablishment of trust and respect among the parties.[71]
Court Annexed Mediation is also taking root in the country, especially with the fairly successful Judiciary pilot project on Court Annexed Mediation, which commenced on 4th April, 2016 at the Family Division and Commercial and Admiralty Division of the High Court in Nairobi. The Pilot Project was entrusted to the following bodies: Mediation Accreditation Committee (MAC)[72]; Alternative Dispute Operationalization Committee (AOC)[73]; and the Secretariat (Technical Working Group (TWG)[74]). The pilot project was mainly introduced as a mechanism to help address the backlog of cases in Kenyan court. Case backlog is arguably one of the indicators used to assess the quality of a country's judicial system.[75]
Mediation has been applied in resolving a wide array of commercial disputes. It works just like negotiation only that it has a third party who helps parties negotiate their needs and interests.

[70] See generally Muigua, K., "Resolving Environmental Conflicts through Mediation in Kenya" Ph.D Thesis, 2011, *Unpublished.*
[71] *S.B.Sinha," ADR and Access to Justice: Issues and Perspectives,"* p.13.
Available at http://www.tnsja.tn.nic.in/article/ADR-%20SBSinha.pdf
[72] The Mediation Accreditation Committee (MAC) is a committee established under section 59A of the Civil Procedure Act, Cap 21, Laws of Kenya. The functions of the Committee include, inter alia, to determine the criteria for certification of mediators, propose rules for certification, maintain a register of qualified mediators, enforce the code of ethics and establish appropriate training programmes for mediators (Sec. 59A (4), Civil Procedure Act, Cap 21, Laws of Kenya).
[73] The Alternative Dispute Resolution Operationalization Committee (AOC) oversees the implementation of the Court Annexed Mediation project. It meets regularly to review the progress of the project, makes recommendations and formulates policies on how to guide the project. AOC was instrumental in the development of the Mediation Manual.
[74] CAMP has a secretariat which also doubles up as the Technical Working Group (TWG). The TWG is charged with the day to day running of the project. The team consists of 3 MDRs, MAC Registrar, 1 Communication specialist, an Interim Program Manager and 2 Program Officers, 2 Mediation Clerks, 2 Executive Assistants and 4 Interns.
[75] Alicia Nicholls, *Alternative Dispute Resolution: A viable solution for reducing Barbados' case backlog?* , page 1, Available at http://www.adrbarbados.org/docs/ADR%Nicholls [Accessed on 21/4/2018]

c. Arbitration in Commercial Disputes

Arbitration is a dispute settlement mechanism where a third party neutral (known as an arbitrator) is appointed by the parties or an appointing authority to determine the dispute and give a final and binding award.[76]

Scholars have rightly observed that the growth in international commercial arbitration has been fueled mainly by globalization and the impracticability of traditional justice systems, effectively driving governments and businesses from around the world to embrace arbitration as an efficacious way of handling international commercial disputes.[77] Other factors contributing to its growth include the tremendous expansion of international commerce and the recognition of a global economy, as well as a corresponding growth in the availability of institutions experienced in handling arbitration and other forms of ADR, providing a practical alternative to litigation.[78]

Arbitration in Kenya is governed by the *Arbitration Act*, 1995 as amended in 2009, the Arbitration Rules, the *Civil Procedure Act* (Cap. 21) and the *Civil Procedure Rules* 2010. Section 59 of the *Civil Procedure Act* provides that all references to arbitration by an order in a suit, and all proceedings there under, shall be governed in such manner as may be prescribed by rules. Order 46 of the *Civil Procedure Rules*, inter alia, provides that at any time before judgment is pronounced, interested parties in a suit who are not under any disability may apply to the court for an order of reference wherever there is a difference. Institutional Rules are also used in guiding the arbitrators as they carry out their work.

It has also been argued that the greatest advantage of arbitration is that it combines strength with flexibility. Strength because, it yields enforceable decisions and is backed by judicial framework which, in the last resort, can call upon the coercive powers of the state. Flexible because it allows the contestants to choose the procedure which fit nature of the dispute and the business

[76] Zekos, G.I., "Arbitration as a Dispute Settlement Mechanism Under UNCLOS, the Hamburg Rules, and WTO." *J. Int'l Arb.* 19 (2002): 497; 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).
[77] Fischer, R.D. and Haydock, R.S., "International Commercial Disputes Drafting an Enforceable Arbitration Agreement," at 945.
[78] Fischer, R.D. and Haydock, R.S., "International Commercial Disputes Drafting an Enforceable Arbitration Agreement," at 947.

context in which it occurs.[79] However, a few challenges associated with the way arbitration is conducted have been identified: traditional adversarial system is run in arbitration proceedings; proceedings are delayed as both parties take lot of time presenting their submissions; the cost of arbitration is much more than the other ADR processes, thereby, it does not attract the poor litigants; and the participatory role of the parties are neglected as the submissions are mode by the party counsel.[80]

Its advantages are that parties can agree on an arbitrator to determine the matter; the arbitrator has expertise in the area of dispute; any person can represent a party in the dispute; flexibility; cost-effective; confidential; speedy and the result is binding. Proceedings in Court are open to the public, whereas proceedings in commercial arbitration are private, accordingly the parties who wish to preserve their commercial secrets may prefer commercial arbitration.[81]

In disputes involving parties with equal bargaining power and with the need for faster settlement of disputes, especially business related, arbitration offers a viable vehicle among the ADR mechanisms to facilitate access to justice. Arbitration can be useful in helping parties take control of their disputes and help in saving costs, time and emotional stress that may come with courts. However, arbitration, as practised today still requires courts for enforcement of awards.[82]

Arbitration is a process subject to statutory controls, whereby formal disputes are determined by a private tribunal of the parties' choosing. A third party neutral is appointed by the parties or an appointing authority to determine the dispute and give a final and binding award.[83]

As far as setting up world class arbitration centres around Africa is concerned, Kenya set up the Nairobi Centre for International Arbitration (NCIA) as established under the *Nairobi Centre for International Arbitration Act*, 2013[84]. Its functions are set out in the Act as *inter alia* to: to promote, facilitate and encourage the conduct of international commercial arbitration in accordance with this 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

[79] *S.B.Sinha," ADR and Access to Justice: Issues and Perspectives,"* p.12.
Available at http://www.tnsja.tn.nic.in/article/ADR-%20SBSinha.pdf [Accessed on 13/5/2018]
[80] Ibid., pp.12-13.
[81] Muigua, K., *Settling Disputes Through Arbitration in Kenya.* (Glenwood Publishers Ltd, Nairobi, 2012).
[82] S. 36, Arbitration Act, No. 4 of 1995 (2009), Laws of Kenya. Government Printer, Nairobi.
[83] R. Stephenson, *Arbitration Practice in Construction Disputes*, (Butterworths, London, 1998), p.123.
[84] No. 26 of 2013, Laws of Kenya (Government Printer, 2013, Nairobi, Kenya).

resolution process of choice; to develop rules encompassing conciliation and mediation processes; to organize international conferences, seminars and training programs for arbitrators and scholars; and to coordinate and facilitate, in collaboration with other lead agencies and non-state actors, the formulation of national policies, laws and plans of action on alternative dispute resolution and facilitate their implementation, enforcement, continuous review, monitoring and evaluation.[85]

Courts have indeed affirmed the place of ADR and especially arbitration in management of commercial disputes due to its advantages over litigation, by observing that '*Kenya ratified the United Nations Commission on International Trade Law (UNCITRAL Model Law) which obligates courts to uphold the principle of party autonomy in resolving commercial disputes. The essence of the principle of party autonomy is that, where parties to a contract have consensually and in unequivocal terms provided for the forum through which to resolve their disputes, the courts are obligated to give effect to that choice of forum of dispute resolution*' (emphasis added).[86] This was also the case in the Court of Appeal decision in *Nyutu Agrovet Ltd Vs Airtel Networks Limited (2015) eKLR* where the Court reaffirmed the supremacy of the principle of party autonomy in the resolution of commercial disputes and the limited role of courts in the following words:- "*Our Section 10 is based on the United Nations Model Law on arbitration and all countries who have ratified it recognize and enforce the autonomy of the arbitral process. Courts of law can only intervene in the specific areas stipulated in the Act and in most cases that intervention is usually supportive and not obstructive or usurpation oriented. If the Kenyan courts refused to recognize this autonomy, we would become a pariah state and would be isolated internationally*."[87]

This is a commendable step towards entrenching arbitration and other ADR mechanisms as choice platforms for management of commercial disputes in Kenya.

d. **Conciliation**

Conciliation is a process in which a third party, called a conciliator, restores damaged relationships between disputing parties by bringing them together, clarifying perceptions and

[85] Sec. 5, *Nairobi Centre for International Arbitration Act*, 2013.
[86] Mungai Ngaruiya & 8 others v Maha Properties Limited [2018] eKLR, Environment & Land Civil Suit 634 of 2017, para. 14.
[87] As quoted in Mungai Ngaruiya & 8 others v Maha Properties Limited [2018] eKLR, Environment & Land Civil Suit 634 of 2017, para. 14.

pointing out misperceptions. 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 is different from mediation in that the third party takes a more interventionist role in bringing the two parties together. Conciliation works well in labour disputes.[88] A conciliator who is more knowledgeable than the parties can help parties achieve their interests by proposing solutions, based on his technical knowledge that the parties may be lacking in. This may actually make the process cheaper by saving the cost of calling any other experts to guide them.

Conciliation and reconciliation can play a significant role in empowering parties to a dispute by giving them substantial control over the process.

e. Adjudication

Adjudication is an informal, speedy, flexible and inexpensive process where a neutral third party called the Adjudicator makes a rapid fair decision within disputes arising from contracts. It is preferred when there is power imbalance between the disputants and is suitable for construction disputes. The use of an adjudicator is found in a variety of standard forms of contract used in the construction industry. For instance, the International Federation of Consulting Engineers (FIDIC), *Conditions of Contract for Construction*: *for Building and Engineering Works Designed by the Employer*[89] and the *Conditions of Contract for Plant and Design Build: For Electrical and Mechanical Plant, and for Building and Engineering Works, Designed by the Contractor*[90], contemplate the use of adjudication in construction disputes and provide for a procedure that is widely used internationally. They allow parties incorporate a dispute adjudication agreement into their contract.

Adjudication in the construction industry has displayed certain characteristics. First, the adjudicator is a neutral individual who is not involved in the day to day running of the contract.

[88] International Labour Office, "Collective Dispute Resolution through Conciliation, Mediation and Arbitration: European and ILO Perspectives." *High–Level Tripartite Seminar on the Settlement of Labour Disputes through Mediation, Conciliation, Arbitration and Labour Courts*. Nicosia, Cyprus October 18th – 19th, 2007; S. 10 of the *Labour Relations Act*, No. 14 of 2007, Laws of Kenya.

[89] The International Federation of Consulting Engineers (FIDIC) *Conditions of Contract for Construction*: *for Building and Engineering Works Designed by the Employer* (First Edition, 1999, FIDIC).

[90] The International Federation of Consulting Engineers (FIDIC), *Conditions of Contract for Plant and Design Build: For Electrical and Mechanical* Plant*, and for Building and Engineering Works, Designed by the Contractor*, (First Edition, 1999, FIDIC).

He or she is neither an arbitrator, nor a State appointed Judge. Second, the adjudicator enjoys his or her powers by virtue of the agreement between the parties. Third, the adjudicator's decision is binding on the parties, and therefore, unlike mediation, the process does not require the co-operation of both parties. Fourth, Adjudicator's decisions are usually expressed as being binding until the end of the contract when either party may seek a review of the decision, most commonly by arbitration. Clause 20.4 of the *FIDIC Conditions of Contract for Construction* provides that if a dispute arises either party may refer it to a Dispute Adjudication Board (DAB), amicable settlement and arbitration as the dispute settlement avenues. However, a party dissatisfied by the decision of the Dispute Adjudication Board should first resort to amicable settlement before the commencement of arbitration.[91]

Notably, the *Small Claims Court Act*[92], although not yet operationalized, has provided for the use of adjudication in the formal court system. Section 5 of the Act provides that the Small Claims Court should be presided over by an adjudicator who should administer judicial justice through procedures that guarantee the timely disposal of all proceedings before the Court using the least expensive method. The adjudicator must ensure the equal opportunity to access judicial services under the Act, promote fairness of the process and simplicity of the procedure.

The Act also provides that in exercise of its jurisdiction under the Act the Court may, with the consent of the parties, adopt and implement any other appropriate means of dispute resolution for the attainment of the objective envisaged under section 3[93] of the Act.[94] Furthermore, the Court may adopt an alternative dispute resolution mechanism and should make such orders or issue such

[91] The International Federation of Consulting Engineers (FIDIC) *Conditions of Contract for Construction*, Clause 20.5.

[92] Small Claims Act, No 2 of 2016, Laws of Kenya.

[93] 3. (1) In exercise of its jurisdiction under this Act, Court shall be guided by the principles of judicial authority prescribed under Article 159(2) of the Constitution.

(2) The parties and their duly authorized representatives, as the case may be, shall assist the Court to facilitate the observance of the guiding principles set out in this section, to that effect, to participate in the proceedings of the Court and to comply with directions and orders of that Court.

(3) Without prejudice to the generality of subsection (1) the Court shall adopt such procedures as the Court deems appropriate to ensure -

(a) the timely disposal of all proceedings before the Court using the least expensive method;

(b) equal opportunity to access judicial services under this Act;

(c)fairness of process; and

(d) simplicity of procedure.

[94] Sec. 18(1), Small Claims Act, 2016.

directions as may be necessary to facilitate such means of dispute resolution.[95] Any agreement reached by means of an alternative dispute resolution mechanism should be recorded as a binding order of the Court.[96]

While the operationalization of this Act is meant to boost the development of adjudication in the dispensation of commercial justice[97], some of the stakeholders have expressed concerns over the nature of adjudication process envisaged under the Small Claims Court Act 2016.[98] Notably, the Act has not defined what is meant by 'adjudication' in its usage under the Act. The Act seems to envisage an inquisitorial type of process that may not sit very well with the general practice in adjudication processes.[99] Also, of concern would be the nature of qualifications required under section 5 thereof for one to be appointed as an adjudicator. The Act provides that 'a person shall be qualified for appointment as an Adjudicator if that person— is an advocate of the High Court of Kenya; and has at least three years' experience in the legal field. There is no mention of any special qualifications as an adjudicator. Arguably, this may deny the process the advantage of being administered by a qualified adjudicator in line with the conventional adjudication procedures and practice.

The Act may thus require review for the above issues to be revisited in line with the general philosophy guiding adjudication processes.

[95] Sec. 18(2), Small Claims Act, 2016.
[96] Sec. 18(3), Small Claims Act, 2016.
[97] Section 12 of this Act sets out the jurisdiction of the small claims courts to include matters arising from contract for sale and supply of goods or services; a contract relating to money held and received; liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property; compensation for personal injuries; and set-off and counterclaim under any contract. Further, these courts may exercise any other civil jurisdiction as may be conferred under any other written law provided that the pecuniary jurisdiction of the Court shall be limited to limited to two hundred thousand shillings.
[98] For instance, comments by Justice Richard Mwongo, during a validation workshop for IDLO Baseline Survey Report on ADR in Kenya, June 2018.
[99] Sec. 19. (1) A Court may, of its own motion or at the request of any party, summon any witness and require the production of any document, record, books of accounts or other thing, which is relevant in any proceedings.
(2) The Court shall inquire into any matter which it may consider relevant to a claim, whether or not a party has raised it.

4. Moving from the Courtroom to the Boardroom: ADR as a Tool for Access to Justice in Commercial Disputes in Kenya

Commercial and 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.[100] The recognized international arbitral institutions were initially based in Europe, but in recent years, there has been considerable growth of such institutions throughout the world. Some recent examples are China, Russia, India, Singapore and Dubai. International trade and commerce is enhanced by the growth of these institutions.[101]

In the face of globalization, the need for effective and reliable mechanisms for management of commercial disputes as well as other general disputes involving parties from different jurisdictions has therefore not only become desirable but also invaluable.[102]

Arbitration, and in some instances, mediation, have thus gained popularity over time as the choice approaches to conflict management especially by the business community due to their obvious advantages over litigation. 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.[103] ADR mechanisms are seen as viable for conflicts management because of their focus on the interests and needs of the parties to the conflict as opposed to positions, which is emphasized by common law and statutory measures on disputes and conflicts management.[104] ADR mechanisms can be flexible, cost-effective, expeditious; may foster relationships; are non-

[100] "Africa ADR – a new African Arbitration Institution", available at http://www.lexafrica.com/news-africa-adr-a-new-african-arbitration-institution [Accessed on 21/4/2018]
[101] "Africa ADR – a new African Arbitration Institution", available at http://www.lexafrica.com/news-africa-adr-a-new-african-arbitration-institution [Accessed on 21/4/2018].
[102] *Alternative Dispute Resolution Methods,* Document Series No. 14, p. 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 [21/4/2018]
[103] Baert, P.R., "The Potential of Online Arbitration (Oarb) In Resolving Disputes at The Lower End of Value," 2017. Available at https://lib.ugent.be/fulltxt/RUG01/002/349/376/RUG01-002349376_2017_0001_AC.pdf; Keohane, Robert O., Andrew Moravcsik, and Anne-Marie Slaughter. "Legalized Dispute Resolution: Interstate and Transnational." *International Organization* (2000): 457-488.
[104] Idornigie, P.O., "Overview of ADR in Nigeria", 73 (1) *Arbitration* 73, (2007), p. 73.D.

coercive and result in mutually satisfying outcomes.[105] Countries and various regions around the world have thus embarked on promoting international arbitration as the best dispute settlement approach in international disputes.[106]

International commercial arbitration institutions are the link between those who invest in Africa, and those who trade in Africa when it comes to dispute management; between the business communities of Africa and abroad and between the international community[107]. Africa as a continent has not been quite at par with the rest of the world as far as international commercial arbitration is concerned.

The referral of African disputes to the European and Asian arbitral institutions for settlement is prohibitively expensive and unsatisfactory. However, it is imperative to note at the earliest that the importance of international commercial arbitration as a viable approach to international disputes has been recognized and basic structures/institutions for arbitration are being established across the continent.[108]

The business and investment community stands to benefit from international commercial ADR in Africa as the same provides an effetive system offering a proper mechanism for the settlement of international and regional disputes. The system would be 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.[109]

There is need for continued investment by arbitrators through acquiring relevant knowledge, skill and experience needed for international dispute resolution as well as putting in place relevant institutions with a global outlook. Institutions such as the Nairobi Centre for International Arbitration (NCIA) can go a long way in not only marketing Kenya as a friendly jurisdiction but

[105] Cloke, K., "The Culture of Mediation: Settlement vs. Resolution", The Conflict Resolution Information Source, Version IV, December 2005, Available at http://www.beyondintractability.org/bi-essay/culture-of-mediation.
[106] Karl P. Sauvant and Federico Ortino, *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*
[107] http://www.africaadr.com/ [Accessed on 12/4/2018]
[108] See Muigua, K., "Reawakening Arbitral Institutions for Development of Arbitration in Africa," in *Arbitration Institutions in Africa Conference*. 2015. Available at http://erepository.uonbi.ac.ke/bitstream/handle/11295/89958/Muigua_Reawakening%20arbitral%20institutions%20for%20development%20of%20arbitration.pdf?sequence=1
[109] Africa ADR – a new African Arbitration Institution, Op. Cit.

also helping in putting in place measures aimed at promoting the commercial use of ADR mechanisms such as negation, mediation, conciliation and arbitration. The functions of NCIA as envisaged under the *Nairobi Centre for International Arbitration Act 2013* and which are relevant to this obligation include but are not limited to: promote, facilitate and encourage the conduct of international commercial arbitration in accordance with this Act; administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices; coordinate and facilitate, in collaboration with other lead agencies and non-State actors, the formulation of national policies, laws and plans of action on alternative dispute resolution and facilitate their implementation, enforcement, continuous review, monitoring and evaluation; in collaboration with other public and private agencies, facilitate, conduct, promote and coordinate research and dissemination of findings on data on arbitration and serve as repository of such data; and educate the public on arbitration as well as other alternative dispute resolution mechanisms.[110]

Enhancing the capacity of the existing institutions as well as the having on record experienced practitioners will also go a long way in boosting the country's profile as a preferred destination for management of commercial disputes.

Concerted efforts from the various stakeholders to market the country is also required so as to attract investors as well as any other parties that may wish to utilize the country's international dispute resolution institutions to deal with their commercial disputes within and outside Africa.

There is also the need to enhance the capacity of various training institutions to meet the demand for ADR training in the country. There are still few institutions that train professional ADR practitioners in the country, the most significant ones being the Chartered Institute of Arbitrators (Kenya Chapter), Strathmore Dispute Resolution Centre and the Mediation Training Institute East Africa (MTI), which provide training on the various ADR mechanisms. These institutions cannot possibly meet the needs for training and therefore, more institutions ought to take up the training of ADR practitioners, including the middle level university colleges.

The Investment Climate Advisory Services of the World Bank Group while making their recommendations in their work ADR guidelines recommended that providing free ADR services could to an extent help in building up a culture of employment of ADR services in a society. They

[110] Sec. 5, Nairobi Centre for International Arbitration Act, No. 26 of 2013, Laws of Kenya.

observe that when first developing ADR services in a jurisdiction, stakeholders may consider providing the service for free to encourage parties to use the process. They further suggest that newly trained and enthusiastic ADR practitioners who want to be involved in the project may offer to do this for a while[111]. This, with proper infrastructure in place, could be tried as part of the legal aid programmes in place. However, the World Bank group also observes that if disputants become accustomed to receiving a service for free, it will be very difficult later to collect a fee for that service[112]. Therefore, this can only be done with very appropriate measures in place to decide when such services should be sought and by which class of people, such as the local business community.

An integrated approach to ADR legal and institutional framework with synergies across different sectors will also go a long way in deepening access to justice for commercial and non-commercial disputes in Kenya.

5. Conclusion

Alternative dispute resolution mechanisms can effectively be used in the administration of justice especially with regard to the commercial disputes. There is thus a need for continued investment and encouraging their use to enhance access to justice and the expeditious resolution of commercial disputes without undue regard to procedural technicalities.

The application of ADR to achieve a just and expeditious resolution of commercial disputes should be actively promoted since it is a very viable option for parties whose conflict's nature requires either specialized expertise or requires preservation of relationships.

ADR mechanisms can now be effectively applied in resolving a wide range of commercial disputes, and this can in turn improve trust in the country's legal system, which may increase foreign investment and the country's standing as far as expeditious settlement of commercial disputes is concerned.[113] Globally ADR is viewed as a commercial necessity that provides a range

[111]World Bank Group, *alternative dispute resolution guidelines*, page 44, Available at http://siteresources.worldbank.org/INTECA/Resources/15322_ADRG_Web.pdf]Accessed on 21/4/2018]

[112] Ibid

[113] Inessa Love, *Settling Out of Court: How Effective Is Alternative Dispute Resolution?* , page 1, The World Bank Group Financial and Private Sector Development vice presidency, october 2011. Available at

of advantages over litigation in resolving both domestic and international commercial disputes. ADR has thus become an important means for reducing domestic commercial disputes, and a critical means for attracting foreign direct investment (FDI).

There is need for the stakeholders in the commercial sector to proactively promote the use of Alternative Dispute Resolution in dealing with commercial disputes in Kenya, both domestic and international.

Utilising ADR for management of commercial disputes is a desirable move that can lead to better relations among business people, lowering of costs of doing business and generally improve the investment climate in the country.

References

'Four Types of Justice' Available at http://changingminds.org/explanations/trust/four_justice.htm [17/4/2018].

"Africa ADR – a new African Arbitration Institution", available at http://www.lexafrica.com/news-africa-adr-a-new-african-arbitration-institution [Accessed on 21/4/2018].

"Global Alliance Against Traffic in Women (GAATW)," Available at http://www.gaatw.org/atj/ [Accessed on 17/4/2018].

Access to Justice Advisory Committee, *Access to justice: an action plan*, AGPS, Canberra, 1994.

Access to Justice–Concept Note for Half Day General Discussion Endorsed by the Committee on the Elimination of Discrimination against Women at its 53rd Session, page 9. Available at

Advantages & Disadvantages of Traditional Adversarial Litigation, Available at http://www.beckerlegalgroup.com/a-d-traditional-litigation Accessed on 27th April, 2018.

Alicia Nicholls, *Alternative Dispute Resolution: A viable solution for reducing Barbados' case backlog?* Available at http://www.adrbarbados.org/docs/ADR%Nicholls [Accessed on 21/4/2018].

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

Arbitration Act, No. 4 of 1995 (2009), Laws of Kenya. Government Printer, Nairobi.

http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/282044-1307652042357/VP329-Sector [Accessed on 21/4/2018]

Baert, P.R., "The Potential of Online Arbitration (Oarb) In Resolving Disputes at The Lower End of Value," 2017. Available at https://lib.ugent.be/fulltxt/RUG01/002/349/376/RUG01-002349376_2017_0001_AC.pdf.

Bercovitch, J., "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution,* Vol.7, 289.

Chartered Institute of Arbitrators, Litigation: Dispute Resolution, Available at http://www.ciarb.org/dispute-resolution/resolving-a-dispute/litigation Accessed on 27th April, 2018.

Civil Procedure Act, Cap 21, Laws of Kenya.

Cloke, K., "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source,* Version IV, December 2005.

Consumer Protection Act, No. 46 of 2012, Laws of Kenya.

Dag Hammarskjold Foundation, 'Rule of Law and Equal Access to Justice', page 1, Discussion Paper, January 2013. Available at http://www.sida.se/PageFiles/89603/RoL_Policy-paper-layouted-final.pdf [21/4/2018].

Fenn, P., "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, *Workbook on Mediation,* (CIArb, London, 2002).

Fischer, R.D. and Haydock, R.S., "International Commercial Disputes Drafting an Enforceable Arbitration Agreement." *William Mitchell Law Review* 21, no. 3 (1996): 942-987.

Idornigie, P.O., "Overview of ADR in Nigeria", 73 (1) *Arbitration* 73, (2007).

Ikenga K. E. Oraegbunam, The Principles and Practice of Justice in Traditional Igbo Jurisprudence, *African Journal Online,* p.53. Available at http://www.ajol.info/index.php/og/article/download/52335/40960 Accessed on 26th April, 2018.

Inessa Love, *Settling Out of Court: How Effective Is Alternative Dispute Resolution?* The World Bank Group Financial and Private Sector Development vice presidency, O c t o b e r, 2 0 11. Available at http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/282044-1307652042357/VP329-Sector [Accessed on 21/4/2018].

International Labour Office, "Collective Dispute Resolution through Conciliation, Mediation and Arbitration: European and ILO Perspectives." *High–Level Tripartite Seminar on the Settlement of Labour Disputes through Mediation, Conciliation, Arbitration and Labour Courts*. Nicosia, Cyprus October 18th – 19th, 2007.

Investment Disputes Convention Act, Cap 522, No. 31 of 1966, Laws of Kenya.

Karl P. Sauvant and Federico Ortino, *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://ccsi.columbia.edu/files/2014/03/Improving-The-International-Investment-Law-and-Policy-Regime-Options-for-the-Future-Sept-2013.pdf [Accessed on 12/4/2018].

Keohane, Robert O., Andrew Moravcsik, and Anne-Marie Slaughter. "Legalized Dispute Resolution: Interstate and Transnational." *International Organization* (2000): 457-488.

Labour Relations Act, No. 14 of 2007, Laws of Kenya.

Ladan, M.T., 'Access to Justice as A Human Right Under the Ecowas Community Law' A Paper Presented at: The Commonwealth Regional Conference On the Theme: - The 21st Century Lawyer: Present Challenges and Future Skills, Abuja, Nigeria, 8 – 11 APRIL, 2010. Available at

Maiese, M., "*Principles of Justice and Fairness,"* in Burgess, G. and Heidi Burgess, H. (Eds.) "Conflict Information Consortium", *Beyond Intractability*, University of Colorado, Boulder (July 2003).

Mbote, P.K. and Akech, M., *Kenya: Justice Sector and the Rule of Law*, Discussion Paper, A review by AfriMAP and the Open Society Initiative for Eastern Africa, March 2011, Available at http://www.opensocietyfoundations.org/sites/default/files/kenya-justice-law-discussion-2011 Accessed on 27th April, 2018.

McKibben, H.E., "Negotiator Discretion and Winning Concessions in International Negotiations: The Case of EU Decision-Making," available at http://wp.peio.me/wp-content/uploads/PEIO9/102_80_1443221726199_McKibben25092016.pdf.

Mkangi K, *Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualized Paradigm for Examining Conflict in Africa*, Available at www.payson.tulane.edu.

Muigua, K. and Kariuki F., 'ADR, Access to Justice and Development in Kenya'. *Paper Presented at Strathmore Annual Law Conference 2014 held on 3rd & 4th July, 2014 at Strathmore University Law School, Nairobi*.

Muigua, K., "Reawakening Arbitral Institutions for Development of Arbitration in Africa," in *Arbitration Institutions in Africa Conference*. 2015. Available at http://erepository.uonbi.ac.ke/bitstream/handle/11295/89958/Muigua_Reawakening%20arbitral%20institutions%20for%20development%20of%20arbitration.pdf?sequence=1

Muigua, K., "Resolving Environmental Conflicts through Mediation in Kenya" Ph.D. Thesis, 2011, *Unpublished,* University of Nairobi.

Muigua, K., *Avoiding Litigation through the Employment of Alternative Dispute Resolution*, pp 6-7, a Paper presented by the author at the In-House Legal Counsel, Marcus Evans Conference at the Tribe Village Market Hotel, Kenya on 8th& 9th March, 2012.

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

Muigua, K., *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*. Available at https://profiles.uonbi.ac.ke/kariuki_muigua/publications/alternative-dispute-resolution-and-article-159-constitution

Mungai Ngaruiya & 8 others v Maha Properties Limited [2018] eKLR, Environment & Land Civil Suit 634 of 2017.

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

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

Ogilvie, J.R. and Kidder, D.L., "What about negotiator styles?" *International Journal of Conflict Management* 19, no. 2 (2008): 132-147.

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

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.

Maiese, M., "Negotiation: What is Negotiation?" October 2003. Available at https://www.beyondintractability.org/essay/negotiation.

Ray, B., 'Extending The Shadow of the Law: Using Hybrid Mechanisms to Develop Constitutional Norms in Socio-economic Rights Cases' *Utah Law Review*, (2009) [NO. 3].

Schetzer, L. and Henderson, J., 'Access to Justice & Legal Needs: A project to identify legal needs, pathways and barriers for disadvantaged people in NSW', Background Paper, August 2002.

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).

Sinha, S.B., "ADR and Access to Justice: Issues and Perspectives." Available at http://www.tnsja.tn.nic.in/article/ADR-%20SBSinha.pdf.

Small Claims Act, No 2 of 2016, Laws of Kenya.

Stephenson, R., *Arbitration Practice in Construction Disputes*, (Butterworths, London, 1998).
Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the Judiciary in the new Constitution, ICJ Kenya, Vol. III, May, 2002.

Tax Procedures Act, No. 29 of 2015, Laws of Kenya.

The Hendrick Hudson Lincoln-Douglas *Philosophical Handbook*, Version 4.0 (including a few Frenchmen). Available at http://www.jimmenick.com/henhud/hhldph.pdf [Accessed on 21/4/2018].

The International Federation of Consulting Engineers (FIDIC) *Conditions of Contract for Construction*: *for Building and Engineering Works Designed by the Employer* (First Edition, 1999, FIDIC).

The International Federation of Consulting Engineers (FIDIC), *Conditions of Contract for Plant and Design Build: For Electrical and Mechanical* Plant, *and for Building and Engineering Works, Designed by the Contractor*, (First Edition, 1999, FIDIC).

Toope, S. J., "Legal and Judicial Reform through Development Assistance: Some Lessons", McGill *Law Journal / Revue De Droit De McGill*, [Vol. 48, 2003], pp. 358-412.

Treaty Making and Ratification Act, No. 45 of 2012, Laws of Kenya.

United Nations Development Programme, 'Access to Justice and Rule of Law'. Available at http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/access_to_justiceandruleoflaw.html

United Nations, Report of the *Secretary-General* on in larger freedom: towards development, security and human rights for all [A/*59/2005*].

World Bank Group, *alternative dispute resolution guidelines.* Available at http://siteresources.worldbank.org/INTECA/Resources/15322_ADRG_Web.pdf]Accessed on 21/4/2018].

Zekos, G.I., "Arbitration as a Dispute Settlement Mechanism Under UNCLOS, the Hamburg Rules, and WTO." *J. Int'l Arb.* 19 (2002): 497.