

*Embracing Alternative Dispute Resolution Processes for Effective Management of Governance Disputes*

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**Kariuki Muigua**

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## **Embracing Alternative Dispute Resolution Processes for Effective Management of Governance Disputes**

**Kariuki Muigua\***

### **Abstract**

*Good Governance is a prerequisite for economic development and poverty alleviation. However, good corporate governance cannot thrive in an environment marred with disputes and conflicts. Effective management of governance conflicts and disputes is therefore necessary for good corporate governance and sustainability of organizations. This paper critically discusses the need for sound management of governance disputes. It argues that such disputes are a threat to the economic, social, and environmental sustainability of organizations. The paper explores the nature and causes of governance disputes and their impacts on corporate sustainability. The paper argues a case for the adoption of Alternative Dispute Resolution (ADR) processes for effective management of governance disputes.*

### **1.0 Introduction**

Governance refers to the system of values, policies and institutions by which a society manages its economic, political and social affairs through interactions within and among the state, civil society and private sector<sup>1</sup>. Governance has also been defined as the process of decision-making and the process by which decisions are implemented (or not

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\* PhD in Law (Nrb), FCI Arb (Chartered Arbitrator), OGW, 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; ESG Consultant; Advocate of the High Court of Kenya; Professor at the University of Nairobi, Faculty of Law; Member of the Permanent Court of Arbitration (PCA) [March, 2024].

<sup>1</sup> United Nations Development Programme., 'Governance' Available at <https://www.undp.org/eurasia/our-focus/governance#:~:text=UNDP%20defines%20governance%20as%20%E2%80%9Cthe,civil%20society%20and%20private%20sector.> (Accessed on 18/03/2024)

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implemented)<sup>2</sup>. Governance can be used in several contexts such as corporate governance, international governance, national governance and local governance<sup>3</sup>.

In the corporate context, governance refers to the system through which organizations are directed and controlled in order to protect the interests of all stakeholders and ensure reasonable return on investment<sup>4</sup>. In addition, it has been noted that governance refers to the structures, systems, and practices an organization has in place to<sup>5</sup>: assign decision-making authorities, define how decisions are to be made, and establish the organization's strategic direction<sup>6</sup>; oversee the delivery of its services;<sup>7</sup> the implementation of its policies, plans, programs, and projects<sup>8</sup>; and the monitoring and mitigation of its key risks; and report on its performance in achieving intended results and use performance information to drive ongoing improvements and corrective actions<sup>9</sup>. Corporate governance therefore entails the system through which a corporation is directed and controlled and which specifies distribution of rights and responsibilities among various players in a corporation being the board of directors, shareholders and other stakeholders and further sets out the rules and procedures for corporate decision making<sup>10</sup>.

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<sup>2</sup> United Nations Economic and Social Commission for Asia and the Pacific., 'What is Good Governance?' Available at <https://www.unescap.org/sites/default/files/good-governance.pdf> (Accessed on 18/03/2024)

<sup>3</sup> Ibid

<sup>4</sup> Cadbury, A. (2002). *Corporate Governance and Chairmanship: A Personal View*. New York: Oxford University Press

<sup>5</sup> Canadian Audit & Accountability Foundation., 'What is Governance' Available at <https://www.caaf-fcar.ca/en/oversight-concepts-and-context/what-is-oversight-and-how-does-it-relate-to-governance/what-is-governance> (Accessed on 18/03/2024)

<sup>6</sup> Ibid

<sup>7</sup> Ibid

<sup>8</sup> Ibid

<sup>9</sup> Ibid

<sup>10</sup> Organisation for Economic Co-Operation and Development (OECD), *Principles of Corporate Governance*, available at <http://www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf> (Accessed on 18/03/2024)

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The concept of Environmental, Social, and Governance (ESG) embraces governance as of its core tenets<sup>11</sup>. ESG is a framework that helps stakeholders understand how an organization manages risks and opportunities around sustainability issues<sup>12</sup>. It includes key elements around environmental and social impact, as well as how governance structures can be amended to maximize stakeholder well-being towards sustainability<sup>13</sup>. ESG has also been defined as a concept that seeks to achieve sustainable, responsible and ethical investment by incorporating Environmental, Social and Governance concerns in corporate decision making<sup>14</sup>. It takes the holistic view that sustainability extends beyond just environmental issues and incorporates social and governance aspects in the sustainability discourse<sup>15</sup>. ESG incorporates environmental factors including environmental sustainability and climate change concerns such as climate resilience and low carbon development<sup>16</sup>; social issues such as improving social welfare and fostering inclusive participation with stakeholders<sup>17</sup>; and governance factors including fostering good governance practices internally and externally in order to realize sustainability<sup>18</sup>. Realizing ESG tenets is therefore necessary on fostering good governance<sup>19</sup>.

Good Governance has been described as a prerequisite for economic development and poverty alleviation<sup>20</sup>. Good corporate governance is important in attracting investors,

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<sup>11</sup> Peterdy. K., & Miller. N., 'ESG (Environmental, Social, & Governance).' Available at <https://corporatefinanceinstitute.com/resources/esg/esg-environmental-social-governance/> (Accessed on 18/03/2024)

<sup>12</sup> Ibid

<sup>13</sup> Ibid

<sup>14</sup> Stuart. L.G et al., 'Firms and Social Responsibility: A Review of ESG and CSR Research in Corporate Finance.' *Journal of Corporate Finance*, 66 (2021): 101889

<sup>15</sup> Peterdy. K., & Miller. N., 'ESG (Environmental, Social, & Governance).' Op Cit

<sup>16</sup> African Development Bank Group., 'Environmental, Social and Governance (ESG).' Available at <https://www.afdb.org/en/topics-and-sectors/topics/environmental-social-and-governance-esg> (Accessed on 18/03/2024)

<sup>17</sup> Ibid

<sup>18</sup> Ibid

<sup>19</sup> Ibid

<sup>20</sup> International Centre for Parliamentary Studies., 'Governance' Available at <https://www.parlicentre.org/about-us/area-expertise/governance> (Accessed on 18/03/2024)

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creating competitive and efficient corporations, enhancing accountability and performance in an organization and promoting effective and efficient use of resources in an organization<sup>21</sup>. It has been noted that good governance is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law<sup>22</sup>. In addition, good governance assures that corruption is minimized, the views of minorities are taken into account and that the voices of the most vulnerable in society are heard in decision-making<sup>23</sup>. It is also responsive to the present and future needs in a society<sup>24</sup>.

It has been noted that good corporate governance cannot thrive in an environment marred with disputes and conflicts<sup>25</sup>. Effective management of governance conflicts and disputes is therefore necessary for good corporate governance and sustainability of organizations<sup>26</sup>. This paper critically discusses the need for sound management of governance disputes. It argues that such disputes are a threat to the economic, social, and environmental sustainability of organizations. The paper explores the nature and causes of governance conflicts and their impacts on corporate sustainability. The paper argues a case for the adoption of Alternative Dispute Resolution (ADR) processes for effective management of governance disputes.

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<sup>21</sup> Private Sector Initiative for Corporate Governance, 'Principles for Corporate Governance in Kenya and a Sample Code of Best Practice for Corporate Governance' available at [https://www.ics.ke/wp-content/uploads/bsk-pdfmanager/Principles\\_of\\_good\\_corporate\\_Governance\\_Private\\_Sector\\_-\\_CS\\_Gabriel\\_Kimani\\_110.pdf](https://www.ics.ke/wp-content/uploads/bsk-pdfmanager/Principles_of_good_corporate_Governance_Private_Sector_-_CS_Gabriel_Kimani_110.pdf) (Accessed on 18/03/2024)

<sup>22</sup> United Nations Economic and Social Commission for Asia and the Pacific., 'What is Good Governance?' Op Cit

<sup>23</sup> Ibid

<sup>24</sup> Ibid

<sup>25</sup> Muigua. K., 'Managing Governance Conflicts through Alternative Dispute Resolution in Kenya' Available at <https://kmco.co.ke/wp-content/uploads/2020/08/Managing-Governance-Conflicts-Through-Alternative-Dispute-Resolution-in-Kenya-3.pdf> (Accessed on 18/03/2024)

<sup>26</sup> Ibid

## **2.0 Governance Disputes: Causes and Effects**

It has been noted that governance disputes involve the board's powers and actions or its failure or refusal to act<sup>27</sup>. Such disputes can arise between the board and its shareholders or between directors and executive management<sup>28</sup>. Further, governance disputes may also involve issues among the directors themselves and between the board and other stakeholders<sup>29</sup>. It has also been opined that corporate governance disputes arise because of how board members interact with each other in discharge of their duties<sup>30</sup>. These disputes could take the form of disagreements between directors and top management over corporate strategy or financial policy<sup>31</sup>. It has been contended that governance disputes often begin when there is a difference of view, when board members disagree over the management of the organisation, the direction the organisation is taking, or where members feel their rights are not being respected<sup>32</sup>. Further, it has been noted that governance disputes can arise as a result of clash of personalities, personal differences, conflicts of interest, inappropriate conduct, a breakdown in communication or a misunderstanding in relation to rights and obligations<sup>33</sup>.

Governance disputes are inevitable<sup>34</sup>. It has been correctly observed that corporate decision making results from a process in which directors consider all the information reasonably available to them and engage in a vigorous debate on issues such as company

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<sup>27</sup> International Finance Corporation., 'Resolving Corporate Governance Disputes' Available at <https://www.ifc.org/en/insights-reports/2011/adr-toolkit#:~:text=Governance%20disputes%20involve%20the%20board's,the%20board%20and%20other%20stakeholders>. (Accessed on 19/03/2024)

<sup>28</sup> Ibid

<sup>29</sup> Ibid

<sup>30</sup> Agrawal. A., & Chen. M., Boardroom Brawls: An Empirical Analysis of Disputes Involving Directors, *Quarterly Journal of Finance*, Vol. 7, No. 3

<sup>31</sup> Ibid

<sup>32</sup> Governance Disputes., Available at <https://www.anthonycollins.com/who-we-help/social-business/business-for-good/governance-and-constitutions/governance-disputes/> (Accessed on 19/03/2024)

<sup>33</sup> Ibid

<sup>34</sup> Muigua. K., 'Managing Governance Conflicts through Alternative Dispute Resolution in Kenya' Op Cit

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strategy, company control and financial policy<sup>35</sup>. Such a situation increases the likelihood of disagreements within the board<sup>36</sup>. As a result, it has been argued that a board that never argues or disagrees is most likely to be an inactive or passive board<sup>37</sup>.

According to the International Finance Corporation (IFC), governance issues, standards, and requirements can be a fertile source for misunderstandings and disputes<sup>38</sup>. They include the relationship between independent directors and the Chief Executive Officer (CEO)<sup>39</sup>; the line between oversight and management; the directors' need for information versus management laxity to provide such information<sup>40</sup>; and the need to strike a balance between an organization's short term and long term interests<sup>41</sup>. IFC further notes that each of these issues can lead to serious tension, which can be triggered or intensified by personality disputes present in an organization<sup>42</sup>. In addition, changes in the corporate ownership structure or poor corporate performance can lead to or worsen existing disagreements among board members<sup>43</sup>.

The growth of ESG has also intensified governance disputes<sup>44</sup>. It has been noted that as the focus on ESG continues to grow, increasing regulation, legislation, industry guidance and external pressures from stakeholders and shareholders means that organizations are facing increasing scrutiny and associated risks which can result in disputes<sup>45</sup>. For

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<sup>35</sup> Masters. J., & Rudnick. A., 'Improving Board Effectiveness: Bringing the Best of ADR into the Corporate Boardroom' (Washington, D.C.: American Bar Association, 2005).

<sup>36</sup> Ibid

<sup>37</sup> Ibid

<sup>38</sup> International Finance Corporation., 'Mediating Corporate Governance Conflicts and Disputes' Available at <https://www.ifc.org/content/dam/ifc/doc/mgrt-pub/focus4-mediation-12.pdf> (Accessed on 19/03/2024)

<sup>39</sup> Ibid

<sup>40</sup> Ibid

<sup>41</sup> Ibid

<sup>42</sup> Ibid

<sup>43</sup> Ibid

<sup>44</sup> ESG Disputes., Available at <https://enyolaw.com/expertise/esg-disputes/> (Accessed on 19/03/2024)

<sup>45</sup> Ibid

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example, disputes and regulatory investigations can arise from a company's poor governance or negative impact on society or the environment<sup>46</sup>. Further, it has been noted that investor-led disputes may arise where a company fails to live up to its ESG commitments<sup>47</sup>.

Governance disputes are undesirable<sup>48</sup>. When a disagreement or dispute arises within an organization, it is in the best interest of the organization to have them managed effectively, expeditiously and efficiently<sup>49</sup>. It has been asserted that how such disagreements are managed determines whether the underlying issues can be resolved or whether the disagreement can ripen into a dispute that can have detrimental effects on the affairs of an organization including its financial performance and public image<sup>50</sup>. It is therefore necessary for organizations to develop and adopt efficient dispute management mechanisms<sup>51</sup>. It has been noted that efficient dispute management within an organization is part of good risk management since it enables an organization to cushion itself against the adverse effects of disputes whenever they occur<sup>52</sup>. Organisations who fail to comply with the need for effective dispute management processes could expose themselves to the threat of disputes escalating and damaging their reputation or such disputes resulting in litigation in the courts<sup>53</sup>.

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<sup>46</sup> Alhouti. D., 'Introduction to ESG Disputes' Available at <https://www.charlesrussellspeechlys.com/en/insights/expert-insights/litigation--dispute-resolution/2023/introduction-to-esg-disputes/> (Accessed on 19/03/2024)

<sup>47</sup> Ibid

<sup>48</sup> Muigua. K., 'Managing Governance Conflicts through Alternative Dispute Resolution in Kenya' Op Cit

<sup>49</sup> Ibid

<sup>50</sup> Omisore, B.O & Abiodun, A.R., 'Organizational Conflicts: Causes, Effects and Remedies' *International Journal of Academic Research in Economics and Management Sciences*, Vol. 3, No. 6 (2014)

<sup>51</sup> Muigua. K., 'Managing Governance Conflicts through Alternative Dispute Resolution in Kenya' Op Cit

<sup>52</sup> International Finance Corporation, 'Resolving Corporate Governance Disputes' available at [https://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/ifc+cg/topics/resolving+corpo+rate+governance+disputes](https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+cg/topics/resolving+corpo+rate+governance+disputes) (Accessed on 19/03/2024)

<sup>53</sup> Ibid

### **3.0 Overview of Alternative Dispute Resolution (ADR) Processes**

Alternative Dispute Resolution (ADR) is an umbrella term that encompasses a set of processes that are applied to manage disputes without resort to adversarial litigation<sup>54</sup>. ADR has also been defined as a term that refers to a wide range of mechanisms that are applied in managing disputes that may be linked to but function outside formal court litigation processes<sup>55</sup>. Further, ADR has been defined as an all-encompassing term which refers to multiple non-judicial methods of handling conflicts and disputes between parties<sup>56</sup>. ADR techniques include negotiation, mediation, arbitration, conciliation, adjudication, expert determination, early neutral evaluation, and Traditional Dispute Resolution Mechanisms (TDRMs) among others<sup>57</sup>. These processes have been recognized at the global level under the *Charter of the United Nations*<sup>58</sup>. The Charter provides that parties to a 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<sup>59</sup> (Emphasis added). At a national level, the *Constitution of Kenya*<sup>60</sup> embraces ADR mechanisms. It mandates courts and tribunals to promote ADR mechanisms including reconciliation, mediation, arbitration and TDRMs<sup>61</sup>.

ADR mechanisms have been classified by some authors into facilitative, evaluative and determinative processes<sup>62</sup>. Facilitative processes include mediation which involves assisting parties to a dispute in identifying issues in dispute and in coming to an

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<sup>54</sup> Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

<sup>55</sup> Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

<sup>56</sup> Block. M. J., 'The Benefits of Alternate Dispute Resolution for International Commercial and Intellectual Property Disputes.' *Rutgers Law Record.*, Volume 44, 2016-2017

<sup>57</sup> Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

<sup>58</sup> United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

<sup>59</sup> Ibid, article 33 (1)

<sup>60</sup> Constitution of Kenya., 2010., Government Printer, Nairobi

<sup>61</sup> Ibid, article 159 (2) (c)

<sup>62</sup> Xie. Z., 'The Facilitative, Evaluative and Determinative Processes in ADR,' 2011-10-12, available at <http://www.xwqlaw.com/info/c47f5ff15b464882ad5c9a7f97338652> (Accessed on 19/03/2024)

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agreement over the dispute<sup>63</sup>. Evaluative processes include early neutral evaluation and expert appraisal where a third party is more actively involved in advising the parties about the issues in dispute and various possible outcomes<sup>64</sup>. Determinative processes include arbitration and expert determination where a third party makes a determination after parties have presented their arguments and evidence in relation to a dispute<sup>65</sup>. However, it has been noted that this classification leaves out negotiation which involves parties discussing the issues at hand so as to arrive at mutually acceptable solutions on their own accord without the help of a third party<sup>66</sup>.

ADR techniques have been hailed as being ideal in enhancing access to justice<sup>67</sup>. The right of access to justice especially in Kenya and Africa at large has hitherto been hampered by many unfavourable factors such high court filing fees, bureaucracy, complex legal procedures, illiteracy, distance from formal courts, backlog of cases in courts and lack of legal knowhow<sup>68</sup>. ADR techniques have the potential to address these challenges and promote the right of access to justice in Africa<sup>69</sup>. Most ADR mechanisms possess key attributes including informality, privacy, confidentiality, flexibility and the ability to promote expeditious and cost-effective management of disputes which makes them a viable tool of enhancing access to justice<sup>70</sup>.

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<sup>63</sup> Ibid

<sup>64</sup> Muigua. K & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-development-in-KenyaRevised-version-of-20.10.14.pdf> (Accessed on 19/03/2024)

<sup>65</sup> Ibid

<sup>66</sup> Ibid

<sup>67</sup> Muigua. K & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Op Cit

<sup>68</sup> 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

<sup>69</sup> Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

<sup>70</sup> Ibid

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Most ADR mechanisms are also ideal in fostering access to justice due to their ability to promote resolution of disputes and conflicts<sup>71</sup>. It has been noted that the process of conflict management can either result in settlement or resolution<sup>72</sup>. The idea of settlement connotes an agreement over the issues in a conflict which often involves a compromise<sup>73</sup>. Settlement seeks to mitigate a conflict without discovering or rectifying the underlying causes of such a conflict<sup>74</sup>. Settlement techniques include litigation and arbitration<sup>75</sup>. These mechanisms have been described as highly coercive, power based and involve a lot of compromise in addressing conflicts and disputes<sup>76</sup>. They may be effective in providing an immediate solution to a dispute but fail to address underlying issues in a dispute leaving the likelihood of disputes reemerging in future<sup>77</sup>. Resolution on the other hand involves a process where the outcome is based on mutual problem-sharing whereby parties to a conflict cooperate in order to redefine their conflict and relationships<sup>78</sup>. Resolution mechanisms include most ADR processes such as mediation, negotiation and facilitation<sup>79</sup>. These mechanisms are non-coercive, non-power based and focus on the needs and interest of parties<sup>80</sup>. Resolution processes result in mutually satisfying outcomes that address the root causes of conflicts thus creating long lasting outcomes<sup>81</sup>.

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<sup>71</sup> Ibid

<sup>72</sup> Ibid

<sup>73</sup> Bloomfield. D., 'Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland,' *Journal of Peace Research*

<sup>74</sup> Ibid

<sup>75</sup> Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

<sup>76</sup> Ibid

<sup>77</sup> Ibid

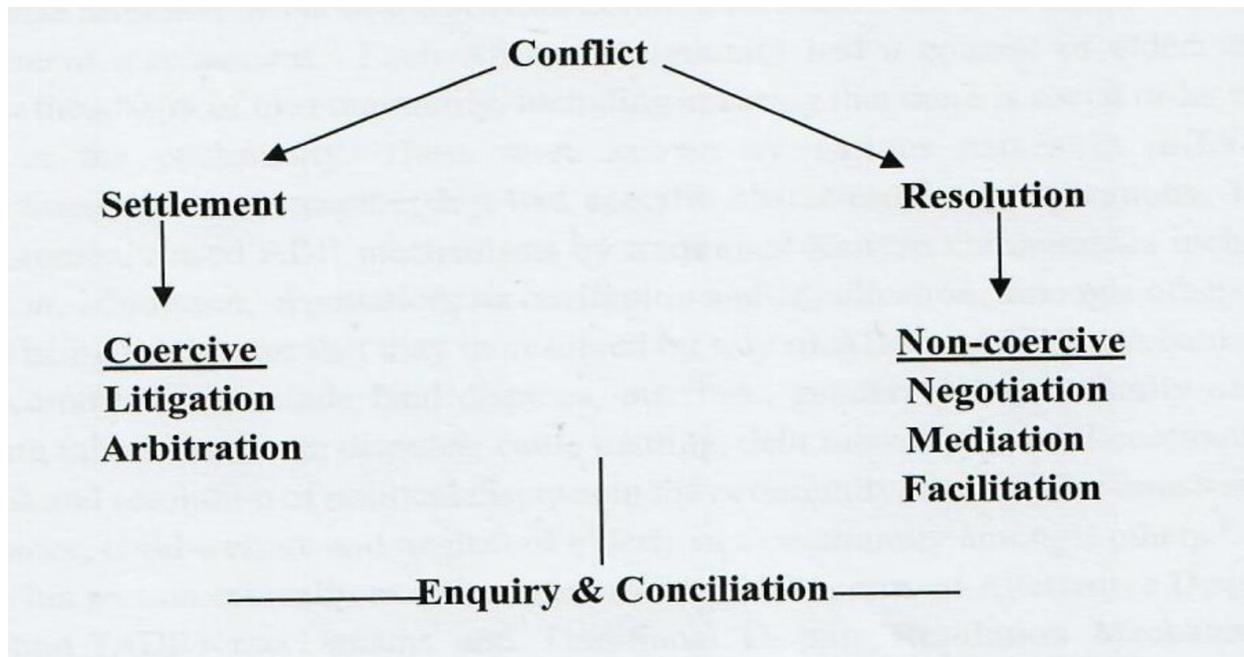
<sup>78</sup> Bloomfield. D., 'Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland,' Op Cit

<sup>79</sup> Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

<sup>80</sup> Ibid

<sup>81</sup> Ibid

**Figure 1: Methods of Conflict Management**



**\*Source: The author**

Figure 1 shows that there are certain methods of conflict management that can only result in settlement. These are categorised as coercive methods where parties have little or no autonomy over the process. The coercive methods are litigation and arbitration. It also shows the non-coercive methods (negotiation, mediation and facilitation) which lead to resolution. In the non-coercive conflict management methods, parties enjoy autonomy over the choice of the mediator or third party, the process and the outcome. Conciliation and enquiry can be classified as coercive (when the reports emanating from them are enforced) and non-coercive, for example, when the reports are used as the basis for negotiation between the parties.

#### **4.0 Applying Alternative Dispute Resolution (ADR) Processes in Managing Governance Disputes: Opportunities and Challenges**

It has correctly been argued that corporations hate to go public with their governance disputes<sup>82</sup>. Such disputes if brought to limelight could affect public perception of an organization and ultimately its overall financial performance<sup>83</sup>. Further, it has been noted that if governance disputes are not managed expeditiously, much of the Board's resources and time will be diverted towards such disputes at the expense of the success of the organization<sup>84</sup>. When governance disputes arise, there is need to have in place a suitable process and venue to manage the conflict in a timely and cost-effective manner<sup>85</sup>. It has been argued that a good corporate governance framework ensures availability of a reliable mechanism for managing emerging and existing disputes<sup>86</sup>.

As a result of the foregoing, litigation is not a viable mechanism for managing governance disputes<sup>87</sup>. Dispute management through litigation can take years before the parties can get justice in their matters due to the formality and resource limitations<sup>88</sup>. It has also been asserted that litigation is often slow and expensive and it may at times lose the commercial and practical credibility necessary in the corporate world<sup>89</sup>. Further, due to the need to preserve relationships among various stakeholders in an organization including the Board of Directors, the management, and shareholders, litigation is not ideal in managing governance disputes since it does not deal with the underlying issues in governance disputes leaving the likelihood of such disputes reemerging and affecting

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<sup>82</sup> International Finance Corporation, 'Resolving Corporate Governance Disputes' Op Cit

<sup>83</sup> Ibid

<sup>84</sup> Muigua. K., 'Managing Governance Conflicts through Alternative Dispute Resolution in Kenya' Op Cit

<sup>85</sup> Pondy, L., Reflections on Organizational Conflict, *Journal of organizational Behaviour*, Vol 13 (2) pp257-261

<sup>86</sup> Muigua. K., 'Managing Governance Conflicts through Alternative Dispute Resolution in Kenya' Op Cit

<sup>87</sup> Ibid

<sup>88</sup> Muigua. K., Utilising Alternative Dispute Resolution Mechanisms to Manage Commercial Disputes, available at <http://kmco.co.ke/wp-content/uploads/2018/09/Utilising-Alternative-Dispute-Resolution-Mechanisms-to-ManageCommercial-Disputes-Kariuki-Muigua-7th-September-2018.pdf> (Accessed on 19/03/2024)

<sup>89</sup> Ibid

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the performance of an organization's performance<sup>90</sup>. It has been argued that litigation typically increases the negative impact of disputes on a company's performance, reputation, and value<sup>91</sup>. In addition, the outcome of litigation does not necessarily address disputes<sup>92</sup>. Further, it has been contended that as a result of litigation, the cost of disputes on the company accelerates exponentially, and strategic decisions affecting the company are often delayed<sup>93</sup>. In addition, prolonged litigation results in certain concerns including greater costs in out-of-pocket expenses to a company, management's distraction, consumption of board time, and impairment to strategic and operational decision-making<sup>94</sup>.

The shortcomings of litigation can be addressed through the application of ADR mechanisms in managing governance conflicts<sup>95</sup>. It has been noted that ADR solutions can be tailored by the parties to deal with ongoing situations in a manner that allows them to continue working together<sup>96</sup>. This is very ideal in the corporate context where there is need to foster good working relationships among all parties<sup>97</sup>. Further, ADR mechanisms are typically voluntary and confidential, and have features that encourage constructive problem-solving without incurring the costs in time, money, and adversarial relations of court litigation<sup>98</sup>.

ADR processes therefore have characteristics that makes them suitable in managing governance disputes. For example, it has been observed that negotiation can be effectively applied in governance disputes such as disputes between board members or

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<sup>90</sup> Muigua. K., 'Managing Governance Conflicts through Alternative Dispute Resolution in Kenya' Op Cit

<sup>91</sup> International Finance Corporation., 'Resolving Corporate Governance Disputes' Available at <https://www.ifc.org/content/dam/ifc/doc/mgrt/adr-toolkit-volume1.pdf> (Accessed on 19/03/2024)

<sup>92</sup> Ibid

<sup>93</sup> Ibid

<sup>94</sup> Ibid

<sup>95</sup> Muigua. K., 'Managing Governance Conflicts through Alternative Dispute Resolution in Kenya' Op Cit

<sup>96</sup> Ibid

<sup>97</sup> Ibid

<sup>98</sup> International Finance Corporation., 'Resolving Corporate Governance Disputes' Op Cit

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disputes involving board members and shareholders<sup>99</sup>. This is due to the underlying common interest at hand which is to promote success of the organization<sup>100</sup>. In such instances, parties will be more than willing to give up their individual positions and adopt a common position that is mutually acceptable and in the interest of the organization<sup>101</sup>. Parties can also embrace other ADR processes such as mediation when they have reached a deadlock while utilizing negotiation<sup>102</sup>.

It has been noted that mediation can result in parties agreeing to novel solutions that cannot be obtained through litigation<sup>103</sup>. Mediation is often more appropriate where interests of the disputing parties need to be addressed and where commercial relationships need to be preserved and even enhanced<sup>104</sup>. Further, it has been pointed out that governance conflicts have at least three dimensions; emotional, legal and commercial<sup>105</sup>. Mediation is able to effectively manage such disputes since it considers all the three dimensions unlike litigation which only considers the legal dimension of a case<sup>106</sup>. Further, mediation is often quicker, less expensive, confidential, and preserves relationships, whereas litigation is adversarial and destroys relationships<sup>107</sup>. Mediation therefore ensures that the cost of executive time is saved and a dilution of focus on the business is avoided<sup>108</sup>.

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<sup>99</sup> Muigua. K., 'Managing Governance Conflicts through Alternative Dispute Resolution in Kenya' Op Cit

<sup>100</sup> Nisanasala, MBS, Win-Win Settlement: Applicability of Negotiation Principles for Dispute Negotiations in Construction Projects, available at <http://dl.lib.uom.lk/handle/123/13841> (Accessed on 19/03/2024)

<sup>101</sup> Ibid

<sup>102</sup> Ibid

<sup>103</sup> International Finance Corporation., 'Mediating Corporate Governance Conflicts and Disputes' Op Cit

<sup>104</sup> King Report on Governance for South Africa, available at [https://cdn.ymaws.com/www.iodsa.co.za/resource/resmgr/king\\_iii/King\\_Report\\_on\\_Governance\\_for.pdf](https://cdn.ymaws.com/www.iodsa.co.za/resource/resmgr/king_iii/King_Report_on_Governance_for.pdf) (Accessed on 19/03/2024)

<sup>105</sup> Runesson. E., & Guy. M., 'Mediating Corporate Governance Conflicts and Disputes' available at <http://documents1.worldbank.org/curated/en/969191468314989975/pdf/418270NWP0Focu1ion0321443B01PUBLI C1.pdf> (Accessed on 19/03/2024)

<sup>106</sup> Ibid

<sup>107</sup> International Finance Corporation., 'Mediating Corporate Governance Conflicts and Disputes' Op Cit

<sup>108</sup> Ibid

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Further, it has been noted that arbitration can be utilized for effective management of governance disputes<sup>109</sup>. As a result of investor uncertainty and dissatisfaction with regulatory judicial enforcement, arbitration has become the preferred method of dispute management for private-equity investors in many emerging markets<sup>110</sup>. Towards this end, arbitration is viewed as more timely, cost-effective, expert oriented, impartial and confidential than national-court adjudication of disputes<sup>111</sup>. It has been observed that investors in a closely held company contractually agree to submit disputes arising under the company's charter or shareholders agreement to binding arbitration pursuant to the rules of an established arbitration institute (such as the International Chamber of Commerce, London Court of International Commercial Arbitration, Stockholm Chamber of Commerce among others)<sup>112</sup>. It has correctly been observed that most organizations are using arbitration to manage disputes with suppliers, dealers and other third parties<sup>113</sup>. In addition, most contracts governing business engagements usually contain arbitration clauses which provide for referral of any dispute arising under the contract to arbitration<sup>114</sup>. It has also been observed that employment agreements between some corporations and senior executives call for the use of arbitration in case of any employment related dispute<sup>115</sup>.

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<sup>109</sup> Organisation for Economic Co-operation and Development., 'Programme Statement for Corporate Governance and Arbitration of Company-Law Disputes ("ACLD")' Available at <https://www.oecd.org/corporate/ca/corporategovernanceprinciples/33963048.pdf> (Accessed on 19/03/2024)

<sup>110</sup> Ibid

<sup>111</sup> Ibid

<sup>112</sup> Ibid

<sup>113</sup> Muigua. K., Emerging Jurisprudence in the Law of Arbitration in Kenya: Challenges and Promises, available at <http://kmco.co.ke/wp-content/uploads/2018/08/Emerging-Jurisprudence-in-the-Law-of-Arbitration-in-Kenya.pdf> (Accessed on 19/03/2024)

<sup>114</sup> Ibid

<sup>115</sup> Muigua. K., 'Managing Governance Conflicts through Alternative Dispute Resolution in Kenya' Op Cit

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ADR mechanisms are also being increasingly used to manage ESG related disputes<sup>116</sup>. It has been noted that in ESG claims, there is need to bear in mind both the litigation aspects of a dispute, and broader ESG concerns including those around reputation and access to capital among other concerns<sup>117</sup>. ADR mechanisms can be ideal in managing ESG disputes by fostering privacy, cost effective and expeditious management of disputes while also allowing parties to select experts to hear and determine contentious ESG matters<sup>118</sup>. It has been argued that the use of ADR mechanisms such as mediation in managing ESG related disputes is a practical demonstration of a sustainability-oriented business culture since mediation can offer a quick, flexible, consensual and win-win solution based on the mutually accepted interests of the parties<sup>119</sup>. It has been noted that mediation is an ESG tool and its use adds ESG value to organizations<sup>120</sup>. It is therefore ideal in managing ESG disputes including real estate disputes, environmental disputes and disputes relating to consumer and business relationships<sup>121</sup>. Parties can also use ADR mechanisms such as negotiation to achieve ESG requirements at workplaces such as fair labour practices that entails the right to equal pay, workplace safety and leave among other entitlements in order to minimize disputes in organizations<sup>122</sup>.

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<sup>116</sup> Hackett. D et al., 'Growing ESG Risks: The Rise of Litigation.' Available at [https://www.bakermckenzie.com//media/files/insight/publications/2020/10/growing\\_esg\\_risks\\_the\\_rise\\_of\\_litigation.pdf](https://www.bakermckenzie.com//media/files/insight/publications/2020/10/growing_esg_risks_the_rise_of_litigation.pdf) (Accessed on 19/03/2024)

<sup>117</sup> Ibid

<sup>118</sup> Thailand Arbitration Center., 'Alternative Dispute Resolution: Significance of ESG in Arbitration.' Available at <https://thac.or.th/alternative-dispute-resolution-significance-esg-arbitration/> (Accessed on 19/03/2024)

<sup>119</sup> Gramatidis.B & Emvalomenos. D., 'Sustainability in Dispute Resolution -Mediation as an ESG Practice.' Available at <https://www.bahagram.com/sustainability-in-dispute-resolution-mediation-as-anesgpractice/> (Accessed on 19/03/2024)

<sup>120</sup> Gramatidis.B & Emvalomenos. D., 'Sustainability in Dispute Resolution -Mediation as an ESG Practice.' Available at <https://www.bahagram.com/sustainability-in-dispute-resolution-mediation-as-an-esgpractice> (Accessed on 19/03/2024)

<sup>121</sup> Ibid

<sup>122</sup> ESG., 'The Path to Equal Pay is Through Negotiation.' Available at <https://esgnews.bg/en/the-path-to-equal-pay-is-through-negotiation/> (Accessed on 19/03/2024)

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The role of ADR mechanisms in managing governance disputes is recognized in various Codes and instruments on corporate governance. For example, The *King III Report on Corporate Governance for South Africa*<sup>123</sup> advocates the use of ADR as a tool of good corporate governance. It encourages directors to *preserve business relationships*(*Emphasis added*)<sup>124</sup>. Consequently, when a dispute arises, in exercising their duty of care, the Report urges directors to endeavour to resolve it *expeditiously, efficiently and effectively* through ADR mechanisms such as mediation(*Emphasis added*)<sup>125</sup>.

In Kenya, *The Code of Corporate Governance Practices for Issuers of Securities to the Public*<sup>126</sup> while providing the guidelines for managing internal and external disputes involving companies notes that disputes are an inevitable part of doing business. It urges companies to establish mechanisms for resolving the disputes in a *cost effective and timely manner*(*Emphasis added*)<sup>127</sup>. It requires mechanisms to avoid the recurrence of disputes to be established and implemented<sup>128</sup>. According to the Code, it is incumbent upon directors and executives, in carrying out their duty of care to a company to ensure that disputes are resolved *effectively, expeditiously and efficiently*(*Empasis added*)<sup>129</sup>. Further, it points out that dispute resolution shall be cost effective and not a drain on the finances and resources of the company<sup>130</sup>. ADR mechanisms therefore have a key role in managing governance disputes and meeting the objectives set out under this Code.

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<sup>123</sup> King Report on Governance for South Africa, Op Cit

<sup>124</sup> Ibid

<sup>125</sup> Ibid

<sup>126</sup> Capital Markets Authority, Gazette Notice No. 1420, The Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015, available at [https://www.cma.or.ke/index.php?option=com\\_phocadownload&view=category&id=92&Itemid=285](https://www.cma.or.ke/index.php?option=com_phocadownload&view=category&id=92&Itemid=285) (Accessed on 19/03/2024)

<sup>127</sup> Ibid

<sup>128</sup> Ibid

<sup>129</sup> Ibid

<sup>130</sup> Ibid

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In addition, the *Code of Governance for State Corporations in Kenya*<sup>131</sup> advises the Board to ensure that disputes with and among stakeholders are resolved effectively, efficiently and expeditiously. Under the Code, the Board is encouraged to take reasonable steps towards managing disputes involving stakeholders through the use of Alternative Dispute Resolution Mechanisms<sup>132</sup>. Board members are expected to resolve issues in a fair and respectful manner which considers informal processes such as dialogue or mediation<sup>133</sup>.

From the foregoing, it is evident that ADR mechanisms have a key role to play in managing governance disputes. However, use of ADR techniques in managing governance disputes raises some concerns. One of the core tenets of ADR is party autonomy<sup>134</sup>. However, in the case of an organization, it may not be possible to get a common position due to the different players at stake<sup>135</sup>. Consequently, most organizations have formal procedures for identifying the persons responsible for decision making on key matters including dispute management<sup>136</sup>. As a result, the management of a corporation may settle a suit through ADR mechanisms to prevent embarrassing disclosures about its managerial policies when such disclosures might well be in the interest of the shareholders of the organization<sup>137</sup>.

ADR Mechanisms also suffer from enforcement challenges which can impede vigorous enforcement measures<sup>138</sup>. It has been noted that in litigation, measures such as contempt

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<sup>131</sup> Mwongozo., 'Mwongozo, The Code of Governance for State Corporations, 2015' Available at <https://wasreb.go.ke/downloads/MWONGOZOCODEOFGOVERNANCE.pdf> (Accessed on 19/03/2024)

<sup>132</sup> Ibid

<sup>133</sup> Ibid

<sup>134</sup> Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

<sup>135</sup> Muigua. K., 'Managing Governance Conflicts through Alternative Dispute Resolution in Kenya' Op Cit

<sup>136</sup> Fiss. O, 'Against Settlement' *The Yale Law Journal*, Vol. 93: 1073, 1984

<sup>137</sup> Ibid

<sup>138</sup> Ibid

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powers and execution of decrees and orders are available in enforcing decisions<sup>139</sup>. However, decisions in ADR mechanisms such as negotiation and mediation are non-binding and their enforcement depends on the goodwill of the parties<sup>140</sup>. This could be problematic for an organization especially in dealing with outside parties such as debtors who may refuse to comply with negotiated or mediated agreements<sup>141</sup>. An organization may therefore be forced to seek the judicial process due to its ability to guarantee enforcement of decisions<sup>142</sup>. It is imperative to address such concerns in order to enhance the role of ADR mechanisms in managing governance disputes.

### **5.0 Way Forward**

It has been argued that the best conflict management strategy is conflict avoidance<sup>143</sup>. It has been noted that in conflict management, individuals prefer avoidance to confrontation even at the risk of a financial loss, in the belief that confrontation might disrupt interpersonal harmony between the parties involved<sup>144</sup>. As result, for effective conflict management, it has been suggested that organizations should strive towards conflict avoidance through simple techniques involving their day to day operations such as facilitating harmonious working relationships, fostering Corporate Social Responsibility and adhering to principles of good corporate governance<sup>145</sup>.

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<sup>139</sup> Muigua. K., 'Managing Governance Conflicts through Alternative Dispute Resolution in Kenya' Op Cit

<sup>140</sup> Reza, S., The Shortcomings of Family Mediation and Restorative Justice Proceedings, 4 SOAS L.J. 73 (2017)

<sup>141</sup> Runesson. E., & Guy. M., 'Mediating Corporate Governance Conflicts and Disputes' Op Cit

<sup>142</sup> Muigua. K., 'Managing Governance Conflicts through Alternative Dispute Resolution in Kenya' Op Cit

<sup>143</sup> Ibid

<sup>144</sup> Zhang. Z & Wei. X., 'Superficial Harmony and Conflict Avoidance Resulting from Negative Anticipation in the Workplace' *Management and Organization Review* 13:4, December 2017, 795–820

<sup>145</sup> Muigua. K., 'Managing Governance Conflicts through Alternative Dispute Resolution in Kenya' Op Cit

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Good governance is at the heart of managing the risks associated with governance disputes<sup>146</sup>. Sustainable Development Goal (SDG) 16 requires states to promote peaceful and inclusive societies, provide access to justice for all and build effective, accountable and inclusive institutions at all levels<sup>147</sup>. SDG 16 recognizes that tenets of good governance including adherence to the rule of law; equal access to justice for all; effective, accountable and transparent institutions at all levels; responsive, inclusive, participatory and representative decision-making at all levels; public access to information; and protection of human rights are essential in achieving Sustainable Development<sup>148</sup>. It has been noted that embracing good governance practices such as transparency, accountability, and corporate disclosure requirements such as sustainability reporting can enable organizations to be more efficiently managed and responsive therefore mitigating disputes<sup>149</sup>. It is therefore necessary to foster good governance in order to minimize disputes within organizations.

Further, it is imperative to embrace and strengthen ADR mechanisms in order to enhance their viability in managing governance disputes<sup>150</sup>. It has correctly been noted that ADR mechanisms such as negotiation, mediation, and arbitration can be ideal in managing governance disputes<sup>151</sup>. Use of ADR mechanisms such as mediation in managing governance disputes ensures that relationships in the corporate world are preserved, the cost of executive time is saved and a dilution of focus on the business is avoided<sup>152</sup>.

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<sup>146</sup> Muigua. K., 'Realizing the Governance ('G') tenet in ESG for Sustainability' Available at <https://kmco.co.ke/wp-content/uploads/2023/10/Realizing-the-Governance-G-tenet-in-ESG-for-Sustainability-1.pdf> (Accessed on 19/03/2024)

<sup>147</sup> United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 19/03/2024)

<sup>148</sup> Ibid

<sup>149</sup> Buniamin. S et al., 'The Role of Corporate Governance in Achieving SDGs Among Malaysian Companies.' *European Journal of Sustainable Development* (2022), 11, 3, 326-339

<sup>150</sup> Muigua. K., 'Managing Governance Conflicts through Alternative Dispute Resolution in Kenya' Op Cit

<sup>151</sup> Ibid

<sup>152</sup> International Finance Corporation., 'Resolving Corporate Governance Disputes' Op Cit

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Organizations should therefore embrace effective dispute management strategies that promote the use of ADR mechanisms<sup>153</sup>. Further, it has been suggested that organizations should consider facilitating conflict management training skills such as negotiation and mediation to the management and board members for effective dispute management<sup>154</sup>. It is also necessary to enhance the capacity of ADR centres to manage governance disputes through appropriate rules and the use of qualified personnel in governance issues<sup>155</sup>.

Finally, it is important to integrate ESG tenets in corporate governance<sup>156</sup>. ESG integration involves incorporating environmental, social and governance indicators into investment and business decision-making processes<sup>157</sup>. It has been noted that the integration of the ESG criteria has become an instrument responsible for defining, planning, operationalizing and executing the actions of corporations directed at environmental prevention and preservation, in addition to social responsibility and the quality performance of their activities<sup>158</sup>. Further, it has been observed that due to the increased importance of environmental, social, and governance factors, investors and other stakeholders are demanding that companies include ESG principles in their corporate governance policies so that they can make informed decisions regarding investments<sup>159</sup>. Integrating ESG tenets into the corporate governance framework as well as risk management and risk assessment frameworks can enable companies better assess their risk exposure and mitigate against those risks<sup>160</sup>. Embracing ESG can also help companies

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<sup>153</sup> Muigua. K., 'Managing Governance Conflicts through Alternative Dispute Resolution in Kenya' Op Cit

<sup>154</sup> Ibid

<sup>155</sup> International Finance Corporation., 'Resolving Corporate Governance Disputes' Op Cit

<sup>156</sup> Barbosa. A., et al., 'Integration of Environmental, Social, and Governance (ESG) Criteria: Their Impacts on Corporate Sustainability Performance.' *Humanities & Social Sciences Communications.*, 2023

<sup>157</sup> Ibid

<sup>158</sup> Ibid

<sup>159</sup> Camara. A., 'The Importance of ESG in Corporate Governance' Available at <https://corporatefinanceinstitute.com/resources/esg/importance-of-esg-in-corporate-governance/> (Accessed on 19/03/2024)

<sup>160</sup> Ibid

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to identify and manage ESG risks and opportunities, ensure compliance with relevant regulations and standards, and enhance transparency and accountability<sup>161</sup>. It is therefore necessary for companies to embrace and integrate ESG matters in their corporate governance frameworks in order to identify, manage, and mitigate opportunities and risks including governance disputes<sup>162</sup>.

### **6.0 Conclusion**

Governance disputes are inevitable<sup>163</sup>. Such disputes can arise in relation to governance issues, standards, and requirements<sup>164</sup>. Governance disputes can involve various parties including the Board of Directors, management, independent directors, shareholders among other stakeholders<sup>165</sup>. Such disputes are undesirable and can have detrimental effects on the affairs of an organization including its financial performance and public image<sup>166</sup>. Effective management of governance disputes is therefore a key pillar of sound corporate governance<sup>167</sup>. A good corporate governance framework ensures availability of a reliable mechanism for managing emerging and existing disputes<sup>168</sup>. In order to effectively manage governance disputes, it is necessary to promote conflict and dispute avoidance<sup>169</sup>; enhance good corporate governance<sup>170</sup>; embrace and strengthen ADR mechanisms<sup>171</sup>; and integrate ESG tenets in corporate governance<sup>172</sup>. Effective management of governance disputes through ADR is a goal that must be achieved for sustainability.

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<sup>161</sup> Ibid

<sup>162</sup> Ibid

<sup>163</sup> Muigua. K., 'Managing Governance Conflicts through Alternative Dispute Resolution in Kenya' Op Cit

<sup>164</sup> International Finance Corporation., 'Mediating Corporate Governance Conflicts and Disputes' Op Cit

<sup>165</sup> Ibid

<sup>166</sup> Omisore, B.O & Abiodun, A.R., 'Organizational Conflicts: Causes, Effects and Remedies' Op Cit

<sup>167</sup> Muigua. K., 'Managing Governance Conflicts through Alternative Dispute Resolution in Kenya' Op Cit

<sup>168</sup> Ibid

<sup>169</sup> Ibid

<sup>170</sup> Muigua. K., 'Realizing the Governance ('G') tenet in ESG for Sustainability' Op Cit

<sup>171</sup> Muigua. K., 'Managing Governance Conflicts through Alternative Dispute Resolution in Kenya' Op Cit

<sup>172</sup> Barbosa. A., et al., 'Integration of Environmental, Social, and Governance (ESG) Criteria: Their Impacts on Corporate Sustainability Performance.' Op Cit

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