

# **Strengthening Ethics in Arbitration in Africa**

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**Strengthening Ethics in Arbitration in Africa**

**Kariuki Muigua\***

*Abstract*

*The paper critically discusses the role of ethics in arbitration. It argues that ethics play a fundamental role in enhancing the viability of arbitration as a dispute management mechanism.*

*The paper explores some of the ethical concerns in arbitration in Africa. It also suggests measures towards strengthening ethical practice in arbitration in Africa.*

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## **1.0 Introduction**

Arbitration is one of the Alternative Dispute Resolution (ADR) mechanisms<sup>1</sup>. ADR refers to a set of mechanisms that are applied to manage disputes without resort to adversarial litigation<sup>2</sup>. It encompasses various processes including negotiation, mediation, arbitration, conciliation, adjudication and Traditional Dispute Resolution Mechanisms (TDRMs) among others<sup>3</sup>. ADR mechanisms have been hailed for their attributes which makes them viable in enhancing access to justice. Such features include privacy, confidentiality, flexibility, informality, party autonomy and the ability to foster expeditious and cost effective management of disputes<sup>4</sup>. These processes are recognized at the global level under the *Charter of the United Nations* which stipulates 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>5</sup>. They have also been upheld at the national level in some countries including Kenya whereby the Constitution mandates courts and tribunals to promote ADR mechanisms including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms<sup>6</sup>.

Arbitration refers to a dispute management mechanism where parties through an agreement submit their dispute to one or more neutral third parties who make a binding decision on the dispute<sup>7</sup>. It has also been defined as a private consensual process where parties in dispute agree to present their grievances to a third party for resolution<sup>8</sup>. Arbitration has developed as the preferred mode of management of disputes especially

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<sup>1</sup> Muigua. K., 'Settling Disputes through Arbitration in Kenya.' Glenwood Publishers, 4th Edition, 2022

<sup>2</sup> Ibid

<sup>3</sup> Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

<sup>4</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-inKenyaSTRATHMORE-CONFERENCE-PRESENTATION.pdf> (Accessed on 11/10/2023)

<sup>5</sup> United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Article 33 (1)

<sup>6</sup> Constitution of Kenya, 2010, Article 159 (2) (c), Government Printer, Nairobi

<sup>7</sup> World Intellectual Property Organization., 'What is Arbitration' Available at <https://www.wipo.int/amc/en/arbitration/what-is-arb.html> (Accessed on 11/10/2023)

<sup>8</sup> Muigua. K., 'Settling Disputes through Arbitration in Kenya.' Op Cit

those that are transnational in nature<sup>9</sup>. This is due to the fact that it has a transnational applicability and guarantees neutrality in the determination of disputes by addressing differences that may arise as a result of multiple legal systems<sup>10</sup>. It also guarantees enforcement of decisions through the *New York Convention* which provides a harmonized legal framework for the recognition and enforcement of foreign awards in arbitration<sup>11</sup>.

It has been pointed out that arbitration in Africa enjoys a thriving present and a promising future<sup>12</sup>. Africa boasts well established, leading international arbitration institutions which offer specialised arbitral services for a full range of international disputes<sup>13</sup>. These institutions are playing an important role in developing regional centres, which will be key to meeting the growing need for dispute resolution services on the continent<sup>14</sup>. Further, arbitration among other ADR mechanisms have been practiced in Africa for many centuries which sets the foundation for these processes to thrive in the continent<sup>15</sup>.

Despite the efficacy of ADR mechanisms including arbitration in enhancing access to justice, it has been argued that there is need for regulations, rules and best practices to ensure that ADR is practiced appropriately towards attaining the ideal of Appropriate Dispute Resolution<sup>16</sup>. Further, it has been pointed out that regulation of ADR through a

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<sup>9</sup> Muigua. K., 'Promoting International Commercial Arbitration in Africa.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/PROMOTING-INTERNATIONAL-COMMERCIALARBITRATION-IN-AFRICA.pdf> (Accessed on 11/10/2023)

<sup>10</sup> Moses, 'The Principles and Practice of International Commercial Arbitration' 2<sup>nd</sup> Edition, 2017, Cambridge University Press

<sup>11</sup> United Nations Commission on International Trade Law., 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards.' (New York, 1958)

<sup>12</sup> Ripley-Evans. J., & De Sousa. M., '2022 SOA Arbitration in Africa Survey Reveals a Thriving Market for Arbitration on the Continent.' Available at <https://hsfnotes.com/africa/2022/11/25/2022-soas-arbitration-in-africa-survey-reveals-a-thriving-market-for-arbitration-on-the-continent/> (Accessed on 11/10/2023)

<sup>13</sup> Ibid

<sup>14</sup> Ibid

<sup>15</sup> Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2<sup>nd</sup> Edition, 2017

<sup>16</sup> Meadow. C., 'Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution' 28 *Fordham Urb. L.J.* 979-990 (2001)

code of conduct, ethics and etiquette will protect users of the various mechanisms from professional malpractices that may be perpetuated by practitioners<sup>17</sup>.

The paper critically discusses the role of ethics in arbitration. It argues that ethics play a fundamental role in enhancing the viability of arbitration as a dispute management mechanism. The paper explores some of the ethical concerns in arbitration in Africa. It also suggests measures towards strengthening ethical practice in arbitration in Africa.

## **2.0 The Role of Ethics in Arbitration**

Due to the finality and binding nature of arbitral awards, which are often significantly shielded from judicial review, it has been argued that transparency and trust in the conduct of the arbitration proceedings are necessary to ensure the legitimacy of the process and the awards rendered<sup>18</sup>. The parties must have confidence that the Arbitrator has the necessary experience, is impartial, independent, possesses the relevant qualifications, is fair-minded and will be able to effectively dispense justice in awarding a fair and just award<sup>19</sup>. As a result, it has been observed that the quality and success of an arbitration is as good as the quality of the arbitrators involved in it<sup>20</sup>. The quality and credibility of an arbitrator are therefore vital for the success of the arbitration proceedings. The fundamental principles in arbitration that are vital in ensuring the success of arbitration proceedings include the impartiality, *ethics* and independence of arbitrators during the arbitral process<sup>21</sup>.

The practice of arbitration raises several ethical concerns ranging from the particular ethical behavioral choices made by the actors inside an arbitration, including the arbitrators, lawyers (or other representatives), parties, and witnesses, to the institutions

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<sup>17</sup> Ibid

<sup>18</sup> Rajoo. D., 'Importance of Arbitrators' Ethics and Integrity in Ensuring Quality Arbitrations.' *Contemporary Asia Arbitration Journal*, Vol. 6, No. 2, pp 329-347 (2013)

<sup>19</sup> Ibid

<sup>20</sup> Ibid

<sup>21</sup> Ibid

who choose, administer, and promote arbitration and courts<sup>22</sup>. In addition to such behavioral choices, there are ethical issues relating to how arbitral choices and decisions are made when compared to other available methods of managing disputes such as litigation<sup>23</sup>. Further, the choice of arbitration and conduct of arbitral proceedings could result in several ethical concerns<sup>24</sup>.

It has been argued that ethical requirements in arbitration including independence, confidentiality, competence, the rules on conflict of interests and costs and fees are aimed at maintaining the integrity and ensuring the success of arbitration proceedings<sup>25</sup>. The ethical requirement of independence ensures that an arbitrator is able to arrive at decisions independently basing the conclusions on reality and objectivity<sup>26</sup>. Confidentiality allows parties to freely engage in candid, informal discussions of their interests to reach the best possible settlement of their dispute without concerns of such information leaking to third parties<sup>27</sup>. The rules on conflict of interest in arbitration and other ADR processes are aimed at ensuring impartiality and preventing bias in management of disputes which could arise due to involvement by the arbitrator with the subject matter of the dispute or relationship between the arbitrator and either of the participants in the proceedings<sup>28</sup>. This is in line with the principles of natural justice and the right to a fair hearing<sup>29</sup>. Competence as an ethical issue is also vital for successful outcomes in arbitration. It ensures that arbitrators have the requisite expertise and

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<sup>22</sup> Meadow. C., 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not.' *University of Miami Law Review*, Volume 56, NO. 4 (2002)

<sup>23</sup> Ibid

<sup>24</sup> Ibid

<sup>25</sup> Muigua. K., 'Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR.' Available at <http://kmco.co.ke/wp-content/uploads/2022/05/Promoting-ProfessionalConduct-Ethics-Integrity-Etiquette-in-ADR.pdf> (Accessed on 11/10/2023)

<sup>26</sup> Harding. K., 'Arbitration - The Role Of Ethics and its Nature.' Available at <https://kluwerlawonline.com/journalarticle/Arbitration:+The+International+Journal+of+Arbitration,+Mediation+and+Dispute+Management/64.3/AMDM1998013> (Accessed on 11/10/2023)

<sup>27</sup> Muigua. K., 'Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR.' Op Cit

<sup>28</sup> Ibid

<sup>29</sup> Ibid

qualifications require to sufficiently discharge their duties<sup>30</sup>. This is necessary in arbitration since it guarantees that arbitrators will follow due process, conduct proceedings in compliance with rules of evidence and write sound and reasoned awards<sup>31</sup>. The rules on costs and fees are designed to foster appropriateness and reasonableness of fees charged by arbitrators<sup>32</sup>.

Ethics therefore play a paramount role in arbitration. Due to this fact, there is need for arbitrators, counsel and parties to be aware of how ethics affect arbitral proceedings and, consequently, their rights and obligations in those proceedings<sup>33</sup>. Ethics in arbitration give confidence to parties that the process will meet their expectations for fairness, transparency, cost effectiveness and finality in managing disputes<sup>34</sup>. Complying with ethics can also guard arbitrators from proceedings concerning professional misconduct by providing a standard by which the arbitrator's performance can be measured and judged in the event of a complaint being made<sup>35</sup>. It is therefore imperative to strengthen ethics in arbitration.

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<sup>30</sup> Meadow. C., 'Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution' Op Cit

<sup>31</sup> Ibid

<sup>32</sup> Ibid

<sup>33</sup> Rogers. C., 'The Ethics of International Arbitrators.' Available at [https://www.international-arbitration-attorney.com/wp-content/uploads/International-Arbitration-Doctrine-49international\\_arbitration.pdf](https://www.international-arbitration-attorney.com/wp-content/uploads/International-Arbitration-Doctrine-49international_arbitration.pdf) (Accessed on 11/10/2023)

<sup>34</sup> Ibid

<sup>35</sup> Ibid

### **3.0 Strengthening Ethics in Arbitration in Africa: Progress and Challenges**

There has been progress towards strengthening ethics in arbitration as envisaged by several codes and institutional rules on ethics.

The International Bar Association (IBA) has formulated guidelines on conflicts of interest in international arbitration<sup>36</sup>. The guidelines apply to international commercial arbitration and international investment arbitration and are designed to assist parties, practitioners, arbitrators, institutions and courts in dealing with the fundamental ethical concerns of impartiality and independence<sup>37</sup>. Among the fundamental principles encapsulated in the guidelines is impartiality and independence<sup>38</sup>. According to the guidelines, every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated<sup>39</sup>. The guidelines further seek to address the ethical concern of conflict of interest. They require an arbitrator to decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator, if he or she has any doubt as to his or her ability to be impartial or independent<sup>40</sup>. According to the guidelines, the rules on conflict of interest are aimed at fostering confidence in the arbitral process<sup>41</sup>. The IBA guidelines also envisage the ethical duty of disclosure. They require an arbitrator to disclose any facts or circumstances that may, in the eyes of the parties, give rise to doubts as to his or her impartiality or independence prior to accepting appointment or as soon as the arbitrator becomes aware of such facts or circumstances<sup>42</sup>.

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<sup>36</sup> International Bar Association., 'IBA Guidelines on Conflicts of Interest in International Arbitration.' Available at <https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918> (Accessed on 12/10/2023)

<sup>37</sup> Ibid

<sup>38</sup> Ibid, Part 1

<sup>39</sup> Ibid

<sup>40</sup> Ibid

<sup>41</sup> Ibid

<sup>42</sup> Ibid

The IBA guidelines also govern parties to an arbitration and require them to disclose any relationship, direct or indirect, with the arbitrator<sup>43</sup>. Disclosure of such relationships is aimed at reducing the risk of an unmeritorious challenge of an arbitrator's impartiality or independence based on information learned after the appointment<sup>44</sup>. The IBA guidelines are important in strengthening ethics in arbitration by providing specific guidance to arbitrators, parties, institutions and courts as to which situations do or do not constitute conflicts of interest, or should or should not be disclosed<sup>45</sup>. The IBA guidelines represent an attempt to formulate a code of ethics in arbitration at the international level. The guidelines have gained wide acceptance within the international arbitration community<sup>46</sup>.

At the Institutional level, the *Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members*<sup>47</sup> sets out professional and moral principles to govern the conduct of members of the Chartered Institute of Arbitrators while discharging their mandate. The Code requires members to maintain integrity and fairness while managing disputes and withdraw from acting if they can no longer fulfill this obligation<sup>48</sup>. The Code further requires members to disclose all interests, relationships and matters likely to affect their independence and impartiality before and throughout the arbitration process<sup>49</sup>. It also requires members to be competent and only accept appointments to manage disputes only when they are appropriately qualified or experienced<sup>50</sup>. In addition, the Code requires arbitrators to ensure that parties are adequately informed of all the procedural aspects of the arbitration process<sup>51</sup>. It further requires members to maintain trust and

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<sup>43</sup> International Bar Association., 'IBA Guidelines on Conflicts of Interest in International Arbitration.' Op Cit

<sup>44</sup> Ibid

<sup>45</sup> Ibid

<sup>46</sup> Ibid

<sup>47</sup> Chartered Institute of Arbitrators., 'Code of Professional and Ethical Conduct for Members.' Available at <https://www.ciarb.org/media/4231/ciarb-code-of-professional-and-ethical-conduct-for-members.pdf> (Accessed on 11/10/2023)

<sup>48</sup> Ibid, Rule 2

<sup>49</sup> Ibid, Rule 3

<sup>50</sup> Ibid, Rule 4

<sup>51</sup> Ibid, Rule 5

confidence of the dispute resolution process<sup>52</sup>. The Code is therefore an important source of professional conduct, ethics, integrity and etiquette for members of the Chartered Institute of Arbitrators. It governs ethical issues in arbitration including integrity, fairness, conflict of interest, competence, trust and confidence.

The London Court of International Arbitration (LCIA) has also made progress towards strengthening ethics in arbitration vide its arbitration rules which contain general guidelines for the parties' legal representatives<sup>53</sup>. This has been described as the first attempt to set out an ethical framework for regulating the conduct of counsel in international arbitration at an institutional level<sup>54</sup>. The guidelines define the standards of ethical conduct expected of counsel appearing before the LCIA or its tribunal<sup>55</sup>. The guidelines prohibit legal representatives from engaging in certain conduct including activities intended unfairly to obstruct the arbitration or to jeopardise the finality of any award, knowingly making any false statement to the arbitral tribunal or the LCIA Court, knowingly procuring or assisting in the preparation of or relying upon any false evidence, knowingly concealing or assisting in the concealment of any document (or any part thereof) which is ordered to be produced by the arbitral tribunal, and deliberately initiating or attempting to initiate any unilateral contact with a member of the arbitration tribunal in relation to the arbitration proceedings<sup>56</sup>. These guidelines are binding upon the parties' legal representatives pursuant to article 18.5 of the LCIA rules<sup>57</sup>. They are aimed at promoting good and ethical conduct for parties' legal representatives appearing before the LCIA.

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<sup>52</sup> Ibid, Rule 8

<sup>53</sup> London Court of International Arbitration., 'LCIA Arbitration Rules 2020.' Available at [https://www.lcia.org/Dispute\\_Resolution\\_Services/Lcia-arbitration-rules-2020.aspx](https://www.lcia.org/Dispute_Resolution_Services/Lcia-arbitration-rules-2020.aspx) (Accessed on 11/10/2023)

<sup>54</sup> Dattilo. V., 'Ethics in International Arbitration: A Critical Examination of the LCIA General Guidelines for the Parties' Legal Representatives.' Available at <https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=2369&context=gjicl> (Accessed on 11/10/2023)

<sup>55</sup> Ibid

<sup>56</sup> London Court of International Arbitration., 'LCIA Arbitration Rules 2020.' Op Cit

<sup>57</sup> Ibid, article 18.5

Further, arbitral institutions in Africa have made progress towards strengthening ethics in arbitration by formulating rules and guidelines to govern ethical conduct in arbitration proceedings. The Nairobi Centre for International Arbitration (NCIA) has developed a code of conduct for arbitrators<sup>58</sup>. The Code requires an arbitrator, when approached with an appointment, to conduct reasonable enquiries with regard to potential conflict of interest that may arise from his or her appointment for that particular matter that may affect impartiality and independence<sup>59</sup>. It requires an arbitrator to accept appointment only where certain requirements have been met. This is where an arbitrator is fully satisfied that he is independent of the parties at the time of the appointment, and is able to remain so until final award has been rendered, able to discharge his duties without bias, has adequate knowledge of the language of the proceedings, has adequate experience and ability for the case at hand, and is able to give to the proceedings the time and attention which parties are reasonably entitled to expect<sup>60</sup>.

The Code also requires arbitrators to conduct proceedings with integrity and fairness<sup>61</sup>. Arbitrators are also required to disclose any interest or relationship that affects impartiality or creates an unfavorable appearance of partiality or bias<sup>62</sup>. The Code is also aimed at fostering appropriateness in communication between the tribunal and parties<sup>63</sup>. It forbids an arbitrator from discussing the case with any party in the absence of the other party<sup>64</sup>. The Code also safeguards the ethical requirements of honesty, trust and confidentiality and requires arbitrators to keep confidential all matters relating to the proceedings<sup>65</sup>. Further, it requires arbitrators to make their decisions in a just,

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<sup>58</sup> Nairobi Centre for International Arbitration, 'Code of Conduct for Arbitrators, 2021.' Available at <https://ncia.or.ke/wp-content/uploads/2021/07/3.-NCIA-CODE-OF-CONDUCT-FOR-ARBITRATORS-2021.pdf> (Accessed on 12/10/2023)

<sup>59</sup> Ibid, Principle 1

<sup>60</sup> Ibid

<sup>61</sup> Ibid, Principle 2

<sup>62</sup> Ibid, Principle 3

<sup>63</sup> Ibid, Principle 4

<sup>64</sup> Ibid

<sup>65</sup> Ibid, Principle 5

independent and deliberate manner<sup>66</sup>. The Code also aims at strengthening ethics in terms of fees charged by arbitrators and requires them to adopt and adhere to the NCIA Schedule of Fees<sup>67</sup>. The NCIA Code of Conduct for Arbitrators is therefore vital in strengthening ethics in arbitration. It requires arbitrators to observe fundamental standards of ethical conduct<sup>68</sup>.

The Arbitration Foundation of Southern Africa has also designed a Code of Conduct that stipulates ethical principles and standards to govern arbitrators<sup>69</sup>. The Code requires an arbitrator to always discharge his or her duties in such manner as to ensure a fair administration of justice between the parties<sup>70</sup>. Further, it requires an arbitrator to only accept appointment where the arbitrator is satisfied that he or she can act impartially and independently in that matter and disclose any matter that impair the ability to act independently and impartially<sup>71</sup>. The Code also stipulates the ethical duty of an arbitrator to act diligently and efficiently, and always with due courtesy to the parties and their witnesses<sup>72</sup>. Further, it enshrines the duty of confidentiality and requires the arbitrator to ensure that the proceedings remain confidential unless the parties agree otherwise<sup>73</sup>. The Code also envisages the ethical duty of an arbitrator to ensure efficient management of disputes and requires an arbitrator to devote sufficient time and proper attention to the matter and employ procedures which avoid unnecessary cost or delay and which promote the efficient management of disputes<sup>74</sup>.

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<sup>66</sup> Ibid, Principle 6

<sup>67</sup> Ibid, Principle 8

<sup>68</sup> Nairobi Centre for International Arbitration., 'Code of Conduct for Arbitrators, 2021.' Op Cit

<sup>69</sup> Arbitration Foundation of Southern Africa., 'Code of Conduct.' Available at <https://arbitration.co.za/domestic-arbitration/code-of-conduct/> (Accessed on 12/10/2023)

<sup>70</sup> Ibid

<sup>71</sup> Ibid

<sup>72</sup> Ibid

<sup>73</sup> Ibid

<sup>74</sup> Ibid

The Kigali International Arbitration Centre vide its arbitration rules also aims at strengthening ethical practice in arbitration<sup>75</sup>. The rules require an arbitrator to be and remain at all times independent and impartial and not act as the advocate of the parties<sup>76</sup>. The rules further require the Centre, in confirming or appointing arbitrators, to have due regard to any qualifications required of an arbitrator by the agreement of the parties and to such consideration as are likely to secure an impartial and independent arbitrator<sup>77</sup>. They also require the Centre to consider whether the arbitrator has sufficient availability and ability to determine the case in a prompt and efficient manner appropriate to the nature of arbitration<sup>78</sup>. Before appointment or confirmation, a prospective arbitrator is required to sign a statement of acceptance, availability, impartiality and independence<sup>79</sup>. The arbitrator is also required to disclose to the Centre any facts or circumstances that may give rise to justifiable doubts as to his or her impartiality<sup>80</sup>. Where these ethical requirements have not been met, the rules allow parties to challenge the appointment of an arbitrator if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence or if the arbitrator does not possess any requisite qualification on which the parties have agreed<sup>81</sup>.

It is therefore evident that progress has been made towards embracing ethics in arbitration in Africa. However, several ethical problems are still being witnessed in arbitration practice in Africa. There have been instances where the ethical duty of confidentiality has been breached resulting in information pertaining arbitration proceedings being leaked to third parties thus affecting the integrity of proceedings<sup>82</sup>.

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<sup>75</sup> Kigali International Arbitration Centre., 'Arbitration Rules, 2012.' Available at <https://kiac.org.rw/wp-content/uploads/2023/06/KIAC-arbitration-rules.pdf> (Accessed on 12/10/2023)

<sup>76</sup> Ibid, article 16

<sup>77</sup> Ibid

<sup>78</sup> Ibid

<sup>79</sup> Ibid

<sup>80</sup> Ibid

<sup>81</sup> Ibid

<sup>82</sup> Nairobi Centre for International Arbitration., 'Confidentiality in Arbitration: Evaluating Legal and Ethical Dilemmas.' Available at <https://ncia.or.ke/wp-content/uploads/2022/10/Confidentiality-in-Arbitration-Evaluating-Legal-and-Ethical-Dilemmas-1.pdf> (Accessed on 12/10/2023)

There have also been cases where the competence of some arbitrators has been questioned resulting in challenges against arbitral awards and setting aside of such awards in some instances<sup>83</sup>. Indeed, most arbitral laws in Africa including the Arbitration Act of Kenya allows an award to be challenged in cases where such an award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration<sup>84</sup>. In addition, there have been cases where arbitrators have been accused of bias and favoritism towards some parties in the conduct of arbitral proceedings and the final outcome in the arbitral award<sup>85</sup>. Another pertinent ethical problem has been in relation to arbitral costs and fees. In some instances, arbitrators have been accused of charging exorbitant fees thus defeating one of the key purposes of arbitration which is fostering cost effective management of disputes<sup>86</sup>. There is need to address these challenges by strengthening ethics in arbitration in Africa.

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<sup>83</sup> Muigua. K., 'Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR.' Op Cit

<sup>84</sup> Arbitration Act, No.4 of 1995, S 35 (2) (iv)

<sup>85</sup> Muigua. K., 'Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR.' Op Cit

<sup>86</sup> Meadow. C., 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not' Op Cit

#### **4.0 Way Forward**

There is need to Africanize conflict management processes in order to fully capture the values and ethics inherent in African societies<sup>87</sup>. The process of conflict management is largely influenced by culture<sup>88</sup>. African societies have since time immemorial ascribed to values aimed at promoting social cohesion<sup>89</sup>. Such values include peaceful coexistence, harmony, truth, honesty, unity, cooperation, forgiveness and respect<sup>90</sup>. Conflicts in African societies were thus viewed as a threat to peaceful coexistence and harmony<sup>91</sup>. African societies thus adopted conflict management strategies that were aimed at amicable management of conflicts in order to preserve the social fabric which tied such communities together<sup>92</sup>. These included informal negotiation, mediation, reconciliation and arbitration that were administered by institutions such as the council of elders<sup>93</sup>. Conflict management processes in African societies therefore adhered to the values and ethics that were held sacrosanct including honesty, truth, peace, unity, harmony, integrity, cooperation, respect and forgiveness<sup>94</sup>. It is therefore vital to Africanize conflict management and embrace Africa-focused arbitration in order to fully capture the values and ethics inherent in African societies<sup>95</sup>. Africa-focused arbitration especially in the context of international arbitration has the ability to acknowledge the current socio-

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<sup>87</sup> Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Available at <http://kmco.co.ke/wp-content/uploads/2023/06/Reframing-Conflict-Management-in-the-East-African-Community-Moving-from-Alternative-to-Appropriate-Dispute-Resolution-1.pdf> (Accessed on 12/10/2023)

<sup>88</sup> Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' *International Journal of Intercultural Relations* 30 (2006) 579–603

<sup>89</sup> Awoniyi. S., 'African Cultural Values: The Past, Present and Future' *Journal of Sustainable Development in Africa*, Volume 17, No.1, 2015

<sup>90</sup> Ibid

<sup>91</sup> Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' *An International Multidisciplinary Journal*, Ethiopia Vol. 8 (2).

<sup>92</sup> Ibid

<sup>93</sup> Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/Conflict-Resolution-by-Elders-successeschallenges-and-opportunities-1.pdf> (Accessed on 12/10/2023)

<sup>94</sup> Awoniyi. S., 'African Cultural Values: The Past, Present and Future' Op Cit

<sup>95</sup> Suedi. A., 'The need for "Africa-focused" Arbitration and Reform of Tanzania's Arbitration Act.' Available at <https://www.iisd.org/itn/en/2020/10/05/the-need-for-africa-focused-arbitration-and-reform-of-tanzanias-arbitration-act-amne-suedi/> (Accessed on 12/10/2023)

economic concerns in the continent and foster management of disputes in manner that takes into account local circumstances, values and ethics<sup>96</sup>.

It is also vital to enforce ethical standards and conduct among arbitrators. Ethical codes and standards formulated by various arbitral institutions have been criticized as being merely soft law norms which lack enforcement<sup>97</sup>. It is therefore important to ensure that such codes and standards are enforced in order to strengthen ethics in arbitration. It has been pointed out that the primary regulators of arbitral conduct and ethics are the appointing institutions and parties through challenge procedures<sup>98</sup>.

Further, arbitrators, counsel and parties should be encouraged and advised to adhere to the rules of conduct, ethics, integrity and etiquette while discharging their mandate<sup>99</sup>. Arbitrators should be encouraged to act with impartiality and integrity in management of disputes and avoid conflict of interest in order to promote the right to a fair hearing<sup>100</sup>. They should also only accept appointments in situations where they are competent to manage the dispute in question and charge fees according to the scale and schedules stipulated by respective institutions in case of institutional arbitration and reasonably in case of ad hoc arbitration<sup>101</sup>. Counsel appearing before arbitral tribunals should also embrace ethical conduct by refraining from activities including acts intended to unfairly obstruct the arbitration or to jeopardise the finality of any award, knowingly making any false statement to the arbitral tribunal, knowingly procuring or assisting in the preparation of or relying upon any false evidence, knowingly concealing or assisting in the concealment of any document (or any part thereof) which is ordered to be produced by the arbitral tribunal, and deliberately initiating or attempting to initiate any unilateral contact with a member of the arbitration tribunal in relation to the arbitration

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<sup>96</sup> Ibid

<sup>97</sup> Hacking, L., & Berry, S., 'Ethics in Arbitration: Party and Arbitral Misconduct.' Available at <https://www.lordhacking.com/Documentation/Hacking%20&%20Berry%20-%20Ethics%20in%20Arbitration%20April%202016.pdf> (Accessed on 12/10/2023)

<sup>98</sup> Ibid

<sup>99</sup> Muigua, K., 'Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR.' Op Cit

<sup>100</sup> Ibid

<sup>101</sup> Ibid

proceedings<sup>102</sup>. Parties' also have a duty to foster ethics in arbitration by acting in a courteous and respectful manner towards each other and the arbitral tribunal, disclosing all material facts to aid the tribunal in arriving at a just determination and avoiding making unilateral contact with the tribunal or influencing the tribunal in order to get a favourable outcome<sup>103</sup>. These measures are essential in strengthening ethics in arbitration.

There is also need foster competence by promoting standards and accreditation for arbitrators. It has been argued that this approach will enhance accountability, efficiency and competence of arbitrators and promote public confidence in arbitration<sup>104</sup>. Arbitral institutions in Africa should therefore continue enhancing training, licencing and accreditation of arbitrators in accordance with universally accepted standards while also bearing in mind local circumstances and needs<sup>105</sup>. This will be an important step in strengthening ethics in arbitration in Africa since it will ensure the availability of competent arbitrators who will be expected to adhere to the rules of conduct and ethics stipulated by the respective arbitral institutions.

Finally, there is need to enhance access to justice in Africa through ADR mechanisms including arbitration. The advantages of ADR mechanisms such as party autonomy, privacy, confidentiality, and the ability to foster expeditious and cost effective management of disputes makes them viable mechanisms for management of disputes compared to other processes such as litigation<sup>106</sup>. It has been pointed out that ADR mechanisms such as arbitration are enjoying a thriving present and a promising future in Africa<sup>107</sup>. It is therefore vital to encourage the uptake of ADR mechanisms such as

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<sup>102</sup> London Court of International Arbitration., 'LCIA Arbitration Rules 2020.' Op Cit

<sup>103</sup> Meadow. C., 'Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution' Op Cit

<sup>104</sup> Aloo, L.O. & Wesonga, E.K., 'What is there to Hide? Privacy and Confidentiality Versus Transparency: Government Arbitrations in Light of the Constitution of Kenya 2010,' *Alternative Dispute Resolution*, Vol. 3, No. 2 (Chartered Institute of Arbitration- Kenya, 2015).

<sup>105</sup> Ibid

<sup>106</sup> Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

<sup>107</sup> Ripley-Evans. J., & De Sousa. M., '2022 SOA Arbitration in Africa Survey Reveals a Thriving Market for Arbitration on the Continent.' Op Cit

arbitration and continue refining them by addressing ethical concerns among other underlying issues in order to enhance their suitability as 'Appropriate' Dispute Resolution mechanisms<sup>108</sup>.

These measures among others are needed in order to strengthen ethics in arbitration in Africa.

## **5.0 Conclusion**

Ethical requirements in arbitration including independence, confidentiality, competence, the rules on conflict of interests and costs and fees are aimed at maintaining the integrity and ensuring the success of arbitration proceedings<sup>109</sup>. Ethics in arbitration give confidence to parties that the process will meet their expectations for fairness, transparency, cost effectiveness and finality in managing disputes<sup>110</sup>. There has been progress towards strengthening ethics in arbitration as envisaged by several codes and institutional rules on ethics. However, several ethical issues are still prevalent in arbitral practice in Africa especially those related to confidentiality, conflict of interest, competence, bias and costs and fees<sup>111</sup>. It is imperative to address these challenges in order to strengthen ethics in arbitration in Africa. This can be achieved by Africanizing conflict management and embracing Africa-focused arbitration<sup>112</sup>; enforcing ethical standards and conduct among arbitrators; encouraging arbitrators, counsel and parties to adhere to the rules of conduct and ethics; fostering competence by promoting standards and accreditation for arbitrators; and enhancing access to justice in Africa through ADR mechanisms including arbitration<sup>113</sup>. Strengthening ethics in arbitration in Africa is a desirable outcome that must be pursued.

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<sup>108</sup> Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

<sup>109</sup> Muigua. K., 'Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR.' Op Cit

<sup>110</sup> Rogers. C., 'The Ethics of International Arbitrators.' Op Cit

<sup>111</sup> Muigua. K., 'Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR.' Op Cit

<sup>112</sup> Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

<sup>113</sup> Meadow. C., 'Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution' Op Cit

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