

**The Evolving Alternative Dispute Resolution Practice:
Investing in Digital Dispute Resolution in Kenya**

Kariuki Muigua

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Abstract

For the longest time, Alternative Dispute Resolution practice and infrastructure in Africa has been focusing on the traditional processes dealing with traditional commercial and investment related disputes. However, with the evolution of technology, many new areas of commerce have emerged, especially in the area of digital technologies and businesses. This paper makes a case for African countries to embrace digital dispute resolution mechanisms in addressing the emerging disputes related to digital commerce, in a timely and cost effective manner, through putting in place responsive legal and institutional infrastructure.

1. Introduction

A perusal through many of the African countries' legal, policy and institutional frameworks on Alternative Dispute Resolution (ADR) practice reveal that most of them are still focused on the traditional arbitral processes that are mainly physical in nature. However, with technological evolution, there has been emergence of new areas of commerce which naturally also come with related disputes. One such area is the digital commerce platforms. Consumer behavior and business models have changed dramatically as a result of digitalisation and technological disruption, which has been expedited by the effect of the COVID-19 pandemic.¹ Apart from pandemic impacts, the rise of information technology, globalization of economic activity, blurring of distinctions between professions and sectors, and increased integration of knowledge have all contributed to developments in the legal

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¹ 'Digital Economy Agreements' <<https://www.mti.gov.sg/Improving-Trade/Digital-Economy-Agreements>> accessed 16 April 2022.

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sector.² Technology has greatly impacted the way law and legal experts are operating in this era as far as enhancing efficiency is concerned.³

Furthermore, the rise of platforms and apps with multiple integrated services ranging from transportation to finance and telemedicine has altered how services are consumed, with businesses increasingly relying on electronic transactions and digital solutions for everything from sourcing to invoicing and payments. Secure and smooth cross-border data transfers are critical for the digital economy's growth and the protection of consumers' interests.⁴

The traditional legal and institutional frameworks on arbitration cannot, arguably, respond to the related disputes as they currently are. This paper makes a case for African countries, with a focus on Kenya, to respond to this digital and technological evolution by putting in place corresponding infrastructure to address the disputes that are bound to arise from the same.

OECD points out that the digital transformation has decreased the costs of international commerce, facilitated the coordination of global value chains (GVCs), aided the diffusion of ideas and technology, and connected a larger number of firms and customers throughout the world.⁵ It goes on to point out that even if international commerce has never been easier, the adoption of new business models has resulted in more complicated

² Kellogg Sarah, 'Cover Story: The Transformation of Legal Education' *From Washington Lawyer*, May 2011 <<https://www.dcb.org/bar-resources/publications/washington-lawyer/articles/may-2011-legal-education.cfm>> accessed 11 April 2022.

³ Abigail Hess, 'Experts Say 23% of Lawyers' Work Can Be Automated—Law Schools Are Trying to Stay Ahead of the Curve' (*CNBC*, 7 February 2020) <<https://www.cnbc.com/2020/02/06/technology-is-changing-the-legal-profession-and-law-schools.html>> accessed 10 April 2022; Alej, ro Miyar | February 06 and 2020 at 09:46 AM, 'Technology Trends That Will Affect the Legal Profession in 2020' (*Daily Business Review*) <<https://www.law.com/dailybusinessreview/2020/02/06/technology-trends-that-will-affect-the-legal-profession-in-2020/>> accessed 10 April 2022; Singapore Academy of Law, 'Deep Thinking: The Future Of The Legal Profession In An Age Of Technology' (*Medium*, 19 July 2019) <<https://medium.com/@singaporeacademyoflaw/deep-thinking-the-future-of-the-legal-profession-in-an-age-of-technology-6b77e9ddb1e9>> accessed 10 April 2022; 'Disruptive Technology in the Legal Profession' (*Deloitte United Kingdom*) <<https://www2.deloitte.com/uk/en/pages/financial-advisory/articles/the-case-for-disruptive-technology-in-the-legal-profession.html>> accessed 10 April 2022; 'New Technologies and the Legal Profession' (*nyujlb*) <<https://www.nyujlb.org/single-post/2019/04/08/New-Technologies-and-the-Legal-Profession>> accessed 10 April 2022; Tanya Du Plessis, 'Competitive Legal Professionals' Use of Technology in Legal Practice and Legal Research' (2008) 11 Potchefstroom Electronic Law Journal.

⁴ Ibid.

⁵ 'Digital Trade - OECD' <<https://www.oecd.org/trade/topics/digital-trade/>> accessed 16 April 2022.

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international trade transactions and policy challenges.⁶ As a result, Governments are confronted with new regulatory problems in today's fast-paced and linked world, not just in addressing concerns originating from digital disruption, but also in ensuring that the potential and advantages of digital commerce are realized and shared equally.⁷

Notably, Kenya is making positive steps towards enhancing the productivity of the digital economy as evidenced by the development of the 2019 Digital Economy Blueprint⁸. The Blueprint proposes five pillars as foundations for the growth of a digital economy which include: Digital Government; Digital Business; Infrastructure; Innovation-Driven Entrepreneurship and Digital Skills and Values.⁹ The Blueprint sets clear results, recognizes open doors and regions that need further concentration, while outlining relating game plans for Government, private area and the citizens. By working together, citizens can partake in the chances of a developing, all around the world serious present day economy, empowered by innovation.¹⁰

The paper makes some comparative analysis borrowed from countries that have made reasonable progress in this area.

2. Nature of Digital Economy

With the fast development of the web beginning in the mid-1990s, the advanced scene has extended and changed how organizations work and how shoppers take part in exchanges with organizations and with one another.¹¹ It has been contended that the digital economy is fundamentally different from the traditional economy as it existed during the twentieth century, when many economic theories crystallized, and that traditional theories fail to

⁶ Ibid.

⁷ Ibid.

⁸ Republic of Kenya, *Digital Economy Blueprint*, 2019. Available at <https://www.ict.go.ke/wp-content/uploads/2019/05/Kenya-Digital-Economy-2019.pdf> [Accessed on 16 April 2022].

⁹ Ibid, chapter Two.

¹⁰ Ibid, p. 28.

¹¹ Barefoot, K., Curtis, D., Jolliff, W., Nicholson, J.R. and Omohundro, R., 'Defining and Measuring the Digital Economy' (2018) 15 US Department of Commerce Bureau of Economic Analysis, Washington, DC, p.3.

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capture the abstract, global, oligopolistic, intangible, and knowledge-driven nature of the digital economy as it has emerged in the twenty-first century.¹²

The digital economy has revolutionized the way we do business and live our lives, and the growth of digitized innovation, such as cloud, mobile services, and artificial intelligence, has accelerated this shift and given us with unprecedented services and benefits.¹³

There are no universally accepted definitions of the terms ‘digital economy’ or ‘digital trade’. The United States International Trade Commission (USITC) defines digital trade as the delivery of products and services over fixed-line or wireless digital networks. This includes both domestic and international trade, but excludes most physical goods, such as goods ordered online and physical goods with a digital counterpart, such as books and software, music, and movies sold on CDs or DVDs.¹⁴ The United Kingdom Digital Dispute Resolution Rules defines a digital asset includes a cryptoasset, digital token, smart contract or other digital or coded representation of an asset or transaction; and a digital asset system means the digital environment or platform in which a digital asset exists.¹⁵

Physically delivered and digitalized purchases of digital services, such as remote cloud computing or architectural plans delivered on-line; or digitally enabled but physically delivered goods and services, such as the purchase of a good on an online marketplace or the booking of a hotel through a matching service. Because trade policy commitments and norms for goods (GATT) and services (WTO) differ, the trade policy environment will be determined by how the transaction is delivered and what sort of product is being transacted (GATS).¹⁶

¹² Usman W Chohan, ‘Some Precepts of the Digital Economy’ [2020] SSRN Electronic Journal 1 <<https://www.ssrn.com/abstract=3512353>> accessed 16 April 2022.

¹³ Watanabe, C., Naveed, K., Tou, Y. and Neittaanmäki, P., ‘Measuring GDP in the Digital Economy: Increasing Dependence on Uncaptured GDP’ (2018) 137 *Technological Forecasting and Social Change* 226, at p. 226.

¹⁴ Lund S and Manyika J, ‘How Digital Trade Is Transforming Globalisation’ (by International Centre for Trade and Sustainable Development (ICTSD) 7 ... 2016), 3.

¹⁵ Rule 2, *Digital Dispute Resolution Rules*, 2021.

¹⁶ González JL and Jouanjean M-A, "Digital Trade: Developing a Framework for Analysis OECD." *Trade Policy Papers* 205 (2017), at p. 13.

Digitization minimizes marginal production and distribution costs while widening access to global commerce, lowering the cost of engaging in trade not only for major enterprises, but also for individuals, small businesses, and entrepreneurs. This is already causing business model innovations and the rise of micro-multinationals, micro-work, and micro-supply chains that may take advantage of international markets.¹⁷

3. Traditional Alternative Dispute Resolution Processes Versus Digital Disputes

ADR procedures have been linked to a number of benefits over litigation, including being quicker, cheaper, and less restrictive on procedural norms. In the twenty-first century, alternative dispute resolution (ADR) aims to develop a faster, more cost-effective, and more efficient approach than litigation, which is time-consuming and expensive.¹⁸ Foreign investors prefer mediation or arbitration over the national court system because they are concerned about the effectiveness of national courts in cross-border conflicts. In the context of cross-border commerce, dispute resolution through arbitration/ADR is not just a domestic but also an increasingly rising worldwide phenomena.¹⁹

Contemporary ADR methods and procedures are thought to be more efficient and constructive than traditional schemes for managing conflicts and settling disputes because they help parties collaborate by reducing animosity and diminishing competitive incentives during the process, and in part, allows for a more satisfactory process through the conflict management expertise of professional negotiators and state-of-the-art in the field.²⁰ The features of flexibility, cheap cost, absence of complex processes, collaborative issue solving, salvaging relationships, and familiarity with the general public are the core selling points of ADR methods.²¹

¹⁷ Lund S and Manyika J, 'How Digital Trade Is Transforming Globalisation' (by International Centre for Trade and Sustainable Development (ICTSD) 7 ... 2016), at p.1.

¹⁸ Muigua, K., "Heralding A New Dawn: Achieving Justice Through Effective Application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya", Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Vol. 1, No 1, (2013), pp. 43-78 at p.55.

¹⁹ Surridge & Beecheno, *Arbitration/ADR Versus Litigation*, September 4, 2006, Available at http://www.hg.org/articles/article_1530.html

²⁰ Peters, S., "The evolution of alternative dispute resolution and online dispute resolution in the European Un." *CES Derecho* 12, no. 1 (2021): 3-17, at p.5.

²¹ Muigua, K., 'ADR: The Road to Justice in Kenya' Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Vol. 2, No 1, (2014), pp. 28-95.

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Digital disruption has been felt across all modes: digital versions of products or services compete with physically embodied versions, and digital distribution/facilitation business models compete with conventional distribution business models.²²

Technology has also crept into the realm of alternative dispute resolution thanks to advancements in the field. There is now online mediation, online arbitration, and even block chain arbitration, which employs the same block chain technology as cryptocurrencies. Alternative conflict resolution, sometimes known as "online dispute resolution," is becoming more popular.²³

The United Kingdom's Digital Dispute Resolution Rules provide for an automatic dispute resolution process which means a process associated with a digital asset that is intended to resolve a dispute between interested parties by the automatic selection of a person or panel or artificial intelligence agent whose vote or decision is implemented directly within the digital asset system (including by operating, modifying, cancelling, creating or transferring digital assets).²⁴ It is, however, worth pointing out that these Rules have also created room for the traditional ADR mechanisms by providing that 'any dispute between interested parties arising out of the relevant contract or digital asset that was not subject to an automatic dispute resolution process shall be submitted to arbitration in accordance with the current version of these rules at the time of submission; however, any expert issue shall be decided by an appointed expert acting as such rather than as an arbitrator'.²⁵

The emergence of Online Dispute Resolution (ODR) as a supplement to Alternative Dispute Resolution (ADR) might result in a meaningful paradigm shift in how conflicts are resolved outside of conventional court systems.²⁶ It has been argued that the traditional court system

²² Ciuriak D and Ptashkina M, 'The Digital Transformation and the Transformation of International Trade' [2018] RTA Exchange. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and the Inter-American Development Bank (IDB), at p. 1.

²³ Yeoh D, 'Is Online Dispute Resolution the Future of Alternative Dispute Resolution?' (*Kluwer Arbitration Blog*, 29 March 2018) <<http://arbitrationblog.kluwerarbitration.com/2018/03/29/online-dispute-resolution-future-alternative-dispute-resolution/>> accessed 17 April 2022.

²⁴ Rule 2, United Kingdom Digital Dispute Resolution Rules 2021.

²⁵ *Ibid*, Rule 5.

²⁶ Peters S, "The evolution of alternative dispute resolution and online dispute resolution in the European Un." *CES Derecho* 12, no. 1 (2021): 3-17, at p. 3.

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is incapable of administering justice 'on a large scale,' and that ADR and ODR are more appropriate because they provide the architecture and tools to handle online disputes and can more proportionally handle functions that judicial authorities can no longer handle.²⁷ International commercial disputes may quickly grow into huge trade disputes with significant political and economic ramifications, necessitating the greater use of extrajudicial dispute settlement rather than litigation in national courts.²⁸ As a result of globalization, effective and dependable systems for resolving commercial and other general issues involving parties from several jurisdictions have become not only desirable but also essential.²⁹

4. Kenya's Preparedness in Embracing Digital Dispute Resolution

While various factors have contributed to the Internet economy's rise, the growing rate of innovation in information and communication technology remains the most significant.³⁰

It has been observed that E-commerce has risen significantly in Kenya, owing to legislation regulating information and communications technology (ICT) services, e-commerce transactions, data protection, and information access.³¹

In April 2021, the UK Jurisdiction Taskforce published the Digital Dispute Resolution Rules which are meant to facilitate the rapid and cost-effective resolution of commercial disputes, particularly those involving novel digital technology such as cryptoassets, cryptocurrency,

²⁷ Peters, S., "The evolution of alternative dispute resolution and online dispute resolution in the European Un." *CES Derecho* 12, no. 1 (2021): 3-17, at p.6.

²⁸ Sagartz, A., "Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court," *Ohio St. J. on Disp. Resol.* 13 (1997): 675, at p. 675.

²⁹ Alternative Dispute Resolution Methods, Document Series No. 14, page 2, Paper written following a UNITAR Sub-Regional Workshop on Arbitration and Dispute Resolution (Harare, Zimbabwe 11 to 15 September, 2000) <http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document14/DocSeries14.pdf > accessed 17 April 2022.

³⁰ Ahmed U and Aldonas G, 'Addressing Barriers to Digital Trade' (by International Centre for Trade and Sustainable Development (ICTSD) 7 ... 2015), at p.1.

³¹ Kiriti-Nganga T and Mbithi M, 'The Digital Trade Era - Opportunities and Challenges for Developing Countries: The Case of Kenya' (2021), in book: *Adapting to the Digital Era: Challenges and Opportunities* (pp.92-109), World Trade Organization, at p.94 <https://www.wto.org/english/res_e/booksp_e/adtera_e.pdf> accessed on 16 April 2022.

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smart contracts, distributed ledger technology, and fintech applications.³² They must be agreed upon in writing by both parties, either before or after a disagreement arises. The guidelines provide language for use in a contract, a digital asset (such as a cryptoasset, digital token, smart contract, or other digital or coded representation of an asset or transaction), or a digital asset system.³³

There is need for African countries to consider investing in similar rules to enhance the growth of digital dispute resolution mechanisms.

4.1. Data Privacy Protection: Data Transfer, Processing, and Storage

Most modern enterprises are progressively bound by national and international data privacy laws, which require companies to know where they are storing Personally Identifiable Information (PII) and Personal Health Information (PHI) and to implement strict controls around the processing, use, and transfer of such PII and PHI.³⁴ Due to the considerable dangers and problems offered by technology in terms of such data, the impact of this will become even more apparent as businesses adopt technology.³⁵ Data breach notification procedures, Data Subject Access Requests (DSARs), and cross-border e-discovery projects are just a few examples of legal processes that demand extreme caution in identifying and managing PII and PHI while working under tight deadlines.³⁶ Data protection rules in one nation may not be as sophisticated as those in another, necessitating a significant investment in this area not only to earn the trust of clients and partners in

³² United Kingdom, Digital Dispute Resolution Rules, April 2021 < https://35z8e83m1ih83drye280o9d1-wpengine.netdna-ssl.com/wp-content/uploads/2021/04/Lawtech_DDRR_Final.pdf > accessed on 16 April 2022.

³³ 'Ground-Breaking Digital Dispute Resolution Rules Published' (*Walker Morris*) <<https://www.walkermorris.co.uk/publications/ground-breaking-digital-dispute-resolution-rules-published/>> accessed 17 April 2022

³⁴ Katharine Perekslis, 'Four Strategies to Navigate Data Privacy Obligations for Compliance, Litigation, and E-Discovery Professionals' (*Law.com*) <<https://www.law.com/native/?mvi=7bd540437dde4b60991f35c257adc521> > accessed 3 June 2020.

³⁵ *Ibid.*

³⁶ *Ibid.*

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another country, but also to avoid the legal ramifications that may result from a data privacy breach.³⁷

Local businesses must make a deliberate decision to invest in data protection infrastructure that will allow them to function efficiently and secure their clients' data regardless of the state of local data protection regulations. As dispute resolution professionals and corporate legal departments seek more cost-effective ways to improve the delivery of legal services, they should look for paralegals and legal assistants with experience in technology-driven systems who can not only help the firm operate more efficiently but also ensure data privacy.³⁸

It may be necessary for policymakers to collaborate closely with other stakeholders to reexamine existing data protection rules in order to improve their efficacy. Relevant personnel should also be prepared with the required data protection skills and knowledge. Information security management, for example, is a collection of rules and procedural controls that Information Technology (IT) and business organizations use to safeguard their informational assets against threats and vulnerabilities-security of information.³⁹ These professionals would be in charge of an institution's or company's Information Security Management System (ISMS). ISMS is essential to ensure that any data is kept secret, has integrity, and is conveniently accessible when needed. Regardless of whether the data is stored in a digital or physical format, the discipline of Information Security Management is essential for preventing illegal access or theft.⁴⁰ This is because any technology-driven business operation, including the legal profession, is vulnerable to security and privacy

³⁷ United Nations Conference On Trade And Development, 'Data protection regulations and international data flows: Implications for trade and development,' UNCTAD/WEB/DTL/STICT/2016/1/iPub, United Nations, 2016 <https://unctad.org/en/PublicationsLibrary/dtlstict2016d1_en.pdf > 10 April 2022; 'How Organizations Can Stay Ahead of Changing Privacy Laws' (*Digital Guardian*, 22 August 2019) <<https://digitalguardian.com/blog/how-organizations-can-stay-ahead-changing-privacy-laws>> accessed 10 April 2022.

³⁸ 'Future Law Office 2020: Redefining the Practice of Law | Robert Half' <<https://www.roberthalf.com/research-and-insights/workplace-research/future-law-office-2020-redefining-the-practice-of-law>> accessed 10 April 2022.

³⁹ 'What Is Information Security Management?' (*Sumo Logic*) <<https://www.sumologic.com/glossary/information-security-management/>> accessed 10 April 2022.

⁴⁰ Ibid.

concerns.⁴¹ The security controls can follow common security standards or be more focused on the industry.⁴²

4.2. Training/Education in E-Literacy

To meet the needs of today's legal consumer, it has been correctly stated that "with the emerging concepts of artificial intelligence, Block chain, Education, and digital technology, capabilities and potential must develop, and efforts must be made at the school and university level for upgrading digital skills, running special basic and advanced skill-based programs."⁴³ Law schools must step in to bridge the knowledge and skills gap if attorneys are to stay relevant and on top of their game. Indeed, it has been correctly said that "the rivalry in the field of law has expanded tremendously to the point that it is now a worldwide platform and every student who steps into the shoes of a lawyer is required to manage many topics."⁴⁴

To prepare the overall population, there is a requirement for the Government, through the Ministry of Information Communication Technology in a joint effort with the other significant partners to make it simple for general society to procure the applicable abilities in innovation through customized courses at all levels of the school educational program as well as through other improved on courses accessible to those all-around out of school and not liable to profit from work related phases of preparation nearby. This will also make it simpler for the general population to have meaningful interactions with the legal system.

⁴¹ 'Introduction to Information Security Management Systems (ISMS) – BMC Blogs' <<https://www.bmc.com/blogs/introduction-to-information-security-management-systems-isms/>> accessed 10 April 2022.

⁴² Luke Irwin, 'ISO 27001: The 14 Control Sets of Annex A Explained' (*IT Governance UK Blog*, 18 March 2019) <<https://www.itgovernance.co.uk/blog/iso-27001-the-14-control-sets-of-annex-a-explained>> accessed 10 April 2022.

⁴³ Raizada S and Mittal JK, 'Structural Transformation and Learning Paradigms-Global Strategic Approach in Clinical Legal Education' (2020) 20 *Medico Legal Update* 188, 189.

⁴⁴ *Ibid*, 189.

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This is especially relevant given that the judiciary is on the verge of incorporating technology into the administration of justice.

The necessity for embracing justice—to allow efficient access to justice for all—will be defeated if the disseminators/facilitators of justice are empowered and the consumers of justice are excluded.

Leaving them out will instead encourage digital apartheid, which is the systematic exclusion of particular populations from digital access and experience as a result of political and commercial policies and practices.⁴⁵ With the increased digitization of government services, such as the Huduma Center service delivery model, a Government of Kenya initiative aimed at advancing citizen-centered public service delivery through a variety of channels, including deploying digital technology and establishing citizen service centers across the country, there is an urgent need to address digital illiteracy in order to improve access for all. The process will benefit from virtual access to justice.⁴⁶ The government can collaborate with the judiciary to establish Digital Villages Projects around the country to improve access to justice-related services.⁴⁷ Such centers should concentrate on providing digital training and education relating to access to justice.

In addition, the government should work with both domestic and international IT businesses to spread out internet access services across the country so that everyone has easy access. They should also collaborate with local mobile service providers to make mobile data accessible to the majority of Kenyans. Furthermore, all people should be able

⁴⁵ Paula Barnard-Ashton and others, 'Digital Apartheid and the Effect of Mobile Technology during Rural Fieldwork' (2018) 48 South African Journal of Occupational Therapy 20.

⁴⁶ Sarah aru and Moses Wafula, 'Factors Influencing the Choice of Huduma Centers' Services (A Case Study of Mombasa Huduma Centre)' (2015) 5 International Journal of Scientific and Research Publications; Amir Ghalib Abdalla and others, 'Effect of Huduma Centers (One Stop Shops) in Service Delivery – A Case Study of Mombasa Huduma Centre' (2015) 5 International Journal of Academic Research in Business and Social Sciences 102; 'Study Heaps Praise on Revolutionary Huduma Centres' (*Daily Nation*) <<https://www.nation.co.kehttps://www.nation.co.ke/dailynation/news/study-heaps-praise-on-revolutionary-huduma-centres-89030>> accessed 11 April 2022.

⁴⁷ 'Broadband in Kenya | Broadband Strategies Toolkit' <<http://ddtoolkits.worldbankgroup.org/broadband-strategies/case-studies/broadband-kenya>> accessed 11 April 2022.

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to afford electricity. The Kenyan government's efforts to guarantee that all Kenyans have access to power through the Last Mile Electricity Connectivity Project are noteworthy.⁴⁸

5. Digital Dispute Resolution: The Future of Commercial Alternative Dispute Resolution?

With the introduction of diverse social media platforms that allow interconnectivity beyond national boundaries and enable cross-border relationships between clients and their dispute resolvers, the experts can use technology to tap into the ever-growing international Alternative modes of Dispute Resolution such as international arbitration, mediation, and Online Dispute Resolution (ODR), especially in the face of rapidly growing networking and borderless legal practice.⁴⁹

5.1. Online Mediation

Mediation is a negotiation process between two parties in the presence of a third party. Through a framework that will not force any solution that is not mutually acceptable, negotiation permits parties to fully control both the process and the outcome.⁵⁰ As an informal dispute resolution procedure, negotiation gives parties complete authority over the process of identifying and discussing their difficulties, allowing them to negotiate a mutually acceptable solution without the involvement of a third party. It focuses on the

⁴⁸ 'Last Mile Connectivity Program Kenya - Inclusive Infrastructure' <<https://inclusiveinfra.github.org/case-studies/last-mile-connectivity-program-kenya/>> accessed 11 April 2022; 'Kenya - Last Mile Connectivity Project II' <<https://projectsportal.afdb.org/dataportal/VProject/show/P-KE-FA0-013>> accessed 11 April 2022; African Development Bank, 'Kenya - Last Mile Connectivity Project - Project Appraisal Report' (*African Development Bank - Building today, a better Africa tomorrow*, 24 January 2020) <<https://www.afdb.org/en/documents/kenya-last-mile-connectivity-project-project-appraisal-report>> accessed 11 April 2022; 'Last Mile Project – Ministry of Energy' <<https://energy.go.ke/?p=914>> accessed 11 April 2022.

⁴⁹ Emmanuel Oluwafemi Olowononi and Ogechukwu Jennifer Ikwanusi, 'Recent Developments in 21st Century Global Legal Practice: Emerging Markets, Prospects, Challenges and Solutions for African Lawyers' (2019) 5 KIU Journal of Social Sciences 31; Samuel Omotoso, 'Law, Lawyers And The Social Media In The 21st Century: Challenges And Prospects' Law, Lawyers And The Social Media In The 21st Century: Challenges And Prospects <https://www.academia.edu/40663364/LAW_LAWYERS_AND_THE_SOCIAL_MEDIA_IN_THE_21ST_CENTURY_CHALLENGES_AND_PROSPECTS> accessed 10 April 2022.

⁵⁰ See generally, Muigua, K., *Resolving Conflicts through Mediation in Kenya* (Nairobi: Glenwood Publishers, 2017).

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parties' similar interests rather than their respective strength or position.⁵¹ It is linked to voluntariness, cost-effectiveness, informality, an emphasis on interests rather than rights, innovative solutions, personal empowerment, greater party control, addressing fundamental causes of conflict, non-coerciveness, and long-term results. This makes it particularly applicable to normal life conflicts that would otherwise be exacerbated by any attempts to resolve them through litigation.⁵² When participants in a negotiation reach a stalemate, they invite a third party of their choosing to assist them in resolving the issue, which is known as mediation.⁵³ Mediation has many of the same benefits as negotiating. However, because mediation has no enforcement mechanism and relies on the goodwill of the parties, it suffers from its non-binding character, which means that if compliance is necessary, one must go to court to acquire it.⁵⁴

The added advantages of online mediation are that parties need not to travel and the cost of mediation is fixed and parties can prepare financially from the start.⁵⁵

5.2. Online Commercial Arbitration

Due to its clear benefits over litigation, arbitration has grown in favour as the preferred method of resolving disputes, particularly among businesses.⁵⁶ The most notable advantage of arbitration over litigation is its transnational application in international conflicts with low or no intervention from national courts, giving parties confidence that justice would be served in the most efficient manner possible. As a result, countries and regions all over

⁵¹ Rahwan, I., Sonenberg, L. and Dignum, F., "Towards interest-based negotiation." In *Proceedings of the second international joint conference on Autonomous agents and multiagent systems*, pp. 773-780, ACM, 2003.

⁵² Muigua, K., 'ADR: The Road to Justice in Kenya' Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Vol. 2, No 1, (2014), pp. 28-95.

⁵³ Mwangi, M., *Conflict in Africa: Theory, Processes and Institutions of Management* (Nairobi: Centre for Conflict Research, 2006), p. 115.

⁵⁴ See generally, Muigua, K., 'Effective Justice for Kenyans: is ADR Really Alternative?' *The Law Society of Kenya Journal*, Vol. II, 2015, No. 1, pp. 49-62.

⁵⁵ 'The Benefits of Online Mediation' (*Mediation Center of Los Angeles / MCLA*, 2 November 2020) <<https://www.mediationla.org/the-benefits-of-online-mediation/>> accessed 17 April 2022.

⁵⁶ See Sagartz, A., "Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court," *Ohio St. J. on Disp. Resol.* 13 (1997): 675 at p.678.

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the world are advocating international arbitration as the preferred method for resolving international conflicts.⁵⁷

International commercial arbitration in Africa will assist the business and investment community because it provides a viable structure for resolving international and regional conflicts.⁵⁸ However, while commercial arbitration's inherent flexibility has allowed it to adapt well to recent global changes, particularly the Covid-19 pandemic, due to its familiarity with remote communications, videoconferencing, and the use of technology to drive efficiencies, holding proceedings entirely (or nearly entirely) virtually has posed its own set of challenges, including concerns about worries over fair treatment, straightforwardness, secrecy, security, data protection and management; the presentation of submissions in a different way; how to manage numerous time regions; screen weariness; and network issues.⁵⁹

Thus, even as the world moves towards embracing online commercial arbitration, there is a need for countries and stakeholders to come up with ways of overcoming the above listed challenges.

5.3. Block Chain Arbitration

Blockchain is defined as a "open, distributed ledger that can efficiently and permanently record transactions between two parties." In its most basic form, a blockchain's functioning premise is built on the connection of each transaction or movement as a "block" to the system, allowing the platform to develop indefinitely. The whole system is updated with

⁵⁷ Karl P. S. and Federico O., *Improving the international investment law and policy regime: Options for the future*, Background report prepared for the Seminar on Improving the International Investment Regime Helsinki, April 10-11, 2013 hosted by The Ministry for Foreign Affairs of Finland, 25 March 2013. Available at <http://www.formin.finland.fi/public/download.aspx?ID=113259&GUIDE>

⁵⁸ Muigua, K., 'Promoting International Commercial Arbitration in Africa,' Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Volume 5, No 2, (2017), pp. 1-27.

⁵⁹ 'Recent Trends in International Arbitration' (*Walker Morris*)

<<https://www.walkermorris.co.uk/publications/recent-trends-in-international-arbitration/>> accessed 17 April 2022.

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each new transaction, and the transaction is accessible to all parties involved anywhere in the globe.⁶⁰

The self-executing, next generation contracts used in Smart Contracts, Blockchain, and Arbitration are designed to achieve preset conditions. By activating the arbitration clause embedded in the smart contract, Blockchain Arbitration can enable the storage and verification of rules, as well as automatic implementation (on a specific occurrence constituting a breach of the agreement).⁶¹

If a disagreement arises, the smart contract will alert the Arbitrator via a blockchain-based dispute resolution interface. A party can digitize the conditions of an agreement, lock the cash in a smart contract, and condition the smart contract such that the work is completed and the monies are received. The smart contract's self-executing nature will automatically enforce the award and transmit the stipulated fee to the Arbitrator once the procedure is completed.⁶²

Due to its decentralized nature, blockchain arbitration currently presents several incompatibilities with the existing arbitration legal framework, such as the cryptographic form of the arbitration agreement and the lack of a seat of arbitration, to name a few.⁶³

The notion of blockchain arbitration is one of the most recent advancements in ADR, and it aims to harness the benefits of the technology in dispute resolution. It is linked to the proliferation of e-contracts and smart contracts in commercial transactions throughout the

⁶⁰ 'Blockchain, Smart Contracts And Arbitration - Technology - Turkey' <<https://www.mondaq.com/turkey/fin-tech/967452/blockchain-smart-contracts-and-arbitration>> accessed 17 April 2022.

⁶¹ 'Blockchain Arbitration: The Future of Dispute Resolution' (*Foxmandal*, 23 November 2021) <<https://www.foxmandal.in/blockchain-arbitration-the-future-of-dispute-resolution/>> accessed 17 April 2022.

⁶² Ibid.

⁶³ Chevalier M, 'Arbitration Tech Toolbox: Is a Mexican Court Decision the First Stone to Bridging the Blockchain Arbitral Order with National Legal Orders?' (*Kluwer Arbitration Blog*, 4 March 2022) <<http://arbitrationblog.kluwerarbitration.com/2022/03/04/arbitration-tech-toolbox-is-a-mexican-court-decision-the-first-stone-to-bridging-the-blockchain-arbitral-order-with-national-legal-orders/>> accessed 17 April 2022.

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world.⁶⁴ There is, however, need for independent and further research on the topic of blockchain arbitration even as the international community moves to embrace the process.

6. Conclusion

The expansion of digital trade and digitally enabled transactions has been tremendous in Kenya, and digitization has become a vital element of a wide range of daily activities and service delivery.⁶⁵ With more and more individuals throughout the globe engaged in immediate cross-border exchanges of digital commodities, and as the infrastructure that supports the Internet increases, obstacles of distance and cost that previously appeared insurmountable have begun to fall away.⁶⁶

The transnational nature of this kind of commerce and the limitations that come with the traditional means of dispute resolution create the need for enhanced use of digital dispute resolution in Africa. 'The quality of an institute depends on the incorporation of current changing dynamics and environmental challenges, and if institutions fail to keep pace with these changes, they will be perceived as increasingly irrelevant, failing to add value to society and shaping and grooming future leaders who can contribute in creative ways to accelerating sustainable economic development,' it has been correctly stated.⁶⁷ This, therefore, calls for investment in institutional frameworks that will ably overcome the challenges that come with digital economy, as far as management of the digital trade disputes is concerned.

Alternative Dispute Resolution practice is rapidly evolving-there is clearly a need to invest in Digital Dispute Resolution in Kenya and the rest of the world.

⁶⁴ Bansal R, 'Enforceability of Awards from Blockchain Arbitrations in India' (*Kluwer Arbitration Blog*, 21 August 2019) <<http://arbitrationblog.kluwerarbitration.com/2019/08/21/enforceability-of-awards-from-blockchain-arbitrations-in-india/>> accessed 17 April 2022.

⁶⁵ Kiriti-Nganga T and Mbithi M, 'The Digital Trade Era - Opportunities and Challenges for Developing Countries: The Case of Kenya' (2021), in book: *Adapting to the Digital Era: Challenges and Opportunities* (pp.92-109), World Trade Organization, at p.94.

⁶⁶ Lund S and Manyika J, 'How Digital Trade Is Transforming Globalisation' (by International Centre for Trade and Sustainable Development (ICTSD) 7 ... 2016), at p.1.

⁶⁷ Raizada S and Mittal JK, 'Structural Transformation and Learning Paradigms-Global Strategic Approach in Clinical Legal Education' (2020) 20 *Medico Legal Update* 188, 189.

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