

Rethinking the Role of African National Courts in Arbitration

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To all pro-arbitration judges in Africa, who by their efforts, have promoted cross-border trade and the cause of international arbitration in Africa.

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CHAPTER 13

Attitude of Kenyan Courts Towards Arbitration

Kamau Karori & Ken Melly

INTRODUCTION

This chapter examines the attitude of Kenyan courts towards arbitration to identify whether the courts and judges are supportive or not of arbitration. Kenya's arbitration law and judicial attitude towards arbitration are both heavily influenced by the 1985 version of the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law) and the New York Convention on the Recognition and Enforcement of Foreign arbitral awards (New York Convention). Kenya ratified the New York Convention on 10 February 1989. Kenya's Arbitration Act, 1995¹ (and subsequent amendments thereto²) borrowed heavily from these two key international instruments. By adopting the principles enunciated or intended by these international instruments, Kenya infused into the practice of both domestic and international arbitration international arbitration principles and best practices. By taking these key steps, Kenya has over the past two decades, experienced robust growth in the use of arbitration and development in arbitral practice. However, this growth has not been without occasional challenges primarily from the judicial interpretations of these laws. To examine these issues, this chapter will set out the laws that apply to arbitration in Kenya in section §13.01, the role of the courts in arbitration in section §13.02, and the effect of the Kenyan Constitution on arbitration in section §13.03. The sections also examine potential setbacks, propose reforms in keeping with international best practices and make suggestions towards streamlining the judiciary-arbitration interface and cementing Kenya's standing as an important arbitration hub and 'safe seat'.

1. The 1995 Arbitration Act, No. 4 of 1995.

2. Vide the Arbitration (Amendment) Act, No. 11 of 2009.

§13.01 ARBITRATION LAWS IN KENYA

This section briefly traces the historical context of arbitration laws in Kenya from the Arbitration Act 1968 to the current Arbitration Act 1995 (section A), the effect of the arbitration agreement (section B) and the arbitral award (section C).

[A] History of Arbitration Laws in Kenya

Kenya's first post-independence legislation on arbitration was contained in the now repealed 1968 Arbitration Act, Cap 49, Laws of Kenya (the 1968 Act). The 1968 Act was substantially a reproduction of the English Arbitration Act, 1950. The Act did not at the time contain an equivalent of Article 5 of the UNCITRAL Model Law, limiting court intervention. Courts were at the time guided by the decision in *Rashid Moledina v. Hoima Ginnors*³ where Duffus JA stated thus:

Generally speaking the courts will be slow to interfere with the award in an arbitration having regard to the fact that the parties to the dispute have chosen this method of settling their dispute and have agreed to be bound by the arbitrator's decision, but the courts will do so whenever this becomes necessary in the interests of justice, and will act if it is shown, as it is alleged in this case, that the arbitrators in arriving at their decision have done so on a wrong understanding or interpretation of the law.

Following Kenya's ratification of the UNCITRAL Model Law it was necessary for the 1968 Act to be repealed and replaced with a new statute that would give effect to the principles espoused in the Model Law. The increasing popularity of arbitration following the ratification of the Model Law was evidenced by the growing number of parties that incorporated arbitration clauses into their contracts. The preference for arbitration by parties in commercial dealings provided an impetus to the Kenyan legislature to better codify the substantive and procedural law of arbitration in Kenya. Accordingly, the 1968 Act was repealed in the mid-1990s with the enactment of the Arbitration Act, No. 4 of 1995 (the 1995 Act or the Act).⁴ This period also witnessed an increased professionalisation of arbitration, as a process of dispute resolution (as compared to litigation). This professionalisation also led to an increase in the number of qualified arbitration practitioners and arbitration institutions to meet the growing need for reliable dispute resolution services in Kenya.

The 1995 Act⁵ is closely modelled on the UNCITRAL Model Law. The Act marked the beginning of a gradual, yet hugely significant, change in Kenya's arbitration landscape. The Act promotes the concept of non-interference by the courts and

3. [1967] EA 645, 645.

4. The repealing provision is contained in section 42(1) of the 1995 Act. See also Githu Muigai & Jacqueline Kamau, 'The Legal Framework of Arbitration in Kenya', in *Arbitration Law & Practice in Kenya*, 2 (2011); and Kariuki Muigua, 'The Arbitration Acts: A Review of the Arbitration Act, 1995 of Kenya vis-à-vis the Arbitration Act, 1996 of the United Kingdom' (March 2010).

5. Act No. 4 of 1995 (as amended in 2009). The Act repealed the 1968 Arbitration Act which borrowed from the English Arbitration Act of 1950.

encourages the maximisation of court support for the arbitral process.⁶ The Act also incorporates various key pillars of any modern arbitration regime derived from the Model Law, such as the promotion of party autonomy,⁷ ‘*kompetenz kompetenz*’⁸ neutrality of the arbitrators and equal treatment of the parties,⁹ procedural flexibility,¹⁰ finality of the award¹¹ and increased enforceability of arbitral awards.¹² Three of the pivotal hallmarks of the 1995 Act are worth highlighting. These are: the effect of the arbitration agreement (section B); the effect of the resulting award (section C); and the role of courts in the arbitral processes (§13.02).

[B] Effect of the Arbitration Agreement

Section 3(1) of the Act is couched in the same terms as Article 7 (1) of the UNCITRAL Model Law and defines an arbitration agreement as:

[A]n agreement by which parties submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

Courts have in numerous cases held that the effect of an arbitration agreement is to bind parties to the chosen mechanism of dispute resolution. Examples of such cases include the case of *James Heather -Hayes v. African Medical and Research Foundation (AMREF)*¹³ and the case of *William Lonana Shena v. HJE Medical Research International Inc*¹⁴ where the courts stated:

[A]n arbitration agreement is a contractual undertaking by which the parties agree to settle disputes by way of arbitration rather than proceedings in court. When a dispute arises both parties are bound to comply with the terms therein. The court cannot rewrite the contract.... I agree with the applicant/respondent that there is a subsisting contract that issues in dispute shall be referred to arbitration and I find as such.

In *William Lonana Shena*¹⁵ the court found that the unlimited jurisdiction of the court did not defeat an arbitration process grounded on statute.

In the more recent years, courts have also remarked on the effect of arbitration agreements regarding the constitutional underpinnings on the promotion of alternative

6. Section 10 of the Act and various ancillary provisions.

7. Sections 4, 20, 28 and 29 of the Act derive from of the UNCITRAL Model Law and expand party autonomy on issues such as the arbitration agreement, procedure, applicable law and issues of evidence.

8. Section 17 of the Act empowers the arbitral tribunal to rule on its own jurisdiction.

9. Section 19 of the Act.

10. Section 20.

11. Section 32A (as amended in 2009).

12. Sections 35, 36, 37 and 39 of the Arbitration Act set out provisions that are facilitative of enforcement of awards and stringent on setting aside and appeals.

13. Case No. 626 of 2013, [2014] eKLR.

14. Case No. 1096 of 2010 (Unreported).

15. *Ibid.*

dispute resolution. One such instance is the case of *Bellevue Development Company Limited v. Vinayak Builders Limited & another*¹⁶ where the court observed as follows:

[29] Article 159 of the Constitution of Kenya enjoins the Court and all tribunals to support and encourage parties to promote Alternative Dispute Resolution Mechanisms (ADR) including Arbitration. This Court is thereby enjoined to breathe life into an Arbitration agreement to give effect to the intentions of the contracting parties who freely choose the said mode of dispute resolution in a private contract so as to take advantage of the trilogy of benefits which are said to be attendant to Arbitration.

Section 4 of the Act (using the same wording as Article 7(1) of the UNCITRAL Model Law) provides that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement, and that an arbitration agreement shall be in writing. Section 4(3) of the Act goes on to provide that an agreement is in writing if it is contained in:

- (a) a document signed by the parties;
- (b) an exchange of letters, telex, telegram, facsimile, electronic mail or other means of telecommunications which provide a record of the agreement; or
- (c) an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other party.

Based on this expanded scope of what constitutes an agreement in writing, it is not mandatory for the formal terms or terms to be contained in one document. This is buttressed by section 4(4) of the Act which stipulates that the reference in a contract to a document containing an arbitration clause shall constitute an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract. In *Westpark Study Entre Ltd v. Gemini Propertis Ltd*,¹⁷ where parties took opposing positions as to whether there was an operative arbitration clause in the context of section 4 of the Act. The Court stated thus:

[I]t is clear that the applicant has an arguable case with a probability of success in so far as their right to access arbitration procedures is concerned. The reason for finding so is because the executed letter of offer and acceptance validates the terms and conditions of the lease whether executed or not, which lease is not disputed that it contains an arbitration clause. Secondly the plaintiff has pleaded in its statement of claim the existence of an arbitration clause. The defendant/respondent has not denied this. Thus bringing the matter into the operation of the provisions of section 4 of the same Act.

The courts are however very keen to ensure that jurisdiction is not conferred where there is no clear arbitration agreement. A case in point is *Consolidated Bank of Kenya Limited v. Arch Kamau Njendu T/A Gitutho Associates*¹⁸ where the court stated:

16. Civil Case No. 571 of 2011, 2014 eKLR, paragraph 29.

17. Civil Case No. 88 of 2008, [2009] eKLR.

18. Miscellaneous Application No. 195 of 2013 [2015] eKLR.

[D]id the arbitrator have jurisdiction to entertain the parties matter [sic]. My answer is in the negative. That find flows from the above discussion that there was no agreement or contract between the parties and which evidenced Engagement. Accordingly clause A-7 could not be invoked. That being so that arbitrator could only have jurisdiction if section 4 of Cap 49 was fulfilled that is the arbitration clause had to be in writing.

Recognition of arbitration agreements is at the core of arbitration practice in Kenya. The arbitration agreement constitutes the voluntary election by the parties to arbitrate. As explained by the court in *Consolidated Bank of Kenya Limited v. Arch Kamau Njendu T/A Gitutho Associates*,¹⁹ an arbitral tribunal has no jurisdiction to entertain a matter in the absence of an arbitration agreement which is the contractual commitment by the parties to resolve disputes by the process of arbitration and parties are accordingly bound by their agreement. This position was affirmed by Kenya's Court of Appeal in *Nyutu Agrovet Limited v. Airtel Networks Limited*²⁰ in the following terms:

[T]o begin with, it is not disputed that the mode to resolve disputes and particularly commercial ones by way of arbitration, is entirely the disputants' own choice. The State has set up the court system to resolve disputes but the larger commercial community has decided, for various reasons that it will in a consensual manner, take the resolution of whatever disputes that may arise in their transactions in their own way. And so by agreements duly executed and therefore binding on them, the business people and merchants place their disputes before a single or whatever number of arbitrators, again selected, appointed in their own way or in the way they agree on, to settle their disputes.

The result of the foregoing is that since the arbitration agreement is in the nature of a contract it cannot be unilaterally terminated. Indeed, section 33 of Kenya's Arbitration Act contemplates consensual termination of arbitration proceedings.²¹ In the absence of a consensual termination of arbitration proceedings such proceedings can only be terminated under section 33 of the Act by: (a) the issuance of the final arbitral award;²² (b) the Claimant withdrawing the claim;²³ or (c) if the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.²⁴ In the case of *Nancy Wangui Njuguna & another v. Nancy Njeri Gitau & another*²⁵ the Court of Appeal held that the mandate flowing from the arbitration agreement only comes to an end upon effective termination of the arbitration proceedings in accordance with section 33 of the Act. The Court of Appeal stated:

[I]f on the other hand, the parties had lost faith in the arbitral process and wanted to proceed with the matter in court, then they needed to terminate the arbitral proceedings first in compliance with Section 33 of the Arbitration Act. Both learned Counsel acknowledged that the arbitral process has never been terminated. The law enjoins the parties herein to either proceed with the arbitral process, or to

19. *Ibid.*

20. Civil Appeal (Application) No. Nai 61 of 2012, [2015] eKLR.

21. Section 33 (2)(b).

22. Section 33(1).

23. Section 33(2)(a).

24. Section 33(2)(c).

25. Civil Appeal No. 98 of 2009, [2016] eKLR.

terminate the arbitral process in accordance with the law before they can proceed with the dispute in court.

Parties to the arbitration agreement enjoy extensive autonomy to determine the way their disputes will be resolved, including in relation to the appointment of arbitrators, selection of institutions by which the arbitration is to be administered and choice of applicable rules of procedure. Courts in Kenya have in numerous cases readily upheld the voluntary choice of parties to refer disputes to arbitration, holding that the duty of the courts is to uphold party autonomy and refer all arbitrable issues for determination by an arbitral tribunal.²⁶

Once agreed upon by the parties an arbitration agreement or arbitration clause in a contract assumes a separate life of its own. Section 17(1) of the Act embodies the doctrine of separability whose effect is that the arbitration agreement is treated as separate from the underlying contract in which it is contained and that the arbitration clauses survives the termination or invalidity of that contract.²⁷ Courts have interpreted section 17(1) of the Act in a manner consistent with the Model Law. In *Nedermar Technology Bv Ltd v. Kenya Anti-Corruption Commission & another*²⁸ the Court stated thus:

The additional reason for this is the application of the now internationally recognised principle of separability which in Kenya is reflected in s 17 of the Arbitration Act 1995. In short, the principle of separability means that the arbitration agreement is separate from the underlying contract. S 17 of the Kenya Arbitration Act is based on UNCITRAL MODEL LAW on which the Agreement the subject matter of this suit is based. Thus an arbitration clause which forms part of the contract (as in this case) shall be treated as an independent agreement from the other terms of the contract and a decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause.

The writers were recently involved in the case of *Sospeter Gitonga Njiru t/a Stepper Electrical & Suppliers v. Nation Media Group Limited*²⁹ in which the court agreed that termination of the distribution contract, whether by effluxion of time or at the instance of the Defendant, would not affect the arbitral agreement given the principle of separability of the arbitral agreement. The court further cited with approval the general principle as explained in the case of *Midland Finance & Securities & Another v. Attorney General & Another*³⁰ thus:

[T]he arbitration clause is regarded as constituting a separate and autonomous contract. It means that the validity of the arbitration clause does not depend on the validity of the contract as a whole. By surviving the termination of the main contract, the clause constitutes the necessary agreement by the parties, that any disputes between them should be referred to arbitration.

26. See the decision of the Court of Appeal in *Midland Finance & Securities Globetel Inc v. Attorney General & another* [2008] eKLR.

27. Section 17(1)(a).

28. Petition 390 of 2006, [2006] eKLR.

29. Civil Case No. 143 of 2016, [2016] eKLR.

30. Misc. Civ. Appli. 359 of 2007, [2008] eKLR.

The final aspect for discussion in relation to the effect of an arbitration agreement is with respect to stay of judicial proceedings under section 6 of the Act. Section 6 provides for stay of judicial proceedings in any matter that is the subject of an arbitration agreement and that the court is required to stay the proceedings and refer the parties to arbitration.³¹ Kenyan courts have held that whereas the arbitration agreement cannot entirely oust the jurisdiction of the court, the Court's involvement in the matter must be in accordance with the provision of the Arbitration Act. In the case of *Epc Builders v. Adam S Marjan & another*³² the Court of Appeal deprecated the practice in which some disputants resorted to court processes as a means of delaying or impeding arbitration and encouraged reference to arbitration where parties have an arbitration agreement in place. Subsequent cases have more aptly addressed the issue and in the vast majority of cases stayed court proceedings pending arbitration. In *Kenya Planters Co-operative Union v. Kenya Commercial Bank and Others*³³ the court stated:

[T]he first issue for consideration is whether the arbitration clause is applicable to the proceedings at hand ... In my view, it does not matter how the pleadings or cause of action is couched, what matters is the substance of the claim and the claim as whole emanates from the dealings between KCB and KCPU which are captured in the Deed of Settlement. The fact that it is a petition framed under Article 22 of the Constitution does not remove the whole dispute outside the purview of the Deed of Settlement. In the circumstances, I find and hold that the subject matter is one that is covered by the arbitration clause in the Deed of Settlement ... Under section 6 of the Arbitration Act, 1995, the Court on application of the respondent would be entitled to stay the proceedings pending reference to arbitration in accordance with the Deed of Settlement.

[C] Effect of the Arbitral Award

Section 32A of the Act provides that an award is final and binding upon the parties and that no recourse is available against the award otherwise than in the manner provided in the Act. The provision is a recasting of Article 32 (1) of the UNCITRAL Model Law. Both provisions essentially are to the effect that the award is conclusive as to the issues with which it deals, unless and until there is a successful challenge against the award. The general attitude of the courts is that finality of arbitration must be enforced as a matter of public policy. This is confirmed by the decision of Kenya's Court of Appeal in *Kenya Shell Ltd v. Kobil Petroleum Ltd*,³⁴ where the Court of Appeal stated thus:

[W]e think, as a matter of public policy it is in the public interest that there should be an end to litigation and the Arbitration Act under which the proceedings in this matter were conducted underscores that policy.

31. Section 6 of the Act is a direct replica of Article 8 of the UNCITRAL Model Law.

32. Civil Appeal No. 248 of 2005 (unreported), speech of Deverell JA.

33. Petition No. 8 of 2014.

34. CA No. 57 of 2006, [2006] eKLR.

In the *Nyutu Agrovat Limited v. Airtel Networks Limited*³⁵ case the Court of Appeal considered the issue of the effect of the award and cited with approval the decision in the Kenya Shell case above, stating that:

At all events the tribunal was bound to make a decision that did not sit well with either of the parties. It would, nevertheless, be a final decision under section 10 of the Act.

A similar finding was reached in *Prof. Lawrence Gumbo & Another v. Hon. Mwai Kibaki & Others*³⁶ where the court reiterated that it was:

Prevented by section 10 of the Act from interfering in the arbitral process in any other manner except as set out in the Act and by extension the rules made under the Act.

One of the oft-cited justifications for finality of arbitral awards is based on the principle of party autonomy. Kenyan courts are reluctant to interfere with the award in arbitration considering that parties to the dispute have chosen the method of settling the dispute and have agreed to be bound by the arbitrator's decision. Numerous court decisions, a few of which are highlighted in the subsequent parts of this chapter, demonstrate that courts are generally slow to interfere with an award outside the ambit of sections 35, 37 and 39 of the Arbitration Act.

The delivery of the final award terminates the arbitration and renders the arbitral tribunal *functus officio*.³⁷ The effect of this is that the arbitral tribunal ceases to have any further jurisdiction over the dispute except in the case of suspension of judicial proceedings by the court to enable the tribunal to take steps to eliminate the grounds for setting aside the award; remission to the tribunal for reconsideration; where parties request the tribunal to make an additional award on any outstanding issues; and lastly where there are slight corrections to be made or interpretation of a portion of the award becomes necessary. Once issued, the award is enforceable subject only for the limited exceptions under section 35,³⁸ 37³⁹ and 39⁴⁰ of the Arbitration Act. As such, unless otherwise agreed in writing, the effect of a valid award is to render the dispute submitted to arbitration *res judicata*.⁴¹ Parties may reserve a right of appeal only on questions of law under section 39 of the Act. In practice, however this channel of appeals is rarely pursued.

Pursuant to section 35 of the Arbitration Act, recourse against an arbitral award may be made only by an application for setting aside. The provision is modelled on

35. *Ibid.*

36. H.C. Misc. Application No. 1025/2004.

37. Section 33(1) of Kenya's Arbitration Act provides that arbitral proceedings terminate upon the final arbitral award or by order of the tribunal under subsection (2).

38. Section 35 sets out the limited grounds for applications for setting aside.

39. Section 37 provides for limited grounds for resisting recognition or enforcement of an award which are modelled along the provisions of Article V of the New York Convention.

40. Limited appeal on questions of law arising out of the award.

41. Geoffrey Imende & Wanjiru Ngige 'The Award', in Githu Muigai (ed) *Arbitration Law and Practice in Kenya* (LawAfrica, 2011).

Article 34 of the Model Law and sets very narrow grounds for setting aside.⁴² Even where such grounds exist the application cannot be made after three months have elapsed.⁴³ This position was affirmed by the Kenyan Court of Appeal in *Anne Mumbi Hinga v. Victoria Njoki Gatheru*⁴⁴ where the Court of Appeal stated:

Besides the issue of jurisdiction as explained above, Section 35 of the Arbitration Act bars any challenge even for a valid reason after 3 months from the date of delivery of the award... All the applications filed in the superior court were incompetently brought before the superior court and the court lacked jurisdiction.

The High Court is enjoined to recognise an award for enforcement unless the limited exceptions set out in section 37 of the Act exist. The Courts have carefully and narrowly circumscribed what constitutes public policy based on the decision in *Christ for All Nations v. Appollo Insurance*⁴⁵ where Ringera, J. (as he then was) summarised the term 'contrary to public policy' as including matters such as:

[I]nconsistent with the Constitution or other laws of Kenya whether written or unwritten; inimical to the national interests of Kenya and Contrary to Justice or morality.

§13.02 ROLE OF THE COURTS

Court assistance is only available where the Act expressly stipulates or provides for it.⁴⁶ The Act principally makes provision for court assistance in three main stages, i.e., before the arbitral tribunal is constituted, during the proceedings and after the arbitral award is rendered. The Act is structured this way to achieve an optimal balance that limits interference by courts whilst facilitating court support for arbitration processes. The role includes: the issuance of orders for stay of court proceedings and reference to arbitration;⁴⁷ grant of interim measures of protection;⁴⁸ making a final determination on applications challenging the arbitral tribunal's ruling on the tribunal's jurisdiction;⁴⁹ appointment (or ratification) of arbitrators appointment where contested or parties are

42. The grounds include proof of incapacity or the agreement is not valid under the law to which the parties submitted it; proof that the party not given notice of the proceedings; award dealing with a dispute not within the terms of the submission or that the subject matter of the dispute not capable of settlement by arbitration under the laws of Kenya.

43. Section 35 (3) of the Arbitration Act (verbatim from Article 34(3) of the Model Law). See also *National Oil Corporation of Kenya v. Prisko Petroleum Limited*, HC No. 27 of 2014.

44. Civil Appeal No. 8 of 2009.

45. Civil Case No. 499 of 1999.

46. Section 10 of Kenya's Arbitration Act provides that '... except as provided in the Act, no court shall intervene on matters governed by the Act'.

47. Pursuant to section 6 of the Act.

48. Both the court and the arbitral tribunal have concurrent powers to grant interim measures under section 7 and section 18 respectively.

49. Section 17 of the Act is a replica of Article 16 of the Model Law. This role is secondary to the 'kompetenz' doctrine.

unable to agree;⁵⁰ termination of an arbitrator's mandate in case of failure or impossibility to act;⁵¹ assisting the tribunal to exercise the range of powers conferred on it;⁵² assistance in taking evidence;⁵³ setting aside arbitral awards on very limited grounds⁵⁴ and no later than three months after the award.⁵⁵ Recognition and enforcement of both domestic and international awards;⁵⁶ determining applications challenging recognition or enforcement;⁵⁷ and limited appeals on points of law in domestic arbitration where parties have agreed in writing.⁵⁸ Numerous court decisions have highlighted these roles of courts, a few of which are discussed next.

The facilitative role of courts is recognised by numerous judicial decisions which at the same time closely limit and circumscribe the extent of intervention. The previously mentioned landmark cases of *Anne Mumbi Hinga*⁵⁹ and more recently *National Oil Corporation of Kenya Limited*⁶⁰ have been extensively cited and upheld in support of the position that there is no legal right to intervene in the arbitral process or in the award except in the situations specifically set out in the Arbitration Act or as agreed by the parties in advance. The facilitative role of the court is also demonstrated by the elaborate provisions under Order 46 of the Civil Procedure Rules, 2010 which provide for court-mandated arbitration by which any party to a suit that is pending in Court may apply to the Court for an order of reference to arbitration at any point in time before judgment is pronounced. Institutional Arbitration Rules of the Chartered Institute of Arbitrators (CI Arb – Kenya Branch) and the Nairobi Centre for International Arbitration⁶¹ are also consistent with the Arbitration Act in the sense that they are very specific on the limited role of the courts.

50. Section 12 of the Act is a replica of Article 11 of the Model Law.

51. Section 15(2) of the Act is a replica of Article 14 of the Model law.

52. Section 18. Whereas the UNCITRAL Model Law was amended in 2006 to distinguish between interim measures and preliminary orders (Article 17B, 17H and 17I), Kenya's Arbitration Act only provides for interim measures which must be enforced through the courts unlike preliminary orders which are self-executing under Article 17B (5) of the Model Law.

53. Section 28. A replica of Article 27 of the Model Law.

54. Section 35 of the Act. (A replica of Article 34 of the Model Law.) The main grounds include: incapacity of a party; invalidity of the arbitration agreement; absence of proper notice of arbitration proceedings; the award being inconsistent with the scope of the reference (subject to severability); the matter being incapable of settlement by arbitration under the law of Kenya; where the award is induced by fraud or is contrary to public policy in Kenya. The court does not review the merits.

55. Section 35(3) of the Act and Article 34(3) of the Model Law. The limitation serves to prevent applications being made in bad faith, safeguard against the objectives of the Act being undermined and to ensure closure as underscored in *Nancy Nyamira & Another v. Archer Dramond Morgan Ltd* HCCC No. 110 of 2009.

56. Section 36 of the Act derives from Article 35 of the Model Law.

57. Section 37 of the Act is drawn from Article 36 of the Model Law.

58. Section 39.

59. Civil Appeal No. 8 of 2009.

60. No. 27 of 2014, [2014] eKLR.

61. Established under Act No. 26 of 2013 as an independent and not-for-profit centre with a broad mandate necessary to administer domestic and international arbitration in Kenya.

§13.03 EFFECT OF THE CONSTITUTION OF KENYA ON ARBITRATION LAW AND PRACTICE

Kenya's current Constitution was promulgated on 27 August 2010. For the first time in Kenya the Constitution contained an express provision that promotes the use of various forms of alternative dispute resolution including arbitration.⁶² Article 159(2)(c) of the Constitution provides:

In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause 3.⁶³

By virtue of the status of the Constitution at the peak of the hierarchy of norms, the provision affects the manner in which all the other sources of law concerning that issue are interpreted or applied. This part of the chapter examines the impact of Kenya's 2010 Constitution on the law and practice of arbitration. The key areas for assessment relate to: the permitted scope of court intervention (section B); recognition of Arbitral Agreements and stay of legal proceedings (section C); composition and jurisdiction of arbitral tribunals (section D); the principle of *Kompetenz-Kompetenz* (section E); and finality of arbitration (section F).

The promulgation of the Constitution of Kenya, 2010⁶⁴ was expected by legal practitioners and members of the general public to have a profound and positive effect on the practice of arbitration and other forms of alternative dispute resolution (ADR) in Kenya.⁶⁵ This view is based on the fact that at the time the 'new' Constitution was enacted the judiciary had serious backlog of cases which caused inordinate delays in the resolution of disputes and there was thus dire need for alternative avenues of resolving the numerous cases and claims that were inundating the courts through ADR methods and particularly arbitration. This was expected to ease the court workload. The observations of the court in *EpcO Builders v. Adam S Marjan & another*⁶⁶ describe the pressure of the courts and lengthy delays as follows:

If it were allowed to become common practice for parties dissatisfied with the procedure adopted by arbitrator(s) to make constitutional applications during the currency of the arbitration hearing, resulting in lengthy delays in the arbitration process, the use of alternative dispute resolution, whether arbitration or mediation would dwindle with adverse effects on the pressure on the courts.

62. Article 159 (2) (c) of the Constitution.

63. Clause 3 contains a three pronged test that mentions contravention of the Bill of Rights, repugnance to justice or morality and inconsistency with the Constitution or any written law.

64. 27 August 2010.

65. <http://allafrica.com/stories/200806231977.html>.

66. Civil Appeal No. 248 of 2005.

Similar remarks were expressed by the Court of Appeal in *Safaricom Limited v. Ocean View Beach Hotel Limited & 2 others*⁶⁷ where the court stated:

[B]ecause extraordinary wrongs call for extraordinary remedies, in my opinion, it would be unjust not to invoke section 3A to strike out a ruling which has so openly subverted the arbitral process which is intended to act as an alternative to litigation so as to ease pressure on the court system and to assist in the fight against backlog of cases and appeals. The act of usurpation of the arbitral jurisdiction by the High Court has resulted in the improper use of court resources both in the High Court and this Court and has further made the parties incur extra cost and unnecessary delay contrary to the overriding objective.

Against the foregoing context it was widely expected by court users that having been anchored in the 2010 Constitution, the importance and attractiveness of arbitration and related ADR methods would be enhanced for expeditious resolution of disputes.

As will be demonstrated in sections B–F below, while some judges continue to hold the view that the role of the courts in the process of ADR is supportive, the courts have in several recent decisions, interpreted several Constitutional provisions in a manner that has potential negative effect on the practice of arbitration in particular and ADR in general. Debate is ongoing on the question of whether the role of the courts of Kenya in arbitration is still supportive or interventionist.

One of the issues that have been the subject of mixed court decisions is the manner in which courts have interpreted Article 10 of the Constitution⁶⁸ which requires all persons engaged or involved in the interpretation or application of the Constitution to ensure compliance with the principles set out in that Article to include arbitrators and/or arbitral tribunals. The effect of this is to expand the laws governing arbitration beyond the Arbitration Act and to include ‘all laws of Kenya’.

The second issue of concern is in relation to the interpretation of the phrase ‘*any person, body or authority*’ in Article 165 (6) and (7) of the Constitution as applying to arbitration and thereby relegating arbitral tribunals to the status of institutions under the supervisory jurisdiction of the High Court. This interpretation relegates arbitral tribunals to the same status as ‘...*subordinate courts and any person, body or authority exercising judicial or quasi-judicial function...*’.⁶⁹ This means that courts have supervisory jurisdiction over arbitral proceedings beyond the limited scope set out in the Arbitration Act and recognised by the Model Law.

The third issue for consideration regards the view taken by some courts that the provisions of Article 165(3)(d) of the Constitution give courts the exclusive mandate to

67. Civil Application No. Nai 327 of 2009 (UR 225/2009) [2010] eKLR.

68. Provision of the Constitution on National Values and Principles of Governance, providing thus:

10 (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them– (a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions.

69. Article 165 (6) of the Constitution of Kenya, 2010.

interpret and apply the Constitution. In the process, the courts have assumed jurisdiction on all issues touching on or affected by any provision of the Constitution even where there exists a valid arbitration agreement. If this interpretation gains currency the scope of arbitration will be severely limited and will carve out more matters beyond the limited traditional matters that the state reserves for itself such as criminal cases and matters relating to legal status such as immigration, etc.

This part of the chapter will also briefly comment on a recent court decision holding that the court has, under Article 22 of the Constitution, an expanded jurisdiction beyond that conferred by section 7 of the Arbitration Act (interim measures of protection) to issue orders under the Bill of Rights even where parties have elected to resolve disputes by arbitration. The question on what the law of arbitration gives finality to – whether finality is to the arbitral award or to the judgment of the court in an application for setting aside under section 35 of the Act will also be considered below.

The above issues and interpretations lead to potential uncertainty in relation to the practice of arbitration in Kenya and whether courts will still apply or adhere to the established international principles including on: (i) the principle of party autonomy in arbitration, which was previously almost unfettered but is now under threat of an expanded scope of limitations; (ii) decisions of arbitrators which were hitherto final and binding may in some instances be challenged in court on grounds other than those set out in the Arbitration Act; and (iii) the trend that courts may assume jurisdiction over matters that were intended to be purely commercial transactions on the basis that the dispute has taken a ‘constitutional trajectory’. Most of the issues arising are still under consideration by the appellate courts, and there is no conclusive position on these yet.

[A] The Principle of ‘Constitutional Supremacy’ in Kenya

One of the key causes of the confusion that the promulgation of the Constitution has created is the principle of constitutional supremacy which is set out in Article 2(1) of the Constitution of Kenya, 2010.⁷⁰ It provides that any law that is inconsistent with the Constitution is void to the extent of the inconsistency, and that any act or omission in contravention of the constitution is invalid.⁷¹ In line with that stipulation or because of it, Courts have held that an Act of Parliament such as the Arbitration Act cannot be interpreted so as to limit any right conferred by or set out in the Constitution.⁷² In the case of *Reverend Dr. Timothy M. Njoya And 6 Others v. The Attorney General and Another*⁷³ the court stated:

70. Article 2(1) provides thus: ‘*This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.*’

71. Article 2(4) of the Constitution of Kenya, 2010.

72. See for example, *Njoya & 6 Others v. Attorney General & 3 Others*, Miscellaneous Civil Application No. 82 of 2004 (OS), [2004] 1 KLR 261.

73. *Ibid.*

The constitution is not an Act of Parliament. It exists separately in our statutes. It is supreme. When an Act of Parliament is in any way inconsistent with the constitution, the Act of Parliament, to the extent of the inconsistency, becomes void. It gives way to the Constitution.

One of the schools of thought arising from the constitutional supremacy provision is that arbitration and other forms of alternative dispute resolution must be conducted in a manner consistent with constitutional principles and values including those set out in Article 10 or elsewhere in the Constitution. Recent court decisions discussed in sections [C] and [D] below demonstrate the readiness of some courts to uphold challenges presented by parties regarding the constitutionality of either the arbitration agreements or the proceedings based on or arising therefrom. Fortunately, there are also recent cases where courts have taken firm positions in support of Arbitration and other forms of ADR. The most remarkable positive support for deference to the parties' choice of ADR post the promulgation of the constitution is to be found in the decision of the Supreme Court of Kenya in the landmark case of *Communications Commission of Kenya & 5 Others v. Royal Media Services & 5 Others*⁷⁴ where the Supreme Court pronounced itself in favour of the principle dubbed 'constitutional avoidance', which stipulates that courts should avoid assuming jurisdiction in matters which are capable of being decided on another basis or resolved through other means. Despite that guidance by the highest court in the land recent trends point to varying extents of compliance. Some of the potential conflict areas and varied positions taken by courts in relation to this issue are discussed next.

[B] Permitted Scope of Court Intervention

Prior to the promulgation of the 2010 Constitution, the position of the courts regarding the status of arbitration and arbitral awards was relatively well settled. As discussed above, the courts recognised arbitration and other forms of ADR as playing separate but connected roles and that court intervention was intended to supplement and not supplant the arbitration process. In *Anne v. Victoria*⁷⁵ the Court of Appeal stated as follows:

We therefore reiterate that there is no right for any Court to intervene in the arbitral process, or in the award, except in the situations specifically set out in the Arbitration Act or as previously agreed in advance by the parties, and similarly, there is no right of appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in Section 39 of the Arbitration Act ... We are concerned that contrary to the broad principles of finality of arbitral awards as set out in the Arbitration Act, the Superior Court all the same entertained incompetent Applications which have in turn resulted in the 10 years delay in the enforcement of the award.

In the main however, the trend following the promulgation of the 2010 Constitution has been at best mixed. While a few judges continue to hold the view that the

74. Petitions No. 14A, 14B and 14C of 2014 (Consolidated), [2015] eKLR.

75. Civil Appeal No. 8 of 2009.

role of the Courts in the process of ADR is supportive, in a number of decisions the Courts have interpreted several Constitutional provisions in a manner that has profound negative effect on the practice of arbitration specifically and ADR in general.

[C] Recognition of Arbitral Agreements and Stay of Legal Proceedings

Section 6 of Kenya's Arbitration Act is modelled along Article 8 of the UNCITRAL Model Law. This provision requires courts seized of matters which are the subject of an arbitration agreement to stay the proceedings and refer the parties to arbitration if a party so applies at the outset. Subsection (2) provides that on presentation of such an application, court proceedings shall not be continued until the issue is determined. Whereas courts have in a vast majority of cases readily recognised and given effect to arbitration agreements as a matter of course and in line with the principle of party autonomy, recent decisions appear to curtail this position in the guise of subjecting the matters to constitutional conformity.

The issue arose and was considered in the recent decision in *Bia Tosha Distributors Limited v. Kenya Breweries Limited & 3 others*.⁷⁶ The court declined to refer the matter to the arbitration and observed as follows:

[N]otwithstanding the principle of constitutional avoidance and settled dispute resolution forums, the court may, depending on how a dispute is framed, still decline to send the parties to another forum.⁷⁷ and further that:

'...I am acutely aware of the far reaching consequences of my conclusive finding that purely constitutional issues and questions have been borne out of a hitherto commercial relationship and hence the court's jurisdiction rather than agreed mode of dispute resolution. I however do not for a moment view it that the framers of our Constitution intended the rights and obligations defined in our common law, in this regard, the right to freedom of contract, to be the only ones to continue to govern interpersonal relationships.'⁷⁸

This decision strongly suggests that even where parties have been unequivocal in their choice of dispute resolution mechanism, a party may avoid that route merely based on 'how the claim is framed'. That is a dangerous route to take since not only does it take away the right of parties to choose how their disputes will be resolved but also reverses the age old and respected position that courts will respect the choice made by the parties and allow the process they chose to guide the resolution of their dispute.

As dispute resolution experts and other users will appreciate, if the question of whether a matter will proceed to arbitration is left to legal craft and ability to state a claim in a manner that would justify a departure from the method agreed by the parties there will be no shortage of strategies designed to defeat reference of the matter to arbitration. The fact that a court can refuse to refer the parties to the mechanism contractually and voluntarily appointed by the parties sends the wrong message about

76. Petition No. 249 of 2016, [2016] eKLR.

77. *Ibid.*, at paragraph 91 of the court's ruling.

78. *Ibid.*, at paragraph 101 of the court's ruling.

the willingness and ability of Kenya to support arbitration as a recognised and enforceable method of dispute resolution.

[D] Composition and Jurisdiction of Arbitral Tribunals

The other provision that has been affected by the promulgation of the Constitution is regarding the constitution of arbitral tribunals and appointment of arbitrators. Section 12 of the Arbitration Act grants parties the right to decide on the formulae for appointing the arbitral tribunal and matters incidental thereto. The right to elect the way the tribunal will be constituted is a key component of party autonomy. While the courts retain the residual jurisdiction to remove an arbitrator appointed by the parties, it is a jurisdiction that it can only assume as a default safeguard and not as an outright original power to determine the way arbitral tribunals are to be constituted.

That position was however upset in the recent case of *Evangelical Mission for Africa & Another v. Kimani Gachuhi & Another*.⁷⁹ While considering an application for setting aside an award, the court after setting aside the award, proceeded to direct the parties to agree on the scope of arbitration, appoint a fresh tribunal within a timeline not contained in the arbitration clause and directed that if the parties failed to do so the court would itself set out the scope and appoint the tribunal. By that order, the court unilaterally removed the arbitrators appointed by the parties and assumed the power to supplant the right of the parties to agree on the issues for determination and appoint the tribunal. That again is a most dangerous trend in so far as the practice of ADR is concerned.

[E] The Principle of *Kompetenz-Kompetenz*

Another area of concern is the extent to which the courts are permitted to examine the issues in controversy between the parties where there is an arbitration clause. Prior to the promulgation of the constitution, the courts readily recognised and upheld the principle of *Kompetenz-Kompetenz*. See for instance *Safaricom Limited v. Ocean View Beach Hotel Limited & 2 others*⁸⁰ where the Court of Appeal rendered itself thus:

It is not the function of a national court to rule on the jurisdiction of an arbitral tribunal except by way of appeal under section 17(6) of the Arbitration Act as the Commercial Court in this matter purported to do.... the principle known as ‘Competence/Competence’ which means the power of an arbitral tribunal to decide or rule on its own jurisdiction.

Worse still the court went on to usurp the intended arbitrators or arbitral tribunal’s role of adjudicating on the merits of the dispute which was intended to be the subject matter of the intended arbitration ... The Commercial Court has no business acting against an Act of Parliament and ruling on a matter it was not competent to rule on in law. Such a ruling is a nullity period.

79. Miscellaneous Civil Application No. 479 of 2014, [2015] eKLR.

80. Civil Application No. Nai 327 of 2009.

Contrary to the above guidance, the court in the *Bia Tosha v. Kenya Breweries*⁸¹ case introduced the concept of constitutional imperative as the basis for assuming jurisdiction over a dispute that was indisputably commercial. The court posited the view that it is for the court to undertake a proper scrutiny based on the pleadings to determine whether the dispute has taken a ‘constitutional trajectory’. Based on this line of thinking the court concluded thus:

[T]he court must seek to find out especially where one party alleges so, whether the dispute genuinely concerns violations of the Constitution. In this light one must also not forget the principle of constitutional supremacy for which ‘Wanjiku’ voted in 2010. By recognizing the Constitution to be supreme, the Kenyan people could not have intended to again leave alone matters done by parties to the parties themselves but rather appeared under Article 165 to empower the court with the task to define limits of any rights whether entrenched under the Bill of Rights or by common law, modifying the latter where necessary to attain an appropriate blend with Constitutionalism.⁸²

The above view was also enunciated in *Evangelical Mission for Africa & Another v. Kimani Gachuhi & Another*⁸³ where the learned Judge stated that the court has:

[A] blank legal cheque and stands on an expansive and firm jurisprudential plateau to ensure that it subjects the decision of the arbitral tribunal to searching test of conformity to all the laws of the land and especially the Constitution itself.

The above decisions demonstrate a disturbing enthusiasm by the courts to ignore the provisions of sections 10 and 17 of the Arbitration and engage in a very robust interrogation of issues that are the subject of an arbitration agreement and that should properly be left to the arbitral tribunal. This chapter argues that it is necessary, when courts are faced with situations where one party is disputing the jurisdiction of the arbitral tribunal, the courts ought to uphold section 17 of the Act and allow the tribunal established under the formula agreed by the parties to resolve the issue. That is the only way that courts can demonstrate deference to the constitutionally sanctioned right of the parties to elect the mode of dispute resolution they wish to pursue.

The risk involved in courts engaging in a robust review of the dispute between the parties is best exemplified by the decision in *Cape Holdings v. Synergy Industrial Credit Limited*⁸⁴ which involved an application for setting aside of an arbitral award. Without going into the merits of the decision it suffices to point out that after hearing the parties, the learned Judge set aside the award and gave no directions regarding the fate of the dispute. By the time the Judge made his orders the limitation period had kicked in meaning that the Claimant who had succeeded in the arbitration was effectively left without a remedy. Again, just as in the *Evangelical* matter referred to above, the court engaged in a wholesome review of the award and made far reaching findings in relation to the matters in dispute. In effect therefore, unless that Judgment is reversed on appeal, the Claimant will have had its case determined not through

81. *Supra* n. 76.

82. Paragraph 84 of the decision.

83. *Supra* n. 79.

84. Miscellaneous Civil Application No. 114 of 2015.

arbitration as agreed by the parties, but by the court in summary manner, in the course of an application for the setting aside of the award.

[F] Finality of Arbitration

The next aspect of the effect of the provisions of the Constitution is regarding what the law of arbitration gives finality to. Is it to the award or to the judgment of the court pursuant to an application for setting aside under section 35 of the Act? This issue arose during consideration by the Court of Appeal of the question whether or not there is a right of appeal from a decision made by the court in an application for setting aside under section 35 of the Arbitration Act. In *Nyutu Agrovet Limited v. Airtel Networks Limited*,⁸⁵ the Court of Appeal took the view that a decision made by the High Court under section 35 of the Act is final and cannot be appealed against.

This decision, even without considering the soundness of the interpretation of sections 35 and 39 of the Arbitration Act and Article 163 of the Constitution raises concern regarding the emphasis placed on the finality of the judgment of the court rather than the arbitral award. While one school of thought posits that the decision sought to insulate the arbitral process which includes the setting aside procedure from the tedious and time consuming appeal process and that by its decision the Court of Appeal was, in reality, giving finality of the arbitration process, two issues arise:

- (a) Public policy was cited as a ground for setting aside. That issue is in most instances considered for the first time in the application for setting aside. By depriving the unsuccessful party in the application for setting aside the right to challenge the decision of the High Court, (yet the unsuccessful party in an award may apply for setting aside) the decision of the High Court has been elevated to a position or status higher than that occupied by arbitral awards. It is critical that courts recognise that what the law seeks to ring fence is the awards and not the judgments of the court. The apprehension is founded on statements by the High Court such as:

[T]he final award ‘... cannot stand and is hereby set aside in toto under section 35(2) (b) (ii) for being in conflict with the public policy of Kenya and against the Constitution of Kenya’.⁸⁶

- (b) As seen in some of the cases highlighted above, there is a huge risk of the High Court making pronouncements that can scare off investors and other consumers of ADR. It is necessary that there be a second set of eyes to correct such errors. The authors recommend that what the courts ought to be doing is raising the threshold for approaching the Court of Appeal but not shutting out that option. As explained by the Court of Appeal in its ruling on the

85. Civil Appeal (Application) No. Nai 61 of 2012.

86. In paragraph 42(b) of the decision in *Evangelical Mission v. Kimani Gachuhi* cited above.

application presented under Rule 5(2)(b) of the Court of Appeal Rules in *Kimani Gachuhi & another v. Evangelical Mission for Africa & another*:⁸⁷

It is evident that the learned judge made a profound statement regarding the jurisdiction of the High Court over the arbitral process, and in particular the court's supervisory jurisdiction over the arbitral process. Going by the submissions made by all the counsel before us, it has been ably demonstrated that the statement raises issues that are arguable. The current Constitution has only been in force for slightly over 5 years. It is still at a stage when it is evolving and finding its bearing, and in that process the courts will constantly have to deal with questions regarding the interpretation of the Constitution in matters before them. The Constitution has provided a hierarchical system within which the courts are to exercise judicial authority. Needless to state that where the High Court has pronounced itself on a novel issue, it is desirable for the Court of Appeal to hear the matter on appeal and either add a stamp of approval to the interpretation of the law and the emerging jurisprudence from the High Court, or arrest the situation if the interpretation is not based on a correct understanding of the law.

It is clear from the discussion above that the way certain provisions of the Constitution of Kenya, 2010 have been interpreted and applied to the practice of arbitration raise genuine concerns regarding the future of arbitration in Kenya. Whereas Kenya's legal infrastructure on arbitration is well established, it is important for the possible conflict areas between the concept of constitutional supremacy and arbitration practice in Kenya to be identified and resolved. It is hoped that jurisprudence will be developed on the issues discussed above to bring the law on arbitration into conformity and in step with other jurisdictions where the status of arbitration continues to be respected and upheld. To this end, it is necessary for a balance to be struck by the courts whenever they are called upon to apply constitutional provisions to ensure there is also beneficial adaptation of the broad principles and best practices in arbitration. It is equally necessary that higher courts⁸⁸ give firm and express guidance on what constitutes the public policy of Kenya considering the 2010 Constitution to ensure greater uniformity and certainty of future decisions.

CONCLUSION

At the heart of every robust system of arbitration is a sound legal framework and dynamic system of practice. A credible and successful legal environment and seat of arbitration is often a product of conscious and concerted efforts among all the stakeholders. This chapter suggests that even though arbitration practice and constitutional supremacy in Kenya started in totally dissimilar contexts and initially manifested in opposing sense, a considerable convergence does in fact exist between them.

87. Civil Application No. 140 of 2015, at p. 17 of the ruling delivered on 29 January 2015.

88. In this case the Supreme Court of Kenya established under Article 163 of the Constitution and the Court of Appeal established under Article 164 of the Constitution.

The evolution narrative of arbitration, constitutional imperative and judicial intervention in Kenya confirms that even though there has been some measure of transitional tensions, the two sets of norms are not mutually exclusive. It is in fact possible, in the interests of justice, to adopt a hybrid approach that takes advantage of the constitutional values and many areas of convergence to improve and support the arbitral process without undue constitutional intrusion.

The importance of having a firm judicial affirmation of a more balanced approach to interpretation by the courts cannot also be gainsaid. If well articulated by the higher courts and taken up by the entire judicial system, the hybrid approach would no doubt be a significant development that could potentially set Kenya on the path to becoming a truly 'arbitration friendly' jurisdiction and 'safe seat'.