Arbitration Law and Practice in Kenya

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Githu Muigai

Editor

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LawAfrica Publishing (K) Ltd
Top Plaza, 3rd Floor
Kindaruma Road,
(Off Ngong Road)
P.O. Box 4260-00100 GPO
Nairobi, Kenya
Wireless: +254 20 249 5067
Cell: +254 708 898 189
Fax: +254 20 249 5067

LawAfrica Publishing (U) Ltd
Office Suite No. 2
Plot 10A, Jinja Road (Opposite NEMA House)
P.O. Box 6198
Kampala, Uganda
Phone: +256 41 255808
Fax: +256 41 347743

LawAfrica Publishing (T) Ltd
Co-Architecture Building, 7th Floor
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P.O. Box 38564
Dar-es-Salaam, Tanzania
Phone: +255 22 2120804/5
Fax: +255 22 2120811

Email: sales@lawafrica.com

Website: www.lawafrica.com

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Preface

It is hardly necessary to emphasize the importance of arbitration in modern day commerce. As the economy grows disputes between investors will gradually increase. Besides, the growth of regional and sub-regional trade agreements and the proliferation of bilateral investment treaties will spur the emergence of disputes that require resolution through arbitration. To persons not familiar with arbitration, the process probably appears quite straightforward. Simply, the parties agree to permit a third party, the arbitral tribunal, to make a final and binding decision over a dispute they are having; and once the arbitrator's decision is made, they abide by it. It is simple on the surface, but it actually raises some extraordinarily difficult and complex issues. In this book, the authors have focused on the salient principles of both substantive and procedural law governing arbitration in Kenya. It is hoped that an understanding of these principles will help in the general development of arbitration law and the emergence of Kenya as the premier arbitration forum in the region.

Githu Muigai
Nairobi, 14th February 2011

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List of Abbreviations

AAA.....American Arbitration Association
ACICA .....Australian Centre for International Commercial Arbitration
ALL ER .....All England Reports
CIETAC..... China International Economic and Trade Arbitration Commission
EA .....East Africa Reports
EWCA.....English and Wales Court of Appeal
EWHC.....High Court of England and Wales
eKLR..... Kenya Law Report
HCCC..... High Court Civil Case
HKIAC ..... Hong Kong International Arbitration Centre
IBA ..... International Bar Association
ICC ..... International Chamber of Commerce
ICSID .. International Convention on Settlement of Investment Disputes
JJA.....Judges of the Court of Appeal
KAR ..... Kenya Appeal Reports
KB .....Kings Bench
LCIA..... London Chamber of International Arbitration
LLR .....Lawafrica Law Reports
NAI .....Netherlands Arbitration Institute
NAFTA..... North American Free Trade Agreement
ICAC .....International Commercial Arbitration Court
SIAC ..... Singapore International Arbitration Centre
UNCITRAL...United Nations Commission on International Trade Law
WIPO ..... World Intellectual Property Organisation

Chapter 1

The Legal Framework of Arbitration in Kenya

By Githu Muigai & Jacqueline Kamau

1.0 Introduction

The Constitution of Kenya[1] enjoins courts, in exercising their judicial authority, to be guided by a set of fundamental principles. One of these principles is that courts are to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.[2]

This constitutional foundation for the promotion of alternative forms of dispute resolution has already resulted in the expansion of the scope of the Civil Procedure Rules, 2010 to accommodate alternative dispute resolution.

1.1 The Arbitration Act, 1968

Now repealed, the Arbitration Act of 1968[3] was closely modelled on the English Arbitration Act of 1950. One of the main criticisms of the 1968 Act was that it did not limit the extent to which the court could intervene in arbitration proceedings.[4] Consequently, delays in arbitration proceedings as a result of references to court were frequent and often defeated the purpose of arbitration which was to allow parties solve their disputes expeditiously and at least

1 Article 159 (2) of the Constitution of Kenya, promulgated on 27 August 2010.

2 Promotion of Alternative Dispute Resolution methods is subject to Article 159 (3) of the Constitution which refers to Traditional Dispute Resolution mechanisms and stipulates that they shall not be used in a way that (a) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with this Constitution or any written law.

3 This 1968 Act is the now repealed Arbitration Act (Cap 49) Laws of Kenya, which was almost identical to the English Arbitration Act, 1950.

4 There was no equivalent of section 10 of the current Arbitration Act, 1995 for instance.

cost.[5] This court interference, it was argued, rendered arbitration proceedings costly and inefficient. For these reasons, and encouraged by the publication of the Model Law on International Commercial Arbitration, by the United Nations Commission on International Trade Law (UNCITRAL), Parliament enacted the 1995 Arbitration Act that repealed the 1968 Act.

1.2 The UNCITRAL Model Arbitration Law, 1985

The UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") was adopted in 1985.[6] The Model Law covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. The purpose of the Model Law was to provide a law acceptable to States with different legal, social and economic systems and contribute to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations.[7] This purpose is promoted by reflecting worldwide consensus on key aspects of international arbitration practice. This Model Law was amended in 2006.

1.3 The Arbitration Act, 1995

The Arbitration Act, 1995[8] was assented to on 10 August, 1995 and came into force on 2 January, 1996. It repealed and replaced the 1968 Act. The 1995 Act is substantially modelled along the provisions of the UNCITRAL Model Law on International Commercial Arbitration of 1985.[9]

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5 Farooq Khan (2002) *"Introduction to Arbitration"* A paper presented at Chartered Institute of Arbitrators-Kenya Branch entry course held at Nairobi on 11 and 12 February, 2002.

6 General Resolution 40/72, 11 December, 1985. In doing so, the General Assembly recognised the value of arbitration as a method of settling disputes arising in international commercial relations.

7 *Ibid*.

8 Act No. 4 of 1995.

9 Hereinafter referred to as the UNCITRAL Model Law. The UNCITRAL Model Law was adopted by the United Nations Commission on 21 June, 1985. On 11

Significantly, the Act distinguishes 'domestic' and 'international' arbitrations.[10] Under the Act an arbitration is domestic if the arbitration agreement provides expressly or by implication for arbitration in Kenya: and at the time when proceedings are commenced or the arbitration is entered into:

(a) where the arbitration is between individuals, the parties are nationals of Kenya or are habitually resident in Kenya;

(b) where the arbitration is between bodies corporate, the parties are incorporated in Kenya or their central management and control are exercised in Kenya;

(c) where the arbitration is between an individual and a body corporate –

  (i) the party who is an individual is a national of Kenya or is habitually resident in Kenya; and

  (ii) the party that is a body corporate is incorporated in Kenya or its central management and control are exercised in Kenya; or

(d) the place where a substantial part of the obligations of the commercial relationship is to be performed, or the place with which the subject-matter of the dispute is most closely connected, is Kenya.[11]

On the other hand an arbitration is international if it meets any of the following factors:

(a) the parties to an arbitration agreement have, at the time of conclusion of that agreement, their places of business in different states;

(b) one of the following places is situated outside the state in which the parties have their places of business–

December, 1985, the General Assembly in its resolution 40/72 recommended that all member states harmonise their arbitration laws to meet the unique needs of international commercial arbitration practice.

10 It is argued that there is no real difference between 'domestic' and 'international' arbitrations – see Russell on Arbitration at paragraph 2-022. No such distinction is contained in the UNCITRAL Model Law. However, certain sections of the 1995 Act apply only to 'domestic' arbitrations, for instance section 39 of the 1995 Act refers to domestic arbitrations.

11 Section 3 (2), Arbitration Act, 1995.

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement, and

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is closely connected;

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.[12]

1.4 Fundamental Principles

A number of key principles underlie the 1995 Act. These are:

(a) Party Autonomy

Arbitration is a consensual process – parties agree to refer their disputes to arbitration. Once referred, parties retain significant control over the conduct of the proceedings. The principle of party autonomy is a fundamental basis of the Model Law and is underscored by numerous provisions in the 1995 Act, including those allowing the parties to agree on: the law applicable to their dispute;[13] the procedure to be followed by the arbitral tribunal in the conduct of arbitral proceedings;[14] the manner in which the dispute will be heard;[15] the appointment of the arbitral tribunal;[16] the seat of arbitration;[17] the language of the arbitral process[18] and the form of the award[19] amongst others.[20]

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12 Section 3(3), Arbitration Act, 1995.

13 See section 29(1) of the Arbitration Act, 1995.

14 See section 20(1) of the Arbitration Act, 1995.

15 Parties may elect to have 'documents only' arbitrations or have full oral hearings – see section 25(1) of the Arbitration Act.

16 Section 12 of the Arbitration Act, 1995.

17 Section 21 of the Arbitration Act, 1995.

18 Section 23 of the Arbitration Act, 1995. In contrast, the languages of court are English and Kiswahili.

19 Section 32(3)(a) of the Arbitration Act, 1995.

20 To promote the principle of speedy resolution of disputes, the 1995 Act does, however, designate the arbitrator as 'master of procedure' where parties are unable to agree on procedure – see section 20(2) of the Arbitration Act, 1995

(b) Non Intervention by Court

One of the significant improvements on the 1968 Act was the codification of the principle of non-intervention by court in arbitral proceedings. This was done by the inclusion of section 10 of the 1995 Act which provides as follows:

> (10) Except as provided in this Act, no court shall intervene in matters governed by this Act.

This statutory limitation on court interference is identical to Article 5 of the Model Law. This limitation means that parties may only apply to the court where there is provision in the 1995 Act to do so, a situation that did not subsist under the 1968 Act. Chapter 5 of this book is devoted to this principle.

(c) Kompetenz Kompetenz

One of the most significant developments in the 1995 Act was the adoption of the principle of *'kompetenz kompetenz'*.[21] This principle provides that the arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement. Although subject to appeal, this provision ensures that less time is wasted in applications to the court on questions of jurisdiction. This principle, its application and consequences are amplified at chapters 2, 3 and 5 of this book.

(d) Neutrality and Equality

Provisions on the participation of both parties in the appointment of an arbitrator promote the principle of neutrality and equality in the conduct of arbitral proceedings. Furthermore, section 13(1) of the 1995 Act provides that a person is approached in connection with his possible appointment as an arbitrator, must disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. This obligation to disclose continues throughout the arbitral proceedings.[22] This means that

21 See section 17 of the Arbitration Act, 1995 and chapters 2 and 3 of this book for a more detailed discussion of this principle.

22 Section 13(2) of the Arbitration Act, 1995.

if circumstances arise that affect the impartiality or independence of an arbitrator during the pendency of arbitral proceedings, the arbitrator must disclose them to the parties. Where neutrality is suspect, parties may challenge the appointment of the arbitrator.[23] The arbitral tribunal is also obliged to treat the parties with equality and give each party a fair and reasonable opportunity of presenting its case.[24]

(e) Flexibility

Arbitral proceedings are flexible. Parties are, for instance, able to agree on the time within which pleadings are to be filed or amended.[25] Pleadings may also take different forms such as letters and what are often referred to as statements of case.[26] For more technical disputes, parties may opt to put their cases in a narrative form and attach all the documents they will be relying on to prove their case. Parties may also agree, where appropriate, to have the dispute decided on documents.[27] This is known as "documents only arbitration". The conduct of the arbitral process is further discussed at chapter 4 of this book.

(f) Finality of Awards

An award is final and binding upon the parties.[28] To further buttress the principle of the finality of arbitral awards, the 1995 Act provides that parties may reserve a right of appeal only on questions of law.[29] Grounds on which arbitral awards may be set aside were narrowed considerably by section 35 of the 1995 Act. There is more on this subject at chapters 5 and 6 of this book.

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23 Under section 14 of the Arbitration Act, 1995.

24 See section 19 of the Arbitration Act, 1995.

25 Section 24(1) and (3) of the Arbitration Act, 1995. This is unlike proceedings in court where time for filing pleadings is fixed by the Civil Procedure Rules.

26 *Ibid*. Statements of Case refer to pleadings to which evidence is annexed.

27 See section 25(1) and (2) of the Arbitration Act, 1995.

28 Section 32A (via the 2009 amendments) also provides that unless parties agree otherwise, arbitral awards are final and binding on the parties.

29 See section 39 of the Arbitration Act, 1995. Section 32A (via the 2009 amendments) also provides that unless parties agree otherwise, arbitral awards are final and binding on the parties.

(g) Enforceability

Arbitration awards would be useful only if they are enforceable. Under the 1995 Act, the High Court of Kenya will recognise an award for enforcement unless the exceptions stipulated at section 37 of the Act exist. This subject is discussed in greater depth at chapter 7 of this book.

1.5 Rules under the Arbitration Act, 1995

The Arbitration Act is not exhaustive on matters of procedure for invoking the intervention of the court in arbitration proceedings. Thus, section 40 empowers the Chief Justice of Kenya to make court procedural rules for matters not prescribed in the Act including recognition and enforcement of arbitral awards, setting aside of awards, stay of proceedings and generally any proceedings in court under the Arbitration Act. In exercise of the powers under section 40, the Arbitration Rules, 1997 were made on 6 May, 1997. These Rules also provide for the Civil Procedure Rules to be applicable in applications under the Arbitration Act, 1995.

1.6 The 2009 Amendments to the 1995 Act

Despite the important improvements to arbitration law and practice occasioned by the passage of the 1995 Act, there remained a number of shortcomings to that Act. Chief amongst these was that there was no provision for the finality of an Arbitral Award.[30] Although it was commonly assumed or provided for within arbitration agreements, the immunity of the arbitrator was not statutory prior to the 2009 amendments.[31] Costs, expenses and interest were also a significant area not provided for by the 1995 Act.[32] Further to recommendations from various stakeholders (including the Chartered Institute of

30 This is now provided under section 32A of the Arbitration Act, 1995 which provides for Awards to be final and binding on parties, save for where otherwise agreed. This is again a nod to the principle of party autonomy in arbitral proceedings.

31 Section 16B of the 1995 Act now expressly provides for the immunity of an arbitrator acting in good faith.

32 These are now provided for under sections 32B and 32C of the Arbitration Act,1995.

Arbitrators) on these and other areas, the 1995 Act was amended via the Arbitration (Amendment) Act of 2009.[33]

1.7 Institutional References to Arbitration

Where parties are unable to agree on the appointment of an arbitrator, the arbitration clause will frequently provide for a third party, usually the Chairman of a professional organization to make such appointment.[34] The Chartered Institute of Arbitrators (Kenya) Branch (CIARB) is one of the most recognised institutions in arbitration in Kenya; the Chartered Institute of Arbitrators Kenya Branch was established in 1984 and is one of the branches of the Chartered Institute of Arbitrators.[35] CIARB has published its own rules which are applicable to proceedings where the Chairman of the CIARB is, where parties cannot agree, the appointing authority.[36] Parties may also agree to adopt these rules.

1.8 Court Supervised Arbitration under order 46 of the Civil Procedure Rules, Civil Procedure Act

Arbitrations may also be conducted under order of Court.[37] Order 46, Civil Procedure Rules, 2010,[38] provides that where the parties agree to refer their suit to arbitration, they may at any time before judgement is pronounced, apply to court for an order of reference.[39]

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33 The details of the amendments are separately discussed in the various chapters in this book.

34 Other appointing institutions include the Architectural Association of Kenya (established in 1934), a professional society for Architects, Quantity Surveyors, Town Planners, Engineers, Landscape architects and Built Environment experts; and the Law Society of Kenya, established in 1962, by an Act of Parliament – the Law Society of Kenya Act, Cap 18, Laws of Kenya.

35 The Chartered Institute of Arbitrators is headquartered in London and was itself established in 1915.

36 See Rule 1, Chartered Institute of Arbitrators, Rules.

37 Section 59 of the Civil Procedure Act, Cap 21 Laws of Kenya.

38 Under the Old Rules, this Order was previously Order 45. The departures from Order 45 of the Old Rules are slight - one of the more significant departures is that while Order 45 was limited to arbitrations under order of court, Order 46 includes provisions for court ordered arbitrations and other alternative dispute resolution methods.

39 Rule 1, Order 46, Civil Procedure Rules, 2010, Civil Procedure Act.

Arbitration under order of court generally allows the court slightly more intervention than is allowed under the 1995 Act.[40] The court, for instance, must fix the time within which the arbitral award must be made and specify such time in the order for reference.[41] Rule 3(2), Order 46 does, however, provide the same sort of limitation provided for by section 10 of the 1995 Act: namely, to limit intervention by the court.[42] Several statutes also provide for the Chief Justice to appoint an arbitrator.[43]

An arbitration under Order of Court however has the main disadvantage of removing the cloak of confidentiality that make arbitral proceedings attractive. Rule 10, Order 46 of the Civil Procedure Rules requires arbitrators to file their awards in court.[44] Once the award is filed, it must also be read by the Registrar.[45]

1.9 Enforcement under the New York Convention

The rapid growth in international commerce inevitably meant that international commercial arbitrations would require an international award enforcement mechanism. That mechanism took the form of

40 The court may, for instance, fix time for making the Award.

41 Rule 3(1), Order 46, Civil Procedure Rules, 2010, Civil Procedure Act. This time can however be extended by consent of the parties under Rule 8, Order 46 of the Civil Procedure Rules, 2010.

42 Order 46, Rule 3(2) provides that: *where a matter is referred to arbitration, the court shall not, save in the manner and to the extent provided in this Order, deal with such matter in the suit*

43 For an example, see section 62(1) of Kenya Ports Authority Act, Cap 391 of the Laws of Kenya. This section provides as follows:

> 62(1) In the exercise of the powers conferred by sections 12, 14, 15 and 16, the Authority shall do as little damage as possible; and, where any person suffers damage, no action or suit shall lie but he shall be entitled to such compensation therefor as may be agreed between him and the Authority or, in default of agreement, as may be determined by a single arbitrator appointed by the Chief Justice.

44 Filing of Awards, together with any depositions and documents which have been taken and proven before them, must be done within fourteen days of making the Award. Under Order 45 of the Old Rules, arbitrators were only required to sign the Award. Under Order 45 of the Old Rules, it was not expressly provided that the Registrar would notify the parties of the filing of the Award. Other notable changes include: Rule 16(2) of Order 46 (which amended Rule 15 of Order 45 under the Old Rules) which requires that an application to set aside an award be served on the arbitrator or umpire; and Rule 17(1), Order 46 which requires that a judgement on award can only be entered by court on request by any party and after due notice to the other party has been given.

45 Rule 11, Order 46, Civil Procedure Rules.

the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).[46] The New York Convention seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign arbitral awards. Kenya acceded to the New York Convention on 10 February, 1989, with a reservation on reciprocity. There is more on this subject at chapters 7 and 9 of this book.

1.10 Conclusion

This first chapter has given a brief introduction to the legal framework of arbitration in Kenya from the constitutional principle that alternative forms of dispute resolution be promoted to the Arbitration Act, 1995 and enforcement under the New York Convention. The chapters following this one will examine, in depth, the various stages of the arbitral process, from the arbitration agreement and the appointment of the tribunal to costs and interests once an Award has been made. The final chapter will then examine International Commercial Arbitration in the Kenyan context.

46 Adopted on 10 June 1958, the New York Convention entered into force on 7 June 1959.

Chapter 2

The Arbitration Agreement

By Kyalo Mbobu

2.0 Introduction

The foundation of every arbitration is an agreement to refer the dispute to arbitration. Typically, that agreement is a clause in the contract between the parties. Where there is no such arbitration clause, the alternative, once a dispute has arisen is for parties to draw up an arbitration agreement.[1] However, it is often difficult for parties to agree to refer their dispute to arbitration once it arises.

This second chapter deals with the following areas:

i) The Arbitration Agreement;
ii) Model Arbitration Agreement;
iii) Other forms of Dispute Resolution Mechanisms;
iv) Validity of Arbitration Agreement;
v) Mandate of Tribunal and Court in Enforcing the Agreement;
vi) Challenges in Enforcing the Agreement;
vii) Appointment and Composition of the Tribunal;
viii) Challenge to Appointment; and
ix) Failure and Termination of Appointment.

2.1 Arbitration Agreement

Section 3 of the Arbitration Act[2] defines an arbitration agreement as "an agreement by the parties to 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." This definition is adopted word for word from the United Nations Commission on International Trade Law (UNCITRAL) Model

1 This is also referred to as a 'submission agreement'.

2 No. 4 of 1995.

Law 1985.[3] The thrust of such an agreement is the contractual undertaking by the parties to resolve disputes by the process of arbitration. The dispute itself need not be based on contractual obligations.

2.2 Form of Agreement

Section 4(2)[4] of the Act requires an arbitration agreement to be "in writing." This requirement is satisfied if an arbitration agreement is contained in:

a) a document signed by the parties; or

b) an exchange of letters, telex, telegram, fax, electronic mail[5] or other areas 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.

The arbitration agreement, if it is to have effect, must be in writing as required by section 4(2) of the Arbitration Act.[6]

Hence, it is not necessary that an arbitration agreement be a formal agreement, or that all the terms be contained in one document. Indeed section 4(4) provides 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 a part of the contract.

Likewise, signature of a written agreement by the parties is not required for an arbitration agreement to be valid under the arbitration law of Kenya; which is based on the UNCITRAL Model Law. Problems may arise however if an award which is based on an

3 The only addition in definition in Article 7 of the UNCITRAL Model Law is the following; "An arbitration agreement may be in the form of an arbitration clause in a contract or in form of a separate agreement."

4 Arbitration Act, No. 4 of 1995.

5 Arbitration (Amendment) Act 2009.

6 In *Pan Africa Builders and Contractors Limited v National Security Fund Board of Trustees* 2006 eKLR, Hon Justice Ransley held that the arbitration agreement if it is to have effect must be in writing as required by section 4(2) of the Arbitration Act.

unsigned arbitration agreement is sought to be enforced in another jurisdiction under the New York Convention. The problem may be overcome at the initial stages if all the parties sign the terms of the reference, for example, pursuant to Article 18 of the ICC Rules.

The above definition makes it clear that the "arbitration agreement" covers:

a) An arbitration clause within a contract by which parties agree to submit their present and/or future disputes to arbitration;

b) A separate agreement not forming part of the primary contract to refer an existing dispute to arbitration. This is also known as the "submission agreement."

2.3 Model Arbitration Agreement[7]

A standard Arbitration agreement should at least provide for the following:

1. *Disputes to be resolved by arbitration*: From the wording of the agreement it will be clear what disputes are to be referred to arbitration. The wording should be elaborate. In *Gunter Henck v Andre and Cie S.A*[8] the arbitration agreement was worded, *inter alia*, that "….all disputes from time to time arising out of or under this contract.." Mocatta J held that the words arising out of the contract extended the meaning that would have otherwise been limited to disputes arising out of that contract.[9]

2. *The disputants must be clearly identified*: It is important to identify the parties who may arbitrate pursuant to an arbitration agreement. Parties may not be substituted without their consent or reference. Instituting proceedings against the wrong party or substituting the parties is fatal.

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7 The provisions of the Arbitration Act No. 4 of 1995 allow parties to make the arbitration agreement as inclusive as possible. However, when drafting the arbitration agreement it must be done within the confines of necessary public interest. The award may be set aside on the grounds that the arbitration agreement is contrary to public interest.

8 (1970) Vol 1 Lloyds Rep 235.

9 See Enid A. Marshall, Gill: *The Law of Arbitration* 4th Ed Pg 24, 25.

In *Kenya Railways v Antares Co Pte Ltd ("the Antares")*.[10] Lord Justice Lloyd in dismissing the appeal stated, *inter alia*, that "it would be contrary to the whole consensual basis of arbitration if the Court were to have power to add or substitute a party to an existing arbitration. There must be a clear reference to arbitration by the parties".

3. *Venue of the arbitration*: section 21[11] provides that parties are free to agree on the place of arbitration. In the context of international arbitration, an agreement on the venue is essential since it may be a determinant of the applicable law. Where the parties do not indicate the venue in the arbitration agreement the tribunal is mandated to determine the venue.[12] Also the choice of venue could have important consequences for the procedure applicable which ultimately, will affect the conduct of proceedings.

4. *Applicable law:* This must also be indicated in the agreement where parties intend to rely on specific statutes.[13] In the case of *Swiss Bank Corporation v Novorissysk Shipping Co*[14] a clause which simply stated 'Arbitration in London', was construed to mean that English law would apply.

5. *Procedure during arbitration:* section 20 of the Arbitration Act provides that the parties should agree on the procedure to be adopted by the tribunal. Where the parties do not agree on such procedure, the rule is that the arbitrator is the master of procedure.[15]

6. *Number of Arbitrator*s: Parties are free to agree on the number of arbitrators, failing which there is one arbitrator.[16] Where parties fail to agree on appointment of an arbitrator, the mode of appointing an arbitrator is provided for under section 12 of the Arbitration Act. However, where the arbitration agreement is clear on the mode of appointment

10 1987 1 Lloyd's Rep 424.

11 The Arbitration Act No. 4 of 1995.

12 Section 21(2) of The Arbitration Act No. 4 of 1995.

13 See *Russel on Arbitration* 23rd Edition Page 82 (2 – 0095).

14 1995 Lloyd Rep 64.

15 Section 20 (2) of the Arbitration Act, 1995.

16 Section 11 of the Arbitration Act, 1995.

of the arbitrator there is little or no interference from court. In *Kenya Oil Company Limited and another v Kenya Petroleum Refineries*[17] Lady Justice Koome, *inter alia*, held that the court will not order the appointment of an arbitrator or termination of arbitration where it is elaborately provided for in the arbitration agreement.

Where a suit is instituted pursuant to the Civil Procedure Act[18] parties may agree to appoint an arbitrator pursuant to provisions of Order 46, rule 2 of the Civil Procedure Rules, 2010.[19]

7. *Limitation period for dispute resolution*: The arbitration agreement may indicate the limitation period for instituting arbitral proceedings. Arbitration proceedings are bound by the Limitation Statute. *Telcom Kenya Limited and another v Kam Consult Limited*[20] Justice Ringera (as he then was) held that the arbitrator did not have jurisdiction to handle a claim that is statute-barred.[21] It is important to note that the arbitration award is likely to be set aside on grounds of public policy if the claim is time-barred.

8. *Costs*: The costs in arbitration unlike the court process can be agreed upon by the parties in the arbitration agreement.

9. *Appeals:* Finally, if parties wish to reserve a right of appeal,[22] it is important that this is expressly captured in the agreement. Where the parties fail to agree the decision of the arbitrator will be final but may be challenged in the High Court pursuant to section 35.[23] Indeed the High Court in its residual inherent jurisdiction hardly ever rejects any application which is brought under section 35, notwithstanding the agreement on the finality of the arbitral award.

17 [2010] eKLR.

18 Chapter 21 Laws of Kenya.

19 The recent amendments to the Civil Procedure Rules have indeed made mediation indispensable to the expeditious resolution of civil disputes.

20 Unreported 2001.

21 See also *Kenya Railways v Antares Co Pte Ltd ("the Antares")* 1987 1 Lloyd's Rep 424 where the court held that the tribunal has no jurisdiction to entertain disputes that are time-barred.

22 Under section 39 of the Arbitration Act, 1995.

23 The Arbitration Act No 4. of 1995.

2.4 Doctrine of Separability

An arbitration agreement is separate from the main contract in which it is contained. This means that the arbitration clause in a contract survives the termination of that contract. This concept was espoused by the English High Courts as far back as 1942 in the case of *Heyman v Darwins.*[24] At page 374, the court observed as follows:

> "It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determination the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract".

In the leading case of *Union of India v Mc Donnel Douglas Corporation*[25] Saville J noted that:

> 'An arbitration clause in a commercial contract…is an agreement inside an agreement. The parties make their commercial bargain… but in addition, agree on a private tribunal to resolve any issues that may arise between them.'

This concept is captured at section 17(1) of the Arbitration Act where it is provided that:

a) an arbitration clause which forms part of a contract shall be treated as an independent agreement of the other terms of the contract; and

b) a decision of the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause.

Indeed, so broad is the concept that it has been accepted in *Glaxosmithkline v Department of Health*[26] that even if the underlying contract never came into existence, the arbitration agreement may still be binding. In that case, it was alleged that the plaintiffs had entered into a purely non-binding and voluntary agreement with no intention to create legal relations. The arbitration agreement, it was alleged, was no more binding than the larger contract of which it formed part. The court found that there was no agreement between

24 [1942] AC 356.

25 [1992] Lloyd 48.

26 [2007] EWAC 1470.

the parties that the award should not be final and binding, effectively holding that the resultant award was binding and enforceable.

The doctrine underscores the breadth of an arbitration agreement because it establishes that an arbitration agreement has a separate life of its own from the underlying contract for which it provides the means of resolving disputes. Therefore, even if the underlying contract is terminated, for example by repudiation or frustration, the arbitration agreement continues to exist in order to deal with any disputes in respect of liabilities under the material contract arising by or after the termination.

2.5 Doctrine of Separability

At times, arbitration agreements become ineffective due to failure to distinguish between different categories or types of disputes resolution mechanism available.

2.6 Validity of the Arbitration Agreement

There is no arbitration unless both parties to a dispute have agreed to submit the matter to arbitration. Disputes relating to the existence and validity of the arbitration agreement are ideally resolved at the initial stages of the arbitral process. The question of the jurisdiction of hearing such disputes depends on the forum at which the question first arises.

Firstly, the tribunal has jurisdiction to interpret and resolve any issues raised as to the validity of the agreement. Section 17 of the Arbitration Act provides that the arbitral tribunal may rule on its own jurisdiction. This includes ruling on any objections with respect to the existence or validity of the arbitration agreement.[27] At this point, the main concern for the tribunal is the issue of jurisdiction.[28]

In deciding the issue of jurisdiction, it may be apparent that the arbitral tribunal interprets and considers the validity of the agreement. In so doing, the arbitral tribunal would have to find that an arbitration agreement capable of being enforced exists. If the

27 See also the Doctrine of *Competenz Kompitenz* discussed by Mohamed Nyaoga's chapter on jurisdiction and powers of the arbitrator, Pages 13- 16.

28 See the case of *Kenya Shell Limited v Kobil Petroleum Limited* [2006] 2 EA 132 (CAK) where the Court of Appeal extensively dealt with the question of jurisdiction.

dispute is barred by statute of limitation then the tribunal will not have jurisdiction to arbitrate.[29]

Secondly, in view of section 10[30] the court should not interfere with the matters that are provided for in the Act. One school of thought is that the court has no jurisdiction at all and therefore the arbitration process should be as envisaged in the agreement or as governed by the Act. The other school of thought is that the High Court has unlimited original jurisdiction in civil and criminal matters.[31] Parties make applications in courts and in so doing, the courts have to decide whether or not there is a valid arbitration agreement.

Section 6(i) of the Arbitration Act provides that the court must, before granting an order of stay, satisfy itself that a valid agreement exists and the dispute is within the scope of the arbitration agreement. Russell argues that when a question arises as to whether an arbitration agreement exists for the purpose of granting a stay of proceeding, the court will determine whether indeed an arbitration agreement exists.[32] The court in that case will only consider the question of the existence of an arbitration agreement and its validity (if indeed an agreement exists) is normally left to the arbitrators.[33]

Thirdly, the arbitration agreement is subject to the Limitation of Actions Act.[34] Therefore, the tribunal has no jurisdiction when the claim is time-barred. Also, when parties agree on a limitation of time within which to make a reference then they are bound by their agreement.[35]

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29 See *Telcom Kenya Limited and another v Kam Consult Limited* Unreported 2001.

30 The Arbitration Act No. 4 of 1995.

31 See Article 165(3) of the Constitution and *Epco Builders Limited v Adan Marjam Arbitrators and another* Civil Appeal No. 248 of 2005.

32 Russel on Arbitration 23rd Ed (London Sweet & Maxwell 2007) P. 360.

33 *Kenya Airports Parking Services and anor v Municipal Council of Mombasa* 2009 eKLR. Justice Kimaru stated that "a party who wishes to challenge the validity or legality of an agreement may do so at first instance when the matter is placed before the tribunal".

34 Chapter 22 Laws of Kenya.

35 See the case of *Barlany Car Hire Services Limited v Corporate Insurance Limited* HCCC (Milimani) No. 1249 of 2000.

2.7 Mandate of Tribunal and Court in Enforcing the Agreement

As noted earlier, the arbitration agreement should be as broad as possible to enhance ease in enforceability. The parties may agree on the nature in which the agreement will be enforced. The arbitral tribunal's mandate is to enforce the agreement at all levels. The court, however, should assist where there is need to do so.[36]

(a) Stay of Proceedings

Recourse to court is usually through a formal application. Section 6 of the Arbitration Act provides that the court may stay proceedings and refer the parties to arbitration. For the court to stay proceedings, the arbitration agreement must not be null and void. An application filed pursuant to section 6 of the Arbitration Act does not render the suit filed despite the existence of the arbitration agreement frivolous or an abuse of court process. Where one party has commenced proceedings in court in breach of the arbitration agreement the other party can make an application to court for stay of the proceedings brought in breach. In most circumstances the stay of proceedings will bar the suit and compel the party in breach to arbitrate.

The defendant must not enter appearance or file a defence before making an application for stay of proceedings.[37] In *Niazsons (K) Limited v China Road & Bridge Corporation Kenya,*[38] the Court of Appeal held, *inter alia,* that as long as an application for stay of proceedings under section 6(1) of the Act is brought promptly, the court is obliged to consider only three things:

Firstly, whether the applicant has taken any steps in the proceedings other than the steps allowed by the section. Secondly, whether there are any legal impediments on the validity, operation or performance of the arbitration agreement; and thirdly, whether the suit indeed concerned a matter agreed to be referred to arbitration.

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36 Section 10 of the Arbitration Act limits the interference of courts in arbitral proceedings.

37 See the case of *Peter Muema Kahoro and another v Benson Maina Githethuki* [2006] HCCC No. 1295 of 2005. Once appearance has been entered and a defence has been filed, an application to stay proceedings and refer the matter to arbitration may be a tactic for delay.

38 [2001] KLR 12.

Bosire JA said: "I think that once an application under section 6(1) of the Arbitration Act has been made, it is incumbent upon the judge seised of the matter to deal with it as a whole, to discover whether any of the legal impediments set out in the section exist to disentitle the applicant to a stay." The impediments may, *inter alia*, include whether there is a valid arbitration agreement, whether the dispute is within the scope of the arbitration agreement.

(b) Interim Measures by Court

On the other hand, section 7 of the Arbitration Act empowers the court to grant interim orders to a party before or during the arbitral proceedings as a measure of protection to that party. In instances where it is important to preserve the assets that are subject to the arbitral proceedings the court will grant an interim injunction to the party. By so doing the court is enforcing the agreement.

In *Don-wood Co. Ltd v Kenya Pipeline Ltd*[39] the defendant had declined to arbitrate. The judge granted the orders and found that the jurisdiction to grant injunctive relief under section 7 of the Arbitration Act was intended to preserve the subject matter of the suit pending determination of the issues between the parties in accordance with the agreement.

In *Mugoya Construction & Engineering Limited v National Social Security Fund Board of Trustees and another*[40] Ransley J[41] in following Ojwang J in the *Don-wood Limited case* held, *inter alia*, that in order to succeed, the applicant must show it has a *prima facie* case with a probability of success pending the hearing and completion of the arbitration proceedings.

(c) Interim Orders of Protection within the arbitration proceeding

The arbitral tribunal or a party with the approval of the arbitral tribunal or any party may seek assistance from the High Court in the exercise of any power conferred on the arbitral tribunal under

39 HCCC. No. 104 of 2004.

40 [2005] eKLR.

41 Following Ojwang J in the Don Woods case *supra*.

section 18(1) of the Arbitration Act. This section provides that any party may with the consent of the arbitral tribunal take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.

A party may also seek that the other provides security in order to protect the property or the subject matter of the dispute pending hearing and determination of the dispute. This in effect means that the party seeks the assistance of the High Court, which has jurisdiction to enforce interim measures of protection. These measures do not bar the tribunal from proceeding with the arbitration.[42]

2.8 Challenges in Enforcement of the Arbitration Agreement

Interpretation

The scope of the arbitration agreement is largely deduced from its construction. When there is a dispute relating to the scope of the agreement, a broad interpretation is favoured.[43] Russell argues that it is possible for the arbitral tribunal to extend the scope of an arbitration agreement such that a dispute relating to contract may cover tortious liability depending on the wording of the arbitration agreement.[44] However, in light of section 29 of the Arbitration Act, the tribunal will not extend its jurisdiction unless allowed to do so by the rules and procedure agreed upon between the parties.

The jurisdiction to determine the effect and interpretation of the arbitration agreement lies with the arbitrator(s).[45] Russell argues that the law of the arbitration agreement (including questions of validity of the agreement, notices, *inter alia*) regulates the substantive matters relating to the agreement including interpretation, validity, effect and discharge of the agreement to arbitrate. When parties opt to go to court in spite of the agreement to arbitrate, they vacate the arbitration agreement giving it no effect.[46]

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42 Section 18(3).

43 *Fiona Trust & Holding Corporation v Yuri Privalov* (2007) EWCA Civ. 20 discusses the aspect of broadening the scope to accommodate the arbitration agreement.

44 *Russel on Arbitration* 23rd Ed (Lon, Sweet & Max 2007) page 72.

45 See section 17 of The Arbitration Act No. 4 of 1995.

46 See the case of *Kenya Shell Limited v Kobil Petroleum Limited* [2006] 2 EA 132.

In *Stellar Shipping Co LLC v Hudson Shipping Lines*[47] there was a dispute as to whether an arbitration clause in a contract of affreightment extended also to a separate guarantee given by a third party which formed a part of the contract of affreightment. Hamblen J ruled that the arbitration clause, properly construed, applied to both agreements.

2.9 Appointment and Composition of Arbitral Tribunal

Section 11 of the Act encapsulates the concept of party autonomy[48] which is indispensable to any modern law on arbitration. It provides in subsection (1) that parties are free to determine the number of arbitrators they desire, failure to which, the number shall be one.

Section 11 of the Act has been amended by the Arbitration (Amendment) Act of 2009 which has introduced a subsection 3 to the effect that where an arbitration agreement provides that the reference shall be to two (2) arbitrators, then, unless the contrary intention is expressed in the agreement, the agreement is deemed to include a provision that the two arbitrators shall appoint a third arbitrator immediately after they are themselves appointed.

Indeed, the parties are free to agree on the procedure of appointing the arbitrator or arbitrators failing which:

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator and the two arbitrators so appointed shall appoint the third arbitrator.
(b) in an arbitration with one arbitrator, the parties shall agree on the person to be appointed.[49]

In order to eliminate the agony of a party faced with a recalcitrant opponent who does not wish to cooperate in the appointment of an arbitrator, the Arbitration (Amendment) Act, 2009 introduced provisions by which the other party having duly appointed an arbitrator, may give notice in writing to the party in default proposing to appoint his arbitrator to act as a sole arbitrator. This

47 [2010] EWHC 2985 (Comm).

48 Party autonomy means the freedom of the parties to decide on the law and procedure to govern the arbitration and the arbitral process.

49 Section 12(9) of Act No. 4 of 1995.

amendment is welcome because it eliminates the requirement under the old section 12(3) that required the moving party to apply to the High Court to make the appointment thereby incurring further costs and delay.

The new section 12(4) provides that if the party in default does not remedy the situation within 14 days the other party may appoint his arbitrator as sole arbitrator and the award of that arbitrator shall be binding on both parties as if he had been appointed by the agreement. The law then shifts the burden of challenging such appointment in the High Court to the party in default.[50]

The new amendments, however, not intending to subvert the spirit thereof, limit the court's discretion by providing that the High Court may grant an application under section 12(5) only if satisfied that there was a good cause for failure or refusal of the party in default to appoint his arbitrator in due time.

However, in the unlikely event that the court grants such application, section 12(7) empowers the parties to consent to the appointment. The court on application of either party may also appoint a sole arbitrator. The decision of the court in respect of appointment of an arbitrator is final and not appealable.

Nonetheless, the High Court in appointing an arbitrator shall have regard to any qualifications required of an arbitrator by the agreement of the parties and such considerations as are likely to secure the appointment of an independent and impartial arbitrator. However, when there is a delay or failure to appoint an arbitrator the court may also appoint one. In the case of *Mohawk Limited v Leo Investment Limited,*[51] for instance, the arbitration agreement required the chairman of the Architectural Association of Kenya to appoint the arbitrator. The Chairman had declined to make the appointment and gave no reason for his refusal. Lady Justice Khaminwa directed the vice chairman of the Architectural Association to appoint an arbitrator.

The above new provisions of law have addressed an issue that has vexed many arbitration practitioners in Kenya for a very long time.

50 Section 12(5) of the Arbitration Act.

51 [2009] eKLR.

By allowing the moving party to appoint his arbitrator as the sole arbitrator, this will eliminate the tendency towards procrastination on the appointment of arbitrators. Likewise, shifting the burden of challenging that appointment to the procrastinating party, is likely to dissuade the users of the process from time wasting and delaying the eventual determination of the dispute.

2.10 Challenge to Appointment

For purposes of the integrity of the arbitral proceedings, section 13(1) of the Act provides that when a person is approached for the possibility of appointment to act as an arbitrator, he is to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. This provision is vital for it gives the arbitral tribunal the very first opportunity of self-examination to determine if an arbitrator proposed for appointment is fit to serve. Section 13(2) of the Act takes this requirement a step further by providing that from the time of the appointment and throughout the proceedings, an arbitrator shall without delay disclose any circumstances to the parties as to his impartiality, or independence. These provisions establish a very high standard of integrity and probity on the part of an arbitrator.

A successful challenge may only be made if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality and independence or if he is physically and/or mentally incapable of conducting proceedings or there are justifiable doubts as to his capacity to do so.

Given the dynamic nature of commercial transactions, section 13(4) of the Act allows a party to challenge an arbitrator appointed by him or in whose appointment the party has participated, only for reasons he becomes aware after the appointment. Certainly, a party is deemed to be aware of the character, standing and capacity, both mental and otherwise, of the arbitrator he proposes for appointment up to the time of appointment.

The Arbitration Act has avoided prescribing any procedure for challenging an appointment by again providing the parties the autonomy and liberty to agree on a procedure for challenging the

appointment of an arbitrator. In *Kenya Oil Company Limited and another v Kenya Petroleum Refineries Limited*[52] Lady Justice Koome held, *inter alia*, that the court will not order appointment of an arbitrator where such appointment is elaborately provided for in the agreement. She said that the court will not make orders in futility. In the event that there is no agreement, a party intending to challenge an appointment must within 15 days of his becoming aware of the composition of the arbitral tribunal or of the circumstances likely to give justifiable doubts as to the tribunal's impartiality or independence, send a written statement of the reasons for challenge to the arbitral tribunal. The tribunal itself then rules on the challenge.[53]

The requirement is a vast improvement on the process prescribed by the repealed Arbitration Act which required such challenge to be taken to the High Court in the first instance.[54] Besides, it is a provision aimed at granting the process greater autonomy and guaranteeing its integrity to the fullest.

The Arbitration (Amendment) Act, 2009 introduced a further challenge procedure whereby an unsuccessful challenging party may within thirty days after being notified of the decision to reject the challenge, apply to the High Court to determine the matter. The court has the discretion to confirm the rejection of the challenge as to uphold the same and remove the arbitrator. The decision of the court on the matter is final and shall not be subject to appeal.[55] In *Don-Woods Company Limited v Samura Engineering Limited*[56] Lady Justice Koome held that there was no prejudice occasioned when the appointment of an arbitrator was made by the Chartered Institute of Arbitrators instead of the Architectural Association of Kenya contrary to the provision of the arbitration agreement.

But of greater importance is the fact that while an application to challenge an arbitrator's appointment is pending in court, parties are at liberty to commence, continue and even conclude the arbitral

52 [2010] eKLR.

53 Section 14(2), Arbitration Act No. 4 of 1995.

54 This was the procedure under section 24 of the Arbitration Act (Cap 49 Laws of Kenya) which was repealed upon the enactment of Act No. 4 of 1995.

55 See section 14(3), (5) and (6), Arbitration (Amendment) Act, 2009.

56 [2010] eKLR.

proceedings.[57] Curiously, section 14(8) of the Arbitration Act provides that no award in such proceedings shall take effect until the application is decided. One would have thought that the efficacy of the process would be enhanced by letting the award be published, but providing for a ground to apply to set aside the award on the basis of the successful challenge of an appointment.

2.11 Failure and Termination of Appointment

The authority and jurisdiction of an arbitrator shall terminate if any of the following circumstances occur:

(a) if the arbitrator is unable to perform the functions of his office or for any other reason he fails to conduct the proceedings properly and with reasonable dispatch;
(b) if the arbitrator withdraws from his office for his own reasons; or
(c) if the parties agree in writing to the termination of the appointment of the arbitrator.[58]

If there is a dispute concerning any of the grounds referred to above, section 15(2) of the Act allows such party to apply to court to decide on the termination of the mandate. The decision of the court on these matters is final and not subject to appeal.

The appointment of a substitute arbitrator shall be made in accordance with the procedure applicable to the appointment of the arbitrator being replaced. Otherwise, the authority of an arbitrator is personal. It ceases upon death. If an arbitrator withdraws from his office, then section 16A(1) of the Act accords him the rights, unless otherwise agreed by the parties, to apply to the court:

(i) to grant him relief from any liability thereby incurred by him; and
(ii) to make such order as the court thinks fit with regard to his entitlement to fees or expenses incurred.

The amendments have also enacted section 16B which concerns the immunity of an arbitrator from liability for anything done or omitted

57 Curiously, section 14(8) of the Arbitration Act provides that no award in such proceedings shall take place.

58 Section 15(1) of the Act No. 4 of 1995.

to be done in good faith in the discharge or purported discharge of his functions as such. The immunity is extended to encompass a servant or agent of an arbitrator in respect of the discharge or purported discharge by such servant or agent with authority and in good faith, of the functions of the arbitrator.

This provision was omitted in the old law on arbitration. It is an important milestone in the entrenchment of the law and practice of arbitration in Kenya. It has statutorily guaranteed every arbitrator of immunity from undue proceedings for any decision made in good faith in the discharge of the functions of his office.

Chapter 3

The Jurisdiction and Power of the Arbitrator

By Mohammed Nyaoga

3.0 Introduction

The origin of the word jurisdiction is the Latin expression, *jurisdictio,* which refers to the power, right or authority to interpret, apply, and declare the law[1]. In the context of arbitration, jurisdiction refers to the power of the arbitrator to make decisions that are binding on the parties to a contract. The core principle in arbitration is the autonomy of the parties and of the arbitral process. Given the consensual nature of arbitration, it is important that the jurisdiction of the arbitrator is understood by disputants and is properly defined by either the arbitral tribunal or courts of law.

In Kenya and other common law countries, it is juridically settled that lack of jurisdiction on the part of the arbitral tribunal renders proceedings invalid. Arbitral awards have been set aside in instances where the courts have adjudged that the arbitral tribunal either exceeded its powers by making arbitral determination on matters not canvassed before it or rendered an award seeking to bind persons not party to the arbitration.

This chapter examines the jurisdiction of the arbitral tribunal by firstly, evaluating the various jurisdictional bases of the tribunal as recognized in the Arbitration Act. The chapter will then examine the grounds commonly raised by parties to challenge the jurisdiction of the arbitrator.[2] Finally, the chapter will analyse the power of the arbitrator to rule on questions of jurisdiction in the context of the statutory power of the arbitral tribunal to decide on its own

1 Capps, Patrick, Evans, Malcolm and Konstadinidis, Stratos (eds.) *Asserting Jurisdiction: International and European Legal Perspectives* (2003), Hart Publishing Ltd., London.

2 These grounds are derived from an analysis of Kenyan case law, comparative English case law and decisions of specialized arbitral tribunals.

jurisdiction, the right of the parties to seek judicial intervention and the stage at which such intervention is appropriate as provided for by the Arbitration Act, 1995.

3.1 Types of Jurisdiction

There are various types of jurisdiction that are recognized. Firstly, jurisdiction may be determined by the parties to the dispute. It is well-settled that only parties to the arbitration agreement can consent to arbitration. In the case of *Structural Construction Company Limited v International Islamic Relief,*[3] the High Court of Kenya declined to enforce an award against a party that had not participated in the arbitral proceedings. The Court held that the arbitral tribunal has no powers to make an award that binds third parties. Jurisdiction can also be determined on the basis of the subject matter of the dispute. The jurisdiction of the arbitral tribunal is limited to the dispute referred to the tribunal. The subject matter of the dispute is contained in the arbitration agreement which may either be a substantive agreement or clause in a commercial agreement. The legal significance of an arbitration clause in an agreement was determined by the High Court in *Blue Limited v Jaribu Credit Traders Limited*.[4] The court emphasized that an arbitration clause operates as a distinct contract. It creates an obligation to the contracting parties to arbitrate.

Jurisdiction may also be determined by reference to territory. The Arbitration Act recognizes 'international arbitration' where:

i) Parties are not resident in Kenya;
ii) The seat of the tribunal is outside the country; and
iii) The place where the obligations will be substantially performed is outside Kenya.

Parties to the agreement may also agree expressly to have the dispute relate to more than one state.

3 [2006] eKLR. Misc Cause No. 596 of 2005.

4 [2008] eKLR.

3.2 Grounds for Challenging the Jurisdiction of the Arbitral Tribunal

Parties may base their objections on a wide range of grounds. Common grounds are:

(a) Procedure

A party may allege that an essential step has not been taken before the appointment of an arbitrator. Some arbitration clauses may provide for compulsory mediation to precede arbitration. Others may provide for the issuance of mandatory notices. Courts are likely to enforce such requirements if they are part of the arbitration agreement.

(b) Invalidity of Arbitration agreement

A party may contend that the Arbitration Agreement is not binding due to the existence of vitiating factors such as fraud, misrepresentation, mistake, undue influence etc. However, the doctrine of separability may render such objections invalid. In so far as the objections on jurisdiction are based on the validity of the underlying contract, the arbitration clause cannot be invalidated.

However, if there is overwhelming evidence that the arbitration agreement or award was procured by fraud, courts of law are more likely than not to declare the arbitration process a nullity. In the American case of *Medina v Foundation Reserve Insurance Co., Inc.*[5] the Supreme Court of New Mexico vacated an arbitration award and ordered a rehearing before a new panel of arbitrators on the ground that the award was procured by *Medina's* fraud, corruption, and undue means. The court explained the issues as follows:

> 'Substantial evidence in the record supports the district court's findings of fact and application of law, taking all evidence in the light most favorable to upholding the arbitration award . . . . Substantial evidence is that evidence which is relevant and which a reasonable mind could accept as adequate to support a conclusion.'[6]

5 940 P. 2d 1175, 1179 (N.M. 1997).

6 *Supra.* P. 1178.

(c) Limitation

Objections may also be raised on the ground that the reference to arbitration is time-barred. In *Sebhan Enterprises Westermont Power (Kenya) Limited*[7] the High Court dismissed an application by a party who sought to challenge the award of the arbitral tribunal on the grounds that it lacked jurisdiction to determine the dispute, the reference to the arbitration having been made out of the contractually prescribed time-limits. Contractual time limits are usually strictly applied. However, parties can extend the prescribed timelines by mutual agreement.

(d) Partiality and competence of the arbitral tribunal

Some parties have lodged challenges based on the partiality and competence of the arbitral tribunal. Such challenges are made even when both parties participated in the appointment of an arbitrator. However, there may be situations where the arbitral tribunal, though voluntarily appointed by the parties, displays partiality during the course of proceedings. Conflicts of interest may also arise which were not known or disclosed prior to the appointment.

(e) Jurisdiction

Some parties have successfully challenged the conduct of the arbitration on the grounds that the arbitrator acted outside the scope of his terms of reference. In *Nyangau v Nyakwara*,[8] the Court of Appeal held that in arbitration proceedings conducted under order of court,[9] the arbitrator must act within either the stipulated time or that extended by agreement. In this case, the Superior Court had ordered the arbitration to be conducted within ninety days. The tribunal did not comply with the order and did not seek an extension of time. The Court of Appeal upheld the Superior Court's decision to set aside the award on the grounds that the arbitrator acted outside the terms of his reference. The Court of Appeal said:

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7 HCCC No. 239 of 2005.

8 [1986] KLR (Platt, Gichichi J.A).

9 Then Order 45 of the old Civil Procedure Rules, now Order 46 of the Civil Procedure Rules, 2010.

> 'It is clear that if an arbitrator was to conduct the arbitration process outside the time set by the court, or even if he has to file an award outside the time specified, the proceedings or the award would be a nullity.'

This decision was an affirmation of an earlier ruling of the Court in *Mairi v Ngonyoro 'B' and another*[10] where it was stated that the arbitral tribunal must finalise the arbitral proceedings within the time prescribed. The legal requirements as to time of completing the award has since then been consistently applied by the Courts in Kenya. In *M-Link Communications Company Limited v Communications Commission of Kenya and another*,[11] Fred Ochieng J, in enforcing strict requirement as to time held as follows:

> 'Since the time for the arbitration proceedings lapsed on 15 December 2002, it would not be possible for the arbitrators to conduct any proceedings until and unless the parties consented to extend time, through a written agreement, alternatively until and unless the court did extend the period.'

(f) No dispute to refer to arbitration

The jurisdiction of the arbitrator may also be challenged on the grounds that no dispute has arisen to refer the matter to arbitration. There are also parties who allege that the dispute is not within the purview of the arbitration agreement. Disputes of this nature usually raise questions of fact and are best resolved through interpretation of the main agreement.

It is important to note that while parties are lawfully entitled to raise objections to the jurisdiction of the arbitrator, objections as to the validity of the underlying agreement do not necessarily, *ipso facto* question the arbitrator's jurisdiction. This is made possible by the application of the doctrine of separability which allows the arbitration clause to be separated from any invalidities of the underlying contract.

Some scholars have expressed the view that if the underlying agreement is invalid, the entire agreement, inclusive of the arbitration

10 [1986] KLR 488.

11 [2005] eKLR.

agreement, must also be invalid.[12] This argument, although academically attractive, does not capture the essence of arbitration. As a private tool of dispute resolution, arbitration is invariably based on the consent of the parties. Debates on the legal effect of an invalid agreement on the arbitration clause raise questions of the scope of the arbitration clause and the parties' intent in respecting such scope. Did the parties intend to include within the scope of their arbitration agreement a claim challenging the agreement's validity? Arbitrators have no jurisdiction over issues the parties did not include within the scope of their arbitration agreement.

3.3 Power of the Arbitral Tribunal to Rule on the Question of Its Jurisdiction

The right of an arbitral tribunal to rule on its own jurisdiction is generally accepted throughout the world. This doctrine has developed into a legal term of art in most countries, phrased as "*kompetenz kompetenz*" in Germany,[13] "*competence de la competence*" in France,[14] and "*competence of competence*" in England.[15]

In Kenya, section 17 of the Arbitration Act expressly recognizes the doctrine *kompetenz kompetenz*. It provides that the arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose: (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract;[16] and (b) a decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause.[17] Moreover, the Act requires that any plea that the arbitral

12 See *Richard C. Reuben, First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions* in 56 SMUL. Rev. 819 (2003).

13 John J. Barcelo 111, Who Decided the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective, in Vanderbilt Journal of Transnational Law Vol.36:1115.

14 *Ibid*.

15 David St John Sutton *et al*. Russell on Arbitration. 23rd Ed. Sweet & Maxwell, London 2007.

16 Section 17(1)(a).

17 Section 17(1)(b).

tribunal does not have jurisdiction must be raised not later than the submission of the statement of defence.[18]

However, a party is not precluded from raising such a plea because he has appointed, or participated in the appointment of, an arbitrator.[19] A plea that the arbitral tribunal is exceeding the scope of its authority must be made as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.[20] The arbitral tribunal may, in either of the cases referred admit a later plea if it considers the delay justified.[21] The Arbitration Act requires the arbitral tribunal to rule on a plea on lack of jurisdiction either as a preliminary question or in an arbitral award on the merits.[22] If the arbitral tribunal rules on the preliminary question that it has jurisdiction, any party aggrieved by the decision can apply to the High Court to decide the matter.[23] The application to the High Court does not terminate the arbitration; the parties may commence, continue and conclude arbitral proceedings.[24] However, an award in such proceedings does not take effect until the application is decided.[25] If the application is successful, the award is void.[26]

The power of the arbitral tribunal to decide on its own jurisdiction is made legally possible in a number of ways. Firstly, the fact that the arbitration process is inherently consensual means that parties can expressly confer jurisdiction on the arbitrator to determine the jurisdiction of the tribunal. Secondly, the concept of separability allows the tribunal to rule its own jurisdiction. Without separability, dilatory tactics would allow parties to use allegations of contract invalidity to delay arbitration until courts ruled on whether a valid contract of arbitration existed. Under the doctrine of separability, the reference to arbitration remains intact, unless

18 Section 17(2).
19 *Supra.*
20 Section 17(3).
21 Section 17(4).
22 Section 17(5).
23 Section 17(6).
24 Section 17(8).
25 *Supra.*
26 *Supra.*

the allegations are directed specifically towards the invalidity of the arbitration clause.

Previously, the legal regime governing arbitration in Kenya did not expressly recognize *kompetenz-kompetenz* in arbitration proceedings. However, this changed in 1995 with the enactment of the Arbitration Act that expressly recognizes application of the doctrine. The Arbitration Act whose provisions are hugely based on the UNCITRAL Model Law on arbitration contains a comprehensive incorporation of the key facets of the doctrine of *kompetenz kompetenz*. However, some scholars and legal practitioners have extensively criticized the application and scope of the doctrine in arbitration proceedings. However, a detailed analysis of this point is beyond the scope of this chapter. Incorporation of the doctrine in section 17 of the Act in clear and succinct terms has reduced the number of disputes that seek to challenge the application of the doctrine in arbitral proceedings in Kenya. The High Court recognised and applied this doctrine in the case of *Kamconsult Limited v Telkom Kenya and another.*[27]

Once the question of jurisdiction is raised, it must be addressed before any substantive issues are decided. The Court of Appeal in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd*,[28] is authority for this position. Nyarangi, JA stated:

> "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law [lays] down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:
>
> > 'By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of

27 [2001] 2 EA 574 (CCK).

28 [1986-1989] 1 EA 305 CAK.

> this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by the like means, If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given'.
>
> It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court".

(a) What is the Court's Role in the Determination of Arbitrability in Kenya?

While the Arbitration Act expressly requires that applications concerning decisions on arbitrability by the arbitral tribunal be filed in the High Court,[29] it makes no mention of the standard of review courts should apply when reviewing the arbitral tribunal's ruling on its own jurisdiction. As it stands, this is a matter that is purely within the discretionary powers of the High Court. There is little case law on the subject. However, in *Kamconsult Limited v Telkom Kenya and another*[30] in an application to review the decision of the High Court under section 17(6) of the Act, Ringera J ruled that once a decision has been made under the section, there is no room for appeal or review. The judge further held that it was highly improper to ground an application for review under Order 44 of the Civil Procedure Rules.

29 Section 6.

30 *Supra*. Note 29.

(b) When Should the Courts Be Able to Rule on the Question of Arbitrability?

The Arbitration Act requires an application to challenge the arbitral tribunal's ruling to be made to the High Court within 30 days of the notice of the ruling.[31] However, there are no impediments to bringing a timely objection to the jurisdiction of the tribunal before, during, or after the final award. Under section 6 of the Arbitration Act the courts may be faced with the arbitrability issue under an application to compel a party to arbitrate.[32] The decision of the Court of Appeal in *Esmailjy v Mistry Shamji Lalji*[33] that the High Court has a discretionary power to determine applications for stay of proceedings leaves room for parties to raise jurisdictional challenges under section 6 of the Arbitration Act. The fact of staying the civil proceedings pending reference to arbitration is itself a key jurisdictional matter. A number of cases are instructive in this regard. In *Lofty v Bedouin Enterprises Limited*[34]the Court of Appeal emphasized that the High Court may reject an application for stay of proceedings if such application is not made at the time of entering the appearance or if no appearance is entered, at the time of filing any pleading or the time of taking any step in the proceedings. This is an obvious restatement of the principle that the arbitral tribunal does not have jurisdiction to determine disputes filed in a court of law.

Another entry point for the High Court is where applications are made after the award is rendered. The High Court may contemplate the arbitrability issue after a final decision of the arbitral tribunal under an application to vacate the award in accordance with section 35 of the Act. Section 35 provides:

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31 *Supra*.

32 Section 6 of the Arbitration Act governs proceedings to compel or stay court proceedings. In such a proceeding, the party seeking to compel or stay court proceedings must show that an agreement to arbitrate exists and that the other party refuses to participate in the arbitration process. Upon a party's application to compel or stay arbitration, a court must determine two things: (1) whether there is a valid, written agreement to arbitrate, and (2) whether the agreement covers the disputed issue.

33 [1985] KLR 150.

34 [2005] 2 EA 122.

'S.35(1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).

(2) An arbitral award may be set aside by the High Court only if:

(a) the party making the application furnishes proof:

(i) that a party to the arbitration agreement was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or

(vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption;

(b) the High Court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

(ii) the award is in conflict with the public policy of Kenya.'

In *Mehican Investment Limited and 3 others v Giovani Gainda and 79 others,*[35] the High Court of Kenya declined to set aside an award on the ground that the award was strictly in accordance with the tenor of the terms of reference to arbitration. From an analytical standpoint, the foregoing grounds of setting aside all revolve around the issue of jurisdiction.

(c) Kompetenz Kompetenz in International Arbitration

Beside Kenya, rules establishing transnational arbitral forums have expressly recognised the doctrine of *kompetenz kompetenz*. For example, different forms of *kompetenz kompetenz* have been recognized under the laws and rules of the United Nations Commission on International Trade Law (UNCITRAL Model Law),[36] the International Chamber of Commerce (ICC),[37] and the International Centre for Settlement of Investment Disputes (ICSID).[38] Under Article 16 of the UNCITRAL Model Law, as well as Article 21 of the UNCITRAL Rules of Arbitration, the arbitrator has the power to determine the validity of objections to his jurisdiction, including those objections relating to the existence and validity of the arbitration agreement. Similarly, under Article 8 of the ICC Rules of Arbitration, there is a two-stage process for determining jurisdiction. If the validity or existence of an arbitration agreement is challenged, once the court is satisfied as to the "*prima facie*" existence of such an agreement, then any decision as to the arbitrator's jurisdiction shall be taken by the arbitrator himself. This rule gives the arbitrator wide discretion to decide his own jurisdiction. Article 41(1) of the

35 Misc.Appl. No.792 of 2004.

36 Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985 Model_arbitration.html The UNCITRAL rules deal primarily with considerations arising from the disparity between developed and underdeveloped countries (commonly referred to as the North-South Axis), Accessed on 10.1.2010.

37 Available at http://www.iccwbo.org/index_court.asp accessed on 10.1.2010. The ICC is a private dispute arbitral, the same as the London Court of Arbitration (LCA).

38 Available at http://icsid.worldbank.org/ICSID/Index.jsp accessed on 10.1.2010. The ICSID arbitration generally governs dealings between private investors and States.

ICSID Convention, also states that the tribunal shall be the judge of its own competence. For law reform purposes it is essential to monitor amendments of these transnational arbitration statutes for the purposes of enriching the Arbitration Act.

(d) Rationale for the Doctrine of Kompetenz Kompetenz

One of the most critical question that revolves around the doctrine of *kompetenz kompetenz* is its rationale. The point has been the subject of great analysis by scholars some of whom have questioned the justification for inclusion of the principle in arbitration statutes. This is partly responsible for its various formulations in transnational arbitration statutes. The fact that the Arbitration Act is modelled along some of these statutes means that we have to keep track of the underlying policy which guides the development of the doctrine. The assumption of many commentators that most challenges to the competence of an arbitrator are in bad faith is best demonstrated by the remarks of one author, who states:

> 'To the party honestly seeking arbitration, delaying tactics by the respondent can be a source of great frustration. One of the most commonly used devices ... is to object to the jurisdiction of the arbitrators, thereby hoping to paralyse or endlessly delay the arbitration proceedings whilst the courts proceed to decide whether the arbitrators have jurisdiction at all.'[39]

Criticism that the application of the doctrine of *kompetenz kompetenz* affects the arbitration process may be valid. It is these very dilatory tactics which have invoked a call from critics to minimize, or at least delay, court intervention in the arbitration process. If these tactics are permitted, arbitration runs the risk of being perceived as an expensive prelude to litigation. Similarly, parties lose an element of certainty in their litigation, for an arbitrability issue, beginning in arbitration, may then be argued before the High Court, only to be returned to the arbitrator. Furthermore, the complexity and specialized nature of certain arbitral proceedings often lead parties

39 Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions. Supra.*

to seek arbitral, rather than judicial dispute resolution in the first place. For example, in the context of international arbitration, these reasons include: greater knowledge of arbitrators on sophisticated international commercial matters; confidentiality of the proceedings; better command of foreign languages by arbitrators, which dispenses with the need for furnishing translations and employing interpreters; other economies of expense; and the relative speed of arbitration proceedings. These reasons lead equally to the conclusion that these same arbitrators are better suited to appreciate the issues so as to determine if the agreement is covered by arbitration.

Nevertheless, there are many situations in which there is genuine doubt as to the jurisdiction of an arbitral tribunal. In these circumstances, the initial reference of arbitrability issues to the tribunal itself can be wasteful. For example, if the tribunal rules on its jurisdiction with the final award, and the courts later determine that the arbitral clause is invalid, fresh proceedings may have to be commenced wasting time and costs. Under this reasoning, cost and time are in fact saved by early judicial determination of the issue. Similarly, the reputation of the arbitral process as effective and useful dispute resolution may be hampered by tribunal rulings, made outside the competence of the arbitral tribunal, which are only later set aside or are unenforceable. Furthermore, fundamental judicial protections such as due process, which includes the right to be heard, should serve as limitations on the otherwise wide discretion of the arbitrators. In fact, the call for legal certainty in court proceedings requires not only intervention, but resolution, by the courts. Finally, intervention is often envisioned in response to the image of the court as the guardian of the law and public policy concerns.

It should be noted that the courts can often actually complement and legitimise the arbitral process. For example, a court may review a tribunal's decision on a lack of jurisdiction, decide it was incorrect and commence new arbitral proceedings, thereby favouring the reference to arbitration. More often, a court may aid the process by appointing arbitrators, ordering discovery, or issuing an order to compel arbitration. In these circumstances, the court is encouraged to intervene, as opposed to being blamed for being too distrustful of arbitration.

Admittedly, there must be some balance between intervention and cooperation. However, with the trend towards greater autonomy of the arbitral tribunal, there seems little reason why the arbitrators should not be entrusted, at least initially, with the capacity to rule on their own jurisdiction. This brings us to this critical question: At which stage may the court intervene? In tandem with any decision to permit court control of, or cooperation with, arbitral proceedings, one must consider the optimal timing of this intervention. While it is arguably more prudent to secure an initial ruling, cluttering the courts with arbitrability questions would be cumbersome, expensive and give rise to dilatory tactics. In any case, the decisive factor in timing issues should be the efficiency of the proceedings. The various stages at which the court may intervene are discussed below.

(e) Interim Court Rulings on Arbitrability

The most common approach is for the arbitrator to make an interim ruling during the arbitral proceedings. This approach allows the parties to know where they stand at the earliest opportunity and prevents the loss of time and costs. These savings, coupled with the ability to insulate the proceedings from further disruption, bolster the argument that the tribunal should rule on arbitrability. The court may thereafter uphold or reverse such ruling. If the arbitral tribunal makes an interim ruling, it usually can, but need not, be appealed to the High Court.

(f) Stay of Arbitral Proceedings

Interim rulings raise the parallel issue of whether the court can, or should, stay the arbitral proceedings until it rules on the validity of the interim ruling. As previously mentioned, the Arbitration Act does not require the stay of arbitral proceedings pending a decision on arbitrability. This is in conformity with international jurisprudence. In fact, the capacity to stay the proceedings is not even provided for under the UNCITRAL Model Law. The result of staying arbitral proceedings until a court review is completed is usually a delay. For this reason, it is argued that arbitration should not automatically come to a halt merely because one of the parties

challenges the jurisdiction of the arbitrator, otherwise there would be a premium on unmeritorious challenges. Nevertheless, there is no reason as to why the tribunal may not stay its own proceedings pending the court's ruling. Practically, once an application is made to the High Court, arbitrators do frequently stay proceedings unless the purpose is clearly to cause delay.

(g) Immediate Intervention

Legislation on arbitration usually provides for parties to challenge the jurisdiction of the arbitral tribunal by recourse to a competent court when the arbitral process commences. The party would then move for an order to halt the arbitration from proceeding. This ability to seek court review has given rise to proposal that the forum of the initial proceeding should resolve the primary issue of jurisdiction first. The UNCITRAL Model Law has one distinctive caveat to its *kompetenz kompetenz* provision: a time limitation on jurisdictional challenges to interim rulings. Article 16(3) reads, in relevant part:

> "If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days ..., the court ... to decide the matter."

The caveat is important in the sense that it attempts to vitiate the use of jurisdictional challenges as an instrument of delay. Thus, this language promotes immediate resolution, so as to avoid a wasted arbitration, while attempting to minimize the use of objections for dilatory purposes.

(h) With Final Award on the Merits

Postponing review until the tribunal has given an award on the merits may result in a waste of time and costs if it is ruled that the tribunal incorrectly exercised its jurisdiction. Proponents of this approach look to keep interference to a minimum, so that the court ruling is less likely to influence the tribunal's ruling on the merits. The risk of the influence of the court on a tribunal, therefore, may mean that a postponement of the review is preferable especially if

the facts on arbitrability are closely intertwined with the merits of the case.

Acknowledging these considerations, the repealed Arbitration Act traditionally gave maximum flexibility to the parties themselves, allowing them to seek a preliminary ruling, raise the objection to the tribunal itself, or protest the matter to a court after the award has been rendered. Under the current Arbitration Act, Kenya has incorporated Article 16 of the UNCITRAL Model Law, except that the provisions are captured in two separate clauses, section 6 and section 17 of the Act. Article 16 of the UNCITRAL Model Law provides as follows:

> The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.
>
> A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

The arbitral tribunal may rule on a plea referred to in the second paragraph of this chapter either as a preliminary question or in a final award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may apply for the High Court to finally decide the matter. While such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

The debate over adoption of the UNCITRAL Model Law in Kenya focused on this very timing issue. Some commentators saw the restriction of UNCITRAL Article 16(3) as an undesirable restriction on the otherwise flexible approach, while others were

of the view that ruling with the final award would operate as a mechanism for delay for the defeated party and saw the Model Law as favourable in that it precludes delayed jurisdictional objections.

3.4 Powers of Arbitrators

The powers of the arbitrator are distinct from jurisdiction. If the arbitrator has no jurisdiction, he cannot determine the dispute at all. Once jurisdiction is established, the arbitrator employs his powers in the discharge of his functions, that is, to determine the dispute. The 2009 amendments codified what had long been consigned to the agreement between the parties—the arbitrator's immunity. An arbitrator is not liable for actions or omissions done in good faith in the discharge of his functions.

Generally, the powers of the arbitrator should be sufficient for the arbitrator to conduct the proceedings before him and determine the dispute. The powers of the arbitrator may be by agreement of the parties or conferred upon him by statute. Even so, the arbitrator's powers are also subject to the principle of party autonomy - by their agreement, the parties may specify which parties they wish the arbitrator to have or conversely which powers they wish to limit. Frequently, the parties' choice of law or procedural rules also play a role in defining the arbitrator's powers.

In addition to the power to rule on his own jurisdiction discussed in the preceding parts of this chapter, and unless the parties agree otherwise, the arbitrator has the following powers under the Arbitration Act:

(a) To decide on the choice of law - where the parties are not agreed on the choice of law, the arbitral tribunal applies the law it considers to be appropriate given all the circumstances of the dispute.[40]

(b) To determine the place of arbitration - the arbitrator may determine the place of arbitration.[41] Such determination must have regard to the circumstances of the case and the convenience of the parties.[42]

40 Section 29(3) Arbitration Act.

41 Section 21(2) Arbitration Act.

42 *Ibid*.

(c) To appoint arbitrators - in an arbitration with three arbitrators, arbitrators already appointed by the parties may appoint a third arbitrator.[43]

(d) To determine the timetable for proceedings - the arbitrator has the power, where parties are not agreed, to determine the timetable for the filing of pleadings and documents.[44] The arbitrator may also refuse leave to amend pleadings where there is delay.[45] The tribunal may also decide on the date on which arbitral proceedings will commence.[46]

(e) To make orders on procedural and evidential matters - failing agreement by the parties, the arbitrator has the power to determine the conduct of the proceedings;[47] where parties are not agreed, to determine the language of proceedings;[48] to determine the admissibility, relevance, materiality and weight of any evidence;[49] to decide on oral or documents only hearings.[50] The arbitrator may also apply to the High Court for assistance in the taking of evidence.[51]

(f) To appoint experts or require expert evidence to be provided to it - unless otherwise agreed by the parties, the tribunal is able to appoint one or more experts to report to it on specific issues.[52] A tribunal may also require a party to give the expert any relevant information or to produce or provide access to, any relevant documents, goods or other property for inspection.[53]

(g) To order interim measures of protection - the tribunal, when so requested by a party may order any party to take

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43 Section 12(2)(a) of the Arbitration Act, 1995. This power is available only where the parties have not agreed otherwise.

44 Section 24(1), Arbitration Act.

45 Section 24(3), Arbitration Act.

46 Section 22 of the Arbitration Act.

47 Section 20(2), Arbitration Act. In exercising such power, the Arbitrator must have regard to the desirability of avoiding unnecessary delay or expense while at the same time affording the parties a fair and reasonable opportunity to present their cases.

48 Section 23(1), Arbitration Act.

49 Section 20(3), Arbitration Act.

50 Unless the parties have agreed otherwise - section 25(1), Arbitration Act.

51 Section 28, Arbitration Act. A party, with the approval of the arbitral tribunal, may also apply to the High Court for such assistance.

52 Section 27(1)(a), Arbitration Act. Section 27 (1) (b), Arbitration Act.

53 Section 27(1)(b), Arbitration Act.

interim measures of protection in respect of the subject-matter of the dispute.[54] The tribunal may also require any party to provide security in connection with such measure.[55] The 2009 amendments now allow the arbitrator to order any party to provide security in respect of any claim or any amount in dispute.[56] Notably, the tribunal is also empowered to apply to the High Court for assistance in the exercise of these powers.[57]

(h) To make orders for security for costs - one of the key provisions brought in by the 2009 amendments to the Arbitration Act is the provision that an arbitrator may order a claimant to provide security for costs.[58] Here also, the tribunal is empowered to seek assistance from the High Court.

(i) To terminate proceedings - where a claimant fails to submit a Statement of Claim, the tribunal has the powers to terminate proceedings.[59] Such powers, however, must be exercised with due regard to the provision on equal treatment, that is, each party must be given a fair and reasonable opportunity of presenting its case.[60] Proceedings may also be terminated where the claimant withdraws his claim;[61] where parties agree on the termination of proceedings;[62] where parties settle;[63] or where the tribunal finds that the continuation of proceedings has for any other reason become unnecessary

54 Section 18(1), Arbitration Act.

55 *Ibid*.

56 Section 18(1)(b), Arbitration Act.

57 Section 18(2), Arbitration Act. A party, with the approval of the arbitral tribunal, may also make such application for assistance.

58 Section 18(1)(c), Arbitration Act.

59 Section 26(a), Arbitration Act.

60 Section 19, Arbitration Act. Prior to the 2009 amendments, the arbitrator was required to give each party a 'full opportunity' of presenting its case.

61 Section 33(2)(a), Arbitration Act. This power may however not be exercised where the respondent objects to the order and there is a legitimate interest in obtaining a final settlement of the dispute. One obvious example would be where there is a counterclaim.

62 Section 33(2)(b), Arbitration Act. Due to the principle of party autonomy, the parties' agreement to terminate proceedings would leave the arbitrator with no choice but to terminate proceedings. Such agreement would effectively terminate the arbitrator's mandate.

63 Section 31(1), Arbitration Act.

or impossible.

(j) To proceed *ex parte* - the arbitrator may proceed *ex parte* in two instances. The first is where the respondent fails to communicate his statement of defence within the agreed time-frame.[64] Whilst the arbitrator may proceed *ex parte,* he is not entitled to treat such failure as an admission of the claimant's allegations.[65] The second instance is where a party does not attend the hearing.[66] In this situation, the arbitrator is entitled to continue the proceedings and make an award on the evidence before it.[67]

(k) To dismiss the claim - this power is available to the arbitrator where the claimant fails to prosecute his claim.[68] The arbitrator may also give directions, with or without conditions for the speedy determination of the claim.[69]

(1) To correct an award - the arbitrator may correct any errors (computation, typographical or clerical) in an award either on application of the parties[70] or on his own motion.[71]

(m) To award interest - the arbitrator may award interest, either simple or compound.[72]

(n) To determine and apportion costs and expenses (taxation) this relatively new power is as a result of the 2009 amendments which allow the tribunal to determine costs and expenses of the arbitration.[73] Notably, the arbitrator also has powers to exercise a lien over the award until full payment of his fees and costs is made.[74] This power is more extensively discussed at chapter 8 of this book.

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64 Section 26(b), Arbitration Act.

65 *Ibid*.

66 Section 26(c), Arbitration Act.

67 *Ibid*. An arbitrator is also entitled to make an award on the evidence before it where a party fails to produce documentary evidence.

68 Section 27(d), Arbitration Act.

69 *Ibid*

70 Section 34(a), Arbitration Act. Section 34(b) also gives the tribunal the power to interpret an award only on application of the parties.

71 Section 34(3), Arbitration Act.

72 Section 32C, Arbitration Act.

73 Section 328(1), Arbitration Act.

74 Section 328(3), Arbitration Act.

3.5 Conclusion

This chapter has focused on the jurisdiction and powers of the arbitral tribunal. Jurisdiction is of absolute importance; hence parties must understand its meaning, scope and application. The basic principle is that the jurisdictional mandate of the arbitrator is derived from and defined by the arbitration agreement entered into by the parties. As long as the parties are willing to follow the procedure provided in the clause and abide by the award, their relationship will be wholly determined by that contract. The enforcement of the agreement to arbitrate will remain in the hands of the parties. This chapter has also generally discussed the arbitrator's powers as conferred by the arbitration agreement between the parties and statute - an in-depth discussion is contained further on in this book.

Chapter 4

The Conduct of the Arbitral Process

By Steven Gatembu Kairu

4.0 Introduction

In discussing the conduct of the arbitral process, this chapter will address the following questions: Once a dispute that is the subject of an arbitration agreement has arisen, how is the arbitration agreement invoked and how is that dispute referred to the arbitral tribunal?[1] How is the arbitral tribunal envisaged under the arbitration agreement constituted? Once the arbitral tribunal is in place how does it commence and conduct the arbitration process culminating with an arbitral award? What procedures are available for conducting the reference? If the process involves an oral hearing, how is the hearing conducted and what are some of the challenges that may be encountered in conducting the reference?

4.1 Beginning the Arbitration

The importance of having a well crafted arbitration agreement has been discussed elsewhere in this book. An arbitration agreement that simply provides that "disputes to be settled by arbitration"[2] or words to that effect may achieve the overall objective of the parties in having the dispute resolved by arbitration. But the journey the parties may have to take to get the dispute to arbitration may be a treacherous one in the absence of a clear roadmap in the arbitration agreement. The arbitration agreement should provide, either expressly or by incorporating by reference, rules that provide the roadmap for invoking the arbitration agreement once a dispute has arisen.

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1 The expression "arbitral tribunal" means, a sole arbitrator or a panel of arbitrators as defined in the Arbitration Act,1995 Section 3.

2 Ronald Bernstein, John Tackaberry, Arthur L. Marriott and Derek Wood, *Handbook of Arbitration Practice* (Sweet & Maxwell in conjunction with The Chartered Institute of Arbitrators, London,1998) page 34.

4.2 Existence and Declaration of Dispute

The existence of a dispute is a prerequisite to invoking the arbitration agreement. A dispute has been defined as a difference of opinion. Lord Halsbury in the case of *London and North Western and Great Western Joint Railway v J. H. Billington Limited* had this to say:

> "…that a condition precedent to the invocation of the arbitrator on whatever grounds is that a difference between the parties should have arisen; and I think that must mean a difference of opinion…"[3]

Whether or not there is a dispute for reference to arbitration can itself invite, and be a source of, controversy.

4.3 Time Limits

It is important that the parties should have regard to any time limits that may exist either contractually or by statute with regard to restrictions on time limits for commencing the arbitration or barring or extinguishing claims. Identification of the date of commencement of the arbitration may be of critical importance to the parties in view of contractual time limits for commencement of the arbitration.[4]

4.4 Appointing the Arbitral Tribunal

Once the dispute has arisen and has been declared, parties should agree on the arbitrator or arbitrators in accordance with the arbitration agreement. Parties are at liberty to agree on the procedure for appointing the arbitrator or arbitrators.[5] The process may take the form of one party nominating or putting forward a name or names of persons proposed for appointment and requesting the other party to concur in the appointment of the person(s) proposed. The other party may accept the names put forward or counter-propose name(s) or may even ignore the proposal.

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3 [1899] A.C. 79 at p. 81. Cited with approval by the High Court of Kenya in *TM AM Construction Group Africa v Attorney General*, High Court civil case number 236 of 2001.

4 David St. John Sutton, Judith Gill and Mathew Gearing, *Russell on Arbitration* (London, Sweet & Maxwell) 23rd edition, 2007 p.184.

5 The Arbitration Act, 1995 Section 12(2).

As often happens once a dispute has arisen, relations between the parties become strained. Parties may not necessarily be cooperative with each other in the appointment process. Indeed one party may embark on deliberate dilatory conduct aimed at frustrating the other party. It is therefore desirable for parties to an arbitration agreement to designate an appointing authority to appoint an arbitrator on their behalf in the event that they fail to agree on one within a stipulated time period. The Law Society of Kenya, the Chartered Institute of Arbitrators (Kenya Branch), the Architectural Association of Kenya are some of the institutions in Kenya that parties may nominate in the arbitration agreement to serve as appointing authorities in the event of failure to agree on the event of default.

4.5 Appointment by the Court

If the parties are unable to agree on an arbitrator(s) and have not nominated a third party institution in the arbitration agreement as the default appointing authority, assistance can be sought from the High Court of Kenya.[6]The application to the High Court by a party to an arbitration agreement to appoint should be made in accordance with the procedures prescribed[7] and is subject to the calendar, practice and procedures of the court. For parties interested in expeditious resolution of the dispute resort to court for appointment of an arbitrator goes against that objective. The importance of a comprehensive arbitration agreement that minimizes the delay that may otherwise be experienced in constituting the arbitral tribunal cannot therefore be overemphasized.

4.6 Independence and Impartiality of Arbitral Tribunal

Following the appointment, whether by the parties themselves or by an appointing authority on their behalf, the arbitral tribunal is then notified of the appointment. Preferably, this is done through a joint letter from the parties or their representatives to the arbitral

6 The Arbitration Act, 1995 Section 12(2).

7 The Arbitration Rules, 1997.

tribunal.[8] The arbitral tribunal is under a statutory duty to disclose to the parties any circumstances likely to give rise to justifiable doubts as to the tribunal's independence or impartiality[9]. If the tribunal has connections either with the parties or with the subject matter or other grounds that would give rise to justifiable doubts as to their independence, it should disqualify itself from arbitrating the dispute.

It is prudent to enquire from the proposed arbitrator(s) prior to the appointment as to possible connections with the parties or the subject matter that might disqualify the person from serving as arbitrator in the dispute. This would avoid a situation where parties have spent time and resources to appoint a person who later disqualifies themselves. Applications seeking disqualification of the arbitral tribunal are not infrequent especially where one of the parties has not participated in the appointment of the arbitral tribunal and this can delay or even derail the arbitration process. The test whether a person is in a position to act judicially and without any bias has been suggested to be:

> "… [do] there exist grounds from which a reasonable person would think that there was a real likelihood that the arbitrator could not or would not fairly determine…[the dispute]…on the basis of the evidence and arguments to be adduced before him?"[10]

If the answer is in the affirmative the arbitrator should disqualify himself or herself. Alternatively, grounds exist for his removal.

4.7 The Preliminary Meeting

The preliminary meeting, also referred to as the preliminary hearing or preliminary conference, is the initial meeting between the arbitral tribunal and the parties or their representatives. The arbitral tribunal upon receiving notice of nomination or appointment convenes the meeting. The agenda for the meeting should be circulated to the parties before the meeting. The meeting should be held in a venue

8 See drafting suggestions at page 620, Note 2 above.

9 The Arbitration Act, 1995 Section 13.

10 Lord Justice Ackner in *Hagop Ardahalian v Unifert International S.A* (The "Elissar") [1984]2 Lloyd's L. R. p84. For a discussion on what constitutes actual or implied bias justifying removal of an arbitrator see *Bremer v Ets Soule*s [1985]1 Lloyd's L.R. 160.

convenient to all the parties. It may also be conducted through video conferencing or teleconferencing if convenient and if circumstances permit. The purpose of the meeting is to organize the arbitration. It may entail the following agenda items:

(a) The Tribunal's Convening Statement

The arbitrator(s) introduces the tribunal and welcomes the parties to the meeting. After the introductions, the parties to the arbitration and their representatives, if any, should be properly identified. The tribunal should then disclose, if it will not already have done so earlier, whether it has any connection with the parties or any other circumstances that would give rise to doubts as to the tribunal's independence or impartiality.

It may well be the first time that the parties or their representatives are involved in an arbitration process. The tribunal should therefore explain the nature of the arbitration process. If the arbitral tribunal will not already have been supplied with the arbitration agreement, the same should be made available to the tribunal at this stage for the tribunal to have an appreciation of the terms and scope of the arbitration agreement. The arbitration agreement may also contain and provide some details as to how the arbitration is to be conducted and the tribunal should take cognizance of these.

(b) Brief Outline of the Dispute or Difference by the Parties

The tribunal should give the parties or their representatives an opportunity to make a brief statement outlining the nature of the dispute. An appreciation of the nature of the dispute is important in determining the most appropriate procedure to adopt for the conduct of the reference. The arbitral process is a dynamic and flexible process and the parties are at liberty to tailor the process to suit their specific needs. The arbitration may, depending on the circumstances, take different forms, which might include some of the following approaches:

(c) Documents Only Arbitration

Parties may agree that the nature of the dispute is such as can be resolved by submitting to the arbitral tribunal an agreed set of documents on the basis of which the tribunal is invited to reach a decision without an oral hearing. In addition to submitting the documents to the tribunal, the parties also have an opportunity to appear before the tribunal to make oral or written submissions.

(d) Look and Sniff arbitrations[11]

The dispute may, for example, involve an issue of the quality of a product. One party may complain in a sales transaction that the goods supplied do not correspond to a sample or are not in conformity with agreed specifications. The parties may agree that for purposes of resolving the dispute, the arbitral tribunal will examine the goods against the sample or specifications and give a verdict without a formal hearing or submissions.

(e) Arbitration involving a Hearing and Arguments

The parties may wish and the nature of the dispute may dictate that a "full-blown arbitration" involving pleadings, discovery and inspection of documents, oral hearing and submissions is appropriate. This is the more frequent form of arbitration that advocates on behalf of their clients choose probably on account of their background in litigation.

4.8 The Jurisdiction of the Tribunal

It is important for the tribunal to establish that the dispute, which has been referred to it, falls within the terms of the reference and is not beyond the scope of the reference. Any objections to jurisdiction by any of the parties should be raised at the earliest opportunity. The regime for dealing with jurisdictional objections is provided under section 17 of the Arbitration Act. The competence of the arbitral tribunal to determine its own jurisdiction, the principle of *Kompetenz Kompetenz*, is discussed elsewhere in the book.

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11 David St. John Sutton, Judith Gill and Mathew Gearing, *Russell on Arbitration* (London, Sweet & Maxwell) 23rd edition, 2007 p.230

4.9 Choice of Law

Most arbitration agreements or the contracts to which the arbitration agreement relates, contain a provision on choice of law to be applied to the substance of the dispute. In that case, a discussion on the choice of law is not necessary. If, however, the choice of law is not expressed in the arbitration agreement then the parties need to discuss and agree on this particularly if the dispute has cross-border implications. The tribunal is under a statutory obligation to determine the dispute in accordance with the choice of law by the parties.[12]

4.10 Procedural Rules

The parties are free to agree on the procedural as well as the evidential rules.[13] That choice may already be expressed and incorporated into the arbitration agreement. If it is not, the preliminary meeting is a good opportunity to canvass this and preferably agree on the rules. In the event that the parties do not agree the tribunal is the master and will determine this.[14]

4.11 Scheduling or Timetabling

Having chosen the form the arbitration will take, certain specific steps then need to be taken by the parties. In a documents only arbitration, a schedule should be worked out in terms of which, when and in what form the documents will be submitted. How soon thereafter will the tribunal give the Award? In a full-blown arbitration the scheduling might address:

(a) The nature of statements of case or defence or counterclaim or pleadings that will be employed or used in the reference and when they will be submitted to the tribunal;
(b) Disclosure and exchange of documents and other information and the time frames within which that is to be done;

12 The Arbitration Act, 1995 Section 29.
13 The Arbitration Act, 1995 Section 20.
14 The Arbitration Act, 1995 Section 20(2).

(c) The time frame within which documents and other material will be submitted to the tribunal;
(d) Whether there will be an exchange of witness statements and the time frames within which that is to be done;
(e) Whether site visits by the tribunal will be required and when that should be scheduled;
(f) Whether the tribunal needs to appoint any expert in the process and when that should be done, how the costs should be shouldered and when the experts' outputs should be submitted to the parties and the tribunal;
(g) Whether the parties will make pre-hearing opening arguments and when and in what form those should be made;
(h) When and where the oral hearing will take place. The parties may in some cases predetermine the venue for the hearing in the arbitration agreement;
(i) Whether and when a pre-hearing meeting should be held to address any issues that may be outstanding;
(j) Whether the parties will make closing arguments and if so how soon after the conclusion of the oral hearing;
(k) Whether any party will need to seek the assistance of the court in either seeking interim measure of protection or procuring the attendance of witnesses and when that should be done;
(l) How soon after the conclusion of the hearing and submissions the arbitral tribunal should make its Award; and
(m) What form the Award should take. A reasoned Award should be given unless the parties have agreed that no reasons are to be given[15] or the Award is an Award on agreed terms.[16]

4.12 Administration of the Reference

The parties should agree, or alternatively the arbitral tribunal should direct, how documents will be served on the parties, how communication between the tribunal and the parties or their representatives will be channeled, whether a stenographer will be employed and any other administrative matters.

15 The Arbitration Act, 1995 Section 32(3)(a).

16 The Arbitration Act, 1995 Sections 31 and 32(3)(b).

4.13 Fees and Deposits of the Tribunal

The remuneration of the arbitral tribunal should be discussed and agreed upon. This includes how payments shall, in the first instance, be made and shared by the parties. Parties may wish to enter into an agreement with the arbitrator or the tribunal concerning the appointment including the right to remuneration and the manner of charging as well as deposits.

The most common method of charging is an hourly rate though parties may also agree on a lump sum amount to cap the arbitrator's fees and expenses. In as far as the appointment of an arbitral tribunal is contractual, remuneration is also a contractual matter and the arbitrator should not depart from the agreed basis of remuneration without the consent of the parties.[17]

4.14 Costs of the Reference

The parties should also discuss and agree how the costs and expenses of the arbitration will ultimately be shouldered as between the parties. In the event that the parties are unable to agree, they can empower the arbitral tribunal to determine as well as assess costs.

4.15 Confidentiality

The tribunal should discuss with the parties the duty of confidentiality and define the parameters of confidentiality. If the language of arbitration will not already have been pre-determined in the arbitration agreement, the parties may do so at the preliminary meeting including whether translator(s) will be required and how the cost of such translators will be met.

The importance of the preliminary meeting becomes immediately clear in terms of the critical role it plays as a tool for organising the arbitration. It requires prior planning by the parties and their representatives and a consideration of the nature of the case prior to the meeting for effective deliberations on the matters for consideration.

17 *K/S Norjarl v Hyundai Heavy Industries Co. Ltd* [1991] 3 All.ER.211.

After the preliminary meeting the arbitral tribunal should issue and serve on the parties or their representatives, an order for directions documenting the directions on the agenda. This serves as a reference point for the parties as to the future conduct of the reference as well as a record of the matters discussed at the preliminary meeting.

4.16 Conducting the Arbitration Hearing

(a) Oral Hearing

The parties are at liberty to decide whether or not they require an oral hearing in keeping with the principle of party autonomy. There is, under the Arbitration Act, 1995, an obligation to hold an oral hearing unless the parties decide that there should be no oral hearing. In the absence of an agreement by the parties, there must be an oral hearing.[18]

(b) Natural Justice

The arbitral tribunal, very much like a court, is vested with the power and responsibility to hear and decide the case before it and to make a binding decision. The tribunal must exercise that power and discharge that responsibility fairly and properly. The tribunal must be vigilant to ensure that the parties are given an opportunity to present their case. Two fundamental principles must be observed throughout the arbitration process and are indeed enshrined in the Arbitration Act.[19] The first is the principle of equality of treatment of parties. The second is that the parties must be accorded a fair and reasonable opportunity to present their case. Both are natural justice principles.

(c) Representation

The parties are at liberty to represent themselves or to be represented at the hearing, as they are indeed entitled to be represented at any stage of the arbitral proceedings, by a representative of their choice.[20] While the object of safeguarding the right for parties to represent

18 The Arbitration Act, 1995 Section 25(5).

19 The Arbitration Act, 1995 Section 19.

20 The Arbitration Act, 1995 Section 25(5).

themselves or to be represented by persons of their choice, including representation by non-advocates, is noble from the perspective of the broader principle of access to justice, proceedings in which the parties are not represented by advocates are much slower and inefficient and end up being more costly to the parties on account.

(d) Tendering Evidence

The oral hearing and the presentation of oral evidence at the hearing follows more or less the format used in courts. The claimant often begins. He may make an opening statement and then offer witnesses to produce evidence in support of his case.

The tribunal has the power to administer oaths or affirm witnesses.[21] Witnesses are first examined in chief, then, if the adverse party wishes, cross-examined, then, the party calling them re-examines the witnesses if they so wish, to clarify any matter that may require clarification arising from the cross-examination. Where the claimant begins, the claimant's witness is lead in evidence by the claimant or by the claimant's advocate. In the course of the evidence-in-chief the witness should make reference to any documents that may be, or may have been produced before the tribunal.[22] That witness is then cross-examined by the respondent or the respondent's representative and may thereafter be re-examined by the claimant.

After the claimant has presented his evidence the respondent can then make an opening statement and proceed to present his evidence. Examination-in-chief can take a lot of time. Time that would otherwise be engaged in examination-in-chief of witnesses can be saved or eliminated by requiring the parties to exchange witness statements containing the substance of the witnesses' evidence-in-chief prior to the hearing so that on the date scheduled for the hearing the witnesses are offered for cross-examination and re-examination.

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21 [Refer to recent amendment in Act].

22 Documents for use at the hearing should already have been produced or submitted to the tribunal either as agreed documents or as disputed documents following directions to that effect at the preliminary meeting.

(e) Closing Arguments

After all the parties have presented their evidence before the tribunal, they may then, in sequence, make oral or written closing arguments or submissions. The object of the closing arguments is for the parties to summarise their respective cases, the evidence as well as to advance any legal or technical arguments supportive of their case or destructive of the adversary's case. Parties are at liberty to agree on the order of address. If they are not able to agree, the tribunal should direct which party should submit first having regard to who has the higher burden of proof and bearing in mind that the party that begins has an opportunity to reply to the other party's submissions.

After the closing submissions, the tribunal can then proceed to consider the case and write its Award and deliver it to the parties within the time frame that may be agreed with the parties. Once the Award is given and subject to the limited power reserved for the arbitral tribunal to make corrections or to interpret or make additional award, the authority of the arbitral tribunal ends once the final award is given.[23]

(f) Record of Proceedings

Whether or not to engage the services of a stenographer to keep a record of the proceedings and the attendant cost of doing so is a matter that should be discussed at the preliminary meeting. It is desirable to have a stenographer record and provide a transcript of the proceedings. It is of great benefit to the parties when preparing the closing arguments and greatly assists the tribunal in reviewing and analysing the evidence when considering its decision and preparing the Award. There are firms and individuals who offer these services in Kenya.

4.17 Some Common Challenges in the Conduct of the Hearing

(a) Failure by one of the Parties to Comply with Directions

A party to an arbitration reference may fail to take steps in the reference required of them. A party may, for example, fail to attend a scheduled hearing, or decline to produce documents directed to be

23 The Arbitration Act, 1995 Sections 33 and 34.

produced or to prosecute or defend its claim. The tribunal is in those circumstances empowered under the Arbitration Act;[24] where for instance the claimant fails to serve a statement of claim in accordance with directions, the tribunal may terminate the proceedings. Where a party fails to attend the hearing the tribunal may proceed with the reference. Where a respondent fails to serve a statement of defence in accordance with directions given, the tribunal may proceed with the reference without it. Before invoking these default powers, the tribunal should give the parties an opportunity to be heard.

(b) Decorum

Sometimes the hearing can get "ugly". Parties or their representatives may in the course of cross-examination use insulting or abusive language or get unnecessarily abrasive with the opponents' witnesses. The tribunal has a duty in those circumstances to protect the witness and to caution the parties that abusive language is not appropriate and shall not be tolerated.

(c) Irrelevant and Redundant Evidence

Parties may sometimes call unnecessary witnesses in the sense of being either irrelevant to the matters in controversy or unnecessarily repetitive of testimony already given. The obligation to grant the parties a full opportunity to be heard must be balanced against the equally important consideration of ensuring that parties are not exposed to unnecessary costs and delays in resolving the dispute. Irrelevant evidence should be excluded.

(d) Request to Summon Witnesses

Parties sometimes require persons as witnesses, who are not parties to the arbitration, to attend and testify before the tribunal. Such persons may be unwilling to do so unless compelled. The parties should in those circumstances apply to the court to issue witness summons compelling attendance as the tribunal may have no mechanism to enforce attendance.

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24 The Arbitration Act, 1995 Section 26.

(e) Requests to Exclude Witnesses

A party's witnesses may testify in the presence of each other inviting objection from the other party. It is important at the onset of the oral hearing to clarify with the parties if any party requires persons who will be called as witnesses to remain outside of the venue during the testimony of the other witnesses and to wait their turn to be invited in.

(f) Objections to Questions

The arbitral tribunal has the power to determine the admissibility, relevance, materiality and weight of any evidence.[25] The Evidence Act does not apply, unless the parties choose to apply it to arbitration proceedings.[26] Objections raised by advocates to questions on basis, for example, of hearsay should be considered in light of the powers of the tribunal under section 20(2) of the Arbitration Act.

(g) Dealing with Experts

The parties may empower the tribunal to engage an expert or experts on any specific issue. In the event of the tribunal appointing an expert it must safeguard that the parties have an opportunity to examine any reports given by such expert and to give the parties an opportunity to counter the expert's report.[27] The advantages of arbitration as a dispute resolution mechanism relative to other processes, which have been discussed elsewhere in this book, are easily realised if the arbitration is well organised and conducted and all the parties cooperate with the tribunal to expeditiously dispose of the dispute.

25 The Arbitration Act, 1995 Section 20(3).

26 The Evidence Act, Chapter 80 Laws of Kenya, Section 2(1).

27 The Arbitration Act, 1995 Section 27.

Chapter 5

The Role of the Court in Arbitration Proceedings

By Githu Muigai

5.0 Introduction

This chapter examines the role played by the court in the arbitral process and considers the nature of the interventions that it is permitted to make.[1] The chapter examines the permissible scope of court intervention in three key phases of the arbitral process: firstly, the court's role before the commencement of the arbitration process, secondly, its role during the pendency of the arbitration particularly by way of considering the regularity and legality of the award, and thirdly, its enforcement if appropriate.[2]

Under the law of Kenya, there are two types of arbitration proceedings: those commenced and concluded under the Arbitration Act, 1995[3] (hereinafter, "the Arbitration Act") and those conducted under the supervision of the court under the Civil Procedure Act.[4] The involvement of the court under both procedures is quite different. The Arbitration Act affirms the fundamental principles enunciated under the United Nations Commission on International Trade

1 Came into force in 1995 replacing Cap. 49 Laws of Kenya.

2 In the English case of *Coppe Lavalin SA/NV v Ken-Ren Chemicals and Fertilizers Limited* [1994] 2 All ER 465, the House of Lords drew a distinction, which is relevant in this regard, between three groups of measures that involve courts in arbitration. First are such measures that involve purely procedural steps and which the arbitral tribunal cannot order and/or enforce. For example issuing witness summons to a third party or stay of stay of proceedings commenced in breach of the arbitration agreement; second are measures meant to maintain the status quo like granting of interim injunctions or orders for preservation of the subject matter of the arbitration; lastly are such matters as give the award the intended effect by providing means of enforcement of the award or challenging the same.

3 Cap. 21 Laws of Kenya.

4 Section 1 of the Arbitration Act.

Law (UNCITRAL) Model legislation[5] limiting court intervention in arbitrations. On the other hand, the Act's stated principles are to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense. By dint of this principle, the court's intervention is substantially circumscribed, and in any event is not to be invoked where it would result in unnecessary delay and expense. Thus as a general rule the object of intervention by the court should be to guarantee fair and impartial resolution of disputes by the arbitral tribunal.

On the other hand, section 59 of the Civil Procedure Act, as elaborated by Order 46 of the Civil Procedure Rules affirms the court's wider supervisory role in arbitration proceedings in the general course of civil litigation.

While both under the Arbitration Act and the Civil Procedure Code, the High Court is the Principal Court involved in supervising arbitration proceedings, the Court of Appeal also plays a limited but significant appellate role, which role is also considered in this chapter.

5.1 The Jurisdiction of the Court under the Arbitration Act

The scope of the court's intervention in the arbitral process under the Arbitration Act is circumscribed by the general principle set out in section 10 of the Act, which provides as follows:

> "Except as provided in this Act, no court shall intervene in matters governed by this Act."[6]

The Act limits the role of the court to a few specified circumstances which are:

1. Determination of the enforceability of arbitration agreement;
2. Stay of court proceedings[7];

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5 Resolution 31/98 adopted by the General Assembly on 15 December 1976. Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/31/17) Chap. V, sect. C. See Chapman M.J. *Commercial & Consumer Arbitration*. London: Blackstone Press Limited, 1997, 630.

6 *Anne Mumbi Hinga v Victoria Njoki Gathara* [2009] eKLR.

7 Section 6.

3. Interim measures of protection[8];
4. Appointment of arbitrators[9];
5. Termination of an arbitrator's mandate[10];
6. Determination of arbitrator's jurisdiction[11];
7. Assistance to the tribunal exercise powers conferred on it[12];
8. Assistance in taking evidence[13];
9. Setting aside arbitral awards[14];
10. Enforcement of awards[15]; and
11. Appeals[16].

(a) Court intervention before commencement of proceedings: Enforceability of the arbitration agreement

An arbitration agreement is 'an agreement by the parties to 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'[17]. The Arbitration Agreement can also be contained in a written exchange of communication, or an agreement evidenced in writing, see section 4(3) of the Arbitration Act, 1995. Where properly drafted, the arbitration agreement normally contains both the agreement to arbitrate and the procedure by which this is to be done. In principle, the breach of an agreement to arbitrate may give rise to a claim for damages but is in practice unlikely that any loss would have been suffered other than the costs of applying to the court for a stay.

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8 Section 7.
9 Section 12.
10 Section 15.
11 Section 17.
12 Section 18.
13 Section 28.
14 Section 35.
15 Sections 36 & 37.
16 Section 39.
17 Section 3(1), Arbitration Act.

The arbitration agreement is independent of the main contract[18] and is treated as such in case of a dispute arising. Therefore, even where the contract is alleged not to exist or where it is alleged to have been procured fraudulently, the arbitration agreement may still be valid and capable of being performed. This is commonly referred to as the doctrine of separability[19]. The classic expression of this principle is to be found in the House of Lords' decision in the case of *Premium Nafta Products Limited and other v Fili Shipping Company Limited and others*[20] where the Court stated:

> "The principle of separability enacted in section 7 [which is in *pari materia* to the Kenyan section 17(1)(a)] means that the invalidity or recission of the main contract does not necessarily entail the invalidity or recission of the arbitration agreement. The arbitration agreement must be treated as 'distinct agreement' and can be void or voidable only on the grounds which relate directly to the arbitration..."

In Kenya, the Court of Appeal in *Adopt-A-Light v Magnate Ventures Ltd and 3 others*[21] stated as follows:

> "In view of the elaborate provisions set out in section 17 of the Arbitration Act, we doubt whether the learned judge could have made any such order. Under the section: 'the arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement and for that purpose: a) An arbitration clause which forms part of the contract shall be treated as an independent agreement of the other terms of the contract; and b) a decision by the arbitral tribunal that the contract is null and void shall not invalidate the arbitration clause.' It is clear under the section that an arbitrator has power to rule on the

18 See section 17(a), Arbitration Act, 1995.

19 Russell on Arbitration [London: Sweet & Maxwell], 1997, pp. 33-34.

20 (2007) UKHL.

21 *Adopt-A-Light Limited v Magnate Ventures Limited and 3 others* [2009] eKLR. In this case, the applicant (Adopt-A-Light) sought interim orders in the High Court under, *inter alia*, section 7 of the Arbitration restraining arbitrators from proceeding with the hearing of the arbitration in respect of a contract between the applicant and the City Council of Nairobi. The interim measures were to last until the High Court determined whether the Arbitrator was seized of jurisdiction, considering that the 2nd and 3rd respondents were not parties to the agreement that formed the substratum of the arbitration. The High Court declined to grant the Application and ordered that the arbitration proceeds with the involvement of the 2nd and 3rd respondents. The appellant appealed to the Court of Appeal.

issue of his own jurisdiction and on the validity or otherwise of the agreement, the subject of the arbitration and may even rule that the contract is null and void."

(b) Arbitrability:

Where any party raises the issue of whether or not a dispute has arisen, or whether the dispute ought to proceed to arbitration, the issue then becomes one of interpretation of the contract, and in this respect, the court has an inherent jurisdiction to determine the matter[22]. Even where the parties have agreed that no action will be commenced until an award has been made i.e. that arbitration is a condition precedent, nothing would stop an action being commenced save that it would be a defence that such an award has yet to be made.

Where the issue is raised before the arbitral tribunal itself, it has jurisdiction to make a determination of the issue, save that the court has power to review the determination where an aggrieved party approaches it within 30 days of the decision.[23] Similarly, the court has the power to set aside an arbitral award if it is satisfied that the award dealt with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside.[24]

5.2 Stay of Proceedings

One of the most important interventions that the Court can make in aid of the arbitration process is to stay proceedings filed before it, pending the setting up of an arbitral tribunal. As a general rule, however, the Court will not decline to assume jurisdiction over a matter merely because of the existence of an arbitration agreement. There is a duty on any of the parties to the arbitration agreement to object to the matter proceeding in court. Upon this happening,

22 This is different from the position under Order 46 of the Civil Procedure Act and Civil Procedure Rules considered herein below.

23 Section 17 of the Act

24 Section 35 of the Act.

the Court is seized of jurisdiction to stay the proceedings pending arbitration. In the Court of Appeal decision of *University of Nairobi v N.K. Brothers Limited*,[25] the parties entered into a contract under which the respondent was to construct three separate entities at one of the appellant campuses. The contract had an arbitration clause. A dispute arose as to the authenticity of payments made by architects under the contracts and the appellant halted the payments to the respondent. The respondent instituted a suit (vide a plaint) in Court to enforce the payments. The appellant entered appearance in the suit and immediately filed a Notice of Motion under a Certificate of Urgency seeking stay of the suit and reference of the dispute to arbitration. The High Court dismissed the application on the grounds that the authenticity of payments involved Architect, not the respondent, and so not a "dispute" within the meaning of the arbitration clause, thus not subject to arbitration. The appellant appealed to the Court of Appeal. The Court of Appeal overruled the holding of the High Court on the ground that the issue of payment affected rights of both the respondent and the appellant and so fell within the definition of a "dispute" under the arbitration clause. The matter was referred to arbitration.

On the other hand, there is the inherent jurisdiction of the Court to stay proceedings in order to prevent an abuse of its process, where proceedings are frivolous and vexatious. Also, there is the jurisdiction of the court to enforce the contract of the parties to arbitrate the dispute.

Thus, where a suit is instituted by the plaintiff in disregard of a binding arbitration agreement clearly designating an arbitral tribunal as the proper forum for resolving the dispute, the power of the Court to stay pending proceedings may be invoked. In this situation, the defendant may apply to stay the court action unless he also wishes to submit to the court's jurisdiction and repudiate the arbitration agreement. While the Court has no power to force parties into arbitration[26], it is obliged to uphold the arbitration agreement by refusing audience to the plaintiff and referring the parties to their contractual dispute resolution mechanism: arbitration.

25 [2009] eKLR.

26 Except under Order 45 of the Civil Procedure Rules, Civil Procedure Act.

In the case of *Joab Henry Onyango Omino v Lalji Meghji Patel & Co Ltd*[27], the Court stated this principle as follows:

> "Once parties to an agreement have chosen to determine their disputes or differences through a domestic forum other than resorting to the ordinary courts of law, that choice should not be brushed aside[28]".

In addition, where court proceedings have been brought in breach of an arbitration agreement, a stay of court proceedings may be sought in order to prevent concurrent proceedings[29]. In the case of *Niazsons (K) Ltd v China Road and Bridge Corporation Kenya*[30], Bosire J stated that:

> "It is the policy of the law that concurrent proceedings before two or more fora is disapproved.[31]"

On the other hand, the defendant's admission of jurisdiction of the court is a complete bar to the matter being referred to arbitration. In *Kisumuwalla Oil Industries Limited v Pan Asiatic Commodities PTE Limited and another,*[32] the Court of Appeal stated the principle as:

> "The parties can of course expressly agree to ignore or disregard the (arbitration) clause. They may also do so by conduct. Once the parties have submitted to the jurisdiction of the court, they cannot

27 Civil Appeal No. 119 of 1997, unreported.

28 *Ibid*, pg 5.

29 The prohibition on concurrent proceedings is also contained in section 6 of the Civil Procedure Act which states that: "No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

30 Civil Appeal No. 157 of 2000.

31 Per Bosire, J's judgement in the case of *Niazsons (K) Ltd v China Road and Bridge Corporation Kenya*, Civil Appeal No. 157 of 2000, at para 1, pg 22. See also *Nairobi Golf* Civil Appeal No. 5 of 1997; the Arbitration Act, Section 6: Application to stay suit for purposes of referral of the dispute to arbitration. The defendant's admission of jurisdiction of the court in a defence is a complete bar to the matter being referred to arbitration. For a party to benefit from a stay of proceedings for purposes of referring a dispute to arbitration, he ought to have taken action to initiate the arbitration. The court, however, has discretion whether or not to grant the stay. Application for stay of proceedings for purposes of referral to arbitration must be made before any steps are taken in the suit. The burden of proving that there was strong cause for stay to be granted was upon the applicant.

32 [1997] eKLR.

> blow hot and cold and subsequently without consent of each other rely upon the condition precedent in the arbitration clause. By not filing an application for stay of the legal proceedings, the appellant has disentitled itself of clause 29 of the contract.[33]

For a party to benefit from a stay of proceedings for purposes of referring a dispute to arbitration, he ought to have taken action to initiate the arbitration. The court, however, has discretion as to whether or not to grant the stay. Application for stay of proceedings for purposes of referral to arbitration must be made before any steps are taken in the suit. The burden of proving that there was a strong cause for stay to be granted is upon the applicant.

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33 The holding of the Court of Appeal is similar to that of English and Wales Court of Appeal in *Downing v Al Tameer Establishment and anor* (2002) EWCA Civ. 721, in which the Court held that "Bearing in mind that the previously expressed view that Clause 13 was binding upon both parties and should be observed, was there any reason for the first defendant to suppose other than that the taking of proceedings represented abandonment by the claimant of his right to arbitrate in the face of the first defendant's attitude? The conditions mentioned at the end of paragraph 35 above were satisfied at the time the stay application was heard and, in consequence, the arbitration agreement was inoperative for the purposes of s. 9(4) of the 1996 Act (Arbitration Act 1996)." See also the decision of the Supreme Court of Victoria in *La Donna Pty Ltd v Wolford AG* (2005) VSC 359 (31 August 2005) in which the Court held: "The right to apply for stay under s. 7(2) (of the International Arbitration Act, 1974) is a private right and as such it may be waived. The issue of whether such a waiver occurs by virtue of a party's conduct in litigation was considered in some detail by Austin J in *ACD Tridon Inc v Tridon Australia Pty Ltd* (2002) NSWSC 896. His honour considered the various characterisation of such conduct by a party in litigation, being estoppels, election and waiver. His honour concluded that there were two forms of waiver which might arise. One he referred to as "waiver in the stronger sense", arising where a party makes an unequivocal final choice between alternative procedures so that it could be said that the party had abandoned the right, if the right was thereafter asserted…The application was based on the explicit premise that the litigation would proceed to trial in the absence of a settlement, and that the matters, the subject of the proceeding would be determined by the Court. Wolford sought an advantage, or at least sought to impose upon La Donna a burden, which was based upon the proposition that the litigation would proceed in this Court, that the defendant would take steps, and that the defendant would incur costs in taking those steps, in that litigation in this Court. This step was an unequivocal abandonment of the alternative course, being an application for a stay and a consequent arbitration. To allow Wolford to rely on the arbitration provision now would be to permit it to approbate and reprobate. In my view, it has waived the provisions and thereby rendered them inoperative."

5.3 Conditions precedent to the granting of stay of proceedings

Section 6(1) of the Arbitration Act provides:

> "A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall if a party so applies not later than the time when that party enters appearance, or takes the appropriate procedural step to acknowledge the legal proceedings against that party, stay the proceedings and refer the parties to arbitration unless it finds –
>
> (a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or
>
> (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."[34]

As such, the following conditions must exist before the Court grants a stay of proceedings:

(a) Existence of Valid Arbitration Agreement

Before the Court can entertain an application for stay of proceedings it must first satisfy itself that a valid arbitration agreement exists. Secondly, it must satisfy itself that a dispute contemplated by that agreement has come into existence. If an arbitration agreement is null and void, inoperative or incapable of being performed then the Court would lack the jurisdiction to stay the proceedings.[35]

When would the Court deem an arbitration agreement to be null and void? Principally, this will be the case where the arbitration agreement was never entered into between the parties in the first place or where it has become void due to intervening circumstances. It is however important to remember that in law the arbitration agreement is considered to be independent of the main contract[36], and is therefore deemed to survive even if the main contract is itself

34 See the Arbitration (Amendment)Act, 2009.

35 Section 6(1) of the Arbitration Act stipulates that the court shall stay of proceedings unless, *inter alia*, it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

36 See the holding of *Adopt-A-Light Limited v Magnate Ventures Limited and 3 others* [2009] eKLR above.

declared null and void. This is commonly referred to as the principle of separability. In some jurisdictions, the Courts have held that even where the contract is alleged to have been procured by fraud or bribery, the arbitration agreement is still intact as the dispute resolution mechanism even of disputes stemming from fraud or bribery[37].

In Kenya, the courts have held an arbitration agreement to be 'null and void' where the agreement purports to oust the jurisdiction of the courts. Thus, in *Rawal v The Mombasa Hardware Limited,*[38] the Court of Appeal held that an arbitration clause does not oust or limit the jurisdiction of the court to grant the reliefs sought by way of plaint. In *Peter Muema Kahoro and another v Benson Maina Githethuki,*[39] a sale of land agreement between the parties had an arbitration clause requiring parties to refer any dispute arising from the sale agreement to a single arbitrator. Upon payment of the entire purchase price by the plaintiff, the defendant refused to transfer the suit land to the plaintiff. The plaintiff instituted a suit in the High Court, seeking, *inter alia*, an order for specific performance, and a permanent injunction against the defendant from interfering with the plaintiff's title, use and possession of the suit property. The defendant entered appearance and then filed grounds of opposition, objecting to the jurisdiction of the Court. The Court held thus:

> "It is clear from the foregoing that an application by the defendant ought to have been brought under section 6(1) of the Arbitration Act, 1995 and for that to be successful, such application ought only to have sought orders-
>
> (a) To stay these proceedings; and
>
> (b) To refer the parties to arbitration unless the court finds otherwise as is stated in the section.
>
> Further, and in order to succeed on the application, the defendant ought not, in the words of the section, to have taken "any steps in the proceedings." In the application before me dated 5 November 2005, the defendant does not only seek to strike out the suit, which is beyond the ambit of section 6 of the Arbitration Act, 1995 aforesaid, but has also failed to move the court to refer the parties to arbitration pursuant to

37 See *Premium Nafta opp cit*.

38 [1968] E.A 392.

39 [2006] HCCC (Nairobi) No. 1295 of 2005.

> the 13 August 1981 Agreement. In addition, and by filing the Grounds of Opposition dated 5 November 2005, the defendant has also actively taken other steps in the proceedings and thereby waived his right to invoke and rely on the Arbitration Clause in the said Agreement."

When would the Courts hold an arbitration agreement to be inoperative or incapable of being performed? The Courts in Kenya have held that the arbitration agreement cannot be enforced if the parties have otherwise submitted to the jurisdiction of the Court. This may be as a result of the defendant failing to seek a stay of proceedings at the appropriate time. For example, in *Tononoka Steels Limited v Eastern and Southern Africa Trade and Development Bank,*[40] the Court of Appeal stated that:

> "the original defendant, instead of pleading as it did in paragraph 7 of the Defence that the Kenya Court had no jurisdiction and the suit accordingly should be dismissed for want of jurisdiction, should have made an application under section 6 of the Arbitration Act, 1995 for a stay of proceedings. No such application was made in this case. The respondent followed a wrong procedure and it is manifest from the record that section 6 of the Arbitration Act was not referred to by counsel and is not referred to by the learned trial judge in his ruling. Indeed, it was not mentioned in the arguments on this appeal, but being a matter of jurisdiction, is clearly one which should now be taken. If an application had been made at the proper time under section 6, it seems probable that the court would have been satisfied as to the requisite matters set out in the section and would have made an order staying the proceedings. As, however, no such application was made, I am of the opinion that the order made should be quashed."

(b) Existence of a Dispute between the Parties with Regard to the Matters Agreed to be Referred to Arbitration

Section 6(1)(b) of the Act makes the existence of a dispute between the parties relating to the matters agreed to be referred to arbitration, a condition precedent to the invocation of the court's jurisdiction can be invoked. This provision, which was contained in the 1975

40 See *Tononoka Steels Limited v Eastern and Southern Africa Trade and Development Bank*, Civil Appeal No. 255 of 1998 and *Nelson Githinji and Another v Munene Irangi*, Civil Appeal No. 133 of 1987 (unreported).

Arbitration Act of England, was not re-enacted in the 1996 English Arbitration Act. In Kenya, however, the 2009 amendments appear to have left the provision intact.[41]

The question of whether or not an arbitrable dispute exists between the parties is not as simple as it may first appear. Part of the complexity lies in the definition of a *dispute* within the context of each case. The court must be satisfied that a *genuine controversy* exists, which the parties had intended to resolve by way of arbitration. In law, not every disagreement between the parties raises an arbitrable controversy. For instance, mere refusal to pay upon a claim which is otherwise not in dispute does not necessarily give rise to an arbitrable dispute. Thus, in the case of *TM AM Construction Group (Africa) v Attorney General,*[42] the plaintiff opposed the application for stay, *inter alia* on the basis that the Attorney General was in fact making an application under section 6 of the Arbitration Act as a delaying tactic as there was in fact not a dispute with regard to the matters agreed to be referred to arbitration. The court held that a party who is wholly unable to produce the most minute evidence to support an allegation of a dispute in contract has absolutely no right to come to this court to seek a stay of proceedings and reference to arbitration because he for the first time alleges that there is a dispute between the parties. The failure of the applicant to tender evidence showing that there is in fact any dispute between the parties means that no basis has been established to show that a dispute in fact exists to justify staying the proceedings and referring the parties to arbitration.

5.4 Other issues to be considered by the court

Having satisfied itself that an arbitration agreement capable of being enforced exists and that a dispute thereunder has arisen, the Court

41 Arbitration Act, s. 6(1)(b) states:
"6(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds… (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."

42 [2001] eKLR.

must then turn to the other requirements of section 6(1). The provision mandates that an application for stay of court proceedings and a reference of the parties to arbitration must be made:

(a) Not later than the time when the applicant enters appearance; or
(b) Takes the appropriate procedural steps to acknowledge the legal proceedings against that party; or
(c) Takes any other steps in the proceedings.

The first of these requirements would appear to be quite straightforward.[43] However, before the 2009 amendments to the Arbitration Act there was quite some confusion in the case law as to whether the provision entitled the defendant/applicant to make his application, at the stage of entering appearance, or at the stage of filing any pleadings or at the time of taking any step in the proceedings. In the case of *Charles Njogu Lofty v Bedouin Enterprises Ltd*[44], the Court of Appeal, took the view that the latest permissible time for making an application for stay of proceedings is the time that the applicant enters appearance[45], in order that applications for stay are made at the earliest stage of the proceedings.

The courts have always taken the view that by filing any pleadings or taking any other steps in court proceedings, the defendant submits himself to the jurisdiction of the court in respect

43 In *Eagle Star Insurance Company Limited v Yuval Insurance Company Limited* [1978] Lloyds Rep. 357, Lord Denning MR was of the view that to merit refusal of stay, the step in the proceedings must be one which "impliedly affirms the correctness of the court's proceedings and the willingness of the defendant to go along with the determination by the courts instead of arbitration." The conduct of the applicant must be such as demonstrates election to abandon the right to stay in favour of the court action proceeding. However, the courts in Kenya have adopted to interpret the proviso to section 6 of the Act strictly and will not stay proceedings unless the application was filed at the time of filing the memorandum of appearance. In the case of *Chevron Kenya Limited v Tamoil Kenya Limited* [2007] eKLR, the judge relied on and upheld Lord Denning's dictum and found that a notice of appointment is not a step in the proceedings that impliedly affirms the correctness of the proceedings and the willingness of the defendant to go along with the determination of the court instead of arbitration. In the leading case of *TM AM Construction Group (Africa) v Attorney General* [2001] eKLR, an application for stay was denied for having been filed after the defendant had entered appearance. The court held that an applicant was obliged to apply for a stay "not later than the time he entered appearance." The court thus found that the AG had lost the right to rely on the arbitration clause.

44 Civil Appeal No. 253 of 2003, at [2005] eKLR.

45 *Ibid,* pg 2.

of the dispute and will not be allowed to go back on his election. The courts have over the years distinguished between 'pleadings', 'any other steps' and pleadings or steps strictly necessary for the proper conduct of one's case[46]. For instance, a party defending itself against an application for injunction or an application for contempt is not deemed to have taken a step in court proceedings[47]. Neither is the application for stay of proceedings a 'pleading' or 'step' for the purposes of section 6(1). On the other hand, a defendant who files a defence[48] would be deemed to have foregone his right to enforce the arbitration agreement.[49]

5.5 Interim measures of protection before arbitration

Notwithstanding the general rule against court interference with the arbitral process, '*it is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure*'[50].

In granting interim measures of protection, the court does not thereby assume jurisdiction over the matters to be resolved by the arbitral tribunal. It is therefore important to distinguish the court's jurisdiction from that of the arbitral tribunal, as the latter has its own

46 A comprehensive discussion of these distinctions is contained in *Charles Njogu Lofty v Bedouin Enterprises Ltd*.

47 See the case of *M.M. Galgalo and 3 others v Musikari Kombo and another* [2006] eKLR where it was held: "Regarding the invocation of Section 6(1) of the Arbitration Act by the applicants, I am not persuaded that the applicants lost their right to invoke the same by filing the application dated 26 April 2006, which application was necessitated by an order made in these proceedings."

48 *Charles Njogu Lofty v Bedouin Enterprises Ltd* Civil Appeal No. 253 of 2003, *Niazsons* Case.

49 In *Nelliwa Builders & Civil Engineers Ltd v Jacob Ngaru Solomon and 3 others* [2004] eKLR, it was held that an application for stay of proceedings cannot be made after the applicant has made an appearance or otherwise acknowledged the claim against which the stay of proceedings is sought; so that the latest permissible time for making an application for stay of proceedings is the time that the applicant enters an appearance. An admission by the defendant of the jurisdiction of the court in a defence has been held to be a complete bar to the matter being referred to arbitration. See also *Kisumuwalla Oil Industries Limited v Pan Asiatic Commodities PTE Limited and another* cited above.

50 Section 7 of the Arbitration Act, 1996.

powers to grant interim measures of protection under section 18 of the Act.[51]

5.6 The Court's role during Arbitration proceedings

During the pendency of the arbitration process, the court's intervention is intended only for the purpose of supporting the arbitral process. This is in contrast to arbitration proceedings under Order 46 of the Civil Procedure Rules, 2010, which are proceedings under the supervision of the court and as such allow wider court intervention[52].

The powers of the court include:

a) granting interim measures of protection (considered above),
b) Court assistance to the arbitral tribunal to enforce orders for interim measures,
c) appointment of arbitrators,
d) fixing time,
e) termination of the arbitrator's mandate,
f) determining disputes over jurisdiction and powers of the arbitral tribunal, and
g) taking evidence.

Each of these powers is now considered.

5.7 Court assistance to Arbitral Tribunal to enforce orders for interim measures

The arbitral tribunal is mandated by section 18 to grant interim measures of protection as it may consider necessary in respect of the subject-matter of the dispute. This power extends to requiring any party to provide security in connection with the measure it deems fit[53]. In enforcing its orders under this section, the arbitral tribunal

51 The law discourages parties from making parallel applications before the arbitral tribunal and/or the High Court. Section 7(2) enjoins the court to adopt any ruling or finding on any relevant matter to the application as conclusive.

52 Order 46, rule 3(2), Civil Procedure Rules, 2010 states: "Where a matter is referred to arbitration, the court shall not, save in the manner and to the extent provided in this Order, deal with such matter in the suit."

53 Section 18(1), Arbitration Act.

may seek assistance from the High Court. As such application is pending, arbitral proceedings continue.

5.8 Appointment of Arbitrators

The arbitration agreement will ordinarily specify the composition and mode of appointment of the arbitral tribunal. Court intervention in making the appointment is the exception to the rule. The Act nonetheless contemplates court involvement in the appointment of the arbitral tribunal where the parties are unable to agree on such appointment, where a party fails to cooperate in such appointment or where a third party institution which may be mandated by the arbitration agreement to appoint the arbitrator fails to do so[54].

The High Court upon the application of a party is empowered to make the appointment of the arbitral tribunal. Its decision in this respect is final and is not subject to appeal[55].

In making its appointment, the High Court must have due regard to the qualifications required of an arbitrator by the agreement of the parties and to considerations likely to secure the appointment of an independent and impartial arbitrator[56]. In cases where there is a sole or third arbitrator, the court is required to consider whether the appointment of an arbitrator of a nationality other than that of the parties is advisable[57].

5.9 Termination of the Arbitrator's mandate

The Court can terminate the mandate of an arbitrator on an application by a party, where the arbitrator is:

a) unable to perform the functions of his office or for any other reason fails to act without undue delay; or
b) withdraws from his office; or
c) where the parties agree to the termination of the mandate.[58]

54 Sections 12(2) and 12(4).

55 Section 12(5).

56 Section 12(6) Arbitration Act, 1995.

57 *Ibid*.

58 Section 15 of the Act.

5.10 Arbitrator is unable to perform the functions of his office

Inability to perform his functions may arise if the arbitrator is seriously ill or dies or perhaps where due to political controls an arbitrator is physically or legally prevented from performing.

5.11 Arbitrator, for any other reason, fails to act without undue delay

It is problematic to determine when "undue delay" has occurred or the arbitrator has failed to properly conduct the proceedings as required under the law. Once the proceedings have commenced, it is problematic for the parties to agree on whether undue delay has occurred, in particular, if one of the parties is not interested in the expeditious rendering of the award.

A party applying for the termination of the mandate of the arbitrator should however consider whether the proceedings for the removal of an arbitrator, in combination with the time for the appointment of a replacement arbitrator, and the additional steps required, would delay the proceedings even more than keeping the arbitrator in place despite the delay.

In the context of institutional arbitration, the institution sometimes has a right of its own to remove an arbitrator for delay in exercising his functions. For example, under the ICC rules, article 12 (2) provides that an arbitrator shall be replaced on the court's own initiative when it decides that he is prevented *de jure* or *de facto* from fulfilling his functions in accordance with the rules or within the prescribed time limits.

5.12 Arbitrator withdraws from his office

An arbitrator may also voluntarily tender his resignation and terminate his mandate either in response to a challenge or for other reasons. Given the disruption caused by such a termination, some jurisdictions limit the right of an arbitrator to resign. In most cases, it is not in the parties' interest to force such an arbitrator to continue; it is better to replace him by another, more co-operative arbitrator. In the light of the disruption caused by a voluntary resignation,

arbitrators should always be made aware of the effect on fees and the arbitrator's liability in contract as a result of such resignation. This should dissuade partisan arbitrators from resigning at any stage of the proceedings thereby distabilizing the arbitration process and creating delays. Section 16 of the Arbitration Act states that unless otherwise agreed by the parties, an arbitrator who withdraws from his office may, if prior notice has been given to the parties, apply to the High Court – to grant him relief from any liability thereby incurred by him; and to make such order as the court thinks fit with respect to his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid. Where the High Court is satisfied that, in the circumstances, it was reasonable for the arbitrator to resign, it may grant relief on such terms as it may think fit.

5.13 Review of the Arbitral Tribunal's ruling on its own jurisdiction

The arbitral tribunal has discretion to rule on its own jurisdiction[59]. Where the arbitral tribunal rules that it has jurisdiction, any party aggrieved by the tribunal's ruling may apply to the court to decide the matter. Such application must be made within 30 days of the notice of the ruling.

5.14 Court assistance in taking evidence

The Court may, under section 28 of the Arbitration Act, assist the arbitral tribunal in taking evidence. Such application may be by the arbitral tribunal or a party with the approval of the tribunal. Once such application is made, the court may execute the request. There is discretion for the court to apply its rules of evidence.

5.15 The Role of the Court after the Arbitration Proceedings

Once arbitration proceedings are concluded, there are two ways in which the court can intervene. The first is by setting aside the award of the arbitral tribunal[60]. The second is by refusing to recognise or

59 Section 17, of the Arbitration Act.

60 Section 35 of the Arbitration Act.

to enforce the award.[61] A party that wishes that an award be set aside under section 35 or that the Court refuses to recognise or to enforce an award does so by way of an appeal under section 39 of the Act. Section 39 of the Act provides:

> "39. Where in the case of a domestic arbitration, the parties have agreed that:
>
> (a) an application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or
>
> (b) an appeal by any party may be made to a court on any question of law arising out of the award, such application or appeal, as the case may be, may be made to the High Court."

5.16 Appeals on a Question of Law arising in domestic arbitration

Parties in domestic arbitrations may agree to have appeals on questions of law arising in the course of the arbitration or in the award being subjected to appeal to the High Court.[62] The Court may either determine the question of law arising or confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re-consideration or, where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration.

Unlike under the English Arbitration Act where an appeal to the High Court is as of right, under Kenyan law parties wishing to reserve their rights to appeal on a question of law, must do so expressly in the arbitration agreement[63].

An appeal to the Court on a point of law is not a review of the entire award as contemplated by section 35. The Court's jurisdiction is limited to consideration of the issue of law raised and must accept the facts as found by the arbitrator. In the UK the courts have stated:

> "The arbitrators are the masters of the facts. On an appeal the Court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the

61 *Ibid*, section 37.

62 *Infra*.

63 Section 39 of the Arbitration Act.

> arbitrators. It is irrelevant whether the court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake on issues of fact might be, or what scale of the financial consequences of the mistake of fact might be."[64]

An appeal from the decision of the High Court lies to the Court of Appeal if the parties have so agreed that an appeal shall lie; or if the High Court grants leave to appeal, or failing leave by the High Court, the Court at Appeal grants special leave to appeal.[65] Where an appeal to the Court of Appeal is preferred it may exercise any of the powers which the High Court could have exercised[66].

When an arbitral award has been varied on appeal the award so varied shall have effect as if it were the award of the arbitral tribunal concerned.

5.17 Setting aside the Award

The Court may on the application of a party set aside an arbitration award,[67] where that party demonstrates that:

a) a party to the arbitration agreement was under some incapacity; or
b) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the law of Kenya;[68] or

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64 *Geogas S.A v Trammo Gas Ltd (The "Baleares")* [1993] 1 Lloyd's Rep. 215 at 228 CA.

65 The Court of Appeal in *Kenya Shell Limited v Kobil Petroleum Limited* [2006] eKLR held that public policy considerations may endure in favour of granting leave to appeal just as they would discourage it. The Court stated that "we think that 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 this policy…we do not feel compelled therefore to extend the agony of this litigation on account of the issues raised by the applicant. "

66 An application or appeal under this section shall be made within the time limit and in the manner prescribed by the Rules of Court applicable, as the case may be in the High Court or the Court of Appeal.

67 See section 35 of the Arbitration Act.

68 An arbitral award may be set aside where the High Court finds that the dispute is incapable of settlement by arbitration under the law of Kenya. The court will also set aside an award that is in conflict with Kenya's public policy.

In *Christ for All Nations v Apollo Insurance Co. Ltd* [2001] KLR 483 the court discussed the defence of public policy against the enforcement of arbitral awards. It held that an award might conflict with Kenya's public policy if it was either (a) inconsistent

c) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(d) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or

(e) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or

(f) the High Court finds that:

i. the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

ii. the award is in conflict with the public policy of Kenya.[69]

An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 36 from the date on which that request had been disposed of by the arbitral award.

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with the Constitution or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice or morality. The court held that the second category included the interests of national defence and security, good diplomatic relations with friendly nations and the economic prosperity of Kenya. The third category includes such considerations as whether the award was induced by corruption or fraud or was founded on a contract contrary to public morals.

These were the grounds relied upon in *Macco Systems India PVT Limited v Kenya Finance Bank Limited* HCCC (Milimani) No. 173 of 1999.

In *Glencore Grain Ltd v TSS Grain Millers Ltd* [2002] KLR 1 the court held that the enforcement of an arbitral award which awarded compensation for a contract, the performance of which would have released onto the Kenyan market maize which had been certified as unfit for human consumption was contrary to public policy.

69 *Ibid*.

The High Court, when required to set aside an arbitral award, may, where appropriate and so requested by a party suspend the proceedings to set aside the arbitral award for such period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

5.18 Recognition and enforcement of awards

An arbitral award, irrespective of the state in which it was made shall be recognized as binding and, upon application in writing to the High Court, shall be enforced as such.[70] Unless the High Court otherwise orders, the party replying on an arbitral award or applying for its enforcement shall furnish the duly authenticated original arbitral award or a duly certified copy of it; and the original arbitration agreement or a duly certified copy of it.[71]

If the arbitral award or arbitration agreement is not made in the English language, the party shall furnish a duly certified translation of it into the English language.

5.19 Grounds for refusal of recognition or enforcement

The recognition or enforcement of arbitral award, irrespective of the state in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the High Court proof that:

  (i) a party to the arbitration agreement was under some incapacity; or

  (ii) the arbitration agreement is not valid under the law

70 Subject to sections 35 and 37 of the Act.

71 In *Kundan Singh Construction Ltd v Kenya Ports Authority* HCCC No. 794 of 2003 an application for recognition and enforcement of an arbitral award was struck out for failure to comply with section 36(2) of the Arbitration Act. The court found that there was not a duly authenticated original arbitral award or a duly certified copy of it. Rather the court found that what was on the court's record were photocopies of the arbitral award and arbitration agreement contrary to the requirements of section 36(2) of the Act which could only be waived upon application which had not been made.

to which the parties have subjected it or, failing any indication of that law, under the law of the state where the arbitral award was made; or

(iii) the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or it contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters relent to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognized and enforced; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or

(vi) the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made; or

(vii) if the High Court finds that:

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

(ii) the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.[72]

If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1)(a)(vi), the High Court may, if it considers it proper, adjourn its decision

72 Section 37 of the Arbitration Act.

and may also, on the application of the party claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security.

The criteria observed by Courts in setting aside the award of the arbitral tribunal under section 35 of the Act and refusing to recognise or to enforce the award under section 37 of the Act have been spelt out in two leading Court of Appeal decisions of *Safaricom Limited v Ocean View Beach Hotel Limited and 2 others*[73] and *Anne Mumbi Hinga v Victoria Njoki Gathara*[74].

In *Safaricom Limited v Ocean View Beach Hotel Limited and 2 others,*[75] Safaricom Ltd (applicant) entered into a lease agreement with Ocean View Beach Hotel Ltd (1st respondent) over L.R. No. 4709 Section 1 Mainland North, Mombasa for 9 years and 11 months. The Lease Agreement had an arbitration clause. The lease would enable the applicant to erect on the suit land a tower antennae, a dish antennae and other equipment to enable the applicant to conduct communication business. The 1st respondent ultimately refused to sign the lease agreement because the 2nd respondent (Salim Sultan Moloo) was a chargee over the suit land and refused to consent to the lease. The 2nd respondent issued a notice to vacate to the applicant. There was also a 3rd respondent (one Alsai (K) Ltd) which claimed to have a registered lease over the suit land and demanded that the applicant remove its communication tower and other apparatus from the suit land. The 2nd and 3rd respondents were not parties to the arbitration. Pending arbitration, the applicant sought preservatory orders (an injunction) from the High Court under section 7 of the Arbitration Act No. 4 of 1995.

The Court of Appeal held that pursuant to section 39(3) of the Arbitration Act, appeal lies to the Court of Appeal when parties so agree and High Court grants leave to appeal to the Court of Appeal or the Court of Appeal grants special leave to appeal. The jurisdiction of the Court of Appeal is circumscribed to determining questions of law arising in the course of arbitration and/or to confirm, vary or set aside arbitral award or remit the matter to arbitral tribunal for

73 (2010) eKLR.

74 (2009) eKLR.

75 (2010) eKLR.

reconsideration. In the absence of an agreement by parties to apply to the High Court any matter arising from the arbitration or to appeal to the High Court or the Court of Appeal, neither the High Court nor the Court of Appeal has the jurisdiction to entertain the Application or the Appeal. The Agreement to appeal against the arbitral award or to make an application to the High Court must be contained in the arbitration agreement itself. The Court stated the law as follows:

> "It is clear that the prerequisites of an appeal to this Court are: a) There must be a prior agreement between parties to an appeal being filed and since an appeal is restricted to question of law arising. The implication here is that the agreement to appeal must be contained in the arbitration agreement itself; and b) the High Court must grant leave for such an appeal to be filed, or the Court of Appeal itself should have given such leave within the periods stipulated in the Court of Appeal Rules. No leave has been given by the High Court. The period of 14 days stipulated under rule 39 already expired since the decision appealed from was made on 6 November 2009 and in any event, no such application for leave was made either in the superior court or in this court. As such, the High Court had no jurisdiction in law to take up the matter outside the provisions of section 7 of the Arbitration Act, and to adjudicate it as it did, since such intervention also violated sections 10 and 39(2) of the Arbitration Act and the issuance of a Notice of Appeal contrary to section 39 of the Arbitration Act does not per se, give this Court jurisdiction. Right of the Appeal to the Court of Appeal is confined to matters of law specified in section 39(2) of the Arbitration Act and only where the High Court has jurisdiction in the first place."

In *Anne Mumbi Hinga v Victoria Njoki Gathara,*[76] the vendor (respondent) vide an agreement dated 14 January 1998, agreed with the appellant to sell the suit property to the appellant for Ksh. 1,500,000. The appellant paid Ksh. 230,000 on execution of the agreement and the balance of Ksh. 1,270,000 was to be paid within 60 days of execution of the sale agreement. Parties disagreed on the manner of payment of the balance of the purchase price and because the sale agreement had an arbitration clause, vide the arbitration, the Chairman of the Law Society appointed a sole arbitrator. After hearing and giving notice to the parties, the arbitrator made and published his award on 19 October, 1999. The arbitrator found

76 [2009] eKLR.

that the respondent had fully complied with the terms of the sale agreement and that the appellant was in breach. After reading of the award, the arbitrator forwarded copies of the award to the advocates for the parties and served the appellant with the notice of filing the award in court. The crux of the appeal was that the appellant had not been notified of the date of the reading of the award and that its advocate was not notified of the making of the award. Further, the appellant contended that a copy of the award was not availed to them. The appellant therefore sought to have the award struck out or not to be enforced or recognised. The High Court dismissed the appeal and found as a matter of fact, both the notice of the making of the award and the application were duly served as required. The appellant appealed to the Court of Appeal.

The Court of Appeal held that the power of the High Court over an arbitral tribunal is exclusively circumscribed in sections 35 and 37 of the Arbitration Act. Part VI of the Arbitration Act has a heading under the title: *"Recourse to High Court against Arbitral Awards*" and the implication is that the High Court has no other power against an arbitral award outside the provisions of sections 35 and 37 of the Arbitration Act. The grounds for setting aside the award are exclusively circumscribed in section 35 of the Act. Failure to serve any process after an award is made is not a ground for setting aside an award. The grounds for refusing to recognise or enforce an award are exclusively circumscribed in section 37 of the Arbitration Act. Failure to serve any process is not a ground for refusing to recognise or enforce an award. Rule 11 of the Arbitration Rules, 1997 providing that *"so far as is appropriate, the Civil Procedure Rules shall apply to all proceedings under these Rules"* does not override section 10 of the Arbitration Act which states that: *"except as provided in this Act, no court shall intervene in matters governed by this Act."* Rule 11 of the Arbitration Rules, 1997 has not imported the Civil procedure Rules line, hook and sinker to regulate arbitrations under the Act. The High Court therefore lacked jurisdiction to intervene in any manner not specifically provided for in the Arbitration Act.

Further, the Court stated that section 35 of the Arbitration Act bars any challenge of the arbitral award even for a valid reason after 3 months from the date of delivery of the award. All the applications filed in the High Court to challenge the arbitral award more than

three months from the date of the award were incompetently brought before the Superior Court and the Court lacked jurisdiction to entertain such application. Considering that the High Court lacked jurisdiction to entertain the application to challenge the arbitral award, the Court of Appeal addressed its mind as to whether the question of the appeal was properly before it in terms of section 39 of the Arbitration Act. Thus, any intervention by the Court of Appeal against the arbitral proceedings or the award can only be valid with the prior consent of the parties to the arbitration pursuant to section 39(2) of the Arbitration Act. Even where such consent is in existence, the consent can only be on questions of law and nothing else. An appeal to the Court of Appeal must be with leave of the High Court or special leave of the Court of Appeal. In the absence of all the foregoing preconditions to appealing to the Court of Appeal, an appeal to the Court of Appeal is improper and incompetent.

While commenting on the concept of finality of arbitral process, the Court of Appeal held that permitting enhanced court review of arbitral awards opens the door to the "full-bore" evidentiary appeals that render informal arbitration merely a prelude to a more cumbersome and time consuming judicial review process. Thus judicial review of arbitral awards should be limited to the specific grounds listed in the statute.[77] The appeal was thus struck out.

5.20 Court supervised Arbitration Court ordered arbitration under Order 46, Civil Procedure Code

Arbitration proceedings under Order 46 of the Civil Procedure Code are regarded as a court supervised process. Thus, the court is able to intervene to a greater extent than is provided for by the Arbitration Act.

77 According to the Court: "Courts' differential review of arbitration awards extended to arbitrator's reasoning for revisiting and clarifying his award. If an arbitrator says that he or she intended to make a particular finding or ruling but inadvertently left it out and stated it incorrectly, the court's respect for arbitration precludes judicial second-guessing of the arbitrator."

(a) Appointment of Arbitrator by the parties[78]

Where a suit is pending before a court and all the interested parties[79] agree that any matter in dispute between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference of the matter to arbitration. The court is thereafter obliged to appoint an arbitrator in the manner agreed upon between the parties.[80]

In making the order for reference to arbitration the court shall specify the matter in dispute that the arbitrator is required to determine and shall fix such time as it thinks reasonable for the making of the award.

(b) Appointment of Arbitrator by the Court[81]

In any of the following cases, namely:

(a) where the parties cannot agree within a reasonable time

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78 The Civil Procedure Rules, Order 46, rule 1 states: *"1. where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference."*

79 Not being parties under any disability.

80 The court in *Seca Africa Ltd v Kirloskar Kenya Ltd and 3 others* [2005] eKLR held that while it is quite true that substantive issues are eminently cut for effective hearing and disposal by regular judicial process, it serves the goal of better use of court time if, where the parties think that it will serve them more fittingly or more expeditiously, this court accords respect to their preferences and passes on the essential decision-making task to an agreed team of arbitrators. It went further to state that the flip side of the established principle the courts do not act in vain, is that they should allow non-judicial procedures of conflict settlement to take effect where the parties express themselves to be likely to be better served by these.

81 The Civil Procedure Rules, 2010, Order 46, rule 5 (1) and (2) states: "5. (1) In any of the following cases, namely- *(a)* where the parties cannot agree within thirty days with respect to the appointment of an arbitrator, or the person appointed refuses to accept the office of arbitrator; or *(b)* where the arbitrator or umpire— (i) dies; or (ii) refuses or neglects to act or becomes incapable of acting; or (iii) leaves Kenya in circumstances showing that he will probably not return at an early date; or *(c)* where the arbitrators are empowered by the order of reference to appoint an umpire and fail to do so, any party may serve the other or the arbitrators as the case may be with a written notice to appoint an arbitrator or umpire. (2) If, within seven clear days after such notice has been served or such further time as the court may in each case allow, no arbitrator or no umpire is appointed, as the case may be, the court may, on application by the party who gave the notice, and after giving the other party an opportunity of being heard, appoint an arbitrator or umpire, or make an order superseding the arbitration, and in such case shall proceed with the suit."

with respect to the appointment of an arbitrator, or the person appointed refuses to accept the office of arbitrator; or

(b) where the arbitrator or umpire:

(i) dies, or

(ii) refuses or neglects to act or becomes incapable of acting, or

(iii) leaves Kenya in circumstances showing that he will probably not return at an early date; or

(c) where the arbitrators are empowered by the order of reference to appoint an umpire and fail to do so, any party may serve the other or the arbitrators as the case may be with a written notice to appoint an arbitrator or umpire.

If, within seven clear days after such notice has been served or such further time as the court may in each case allow, no arbitrator or no umpire is appointed, as the case may be, the court may, on application by the party who gave the notice, and after giving the other party an opportunity of being heard, appoint an arbitrator or umpire, or make an order superseding the arbitration, and in such case proceed with the suit.

Where the Court has referred a matter to arbitration it shall not deal with the same matter in the suit save as may have been provided for in the Order of reference to arbitration.

(c) Appointment of Two or More Arbitrators or an Umpire[82]

Where the reference is to two or more arbitrators, the court is also required to make an order for the resolution of any differences of opinion among the arbitrators:

(a) by the appointment of an umpire; or

(b) by declaring that, if the majority of arbitrators agree, the

82 The Civil Procedure Rules, Order 46, rule 4 states: "4. (1) Where the reference is to two or more arbitrators provision shall be made in the order for a difference of opinion among the arbitrators — *(a)* by the appointment of an umpire; or *(b)* by declaring that, if the majority of the arbitrators agree, the decision of the majority shall prevail; or *(c)* by empowering the arbitrators to appoint an umpire; or *(d)* otherwise as may be agreed between the parties, or, if they cannot agree, as the court may determine. (2) Where an umpire is appointed, the court shall fix such time as it thinks reasonable for the making of his award in case he is required to act."

decision of the majority shall prevail; or
(c) by empowering the arbitrators to appoint an umpire; or
(d) otherwise as may be agreed between the parties, or, if they cannot agree, as the court may determine.

Where an umpire is appointed, the court is required to fix such time as it thinks reasonable for the making of his award in case he is required to act[83].

5.21 Court Assistance in summoning witnesses[84]

The court may issue the same processes to the parties and witnesses upon application by the arbitrator or umpire in the same way as the court could issue in suits tried before it. Persons not attending in accordance with such process or making any other default, or refusing to give their evidence, or are guilty of any contempt to the arbitrator or umpire during the investigation of the matters referred, may be subject to like disadvantages, penalties, and punishments, by order of the court on the representation of the arbitrator or umpire, as they would incur for the like offences in suits tried before the court.

5.22 Extension of Time for Making Award

The parties may, by filing an agreement in writing, extend the time for the making of the award, whether or not at the date of the agreement time has expired, and whether or not an award has been made since the expiry of the time allowed.[85]

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83 The umpire may arbitrate in lieu of the arbitrators if they have allowed the appointed time to expire without making an award, or if they have delivered to the court or to the umpire a notice in writing stating that they cannot agree.

84 The Civil Procedure Rules, Order 46, rule (7) states:
"7(1) The court shall issue the same processes to the parties and witnesses whom the arbitrator or umpire desires to examine as the court may issue in suits tried before it.
(2) Persons not attending in accordance with such process or making any other default, or refusing to give their evidence, or are guilty of any contempt to the arbitrator or umpire during the investigation of the matters referred, shall be subject to the like disadvantages, penalties, and punishments, by order of the court on the representation of the arbitrator or umpire, as they would incur for the offences in suits tried before the court."

85 The Civil Procedure Rules, Order 46, rule 8 states: "8. (1) The parties may, by filing an agreement in writing, extend the time for the making of the award, whether or

On application made by a party, arbitrator or umpire on notice, the court may either extend the time for the making of the award, whether or not at the date of the application time has expired, and whether or not an award has been made since the expiry of the time allowed, or make an order superseding the arbitration in which case it shall proceed with the suit.[86] Where an award in a suit has been made, the persons who made it are required to sign it and cause it to be filed in court, together with any depositions and documents which have been taken and proved before them; after which notice of the filing is required to be given to the parties.

5.23 Fixing of time for making of the Award[87]

Where one or more of the parties are not represented by an advocate notice of the filing of the award is required to specify a date and time for reading the award giving not less than thirty days' notice of the reading. And on the date and at the time fixed by the notice the award is read by the registrar to such of the parties as are present.

5.24 Statement of Special Case by Arbitrators or Umpire[88]

The arbitrator or umpire may, upon any reference by an order of the court, and shall if so directed by the court, state the award as to the whole or any part thereof in the form of a special case for the opinion of the court, and the court shall deliver its opinion thereon, and shall order such opinion to be added to and form part of the award.

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not at the date of the agreement time has expired, and whether or not an award has been made since the expiry of the time allowed.

(2) On application made by a party, arbitrator or umpire on notice, the court may either extend the time for the making of the award, whether or not at the date of the application time has expired, and whether or not an award has been made since the expiry of the time allowed, or make an order superseding the arbitration in which case it shall proceed with the suit."

86 In the case of *Nyangau v Nyakwara* [1986] KLR 712 the Court of Appeal held that an arbitrator should always act within the time stipulated or as extended by agreement, in accordance with Order XLV, rule 8. If there was an order referring a matter to arbitration, if the said order was specific as to time, any action taken outside of that time was a nullity. The same position was restated by the Court of Appeal in *Mairi v Ngonyoro "B" and another* [1986] KLR 488.

87 The Civil Procedure Rules, Order 46, rule 11.

88 The Civil Procedure Rules, Order 46, rule 12.

5.25 Costs of Arbitration[89]

The court may make such order as it thinks fit in respect of the costs of an arbitration save to the extent to which an award of costs has been properly made by the arbitrator.

5.26 Courts power to modify or correct award[90]

The court may modify or correct an award:

(a) where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; or
(b) where the award is imperfect in form, or contains an obvious error which can be amended without affecting such decision; or
(c) where the award contains a clerical mistake or an error arising from an accidental slip or omission.

5.27 Court's power to remit an Arbitration[91]

The court may remit an award, or any other matter referred to arbitration, to the reconsideration of the same arbitrator or umpire upon such terms as it thinks fit:

(a) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration, unless such matter can be separated without affecting the determination of the matters referred;
(b) where the award is so indefinite as to be incapable of taking effect;
(c) where an objection to the legality of the award is apparent on the face of it.

The order remitting the award shall state the time within which it shall be reconsidered, and rule 8 shall apply to such reconsideration as it applies to an award. Thus, in *Kihuni v Gakunga and another,*[92] the

89 The Civil Procedure Rules, Order 46, rule 13.
90 The Civil procedure Rules, Order 46, rule 14.
91 The Civil Procedure Rules, Order 46, rule 15.
92 [1986] KLR 572.

Court of Appeal stated as law that: *"According to Civil Procedure Rules, Order XLV, rule 14(1)(c) (as it then was), an award can only be remitted for reconsideration by arbitrators where there has been an objection to the legality of the award which is apparent on the face of the record."*

5.28 Court's power to set aside Award[93]

The court may set aside an award on the following grounds only:

(a) corruption or misconduct of the arbitrator or umpire;
(b) that either party has fraudulently concealed any matter which he ought to have disclosed, or has wilfully misled or deceived the arbitrator or umpire.

Where an award is set aside under this rule the court shall supersede the arbitration and shall proceed with the suit. An application may be within thirty days of receipt by the applicant of notice of refiling of the award[94] or, where a date for reading the award has been fixed by the court, within thirty days of that date. Thus, in *Kibutha v Kibutha,*[95] the Court of Appeal held that an application to set aside an arbitration award where misconduct within the meaning of Order XLV, rule 15(a) (as it then was) is established.

5.29 Court Judgment on the Award[96]

The court shall on request enter judgment according to the award:

(a) when no application has been made within thirty days of receipt by the applicant of notice of the filing of the award; or
(b) when an application to determine the cost of arbitration, set aside an award or remit an award for reconsideration has been heard and determined and no other application has been within thirty days of receipt by the applicant of notice of the filing of the award; or

93 The Civil procedure Rules, Order 46, rule 16. In the case of *Silas Mbaya v Gladys Rigeria Njiru and 5 others* [2007] eKLR, the Court held that the rule is limiting in that only the rules cited in it may be used to set aside an award. An application under rule 15 shall be served on the arbitrator or the umpire.

94 Civil Procedure Rules, Order 46, rules 12, 13, 14 and 15.

95 [1984] KLR 243.

96 The Civil Procedure Rules, Order 46, rule 18.

(c) when every application to determine the cost of arbitration, set aside an award or remit an award for reconsideration has been heard and refused and no leave to appeal against any such refusal has been granted within fourteen days of that refusal.

Upon the judgment so entered a decree shall follow and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award.

CHAPTER 6
THE AWARD

GEOFFREY IMENDE & WANJIRŪ NGIGE

6.0 DEFINITION OF AWARD

The Arbitration Act, 1995 defines an Arbitral Award as "*any award of an arbitral tribunal and includes an interim arbitral award*".[1] This definition is somewhat tautological and does little to underscore the importance of an arbitration award. A more useful definition of the term "award" is the final determination of a particular issue or claim in the arbitration.[2]

6.1 DISTINCTION BETWEEN AWARD AND ORDERS FOR DIRECTIONS

An Award (whether Interim or Final) is different from Orders and Directions issued by the Arbitrator[3] which address the procedure by which the Tribunal will be guided under section 20(2) of the Arbitration Act, 1995.[4] Thus, matters to do with procedure, timetables and appearances before an Arbitrator are addressed by Orders for Directions whereas determinations of jurisdiction and/or the applicable substantive law would be addressed by an Interim Award.[5] The distinction is necessary because while the parties may have recourse to the courts where there is an Award, whether Final or Interim, the courts may not intervene where the issue is solely procedural.[6]

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1 See section 3(1) of the Arbitration Act, 1995. There is no statutory definition of an "Award" in English law.

2 Russell on Arbitration, London, Sweet and Maxwell, pg 249.

3 Commonly referred to as "Orders for Directions".

4 The distinction is shown at section 26(d) of the 1995 Act, from which a distinction can be shown between an Award which determines the dispute and directions which enable the Tribunal through the parties to make its determination.

5 As a further example, all the matters covered by section 17 of the Arbitration Act, 1995 would be determined in an Interim Award as these matters go to substance rather than procedure.

6 See section 10 of the Arbitration Act, 1995 which limits court intervention to the

6.2 Categories of Awards

(a) Final Awards

All awards may be said to be final in that (subject to the possibility of challenge in the courts) they dispose of one or more of the issues in dispute between parties and are enforceable. However, the term "Final Award" is customarily reserved for an award that finally determines all the issues between the parties. Final Awards are said to be "final" in three senses: firstly, an Award is said to be final if it determines all the issues in the arbitration or determines all issues not previously dealt with in prior Awards. Secondly, an Award is final in that it is binding on the parties. Section 32A of the Arbitration Act, 1995[7] contains express provision as to the finality and binding nature of arbitral awards as follows:

> 32A Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act.

The case of *Rashid Moledina and Company Ltd v Hoima Ginners Ltd*[8] set out the court's approach to an arbitral award 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."[9]

Courts are therefore generally slow to interfere with an Award outside of the ambit of sections 37 and 39 of the Arbitration Act,

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instances provided for in the Act.

7 As amended by section 24 of the Arbitration (Amendment) Act, 2009.

8 [1967] EA 645.

9 Per Duffus JA at page 650.

1995.[10] It should also be noted that most arbitration agreements contain a stipulation that the Final Award is final and binding.[11]

Subject to certain exceptions (elaborated below), the delivery of a Final Award renders the arbitral tribunal *functus officio*.[12] The arbitral tribunal ceases to have any further jurisdiction over the dispute and the special relationship that exists between the arbitral tribunal and the parties during the currency of the arbitration ends. This has significant consequences. An arbitration tribunal should not issue a final award unless it is satisfied that there are no outstanding issues left to be determined. However, where there are outstanding matters to be determined such as questions relating to costs or interest or further directions to be given, the arbitral tribunal may issue an award expressly designated as "additional".

Exceptions to the general rule

As stated above there are exceptions to the general rule that the delivery of a Final Award renders the arbitral tribunal *functus officio*[13], these being:

10 Though this subject is conclusively dealt with in this Chapter, courts will also be slow to intervene during the pendency of arbitration proceedings. In the case of *Epco Builders Ltd v Adam S Marjan Arbitrator and anor* CA Civil Appeal No. 248 of 2005 (UR), Deverell JA emphasized the need for the courts to encourage alternative dispute resolution mechanisms so as to reduce the pressure that had resulted from the ever increasing number of litigants seeking redress through the courts. Deprecating the practice by which litigants wishing to delay the hearing and determination of a dispute by arbitration pursuant to an arbitration agreement would resort to the court practice, he observed (at page 4 of his ruling) "*If it were allowed to become common practice for parties dissatisfied with the procedure adopted* by *arbitrators to make constitutional applications during the currency of the arbitration hearings, 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*". The attitude of the courts towards the finality and binding nature of arbitration awards remains much the same. In a recent case, *Kenya Shell Ltd v Kobil Petroleum Ltd* [2006] eKLR, the Court of Appeal stated that: "*We 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*", going on to state "*we do not feel compelled therefore to extend the agony of this litigation on account of issues raised by the applicant*".

11 Cross reference to chapter on Arbitration Agreement and the case of *Samuel K Muhindi v Blue Shield Insurance Company Ltd* [2010] eKLR where an arbitration agreement which stipulated that the arbitration award would be final and binding on the parties was upheld.

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

13 A latin term meaning "having performed his or her office" and is used to describe

i) Where an application has been made to the High Court to set aside the arbitral award.[14] Where appropriate and if so requested by a party, the High Court may suspend the proceedings to set aside to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as will eliminate the grounds for setting aside the arbitral award;[15]

ii) Where an appeal has been preferred against the award, or an application made to the High Court, the court may remit[16] the matter to the arbitral tribunal for reconsideration;

iii) Where, in an arbitration under order of court, the court remits an award[17] or any other matter referred to arbitration for reconsideration by the same arbitrator where: the award has left undetermined any of the matters referred to arbitration or where the tribunal determines any matter not referred to arbitration, unless such matter can be separated without affecting the determination of the matters referred;[18] where the award is so indefinite as to be incapable of taking effect;[19] and where an objection to the legality of the award is apparent on the face of it;[20] and finally

iv) Where a party requests the tribunal to make an additional award.[21] The circumstances in which an additional award can be made are further elaborated upon below.

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an office without further authority or legal competence because the duties and functions of the original commission have been fully accomplished – *Black's Law Dictionary,* Eighth Edition, Thompson West.

14 Under section 35 of the Arbitration Act, 1995.

15 Section 35(4) of the Arbitration Act, 1995.

16 Section 39(2)(b) of the Arbitration Act, 1995. Other options available to the High Court in such an instance are to confirm, vary or set aside the arbitral award.

17 The order remitting the Award to the Arbitrator must contain the time within which the Award shall be reconsidered – see Order 46, rule 15(2) of the Civil Procedure Rules, 2010.

18 Order 46, Rule 15(1)(a), Civil Procedure Rules, 2010.

19 Order 46, Rule 15(1)(b), Civil Procedure Rules, 2010. There is considerable doubt, though, as to whether an award so indefinite as to be incapable of taking effect would qualify to be called an Award.

20 Order 46, Rule 15(1)(c), Civil Procedure Rules, 2010.

21 Section 34 of the Arbitration Act, 1995.

(b) Interim Awards

The power to issue an interim award is a powerful weapon in the armoury of an arbitral tribunal. An interim award is an effective way of determining matters that are susceptible to determination during the course of the proceedings and which, once determined may save considerable time and money for all involved. The power of an arbitral tribunal to issue interim awards may derive from the arbitration agreement, from the applicable law or from the 1995 Act.[22] The effect of an award dealing with particular issues is to render the tribunal *functus officio* on that particular matter. The tribunal does not have the power to reopen its award at some later stage of the reference nor to make a subsequent determination of issues previously disposed of in an interim award.[23] Some of the matters on which an arbitral tribunal may make interim awards include:

i) Jurisdiction

One obvious example is where an issue of the tribunal's jurisdiction is involved. Section 17(1) of the 1995 Act permits the tribunal to rule on its own jurisdiction thus:

> "The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement…"

Such a ruling amounts to an interim award which may shorten or at least simplify the proceedings considerably.[24] An arbitral tribunal that spent months hearing a dispute only to rule in its final award that it had no jurisdiction, would, to put it mildly, look irresponsible (unless the issue of jurisdiction was inseparably bound up with the merits of the case). It is therefore prudent for the arbitral tribunal

22 The parties may agree to donate powers additional to those contained in the applicable laws to the Arbitrator to issue interim awards, for example, the parties may agree to have the Arbitrator conduct separate hearings on liability and quantum.

23 There are no powers of review under the Arbitration Act, 1995. A tribunal must therefore be sure of any award delivered. Russell on Arbitration refers to this situation as "issue estoppel" – see page 257.

24 Where a party applies to the High Court against the decision of the arbitral tribunal on jurisdiction, section 17(8) as amended by the 2009 Act provides that an award shall not take effect until the application is decided. Should the application be unsuccessful, the award is void.

to deal with questions of jurisdiction as soon as they arise. This is especially so if on the material placed before it, the question of the tribunal's jurisdiction can be conclusively determined. Section 14 of the Arbitration Act, 1995 also provides for any party to challenge the appointment of an arbitrator and for the tribunal to decide on such a challenge.[25] The Court of Appeal in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd*[26], settled the position on jurisdiction. Nyarangi, JA's judgement stated as follows with regards to jurisdiction:

> "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law [lays] down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:
>
> 'By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire

25 It should be noted that where a challenge is unsuccessful, the aggrieved party may appeal to the High Court before which the Arbitrator is entitled to be heard. Section 14(8) of the Arbitration Act (as amended by the 2009 Act) provides that where such an application is pending before the High Court, the parties may commence, continue and conclude arbitral proceedings but no award in such proceedings shall take effect until the application is decided, and such an award shall be void if the application is successful.

26 [1989] 1 KLR.

> into the existence of the facts in order to decide whether it has jurisdiction; but except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given'.
>
> It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court".

Where the issue of jurisdiction is raised, it is the most basic duty of the tribunal to make a ruling on the issue before making any finding on the substantive dispute.

ii) Applicable Laws & Procedure

Another example of a situation in which an interim award is likely to be made is where there is a dispute between the parties as to the law or laws applicable to the merits of the case. Section 29(3) of the Arbitration Act provides that:

> "Failing a choice of the law under subsection (1) by the parties, *the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances of the dispute."*[27]

This, by necessary implication, places a duty on the arbitral tribunal to make a reasoned determination of the law and rules to be applied in resolving the dispute.

Section 20 of the Arbitration Act also provides that:

> 20(1) Subject to the provisions of this Act, the parties are free to agree on the procedure to be followed by the arbitral tribunal in the conduct of the proceedings;
>
> (2) Failing an agreement, the arbitral tribunal may conduct the arbitration in the manner it considers appropriate, having regard to the desirability of avoiding unnecessary delay or expense while at the same time affording the parties a fair and reasonable opportunity to present their cases.[28]

27 From the wording of this section, such an Award must be reasoned.

28 As amended by the 2009 Arbitration (Amendment) Act, No. 11 of 2009.

iii) Preservatory Interim Awards/Security for Costs

Further, the arbitral tribunal may make interim orders (awards) intended for the protection of the subject matter of the dispute and the provision of security both for the claim amount and for costs. In Kenya, where this power is not expressly conferred by the agreement of the parties, it may nevertheless be conferred by operation of law. In this regard, section 18 of the Arbitration Act states that:

> "Unless the parties otherwise agree, an arbitral tribunal may, on the application of a party:
>
> a. order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute, with or without an ancillary order requiring the provision of appropriate security in connection with such a measure; or
>
> b. order any party to provide security in respect of any claim or any amount in dispute; or
>
> c. order a claimant to provide security for costs."

The main disadvantage of an interim award, whether it is on an issue of jurisdiction, applicable law or other matter in dispute is that a further avenue for review by the courts (and consequent delay) is created.[29]

(c) Partial Awards

Section 32(6) of the Arbitration Act, 1995[30] provides for the tribunal, at any time to make a partial award by which some, but not all, of the issues between the parties are determined. Partial Awards are likely where the tribunal separates the issues of quantum and liability. The arbitral tribunal first makes a determination on the question of liability before moving on to rule on the extent of quantum. For example, the determination of a particular issue of liability in favour of the respondent may make it unnecessary for the arbitral tribunal to investigate the questions of

29 One case where an Interim Award for security of costs resulted in significant delay is an arbitration between an oil marketing company and Kenya Pipeline Company Ltd. The resultant delay is reported here http://www.businessdailyafrica.com/Company%20Industry/Oil%20marketer%20embroiled%20in%20battles%20on%20several%20fronts/-/539550/1009372/-/view/printVersion/-/10j8yaz/-/index.html

30 As amended by section 23(d) of the Arbitration (Amendment) Act, No. 11 of 2009.

quantum. If it is possible to disentangle the issues of liability from issues of quantum, doing so may result in a saving of time and expense. A decision of an arbitral tribunal on certain areas of liability may very well encourage the parties to reach a settlement on quantum. However, there are very real dangers in attempting to isolate determinative issues at an early stage of the proceedings. The nature of the dispute and the way in which the parties present their cases may change during the course of the proceedings; and it is not unknown for parties to alter their case fairly radically, in order to take advantage of a preliminary award on liability.[31] Where this happens, savings of time and cost will not be achieved and the result will be the opposite of that intended.

Moreover, the process of rendering a preliminary award can itself be a time consuming and expensive one. Partial awards must clearly state what issues or disputes they address because the effect of an award dealing with particular issues is to render the tribunal *functus officio* on that particular matter. The tribunal does not have the power to reopen its award at some later stage of the reference nor to make a subsequent determination of issues previously disposed of in a partial award. Any issue already disposed of in an earlier award is therefore outside the tribunal's jurisdiction.[32]

(d) Arbitral Awards on Agreed Terms (Agreed Awards)

Occasionally, parties do settle the issues in dispute during the pendency of arbitral proceedings. According to section 31 of the Arbitration Act, where this happens, the proceedings must be terminated. The settlement can be recorded in the form of an arbitral award on agreed terms, which has the same status and effect as any other arbitral award on the substance of the dispute. There are conditions to an agreed award being that a request must be made by the parties and the arbitral tribunal must not object to the recording of the settlement.[33] An Agreed Award is subject to section 32 of

31 *Law and Practice in International Commercial Arbitration* by Alan Redfern.

32 Russell on Arbitration refers to this circumstance as "issue estoppel" – see pg 257 of the text.

33 It is likely that if the Tribunal does object, then parties cannot compel the issue of an agreed award. Russell on Arbitration, para 6-024 states that this proviso is important as a control mechanism to ensure the agreed award procedure is not misused by parties seeking an award in terms which would mislead third parties.

the Arbitration Act, meaning that the Award must comply with all the formal requirements of an Award but need not contain reasons on which it is based.[34] Importantly, such an award is also final and binding[35] and the main advantage to recording a settlement in terms of an Agreed Award is that enforcement of this award is simpler than bringing proceedings to enforce the terms of a settlement. Where an award is to be enforced outside of Kenya, it may be recognised and enforced under the New York Convention.[36]

(e) Additional Awards

An Arbitration tribunal is able to make additional awards, in amongst others, the circumstances below:

i) Claims presented before the arbitral tribunal but omitted from the arbitral award - a party may request the arbitral tribunal to make an additional award in respect of claims made but not addressed in the Award.[37]

ii) Correction of errors – a party may request the arbitral tribunal to correct any errors in the Award.[38]

iii) Interpretation of the award – a party, if agreed by the parties, may request the arbitral tribunal to give an interpretation of a specific point or part of the arbitral award.[39]

iv) Costs and expenses - parties unable to agree on costs often request the Tribunal to tax the same. The decision on costs

34 Section 32(3)(b) of the Arbitration Act, 1995.

35 Section 32A of the Arbitration Act, 1995. An agreed award has the same effect as a consent judgement and can only be set aside on grounds which would justify setting a contract aside, see the case of *Flora Wasike v Destimo Wamboko* [1982-88] 1 KAR 625.

36 The Convention on the recognition and enforcement of Foreign Arbitral Awards, New York, 10 June 1958.

37 Section 34(4) of the Arbitration Act. Such a request must be made within 30 days of receipt of the Arbitral Award and where the tribunal considers such a request justified, must make such additional award within 60 days – see section 34(5) of the Arbitration Act, 1995.

38 Section 34(1) of the Arbitration Act. The Tribunal may also make such corrections of its own motion under section 34(3) of the Arbitration Act. Errors which the tribunal may correct are set out in section 34(1)(a) of the Arbitration Act and include computation errors, clerical or typographical errors or errors of a similar nature.

39 Section 34(1)(b) of the Arbitration Act.

is then contained in an Additional Award.[40]

Additional awards must comply with the formal requirements under section 32 of the Arbitration Act, 1995.

(f) Majority Award

Unless the parties expressly agree otherwise, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members.[41] The parties may agree to appoint a chairman[42] of the tribunal and can agree what his functions will be in relation to the making of decisions on awards and orders.[43] The parties may therefore agree that where a majority is not achieved, the chairman will make the decision. Any member of the tribunal who does not assent to an award need not sign it[44] and may set out his or her own views of the dispute in a dissenting opinion.

(g) Default Award

A default award may occur in three situations. The first is where the claimant in an arbitration fails to prosecute his claim. The arbitral tribunal may then make an award dismissing the claim.[45] The second is where the respondent in an arbitration fails to communicate his statement of defence, fails to produce any evidence or does not take part in arbitral proceedings. The arbitrator's duty in such a circumstance is to continue the proceedings without treating such failure in itself as

40 Section 32B of the Arbitration Act, 1995.

41 Section 30(1) of the Arbitration Act, 1995.

42 The Arbitration (Amendment) Act, 2009 introduced the term "chairman" to replace "presiding arbitrator".

43 Section 30(2) of the Arbitration Act, 1995 specifically provides for the Chairman to decide, if authorised by the parties or all the members of the arbitral tribunal, questions of procedure.

44 Indeed section 32(2) of the Arbitration Act contemplates such a situation and provides that the signatures of the majority of all the arbitrators shall be sufficient so long as the reasons for any omitted signature is stated. Dissenting opinions do not form part of the award but Russell on Arbitration suggests that they may be useful in terms of adding weight to the arguments of a party wishing to appeal against the Award – see the discussion at para 6-059, pg 271 Russell on Arbitration.

45 Section 26(d) of the Arbitration Act, 1995.

an admission of the claimant's allegations.[46] In such event, the arbitral proceedings may continue and the arbitral proceedings may make the award on the evidence before it.[47] The third situation occurs where either of the parties fails to appear at a hearing or fails to produce documentary evidence. The arbitral proceedings may continue and the arbitral tribunal may make the award on the evidence before it.[48]

In situations where a default award is necessary and to ensure its validity, a default award should recite the procedure followed and the efforts made by the arbitral tribunal to communicate the active party's case to the defaulting party so as to comply with the statutory requirement that each party shall be afforded a fair and reasonable opportunity of presenting its case.[49]

(h) International Arbitration Awards

International Arbitration Awards are recognised under section 36(2) of the Arbitration Act, 1995.[50] Awards under this head are enforced in accordance with the provisions of the New York Convention. For an Award to be enforced, it must be translated into the English language if it isn't already in English.[51]

6.3 Time for Making an Award

Generally and unless otherwise agreed in writing, the arbitral tribunal may make its award or awards at any time after hearing the parties on the issues on which the award is to be delivered. In an arbitration under order of court, however, it is the court which fixes the time within which the Award must be made.[52] Other situations in which time is fixed (but can be extended by consent of the parties or application to court) include:

i) Where a party has made a request for an additional award

46 Section 26(b) of the Arbitration Act, 1995.

47 Section 26(b) of the Arbitration Act, 1995.

48 Section 26(c) of the Arbitration Act, 1995.

49 Section 19 of the Arbitration Act, 1995 as amended by section 16 of the Arbitration (Amendment) Act, 2009.

50 As amended by section 27 of the Arbitration (Amendment) Act, 2009.

51 Section 36(4) of the Arbitration Act, 1995.

52 Order 46, rule 3(1) of the Arbitration Act, 1995. Time is stated in the order referring the matter to arbitration. Notably, rule 8, Order 46 provides that the parties may, by consent, enlarge the time so fixed by the court.

for correction of errors or interpretation of a specific point in the award, the arbitral tribunal, if it considers the request to be justified, must make such additional award within thirty days of receipt of the request;[53]

ii) Where the arbitral tribunal of its own motion corrects any errors in the award, it must do so within thirty days after the date of the arbitral award by issuing an additional award;[54]

iii) Where a party requests an additional award in respect of claims presented in the arbitral tribunal but not addressed in the Award, the arbitral tribunal must make the additional award within sixty days;[55] and

iv) Where, in an arbitration under order of court, the court remits an award or any other matter referred to arbitration for reconsideration by the same arbitrator. The order remitting the award states the time within which it shall be reconsidered.[56]

It should be noted, however, that the arbitrator can be removed if he fails to conduct proceedings properly and with reasonable dispatch.[57]

(a) Delivery of the Award

Unless the parties agree otherwise, the Award, once made, must be delivered to each party in the reference[58] inlcuding parties claiming through or under another party. It must be delivered without delay, subject to the tribunal's right to withhold the award in case of non-payment of its fees and expenses.[59] The date of delivery may be

53 Section 34(2) of the Arbitration Act, 1995.

54 Section 34(3) of the Arbitration Act, 1995.

55 Section 34(4) and (5) of the Arbitration Act, 1995.

56 Rule 15(2), Order 46 of the Civil Procedure Rules, 2010. This provision has no counterpart at section 39 of the Arbitration Act, 1995.

57 Section 15(1), (a) of the Arbitration Act, 1995 as amended. Prior to the amendments, the arbitrator was required to act without "undue delay".

58 Section 32(5) of the Arbitration Act, 1995.

59 Section 32B(3) of the Arbitration Act, 1995. In such an event, the tribunal will normally retain the award until its outstanding fees and expenses have been paid. The tribunal will inform the parties that the award is ready and at the same time provide details of any sums outstanding in respect of its fees. Cross reference - This lien is covered further in chapter (insert)

specified within the arbitration agreement or may be ordered by the court. However in arbitrations under order of court, it is mandatory that the arbitral tribunal cause the award to be filed in court within fourteen days of its making.[60] Whilst in England and Wales, under the UK Arbitration Act, 1996, a delay in taking up an award can have serious ramifications in the context of applications to court challenging or appealing against the Award.[61] In Kenya, generally time under the Arbitration Act, 1995 starts to run either on the date agreed upon by the parties.[62] In the absence of an agreement and in the circumstances specified below, time runs on the date of receipt of the award rather than the date of the award itself:

i) Correction of arbitral awards – section 34(1) *Within 30 days **after receipt** of the arbitral award, unless a different period of time has been agreed upon by the parties*…[emphasis suppplied]
ii) Interpretation of arbitral awards – section 34(4) *Unless otherwise agreed by the parties, a party may within 30 days **after receipt** of the arbitral award*….[emphasis supplied]
iii) Applications to set aside the arbitral award – section 35(3) *An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application **had received** the arbitral award*…. [emphasis supplied]

Where the arbitrator wishes to correct any errors on its own initiative, time starts to run on the date of the arbitral award.[63] Where an appeal on a question of law is preferred against the award pursuant to section 39 of the Arbitration Act, 1995, time starts to run in accordance with the Civil Procedure Act and Rules thereunder.[64]

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60 Rule 10, Order 46, Civil Procedure Rules, 2010.

61 In the absence of an agreement on the requirements as to notification of the award to the parties, time starts to run from the date of the Award whether or not it has been "delivered" to the parties – see section 55(1) and (2) of the Arbitration Act, 1996. Notification within section 55(2) of the 1996 Act means service on the parties of copies of the Award.

62 Section 34(1) of the Arbitration Act, 1995.

63 Section 34(3) of the Arbitration Act, 1995. Errors so corrected are those referred to at section 34(1)(a) of the 1995 Act, being computation errors, clerical or typographical errors.

64 See section 39(4) of the Arbitration Act, 1995. Appeals to the High Court must be filed within thirty days of the date of the Award – see section 79G of the Civil Procedure Act. The relevant order is Order 42 of the Civil Procedure Rules, 2010.

(b) Reading the Award

The Arbitration Act, 1995 does not require the Award to be read out – delivery of the Award to the parties is sufficient. However, arbitrations under an order of court do require that the Award be read.[65] Once the Arbitrator has filed the Award in court, the Registrar, within fourteen days of such filing notifies the parties of its filing. In this notification, the Registrar specifies a date and time for the reading of the Award which must be read within thirty days of the notice.[66] The Award is read by the Registrar.[67]

6.4 Formal Requirements of Award

The formal requirements of an award are dictated by the arbitration agreement as well as the applicable laws and procedure.

Statutory Requirements - section 32 of the Arbitration Act, 1995 has several requirements for an award, which must be:

i) In writing.[68] Having the tribunal's decision in writing facilitates both the enforcement of the Award and any challenge to it;
ii) Signed by the arbitrator or arbitrators and dated.[69] The date is important in order to guide the calculation of interest and allow the parties or the court to abide by statutory

65 Rule 11(1) and (2), Order 46 of the Civil Procedure Rules.

66 *Ibid*. (Rule 11, Order 46, Civil Procedure Rules, 2010).

67 Rule 11(3), Order 46, Civil Procedure Rules, 2010.

68 Section 32(1) of the Arbitration Act, 1995.

69 Sections 32(1) and (4) of the Arbitration Act, 1995. Order 46, rule 10 of the Civil Procedure Rules, 2010 also provides that the Award must be signed and dated. Although there is no statutory requirement for it, some Arbitrators have their signatures witnessed. The implication of an unsigned award is to undermine the authenticity of the award. In the case of *Muhindi and anor v Mugendo* [1991] KLR the Court of Appeal held that "*signatures of the members of the panel gives the award the authenticity it should have, being as it is a statutory delegated decision of the court*" [at para 40]. As regards the importance of signatures, this decision can be contrasted with the dissenting judgement of Apaloo JA in the case of *Wachira v Ndanjeru* [1987] KLR 252 who held that no failure of justice was occasioned to the appellants when their arbitration award was unsigned saying: "*I am satisfied that failure to sign the award and that kind of thing is really not a failure which can be said to have occasioned to this appellant any failure of justice unless he was able to show that in fact there were no elders sitting with the District Officer which would in effect make the Award a forgery*".

time limits in applications or appeals.[70] The Award must also state the place at which it is made;[71]

iii) Reasoned;[72] and

iv) Delivered to each party.[73]

Recitals - It is useful for an award to set out the circumstances leading to the award, including for example the relationship between the parties, the arbitration agreement (which goes to jurisdiction), the matters giving rise to the dispute, the appointment of the arbitral tribunal, whether the proceedings were conducted on a documents only basis or oral hearings.

Issues in dispute – The award should state what the issues in dispute are in order to resist applications to set aside the award under section 35 of the Arbitration Act and also facilitate appeals under section 39 of the Act.

Reasoned Awards

A reasoned award is one in which the tribunal states its reasons for its decision and these reasons form part of the award itself. "Reasoned" is the default position, unless the parties agree otherwise.[74] An arbitral tribunal must, unless the parties agree, state the reasons on which it is based or the award is agreed. Parties to an arbitration are entitled to know the reasons for the tribunal's decision by which they are bound unless they have agreed otherwise. Such reasons are a pre-requsite in appeals on questions of law under section 39 of the Arbitration Act, 1995. The arbitral tribunal should set out, what, in its view of the evidence, did or did not happen and explain

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70 For instance, applications to set aside under section 35 of the Arbitration Act, appeals under section 39 and procedural requirements under Order 46 of the Civil Procedure Rules, 2010.

71 Section 32(4) of the Arbitration Act, 1995.

72 Section 32(3) of the Arbitration Act, 1995. "Reasoned" is the default position unless the parties have agreed that no reasons are to be given (section 32(3)(a) of the Arbitration Act, 1995 or the award is an arbitral award on agreed terms (section 32(3)(b) of the Arbitration Act, 1995.

73 Section 32(5) of the Arbitration Act, 1995. Order 46, rule 10 of the Civil Procedure Rules, 2010 also provides that the Award must be filed in court within fourteen days of its making together with any depositions and documents which have been taken and proved before them.

74 Section 32(3) of the Arbitration Act, 1995.

why, in the light of what happened, the tribunal has reached its decision and what that decision is.[75] The award should set out the facts and general reasoning so as to enable the parties to understand them and why particular points were decisive. The Award should indicate the tribunal's findings and reasoning on issues argued before it to enable the parties and the court to consider the position with respect to appeals or applications for setting aside.[76] It is sufficient that the tribunal explains what its findings are and how it reached its conclusions.[77]

6.5 Substantive Requirements of an Award

(a) Valid Awards

An arbitral tribunal should ensure that its award is not only correct, but also valid and enforceable.

(b) Award must be by the Tribunal on the Matters referred to it

An arbitral award may not be delegated, i.e. no part of it may be made or left to somebody outside the arbitral tribunal. An award seeking to delegate the decision to a third party will not be valid.[78] The reason for this is because the authority given by parties to an arbitral tribunal is personal – it belongs to, and can only be exercised by the persons appointed as arbitrators.[79]

To be valid, an award must comprise a decision by the tribunal on the matters referred to it.[80] An award which does not do so may be set aside on the grounds of misconduct as in the case of *Josephat Murage Miano and another v Samuel Mwangi Miano and another.*[81] Briefly, a dispute concerning entitlement to a parcel of land (by way of adverse possession) was referred to arbitration. After

75 Russell on Arbitration, pg 261, para 6-030.

76 Russell on Arbitration, pg 261-262, para 6-030.

77 Russell on Arbitration, pg 261-262, para 6-030.

78 Old English case of *Johnson v Latham* (1850) 19 L.J.Q.B. 329.

79 Section 16(4) of the Arbitration Act, 1995 introduced by the 2009 amendments.

80 Section 29(1) of the Arbitration Act, 1995.

81 [1997] eKLR.

deliberations, the arbitral tribunal awarded each of the parties a portion of the land. The Court of Appeal found that this action did not deal with the dispute which had been referred to arbitration, holding as follows:

> The basis of this award is unexplained and it is apparent on the face of it that the real issue in controversy between the respondents and the appellants was not adjudicated upon by the arbitrators.

In setting aside the award, the court stated:

> It would appear to us therefore that failure by the arbitrators to adjudicate the real dispute before them amounted to misconduct in the hearing of the matter they had to decide and that entitled the appellants to have the application set aside.

As the tribunal is required to deal with the disputes referred to it, an award must also be final, in the sense of being a complete decision without leaving matters to be dealt with subsequently or by a third party. When making its decision, the tribunal must also consider all relevant evidence that is adduced, or sought to be adduced before it. In the case of *Bagwasi Nyangau v Omosa Nyakwara*,[82] the Court of Appeal held that the refusal by the arbitrator to permit the calling of a material witness amounted to misconduct on which ground an application to set aside the arbitral award should have been allowed.[83]

(c) Certainty

An award must also be certain in the sense that the decision of the tribunal on the dispute or the matters dealt with must be clear from its face.[84] If the award is ambiguous it will be susceptible to challenge under the setting aside procedure under section 35 of the Arbitration

82 [1982-88] 1 KAR.

83 An English case - *Williams v Wallis and Cox* [1914] 2 KB 478 is cited in the Nyangau case where misconduct is defined thus: *misconduct is not necessarily personal misconduct. If an arbitrator for some reason which he thinks good declines to adjudicate upon the real issue before him, or rejects evidence which, if he had rightly appreciated it would have been seen by him to be vital, that is, within the meaning of the expression 'misconduct' in the hearing of the matter which he has to decide, and misconduct which entitles the person against whom the award is made to have it set aside'*, per Lush J at 484.

84 See the case of *Josephat Murage Miano and another v Samuel Mwangi Miano and another supra*.

Act, 1995. Parties may also apply for an additional award to interpret specific points in the Award. In court ordered arbitrations, an award is not valid where the award is so indefinite as to be incapable of taking effect.[85] With such an award, the court has powers to remit that award to the tribunal for reconsideration.[86]

The arbitral award must not contain decisions on matters beyond the scope of the reference to arbitration.[87] In the case of *Gitonga Warugongo v Total Kenya Ltd*[88], the Court of Appeal set aside a portion of the arbitral award for the reason that the arbitrator dealt with a matter outside the dispute referred to him. The arbitration itself concerned monthly rent payable in accordance with the lease agreement between the parties. The parties had specifically agreed that there would be an increment of the monthly rent after every seven years. After determining the monthly rent payable, the arbitrator made a further award awarding a 20% increment every two years for the portion of the seven-year term remaining on the lease "to take care of increases in sales and profit". In setting aside this portion of the Award, the Court of Appeal held as follows:

> "In purporting to impose those terms, the arbitrator was making a new contract for the parties. He was accordingly going beyond the terms of the reference to him, that is, he was exceeding his authority as an arbitrator

Notably, the Court of Appeal only set aside the portion of the Award that was outside of the Arbitrator's mandate in contrast to the High Court which set aside the Award in its entirety."[89]

(d) Public Policy

A valid award must not deal with a dispute not capable of settlement by arbitration under the law of Kenya and must also not be in conflict

85 Rule 15(1)(b), Order 46, Civil Procedure Rules, 2010.

86 Rule 15(1)(b), Order 46, Civil Procedure Rules, 2010.

87 Section 35(2) (iv) of the Arbitration Act, 1995.

88 [1998] eKLR.

89 Section 35(2)(iv) expressly provides that where it is possible to separate decisions on matters referred to arbitration from those not so referred, the court should set aside only that portion which contains decisions on matters not referred to arbitration.

with the country's public policy.[90] Public policy is an indeterminate principle and has previously been described as "*unruly horse, and when you get astride it, you never know where it will carry you*"[91]. Ringera, J (as he then was) attempted to describe public policy and acts contrary thereto in the case of *Christ for all Nations v Apollo Insurance Co Ltd*[92], where he stated:

> An act is contrary to public policy if it is either (a) inconsistent with the Constitution or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice or morality. The first category is clear enough. In the second category I would without claiming to be exhaustive include the interests of national defence and security, good diplomatic relations with friendly nations, and the economic prosperity of Kenya. In the third category, I would, again without seeking to be exhaustive, include such considerations as whether the award was induced by corruption or fraud or whether it was founded on a contract contrary to public morals.

Finally, the award must not be induced or affected by fraud, bribery, undue influence or corruption,[93] all of which are grounds under which the award may be set aside.

(e) Decisions based on Expert Knowledge

Generally, the award should be based on the evidence and submissions presented by the parties. If the parties appoint an arbitrator because of his knowledge and experience of a particular trade or industry, the arbitrator is entitled to decide questions of quality, compliance of bulk with sample and the like on the basis of his own expert knowledge. By appointing an arbitrator with expert knowledge, the parties are taken to have assented to him using that general knowledge of the trade in reaching his decision. Where an arbitrator

90 Section 35(2)(b) of the Arbitration Act, 1995.

91 *Richardson v Mellish* (1824) 2 Bing 229.

92 [2002] EA 366.

93 These are other grounds on which an Award can be set aside, see section 35(2)(vi) of the Arbitration Act, 1995 introduced by the 2009 amendments.

has special facts relating to a particular case, he must give the parties an opportunity to make submissions to him on those matters.[94]

(f) Court's Power to Modify or Correct an Award

In arbitrations under order of court, the court has the power to modify or correct an Award in three situations, these being:

i) Where it appears that a part of the award is on a matter not referred to arbitration and such part is separable from the remainder of the Award without affecting the decision on the matter referred to arbitration;[95]
ii) Where the award is imperfect in form or contains an obvious error which can be amended without affecting the decision;[96] and
iii) Where the award contains clerical errors.[97]

6.6 Effect of A Valid Award

A valid award is final and binding upon the parties and on any parties claiming under or through them. Unless otherwise agreed in writing, the effect of a valid award is to render the dispute referred to arbitration *res judicata*. The award is conclusive as to the issues with which it deals, unless and until there is a successful challenge or appeal against the award. The award is enforceable and upon its delivery, renders the arbitral tribunal *functus officio* save for the exceptions discussed earlier.

94 Russell on Arbitration para 6-079.

95 Rule 14(a), Order 46, Civil Procedure Rules, 2010.

96 Rule 14(b), Order 46, Civil Procedure Rules, 2010.

97 Rule 14(c), Order 46, Civil Procedure Rules, 2010.

Chapter 7

Recognition & Enforcement of Arbitral Awards

By Njoroge Regeru

7.0 Introduction

An Arbitrator's Award does not immediately entitle the successful party to levy execution against the unsuccessful party. Such party must first lodge the Award with the Court for recognition and enforcement where after it shall be treated as a judgment of the Court. Execution of the Award may then ensue. Recognition and enforcement of arbitral Awards is therefore of great significance and importance in the arbitral process.[1] The Award is, after all, the culmination of the arbitral process and recognition and enforcement of the Award is the final vindication of the process.

Parties to an arbitration agreement impliedly promise to perform a valid Award. If the Award is not performed, the successful party can proceed by action in the ordinary courts for breach of this implied promise and obtain judgement giving effect to the Award.

7.1 Definition of Recognition and Enforcement and their Legal Effects

The terms "recognition" and "enforcement" are at times used as if they were synonymous. For example, section 36 of the Kenyan Arbitration Act, No. 4 of 1995 (hereinafter "the Arbitration Act" or "the Act" as the context permits) talks of "recognition and enforcement" of Awards. The same language is adopted and/or borrowed from the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

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1 Mustill & Boyd (1989), Commercial Arbitration, 2nd edn, Butterworths, London and Edinburg

The two terms are, however, distinct. An Award may be recognized without being enforced, though it is unlikely that it can be enforced without being recognized.

Recognition is a defensive process and it arises when a Court is asked to grant a remedy in respect of a dispute which has been the subject of previous arbitral proceedings. The Court would be asked to recognize the Award as valid and binding upon the parties in respect of the issues with which it dealt, and in so doing put an end to the new proceedings by rendering them to be *res judicata*.[2]

The other purpose of recognition would be to act as estoppel by record and to prevent either of the parties from denying that such facts as are recorded in the Award took place. Recognition acts as a shield and is used to block any attempt to raise fresh proceedings on issues which have already been decided upon in the arbitration.

Enforcement refers to an application made to a court to recognize the legal force and effect of an arbitral Award and to ensure that it is carried out by using the available legal sanctions.[3] A court seeking to enforce an Award recognizes that it is validly made and binding upon the parties to it. Recognition and enforcement clearly run together with one leading to the other. The purpose of enforcement is to act as a sword and it is a positive action taken to compel the losing party to carry out an Award that he is unable or unwilling to carry out voluntarily. It therefore means applying sanctions in an attempt to ensure that the Award is carried out.[4] Possible legal sanctions include seizure of property and other assets, forfeiture of bank accounts and in the extreme, may include imprisonment. If the defaulting party is a corporate body, enforcement is directed against the property and other assets of the corporation like stock-in-trade, bank and trading accounts. In some instances, directors of the company may be held personally liable, for instance, if they had acted as guarantors.[5]

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2 Murray, J et al (1988) *Process of Dispute Resolution: The Role of Lawyers* New York, Foundation Press.

3 Redfern A, Hunter M, 1999, '*Law and Practice of International Arbitration*' 3rd Ed., Sweet and Maxwell: London. P449.

4 Campell D. & Summerfield Peter, (1989), Effective Dispute Resolution for the International Commercial Lawyer: Kluwer Law and Taxation Publishers, Boston, pg 169.

5 This chapter does not discuss the various modes of execution as that is beyond its scope.

A distinction may be drawn between the enforcement of an Award in the *lex arbitri*, the seat of the arbitration and enforcement of an Award regarded as a "foreign" or "international" Award because it was made outside the territory of the state in which enforcement is sought.

Both concepts are central in ensuring that the just ends of the arbitral process are carried out. Recognition and enforcement of commercial arbitral Awards provides an essential link between the beginning of the arbitral process, the arbitration agreement and its end, which is implementation of the Award. They are the touchstone of that arch.

7.2 Kenyan Law Governing Recognition and Enforcement of Arbitral Awards

The statute that deals with arbitration in Kenya is the Arbitration Act. This statute commenced on the 2 of January, 1996 by virtue of Legal Notice No. 394 of 1995.[6] Prior to this statute, the Arbitration Act, Chapter 49 of the Laws of Kenya, was applicable.

The Arbitration Act is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration[7] which was adopted in 1985 with a view to encouraging arbitration and processes that would have global recognition.

The UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law) was designed to serve as a model of domestic arbitration legislation, harmonizing and making more uniform the practice and procedure of international commercial arbitration, while freeing international arbitration from the domestic law of any given adopting state. The essence of the Act is that it provides for very broad party autonomy in fashioning the

6 The Arbitration (Amendment) Act, 2009 Act, No. 11 of 2009 which is yet to come into force seeks to amend certain provisions of the current Arbitration Act. The new Act, seeks to, *inter alia* domesticate the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations General Assembly in New York on 10 June, 1958 and acceded to by Kenya on 10 February, 1989 with the reciprocity reservation.

7 United Nations document A/40/17, Annex 1 as adopted by the United Nations Commission on International Trade Law on 21 June 1985.

Arbitration process. The Act deals with enforcement and recognition of domestic and foreign Awards.

The Act does not distinguish between recognition and enforcement of domestic and foreign Awards.[8] Both domestic and foreign Awards are thus treated equally[9]. This is in accordance with Article III of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[10]

It is noteworthy that The Arbitration (Amendment) Act, 2009 Act No. 11 of 2009 which has been duly passed by Parliament and received Presidential Assent but is yet to come into force as at the date of publication of this book has repealed section 31(1) of the current Arbitration Act and replaced the same with a new section which provides as follows:

> "Section 36(1) A domestic arbitral Award, shall be recognized as binding and, upon application to the High Court, shall be enforced subject to this Section and Section 37.
>
> Section 36(2) An international arbitration Award shall be recognized as binding and enforced in accordance to the provisions of the New York Convention or any other Convention to which Kenya is a signatory and relating to arbitral Awards.

Section 40 of the Arbitration Act empowers the Chief Justice to make Rules of Court for:

a) The recognition and enforcement of arbitral Awards and all proceedings consequent thereon or incidental thereto;

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8 Section 36(1) of the Arbitration Act provides as follows, "An Arbitral Award, irrespective of the state in which it was made shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this Section and Section 37.

9 See the case of *office du café de Burundi v O.M. Robinson, Advocate* [2004] eKLR Misc. Application No. 124 of 2004 in which the Kenyan Court enforced an Award made by the Coffee Trade Organization in London on the basis that it had met all the requisite requirements of the Arbitration Act.

10 Article III of the New York Convention provides as follows, "each contracting State shall recognize arbitral Awards as binding and enforce them in accordance with the rules of procedure of the territory where the Award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of Arbitral Awards to which this convention applies than are imposed on the recognition or enforcement of domestic arbitral Awards."

b) The filing of applications for setting aside arbitral Awards;

c) The staying of any suit or proceedings instituted in contravention of an arbitration agreement;

d) Generally all proceedings in court under the Act.

The Chief Justice has promulgated the Arbitration Rules, 1997 which came into effect by virtue of Legal Notice Number 58 of 1997. The Rules basically provide guidelines on Applications to Court emanating from the Act.

Where a party had sought the assistance of the court under the provisions of sections 12, 15, 17, 18, 28 and 39 of the Act, then the Award shall be filed in the same cause and shall be served on all the parties at least seven days before the hearing date.[11] Such an Application shall be by way of summons in chambers supported by an Affidavit.

The Application would be filed by way of a letter addressed to the Deputy Registrar of the High Court in which the Award is to be enforced. Where previous proceedings had been instituted, the Award shall be filed in the same suit. However, if no such proceedings had been instituted then the Award shall be given its own serial number in the civil registry.

Where no Application has been made to set aside the Award within the time stipulated in section 35 of the Arbitration Act, the party filing the Award may apply *ex parte* by summons for leave to enforce the Award as a decree.[12]

All Applications shall be made by summons in chambers and the court fees payable for filing the Award is the sum of Kenya Shillings Ten Thousand Shillings.

It should, however, be noted that although the Rules provide that the Application to enforce the Award shall be made *ex parte,* failure to serve the other party is a ground upon which such a party may apply for the setting aside of any order emanating *Shalimar Limited and 2 others*[13] the Applicants sought leave of the Court of

11 Rule 4 (3) of the The Arbitration Rules, 1997.

12 *Ibid* Rule 6.

13 [2006] eKLR.

Appeal to appeal against the decision of the High Court which dismissed their Application seeking to set aside an *ex parte* judgement which had recognized and enforced an arbitral Award. The basis of the Application was that the applicants had not been served with the Application to enforce the Award and had thus been denied an opportunity to traverse the same. It was held that the applicants had a *prima facie* case since they had been denied a right to be heard after the Award had been published and before it was made a judgement of the court. The Application was therefore allowed.

7.3 Formalities for Recognition and Enforcement of Arbitral Awards

Section 36(2) of the Arbitration Act provides for the formalities necessary for recognition and enforcement of arbitral Awards. In this regard it is stipulated that the party relying on the arbitral Award or applying for its enforcement shall furnish the court with:

a) The duly authenticated original arbitral Award or a duly certified copy of it;
b) The original arbitration agreement or a duly certified copy of it;
c) Where the Award or the agreement is not in the English language, the party must furnish a duly certified translation of it into the English language.

In the case of *David Chabeda and another v Francis Inganji,*[14] the respondent raised a preliminary objection to the claimant's Application seeking to enforce an arbitral Award on the grounds, *inter alia*, that the Application was incurably incompetent and defective for breach of the mandatory provisions of section 36 of the Arbitration Act as no original or certified copy of the Award had been furnished to the Court. It was held that since the applicant had failed to furnish a duly authenticated original arbitral Award or a duly certified copy, such failure to comply with an express statutory provision could not be cured under section 3A of the Civil Procedure Act. It was further held that the inherent powers of the court do not include the jurisdiction to ignore express statutory

14 [2007] eKLR Civil Case No. 597 of 2002 (H.P.G Waweru, J).

requirements. Accordingly, the objection was upheld and the Application to enforce the Award was dismissed.

In the case of *Iris Properties Limited and another v Nairobi City Council*[15], the applicant sought to enforce an Award and the respondent objected to the same on the main ground that the Application had been made in a non-existent suit as the Order which stayed the proceedings pending arbitration effectively terminated that suit. Githinji, J (as he then was) held *inter alia* as follows:

> "..no Application was filed in the High Court in the course of arbitral proceedings. It follows that the arbitral Award should have been filed as an independent cause with its own serial number in the Civil Register. The Award cannot competently be filed in the original suit. The Award has not in any case been filed in accordance with the Arbitration Rules. The Award is merely appended to the Application under Section 36 of the Arbitration Act. The Court fees of KSh. 10,000.00 payable on filing the Award has not been paid. The Applicant only paid KSh. 485 for filing the Chamber Summons. The notice of filing of the Award has not been given to the parties in accordance with Rule 5 of the Arbitration Rules. That renders the application incompetent."

7.4 Grounds upon which Recognition and Enforcement of Arbitral Awards may be Refused

The grounds for refusal for recognition and enforcement of arbitral Awards are set out in section 37(1) of the Arbitration Act[16] and are

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15 Civil Case No. 947 of 1999 (unreported) delivered by Githinji, J on 12 April, 2002.

16 Section 35(1) provides that an Award may be set aside or recognition and enforcement may be refused only if the party resisting enforcement of the Award and seeking setting aside thereof furnishes proof that:

(a) A party to the arbitration agreement was under some incapacity;

(b) The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the state where the arbitral Award was made;

(c) The party against whom the arbitral Award is invoked was not given proper notice of the appointment of an Arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

(d) The arbitral Award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or it contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, that part of the arbitral Award which contains decisions on matters referred to arbitration may be recognized and enforced;

(e) The composition of the arbitral tribunal or the arbitral procedure was not

the same as the grounds set out in section 35(2) of the Act upon which an Award may be set aside.[17] Section 35(2) provides that an Award may be set aside or recognition and enforcement may be refused only if the party resisting enforcement of the Award and seeking setting aside thereof furnishes proof that:

(a) A party to the arbitration agreement was under some incapacity;
(b) The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the state where the arbitral Award was made;
(c) The party against whom the arbitral Award is invoked was not given proper notice of the appointment of an Arbitrator or of the arbitral proceedings or was otherwise unable to present his case;
(d) The arbitral Award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or it contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, that part of the arbitral Award which contains decisions on matters referred to arbitration may be recognized and enforced;
(e) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place;
(f) The arbitral Award has not yet become binding on the

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in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place;

(f) The arbitral Award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which or under which that arbitral Award was made;
(g) The subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya;
(h) The recognition or enforcement of the arbitral Award would be contrary to the public policy of Kenya.

17 The Arbitration (Amendment) Act, 2009 Act No. 11 of 2009 which is yet to come into force as at the date of publication of this book, has added another ground as follows: Section 37(1) (vii) the making of the arbitral Award was induced or affected by fraud, bribery, corruption or undue influence.

parties or has been set aside or suspended by a court of the state in which or under which that arbitral Award was made;

(g) The subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya;

(h) The recognition or enforcement of the arbitral Award would be contrary to the public policy of Kenya.

7.5 How Kenyan Courts have dealt with Applications brought under Section 35(2) and Section 37(1) of the Arbitration Act

Over the years, Kenyan Courts have had occasion to consider and determine assorted Applications brought before the Courts under the sections aforesaid. A brief outline of the various decisions handed down by the High Court and the Court of Appeal under the various heads provided for under the said sections is as follows:

(i) Where the Applicant had no notice of the hearing

In the case of *John Adero v Ulinzi Sacco*[18] Justice Onyango Otieno (as he then was), allowed an Application under section 35 of the Arbitration Act on the grounds that there was no evidence of Notice having been given in a matter which had proceeded before an Arbitrator *ex-parte*. In taking that view, Justice Otieno said:

> "one thing seems to be clear to me and that is that no evidence exists to confirm that the Applicant was aware of the Hearing Date. The matter was heard *ex parte* and a decision made without the Applicant's input. It is now settled law that no one can be condemned unheard, the Applicant in this case was indeed condemned unheard and this was not proper."

The Award was therefore set aside and the matter was referred to the Tribunal for full hearing.

In the case of *China Jiangsu International v Dudu Housing Co-operative Society Limited*[19], the applicant made an Application seeking

18 High Court Civil Cause Number 1879 of 1999, Milimani Commercial Court (unreported).

19 High Court Miscellaneous Cause Number 54 of 1999, Milimani Commercial Court (unreported).

to set aside an arbitral Award on the basis that it had not been given proper or any notice of the arbitral proceedings and that it was therefore unable to present its case. Justice Onyango Otieno (as he then was) held, *inter alia,* as follows:

> "I am not satisfied that the Applicant was properly served with hearing notices for the proceedings that eventually proceeded *ex parte*. I cannot from my side call the Applicant recalcitrant without proper evidence having been adduced. All I see is the emotional outbursts of the Arbitrator which I think needed not be there as he was carrying out quasi judicial duties and needed to be sober in approaching the same duties despite any proactive actions or omissions by any party. Under the circumstances although I am aware that the Courts are normally very reluctant to interfere with the arbitration Awards, I feel that the *ex parte* hearing of this arbitration proceedings was not proper and the decision which the Arbitrator himself also describes as made *ex parte* and on the basis of documentary evidence only cannot be recognized and cannot be enforced."

(ii) If the Award deals with a matter which was not in contemplation or not falling within the terms of the reference to arbitration

It amounts to misconduct on the part of an Arbitrator if he fails to comply with the terms, express or implied, in the arbitration agreement. It is, however, difficult to give an exhaustive definition of what may constitute misconduct on the part of the Arbitrator. The expression is of wide import, for an Arbitrator's Award, unless set aside, entitles the beneficiary to call on the executive power of the state to enforce it.[20] Misconduct occurs, for example, if the Arbitrator or umpire fails to decide all the matters which were referred to him, or, if by his Award the Arbitrator or umpire purports to decide matters which have not in fact been included in the agreement or reference, if the Award is inconsistent[21], or is uncertain or ambiguous, or if there have been irregularities in the proceedings and where the Arbitrator has failed to act fairly towards both parties.[22]

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20 See *Halsbury's Laws of England*, Volume 2, 4th Edn, Butterworths, London, pg 330.

21 In *Ames v Milward* (1818) 8 Taunt 637 cited in Halsbury's id. The claim was based entirely on fraud, the Arbitrator held that there was no fraud yet upheld, the Award was set aside.

22 In the case of *Government of Ceylon v Chandris* (1963) 1 Lloyd's Reports 214 Justice Megaw held as follows: "it is, I apprehend, a basic principle, in arbitrations as much

In the case of *HFCK v Gitutho Associates and another*[23], the plaintiff applied to set aside an Award under section 35(2)(a)(ii) of the Act on the basis that jurisdiction was exceeded, but on the facts of this case Justice Mbaluto, (as he then was) dismissed the Application of the plaintiff's action and held:

> "having carefully considered the evidence and the law applicable to the matter, I cannot see any justification for claiming that the Award dealt with a dispute not contemplated by or not falling within the terms of the reference to arbitration nor for that matter can I see any basis for finding that the decisions of the Arbitrator are on matters beyond the scope of the reference."
>
> The Judge then proceeded to dismiss the Application.

In *Express Kenya Limited v Peter Titus Kanyago*[24], an Application was brought under section 35 of the Act seeking to set aside an Award in which the arbitral tribunal had awarded the respondent a sum of KSh. 5,400,000.00 as a consultancy fee in terms of a Consultancy Services Agreement. The dispute in that respect did not stem or was not covered under the Arbitration Clause but the Arbitrator found that the matters that the parties had agreed to refer to Arbitration under the Arbitration Agreement were "inextricably linked" to the matter stemming from the consultancy services agreement and accordingly proceeded to make the said Award of KSh.5,400,000.00. Justice Ringera, (as he then was) held that the Award was outside the scope of the arbitration agreement and further held that the Arbitrator had exceeded or gone outside the scope of the reference. The Award was therefore set aside.

Miano and another v Miano[25] was an Appeal against a Ruling in the superior court which had declined to set aside an arbitral Award. The appellants stated that the Arbitrators failed to adjudicate the real dispute before them and that this failure amounted to an error of

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as in litigations in the courts (other, of course, than *ex parte* proceedings), that no one with judicial responsibility may receive evidence, documentary or otherwise, from one party without the other party knowing that the evidence is being tendered and being offered an opportunity to consider it, object to it or make submissions on it. No custom or practice may override that basic principle."

23 Civil App. 76 of 2000 (unreported).

24 Civil App. 963 of 2002.

25 Civil Appeal No. 26 of 96 Citation: [1996] LLR 2664.

law and that therefore the Award should be set aside. The Court of Appeal considered the matter and, *inter alia*, dealt with the issue of what amounted to misconduct on the part of an Arbitral Tribunal. The Court of Appeal held that the failure of the Arbitrators to adjudicate the real issue in dispute amounted to misconduct and hence the Award should be set aside. The Court expressed itself as follows:

> "it would appear to us therefore that failure by the Arbitrators to adjudicate the real dispute before them amounted to misconduct in the hearing of the matter they had to decide and that entitled the Appellants to have the arbitration Award set aside."[26]

In the case of *Abuga Bogonko v Nyamongo Orina and 4 others,*[27] the applicant made an Application seeking to set aside an award on grounds that the Arbitrator had misconducted himself by failing to demand books of accounts from the respondents. Justice Kaburu Bauni held, *inter alia,* as follows:

> "I have considered the arbitration Award and the submissions. There was no proof that the Arbitrator misconducted himself in any way. Every party was given an opportunity to be heard. Each party had appointed three elders. Nobody was stopped to give evidence. The Applicant gave evidence...the Applicant did not demand that the Respondent produce any books or receipts. I agree with counsel for the Respondent that it was not for the Arbitrator to go fishing for evidence. It was for the parties to produce the same…all in all I find the Application has no merit and the same is dismissed with costs."

(iii) The High Court may set aside an Award if the High Court finds that the Award is in conflict with public policy of Kenya

Public policy as a ground for setting aside arbitral Awards is extremely wide. Many an applicant will cite public policy as a ground of challenge to arbitral Awards. The challenge falls on the Court before which such an Application is made to grapple with the issue and determine whether indeed public policy has been offended in any way. Let us see how different courts have dealt with the issue.

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26 Per Gicheru, Shah & Bosire JJA.

27 [2004] eKLR, Civil Suit No. 347 of 1997 (Kaburu Bauni, J).

In the case of *Air East Africa v Kenya Airports Authority*[28] an Application was made to set aside an Award where the interest rates were awarded at less than commercial rates. In allowing the Application, the Judge held that an arbitration Award may be set aside on the ground that it was outside the terms of reference and contrary to public policy. It was held, *inter alia,* that for an Arbitrator's Award to be worthy of its name, it must be certain. It must be in a form that can be enforced as a judgment of the Court. Otherwise it would be outside what is contemplated by the reference to arbitration and it would be contrary to public policy and will be set aside. The Court further held that an Award will only be considered uncertain if it is not clear as to the parties and not because one of the parties says so and the court will look at the whole Award and not a single word or sentence and this includes documents referred to in arbitration.

In *Christ for All Nations v Apollo Insurance*[29], the applicant brought an Application under section 35 of the Arbitration Act seeking to set aside an arbitral Award on the main ground that the Award was in conflict with public policy. Justice Ringera, (as he then was), after reciting section 35(2)(b) was guided by an Indian decision in the case of *Renu Saghar Power Co. v General Electric* in which the Indian Supreme Court had identified three patterns of the operation of the doctrine of public policy in the field of enforcement and recognition of foreign arbitral Awards. Those three patterns, the Indian Court held, are that an Award will not be given effect if it is contrary to the fundamental policy of the Indian Law, that is, if the Award involves a violation of the Indian Laws on non-compliance with a court's order; if the enforcement of the Award would be contrary to the interests of India and if the Award would be contrary to justice and morality.

Justice Ringera adopted the aforesaid principles enunciated by the Indian Supreme Court and stated:

> "I am persuaded by the logic of the Supreme Court of India and I take the view that although public policy is a most broad concept incapable of precise definition or that as the common law judges used to say, it is an unruly horse. An Award could be set aside under Section

28 [2001] 2 EA 323.

29 Civil Case 499 of 1999.

> 35(2)(b) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that it was either inconsistent with the Constitution or other laws of Kenya whether written or unwritten; inimical to the national interests of Kenya, contrary to justice or morality."

In the latter category, the learned Judge gave the example of Awards induced by corruption or fraud or Awards founded on contracts contrary to public morals. In the second category of national interest, the Judge gave examples of national defence and security, economic prosperity of Kenya and good diplomatic relations with friendly nations. But the Judge was quick to observe that that list was not exhaustive of instances in which public policy may be said to have been offended; each case depending on its own peculiar facts and circumstances**.**

The applicant in *Glencore Grain Limited v TSS Grain Millers Limited*[30] sought leave of the Court to enforce an international arbitral Award as if it were a decree of the court under section 36 of the Arbitration Act and under rules 4(1) and 9 of the Arbitration Rules, 1997. The respondents filed a second application seeking leave of the Court to oppose the enforcement of the Award and to set aside the same. The respondents argued that the Arbitral Award should not be enforced as it was contrary to public policy in that the subject matter, that is, maize which the applicant purported to sell was found to be totally unfit for human consumption. The second ground was that the application was not supported by an Affidavit as required by law. The Court held that since the application to enforce the Award was not supported by an Affidavit, the same was fatally defective and as such ought to be dismissed. The Court held that the Application was not proper as the Award and the Agreement were not originals and neither were they certified as required by the Act. On the issue of public policy, the Court held that since the subject matter of the arbitration was maize which had been certified to be unfit for human consumption, it was against the public policy of Kenya. On this issue Justice Mwera held as follows:

30 [2002] 1 KLR 606 also reported in the Yearbook Commercial Arbitration, Vol XXXIV, 2009, Kluwer Law International at page 666.

> "in this case the court is persuaded to protect a public policy in favour of Kenyan citizens who would be exposed to a health risk as discussed hereinabove. Indeed in my opinion, a contract or an Award whose effect would be to release to the public maize unfit for human consumption would itself be (tortious) as well as illegal within the legal meaning used hereinabove and accordingly the transaction or contract would be against Kenya's public policy."

In *Kenya Shell Limited v Kobil Petroleum Limited*[31], the Court of Appeal considered the issue of public policy in light of the proposition that it is in the public interest that litigation must come to an end. The court held *inter alia,* as follows:

> "..in our view, public policy considerations may enure in favour of granting leave to appeal as they would discourage it. We 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."

(iv) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place

In the spirit of party autonomy, parties to an arbitration agreement are free to choose for themselves the procedure to be adopted by the Arbitrator. Such procedure may either be set out in the arbitration agreement or agreed upon by the parties at the time when the matter is referred to arbitration. Failure to comply with such a procedure would be a ground for the setting aside of the Award. This point is illustrated by the case of *Dr. Joseph Karanja and another v Geoffrey Kuira*[32] in which the arbitration agreement between the parties had stipulated that the Tribunal shall keep a record of all its proceedings and decisions and a verbatim record of all evidence, whether from experts or witnesses of fact at oral hearings. The applicant had sought to set aside the Award on the basis that this requirement was not met. This Application was allowed by the High Court since there was evidence that this requirement had not been

31 Civil Appeal No. 57 of 2006 (Omolo, O'Kubasu and Onyango-Otieno JJA) delivered on 7 April, 2006 see [2006] eKLR.

32 [2006] eKLR Civil Appeal No. 130 of 2002 (Omolo, O'Kubasu & Deverell, JJA).

complied with. The respondent, however, sought a review of the said ruling on the ground that there had been material non-disclosure since the parties had, at the preliminary meeting, agreed to dispense with this requirement. The application for review was allowed. The Applicant was, however, dissatisfied and moved to the Court of Appeal appealing against the orders for review. The Court of Appeal held, *inter alia,* as follows:

> "More importantly it is clear from the ruling of the superior court that what led to the Judge's decision that there should be a review was the fact that the existence of the Minute was not revealed to him. There was in his view a significant non-disclosure relevant to an aspect which he had based his decision upon. This made a review necessary. We further consider that the Judge was right in exercising his discretion and ruling that in the circumstances it was necessary for the original application to be reargued before the court in the light of the new information which had not been available to him at the previous hearing."

(v) The arbitral Award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which or under which that arbitral Award was made

The Award must have become final in the country in which it was made otherwise, it may be set aside. An Award is not for this purpose deemed to be final if any proceedings for the purpose of contesting its validity are pending in the country in which it was made.

Where there is a condition precedent to the recognition and enforcement of an Award, or where the arbitral Award has been set aside or suspended by a court of the state in which it was made, then the Award shall be set aside.

In the case of *Pentecostal Assemblies of God (K) v Rev. John Malwenyi and others*[33] the applicant sought to set aside an Award on grounds, *inter alia,* that the same had not been signed by all the Arbitrators and that the requisite court fees had not been paid. Justice Mwera held as follows:

> "The record shows that the Arbitrators sent the Award to court by their letter dated 15 July 2005 so that further action would be taken. It is this

33 [2006] eKLR Civil Suit No. 29 of 2005.

> court's position that the filed and delivered Award be returned to the Arbitrators-particularly one N.O Migiro, the author of the letter of 15 July 2005 to give the Award the date of that day or any earlier one. As for fees, each side is ordered to pay the required fee to the court, or if one side pays the other to refund or as the parties may agree on the day the Award is returned to court. By fulfilling the two conditions above the Award herein is recognized and will accordingly be enforced. (Emphasis provided)

It therefore follows from the said decision that if the two set conditions are not met, then the Award cannot be recognized or enforced and such an attempt would be futile.

In *Francis K.E Hinga v George Nyanja*[34] the claimant had filed an Application to Court seeking to enforce an arbitral Award and the Application was allowed. The respondent, however, filed an Application to set aside the ruling on the grounds that the claimant had filed a suit in the Magistrate's Court claiming the same amount as the subject matter of the arbitration. His Application for summary judgment was refused, whereupon he filed an appeal to the High Court. The respondent submitted that the Award ought not to be recognized or enforced since the two matters still subsisted. Justice Njagi held that to enforce the Award whilst the claim both in the Magistrate's Court and in the High Court subsisted was an abuse of the court. The claimant thereafter filed notices of withdrawal of both suits and then made an Application that its Application to enforce the Award be heard *de novo*. Justice Kasango, held *inter alia,* as follows:

> "I do not accept that the pending issue of costs can be said to mean that the suit is still subsisting. I therefore find that the reason given by Justice Njagi when he ordered the setting aside of previous orders of enforcement or arbitral Award and the stay was based on the pending suits. Those suits are no longer in existence. I therefore find no reason why this court should not allow the Claimant's notice of motion dated 6 March, 2006."

The gist of the above cases is to demonstrate that where there are factors or conditions precedent which have not been fulfilled, the Court may refuse to recognise or enforce the Award.

34 [2006] eKLR Misc. Cause No. 472 of 2004.

(vi) The subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya

Not all disputes are suitable for settlement by arbitration because of their public importance and need for formal judicial procedures.[35]

The Arbitration Act, however, does not expound on disputes which are not capable of settlement by arbitration. In Kenya, there are certain matters which are not arbitrable such as criminal proceedings or probate matters. A case in point is that of *Gichuki Ngoi v Bernard Kiragu Ngoi and 4 others*[36]. This was a succession cause, [No. 245 of 1999]; in which the applicant and the objectors filed a consent to refer the matter to arbitration by the District Officer of Mukurweini. The Award was then filed in court and the applicant sought judgment in terms of the Award. Lady Justice Okwengu held as follows:

> "I have considered this application and the court record. It appears that the parties purported to refer this matter to arbitration under Order XLV of the Civil Procedure Rules to succession proceedings. Indeed the court is now being asked to enter judgment in terms of the elders' Award under Order XLV of the Civil Procedure Rules. However the matter before the court was a succession cause governed under the provisions of the Law of Succession Act Cap 160. Rule 63 of the Probate and Administration Rules made pursuant to Section 97 of the Law of Succession Act provides for limited application of the Civil Procedure Rules to Succession proceedings…..this means that the reference to arbitration was improper and even the application before me is defective as it purports to invoke Order XLV, Rule 17 (1) a of the Civil Procedure Rules which is not applicable to these proceedings."[37]

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35 Born Gary, (2001) International Commercial Arbitration; Commentary and Materials, Transnational Publishers, New York, pg 17. See also Redfern & Hunter M, (1986), 'Law and Practice of International Commercial Arbitration, 3rd Ed., Sweet and Maxwell: London. Pg. 148

36 [2006] eKLR

37 See also the case of *Elizabeth Chepkurui v Esther Mosonik* [2006] eKLR (Kimaru, J) in which the Judge set aside an Award that had been made in a succession matter and in which he held *inter alia* as follows:

"The High Court is the only Court which is granted jurisdiction by the Law of Succession Act to deal with issues related to revocation and annulment of grants (see Section 48(1) of the Law of Succession Act). In this case therefore the Applicants were out of order when they sought to refer a dispute to be arbitrated by a tribunal which did not have jurisdiction in law to hear and determine such disputes."

7.6 Time Frame within which to Challenge an Award

The Act at section 35(3) provides that an Application for setting aside the arbitral Award may not be made after three months have lapsed from the date on which the party making that Application received the Award.[38] Although the language used in the Act would appear to be discretionary by dint of use of the word "may", this discretion is exercised judicially and the courts, as is evident from decided cases, will usually disallow applications brought after the said time limit.

In *APV Hall Equitorial Ltd v Mistri Jagva Pagbat,*[39] an Application to set aside an Award under section 35 was made after the expiry of the three months and the Advocate for the applicant sought to argue that the provisions of section 35(3) conferred a discretion on the court to admit an Application to set aside even after expiry of the time limit. The Judge ruled that the mere use of the word "may" in that section cannot be taken to mean that a party to arbitration proceedings can ignore that provision as to time limit with impunity. In his view, it is still a provision that must be complied with and non-compliance with it is clearly at the detriment of the party failing to comply. He then upheld the respondent's submissions that the Application was incompetent having been made after three months.

The applicant in *Seyani Brothers & Co. Ltd v Zakhem Construction (K) Ltd*[40] brought an Application seeking to set aside an Award on the grounds, *inter alia*, that it conflicted with public policy and further, that it was beyond the scope of the agreement by the parties. The Application was opposed on the grounds *inter alia* that the Application was made after the expiry of the statutory limit of three months. Lady Justice Okwengu held as follows:

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38 Contrast with the decision in *S.N Patel v Raha Housing Estate Limited*; Civil Appeal No. 103 of 1985 (Nyarangi, J.A Platt & Gachuhi Ag, JJA) in which it was held that the old Arbitration Rules of 1983 did not provide any time limit within which to bring an Application to set aside an arbitral Award.

39 Civil Application Number 39 of 1999, Milimani (unreported).

40 Miscellaneous Cause No. 1212 of 2006 (Milimani) Okwengu. J delivered on 29 March, 2007 (unreported).

> "As was submitted by the Advocate for the Respondent an Application for setting aside an arbitral Award under section 35(3) of the Arbitration Act cannot be made after three months from the date on which the party making this Application has received the arbitral Award. It is for that party to satisfy the court that this Application has been brought within the required time…I do concur with the Respondent that on this ground the Application for setting aside the Award under Section 35 was filed out of time without any leave and is therefore defective. For these reasons I find that this Application must fail and is accordingly dismissed with costs to the Respondent."

7.7 Provisions for Appeals against Domestic Awards

Once an arbitral Award has been made, the next step would be to have the respondent pay the Awarded sum. If the respondent fails to pay, the applicant will make an application to the High Court seeking recognition and enforcement of the Award. The respondent may also make an application seeking to set aside the arbitral Award based on the grounds specified under section 35 of the Arbitration Act. Where the High Court refuses to allow such an Application to set aside an arbitral Award, the respondent may, with the leave of the High Court or Court of Appeal, as the case might be, and with the consent of the parties, appeal against such a decision. The High Court has held that the language of the Arbitration Act requires mandatory consent of the parties before an appeal can be lodged.

Section 39(3) of the Arbitration Act provides that in a domestic arbitration, a party may appeal against the High Court's decision refusing to set aside an arbitral Award upon obtaining the consent of the parties and upon grant of leave to appeal by the High Court or the Court of appeal. Failure to adhere to this procedure has been held to be fatal.

In the case of *Githunguri Dairy Company Limited v Ernie Campell & Company Limited*[41], the applicant made an Application to the High Court seeking stay of execution of the arbitral Award pending appeal against the decision of the High Court refusing to set aside the Award. The respondent objected to the application on the grounds that the requirements under section 39(3) of the Arbitration Act had not

41 [2004] eKLR.

been complied with as the parties had not consented to the appeal and further, as the leave of the Court to appeal had not been granted. The Court held that the requirements under the Arbitration Act, for consent of the parties and leave of the Court to appeal, had to be complied with before an appeal could be lodged. The court further held that the use of the consonant 'and' in the Arbitration Act meant that both conditions must be satisfied before lodging of an appeal and since the parties had not consented to the appeal, the Application for stay of execution of the Award did not lie and the same was dismissed.[42]

The applicant in *Kenya Shell Limited v Kobil Petroleum Limited*[43] had sought leave of the Court of Appeal to appeal against the decision of the High Court. The respondent, however, argued that the Court of Appeal did not have the jurisdiction to grant leave to appeal. It was held that the provisions of section 39(3) severely limit the right of appeal from decisions of the High Court. The court further held that the Act provides for the grant leave to appeal in special circumstances. The Court of Appeal did not find that special circumstances were present in this case and accordingly declined to grant leave to appeal.

7.8 Remission of Award

Section 39(2) of the Arbitration Act deals with questions of law arising in domestic arbitrations. It provides that the High Court may, as appropriate, determine the question of law arising from a reference, confirm, vary, set aside the arbitral Award or remit the matter to the arbitral tribunal for re-consideration or, where another arbitral tribunal has been appointed, to that other arbitral tribunal for consideration.

42 The Arbitration (Amendment) Act, 2009 Act No. 11 of 2009 which is yet to come into force as the time of publication of this book has sought to cure this by amending the said Section by removing the word "may" and substituting it with the word "shall". It has also provided that the consent shall be obtained prior to the delivery of the arbitral Award. Reference to the Court of Appeal has also been amended by providing that the Court of Appeal, being of the opinion that a point of law of general importance is involved the determination of which will substantially affect the rights of one or more of the parties, grants leave to appeal, and on such appeal the Court of Appeal may exercise any of the powers which the High Court could have exercised.

43 Civil Appeal No. 57 of 2006 (30/2006 UR), Omolo, O'kubasu & Onyango Otieno JJA delivered on 13/10/2006.

The whole of or only part of an Award may be remitted. In the former case the Award so remitted is of no effect, in the latter only that portion of the Award which is remitted is avoided and the reminder is valid and enforceable.[44]

Where an Award is remitted for the reconsideration of the Arbitrator, his original powers are thereby revived and it is his duty to hear such further evidence as the parties may wish to present, unless the remission is merely for the purposes of correcting some formal defect or making some alteration in the Award which would not require the hearing of further evidence.[45]

The general principles for remitting Awards were laid out by *Cockburn C.J* in the old English case of *Hodgkinson v Fernie*[46] as follows:

> "I am, however, clearly of the opinion that it was not intended by that enactment to alter the general law as to the principles upon which the courts have been in the habit of acting in determining whether they would or would not set aside Awards; but merely to give the court power to remit the matter to the Arbitrator for reconsideration. In all cases, though, the submission should not contain that extremely useful clause giving them that power, where it turned out that there was a fatal defect in the Award, but of such a nature as not to render it expedient to set aside the Award, and thus render nugatory all the expense that had been incurred under the reference."

In the case of *Arnold Otto Meyer NV v Aune*[47] *Branson, J* held as follows:

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44 *Supra*. Note 19 at page 329.

45 In *Kiril Mischief Ltd v Constant Smith & Co.* [1950] 1 ALL ER 890 it was held that an Award should be remitted, as the error might have been merely a failure on the part of the Arbitrators to set out some step in their proceedings. Lord Devlin held as follows:–

"I next have to consider what course I should take-whether to set aside the Award or remit it to the Arbitrators. There are numerous authorities in which Awards have been sent back, and I have been referred to a number of them, but they are all cases in which the Award itself has been ambiguous and uncertain and where by sending it back, the ambiguity can be cured……..as a matter of general principle, if an Award contains defective reasoning and the defect may be due, not to an error of law, but an omission to set out some step in the Arbitrator's reasoning, it would not be improper to send it back to cure that defect of reasoning."

46 (1857) 3 C.B.N.S 189, 27 L.J.C.P 66, 140 E.R 712.

47 [1939] 3 ALL ER 168.

> "The first question for decision is whether the Award should be remitted to the board to take fresh evidence. Two circumstances must co-exist before this court will remit an Award for the admission of fresh evidence. First, the evidence must be such that the tribunal of fact could properly give it some weight, and, secondly, it must be evidence which the party desiring to adduce it could not, by exercise of any reasonable diligence, have procured before the first trial."

In determining whether or not to remit an Award, the court should be guided by, *inter alia*, considerations of whether justice can be done to the parties. The court should have in mind the fact that the parties have chosen this tribunal and the Arbitrators, and, if it is avoidable, they are not to be put to the expense of starting *de novo*.[48]

The Arbitration Act does not prescribe the time limit within which the second Award is to be made. This is in contrast, for example, with the English Arbitration Act, 1996 which provides for a period of three months, which can be extended or abridged by the Court.[49]

7.9 Security for the Award Pending Recognition and Enforcement of an Award

Section 37(2) of the Arbitration Act provides that where an Application for the setting aside or suspension of an arbitral Award has been made to a court referred to in subsection (1)(a)(vi), the High Court may also, on the Application of the party claiming recognition or enforcement of the arbitration Award, order the other party to provide appropriate security.

Justice Ringera, (as he then was), in *Nova Chemicals Limited v Alcon International Limited*[50] held as follows regarding section 37(2):

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48 It should be noted, however, that the power to remit an Award for reconsideration is a discretional power. *See Odlum v Vancouver City* (1915) 85 L.J.P.C, 113 L.T 795 in which Lord Dunedin held as follows:

"There remains the question of whether it (Award) should be set aside or remitted for reconsideration. This seems to their Lordships a question of discretion for the Judges in the whole circumstances of the case and unless that discretion has been obviously misused they do not feel inclined to interfere with it."

49 Section 71 of the English Arbitration Act, 1996.

50 Civil Case No. 1124 of 2002 (Ringera, J) Delivered on 18 February, 2003 (unreported).

> "in my understanding, the above provisions of the Act enable the High Court of Kenya to make an order for security against a party who has applied to the Court of the state in which or under the law of the state in which an Award was made to set aside or suspend such an Award. Thus if an arbitral Award was made in Kenya or was given out of Kenya but under the law of Kenya and the party against whom the Award was made has moved a Kenyan Court to set aside or suspend the said Award, the High Court of Kenya may, on an Application by the beneficiary of the Award order, that person to furnish security."

In *Samuel Kamau Muhindi v Blueshield Insurance Co. Limited*[51], an Application for security for the Award was granted after the applicant demonstrated successfully that there was real danger that the respondent was unable to pay its just debts and had been threatened with winding up proceedings.[52]

7.10 Recognition and Enforcement of Arbitral Awards against a Foreign State

Where a foreign State has agreed to refer a commercial dispute to arbitration it would seem that the foreign State cannot plead immunity either to arbitration proceedings or to any auxiliary, avoidance or recognition proceedings in connection therewith.[53]

In arbitration, it is noteworthy that a State is a competent party to an arbitration. An Award against a State for the payment of money or costs may be enforced by the procedure for the satisfaction of orders against the State for example, as stipulated under section 25 of the Government Proceedings Act[54]. A foreign State is a competent

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51 High Court Misc. Cause Number 166 of 2009 (Kimaru, J).

52 It is noteworthy, however, that the respondent appealed against this decision in NAI 219 of 2009 and the Court of Appeal stayed the said decision. It is interesting to note that although both the applicant and the respondent were agreed that the Court could, under the provisions of section 37(2) order security as prayed, the Court of Appeal, *suo motu,* raised the issue as to whether security could be ordered in respect of Awards arising out of a domestic arbitration (as was the case here), or whether the jurisdiction conferred by the section related only to international arbitrations.

53 See Article 22 of the Vienna Convention on Diplomatic Relations which has force of law in Kenya by dint of Privileges and Immunities Act Chapter 179 Laws of Kenya which provides that "*the premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.*"

54 Chapter 40 of the Laws of Kenya.

party to an arbitration agreement with a person who is not a state, and although such a state is as a general rule, immune from the jurisdiction of the courts of a different state, immunity does not apply to proceedings relating to an arbitration to which the state has agreed in writing to submit disputes.[55] The fact that a state is a party to an arbitration agreement does not prevent the court from exercising all the powers which would be available to it in the usual case of an arbitration between private persons.

The exception, however, is in the processes of execution and attachment which is not available against the property of a state for the enforcement of an arbitration Award, unless that property is in use or intended for use for commercial purposes.[56] It is one thing to pronounce a judgment or an Award against a foreign sovereign State and thus bring moral pressure upon it, but quite another to use force against the property of that State.

Generally speaking, it is universally recognized that greater caution must be exercised in this field than in relation to the assumption of jurisdiction. Internationally, however, there seems to be a trend in favour of limiting the scope for pleading immunity in attachment and enforcement proceedings. For example, the U.S. Foreign Sovereign Immunities Act of 1976 provides that a waiver of immunity from enforcement is irrevocable and makes available for execution any property of the foreign State used by the foreign State in a commercial activity in the United States. The 1982 International Law Association Draft Convention on State Immunity contains similar provisions.

Under the Washington Convention, an International Convention on Settlement of Investment Disputes (ICSID) Award must be treated by a contracting party as if it were a final judgment of a court of that state. However, this provision for the automatic recognition does not mean that it will be treated as overriding any immunity from execution that exists in the contracting state.

It is noteworthy that section 41 of the Arbitration Act provides that the Act shall bind the Government. This means that the Kenya

55 See for example, the general rule laid down under section 1 of the English State Immunity Act, 1978 and the exception relating to arbitration in section 9 thereof.

56 *Ibid* section 13(2) and 4.

Government is bound by the Act and any proceedings brought against the Government under the Act shall be enforceable provided that all necessary requirements are met.

7.11 Provisions for Correction of Errors, Interpretation of Arbitral Awards and the Making of Additional Award

Section 34 of the Arbitration Act makes for provision for the correction and interpretation or arbitral Awards and the making of any additional Awards. A party may within 30 days of receipt of the Award request the Arbitrator to correct in the Award, any computation errors, any clerical or typographical errors or any other errors of similar nature. The correction should not involve the substance of the Award but relate to only those peripheral issues falling within the category specified in the Act.[57]

The Act further provides that if the parties agree, they may request the Arbitrator to give an interpretation of a specific point or part of the arbitral Award. Any such corrections or interpretations shall thereafter form part of the Award and be subject to the provisions relating to recognition and enforcement of Awards.

It should be noted, however, that this power is rigidly limited to mere clerical mistakes or errors arising from an accidental slip or omission.[58]

7.12 International Law Governing Recognition and Enforcement of Arbitral Awards

The New York Convention is the most important International Treaty relating to international commercial arbitration[59]. The New York Convention was preceded by the Geneva Protocol of 1923 and the Geneva Convention of 1927.

Under the **Geneva Protocol** each contracting state agreed to ensure that the execution of arbitral Awards would be done

57 Compare with the common law position in which the Arbitrator could not alter the Award in any way whatsoever, he could not even correct an obvious clerical mistake. See the case of *Re Stringer and Riley Bros* [1901] 1 KB 105.

58 *Supra* Note 19 at page 325.

59 *Supra* Note 3, page 67.

under its own laws of Awards made in its own territory pursuant to an arbitration agreement covered by the Protocol. The Geneva Convention sought to widen the scope of the Geneva Protocol by providing for the recognition and enforcement of Protocol Awards within the territory of contracting states and not merely in the state where the Award was made.

The **Geneva Treaties** encountered several difficulties including limitations to their field of application.[60] A party seeking enforcement had to prove the conditions necessary for enforcement leading to the problem of *"double-exequatur"*. To show that an Award had become final in its country of origin, a party was obliged to seek a declaration in the courts of the country where the arbitration took place in order to show that the Award was enforceable in that country before the Award could be enforced in the courts of the place of enforcement.

In 1953, the International Chamber of Commerce (ICC) headquarters in Paris, France, promoted a new Treaty to govern international commercial arbitrations. These proposals were later taken up by the United Nations Economic and Social Council (ECOSOC) and resulted in the New York Convention, which was adopted in 1958.[61]

The Convention is an improvement on the Geneva Convention of 1927. It provides for a much more simplified and effective method of obtaining recognition and enforcement of foreign arbitral Awards. It gives wider effect to the validity of arbitration agreements than the Geneva Convention.

In its opening statement, the Convention provides that:

> "This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal.

60 Geneva Protocol article 1. It applied only to arbitration agreements made "between parties subject respectively to the jurisdiction of different contracting states and could be further limited by states availing themselves of the commercial reservation".

61 As in the apt words of Justice Stephen Schwebel, a former President of the International Court of Justice, The New York Convention "Works." The Convention was designed to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral Awards are enforced in the signatory nations.

> It shall also apply to arbitral awards not considered domestic awards in the state where their recognition and enforcement are sought."[62]

The Convention has, however, been curtailed by qualifications placed by Article 1.3 of the Convention which allows states to make two reservations. The first of these reservations is the reciprocity reservation and the other is the commercial reservation.[63]

(i) Reciprocity Reservation

Article 1.3 of the New York Convention provides that:

> "When signing, ratifying or acceding to this Convention, or notifying extension under Article X hereof, any state may, on the basis of reciprocity, declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State."

This reservation has the effect of narrowing the scope of application of the New York Convention if states take advantage of it. Thus where states take advantage of the reservation, the scope of the Convention may be limited to "convention awards".[64]

The limiting effect of this reservation is, however, not as alarming if one takes into account the fact that the number of states making up the international network for the recognition and enforcement of arbitral awards established by the New York Convention grows every day. The growth in numbers ensures that the reciprocity reservation becomes less significant. The Model Law, in articles 35 and 36 requires the recognition and enforcement of an arbitral Award irrespective of the country in which it was made.

(ii) Reservation on Commercial Relationships

Article 1.3 of the New York Convention contains a further reservation entitling a contracting state to declare that it will only apply the Convention to differences arising out of legal relationships,

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62 New York Convention, Art. 1.1.

63 The commercial reservation is also found in the Geneva Protocol of 1923.

64 Awards made in a state which is party to the New York Convention.

whether contractual or not, "which are considered as commercial under the national law of the state making such declaration".[65]

The Reservation has the effect of narrowing down the scope of the Convention and the fact that each contracting state may determine for itself what relationships it considers to be "commercial" has created problems in the Convention's application.[66] States have different definitions of the term "commercial" and this does not assist in seeking to obtain a uniform application and interpretation of the Convention.

The commercial reservation has even led to difficulties of interpretation within the same state, as is shown by two cases that arose in India.[67] In the first,[68] 'the High Court of Bombay was asked to stay legal proceedings that had been commenced despite the existence of an arbitration agreement. Under the relevant Indian legislation enacting the New York Convention, the court was obliged to grant such a stay, so long as the arbitration agreement came within the Convention. In ratifying the New York Convention, the State of India had entered the commercial reservation. The court held that, whist the agreement under which the dispute arose was commercial in nature, it could not be considered as commercial "under the law in force in India". The Judge said:

> "In my opinion, in order to invoke the provisions of [the Convention], it is not enough to establish that an agreement is commercial. It must also be established that it is commercial by virtue of a provision of law or an operative legal principle in force in India." '[69]

The High Court of Gujarat, however, disapproved of this decision in the second case[70]. In this case, the plaintiffs moved for a stay of legal

65 A similar commercial reservation can be found in the Geneva Protocol of 1923.

66 According to Redfern *supra* note page 3, of the 115 states which were parties to the Convention by the end of 1998, 38 had taken up the commercial reservation. Yugoslavia restricted the application of the Convention to "economic" disputes and Norway stated that it would not apply the convention in any dispute if the subject-matter was immovable property in Norway or rights in such property.

67 *Supra* note 1 P457.

68 *Indian Organic Chemical Limited v Subsidiary I (U.S) Subsidiary 2 (U.S.) and Chemtex Fibres Inc.* (Parent Company) (U.S.) (1979) IV Yearbook Commercial Arbitration 271.

69 *Supra* Note 1 P 457.

70 *Union of India and Ors v Lief. Hoegh & Co. (Norway) and Ors*, (1984) IX Yearbook Commercial Arbitration 405 at 407.

proceedings that, again, had been commenced despite the existence of an arbitration agreement. The court granted this motion… the Judge said that the term "commerce":

> "…is a word of the largest import and it takes in its sweep all the business and trade transactions in any of their forms, including the transportation, purchase, sale and exchange of commodities between the citizens of different countries." "[71]

The two cases clearly illustrate the point that each national state may decide for itself the kind of relationships it considers to be "commercial" for the purposes of commercial reservation.

(iii) Recognition and enforcement under the New York Convention

Recognition under the New York Convention requires states bound by the Convention to undertake to respect the binding effect of Awards to which the Convention applies. With regard to enforcement, a state that is party to the Convention is required to enforce Awards to which the Convention applies and to undertake not to impose substantially onerous conditions or higher fees or charges for such enforcement than are imposed in the enforcement of domestic Awards.[72]

(iv) Formalities

The formalities for obtaining recognition and enforcement under the Convention are simple. A party seeking for recognition and enforcement is required to produce to the relevant court[73]:

- The duly authenticated original Award or a duly certified copy of it; and
- The original agreement referred to in Article II or a duly certified copy of it.[74]

Certified translations of the Award and arbitration agreement will be required if they are not in the official language of the country in

71 *Ibid* P 458.

72 New York Convention, Art. III.

73 Relevant Court refers to the Court of the state where recognition and enforcement is sought.

74 *Ibid*, Art. IV.

which recognition and enforcement is sought[75]. Once the court has the necessary documents, it will grant recognition and enforcement unless any of the grounds for refusal as set out in the Convention are present.

(v) Grounds for Refusal of Recognition and Enforcement

Under the Convention, an arbitral Award may be refused if the opposing party proves that:

- The parties to the arbitration agreement were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the law of the country where the Award was made; or[76]
- The party against whom the Award is invoked was not given proper notice of the appointment of the Arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
- The Award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the Award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
- The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, failing such agreement, was not in accordance with the law of the country where arbitration took place; or
- The Award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the Award was made.

Recognition and enforcement may also be refused if the competent authority of the country in which enforcement is sought finds that:

75 *Ibid*, Art. IV. 2.

76 Incapacity; invalid arbitration agreement.

- The subject-matter of the difference is not capable of settlement by arbitration under the law of that country; or
- The recognition or enforcement of the Award would be contrary to the public policy of that country.

These grounds for refusal are of great importance because they represent an internationally acceptable standard. First, because of the international usage and widespread acceptance of the convention throughout the world. Secondly, because the Model Law adopts precisely the same grounds for refusal of recognition and enforcement of an arbitral Award, irrespective of the country in which the Award was made.[77] Thirdly, six of the grounds for refusal are also set out in the Model Law as grounds for setting aside of an arbitral Award by the national court of the place of arbitration.[78]

Lastly, the first four of these grounds also appear in the European Convention of 1961.[79]

The grounds for refusal set out in the New York Convention have found judicial expression and judicial interpretation in various national courts. The underlying theme in judicial interpretation is narrow construction of these grounds to favour enforcement.

In *Parsons & Whittemore Overseas Co. v Societe Generale de L'Industrie Du Papier (Rakta) and Bank of America*[80] the court made the following findings with respect to the New York Convention:

- The Convention's basic thrust was to liberalize procedures for enforcing foreign arbitral Awards.
- Unlike the **Geneva Convention of 1927** which placed the burden of proof on the party seeking enforcement and did not circumscribe the range of available defenses to those enumerated in the Convention, the New York Convention shifted the burden of proof to the party defending against enforcement and limited his defenses to seven as set forth in Article V.
- The New York Convention has a pro-enforcement bias.
- The defence of public policy under Article V(2)(b) is to be narrowly construed as an expansive construction of

77 Model Law Art. 36.

78 Model Law Art 34.

79 Art XI (1).

80 United States Courts of Appeals, 74-1642 and 74-1676, University of Nairobi LLM 2008/2009 Materials on International Commercial Arbitration.

> this defence would vitiate the Convention's basic effort to remove pre-existing obstacles to enforcement. Enforcement of foreign arbitral Awards may be denied on this ground only where enforcement would violate the forum state's most basic notions of morality and justice.

The court further held that the defence of public policy should be construed narrowly. The US Court of Appeals for the Second Circuit held that:

> "Public policy defence of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards should be construed narrowly…. Enforcement of foreign arbitral Awards may be denied on the basis of the public policy defence of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards only where enforcement would violate the forum state's most basic notions of morality and justice."

In *SSP v Arab Republic of Egypt*[81] the French Court[82] set aside the Award of the arbitral tribunal appointed under the International Commercial Court. On the other hand, the District Court of Amsterdam[83] in the Netherlands granted SSP leave to enforce the Award of the arbitral tribunal. The proceedings in the French Court were instituted by Egypt, and the proceedings in Netherlands were instituted in Netherlands on the same date.

The President of the Netherlands Court in granting leave for the enforcement held that when a party complies with the formal requirements of the New York Convention[84] then he is *prima facie* entitled to leave for enforcement unless the other party can prove one of the grounds for refusal of enforcement listed "limitatively" in Article V(1) of the Convention. The President also found that the enforcement court may also refuse enforcement on its own motion for violation of public policy. He further stated:

> "it results from both the legislative history of the Convention and the texts of Articles V(1)(e) and VI that the mere initiation of an action

81 (1983) 22 ILM 752, cited in Okekeifere, A., "Enhancing the Implementation of Economic Projects in the Third World Through Arbitration", The International Journal of Arbitration, Mediation and Dispute Management, Chartered Institute of Arbitrators & Sweet & Maxwell, number 3, August 2001, Vol 67:243.

82 Decision made in 1983 March.

83 *SPP v Egypt*, 1984 July.

84 See above for the two simple formalities.

> for setting aside does not have as a consequence that the arbitral Award must be considered as not binding. An arbitral Award is not binding if it is open to appeal on the merits before a judge or an appeal arbitral tribunal. If this were otherwise, the words "has been set aside or suspended" in Article V(1)(e) to which reference is made in Article VI would have no meaning. The drafters of the Convention chose the word "binding" in order to abolish the requirement of the double-exequatur which was the result of the word "final" in the Geneva Convention of 1927."

The purpose of the New York Convention was to enhance the recognition and enforcement of foreign arbitral Awards by subjecting the recognition and enforcement to a minimum number of conditions[85].

7.13 Conclusion

The late Sir Michael Kerr, speaking nearly twenty years ago when he was Lord Justice of Appeal said:

> "The necessary powers to give binding effect to the legal consequences of arbitration, which is the whole raison d'etre of the arbitral process, is invariably vested in the national courts by legislation. So far as known to this author, this is the position in all legal systems throughout the world. *In the ultimate analysis the effectiveness of the private process must therefore rest upon the binding, and even coercive powers which each State entrusts to its courts. It is the exercise of these powers which determines whether the acts of arbitral tribunals are to be recognized and enforced or are rendered nugatory and ineffective.* This is why any discussion about the law of arbitration can only be concerned with the role of the courts in relation to arbitration. There is no law of arbitration."[86] *(Emphasis provided)*

Lord Mustill used similar language in *Channel Tunnel Group v Balfour Beatty Ltd*[87] when he referred to-

> "The partnership which exists under English law between the arbitral process and the courts."[88]

85 *Supra* Note 4.

86 Arbitration and the Courts: The UNCITRAL Model Law (1985) 34 ICLQ.

87 [1993] AC 334.

88 [1993] AC 334, 364.

The role that Courts play in recognition and enforcement of arbitral Awards thus cannot be overstated. The court's main role in the arbitration process is to recognize and enforce the Award. All other powers have been limited under section 10 of the Arbitration Act.

The present legislation and practices in Kenya regarding recognition and enforcement of domestic and foreign arbitral Awards are consistent with the New York Convention and the UNCITRAL Model Law. Nonetheless, improvements can always be made and the amendments introduced in the Arbitration (Amendment) Act, 2009 are a welcome development. The law should never be static and it is therefore hoped that further amendments will continue to be made so as to enhance and promote arbitration generally, and the recognition and enforcement thereof, in particular. For example, the ambiguity referred to by the Court of Appeal in section 37(2) of the Act[89] should be eliminated by stating in no uncertain terms that security for the Award may be ordered in respect of Awards made in both domestic and international arbitrations. Section 39(2) of the Act could also be improved so as to require that where an order for remission, of the Award is made, the second Award must be made within a specified time limit.[90]

89 *Supra,* Note 52

90 Compare with the provisions of the English Act, 1996 section 71 thereof which provides as follows:

Section 71 - Challenge or appeal: effect of order of court:

(1) The following provisions have effect where the court makes an order under section 67, 68 or 69 with respect to an award.

(2) Where the award is varied, the variation has effect as part of the tribunal's award.

(3) Where the award is remitted to the tribunal, in whole or in part, for reconsideration, the tribunal shall make a fresh award in respect of the matters remitted within three months of the date of the order for remission or such longer or shorter period as the court may direct.

(4) Where the award is set aside or declared to be of no effect, in whole or in part, the court may also order that any provision that an award is a condition precedent to the bringing of legal proceedings in respect of a matter to which the arbitration agreement applies, is of no effect as regards the subject matter of the award or, as the case may be, the relevant part of the award.

Chapter 8

Costs and Interest

By J. B Havelock

8.0 Introduction

The legal principles in awarding costs in arbitration have consistently mirrored those in litigation. It is fair for arbitration practitioners to remind themselves that arbitration is not litigation in the private sector; it is not intended, or not always intended, to follow Court rules. Arbitrators are not bound to follow the Civil Procedure Rules. Arbitration is intended to be a commercially orientated person's wish to bring his or her dispute before like-minded commercial persons for a decision. There is a clear identity, an association between parties and the third-party decision maker. Arbitration gives the dispute back to the parties; our courts in Kenya tend not to. The arbitrator is a professional who can manage the process with a sense of commercial reality which industry prefers. The common ground is for the arbitral tribunal to make a binding decision by applying legal principles, discovering the facts and applying the law to those facts. In litigation or arbitration it is rare for a party to "win" on everything. That being so, what does an arbitral tribunal do when ordering or deciding who will pay the costs?

Clearly, one of the most difficult and important functions which an arbitrator has to perform relates to the making of awards of costs and interest. Arbitration is not cheap. There are fees to be paid to the Arbitrator, to the Advocates and possibly to expert witnesses. Expert reports may have been commissioned and perhaps meeting rooms and facilities hired. Sometimes it becomes necessary to engage the services of a stenographer to take down the evidence of witnesses by way of transcript at the request of the parties or on the Arbitrator's own initiative. Many activities have taken place from the commencement of the arbitral proceedings to its conclusion involving costs to parties.

The necessary question in the minds of those involved is: who is to pay these costs, how much should they be and from when shall they be payable? Who has the power to tax costs, particularly those of the arbitrator? Will the costs be paid with interest and if so at what rate and from when? As can be seen, deciding on costs is a delicate but necessary issue in arbitral proceedings not only in Kenya but worldwide.

8.1 Power to Award Costs by Arbitrators

Powers to award costs by Arbitrators in Kenya is vested by sub-section 32(6) of the Arbitration Act, 1995 which provides:

> "32(6) unless otherwise agreed by the parties:
>
> (a) The costs and expenses of an Arbitration, being the legal and other expenses of the parties the fees and expenses of the Arbitral tribunal and other expenses related to the Arbitration shall be as determined and appointed by the Arbitral tribunal in its award under this section, or any additional award under section 34(5).
>
> (b) In absence of the award, or additional award determining and apportioning the costs and expenses of the Arbitrator each party shall be responsible for the legal and other expenses of that party and expenses of the Arbitrator and any other expenses relating to the Arbitration."

However, subsection 32(6) was deleted in its entirety by the Arbitration (Amendment) Act, 2009 which was signed into law by the President on the last day of the year 2010. A new subsection 32(6) was substituted making provision for an arbitral tribunal to make a partial award. The question of costs was the subject of a new clause 32B. Sub-clauses 32B (1) and (2) merely repeated the contents of the old sub-section 32(6) as above.

The Arbitration (Amendment) Act, 2009 did introduce five new subsections as follows:

> "32B(3) the arbitral tribunal may withhold the delivery of an award to the parties until full payment of the fees and expenses of the arbitral tribunal is received.

> 32B(4) if the arbitral tribunal has, under subsection (3), withheld the delivery of an award, a party to the arbitration may, upon notice to the other party and to the arbitral tribunal, and after payment into court of the fees and expenses demanded by the arbitral tribunal, apply to the High Court for an order directing the manner in which the fees and expenses properly payable to the arbitral tribunal shall be determined.
>
> 32B(5) the fees and expenses found to be properly payable pursuant to such an order shall be paid out of the moneys paid into court and the balance of those moneys, if any, shall be refunded to the applicant.
>
> 32B(6) the decision of the High Court on an application under subsection (4) shall be final and not subject to appeal.
>
> 32B(7) the provisions of subsections (3) to (6) have effect notwithstanding any agreement to the contrary made between the parties."

Quite what these four subsections have added to the Arbitration Act, 1995 so far as usefulness to the practicing arbitrator is unclear. The statute now gives sanction to the arbitrator to withhold the delivery of the award to the parties until he is paid under subsection 32B(3), but at what price? It appears that it is now up to the High Court to (arbitrarily) decide, with no criteria stipulated, just what are the arbitrator's entitlements to his fees and expenses. The subsection clearly has the implication that it is for the arbitrator to appear in the High Court to "defend" what he has assessed are his own fees and expenses. Hopefully the Chief Justice, to whom powers are given under the Arbitration Act, 1995, will now produce Rules of Court to allow for the determination of the extent of what arbitrator's fees and expenses are "properly payable". What it means, of course, is that arbitrators will now be inclined to inflate their fees and expenses with the full knowledge that the High Court under subsection 32B(5) has the power to "tax" the same downwards, certainly not upwards!

There is no other mention of costs in the Arbitration Act, 1995 or in the Arbitration (Amendment) Act, 2009. Thus outside this minimal mention of costs in the applicable statute, arbitration practitioners in Kenya have looked and will have to look to English and Commonwealth precedent for assistance in interpretation of decisions on costs.

It will be noted that subsection 32B(1) of the Arbitration (Amendment) Act 2009 opens with the words "Except as otherwise agreed...". Thus the first task of an arbitrator is to satisfy himself that the Arbitration Agreement does not contain some express condition relating to costs, which he is bound to follow. In nearly all cases, the Arbitration Agreement will be silent about costs and thus subsection 32B(1) will apply. It should be noted that the arbitrator must deal with the costs of the reference in his Award unless there is a contrary intention/provision in the Arbitration Agreement. In any case, the arbitrator should always give the parties an opportunity to address him about costs at the end of the hearing or after issuing his (interim) Award on the substantive issues.

8.2 Types of Costs in Arbitration

Essentially, the need for an award of costs arises because in the course of prosecuting or defending arbitration proceedings, the parties will or may incur costs of three different types:

(a) liability for the arbitrator's fees and expenses;
(b) liability for the fees and expenses of any arbitral institution involved; and
(c) legal and other costs incurred directly by the parties.

A party who is successful in prosecuting or resisting a claim will be looking for an order against the unsuccessful party for reimbursement of its costs incurred. Such an order can be sought in relation to all three of the categories of costs as set out above. An order of this kind is typically sought after the arbitrator has disposed of the main issues of liability and quantum raised by the claim. However, such an order may be sought at an earlier stage in the arbitral proceedings, for example, at the stage of a partial or interim award.

The arbitrator normally has a wide discretion as to making awards of costs and this discretion enables the arbitrator to have regard to the particular circumstances of the case and to make an order which seems fair in all the circumstances. However, there are, inevitably, principles which must be observed. The Civil Procedure Rules (made by the Chief Justice under the provisions of the Civil Procedure Act), which deal with the making of orders for costs in

actions before the Courts, do not apply to arbitration and thus have no impact on costs orders to be made by an arbitrator. Nor is there any longer a requirement that an arbitrator must act "judicially" in the sense that he must follow the same principles as would be adopted by a Court in making an order for costs.

Although not specifically spelt out in subsection 32(6) of the Act, unless the parties otherwise agree, the general rule or principle is that "costs should follow the event". However, if the parties do not otherwise agree and the arbitral tribunal does not otherwise determine, the arbitral tribunal must determine the recoverable costs on the basis set out in subsection 32(6)(b) of the Act. It is important that when making an award of costs, an arbitrator should have regard to the relevant principles. Should he misdirect himself, a party may apply to set aside his costs award on a point of law under the provisions of section 39 of the Arbitration Act, 1995. The three types of costs should now be explained in detail as follows:

(a) The Arbitrator's Fees and Expenses, sometimes called the "Costs of the Award"

These are costs payable to the arbitrator as his remuneration. They include:

(i) Arbitrator's fees
(ii) Costs of hiring the meeting rooms i.e. room to conduct the hearing
(iii) Costs of providing a transcript of the proceedings for the use of the Arbitral Tribunal and parties
(iv) Fees payable to any technical or legal advisors employed/ consulted by the arbitrator (usually with the consent of the parties)
(v) Disbursements and out of the pocket expenses, including VAT
(vi) Travel, subsistence allowance, postage, telephones etc.

It is very important that the arbitrator does agree with the parties the method of charging his fees and disbursements when he accepts the appointment or during the first preliminary meeting. This will avoid future disagreement with the parties at the end of the

arbitration. However, it is unlikely that parties will agree on a lump sum because of the uncertainty of the period that the matter may take. Nevertheless, it is important that the arbitrator's rate of charges be agreed upon and perhaps also, to reserve the right to review the fees and charges should the circumstances arise. This gives the arbitrator the opportunity to keep his fees in line with inflation in extended arbitral proceedings. It is also advisable for an arbitrator to take a deposit up-front from all parties so that the extent of his fees and disbursements are covered at all times throughout the arbitration proceedings. Such deposits can be "topped up" from time to time. Arbitrators frequently refuse to proceed further with arbitration unless the deposits are paid or topped-up. The following may be used as headings under which charges should be considered:

1. An hourly rate for use when the arbitrator is sitting at the preliminary meetings of the hearing.
2. A rate for correspondence if not dealt with under the hourly rate.
3. An hourly rate for working on matters relating to the arbitration outside the hearing e.g. award writing etc, covering normal working hours.
4. A rate whilst sitting at any other time other than a working day or out of working hours or engaged in matters related to the arbitration.
5. Possibly a different rate for travelling etc. where applicable.

Sometimes disputes are settled during or before the hearing commences. Indeed, it is the duty of the arbitrator to encourage the parties to settle their disputes and if they do, they save costs. If settlement is reached, the arbitrator who has set up time which is vacated by virtue of settlement should be remunerated for the time he is unable to fill with other work. Some arbitrators charge fees on settlement in accordance with the period before the commencement of the hearing as follows:

1. 3 months before hearing 30%
2. 2 months before hearing 60%
3. 1 month before hearing 90%
4. During the hearing 95% of the time allocated by him for the hearing.

However, such settlement fees are rare and need to be carefully set out and agreed with the parties at the preliminary meeting. The arbitrator will normally calculate his charges on agreed rates and incorporate them in the Award. He then writes to the parties informing them that the Award is ready for collection on the payment of his fees. He has a lien on the Award, meaning that he holds it as his security for his fees and may only release it to the parties on payment. If disagreement arises on the amount of the arbitration fees, parties may apply to the High Court under subsection 32B(4) *supra*, which in most cases, will require the parties to deposit the fee amount claimed by the arbitrator with the Court and direct the costs for taxation. After taxation, the arbitrator will lift his lien and release the Award.

(b) The Fees and Expenses of any Arbitral Institution Involved

Invariably as a result of an arbitration clause in a contract and where parties are unable to agree upon the appointment of a mutually acceptable arbitrator, an arbitral institution will be called upon to appoint an arbitrator or an arbitral tribunal. Such institutions charge an appointment fee (as a one-off), normally paid by the claimant. Other arbitral institutions charge management or supervision fees payable during the progress of an arbitration, such being quite common in international arbitrations. These management fees can and do mount up during the course of arbitration and can end up being quite substantial. Some arbitral institutions jealously guard their appointed arbitrators, offering (sometimes expensive) assistance throughout the period of the arbitration. Such fees and charges are generally dealt with in the same way as the arbitrator deals with his fees and expenses but such tend to be resented by losing parties who feel that, at the very least, they should be shared by the parties.

(c) Legal and other Costs Incurred Directly by the Parties

These are defined as costs which the parties have incurred during the arbitral proceedings. Sometimes they are called the recoverable costs of the arbitration. They include among other matters, costs

of hiring the services of an advocate (if this is the case), travelling expenses incurred by the parties and their witnesses, witnesses' fees (including expert witness fees and costs), subsistence allowances and costs of parties' attendance etc. Most of the time each of the parties has incurred these costs and the Arbitrator has to use his discretion and decide who pays whose costs. Where the arbitrator determines the recoverable costs of the arbitration, it is incumbent upon him to specify the "basis" upon which he has acted. That basis may be one which has been agreed by the parties. If there has been no such agreement, then the arbitrator may determine the recoverable costs "on such basis as he thinks fit", provided that it is specified.

However, if the basis is neither agreed by the parties nor specified by the arbitral tribunal then recoverable costs are ordinarily determined on the basis that: "there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubt as to whether costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party". This principle being specifically defined in section 63(5) of the English Arbitration Act (1996). The two points of note are (i) that the key to recovery is whether costs are "reasonably incurred" and (ii) that the burden of proving reasonableness is on the receiving party. Traditionally "reasonableness" has been determined on an item by item basis. If any particular item was reasonably incurred and the amount charged for the item was in line with the level of costs generally charged at the time and in the circumstances when the professional charges were rendered, such was normally accepted as being reasonable and therefore recoverable. In Kenya, the trend has been to assess particularly professional fees, on the scales applicable to that profession's laid down scale of fees, for example the Advocates' Remuneration Order.

The Civil Procedure Rules in England and Wales were overhauled in 1998 with new Rules being introduced. One of the requirements of the Courts was that they should not only enquire as to whether the costs were reasonable but also whether such were "proportionate". The Arbitration Act, 1995 and the current Civil Procedure Rules in Kenya do not spell out this concept of "proportionality". However, many Kenyan arbitrators take into account whether the receiving party's costs were "proportionate"

to the amount claimed and/or awarded. For example, suppose a claimant in arbitration advances a claim for KSh. 100,000.00 by way of damages and is successful in recovering that amount but his costs amount to KSh. 1,000,000.00, that sum is wholly disproportionate to the sum claimed and is therefore unrecoverable. The concept of "proportionality" requires the arbitral tribunal to look at the amount of the award and the costs incurred globally. One factor is, of course, whether the costs are proportionate to the amount claimed but other factors will include the conduct of the parties, the importance of the matter to the parties, the matter's complexity and the difficulty of the issues raised, time spent and the skill, effort, specialized knowledge and responsibility involved.

Arbitrators in Kenya are best advised to adopt the above basis for determining costs and notify the parties in advance that he is going to:

1. only allow costs which are reasonably incurred and are proportionate to the matter in issue, and
2. resolve any doubt as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying (of the costs) party.

An arbitrator is entitled to adopt this type of formula for deciding upon costs provided, of course, that the parties have not agreed otherwise. In setting out his award on costs, an arbitrator would be well advised to specify therein that he has acted on the above basis (see "Reasons" below).

8.3 Allocating Costs of an Arbitration between the Parties

On the whole parties to arbitration are free to reach agreement on the principles to be followed when an arbitrator is asked to make an order in respect of costs and allocation of the same as between the parties. In this regard, there are a couple of points to note as regards Arbitration Agreements viz:

(a) where an arbitration agreement is made before the dispute arose and there appears a clause to the effect that either or both parties shall in any event pay the whole or part of their own costs when disputes do arise, such an agreement is void and is not binding on the arbitrator.

(b) where an arbitration agreement is made after the dispute has arisen, to the effect that parties shall pay their own costs wholly or partly, such an agreement is valid and enforceable and the Arbitrator is bound to follow it.

Further, section 56 of the Advocates Act, which empowers a Court before which any proceeding is being heard or is pending, to charge property recovered or preserved in the proceeding with the payment of advocates' costs, applies in respect of an arbitration.

Apart from this, it is essential that arbitrators should examine the contract as between the arbitral parties to ascertain whether there is any provision relating to costs. Where the contract incorporates rules of procedure e.g. the Arbitration Rules of the Chartered Institute of Arbitrators (Kenya Branch), UNCITRAL Rules, LCIA Rules etc., those rules should be perused and taken cognizance of. If such rules lay down principles for the allocation of costs as between parties, then those principles will or may displace or (more likely) supplement the principles laid down in section 32(6) of the Act (*supra*).

In England, the general rule is based on the long standing common law principle that in litigation it is the unsuccessful party that pays the costs of the successful party. This rule is also expressed as "costs follow the event". Such has now been embedded in the English Arbitration Act, 1996 section 61(2). The English position is therefore, that if the claimant is successful in his claim, he should get his costs of his claim. Likewise, if the respondent is successful in his counter-claim, he too should get his costs for his counter-claim. The arbitrator cannot set-off one set of costs against the other without the consent of the parties. However, in so doing, the arbitrator should decide whether the counter-claim is a "sword" or a "shield". If a "sword" the costs of the counter-claim must be stated separately. If a "shield" i.e. merely an extension of the defence against the claim, the costs can be set off against the claimant's costs. However, it must be emphasized that this is the position in England under the English Arbitration Act, 1996, it is not the identical position in Kenya as section 32(6) of the 1995 Act does not spell out the principle that costs should follow the event, it leaves it entirely to the arbitral tribunal to determine and apportion arbitral costs.

Consequently, circumstances do arise whereby the arbitrator can and may depart from the general rule i.e. instead of awarding costs to the successful party, he awards them to the unsuccessful one. What is important is that an arbitrator ought not to disregard general principles unless there are good grounds for so doing. As an arbitrator has a wide discretion in awarding costs he is entitled to take regard of all the circumstances including:

(a) the conduct of the parties
(b) whether a party has succeeded on the part of its case even if such has not been wholly successful
(c) whether a successful party has been unsuccessful on issues raised in the arbitration on which substantial amounts of time were spent
(d) any offer to settle the case that has been drawn to the arbitrator's attention.

This departure from the general rule is exercised by the arbitrator where the successful party may have behaved unreasonably during the arbitration proceedings, so that he has contributed largely to the expenses incurred by the unsuccessful party. If, for example, a party wrongfully refuses to supply particulars or to make discovery when requested to do so, with the result that his opponent has no alternative other than to apply to the arbitrator for an order compelling the party to do what he ought to do, it may be right to order such party to pay the costs of such an application even if, in the end, he is adjudged the successful party. Such costs awarded to be paid by the successful party to the unsuccessful one are also known as wasted costs. Where an arbitrator decides in any particular case that it is not appropriate to award the successful party its costs or more likely that it is appropriate to deprive the successful party of a proportion of its costs, then the arbitrator must be prepared to defend his decision. In such circumstances and to avoid a challenge to his award on costs, an arbitrator should clearly set out in his award just why he found it inappropriate not to award costs on the principle that costs should follow the event.

Who then is the "successful" party? If a claimant recovers a monetary award then he is normally regarded as successful since he was the one who had to bring the arbitration to recover his loss.

The "event" is the recovery of money. It is no ground for depriving a successful party of his costs even though the sum recovered is less than that claimed unless such recovery is so small as to be minimal, nominal or derisory. A lot depends upon the particular circumstances as, for example, a claimant who has succeeded in obtaining a monetary award can be shown to have exaggerated his claim, particularly if such exaggeration was not in good faith and may have led to a large increase in the costs of the arbitration. Similarly, the position may again be very different if the respondent has previously to pay the sum eventually awarded. Although, in the absence of such an offer by the respondent, the outcome of the arbitration can be said to have justified the claimant in having to bring it, the arbitrator could well consider it appropriate that any extra time or cost involved should be reflected in the eventual costs order.

Again, where there is a counterclaim brought by the respondent and both parties recover monies in the award, further questions of allocation of costs can arise. If the claim and counterclaim are closely related emanating from the same transaction or series of transactions as between the parties, the arbitrator should normally set-off the two awards and award the costs to whichever party is shown to be entitled to the net recovery after deduction of the other monetary award. However, in cases where there is no link between the awards on the facts, it may be appropriate for the arbitrator to award the costs of the claim to the claimant and the costs of the counterclaim to the respondent.

Of course, there are many situations as regards arbitrations, where a party has only partially succeeded in his claim. In many instances, even though the party has only achieved partial success, it would not be just or fair to penalize such party for having made claims or raised issues which have ultimately been unsuccessful. The arbitrator has to make up his mind that these claims or issues were reasonably raised by the party concerned and whether they have not led to substantial extra expenditure of money or time in the course of the arbitral proceedings. If reasonably raised, then costs should be awarded to follow the event in the normal way. However, where there has been a considerable amount of time or money spent on issues and claims upon which the party has not been successful, then

the position is different. Here it may be apposite for an arbitrator to award the general costs of the arbitration to the successful party but to also award to the unsuccessful party the costs of the claims and issues upon which that party has succeeded in defending.

Costs orders of this kind can be difficult to administer perhaps because it is often complicated to separate the costs so attributable to particular claims and issues but also because such an order often leads to the arbitral tribunal having to quantify the costs of both the successful and unsuccessful parties. In these situations, it is usually more convenient and practical to make allowance for claims and issues upon which the successful party has failed by awarding to him only a proportion of his costs. This requires the arbitrator to make an attempt to ensure that the proportion he so awards reflects the extent to which the successful party has succeeded overall on the more important issues to which time and money were expended. If an arbitrator should adopt this approach, then he must bear in mind in his assessment of what proportion should be awarded to the successful party that the unsuccessful party will not be making any recovery with regard to the costs relating to those issues upon which he was successful in defending. Naturally enough, it is easier for an arbitrator to make an award on costs after the main issues of liability and quantum have been first determined as it is then possible for him to stand back and review the conduct of the arbitral proceedings, determine the proportion of the more important issues on which either one or other of the parties has succeeded and arrive at an appropriate costs order reflecting this.

Quite often during the course of arbitral proceedings, particular points are raised as preliminary issues and the arbitrator may be asked to make an interim award of costs at the same time as making his interim award on the particular preliminary issue. If faced with this kind of application, the following types of orders can be made at the interlocutory stage of the arbitral proceedings:

(a) Costs of an application be costs in the reference i.e. the costs will follow the event.
(b) Costs of an application shall be for claimant or the respondent in any event i.e. claimant/respondent gets the costs whether he wins the arbitration or not.

(c) Costs of an application shall be claimant's/respondent's in the arbitration i.e., the claimant/respondent gets the costs if he wins the Arbitration but is not liable to pay if he loses the Arbitration.
(d) Each party to bear its own costs of the application.

The choice as between these various orders is dependent upon a number of factors. On occasion, the arbitrator may consider it appropriate to decide upon the preliminary issue as a distinct case within a case and order costs appropriately. However on other occasions, the arbitrator may consider that the matters raised by the preliminary issue are relevant to the whole proceedings and consider it appropriate to order costs of that preliminary issue to the winner on the grounds that such reflects the whole outcome of the arbitral proceedings. There are also circumstances where it is clear that the party who ultimately succeeds in the arbitration should also recover the costs of the preliminary issue so that "costs in the arbitration" is the appropriate order.

8.4 Offers to Settle Disputes by Parties

As already mentioned, parties should be encouraged to settle their disputes. Commercial and legal entities recognize that parties should be encouraged to settle instead of fighting out their disputes to the end. For this reason, the law affords privilege from disclosure to the other party regarding matters which aim to promote settlement of disputes. The making of a settlement offer during the course of arbitration proceedings may have an important bearing upon an award of costs. If during the course of arbitral proceedings, there has been no settlement offer, it may then prove hard for the respondent to dispute that it was necessary for the claimant to incur the costs in order to obtain the monetary award granted. In contrast, where the respondent has made an offer to settle and the claimant eventually recovers less than the offer made for settlement of the dispute between the parties, it will have been a waste of time and money to pursue the arbitration to its end after the time the settlement offer was made and could have been accepted by the claimant. Thus it would not be appropriate to allocate costs on the principle that costs

should follow the event in relation to the period following upon the offer having been made.

Offers of settlement in arbitral proceedings may be made in a variety of different situations, where the respondent wishes to obtain some sort of protection against having to pay all the costs of the arbitration. The respondent can do this by making a settlement offer. There are three kinds of such offers namely, "open" "sealed" and "without prejudice".

8.5 Open Offers

An open offer is one made to the other party and to the arbitrator to which either party can refer to at any stage of the proceedings. Since it is "open" it may influence the arbitrator both in his decision on the matter in dispute and his order as to the costs.

8.6 Sealed Offers

In arbitration proceedings, these are equivalent to making a payment into Court in settlement of a claim in civil litigation. In this type of offer of settlement, neither the fact nor the amount should be revealed to the arbitrator until he has decided the substantive issues in the dispute in his award, other than the costs. The existence of the sealed offer has to be brought to his attention before he has reached the decision on costs, otherwise it should remain sealed. It would be wholly improper for the arbitrator to look at it before he has reached a final decision on the matters in dispute otherwise the contents thereof may influence his decision.

Parties in some cases are reluctant to hand over sealed offers for fear that the arbitrator may construe that offer as some admission on their part, even if he does not know the contents. To avoid such a situation, some arbitrators invite both parties to hand over at the end of the hearing, a sealed offer to state whether there is one or not.

The effect of the sealed offer is to assist the arbitrator to decide upon who pays the costs. If the claimant refuses to accept the sealed offer and proceeds with the arbitration and at the end, he is awarded less or equal the amount which he had rejected, then continuance of the arbitration after the date of the offer has been a waste of

time and money. *Prima facie* therefore, the claimant should recover his costs up to the date of the offer and should be ordered to cover the respondent's costs after that date. If on the other hand he has achieved more by going on, then the respondent pays the costs throughout.

8.7 Offers "without prejudice" Except as to Costs

This type of offer is also known as a Calderbank Offer[1]. The offer is marked "Without Prejudice Save as to Costs". Both the offer and the refusal are placed in a sealed envelope and handed to the arbitrator, after he has made his substantive award and before he makes his award as to costs. This means that at the hearing, the arbitrator must be requested to issue his substantive award on all matters except costs by way of an "interim award". If the offer is equal to or exceeds the award, the party making the offer then requests the arbitrator to hear him on the question of costs and will normally request that his costs be awarded against the other party from the date of the offer. The arbitrator will normally accept this plea as having the same effect as a payment into Court in litigation and will take this into consideration while exercising his judicial discretion in awarding costs.

Generally, the "Open Offer" or "Sealed Offer" procedure detailed to the arbitrator before the award are not recommended as they tend to prejudice the arbitrator in knowing that the offer is on the table even if not its details. In a Calderbank Offer, all the arbitrator knows is that he might be addressed on costs after he has made the substantive award.

8.8 The Award as to Costs

An arbitrator's award as to costs will not be enforceable unless (i) it is contained in an award, and (ii) it's for a quantified amount. The order as to costs may be contained in the same award that deals with the substantive issues between the parties or in one or more separate awards as to costs. An award of costs is subject to the requirement of section 32(3) of the Arbitration Act, 1995 that it must be reasoned unless the parties have agreed that no reasons are to be given or

1 [1973] 1 QB 609.

unless it is an agreed award under section 31. In a simple case it may be sufficient for an arbitrator, when awarding costs, to refer to the principle that costs follow the event but where the arbitrator departs from that principle, he should explain his reasons for doing so in his award. Where the effect of the award is to quantify the amount of recoverable costs, the arbitrator should do more than just set out the aggregate amount – his award should state the sums awarded in respect of each of the main heads of recoverable costs.

Where an arbitrator is making an interim award dealing with a preliminary issue and is awarding costs of that preliminary issue to the party in whose favour he has decided the issue, he may be asked to make an order (i) to determine the amount of those costs, and (ii) directing immediate payment thereof. There is no reason not to make such an order if the justice of the reference so requires. However, it is sometimes more convenient to defer such questions of quantification of costs to the end of the arbitral proceedings. Where the arbitrator must exercise caution is where he is asked to make an order in favour of a party at a preliminary hearing on purely procedural matters. There is no precedent for making interim awards in respect of orders for payment of costs of purely procedural hearings as an order for payment must be contained in an award to be enforceable.

8.9 Capping Recoverable Costs

At the time when the English Arbitration Act was passed in 1996, there were already deep concerns being expressed by users of the arbitration process, that arbitration was becoming expensive and arbitration costs should somehow be controlled. It was for this reason that section 65 of the English Act was introduced whereby the arbitral tribunal might direct that the recoverable costs of the arbitration or of any part of the arbitral proceedings be limited to a specific amount. The object of the section was to put a ceiling on costs so that, while a party might spend as much as it liked on an arbitration, it would not be able to recover more than the ceiling limit from the other party. It was aimed at discouraging those parties with deep pockets from intimidating their opponents into giving up arbitral proceedings for fear of incurring a liability for costs beyond

their means. However, should the parties agree that there should be no cost cap then an English arbitrator has no power to impose one. Similarly if the parties agree a limitation on recoverable costs, an English arbitrator has no power to interfere.

Unfortunately, there is no similar position in relation to cost capping under the Kenya statute. Kenyan arbitrators are, however, very much aware that arbitral processes are getting more and more expensive so that a similar provision on cost capping is being considered by way of amendment to the Arbitration Act, 1995. At least one of the bodies often chosen for appointment of arbitrators specifies guidelines to its members on recommended fees to be charged for arbitral proceedings on a time expended basis. Such action helps to keep down, at least, the arbitrator's costs. However, in the light of the power given to arbitrators under section 32(6) of the 1995 Act, to fix the basis upon which costs are to be recovered, there are other ways of tackling the problems anticipated by the English statute than by setting a ceiling for recoverable costs.

8.10 Security for Costs

The arbitrator's authority to make an order in respect of security for costs derives from the new section 18 of the Arbitration Act, 1995 introduced by section 15 of the Arbitration (Amendment) Act, 2009 which now provides in the tersest form:

> "S 18(1) Unless the parties otherwise agree, the arbitral tribunal may, on the application of a party –
>
> (a) order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute, with or without an ancillary order requiring the provision of appropriate security in connection with such measure; or
>
> (b) order any party to provide security in respect of any claim or any amount in dispute; or
>
> (c) order a claimant to provide security for costs".

It should be noted that subsection 18(1)(c) does not state security for the respondent's costs but "security for costs" from which one must

necessarily conclude that an order may be made for security to be provided by the claimant for the costs of the arbitral tribunal as well. There are formal constraints where parties reside outside Kenya on the exercise of the power to order security for costs. The arbitrator must exercise the power judicially and with proper discretion.

8.11 The Arbitrator must satisfy himself that the Application is a Proper One

There are two limbs to any application for a security for costs order. Firstly, the applicant (respondent) must satisfy the tribunal that it has the power to make the order sought and secondly, the tribunal must consider whether it will, or the manner in which it is to exercise its discretion. It by no means follows that a tribunal which satisfies itself that it has the jurisdiction will exercise its discretion by making the order sought or, indeed, any other form of order *(Mavani v Ralli Brothers*[2]*)*. Technically, there is no question as to whether the arbitrator has jurisdiction to entertain an application for security for costs provided the application is made in respect of a claimant or a party in the position of a claimant, the arbitrator may deal with it. In most cases the application for security for costs will be made on the ground that the claimant will or may be unable to pay the applicant's (respondent's) costs in the event that it is the respondent that is successful in the arbitration.

Nevertheless, it is submitted that an arbitrator should first satisfy himself that the application is a proper one. It must be demonstrated on a balance of probabilities by credible evidence, that the claimant will be unable to pay the costs of a successful respondent at the time they would become payable. However, it is normally appropriate that there is some other factor associated with the claimant's status which makes the application proper. Such factors may include:

(i) where the claimant is a nominal claimant - here the real claimant shelters behind the limited means of a nominal intermediary; or
(ii) where the claimant is a limited company, so that the shareholders of the company stand to gain personally from

2 [1973] 1 AER 555.

a successful claim, but may set up the limited liability as a defence to the payment of the bill of costs in the event that the company cannot pay it.

Thus there are several preliminary conditions which must be met by a respondent applicant:

It must provide credible testimony, that is to say, the sworn statement of a person or persons having knowledge (directly or by research) of the claimant's financial affairs, relevant and persuasive documents including the annual accounts and statutory (Annual) returns of the claimant, company searches, documentary admission of impecuniosities and similar evidence.

(i) The testimony must give rise to a reason to believe that the claimant will be unable to pay the respondent's costs if the latter is successful in its defence. It is the testimony which must give rise to the reason to believe and not some reasonable fear or speculation on the part of the respondent.
(ii) The applicant must demonstrate that the claimant will be unable to pay. It is insufficient for the applicant to show only that the claimant will probably or might, be unable to pay or that something could arise in the future which could impede the claimant's ability to pay the respondent's costs *(see Cheffick v JDM Associates and others*[3]*)*.

If the applicant is unsuccessful in persuading the arbitral tribunal that the conditions necessary to establish jurisdiction have been satisfied, the tribunal will publish its decision not to make the order sought of it. However, if the applicant has been successful in persuading the tribunal that it has the jurisdiction to make the order sought, then it will proceed to consider the matter of exercising its discretion.

8.12 The Arbitrator's Discretion

Where the arbitrator is satisfied that the application is a proper one, he may exercise his discretion to consider whether in all the circumstances, an order for security for costs is appropriate. The arbitrator is not constrained in the factors which he may take into account when exercising his discretion.

3 [1988] 43 BLR 52.

However, before considering the factors that may be taken into account by an arbitrator in exercising his discretion, cognizance needs be had of the law pertaining to security applications. Perhaps the best known of the older cases in relation to security for costs applications is that of *Sir Lindsay Parkinson & Co. Ltd v Triplan Ltd*[4] as applied in *Gulf Engineering (East Africa Limited) v Amrik Singh Kalsi*[5]. In both these cases the application for security for costs was made under the relevant provisions of the English Companies Act (1948) and under section 401 of the Kenya Companies Act[6] which was almost identical to the English provision. That section as mentioned in the *Gulf Engineering* case: "gave the court a wide discretion whether or not to order security for costs in any case and, the court being satisfied that the plaintiff company's claim was *bona fide* and had a reasonable prospect of success, it would not order the company to provide security for costs even though it would be unlikely to be able to afford the first defendant's costs should he be successful". Further, and as Lord Denning observed in the Lindsay Parkinson case: "...If there is a reason to believe that the company cannot pay the costs, then security MAY be ordered, but not MUST be ordered. The court has a discretion which it will exercise considering all the circumstances of the particular case."

What then does the arbitrator need to know before exercising his discretion? This can be summed up as a statement of general guidance by listing the following questions (not exhaustive) again from the judgment of *Lord Denning* in the *Lindsay Parkinson* case*:*

(i) Is the claim *bona fide* and not a sham?
(ii) Does the claim have a reasonably good prospect of success?
(iii) Has there been any admission of liability?
(iv) Has there been a payment in the claim?
(v) Is there any element of oppression in the application?
(vi) Is the application made at an oppressively late stage in the proceedings?

4 [1973] 2 WLR 632 (CA).
5 [1976] KLR 227.
6 Cap 486, Laws of Kenya.

In summary, however, as emphasized by *Lord Denning:* "The court has a discretion which it will exercise considering all the circumstances of the particular case."

The *Lindsay Parkinson* decision was also followed in the Uganda High Court case of *Shah and others v Manurama and others*[7]. In that case, *Ogoola J* went somewhat further than the *Lindsay Parkinson* finding and held that (i) there is no inflexible rule or practice to the effect that a plaintiff resident abroad will, by that reason alone, be ordered to give security for costs, (ii) In East Africa, there can no longer be an automatic and inflexible presumption that the courts do order payment for security for costs with regard to a plaintiff who is a resident of the East African Community, and (iii) the insolvency or poverty of a plaintiff is no ground for requiring him to give security for costs, even where such a plaintiff is an undischarged bankrupt. One of the influential factors in *Ogoola J's* decision was his following of the judgment in *Porzelack KG v Porzelack United Kingdom Limited*[8] where he found that: in exercising its discretion whether or not to order security for costs, the court is entitled to treat ease of enforcement as a sufficient and relevant ground for denying the order, provided other relevant factors are not ignored." Further, *Ogoola J* found that the order applied for should not become a weapon of oppression against the plaintiff's action and that his case has a high likelihood of success.

Without doubt the most concise statement of the law in that regard is to be found in the English Court of Appeal case of *Keary Developments Ltd v Tarmac Construction Ltd and anor.* (1995)[9]. In that case, which is of highly persuasive value in the Kenyan courts, *Lord Justice Bingham* pointed out that the system of justice which prevails in England (and, no doubt, in Kenya) which differs fundamentally from that of civil jurisdictions, is founded on the premise that the interests of justice are ordinarily best served if successful litigants recoup the costs of their litigation and that the unsuccessful litigants pay them. The question then arises as to what should be done if it appears that a defendant if successful in his defence would not be

7 [2003] 1 EA 294.

8 [1987] 1 AER 1074.

9 [1995] 3 AER 534 CA.

able to enforce an order for costs in its favour against the plaintiff. The answer, though not a comprehensive one, is the power given to the courts to make an order for security of the whole or part of an applicant party's estimated costs and to stay further proceedings until security is provided.

Gibson LJ in *Keary* stated the generally applicable principles as being:

(a) The court has a complete discretion whether to order security, and accordingly will act in the light of all the relevant circumstances.

(b) The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not, without more, a sufficient reason for not ordering security, as Parliament must have envisaged that an order might be made in respect of a plaintiff company that would find difficulty in providing security.

(c) The court must carry out a balancing exercise. It must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security against the injustice to the defendant if no security is ordered and at trial the plaintiff's claim fails, the defendant finding himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim. The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as stifling a genuine claim by an indigent company against a more prosperous company, particularly where the failure to meet that claim might in itself have been a cause of the plaintiff's impecuniosities. But it will also be concerned not to be so reluctant to order security that it becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company.

(d) In considering all the circumstances, the court will have regard to the plaintiff company's prospects of success. But it should not go into the merits in detail unless it can be clearly demonstrated that there is a high probability of success or failure.

(e) The court shall keep in mind that an amount ordered

for security can be any amount up to the sum claimed as security, provided that it is not a purely nominal amount.

(f) Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, it must be satisfied that, in all the circumstances, it is probable that the claim would be stifled.

(g) The court may take into account any undue lateness in making the application. It is, in any event, proper to take into account any costs which had been incurred prior to the application.

The *Keary Developments'* finding was applied in Kenya in the case of *Ignazio Messina and CPSA v Stallion Insurance Company Limited*[10] where *Githinji JA* expressed concern that the law seems to treat a natural person and a limited company differently in relation to provision of security for costs against them as plaintiffs in an action. He found that: "With a few exceptions, the law does not require an individual plaintiff to give security for costs on the grounds of insolvency or poverty. The policy of the law seems to be that the poverty of an individual plaintiff should not deny him access to justice to pursue a genuine claim in a court of law. In contract, in the case of a limited company, an artificial creature, section 401 of the Companies Act requires them, without exception as plaintiffs in a suit to give security for costs in the discretion of the court." However, *Githinji JA* held that the *Keary Developments'* case lays down the modern and pragmatic principles (though not exhaustive) which should guide the court (and the arbitrator) in exercising its discretion whether to order a plaintiff limited company to provide security for costs of a defendant in a suit. Indeed, in *Mama Ngina Kenyatta and another v Mahira Housing Company*[11], the Kenya Court of Appeal found that: "The fact that a company is insolvent and unable to pay costs or is even in liquidation is not decisive. The court has still a complete discretion whether or not to order security for costs." The Court confirmed the application and decisions of the *Lindsay Parkinson, Gulf Engineering* and *Keary Developments (supra)* cases as the current guiding principles as regards to security for costs applications.

10 [2005] LLR 4273 (CAK).

11 Civil Application No. NAI 256 of 2003 (unreported).

There are times where a defendant may bring a security for costs application before a court or an arbitrator on more than one occasion. It appears from the *Ignazio Messina* case that even though a defendant may have brought an application for security for costs that may have been dismissed, this does not preclude him from bringing a further application as the discretion of the court (and an arbitrator) is exercised at any time according to the circumstances pertaining at the time of making the application. The court's discretion can be exercised again if circumstances materially change (see *Siri Ram Kaura v Morgan*[12]).

After he has considered the general principles of an application for security for costs, a good arbitrator should then consider:

(a) What is likely to be the total amount of the applicant's recoverable costs; and
(b) Is it probable on the evidence that the claimant will be unable to pay that amount at the time when the award will become enforceable?

Any dispute as to the ability of the claimant to pay the respondent/applicant's costs at the time when the award will become enforceable will most likely, give rise to an examination of the claimant's accounts. Arbitrators are at liberty to draw inferences from such accounts as well as from any failure by the claimant to publish or produce its accounts. If the evidence shows at the first stage, that the claimant will be unable or unlikely to be able to satisfy and pay the applicant's recoverable costs, the arbitrator needs to go on to consider the second stage which may involve the consideration of broader factors relevant to the exercise of his discretion.

In some cases, the dispute may centre on whether a successful respondent/applicant would be able to enforce an award of costs as against any assets owned by the claimant. If the claimant can show tangible assets in Kenya, then the question does not arise. However, if the claimant is normally resident in a country which has acceded to the New York Convention and has assets in that jurisdiction, then it should be possible for a successful respondent to enforce the award (of costs) against those assets. Where there is no adequate

12 [1961] EA 462.

legal regime in the country be it a signatory to the Convention or otherwise, this will be a powerful factor in favour of granting security for costs. Traditionally, difficulties of enforcement were the justification for making orders for security for costs against claimants resident outside Kenya.

There are some instances, where a claimant will assert positively, as a reason why security should not be ordered by the arbitrator, that it has no assets or insufficient assets to meet the respondent/applicant's costs and that consequent to this, if it were ordered to provide security, such would deprive it of the opportunity to pursue a meritorious claim. In these cases, it is difficult to find an equitable solution. It is to be borne in mind where the claimant is a limited liability company that its backers, shareholders or directors may be able to put up security for the respondent's costs. In all such cases, a balance needs be struck between any injustices which an order for security may cause to the claimant against the injustice which may be caused to the respondent/applicant by refusing an order for security in circumstances where the claimant will be unable to pay its costs at the end of the day. An order for security should not be allowed to become an instrument of oppression. Arbitrators should be vigilant and guard against the use of an application for security as a tactical device for intimidation of a weaker party or as an instrument of delay in relation to the time when the arbitral tribunal has to address the main dispute.

When faced with an application for security for costs, it is normally unproductive for an arbitrator to go into and examine the merits of the claimant's claim. It is likely that in the course of making or opposing an application for security, one or other of the parties will advance arguments based on the merits of the claim or the defence. In such circumstances, it is as well that the arbitrator should go some way towards considering an assessment of the cases of the parties even if only to look at the pleadings. It may become evident that the chances of a respondent/applicant obtaining an order for costs in due course may be extremely thin. An arbitrator will ultimately have to decide the dispute on its merits and consequently should be wary of going into such merits in more detail than is absolutely necessary. He should certainly decline to do so where the

application for security involves examination likely to be detailed or prolonged. Then, when making his decision as to whether to grant an order for security, he should express such decision with considerable caution so as to avoid giving any impression that he has formed a view on the merits without giving the party affected a reasonable opportunity of putting his case.

Should an arbitrator decide to order security for costs, he should ensure that his order makes provision for the following:

(a) the amount of the security to be provided
(b) the form in which it is to be provided
(c) the stage (or the whole) of the arbitral proceedings which it is to cover
(d) the time within which the security so ordered is to be provided.

Consideration of what amounts to the appropriate amount of the security to be provided has regularly exercised the minds of judges and arbitrators alike. In *Unisoft Group*[13], *Sir Donald Nicholls VC* identified a paradox that is apparent in many cases where a wealthy defendant seeks an order for security against an impecunious plaintiff: "The respondents cannot have the matter both ways in this case. They cannot credibly contend that SLH's financial state is such that SLH cannot meet a costs order but, at the same time, contend that it can provide security in the like amount". He went on to observe: "…..the jurisdiction conferred by the statute does not require the court either to award security in a sum equal to the anticipated costs or to make no award at all. It is not a case of either all or nothing. The discretion is wide enough to permit the court to award a sum in between these two extremes if justice and fairness so require."

The amount to be ordered is a matter for the arbitrator's discretion. Sometimes it is reasonable to order security for those costs anticipated up to a particular stage of the proceedings with liberty to come back for more later. On other occasions, it is reasonable to make an order to secure at once the whole of the costs of the arbitration up to the end of the hearing. The top limit for security should normally be an amount estimated as equivalent

13 (No. 2) [1993] BCLC 532.

to the opposing party's costs of the arbitration taxed on the standard basis as between party and party. So what are the guidelines as to the quantum of security to be put up where a tribunal considers that an order for security is pertinent to the matter before it?

In *Bose v Somaia and 3 others*[14], Ibrahim J reviewed various decisions but more particularly the guiding principle as per *Halsbury's Laws of England*[15]*:*

"……It is not the practice to order security for costs on a full party and party, still less on an indemnity basis. In the case of a plaintiff resident out of the jurisdiction the more conventional approach is to fix the sum at about two thirds of the estimated party and party costs up to the stage of the proceedings for which security is ordered, but there is no hard and fast rule." From this it would appear that the practice in England has been that the courts do not usually order security for costs on a full party and party basis or that the quantum should be fixed on an indemnity basis. The stage that the proceedings have reached is also to be taken into consideration.

In Ibrahim J's view in adopting the conclusions of *Lindley MR* in *Sloyan and Sons (Builders) Ltd and anor. v Brothers of Christian Instruction*[16] detailed that:

> "It is obvious that, as to a question of quantum, you cannot lay down any accurate principle or rule. The only principle which, as it appears to me, can be said to apply to a case of this kind is this, that you must have regard, in deciding upon the amount of security to be ordered, to the probable costs which the defendant will be put to so far as this can be ascertained" and "the principle to be applied is that the security ought not to be illusory or oppressive – not too little not too much."

Ibrahim J's own view was that:

> "It would appear that there cannot be any fixed rules or conditions to be taken into account when the court is fixing quantum for security for costs. Each case ought to be considered on the merits of its own special circumstances. However, in my case, I am inclined to state

14 HCCC 164 of 2004 (unreported).

15 4th Edition, page 232.

16 [1974] 3 AER 715.

that such amount ought to be reasonable and sufficient taking all the circumstances of each case under consideration,"

The learned Judge then considered the dictum of *Ringera J* (as he then was) in *First American Bank of Kenya Limited v Gulab Shah and 2 others*[17] who stated:... "In my opinion, the full instruction fees to defend a suit is earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees". The learned Judge was of the same view and found that as the court had an idea of the level of instruction fees in that suit, it would take this into account. He continued that the instruction fees that his court would accept for purposes of the application for security for costs is that based on the party-party bill of costs and not one under the advocate-client bill of costs. This then, it would appear, should be the guideline which Kenyan arbitrators should take into account when fixing the quantum of security to be put up.

8.13 Effect of Non-compliance with an Order for Security for Costs

If an order for security is not complied with the sanction available to the applicant is to apply for a peremptory order within section 7 or 18(2) of the Arbitration Act, 1995. Such peremptory order must prescribe a time for compliance. If the claimant fails to comply with the provisions of the peremptory order, the respondent/applicant may apply to the arbitral tribunal for an award dismissing the claim.

8.14 Challenging the Order

There is no mechanism under the Arbitration Act, 1995 or the amending statute for a party to challenge an order for security for costs. Where a claimant against whom such an order is made is unable to raise the security and an order is made dismissing the claim, the claimant may attempt to challenge the arbitrator's order on the grounds that there has been a serious irregularity. It is thought that the application will succeed only where the order for security was clearly wrong.

17 HCCC No. 225 of 2005 (unreported).

8.15 Taxation of the Costs of the Reference

Only with the consent of the parties and at their request, may the arbitrator tax and settle the parties' costs, otherwise taxation is referred to a taxing officer normally a Deputy Registrar of the High Court. It is, however, advisable that parties do give their consent that the arbitrator should be given the discretion to tax their costs. After all, he has heard the dispute, knows the details of it and is likely to be fairer than the Court who only comes to know of the matter at the taxation stage. Taxation by the arbitrator may also prove to be quicker than in the High Court. While taxing and settling costs, the arbitrator is not limited to the scales mentioned above as the only bases of an assessment and he is free to make his own assessment of what costs are reasonable and fair to award, provided always that he acts judicially. The expression "tax and settle costs" means that the Arbitrator must apply his own independent mind and judgment as to the fees demanded and the work done to justify the charges. He must be satisfied that the charges are fair and reasonable bearing in mind the interest of the party who will have to pay them, as well as the legitimate interests of the Arbitration generally. The Rule is: *"The receiving party is entitled to be paid a reasonable amount in respect of all costs reasonably incurred"*. If there are any doubts as to whether the costs were reasonably incurred or were reasonable in amount, they shall be resolved:

(a) According to standard basis, in favour of the paying party.
(b) According to indemnity basis, in favour of the receiving party.

The Arbitrator shall in his award on taxation, state which basis he used in the taxation of the award costs.

8.16 Cases on Arbitrators' Awards on Costs

As we have seen, costs are of great practical importance in arbitration. Almost every award contains an award as to costs and more and more these days, the costs are greater than the substantive sums in the dispute. Judicial guidance on costs, however, is rare. Under section 39 of the Arbitration Act, 1995 an award as to costs can only be brought before the High Court by way of an appeal on a question of law and only in a domestic arbitration at that. In Kenya, since

the passing of the Act in 1995 there have been no significant cases appealing an arbitrator's wide discretion on the question of costs. In England too, there have been a limited number of cases which have come before the Courts on appeal in relation to arbitrator's costs.

8.17 The Arbitrator's Power to Award Interest

Before the repeal of the Arbitration Act, Chapter 49 of the Laws of Kenya, by the Arbitration Act (1995) the powers of the arbitrator to award interest were clearly spelt out by section 21(2). It reads as follows:

> "Section 21(2). Unless the award otherwise directs, a sum directed to be paid by an award carries interest from the date of the award at the same rate as a judgment debt".

The current Arbitration Act, 1995 did not have a similar section dealing with interest. It is not clear whether the omission was an oversight or intentional. Whatever, the Arbitration (Amendment) Act, 2009 has now put matters right by inserting into the 1995 Act a new section 32C which reads:

> "Section 32C. Unless otherwise agreed by the parties, to the extent that the rules of law applicable to the substance of the dispute permit, an arbitral award may include provision for the payment of simple or compound interest calculated from such date, at such rate and with such rests, as may be specified in the award".

The determination of what interest to award to a successful party in arbitration is an important but not always an easy task for the arbitrator. Quite often, advocates acting for arbitral parties pay little regard to interest other than to include a prayer for such in the pleadings. Such serves to increase the onus on the arbitrator in making his decision on what, if any interest to award. As a guideline, the following broad principles should be borne in mind:

(a) Elementary perhaps but it is essential for an arbitrator before making an award of a monetary sum to one or other of the parties, to take into account what interest to include in the award.
(b) Awards of interest should cover two distinct periods: (a) the period up to the issuance of the award, and (b) the period

between the issuance of the award and the payment date.

(c) Before making his award on interest, the arbitrator should look to see the basis upon which any claim for interest is being made. To this end, he must take into account the submissions of the parties. It is for the claimant to assert the basis upon which interest is claimed.

(d) Following upon (c) above, it would be wrong for an arbitrator to award interest on a basis that the claimant has not asserted and to which the respondent has not had an opportunity of commenting upon or objecting to. Further, it would be wrong for an arbitrator to award interest at more than has been claimed by the claimant or less than has been admitted to by the respondent.

(e) As generally happens, where no claim at all has been made for interest, a prudent arbitrator would be justified in drawing such an oversight to the attention of the claimant. If thereafter a claim for interest is made by the claimant, the arbitrator must afford the opportunity to the respondent to respond thereto prior to making any award on interest.

(f) As detailed, it is common for a claimant to claim or plead just "interest" in the statement of claim, without specifying the basis upon which the claimant seeks interest. In certain cases, it would be prudent for the arbitrator to seek clarification of this head of claim and to give an opportunity for the respondent to respond thereto. In other cases, the arbitrator may well be justified in assuming that the claimant is asking him to exercise his discretion under section 32C *supra*.

(g) In other disputes, the arbitrator may well overcome any problems as to an award of interest by asking the parties at an early stage of the arbitration, to agree the rate of interest to be awarded to the successful party or by asking the parties in their opening submissions to comment upon the same.

(h) In making an award of interest, the arbitrator should give consideration to:

  (i) the period(s) for which interest should run;
  (ii) the rate of interest awarded;
  (iii) whether such interest is simple or compound. If the latter, the arbitrator should detail the basis upon which it is compounded.

(iv) whatever award on interest the arbitrator makes will depend on whether interest is recoverable as of right or the award is discretionary depending on each particular case.

8.18 Interest Recoverable as of Right

In Kenya, there are two headings under which interest may be claimed as of right: (i) under an express term of the contract or trade usage, and (ii) as damages for late payment.

(a) In cases where an express clause as to interest is included in the contract, it will usually stipulate the period for which interest may be claimed and whether interest is simple or compound. Unless the clause specifically details discretion, the arbitrator will be bound to award interest on the basis set out in the contract clause. In some cases interest may be claimable based on an implied trade usage. See *Director General of Fair Trading v First National Bank Plc*[18] where a borrower through a bank loan or mortgage will usually be required to pay compound interest up to the date of judgment. An express contractual provision may provide for compound and/or variable interest on unpaid amounts not only up to the date of judgment but also for the period post judgment or award until payment in full is made.

(b) As Kenya law on contract is based on the English law, it is rare for a claimant to be able to claim interest as damages for the late payment of a debt. In *London, Chatham and Dover Railway Co*[19] and *President of India v La Pintada Compania Navigacion SA*[20] it was held that interest may only be recovered as "special damages". English law has never recognized a cause of action in damages for late payment of damages unlike other foreign jurisdictions where interest can be recovered as damages for failure to pay a debt promptly. Interest recoverable as damages is a substantive right, not a procedural matter governed by the law of the seat of the arbitration.

18 [2002] 1 AC 481.

19 [1893] AC 429.

20 [1985] 1 AC 104.

8.19 Discretionary Interest

Where interest is not recoverable as of right, arbitrators may still include an award of interest by the exercise of their discretionary power to do this. The discretionary right to award interest is generally found in the Rules of some arbitration institutions. Now with section 32C being inserted into the Arbitration Act, 1995 through section 24 of the Arbitration (Amendment) Act, 2009, the arbitrator's wide discretionary power has the full weight of statute. Although no guidance is given in the statute as to how the discretionary right to award interest should be exercised, one general principle is clear. This is sometimes called "the compensatory principle". It is that an award of interest under section 32C should be formulated solely to compensate a successful claimant for having been kept out of the sum of money which the award has given him. However, arbitrators should bear in mind that interest awards should not be penal.

8.20 General Principles in Awards of Interest

In practice, claimants and respondents are advised by their advocates to claim interest in their pleadings as special damages and by so doing confer powers to the arbitrator to award interest at the rate pleaded or such other rates as the arbitrator may find fit to award (usually the applicable commercial rate at the time or as varied from time to time).

What is of concern to the arbitrator is the consideration of the sum on which interest should be awarded. If a party has been kept out of his monetary entitlement, he should be awarded interest on the amount involved from the date that he was entitled to the money. Again, if a party to a contract obtains an overdraft from a bank to enable him to perform his part of the contract, it is reasonable "that he is awarded interest to cover the interest charged to him by the bank".

Where an award of interest is discretionary, it is possible for widely diverging approaches to be taken by different arbitrators towards the function of awards of interest including the period for which interest should be awarded, the rate of interest and whether it should be simple or compound. The English courts have laid down

guidance principles in relation to the making of awards of interest in cases in pending litigation. The main authorities are cited and extensively discussed in *Kuwait Airways Corp v Kuwait Insurance Co. SAK*[21]. That decision laid down the following guidelines:

(a) An award of interest should be compensatory, not penal in purpose.
(b) The best approach is to attempt to assess the commercial rate of interest that someone in the position of the claimant would have had to pay to borrow the money which is to be awarded to him as a debt or damages.
(c) The tribunal should not normally embark on an enquiry into the actual financing arrangements of a particular claimant. It should, however, give effect to the probability that the better the "personal covenant" of the borrower, the lower the rate (of interest) is likely to be and vice versa.
(d) It is normally irrelevant that the particular claimant was in a special personal position such that he could only borrow money at a very high rate or was able to borrow at specially favourable rates.
(e) Accordingly the right approach is to assess, on a broad brush basis, the rate which a claimant having the general attributes of the actual claimant would have had to pay to borrow the money.
(f) The assessment should be based on the rate of interest applicable to short term unsecured loans, and not on any lower rate that might have been obtainable for a secured loan.

As a general rule, it follows that a successful claimant should not attempt to prove what loss he in fact suffered through non-payment of the sum which the arbitrator is minded to award him. However, in some exceptional cases it may be permissible for evidence to be admitted of the actual rate of interest the claimant had to pay under his financing arrangements. Such evidence may be some indication of the rate which a claimant having the general attributes of the actual claimant would have had to pay to borrow the money in question. Of greater assistance in most cases is general banking evidence as to the average bank short-term lending rate to prime borrowers

21 (2000) Lloyd's Rep I & R 678.

prevailing for the currency of payment over the period beginning with the date when the sum or sums ought to have been paid.

8.21 Period of Pre-award Interest

In case of debts, interest should normally be awarded from the date when the debt fell due up to the date of the award. In cases involving an award of damages, the arbitrator will need to assess the date or dates when the relevant loss was suffered. Interest should be awarded from that date or dates to the date of the award. It is often convenient where losses were incurred over a period of time, to award interest from the middle or average date upon which the losses were incurred, up to the date of the award. There may be special reasons in particular cases for awarding interest from a later date for example where it is alleged that the respondent needed time to assess his liability to pay the principal amount or where the claimant has delayed unreasonably in bringing his claim. In these situations, it should be remembered that for so long as the debt or damages are not paid, the respondent continues to enjoy the benefit of the interest on the sum which he will have to pay and thus it is reasonable that the gain should pass to the aggrieved party.

8.22 Rates of Interest

Usually where there is an express term relating to interest in the contract, the rate of interest will be specified. However, where discretionary interest is to be awarded under section 32C the arbitrator will need to decide upon the applicable rate. Such interest rates are not static and the arbitrator must necessarily first choose an appropriate base rate and then decide if, during the interest period, the base rate needs to be increased to take into account market trends. If compound interest is to be awarded, the rate of interest to be applied to compensate the claimant may be lower than if simple interest is to be awarded. A claimant who had to borrow the money which is awarded by the arbitral tribunal would normally be charged by most financial institutions, compound interest on the loan. Thus it would seem reasonable that arbitrators should normally award compound interest for the relevant period. However, there may be special features of particular cases which render it more

appropriate for the arbitrator to award simple interest. Each case should be considered on its own merits. A disadvantage of awarding compound interest is that it is more difficult to calculate than simple interest. However this should not be a problem for arbitrators or lead to complexity in drafting awards. An arbitrator is able to leave all detailed calculations to the parties and make the direction that the principal sum awarded should carry interest at a specified rate compounded at monthly or quarterly rates.

8.23 Post-Award Interest

There is no statutory provision that enables a claimant to automatically recover interest for the period between the date of the award and the date when the awarded sum is paid. It is therefore necessary for arbitrators, in awards, to provide for post-award interest. Where interest is recoverable as of right, the rate of interest is usually fixed by the contract or by a statutory provision. In these cases the arbitrator should ensure that he details in his award that interest will continue to run at the fixed rate until the awarded amount is paid. This applies even though the contract does not itself provide that interest shall continue to run during the post-award period. Where the interest rate has been fixed for the period up to the award, it is normally right as a matter of discretion, to award the same rate of interest for the post-award period. Similarly with discretionary interest, section 32C enables the arbitrator to award interest on the outstanding amount of any award from the date of the award until payment of the award sum in full.

In some cases in the past, arbitrators have awarded interest at a higher rate for the period after the delivery of the award than for the period before it. The argument seems to be that the respondent knows the extent of his obligation and should honour it. This practice is not recommended for if the rate of interest has been fixed by the contract or statute; the more consistent approach is to continue to apply the compensatory principle and to consider what loss will be suffered by the claimant through any failure on the part of the respondent to pay the awarded sum promptly.

The appropriate rate for post-award interest if it has not been fixed by contract or statutory provision may be made up of two

elements – the base rate as determined by the arbitrator and an uplift where applicable. Of course, the arbitrator can obtain from banks a list of prevailing interest rates for the pre-award period. However, he has no way of knowing in advance when the award amount will be paid by the respondent and cannot be expected to foresee how interest rates may fluctuate in the meantime. It is appropriate therefore that the most accurate way to give effect to the compensatory principle in respect of the post-award period is to express the liability to pay interest in terms of a formula for a floating rate e.g. to detail that the respondent will pay interest between the date of the award and the date of payment of the awarded sum at the Central Bank of Kenya (or other commercial bank) base rate plus, say, 1% or 2%. Where the awarded sums are not large, it is not wrong to provide that the rate calculated for interest up to the date of the award shall continue to be payable until the awarded sum is paid in full.

8.24 Reasons

Section 32(3) of the Arbitration Act (1995) details that the arbitral award shall state the reasons upon which it is based unless it is an agreed award or the parties have agreed to dispense with reasons. It follows that generally, reasons should be given by arbitrators on awards of interest. Such should, however, be very brief unless any question of principle is involved.

Chapter 9

International Commercial Arbitration in Kenya

By Attiya Waris & Muthomi Thiankolu

9.0 Introduction

Globalisation has led to significant interdependence and interconnectedness among the world's economies.[1] Modern commercial transactions, therefore, invariably involve parties from different countries or obligations to be performed in or connected with more than one country. Litigation of disputes arising from such transnational transactions before national courts has, in the last few decades, lost appeal to most players in international commerce.[2] Arbitration is the established method of resolving disputes arising from international trade and commerce.[3]

This chapter will be limited to a review of the legal regime for international commercial arbitration under the Kenyan Arbitration Act, 1995 ("the Act"). In order to put the review into perspective, the broad features of international commercial arbitration and the applicable international legal framework are set out. The focus of the chapter, however, will be a consideration of the relevant provisions of the Act.

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1 Nayyar, D. (2006) "Globalization, History and Development: A Tale of Two Centuries," 30 Cambridge Journal of Economics 137-159 at p. 137.

2 Moses, L. M. (2008) The Principles and Practice of International Commercial Arbitration, Cambridge University Press, New York, at page 1.

3 ibid. See also Babu, R. R. (2006) "International Commercial Arbitration and the Developing Countries," 4 AALCO Quarterly Bulletin, 385, available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=981123* (accessed on 28 April 2010).

9.1 Laws Applicable to International Commercial Arbitration

International commercial arbitration invariably entails reference to (and application of) many national systems or rules of law.[4] These include:

(i) the law governing the validity, recognition and enforcement of the arbitration agreement;
(ii) the law governing the arbitration proceedings;
(iii) the law applicable to the substantive matters in dispute; and
(iv) the law governing recognition and enforcement of the arbitral award.[5]

Parties to an arbitration agreement have the liberty to choose, and invariably choose, both the procedural and substantive law(s) applicable to any dispute that may arise between them.

International arbitration depends for its effectiveness on cooperation among states to ensure that arbitral awards can be enforced outside the country in which they are made.[6] The applicable international legal framework is mainly found in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[7] Other relevant international conventions and instruments include the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, 1978; the UNCITRAL Model Law on International Commercial Arbitration 1985 (hereinafter "the UNCITRAL Model Law"); the International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts, 1994; the International Bar Association (IBA) Rules for Evidence in International Commercial Arbitration, 1999; the European Convention on International Commercial Arbitration, 1961; the

4 See Redfern, A. and Hunter, M. (2004) Law and Practice of International Commercial Arbitration, 4th Edition, Sweet & Maxwell, London, at p. 2.

5 *ibid*.

6 *ibid*. See also *Halsbury's Laws of England*, Volume 2 (2008), 5th Edition at para 1202.

7 Commonly referred to as "the New York Convention." Completed in New York on 10 June 1958, the Convention entered into force on 7 June 1959. Recognition and enforcement of foreign arbitral awards are discussed elsewhere in this book.

Washington Convention on the Settlement of Investment Disputes Between States & Nationals of other States (establishing the International Centre for the Settlement of Investment Disputes -ICSID), 1965; the Inter-American (Panama) Convention, 1975; the North American Free Trade Agreement (NAFTA), 1992; the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927; and the Geneva Protocol on Arbitration Clauses.

International commercial arbitration may be *ad hoc* or institutional. There are many institutions that offer confidential international commercial arbitration. These include the International Chamber of Commerce in Paris (ICC); the London Chamber of International Arbitration(LCIA); the Cairo Regional Centre for International Commercial Arbitration; the American Arbitration Association (AAA); the Stockholm Chamber of Commerce; the Euro-Arab Chamber of Commerce; the Netherlands Arbitration Institute (NAI); the Hong Kong International Arbitration Centre (HKIAC); the Australian Centre for International Commercial Arbitration (ACICA); the China International Economic and Trade Arbitration Commission (CIETAC); the Russia International Commercial Arbitration Court of the Russian Chamber of Commerce (ICAC); the Singapore International Arbitration Centre (SIAC); the World Intellectual Property Organisation (WIPO) Arbitration Centre; the Vienna International Arbitral Centre of the Federal Economic Chamber; the Zurich Chamber of Commerce; and the Kenya Chamber of Commerce.

Kenya acceded to the New York Convention on 10 February 1989, reserving it to arbitral awards made in the territory of other contracting states.[8] The reservation is important because as a matter of international law, Kenya is only obliged to recognise and enforce arbitral awards made in a contracting state and not in any other state.

8 On the status of ratification or accession to the New York Convention, visit *http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html* (accessed on 22 February 2010).

9.2 The Act and International Commercial Arbitration

The Act is based on the UNCITRAL Model Law.[9] It sets out the features of an international arbitration in section 3(3).[10] These are:

> "3 (1)….
>
> (3) An arbitration is international if:
>
> (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states;
>
> (b) one of the following places is situated outside the state in which the parties have their places of business:
>
> (i) the juridical seat of arbitration is determined by or pursuant to the arbitration agreement; or
>
> (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
>
> (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one state.
>
> (4) For the purpose of subsection (3):
>
> (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement; and
>
> (b) if a party does not have a place of business, reference is to be made to his habitual residence…"

The features of international (commercial) arbitration as set out in section 3(3) need not be coexistent. Put differently, arbitration need

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9 *http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html* (accessed on 23 April 2010). The UNCITRAL Model Law was specifically developed to address international commercial arbitration (see Article 1 of the UNCITRAL Model Law). Consequently, although the Kenyan Arbitration Act is largely based on the UNCITRAL Model Law, it contains additional provisions (such as in the case of bankruptcy) that are limited to domestic arbitrations.

10 Section 3(3) of the Act is based on, and is almost an exact replica of, Article 1(3) of the UNCITRAL Model Law.

not have all the features set out in section 3(3) in order to qualify as international. Moreover, it is not clear, from a textual reading of section 3(3), whether arbitration with a feature that is not set out therein can nonetheless be deemed international.

The sole consideration under section 3(3)(a) is the location of the parties' places of business at the time of conclusion of the arbitration agreement. If the parties have their places of business in the same country, the arbitration cannot be deemed international under section 3(3)(a). Where a party has more than one place of business, the 'operative' place of business for purposes of section 3(3)(a) is the place of business with the closest relationship to the arbitration agreement.[11] Since firstly, an arbitration agreement is separate from the agreement establishing the underlying commercial relationship; and secondly, an arbitration agreement may in fact be contained in a separate instrument signed at a different time and place from the agreement establishing the underlying commercial relationship, the operative place of business for purposes of section 3(3)(a) will not necessarily be the place which has the closest connection to the underlying commercial relationship.

According to section 3(4)(b), where a party has no place of business (at the time of conclusion of the arbitration agreement), reference is to be made to his habitual residence. The situation anticipated by section 3(4)(b) might seem to be somewhat, if not very, curious. Ordinarily, it is difficult to envisage a significant commercial transaction, amenable to international arbitration, whose parties (or one of whose parties) have no place of business. Section 3(4)(b) might arguably be useful in situations where parties have used secret jurisdictions and tax havens for registration but have operations elsewhere in the world. Even for such situations, the usefulness of section 3(4)(b) would still be debatable because the need for secrecy might militate against disclosure of the actual habitual place of residence.

The word "states" as used in section 3(3) of the Act presumably refers to "sovereign states" as the concept is known in international law. Kenyan courts, however, have not had the opportunity to

11 See section 3(4)(a) of the Act.

render an opinion on the issue. Consequently, it remains to be seen whether the requirement of "different states" is met in the case of unrecognised states, overseas territories of sovereign states which nonetheless have characteristics of a sovereign state or countries that are dominions of other sovereign states.

The operative time for purposes of section 3(3)(a) is the time of conclusion of the arbitration agreement—not the time of the dispute. Accordingly, if subsequent to the conclusion of the arbitration agreement the parties have relocated their places of business to the same country, the arbitration will still be deemed international. Difficulties that can arise and are not settled in Kenyan law include the fact that the time of conclusion of the arbitration agreement may not necessarily be the same as the time for conclusion of the agreement establishing the underlying contractual/commercial relationship.[12]

The important consideration under section 3(3)(b)(i) is the "*juridical*" seat of arbitration, as determined by, or pursuant to the arbitration agreement. Generally, the (juridical) seat of arbitration refers to a particular state or territory which is associated with a recognisable and distinct system of law.[13] The "juridical seat of arbitration" need not be the same as the country in which the arbitral proceedings actually take place. An arbitral tribunal may, unless otherwise agreed by the parties, meet at any location it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.[14]

The distinction between the juridical seat and the place of arbitration is important. While arbitral proceedings may be held in any convenient place, any necessary judicial assistance during the course of arbitration will normally be sought in the courts of the country identified as the seat of the arbitration. Moreover, where

12 Moreover, the law governing the validity, interpretation and effect of the arbitration agreement will often, but not necessarily, be the same as the law governing the substantive contract of which it forms a part. For one such case, see *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1981] 2 Lloyd's Rep 446.

13 See *Dubai Islamic Bank PJSC v Paymentech Merchant Services Inc* [2001] 1 All ER (Comm.) 514.

14 Section 21(3) of the Act.

enforcement of an arbitral award is sought in a foreign country, the award is more likely to be treated as having been made at the seat of arbitration rather than the country in which the arbitral proceedings, or a part of the arbitral proceedings, were actually held.[15] The Kenyan Arbitration Act, though lacking in clarity, acknowledges the distinction between the seat and place of arbitration. Section 21(1) of the Act states that parties are at liberty to agree on the *"juridical seat of arbitration and the location of any hearing or meeting*."

Where there is no agreement as to the place of arbitration, section 21(2) of the Act states that the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case and convenience of the parties.[16] It appears, however, that the Act does not envisage the absence of agreement between the parties as to the juridical seat of arbitration. It is not clear, from a textual reading of the Act, whether an arbitral tribunal has powers to determine the juridical seat of arbitration in the absence of agreement by the parties.[17] The issue had not, as at the date of this chapter, arisen before Kenyan courts. In the absence of a clear provision to the contrary, however, an agreement between the parties that the procedural law of a particular country should apply to the arbitration is likely to have the result that that country is also the (juridical) seat of arbitration.[18]

According to section 3(3)(b)(ii), an arbitration will be deemed international where any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected is situated outside the State in which the parties have their places of business. Again it remains to be seen whether this

15 Section 100(2)(b) of the UK's Arbitration Act, 1996 provides, for instance, that a New York Convention award "shall be treated as made at the seat of the arbitration, regardless of where it was signed, despatched or delivered to any of the parties."

16 Section 21(2) of the Act.

17 Contrast section 21 of the Act with section 3 of the English Arbitration Act, 1996; the latter empowers an arbitral tribunal to determine the juridical seat of arbitration in the absence of agreement by the parties.

18 As was held in the English case of *ABB Lummus Global Ltd v Keppel Fels Ltd* [1999] 2 Lloyd's Rep 24.

requirement will be met if the "place" happens to be situated in a country in which one of the parties has a place of business.

Section 3(3)(c) states that arbitration will be deemed international where the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one state. It is unclear whether the requirements of the sub-section will be met in the case of situations where the contract does not expressly so state but the subject-matter of arbitration agreement actually relates to more than one state.

Kenyan courts have not dealt with the issue as to whether arbitration is domestic or international.[19] A dispute on the issue, however, would be academic-because the material provisions of the Act apply to both domestic and international arbitration. Be that as it may, Kenyan courts have decided a few cases with a bearing on international commercial arbitration. Where a Kenyan company freely enters into an (international) arbitration agreement in which the place of arbitration is outside Kenya, for instance, it cannot reject arbitration as the method of dispute resolution merely on the ground that it finds it too costly to participate in foreign arbitral proceedings.[20] Moreover, although the issue was not explicitly discussed, it appears that the common law doctrine of *forum non conveniens* cannot be invoked to supplant an agreement for foreign arbitration with domestic litigation:

> "That the respondent is a Kenyan company with its registered office in Nairobi and that it does not own any foreign assets are matters which were wholly irrelevant to the issue of arbitration. The respondent knew all these matters from the beginning but chose to enter into the agreement and having freely entered into that agreement, the respondent cannot now be heard to complain that it is unable to incur costs and participate in a foreign arbitration."[21]

The reasoning of the court accords with the practice in many countries. A comparative study of case law from various countries

19 A dispute on the issue would not have any practical implications because the material provisions of the Act apply to both domestic and international arbitration.

20 Per Gicheru, Omolo and Pall JJ.A. in Civil Appeal No. 125 of 1991 *Inter-Continental Hotels Corporation v Mukawa (Hotels) Holdings Ltd* (unreported), at pages 6-7.

21 *Ibid*.

indicates that an agreement to arbitrate in a foreign country will often prevail against any attempt to litigate the dispute before domestic courts. The rationale for the rule is simple: failure to enforce the arbitration clause in such cases would not only negate the parties' agreement to arbitrate but also reflect a "parochial" concept that all disputes must be resolved under the country's national laws and before national courts.[22] Moreover, refusal to enforce the arbitration agreement merely because it provides for arbitration in a foreign jurisdiction, on considerations of *forum non conveniens*, would offend the provisions of Article II (3) of United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[23]

An agreement to resolve disputes by arbitration (whether domestic or international) will not oust the jurisdiction of Kenyan courts to deal with peripheral matters and to ensure that parties resolve the substantive dispute in the manner set out in the arbitration agreement.[24]

9.3 Recognition and Enforcement of Foreign Arbitral Awards

The applicable international legal framework is mainly found in the New York Convention. Kenya acceded to the Convention on 10 February 1989, reserving it to arbitral awards made in the territory of other contracting states. As stated, the reservation means Kenya is only obliged to recognize and enforce arbitral awards made in a contracting state, not any other state. The recognition and

22 See the United States Supreme Court's majority opinion in *Scherk v Alberto-Culver Co*. 417 US 506 (1974) at pp. 516 and 519. See also the Australian case of *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc* (1998) 90 FCR 1, which involved a mix of arbitrable and non-arbitrable claims, where the court ordered domestic trial of the non-arbitrable claims and foreign arbitration of the arbitrable claims. On whether a court can issue anti-suit injunction to restrain foreign litigation instituted in violation of an agreement to arbitrate in the forum, see the English case of *West Tankers Inc v Ras Riunione Adriatica di Sicurta SpA* [2007] UKHL 4.

23 Also see Article 8 of the UNCITRAL Model Law. Ironically, it appears that *forum non conveniens* may be available as a shield against an application to enforce a foreign arbitral award. For insights on this, see Gillies, P. (2008) "Forum Non Conveniens in the Context of International Commercial Arbitration," at pp. 11-13, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103344 (accessed on 1 May 2010).

24 *Indigo EPZ Ltd v Eastern and Southern African Trade & Development Bank* [2002] KLR 1.

enforcement of foreign awards is a chapter within this book and has been dealt with extensively. However in the context of international commercial arbitration, it is critical to emphasise that Kenya is a party to the New York Convention. The primary aim of the New York Convention is the recognition of foreign arbitral awards and the indirect enforcement of international commercial arbitration agreements. By the end of 1990 over 80 countries had ratified or acceded to the Convention. This is reflected in section 36 of the Arbitration Act:

> '(2) An international arbitration award shall be recognised as binding and enforced in accordance to the (emphasis) provisions of the New York Convention or any other convention to which Kenya is signatory *and* relating to arbitral awards.'

And in sub-section 5 it states further that:

> '5) In this section, the expression "New York Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations General Assembly in New York on the 10 June, 1958, and acceded to by Kenya on the 10 February, *1989*, with a reciprocity reservation.'

An award, irrespective of the state in which it is made, is enforceable in Kenya if an application in writing is made to the High Court of Kenya and it is granted. As a result, in interpreting section 35(2)(b)(ii) of the Act, the High Court of Kenya interpreted the section to be limited to the cases where an award was in conflict with Kenya's public policy.[25] This interpretation was extended to an international arbitration award in *Glencore Grains Ltd v TSS Millers,* where the award of the arbitrator would have led to performance of a contract releasing grain unfit for human consumption into the Kenyan market which was contrary to public policy.[26] This decision is inconsistent with the provisions of the Model Law to the extent that it permits Kenyan courts to annul both arbitral awards even where the arbitration is governed by another country's laws or procedures.

25 *Christ for All Nations v Appollo Insurance Co. Ltd* [1999] LLR 1635.

26 [2002] KLR 1.

9.4 Conclusion

The current Arbitration Act is compatible with the prospect of Kenya being an attractive venue for international commercial arbitration, both *ad hoc* and institutional. However, thus far, Kenya's potential as a regional hub has not been extensively exploited in international commerce. Similarly, Kenya has not been the place or seat of arbitration of choice for most players in international commerce. This, however, is not unique to Kenya. Generally, African countries are seldom chosen as centres of international commercial arbitration.[27] Limited Kenyan case law in the area of international commercial arbitration has created a situation where the practical implications of most provisions of the Act remain either unclear or unpredictable, and arguably explains why Kenya remains less attractive as a seat of international commercial arbitration.

27 See Asouzu, A. A. (2001) International Commercial Arbitration and African States: Practice, Participation and Institutional Development, 18 Cambridge Studies in International and Comparative Law, Cambridge University Press 163.

Notes on Contributing Authors

1. J.B. Havelock

J.B. Havelock is an Advocate of the High Court of Kenya and is a Fellow of the Chartered Institute of Arbitrators (Kenya Branch). Mr Havelock is the immidiate past chairman of the Chartered Institute of Arbitrators (Kenya Branch) and was recently appointed as Judge of the High Court of Kenya.

2. Geoffrey Imende

Geoffrey Imende is an Advocate of the High Court of Kenya and is a Member of the Chartered Institute of Arbitrators (Kenya Branch). He holds a Bachelor of Laws from Moi University and is currently pursuing a Masters in Law in International Trade Law at the University of Nairobi.

3. Steven Gatembu Kairu

Steven Gatembu Kairu is an Advocate of the High Court of Kenya. He holds a Bachelor of Laws degree from the University of Nairobi and a Masters of Laws from Boston University. He is a Fellow of the Chartered Institute of Arbitrators. Mr Kairu is also a Lecturer, since 1990, in the Commercial Law Department of the School of Law, University of Nairobi. He teaches Alternative Dispute Resolution and Banking Law. He has also taught Civil Procedure and Practice, HIV/Aids and the Law, the Law of Torts and Law of International Institutions.

4. Jacqueline Kamau

Jacqueline Kamau holds a Bachelors of Social and Legal Sciences (B.S.L) and a Bachelors of Laws both from the University of Poona, Poona, India. Ms Kamau also holds a Masters of Arts in Sociology from the University of Nairobi. Ms Kamau is an Advocate of the High Court of Kenya and is also a Fellow of the Chartered Institute of Arbitrators, London and Kenya branches.

5. Kyalo Mbobu

Kyalo Mbobu is an Advocate of the High Court and a Fellow of the Chartered Institute of Arbitrators (Kenya Branch). Mr Mbobu holds a Bachelor of Laws from the University of Nairobi and a Masters of Law from Georgetown University (Washington).

6. Githu Muigai, Editor

Githu Muigai is a Chartered Arbitrator, a Fellow of the Chartered Institute of Arbitrators (UK), an Advocate of the High Court of Kenya, and an Associate Professor of Law at the University of Nairobi, School of Law (on Leave of Absence). Prof Muigai also holds a Bachelor of Laws from the University of Nairobi; a Masters of Law from Columbia University, New York and a Doctorate in Public Law from the University of Nairobi.

7. Wanjirũ Ngige

Wanjirũ Ngige is an Advocate of the High Court of Kenya She holds a Bachelor of Laws and a Masters in International Relations from Keele University (UK). Miss Ngige was called to the Bar of England and Wales in 2007 and is a member of the Honourable Society of Gray's Inn.

8. Mohammed Nyaoga

Mohammed Nyaoga is an Advocate of the High Court of Kenya and holds a Bachelor of Laws and a Masters of Laws from the University of Nairobi. Mr Nyaoga is also a lecturer in the Commercial Department at the University of Nairobi and has previously taught Business Law at the United States International University.

9. Njoroge Regeru

A Chartered Arbitrator, Njoroge Regeru is an Advocate of the High Court of Kenya. He holds a Bachelor of Laws from the University of Nairobi and is currently pursuing a Masters in Law, majoring in International Economic Law, Company Law and the

Law of International Institutions. Mr Regeru also has a Diploma in International Commercial Arbitration and is also a Fellow of the Chartered Institute of Arbitrators (UK).

10. Muthomi Thiankolu

Muthomi Thiankolu is an Advocate of the High Court of Kenya and holds a Bachelor of Laws from the University of Nairobi and a Masters of Laws (with Distinction) in International Economic Law, University of Warwick.

11. Attiya Waris

Attiya Waris is an Advocate of the High Court of Kenya and a Member of the Chartered Institute of Arbitrators (UK & Kenya). Dr Waris is a lecturer in the Department of Commercial Law, University of Nairobi and a visiting lecturer at the National University of Rwanda. Dr Waris holds the following degrees: a Bachelor of Laws from the University of Nairobi; a Masters of Laws in Human Rights and Democratisation in Africa from the University of Pretoria; a Masters of Laws in Business and Commercial Law from the University of London and a PhD in Tax Law and Development from Lancaster University (UK).