



**PREMIER ADR CONSULTANTS**

# **THE SCOPE OF ALTERNATIVE DISPUTE RESOLUTION**

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# Commercial Arbitration and Alternative Dispute Resolution

## 1 General Principles of arbitration and ADR

### 1.1 Introduction

Disputes are as old as the human race. They are a common feature of social and legal relations between individuals, corporate and state parties both at domestic and international level. Their continued escalation calls for the establishment of elaborate systems of conflict management and dispute resolution or determination. Such a system would accommodate the increasing need for expedition and the desire to resolve disputes at minimal cost, particularly in commercial transactions, in the interest of all parties.

To achieve these objectives, there are innovative international protocols, treaties and domestic legislation designed to offer invaluable alternatives to conventional judicial systems, whose adversarial scales of justice often do not tip to the advantage of the litigants, taking account of the expense in time and money weighed against the limited benefits.

Basic treaty and legislative instruments, such as the 1923 Geneva Protocol on Arbitration Clauses, the 1985 United Nations Commission on International Trade Law, the 1958 New York Convention on the Enforcement of Foreign Awards, domestic legislation, such as the Arbitration Act, Revised 2010 (1995), and institutional rules, only to mention a few, have spurred the establishment of various institutions and promulgation of procedural rules to facilitate enforcement of rights and awards in commercial and other matters capable of settlement by arbitration without undue delay and expense. The 1995 Act applies to both domestic and international arbitration.

Save in non-arbitrable disputes or disputes in which either one or more of the parties anticipates legal aid, parties in difference can choose whether to litigate or to adopt any of the alternative methods of dispute resolution, such as negotiation, conciliation, mediation, or arbitration. A choice to mediate presupposes desire by the parties to maintain their relationship in spite of the dispute. The process is consensual and accommodates mutual interests without undue regard to legal technicalities or to strict enforcement of legal rights as traditionally sought in litigation.

In mediation, the parties determine and contribute to the means and the end result of mediation from which they emerge as winners. Their mutual commitment to agreement and constructive interaction ensures equal participation and joint control over the outcome of the dispute. The mediator's role is that of a neutral facilitator. He acts with impartiality and does not influence or determine the dispute. Either party in subsequent arbitral or judicial proceedings in the event of breach may reduce the resolution reached on mutually acceptable terms into an enforceable formal agreement. Whether or not the agreement is legally enforceable depends on whether the parties agree that the process shall be binding.

In exercising judicial authority, the courts and tribunals are mandated under the Constitution to be guided by, among others, the principle that alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms be promoted, subject to the provisions of article 159(3).<sup>1</sup> Clause (3) prescribes restrictions on the use of TDR and provides that traditional dispute resolution mechanisms shall not be used in any 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 the Constitution or any written law.<sup>2</sup>

*In the spirit of article 159(2) of the Constitution*, courts and tribunals may adopt and implement (of their own motion or at the request of the parties) any appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1A and 1B of the Civil Procedure Act, 2010.<sup>1</sup> Accordingly, courts are empowered by rule 20(2) to adopt alternative dispute resolution strategies and make such orders or issue such directions as may be necessary to facilitate such means of dispute resolution. The overriding objective envisaged in section 1A(1) of the Civil Procedure Act is “... to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes.”<sup>2</sup>

To this end, the judiciary in Kenya adopted the court-annexed mediation scheme in 2016 under which parties to civil proceedings are required to submit to mediation facilitated by mediators accredited by the Mediation Accreditation Committee (MAC). Failing agreement, the cases referred to mediation under the programme proceed to full trial in accordance with the Civil Procedure Rules. In addition to this scheme, Order 46 Rule 1 provides parties with the option of submitting to arbitration under an order of the court. Accordingly,

“[w]here 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.”<sup>3</sup>

With regard to commercial arbitration, fair resolution of disputes by impartial arbitral tribunals is now attainable without undue delay and expense due to the enabling environment directly attributable to supportive legislation and institutional rules which govern procedure in domestic and international arbitration. International commerce and the construction industry in Kenya have for a long time enjoyed this cost-effective and expeditious means of dispute resolution whose benefits can be extended to other areas, such as business and employment relations, only to mention a few. Other jurisdictions, such as the United Kingdom, Canada, Asia, and the United States of America, enjoy the priceless benefits of the various means of alternative dispute resolution (ADR) in almost all social and economic sectors, including marital disputes, consumer complaints, malpractice claims, labour and trade disputes, local business and international commercial and investment disputes.

An arbitration is domestic within the meaning of section 3(2) of the 1995 Act 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,

<sup>1</sup> The Constitution of Kenya, 2010 art 159(2) (c).

<sup>2</sup> *ibid* art 159(3).

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

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<sup>1</sup> The Civil Procedure Act, Revised 2012 (1924) s 1A and 1B; ord 46 r 20(1) and (2) of the Civil Procedure Rules, 2010.

<sup>2</sup> *ibid* s 1A(1).

<sup>3</sup> *ibid* ord 46 r 1.

(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 arbitral proceedings are 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.

Conversely, an arbitration is international within the meaning of section 3(3) of the Act 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, namely, (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.

Subject only to such safeguards as are necessary in the public interest, parties to a reference are also free to agree on the rules of law and procedure by which they wish to have their arbitral proceedings regulated. Party autonomy extends to the right to exclude application of strict rules of evidence. Likewise, the right of appeal on a question of law may be excluded by agreement to ensure finality of an award and stem costly and time-consuming vexatious reviews and appeal processes common in judicial proceedings. Parties to a dispute may jointly appoint and determine the composition of the arbitral tribunal or, otherwise, agree on the manner of its appointment, powers, qualifications and experience, a luxury unknown to litigants in judicial proceedings. They are also free to agree on procedure, venue and duration of proceedings to avoid inflation of costs, and may also empower the tribunal to decide on procedural and evidential matters.

In practice, arbitral proceedings are private and may be so informal as to exclude oral testimonies. Courts may only be moved to support the reference or to enforce orders and awards or, in rare cases, to remove an arbitrator for serious irregularity, want of impartiality or diligence. Otherwise, any judicial intervention is restricted to those supportive motions permissible by the 1995 Act or by agreement of the parties to enforce their rights under the arbitration agreement.

The fact that prolonged unresolved disputes have transformed litigation into an unbearable burden cannot be overemphasised. For this reason, there has been an increasing need for an appropriate and expeditious dispute resolution mechanism. Local solutions shaped by the parties themselves have become more necessary than ever before. Mediation and arbitration offer the much needed expeditious and cost-effective means of dispute resolution. Legal practitioners in Kenya are now being brought into the fold in greater numbers than was the case in the past when architects, engineers, surveyors and building economists dominated the field, enjoying the invaluable benefits of speedy and inexpensive construction adjudication and arbitration.

The Chartered Institute of Arbitrators (Kenya Branch) offers advisory services on the appointment of mediators and arbitrators from its current membership for both domestic and international disputes. The

critical role of the recently established Nairobi Centre for International arbitration cannot be overemphasized. The Institute's instrumental role in the implementation of policy to establish a pilot scheme for court-mandated and court-assisted mediation is a momentous milestone in Kenya's attempt to develop a culture of ADR in conflict management and dispute resolution.

It is expected that the ongoing judicial reforms in Kenya subsequent to the promulgation on 27 August 2010 of the Constitution of Kenya 2010, and the recently enacted provisions of Order 46 of the Civil Procedure Rules made under the Civil Procedure Act, will effectively accommodate alternative dispute resolution and encourage alternative means of conflict management and resolution at a cost within reach of all players. Article 159(2) (c) of the Constitution provides the legal framework for the promotion by all courts and national tribunals of alternative forms of dispute resolution to avoid delay in the delivery of justice when exercising their judicial authority. Paragraph (d) mandates courts to administer justice without undue regard to procedural technicalities, a principle tenaciously held in arbitral proceedings and other alternative dispute resolution mechanisms.

Unlike other methods of conflict management and dispute resolution, arbitration is not unfamiliar to students of commercial law. Arbitration is an informal process of dispute resolution to which one or more parties submit pursuant either to an arbitration agreement previously made between them, or to specific rules of procedure under which their dispute may be referred for settlement by one or more impartial arbitrators appointed by the parties under the agreement or, otherwise, by an appointing authority with the consent of the parties. Reference of a dispute to arbitration may, therefore, be either voluntary or in discharge of a statutory obligation in certain cases. The Act also applies to arbitration administered by permanent arbitral institutions. The process of arbitration may be preceded by negotiation, conciliation or mediation, which, if successful, brings the dispute to rest.

## 1.2 Negotiation, Conciliation and Mediation

As an ADR strategy, negotiation manages conflict in a positive and productive manner in the interest and to the benefit of all parties. Those who stand the test of conflicts reap the benefits of strengthened relations, self-awareness and enhanced personal and psychological development. On the other hand, the adversarial positions often taken in judicial and arbitral proceedings breed strife and hostility with little or no tangible benefits. Backed by goodwill, the commonality of purpose gives the parties the impetus to hold onto every opportunity for settlement on terms and in a process which they own, and with which they identify.

The process of negotiation presents parties with an opportunity to manage their conflict and merge their psychological disparity in relation to their rights, interests and ideas. Their interactive interdependence facilitates simultaneous achievement of their perceived divergence of interests, beliefs and aspirations. What may have been conceived as incompatible goals are transformed into common interests. The ease or difficulty with which this may be achieved depends on, among other factors, the level of conflict in issue.

Negotiation thrives in a flexible medium of good will outside fixed or established rules of procedure, or other rigid systems for resolving the conflict. Where such systems are engaged and pose the risk of impeding progress in joint resolution, the parties are free to opt out of them and adopt a more flexible procedure for the achievement of what emerges as their own invention. Negotiation is so informal that few recognize its dynamic character and rewarding effect. Indeed, the desired effect of a negotiated settlement is worth more than the unpredictable award of an arbitrator or judge in the courtroom in many ways. It ensures the safeguarding of relations between the parties and guarantees continuity in their social or business engagement. To this end, they adjust their respective positions so as to win the other's confidence

towards joint resolution. Even though they may initially argue strenuously for what they want and push the other for concessions, they eventually modify their positions and move towards the other's point of view. It is not uncommon to find that initial settlement meetings yield little but nevertheless serve as valuable exploratory exercises in which parties test the waters, size-up the other, and weigh the pros and cons of various options within the bargaining and settlement range. This eventually results in a "merger" of interests and resolution on mutually acceptable terms. Whatever they think, say and do within the zone of potential agreement, they have power to invent a solution that meets the objectives of all sides.

It should be borne in mind, though, that not all conflicts may be resolved or managed through negotiation as between party and party with or without counsel. While third party intervention may not be necessary in most cases of conflict resolution, it is common in certain types of disputes, such as disagreement between business partners, labour relations, marital or patent rights disputes, where the legal system or other process in which a mediator, arbitrator or legal expert may be engaged. Certain statutes or organizational regulations may also prescribe grievance systems through which disputes in specific areas may be resolved. Such third parties may be institutionalised into rules, policies and procedures of various organizations charged with oversight of individual or group interests. Whether undertaken by the parties themselves or through third party intervention, the social process of negotiation is invariably profitable to the parties in dispute. Their strategies, whether competitive or win-loss, bargaining, or collaborative or win-win negotiation, culminates in merger of interests and simultaneous achievement of hitherto incompatible goals.

If parties refuse to yield to the demands of others, or engage in unproductive or ineffective communication and ultimately fail to find a common ground or invent joint solution to the problem, the negotiations break down. Events may sometimes progress in such a way that anger and frustrations set in and erode effective communication. However, the resulting destructive conflict is not altogether without cure. A skilled negotiator can put a derailed process back to its tracks using techniques beyond the scope of this book. Suffice it to say that they hinge on strategy, communication skills, the art of persuasion, sound judgment, the business or social context of the conflict, tools of transformation, power and personal influence of the negotiator, and the impact of individual differences on the outcomes of the process.

Where negotiation fails, parties may resort to third party intervention whereby a conciliator or mediator is engaged to facilitate the process of dispute resolution. Conciliation or mediation involves the engagement of a mutually trusted mediator who helps the parties to resolve their dispute in a voluntary process which accommodates their mutual interests and from which all emerge as winners. The otherwise inescapable negative emotional impact, and the ultimate loss and victory characteristic of adversarial judicial proceedings, are thereby avoided. The mediation agreement may even provide that everything said or disclosed by the parties to the conciliator or mediator in the process remains strictly confidential, never to be used to the detriment of either party in subsequent arbitration or judicial proceedings. Accordingly, the mediator may not disclose information confided in him by a party to the prejudice of his case, unless he is expressly authorized to do so.

In a mediation process, the task of the mediator is to (a) impartially confer with the parties separately; (b) assess their respective needs and broad interests; (c) endeavour to facilitate improved communication between them; and, ultimately, (d) facilitate voluntary and collaborative settlement in mutually agreeable terms.

Unlike arbitral or judicial proceedings in which the arbitrator or judge, as the case may be, hears the opposing cases of the disputants and makes an award purely on his judgment as to the respective rights of the parties, mediation depends on complete mutual trust. It takes a collaborative course and enables the parties to invent their mutually agreeable solution to their conflict. The mediator, who is invited by the

parties to help them resolve their dispute acts impartially and employs tested communication skills to promote mutual resolution and means of implementation of the agreed terms. He does not judge or make decisions.

Notably, a mediator's primary task is facilitative and includes *inter alia*

- (a) controlling the process and the conflict by facilitating improved communication;
- (b) creating an atmosphere in which each party freely expresses his views and interests;
- (c) facilitating the parties' understanding of their conflicting interests;
- (d) helping the parties explore various options and possible outcomes in which their mutual interests may be addressed and accommodated; and
- (e) recording their agreement on practical terms.

## 2 Arbitration Under an Order of the Court

Litigants in judicial proceedings may, pursuant to the provisions of Order 46 of the Civil Procedure Rules, also submit to arbitration at any time before final determination by the court of the issues in dispute. Order 46 makes provision for arbitration under order of a court and other alternative dispute resolution mechanisms. Pursuant to rule 1, all interested parties in a suit may apply to the court for an order of reference, provided that (a) they are in agreement to submit to arbitration; (b) they have capacity to enter into a legally binding agreement; and (c) the application for an order of reference is made before judgment is pronounced.

To this end, the court may make an order of reference in respect of any or all the issues in difference for determination by one or more arbitrators. The arbitrator or arbitral tribunal (as the case may be) may be appointed by the parties or by an appointing institution or authority. In its order, the court may specify the period within which the award shall be made. In effect, a reference to arbitration can only be made with the express agreement of all the interested parties. In effect, there is no valid reference where the court makes an order of reference on its own motion without the express agreement of the parties.<sup>4</sup> This upholds the principle of party autonomy and recognises the crucial fact that arbitration is invariably consensual and voluntary in nature.

Where the parties agree to have the issues in difference referred to arbitration by order of the court, rule 2 requires that "the arbitrator shall be appointed in such manner as may be agreed upon between the parties". Rule 3(1) prescribes the form of order and states:

"The court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the making of the award, and shall specify such time in the order."<sup>5</sup>

Rule 4 makes provision for references in which two or more arbitrators are appointed. Sub-rule (1) provides that 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;

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<sup>4</sup> *Wasike v Swala* [1985] KLR p.425.

<sup>5</sup> The Civil Procedure Rules, 2010 ord 46 r 2 and 3.

- (b) by declaring that, if the majority of the arbitrators agree, the decision of the majority shall prevail;
- (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.<sup>6</sup>

Where an umpire is appointed by an order of the court, rule 4(2) requires the court to fix such time as it thinks reasonable for the making of his award in case he is required to act. Rule 9 empowers an umpire to enter on the reference in the place of the arbitrators (a) if they allow the appointed time to expire without making an award; or (b) if they deliver to the court or to the umpire a notice in writing stating that they cannot agree.

In any other case, the court has power under rule 5(1) to appoint an arbitrator (or umpire, as the case may be) in any of the following circumstances, namely,

- (a) where (i) the parties cannot agree within thirty days with respect to the appointment of an arbitrator; or (b) the person appointed refuses to accept the office of arbitrator; or
- (b) where the arbitrator or umpire
  - (i) dies;
  - (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.

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 with a written notice to appoint an arbitrator or umpire. Failure to concur on the appointment, or to comply with the order of the court in relation to the appointment of an arbitrator or umpire, is consequential to the arbitral proceedings. If, within seven clear days after such notice has been served pursuant to Order 46 rule 5(1) (c) or such further time as the court may in each case allow, no arbitrator or umpire (as the case may be) is appointed, the court may, on application by the party who gave the notice, and after giving the other party an opportunity of being heard, either (a) appoint an arbitrator or umpire; or (b) make an order superseding the arbitration. If the court makes an order superseding the arbitration, it shall proceed to hear and determine the suit.

Except where the court has statutory power to appoint an arbitrator or umpire failing agreement of the parties, the power to appoint is primarily the preserve of the parties. The parties may exercise this power in concurrence either directly or by conferring their power to an appointing authority in accordance with the arbitration agreement or the order of reference. Notably, an arbitrator or umpire appointed by the court under rule 4 or 5 failing agreement of the parties has the same powers as those of an arbitrator or umpire appointed under an order of reference with the consent of the parties.

After reference to arbitration by an order of the court, the court is precluded by rule 3(2) from proceeding to hear the matter or any part thereof during the currency or pendency of the arbitration. In other words, the court has no jurisdiction to deal with any matter in the suit where such matter has been referred to arbitration. The term “any matter in difference between the parties to a suit” in rule 1 of Order 46 refers to all disputed matters in the pleadings. Therefore, on an application to the court for an order of reference, the order of reference to arbitration should encompass all the matters in dispute and not only issues stated

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<sup>6</sup> *ibid* r 4(1).



by the consent order. To restrict a reference by selecting a number of issues and thereby omitting or running the risk of omitting some matters in difference amounts to non-compliance with rule 3(1) of Order 46.<sup>7</sup> In every case, the arbitrator will only consider evidence on issues which are referred to him. Any issue not raised in the pleadings or otherwise referred to arbitration is deemed to have been abandoned. This is particularly because the order of reference is made with the agreement of the parties, who are deemed to know the real questions between them.<sup>8</sup>

### 3 Commercial Arbitration

#### 3.1 Introduction

The Arbitration Act, Revised 2010 (1995) governs arbitration generally and provides an alternative process of dispute resolution outside the conventional judicial system. However, the 1995 Act does not provide for mediation or other forms of alternative dispute resolution, such as adjudication, mediation, negotiation and conciliation. The Act requires that any reference to arbitration be with the agreement of the parties.

In Kenya, the chartered institute rules, which supplements the 1995 Act modelled on the United Nations Commission on International Trade Law (UNCITRAL model law), the International Chamber of Commerce (ICC) rules and Arbitration Rules 2009 made by the Chief Justice in exercise of powers conferred upon him by the Arbitration Act (1995), are commonly used. However, the parties are at liberty to introduce additional rules or modify any of the rules of procedure as may be agreed to govern the proceedings. In contrast, the ICC rules cannot be contracted out or varied by agreement.

The process of arbitration is comparable to the adversarial means of determining claims through judicial proceedings. When a dispute arises, the claimant lodges a statement of claim to which the corresponding party responds with a defence with or without a counterclaim. Thereafter, the claimant may deliver his reply to the defence and defence to counterclaim (if any) and, subsequently, documents intended for production at the hearing may be exchanged by way of discovery and parties and their witnesses (if any) may be examined and cross-examined on oath in the usual manner.

After hearing the corresponding cases, the arbitrator makes a reasoned award which is registered as a judgment of the court on application to the High Court and from which a decree is issued for enforcement. In principle, a dispute that has been referred to arbitration under an arbitration agreement between the parties cannot subsequently be the subject of litigation for determination by the court in judicial proceedings. However, courts may promote or encourage negotiation, mediation or arbitration pending final determination of a dispute before it as long as the parties are agreeable to a reference for that purpose pursuant to Order 46 of the Civil Procedure Rules.

The finality of the arbitral process dictates that courts do not subsequently deal with any matter previously referred to arbitration otherwise than for the purpose of enforcing or setting aside the award on specific grounds prescribed by statute. It must be borne in mind, though, that not all disputes are arbitrable. This means that the dispute or issue in question should be capable of determination by arbitration. If not, or if the award contravenes public policy of the enforcing state, the award will not be enforced, and the arbitration agreement will become null and void. In effect, the award must be capable of being enforced in the same manner as a decree of the court. This is unlike the outcome of conciliation or mediation, which

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<sup>7</sup> *Mairi v Ngonyoro "B" and another* [1986] KLR p.488.

<sup>8</sup> *Kihuni v Gakunga and another* [1986] KLR p.572.

does not bind the parties and is, therefore, unenforceable. As a general rule, conciliation or mediation agreements are only enforceable if their terms of settlement are reduced into a binding agreements, which are enforceable either by arbitration or by judicial proceedings.

### 3.2 Arbitration Agreements

By their very nature, arbitral proceedings are consensual and can only be commenced with the agreement of the parties. The nature of the agreement is vital to its validity. The 1995 Act requires that an arbitration agreement be in writing, even though it does not prescribe any particular form or terms as to content. It may, for instance, take the form of an ad hoc submission agreement entered into after the dispute has arisen, or of an agreement to refer all present and future disputes to arbitration.

An arbitration agreement may be comprised of a simple declaration or statement of intention to refer a dispute or disputes (whether present or future) to arbitration either (a) contained in a clause or part of the contract in respect of which the dispute arises; or (b) comprised of a series of letters or other written memoranda containing terms on which the dispute or disputes may be referred to arbitration, whether an arbitrator, or appointing authority, is named or not.

Section 3 of the Act 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." The agreement must be either in writing or evidenced by a memorandum in writing, and it is immaterial whether an arbitrator is named in it or not. It may be in the form of an arbitration clause in a contract, or in the form of a separate agreement.<sup>9</sup>

An agreement is in writing within the meaning of the Act if it is contained in any of the following:

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

Similarly, the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract. The arbitral tribunal to be appointed pursuant to the agreement may be constituted by a sole arbitrator or a panel of arbitrators.

Notably, the arbitrator or arbitrators need not be appointed in the agreement or even by consent of the parties. The parties may either agree on the composition and powers of the tribunal or simply on the procedure for appointment. If agreed upon, the parties are bound to adhere to the procedure for appointment and, in default, either party may apply to the High Court to appoint the tribunal, whose powers are, in the absence of an agreement to the contrary, governed by the Act and the Arbitration Rules.

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<sup>9</sup> The Arbitration Act, Revised 2010 (1995) s 4(1).

Unless a contrary intention is expressed, the authority of an arbitrator appointed under or by virtue of the agreement is irrevocable except with the leave of the High Court. Neither is such authority revoked by the death of a party by whom the arbitrator is appointed. Nor is an arbitration agreement discharged by the death of any party thereto. Notwithstanding his death, the agreement is enforceable by or against the personal representative of the deceased party, unless the right of action in issue either abates or is extinguished by such death. Likewise, an arbitration agreement to which a bankrupt becomes privy prior to the making of an adjudication order is enforceable by or against a trustee in bankruptcy in relation to differences arising from contracts to which the agreement relates.

An arbitration agreement precludes parties from instituting any civil proceedings for relief, other than for the purpose of enforcing the agreement, in respect of a dispute to which the agreement relates. For instance, where an insurance policy contains an arbitration clause, a claimant is precluded from instituting civil proceedings before referring the dispute to arbitration. Failure to do so renders the suit premature and liable to dismissal.<sup>12</sup> In *Corporate Insurance Co Ltd v Wachira*, the arbitration clause required that disputes between the parties be referred to arbitration and that the arbitral award be a condition precedent to the enforcement of any rights under the contract.

Section 6(1) of the 1995 Act empowers the court to order stay of proceedings and provides that 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 that (a) the arbitration agreement is null and void, inoperative or incapable of being performed; or (b) there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

Section 6(2) precludes the court from continuing to deal with any matter in respect of which an application has been made to stay proceedings under sub-section (1) and the matter remains undetermined. However, if the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings. This means that such a provision will have been overtaken by events.

There are no hard and fast rules as to how judicial discretion should be exercised in determining whether to excuse a party from submitting to arbitration under the Act. All the surrounding circumstances should be taken into account. For instance, proof of fraud or misrepresentation may vitiate an arbitration agreement.<sup>10</sup> Where stay of proceedings is sought to allow arbitral proceedings pursuant to an arbitration agreement, the court must be satisfied that (a) there is no sufficient reason why the matter should not be

<sup>12</sup> *Corporate Insurance Co Ltd v Wachira* [1995-98] 1 EA p.20.

referred to arbitration in accordance with the agreement; and (b) the applicant was, at the time the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration.<sup>11</sup>

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<sup>10</sup> *Shamji v Treasury Registrar Ministry of Finance* [2002] 1 EA p.273.

<sup>11</sup> *Esmailji v Mistry Shamji Lalji and Co* [1984] KLR p.150. <sup>15</sup>

*Kenindia Assurance v Mutuli* [1993] KLR p.283 (CAK).\*

In any event, the application for stay of proceedings must be made to the court after appearance, but before delivering any pleadings or taking any other steps in the arbitral proceedings. Delivery of pleadings or other steps in the arbitral proceedings may be construed as a waiver of the applicant's right to enforce the arbitration agreement. By filing a defence, a party loses his right to rely on the arbitration clause.<sup>15</sup> Where the court is satisfied that the dispute arises within the arbitration agreement, the opposing party must show cause why effect should not be given to the agreement.<sup>12</sup>

After stay of court proceedings, arbitral proceedings may be commenced or continued and an arbitral award may be made notwithstanding that an application has been brought under section 6(1) and the matter is pending before the court. The rationale for stay of proceedings is that there cannot be parallel proceedings before both the court and an arbitral tribunal over the same subject matter in light of the provisions of section 6 of the Civil Procedure Act, 1924 and section 6(2) of the Arbitration Act, 1995. Accordingly, it is not open for a party to take out an application for stay of proceedings under section 6(1) of the 1995 Act and simultaneously file a written statement of defence under the Civil Procedure Rules.<sup>13</sup> In principle, stay of the civil suit is intended to give way for commencement and determination of the arbitral proceedings.

### 3.3 Appointment and Composition of the Arbitral Tribunal

Except where the court has statutory power to appoint an arbitrator or umpire failing agreement of the parties, the power to appoint is primarily the preserve of the parties. The parties may exercise this power in concurrence either directly or by conferring their power to an appointing authority. Examples of appointing authorities or institutions involved in international commercial arbitration include the International Chamber of Commerce (ICC), the Chartered Institute of Arbitrators (CIArb), the London Court of Arbitration, the American Arbitrators Association (AAA), or other authority (including professional bodies), nominated by the parties in accordance with the arbitration agreement. The agreement may also state the place (or seat), procedural rules and substantive law, of arbitration. Such domestic and international institutions are instrumental in alternative dispute resolution in both domestic and international commercial disputes.

In practice, the parties are expected to agree on the procedure for appointment and on the composition of the tribunal. However, this is not always the case. For this reason, sections 11 and 12 of the Act imply into every arbitration agreement terms designed to address this eventuality. In this regard, every arbitration agreement in which no other mode of reference is provided is deemed to include a provision that the reference shall be to a single arbitrator, unless a contrary intention is expressed in it.

According to section 12(1) of the Act, "no person shall be precluded by reason of that person's nationality from acting as an arbitrator, unless otherwise agreed by the parties . . . ." This statutory protection against discrimination on the basis of nationality in the appointment of an arbitrator is probably intended to eliminate the risk of real or perceived bias where the nationality in question is likely to impair the arbitrator's impartiality, taking account of the subject-matter of the dispute.

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<sup>12</sup> *Omino v Lalji Meghji Patel and Co Ltd* [1995-98] 1 EA p.264.

<sup>13</sup> *Niazons (K) Ltd v China Road and Bridge Corporation (K) Ltd* [2001] 2 EA p.503.

The 1995 Act guarantees party autonomy in the appointment of an arbitrator or chairman of the arbitral tribunal. As a general rule, the parties are free to agree on a procedure of appointing the arbitrator or arbitrators and any chairman and, failing such agreement,

- (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 two arbitrators, each party shall appoint one arbitrator; and
- (c) in an arbitration with one arbitrator, the parties shall agree on the arbitrator to be appointed.

Section 12(3) seeks to lend expedition to the process of appointment of an arbitrator in situations where one of the parties is in default by failure to act in accordance with the arbitration agreement. Subsection (3) provides that (unless the parties otherwise agree) where each of two parties to an arbitration agreement is to appoint an arbitrator and one party (“the party in default”) (a) has indicated that he is unwilling to do so; (b) fails to do so within the time allowed under the arbitration agreement; or (c) fails to do so within fourteen days (where the arbitration agreement does not limit the time within which an arbitrator must be appointed by a party), the other party, having duly appointed an arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.

If the party in default does not, within fourteen days after notice under subsection (3) has been given, (a) make the required appointment; and (b) notify the other party that he has done so, the other party may appoint his arbitrator as sole arbitrator pursuant to subsection (4). On such appointment and determination of the matters in dispute, the award of that arbitrator shall be binding on both parties as if he had been so appointed by agreement.

Where a sole arbitrator has been appointed under subsection (4), the party in default may, on notice to the other party, apply to the High Court under subsection (5) within fourteen days to have the appointment set aside. The court may grant an application under subsection (5) and set aside the appointment only if it is satisfied that there was good cause for the failure or refusal of the party in default to appoint his arbitrator in due time.

On granting the application under subsection (5), the High Court may, with the consent of the parties or on application by any of them, proceed to appoint a sole arbitrator. Its decision in this regard shall be final and not subject to appeal. In appointing an arbitrator under this section, the High Court shall have due regard to any qualifications required of an arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator. In the case of a sole or third arbitrator, the court shall also take into account the advisability of appointing an arbitrator of a nationality other than those of the parties as required by subsection (9).

In relation to a reference to two or more arbitrators, where one arbitrator dies or refuses to act, the party appointing him may appoint a new arbitrator in his place. Failing appointment, the remaining arbitrator acts as a sole arbitrator as if he were appointed with the consent of the parties. Where an arbitration agreement provides that the reference shall be to two arbitrators, then, unless a contrary intention is expressed in the agreement, section 11(3) of the 1995 Act provides that “the agreement is deemed to include a provision that the two arbitrators shall appoint a third arbitrator immediately after they are themselves appointed.”<sup>14</sup>

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<sup>14</sup> The Arbitration Act, Revised 2010 (1995) s 11(3).

If the two arbitrators are unable to agree, the third arbitrator may enter on the reference in place of the arbitrators as if he were a sole arbitrator. Where the agreement provides for the appointment of a third arbitrator by the parties, he shall act as chairman. In any other case, the High Court may appoint an arbitrator, chairman or third arbitrator on application by a party giving notice in that regard in the event of (a) failure on the part of the other party or both to appoint an arbitrator, or chairman or third arbitrator (as the case may be); (b) failure on the part of two arbitrators to appoint a chairman; or (c) where an arbitrator, chairman or third arbitrator properly appointed under the agreement dies or refuses to act and the agreement does not provide for the supply of the vacancy. The person so appointed shall have power to act as if he were appointed with the consent of the parties and shall proceed to hear the dispute and make an award which shall be filed in court, and in accordance with which the court shall determine the issues in difference between the parties.

### 3.4 Powers and Mandate of the Arbitral Tribunal

At times, arbitration agreements may not provide for the procedure for the determination of the reference, which makes it necessary for the Act to make provision for the implication into every agreement of terms in that regard, and for the implied powers of the tribunal. For instance, it is an implied term of every arbitration agreement that every party to the reference and all persons claiming through them respectively shall be subject to the examination by the arbitrator or chairman on oath or affirmation in relation to the matters in dispute. Examination on oath or affirmation is designed to satisfy the tribunal in all respects that the issues before it have been exhaustively considered.

To aid in the expeditious determination of the matters before the tribunal, the High Court has power under Order 46, rule 7(1) to issue the same processes (including summons to witness) to the parties and witnesses whom the arbitrator or umpire desires to examine in like manner as the court may issue in suits tried before it.<sup>15</sup> The following acts or omissions constitute an offence for which a person in default is subject to such disadvantages, penalties and punishments as are incurred in suits tried before the court:

- (a) failure to attend in accordance with such process;
- (b) the making of any other default;
- (c) refusal to give evidence; or
- (d) contempt of the arbitrator or umpire during the investigation of the matters referred to arbitration.

The sanctions mentioned above may be imposed by order of the court on the representation of the arbitrator or umpire. It must be borne in mind that court intervention in arbitral proceedings is only designed to aid the tribunal in the effective discharge of its mandate in the reference. In every case, the mandate of an arbitrator duly appointed by the parties or by the court terminates if

- (a) he is unable to perform the functions of his office or, for any other reason, fails to act without undue delay, such as where the arbitrator appointed under an order of reference (i) fails to comply with the order to conduct the proceedings within ninety days of the reference; and (ii) further, fails to seek extension of time under rule 8 of Order 46 of the Civil Procedure Rules, which goes to the root of his jurisdiction;<sup>16</sup>
- (b) he withdraws from his office; or

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<sup>15</sup> The Civil Procedure Rules, 2010 ord 46 r 7(1).

<sup>16</sup> *Nyangau v Nyakwara* [1986] KLR p.712.

- (c) the parties agree to the termination of the mandate.

The appointment of an arbitrator is not unassailable. It may be challenged by any party in accordance with section 13(3) of the 1995 Act on any of the following grounds, namely, (a) want of impartiality or independence; or (b) if he does not possess the qualifications agreed to by the parties.<sup>17</sup> Section 14 prescribes the procedure for such challenge.

When challenged, an arbitral tribunal is competent under section 17 of the Act to rule on its own jurisdiction. Where the mandate of an arbitrator is terminated for any reason, a substitute arbitrator is appointed in accordance with the procedure applicable for the appointment of the arbitrator being replaced. Except for arbitral proceedings which are held afresh, the replacement does not necessarily invalidate an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator.

Section 18 empowers the arbitral tribunal at the request of a party to order any party to take any interim measure of protection in respect of the subject matter of the dispute. To this end, the tribunal may order any party to provide appropriate security in connection with such measure. In this regard, any party may, subject to the approval of the arbitral tribunal, seek assistance from the High Court in the exercise of any power conferred on the tribunal, and the court may make any order for the doing of anything which the arbitral tribunal is empowered to order. An application to the court for any orders under or by virtue of section 18 does not operate as a stay of arbitral proceedings or the giving of an award by the tribunal.

### 3.5 Conduct of Arbitral Proceedings

In the conduct of arbitral proceedings, the arbitrator is under duty imposed by section 19 of the 1995 Act to treat all parties with equality and to give each full opportunity of presenting his case. Section 20 substantially upholds party autonomy as respects matters of procedure. In other words, the parties are free to agree on the procedure to be followed by the arbitral tribunal in the conduct of the proceedings, failing which the tribunal may conduct the arbitration in the manner it considers appropriate.

The tribunal's discretionary powers in the conduct of proceedings include the power to determine the admissibility, relevance, materiality and weight of any evidence presented before it. In effect, the arbitral tribunal is not bound by rules of evidence, unless the parties so agree. In addition, the arbitrator has power to order discovery or production before the tribunal of all documents within their possession or power, which may be required or called for.

Likewise, it is an implied term that the witnesses on the reference may be examined on oath or affirmation. To this end, the arbitrator has implied power to administer oaths to, or take affirmations of, the parties and their witnesses on any reference under the agreement. Accordingly, persons whose attendance at the hearing is required may be summoned either to give evidence or to produce documents in accordance with the Civil Procedure Rules.<sup>18</sup>

Unless the parties otherwise agree, the arbitral tribunal has the discretion to decide whether to hold oral hearing for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted

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<sup>17</sup> The Arbitration Act, Revised 2010 (1995) s 13(3).

<sup>18</sup> The Civil Procedure Rules, 2010 ord 16 and ord 46 r 7.

on the basis of documents and other materials furnished in accordance with section 24 of the 1995 Act. Section 24 provides for the lodging of statements of claim and defence, and other relevant documents of evidential value, disclosing the following, among other particulars, namely,

- (a) the facts supporting the claimant's claim;
- (b) the points at issue;
- (c) the relief or remedy sought; and
- (d) the respondent's defence in respect of the aforesaid particulars.

In the absence of an agreement to the contrary, a sole arbitrator or chairman of an arbitral tribunal has power to make orders and give directions with respect to any matter of procedure in the arbitral process without the intervention of the court. Intervention by the court in the proceedings is permissible by the 1995 Act for the purpose only of supporting the arbitral process. Section 10 prohibits intervention by the court in any matter governed by the Act with the exception only of those expressly provided by the Act. However, a party may request from the High Court an interim measure of protection, including an order of injunction, which the High Court may grant under section 7 either before or during the arbitral proceedings.

In relation to arbitral proceedings (including proceedings commenced pursuant to an order of reference) the High Court has power, among other things, to make orders in respect of any one or more of the following matters, namely.

- (a) security for costs;
- (b) discovery of documents and interrogatories;
- (c) depositions (i.e., the giving of evidence by affidavit);
- (d) examination on oath of any witness before an officer of the court or other person and the issue of a commission or request for the examination of a witness out of the jurisdiction;
- (e) the preservation, interim custody or sale of any goods which are the subject matter of the reference;
- (f) securing the amount in dispute in the reference;
- (g) the detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein; or
- (h) interim injunctions, or the appointment of a receiver in relation to a suit in the court.

With regard to (d), section 28 of the Act empowers the arbitral tribunal, or any party with the approval of the tribunal, to request from the High Court assistance in taking evidence within its competence, and in accordance with its rules.<sup>19</sup> It should be noted, though, that the foregoing provisions for court intervention do not prejudice any power which may be vested in an arbitrator or chairman of making orders and giving directions with respect to any of the matters aforesaid. An application by any party to the High Court for any of the aforesaid orders is usually made with the leave of the arbitral tribunal where it declines for any valid reason to give directions or make orders in that regard.

### 3.6 Arbitration Awards

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<sup>19</sup> The Arbitration Act, Revised 2010 (1995) s 28.



An award is a final determination of a particular issue or claim in the arbitration and can be interim or final on the specific issue. It differs from orders and directions, which address procedural mechanisms to be adopted in the reference. For instance, questions concerning jurisdiction of the tribunal or choice of applicable substantive law are suitable for determination by issue of an award. On the other hand, questions of admissibility of evidence or extent of discovery are procedural and fit for orders for directions. Awards can be the subject of a challenge or an appeal to the court while orders and directions cannot be challenged by way of appeal. Procedural orders and directions deal with procedural issues in respect of which, in the absence of agreement to the contrary, the arbitral tribunal is master.

With regard to substantive law, the arbitral tribunal is bound by section 29 of the 1995 Act to decide the dispute under reference in accordance with the rules of law chosen by the parties as applicable to the substance of the dispute. Failing agreement in that regard, the tribunal may apply the rules of law which it considers to be appropriate, taking into account all the circumstances of the dispute. On the other hand, the tribunal may decide on the substance of the dispute according to considerations of justice and fairness without being bound by the rules of law only if the parties expressly authorise it to do so. In all cases, the tribunal is mandated to decide in accordance with the terms of the particular contract, taking into consideration the customs and usages of trade applicable to the particular transaction.

The general rule in arbitral proceedings is that questions of procedure may be decided by the chairman with the authority of the parties or of all the members of the arbitral tribunal as contemplated by section 30 of the Act. In arbitral proceedings before more than one arbitrator, any decision of the tribunal shall be made by a majority of all its members, unless the parties otherwise agree. In any other case, an arbitrator or chairman (as the case may be) may make an award at any time, unless the parties otherwise agree as to the time within which his award should be published.

In the case of a reference under an order of the court, the arbitrator may make an award at any time, unless directed by the court on remission of an award for reconsideration, and unless such time (if any) limited for the making of the award is enlarged by order of the court. Order 46 rule 8(1) makes provision for enlargement of time within which to make an award and states that

“[t]he 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.”<sup>20</sup>

The right to seek extension of time within which to make an award is equally open to the arbitrator or umpire pursuant to rule 8(2), which states:

“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.”<sup>25</sup>

Where there has been a valid reference to arbitration under Order 46 of the Civil Procedure Rules, the court is bound to enter judgment in accordance with the award, unless (a) there is an objection to the award; or (b) an application seeking to invoke the court’s power to modify or correct the award under rule 14 and enter it as so corrected; or (i) to remit the award to reconsideration by the arbitrator under rule 15; or (ii) to

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<sup>20</sup> The Civil Procedure Rules, 2010 ord 46 r 8(1).

set aside the award under rule 16 and proceed to hear the matter in difference between the parties.<sup>21</sup> In the absence of such objection or application, the court may enter the award as it is.

Section 15 of the 1995 Act (which provides for the eventuality of failure or impossibility to act) empowers the court to remove an arbitrator or chairman who fails to expeditiously enter on and proceeding with the reference and make an award. The court's power to intervene pursuant to section 15 extends to cases where two arbitrators are unable to agree, thereby making it impossible to determine the dispute.

### 3.7 Provisional Orders and Partial Awards

It is an implied term of every arbitration agreement that an arbitrator or chairman may make an interim award if he thinks fit. An arbitral award may be final, partial, provisional or otherwise made by consent of the parties. Where the parties settle the dispute in the course of arbitral proceedings, the proceedings terminate and the arbitral tribunal may, on the request of the parties, record the settlement in the form of an arbitral award on agreed terms in accordance with section 32 as to its form and content.

An arbitral award on agreed terms has the same status and effect as a final or any other arbitral award on the substance of the dispute.<sup>22</sup> Rule 10 requires an award made in a suit to be signed, dated and caused to be filed in court within fourteen days by the person who made it together with any depositions and documents taken and proved in the reference, whereupon the Registrar notifies the parties of the date fixed for reading of the award.<sup>23</sup> Rule 11(2) requires the award to be read within 30 days of the notice to such parties as are present.<sup>24</sup>

According to section 32A of the 1995 Act, “[u]nless the parties otherwise agree, 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 the Act”. A final award determines (a) all the issues in the arbitration; or (b) all the issues which remain outstanding following earlier (interim or provisional) awards dealing with only some of the issues in the arbitration.

<sup>25</sup> *ibid* r 8(2).

In principle, an award must be final and binding on the parties as a complete decision without leaving matters to be dealt with subsequently or by a third party. Once a final award is made, the tribunal is *functus officio* in the sense that its jurisdiction over the matters referred to arbitration comes to an end and cannot subsequently amend or interfere with the contents of the award. The only exception to this rule is with regard to awards remitted by the court for reconsideration. Similarly, once an arbitrator has published and filed his award pursuant to an order of reference, the court has no jurisdiction in the arbitration or over the arbitrator, except on an application to set aside or remit the award.<sup>25</sup>

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<sup>21</sup> *Nganga v Njoroge* [1984] KLR p.401.

<sup>22</sup> The Arbitration Act, Revised 2010 (1995) s 32.

<sup>23</sup> The Civil Procedure Rules, 2010 ord 46 r 10.

<sup>24</sup> *ibid* r 11(2).

<sup>25</sup> *Manibhai Bhailalbhai Patel v Mehal Singh and others* (1956) 23 EACA p.378.

In addition to the statutory powers aforesaid, the 1995 Act empowers the tribunal (a) to correct clerical mistakes or errors; or (b) to clarify or remove any ambiguity in the award; and (c) to make an additional award in respect of any claim presented to the tribunal which was not dealt with in the award. In cases where an award is made pursuant to an order of reference, the court has power under Order 46 rule 14 to modify or correct the 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;

(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.<sup>26</sup>

This raises a pertinent question as to when an award is deemed to be final. The following criteria of determining the finality and the enforceability of an award ultimately centre on its effect. As a general rule, an award is final and binding (a) if it is conclusive as to the issues with which it deals, unless and until it is successfully challenged; and (b) if it can be enforced even if there are other issues outstanding in the reference. An award is final and binding as to the particular issues with which it deals conclusively even if it is not the final award. This means that it is final if it is a complete decision on the matters dealt with. In effect, it is immaterial that the decision on those particular matters does not conclusively determine the dispute.

A tribunal has power under the Act to make more than one award in view of the fact that an award may dispose only of some of the issues in the arbitration leaving others to be determined in a subsequent award. Such awards are known as partial awards. The Act empowers a tribunal to make more than one award at different times in different aspects of the matters to be determined subject, however, to agreement of the parties. The tribunal has complete discretion to make partial awards usually in complex cases, but subject to the agreement of the parties and to the provisions of the Act. This is intended to lend expedition where certain issues may be determinant of the claim. For instance, it is usual for a tribunal to deal with the issue of liability before dealing with that of quantum with intent to narrow issues to ease the process of final determination.

An arbitral tribunal may also give a partial award where there is no defence to some part of a claim or cross-reference. The Act also empowers a tribunal to make an award on the issue of jurisdiction as a partial award where it is either concerned with its own jurisdiction or where its jurisdiction is challenged. However, a tribunal cannot be compelled to give an award on its jurisdiction prior to its final award. Partial awards may impose conditions, such as security for costs. Likewise, temporary financial adjustments may be made between the parties pending determination of the dispute, but only in exceptional cases. In every case, issue estoppel applies to partial awards on specific issues with which it deals and cannot be re-opened for subsequent determination in later awards. This means that issues already disposed of in an earlier award cannot be subsequently adjudicated upon. It is outside the tribunal's jurisdiction to do so.

A tribunal can also make provisional orders or other interim relief with the consent of the parties. Provisional relief is of the nature as the tribunal can make in a final award, and may include (a) an order

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<sup>26</sup> The Civil Procedure Rules, 2010 ord 46 r 14.

for payment of money; (b) disposal of property; or (c) interim payment of costs to the tribunal. However, this power does not allow *ex parte* orders for Mareva or *Anton Piller injunctive* relief.

A mareva injunction enables the court to freeze the assets of a defendant (whether resident within the jurisdiction of the court or not) for the purpose of preventing him from removing his assets abroad and thus making it worthwhile to sue and enforce a decree against him.<sup>27</sup> This draconian remedy is popular in the commercial world, such as the construction industry. This type of provisional relief is important in commercial disputes where uninterrupted cash flow is vital to the carrying out of the business undertaking to which the dispute relates.

An *Anton Piller* order is one made by the High Court requiring a defendant to permit a plaintiff or his representatives to enter the defendant's premises to inspect or take away material evidence which the defendant might wish to remove or destroy in order to frustrate the plaintiff's claim or to force a defendant to answer certain questions.<sup>33</sup> The order is commonly used in cases where the copyright of video films or tapes, or computer software, is alleged to have been infringed. It should be borne in mind, though, that provisional orders are subject to the final decision of the tribunal on the case.

If sought as relief in any claim, the arbitral tribunal has the same power as the High Court to order specific performance of a contract. As respects costs, the tribunal may, at its discretion, direct payment of costs taxable in the High Court by one party to the other. Likewise, the tribunal has implied power to award interest on a sum to be paid between the date when the cause of action arose, that is, when the amount became due and payable, and the date of the award. Interest on the principal amount and on recoverable costs is also awarded from the date of the award until payment.

### 3.8 Correction of Awards

Arbitration awards are not free from typographical or clerical errors. Accordingly, the arbitral tribunal has power under section 34 of the Act, either of its own motion within thirty days after the date of the arbitral award, or on request by any party, to correct in the arbitral award any computation errors, any clerical or typographical, or accidental slip or omission appearing in an award. A party may request correction of typographical errors or any other errors of a similar nature within thirty days after receipt of the award, unless a different period of time is agreed upon by the parties.<sup>28</sup>

Similarly, a party may, with the agreement of the other party or parties, request the arbitral tribunal to give an interpretation of a specific point or part of the arbitral award. On the other hand, an award, though intended to be final, may not be exhaustive of the issues referred to arbitration. In such a case, and unless otherwise agreed by the parties, the arbitral tribunal has power under section 34(4), on request by any party, to make an additional award as to claims presented in the arbitral proceedings but omitted from the arbitral award. The Act requires that the additional award be made within sixty days of the request.<sup>35</sup>

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<sup>27</sup> *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER p.213. <sup>33</sup>  
*Anton Piller KG v Manufacturing Processes* [1976] Ch p.55.

<sup>28</sup> The Arbitration Act, Revised 2010 (1995) s 34.

In addition to the foregoing, section 34(6) of the Act empowers the arbitral tribunal to extend the period of time within which it is bound to make a correction, give an interpretation or make an additional arbitral award under the Act.<sup>36</sup> The addendum containing the correction, interpretation, or additional award, forms an integral part of the arbitral award. Accordingly, it must conform to the prescriptive provisions of section 32 as respects its form and content.

### 3.9 Challenge of Awards

Though final, the orders and directions, and the terms of an arbitral award are not necessarily absolute in the sense that an award may be the subject of a challenge on any of the grounds prescribed by the Act. Part VI of the 1995 Act makes provision for recourse to the High Court against arbitral awards subject, of course, to compliance with the limitation as to the time within which such challenge should be lodged in court.

Section 35 entitles any party to apply to the High Court within three months of the receiving of an award, or within three months from the date of disposal of a request for recognition and enforcement of a foreign award under section 36, to set aside an award.<sup>37</sup> The court may set aside such an award if the party making the application 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, the law of Kenya;
- (c) the party making the application was not given proper notice of the appointment of the 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 contains decisions on matters beyond the scope of the reference to arbitration,<sup>29</sup> 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 the Act from which the parties cannot derogate, or failing such agreement, was not in accordance with this Act.

<sup>35</sup> *ibid* s 34(5).

<sup>36</sup> *ibid* s 34(6).(3).

<sup>37</sup> *ibid* s 35(2) and

In addition to the foregoing grounds, the High Court may set aside an award on application under section 35 where it finds that either (a) the subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or (b) the award is in conflict with the public policy of Kenya. Public policy is a broad concept incapable of precise definition. An award can be set aside under section 35(2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it is shown that it was (i)

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<sup>29</sup> *Air East Africa v Kenya Airport Authority* [2001] 2 EA p.323.

inconsistent with the Constitution or other laws of Kenya, whether written or unwritten; (ii) inimical to the interest of Kenya; or (iii) contrary to justice or morality.<sup>30</sup>

It should be borne in mind, though, that courts cannot interfere with findings of fact by an arbitrator. In principle, a mistake of fact or law is not a ground for setting aside or remitting an award for further consideration on the grounds of misconduct. The court's intervention is limited to errors of law which are apparent on the face of the award.<sup>31</sup>

Section 35(4) empowers the court to give time for the curing by the parties or the arbitral tribunal of the defect or ground on which the application for setting aside of an award is made. If requested by a party in appropriate cases, the court may suspend the proceedings to set aside the arbitral award for such period of time as it may determine in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or take such other action as it considers necessary to eliminate the grounds adduced for setting aside its award.<sup>32</sup>

Where the arbitral reference is by an order of the court, the High Court may from time to time remit any of the matters referred to the reconsideration of the arbitral tribunal. The order remitting an award shall specify the time within which it shall be reconsidered.<sup>33</sup> In effect, the court has power under Order 46 rule 15 to remit an award or any other matter referred to arbitration for reconsideration by 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 matters 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; or

(c) where the award has an obvious error of law or other illegality apparent on the face of it<sup>43</sup> or other formal defect or mistake sufficient to justify the court to set it aside.

In principle, courts will be slow to interfere with the award in an arbitration, but will do so whenever it becomes necessary in the interest of justice, and will act if it is shown that the arbitrators, in arriving at their decision, have done so on a wrong understanding or interpretation of the law,<sup>34</sup> unless, of course, the right of appeal is excluded by agreement of the parties. However, reservations have been expressed as to whether an arbitral award should ever be the subject of remission or setting aside on the ground of error in law apparent on its face.

It has been argued that, when the parties to a dispute refer it for decision to arbitrators of their own choice and agree to be bound by their decision, they must, ordinarily speaking, be held to be bound by any mistakes of law or fact made by the arbitrators. According to Lockhart-Smith AVP, an arbitral award should

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<sup>30</sup> *Christ For All Nations v Apollo Insurance Co Ltd* [2002] 2 EA p.366.

<sup>31</sup> *DB Shapriya and Co Ltd v Bish International BV (2)* [2003] 2 EA p.404.

<sup>32</sup> The Arbitration Act, Revised 2010 (1995) s 35(4).

<sup>33</sup> The Civil Procedure Rules, 2010 ord 46 r 15(2).<sup>43</sup>

*Kihuni v Gakunga and another* [1986] KLR p.572.

<sup>34</sup> *Rashid Moledina and Co (Mombasa) Ltd and others v Hoima Ginnors Ltd* [1967] EA p.645.

not be remitted to the arbitrators on account of an error of law apparent upon the face of it.<sup>45</sup> As observed by Williams J in *Hodgkinson v Fernie*, where a cause or matters in difference are voluntarily referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and fact.<sup>46</sup> To allow remission or setting aside on any grounds results in undesirable protraction of litigation.

Where it is sought to remit or set aside an award on the ground of error on the face of the award, the general rule as stated by Sir Ronald Sinclair AP is that only the record or documents accompanying and forming part of the award will be looked at.<sup>47</sup> For instance, an objection to the legality of an award may be successfully raised and the award remitted for reconsideration if the applicant shows that the arbitrator had erred in law.<sup>48</sup>

In *Sohan Lal v East African Builders Merchants*, the Court of Appeal for Eastern Africa allowed an appeal against the decision of the High Court of Kenya allowing an application to remit an award on the ground that the arbitrator erroneously awarded payment for work done prior to the termination of the contract which was, in the court's inference, for a lumpsum, a fact not stated in the award.<sup>49</sup>

As was explained in *Champsey Bhara and Co Ltd v Jivraj Baloo Spinning and Weaving Co Ltd*, the phrase "an error in law on the face of the award" means "... that you find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can say is erroneous."<sup>35</sup> Before the court can remit the award in issue, it must be shown that the arbitrator has "tied himself down to some special legal proposition which then, when examined, appears to be unsound."<sup>36</sup> But no such error would be imputed if an arbitrator's award does not state any legal proposition save for mere references to the law and refraining from attempting to state it.<sup>37</sup>

In ordinary cases of a reference by order of the court under Order 46 of the Civil Procedure Rules, the arbitrator or chairman is bound to make his award within three months after the date of the order of reference, unless otherwise directed. However, where no time is fixed for the making of an award and the parties acquiesce in the arbitral tribunal making its award, but without prejudice to any of them, a challenge on the ground of omission to fix a time for the making of the award cannot stand.<sup>38</sup> On the other

<sup>45</sup> *Sohan Lal v East African Builders Merchants* (1951) 18 EACA p.50 at p.53.

<sup>46</sup> *Hodgkinson v Fernie* [1857] 3 CB (NS) p.189 at p.202.

<sup>47</sup> *Manibhai Bhailalbai Patel v Mehal Singh and others* (1956) 23 EACA p.378 at p.380 citing Wilde B in *Holgate v Killick* [1861] 31 LJ Ex p.7.

<sup>48</sup> *Sohan Lal v East African Builders Merchants* (1951) 18 EACA p.50.

<sup>49</sup> *ibid.*

hand, the award may, in certain circumstances, be remitted or set aside on the grounds specified in rule 16.

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<sup>35</sup> *Champsey Bhara and Co Ltd v Jivraj Baloo Spinning and Weaving Co Ltd* LR 50 IA p.324.

<sup>36</sup> *ibid.*

<sup>37</sup> *GGT Ainslie v Alexander Morrison* (1951) 18 EACA p.96.

<sup>38</sup> *Devji Ladha Patel (Trading as Nairobi Printing Press) v Nathabhai Vashram Patel* (1944) 11 EACA p.15.

The Civil Procedure Rules limit the grounds on which the Court may set aside an arbitration award. In effect, the High Court has power under Order 46 rule 16(1) to set aside an arbitration award in any of the following circumstances only:

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

In view of the fact that the first ground challenges the conduct of the arbitrator or umpire, an application made under this rule shall be served on the arbitrator or umpire to facilitate fair determination of the matters in question. Rule 17 requires the application to set aside an award made pursuant to Order 46 to be made within thirty days of the notice of filing the award or of the date fixed for reading of the award.<sup>54</sup> If an award made on reference in pursuance of Order 46 of the Civil Procedure Rules is ultimately set aside, the court will supersede the arbitration and proceed to determine the suit. There is no appeal as of right against an order setting aside an arbitration award and, therefore, leave of the court is required before such appeal is lodged.<sup>55</sup>

The grounds on which termination of an arbitrator's authority is sought are justifiable. Serious irregularity on the part of the arbitrator invariably erodes the trust and confidence placed on the arbitrator and, therefore, entitles the parties to terminate his authority either by consent or by an order of the court on application by either of them. It is for this reason that the High Court has power to remove an arbitrator who misconducts himself<sup>39</sup> or the proceedings.

An arbitrator misconducts himself where he (a) accepts a bribe; (b) is interested in the subject matter; or (c) refuses to state a case for the opinion of the court on a material point of law. Similarly, under Order 46 rule 16(1) (a), an arbitration award can be set aside on account of corruption or misconduct of the arbitrator where he refuses to hear the evidence of a material witness.<sup>40</sup>

In determining an application for removal, or for setting aside an award of an arbitrator on grounds of misconduct, the court may admit extraneous evidence to prove such misconduct. As observed by Sir Ronald Sinclair in *Manibhai Bhailalbhai Patel v Mehal Singh and others*, the arbitrator himself may be called as a witness to give evidence as to his conduct of the arbitration proceedings.<sup>41</sup> Likewise, the authority of an arbitrator may be revoked, and the court may grant an injunction restraining the arbitrator or the other party from proceeding with the arbitration, where it is satisfied that the arbitrator named or designated in the agreement is not (or might not be) impartial by reason of either (a) his relation towards any of the parties to the agreement; or (b) his connection with the subject matter of the reference.

<sup>54</sup> The Civil Procedure Rules, 2010 ord 46 r 17. <sup>55</sup>

*BD Bilimoria and another v TD Bilimoria* [1962] EA p.198.

### 3.10 Recognition and Enforcement of Arbitral Awards

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<sup>39</sup> *Kibutha v Kibutha* [1984] KLR p.243.

<sup>40</sup> *Nyangau v Nyakwara* [1986] KLR p.712.

<sup>41</sup> *Manibhai Bhailalbhai Patel v Mehal Singh and others* (1956) 23 EACA p.378 at p.380.



An arbitral award is recognised as binding under and by virtue of section 36 of the 1995 Act irrespective of the state in which it was made. It takes effect from the date of its publication and binds the parties to do what it awards and directs, and to do so on or before the time and date set for the discharge of its terms. The award may be enforced on application in writing to the High Court in accordance with the Act. The enforcement procedure is summary in nature and is designed to expeditiously cure noncompliance in cases where a party to the arbitral proceedings refuses, fails or neglects to do an act as directed in the award. In the event of default, the party in whose favour the award is given is entitled to take steps to obtain judgment in its terms and enforce performance or discharge of the liability thereby created in accordance with the Act.

The application for leave to enforce an arbitral award must comply with the mandatory rules of procedure failing which it is liable to dismissal for incurable defect.<sup>42</sup> Where the arbitration in question is under an order of the court, the court has power to order interest if the award is silent on the matter.<sup>43</sup>

An award on an arbitration agreement may be recognised and enforced by leave of the High Court pursuant to sections 35 and 36 of the 1995 Act on application by any party in accordance with Order 46 rule 18 with due notice to the other party or parties in the same manner as a decree or order, and to the same effect.<sup>44</sup> Where leave is so given, judgment shall be entered in terms of the award together with the costs of the application where the following conditions have been satisfied:

- (a) in the case of a reference under Order 46 of the Civil Procedure Rules, when no formal application has been made within the statutory period of thirty days to either set aside the award or to remit it for reconsideration or generally objecting thereto and, in any other case, no application has been made to set aside the award under section 35 of the 1995 Act;
- (b) when an award is adopted even after objection or remission, or is otherwise not set aside; and
- (c) when there is no appeal pending in respect of the award, or when leave to appeal has been denied.

According to section 37 of the Act, recognition and enforcement of an arbitral award is not a matter of course. In effect, recognition and enforcement of an arbitral award regardless of the state in which it was made may be refused

(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;
- (ii) the arbitration 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;
- (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 and deal with that of the other party;

(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,

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<sup>42</sup> *Glencore Grain Ltd v TSS Grain Millers Ltd* [2002] 1 KLR p.606.

<sup>43</sup> *Bishan Das Shahi v I Girdharilal Sethi and another* [1964] EA p.246.

<sup>44</sup> The Arbitration Act, Revised 2010 (1995) s 35 and 36; The Civil Procedure Rules, 2010 ord 46 r 18.

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 of matters referred to arbitration may be recognised and enforced;

(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;

(iv) 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

(b) 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.

Even though it is Kenya's policy to enforce international arbitral treaties and agreements, the court must balance the competing rights as between (a) the public policy in protection of matters in favour of international arbitral awards, contracts or judgments; and (b) public policy in protection of matters more favourable to the welfare of the people of Kenya.<sup>45</sup> In matters touching public policy, the court has authority to examine the award even at the stage of enforcement to determine whether or not the arbitral tribunal had jurisdiction in respect of the disputes relating to the underlying contract. In effect, the court cannot enforce an award arising from what it finds to be an award in respect of an illegal, tortuous or immoral contract relating to or against public policy.<sup>46</sup>

Apart from the statutory right of the parties under section 35 to apply to the court to set aside an arbitral award, an appeal may lie on a point of law against an award or decree drawn on an award if the right of appeal is not excluded by agreement of the parties. Section 39(1) of the Act provides that where, in the case of a domestic arbitration, the parties have agreed that (a) an application by any party may be made to 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. Upon such application or appeal being made, the High Court may either (i) determine the question of law arising in the award; or(ii) confirm, vary or set aside the arbitral award, or remit the matter to the arbitral tribunal for reconsideration or, where another arbitral tribunal has been appointed, to that arbitral tribunal for reconsideration.

Section 39(3) permits the lodging of an appeal to the Court of Appeal against the decision of the High Court in that regard if the parties agree that a further or any appeal shall lie, but (a) subject to leave of the High Court; or (b) failing leave by the High Court, subject to the Court of Appeal granting special leave to appeal in accordance with the rules of procedure or with the Court of Appeal rules. On further appeal, the Court of Appeal may exercise any of the powers which the High Court could exercise in that regard.

In practice, though, there is a limit as to the grounds on which an appeal may lie on a decree given pursuant to an arbitral award which is not challenged. An appeal from such a decree shall not lie except in so far only as the decree is in excess of, or not in accordance with, the award, even though Order 43 of the

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<sup>45</sup> *Glencore Grain Ltd v TSS Grain Millers Ltd* [2002] 1 KLR p.606.

<sup>46</sup> *ibid.*

Civil Procedure Rules (which regulates appeals from orders) allows an appeal against a decree made pursuant to Order 46 only on the aforesaid ground as of right.<sup>64</sup> When an arbitral award has been varied on an appeal, the award so varied has the same effect as if it were the award of the arbitral tribunal concerned.

The overall effect of sections 36 and 37 of the 1995 Act is that foreign awards have the same legal effect as, and are enforceable in Kenya in like manner as, domestic awards. The Act provides for the enforcement of arbitral awards without distinction as to, and regardless of, the seat of arbitration or the State in which they were made. In effect, a foreign award is enforceable in Kenya (a) by action without regard to jurisdictional reciprocity usually necessary for the enforcement of foreign judgments; and (b) in the same manner as a domestic arbitral award. A foreign award enforceable under the Act is binding for all intents and purposes on the persons as between whom it was made, and may be relied upon by those persons by way of defence, set-off or otherwise in any legal proceedings in Kenya.

It must be borne in mind, though, that in order that a foreign award may be enforceable under the Act, it must have been made

- (a) in pursuance of a valid arbitration agreement enforceable under the law by which it was governed;
- (b) by the tribunal provided for in the agreement or constitution in manner agreed upon by the parties;
- (c) in conformity with the law governing the arbitration procedure;
- (d) became final in the country in which it was made;
- (e) in respect of a matter which may lawfully be referred to arbitration under the law of Kenya; and
- (f) the enforcement thereof must not be contrary to the public policy or the law of Kenya (i.e., the matter to which it relates must be arbitrable and consistent with domestic public policy).

On the other hand, a foreign award is not enforceable in Kenya if

- (a) it has been nullified in the country in which it was made;
- (b) it was obtained in breach of due process, such as (i) where the party against whom it is sought to enforce was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or (ii) was under some legal incapacity and was not properly represented; or
- (c) the award is inexhaustive and does not deal with all the questions referred to arbitration, or contains decisions on matters beyond the scope of the arbitration agreement, in which case the court may either (i) postpone the enforcement of the award; or (ii) order its enforcement subject to the giving of such security by the enforcing party on such terms as the court thinks fit.

As a general rule, an award is not final if the proceedings for the purposes of contesting its validity are pending in the country in which it was made. Nor is it enforceable if obtained in breach of due process or of any rules of natural justice. However, regardless of where it was made, an arbitration award must not be liable to challenge on the grounds of bias or breach of the right of any party to a fair hearing or of the right to equal treatment before the tribunal. Failure to afford a party an opportunity to be heard amounts to denial of natural justice and is tantamount to misconduct on the part of the arbitrator.<sup>47</sup> A

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<sup>47</sup> *Mehtar Singh Bros Ltd v Ruparel Investment Ltd* [1964] EA p.324.

<sup>64</sup> *Ruhara v Kabuga and another* [1986] KLR p.551.

challenge of this nature ought to be presented to the arbitrator at the earliest opportunity in the proceedings, and delay in doing so precludes the applicant from raising the complaint after the award has been made and published. On the other hand, an award made in excess of the tribunal's jurisdiction is equally challengeable.

Even though the Arbitration Act comprehensively applies the United Nations International Commission on Trade Law (commonly referred to as the UNCITRAL model law), it is by no means exhaustive on matters of procedure. For this reason, section 40 of the Act empowers the Chief Justice to make rules providing for matters not prescribed by the Act. These include *inter alia*

- (a) the recognition and enforcement of arbitral awards and all proceedings consequent thereon or incidental thereto;
- (b) the filing of applications for setting aside the arbitral awards;
- (c) the staying of any suit or proceeding instituted in contravention of an arbitration agreement or reference; and
- (d) generally all proceedings in court under the Arbitration Act.

#### 4 Advantages and Disadvantages of Arbitration

The nature of arbitration and other alternative dispute resolution mechanisms offer parties an informal and expeditious means of dispute resolution compared to the complex, time-consuming, costly and technically tedious process of litigation in ordinary courts. The advantages of alternative dispute resolution and of arbitration in particular cannot be overemphasized, and may be summed up as follows, namely,

- (a) arbitration is informal and flexible;
- (b) arbitration is not as procedurally cumbersome as judicial proceedings, which are characterized by costly and time-consuming motions, summonses and other preliminary and interlocutory applications on matters of procedure and legal technicality;
- (c) parties are at liberty to agree on the mode of appointment of an arbitrator or arbitrators and chairman, if any, and on their respective qualifications and expertise;
- (d) unlike judicial proceedings that provide for time-consuming and costly applications for review and appeals in respect of orders and decrees of the court, arbitration awards are final unless challenged on limited grounds only;
- (e) the process of arbitration may be tailored to the convenience of the parties as regards the procedure, time and place so as to guarantee privacy;
- (f) parties to arbitral proceedings can avoid publicity and ensure privacy and confidentiality, which cannot be guaranteed in open courts; and
- (g) the arbitral tribunal may disregard technical rules of evidence and admit evidence inadmissible in usual cases so as to reach a just determination.

The fact that arbitration is informal and flexible means that the parties do not necessarily require often costly legal representation. In effect, alternative dispute resolution saves the parties both time and money. In principle, they can be commenced and concluded in a matter of months compared to judicial proceedings, which may take years to determine. By nature, arbitration is free from rigid rules of procedure and allows the arbitral tribunal a wide range of powers and discretion in conducting the hearing expeditiously in the

interest of the parties. Moreover, party autonomy empowers parties to appoint an arbitrator or chairman of their choice, bearing in mind the technical or special nature of the subject matter of the dispute. This choice is not enjoyed by parties in judicial proceedings presided over by judges or magistrates, who do not necessarily have the special skills vital for the appreciation of the technical matters in question

Suffice it to say that the advantages of arbitration outweigh the disadvantages, which are nonetheless worthy noting. Some arbitrators are likely to disregard or inadvertently fail to consider relevant legal principles where they are not equipped with legal knowledge. They are invariably bound to determine the dispute before them pursuant to, and in terms of, the arbitration agreement, and on the basis of the oral and written evidence and submissions made to them. Even though their powers under the Act and under the arbitration agreement may be extensive, they do not have the latitude enjoyed by judges to apply and introduce personal knowledge of law or facts in making their awards. To do so would be tantamount to enhancing the cause of one party to the prejudice of the other's case. Consequently, arbitration does not enhance the uniformity of the general principles of law and, therefore, awards made on arbitration are of no precedential value. This is because they are made on the basis of merit and fairness without regard to legal technicalities.