A CRITICAL ANALYSIS OF ARBITRAL INTERIM MEASURES OF PROTECTION IN KENYA

UNVERSITY OF NAIROBI

SAINA ARRIELLA JEPTOO

G62/10868/2018

A Research Project submitted to the University of Nairobi Law School in partial fulfilment of the requirements for the Master of Laws (LL.M) Degree Program.

November 2019

DECLARATION

I, **SAINA ARRIELLA JEPTOO**, declare that this is my original work and has not previously been submitted for a degree to any institution of higher learning for the award of diploma, degree or post-graduate qualifications.

Signed …… Date ……..

SAINA ARRIELLA JEPTOO

This project has been presented for examination with my authority as the university supervisor.

DR. NKATHA KABIRA

Signed..... Date.....

DEDICATION

For my mother Miriam Saina who has always inspired me.

ACKNOWLEDGMENTS

I owe deep gratitude to my parents and siblings for their unflinching support.

My profound thanks to Dr. Nkatha Kabira for her invaluable assistance, patience and guidance throughout the earlier review of this work.

I am grateful to my dear friends Christopher Marwa and Nelson Ndalila from whom I solicited advice when reorganizing this work.

Lastly, I thank the University of Nairobi for the opportunity and for providing all the material I needed to complete this work.

LIST OF CASES

Afrikon Limited v Ivrcl Limited & Sutanu Sinha [2019] eKLR

Airports Parking services Ltd & Another v Municipal Council of Mombasa Civil case 434 of 2009

Anne Mumbi Hinga v Victoria Njoki Gathara [2009] eKLR

Babs Security Limited v Geothermal Development Limited [2014] eKLR

Bia Tosha Distributors Limited v Kenya Breweries Limited & 3 others [2016] eKLR

Buckeye Check Cashing Inc. v Cardegena et al 546 U.S. 440 [2006]

Celetem v Roust Holdings [2005] 4 All ER 52

China Young Tai Engineering Co Ltd v L G Mwacharo T/A Mwacharo & Associates & another [2015] eKLR

CMC Holdings Ltd & Another vs Jaguar Land Rover Exports Limited [2013] eKLR

Coast Apparel Epz Limited v Mtwapa Epz Limited & another [2017] eKLR

Dimension Data Solutions Limited v Kenyatta International Convention Centre [2016] eKLR

Elisha Kuria Kariguh & 2 others v John Kimani Mwangi & another [2019] eKLR

Elizabeth Chebet Orchardson v China Sichuan Corporation for Tecno-Economic Corporation & Another [2013] eKLR

EON Energy Limited v Desnol Investment Limited & 4 others [2018] eKLR

Equatorial Land Holdings Limited & another v Cheseret arap Korir [2019] eKLR

Equity Bank Limited v Narok County Government [2013] eKLR

Futureway Limited v National Oil Corporation of Kenya [2017] eKLR

LIST OF STATUTES

Kenya

Arbitration Act 1995

Arbitration Act 1968

Civil Procedure Act 2012

Civil Procedure Rules 2010

Constitution of Kenya 2010

Investments Disputes Convention Act 1967

Nairobi Centre for International Arbitration Act 2013

Small Claims Court Act No. 2 of 2016

United Kingdom

Arbitration (Scotland) Act 2010

Common Law Procedure Act 1854

English Arbitration Act 1996

INTERNATIONAL TREATIES AND RULES

European Convention on International Commercial Arbitration 1961

Geneva Convention on the Execution of Foreign Arbitral Awards 1927

Geneva Protocol 1923

International Chamber of Commerce Arbitration Rules 2017

International Centre for the Settlement of Investment Disputes Convention 1965

London Court of International Arbitration Rules 2014

Inter-American Convention on International Commercial Arbitration 1975

United Nations Commission on International Trade Law 1985

United Nations Commission on International Trade Law Model Law 2006

New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958

LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
CIArb	Chartered Institute of Arbitrators
CEDR	Centre for Dispute Resolution, established in London in 1990
ICC	International Chamber of Commerce, located in Paris, established in Paris in 1923
ICA	Court International Court of Arbitration of the ICC
ICSID	International Centre for the Settlement of Investment Disputes also Convention on Settlement of Investment Disputes between States and Nationals of other States
KLR	Kenya Law Reports
LCIA	London Court of International Arbitration
LCIA	London Chartered Institute of Arbitrators
LCICA	London Court of International Commercial Arbitration
OECD	Organisation for Economic Co-operation and Development
OHADA	Organisation for the Harmonization of Business Law in Africa
UNCITRAL	United Nations Commission on International Trade Law
UK	United Kingdom

ABSTRACT

This study examines arbitral interim measures of protection in Kenya. It focuses on the court's intervention in the award of interim measures and makes two arguments. The *first* argument is that although section 7 of the Arbitration Act 1995 grants the High Court the power to award interim measures of protection, nevertheless, the High Court, in exercise of its discretion, has created inconsistent and contradictory jurisprudence with regards to the conditions for granting such measures. This inconsistency is due to the absence of a clear statutory provision under the Arbitration Act 1995 that establishes these conditions. The *second* argument is that there is a tension between the supremacy of the Constitution and the Arbitration Act 1995.

Thus, in utilising a doctrinal legal research methodology, this study analyses statutory provisions and case law to determine the courts approach in granting interim measures. Based on this analysis, the study found that: (a) the conditions for granting interim measures established by courts, such as, the existence of an arbitration agreement, irreparable harm and urgency are not applied uniformly; (b) in other jurisdictions such as the UK and in the UNCITRAL Model Law and UNCITRAL Arbitration Rules, the conditions for granting interim measures are clearly delineated; and (c) in some cases, courts have relied on the supremacy of the constitution as a basis for usurping jurisdiction over the application of the Arbitration Act 1995. As a result of these findings, the study concludes that the uncertainties and inconsistencies in the award of interim measures signify that a litigant is irresolute of the outcome of his case. Therefore, the study recommends a legislative reassessment to address the deficiencies in the Arbitration Act 1995. Areas of further research have also been provided in light of the research findings.

Key words: arbitration, courts, interim measures of protection, Kenya, UNCITRAL.

TABLE OF CONTENTS

CHAPTER ONE: INTRODUCTION

1.0. Introduction

In Kenya, arbitration has historically been less popular than the traditional adversary method of litigation. However, in the recent years there has been a significant increase in the popularity of arbitration as a means of resolving commercial and investment disputes.[1]

The increased globalization of business and expansion of world trade and investment has resulted in increasingly harmonized arbitration practices around the world which has largely contributed to the rise of arbitration in Kenya.[2]

The preference for arbitration has been buttressed by the Constitution which recognizes arbitration and other forms of ADR.[3] In effect, courts now give greater importance to arbitration clauses and court-mandated arbitration.[4]

This recognition has augmented the number of cases that warrant the intervention of the courts in arbitral proceedings. Therefore, this study will examine how the High Court has exercised its discretion in granting interim measures of protection. In doing so, the. study will examine case law to order to analyse the conditions relied by the court in granting these measures.

[1] Gary Born, *International Arbitration: Law and Practice* (Kluwer Law International, 2012) 15.
[2] David J. Mclean, 'Toward a New International Dispute Resolution Paradigm: Assessing the Congruent Evolution of Globalization and International Arbitration' (2009) 1087 <https://www.lw.com/thoughtLeadership/congruent-evolution-of-globalization-and-international-arbitration> accessed 9 February 2019.
[3] Constitution of Kenya 2010, Art 159 (2) c, ADR mechanisms shall be promoted and used provided they do not contravene the bill of rights, are not repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with the constitution or any written law, *See* generally Art 159 (3).
[4] *See* Order 46 Rule 20 of the Civil Procedure Rules.

2.0.Background to the Study

Arbitration is an ADR mechanism whereby parties agree to submit their disputes to a neutral decision maker who has the authority to hand down a binding decision based on objective standards.[5] Parties who arbitrate have decided to resolve their disputes outside of any judicial system pursuant to an agreement between two or more parties, under which the parties agree to be bound by the decision to be given by the arbitral tribunal.[6]

The arbitral tribunal may consist of one or three arbitrators who are chosen by the parties who are at liberty to agree on the procedure of appointment of such arbitrators.[7] Parties also decide between two types of proceedings: institutional arbitration, or *ad hoc* arbitration. In the former, parties designate an institution to administer the arbitral process in accordance with its arbitration rules.

By contrast, the latter requires the parties to select the arbitrators, and the rules and procedures. If necessary, the parties can also choose an arbitral institution as an appointing authority and adopt an institution's arbitration rules, if the rules allow the parties to opt out of case administration by that institution.[8]

Additionally, parties are free to choose the place of the arbitration and the language of arbitration.[9]Thus, arbitration gives parties substantial freedom and control to execute the arbitration agreement. This freedom is called the principle of party autonomy.[10]

Notably, arbitration has become attractive as it offers neutrality of forum, it is flexible and the autonomy of the process allows parties to have control. However, its effectiveness has diminished as it has become complex and costly.[11]

---

[5]Peter d'Ambrumenil, *Mediation and Arbitration,* (Cavendish Publishing Limited, 1997) 7.
[6]Ronald Bernstein, *The Handbook of Arbitration Practice: General Principles* (Sweet & Maxwell, London 1998) 313.
[7]Arbitration Act, 1995, s 12.
[8] William Hartnett, QC and Michael Schafler, "Ad Hoc v. Institutional Arbitration – Advantages and Disadvantages"http://adric.ca/wp-content/uploads/2017/09/Hartnett-and-Shafler.pdf> accessed 28 January 2019
[9](n 3), ss 21 & 23.
[10] Sunday Fagbemi, 'The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality', https://www.ajol.info/index.php/jsdlp/article/viewFile/128033/117583 accessed 5 January 2019

Although arbitration depends on the agreement of the disputing parties, the states provides the legal framework within which parties agree to arbitrate and in which arbitration takes place. Nonetheless, the invocation of the process depends solely on the parties agreeing to use it to resolve their disputes.[12]

2.1.The Arbitration Agreement

The arbitration agreement is the foundation of an arbitration. It provides the basis of arbitration and sets that parameters within which the arbitration can take place. Parties may incorporate an arbitration clause within their main contract[13]or have it in the form of a separate agreement.[14]

The arbitration agreement is paramount to this study in light of the recent judicial developments on the award of interim measures. In the case of *Bia Tosha Distributors Limited v Kenya Breweries Limited & 3 others*[15], although the distributorship agreement between the parties incorporated an arbitration agreement, nevertheless, the court stated that where the dispute is laid out as a constitutional issue then the High Court must deal with the dispute.

The foregoing case demonstrates the disparity in which court have handled the application for interim measures. Whilst parties in their arbitration agreement anticipated that any disputes that could arise between them will be resolved by arbitration, the court assumed jurisdiction over the dispute which was purely commercial and impute that the dispute had taken a constitutional trajectory.

---

[11] Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration,* (Cambridge University Press, 2008) 1.

[12]Alan Redfern and Martin Hunter, *International Arbitration*, paras 106 - 116.

[13] The arbitration clause refers to disputes not existing when the agreement is executed. Parties may also form a separate agreement when a dispute has already arisen, in which case the arbitration agreement contains an accurate description of the subject matters to be arbitrated.

[14]Arbitration Act 1995 (2009), s 4(1) states that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

[15][2016] eKLR.

2.2.Role of the courts in arbitration

Although there has been an apparent shift towards arbitration, courts continue to play a role in the arbitration process. Judicial intervention is restricted by the Arbitration Act which states that courts shall not intervene in matters governed by the Act except as provided in the Act.[16]

Judicial decisions have stamped the extent of court intervention in arbitration. In the classic case of *Ann Mumbi Hinga v Victoria Njoki Gathara*[17]the court stated firmly that there is no right for any court to intervene in the arbitral process or in the award except in the situations specifically set out in the Arbitration Act or as previously agreed in advance by the parties.

One of the permitted interventions under the Arbitration Act therefore, is the High Court's power to grant interim measures of protection before or during the arbitral proceedings.[18]

Interim measures of protection are interim reliefs[19] which are granted before the final award, for the purpose of ensuring that once the final award is rendered, the relief on the disputed matter would still be available.[20]Essentially, these reliefs protect the ability of a party to obtain a final award. Without them, final arbitral awards will be rendered nugatory as they minimize loss, damage, or prejudice during the arbitral process.[21]

A party may apply to the High Court for Interim measures of protection and in doing so, will not lose their right to arbitrate as it will not be incompatible with the arbitration agreement. Alternatively, if the parties agree, a party may apply to the arbitral tribunal for interim measure of protection.[22]

---

[16](n 7) s 10.
[17][2009] eKLR.
[18](n 7), s 7.
[19] Interim measures are sometimes referred to as *'interim conservatory measures'* under the ICC Rules, '*provisional or conservatory measures'* under the Swiss law; or *preliminary measures*; *precautionary measures; preliminary injunctive measures*; and *urgent measures.*
[20] Moses (n 11), 100.
[21]Gary B. Born, *International Commercial Arbitration: Commentary and Materials* (2nd edn, 2001) 920.
[22](n 7) s 18.

Although the High Court is guided by section 7 of the Arbitration Act, there is contradictory jurisprudence on how it has handled interim reliefs. Furthermore, the Act is mute on types of interim measures, the conditions for granting these measures and the scope of measures that can be granted leaving courts with a wide discretion which is subject to abuse.

Generally, Kenyan Courts have relied on the conditions for granting interim measures enumerated in the case of *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others.*[23]First and foremost, the Court of Appeal in this matter faulted the High Court's application of civil procedure requirements for the grant of injunctions in a matter filed under section 7. In the ruling of Nyamu J, the Court of Appeal observed as follows:

> "…the Court also failed to correctly address the principles for the issue of any such measures and worse still, the supreme court took over the subject matter altogether and ruled on the merits of the subject matter of the arbitration thereby prejudicing the outcome of the arbitration…".

In an attempt to rectify this anomaly, the Court of Appeal distinguished interim measures from injunctions and went further to state that in Kenya the factors that the court must take into account before issuing the interim measures of protection are, (a) the existence of an arbitration agreement, (b) whether the subject matter of arbitration is under threat, (c) what is the appropriate measure of protection after an assessment of the merits of the application? (d) For what period must the measure be given as to avoid encroaching on the tribunal's decision-making power as intended by the parties?

Other factors were added and considered in the case *Futureway Limited v National Oil Corporation of Kenya*[24] where the Court sated as follows:

> "…I have no quarrel with the principles stated in Safaricom Ltd case. The prerequisites are sound. I would perhaps add that the grant of an interim order of protection is indeed

[23][2010] eKLR**,** para 14.
[24][2017] eKLR, para 35.

discretionary and thus the court ought to take into account the factor of urgency with which the applicant has moved to court. The court should also, in my view, look into the risk of substantial (not necessarily irreparable) harm or prejudice in the absence of protection."

From the foregoing cases, it would appear that the test is set, however, more judges have set their own conditions diverging from the established test. For instance, in *Safari Plaza Limited vs Total Kenya Limited*[25], the court was convinced with the existence of a valid arbitration agreement, nothing more.

The said court was guided by the decision in *Seven Twenty investments Limited vs. Sandhoe investments Kenya Limited*[26]where Kamau J stated that *"[in decided whether to grant interim measure of protection] … all that a court would be interested in is whether or not there was a valid arbitration agreement."*

In light of the above decisions, the study seeks to study whether the divergent interpretation of section 7 stems from the absence of a clear legal framework. Whereas, the Arbitration Act authorizes the High Court to grant interim measures, it does not set the conditions for granting such measures. This uncertainty demonstrates that the Arbitration Act may not be in tandem with the international best practices.

The 2006 amendment of the UNCITRAL Model Law harmonizes the approach towards interim measures. It lays down the scope of measure that can be granted and conditions under which those interim measure could be granted.[27] However, Kenya has not adopted this amendment hence the inconsistent approach towards interim measures.

[25] [2018] eKLR
[26] [2013] eKLR.
[27] UNCITRAL Model Law (2006), Art. 17.

3.0.Statement of the Problem

Although section 7 of the Arbitration Act 1995 gives the High Court the power to grant interim measures of protection in arbitral proceedings, nevertheless, that section does not provide the conditions for granting interim measures of protection in arbitration disputes resulting in contradictory jurisprudence. Thus, this study seeks to analyse the power of the courts in granting interim measures. In doing so, the study will examines the relevant international arbitration laws and institutional arbitration rules and analyse whether there is certainty in the legal regime governing interim measures in Kenya.

4.0.Justification of the Study

The growing popularity of arbitration has increased the number of applications that are premised on section 7 of the Arbitration Act. Therefore, there is a need for a clear statutory provision that addresses the deficiencies in the Arbitration Act 1995. As the study illuminates the current international practice in the award of interim measures, the results will aid the improvement of the a new legal regime that seals the shortcomings in the present system in order to conform to the international best practice.

5.0. Research objectives

5.1. General objective

The main purpose of this study is to analyse arbitral interim measures of protection in Kenya.

5.2. Specific objectives

1) To outline the development of the laws arbitration in Kenya.
2) To examine the current legislative and institutional framework governing the award of arbitral interim measures of protection in Kenya.
3) To analyse the conflicting judicial decisions in the award of interim reliefs.

4) To examine the award of interim measures of protection under the Arbitration Act 1995 in light of the supremacy of the Constitution of Kenya.

6.0. Research Questions

This study seeks to find answers to the following questions:

1) Why is there a contradictory jurisprudence in the award of interim measures of protection?
2) What is the history and development of the laws governing interim measures of protection in Kenya?
3) What is the current legislative and institutional framework governing the award of arbitral interim measures of protection?
4) What are the conditions for granting interim measures of protection in Kenya?
5) What is the effect of the Constitution of Kenya in the award of interim measures of protection?

7.0.Hypothesis

This study hypothesises that although section 7 of the Arbitration Act gives the High Court the power to grant interim measures of protection in arbitral proceedings, nevertheless, there is contradictory jurisprudence in the award of interim measures of protection because section 7 does not indicate the conditions for granting interim measures of protection in arbitration disputes.

The study also hypothesises that although the Arbitration Act 1995 governs the award of interim measures of protection, nevertheless, its effect has been diluted due to the tension between the Arbitration Act 1995 and the supremacy of the Constitution.

8.0.Theoretical Framework

The study relies on legal formalism schools of thought. This theory posits the judges should be constrained by the determinable meaning of a statute because the exercise of discretion threatens democratic governance.

8.1. Legal Formalism

This study relies on the formalist theory of adjudication, a theory about how judges actually do decide cases and/ or how they ought to decide them.[28] Formalism or legal formalism is understood as a theory of adjudicative neutrality and internal intelligibility of legal arguments.[29] It is meant to provide predictability in the behaviour of law-applying authorities while simultaneously endowing judicial decisions with a greater legitimacy and authority.[30] Thus, formalism is an antithesis of radical rule-skepticism and legal realism which equate the law with law-application.[31]

Formalists maintain that law manifests itself in formal and fixed rules which regulate the methods used to create law; so that, in modern democratic legal systems, fixed legal rules play a vital role in solving legal problems.[32] Further, formalists insist on the claim that fixed legal materials must determine legal decisions, the so called rule based decision making and reasoning.[33] Here, the formalist argue that judges should restrict the scope of considerations that can figure in the decision-making process to the relevant legal reasons (e.g. to fixed legal rules or the source-based law) and not on morals, politics or other extra-legal

[28] Brian Leiter, 'Positivism, Formalism, Realism' (1999), 99 Columbia Law Review [v] 1144-1145.
[29] Jean d'Aspremont, *Formalism and the Source of International Law: A Theory of the Ascertainment of Legal Rules* (1st edn, Oxford University Press 2011), 18.
[30] Ernest J Weinrib, 'Legal Formalism: On the Immanent Rationality of Law' (May 1988) 97(6) Yale L. J. 949–1016; <https://www.jstor.org/stable/pdf/796339.pdf?refreqid=excelsior%3A167b500c5124e38820636a00c7447859> accessed 27 September 2019.
[31] See H.L.A, *Concept of Law,* where Hart construes formalism and rule-scepticism as the 'Scylla and Charybdis of justice theory' and rejects both of them.
[32] Krisztina Ficsor, 'The Nature and Theoretical Limits of Adjudicative Formalism in Contemporary Anglo-Saxon Legal Theory' (2014) Acta Juridica Hungarica, 55, No 1. 38–56.
[33] Ibid, 41.

considerations.[34] This pattern of deductive reasoning takes the following form; (a) legal rule; (b) relevant facts; and (c) judgment.[35]

A plain meaning of legal concepts is important because it makes legal decision more predictable. *L. Blutman*[36] argues that ignoring the clear meaning of legal texts and engaging in extra legal reasoning entails the possibility of relying on subjective preferences or establishing an incoherent and inconsistent legal practice.[37] Therefore, formalism defends predictability, stability and certainty in law and in legal reasoning. By supporting a textual interpretation, formalist believes that legal reasoning should be isolated from reasoning from political and moral reasoning thereby providing a predictable, stable practice of reasoning and decision-making.[38]

The formalist theory came from existing case law, which was induced from the practice of courts.[39] The practice of the courts however, came from the Nineteenth Century Ronald Dworkin (1931-2013), a formalist who sees the law rationally determinate. Dworkin denies that judges have strong discretion and are bound by authoritative legal standards.[40]

Karl Llewellyn's (1893-1962) critique of formalism claims that formalism divorces law from life, rendering law an alien, unpredictable, and, by reference to the baseline of social practice, arbitrary force.[41]

Similarly, in Roberto Unger's account, three features are apparent in formalism. First, it asserts the possibility of a method of legal justification that can be distinguished from political justification.[42] Second, the distinctive rationality of law is immanent to the legal material on which it operates. In this regard, law is characterized through the claim that the

[34] Ibid.
[35] Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (3rdedn Oxford University Press, 2012) 148.
[36] László Blutman, 'Adjudication and Textual Interpretation' 4: 94–104.
[37] Ibid, 97-99.
[38] Ficsor, 43.
[39] Thomas C. Grey, 'Langdell's Orthodoxy'(1983), 45 U. PITT. L. REV. 1, 24-27.
[40] Leiter, 1146.
[41] David Charny, 'The New Formalism in Contract', (1999)66 U. CHI. L. REV. 843-44.
[42] Roberto Unger, 'The Critical Legal Studies Movement' (1983) 96 Harv. L. Rev. 564.

content of law is elaborated from within. Third, the moral dimension of this rationality, ascribing normative force to its application.[43]

This study is guided by this theory in arguing that fixed legal rules are important in solving legal problems because a judge will have the ability to pinpoint the applicable law in developing a conclusion thereby creating certainty in legal reasoning.

9.0. Research Methodology

This study is purely theoretical hence it adopts a doctrinal legal research methodology grounded on the academic approach and whose purpose is to critique the law.[44] This methodology involves the systematic analysis of the statutory provisions and the legal principles enunciated therein, substantive law rules, doctrines, concept and judicial pronouncements.[45]

The study seeks to collect and analyse qualitative data derived from secondary body of case law, together with any relevant legislation and data that has already been collected by other researchers and is available from sources such as books, reports, articles, journals and internet materials.[46] In doing so, the study will focus on the analysis of the law on interim reliefs to in order to discern its applicability and how it has developed in terms on judicial reasoning and legislative enactment. In order to examine the development of arbitration laws and how they shaped the award of interim measures, the study will employ historical research method to study the events and ideas of the past.[47]

---

[43]Weinrib, 954.
[44] Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2007), 6.
[45] Ibid.
[46]C.R Kothari, *Research Methodology: Methods and Techniques* (2nd edn New Age International Publishers, 1985) 111.
[47] Ibid, 4.

10.0. Literature Review

Whereas a lot of literature has been written about interim measures in international commercial arbitration, the same cannot be said for interim measures in domestic arbitration in Kenya. First, there is little research that has identified the gap in the Arbitration Act or that has attempted to analyse and interrogate the recent contradictory judicial pronouncements on interim measures.

In contrast, a lot has been written on the role of courts in arbitration proceedings in Kenya which duplicates the jurisdiction of the court under the Arbitration Act. For instance, *Githu Muigai*[48]observes that despite the general rule against court interference in arbitral proceedings, a party is allowed to request from the high court an interim measure of protection before or during arbitral proceedings. *Muigai* recognizes that in granting these measures, the courts do not assume the jurisdiction of the arbitrator in determining the disputes on merits.[49]

Whilst this study acknowledges the role of court in granting interim reliefs, it goes further to explore how courts have exercised this power, what conditions have the courts employed, and seeks to find out whether these courts have these courts transcended their mandates.

Similarly, *Kariuki Muigua* in his book *Settling Disputes Through Arbitration in Kenya*[50] emphasizes that the High Court has wide discretion to grant interim measures in arbitration. However, he fails to recognize that the courts discretion has created contradictory jurisprudence.

Although *Muigua* recognizes that the Arbitration Act was silent on preliminary orders which is entrenched in the Model Law, nonetheless, he failed to appreciate that Kenya has not yet adopted the 2006 amendments of the Model Law on interim measure of protection which

[48]Githu Muigai, 'The Role of the Court in Arbitration Proceedings' at 78 in *Arbitration Law and Practice in Kenya* (Law Africa Publishing Limited, 2013).
[49]Ibid.
[50]Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya* (3rd edn Glenwood Publishers Limited, 2017) 131.

seeks to create a uniform approach to interim reliefs thereby leaving a gap in the Arbitration Act that has thus far fuelled the rise of divergent jurisprudence in the award of interim reliefs. This study will instead interrogate the provision on interim measures incorporated into various institutional rules and will recommend the adoption of the current best practices on interim reliefs.

According to *Margaret L. Moses,* in her book *The Principles and Practice of International Commercial Arbitration,*[51]many countries have different approaches towards interim measures especially those countries that have not adopted the Model Law. To *Moses,* the Model Law serves as a useful guideline that informs a consistent approach to interim measures by courts and arbitral tribunals.

Comparably, this study argues that a consistent approach is imperative to serve as a guideline for subsequent applications involving similar disputes. However, it goes beyond the uniformity of laws as underscored by Moses and recommend certainty and consistency in judicial precedents.

Philip Clapper[52]agrees that courts have an important role in supporting arbitration and are frequently called upon to do so.[53]He states that courts of most states with modern arbitration laws will issue interim orders to protect the subject matter of the dispute.[54]However, he stresses that when courts perform its supporting role in arbitration, they should not make a final decision on the merits of the dispute.

This study will discuss the principle of judicial non-interference in arbitral proceedings and argue that this principle has been eroded by Kenyan courts. In doing so, the study will employ case laws to show how the facilitative role of the court in Kenya has been exceeded hence justifying the need for a consistent approach and harmonization of the law.

---

[51]Moses (n 11) 102.
[52] Philip Capper, *International Arbitration: A Handbook* (3rdedn Lovells, 2004).
[53]Ibid, 6.
[54]Ibid.

According to *Peter B Routledge* in *Arbitration and the Constitution*[55] constitutional norms have increasingly worked their way into arbitration law, he termed it as the "*"seepage" of constitutional norms into the arbitration sphere*"[56] and that arbitration law has influenced the development of constitutional norms. However, this seepage does not necessarily take the form of express "constitutionalization" of arbitration.

He further states that *"the wall between arbitration and constitution remains although significant porous have formed."*[57] And observes that the resulting seepage takes various form,[58] for example, constitutional norms have affected arbitration through the development of private norms which parties then incorporate into their arbitration agreements which ultimately shapes the course of the dispute.

This study seeks to expound he arguments made by Routledge and focuses instead on the use of constitutional norms by courts in deciding whether to grant interim measures. The study was informed by the *Bia Tosha case*[59] where the court adopted the concept of constitutional imperative as the basis for assuming jurisdiction to determine an application for interim measures yet the dispute was purely commercial. The courts stated:

> "The court should not be in a hurry to simply invoke the principle of pacta sunt servanda (the agreement must be kept) and dispatch the parties away from the court process. The court ought to be holistic enough in considering the private personal agreements together with Article 159 on the one hand and the extent of Article 165 on the other hand. Painlessly, the court must seek to find out especially where one party alleges so, whether the dispute genuinely concerns violations of the Constitution. In this light one must also not forget the principle of constitutional supremacy for which 'Wanjiku' voted in 2010. By recognizing the Constitution to be supreme, the Kenyan

[55]Peter B. Routledge, *Arbitration and the Constitution* (Cambridge University Press, 2013) 5.
[56]Ibid.
[57]ibid.
[58]Ibid.
[59](n 15), para 84.

people could not have intended to again leave alone matters done by parties to the parties themselves but rather appeared under Article 165 to empower the court with the task to define limits of any rights whether entrenched under the Bill of Rights or by common law, modifying the latter where necessary to attain an appropriate blend with Constitutionalism"

This decision demonstrates that courts are willing to deviate from section 7 and 10 of the Arbitration Act and "constitutionalize" the arbitration process. Thus, this study seeks to identify a boundary in which courts must not overstep in their attempt to eclipse the jurisdiction of the arbitral tribunal under section 7.

John Hanna in his article, *The Role of Precedent in Judicial Decision*[60]observes that a court is not necessarily bound by its own precedents but it will follow the rule of law which it has established in earlier cases, unless clearly convinced that the rule was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent. This precedent, he continues, must be formulated not from the opinion but from the actual decision upon the material facts.[61]

Correspondingly, *Frederic R. Coudert* opines that a fair degree of certainty is a necessity in every system of law hence the rise of the common law doctrine of *Stare Decisis* as a mode of bringing about some sort of coherence in the justice administered and in formulating the justice into rules of law.[62]These propositions by *Hanna and Coudert* support this study's case for certainty and predictability in the award of interim measures which ultimately will reflect itself through legislation.

[60]John Hanna, ''The Role of Precedent in Judicial Decision' 2 Vill. L. Rev. 367 (1957). http://digitalcommons.law.villanova.edu/vlr/vol2/iss3/.
[61]Ibid, 371.
[62] Ibid, 363.

The study further argue that certainty will assure individuals that if they act on authoritative rules of conduct their contracts and other interests will be protected in the courts, makes for equality of treatment of all men before the law, and lends stability to the judiciary.

11.0. Limitations

The arguments made in the study are based on the existing literature therefore, the researcher may not be able to employ other methods of data collection such as interviews and administering questionnaires in soliciting for more information relating to the study.

12.0. Chapter Breakdown

Chapter 1: Introduction

The first chapter outlines the background of the study, the problem statement, objectives, research questions that the study seeks to answer, hypotheses, methodology, limitation and a brief literature review. This chapter introduces the study and gives a general introduction of the whole research.

Chapter 2: The development of the laws of arbitration in Kenya

The Chapter examines the development of the laws of arbitration in Kenya with regard to the power of the courts and arbitral tribunal to grant provisional measures.

Chapter 3: Legal and Institutional framework on arbitration in Kenya

The chapter examines the legal and institutional framework on arbitration and to provide an in-depth analysis on how the laws and the institutional rules have provided for the interim measures of protection.

Chapter 4: Critical analysis of arbitral interim measures of protection in Kenya

The Chapter will critically analyse judicial precedents in Kenya on the interpretation and applicability of section 7 of the Arbitration Act.

Chapter 5: Conclusions and recommendations

The Chapter summarises the findings, conclusions and recommendations of the study.

CHAPTER TWO: THE DEVELOPMENT OF THE LAWS OF ARBITRATION IN KENYA

2.0. Introduction

Disputes are as old as humankind[63] and have generally been treated by societies as a costly occurrence that should be avoided if possible or addressed quickly when they cannot be avoided.[64]

Thus, societies devised ways of settling disputes since they view disputes as a threat to preservation of order and a cause of interruptions of the flow of commerce. Although humans tend to solve disputes by fighting, they have also recognized the benefits of settling the matter peacefully hence the search for alternatives to violence gave birth to the precursors of ADR.[65] At the initial stages, the first form of ADR that parties utilize is negotiation where two people simply talk about a problem and attempt to reach a resolution both can accept.[66] If the parties are unsuccessful, they will engage in mediation, a non-binding process where parties accept intervention of a third party will try to make sure each party understands the other's point of view, will meet with each party privately and listen to their respective viewpoints, stress common interests, and try to help them reach a settlement.[67] If the third party was asked to make a decision or placed the decision in the hands of some arbitrary mechanism, the process was arbitration.[68] Other methods followed when the third party undertook an investigation that helped bring the matter to closure; this was fact finding or neutral fact finding.[69] If a third-party neutral gives an opinion on the likely outcome of a trial as the basis for settlement

[63] Michael L. Moffit and Robert C. Bordone (eds), *The Handbook of Dispute Resolution* (1st edn, Jossey-Bass: A Wiley Imprint 2005), 13.
[64] Ibid, 1.
[65] Jerome T. Barrett and Joseph P. Barrett, *A History of Alternative Dispute Resolution: The Story of a Political, Cultural and Social Movement* (1st edn, Jossey-Bass: A Wiley Imprint 2004), 1.
[66] Ibid.
[67] Moses (n 11)14.
[68]Barrett (n 65) 2.
[69] It is usually utilized when parties have reached an impasse therefore the opinion of a neutral third party helps to move the parties away from the impasses. It only deals with questions of fact not interpretations on law or policy,see Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya* (3rd edn Glenwood Publishers Limited, 2017) 23.

discussions, that process is called early neutral evaluation.[70] If the matter is brought before the community and all members had to be satisfied with the outcome, the process is called consensus building. ADR is often thought of as a new way of resolving disputes. In fact, its roots run deep in human history, and they have long played a crucial role in cultures across the globe.[71]

This chapter is paramount to the study as it discusses not only the historical legislative framework of arbitration laws in Kenya but also the history of interim measures of protection. It examines the genesis of the transition from the exclusive jurisdiction of the courts to grant interim reliefs to concurrent jurisdiction, where both courts and arbitral tribunals have concurrent powers to order interim reliefs.

In doing so, this chapter will first address the earliest recognition of ADR in Kenyan communities, the evolution of arbitration laws and how they shaped the award of interim measures.

2.1. ADR in Traditional Communities in Kenya

In its early days, arbitration was a simple and informal process, for instance indigenous communities in Kenya engineered their own ways of settling disputes. Thus, dispute resolution mechanisms were not alien. Elders in these communities were tasked with the role of resolving conflicts and disputes and they utilized norms derived from customs in their respective traditional justice systems.[72]

The constitution of Kenya later recognized the role played by culture in the nation. Article 11(1) and (2a) states as follows:

> "This Constitution recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.

[70] Kariuki Muigua (n 50), 22.
[71] Ibid.
[72] Ibid.

> The State shall promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage…"

Kariuki Muigua in his book '*Alternative Dispute Resolutions and access to justice in Kenya*'[73]states that

> "it has been observed throughout Africa that traditions have emphasized harmony and humanity and the same has been expressed through terms such as Ubuntu in South Africa and Utu in East Africa"

It can therefore be inferred that our traditional African justice systems, played a role in dispute resolutions only that these traditional mechanisms adopted informal approaches unlike Arbitration which has a laid down legal framework. To date, some disputes such as family and land disputes are resolved through these traditional mechanisms.

2.2. The Law Merchant

In Europe before the end of the thirteenth century, commercial arbitration was widely used as means of solving finance and commerce disputes under a practice referred to as the law merchant.[74] This arbitration was voluntarily developed, adjudicated, and enforced by merchants. The legitimacy of the process was founded on an understanding of fairness, mutual benefits, and reciprocity of rights.[75] It was special law for mercantile transactions than a special law for merchants and were not conceived to be purely English law but rather a *ius gentium* known to merchants throughout Christendom.[76]

---

[73] Kariuki Muigua, *Alternative Dispute Resolutions and access to justice in Kenya* (Glenwood Publishers Limited, 2015).
[74] Barrett (n 65), 16.
[75] Ibid.
[76] Sir Frederick Pollock and Frederick William Maitland, *The History of English Law* before *the time of Edward 1* 667 (2nd edn Cambridge University Press, 1898), 493.

In urban centres, markets, and trade fairs, merchants selected informal judges drawn from the merchant ranks to resolve disputes according to customs and practice.[77]The voluntary and participatory nature of the process contributed to its popularity. By the late Middle Ages, common law courts replaced some work of the law merchant. These courts, however, lacked the technical expertise of the merchant judges, who were more akin to arbitrators with their extensive knowledge of travel and commerce.[78]

By the eighteenth-century, arbitration was widely used as a means of alternative dispute resolution. However, courts began to intervene because of their desire to keep all adjudications within their sphere and also because litigants in arbitrations sought court's assistance who in turn exacted a price for the assistance offered.[79]

The first arbitration law was enacted in 1698 and it established several important principles that continue to apply in arbitration today: the parties were allowed to choose their own arbitrator, arbitration awards were recorded in a state court, and the court was likely involved in enforcing the awards.[80]

The Common Law Procedure Act 1854 followed which incorporated further provisions on arbitral proceedings. It improved the granting and enforcement of arbitral provisional measures[81] and granted the courts the power to stay proceedings whenever a person, having agreed that a person's dispute should be referred to arbitration, nevertheless commenced an action in respect of the matters referred.

However, the first specific Arbitration Act was enacted in 1889 which amended and consolidated all previous practices. It was later revised by the enactment of the Arbitration

[77] Ibid.
[78] The commercial community continue to prefer arbitration over traditional courts which had expanded its jurisdiction owing to the technical and time-consuming character of litigation which did not accord with their desire for speed in the resolution of their disputes.
[79] Kyriaki Noussia, 'Confidentiality in International Commercial Arbitration: A Comparative Analysis of the Position under English, US, German and French Law' 2010 XIII, 200P.
[80] Barrett (n 65), 17.
[81] Common Law Procedure Act 1854, s 2, s 28 as implemented by s 8 of the Arbitration Act 1934.

Act 1950, 1975, 1979 and 1996 which is the current Arbitration Act in England. These acts embody the principle for party autonomy and as opposed to judicial intervention that existed prior. The Arbitration Act 1979, for instance, abolished the procedure which allowed courts to review an award if an error of law or fact appeared on the face of the award, and in its place established a structure under which errors of fact could not be the subject of an appeal and errors of law could be appealed only under exceptional circumstances.[82]

The Arbitration Act 1996 consolidated all the legal principles enshrined in the previous Arbitration Acts and the common law. It is a comprehensive law on arbitration law ever enacted in England, although both the common law and decisions on earlier legislation still remain significant, not least as a guide to the interpretation of its provisions. It has managed to move English law far closer to the UNCITRAL Model Law.[83]

2.3. The Development of the law of Arbitration in Kenya

In the late nineteenth century, the European colonial conquest of Africa disrupted the social, economic and political spheres of life in the continent that culminated in the installation of alien institutions and mode of control.[84] Kenya, then the East Africa Protectorate, was conquered by the British in the years following the Berlin Conference of 1884-1885 that portioned Africa among the European imperial powers.

The British government stamped its authority in East Africa by the construction of the railroad between 1896 and 1901 which opened the interiors of Kenya for colonial exploitation and control. This domination of the economy and society during the colonial period was effected through legislation and coercive forces of the police and the military.[85]

[82] Noussia (n 79).
[83] ibid, 13.
[84] Michael M. Kithinji and others (eds), *Kenya After 50: Reconfiguring, and Policy Milestones* (1st edn, Palgrave Macmillan 2016), 2.
[85] Ibid, 3.

The British installed English laws to cement their incursion,[86] the transplantation of English law through the Orders-in-Council 1900 and 1907 ignited a new era in dispute resolution[87] which signalled the departure from the traditional dispute resolution.

The first arbitration statutes to be introduced in Kenya were the Arbitration Ordinance 1914 which was a reproduction of the English Arbitration Act 1889.[88] Section 21 of the Ordinance allowed courts to have absolute control over arbitral proceedings as courts were given the power to direct an arbitrator or umpire to state any question of law arising in the course of the reference or an award or part thereof in the form of a special case for the decision of the court.

Arbitration Act 1968 was Kenya's first post-independence statute and was a replica of the English Arbitration Act of 1950. Section 12 (6) (e-h) of this Act granted the High Court the powers to make orders in respect of the preservation; interim custody or sale of any goods which are the subject matter of the reference; securing the amount in dispute in the reference; the detention, preservation or inspection of any property or thing which is the subject of the reference and interim injunctions or the appointment of a receiver.[89]

Whilst both the Arbitration Act if 1950 and 1968 permitted the high court to grant interim measures, the arbitral tribunal was not granted the jurisdiction to award interim measures even where the arbitration agreement provided for it. This power was exclusively reserved for the high court.

The Arbitration Act 1968 remained the operative statute until 1995 when the current Arbitration Act was enacted. The current Act is modelled after the UNCITRAL Model Law

---

[86] Ibid.

[87] Jacob K. Gakeri 'Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR' <https://suplus.strathmore.edu/bitstream/handle/11071/3435/Placing%20Kenya%20on%20the%20global%20platform%20an%20evaluation%20of%20the%20legal%20framework.pdf?sequence=1&isAllowed=y> accessed 23 March 2019.

[88] Kariuki Muigua, 'Emerging Jurisprudence in the Law of Arbitration in Kenya: Challenges and Promises', 8 <http://kmco.co.ke/wp-content/uploads/2018/08/Emerging-Jurisprudence-in-the-Law-of-Arbitration-in-Kenya.pdf> accessed 23 March 2019.

[89] See also Arbitration Act 1968 Chapter 49 Laws of Kenya, s 13 (5) (c-h).

which was adopted by resolution of UNCTRAL at its session in Vienna in June 1985 as a law to govern international commercial arbitration.[90]

The Model Law on Arbitration has led the modernization of national arbitration laws.[91]In fact. its primary objective is not only modernization of the national laws but also ensuring that the national laws make provisions for international commercial arbitration.[92] The Model Law was enacted because of the huge discrepancies in the national laws on arbitration. Further, these national laws did not fully cater for the needs of international commercial arbitration hence, the justification for the harmonization.[93]

The Model Law encompasses provisions for all the stages of arbitration process beginning with the arbitration agreement which is treated as independent of the contract of which it forms part. It contains detailed provisions for the appointment and challenge of arbitrators.[94]It incorporates the principle of *kompetenz kompetenz* which authorizes the tribunal to rule on its own jurisdiction, extent of judicial interventions by way of referral of cases to arbitration,[95] and recognition and enforcement of arbitral awards. Essentially, the Model Law codifies the internationally accepted best practices in arbitration.[96]

The Model Law permits a party to request from a court an interim measure of protection before or during arbitral proceedings.[97] The arbitral tribunal may also, at the request of a party, order any party to take such interim measure of protection in respect of the subject

[90] Redfern and Hunter (n 12) 63.
[91] ICCA, "ICCA's Guide to the Interpretation of the 1958 New York Convention" (International Council for Commercial Arbitration (ICCA), 2011), <https://goo.gl/Rcv0rq> accessed 23 March 2019.
[92] UNCITRAL, "UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration" (United Nations Commission on International Trade Law, 2012), <https://goo.gl/yRdPVo> accessed 24 March 2019.
[93] Ibid.
[94] Redfern and Hunter (n 12), 64.
[95] The model law authorizes the arbitral tribunal to grant interim measures of relief e.g. to preserve assets or material evidence.
[96] UNCITRAL, "Status UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006" (United Nations Commission on International Trade Law (UNCITRAL).2016), <https://goo.gl/t6AdXL> accessed 24 March 2019. See also, s 4, 17, 19, 20, 28, 29 and 32A the Arbitration Act which are all lifted from the Model Law.
[97] Model Law, Art 9.

matter of the dispute.[98]The Model Law therefore provides for concurrent jurisdiction of the courts and the arbitrators to grant interim measures.

The amendments to the Model Law adopted in 2006 expanded the provision on interim measures. It included a broad definition of interim measures and delineated the conditions for granting such measures.[99]Section 4 sets out rules for the recognition and enforcement of interim measures as well as the ground for the refusing recognition and enforcement.[100]

The principle of concurrent jurisdiction was reinforced under Section 5 such that the existence of an arbitration agreement does not negate the powers of the court to grant interim measures. Article17 J states that 'a court shall have the same power of issuing interim measures in relation to arbitration proceedings, irrespective of whether their place is in the territory of the enacting state, as it has in relation to proceedings in courts.'

Whilst the revision of the Model Law incorporated internationally accepted principles on interim measures, the Arbitration Act 1995 remains too rigid and limited in scope as it lacks provisions on the recognition and enforcement of interim measures.

It is paramount to note that the Model Law only acts as a guide to the enactment of national legislations.[101] Therefore, it must be ratified by a domestic law of a member state for it to take effect.[102]

The Arbitration Act 1995 is thus considered an 'arbitration friendly legislation'[103] due to the adoption of the Model Law and the modifications which were made to further align the act to the best international practices in commercial arbitration.

[98] Ibid, Art 17.
[99] Model Law, Section 1, Art 17 and 17A.
[100] ibid, Art 17 H and I.
[101] Poudret Jean-François and Sébastien Besson, Comparative Law of International Arbitration. (London: Sweet & Maxwell, 2007), <https://goo.gl/oYm6bV> accessed 24 March 2019.
[102] Ibid.
[103] (n 12) [1.219].

2.4. Conclusion

This chapter examined the development of arbitration and the legal framework and how it has impacted the award of interim measures. The chapter has also covered how the order of interim measures has progressed since 1968 to 1995 and how the amendments to the Model Law in 2006 improved and harmonized the provisions on interim measures. The revision was necessary in light of the important role interim reliefs play in arbitration.

This Chapter found that interim reliefs were not utilised in traditional dispute resolution methods due to their informal nature. However, the practice in England which granted the High the power to grant interim reliefs was replicated in Kenya by the adoption of English Laws in the post-independence era.

This chapter argued that the Arbitration Act 1995 is out-dated thereby leaving room for uncertainties in the award of interim measures.

CHAPTER THREE: LEGAL AND INSTITUTIONAL FRAMEWORK ON ARBITRATION IN KENYA

3.0. Introduction

The increased globalization and world trade and investments resulted in the growth of both domestic and international arbitration as parties now favour arbitration as a method of resolving disputes. This growth of arbitration is due to a harmonised practice that has developed overtime and rest on wide network of legal and institutional framework which governs the legal status and effectiveness of arbitration from the arbitration agreement to the enforceability of the arbitration award. [104]

The primary focus of this chapter will be to examine the legal and institutional framework on arbitration and to provide an in-depth analysis on how the laws and the institutional rules have provided for the interim measures of protection.

3.1. Local Framework

3.1.1. The Constitution

In Kenya, arbitration and other modes of alternative dispute resolution are anchored in and promoted by the Constitution. Article 159 (2c) states as follows:

> "In exercising judicial authority, the courts and tribunals shall be guided by the following principles: -
>
> (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause."

[104] Redfern and Hunter (n 12), 1.

This constitutional status has led to its application by the courts through various projects including the Court Annexed Mediation, enactment of the Small Claims Court Act No. 2 of 2016 which calls for the adoption of ADR in settlement of disputes under that Act.[105]

3.1.2. The Arbitration Act 1995

The Arbitration Act 1995 is the principle legislation governing arbitration in Kenya. It contains a comprehensive legal framework which applies, except as otherwise provided in a particular case, to both domestic and international arbitrations.[106]

The arbitration Act espouses principles that govern the conduct of the parties and the arbitral tribunal. The first principle is the fair resolution of disputes by the tribunal without unnecessary delay or expenses. Section 20 of the Act states that where the parties fail to agree on the procedure to be followed by the arbitral tribunal in the conduct of the proceedings, *"the arbitral tribunal may conduct the arbitration in the manner it considers appropriate, having regard to the desirability of avoiding unnecessary delay or expense while at the same time affording the parties a fair and reasonable opportunity to present their cases."*

Although the Act does not specifically require the independence and the impartiality of the arbitral tribunal, nonetheless, it provides that the appointment of an arbitrator may be challenged on grounds giving rise to justifiable doubts as to his impartiality and independence.[107] As section 20 places an obligation to the arbitral tribunal to act in a manner that avoids unnecessary delay and expense, there's a corresponding duty on the parties do all things necessary for the proper and expeditious conduct of the arbitral proceedings.[108]

This duty was introduced by the 2009 to the Arbitration Act and is similar to the duty imposed on the courts under the Civil Procedure Act Cap 21 to deal with cases for the

[105] Small Claims Court Act No. 2 of 2016, s 18.
[106] Arbitration Act 1995, s 2.
[107] Ibid, 13 (3).
[108] See s 19A on the general duties of the parties

purpose of attaining a just determination and a timely disposal of the proceedings in the court.[109]

The second principle is that of party autonomy which is reflected in the Arbitration Act severally. For example, parties are free to determine the number of arbitrators [110] the procedure for appointing the arbitrator or arbitrators,[111] the rules of procedure,[112] juridical seat of arbitration and the location of any hearing or meeting,[113] to be used in the arbitral proceedings, [114] whether the hearing shall be held orally or there will be written representations,[115]a cause of action where there is default by any party,[116] the appointment of experts,[117] a choice of law,[118] the decision making by the panel of arbitrators,[119]the effect of the award,[120]the costs and expenses of an arbitration,[121] the provision on the payment of interest[122] and the determination of any questions of law arising in domestic arbitration.[123]

The Act further encourages party autonomy as it is drafted in a 'user – friendly' manner that does not require reference to other sources to be fully understood.

The third principle limits courts interference in arbitration matters.[124] However, it provides various instance where courts assistance in arbitration is necessary; and it may take place before the arbitral proceeding has commenced, during the arbitral proceedings and after the award has been rendered.

[109] Civil Procedure Act Chapter 21 laws of Kenya, s 1B.
[110] (n 2) s 11 (1).
[111] Ibid, s 12 (2).
[112] Ibid, s 20 (1).
[113] Ibid, s 21 (1).
[114] Ibid, s 23 (1).
[115] Ibid, s 25 (1)
[116] ibid, s 26.
[117] Ibid, s 27.
[118] Ibid, s 29 (1)
[119] Ibid, s 31 (1).
[120] Ibid, s 32A.
[121] Ibid, s 32B.
[122] Ibid, S 32 C.
[123] Ibid, S 39 (1).
[124] Ibid, s 10.

The grant of interim measures of protection under section 7 of the Arbitration Act is an instance where the court intervenes before or during arbitral proceedings upon application by a party. Alternatively, where the arbitral tribunal has been constituted, party may choose to apply to the arbitral tribunal for interim measures of protection and the court may still render its assistance to the arbitral tribunal or a party with the approval of the arbitral tribunal so applies. Section 18 of the Arbitration Act states as follows:

> 18(1) unless the parties otherwise agree, an arbitral tribunal may, on the application of a party—
>
> (a) order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute, with or without an ancillary order requiring the provision of appropriate security in connection with such a measure; or
>
> (b) order any party to provide security in respect of any claim or any amount in dispute; or
>
> (c) order a claimant to provide security for costs.
>
> (2) The arbitral tribunal or a party with the approval of the arbitral tribunal, may seek assistance from the High Court in the exercise of any power conferred on the arbitral tribunal under subsection (1).

The applicability of section 7 and its interpretation by the courts will be discussed in detail in Chapter 4 of this study.

3.1.3. Civil Procedure Act Cap 21

Aside from the Constitution, the Civil Procedure Act and its Rules have endorsed Arbitration and other ADR and this has helped escalate the popularity the ADR in Kenya.

The Civil Procedure Act delegates the manner in which all references to arbitration by an order in a suit, and all proceedings thereunder, shall be governed.[125] It also establishes a Mediation Accreditation Committee whose function is to, among others, determine the conditions for the certification of mediators and to set up appropriate training programmes for mediators.[126]

The Civil Procedure Rules permits parties to a suit to apply to the court for order of reference to arbitration provided the application is made before judgment is pronounced.[127] In line with the principle of party autonomy, the Rules allows parties to appoint an arbitrator in a manner they so wish.[128]

Moreover, in line with the non-intervention of courts principle, once a matter has been to arbitration by an order of the court, the court shall not deal with that matter in the suit except in the manner and to the extent provided in Order 46.

One of the ways in which a court can still deal with the matter is by assisting the parties in appointing the arbitrator or umpire where the parties have failed to agree.[129] The court may also assist the arbitrator or umpire where there is a hostile witness and where the arbitrator or umpire on notice or a party seeks an extension of time for the making of an award.[130]

Most importantly, Order 46, Rule 20 allows the court on its own motion or at the request of the parties to adopt or implement ADR as a means for resolving the dispute or as a means for the attainment of the overriding objective envisaged under section 1A and 1B of the Civil Procedure Act.

[125] (n 5), s 59.
[126] Ibid, s 59A (4).
[127] Civil Procedure Rules 2010, Or 46 r 1.
[128] Ibid, Or 46 r 2.
[129] Ibid, Or 46 r 5.
[130] Ibid, Or 46 r 7 and 8.

3.2. Institutional Framework in Kenya

3.2.1. Local Framework

3.2.1.1. The Chartered Institute of Arbitrators, Kenya Branch (CIArb)

The Kenyan Chapter of the Chartered Institute of Arbitrators was established in 1984[131] and registered under the societies Act Cap 108. It is a branch of the Chartered Institute of Arbitrators which was founded in the United Kingdom in 1915. Through its arbitration rules published in 2015, the Institute promotes and facilitates the resolution of disputes by arbitration or other modes of ADR.

Parties may choose to have future disputes referred to arbitration under the CIArb rules or stipulate in their contract that the CIArb will assist them in appointing the arbitrators.[132]

The CIArb Rules authorizes any party who is need of conservatory or urgent interim measures prior to the constitution of the arbitral tribunal to file an application with the CIArb seeking an appointment of an emergency arbitrator. The arbitral tribunal may at the request of any party, grant interim measures.

The Rules also provides a generic definition of what an interim measure is as well as the requirements for granting such measures which the arbitral tribunal shall apply to the extent it considers appropriate.[133]

Most importantly, Article 26(10) categorically states that it shall not be deemed incompatible with the arbitration agreement, if a request for interim measures is addressed by any party to a judicial authority.

3.2.1.2. The Nairobi Centre for International Arbitration (NCIA)

The Nairobi Centre for International Arbitration (NCIA) was formed by a Memorandum of Understanding between the Secretary General of Asian-African Consultative Organization,

[131] Chartered Institute of Arbitrators Kenya <https://www.ciarbkenya.org/about-us/> accessed 10 April 2019.
[132] Ibid, Art 26(1). See also Appendix 1 – Emergency Arbitrator Rules.
[133] Ibid, Art 26(3) and (4).

an organization comprising of forty-seven member states from Asia and Africa and the Attorney General of Kenya on 3rd April 2006 during the forty fifth annual session of the AALCO in New Delhi India.[134]

The agreement establishing the NCIA was however signed a year later on 2nd July 2007 at the forty sixth annual session of AALCO in Cape Town South Africa. On 25th January 2013, the Nairobi Centre for International Act no. 26 of 2013 was created. The main aim for its formulation was to promote international commercial arbitration and other alternative forms of dispute. The headquarters of the Centre are in Nairobi[135]

The functions[136] of the NCIA includes among others: - to promote, facilitate and encourage the conduct of international commercial arbitration in accordance with this Act and Administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices.

The Act establishes an Arbitral Court comprising of members of courts who are appointed competitively by the board of directors in charge of administering the center. The Court has exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with the said Act or any other written law.[137]

On 24th December, 2015, the Nairobi Centre for International Arbitration (Arbitration) Rules, 2015 was published through Legal Notice No. 255. The Rules 'apply to arbitrations where any agreement, submission or reference, whether entered into before or after a dispute has arisen, provides in writing for arbitration under the Nairobi Centre for International

[134] Kariuki Muigua, 'Effectiveness of Arbitration Institutions in East Africa' 2016.
[135] Nairobi Centre for International Arbitration Act 2013, s 4 (3).
[136] Ibid, s 5.
[137] Ibid, s 21 and 22.

Arbitration Rules or such amended Rules as the Centre may have adopted to take effect before the commencement of the arbitration.'[138]

The Rules contains provisions on interim and conservatory measures.[139]It states that unless agreed by the parties, the arbitral tribunal shall, on the application of a party, have power to order the preservation, storage, sale or other disposal of any property or thin under the control of any party and relating to the subject matter of the arbitration; and also order on a provisional basis, any relief which the arbitral tribunal may have power to grant in an award, including a provisional order for the payment of money or the disposition of property as between any parties.

The power of the arbitral tribunal shall not prejudice a party's right to apply to judicial authority for interim of conservatory measures prior to the formation of the arbitral tribunal and in exceptional cases.[140] However, once parties have consented to an arbitration process in accordance with the Rules, they are considered to have agreed not to apply to a judicial authority for any order for security for legal or other costs available from the arbitral tribunal.

Rule 28 and the Second Schedule provides for the appointment of an emergency arbitrator. However, upon the formation or expedited formation of the arbitral tribunal, the emergency arbitrator ceases to have further power to act in the dispute.

3.3. International Framework

3.3.1. Multilateral Conventions

There are a large number of multilateral conventions on arbitration such as the Geneva Protocol of September 24, 1923[141] and the Geneva Convention of September 26, 1927 on the Execution of Foreign Arbitral Awards which came into force on July 25, 1929.

[138] Nairobi Centre for International Arbitration (Arbitration) Rules, 2015, r 3.
[139] Ibid, s 27.
[140] Ibid, s 27 (4).
[141] Protocol on Arbitration Clauses in Commercial Matters, entered into force on July 28, 1924.

The Geneva Protocol of 1923 was ratified by Kenya on 22nd June, 1925 and although the Protocol contains only four articles covering the validity and effect of arbitration clauses, it nevertheless had a decisive impact on the future of arbitration throughout the world. It laid a foundation for the worldwide development of international arbitration, which is obviously dependent on the effectiveness of arbitration agreements in international contracts.[142] Its main objective was to ensure that arbitration clauses were enforceable internationally so as to promote arbitration over courts by requiring national courts to refuse to deal with proceedings brought in breach of the arbitration agreement.[143]

The Geneva Convention of 1927 widened the scope of the Geneva Protocol by providing the conditions for the recognition and enforcement of foreign arbitral awards made in the territories of any high contracting party and between persons who are subject to the jurisdiction of one of the high contracting parties. This condition portrayed the weakness of the Convention as it confined scope of the Convention to awards made in a contracting state and, in particular, to awards between parties both of which are subjects of contracting states.[144]

As the growth of international trade continue to soar, earlier conventions needed to be revised for arbitration to become an efficient means of resolving international disputes.[145] Therefore, the United Nations, through ECOSOC, took the lead in the review of the ICC draft convention which later became the New York Convention, 1958[146] which governs the enforcement of both arbitration agreements and awards. Other fundamental conventions are the Washington Convention on the Settlement of Investment Disputes between States and

[142] Emmanuel Gaillard and John Savage, *International Commercial Arbitration* (Kluwer Law International, 1999) 121.
[143] Redfern and Hunter (n 12), 60.
[144] Ibid, 122.
[145] Ibid.
[146] Known as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, it has been 159 parties and 24 signatories.

Nationals of other States, 1965 (ICSID Convention)[147], European Convention on International Commercial Arbitration[148] and Inter-American Convention on International Commercial Arbitration (the Panama Convention).[149]

Regionally, OHADA was established by a treaty signed in Mauritius in 1993. The OHADA Council of Ministers adopted a uniform law on arbitration, repealing all contrary provisions in national legislation of its member states. The convention also established a "Joint court of Justice and Arbitration" which plays the dual role of an arbitration institution and a court empowered to review awards. The new regime applies to both domestic and international arbitration.[150]

These conventions serve to ensure that the arbitral process is carried out in a harmonized and effective manner. Moreover, they give parties confidence that they will have a reasonable method of recourse when problems develop in their international business transactions.

3.3.2. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The 1958 New York Convention)

As international trade continued to grow there was a need to revise the 1927 Geneva Convention if arbitration was to remain as the preferred means of resolving cross border disputes.[151] Thus, the New York Convention was drafted by the ICC to provide an international framework for the recognition and enforcement of international arbitration awards which was earlier governed by the domestic laws of the countries in which

[147] UNTS 159, T.I.A.S. 6090, 17 U.S.T.1270 (1965). Kenya enacted the Investments Disputes Convention Act in 1967 to give legal sanction to the provisions of the ICSID Convention. It specifically confirms the status, immunities and privileges of the International Centre for the Settlement of Investment Disputes.
[148] UNTS (1963-64), Vol. 484, No.7041.
[149] Inter-American Convention on international commercial arbitration <https://treaties.un.org/doc/Publication/UNTS/Volume%201438/volume-1438-I-24384-English.pdf> accessed on 1st April 2019.
[150] Title IV: Arbitration, Arts. 21 to 26.
[151] (n 142), 122.

recognition and enforcement were sought due the inadequacies of the Geneva Protocol of 1923 and the Geneva Convention of 1927.[152]

Notably, the Convention is universal in its application as it does not refer to the nationality of the partiers to the arbitration or the award, unlike the 1927 Convention which applied only where the parties were subject to the jurisdiction of one of the high contracting parties.[153]

Although the title of the Convention refers to "foreign" awards, the Convention has a national connection. Article I reads as follows:

> "This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.
>
> The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted."

The above provision implies that it is immaterial whether the dispute has an interest of international trade or whether the arbitration has a foreign component. Of importance is that an award in question is made in another country.[154]It also governs those awards which are not considered as domestic awards in the country where their recognition and enforcement are sought.

In the facilitation of recognition and enforcement of foreign arbitral awards, the Convention imposes two main obligations on contracting states. Firstly, it requires the national courts of contracting parties at the request of a party to refer the matter to arbitration provided the

[152] UNCTAD, Recognition and Enforcement of Arbitral Awards: The New York Convention (United Nations Conference on Trade and Development, 2003), <https://unctad.org/en/Docs/edmmisc232add37_en.pdf> accessed 3 April 2019.
[153] Gaillard and Savage (n 142), 125.
[154] Ibid, 126.

parties have a valid arbitration agreement.[155] The Convention also mandates the national courts of contracting parties to recognize and enforce foreign arbitration awards in accordance with the rules of procedure of the territory where the award is relied upon.[156]

Thus, a State may not impose procedures and fees for the recognition or enforcement of awards under the New York Convention than it would impose for a domestic award by national courts.

A vital provision in the Convention lies with Article V which espouses the grounds upon which the enforcement of a foreign arbitral award may be refused by a domestic court. For example, where the parties to an agreement were under some incapacity, if the arbitration agreement in invalid under the law to which the parties have subjected it or under the law of the country where the award was made.[157]

`The Arbitration Act recognizes the Convention as it authorizes international arbitration awards to be recognized as binding and in accordance with the provisions of the Conventions or other conventions which Kenya is signatory and relates to arbitral awards.[158]

3.3.3. UNCITRAL Model Law

The work on the Model Law began in 1979 with a proposal to reform the New York Convention,[159] which led to a report to the UNCITRAL whose objective was the harmonization of national arbitration laws through a uniform law.[160]

The Model Law was adopted by the UNCITRAL, at its session in Vienna in June 1985 as a law to govern international commercial arbitration. Thus far, more than seventy states have adopted their arbitration laws to the Model Law.[161] Kenya in an example of states that

[155] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art II (3).
[156] Ibid, art III.
[157] Ibid, art V (1).
[158] (n 2), s 36.
[159] (n 29), 62.
[160] Ibid, [1.218].
[161] ibid.

adopted the Model Law, although it has not yet adopted the revised provisions following the 2006 amendments to the Model Law.[162]

Model Law contains various salient features; an important feature is its flexibility as countries are free to choose its scope of application, whether or not it will apply to either domestic or international arbitration or whether or not it is to be binding.[163]

Other salient features include firstly, the principles of party autonomy, as party are free to determine the number of arbitrators, the procedure for appointing the arbitrator or arbitrators,[164] the rules of procedure, place of arbitration amongst others entrenched throughout the Model Law.[165]

Secondly, the principle of *Kompetenz-Kompetenz* is provided for under Article 16 where the arbitral tribunal has jurisdiction to rule on its jurisdiction and or determine any matters relating to the existence or validity of the arbitration agreement. Thirdly, Article 16(1) incorporates the principle separability which provides that the arbitration clause shall be treated as an independent agreement from other forms of the contract. Accordingly, a decision by the arbitral tribunal that the contract is null and void shall not invalidate the arbitration clause.

The grounds for the setting aside an arbitral awards as provided for in Article 34 of the Model Law relates to procedural irregularities and not to the merits of the decision embodied by the arbitral award. Therefore, the courts are strictly limited to pronounce themselves on the merits of the decision.[166]

---

[162] Kariuki Muigua, (n 50).
[163] UNCITRAL Model Law on International Commercial Arbitration 1985, art 1.
[164] Ibid, arts 10 and 11.
[165] Ibid, arts 19 and 20. *See* generally articles 21-25.
[166] Hamid Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* (Kluwer International 2002) <https://goo.gl/RyP4Gw> accessed 7 April 2019.

As discussed in Chapter 2, Articles 9 and 17 the Model Law contains comprehensive provisions on interim measures of protection which Kenya ought to adopt.

On the other hand, the UNCITRAL Arbitration Rules permits the arbitral tribunals as well as courts to order interim measures. Article 26(1) states that 'The arbitral tribunal may, at the request of a party, grant interim measures.'

3.4. Institutional Rules

3.4.1. ICC Arbitration Rules

The Rules allows both the arbitral tribunal and a judicial authority to have concurrent jurisdiction in granting interim measures. Under Article 28, arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. Further, the arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Article 28 (2) also allows a party to apply to any competent judicial authority for interim or conservatory measures. The Rules provide that the application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal.

Article 29 and Appendix V ("Emergency Arbitrator Provisions") provides that a party that needs urgent interim measures ("Emergency Measures") that cannot await the constitution of an arbitral tribunal may make an application to the Secretariat of the ICC International Court of Arbitration. The provisions on emergency arbitrator only apply to parties that are signatories to the arbitration agreement that is relied upon for the application or successors to such signatories.

3.4.2. LCIA Arbitration Rules

Article 25 grants the arbitral tribunal the power upon the application of any party, to order any respondent party to a claim or cross-claim to provide security for all or part of the amount in dispute, by way of deposit or bank guarantee or in any other manner; to order the preservation, storage, sale or other disposal of any documents, goods, samples, property, site or thing under the control of any party and relating to the subject-matter of the arbitration; and to order on a provisional basis, subject to a final decision in an award, any relief which the Arbitral Tribunal would have power to grant in an award, including the payment of money or the disposition of property as between any parties.

Similar to the ICC Arbitration Rules, Article 25.3 of the LCIA Rules provides that the application to the arbitral tribunal for interim measures shall not be prejudicial to a party's right to apply to a state court or other legal authority for interim or conservatory measures to similar effect, before and after the formation of the Arbitral Tribunal, and in exceptional cases and with the Arbitral Tribunal's authorisation, until the final award.

Further, the LCIA Rules contains provisions on emergency arbitration. Article 9B states that in the case of emergency at any time prior to the formation or expedited formation of the arbitral tribunal, any party may apply to the LCIA Court for the immediate appointment of a temporary sole arbitrator to conduct emergency proceedings pending the formation or expedited formation of the arbitral tribunal. Such an application must be made to the Registrar in writing (preferably by electronic means), together with a copy of the request (if made by a claimant) or a copy of the response (if made by a respondent), delivered or notified to all other parties to the arbitration.

3.5. Conclusion

This Chapter analysed the legal and institutional framework and in particular the provisions on interim measures of protection. The chapter identified the laws that espouse comprehensive provisions on interim measures such as the Model Law and the UNCITRAL Arbitration Rules. These laws have provided a standard which other laws and institutional rules such as the NCIA and the CIArb Rules have emulated in addition to their own rules on emergency arbitration.

Furthermore, this chapter established that it is now a standard practice for both the arbitral tribunal and a judicial authority to have powers to grant interim measures.

This chapter also found that the Arbitration Act 1995 is limited as it is silent on the types of interim reliefs and the conditions for granting such reliefs and therefore there is need for amendments in order to align the Arbitration Act to the best international standards in relation to the issues of interim measures of protection.

CHAPTER 4: THE ANALYSIS OF INTERIM MEASURES OF PROTECTION IN KENYA

4.0. Introduction

The relationship between national courts and arbitral tribunals is often regarded to be one of partnership.[167] However, it is not a partnership of equals because national courts could exist without arbitration, but arbitration could not exist without the courts.[168]

Thus, this chapter focuses on interim measures of protection and examines the conditions necessary for granting such measures. The chapter also delineates the different classifications of interim measures and examines various courts cases in order to identify some of the uncertainties in judicial decisions on interim measures. The examination will focus on the current jurisprudential trend on interim measures as well as the effect of the constitution in the award of such measures.

4.1. Interim Measures of Protection

The Arbitration Act limits the intervention of courts in arbitral process as far as possible. Section 10 states that 'Except as provided in this Act, no court shall intervene in matters governed by this Act.' This section reaffirms the independence of arbitration; however, it is sometimes necessary for the court to intervene in order to supervise or provide assistance to the arbitral process.

The Arbitration Act permits various ways in which the assistance of the court is necessary, one of which is the award of interim measures of protection whose purpose is to preserve the subject matter of the dispute pending arbitration.[169]

---

[167] Redfern and Hunter (n 12), 416.
[168] Ibid.
[169] See *Elizabeth Chebet Orchardson v China Sichuan Corporation for Tecno-Economic Corporation & Another [2013 eKLR, CMC Holdings Ltd & Another vs Jaguar Land Rover Exports Limited [2013] eKLR*

The Act allows the High Court and the arbitral tribunal to share the concurrent jurisdiction to grant interim measures. In other jurisdictions such as Argentina and Italy, arbitrators do not have the power to issue interim reliefs.[170]English law for example, specifies the situations where parties to an arbitration agreement could seek the court for an application of interim measures or otherwise be compelled to seek the tribunal to issue such an order.[171]

In most jurisdictions, where the tribunal has not yet been constituted parties can only seek interim measures from a local court if there is an emergency. Once the tribunal has been constituted, under some rules like the ICC Rules, parties are only supposed to apply to a court "in appropriate circumstances,"[172] or, according to LCIA Rules, "inexceptional cases."[173]

The principle concurrent jurisdiction allows parties to apply to courts to obtain interim reliefs despite the existence of an arbitration agreement. Gaillard and Savage argue that it is more effective to apply to the courts for emergency measures because the courts will hear an application as a matter of emergency and also because their decisions will be readily enforceable.[174]

The application to courts for interim measures does not preclude the application of the arbitration agreement to the merits of the dispute. This rule is set forth under Section 7 of the Arbitration Act, 1995, Article 9 of the Model Law as well as Article 26 (3) of the UNCITRAL Arbitration Rules.

In *Isolux Ingeniera, S. A v Kenya Electricity Transmission Company Limited & 5 others [2017] eKLR*, the court stated as follows:

> "I conclude by stating that in the case of interim measures of protection there exists a regime of concurrent jurisdiction whereby either the arbitral tribunal once constituted or the national courts of the juridical seat of arbitration or the national courts of where

[170] Argentine Code of Civil Procedure, art. 753; Italian Code of Civil Procedure, art. 818.
[171] (n 3) s 44(3-5).
[172] ICC Rules, art. 23(2).
[173] LCIA Rules, art. 25.3.
[174] Gaillard and Savage (n 142), 711.

the underlying contract was being performed, may as appropriate and depending on the urgency, entertain and grant an interim measure of protection pending arbitration."

Moreover, with the concurrent jurisdiction, the arbitrators also have power to grant interim measures. As discussed in chapter 3, earlier arbitration laws gave the courts exclusive jurisdiction to order interim measures, this has changed as modern legislation now recognize the importance of concurrent jurisdiction. In fact, section 18 (2) the Arbitration Act 1995 goes further to permit the arbitral tribunal or a party with the approval of the arbitral tribunal, may seek assistance from the High Court in matters pertaining to an application for interim measures.

4.2. Classifications of interim measures of protection

Interim measures take many forms and vary from state to state. Although the Arbitration Act 1995 Act prescribes no standards applicable to applications for interim measure of protection but case law has essentially settled the standards. Other laws have also guided the courts; notably, Article 17 (2) of the Model Law and Article 26 (2) of the UNCITRAL Arbitration Rules contains a comprehensive classification of interim measures.[175] They include measures relating to the maintenance of the status quo pending determination of the dispute, measures intended to prevent irreparable harm, those designed to preserve evidence and assets out of which a subsequent award may be satisfied.[176]

In the *Safaricom case*[177], the Court of Appeal stated that:-

"Interim measures of protection in arbitration *take different forms and it would be unwise to regard the categories of interim measures as being in any sense closed (say restricted to injunctions for example) and what is suitable must turn or depend on the*

[175] See also UK Arbitration Act 1996, s 44.
[176] For the court's jurisprudence on the classifications of interim measures of protection, See *Isolux Ingeniera, S. A v Kenya Electricity Transmission Company Limited & 5 others [2017] eKLR para 67, CMC Holdings Ltd & Another vs Jaguar Land Rover Exports Limited [2013] eKLR*
[177] (n 23).

facts of each case before the court or the tribunal – such interim measures include, measures relating to preservation of evidence, measurers aimed at preserving the status quo, measures intended to provide security for costs and injunctions…"

The measures aimed at preserving of the status quo seek to maintain or restore the contractual obligation between parties to an arbitration agreement. In *Isolux Ingeniera, S. A* case[178]the contract had been terminated by Kenya Electricity Transmission Company Limited (Ketraco) and the performance guarantees had also been called in and some honoured. Per contra, Isolux had also been declared insolvent and was under an administration order. In considering the effect of granting an order maintaining the status quo ante, the court observed that it would mean rewinding the clock and having the contract performed by both Isolux and Ketraco yet an insolvent administrator has already been appointed. Additionally, to grant order of status quo ante meant having to redo all the performance guarantees which have been called in and honoured. Consequently, the court declined to maintain the status quo whose effect would lead to unpredictable uncertainties.

Measures to preserve evidence are necessary where urgency is established even though the even if the merits of the dispute are before the arbitral tribunal. The preservation of evidence is distinguished from the courts assistance in taking evidence as provided under section 28 of the Arbitration Act.

4.3. The Conditions for granting interim measures of protection

The court in granting interim measures exercises judicial discretion.[179] This exercise of discretion is meant to further the cause of justice, and to prevent the abuse of the court process.[180] In doing so, the court is called upon to strike a balance to ensure that the intended arbitration proceedings are not prejudiced either by failing to protect the status quo and or the

[178] Ibid.
[179] In Futureway Limited v National Oil Corporation of Kenya [2017] eKLR, the court stated that "*the grant of an interim measure of protection is indeed discretionary."*
[180] Scope Telematics International Sales Limited v Stoic Company Limited & another [2017] eKLR,

subject matter of the intended arbitration and at the same time to ensure or avoid making an order that goes to resolving the dispute between the parties which ought to be left exclusively in the hands of the arbitrator.[181]

In exercise of its discretion, the court has devised as set of conditions as a guide in the award of interim measures of protection. These conditions were first stated in the *Safaricom case*[182] (Per Nyamu JA):

> "… Under our system of the law on arbitration the essentials which the court must take into account before issuing the interim measures of protection are:-
>
> 1. The existence of an arbitration agreement.
> 2. Whether the subject matter of arbitration is under threat.
> 3. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application.
> 4. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunals decision making power as intended by the parties".

Many courts have refused the urge to reinvent the wheel in this regard, courts simply cite the above passage and proceed to interrogate whether the applicant has fulfilled the first criterion.[183]

---

[181] Ibid.
[182] (n 23).
[183] See for example *Dimension Data Solutions Limited v Kenyatta International Convention* Centre [2016] eKLR, para 11. *Afrikon Limited v Ivrcl Limited & Sutanu Sinha* [2019] eKLR, para 14; *Ongata Works Limited v Tatu City Limited* [2018] eKLR, para 43; *Lagoon Development Ltd v Beijing Industrial Designing & Researching Institute* [2014] eKLR, para 24; *Karen Blixen Coffee Garden & Cottages Limited v Tamarind Management Limited* [2017] eKLR, para 24; *Tihan Limited v Sohan Singh Josh & Sons Limited* [2019] eKLR, para 22; *Muga Developers Limited v Njehu Gatabaki & 8 others* [2017] eKLR; para 10; *Safari Plaza Limited v Total Kenya Limited* [2018] eKLR, para 15; *Richard Boro Ndungu v KPMG East Africa Association & 2 Others* [2017] eKLR, para 26; *EON Energy Limited v Desnol Investment Limited & 4 others* [2018] eKLR, para 22, where the court stated that:

Some courts have questioned whether the first condition (the existence of an arbitration agreement) is a necessary prerequisite to order a status quo. In *Isolux Ingeniera, S. A case*,[184]the court stated that an applicant needs to do more and show that he stands to be prejudiced beyond redemption as the entire subject matter of the arbitration would be put to way beyond restitution or reparation. Once this shown, the court stated that it would then "assess the merits of the application" [185] to determine whether in the circumstances it would be appropriate to order a measure of protection. The court was however clear that such a determination of the merits should not encroach on the substantive decision-making power of the arbitrators by venturing into the merits of the dispute.

The importance of an arbitration agreement was further reiterated in *Coast Apparel EPZ Limited v Mtwapa Epz Limited & another* where the court relied on the conditions laid down in the Safaricom case. However, the court dismissed the application since the Plaintiff had not followed the dispute resolution procedure enumerated in the arbitration agreement, namely, by calling for consultations with the 1st Defendant. Thus, the court stated as follows:

> "In my view, an interim order of protection is meant to protect the subject matter of arbitration. For it to be granted, the court must be satisfied that the parties have already commenced the process for putting in place an arbitral panel or arbitration proceedings have already started. It is not an order issued in a vacuum as it is premised on intended or ongoing arbitration proceedings."

While the existence of an arbitration agreement is paramount, courts have consistently held that the issue of validity of the agreement is an issue that the arbitrator has jurisdiction to deal with. In

---

> "The principle upon which interim measure of protection will be granted under section 7 of the Arbitration Act 1995 is now well settled. In the case **of Safaricom Limited Vs**. **Ocean View Beach Hotel Limited & 2 others (2010) eKLR,** the Court of Appeal, stated the following with regard to factors to be taken into account before granting of an interim measure of protection under the aforesaid section…"

[184] (n 10), para 90.

[185] [2017] eKLR, para 45.

Infocard Holdings Limited v Attorney General & 2 others,[186] the court rightly observed,

> "I think time has come when courts should be categorical and parties should be always ready to admit that courts will not determine the question of validity of an arbitration agreement for purposes of section 7 of the Act. By that approach, parties will spare courts the length submissions on a matter they ought not to call upon the court to determine in the first place. I too will not determine that issue. I will proceed to the other matters in the application."

Aside from the widely accepted conditions in the *Safaricom case*, an additional criterion was added in *Futureway Limited*[187] where the court stated as follows: -

> "I have no quarrel with the principles stated in Safaricom Ltd case. The prerequisites are sound. I would perhaps add that the grant of an interim order of protection is indeed discretionary and thus the court ought to take into account the factor of urgency with which the applicant has moved to court. The court should also, in my view, look into the risk of substantial (not necessarily irreparable) harm or prejudice in the absence of protection."

These conditions have been applied concurrently[188] and together they have formed the set jurisprudence in the award of interim measures in Kenya. Comparatively, the Model Law has created its own conditions which are enumerated under Article 17 A, which state as follows:

> 1. The party requesting an interim measure under article 17(2)*(a)*, *(b)* and *(c)* shall satisfy the arbitral tribunal that:

[186] [2014] eKLR, para 18. See also, *Buckeye Check Cashing Inc. v Cardegena et al* 546 U.S. 440 [2006], *Kenya Airports Parking services Ltd & Another v Municipal Council of Mombasa* Civil case 434 of 2009.
[187] (n 24), para 34.
[188] See for example *Richard Boro Ndungu case, para 27, Isolux Ingeniera case, para 87,*

a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

Article 17 A was brought forward by the revision of the Model Law adopted in 2006 and was intended to address the evolving practice in international trade. The revision was ripe since interim measures are increasingly relied upon in commercial arbitration. The revision also includes an enforcement regime for such measures in recognition of the fact that the effectiveness of arbitration frequently depends upon the possibility of enforcing interim measures.[189]

In light of the above observations, it would appear as if courts have accepted the established conditions in the *Safaricom* case and *Futureway* case (the "Established Conditions"), however, this is not the case. Part 4.4 below will interrogate how some courts have deviated from the set conditions thereby creating inconsistency and uncertainties in the award of interim measures of protection

[189] Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006 <https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARB-explanatoryNote20-9-07.pdf> accessed 12 July 2019.

4.4. Cases that have devised new conditions in granting interim measures of protection or have diverged relatively from the Established Conditions

Aside from the standards established by the Safaricom case, other courts have charted their own conditions in handling similar matters. Since interim measures may any take any form[190], courts have applied different conditions depending on the relief sought.

A court has stated that the existence of an arbitration agreement is sufficient enough for the court to grant interim measures. In *Seven Twenty Investments Limited v Sandhoe Investment Kenya Limited*[191], the court stated that the issue of whether or not there is a dispute or whether or not there would be losses by either side would not be a factor for a court to take into consideration when deciding whether or not it should grant an order from interim measure of protection or injunction to safeguard the subject matter of the arbitral proceedings.

The court went further to state that:

> "All that a court would be interested in is whether or not there was a valid arbitration agreement and if indeed the subject matter of the arbitral proceedings was in danger of being wasted or dissipated so as to preserve the same. Pending the hearing and determination of the arbitral reference."[192]

In *Scope Telematics International Sales Limited v Stoic Company Limited & another*[193], the Court of Appeal observed that when exercising the power granted under section 7 of the Arbitration Act;

> "[the court] is called upon to strike a balance to ensure that the intended arbitration proceedings are not prejudiced either by failing to protect the status quo and or the

[190] See *Isolux Ingeniera* case.
[191] [2013] eKLR
[192] Ibid. para 21. See also *RPM Credit Limited v Visionfund Kenya Ltd & Vision fund International [2018] eKLR*, para 24, the court stated that "in determining an Application brought under Section 7 of the Act, the Court must first be satisfied that there is a valid Arbitration Agreement between the Parties." In these two cases, the court did not interrogate the other conditions in the Established Conditions.
[193] [2017] eKLR.

subject matter of the intended arbitration and at the same time to ensure or avoid making an order that goes to resolving the dispute between the parties which ought to be left exclusively in the hands of the arbitrator."

The court further noted that "irreparable harm or injustice to a party would be a compelling reason to merit a court to exercise its discretion in favour of an applicant." For this reason, the court faulted the trial court for granting interim measures yet there was no iota of evidence on record to show that the 1st respondent would suffer harm, whether irreparable or not, or injustice for that matter, if the order of interim protection was denied. In this case, the Court of Appeal reviewed the trial court's decision based on the "irreparable harm" conditions which is distinct from the Established Conditions.

In determining an application for interim measures, the court in *CMC Holdings Limited,*[194], considered whether the subject matter will likely be wasted if conservatory orders are not issued. Thus, it declined to issue interim orders since the contract, which was the subject matter of the dispute, could not be wasted.[195]

In some cases, the Established Conditions has been applied simultaneously with the conditions for granting of an interlocutory injunction as set out in *Giella v Cassman Brown & Co. Limited.*[196] While in others, the Established Conditions has been abandoned altogether invoking the question as to what should be used between the Established Conditions and the conditions in the *Giella case.*

In *Elizabeth Chebet Orchardson v China Sichuan Corporation for International Techno-Economic Corporation & Kenya Commercial Bank,*[197] Elizabeth Orchardson (Plaintiff) filed

[194] (n 176), para 63.
[195] Similarly, in *China Young Tai Engineering Co Ltd v L G Mwacharo T/A Mwacharo & Associates & another* [2015] eKLR, para 10, where the court stated the Applicant must satisfy the court that the subject matter of the suit will not be in the same state at the time the arbitral proceedings are concluded unless an injunction is granted. The court did not require a satisfaction of any other critetia in determining whether to grant an order of interim relief.
[196] [1973] EA at p 360.
[197] [2013] eKLR.

a suit under section 7 seeking temporary injunction restraining the Kenya Commercial Bank (2nd Defendant) from releasing or authorizing the release of the balance of the purchase price of Kshs 6,030,000/= to China Sichuan (1st Defendant) pending reference to, hearing and final determination of arbitral proceedings. In the submissions, the Plaintiff stated that it had satisfied the conditions set out in the *Giella case* where the court held that an applicant seeking a grant of a temporary injunction must meet the following conditions:-

a) The Applicant must show a prima facie case with a probability of success;
b) The Applicant must show that unless the interlocutory injunction is granted, he might suffer irreparable injury which would not be adequately compensated by way of damages; and
c) If the court was in doubt it would decide on a balance of convenience.

The court stated that in determining an application for interim measure, all that a court would be interested in is whether or not there was a valid arbitration agreement and if indeed the subject matter of the arbitral proceedings was in danger of being wasted or dissipated so as to preserve the same[198] and that The injunction or interim measure of protection must be of urgent nature to preserve the subject matter of the dispute so that the proceedings before the arbitral tribunal are not rendered nugatory.[199]

Further, the court imputed another criterion that since the purpose of an interim measure of protection is to ensure that the subject matter will be in the same state as it was at the commencement or during the arbitral proceedings. The court must be satisfied that that the subject matter of the arbitral proceedings will not be in the same state at the time the arbitral reference is concluded before it can grant an interim measure of protection.

While the court considered granting an interim measure to preserve the subject matter, which in that case, was the balance of the purchase price being held by the 2nd Defendant, it stated:

[198] (n 24).
[199] (n 14), paras 28 and 29.

"…this is good case to grant an order for injunction under Section 7 (1) of the Arbitration Act purely on the ground of a balance of convenience. Granting the injunction on the grounds that the Plaintiff has established a *prima facie* case or that she would be adequately compensated by way of damages would mean that this court has considered the merits or demerits of the dispute between her and the 1stDefendant which this court cannot do.

The uncertainty created by this case is very startling; the court granted an injunction on the basis of condition 3 (on a balance of convenience) of the *Giella* case, without satisfying the first two conditions. Whilst the court properly held that condition 1 and 2 would mean determining the dispute on merits, it certainly, precluded the court from relying on the last condition.

Similarly, in *Njama Wambugu v Space and Style Limited & 5 others*[200]. The restraining orders sought by the plaintiff were also in the nature of interim measure of protection pending arbitration. In relying on *Telewa Road Construction Limited vs Kenya National Highways Authority*[201], the court stated that it was satisfied that the Applicant had demonstrated on balance of convenience that restraining orders should be granted and not that it has established a prima facie case with probability of success nor has it established it has a case on merit.[202]

Furthermore, in the *Infocard Holding Limited case,*[203] in determining an application for interim relief, the court stated that the arbitration agreement was the basis for the application. The court further stated that:

"[The] agreement has not been performed at all, "One wonders what is to be conserved in the agreement. On this, I am in agreement with what Kamau J stated in **CMC**

[200] [2019] eKLR.
[201] [2014] eKLR.
[202] Ibid. para 41.
[203] (n 179).

Holdings Limited & Anor v Jaguar Land rover Exports Limited (2013) eKLR that ***"a contract is not something that would be wasted if it was not conserved'.*** I do not see any merit in the request for an interim measure of protection because there is nothing the Respondents have done or are in the process of doing which will prejudice the final outcome of the arbitration action before judgment has been reached therein"

Accordingly, the court found no basis laid for an injunction, and dismissed the application for not satisfying the test in the *Giella case*.[204]

The decision in *Elizabeth Chebet Orchardson* and *Njama Wambugu* above are inconsistent with the court's jurisprudence which has consistently held[205] that the three principles in *Giella* must be approached and applied sequentially, so that the second and third conditions must not be considered once the first condition is not established, the courts have traditionally considered all the conditions, one after the other. For instance, a court will have a finding on the existence of a *prima facie* case, then proceed to determine whether damages would be adequate compensation *in lieu* of injunction and finally the balance of convenience.

This principle was first stated in *Kenya Commercial Finance & Co. Ltd v Afraha Education Society*[206] as follows:

"The sequence of granting an interlocutory injunction is firstly that an Applicant must show a prima-facie case with probability of success if this discretionary remedy will inure in his favour. Secondly, that such an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury; and thirdly where the court is in doubt it will decide the application on a balance of convenience…the

[204] See also, Jung Bong Sue v Afrikon Limited [2015] eKLR.
[205] See *Elisha Kuria Kariguh & 2 others v John Kimani Mwangi & another [2019] eKLR, Novapeku (PK) Construction and Engineering Company Limited & 2 others v County Government of Kiambu [2019] eKLR.*
[206] [2001] 1EA 86.

conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed.

Similarly, in *Nguruman Ltd v Jan Bonde Nelson & 2 others,*[207]the court observed;

> *"It is established that all the above three conditions and stages are to be applied as separate, distinct, and logical hurdles which the applicant is expected to surmount sequentially.*

Above all, the court in *Futureway* clarified that the principles laid out in *Giella* as to interlocutory injunctions do not apply in granting interim measures of protection, so as to avoid pre-empting or prejudicing the dispute before the arbitrator.[208]

Similarly, in *Portlink Limited v Kenya Railways Corporation*[209], the Court reiterated that in considering an application under Section 7, the principles set out in GEILLA's case ought not to be considered.[210]

In comparison to decision in *Elizabeth Chebet Orchardson* and *Njama Wambugu,* the court in *Infocard,* analysed the arbitration agreement pursuant to the conditions set in the *Safaricom* case, and in finding that the subject matter agreement could not be wasted, dismissed the case relying on the *Giella* test, without interrogating the said test.

The above quoted cases have shown how courts have applied the conditions in the *Giella* Case rather that the Established Conditions when handling applications for interim measures of protection. The cases below will show how both the Established Conditions and the conditions in *Giella* have been applied together.

---

[207] Civil Appeal No.21 of 2014(UR).
[208] (n 20), Para 36.
[209] [2015] eKLR.
[210] The court in *Presbeta Investment Limited & another v National Bank of Kenya & 2 others [2016],* stated that in determing an application under section 7, it is bound to to ignore the principles of injunction laid down in the *Giella* case and go with the principles laid down in the case of Portlink Limited (citing the Safaricom case) for the determination of an application for interim measure of protection.

In *Equity Bank Limited v Narok County Government*[211], the Plaintiff's Chamber Summons was brought under the provisions of section 7 (1) of the Arbitration Act and Rule 2 of the Arbitration Rules, 1997. However, the Plaintiff's application also sought further Orders which the court found to amount to the seeking of an interlocutory mandatory injunction. Hence, the court held that whether the Plaintiff had a *prima facie* case or otherwise lied to be decided by the arbitral tribunal, accordingly, the court refused to exercise its discretion in the granting of a mandatory interlocutory injunction and dismissed the Plaintiff's application.

Conversely, in *EON Energy Limited v Desnol Investment Limited & 4 others*[212]the Applicant through a chamber summons prayed for, inter alia, orders, that there be an interlocutory injunction against the Directors of Desnol Investments Limited restraining them from commencing, continuing or concluding any transactions for the selling, transferring, leasing or utilizing the real, movable and cash assets of the company including the lands registered as KSM/KOCHIENG/4157, KSM/OJOLA/4116, KSM/OJOLA/3927, & KSM/OJOLA/4393 without the authorization of the court and/or the involvement of the Applicant pending the hearing and determination of the Application and pending the completion of the arbitral proceedings.

It is explicit from the application that the Applicant was seeking an interlocutory injunction and at the same time the application was premised on inter alia, section 7(1) and (2), of the Arbitration Act. However, the court stated that:

> "In the present application before me, it is clear the application as formulated; the Applicant is seeking an interim measure of protection pending the completion of the

[211] [2013] eKLR.
[212] [2018] eKLR.

arbitral proceedings. The orders sought are under several provisions of the law, but mainly under Section 7 of the Arbitration Act…."[213]

The court went further to apply the principles in the Safaricom case and granted orders of interlocutory injunction.

Equally, in *Equatorial Land Holdings Limited & another v Cheseret arap Korir*[214], the plaintiffs prayed for an order that pending the hearing , determination and final decision/award of the Arbitrator, the Honourable Courts be pleased to issue a permanent injunction restraining the Defendant/Respondent, from terminating the lease agreement between the 1st Plaintiff and Defendant , evicting the 1st plaintiff company from parcels of land, and that an order to be signed directing the defendant/Respondent to submit to and cooperate in the Arbitration as provided in the lease agreement entered into between the 1st Plaintiff and Defendant.

The Plaintiff contended that she had a *prima facie* case with a high probability of success and that unless the orders sought are granted; the plaintiffs will suffer irreparable loss and hardship that cannot be adequately compensated by an award of damage. On the other hand, the Defendant argued whether the plaintiff had demonstrated that there exists a *prima facie* case.

Even though the court rightly observed that there was a dispute between the parties regarding the renewal of a lease, the court quoted section 7, and stated as follows:

"…this court finds that the plaintiff has established a prima facie case with a likelihood of success that there is an arbitration clause in the lease agreement and that the subject matter under arbitration is under threat."

Having established that there is a prima facie case, the court further stated:

[213] Ibid, para 20.
[214] [2019] eKLR.

> "Under our system of the law on arbitration, the essentials which the court must take into account before issuing interim orders of protection are that; there exists an arbitration agreement, and that, the subject matter under arbitration agreement is and lastly the appropriate circumstances to grant the reliefs. However, whichever order the court grants must not prejudice the outcome of the arbitration."

Despite laying out the settled prerequisites, the court proceeded to determine the issue as to whether the plaintiff stands to suffer irreparably if injunction is not granted. Accordingly, the court stated:

> "I do find that this is a special circumstance where by the arbitral proceedings need to be protected by an order of injunction. However, the plaintiff is hereby ordered to deposit security for costs of Kshs. 2,000,000/= (Two million) only, in an interest earning account in a reputable bank in the names of the 2 firms of advocates on record."

In this case, the court applied the Established Conditions and the standards in *Giella* and found that there was a *prima facie* case with a likelihood of success. Although the court noted the need not to prejudice the outcome of arbitration, nonetheless, having found that there was *prima facie* case, the court determined the matter on merits thereby overstepping its discretion under section 7 of the Arbitration Act.

In *Talewa Road Contractors Ltd. –vs- Kenya National Highways Authority*,[215] the learned Judge rightly observed:

> "The injunction herein was granted on a balance of convenience as granting it on the grounds that the Plaintiff has established a prima facie case with probability of success could be misinterpreted to mean that the Court has considered the merits or demerits of

[215] [2014] eKLR.

the dispute between it and the Defendant and which this Court found it has no power jurisdiction to do."

It is trite that where a court is called upon to grant interim measure of protection it must take great care not to usurp the arbitral process and to ensure substantive questions are reserved for the arbitrator.[216]

Moreover, courts have consistently argued that if an injunction is sought as the interim relief under section 7, the existence of an enforceable arbitration agreement constitutes *prima facie* case in the context of *Giella*. However, in *Babs Security Limited v Geothermal Development Limited*[217], the court stated that this standard is not enough to grant interim relief by way of a temporary injunction as the Court will be obligated to consider all the other factors before it comes to a decision that the Applicant deserves an injunction as a measure of protection of the subject of the arbitral proceedings.

Some courts have gone further to state that since the powers under *section 7* of the Act are discretionary, court will always consider all the circumstances including the applicant's conduct.[218]

Part 4.4 has examined the manner in which courts have applied the Established Conditions and the conditions in *Giella* showing the inconsistency in the award of interim measures.

The inconsistency has been further augmented by courts who have asserted the supremacy of constitution over some provisions of the Arbitration Act. This will be discussed further in 4.5 below.

---

[216] See *Celetem v Roust Holdings [2005] 4 All ER 52, Anne Mumbi Hinga v Victoria Njoki Gathara* [2009] eKLR.

[217] [2014] eKLR.

[218] *Ongata Works Limited v Tatu City Limited* [2018] eKLR. See also *Coast Apparel Epz Limited v Mtwapa EPZ Limited & another* [2017] eKLR, para 51, where the application was dismissed because the interim order of protection was not sought in good faith.

4.5. Comparison with other jurisdictions

4.5.1. The Condition for granting interim measures under the English Arbitration Act 1996 and Arbitration (Scotland) Act

The English Arbitration Act 1996 does not provide the conditions for granting interim measures.

The courts powers under section 44 of the English Arbitration Act apply unless the parties otherwise agree and restricted to the matters listed in section 44(2).

Section 44 states as follows:

Court powers exercisable in support of arbitral proceedings

(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.

(2) Those matters are-

a. The taking of evidence of the witnesses;

b. The preservation of evidence;

c. making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings—

i. for the inspection, photographing, preservation, custody or detention of the property, or

ii. ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property; and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration;

d. the sale of any goods the subject of the proceedings;

e. the granting of an interim injunction or the appointment of a receiver.

Comparably, the conditions granting interim measures under English law can be gathered form case law.[219] In *Cetelem SA v Roust Holdings Limited,*[220] the court stated that in case of urgency, the court can make an order under section 44 is one of the conditions for granting interim measures. Moreover, a few conditions are mentioned under section 39 of the English Act and Rule 53 of the Scottish Act - party agreement, the provisional basis of such measures, urgency, irreparable harm, party request and arbitral tribunal consent.

In Scotland, the court had power to grant interim measures as it would in ordinary civil proceedings. [221] The conditions that courts can rely on to grant interim measures includes: a) agreement of the parties; b) commencement of arbitration; and c) urgency.[222] Accordingly, after arbitration has begun, the consent of another party or the arbitral tribunal is paramount before an application for interim measures is submitted.[223] Where the case is urgent, the consent of the arbitral tribunal is waived as urgency is sufficient enough to warrant the court's intervention.[224] In determining whether a case is urgent, court examines the circumstance of each case and the evidence submitted on the matter.[225]

A review of the English system reveals that the conditions for granting interim measures are deduced from case law, whereas Rule 46 of the Arbitration (Scotland) Act provides for three conditions in which the court, when satisfied, can award an interim measure in order to protect the rights of the parties during the arbitral proceedings.

Tables A and B below summarises the findings in this chapter. Table A compares the conditions for granting interim measures across three jurisdictions. Whereas Table B shows a categories of cases analysed in the Kenyan context.

[219] *Permasteelisa Japan UK v Bouygesstroi*, [2007] All ER 97, *Kastner v Jason* [2004], EWHC 592.
[220] *Cetelem SA v Roust Holdings Limited* [2005] EWCA Civ 618.
[221] Arbitration (Scotland) Act 2010, r 46(1).
[222] Ibid. r 46(2)
[223] Ibid.
[224] Ibid.
[225] *Hiscox Underwriting Ltd v Dickson Manchester & Co Ltd* [2004] EWHC 479

Table A: Conditions for granting interim measures of protection		
Under the *Safaricom* and *Futureway case*	**Under the Model Law**	**Under the Scottish Arbitration law**
a. arbitration agreement b. threat to the subject matter c. what is the appropriate measure of protection after an assessment of the merits of the application. d. period for which the measure is given e. Urgency f. Irreparable harm	a. irreparable harm; and b. reasonable chance of success on the merits, provided this does not affect the discretion of the arbitral tribunal in making any subsequent determination.	a. agreement of the parties; b. commencement of an arbitration; and c. urgency

Source: Author

TABLE B: Column I shows cases where courts applied the Established Conditions and Column II show cases which diverged from the Established Conditions	
I. Cases relying on the Established Conditions	**II. Cases diverging from the Established Conditions**
Afrikon Limited v Ivrcl Limited & Sutanu Sinha [2019] eKLR	Babs Security Limited v Geothermal Development Limited [2014] eKLR
Dimension Data Solutions Limited v Kenyatta International Convention Centre [2016] eKLR	China Young Tai Engineering Co Ltd v L G Mwacharo T/A Mwacharo & Associates & another [2015] eKLR
EON Energy Limited v Desnol Investment Limited & 4 others [2018] eKLR	CMC Holdings Ltd & Another vs Jaguar Land Rover Exports Limited [2013] eKLR
Futureway Limited v National Oil Corporation of Kenya [2017] eKLR	Elizabeth Chebet Orchardson v China Sichuan Corporation for Tecno-Economic Corporation & Another [2013 eKLR
Infocard Holdings Limited v Attorney General & 2 others [2014] eKLR	EON Energy Limited v Desnol Investment Limited & 4 others [2018] eKLR
Isolux Ingeniera, S. A v Kenya Electricity Transmission Company Limited & 5 others [2017] eKLR	Equatorial Land Holdings Limited & another v Cheseret arap Korir [2019] eKLR
Karen Blixen Coffee Garden & Cottages Limited v Tamarind Management Limited [2017] eKLR	Equity Bank Limited v Narok County Government **[2013] eKLR**
Lagoon Development Ltd v Beijing Industrial Designing & Researching Institute [2014] eKLR	Jung Bong Sue v Afrikon Limited [2015] eKLR
Muga Developers Limited v Njehu Gatabaki & 8 others [2017] eKLR	Portlink Limited v Kenya Railways Corporation [2015] eKLR
Ongata Works Limited v Tatu City Limited [2018] eKLR	RPM Credit Limited v Visionfund Kenya Ltd & Vision fund International [2018] eKLR
Richard Boro Ndungu v KPMG East Africa Association & 2 Others [2017] eKLR	Scope Telematics International Sales Limited v Stoic Company Limited & another, [2017] eKLR
Safari Plaza Limited v Total Kenya Limited [2018] eKLR	Seven Twenty Investments Limited v Sandhoe Investment Kenya Limited [2013] eKLR
Tihan Limited v Sohan Singh Josh & Sons Limited [2019] eKLR, para 22;	Talewa Road Contractors Ltd. –vs- Kenya National Highways Authority [2014] eKLR

Source: Author

4.6. The supremacy of the Constitution and its effect on the award of interim measures of protection.

4.6.1. Rule 2 vis a vis Article 159 2 (d) of the Constitution of Kenya

Applications for interim measures of protection under section 7 shall be made by summons in the suit as provided under Rule 2 of the Arbitration Rules 1997.[226] Even though Rule 2 is couched in mandatory terms, in most cases, applications for interim measures have been filed through notice of motions, plaints or miscellaneous applications.

In *Smatt Construction Co. Ltd v Country Government of Kakamega*[227], the issue for determination was, inter alia, whether the application for interim measure was properly before Court. In finding that the application was properly before it, the court observed that that there need not be an underlying suit since any order to be issued in a case of that nature serves the purpose of holding the status quo pending the outcome of the arbitral proceedings. As such, the court held that it had a duty to consider the application by the applicant regardless of the fact that there was no suit pending before the Court. The court relied on *Joseph Kibowen Chemjor –vs- William C. Kisera*[228] where it was held:

> "… there are times when all that a person wants is an order of Court where the rights of the parties are not going to be determined. There is no "action" being enforced or tried. In many such instances, it is the discretion of the Court being sought or a procedural issue sought to be endorsed. The Court in such a case is not being asked to determine any rights of the parties. Now the Civil Procedure Rules do not specifically provide for the procedure to be followed where there is no "action". In such instances, I think it is permissible for such a person to file a miscellaneous application because the Court is not asked to determine any issues between the parties. This is common and

[226] Rule 2 states that Applications under sections 6 and 7 of the Act shall be made by summons in the suit.
[227] [2016] eKLR.
[228] [2017] eKLR.

permissible where all that the party wants is a mere order from the Court which does not settle any rights of the parties ……"

The above position has however been overruled by the court of appeal in *Scope Telematics International Sales Limited case*[229], the Application which was the subject of appeal was a notice of motion. The trial judged had found that the fact that the application was not anchored on a suit did not render it fatal so as to deny the 1st respondent the right to seek an interim relief. The Judge was of the view that in some instances a party could be allowed to file a miscellaneous application without the basis of a suit where such a party was not seeking to enforce any rights or obligations and where there was no action being enforced or tried like in the present case.

Contrary to the holding in *Scope Telematics*, the court of appeal in quoting *Speaker of National Assembly vs. Njenga Karume*[230], further stated that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or Statute, that procedure should be strictly followed.

Whilst it is common for litigants to invoke Article 159 of the Constitutions as defense in circumstances such as this, the Court of Appeal observed that Article 159 of the Constitution[231] should not be seen as a panacea to cure all manner of indiscretions relating to procedure.[232] Most importantly, the court of appeal stated as follows:

The manner of initiating a suit cannot be termed as a mere case of technicality. It is the basis of jurisdiction. Obviously, in overlooking a statutory imperative and the above authorities, the learned Judge cannot be said to have exercised his discretion properly. There can be no other interpretation of Rule 2. The application should have been

[229] (n 193).
[230] [2008] 1 KLR 425.
[231] 159 (2) d states: In exercising judicial authority, the courts and tribunals shall be guided by the following principle
- justice shall be administered without undue regard to procedural technicalities.

[232] See also *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 Others [2010] eKLR.*

anchored on a suit. It was not about what prejudice the appellant or and 2nd respondent would suffer or what purpose the suit would have served. Discretion cannot be used to override a mandatory statutory provision. For these reasons, we are in agreement with the submissions of the appellant that the application was fatally and incurably defective.

The court in *TYL Limited v China National Aero-Technology International Engineering Corporation,*[233] was in agreement with the above findings of the Court of Appeal whereby it reiterated that:

"Procedural requirements however subordinate they may be to the statutory and/or constitutional provisions, must be complied with. Rule 2 of the Arbitration Rules 1997, is couched in mandatory terms which require that applications under Sections 6 and 7 of the Act shall be made by summons in the suit."

4.6.2. Section 17 of the Arbitration Act (*Kompetenz-Kompetenz*) vis a vis Article 165 of the Constitution

The principle of *Kompetenz-Kompetenz*[234] is recognized by the Arbitration Act under section 17 of the Arbitration Act and has widely been interrogated by courts.

In the *Safaricom case*, the court stated:

"It is not the function of a national court to rule on the jurisdiction of an arbitral tribunal except by way of appeal under *section 17(6)* of the Arbitration Act as the Commercial Court in this matter purported to do. In this regard, I find that the superior court did act contrary to the provisions of *section 17* and in particular violated the principle known as "Competence/Competence" which means the power of an arbitral tribunal to decide or rule on its own jurisdiction. What this means is *"Competence to decide upon its competence"* and as expressed elsewhere in this ruling in German it is

[233] [2019] eKLR, para 6.
[234] See chapter 2.

"*Kompetenz/Kompetenz*" and in French it is "*Competence de la Competence*". To my mind, the entire ruling is therefore a nullity and it cannot be given any other baptism such as "acting wrongly but within jurisdiction."

While section 10 limits the intervention of courts, and section 17 grants the arbitrator the jurisdiction to determine its own jurisdiction, courts have usurped this power and assumed jurisdiction to determines a dispute despite the existence of an arbitration agreement.

In the *Bia Tosha case*[235], although the distributorship agreement between the parties incorporated an arbitration agreement, nevertheless, the court stated that where the dispute is laid out as a constitutional issue then the High Court must deal with the dispute.[236] The Court found that the dispute had a constitutional trajectory since the issue of:

"whether what has been identified as constituting proprietary interest is "property" within the provisions of Article 40 and whether the same has been arbitrarily expropriated or whether the expropriation is, if at all, justified…[is] the core question in this Petition and it is a purely a question of constitutional interpretation and determination, in my view.[237]

Additionally, the Court also dealt with the Respondent's application for conservatory orders pending arbitration, in this regard, the court stated:

"An "interim measure of protection" under the Arbitration Act (Cap 49) is not expressly defined but the inkling derived from Section 7(2) is that it may be wide enough not just to cover the arbitral process but also any interests vested or claimed to have vested in the parties or any of them. An interim measure of protection may thus

[235](n 15).
[236] The High Court's jurisdiction is conferred by the Constitution under Article 165. Article 165 (3) (b) of the Constitution expressly confers upon the High Court the "jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened". Article 165(3)(d)(ii) additionally expressly also confers upon the High Court the jurisdiction to determine "the question whether anything said to be done under the authority of the Constitution or of any law is consistent with or in contravention of, the Constitution."
[237]*See* Para 97.

very well be the equivalent of a conservatory order issued by the court under Article 23(3) of the Constitution and Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

Besides, I do not hold the view that where a court refers a matter to arbitration then the court's jurisdiction under Article23(3) is also divested. The reasoning should be simple: a statutory provision under Section 7 should not claw-back the Courts jurisdiction under the Constitution."[238]

In interrogating whether the application had taken a constitutional trajectory, the court observed that:

"the court should not be in a hurry to simply invoke the principle of *pacta sunt servanda* (the agreement must be kept) and dispatch the parties away from the court process. The court ought to be holistic enough in considering the private personal agreements together with Article 159 on the one hand and the extent of Article 165 on the other hand. Painlessly, the court must seek to find out especially where one party alleges so, whether the dispute genuinely concerns violations of the Constitution. In this light one must also not forget the principle of constitutional supremacy for which 'Wanjiku' voted in 2010. By recognizing the Constitution to be supreme, the Kenyan people could not have intended to again leave alone matters done by parties to the parties themselves but rather appeared under Article 165 to empower the court with the task to define limits of any rights whether entrenched under the Bill of Rights or by common law, modifying the latter where necessary to attain an appropriate blend with Constitutionalism."[239]

In *Bia Tosha case* the court assumed jurisdiction under Article 165 of the Constitution since the question for the court at the hearing of the Petition will be whether what has been

[238] Ibid, paras 105-106.
[239] Ibid, para 84.

identified as constituting proprietary interest is “property” within the provisions of Article 40 of the constitution and whether the same has been arbitrarily expropriated or whether the expropriation is, if at all, justified are all questions of constitutional interpretation and determination. Thus, for this reason, the court declined to dispatch the parties to arbitration even though it was undisputed that exist commercial agreements between the parties.

4.7. Conclusion

This chapter has examined comprehensively the current jurisprudence in Kenyan courts with regards to the award of interim measures of protection. The chapter has established that even though courts have relied on the Established Conditions, other courts have deviated from that conditions and devised their own.

Moreover, it has become apparent that the conditions for granting interlocutory injunctions as stated in the *Giella case* have either been applied solely or simultaneously with the Established Conditions. Ultimately, the analysis of the court precedents on the award of interim measures proves that the existence of different conditions in granting interim measures under section 7 has created uncertainties and inconsistencies such that an applicant approaching the court for interim reliefs is irresolute of the outcome of the case.

The result will be the lack of confidence in the judiciary because a litigant will perceive it as an organ with unfettered discretion exercised capriciously thereby defeating the cause of justice.

CHAPTER 5: FINDINGS AND RECOMMENDATIONS

5.0. Introduction

This study set out to examine the application of interim measures of protection under Section 7 of the Arbitration Act in Kenya. The main objective of this study was to interrogate why there is contradictory and inconsistent jurisprudence in the award of interim measures of protection.

The study is premised on the problem that the judicial interpretations of section 7 of the Arbitration have brought to fore contradictory jurisprudence thereby raising crucial access to justice considerations. In investigating this problem, this study hypothesized that although the High Court has power to grant interim reliefs under section 7, nevertheless, the judicial interpretation of that section is fundamentally inconsistent because there are contrasting threshold that guides the award of interim measures.

This research also hypothesized that courts tend to rely on the Constitution and assert its supremacy over the provisions of the Arbitration Act.

In investigating the problem, this study formulates three research question in Chapter One and each were answered chronologically in each chapter. Chapter Two answered the first question by outlining the development of arbitration laws in Kenya and how they shaped the award of interim measures of protection. It examined the genesis of the transition from the exclusive jurisdiction of the courts to grant interim reliefs to concurrent jurisdiction, where both courts and arbitral tribunals have concurrent powers to order interim reliefs. Thus, the chapter began by first addressing the earliest recognition of ADR in Kenyan communities and ultimately the evolution of arbitration laws in relation to the award of interim reliefs.

Chapter Three examines the legislative and institutional framework governing the award of arbitral interim measures of protection in Kenya. The chapter provides an in-depth analysis

on how various laws and the institutional rules have provided for the interim measures of protection.

Chapter Four is the focal point of this study, it analyses the conflicting judicial interpretations in the award of interim reliefs. It identifies the various conditions that the courts have relied on in granting interim measures and reviewed the current trend in the judicial interpretation of section of the Arbitration Act. Notably, the chapter reviews various constitutional provisions which courts have relied to either overrule the provisions of the Arbitration Act or assume jurisdiction over a dispute.

In this final chapter, the study will summarize the findings and conclusions and make legislative proposals and recommendations that will rationalize the interpretation of section 7 of the Act.

5.1. Research Findings

Chapter Two found that even though interim measures are increasingly relied upon today in both national and international commercial arbitration, its use began as early as 1854 following the enactment the Common Law Procedure Act which contained provisions on granting and enforcement of arbitral provisional awards. The revision of the first Arbitration Act of 1889 was achieved by the enactment of the Arbitration Act 1950 in England which granted the High Court the power to make interim orders. Since then, successive Acts in England such as the Arbitration Act 1968 have been replicated in Kenya and have continued to permit the high court to grant interim measures.

The chapter also found that this power was exclusively reserved for the high court until 1995 when the Kenyan Arbitration Act was enacted. Since the Kenyan Act is modelled after the Model Law, it incorporates the principle of concurrent jurisdiction which allows both the High Court and the arbitrator to grant interim measures.

Chapter Three established that all the arbitration laws and rules applicable in Kenya, such as the Arbitration Act 1995, CIArb rules; NCIA Rules contains provisions on interim and conservatory measures. However, the chapter reveals that those provisions are not comprehensive and up to standard with the current international best practices. The chapter analysed the provisions in the Model Law and UNCITRAL Arbitration Rules and found that they not only provide for the types of interim reliefs but also the conditions for granting such reliefs.

Most importantly, the chapter revealed that the principle of concurrent jurisdiction is now widely accepted and have been incorporated in both domestic laws and institutional rules such as those of the ICC and the LCIA. The Chapter also uncovered that the these rules contain provisions on emergency arbitration whereas the Arbitration Act is silent on the same.

Chapter Four being a critical chapter in this study uncovered that indeed there is an increase in the number of applications premised on section 7 of Arbitration Act since 1995. However, in 2010, the *Safaricom Case* established a set of conditions that guides the court in granting interim measures. Those conditions have been relied on by many courts who are reluctant to reinvent the wheel. Notwithstanding this headway in the award of interim measures, in 2017, the court in *Futureway case* devised an additional criterion and together with the previously established set, formed the now accepted principles that the any court may consider in granting interim measure of protection.

While it appears that there might be limited room for change, courts have taken a strange turn and charted a different path by either inaugurating a different set of conditions such as the application of the conditions stated in the *Giella case* or new standards all together and in some cases the concurrent application of both the conditions stated in *Safaricom* and *Giella*

cases. The Chapter identified cases where a court considered the lack of candor on the part of the applicant as the basis for declining to grant interim reliefs.

Comparably, the chapter also recognized cases where courts were only satisfied with the existence of an arbitration agreement, nothing more.

Fundamentally, the chapter found that there are instance where courts rely on the supremacy of the constitution as a basis for usurping jurisdiction by overruling the application of the Arbitration Act.

5.2. Recommendations

Based on the above findings, this study makes various recommendations divided into immediate, short term and long term recommendations which broadly suggests that the extent of judicial intervention in the award of interim measures should be defined more restrictively. This includes: the conditions which the courts can rely in granting interim reliefs and the circumstances in which a party may approach the court for interim reliefs.

The recommendations below enjoin the parliament of Kenya to enact, amend, or review existing legislation to conform to the best international practice on interim measures.

5.2.1. Immediate Recommendations

An immediate recommendation includes the amendment of section 7 of the Arbitration Act 1995 to (a) define interim measures; (b) include the types of interim measures; and (c) include conditions for granting interim measures and/or the adoption of Article 17 A of the Model Law[240]to incorporate the conditions for granting interim measures. The new provision will serve to delineate the scope of the courts power in order to protect the sanctity of section 10 of the Arbitration Act.

[240] See (n 189).

Although the tension between the Arbitration Act and the Constitution is cured by Article 2,[241]it must be underscored that the national values and principles of governance espoused it the constitution binds all state organs, state officers, public officers and all persons whenever any of them *inter alia*: enacts, applies or interprets *any* law; or makes or implements public policy decisions. Accordingly, the Arbitration Act must be consistent with the Constitution. Additionally, where a dispute lays down a constitutional issue, the High Court is empowered under Article 165 (2) b to have jurisdiction over the matter as was held in the *Bia Tosha* case.[242] After all, the bill of rights and fundamental freedoms binds all state organs and all persons[243] and applies to all law and requires equal treatment of every person including parties to a private law governed dispute settlement process.

Thus, this study recommends that as the High Court determines an application for interim measures, it must protect the constitutionally guaranteed rights despite the parties transacting under the sphere of private law.

5.2.1. Short term Recommendations

A short term recommendation includes the enactments of rules on emergency arbitration so that parties who have opted in can commence emergency proceedings within the framework of their arbitration. The rules will allow parties to appoint an emergency arbitrator to address any urgent application pending formation of the arbitral tribunal.

5.2.3. Long term Recommendations

A long term recommendation involves the review of the Civil Procedure Act 2012 to facilitate the enforcement of interim measures.

[241] Article 2 states that: "This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government."
[242] (n 15).
[243] (n 3), Art 20 (1).

5.3. Areas of further research

This study has examined the inconsistencies in the courts jurisprudence in the award of interim measures of protection by courts. The study has made recommendations that will address such inconsistencies to ensure a more predictable legal regime.

As discussed in this study, the Arbitration Act permits the application for interim measures to be made to the court and the arbitral tribunal. The study examined the applications to court, thus future work in this area include examining the application to the arbitral tribunal. Article 17 (1) of the Model Law provides the limitations on the tribunal's power to grant interim measures which must be on the application of a party and not on the tribunal's own motion. It states as follows;

> 17 (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measure.

Section 18 (1) of the Arbitration mirrors the wording of the Model Law Article 17 but makes additional provisions as follows:

> 18(2): The arbitral tribunal or a party with the approval of the arbitral tribunal, may seek assistance from the High Court in the exercise of any power conferred on the arbitral tribunal under subsection (1);
>
> 18(3) If a request is made under subsection (2) the High Court shall have, for the purposes of the arbitral proceedings, the same power to make an order for the doing of anything which the arbitral tribunal is empowered to order under subsection (1) as it would have in civil proceedings before that Court, but the arbitral proceedings shall continue notwithstanding that a request has been made and is being considered by the High Court.

Section 18(3), empower the High Court to exercise the same power that it has in ordinary civil proceeding, which are more extensive than those conferred under section 18 (1). Thus,

further research is required to assess the effect of section 18 (3) *vis a vis* the power of the court to grant interim measures under section 7 of the Arbitration Act and the power of the arbitral tribunal under section 18(1) to continue with the proceedings while the request for assistance is pending before the court.

Study in this area will uncover how courts have handled the request for assistance without triggering delays to the ongoing arbitral proceedings. Moreover, the study will determine the extent of the court's power in providing assistance in relation to the jurisdiction of the arbitral tribunal. *In providing assistance, has the High Court encroached on the tribunal's decision-making power?*

Areas of further research also include studying the application of interim measures of protection in international commercial arbitration as well as the recognition and enforcement of such measures in Kenya.

BIBLIOGRAPHY

Books

Barrett J and Barrett P, *A History of Alternative Dispute Resolution: The Story of a Political, Cultural and Social Movement* (1st edn, Jossey-Bass: A Wiley Imprint 2004).

Bernstein R, *The Handbook of Arbitration Practice: General Principles* (Sweet & Maxwell, London 1998).

Born G, *International Commercial Arbitration* (Kluwer Law International, 2ndedn, 2014).

……..……International Commercial Arbitration: Commentary and Materials (2d edn, 2001).

Capper P, *International Arbitration: A Handbook*, (Dispute Resolution Guides, 3rdedn, 2004).

D'Ambrumenil P, *Mediation and Arbitration,* (Cavendish Publishing Limited, 1997).

D'Aspremont J, *Formalism and the Source of International Law: A Theory of the Ascertainment of Legal Rules* (1st edn, Oxford University Press 2011)

Gaillard M and Savage J, *International Commercial Arbitration* (Kluwer Law International, 1999).

ICCA'S Guide to the Interpretation of the 1958 New York Convention: A handbook for Judges (2011), International Council for Commercial Arbitration.

Kithinji M and Others (eds), *Kenya After 50: Reconfiguring, and Policy Milestones* (1st edn, Palgrave Macmillan 2016).

Kothari C.R, *Research Methodology: Methods and Techniques* (2nd edn New Age International Publishers, 1985).

Marchac G, Interim Measures in International Commercial Arbitration Under the ICC, AAA, LCIA and UNCITRAL Rules, 10 Am. Rev. Int'l Arb. 123 (1999).

Moses M, *The Principles and Practice of International Commercial Arbitration,* (Cambridge University Press, 2010).

Muigua K, *Settling Disputes Through Arbitration in Kenya* (3rd edn Glenwood Publishers Limited, 2017).

……,.*Alternative Dispute Resolutions and access to justice in Kenya (*Glenwood Publishers Limited, 2015).

McConville M and Chui W (eds), *Research Methods for Law* (Edinburgh University Press, 2007).

Moffit M and Bordone R (eds), *The Handbook of Dispute Resolution* (1st edn, Jossey-Bass: A Wiley Imprint 2005).

Pollock F and Maitland F, *The History of English Law* before *the time of Edward 1* 667 (2nd edn Cambridge University Press, 1898).

Ratnapalla S, Jurisprudence (Cambridge University Press, 2009).

Redfern A and Hunter M, *The Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 1999).

Routledge P, *Arbitration and the Constitution* (Cambridge University Press, 2013).

Wacks R, *Understanding Jurisprudence: An Introduction to Legal Theory* (3rdedn Oxford University Press, 2012).

Journals

Aloo L, 'Consolidation of Commercial Arbitration: Institutional and Legislative Responses,' *Chartered Institute of Arbitrators (Kenya) Alternative Dispute Resolution*, Vol. 3 No 1, (2015), pp. 139-162.

Blutman L, **'**Adjudication and Textual Interpretation' 4: 94–104.

Boukema H, 'Legal Realism and Legal Certainty' Archives for Philosophy of Law and Social Philosophy 66, no. 4 (1980): 469-85. <http://www.jstor.org/stable/23679543> accessed 8 January 2019.

Charny D, 'The New Formalism in Contract', (1999)66 U. CHI. L. REV. 843-44.

De Ly, F, "The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning," *12 Nw. J. Int'l L. & Bus. 48 (1991-1992),* pp. 48-85.

Grey T, 'Langdell's Orthodoxy'(1983), 45 U. PITT. L. REV. 1, 24-27.

Ficsor K, 'The Nature and Theoretical Limits of Adjudicative Formalism in Contemporary Anglo-Saxon Legal Theory' (2014) Acta Juridica Hungarica, 55, No 1. 38–56.

Gharavi H, *The International Effectiveness of the Annulment of an Arbitral Award* (Kluwer International 2002) <https://goo.gl/RyP4Gw> accessed 7 April 2019.

Leiter B, 'Positivism, Formalism, Realism' (1999), 99 Columbia Law Review [v] 1144-1145.

McLaughlin, JT, "Arbitration and Developing Countries," The *International Lawyer,* Vol. 13, No. 2 (Spring 1979), pp. 211-232.

Pound R, ''Sociology of law and sociological jurisprudence', V(1) The University of Toronto Law Journal, 1943, 1–20.

"Role of the Court Under Arbitration Act 1995: Court intervention before, pending and after Arbitration in Kenya", *Kenya Law Review* 2008-2010.

Thomas D, Interim Relief Pursuant to Institutional Rules Under the English Arbitration Act 1996, Arbitration International 1997.

Torgbor E, 'Privatization of Commercial Justice through Arbitration: The Role of Arbitration Institutions in Africa,' *Chartered Institute of Arbitrators (Kenya) Alternative Dispute Resolution,* Vol. 3 No 2, (2015), pp. 109-121.

Unger R, ‘The Critical Legal Studies Movement’ (1983) 96 Harv. L. Rev. 564.

Weinrib E, ‘Legal Formalism: On the Immanent Rationality of Law’ (May 1988) 97(6) Yale L. J. 949–1016;

Internet Sources

Chartered Institute of Arbitrators Kenya <https://www.ciarbkenya.org/about-us/> accessed 10 April 2019.

Coudert R, "Certainty and Justice." *The Yale Law Journal* 14, no. 7 (1905): 361-73. doi:10.2307/781604.

Fagbemi S, ‘The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality’, https://www.ajol.info/index.php/jsdlp/article/viewFile/128033/117583 accessed 5 January 2019.

Gakeri J, ‘Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR’ <https://suplus.strathmore.edu/bitstream/handle/11071/3435/Placing%20Kenya%20on%20the%20global%20platform%20an%20evaluation%20of%20the%20legal%20framework.pdf?sequence=1&isAllowed=y> accessed 23 March 2019.

Gharavi H, *The International Effectiveness of the Annulment of an Arbitral Award* (Kluwer International 2002) <https://goo.gl/RyP4Gw> accessed 7 April 2019.

Hanna J, ‘’The Role of Precedent in Judicial Decision’ 2 Vill. L. Rev. 367 (1957). http://digitalcommons.law.villanova.edu/vlr/vol2/iss3/

Holmes O, ‘The path of Law’ 1897 <https://warwick.ac.uk/fac/soc/sociology/staff/sfuller/social_theory_law_2015-16/oliver_wendell_holmes_oliver_holmes_the_path_of_law.pdf> accessed 9 January 2019.

ICCA, "ICCA's Guide to the Interpretation of the 1958 New York Convention" (International Council for Commercial Arbitration (ICCA), 2011), <https://goo.gl/Rcv0rq> accessed 23 March 2019.

Inter-American Convention on international commercial arbitration <https://treaties.un.org/doc/Publication/UNTS/Volume%201438/volume-1438-I-24384-English.pdf> accessed on 1st April 2019

Jean-François P and Besson S, Comparative Law of International Arbitration. (London: Sweet & Maxwell, 2007), <https://goo.gl/oYm6bV> accessed 24 March 2019.

Kariuki Muigua, 'Effectiveness of Arbitration Institutions in East Africa' 2016

……., 'Emerging Jurisprudence in the Law of Arbitration in Kenya: Challenges and Promises', 8 <http://kmco.co.ke/wp-content/uploads/2018/08/Emerging-Jurisprudence-in-the-Law-of-Arbitration-in-Kenya.pdf> accessed 23 March 2019.

....., 'Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending and After Arbitration in Kenya.'

....., 'Constitutional Supremacy over Arbitration in Kenya'.

....., 'The Arbitration Acts: A Review of Arbitration Act, 1995 of Kenya vis-a-viz Arbitration Act 1996 of United Kingdom.'

Mclean D, 'Toward a New International Dispute Resolution Paradigm: Assessing the Congruent Evolution of Globalization and International Arbitration' (2009) 1087 <https://www.lw.com/thoughtLeadership/congruent-evolution-of-globalization-and-international-arbitration> accessed 9 February 2019.

Noussia K, Confidentiality in International Commercial Arbitration: A Comparative Analysis of the Position under English, US, German and French Law 2010 XIII, 200P.

Wang W, ‘International Arbitration: The Need for Uniform Interim Measures of Relief’, 28 Brook. J. Int'l L. (2002). <http://brooklynworks.brooklaw.edu/bjil/vol28/iss3/8> accessed 7 January 2019.

UNCITRAL Secretariat, Explanatory Note on the 1985 Model Law on International Commercial Arbitration as amended in 2006 <https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARB-explanatoryNote20-9-07.pdf> accessed 12 July 2019.

……, “Status UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006” (United Nations Commission on International Trade Law (UNCITRAL).2016), <https://goo.gl/t6AdXL> accessed 24 March 2019.

……., “UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration” (United Nations Commission on International Trade Law, 2012), <https://goo.gl/yRdPVo> accessed 24 March 2019.

UNCTAD, Recognition and Enforcement of Arbitral Awards: The New York Convention (United Nations Conference on Trade and Development, 2003), <https://unctad.org/en/Docs/edmmisc232add37_en.pdf> accessed 3 April 2019.