ALTERNATIVE DISPUTE RESOLUTION (ADR) FOR INSURANCE DISPUTES: A COMPREHENSIVE REVIEW OF THE LEGISLATIVE FRAMEWORK IN KENYA

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DECLARATION

I hereby declare that this Project Paper is my original work and that it has not been submitted for award of a degree or any other academic credit in this or any other University.

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To my family, my constant source of inspiration. Words cannot express the joy I have to know that you are forever by my side. Today, I am thankful for you.

DEDICATION

To George and Joe, for the constant encouragement to stay the course.

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES AND CONVENTIONS

Appellate Jurisdiction Act, Chapter 9 Laws of Kenya

Arbitration Act, No. 4 of 1995

Civil Procedure Act and Civil Procedure Rules Chapter 21 Laws of Kenya

Constitution of Kenya, 2010.

Consumer Protection Act, No. 46 of 2012

Insurance (Motor Vehicle Third Party Risks) Act, Chapter 405 Laws of Kenya.

Nairobi Centre for International Arbitration Act, No. 26 of 2013

Small Claims Court Act, No. 2 of 2016

Societies Act, Chapter 108 Laws of Kenya

The Insurance Act, Chapter 487 of the Laws of Kenya

The United Nations Commission on International Trade Law, Model Law on Arbitration

LIST OF ABBREVIATIONS

ADR - Alternative Dispute Resolution

AKI- Association of Kenya Insurers

CIARB- The Chartered Institute of Arbitrators

IRA- Insurance Regulatory Authority

ODR- Online Dispute Resolution

TCF- Treating Customers Fairly

TDR- Traditional Dispute Resolution

UNCITRAL – The United Nations Commission on International Trade Law Model Law on Arbitration

ABSTRACT

Disputes are inevitable when not avoidable and especially so in the insurance industry which is synonymous with high volumes of claims. Unresolved disputes become a constant burden to all the parties involved and therefore, an operative and functional dispute resolution tool is paramount to guarantee the expeditious resolution of disputes.

The global trend has shifted from the traditional over reliance on litigation towards adoption of other alternative methods of dispute resolution. The inclusion of Alternative Dispute Resolution (ADR) in the Constitution of Kenya under Article 159 is a notable recognition of the role ADR plays towards the attainment of justice. However, it is evident that the insurance industry in Kenya is yet to embrace ADR despite the recognition that a comprehensive ADR framework will provide a better dispute resolution system for the industry.

The study analyses the legal framework of ADR in Kenya vis-à-vis its application as a tool for dispute resolution in the insurance industry while evaluating its effectiveness in resolving insurance related disputes. The study identifies the challenges attributing to the low use of ADR in the insurance industry and a conclusion is drawn supported by the findings of the study towards making recommendations for necessary legal reforms.

CHAPTER ONE: INTRODUCTION

1.1 Background of the Study

Alternative Dispute Resolution (ADR) is recognised in the Constitution under Article 159[1] as a mode of enhancing access to justice. The journey of ADR since 2010 when the Constitution was promulgated is evident in many sectors with considerable efforts already made towards entrenching ADR into the formal justice system. The role that ADR plays in managing insurance disputes is incontestable owing to the fact that these disputes when not amicably resolved remain litigious and very polarized. The insurance industry must capitalise on the advantages of ADR and aim at adopting it as the forum of choice for dispute resolution. This lays a background for the current study.

Disputes in the insurance industry are inevitable. When a loss occurs, the claims process begins and when a dispute arises during this process, it calls for resolution. The method chosen for dispute resolution is key if parties intend to resolve the issue expeditiously, cost effectively and most importantly, amicably so as to maintain their business relationship. The nature of insurance disputes characterised as being commercial and personal in nature elevates conflict among the parties who mistakenly view the outcome as a win or a loss.[2] With such a polarized state of affairs, it is no wonder that litigation is predominantly the first method of choice for dispute resolution when it comes to resolving disputes in the insurance industry.[3] Litigation is viewed as neutral since the matter is adjudicated by a public court of law through a formal legal process and any decision arrived at is in the public record and capable of being reviewed through an appellate process.

[1] The Constitution of Kenya, 2010.
[2] Robert Glynn, 'ADR for Insurance Disputes', (*IMIA Conference*, September 2004), <www.imia.com/wp-content/.../GP04-2004-Alternative-Dispute-Resolution.pdf> accessed on 07/01/2019.
[3] Ibid

However, the Kenyan judiciary is overwhelmed due to the high number of cases filed each year. According to the judiciary's strategic blueprint for 2016, the number of cases pending were 505,315 out of which 360,284 were backlog cases.[4] With such gleam statistics, and the common perception that the judicial system is unable to provide timely and efficient access to justice, ADR has begun to materialise as an alternative to the formal judicial process.[5]

ADR is defined as a "procedure for settling disputes by means other than litigation."[6] It permits for disputes to be resolved outside the judicial process and has been viewed as providing an alternative route to accessing justice.[7] In Kenya, ADR is provided for under Article 159 of the Constitution which lists alternative forms of dispute resolution as including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The judiciary has gone further to appreciate the role ADR plays by entrenching the Alternative Justice System and the Court Annexed Mediation Program.[8]

With the judicial system being clogged, ADR then becomes the most compelling method for use to resolve insurance disputes. If applied appropriately, ADR will be effective in securing the determination of such claims at a benefit to all the parties involved.[9] However, a legal framework is needed to ensure ADR is integrated in the industry.[10]

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[4] The Judiciary-Republic of Kenya, *Sustaining Judiciary Transformation (SJT): A Service Delivery Agenda, 2017-2021*, (2017) 21.
[5] Catherine Price, *Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution?* (2018) 18 Pepp. Disp. Resol. L.J., 393 <https://digitalcommons.pepperdine.edu/drlj/vol18/iss3/2> accessed on 02 January 2019
[6] Bryan A Garner(ed), *Black's Law Dictionary* (8th edn, Thomson West 2004).
[7] Kariuki Muigua, '*Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework',* (2015) <www.kmco.co.ke/.../156-legitimising-alternative-dispute-resolution-in-kenya> *accessed on 03 January 2019*
[8] The Judiciary-Republic of Kenya, *Sustaining Judiciary Transformation (SJT): A Service Delivery Agenda, 2017-2021*, (2017)
[9] Jay E. Grenig, 'Alternative Dispute Resolution' (3rd ed. 2005).
[10] Ibid n6.

1.2 Statement of the Problem

In giving effect to Article 159 of the Constitution which encourages the use of ADR mechanisms to resolve disputes, the Civil Procedure Act[11] under Sections 1A and 1B outlines the overriding objectives of the Act to wit the court is required to handle matters efficiently, justly, timely and at an affordable costs and in that regard, the Act promotes the use of ADR. Order 46 of the Civil Procedure Rules, 2010[12] provides for arbitration on the order of the court and further provides for other ADR methods to be adopted so as to facilitate dispute resolution with the goal of attaining the overriding objective of the Civil Procedure Act.[13] This sets a legislative foundation for the adoption of ADR in resolving insurance related disputes.

Although ADR is recognised as an ideal method of resolving disputes, nevertheless the insurance industry is yet to fully embrace its use despite the concept of ADR having being introduced into the Constitution[14] and given constitutional status. The study puts into perspective the subject of ADR and its application in the insurance industry while conceptualizing that it is a consensual process therefore limiting its mandatory use. It aims at establishing the place of ADR in resolving insurance related disputes with a view of understanding why the resistance towards embracing its use. This project strives to determine whether the present-day legal framework is able to sustain the adoption of ADR in the insurance industry.

1.3 Objectives of the Study

1.3.1 General Objective:

To study the legal framework of ADR in Kenya vis-à-vis its application as a tool for dispute resolution in the insurance industry while evaluating its effectiveness in resolving insurance related disputes.

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[11] Cap 21 of the Laws of Kenya.
[12] Under Section 81 of the Civil Procedure Act, CAP 21 of the Laws of Kenya.
[13] Order 46, Rule 20 of the Civil Procedure Rules.
[14] Article 159 of the Constitution of Kenya, 2010.

1.3.2 Specific Objectives:

i. Review the current legal framework for ADR in the resolution of disputes arising in the insurance industry in Kenya.

ii. Evaluate the extent and effectiveness of ADR in resolving insurance disputes in Kenya.

iii. Assess the future prospects of ADR and make recommendations for its use in the insurance industry.

1.4 Research Questions

The central questions guiding this study are;

i. What is the current legal framework for ADR in the resolution of disputes in the insurance industry in Kenya?

ii. To what extent and how effective has ADR been in resolving insurance disputes in Kenya?

iii. What is the future prospects of ADR in the insurance industry and the recommendations necessary to promote its use?

1.5 Justification of the Study

The change in dynamics in the dispute settlement spectrum has steered the current wave of calls for institutionalization of ADR in every sector. Therefore, it is the ultimate time for a study to be undertaken to evaluate the current legal framework for ADR as it relates to the insurance industry while establishing the extent of its use since it was entrenched in the Constitution.

The study will not only be beneficial to the insurance industry but to the parties involved, who are in most instances personally affected by the various disputes that arise. An effective ADR

framework will directly impact insurance companies financially through reduction of legal costs while claimants will benefit from expeditious resolution of disputes.

When ADR is fully institutionalized in the insurance industry, the ripple effect will be a significant decrease in insurance disputes culminating in civil courts and consequently, the judicial system will be able to meet its overall objective of facilitating access to justice.

The study will also be beneficial to the insurance regulator whose main objective is to promote financial sustainability partly through advocating for customers' rights and being mediators when disputes arise between players in the industry. The findings will assist the regulator to make an informed decision on the feasibility of ADR as an option for resolving insurance disputes and the necessary reforms that can be undertaken to promote its use.

1.6 Research Methodology

The research will be predominantly qualitative and will involve a review of relevant primary and secondary data on ADR in the insurance industry. The primary sources will include the various legal instruments governing ADR in Kenya and its application in the insurance industry. It will further involve collecting data from the field on the current status and use of ADR in the insurance industry. This will be done through the use of questionnaires. The secondary sources will include books, journals and electronic database.

The study will adopt a descriptive research design since it aims at collecting information about the relevant participants' attitudes, views and practices towards ADR in the insurance industry.

1.6.1 Target population

It will include the interested parties in the insurance industry who participate in the resolution of disputes in one way or the other. The research will be based on a stratified sample population based on the following strata:

A. The Regulator;

The duties of the Insurance Regulatory Authority (IRA) as provided for by the Insurance Act includes the regulation, supervisions and the development of the insurance industry in Kenya.[15] They are a key player when it comes to dispute resolution as any ADR framework recommended for adoption requires their input and assistance in ensuring compliance.

B. Insurance Companies;

They are obligated to settle payable claims lodged against their policy holders. As at January 2019, there are 53 insurance companies licensed to practise in Kenya and their classification is as follows:

Table 1:1: Classification of Insurance Companies in the year 2019

CATEGORY	**TOTAL**
General Insurance Companies	38
Life Insurance Companies	15

The research is limited to general insurance companies and the various disputes in that sector.

C. Practising Advocates

They engage in settlement of insurance related disputes on a regular basis and are thus well suited to give their insights on the current practise of ADR.

D. Litigants

They are mostly affected by the disputes and being the claimants, they are entitled to make decisions regarding the handling of their matters.

The study will adopt the use of questionnaires for data collection which will be distributed within each stratum based on the purposive random sampling method. Each stratum will have its own questionnaire which will be co-related and designed to establish the current usage of ADR in the resolution of insurance related disputes.

Chapter Three of the study gives an in depth analysis of the research methodology adopted.

[15] Cap 487 of the Laws of Kenya.

1.7 Theoretical Framework

The research will be underpinned on the broader Sociological School of Thought as propounded by Roscoe Pounds and in particular, the study will be founded on the theoretical framework of the Justice Theory as validated by Jeremy Bentham's 'Utilitarian Theory of Justice'.

1.7.1 Sociological Jurisprudence

Sociologists argue that the proper subject of sociology of law is "social control" and not the "law" and its overall impact on the public.[16] Sociologists reason that the role of law is to preserve social order towards the realization of continued growth and advancement of the society in general.[17]

Roscoe Pounds regarded the law as a tool for social control whose main purpose was to satisfy, reconcile and harmonize the conflicting interests between the individuals in society.[18] Pounds argued that it was necessary to study legislation analytically while focusing on its influence in the society. The enacted laws should be effective and capable of enforcement and it should serve to fill the gap between the law and social reality.[19] He argued that while it was important to study the historical evolution of laws, its overall performance in the society is of more importance if only to determine its effectiveness.[20] So that if a law does not serve to mediate the conflicting interests between individuals, then it is of little use to the society. Further, sociologists advocate for empirical legal research whose findings are capable of resolving social problems.[21]

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[16] Michael Freeman, *Law and Sociology* (Oxford University Press 2006),16.
[17] Sheskin Arlene. 'A Critical Review and Assessment of the Sociology of Law' (1978) 3(2) *Mid-American Review of Sociology*, 109–124. www.jstor.org/stable/23252535 accessed on 15/11/2018.
[18] Roscoe Pound. "The Scope and Purpose of Sociological Jurisprudence" (1911) 5, Harvard Law Review, https://archive.org/stream/jstor-1324775/1324775_djvu.txt accessed on 15/11/2018
[19] Ibid
[20] Ibid n13
[21] James A. Gardner, *The Sociological Jurisprudence of Roscoe Pound (Part I)*, (1961) 7 Vill. L. Rev. 1 http://digitalcommons.law.villanova.edu/vlr/vol7/iss1/1 accessed on 15/11/2018

With respect to ADR in the insurance industry, the "formal law" and the "law in action" differs since claims are dependent on negligence of parties under tort law. Decisions are arrived at based on human emotions, negotiating power of parties and not the knowledge of the law.[22] The theory will provide guidance on reviewing the legal framework of ADR and its overall impact and benefits to the society.

1.7.2 The Theory of Justice

Justice is mirrored to be a moral and political concept. To theorize justice, one looks at its nature as a determinant for morality of character and a sought after feature for a political society.[23] Justice is described as one of the four cardinal virtues in the society.[24]

For Plato,

> "Justice is a virtue establishing rational order, with each part performing its appropriate role and not interfering with the proper functioning of other parts".[25]

According to John Rawls,

> "Justice is the first virtue of social institutions and regardless of how perfect they might be, an unjust institution must be reformed or abolished."[26]

Aristotle says,

> "Justice consists in what is lawful and fair, with fairness involving equitable distribution and correction of what is inequitable."[27]

Justice as a theory is important to the subject of ADR. Parties pursue resolution of their disputes through ADR so as to attain justice. Twining argues that the ADR movement has grown because of the perception that civil adjudication is not capable of achieving "justice" as was

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[22] Snyder Francis G. "Administrative Law Review." (1973) 25(3), *Administrative Law Review*, 337–341. www.jstor.org/stable/40708838 accessed on 15/11/2018

[23] Miller, David, "*Justice*", *The Stanford Encyclopedia of Philosophy* (Fall 2017 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/fall2017/entries/justice/>.

[24] Carr, David. "*The Cardinal Virtues and Plato's Moral Psychology*." The Philosophical Quarterly (1950) 38 (1988),186-200.

[25] Ibid

[26] John Rawls, *A Theory of Justice*, (2nd edn, The Belknap Press of Havard University Press 1971).

[27] Anton-Hermann Chroust & David L. Osborn, *Aristotle's Conception of Justice*, 17 Notre Dame L. Rev. 129 (1942).

meant to due to the challenges facing the adjudication process including delays and the high volumes of civil cases being filed.[28]

Procedural justice refers to the notion of making processes fair when dealing with the resolution of disputes and apportionment of resources and its pillars are impartiality, fairness, voice, and transparency.[29] The satisfaction of claimants who have gone through the process of ADR is dependent on how they view the dispute resolution process and whether there was fairness and justice in the procedure so as to arrive at a perceived fair outcome.[30]

The basic utilitarian argument on justice is that when we act to maximize utility, we are acting justly and the outcome will bring out the 'most good' for the 'most people'. In other words, while achieving utility, you also achieve justice. According to **Jeremy Bentham**, justice is a part of utility that is found in legislation and the legislator must keep in mind utility when enacting laws so as to promote abundance and as such, justice will be achieved.[31] Utilitarian theorists argue that man is a social creature that is chiefly motivated by his quest for happiness and to achieve that in a just society, the state becomes chiefly responsible to regulate interactions by making laws that bring about happiness.[32] As such, justice becomes a product of utility. He argued that a law maybe good at one time but bad at another and therefore law makers have an obligation to review the laws as society changes while considering the evolving needs of the social order. To him, the creation of laws was a continuous process that required constant knowledge of the changing circumstances.[33]

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[28] William Twining, Alternative to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics, (1993) The Modern Law Review Limited, 56:3, 380-392.
[29] Tyler, Tom R. "What Is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures." (1988) Law & Society Review, vol. 22, no. 1, 103–135. <www.jstor.org/stable/3053563> accessed on 01/03/2019.
[30] Ibid
[31] Jeremy Bentham, "*An Introduction to the Principles of Morals and Legislation"* (1781 ed.) <http://www.utilitarianism.com/jeremy-bentham/index.html> accessed on 01/03/2019.
[32] Driver Julia, "The History of Utilitarianism", *The Stanford Encyclopedia of Philosophy* (Winter 2014 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/win2014/entries/utilitarianism-history/>.
[33]Ibid n27.

As regards litigation in comparison to ADR, Bentham argued that litigation's main objective should be the operationalization of the written law as drafted towards the stimulation of utility for the masses.[34] To him, litigation was characterised by the calling of witnesses, placing them before a judge, testing the testimony and facts and weighing the evidence to arrive at a decision backed by sanctions.[35] He viewed the entire process as confusing and technical coupled with sinister interests of lawyers and judges and in the end, it does not yield utility.[36] As such, his main suggestion to cure the problem was the adoption of an inquisitorial approach that focuses on compromise and conciliation which is backed by adjudication in conformity with the law.

A review of Bentham's utilitarian theory shows that he perceived ADR as a lesser evil when compared to litigation since it promoted utility but argued that ADR is also not capable of resulting in 'complete justice' because one party usually has more bargaining power than the other and therefore, they have to sacrifice their right in order to get justice.[37]

Is ADR better than litigation in terms of resulting in justice? According to the utilitarian theory, it is the lesser evil. The study will attempt to answer the question.

1.8 Literature Review

Kenya's legal system is adversarial in nature and has been succinctly described by Ainsworth as "*a kind of contest between two equally-situated contestants, each of which is striving to prevail.*" [38] This description captures the current state of affairs when it comes to insurance related disputes. Each party is ready to litigate hoping to be the "winner" when the suit is concluded. Despite litigation being typically costly, time consuming, uncertain and ultimately

[34] William Twining, '*Alternative to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics'*, (1993) The Modern Law Review Limited, 56:3, 380-392
[35] Ibid
[36] Ibid
[37] Ibid
[38] Ainsworth, J. 'Legal Discourse and Legal Narratives', (2015) , 2(1) Language and Law, 1-11 <ler.letras.up.pt/uploads/ficheiros/13568.pdf> accessed on 03/01/2018

unsatisfying, players in the insurance industry have not been keen on taking up ADR and are still pursuing resolution of disputes through the formal court process.[39] Public perception is that insurance companies are always out to not only minimise the amount in claims settled but to also avoid settling claims altogether.[40] As such, this has widely contributed to litigation becoming the default mode for resolving insurance disputes.

Jay Grenig[41] in his book *Alternative Dispute Resolution* contends that most personal injury claims are suitable to be handled under ADR for the main reason that ADR is just, speedy and inexpensive. He outlines the characteristics of such claims in the following terms: the claimant is typically inexperienced in resolving such claims; negotiations is usually about distribution of funds from one party to another; and the issue being handled is largely subjective.[42] Due to the above, he recommends that it is necessary for claimants to be represented by advocates so as to ensure the parties have equal strength during the negotiation process. In any case, the society should not rely heavily on litigation and the formal judicial process as some of their disputes are better resolved through ADR. To him, ADR complements the judicial system and is key when it comes to resolving disputes in the insurance industry.[43] The book is well informed on the aspect of ADR in resolving insurance disputes but it nevertheless focuses on the practise in the American jurisdiction and therefore fails to be fully applicable in this research.

Robert Jerry[44] argues that the insurance industry is very important to the economy and the public given it affects both parties substantially and once the reality of disputes being inevitable

[39] Mills, Michael and Furlan, Nicholas "Resolving insurance disputes: the value of less formal processes," (2002) 5(1)-3, *ADR Bulletin*, <http://epublications.bond.edu.au/adr/vol5/iss1/3> accessed on 03/01/2018
[40] Cassandra Roeder, "Reforming Consumer-Insurer Dispute Resolution in the Auto Insurance Industry" (2014) 7, *Student Award Winning Papers*, <http://scholarship.law.wm.edu/awardwinning/7> accessed on 04/01/2018
[41] Jay E. Grenig, 'Alternative Dispute Resolution' (3rd ed. 2005).
[42] Ibid pg 25.
[43] Ibid
[44] Robert H. Jerry II, *Dispute Resolution, Insurance, and Points of Convergence*, (2015), 2015 J. Disp. Resol. <https://scholarship.law.missouri.edu/jdr/vol2015/iss2/3> accessed on 08/01/2018

sets in, it only calls upon the players to tap into the field of dispute resolution and better understand how the process of resolving insurance claims can be improved. He argues that without an effective dispute resolution process, the security guaranteed in the contract of insurance is lost leading to a perceived failure of insurance.[45] The article is relevant to the study in so far as it examines the important role that ADR plays in the insurance industry. However, it focuses on arbitration and how it can be incorporated into the insurance industry but fails to review the other ADR methods that can be applied in resolving insurance disputes which will be the focus of this study.

In support of ADR, **Catherine Price**[46] outlines the benefits of ADR that are specific to the African context as efficient, effective and feasible. She contends that the African judicial system is always tainted with claims of inefficiency due to backlogged court systems leading to the court being susceptible to external influence and manipulation and as such users have lost faith in the system. She therefore recommends the adoption and formalisation of ADR into the legal system in order to realize its benefits.[47] Although Price's article emphasises for the need to adopt ADR in Africa and is relevant to the study for laying a foundation to encourage the adoption of ADR in an African context, it does not specifically look into the applicability of ADR in the insurance industry and this research will attempt to fill that gap.

Robert Glynn[48] reasons that the legal system breeds conflict due to the culture of win/lose and it becomes difficult to resolve disputes without the intervention of a neutral third party. He notes that although ADR is voluntary, the courts are currently keen to resolve disputes through ADR and has resorted to imposing ADR on parties before they can pursue litigation. As regards

[45] Ibid
[46] Catherine Price, Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution? (2018) 18 Pepp. Disp. Resol. L.J., 393 <https://digitalcommons.pepperdine.edu/drlj/vol18/iss3/2> accessed on 02 January 2019
[47] Ibid
[48] Robert Glynn, 'ADR for Insurance Disputes', (*IMIA Conference*, September 2004), <https://www.imia.com/wp-content/.../GP04-2004-Alternative-Dispute-Resolution.pdf> accessed on 07/09/2018

the insurance industry, Glynn agrees that ADR is a sensible option for the industry. However, he notes that the industry has not been keen on responding to ADR because of lack of knowledge on ADR, its presumed unreliability, the common trend of insurers contesting claims and their unwillingness to settle disputes promptly and the lack of mandatory provisions for utilization of ADR in the determination of insurance claims. Nonetheless, he notes that the insurance industry has begun initiatives towards embracing the use of ADR and he gives an example of the 'Market ADR Commitment' that advocates for reconciliation and mediation being used as a first option for disputes between insurance companies.[49] These efforts though noble are hampered by the lack of institutional support and Glynn argues that more must be done to support it. For ADR to become successful in the insurance industry, dispute resolution needs to become co-ordinated and there should be greater commitment by the stakeholders.

On the aspect of lawyers handling insurance disputes, Glynn notes that they contribute to the low use of ADR because they disregard the use of ADR as making their case look weaker while affecting their overall fee income.[50] When he looks into the future, he concludes that ADR will eventually find its space in the insurance industry as ADR continues to be entrenched in the ever evolving economic sphere.[51] Glynn's article is enriched with comprehensive research on ADR and its applicability in the insurance industry which this research largely identifies with. However, Glynn makes recommendations that are applicable to the American jurisdiction that cannot be applied to our jurisdiction. This research will therefore improve on the laid down arguments and make recommendations that will resonate with our system.

Mills Michael and Furlan Nicholas[52] are in support of the use of ADR in the insurance industry and they begin their discussion by pointing out that litigation is costly, time consuming

[49] Ibid
[50] Ibid
[51] ibid
[52] Mills, Michael and Furlan, Nicholas "Resolving Insurance Disputes: The Value of Less Formal Processes," (2002) ADR Bulletin: Vol. 5, 1(3). <http://epublications.bond.edu.au/adr/vol5/iss1/3> accessed on 12/11/2018.

and unsatisfying. Conflict in the insurance industry remains rampant and is apparent from the number of civil cases being litigated which shows that players in the industry have failed to capitalize on the benefits of ADR. They analyse the types of insurance disputes and categorize them as follows:

a. **Coverage Disputes**: Dispute between the insurance company and its policy holder over a claim or terms of the contract.[53]
b. **Third Party Disputes:** Dispute between the insurance company, insured and a third party regarding a claim. Commonly involves injury claims and property damage claims.[54]

The above disputes can be resolved through ADR through the use of either of the following processes:

a. **Consensual process**: Includes negotiation, conciliation and mediation.
b. **Adjudicative process**: includes arbitration, appraisal, early neutral evaluation and mini-trial. These mechanisms resemble the formal judicial process.

When it comes to coverage disputes, they view the relationship between the insurer and the insured as that of a customer and a service provider. As such, these disputes are best suited to be resolved through the consensual process because parties are keen on maintaining the relationship even after the dispute is resolved. They argue that negotiation should be the starting point to resolving such disputes since the parties are already familiar with each other.[55] The consensual process is advantageous because of its adaptability and parties have a leeway to agree on how best to resolve their disputes. However, they point out the disadvantages of the process as: there is an unbalanced bargaining power between the parties especially when parties lack legal representation.[56] The insurer is more powerful having more experience in

[53] Mills, Michael and Furlan, Nicholas "Resolving Insurance Disputes: The Value of Less Formal Processes," (2002) ADR Bulletin: Vol. 5, 1(3). <http://epublications.bond.edu.au/adr/vol5/iss1/3> accessed on 12/11/2018.
[54] Ibid
[55] Ibid
[56] Ibid

dealing with such issues as compared to the claimants who might be experiencing such a dispute for the first time.

When it comes to third party claims, they critic the way ADR proceedings are conducted in private which is in contrast with the judicial system whose proceeding are done in public and are available to the public for reference purposes.[57] They view this as a problem because the ADR process becomes susceptible to abuse especially by parties with more bargaining power. Secondly, justice must be seen to be done. This is however not possible for ADR as the proceeding are done in private. Thirdly, legal principles are developed through decisions by courts and when most matters are settled through ADR, it will bring about uncertainty in the field of dispute settlement because of the lack of judicial precedents.[58] These reasons are just but a few that have contributed to the minimal adoption of ADR for resolution of insurance disputes. When dealing with third party claims, they argue that an adjudicative process will be more suitable because parties do not share a relationship with each other. Further, the issue of liability must be resolved first which calls for a more formal process.[59]

They conclude by arguing that litigation is unsustainable due to the current challenges facing the judicial system of delays and backlogs. It is therefore in the interest of all parties in an insurance dispute to give ADR the first priority as a dispute resolution method.[60] This study will borrow from the authors while analysing the applicability of ADR for resolution of insurance disputes in Kenya.

Robert Matlin[61] begins by acknowledging that historically, ADR has always been utilized as a tool for resolution of insurance disputes and especially marine disputes. The article focuses

[57] Mills, Michael and Furlan, Nicholas "Resolving Insurance Disputes: The Value of Less Formal Processes," (2002) ADR Bulletin: Vol. 5, 1(3). <http://epublications.bond.edu.au/adr/vol5/iss1/3> accessed on 12/11/2018.
[58] Ibid
[59] Ibid
[60] Ibid
[61] Robert Matlin, Alternative Dispute and its Use in Commercial Insurance Disputes, (2006) The Metropolitan Corporate Counsel, 43 <*ccbjournal.com/.../alternative-dispute-resolution-and-its-use-commercial-insurance-dispu...*> accessed on 01/03/2019.

on arbitration and in particular its benefits in commercial insurance disputes. He points out that in recent years, ADR has become common through the court annexed programs which has mostly focused on third party claims but nevertheless, it is yet to be accepted for commercial insurance disputes because insurance policies do not contain ADR clauses.[62] This is despite the fact that ADR is flexible, less expensive with more amicable outcomes than court based dispute resolution methods. As such, the proposal given is to include a specific ADR clause in the relevant insurance policies as it is a 'too powerful tool' for dispute resolution to be ignored.[63] Matlin's realization that ADR plays an important role in the insurance industry is undisputable. However, his argument that insurance policies should have the arbitration clause is only meant to cater for coverage disputes between the insurer and the insured and cannot affect third parties who are not privy to the contract of insurance. Therefore, the recommendation will not affect the majority of disputes in the insurance industry which relate to third party personal injury claims.

Owen Fiss[64] argues against the practise of ADR in resolution of disputes and he begins by using an analogy of two neighbours with a dispute who have an option to approach a stranger-the court, which will pronounce itself in a judgment or ADR-which will result in a settlement agreed between them. He contends that ADR is not only problematic, but often misunderstood as the better option despite its demerits which includes the power imbalance between the parties and the probability that a settlement may not result in justice more so because parties are mostly after maintaining peace than accessing justice.[65]

He further argues that the power imbalance between the parties can negatively influence settlement through ADR since the less powerful party may lack the resources needed to

[62] Robert Matlin, Alternative Dispute and its Use in Commercial Insurance Disputes, (2006) The Metropolitan Corporate Counsel, 43 <*ccbjournal.com/.../alternative-dispute-resolution-and-its-use-commercial-insurance-dispu...*> accessed on 01/03/2019.
[63] Ibid
[64] Owen Fiss, Against Settlement (1984) The Yale Law Journal, 93(6), p.1073.
[65] Ibid

effectively deal with the claim and consequently, they may be influenced to accept a lower settlement offer than they deserve. This is also contributed to by the immediate need of a settlement by the parties thus compromising their positions.[66]

In any event, Fiss maintains that ADR may not be appropriate for all cases especially because enforcement of a consent may be very difficult. To him, ADR only serves to limit the opportunities created by litigation for the courts to interpret statutes and constitutional provisions and create precedence.[67] In the end, he strongly argues against the use of ADR for settlement of disputes and advocates for adjudication.

The article is relevant to the study as it is not disputed that ADR has its demerits. However, the study will put into perspective both sides of ADR to give it a balanced outlook of the issue.

In the Kenyan perspective, it is noted that no research has been done to articulate the role of ADR in resolving insurance disputes. The focus has been on reviewing the different aspects of ADR in general and its applicability in the country while focusing on establishing its place as a tool for dispute resolution. Further, the available research has also mostly been devoted to arbitration and the call for its institutionalization into the judicial system seeing that it plays a role in providing an alternative to the formal justice system. With this background in mind, this research will thus be timely in that it will give insight into establishing the role that ADR plays in the insurance industry and what can be done to enhance its use. The Kenyan literature reviewed may not be sufficient in answering this question. However, it is still important for giving a background on the state and use of ADR in Kenya which will eventually lead this study towards establishing the role of ADR as a dispute resolution tool for insurance disputes and give recommendations towards its institutionalization.

[66] Ibid
[67] ibid

Eric Opiyo[68] argues that because of ADR, justice is achieved through promoting resolution of grievances affecting citizens by the use of any available dispute resolution mechanism that will result in a lasting solution. He points out that Article 48 of the Constitution[69] is a key pillar of the constitution for providing alternative routes to get justice. To him, ADR is a key aspect when it comes to providing access to justice and his article proceeds to review the available institutions that deal with ADR in the East African region. This article gives a background of ADR in Kenya without going into any intricate details of its utilisation as it focuses on achieving justice through ADR. It is relevant to this study as it contextualizes the aspect of justice attained from resolving matters through ADR in a Kenyan perspective.

According to **Kariuki Muigua**[70] successful incorporation of ADR requires a mental shift in the attitudes and perceptions of all parties so that they can allow some of their conflicts to be resolved through the use of ADR. He argues that taking a laid back approach and waiting for the courts to make it mandatory for ADR to be utilized will not bring the desired change of elevating and recognising ADR.[71] To him, ADR is complementary to the court system as each serves to attain the resolution of disputes. Justice according to Muigua is subjective meaning it should be fair, affordable and flexible and he continues to critique the formal justice system as not being interested in establishing the root cause of a conflict when compared to ADR which focuses on conflict resolution that is based on mutual problem sharing that results in a mutual satisfying solution.[72] However, he acknowledges that ADR might not be suitable for all conflicts but nonetheless, it facilitates restorative justice and thus enhancing access to justice. Muigua concludes that ADR has not lost its place in Kenya and what is required to elevate its

[68] Eric Opiyo, "Achieving Access to Justice through Alternative Dispute Resolution: A Regional Perspective" (2016) LSKJ 12(1), 153-169.
[69] Article 48 of the Constitution of Kenya provides that: *"The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice."*
[70] Kariuki Muigua, 'Effective Justice for Kenyans: Is ADR Really Alternative?' (2015) LSKJ 11(1) 49-62.
[71] Ibid
[72] Ibid

use is mainstreaming and not necessarily formalization which might take away its benefits.[73] The article is relevant as it gives a background as to whether ADR is effective and to what extent. However, this research will examine the effectiveness of ADR specifically in the insurance industry.

Jacob Gakeri[74] has focused on arbitration and its place in in Kenya and he begins by pointing out that it is yet to meet the confidence of its potential users and he advocates that more must be done to shift emphasis from litigation to arbitration. A possible reason for the minimal use of ADR is that litigants lack the knowledge of other dependable alternative tools and as a result of this ignorance, litigation is common leading to court backlogs and delays. He argues that arbitration and by inference ADR has not been embraced because of the perception that the concept is foreign and is meant for foreign matters only.[75] Further, the lack of a clear defined policy to promote ADR and arbitration in Kenya poses a challenge which is subsequently enhanced by the realization that the courts and legislators have done little to promote arbitration and ADR methods. Lastly, the legal framework has not played the requisite facilitative or supportive role for ADR and arbitration.

Gakeri notes that there is no statutory framework for court mandated ADR before litigation is pursued.[76] To date the situation is still the same save for the introduction of the court annexed mediation which is only done after litigation has begun. On ADR's legal framework, Gakeri concludes that it is responsible for its inadequate utilization in the country.[77] Kenya's legal framework for ADR has largely remained the same over the years which leaves a gap in the practise and adoption of ADR in not only the insurance industry but other sectors as well. He

[73] Ibid
[74] Jacob Gakeri, 'Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR' (2011) International Journal of Humanities and Social Science1(6), 1-2 <www.ijhssnet.com/journals/Vol._1_No._6;_June_2011/25.pdf> accessed on 20/11/2018
[75] Ibid
[76] Ibid
[77] Ibid

recommends for the adoption of a robust legal framework on ADR through: Formulation of a systemic policy and methods of settlement of civil suits other than litigation which will see a paradigm shift in the area;[78] Recognition of ADR as a profession so that minimum qualifications are prescribed for members including their duties, immunity and standards of conduct.[79] This proposal if implemented will see the use of ADR in the insurance industry take a positive shift towards embracing it which will decrease the misconceived perception that ADR is not an appropriate method for dispute resolution for insurance related disputes. Professionalism will allow or contribute towards its wide adoption and use. Further, he recommends that an institution should be created to popularize ADR and govern the profession.[80]

He also advocates for the court to mandate the use of ADR before litigation.[81] This proposal when implemented will be quite beneficial in the insurance industry as parties will be compelled to attempt to resolve their disputes through ADR and as a result create a win-win solution for both parties. The legislature should be proactive in promoting ADR through making express provisions for the utilization of ADR in the first instance under different statutes e.g. in the Insurance Act. The proposal resonates with the argument that when it comes to the use of ADR, parties should have a choice on whether to use it or not but they should not have a choice on whether to consider it or not.[82] ADR will be backed by legislative authority so that compliance increases. The expected outcome is that most disputes will be concluded at the ADR stage and thus minimizing the number of disputes being resolved through litigation.

[78] Jacob Gakeri, 'Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR' (2011) International Journal of Humanities and Social Science1(6), 1-2 <www.ijhssnet.com/journals/Vol._1_No._6;_June_2011/25.pdf> accessed on 20/11/2018
[79] Ibid
[80] Ibid
[81] Ibid
[82] Jethro K. Lieberman, Lessons from the Alternative Dispute Resolution Movement, (1986) 53 University of Chicago Law Review 424–439.

The article is well versed on the legal structure for ADR in Kenya and concludes by making recommendations for legal reform so as to promote ADR. This research will however take it a notch higher by examining the reforms necessary to stimulate application of ADR in the insurance industry.

Kariuki Muigua in his article *Regulating Alternative Dispute Resolution Practise in Kenya: Looking into the Future*[83] begins by noting that there is need for more professionals practising ADR to get expertise in the ADR spectrum.[84] As such he argues that regulation is necessary in this area of practise. His views are similar to Gakeri's as they both agree that regulation is necessary for consistency to be attained in the area and practise of ADR. Inclusion of ADR in the Constitution has led to an increase in the number of practitioners which in turn has led to the call for training of professionals. Regulation has become important because professionals practising ADR are from all categories of professions some of which are unregulated which means some practitioners are practising independently.[85]

Muigua argues that regulation is advantageous as it will encourage the wide adoption and use of ADR enabled through availability of competent and qualified practitioners and the outcome will be a fair and unbiased ADR process.[86] Currently, the ADR practise is unregulated and thus any instances of corruption or the compromise of the mediator/arbitrator is likely to go unpunished.[87] In the occurrence of such instances, parties will distrust the system leading to their shift in preference towards litigation. The current system is based on a lot of faith being

[83] Kariuki Muigua, "Regulating Alternative Dispute Resolution Practise in Kenya: Looking into the Future" (2018) *<kmco.co.ke/wp.../Regulating-ADR-Practice-in-Kenya-Kariuki-Muigua-June-2018.pdf> accessed on 03/03/2019.*
[84] Ibid
[85] Ibid
[86] Ibid
[87] Ibid

placed on the practitioners that they will practise integrity, honesty and professionalism failure to which parties are prejudiced with unforgiving consequences.[88]

Muigua however warns we must strive to strike a balance between upholding the positive characteristics of ADR and facilitating dispute resolution.[89] He notes that countries with mandatory ADR provisions have not necessarily made ADR common because there is still lack of education and training of the practitioners, there are minimal court connected programs and insufficient legislation on ADR.[90] He notes that there are arguments that legislative regulations only bring about limits and restraints to an otherwise free practise and it will not necessarily make it acceptable.[91] It takes away the voluntary aspect attributed to the success of ADR. Muigua's article analyses the need for issuing guidelines for the practise of ADR which is significant to this research as one of the key challenges hindering the use of ADR is the perception that it is not regulated and thus leaves room for impropriety. The research will further analyse whether regulation will have an impact on the overall practise of ADR in the insurance sector.

A review of the available literature in Kenya on the subject matter reveals that scholars have mostly focused on arbitration and its impact in the country with little or no research touching on ADR in the insurance industry. This is where the knowledge gap lies and is partly contributed to by the fact that ADR is yet to be fully established through formal policies. As such, the industry has lagged behind in institutionalization of ADR. It thus calls for the examination of the factors contributing to the low use of ADR in the insurance industry and

[88] Kariuki Muigua, "Regulating Alternative Dispute Resolution Practise in Kenya: Looking into the Future" (2018)__*<kmco.co.ke/wp.../Regulating-ADR-Practice-in-Kenya-Kariuki-Muigua-June-2018.pdf> accessed on 03/03/2019.*
[89] Ibid
[90] Ibid
[91] Ibid

what can be done to change the situation noting that adoption of ADR is inevitable in the long run.

1.9 Scope and Limitation

The study will focus on the legal framework of ADR in the insurance industry in Kenya and evaluate the extent of its use since 2010 when the Constitution was promulgated with the aim of establishing its effectiveness and make proposals for reforms. The study will be limited to coverage disputes and third party claim disputes. It is anticipated that data collection will be wide and therefore time consuming with expected financial constraints.

1.10 Research Hypotheses

i. The use of ADR though advantageous is hampered by the lack of a comprehensive legal framework to support its use as a tool for resolving insurance related disputes.

ii. There is need to reform the legal framework in order to promote ADR as the preferred dispute resolution method for insurance related disputes.

iii. Sensitization on ADR is necessary in order to change the perception of the key players in the industry and the general public so as to encourage its use.

1.11 Chapter Breakdown

Chapter 1 introduces the study and gives a brief background on ADR in Kenya and in particular its overview in the insurance industry. It lays a foundation for the study and contains the statement of the problem, the objectives, the research questions, the theoretical framework, research methodology and literature review.

Chapter 2 will conceptualize the legal framework of ADR in Kenya and will begin by defining ADR and analysing the various methods while outlining the advantages and disadvantages of each method and their applicability to disputes in the insurance industry.

Chapter 3 will focus on the methodology used and the study's research design adopted. An in depth analysis of the target population will be done and a discussion on the choice of the sample size will be undertaken. It will also discuss on the sampling procedure, the data collection procedure and the data analysis technique.

Chapter 4 will analyse the data collected, its presentation and interpretation. It will analyse responses collected and highlight the current state and use of ADR in the insurance industry while highlighting the emerging issues on the subject as it pertains to the industry.

Chapter 5 will summarise the findings of the study and offer recommendations on how to improve ADR in the insurance industry.

CHAPTER TWO: LEGAL FRAMEWORK OF ADR IN KENYA

1) Introduction

The legal framework of ADR has its underpinnings on the Constitution under Article 159 which lists the other methods of dispute resolution as reconciliation, mediation, arbitration and Traditional Dispute Resolution (TDR).[92] The legal framework of ADR has continued to grow substantively with more being done to institutionalize and popularize it, evident through the introduction of the Court-Annexed Mediation scheme among other projects including the Alternative Justice System.[93]

This chapter will examine Kenya's legal framework for ADR applicable to the insurance industry. It will begin by analysing the continuum of dispute resolution available for insurance disputes with emphasis being placed on negotiation, mediation and arbitration. The chapter will further analyse why the three mechanisms are of particular interest in terms of their use in the resolution of insurance related disputes and the benefits of each method.

The chapter will then investigate the salient statutes on ADR in the insurance industry beginning with the Constitution, The Civil Procedure Act and Civil Procedure Rules (CAP 21), The Appellate Jurisdiction Act (CAP 9), The Arbitration Act (No. 4 of 1995), The Small Claims Court Act (No. 2 of 2016) and The Consumer Protection Act (No. 46 of 2012) and how each plays a key role towards promoting ADR. It will be evident from the analysis that despite the recognition of ADR and the continued emphasis for its use to resolve disputes, there is a gap in the legal framework in terms of making specific provisions for utilization of ADR to resolve insurance related disputes. The insurance sector is lagging behind when compared to other players in the financial sector who have acknowledged the advantages of ADR and

[92] The Constitution of Kenya, 2010.
[93] The Judiciary-Republic of Kenya, Sustaining Judiciary Transformation (SJT): A Service Delivery Agenda, 2017-2021, (2017).

embraced its use. Currently, tax related disputes can now be settled through ADR as summarised in Section 55 of the Tax Procedures Act, No. 29 of 2015.

Conversely, the Insurance Act, Cap 487 makes no provisions for ADR and no regulations or guidelines are available to effect ADR for insurance disputes. Further, an evaluation of The Insurance (Motor Vehicle Third Party Risks) Act,[94] discloses no provisions for the use of ADR to resolve Third Party Personal Injury (TPPI) claims.

The conclusion reached is that the legal framework for ADR in the insurance industry is thus insufficient and reforms are indispensable to promote ADR as the preferred dispute resolution method for insurance related disputes.

2.2 The Continuum of Dispute Resolution Applicable for Insurance Disputes

Disputes in the insurance industry have a distinctive characteristic. When it involves the insurer and the insured, they have a long-standing business relationship history that needs to be maintained even after the dispute is resolved. Litigation becomes inappropriate for such disputes.[95] When it involves the insurer and a third party, the approach taken to resolve such a dispute is key if the insurer's reputation is to be maintained. Commercial attractiveness remains a big concern for the insurance industry.[96] Consequently, the ADR mechanism adopted for any dispute in the insurance industry is dependent on nature of the claim and the intended result as envisioned by the parties.[97] The continuum lies on a process which begins from the most informal to increasing structure and formality. The ADR mechanisms can be categorized based on the process[98] as follows:

[94] Cap 405 of the Laws of Kenya

[95] Mills, Michael and Furlan, Nicholas (2002) "Resolving insurance disputes: the value of less formal processes," ADR Bulletin: Vol. 5: No. 1, Article 3. <http://epublications.bond.edu.au/adr/vol5/iss1/3> accessed on 18/11/2018

[96] Ibid, Mills and Furlan, 'Resolving Insurance Disputes: The Value of Less Formal Processes'

[97] Nancy Neslund, Dispute Resolution: A Matrix of Mechanisms, J. Disp. Resol. (1990) https://scholarship.law.missouri.edu/jdr/vol1990/iss2/1 accessed on 21/06/2019

[98] Tania Sourdin, Alternative Dispute Resolution, 4th ed, Thomson Reuters 2012

A. **Facilitative processes**:[99] Includes mediation, facilitation and facilitated negotiation conducted by a third party who is tasked with aiding the parties to establish ways of mutually resolving their disputes.

B. **Advisory processes**[100]: includes expert appraisal and early neutral evaluation. The third party reviews the issue and gives their independent advise on the law and how the issue can be resolved.

C. **Determinative processes:**[101] includes arbitration and expert determination. The third party reviews the dispute, evidence presented and makes a binding decision.

D. **Combined or hybrid processes**: includes the combination of two processes e.g. mediation and arbitration (Med-Arb) or conciliation and conferencing.[102]

Negotiation being the most informal lies on one end while litigation lies on the other end. A visual representation of the continuum is as per the below figure:

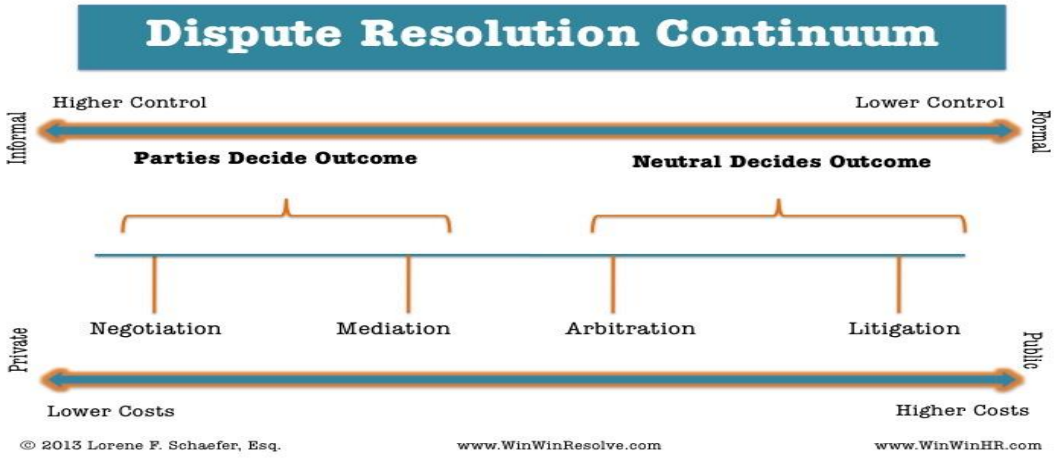

Figure 1 – ADR Continuum[103]

[99] National Alternative Dispute Resolution Advisory Council (NADRAC), Dispute Resolution Terms, (2003) https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Dispute%20Resolution%20Terms.PDF accessed on 17/06/2019

[100] Ibid

[101] Ibid

[102] Ibid

[103] Adopted from <https://www.slideshare.net/LoreneSchaefer/dispute-resolution-continuum-21161231> accessed on 21/06/2019.

Owing to the high number of claims handled by insurance companies and the expenses involved, ADR resonates well with insurance disputes. The study will analyse the three ADR mechanisms i.e. negotiation, mediation and arbitration and their suitability for insurance disputes.

2.2.1 Negotiation

Negotiation is an ADR mechanism that permits the parties to voluntarily engage in the process of dispute resolution in a manner that befits both of them without the intervention of an intermediary towards reaching a compromise.[104] Negotiation is a common practice in the insurance industry being an ADR method that is inexpensive, efficient, expeditious and informal allowing both the insurer and the insured or the third party to resolve their disputes.[105] This is more so because when liability is not in dispute, agreeing on quantum will involve a "give and take" approach towards a settlement that is viewed as satisfactory to both parties.[106] Negotiation is thus a suitable method for resolving both coverage disputes and third party disputes in the insurance industry.

A drawback of negotiations is the inequality of parties in terms of their negotiating power as the insurer is likely to have more experience in dealing with similar claims leading to a result that is "win-lose" as opposed to a "win-win" result.[107] However, a party can always walk away from the negotiations if need be.

[104] Kariuki Muigua, 'Utilising Alternative Dispute Resolution Mechanisms to Manage Commercial Disputes' (1st Nairobi Centre for International Arbitration (NCIA) Alternative Dispute Resolution (ADR) National Conference, Intercontinental Hotel, Nairobi, Kenya on 5th - 6th June, 2018)
[105] Jay E. Grenig, 'Alternative Dispute Resolution' (3rd ed. 2005).
[106] Ibid
[107] Ibid

2.2.2 Mediation

Mediation consists of a mediator, who is typically a neutral party, who helps disputing parties to set down their issues and concerns towards finding possible alternatives to resolving their disputes.[108] Mediation may be opted for voluntarily by the parties but in other scenarios, it may be imposed by the court through an order if a suit is found suitable to be handled through mediation. Additionally, mediation may be indicated in a contract or an agreement as the first option for settlement of disputes between contracting parties. When used as an alternative to litigation, mediation has the advantage of being voluntary, flexible, expeditious and cost-effective and the settlement reached is non-binding.[109] A salient characteristic of mediation is that it is a more confidential way of resolving disputes and this allows the parties the poise of handling their issues in a way that is suitable to them and the result will be their own albeit with the help of the mediator.[110] Subsequently, parties can be free to amend the mediation agreement if the circumstances change which is another positive aspect of mediation.[111]

The drawbacks of mediation includes the power imbalance between the parties which leads to the dominance of one party in the mediation process thus compromising its legitimacy.[112] It is also non-binding and may lead to endless proceedings between the parties.[113]

With the Court-Annexed Mediation and the application of the Small Claims Court Act, it is expected that more insurance disputes will eventually be settled through mediation. It is also worth noting that the standard policy document requires coverage disputes to be resolved in

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[108] Kariuki Muigua, 'Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms' (CIArb Africa Region Centenary Conference 2015 held on 15-17 July, 2015)

[109] Kariuki Muigua, 'Utilising Alternative Dispute Resolution Mechanisms to Manage Commercial Disputes' (1st Nairobi Centre for International Arbitration (NCIA) Alternative Dispute Resolution (ADR) National Conference, Intercontinental Hotel, Nairobi, Kenya on 5th - 6th June, 2018).

[110] Nancy Neslund, Dispute Resolution: A Matrix of Mechanisms, J. Disp. Resol. (1990) https://scholarship.law.missouri.edu/jdr/vol1990/iss2/1 accessed on 21/06/2019

[111] Justice: Mediation and Alternatives to Court; available at https://www.justice.gov.uk/courts/mediation [accessed on 01 February 2019].

[112] Kariuki Muigua, Alternative Dispute Resolution and Article 159 of the Constitution (2018) Available at <http://kmco.co.ke/wp-content/uploads/2018/08/A-PAPER-ON-ADR-AND-ARTICLE-159-OF-CONSTITUTION.pdf> accessed on 01/02/2020

[113] Ibid

the first instance through mediation although the practice is yet to take root in the insurance industry.[114]

2.2.3 Arbitration

Arbitration is defined as a process in which the disputing parties submit their dispute before an arbitrator or umpire who is tasked to reach a decision that becomes binding and is capable of being enforced.[115] Despite the courts or the judicial system sharing this characteristic of a neutral party overseeing the dispute, the powers of the court and arbitrator may vary but seek to realize a similar result. [116] The key distinction is the initiation of either processes; the arbitration is by mutual consensus at the inception of the contractual relationship in the form of an arbitration clause, whilst for the judicial process, it is initiated by the aggrieved party on their own motion as against the "other party".[117] The award issued is binding and has similar implications to that of a court judgment, and can be realized or enforced through similar mechanisms.

Arbitration is credited for being efficient especially when parties participate fully and the process remains fair which limits a further conflict when the decision is made.[118] Secondly, the process of arbitration is faster than litigation as parties have the opportunity to decide on timelines for milestones during the process and they can exercise their powers by appointing an arbitrator who is capable of meeting their expectations.[119] Thirdly, arbitration is very flexible which allows the parties to choose their preferred time for holding meetings and a suitable location convenient to them which is rarely the case for litigation cases.[120]

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[114] Available at <https://www.ira.go.ke/index.php/standardized-insurance-policies-motor> accessed on 19/07/2019.
[115] Farooq Khan, *Alternative Dispute Resolution*, A paper presented to the Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.
[116] Kariuki Muigua, *Emerging Jurisprudence in the Law of Arbitration in Kenya: Challenges and Promises* <http://www.kmco.co.ke/index.php/publications/122-emerging-jurisprudence-in-the-law-of-arbitration-in-kenya-challenges-and-promises> Accessed on 23/02/2019.
[117] Ibid
[118] Allan Munyao Mukuki, 'The Various Alternative Dispute Resolution (ADR) Mechanisms and Access to Justice in Kenya' (2016) 5 Kenya Law Review Journal 205.
[119] Ibid
[120] Ibid

The roots of arbitration in the insurance industry goes back to the seventeenth century when marine contract disputes were typically resolved through arbitration.[121] Arbitration is therefore not new in the insurance industry. Arbitration can only apply in coverage disputes through the inclusion of an arbitration clause in the policy document. It should be noted that the standardized policy document as recommended by IRA contains an arbitration clause.[122] However, it is evident that most of these matters end up in court despite the inclusion of the arbitration clause in the policy document.[123]

2.3 Other Notable ADR Mechanisms that can be used in Insurance Disputes

2.3.1 Convening

Convening primarily involves the identification of parties to a disputes, the main aspects of the dispute through the guidance of a convener.[124] On determination of these issues, parties are then able to employ other ADR mechanisms towards reaching a settlement.[125] This mechanism may be relevant where there are multiplicity of suits relating to the same course of action.

2.3.2 Facilitation

Facilitation serves to improve the flow of information between the parties.[126] The facilitator provides guidance through the process of negotiations and it is up to the parties to reach a settlement.[127]

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[121] Robert H. Jerry II, Dispute Resolution, Insurance, and Points of Convergence, 2015 J. Disp. Resol. (2015) Available at: https://scholarship.law.missouri.edu/jdr/vol2015/iss2/3. See Paul D. Carrington and Paul Y. Castle, The Revocability of Contract Provisions Controlling Resolution of Future Disputes Between the Parties, Law and Contemporary Problems (2004) 67 (207), at page 212 where they note that the courts enforced the arbitration clause as in the case of *Cobb v. New England Mut. Marine Ins. Co., 6 Gray 192 (Mass. 1856)* marine insurance policy contained a clause which stated that 'insured cannot obtain action against the company until he has offered to submit the claim to arbitration'.

[122] Available at <https://www.ira.go.ke/index.php/standardized-insurance-policies-motor> accessed on 19/07/2019.

[123] See *Dhanjal Investments Limited v Kenindia Assurance Company Limited [2018] eKLR*, in which a dispute involving a public liability policy was litigated from the high court to the supreme court because of the lack of goodwill by the parties to try and resolve their dispute through arbitration as per the terms of the policy.

[124] Kariuki Muigua, Alternative Dispute Resolution and Article 159 of the Constitution (2018) Available at <http://kmco.co.ke/wp-content/uploads/2018/08/A-PAPER-ON-ADR-AND-ARTICLE-159-OF-CONSTITUTION.pdf> accessed on 01/02/2020

[125] Ibid

[126] Ibid

[127] Ibid

2.3.3 Mediation-Arbitration (Med-Arb)

Med-Arb combines the use of both mediation and arbitration to resolve a dispute.[128] The dispute is first handled through mediation and when no solution is reached, parties proceed to arbitrate.[129] Parties can decide to appoint the mediator to be the arbitrator or they can opt to appoint a new arbitrator whose decision becomes binding.[130]

2.3.4 Fact-Finding or Neutral Fact-Finding

This method involves appointing an investigator or fact-finder to establish the facts of the matter when it is in question.[131] This approach can only be fruitful if the parties accept the opinions of the fact-finder during the investigation process while recognising that the third party can only deal with issues of facts and not the law.[132] This method is important if parties have a challenge agreeing on the facts and they therefore require an independent eye to review and lay down their findings for the benefit of assisting in resolving the dispute.[133]

2.4 Current Legal Framework of ADR In Kenya Applicable to the Insurance Industry

Kenya's insurance industry lacks a comprehensive framework to administrate the implementation of ADR in resolving insurance claims. However, the current legal framework for ADR in general and its use in insurance disputes can be supported by a number of statutes and at the epitome is the provisions of Article 159 of the Constitution which arguably provides a firm foundation for the practise of ADR in the country.[134]

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[128] Law Reform Commission of Ireland, *Alternative Dispute Resolution (*Consultation Paper, LRC CP 50, 2008)
[129] Ibid
[130] See generally Chapter One in Kariuki Muigua, "Settling Disputes through Arbitration in Kenya", (Ladona Publishers, Nairobi, 2012).
[131] Kariuki Muigua, Alternative Dispute Resolution and Article 159 of the Constitution (2018) Available at <http://kmco.co.ke/wp-content/uploads/2018/08/A-PAPER-ON-ADR-AND-ARTICLE-159-OF-CONSTITUTION.pdf> accessed on 01/02/2020
[132] Ibid
[133] Ibid
[134] Jacob Gakeri, 'Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR' (2011) International Journal of Humanities and Social Science1(6), 1-2. Gakeri argues that colonialists ensured the downfall of TDR by denying it legal recognition leading to its demise.

2.4.1 The Constitution

The role of ADR is undeniably critical in providing an alternative route to attaining justice. The duties of the judicature in this regard has been succinctly listed as including the protection and promotion of the Constitution, [135] the responsibility to ensure that justice is not only done but done without delay and without giving import to unjustified procedural technicalities. [136] These provisions provide a legal foundation for ADR in the insurance sector.

The fundamental principles envisioned in Article 159 then becomes the centre for the administration of ADR mechanisms in Kenya with the main goal of guaranteeing that disputing parties attain justice notwithstanding the dispute resolution method they choose for resolving their disputes.[137]

2.4.2 The Civil Procedure Act and The Civil Procedure Rules

The Civil Procedure Act[138] is an important legislation in giving effect to ADR in the insurance industry evident from its preamble which describes its purpose as an "*Act of Parliament to make provision for procedure in civil courts*." Section 1A (1) of the Act provides that its overriding objective shall be to *"facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act"*.[139] Section 1A (2) further gives the courts the power to "*give effect to the overriding objective"*.[140] Section 1B outlines the court's duty in furthering the overriding objective through "*the just determination of proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and*

[135] Art. 159(2).
[136] The Constitution however gives conditions under Art. 159(3) "*Traditional dispute resolution mechanisms shall not be used in a way that—(a) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with this Constitution or any written law*."
[137] Muigua Kariuki, Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010, (2014) <http://kmco.co.ke/wp-content/uploads> accessed on 23/01/2019
[138] Cap 21 of the Laws of Kenya.
[139] Ibid. Cap 21 of the Laws of Kenya
[140] Ibid. Cap 21 of the Laws of Kenya

administrative resources; the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and the use of suitable technology."[141]

Section 59 of the Act further institutionalizes ADR by making provisions for arbitration and reference of cases to mediation. Section 59 allows the court to refer a matter to arbitration by an order in a suit as governed by the rules.[142] Section 59A establishes the Mediation Accreditation Committee which is tasked with the general responsibility of governing mediators for the purposes of regulating the practice.[143] Section 59B provides for reference of cases to mediation and the court is empowered on its own motion, or where the parties request or where the law requires, to refer a dispute to be resolved through mediation. The Act proceeds to provide that the mediation agreement becomes binding on the parties and shall be enforceable as if it was a judgment of the court and further that no appeal can lie from it.[144] The provisions are also duplicated in Section 59C which recognizes other ADR methods as agreed by the parties or ordered by the court and any agreements reached becomes enforceable against the parties and no appeal can lie from it.[145] These provisions makes mediation more structured and lays a foundation for its practice in the insurance industry.

Under the Civil Procedure Rules, Order 11 gives effect to ADR by allowing parties during the pre-trial process to explore ways of resolving their issues before hand.[146] Order 46 provides for arbitration on the order of the court and also recognizes other ADR methods to be adopted so as to facilitate dispute resolution with the goal of attaining the overriding objective.[147]

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[141] Ibid. Cap 21 of the Laws of Kenya
[142] Section 59 of the Civil Procedure Act, CAP 21.
[143] Section 59A (4) *provides that the Committee is responsible for accreditation and certification of mediators, enforcing the code of ethics and providing training for mediators*.
[144] Section 59B (5) of the Act.
[145] Section 59C (5) of the Act.
[146] Order 11 Rule 3 (1).
[147] Order 46 Rule 20 provides that: *Nothing under this order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1A and 1B of the Act.*

2.4.3 The Appellate Jurisdiction Act

Similar to the oxygen principle provided for under the Civil Procedure Act, Section 3A and 3B of the Appellate Jurisdiction Act[148] provides the overriding objective of the Act which shall be to facilitate the just, expeditious, proportionate and affordable resolution of the appeals under the Act.[149] The appellate courts are also required to facilitate the timely disposal of matters at an affordable cost to the parties.[150] These provisions ensures that the appellate courts give effect to the overriding objectives towards promoting alternative ways of resolving disputes.

2.4.4 The Arbitration Act

A transitory history of the Kenya's Arbitration Act goes back to the Arbitration Ordinance of 1914 as borrowed from the English Arbitration Act of 1889. The Ordinance granted courts control over arbitration in Kenya as opposed to giving effect to party autonomy. The Arbitration Act was eventually enacted in 1968.[151] The Act only dealt with the resolution of local disputes but did not deal with international disputes.

In 1985, Kenya adopted the Model Law on international commercial arbitration by the United Nations Commission on International Trade Law (UNCITRAL). However, it was not until 1995 that the Arbitration Act No. 4 of 1995 was enacted.[152] The Arbitration Act, 1995 is the main act that governs arbitration in Kenya and it came into force on 2nd January 1996.[153] Section 40 of the Arbitration Act 1995 makes provisions for the Arbitration Rules of 1997[154] that further governs arbitration proceedings in Kenya.[155] According to Kariuki and Muigua, the differentiating factor between the Arbitration Act and the Civil Procedure Act is that the

[148] Cap 9 of the Laws of Kenya.
[149] Section 3A (1) of Cap 9.
[150] Section 3B (1) (c) of Cap 9.
[151] Ibid.
[152] Ibid.
[153] Kariuki Muigua, 'The Arbitration Acts: A Review of Arbitration Act, 1995 Of Kenya Vis-A-Viz Arbitration Act 1996 of United Kingdom, Rev.' (March, 2010), <www.kmco.co.ke/articles.html> accessed on 10/01/2019
[154] Arbitration Rules, 1997.
[155] Cap. 49, Laws of Kenya

former governs the application of arbitration and the latter makes provisions for both mediation and arbitration.[156]

The Arbitration Act has laid a foundation for the establishment and the growth of the institutional framework governing arbitration in Kenya which includes The Chartered Institute of Arbitrators (CIARB) established in 1984 and registered under the Societies Act Cap 108 and the Nairobi Centre for International Arbitration (NCIA) established under the Nairobi Centre for International Arbitration Act No. 26 of 2013.

2.4.5 The Small Claims Court Act

Small Claim Court Act[157] is a notable legislative development establishing the Small Claims Court, a subordinate court with a pecuniary jurisdiction of KES 200,000. However, the Chief Justice may determine the pecuniary jurisdiction in a Gazette Notice.[158] The Small Claims Courts are to be accessible in every county, as well as in other decentralized units of judicial service delivery and shall be guided by the same constitutional principles that guide other courts that are established in the Constitution.[159] Under the Act,[160] a Small Claims Court has jurisdiction to deal with any civil claims relating to matters such as: contracts for sale and supply of goods or services; contracts for money held and received; for the delivery or recovery of movable property; set-off and counterclaim under any contract; and for the purposes of this study; *liability in tort in respect of loss or damage to any property, compensation for personal injuries.* It is cogent that the Act can also play a crucial role as an ADR approach to settlement of insurance disputes.

[156] Muigua, Kariuki, and F. Kariuki. "ADR, Access to Justice and Development in Kenya." In Strathmore Annual Law Conference 2014 held on, vol. 3. 2014. See also Arbitration Act, Cap. 49, Laws of Kenya (Revised, 2010) and Civil Procedure Act Cap.21.
[157] Small Claims Court Act, No. 2 of 2016.
[158] Jill Barasa, 'Doing Justice: The New Statutes Changing Kenya's Dispute Resolution System.' (2018) <www.oraro.co.ke/2018/07/29/doing-justice-the-new-statutes-changing-kenyas-dispute-resolution-system/> accessed on 21/07/2019.
[159] Ibid
[160] Ibid

Section 18 of the Act provides for adoption of ADR mechanisms to facilitate the resolution of disputes.[161] Of particular interest is the requirement that ADR can only be adopted with the consent of the parties unlike the provisions of the Civil Procedure Act that allows the court on its own motion to refer a matter to be resolved through ADR. Further, the Act outlines that adoption of ADR is a means of attaining the objectives of the Act to wit: the timely disposal of all proceedings before the Court using the least expensive method; equal opportunity to access judicial services; fairness of process; and simplicity of procedure.[162]

2.4.6 The Consumer Protection Act

The Consumer Protection Act[163] was enacted based on provisions of Article 46 of the Constitution which articulates the rights of consumers including provisions for promotion and enforcement of consumer rights.[164] In terms of resolution of disputes, the Act lists one of its purposes as to promote and advance the social and economic welfare of consumers in Kenya through providing a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions.[165] Ironically, the Act proceeds to limit the scope of arbitration in a consumer agreement which imposes on the consumer to arbitrate a dispute by limiting their right to commence any proceedings at the High Court.[166]

In the insurance industry, the Consumer Protection Act is applicable based on the fact that policy holders and third parties are consumers of products and services being offered by insurance companies and their rights are therefore protected under the Act. On this basis, the

[161] Section 18 (1): *In exercise of its jurisdiction under this Act, the Court may, with the consent of the parties, adopt and implement any other appropriate means of dispute resolution for the attainment of the objective envisaged under Section 3 of this Act.*
[162] Section 3 (3), (a) to (d) of the Act.
[163] Act No. 46 of 2012 Laws of Kenya.
[164] Article 46(1) of the Constitution lists consumer rights to include the right to; (*b) information necessary for them to gain full benefit from goods and services; (c) to the protection of their health, safety, and economic interests.*
[165] Section 3 (4) (g) of the Consumer Protection Act.
[166] Section 88 (1) to (3) of the Consumer Protection Act.

IRA has established a Consumer Protection Department[167] that is tasked with the responsibility of resolving complaints against players in the insurance industry. It is on this ground that IRA released the Treating Customers Fairly (TCF) guidelines whose aim is to promote fair treatment of customers.[168]

2.5 Conclusion

It is undisputed that the current legal framework for ADR applicable to the insurance industry is inadequate and fails to give adequate provisions for its application. From the analysis, it is notable that the Insurance Act[169] does not feature because it makes no provision for application of ADR to resolve insurance disputes in any circumstances despite being the main Act that regulates the industry.

The statutes applicable in the insurance industry make no reference for the use of ADR and they do not provide any specific guidelines or framework towards institutionalization of ADR in the industry. With the undoubted benefits of ADR, its inclusion into these statutes will benefit the industry by bringing about crucial reforms needed to promote application of ADR in the resolution of insurance disputes.

[167] See information available on <https://www.ira.go.ke/index.php/consumer-protection> accessed on 28/06/2019.
[168] Ibid
[169] Cap 487 of the Laws of Kenya

CHAPTER THREE: RESEARCH METHODOLOGY

3.1 Introduction

This chapter introduces the methodology selected for the study with the aim of understanding how the study will unravel the research problem and get to appreciate why the insurance industry is yet to fully embrace the use of ADR despite its constitutional status. The literature review revealed that there is no actual study that has been done to analyse the relation between ADR and the insurance industry and therefore the study comes in hand to bring forth this relation. In the end, the data collected will facilitate the questioning of the underlying assumptions of the study which surmises that the existing legal structure is not adequate to support ADR within the insurance industry and thus the need for reform. Secondly, it will further look into the reasons for the negative perception not only towards the utilization of ADR in the resolution of insurance disputes but also within the insurance industry.

The chapter will begin by describing the research design selected, identifying the proper population and the reasons for their selection, the sampling procedure employed in conducting the study, methods and procedure of collection of data, validity of the collected information and its analysis thereof and finally ethical considerations.

3.2 Research Design

A descriptive research design was adopted which targeted collecting information about the relevant participants' attitudes, views and practices towards ADR in the insurance industry. The main goal of a descriptive research design is to question the precise features of a pre-identified population and its juxtaposition between the present time and at a variable future.[170] This design was deemed appropriate as it assisted to answer the study's questioning of the effectiveness of ADR in resolving insurance disputes and the necessary reforms needed to promote its use. Through the data collected, the study was able to determine what is viewed as

[170] Cooper, D.R., & Schindler, P.S, *Business Research Methods* (8th ed. McGraw-Hill 2000).

normal in terms of the resolution of emerging disputes within the insurance industry and the underlying reasons for such views.

The research design was also non-doctrinal which allowed the study to not only focus on the law but its application and implications in the society in general.[171]

3.3 Target Population

The population in this context refers to the entire cluster of subjects identified to be examined.[172] The target population included the various stakeholders in the insurance industry and in particular insurance companies, litigants, advocates and the regulator- IRA. They were selected because of the role they play in insurance dispute resolution. Since the study is limited to the insurance industry in Kenya, the data was collected from the participating respondents within this boundary.

3.4 Sample Size and Procedure

A sample is described as a sub-set of a populace and the use of a sample is considered to be both cost effective and time sensitive.[173] Sampling on the other hand is the process of singling out the relevant individuals to be representative of the populace so as to limit the need for investigating the entire population.[174] Because of the large size of the population, the research adopted a stratified sample population based on the following four strata: insurance companies, litigants, advocates and the regulator- IRA. Stratified sampling refers to the division of the populace into groups identified as strata.[175] Stratified sampling was considered appropriate for this study because of the uniqueness of each strata in their use of ADR to resolve insurance disputes. Further, while appreciating that each strata has its own distinctive characteristics, the

[171] Salim Ali & Zainal Ayub, Legal Research of Doctrinal and Non-Doctrinal (2017) International Journal of Trend in Research and Development, Volume 4(1)
[172] Mugenda and Mugenda, Research Methods – Quantitative & Qualitative Approaches, (Acts Press Nairobi 2003).
[173] Ibid
[174] Ibid
[175] Ibid

questionnaires used were packaged differently for each strata thus making stratified sampling appropriate. The questionnaires though unique for each group, were related in their substance so as to extract the anticipated feedback towards answering the study's research questions.

The purposive simple random sampling method was thereafter employed to administer the questionnaires within each strata with the aim of safeguarding the impartiality and generality of the findings to the identified population. According to Mugenda and Mugenda, they considered that in descriptive research, 10% of the total population is enough to ensure inclusion of each participant.[176] Therefore, for insurance companies, responses from 4 companies would be sufficient owing to the fact that there are only 38 general insurance companies in Kenya.[177] The study was able to collect data from 10 companies. As regards advocates and litigants, the population was quite large and the study targeted to collect responses from at least 15 participants from each stratum.

3.5 Research Instruments

Questionnaires were used to collect primary data. The feedback forms incorporated both unrestricted questions which are open-ended in nature and polar questions thus allowing for structured responses to pertinent issues that cut across each strata while allowing the respondents the freedom to respond to certain questions and express their experiences in their own words. The use of questionnaires as the data collection method of choice for the study was underpinned on the recognition that the subject of the study though not new might not be familiar to each respondent especially the litigants and thus questionnaires allows for an inference into the expected answers. Additionally, questionnaires are relatively easy to administer and cost effective and was thus suitable for this study.

[176] Mugenda and Mugenda, *Research Methods – Quantitative & Qualitative Approaches*, (Acts Press Nairobi 2003

[177] IRA website <https://www.ira.go.ke/index.php/consumer-information/investor-information/insurers-reinsurers/licensed-insurer> accessed on 09/04/2019.

3.6 Testing of Research Instruments

Pilot testing denotes the technique of testing the instruments on a small population so as to examine whether they will indeed yield the desired result.[178] The process is critical as it allows for improvement of the research instruments.

The questionnaire was tested before final distribution by administering the questionnaire to a respondent from each stratum other than the regulator. As a result, the weaknesses for each questionnaire was tested and corrected before distribution to other respondents. This was based on the understating that data not only has to be valid but also reliable and thus the need for pilot testing.

3.7 Validity of the Research Instruments

Data collected can be valid but unreliable and to ensure validity, the questionnaires' contents were analysed, discussed and eventually agreed on with the supervisor to ensure that they passed the validity test. According to Kothari, the validity test can be divided into two categories: face validity test which is validity on the face value and content validity test which tests the appropriateness of the questions towards the study.[179] The instruments passed the face validity test when it was recognized that the measures were indeed logical. They also passed the content validity by ensuring that all the relevant questions were captured and that they were consistent with the concepts being measured.

3.8 Data Collection Procedure

The study used the primary data collected through the questionnaires which were distributed to the respondents via email correspondence and when delay was realized, a phone call was made to the particular respondent to call for their response. After a few delays were experienced, it became necessary to adopt the drop and pick method especially when email

[178] Kothari, C. R. Research Methodology: Methods and Techniques. (2004), New Delhi: Wiley
[179] Ibid

correspondence was not forth coming. The distribution was done through purposive simple random sampling after obtaining email addresses and telephone contact details of potential participants. Thereafter, snowballing technique was used to get additional contacts for respondents.[180] The respondents were instructed to either print out the questionnaire, fill it, scan and email back and if possible send the original back for records purposes. Some respondents chose to type their answers as opposed to writing them down which was still acceptable.

As for litigants in particular, it also became necessary to administer the questionnaires directly to them after some questionnaires distributed via email were not responded to. The questionnaires were therefore distributed randomly to visiting litigants of ICEALION General Insurance Co. Ltd which guaranteed randomness and efficiency. Additionally, a few advocates agreed to forward the questionnaire to their clients for their response.

Some of the questionnaires were eventually not responded to or returned despite the reminders and phone calls. The entire process took approximately 2 months to conclude. After collection of data, a review was done to bring out the inconsistencies and errors before data analysis began.

3.9 Ethical Considerations

Extreme caution was taken when administering the questionnaires while appreciating that anonymity and confidentiality was an important aspect of the study. As such, the questionnaires included an introductory statement that highlighted the study and the need for their participation while informing them that any of their personal data will be kept confidential. Further, participants were informed that the data collection was purely for the purposes of

[180] See Kothari, C. R. *Research Methodology: Methods and Techniques*. (2004), New Delhi: Wiley. Notes that the snowball method relies on the social contacts of identified respondents which allows the researcher to get additional respondents to provide the researcher with the required information.

academic research. Participation was also voluntary and non-invasive and care was taken to guarantee that all personal information was kept confidential.

3.10 Conclusion

The empirical study of the law for this research was considered to be appropriate for providing an accurate presentation on what the law is, what it does and how it can be improved.[181] The study will be keen on establishing how the law is applied in the society, how often it is used and how effective it is. With the findings, we can be able to reflect on the relationship between the law on ADR and the players in the insurance industry.

The sample population chosen for the study was considered as appropriate for being the main users of the law and their feedback is thus important for the study. The results will also affect them in one way or another. The data collection method was influenced by the research questions which intended to gather data on the extent and effectiveness of the law. The use of questionnaires was thus considered the most suitable for this purpose.

Analysis of the data collected will be done through the use of tables, frequencies and percentages. Qualitative questions giving the views of the respondents will be summarized in a manner to support the quantitative responses.

[181] Willem H. van Boom, Pieter Desmet and Peter Mascini, Empirical Legal Research: Charting the Terrain in: Willem H. van Boom, Pieter Desmet & Peter Mascini (Eds) Empirical Legal Research in Action: Reflections on Methods and their Applications (Edward Edgar Publishing 2018)

CHAPTER FOUR: DATA ANALYSIS, PRESENTATION AND DISCUSSION

4.1 Introduction

An extensive analysis of the data collected from the field will be undertaken in this chapter. The data will further be presented and a discussion on the findings will be carried out.

The questionnaires were specifically designed to test the study's hypotheses which proceeds on the presumption that the use of ADR though advantageous is hampered by the lack of a comprehensive legal framework to support its use as a tool for resolving insurance related disputes. Following this presumption, the study proves that there is indeed need to transform the legal framework with the intention of promoting ADR as the preferred dispute resolution method for insurance related disputes. Sensitization is also key so as to stimulate a dynamic shift in the perception of the users towards the use of ADR.

4.2 Questionnaire Return Rate

The study targeted 15 practising advocates who routinely deal with insurance related matters and questionnaires were forwarded to them out of which 13 were returned giving a return response rate of 87%. As for litigants, out of the 18 administered, 14 were returned which gives a return response rate of 78%. As for insurance companies, the study targeted 15 general insurance companies out of which 12 were returned making the return response rate 80%. Only one questionnaire was administered to the regulator-IRA which was not returned. The responses were more than adequate to support the study.

4.3 Demographic Information of the Respondents

The study considered five general characteristics being the respondents gender, number of years dealing with insurance related disputes or employed in the insurance industry (for insurance companies), position held in the organization, number of disputes handled in the last year and the type of disputes. These are discussed below:

4.3.1 Gender of the Respondents

This study gathered information from both male and female respondents in all the strata so as to ensure fair participation of the genders. The distribution is as follows:

Table 4.1 Overall gender of the respondents

	FREQUENCY	PERCENTAGE
Male	20	49
Female	19	51
Total	**39**	**100**

The gender of the respondents was almost equally distributed and on average, there were 49% female respondents as compared to 51% male respondents.

In detail, the distribution of the gender as per each strata is as follows:

Table 4.2 Distribution of gender in each strata

CATEGORY	GENDER	FREQUENCY	PERCENTAGE
Advocates	M	5	13
	F	8	21
Litigants	M	11	28
	F	3	7
Insurance Companies	M	4	7
	F	8	21
		39	**100**

4.3.2 Education Background

100% of the respondents from the advocates and insurance companies had a legal background. As regards litigants, their education background varied with the highest being degree and the lowest being primary education.

4.3.3 Number of Years in Practise or Dealing with Insurance Matters

The study also sought to establish how many years the respondents had in dealing with insurance matters. The responses from the advocates and the insurance companies are as shown below:

Table 4.3 Number of years in practise

	FREQUENCY	PERCENTAGE
0-3 Years	11	44
4-6 years	5	20
7-9 years	6	24
10-12 years	1	4
Over 12 years	2	8
Total	**25**	**100**

4.3.4 Position held in the Company

This question was specifically asked to respondents from the insurance companies to establish their designations at their places of work. Their responses are:

Table 4.4 Position held in the company

	FREQUENCY	PERCENTAGE
Senior Manager	1	8
Middle Manager	1	8
Senior Officer	8	67
Others	2	17
Total	**12**	**100**

The respondents were predominantly senior officers at 67%, while 8% were senior managers and another 8% were middle managers. 2 respondents indicated 'others' being Legal Analyst and one failing to specify their title.

4.3.5 Number of Insurance Cases Handled

The study inquired on the number of insurance cases handled by advocates in the past 12 months and the responses received are as follows:

Table 4.5 Number of Insurance cases handled

	FREQUENCY	PERCENTAGE
0-3 Cases	0	0
4-6 Cases	0	0
7-9 Cases	1	8
10-12 Cases	0	0
Over 12 Cases	12	92
Total	**13**	**100**

It is evident that 92% of the advocates had handled more than 12 cases in the past year and only 8% had handled less than 12 and in particular they handled 7 to 9 cases in that past 12 months.

4.3.6 Number of Disputes Handled by Insurance Companies

The study inquired on the number of cases each respondent had handled and the question focused on the listed types of disputes being: Motor vehicle related injury claims (TPPI), Work injury claims (WIBA) and material damage claims (Coverage disputes). On average, the respondents handled 176 TPPI cases, 42 WIBA cases, and 84 Material damage claims. The results is as per the below table:

Table 4.6 Number of disputes handled by insurance companies

Type of Dispute	**Average**
Injury Claims	176
Work Injury Claims	42
Material Damage Claims	84

The findings correspond to the response given by litigants with regard to the type of insurance dispute they had been involved in and their responses were as follows:

Table 4.7 Distribution of type of disputes affecting Litigants

	FREQUENCY	**PERCENTAGE**
Injury Claims	12	80
Work Injury Claims	1	7
Material Damage Claims	2	13
Total	**15**	**100**

The findings indicate that a majority of litigants had injury claims representing 80% of the respondents, while 13% had material damage claims and 7% had work injury claims. It should be noted that one respondent had both an injury claim and a material damage claim.

4.4 Use and Effectiveness of ADR in the Insurance Industry

The study sought to establish to what extent ADR was being used in the industry and its effectiveness thereof. The questions were therefore framed towards getting responses on this subject.

4.4.1 Whether Respondents have used ADR

This question was directed at advocates and insurance companies and the response received was that 100% of the respondents had used ADR at one point. This only goes to show that more people are aware of ADR and have utilised it to resolve insurance disputes.

4.4.2 Whether Respondents will suggest the use of ADR to litigants or advocates

This question was answered by advocates and insurance companies and 100% of the respondents answered positively that they do suggest the use of ADR in place of litigation. The positive response from all the respondents indicates that ADR is being considered as a dispute resolution tool to a large extent.

4.4.3 Number of cases referred for settlement through ADR

On establishing that indeed ADR is being used, the respondents were further questioned on the number of cases handled in the past 12 months have actually been referred for settlement through ADR. The responses received from advocates is as shown below:

Table 4.8 Number of cases referred to ADR by Advocates

	FREQUENCY	PERCENTAGE
None	-	-
Less than 5	3	23
More than 5	9	69
Specific	1	8
Total	**13**	**100**

In the past 12 months, a majority of the advocates being 69% referred more than 5 insurance related matters to be settled through ADR while 23% referred less than 5 matters to be settled through ADR. One respondent indicated that a majority of the insurance cases they handled are referred for settlement through ADR.

When the same question was posed to the respondents from the insurance industry, the responses received were as follows:

Table 4.9 Number of Cases referred to ADR by insurance companies

	FREQUENCY	PERCENTAGE
None	-	-
Less than 15	-	-
More than 15	11	92
Specific	1	8
Total	**12**	**100**

The responses received shows that 92% of insurance related disputes in the insurance industry are referred for settlement through ADR while one respondent indicated that in the past 12 months, they had referred 200 cases to be settled through ADR. This is against the 350 cases handled by this specific respondent.

When questioned on whether the matters were eventually concluded through ADR, 62% of the advocates indicated that the matters we indeed finalized through ADR while 38% indicated they were not. The reasons given for the matters not be concluded through ADR varied from low offers from insurance companies, litigants preferring litigation as opposed to ADR and the insurance company declining to negotiate.

4.4.4 General Knowledge of ADR by Litigants

The question on whether any litigant/client has requested for their matter to be settled through ADR was posed to advocates and insurance companies to establish whether litigants were aware of ADR and whether they are willing to utilize it as a tool for dispute resolution. The outcome was as below:

Table 4.10 Response by Litigants on their knowledge of ADR

	FREQUENCY	PERCENTAGE
Yes	21	88
No	3	12
Total	**24**	**100**

The results proves that litigants have become increasingly more aware of ADR and they are willing to have their matters settled through ADR.

However, when the litigants were questioned on what they know about ADR in Kenya, their answers varied from being aware that it is an alternative to litigation with other respondents indicating that they were not aware of what ADR was. One of the respondents stated that they were cognisant that ADR was at inception stage and yet to be embraced which was quite an eye opener as it relayed how ADR is being misconceived to be a method that only exist in theory but is not being practised. However, a majority of the responses indicate that litigants do have an idea on what ADR was.

When asked whether they were aware that their disputes could be settled through ADR and not necessarily litigation, 64% of the respondents indicated they were aware while 36% responded they were not.

Further, when asked whether their advocate has ever informed them that the dispute could be resolved through ADR, 64% responded positively while 36% responded negatively. It goes to show that advocates are becoming more receptive towards ADR and are inherently positively influencing their clients.

Similarly, when questioned on whether they were aware that they could approach the insurance company directly without intervention from an advocate, 71% of the litigants responded that they were aware while 29% were not aware. The inference made is that litigants are quite knowledgeable on aspects of ADR especially because ADR is slowly gaining prominence and information is being shared to them.

The study also sought to know whether any of the litigants had been required by the court to have their matter resolved out of court and 64% of the respondents responded that the court did not give such directions while 36% answered positively in that the court required them to participate in ADR. The court's role in encouraging the practise of ADR is minimal as they are

limited from imposing ADR on litigants other than through the Court Annexed Mediation which is quite recent and is starting to take shape.

4.4.5 How often each dispute resolution method was used and how effective it was

This question was posed to all the respondents but however, the litigants' question inquired on whether they were aware of any of the listed methods. When questioned on how often they have used ADR to resolve insurance related disputes, the response are as shown below:

Table 4.11 Use of the different ADR Methods

	Mean	Mode	Median
Negotiation	73	90	80
Mediation	33	20	23
Arbitration	17	10	10

Based on the figures above, respondents have used negotiation more often (73%) than they have used mediation (33%) or arbitration (17%). People therefore prefer to use negotiation more than they use mediation or arbitration with arbitration being the least used. The mode infers that a lot more respondents tend to use negotiation at higher rates when compared to the other methods.

The study also posed the question on how effective each of the listed ADR methods was when resolving insurance disputes. Based on the Likert Scale, the results are as shown below:

Table 4.12 Effectiveness of the different ADR Methods

1-5; 1=Very Poor 2=Poor 3=Fair 4=Good 5=Excellent

	Mean	Mode	Median
Negotiation	4	4	4
Mediation	3	4	4
Arbitration	3	3	3

Majority of the respondents feel that negotiation was good in resolving disputes when compared to mediation and arbitration which a majority felt that they were only fair as ADR methods for resolving insurance disputes.

The overall finding is that negotiation is quite popular for resolving insurance related disputes when compared to mediation and arbitration. On the other hand, 93% of the litigants were aware of negotiations as a dispute resolution method, 57% of the respondents were familiar with mediation while 36% were cognisant of arbitration. The results tallies with the responses received from the other respondents and the overall conclusion is that negotiation in the insurance industry is not only popular but more effective as compared to other methods.

4.5 Perception of ADR

The perception of the players in the insurance industry on the significance of ADR plays a major role in determining which method will eventually be used. The study reflected on the subject by questioning respondents on what their opinion was on ADR in the industry and how they viewed the main players in the industry.

4.5.1 Perception of ADR by the Litigants

Despite a majority number of litigants being aware that their matter could be resolved through ADR and that they could approach the insurance industry directly without the involvement of an advocate, when questioned on how they chose to have their matter resolved, their responses was as follows:

Table 4.13 Litigants choice of method for settling insurance disputes

	FREQUENCY	**PERCENTAGE**
I approached the insurance company	3	21
I instructed an advocate	11	79
I filed the case myself	-	
Total	**14**	**100**

79% of the litigants chose to appoint advocates to act on their behalf while a meagre 21% chose to approach the insurance company for settlement. To try and understand why this was so, the respondents were questioned on the challenges they faced in the process of pursuing settlement of their matter. Most of the litigants pointed out that the process is quite long and has unnecessary procedures which they thought added no value to their dispute. One of the litigants

stated that there was too much unnecessary back and forth petty requirements from the insurance side which they felt were uncalled for. They could not understand why it was necessary to have their wound measured by a doctor one year after the accident when they had fully recovered. Another common observation by the litigants was that insurance companies give very low offers that do not correspond to the injuries sustained and even when an offer is made and accepted, the matter is rarely settled on time. The general perception is that insurance companies are not ideally fair partners in the ADR process since they fail to honour their end of the deal as is expected. This has contributed to the continuous increase in litigation as compared to the use of ADR.

It follows therefore that when asked whether their matter has been resolved and how the matter was resolved, 79% of the respondents indicated that their matter had been resolved and 21% indicated that their matter was still ongoing. The table below shows the responses received on how the matter was resolved:

Table 4.14 How disputes were resolved

	FREQUENCY	**PERCENTAGE**
Settled directly by the insurance company	-	-
Settled through the court	8	67
Settled out of court	3	25
I don't know	1	8
Total	**12**	**100**

It is thus understandable why none of the matters was settled directly by the insurance company because of the negative perception that they have towards them noting the concerns raised on non-payment of claims and failing to keep their word during negotiations. As such, 67% of the matters were eventually settled by the court while 25% of the matters were settled out of court through guidance of the advocates. 8% of the respondents did not know how their matter had been resolved as there was no communication from their advocate even when they were asked for an update.

The concerns raised are valid and calls for further investigations to de done on how to improve the public perception towards the insurance industry.

4.5.2 Perception of ADR by the Advocates

The advocates were questioned on whether they would advocate for matters to be settled through ADR and they all affirmed that they would. Some of the reasons given for advocating for ADR was that the process is expeditious, cost effective, less adversarial and reduces backlog in courts.

The advocates were further questioned on whether they had been involved in a matter which was resolved directly by the insurance company and 92% confirmed they had while 8% had not. When questioned how effective the process was, based on the Likert Scale, the respondents rated the process as fair (3). According to the respondents, the greatest challenge they faced was resistance from insurance companies and litigants with 53% citing this as the greatest challenge. The second challenge standing at 27% is lack of structure for conducting ADR while delay came in third at 20%. The findings are as below:

Table 4.15 Challenges faced by Advocates when dealing with insurance disputes

	FREQUENCY	PERCENTAGE
Delay	3	20
Resistance	8	53
Lack of structure	4	27
I did not face any challenges	-	-
Total	**15**	**100**

Despite all these challenges, 100% of the advocates would still prefer their matters to be settled through ADR for various reasons including the fact that it is cheap, faster and affords each party an opportunity to be heard. According to the respondents, the greatest benefits of settling insurance disputes through ADR includes the satisfaction that all parties get out of the process, it avoids further escalation of costs incurred out of litigation, and it is expeditious and cost effective.

When the respondents were questioned on why ADR is not utilized despite the above benefits, the respondents indicated that the situation is enabled by the lack of proper information and knowledge about ADR which is also contributed to by the lack of a proper structure for dealing with ADR matters. The incapability of insurance companies to honour their responsibilities is also a problem and as such, they avoid engaging in ADR altogether and even when they do, they make very unreasonable offers thus discouraging claimants from pursuing ADR. There is also usual delays to settle the claim when you engage in direct negotiations with insurance companies. Further, there is a common perception that courts are superior making litigation more appealing despite the delays in court. Another reason given is that advocates are afraid that they will run out of business if ADR is fully utilized and thus they avoid using it and have become very resistance to accept its use.

4.5.3 Perception of ADR by Insurance Companies

The study interrogated whether insurance companies shared the same views as advocates on whether they would advocate for matters to be settled through ADR and 100% of the respondents indicated that they would pursue settlement of the matters through ADR. Some of the reasons given for supporting ADR was that the process is cost effective especially when it comes to savings costs in terms of legal fees. Further, parties sustain their mutual relationship post the dispute which is key for business continuity. Another reason advanced is that eventually the matter is settled for way less than what would have been awarded by the court through litigation. Some of the more insightful responses was the confidentiality of the process and permits the parties to exercise greater control during the process and as such responds better to individual needs.

The participants were further questioned on whether had engaged in direct negotiations with advocates or litigants and 100% of the respondents confirmed they had settled matters directly with litigants. When questioned how effective the process was, based on the Likert Scale of

1-5;[182] the respondents rated the process as good (4). The greatest challenge they faced was resistance from litigants and advocates to have the matters settled amicably. Ironically, 42% respondents indicated that they faced no challenges during the process. The findings are as below:

Table 4.16 Challenges faced by Insurance Companies when handling disputes

	FREQUENCY	PERCENTAGE
Delay	1	8
Resistance	6	50
Lack of structure	-	-
I did not face any challenges	5	42
Total	**12**	**100**

It is clear that both parties find each other to be resistant to settle matters through ADR and when advocates blame the insurance companies, insurance companies find the process to be good and they face minimal challenges other than resistance from the other party. The study proves that the industry's image affects the settlement of matters through ADR.

When the respondents were questioned on why ADR was not preferred for settling insurance disputes despite the benefits, the responses were quite unique to the industry with their greatest fear being the increase in fraudulent claims and manipulation of figures so as to get a higher amount out of the process. Further, it was also a concern for one of the respondents that the process does not guarantee a positive outcome for either of the parties' especially because parties tend to take hard line positions when engaging in negotiations. Another reason was that insurance companies face financial difficulties which limits their ability to engage in ADR which also contributes to failure to maintain timelines and thus creating friction between the parties. It was also noted that some of the ADR processes are very costly like arbitration which discourages the use of ADR even when it is advocated for in the insurance policies. Additionally, because of the lack of a proper structure, there is no check and balances on the

[182] 1=Very Poor 2=Poor 3=Fair 4=Good 5=Excellent

bargaining powers of parties and more often than not, one party has more bargaining power than the other. Another reason was that it fails to create any legal precedence because of its confidentially thus making the process less attractive.

4.6 Role of IRA in Insurance Dispute Resolution

As the regulator, IRA must ensure that the industry is able to embrace ADR especially after being given constitutional status. The study interrogated the respondents on their familiarity of the role of IRA and whether they should be involved in dispute resolution.

4.6.1 Litigants Knowledge of IRA

Litigants were questioned on whether they were aware of the role IRA plays in the resolution of insurance disputes. 57% of the respondents were aware of their role while 43% were not. It goes to show that there is still more to be done towards creating awareness of the role of IRA in dispute resolution more so since they are responsible for regulating insurance companies and ensuring there is full compliance to their obligations.

When questioned on whether IRA should be involved in resolving insurance related disputes, 79% responded in the affirmative which indicates that the role IRA plays cannot be side lined. 14% of the respondents thought IRA should not be involved while one respondent responded they did not know whether IRA should be involved.

4.6.2 Advocates Knowledge of IRA

The advocates were questioned on whether they thought IRA has a role to play in actively advocating for matters to be settled through ADR. 92% of the respondents answered affirmatively in that IRA should participate actively in promoting the use of ADR in the insurance industry while 8% said they should not. The respondents were also asked whether IRA should be involved in dispute resolution and 85% agreed they should while 15% thought IRA should not be involved. The results proves that IRA's role is fundamental in terms of advocating for ADR in the insurance industry. Majority of the respondents think that IRA

should participate more aggressively in promoting ADR in the insurance industry as part of their statutory responsibility. However, respondents find it unnecessary for the regulator's direct involvement in the dispute resolution process.

4.6.3 Insurance Companies Opinion on the Role of IRA

The same question was posed to insurance companies and their responses tallied to the response given by advocates in that 92% think IRA should be actively involved in advocating for ADR while 8% think they should not. Similarly, 83% of the respondents agree that IRA should be involved in dispute resolution while 17% disagree.

4.7 Legal Framework

ADR was given constitutional status under Article 159 of the Constitution of Kenya. However, despite the constitutional recognition, the insurance industry is yet to fully embrace it use. It is against this background that the respondents were questioned on whether inclusion of ADR into the Constitution has made any difference in the insurance industry, whether the current legal framework for ADR is sufficient to support its use in the industry and the legal reforms necessary to bring about change in the industry in terms of embracing ADR.

4.7.1 Whether inclusion of ADR in the Constitution of Kenya has made a difference in the insurance industry.

76% of the participants agree that inclusion of ADR in the Constitution has impacted the insurance industry while 24% disagree.

Table 4.17 Impact of inclusion of ADR in the Constitution

	FREQUENCY	PERCENTAGE
Yes	19	76
No	6	24
Total	**25**	**100**

The results confirmed that ADR is gaining prominence and acceptance with more parties choosing to use it when resolving insurance disputes. However, more needs to be done to

encourage its use in the insurance industry. Through inclusion of ADR in the Constitution, the Court Annexed Mediation program has become possible and more matters are getting screened to be settled through mediation.

4.7.2 Whether the current legal framework for ADR is sufficient to support its use in the insurance industry.

64% of the respondents think that the legal framework is not sufficient to support its use in the insurance industry while 36% think it is.

Table 4.18 Sufficiency of the Legal Framework for ADR

	FREQUENCY	PERCENTAGE
Yes	9	36
No	16	64
Total	**25**	**100**

While putting the results of the study in context of this question, it is evident that there is no structure for the utilization of ADR in resolving insurance disputes and ADR is not anchored on any specific laws other than a few legislations encouraging its use in general. The benefits of ADR far outweigh its limits and it therefore calls for necessary legal reform which is specific to the insurance industry so as to make its use more prominent and in a structured manner. The results tallies with the conclusion reached in chapter two which underscored that the current legal framework for ADR applicable to the insurance industry is inadequate and fails to give any provisions for the usage of ADR.

The respondents were also requested to indicate what legal reforms they thought were necessary to support the formalization of ADR in the industry and some of the reforms suggested include amendment of CAP 405[183] to recognise ADR as a way of resolving disputes provided for under that Act in the first instance before pursuing litigation. With this amendment, it is expected that more matters will eventually be concluded through ADR.

[183] The Insurance (Motor Vehicle Third Party Risks) Act, Cap 405, Laws of Kenya.

Another reform suggested is the introduction of an institution backed by statute that specifically deals with insurance disputes so that they are directly resolved through ADR in the first instance. Majority of the respondents also recommended making ADR mandatory before litigation through amendment of the current statutes dealing with insurance disputes. This recommendation is in fact a reflection of the response given to the question on whether ADR should be made mandatory in the first instance. 64% of the respondents thought that ADR should be made mandatory while 34% disagreed.

Some of the reasons given for advocating for ADR to be mandatory are; it is the only way ADR will be taken seriously in the industry especially because disputes arise because of ignorance and lack of information on the available avenues for dispute resolution. It will reduce the legal costs associated with litigation and delays and eventually reduce the backlog in courts. Another reason given was that in any case, ADR is provided for as the first avenue for dispute resolution in the insurance policy document and it is therefore the high time it should start being utilised. The respondents who were against making ADR mandatory argued that ADR will always remain a voluntary process and making it compulsory will take away its probative value. Parties should thus be free to choose which method best suits them especially because insurance companies are likely to use it as a stalling tactic against claimants.

4.8 Conclusion

In conclusion, the study noted that most respondents appreciate the inclusion of ADR in the constitution and the impact it has had in promoting its use in dispute resolution. However, the negative perception towards the industry has in turn negatively affected its use.

This chapter proves the hypotheses of the research. The legal framework for ADR is still insufficient and not fully comprehensive to give elaborate provisions for the utilization of ADR for insurance disputes. As a consequence, disputes continue to be settled through litigation

despite the acknowledged benefits of ADR. This is despite the formal recognition of ADR in the Constitution. There is therefore need for reform.

Further, the study proves that there is still need for sensitization on matters ADR especially in the insurance industry where a majority of disputes continue to be resolved through litigation. Empowering stakeholders with knowledge on ADR will facilitate the conclusion of more matters through ADR and elevate the status of ADR even without the recommended imposition of ADR on parties.

The conclusions and recommendations made in the following chapter are drawn from the results of the study and the recommendations offered during the fieldwork research will be considered.

CHAPTER FIVE: SUMMARY OF FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter lays out the conclusions based on the summary of the findings and offers recommendations and proposals for reform. The main objective of the study was to appraise the legal framework of ADR in Kenya vis-à-vis its application as a tool for dispute resolution in the insurance industry while evaluating its effectiveness in resolving insurance related disputes. The study will offer both short term and long terms recommendation and suggestions for further research.

5.2 Summary of Findings

The study was able to review the current ADR legal framework in terms of its use in the enablement of resolution of insurance disputes in Kenya and as such, the research objectives of the study were met. The results of the study answered the research question by identification of the various statutes giving provisions for ADR in the resolution of insurance disputes and the conclusion reached is that the legal framework is insufficient.

The second research objective was to evaluate the extent and effectiveness of ADR in resolving insurance disputes in Kenya. In answering the question to what extent ADR is being used, the study established that indeed ADR is widely known but relatively utilised used because of the participants' knowledge of the benefits of ADR coupled with underlying challenges that makes the process less attractive. On how effective ADR is, the study established that for insurance disputes, it is indeed effective and suitable for insurance disputes.

The study met its objective of assessing the future prospects of ADR by noting that there is indeed a future for ADR in the insurance industry if the recommendations for its use as highlighted are adopted.

The study proceeded on the hypotheses that the use of ADR is hampered by the lack of a comprehensive legal framework to support its use as a tool for resolving insurance related disputes and as such, reform is necessary if ADR is to be promoted as the preferred dispute resolution method for insurance related disputes.

A review of the literature analysed in Chapter 1 and the results of the study proves the research hypotheses which presupposes that indeed the current legal structure provided for ADR is insufficient to sustain ADR in the insurance industry. That even with the institutionalization of ADR, the insurance industry is yet to be at par in terms of embracing its use as envisioned in the constitution. The study has also demonstrated that the process of ADR is still not ideal for most parties which supports the argument in the theoretical framework that ADR is not capable of resulting in 'complete justice' because parties lack equal bargaining power during the ADR process. Results of the study identified with this argument in that a majority of participants viewed the process as unfair in terms of bargaining power and in the end procedural justice is not attained.

Chapter two reviewed the current legal framework provided for ADR in Kenya as underpinned by Article 159 of the Constitution. However, the study established that there is a fundamental gap in the legal framework for ADR in the insurance industry with no statute making provisions for its use in the industry. This has resulted in negotiation as a dispute resolution method to be more preferred because it is the most informal and when negotiations fail, litigation becomes the other "best" option for parties. The study has shown that although parties prefer negotiations, its drawback is evident in that parties do not have equal bargaining power. A majority of insurance companies find the negotiation process to be very favourable to them since they have an upper hand as compared to their counterparts. There is thus need for legislative reform to bring about a formal structure to the ADR process in the industry.

Chapter three focused on the research methodology with a view of ensuring that the data collection process met the required research standards and the findings of the study remain viable.

Chapter four focused on empirical research to confirm the hypotheses of the study which demonstrates that the legislative framework is insufficient to support the use of ADR in the insurance industry even with its inclusion in the Constitution. This has hampered the utilization of ADR for the resolution of insurance disputes and as a result, a majority of matters are still being settled through litigation. However, the study established that parties do prefer ADR because of its apparent advantages and a supportive legislative framework will go a long way towards making ADR more effective.

5.3 Conclusion

The study concludes that the legal framework for ADR in the insurance industry is not sufficient to support its use. The pertinent statutes regulating the insurance industry make no provisions for the use of ADR and as a result, negotiations as a dispute resolution tool is popular for the resolution of insurance resolution disputes due to its informality. The gap created due to the lack of formality in the ADR process and the informal structures to guide its application in the insurance has led to the continued litigation of disputes. While appreciating that ADR is now included in the Constitution, the study concludes that more needs to be done to institutionalize it in the insurance industry to support its application as envisioned by the Constitution.

On the extent and effectiveness of ADR in resolving insurance disputes, the study has demonstrated that there is general knowledge about ADR and its advantages. However, even with the acknowledged advantages, ADR is still not extensively used and the major challenge faced is resistance of the parties towards its use. Claimants perceive insurance companies as a partial party who fails to honour obligations and is out to maximize on profits at their expense

while insurance companies continue to be worried that claimants are out to defraud them. The study concludes that ADR is indeed effective and although widely preferred, the extent of its use is determined by external factors like perception which continues to hamper the use of ADR in insurance dispute resolution.

The study met its objective of assessing the future prospects of ADR by noting that there is indeed a future for ADR in the insurance industry if the recommendations for its use as highlighted are adopted.

5.4 Recommendations

It is a particular concern that in the insurance industry, the inadequacy of the legal framework for ADR continues to be responsible for the underutilization of ADR and therefore calls for legislative reform.

5.4.1 Short Term Recommendation

The study established the court's role in promoting ADR is still insignificant. With the introduction of the Court Annexed Mediation program and the anticipated positive impact, the study therefore recommends for the wider screening of matters by the judiciary to increase the extent of its use. The characteristic of insurance disputes makes them suitable for resolution through mediation especially when liability is not in dispute. A working mediation program will enhance the extent and effectiveness of ADR bringing about positive change in the industry.

5.4.2 Medium Term Recommendation

The study recommends the promotion of ADR through sensitization programs promoted by stakeholders in the industry. The insurance companies stand to gain a lot when matters are resolved through ADR and it therefore informs the consideration that through the regulator (IRA) and the Association of Kenya Insurers (AKI), trainings and workshops should be

conducted to sensitize the public on the benefits of ADR. Consumer satisfaction will subsequently lead to a better perception of ADR in the industry.

The study makes a further recommendation for an industry-tailored approach towards the adoption of ADR to resolve insurance disputes. The insurance companies together with IRA and AKI can make recommendations towards instituting a relevant self-regulatory policy that provides for the consideration of ADR in the first instance. This approach will only work if the industry moves away from state-regulation which heavily relies on statutory backing. The study therefore recommends that the insurance industry focuses on self-regulation on the aspect of ADR so that a systemic policy structuring the adoption of ADR for the settlement of insurance disputes is formulated. This will give it a better likelihood of success as the stakeholders will be more comfortable with a self-created system that is able to focus on their areas of concern e.g. fraudulent claims. The end result will be a paradigm shift towards ADR in the industry. Self-regulation can be enabled through an Online Dispute Resolution (ODR) system which will make dispute resolution expeditious and less costly. Such a system will especially be beneficial to claimants since it will be implemented at a no-cost to them. It will also minimize the common problem of ambulance chasers and the increase in fraudulent claims which is greatly affecting the insurance industry. A well-documented process and structure that is purposeful and objective will take away the perception that litigation is better for being more formal.

5.4.3 Long Term Recommendation

From the data gathered, a majority of the participants thought that making ADR mandatory before pursuing litigation would go a long way towards promoting its extensive use. However, taking this route is at the risk of taking away the voluntary aspect of ADR which is one of the benefits that makes it attractive. The study does not therefore propose for the enactment of an independent legislation that provides for the mandatory use of ADR and neither does it call for

amendment of the various legislations to impose ADR on the parties. However, the study recommends inclusion of ADR in the relevant statutes to make it a statutory backed option available for parties. Such an inclusion will give ADR more validity and increase the extent of its use. The legislature, through recommendation by the regulator-IRA, should be proactive in promoting ADR through making provisions for ADR under the different statutes e.g. in the Insurance Act that expressly provide that ADR should be given priority consideration even if it is not on mandatory terms. To this extent, parties will have a choice on whether to use ADR but they will not have a choice on whether to consider it.

5.5 Proposal for Further Research

The findings of the study indicate that a majority of the participants advocate for the mandatory use of ADR to resolve insurance disputes in the first instance. However, some scholars have argued that making ADR mandatory will not necessarily yield the desired results and it will take away the consensual aspect of the process. As such, further research should be undertaken on comparative analysis of jurisdictions with mandatory ADR to establish whether the system is indeed more effective and make recommendation for adoption of the best practices from those jurisdictions.

BIBLIOGRAPHY

1. Ainsworth J. 'Legal Discourse and Legal Narratives', (2015) 2(1) Language and Law, 1-11.

2. Anton-Hermann Chroust & David L. Osborn, '*Aristotle's Conception of Justice*' (1942) 17 Notre Dame L. Rev. 129.

3. Bryan A Garner(ed), *Black's Law Dictionary* (8th edn, Thomson West 2004).

4. Carr David. '*The Cardinal Virtues and Plato's Moral Psychology*' The Philosophical Quarterly (1950) 38 (1988) 186-200.

5. Cassandra Roeder, 'Reforming Consumer-Insurer Dispute Resolution in the Auto Insurance Industry' (2014) 7, Student Award Winning Papers, <http://scholarship.law.wm.edu/awardwinning/7>

6. Catherine Price, '*Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution?'* (2018) 18 Pepp. Disp. Resol. L.J., 393

7. Cooper, D.R., & Schindler, P.S, *Business Research Methods* (8th ed. McGraw-Hill 2000).

8. Driver Julia, "The History of Utilitarianism", *The Stanford Encyclopedia of Philosophy* (2014), Edward N. Zalta (ed.), <www.plato.stanford.edu/archives/win2014/entries/utilitarianism-history/>

9. Eric Opiyo, 'Achieving Access to Justice through Alternative Dispute Resolution: A Regional Perspective' (2016) LSKJ 12(1), 153-169.

10. Jacob Gakeri, 'Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR' (2011) 1(6), International Journal of Humanities and Social Science.

11. James A. Gardner, *The Sociological Jurisprudence of Roscoe Pound (Part I)*, (1961) 7 Vill. L. Rev. 1 http://digitalcommons.law.villanova.edu/vlr/vol7/iss1/1 accessed on 15/11/2018

12. Jay E. Grenig, 'Alternative Dispute Resolution' (3rd ed. 2005).

13. Jeremy Bentham, "*An Introduction to the Principles of Morals and Legislation"* (1781 ed.) <http://www.utilitarianism.com/jeremy-bentham/index.html> accessed on 01/03/2019.

14. John R. Miller, **'**Alternative Dispute Resolution (ADR): A Public Procurement Best Practice that has Global Application' (2006) <*www.ippa.org/IPPC2/PROCEEDINGS/Article_24_Miller.pdf*> accessed on 04 January 2019

15. John Rawls, '*A Theory of Justice'* (2nd edn, The Belknap Press of Havard University Press 1971).

16. Kariuki Muigua, 'Effective Justice for Kenyans: Is ADR Really Alternative?' (2015) LSKJ 11(1) 49-62.

17. Kariuki Muigua, '*Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework',* (2015) <www.kmco.co.ke/.../156-legitimising-alternative-dispute-resolution-in-kenya> *accessed on 03 January 2019*

18. Kariuki Muigua, "Regulating Alternative Dispute Resolution Practise in Kenya: Looking into the Future" (2018) *<kmco.co.ke/wp.../Regulating-ADR-Practice-in-Kenya-Kariuki-Muigua-June-2018.pdf> accessed on 03/03/2019.*

19. Kothari, C. R. Research Methodology: Methods and Techniques. (2004), New Delhi: Wiley

20. Michael Freeman, *Law and Sociology* (Oxford University Press 2006), 16.

21. Miller, David, '*Justice*' (2017) *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/fall2017/entries/justice/>.

22. Mills, Michael and Furlan, Nicholas 'Resolving Insurance Disputes: The Value Of Less Formal Processes' (2002) 5(1)-3, *ADR Bulletin,* <http://epublications.bond.edu.au/adr/vol5/iss1/3> accessed on 03/01/2018

23. Mugenda and Mugenda, *Research Methods – Quantitative & Qualitative Approaches,* (Acts Press Nairobi 2003)

24. Paul D. Carrington and Paul Y. Castle, The Revocability of Contract Provisions Controlling Resolution of Future Disputes Between the Parties, Law and Contemporary Problems (2004) 67 (207)

25. Robert Glynn, 'ADR for Insurance Disputes', (*IMIA Conference*, September 2004), <www.imia.com/wp-content/.../GP04-2004-Alternative-Dispute-Resolution.pdf> accessed on 07/01/2018

26. Robert H. Jerry II, '*Dispute Resolution, Insurance, and Points of Convergence'* (2015), J. Disp. Resol. <https://scholarship.law.missouri.edu/jdr/vol2015/iss2/3> accessed on 08/01/2018

27. Robert Matlin, 'Alternative Dispute and its Use in Commercial Insurance Disputes' (2006) The Metropolitan Corporate Counsel, 43 *<ccbjournal.com/.../alternative-dispute-resolution-and-its-use-commercial-insurance-dispu...>* accessed on 01/03/2019.

28. Roscoe Pound. 'The Scope and Purpose of Sociological Jurisprudence' (1911) 5, Harvard Law Review, https://archive.org/stream/jstor-1324775/1324775_djvu.txt accessed on 15/11/2018

29. Salim Ali & Zainal Ayub, Legal Research of Doctrinal and Non-Doctrinal (2017) International Journal of Trend in Research and Development, Volume 4(1),

30. Sheskin Arlene. 'A Critical Review and Assessment of the Sociology of Law' (1978) 3(2) *Mid-American Review of Sociology,* 109–124. www.jstor.org/stable/23252535 accessed on 15/11/2018.

31. Snyder Francis G. 'Administrative Law Review' (1973) *Administrative Law Review,* 25(3), 337–341. www.jstor.org/stable/40708838 accessed on 15/11/2018

32. The Judiciary-Republic of Kenya, '*Sustaining Judiciary Transformation (SJT): A Service Delivery Agenda, 2017-2021'* (2017) 21.

33. Tyler, Tom R. 'What Is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedure' (1988) Law & Society Review, vol. 22, no. 1, 103–135. <www.jstor.org/stable/3053563> accessed on 01/03/2019.

34. William Twining, 'Alternative to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics' (1993) The Modern Law Review Limited, 56:3, 380-392.

35. Owen Fiss, Against Settlement (1984) The Yale Law Journal, 93(6), p.1073.

36. Jethro K. Lieberman, Lessons from the Alternative Dispute Resolution Movement, (1986) 53 University of Chicago Law Review 424–439

37. Kariuki Muigua, 'Utilising Alternative Dispute Resolution Mechanisms to Manage Commercial Disputes' (1st Nairobi Centre for International Arbitration (NCIA) Alternative Dispute Resolution (ADR) National Conference, Intercontinental Hotel, Nairobi, Kenya on 5th - 6th June, 2018).

38. Kariuki Muigua, 'Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms' (CIArb Africa Region Centenary Conference 2015 held on 15-17 July, 2015).

39. Kariuki Muigua, Alternative Dispute Resolution and Article 159 of the Constitution (2018) Available at <http://kmco.co.ke/wp-content/uploads/2018/08/A-PAPER-ON-ADR-AND-ARTICLE-159-OF-CONSTITUTION.pdf> accessed on 01/02/2020

40. Law Reform Commission of Ireland, Alternative Dispute Resolution (Consultation Paper, LRC CP 50, 2008)