

# Dealing with Conflicts in Project Management

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**Kariuki Muigua**

## **Abstract**

*This paper addresses the issue of dealing with conflicts in project management. It looks at the range of conflict management mechanisms available to parties in the course of project management in Kenya. Their various merits and demerits are examined. The challenges facing the legal and institutional infrastructure for management of conflicts in Kenya are discussed. These challenges are likely to impact on project implementation and delivery. The paper examines the opportunities afforded by various mechanisms in dealing with conflicts expeditiously and hence ensuring smooth and timely implementation and delivery of projects.*

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# Dealing with Conflicts in Project Management

Kariuki Muigua\*

## 1. Introduction

### 1.1 Definition and Nature of Project Management

Project management is a methodological approach to achieving agreed upon results within a specified time frame with defined resources and involves the application of knowledge, skills, tools, and techniques to a wide range of activities in order to meet the requirements of a project.<sup>1</sup> Scholars have argued that project management is premised on performance, cost and time as its main goals wherein the focus is to meet customer expectations, deliver projects within

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<sup>1</sup> Amy Ohlendorf, Conflict Resolution in Project Management, Information Systems Analysis MSIS 488, Fall 2001, available at <[http://www.umsl.edu/~sauterv/analysis/488\\_f01\\_papers/Ohlendorf.htm](http://www.umsl.edu/~sauterv/analysis/488_f01_papers/Ohlendorf.htm)> accessed on 24/08/2011; See also Atkinson, R., "Project Management: Cost, Time And Quality, Two Best Guesses And A Phenomenon, It's Time To Accept Other Success Criteria," *International Journal of Project Management*, Vol.17, no. 6 (1999), pp. 337-342 at p.337:

.... Project Management is the application of a collection of tools and techniques (such as the CPM and matrix organisation) to direct the use of diverse resources toward the accomplishment of a unique, complex, one-time task within time, cost and quality constraints. Each task requires a particular mix of these tools and techniques structured to @t the task environment and life cycle (from conception to completion) of the task (p.337).

.....The planning, organisation, monitoring and control of all aspects of a project and the motivation of all involved to achieve the project objectives safely and within agreed time, cost and performance criteria. The project manager is the single point of responsibility for achieving this (p.338).

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budget, and complete projects on time.<sup>2</sup> Notably, recent literature on the subject takes the view that while earlier debates on definitions of project management focused on the variables of time, cost, and scope—otherwise known as the “iron triangle”, recent definitions of project management are more inclusive and emphasize the importance of working with stakeholders to define needs, expectations, and project tasks.<sup>3</sup> Thus, these definitions describe project management as involving cultural, structural, practical, and interpersonal aspects, making “project management about managing people to deliver results, not managing work”.<sup>4</sup>

Based on the broadened scopes in definition, it follows that the success of a project will rely on a number of factors, including managing conflicts and problems in projects as an important determinant of project success.<sup>5</sup> This, according to scholars, involves people skills which focus on fostering a climate of active participation and minimal dysfunctional conflict and implies an environment of trust, consistent processes without ambiguity, communicating expectations, and clarity in communications.<sup>6</sup> It also considered as involving defining roles and responsibilities of project team members without ambiguity to avoid conflict and encourage teamwork.<sup>7</sup> Empirical studies on the criteria for effective project team management have shown these as including understanding the tasks and roles of the project team members; defining each team member’s individual responsibilities, role and level of accountability; creating an environment of trust and support in problem solving; motivating team members; encouraging open, effective communication; and providing appropriate communication tools, techniques, and systems.<sup>8</sup> The studies also supported the hypothesis that satisfying personal and professional needs of team members will have the strongest effect on team performance, and identified some other factors, which include ability to resolve conflict, mutual trust and respect, and communications across organizational lines.<sup>9</sup> It therefore follows that conflict management is an important aspect of project management, and while it may not always be possible to avoid

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<sup>2</sup> Atkinson, R., "Project Management: Cost, Time and Quality, Two Best Guesses and A Phenomenon, It's Time to Accept Other Success Criteria," op cit., p. 338.

<sup>3</sup> Jugdev, Kam, and Müller, R., "A retrospective look at our evolving understanding of project success," *Project management journal*, Vol.36, no. 4 (2005), pp.19-31 at p.20.

<sup>4</sup> Ibid, at p.20.

<sup>5</sup> Anantatmula, V.S, "Project Manager Leadership Role in Improving Project Performance," *Engineering Management Journal*, Vol.22, No. 1 (2010), pp.13-22 at p.15.

<sup>6</sup> Ibid, at p.15.

<sup>7</sup> Ibid, at p.15.

<sup>8</sup> Ibid, at p.15.

<sup>9</sup> Ibid, at p.15.

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conflicts, the arising conflicts can be managed effectively in an atmosphere of mutual respect, trust, understanding and open communication for the success of the project.

It is on the basis of the above findings on what drives success in project management that this paper explores some of the most viable mechanisms, based on their characteristics, that project managers can use to deal with potential conflicts and enhance the chances of the project success.

### **1.2 Need for Conflict Management in Project Management**

A conflict is a situation that exists when persons pursue goals that are incompatible and end up compromising or contradicting the interests of another.<sup>10</sup> In a conflict situation, each party wants to pursue its own interests to the full, and in so doing ends up contradicting, compromising, or even defeating the interests of the other.<sup>11</sup> Conflict is also viewed as a process of adjustment, which itself can be subject to procedures to contain and regularize conflict behaviour and assure a fair outcome.<sup>12</sup>

Conflicts are inevitable in project management and can be time consuming, expensive and unpleasant in that they can destroy the relationship between the contractual parties and also add to the cost of the contract.<sup>13</sup> They can bog down and impede the smooth implementation of projects. Some scholars have argued that disputes and conflicts in projects divert valuable resources from the overall aim, which is completion of the project on time, on budget and to the quality specified.<sup>14</sup> Furthermore, they generally cost money, take time and destroy relationships, which may have taken years to develop.<sup>15</sup>

Protracted disputes that remain unsettled can negatively impact on the progress of a project and ultimately delay its delivery. They have attendant negative impact on projects. A

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<sup>10</sup> Odhiambo, M.O., *The Karamoja Conflict: Origins, impacts and solutions*, (Oxfam GB, 2003), p.15. Available at <https://oxfamilibrary.openrepository.com/oxfam/handle/10546/121081> [Accessed on 7/06/2018].

<sup>11</sup> Ibid., p.15.

<sup>12</sup> Rummel, R.J., 'Principles of Conflict Resolution,' Chapter 10, *Understanding Conflict and war: Vol. 5: The Just Peace*. Available at <http://www.mega.nu/ampp/rummel/tjp.chap10.htm> [Accessed on 7/06/2018].

<sup>13</sup> Amy Ohlendorf, *Conflict Resolution in Project Management*, Information Systems Analysis, op. cit.

<sup>14</sup> Fenn, P., "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, *Workbook on Mediation*, (CI Arb, London, 2002), at p. 12.

<sup>15</sup> Ibid., at p. 12.

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delayed project continues to attract costs, fees, penalties and numerous other charges that would otherwise be avoided. For instance a project that is finalized through a loan needs to be implemented and delivered expeditiously so as to minimize financial losses occurring due to interest and other charges.

Disputes and conflicts impact negatively on relationships. Projects need teamwork in order to be implemented and delivered as planned. They occur in any social setting and when they do the need of a speedy, efficient and cost effective dispute resolution mechanism cannot be gainsaid. Even in project management, disputes do occur, and indeed, they are envisaged in contracts hence the Dispute Resolution Clause found in various standard form contracts<sup>16</sup>. For example, in construction disputes, the most common disagreement will be between the contractor and employer or sub-contractor and the main contractor. It is important for the parties to choose a dispute settlement mechanism that is practicable and effective. It is therefore crucial to work towards avoiding disputes at the first instance.

Consequently, it is to be noted that the contract negotiation stage is of the greatest importance since it is during this stage that parties agree on the dispute settlement method to be applied in the event of a dispute. If the parties agree in the contract to adopt certain procedures in the event of a dispute arising, one party cannot insist on the use of other procedures, or even any other methods of implementing agreed procedures, without the consent of the second party.<sup>17</sup>

## **2. Overview of the Conflict Management Mechanisms**

Conflict management has been defined as the practice of identifying and handling conflicts in a sensible, fair and efficient manner that prevents them from escalating out of control and becoming violent.<sup>18</sup> It is considered as a multidisciplinary field of research and action that addresses

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<sup>16</sup> See, Clause 20 of the FIDIC Conditions of Contract for Construction, First Edition 1999; Clause 45.0 of The Joint Building Council, Agreement and Conditions of Contract for Building Works, 1999 Edition and Clause 31.0 of The Kenya Association of Building and Civil Engineering Contractors, Agreement and Conditions of Sub- Contract for Building Works, 2002 Edition.

<sup>17</sup>See generally, Dispute Resolution Guidance at [http://www.ogc.gov.uk/documents/dispute resolution.pdf](http://www.ogc.gov.uk/documents/dispute%20resolution.pdf), accessed on 19/08/2011.

<sup>18</sup> Engel, A. & Korf, B., 'Negotiation and mediation techniques for natural resource management,' Prepared in the framework of the Livelihood Support Programme (LSP), An interdepartmental programme for improving support

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how people can make better decisions collaboratively, through ensuring that the roots of conflict are addressed by building upon shared interests and finding points of agreement.<sup>19</sup>

In the widest sense conflict management mechanisms include any process which can bring about the conclusion of a dispute ranging from the most informal negotiations between the parties themselves, through increasing formality and more directive intervention from external sources, to a full court hearing with strict rules of procedure.<sup>20</sup> It has rightly been pointed out that there are many factors that determine the emergence, persistence, and even management of conflicts, and, the understanding of these factors which range from internal to relational and contextual ones, is thus important in developing policies that effectively limit and manage conflict.<sup>21</sup> It is arguable that the unique circumstances and needs of a conflict dictate the mechanism to be employed in its management. The discourse in this paper contemplates the following conflict management mechanisms in the context of project management;

### **2.1 Negotiation**

Negotiation is defined as a process that involves parties meeting to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party. It is also described as a process involving two or more people of either equal or unequal power meeting to discuss shared and/or opposed interests in relation to a particular area of mutual concern.<sup>22</sup> Negotiation is also defined as a process by which involved actors communicate and exchange proposals in an attempt to agree about the dimensions of conflict termination and their future relationship.<sup>23</sup>

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for enhancing livelihoods of the rural poor, (Food and Agriculture Organization of The United Nations, Rome, 2005), available at [http://peacemaker.un.org/sites/peacemaker.un.org/files/NegotiationandMediationTechniquesforNaturalResourceManagement\\_FAO2005.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/NegotiationandMediationTechniquesforNaturalResourceManagement_FAO2005.pdf) [Accessed on 7/06/2018].

<sup>19</sup> Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' available at <http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage> [Accessed on 7/06/2018].

<sup>20</sup> Sourced from, <<http://www.buildingdisputestribunal.co.nz/.html>> accessed on 24/08/2011.

<sup>21</sup> Louis, K., "Factors Shaping the Course of Intractable Conflict." *Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Research Consortium, University of Colorado, Boulder. Posted: October 2003. <[http://www.beyondintractability.org/essay/factors\\_shaping\\_intractable\\_conflict/](http://www.beyondintractability.org/essay/factors_shaping_intractable_conflict/)>.

<sup>22</sup> Negotiations in Debt and Financial Management 'Theoretical Introduction to Negotiation: What Is Negotiation?', Document No.4, December 1994, Available at [http://www2.unitar.org/dfm/Resource\\_Center/Document\\_Series/Document4/3Theoretical.htm](http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document4/3Theoretical.htm) [Accessed on 7/06/2018].

<sup>23</sup> Bercovitch, J. & Jackson, R., 'Negotiation or Mediation?: An Exploration of Factors Affecting the Choice of Conflict Management in International Conflict,' *Negotiation Journal*, January 2001, Vol. 17, Issue 1, pp 59-77, p. 60.

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Negotiation is considered by far the most efficient conflict management mechanism in terms of management of time, costs and preservation of relationships and has been seen as the preferred route in most disputes.<sup>24</sup> In negotiation the parties themselves attempt to settle their differences using a range of techniques from concession and compromise to coercion and confrontation.<sup>25</sup> Its advantages include, *inter alia*, that it is fast; cost saving; confidential; preserves relationships; provides a range of possible solutions and there is autonomy over the process and the outcome. The outcome of a collaborative approach to negotiations is considered to be: improved relationships; a better chance of building trust and respect; self-confidence; more enjoyment; less stress; and more satisfactory results.<sup>26</sup> Its disadvantages are, *inter alia*, it requires the goodwill of the parties; endless proceedings; can create power imbalances; it is non-binding unless parties reduce the agreement into writing; creates no precedents and it is not suitable when one party needs urgent protection like an injunction.

If the parties do not reach an agreement through negotiation, they will need to consider what other method or methods of dispute resolution would be suitable. However, it will still be possible or may be necessary to continue with negotiations as part of or alongside other forms of dispute resolution.<sup>27</sup> Negotiation with the help of a third party is called mediation, where negotiation leads to mediation in the sense that the need for mediation arises after the conflicting parties have attempted negotiation, but have reached a deadlock.<sup>28</sup>

### **2.2 Mediation**

Mediation is a voluntary, non-binding dispute resolution process in which a third party helps the parties to reach a negotiated solution.<sup>29</sup> Mediation is also defined as the intervention (often at different levels of development or intensity) in a standard negotiation or conflict of an

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<sup>24</sup> See *Dispute Resolution Guidance* op. cit.

<sup>25</sup> Fenn, P., "Introduction to Civil and Commercial Mediation", op. cit, p. 14.

<sup>26</sup> French, A., *Negotiating Skills*, (Alchemy, 2003), p. viii.

<sup>27</sup> Fenn, P., "Introduction to Civil and Commercial Mediation", op. cit, p. 14.

<sup>28</sup> Mwangi, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), pp. 115-116.

<sup>29</sup> Fenn, P., "Introduction to Civil and Commercial Mediation", op. cit, p.10.



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acceptable third party who has limited or no authoritative decision-making power but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute.<sup>30</sup>

It has all the advantages of conventional negotiation as set out above but the involvement of the third party can make the negotiation more effective. It is also seen as the preferred dispute resolution route in most disputes when conventional negotiation has failed or is making slow progress.<sup>31</sup>

### **2.3 Conciliation**

Conciliation<sup>32</sup> is a process in which a third party, called a conciliator, restores damaged relationships between disputing parties by bringing them together, clarifying perceptions, and pointing out misperceptions.<sup>33</sup> The difference between mediation and conciliation is that the conciliator, unlike the mediator who may or may not be totally neutral to the interests of the parties. Successful conciliation reduces tension, opens channels of communication and facilitates continued negotiations.<sup>34</sup> Frequently, conciliation is used to restore the parties to a pre-dispute *status quo*, after which other ADR techniques may be applied. Conciliation is also used when parties are unwilling, unable, or unprepared to come to the bargaining table.<sup>35</sup>

This process is similar to mediation save that the third party can propose a solution. Its advantages are similar to those of negotiation. It has all the advantages and disadvantages of negotiation save that the conciliator can propose solutions making parties lose some control over the process.

### **2.4 Med-Arb**

Med-Arb is a combination of mediation and arbitration, where the parties agree to mediate, and if that fails to achieve a settlement, the dispute is referred to arbitration.<sup>36</sup> Med-Arb

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<sup>30</sup> Moore, C., *The Mediation Process: Practical Strategies for Resolving Conflict*, 3rd, (San Francisco: Jossey-Bass Publishers, 2004).

<sup>31</sup> See *Dispute Resolution Guidance* op. cit.

<sup>32</sup> Peter Fenn, P., "Introduction to Civil and Commercial Mediation", op. cit, p.14.

<sup>33</sup> Hajdú, J., *The methods of alternative dispute resolution (ADR) in the sphere of labour law*. na, 1998.

<sup>34</sup> Oluwabiyi, A.A., "A Comparative Legal Analysis of the Application of Alternative Dispute Resolution (ADR) to Banking Disputes." *JL Pol'y & Globalization*, Vol.38 (2015): 1, at p.2.

<sup>35</sup> *Ibid.*, p.2.

<sup>36</sup> Osborne, C., *Civil Litigation 2007-2008: Legal practice course guides; 2007-2008*, (Oxford

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process is intended to allow the parties to profit from the advantages of both procedures of dispute settlement.<sup>37</sup> It has been asserted that through incorporating mediation and arbitration, Med-Arb, therefore, strikes a balance between party autonomy and finality in dispute settlement.<sup>38</sup>

It is considered best to have different persons mediate and arbitrate. This is because the person mediating becomes privy to confidential information during the mediation process and may be biased if he or she transforms himself or herself into an arbitrator. The other risks have been identified as obtaining less-than-optimal assistance from the third party due to different competencies' requirement for mediation and arbitration.<sup>39</sup> This is because the arbitrator's strength is believed to be in intellectual analysis and evaluation, while the mediator's strength is in balancing the legal evaluation with the creative work necessary to meet the parties' underlying business, personal and emotional interests.<sup>40</sup> There is also the risk of delay should the mediation fail; it will take some time to get the arbitration back on track, especially if a party decides a different third party is needed to serve as the arbitrator.<sup>41</sup>

However, at times the same person acting as mediator "switches hat" to act as the arbitrator.<sup>42</sup> The disputing parties however agree in advance whether the same or a different third party conducts both the mediation and arbitration processes. It is argued that it is also important to let the parties know at the outset that particularly sensitive information, which they might identify in their deliberations with the Med-Arbiter as to matters not to be shared with the

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University Press, 2007), p. 461; Lowe, D., & Leiringer, R., (eds), *Commercial Management of Projects: Defining the Discipline*, (John Wiley & Sons, 2008), p. 238; Chartered Institute of Arbitrator, *ADR, Arbitration, and Mediation*, (Author House, 2014), p. 247.

<sup>37</sup> De Vera C, 'Arbitrating Harmony: Of Culture and Rule of Law in the Resolution of International Commercial Disputes in China' *Columbia Journal of Asian Law*, Vol. 18, No.1, 2004, 149, p. 156.

<sup>38</sup> Bridge, C., 'Mediation and Arbitration - Are They Friends or Foes?' *Paper Prepared For Bani / Rodyk & Davidson Conference Shangri-La Hotel Jakarta*, 1 November 2012, p. 13. Available at <http://campbellbridge.com/wp-content/uploads/2012/12/MEDIATION-AND-ARBITRATION.pdf> [Accessed on 3/12/2015]; Chornenki BGA & Linton, H, 'Should Lawyers Be Recommending More Mediation-Arbitration? Is It Really Mandatory Mediation?' *The Lawyer's Weekly*, December, 2005.

<sup>39</sup> Bridge, C., 'Mediation and Arbitration - Are They Friends or Foes?' *Paper Prepared For Bani / Rodyk & Davidson Conference Shangri-La Hotel Jakarta*, 1 November 2012, p. 13. Available at <http://campbellbridge.com/wp-content/uploads/2012/12/MEDIATION-AND-ARBITRATION.pdf> [Accessed on 3/12/2015]; Chornenki BGA & Linton, H, 'Should Lawyers Be Recommending More Mediation-Arbitration? Is It Really Mandatory Mediation?' *The Lawyer's Weekly*, December, 2005.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Lieberman, A., 'MED-ARB: Is There Such a Thing?' *Attorney At Law Magazine*, (Greater Phoenix Edition), available at <http://www.attorneyatlawmagazine.com/phoenix/med-arb-is-there-such-a-thing/> [Accessed on 7/06/2018].

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opposition, would be used only in mediation and would be ignored in arbitration.<sup>43</sup> That way, parties may gain confidence in the process and chances of the parties readily accepting the outcome are enhanced.

There are those who still hold that the Mediation/Arbitration process can be an effective alternative dispute resolution method if parties, counsel, and neutrals alike understand the pros and cons of merging the two processes and the nuances inherently involved in the resultant combination.<sup>44</sup>

Parties should appreciate the challenges that are likely to arise in Med-Arb before settling for it. To facilitate this, the proposed Mediator-Arbitrator should be well trained in both mediation and arbitration. They should also be able to advise the parties accordingly on the consequences of taking up Med-Arb as the conflict management mechanism of choice.

### **2.5 Arb-Med**

Arb-Med<sup>45</sup> is where parties start with arbitration and thereafter opt to resolve the dispute through mediation. Arb-Med begins with the parties presenting their case to the neutral third-party arbitrator who renders a decision, which is not revealed, and then the parties commence a standard mediation facilitated by the same person.<sup>46</sup> If they are able to resolve their issues, the arbitration award is discarded. If the parties are unable to resolve the issue in mediation, the arbitration award is revealed and generally becomes binding.<sup>47</sup>

The same ethical issues of caucus communications and confidentiality, the parties' perception of impartiality of both the mediator and the arbitrator, and the tendency to have a more restrained mediation process because of inhibitions of the parties to be openly candid are also likely to arise in this process.<sup>48</sup> The arbitrator-mediator should, thus, be knowledgeable in

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<sup>43</sup> Ibid.

<sup>44</sup> Flake, RP, 'The Med / Arb Process : A View from the Neutral's Perspective,' *ADR Currents: The Newsletter of Dispute Resolution Law and Practice*, June, 1998, p. 1; See also Weisman, MC, 'Med/Arb-A Time And Cost Effective Hybrid For Dispute Resolution,' *Michigan Lawyer's Weekly*, October 10, 2011. Available at [http://www.wysr-law.com/files/med-arb\\_-\\_a\\_cost\\_effective\\_hybrid\\_for\\_dispute\\_resolution.pdf](http://www.wysr-law.com/files/med-arb_-_a_cost_effective_hybrid_for_dispute_resolution.pdf) [Accessed on 1/12/2015].

<sup>45</sup> See *Dispute Resolution Guidance* op. cit.

<sup>46</sup> Weisman, MC, 'Med/Arb-A Time and Cost-Effective Hybrid for Dispute Resolution,' *Michigan Lawyer's Weekly*, October 10, 2011, op cit, p. 2.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

both processes so as to effectively handle all arising ethical issues as well as delivering satisfactory outcomes.

## **2.6 Dispute Review Boards**

In other jurisdictions, and indeed across the world, scholars argue that the ubiquity of disputes on construction projects and the accompanying expense and disruption of litigation, led to the development of dispute review boards (DRBs) specifically for the challenges of large construction projects and have become the ADR of choice on substantial, high-profile work in the construction industry.<sup>49</sup> However, it must be pointed out that although the origins of DRB's are found in the construction industry, their ambit is far wider than construction and DRB's are now found in financial services industry, long-term concession projects, operational and maintenance contracts.<sup>50</sup> Dispute Boards are normally set up at the outset of a contract and remain in place throughout its duration to assist the parties, if they so desire, in resolving disagreements arising in the course of the contract and make recommendations or decisions regarding disputes referred to it by any of the parties.<sup>51</sup>

The key features of a Dispute Review Board (DRB) have been identified as follows:<sup>52</sup> the three members of the DRB are appointed for their extensive expertise in the type of project on which the DRB is established; the DRB members must not have conflicts of interest and must act as objective, neutral third parties under a Three Party Agreement with the Employer and Contractor; the DRB is appointed at the beginning of the project, visits the project on a periodic basis depending on the pace of construction, and is kept apprised of the project's progress between site visits; at the periodic site visits the DRB explores with the parties all open issues and urges the parties to resolve disputes that may otherwise eventually become formal claims. The DRB can also be asked to give non-binding, very informal "advisory opinions" on issues

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<sup>49</sup> McMillan, D.D., and Rubin, R.A., "Dispute Review Boards: Key Issues, Recent Case Law, and Standard Agreements," *Construction Lawyer*, Vol.25, no. 2 (2005), p.1.

<sup>50</sup> Chapman, P.H.J, "Dispute Boards," p.2, available at <http://fidic.org/sites/default/files/25%20Dispute%20Boards.pdf> [Accessed on 11/06/2018].

<sup>51</sup> Sourced from <http://www.buildingdisputestribunal.co.nz/DRBS.html>, accessed on 24/08/2011

<sup>52</sup> Dettman, K. and Christopher Miers, C., "Dispute Review Boards and Dispute Adjudication Boards: Comparison and Commentary," *Forum*, February 2012 (Special Edition Reprint), p. 1. Available at <https://www.scmmediation.org/wp-content/uploads/2013/09/DRBF-Forum-Kings-College-02-12-DRB-DAB-Reprint.pdf>.

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that have not become formal claims under the contract; the DRB hears claims as part of an informal hearing process where the parties themselves (as opposed to legal representatives) present their positions. The informal hearing process has none of the trappings of a legal process, such as a formal record, swearing of witnesses, or cross-examination; the DRB issues detailed non-binding findings and recommendations that analyze the parties' arguments, the contract documents, the project records, and the supporting information presented at the hearing.<sup>53</sup>

In addition to the foregoing, since the DRB's findings and recommendations are non-binding, the parties are free to accept them, reject them, or keep negotiating based on the parties' respective risk exposure, taking into account the DRB's analysis.<sup>54</sup> The DRB's findings and recommendations (but not other records) usually are also admissible in subsequent proceedings.<sup>55</sup> The technical competence of DRB members is considered as the one that enhances the credibility of their recommendations.<sup>56</sup>

The DRB is considered a hybrid form of ADR, which shares some attributes of adjudication as well as some traits of mediation.<sup>57</sup> Some authors have however opined that the significant difference between DRB's and most other ADR techniques (and possibly the reason why DRB's have had such success) is that the DRB is appointed at the commencement of a project and, by undertaking regular visits to site, is actively involved throughout construction. It becomes part of the project and thereby can influence, during the contract period, the performance of the contracting parties. It has 'real-time' value.<sup>58</sup>

It has been suggested that the expanding use of DRBs on major construction projects requires that construction lawyers become more familiar with the DRB process, standard DRB agreements, and the varied roles lawyers may play in the DRB process.<sup>59</sup>

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<sup>53</sup> Ibid, p.1.

<sup>54</sup> Ibid, p.1.

<sup>55</sup> Ibid, p.1.

<sup>56</sup> McMillan, D.D., and Rubin, R.A., "Dispute Review Boards: Key Issues, Recent Case Law, and Standard Agreements," op cit., p.1.

<sup>57</sup> McMillan, D.D., and Rubin, R.A., "Dispute Review Boards: Key Issues, Recent Case Law, and Standard Agreements," op cit., p.1.

<sup>58</sup> Chapman, P.H.J, "Dispute Boards," p.1, available at <http://fidic.org/sites/default/files/25%20Dispute%20Boards.pdf> [ Accessed on 11/06/2018].

<sup>59</sup> Ibid, p.1.

## **2.7 Early Neutral Evaluation**

Early Neutral Evaluation<sup>60</sup> is a private and non-binding technique where a third party neutral (often legally qualified) gives an opinion on the likely outcome at trial as a basis for settlement discussions.<sup>61</sup> The aim of a neutral evaluation is to test the strength of the legal points in the case. It can be particularly useful where the dispute turns on a point of law.

## **2.8 Expert Determination**

Expert Determination<sup>62</sup> is where the parties submit their dispute to an expert in the field of dispute for determination. The expert determinant gives his decision based on his expertise e.g., accountants valuing shares in a company, a jeweler assessing the carat content of a gold bracelet, etc.<sup>63</sup>

Expert Determination is defined as a process for settling disputes about facts (value of works done - satisfactory works and issue of certificates - including extensions of time – variations, amongst other technical issues.<sup>64</sup> Furthermore, Expert Determination may be contracted into before the event by the parties as a contractual mechanism for settling disputes about facts between the parties to a contract. Alternatively, the parties to a dispute about facts may refer that dispute to an expert for determination.<sup>65</sup> The crucial distinction between expert and judicial / quasi-judicial determination is believed to lie in the fact that the scope of the dispute is limited to questions of fact and does not extend to questions of law or involve mixed questions of law and fact.<sup>66</sup> Notably, after an expert has made a determination, the next step depends upon the procedure set out in the contract.<sup>67</sup>

It has been suggested that Expert Determination is potentially the cheapest and quickest form of Dispute Resolution particularly in technically complex areas. Consequently, there is

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<sup>60</sup> Fenn, P., “Introduction to Civil and Commercial Mediation”, op. cit, p. 15.

<sup>61</sup> Ibid.

<sup>62</sup> Fenn, P., “Introduction to Civil and Commercial Mediation”, op. cit, p. 16.

<sup>63</sup> Ibid.

<sup>64</sup> CHSpurin, “Expert Determination Q&A,” *ADR News: The NADR Quarterly News Letter*, Vol. 5 Issue No2, July 2005, p.1. Available at <http://www.nadr.co.uk/articles/published/construction/Expert%20determination%20CHS%202005.pdf> [ Accessed on 11/06/2018].

<sup>65</sup> Ibid. p1.

<sup>66</sup> Ibid, p.1.

<sup>67</sup> Ibid, p.1.

increasing interest in this Dispute Resolution method in high-tech areas or industries such as IT, pharmaceuticals, chemicals etc.<sup>68</sup> The coffee and tea industries also often rely on Expert Determination to address some disputes.

## **2.9 Mini Trial (Executive Tribunal)**

This is a voluntary non-binding process where the parties involved present their respective cases to a panel comprised of senior members of their organisation assisted by a neutral third party and has decision making powers.<sup>69</sup> After hearing presentations from both sides, the panel asks clarifying questions and then the facilitator assists the senior party representatives in their attempt to negotiate a settlement.<sup>70</sup>

## **2.10 Adjudication**

Adjudication is defined under the *CI Arb (K) Adjudication Rules* as the dispute settlement mechanism where an impartial, third-party neutral person known as adjudicator makes a fair, rapid and inexpensive decision on a given dispute arising under a construction contract.<sup>71</sup>

Adjudication is an informal process, operating under very tight time scales (the adjudicator is supposed to reach a decision usually within 28 days or the period stated in the contract)<sup>72</sup>, flexible and inexpensive process; which allows the power imbalance in relationships to be dealt with so that weaker sub-contractors have a clear route to deal with more powerful contractors. The decision of the adjudicator is binding unless the matter is referred to arbitration or litigation.<sup>73</sup>

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<sup>68</sup> Engineers Ireland, “Expert Determination,” available at <https://www.engineersireland.ie/EngineersIreland/media/SiteMedia/services/employment-services/Expert-Determination-Explained.pdf> [Accessed on 11/06/2018].

<sup>69</sup> Fenn, P., “Introduction to Civil and Commercial Mediation”, op. cit,p.16.

<sup>70</sup> Lowe, D., & Leiringer, R., (eds), *Commercial Management of Projects: Defining the Discipline*, (John Wiley & Sons, 2008), p. 239.

<sup>71</sup> The CI Arb (K) Adjudication Rules, Rule 2.1

<sup>72</sup> Ibid, Rule 23.1. Notably, FIDIC Rules provide for up to 84 working days within which the decision can be rendered. (See the International Federation of Consulting Engineers (FIDIC), *Conditions of Contract for Construction: for Building and Engineering Works Designed by the Employer and the Conditions of Contract for Plant and Design Build: For Electrical and Mechanical Plant, and For Building and Engineering Works, Designed by the Contractor, Appendices*).

<sup>73</sup> CI Arb (K) Adjudication Rules, Rule 29.

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It has been argued that adjudication must be distinguished from litigation, arbitration and mediation in that, unlike litigation, adjudication is not generally controlled by legislation or a common law regime, nor is it administered by the state. Decisions are not immediately binding.<sup>74</sup> Furthermore, unlike arbitration, adjudication is not generally undertaken under the protection and within the confines of an Arbitration Act or subject to international conventions. Also, unlike mediation, adjudicators are required to decide matters in accordance with contractual and legal frameworks.<sup>75</sup>

Adjudication is thus effective in construction disputes that need to be settled within some very strict time schedules. However, it may not be suitable to non-construction disputes; the choice of the adjudicator is also crucial as his decision is binding and it does not enhance relationships between the parties.

Notably, the International Federation of Consulting Engineers (FIDIC), *Conditions of Contract for Construction: for Building and Engineering Works Designed by the Employer* and the *Conditions of Contract for Plant and Design Build: For Electrical and Mechanical Plant, and For Building and Engineering Works, Designed by the Contractor*, also contemplate the use of adjudication in construction disputes and the procedure therein is widely used internationally, where parties incorporate a dispute adjudication agreement into their contract. Adjudication usually leads to arbitration, if parties are not satisfied with the decision.

### **2.11 Arbitration**

Arbitration in Kenya is governed by the Arbitration Act, 1995, the Arbitration Rules 1997, the Civil Procedure Act<sup>76</sup> and the Civil Procedure Rules 2010. It is also one of the ADR mechanisms contemplated under the Constitution of Kenya 2010<sup>77</sup>, which provides that in exercising judicial authority, the courts and tribunals should be guided by certain principles. One of these principles is that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional conflict resolution mechanisms should be promoted,

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<sup>74</sup> Chapman, P.H.J, "Dispute Boards," op cit. p.1.

<sup>75</sup> Chapman, P.H.J, "Dispute Boards," op cit., p.1.

<sup>76</sup> Cap 21, Laws of Kenya; Section 59 of the Civil Procedure Act provides that all references to arbitration by an order in a suit, and all proceedings thereunder, shall be governed in such manner as may be prescribed by rules.

<sup>77</sup> Order 46 of the Civil Procedure Rules, inter alia, provides that at any time before judgment is pronounced, interested parties in a suit who are not under any disability may apply to the court for an order of reference wherever there is a difference.



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provided that they do not contravene the Bill of Rights, they are not repugnant to justice and morality or results to outcomes that are repugnant to justice or morality and if they are not inconsistent with the constitution or any written law.<sup>78</sup> Arbitration arises where a third party neutral is appointed by the parties or an appointing authority to determine the dispute and give a final and binding award. The Arbitration Act, 1995 defines arbitration to mean “any arbitration whether or not administered by a permanent arbitral institution.” This is not very elaborate and regard has to be had to other sources. According to Khan<sup>79</sup>, arbitration is a private consensual process where parties in dispute agree to present their grievances to a third party for resolution. It is an adversarial process and in many ways resembles litigation.

Its advantages are that parties can agree on arbitrator to determine the matter; the arbitrator has expertise in the area of dispute; any person can represent a party in the dispute; flexibility; cost-effective; confidential; speedy and the result is binding. Proceedings in Court are open to the public, whereas proceedings in commercial arbitration are private, accordingly the parties who wish to preserve their commercial secrets may prefer commercial arbitration.

### **2.12 Litigation**

This is an adversarial process where parties take their claims to a court of law adjudicated upon by a judge or a magistrate. The judge/ magistrate gives a judgment which is binding on the parties subject to rights of appeal. The judicial authority in Kenya is exercised by the courts and tribunals.<sup>80</sup>

In litigation, the parties to the dispute have minimum or no control at all over the forum, the process and outcome of the process and as such the outcome may not satisfy both parties. Litigation has its advantages in that precedent is created and issues of law are interpreted.<sup>81</sup> It is also useful where the contract between the parties does not stipulate a consensual process and the parties cannot agree on one, the only alternative is litigation. Through litigation, it is possible to

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<sup>78</sup> Article 159 (2) (c) of the Constitution of Kenya, (*Government Printer*, Nairobi, 2010).

<sup>79</sup> Khan, F., *Alternative Dispute Resolution*, A paper presented Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.

<sup>80</sup> See Article 159 of the Constitution of Kenya, *Government Printer*, Nairobi.

<sup>81</sup> See the argument by Calkins, R.M., ‘Mediation: A Revolutionary Process That is Replacing the American Judicial System,’ *Cardoza Journal of Conflict Resolution*, Vol. 13, No. 1, 2011; cf. Ray, B., ‘Extending The Shadow Of The Law: Using Hybrid Mechanisms To Develop Constitutional Norms In Socioeconomic Rights Cases,’ *Utah Law Review*, No. 3, 2009, pp. 797-843, p. 799.

bring an unwilling party into the process and the result of the process be enforceable without further agreement.<sup>82</sup>

### **2.13 Ombudsman (Ombudsperson)**

An Ombudsman (Ombudsperson) is an organizationally designated person who confidentially receives, investigates, and facilitates resolution of complaints.<sup>83</sup> The ombudsman may interview parties, review files, and make recommendations to the disputants, but normally is not empowered to impose solutions. Ombudsmen often work as management advisors to identify and recommend solutions for systemic problems in addition to their focus on disputes from individual complainants.

### **2.14 Conflict Avoidance**

It has been suggested<sup>84</sup> that due to the expense and disruption caused to any contract when a dispute arises and the damage to the relationship of the parties the importance of dispute avoidance techniques cannot be over-emphasized. Conflict avoidance in the construction industry can take various dimensions:

1. Firstly, the contractual parties must ensure a clear wording in the contract that reflects the intention of the parties. The wording of the contract should include provision for the appropriate dispute resolution techniques to be applied in the event of a dispute arising, with suitable arrangements for escalation.<sup>85</sup>
2. Secondly, once the contract is in place good contract management is essential. Contract management techniques should include monitoring for the early detection of any problems where parties should give at the earliest possible warnings of any potential

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<sup>82</sup> See generally, *Dispute Resolution Guidance*, available at [http://www.ogc.gov.uk/documents/dispute\\_resolution.pdf](http://www.ogc.gov.uk/documents/dispute_resolution.pdf), [Accessed on 05/01/2012].

<sup>83</sup> For instance, see Commission on Administrative Justice (CAJ) also known as the Office of the Ombudsman is a Constitutional Commission established under Article 59 (4) and Chapter Fifteen of the Constitution, and the Commission on Administrative Justice Act, No. 23 of 2011, Laws of Kenya. The Commission has a mandate, inter-alia, to investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. (Website: <http://www.ombudsman.go.ke/ombudsman/about-us-page/> ).

<sup>84</sup> See *Dispute Resolution Guidance* op. cit.

<sup>85</sup> Ibid.

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dispute and regular discussions between parties including reviews of possible areas of conflict.<sup>86</sup> This may include meetings to resolve issues such as change orders, extension of time to contractors and assessment of liquidated damages payable.

3. Thirdly, when a contract is initially established the parties should bear in mind how the expiry of the contract is to be managed (especially if there is a need for ongoing service delivery, not necessarily by the contractor) should be borne in mind and reflected in the contract.<sup>87</sup>

Whenever a dispute arises it is important to manage it actively and positively and at the right level in order to encourage early and effective settlement. There are various techniques that can be used either consciously or end product to avoid disputes. According to Fenn<sup>88</sup> these techniques include: risk management to ensure that risks are identified, analyzed and managed; procurement strategies to ensure that risks are appropriately allocated and contractual arrangements to allow sensible administration.

### **3. Dispute Settlement Clauses in Standard Form Contracts**

Clause 20.4 of the FIDIC Conditions of Contract for Construction<sup>89</sup> provides that if a dispute arises either party may refer it to a Dispute Adjudication Board (DAB), amicable settlement and arbitration as the dispute settlement avenues. This clause envisages a dispute of any kind whatsoever arising in connection with or arising out of the contract or the execution of the works, any dispute as to any certificate, determination, instruction, opinion or valuation of the engineer. Notably, the DAB is required to render its decision within 84 days of receiving such a reference.<sup>90</sup>

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<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

<sup>88</sup> Fenn, P., "Introduction to Civil and Commercial Mediation", op. cit, p.14.

<sup>89</sup> The International Federation of Consulting Engineers (FIDIC) *Conditions of Contract for Construction: for Building and Engineering Works Designed by the Employer* (First Edition, 1999, FIDIC).

<sup>90</sup> The International Federation of Consulting Engineers (FIDIC), *Conditions of Contract for Construction: for Building and Engineering Works Designed by the Employer*, Clause 20.4; See also The International Federation of Consulting Engineers (FIDIC), *Conditions of Contract for Plant and Design Build: For Electrical and Mechanical*

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A party dissatisfied by the decision of the Dispute Adjudication Board should first resort to amicable settlement before the commencement of arbitration.<sup>91</sup> In other jurisdictions, courts have supported Board decisions through upholding the outcomes when challenged in court. For instance, in *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation [2015] SGCA 30*, the Singapore Court of Appeal held that parties under a contract containing the Red Book's dispute resolution provision (clause 20.4) must comply with any decision by a dispute adjudication board in a prompt manner, even if the merits of the dispute have not been determined.<sup>92</sup>

The *Agreement and Conditions of Contract for Building Works*<sup>93</sup> provides that in the event of a dispute between the Employer or the Architect on his behalf and the contractor, either during the progress or after the completion or abandonment of the Works, the dispute shall be referred to an arbitrator agreed upon by the parties. Where the parties fail to concur on the appointment of the Arbitrator, the Arbitrator shall be appointed by the Chairman or Vice Chairman of The Architectural Association of Kenya or by the Chairman or Vice Chairman of The Chartered Institute of Arbitrators, Kenya Branch, on the request of the applying party. The clause further provides that the arbitral proceedings shall not commence unless an attempt has been made to settle the dispute amicably. Moreover, the award of the arbitrator is final and binding upon the parties<sup>94</sup> and thus an aggrieved party has no further recourse.

The dispute settlement clause under the Kenya Association of Building and Civil Engineering Contractors, Agreement and Conditions of Sub-Contract for Building Works, 2002 provides for similar avenues in the event of a dispute between the contractor and the sub-contractor. A model dispute resolution clause should include all avenues i.e. negotiations in good

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*Plant, and For Building and Engineering Works, Designed by the Contractor*, (First Edition, 1999, FIDIC), Clause 20.4.

<sup>91</sup> The International Federation of Consulting Engineers (FIDIC) *Conditions of Contract for Construction*, Clause 20.5.

<sup>92</sup> [Cia Ai Eng, Henry Winter and Stephanie Khan](https://www.hlarbitrationlaw.com/2015/06/singapore-court-of-appeal-upholds-obligation-to-promptly-comply-with-dispute-adjudication-board-decisions/), "Singapore Court of Appeal upholds obligation to promptly comply with dispute adjudication board decisions," June 10, 2015. Available at <https://www.hlarbitrationlaw.com/2015/06/singapore-court-of-appeal-upholds-obligation-to-promptly-comply-with-dispute-adjudication-board-decisions/> [ Accessed on 8/6/2018].

<sup>93</sup> The Joint Building Council, *Agreement and Conditions of Contract for Building Works*, 1999 Edition.

<sup>94</sup> *Ibid*, Clause 45.10.

faith, mediation, adjudication, arbitration and litigation, within time frames on when each mechanism is to be tried to facilitate timely project implementation and delivery.

Notably, the main difference between a DRB and DAB is that if the decisions are non-binding and merely advisory, this is generally referred to as a dispute review board (DRB). In contrast, if the decisions are agreed to have binding effect between the parties, this is known as a dispute adjudication board or DAB. In the 1999 "rainbow suite" of FIDIC contracts, FIDIC opted to use the DAB form—accordingly, due to the widespread use of FIDIC forms internationally, this has become the dominant form.<sup>95</sup>

#### **4. Challenges Facing the Conflict Management Framework in Kenya**

There are various challenges facing the conflict management framework in Kenya. The mediation process has been criticised as being indefinite, time consuming and does not encourage expediency.<sup>96</sup> This is a big challenge in project implementation and delivery owing to the fact that projects are time bound and thus require a speedy, efficient and cost effective dispute resolution mechanism. Kenya does not as yet have a comprehensive and integrated policy framework to govern the application of ADR mechanisms in the resolution of disputes.

Kenya does not also have an Act dealing with Construction Adjudication and parties rely on the Construction Adjudication Rules framed by the Chartered Institute of Arbitrators and other professional bodies. There is need to expand the scope of the Civil Procedure Act and entrench adjudication as a means of dispute resolution. There is also need for a constitutional provision on court ordered adjudication to avoid a situation where attempts to order adjudication by court are thwarted by constitutional references. These Adjudication Rules provide for the basic procedure for adjudication and for adjudication to be applicable, the subject construction contract must have an adjudication clause.<sup>97</sup> This is because at present, adjudication cannot be

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<sup>95</sup> Goodrich, M., "Dispute Adjudication Boards: Are they the future of dispute resolution?" 2 September 2016, available at <https://www.whitecase.com/publications/article/dispute-adjudication-boards-are-they-future-dispute-resolution> [Accessed on 11/06/2018].

<sup>96</sup> Murithi, T. & Ives, P.M., Under the Acacia: Mediation and the dilemma of inclusion, *Centre for Humanitarian Dialogue*, April 2007, p. 77.

<sup>97</sup> See generally, Muigua, K., Adjudication Procedure: The Housing Grants, Construction and Regeneration Act, 1996 of the U.K: It's Development and Lessons for Kenya, A Paper presented at Nairobi Club on 23<sup>rd</sup> September, 2008.

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imposed by the law even where the contract in question is ideal for it. In any case, given that adjudication is not legislated for in Kenya, there is no provision for stay of proceedings for parties to undertake adjudication as provided for in the case of arbitration under the Arbitration Act 1995. Rule 29 of the CIArb Adjudication Rules makes it feasible to refer the matter to arbitration or litigation. The effect is that whether or not a dispute will be referred to adjudication in Kenya presently depends on the parties' willingness to participate in the process. This reality has hindered the application and attainment of full potential of adjudication as a mechanism for dispute resolution in Kenya.<sup>98</sup>

Arbitration, as practiced in Kenya, is increasingly becoming more formal and cumbersome as lawyers enter the practice of arbitration applying delay tactics and importation of complex legal arguments and procedures into the arbitral process.<sup>99</sup> The Civil Procedure Act does not help matters as it leaves much leeway for parties bent on frustrating the arbitral process to make numerous applications in court. It is hardly feasible to describe arbitration in Kenya as an expeditious and cost effective process which can be used in settling disputes arising out of the construction contracts where project implementation and delivery is at the heart of the contract. In essence arbitration is really a court process since once it is over an award has to be filed in court and thus the shortcomings of the court system apply to the arbitration process.

Litigation in Kenya is characterized with many problems related to access to justice for instance high court fees, geographical location, complexity of rules and procedure and the use of legalese. The court's role is also 'dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves.'<sup>100</sup> As a result litigation may take several years before settlement of disputes hence hampering the effective implementation and delivery of projects which are justice in environmental issues to be inaccessible to many people. This is due to the formality and resource limitations placed on the legal system by competing fiscal constraints and public demands for justice, litigation is so slow and too expensive and it has largely lost commercial and practical credibility necessary in project implementation.

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<sup>98</sup> Ibid.

<sup>99</sup> See Muigua, K., "Overview of Arbitration and Mediation in Kenya"; A Paper Presented at a Stakeholder's Forum on Establishment of Alternative Dispute Resolution (ADR) Mechanisms for Labour Relations In Kenya, held at the Kenyatta International Conference Centre, Nairobi, on 4th – 6th May, 2011.

<sup>100</sup>Ojwang, J.B., "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), p. 29.

## **5. Opportunities Offered by Various Dispute Settlement Mechanisms in Project Management**

### **5.1 Negotiation**

Negotiation can be, and usually is, the most efficient form of conflict resolution in terms of time management, costs and preservation of relationships. It should be seen as the preferred route in most disputes arising out of construction contracts owing to the fact projects are time bound and thus need timely implementation and delivery. It prides itself on speed, cost saving, confidentiality, preservation of relationships, range of possible solutions and control over the process and outcome which attributes are vital in ensuring the expeditious handling of disputes and the overall management and implementation of the project. Moreover, even if parties are unable to achieve a settlement through negotiation, it will still be possible or may be necessary to continue negotiating as part of or alongside other forms of dispute resolution.<sup>101</sup>

### **5.2 Mediation**

Mediation should be seen as the preferred conflict resolution route when conventional negotiation has failed or is making slow progress.<sup>102</sup> It is a cost effective, flexible, speedy, confidential process that allows for creative solutions, fosters relationships, enhances party control and allows for personal empowerment and hence suitable in settling disputes to ensure effective project management and implementation. Mediation is particularly useful in projects because of the need to preserve the ongoing relationship between the parties and enhance communication.<sup>103</sup>

### **5.3 Adjudication**

Adjudication is an informal process, operating under very tight time scales, flexible, fast and inexpensive process; which allows the power imbalance in relationships to be dealt with so that

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<sup>101</sup> See *Dispute Resolution Guidance* op. cit.

<sup>102</sup> Ibid.

<sup>103</sup> Sourced from < <http://www.buildingdisputestribunal.co.nz/.html>> accessed on 24/08/2011.

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weaker sub-contractors have a clear route to deal with more powerful contractors. The adjudicator is supposed to reach a decision within 28 days or the period stated in the contract.<sup>104</sup> To guarantee impartiality and neutrality of the adjudicator, the Rules provide that s/he must not be involved in implementation or administration of the contract under which the dispute arises; be knowledgeable and experienced in the matter in dispute, preferably a construction expert and be well versed in dispute resolution procedures.<sup>105</sup> The CI Arb Adjudication Rules provide for procedural fairness, natural justice, courts procedures, jurisdiction of the arbitrators, definition of construction adjudication, scope of the adjudicators powers, timeframe and extension of time, enforcement of adjudication awards, stay of court proceedings pending adjudication, appointment of adjudicators, misconduct of adjudicators and other ethical issues, adjudication fees per scale or as agreed by the parties, recognition of adjudication awards, correction of slips or errors, points of law, extent of court intervention, failure to adjudicate and adjudication agreement.<sup>106</sup> Since adjudication is flexible, fast, expeditious, cost effective and informal, it may be the way to go if effective project implementation and delivery is to be realized in the construction and building industry in Kenya.

### **5.4 Early Neutral Evaluation**

Although settlement is not the primary objective, the purpose of early neutral evaluation is to promote settlement discussions at an early stage in the litigation process, or at the very least to assist parties avoid the significant time and expense associated with further steps in litigation of the dispute.<sup>107</sup> The opinion can then be used as a basis for settlement or for further negotiation. It would save time and costs that would be expended in dispute settlement and hence effective project implementation and delivery.

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<sup>104</sup> Adjudication Rules, Rule 23.1.

<sup>105</sup> See Muigua, K., "Adjudication Procedure: The Housing Grants, Construction and Regeneration Act, 1996 of the U.K: its Development and Lessons for Kenya," op. cit.

<sup>106</sup> Muigua, K., "Adjudication Procedure: The Housing Grants, Construction and Regeneration Act, 1996 of the U.K: Its Development and Lessons for Kenya," op. cit.

<sup>107</sup> Building Disputes Tribunal, New Zealand<<http://www.buildingdisputestribunal.co.nz/.html>>accessed on 24/08/2011.



### **5.5 Expert determination**

This is a fast, informal and cost efficient technique which is applicable where there are disputes of a technical nature for example between the contractor and the architect or employer. It has become a popular method of resolving disputes in the building and construction industry involving qualitative or quantitative issues, or issues that are of a specific technical nature or specialized kind, because it is generally quick, inexpensive, informal and confidential. Expert determination is an attractive method of resolving disputes in building and construction contracts as it offers a binding determination without involving the formalities and technicalities associated with litigation and arbitration; and at the same time it assists in preserving relationships where litigation would not<sup>108</sup>. Expert determination can be used in disputes related to; measure and value claims; variation claims; value of additional building and civil works; the standard of work completed i.e. concrete finishes, stopping, painting and specialist finishes, flooring, tiling, waterproofing; extension of time claims; delay and disruption claims, amongst others.

### **5.6 Arbitration**

Even though closely related to litigation, there are certain salient features of arbitration which make it an important and attractive alternative to litigation. In arbitration the parties have autonomy over the choice of the arbitrator, place and time of hearing, and as far as they can agree, autonomy over the arbitration process which may be varied to suit the nature and complexity of the dispute.<sup>109</sup>

### **5.7 Litigation**

Where the contract between the parties does not stipulate for a consensual process and the parties cannot agree on one, the only alternative is litigation. Through litigation it is possible to bring an unwilling party into the process and the result of the process is enforceable without further agreement.<sup>110</sup> The constitution postulates that the courts and tribunals should do justice to all

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<sup>108</sup> Ibid.

<sup>109</sup> Ibid

<sup>110</sup> See *Dispute Resolution Guidance* op. cit.

irrespective of status; justice should not be delayed; alternative forms of dispute resolution should be promoted and justice should be administered without undue regard to procedural technicalities.<sup>111</sup> With a significantly reforming judiciary, litigation may become an efficacious process once again and parties to a contract may resort to it. Litigation should not be entirely condemned as it comes in handy for instance where an expeditious remedy in the form of an injunction is necessary.

## **6. Recommendations and Way Forward**

Projects are time bound thus the conflict resolution procedure selected should be one that can manage conflicts in an expeditious, transparent, impartial, objective and constructive manner within the projected timelines. The mechanism should be easily accessible by the contractual parties from project planning, implementation and completion and where possible the mechanism should not interfere with the progress of the project. This is the need for early dispute settlement and application of dispute avoidance techniques in project implementation. It should be predictable allowing actions taken in response to complaints to be efficiently monitored and timely reported to the disputants. The following recommendations are essential in settling disputes in project management:

### **6.1 Constructing a Dispute Resolution Clause**

It has been said that the inclusion of an alternative dispute resolution clauses in a contract allows the settlement process to begin at an early stage and obviates the frequent problem of persuading the other party to the dispute to engage in an ADR process thus saving on time. A model dispute resolution clause should include all avenues i.e. negotiations in good faith, mediation, adjudication, arbitration and litigation. Such a dispute resolution clause should provide timelines within which each mechanism is to be tried so as to avoid a scenario whereby the projected timeframes for completion are jeopardized.

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<sup>111</sup> See Article 159 (2) of the Constitution of Kenya 2010, Government Printer, Nairobi.

## **6.2 Improving the Policy, Legal and Institutional Framework for Managing Conflicts in Project Management**

There is a need to restore speed, flexibility and public confidence in the existing policy, legal and institutional mechanisms. The legal system has been criticized for being too slow and expensive and has thus lost commercial and practical credibility necessary in project implementation. The flexibility, speed and cost effectiveness of ADR techniques such as negotiation, mediation and adjudication is what can lead to expeditious settlement of disputes in projects and thus these mechanisms need formal incorporation in the legal system. Kenya does not yet have an Act dealing with Construction Adjudication and parties rely on the Construction Adjudication Rules framed by the Chartered Institute of Arbitrators. An Adjudication Bill should be introduced in parliament to provide the legal framework for the application of adjudication in construction contracts in Kenya. There is a need to have a comprehensive and integrated framework providing for mediation in Kenya in the resolution of disputes as mediation has been linked to the court process and hence subject to the shortcomings of litigation.

## **6.3 Working as a Team to Achieve Project Goals**

Need for transparency and open communication through continuous dialogue and focused site meetings between the contractors and the employers; sub-contractors and contractors, amongst others, to facilitate early dispute resolution and avoidance of disputes.

## **6.4 Need for Conflict Avoidance**

It is important to manage disputes actively and positively and at the right level in order to encourage early and effective settlement. Good risk management techniques to ensure that risks are identified analyzed and managed; procurement strategies to ensure that risks are appropriately allocated and contractual arrangements to allow sensible administration should be in the party's contemplation while contracting. Such techniques may include Strategic Impact Assessments and Environmental and Social Impact Assessments before the projects are undertaken and regular audits in the course of the projects.

### **6.5 Use of Scientific Technology for Certainty**

This may involve coming up with a critical path analysis of the project and represent this in gant charts. A critical path is a project-management technique that lays out all the activities needed to complete a task, the time it will take to complete each activity and the relationships between the activities. A critical path analysis can help predict whether a project can be completed on time and can be used to reorganize the project both before starting it, and as it progresses, to keep the project's completion on track and ensure that deliverables are ready on time.<sup>112</sup> A critical path can thus be useful in handling disputes as it takes into the account the eventualities that may arise in the course of the contractual performance.

### **7. Conclusion**

There is a need to have an efficacious conflict management mechanism in the course of projects in order to ensure effective project implementation and delivery. It is not possible to achieve efficient implementation in the face of unresolved disputes. There is a need to put in place mechanisms for effective management of conflicts. Kenya will benefit from a policy, legal and institutional framework that is flexible, speedy, cost effective, and efficacious to ensure that conflicts arising out of projects are disposed expeditiously. Since conflicts consume a lot of time, are expensive and may destroy the relationship of parties, the need of an effective mechanism is crucial.

Dealing with conflicts in project management cannot be wished away. It is an exercise that should be conceptualised and actuated throughout a project and even afterwards.

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<sup>112</sup> *Definition of Critical Path Analysis*. (2011). Retrieved from

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