

UNIVERSITY OF NAIROBI
COLLEGE OF HUMANITIES AND SOCIAL SCIENCES
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**THE ROLE OF KENYAN COURTS IN ARBITRATION,
ENABLING OR CONSTRAINING?**

BY

CLAIRE MWANGI

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SUPERVISOR: MS. FAITH MONY

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DECLARATION

This research paper is my original work and has not been submitted elsewhere for examination, award of a degree or publication. Any material, scholarly works and writing not being my own which has been relied on, the same has been properly acknowledged and referenced accordingly.

NAME: CLAIRE MWANGI

DATE:

SIGNATURE:

This thesis has been submitted for examination with my approval as the University Supervisor.

NAME: MS. FAITH MONY

DATE:

SIGNATURE:

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To God-for being so kind as to favour me with an opportunity to advance my studies and undertake this Master of Laws degree program.

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I dedicate this project to my family, for standing by and with me, throughout my entire study.

ABSTRACT

Even as arbitration becomes popular, it is imperative to have the same examined with a view to identifying and addressing concerns that would otherwise impede its growth. That way, access to justice that is expeditious is achieved, which in turn leads to growth of the Kenyan justice system. This paper raises significant questions as to the place of courts in arbitration in Kenya, highlighting some of the strengths and weaknesses that can be seen in our jurisprudence. The main aim of this research is to develop a clear cut dividing line as to the relationship between courts and arbitral tribunals. This study seeks to establish that any challenges highlighted in the arbitral-judiciary process that would strain this relationship are, to a great extent surmountable and ought to be embraced by all concerned.

Arbitration in Kenya has tremendously grown, and this can be attributed to the fact that there has been more awareness by parties entering into it, and professionals who have been trained to become competent arbitrators. This study seeks to critically analyze the role that the advocates, the arbitrators and courts play in the arbitral process. The paper will study in great detail, the procedure from the commencement of arbitration, to the delivery of the award, the consequences thereof and the enforcement that usually follows where there is a recalcitrant party. This study will then make a comparative analysis with the arbitration procedure in England. With this comparison, this paper will seek to fill the gaps that exist in the arbitral process in Kenya, and thereafter give a host of key findings and recommendations.

CHAPTER ONE

1.0. INTRODUCTION

Arbitration in Kenya is governed by the **Arbitration Act** (hereinafter “the Arbitration Act”),¹ the **Civil Procedure Act**² and the rules thereto. The Arbitration Act was assented on 10th August, 1995 and came into force on 2nd January, 1996. It repealed Chapter 49 Laws of Kenya, which had governed arbitration matters since 1968. The Arbitration Act is based on the United Nations Commission on International Trade Law (UNCITRAL) model Law on International Commercial Arbitration (“the Model Law”). It was adopted on 21st June 1985.³ The signatory states amended their arbitration acts to ensure conformity with this Model Law, which at Article 5 delimits the intervention of courts in arbitral matters. Article 5 by itself does not take a stand on what is the appropriate role of the courts but guarantees that all instances of possible court intervention are defined in this Law, except for matters not regulated by it (for instance, consolidation of arbitral proceedings, contractual relationship between arbitrators and parties or arbitral institutions, or fixing of costs and fees, including deposits).⁴ As will be discussed in this paper, courts have interpreted article 5 of the Model Law (or enactments thereof) which mirrors section 10 of the Arbitration Act, to limit courts’ intervention but not to limit the support that courts can provide to arbitral tribunals.

Kenya is also governed by the arbitration rules. In exercise of the powers under section 40 of the Arbitration Act, the arbitration rules 1997 were made on 6th May 1997 and have recently been replaced by the Arbitration Rules, 2012. Article 159 of the Constitution of Kenya, 2010 (hereinafter ‘the Constitution’) also states that the courts and tribunals in exercising judicial authority, shall be guided by alternative forms of dispute resolution including *inter alia*, arbitration. By dint of the Constitution⁵, the general rules of international law form part of the law of Kenya and any treaty or convention ratified by Kenya also forms part of the law of Kenya.⁶ To this end, the New York Convention⁷ also applies in regard to the enforcement of international arbitration awards.⁸

¹ No. 4 of 1995.

² Cap 21 Laws of Kenya.

³ http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf accessed 30th January, 2015.

⁴ ‘UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration’ <http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf> accessed 27th February, 2016.

⁵ Article 2(5).

⁶ Ibid 2(6).

⁷ The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention). Adopted on 10th June 1958, and entered into force on 7th June, 1959.

⁸ Section 36 (2) of the Arbitration Act provides thus; ‘An international arbitration award shall be recognized as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.

By dint of the Nairobi Centre for International Arbitration Act⁹ the Nairobi Centre for International Arbitration (NCIA) was established whose functions *inter alia* to promote international commercial arbitration and facilitate adhoc arbitrations.¹⁰ NCIA has been discharging some of its functions under section 5 of its act such as the development of rules encompassing conciliation and mediation processes.¹¹

The above are the laws that inform the law and procedure of arbitration in Kenya. Despite the laws stipulated above that govern arbitration, the involvement of the court is at the crux of a successful arbitration reference. This paper from the outset, appreciates that the role of courts in arbitration generally is inevitable. It also appreciates that the courts ought to be, at all material times, alive to the spirit and the law governing arbitration in Kenya, and most importantly, that arbitration is not an appendage to litigation. This paper is birthed out of a growing concern as to whether or not arbitration is necessary, owing to the court's role which does not encourage arbitration,¹² and what can be done to reverse this sorry trend.

This paper proceeds to examine the way the courts have handled applications in arbitration matters once they have been referred to court. This paper will establish the court's role by analyzing various case law in Kenya and establishing whether the court is supportive of arbitration, whether it undermines the arbitration process and arbitrators in general, and ultimately, whether court intervention is a friend or foe to the expeditious and fair determination of arbitral matters. In seeing to the just and expeditious determination of arbitral matters, this paper will examine whether the courts have dismissed arbitral matters for want of form or on a technicality, whether arbitral matters are prioritized when filed in court, and whether there are fixed timelines on compliance with court directions on arbitration matters. Essentially, whether the advantages of arbitration are still evident when an application thereof is filed in court. Such, among others issues, will be discussed in this paper in respect to the conduct of applications in arbitral matters when filed in court.

1.1. STATEMENT OF THE PROBLEM

It is said that without the support of the court, arbitral proceedings may falter or be ineffective.¹³ Seeing that the role of the courts is vital, this paper seeks to examine whether this role as pertains the Kenyan courts, is being exercised judiciously for justice to be done and to be seen as done. Whereas the focus of this paper is to principally examine the court's role in arbitration, and to consider whether its intervention in arbitration is appropriate, the part played by Advocates in

⁹ No.26 of 2013.

¹⁰ Ibid 5.

¹¹ See Nairobi Centre for International Arbitration (Arbitration) Rules, 2015, Legal Notice No.255 of 2015; Nairobi Centre for International Arbitration (Mediation) Rules, 2015, Legal Notice No. 253 of 2015.

¹² Kariuki Muigua 'Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending and After Arbitration in Kenya' (2010) at p.2 < <http://kenyalaw.org/kl/index.php?id=1923>> accessed 9th December, 2015.

¹³ D.J Sutton, J.Kendall & J. Gill, *Russel on Arbitration* (21st Edition, Sweet & Maxwell 1997) para 7-001.

enhancing this role cannot be downplayed. Commentators and practitioners traditionally have argued for curtailing court involvement in International Arbitration proceedings to protect the independence and integrity of those proceedings and, thus, make arbitration more attractive.¹⁴ This limited scope of court's intervention has also been adopted in Kenya vide its Arbitration Act.

A hearing dealt with by an arbitral tribunal alone allows the natural process of arbitration to flow, and tends to be more efficient.¹⁵ The neutrality of the process, as the prime reason for choosing arbitration over litigation, may suffer if the involvement of the local court becomes overarching.¹⁶ In addition, the confidentiality of a case is more subject to public scrutiny with continued referral to the courts and flexibility, informality, control, and procedural predictability all start to disintegrate with too much court interference.¹⁷ Court involvement should therefore not be the trigger to long winding arbitration proceedings, but should be a tool that firmly anchors the integrity of arbitration proceedings through its support thereof.

Various instruments recognize the place of courts in arbitration albeit with limitations e.g. article 5 of the Model Law provides as follows; 'In matters governed by this Law, no court shall intervene except where so provided in this Law.'¹⁸ Section 44 of the English Arbitration Act, 1996 provides that the court would only act on applications made by a party to it to the extent that the arbitral tribunal has no power or is unable for the time being to act effectively. This nature of court intervention has the major advantage of granting the arbitral process greater autonomy and guaranteeing its integrity to the fullest.

In Kenya, the extent of the court's intervention is embodied in section 10 of the Arbitration Act that stipulates thus; 'Except as provided in this Act, no court shall intervene in matters governed by this Act.' Whereas the court's intervention in arbitration matters is necessary, the procedure relating to this intervention is nothing but unfriendly. Dr. Kariuki Muigua observes that;¹⁹ 'the procedure relating to application to court for interventions is very strict as to afford lawyers intending to delay arbitration proceedings room for maneuvers. The procedure ought to be relaxed to ensure that it secures justice for the opposing party without being tyrannical and prone to abuse.' Applications under the Arbitration Act for example, should not be dismissed for want of form and this should be expressly stipulated in the Arbitration Act. Instead, applications ought to be entertained and heard

¹⁴ Charles C. Correll, jr. and Ryan J. Szczepanik, 'No Arbitration is an island: The role of courts in aid of international arbitration' (2012) volume 6, No. 3 World Arbitration and Mediation Review at p. 555 http://www.kslaw.com/imageserver/KSPublic/library/publication/2013articles/1-13World_Arbitration_Mediation_Review_CorrellSzczepanik.pdf accessed 30th January, 2015.

¹⁵ Ashraf El Motei, 'Local Court Intervention in International Arbitration' (2009) <http://www.motei.com/local-court-intervention-in-international-arbitration> accessed 27th February, 2016.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Article 5, UNICTRAL Model Law on International Commercial Arbitration, United Nations Document A/40/17, Annex 1 as adopted by the United Nations Commission on International Trade Law on 21st June, 1985.

¹⁹ Dr. Kariuki Muigua, FCIarb, Ph.D, *Settling disputes through Arbitration in Kenya* (2nd Ed, Glenwood Publishers Limited 2012) 190-191.

on their merit so as to ensure justice and fairness to the parties and to avoid delays in arbitration. There is also need for the law to be amended to provide that arbitration related applications be heard on a priority basis.

Despite the fact that Arbitration is recognized as being a more expedient method of dispute resolution, the mechanism in place at the High Court does not reflect such an understanding for arbitral matters. For starters, arbitral matters are usually not heard on a priority basis and follow the usual channels of dispute resolution as other commercial matters. They are not given a priority in regards to prosecution thereof, which acts to impede the prompt determination of the matter. If only arbitral matters had a label that depicted their importance or were at all times treated like certificates of urgency, then probably there would be little or no backlog relating to arbitration disputes.

The upshot of the foregoing is that even though the courts play a vital role in arbitration proceedings, this role has sometimes been abused by *inter alia*:-

- a) Advocates who abuse court intervention to clog the arbitration process. This is evidenced by the frequent adjournments sought by Advocates whenever a matter is scheduled for hearing, without the court exercising its firm hand to curtail the same. In premise, a simple application ends up lasting inordinately long in court;
- b) Courts striking out applications in arbitration matters for want of form or on mere technicalities. See the case of *Kundan Singh Construction Limited v Kenya Ports Authority (infra)*, where an application for recognition and enforcement of an arbitral award was struck out as the annexed arbitral award was not the original or a duly certified copy thereof. This was not a fundamental omission and the much that the court would have done is to order for the production of the original or a duly certified copy and decide the application on its merits. The Kenyan scenario is not an isolated one, Section 1 (c) of the English Arbitration Act was included as a response to international criticism that the courts of England and Wales were too interventionist in the arbitral process.²⁰ The section provides; ‘in matters governed by this Part the court should not intervene except as provided by this Part.’
- c) The system in place at our registries does little to help as well. Even though judges may understand the need to fast track arbitration hearings, the judiciary clerks at the registry have not been sensitized to be of the same understanding. The resultant effect being that near court dates are not given where these matters are concerned;
- d) There is a huge backlog of cases owing to the few judges at the Commercial and Admiralty division. In the Milimani law courts in Nairobi for example, there are only five judges sitting at the commercial division. There is therefore a very low possibility that a judge, however

²⁰ Andrew Tweedale, Keren Tweedale, *Arbitration of Commercial disputes International and English Law Practice* (Oxford University press) para 16.12.

committed he might be at expediting arbitration applications, to see to their speedy conclusion thereof.

- e) It is also quite unfortunate that Judges do not get the requisite arbitration training that would empower them with the skills to direct the conduct of arbitration matters before them. As at the time this paper was being authored, only one judge of the Commercial and Admiralty division in Milimani had the training in Arbitration.
- f) Judges, just like advocates, have trainings at the Judiciary Training Institute that help them hone their skills every so often. Some of these trainings touch on arbitration. The problem arises because these trainings are not mandatory and there is a high likelihood that a Judge in the Commercial and Admiralty division may never interact with any of these sessions.

1.2. THEORETICAL FRAMEWORK

In any analysis of a legal issue, the jurisprudence behind it plays a critical role. At a practical level, this paper hopes to achieve involvement and participation in jurisprudential discussions, develop the ability to analyze and to think critically and creatively about the law.²¹ Arbitration is a core issue in our legal system today and a study of the jurisprudence behind arbitration would enrich one with skills that would be useful when trying to formulate and advocate novel approaches to arbitration problems.

In principle, there is no such thing as right or wrong theory/philosophy of arbitration. This is because every philosopher has a basis within which the theory is based. In this regard, one may either share the philosophy or not. It may either be overt or implicit, efficient or inefficient, but can never be wrong.

Numerous jurisprudential theories have been attributed to arbitration. Different theories conceptualize arbitration in different ways. The same have also been critiqued in equal measure and this chapter will expound further on these schools of thought that are relevant to the focus of this study. A school of thought can be defined as a point of view held by a particular person or group of persons. It seeks to provide a deeper understanding of how different legal aspects are/should and/or ought to be perceived. The persons that elucidate these theories are commonly referred to as legal theorists and/or philosophers. This chapter will discuss and examine two theories that this paper aligns itself with being; the natural law theory, the contractual theory and Hart's Rule of Recognition.

²¹ Brian Bix, *Jurisprudence Theory and Context* (5th Ed Sweet and Maxwell) viii.

1.2.1. The Contractual Theory.

In the book, *Arbitration Law and Practice in Central and Eastern Europe* as edited by Christoph Liebscher²² *et al*, four theories of arbitration as outlined below:-

- a) The Contractual theory;
- b) The Procedural/Jurisdictional theory²³;
- c) The Mixed or Hybrid theory²⁴; and
- d) The *Sui generis* or original theory²⁵.

²² Christoph Liebscher, Alice A. Fremuth-Wolf, 'Arbitration Law and Practice in Central and Eastern Europe' <https://books.google.co.ke/books?id=Pq5QDrECIPcC&pg=PR1068&lpg=PR1068&dq=schools+of+thought+in+arbitration&source=bl&ots=RCq1uzngFI&sig=JNFRIYSNg6cxsbAhpQljRzbfmik&hl=en&sa=X&ei=t0RTVZL9DMGdygPx-IGgBA&redir_esc=y#v=onepage&q=schools%20of%20thought%20in%20arbitration&f=false> accessed 13th May, 2015.

²³ This theory regards arbitration as a process with peculiar procedural characteristics whose validity is determined by reference to the procedural law of the *forum arbitri*. According to this theory, the arbitrator is not bound by the arbitration agreement as such, but by the procedural law of the country in which arbitration takes place. Additionally, under the jurisdictional theory, the Court in the country where recognition or enforcement is sought has a supervisory power as regards the issue of arbitrability. Accordingly, under Article V (2) of the NYC, 1958, the Court has the option to decline to recognize or enforce an arbitral award if it finds that "the subject matter of the difference is not capable of settlement by arbitration under the law of that country" or "recognition or enforcement of the award would be contrary to the public policy of that country."

Arbitration is characterized as proceedings in which arbitrators discharge judicial tasks. In these proceedings, the authority of arbitrators, before deriving from the intention of the parties, originates from the intention of the law, which allows the parties to refer disputes to arbitration. The Jurisdictional theory is summarized as follows; 'It follows that the arbitrator, like the judge, draws his power and authority from local law; hence the arbitrator is considered to closely resemble a judge. The only difference between a judge and an arbitrator is that the former derives his power and authority directly from the sovereign, whilst the latter derives his power from the sovereign but his nomination is a matter for the parties.'

The Jurisdictional theory can also be seen from the nature of the immunity of arbitrators, in that, arbitrators are often treated in law as if they were judges. This can also be seen in the power of an arbitral tribunal to carry on with proceedings, even in the event of default of one party, and the fact that arbitration decisions are final and binding. This theory can be heavily criticized especially in the Kenyan context, as there is no law that gives and/or defines who an arbitrator is. The Arbitration Act has no definition of what arbitration is, and the same is left to be interpreted by other sources of law *to wit*:- Books, Statutes, Precedents etc. Since Arbitrators as well have not been defined to the effect of stipulating what the qualifications are, for one to become an arbitrator, anyone therefore, may become one. This is for instance contrasted by the Advocates Act which defines an Advocate together with the qualifications that need to be in place for one to be qualified as such. In the premises, the Jurisdictional theory may not be accurate.

²⁴ This theory regards arbitration as having both contractual and procedural characteristics. Arbitration has elements of both public and private law. The consensual nature of arbitration is essential in initiating arbitration. After proceedings have commenced, the parties have only limited autonomy. It is on this basis, that the contractual and jurisdictional theories can be reconciled. This theory recognizes therefore, that arbitration derives from a private contract, but also that arbitrators exercise a quasi-judicial function, concluding that the two elements are indissolubly intertwined.

²⁵ The *Sui generis* or original theory emphasizes the need to adapt the arbitral proceedings to the contracting parties' practical demands, as the arbitral proceedings develop. Hence, this theory defies any classification of the characteristics of arbitration as primarily contractual, procedural or mixed.

For the purpose of this study, this paper shall focus on the contractual theory owing to its relevance in respect to the subject herein. The development of this paper will therefore have a huge inclination to the contractual theory, as it is the contract, which forms the root to party autonomy in arbitration matters.

The Contractual theory which considers the arbitration agreement to be an ordinary contract and emphasizes the sacrosanct principle of party autonomy. Here the doctrine of *Pacta Sunt Servanda*²⁶ ought to prevail. The importance of the *lex fori* in this theory is not given much thought. This is justified by the fact that arbitration originates from the agreement between the parties. No relationship exists between the arbitration proceedings and the national laws of the place where it is conducted.

Parties have the liberty to decide the pertinent issues regarding the arbitration procedures and this liberty must not be hampered with by the States. The contractual theory, as opposed to the jurisdictional theory, looks at the concept of arbitration from a contractual point of view. In the case of *Cereals S.A. vs. Tradax Export S.A.*²⁷ the Court while holding that a contractual relationship existed between the parties and the arbitrators, observed that the arbitrators became parties to the arbitration agreement the moment they were appointed. The crux of this theory is that if not for contract, arbitration would never come to be.

The supporters of this theory deny the primacy or control of the state in arbitration and argue that the very essence of arbitration is that it is created by the will and the consent of the parties.²⁸ The real basis for the contractual theory is the fact that the whole arbitration process is based on contractual arrangements. Both the arbitration agreement and the award, reflect the contractual character of arbitration. The origin of every arbitration is a contract. The parties agree to submit their disputes to arbitration. The state has no influence or control over this decision.²⁹

Everything that is therefore done in arbitration stems from the consent of the parties. This includes appointment of arbitrators, the place and seat of arbitration, the timelines within which an award should be rendered among others.

1.2.2. Hart's Rule of Recognition

The fundamentally philosophical notions of autonomy and freedom are at the heart of arbitration. Additionally, questions of legitimacy raised by the freedom of the parties to favor a private form of

²⁶ This is an expression signifying that agreements and stipulations of parties to a contract must be observed.

²⁷ [1981] 1 WLR 711.

²⁸ Julian D.M. Lew, 'Comparative International Commercial Arbitration'

<<https://books.google.co.ke/books?id=b1OgnDQ2UnwC&pg=PA77&lpg=PA77&dq=contractual+theory+arbitration&source=bl&ots=16UjzFeuNR&sig=a6Uckyu7FiOPjqvAGEXVKga6F51&hl=en&sa=X&sqi=2&redir_esc=y#v=onepage&q=contractual%20theory%20arbitration&f=false> accessed 16th July, 2015.

²⁹ Ibid.

dispute resolution over national courts, to choose their own arbitrators, to tailor the procedure as they deem appropriate, to determine the rules of law that will govern the dispute even where the chosen rules are not those of a given legal system.

No less essential is the doctrine of *kompetence kompetence* where the arbitrators have the freedom to determine their own jurisdiction, to shape the conduct of the proceedings and, in the absence of an agreement among the parties, to choose the rules applicable to the merits of the dispute. More significantly still, the arbitrators' power to render a decision, which is private in nature, on the basis of an equally private agreement of the parties, begs a fundamental question. Where does the source of such power and the legal nature of the process and of the ensuing decision stem from?

It can be argued that such power stems from the rule of recognition as was enunciated by Hans Kelsen.³⁰ Kelsen stipulates that the rule of recognition is a system of rules which must be effectively accepted as common public standards of official behavior. H.L.A. Hart, a later positivist, derived the rule of recognition from Hans Kelsen.³¹ This concept is very much in line with how parties to an arbitration recognize and donate their powers to the arbitrator to make decisions when they are unable to. Parties recognize this power and have many a time conferred upon the arbitrator the power to draft their submission agreement that then initiates arbitral proceedings. The Rule of recognition is therefore much in line with the prevailing arbitration practice and procedure. According to this theory, officials comply with the Rule of Recognition³², and all the more reason why even Judges are fully alive to the Arbitrator's mandate, thereby distancing themselves from unnecessary interference thereto. This paper is therefore hinged on Hart's Rule of Recognition, as the very fact that it discusses arbitration means this study recognizes the power of arbitrators.

Hart stipulates that whenever an official, say an Arbitrator or even a judge takes up office, he finds a firmly settled practice of adjudication which requires him to apply the legal norms identified by certain criteria, a practice that determines the central duties of his office. This settled practice is the Rule of Recognition.³³ Arbitrators for example, engage in arbitration fully aware that the whole process should be party driven-this is the rule of recognition which is worthy of moral approval – if things would change for the worse they would gradually give up that disposition.

Critiques of Hart's rule of recognition postulate that it is not clear which officials the theory applies to. Sometimes Hart made it look like the rule of recognition applies to all officials.³⁴ Other times,

³⁰ Emmanuel Gaillard, *Legal Theory of International Arbitration* Martinus Nijhoff Publishers (Leiden Boston) 2.

³¹ Arun Krishnan, 'A Concise Interpretation of Hans Kelsen's Pure Theory of Law' <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1521569> accessed 9th September, 2015.

³² Torben Spaak, 'Kelsen and Hart on the Normativity of Law' <<http://www.scandinavianlaw.se/pdf/48-24.pdf>> accessed 9th September, 2015.

³³ Ibid 411.

³⁴ Scott J. Shapiro, 'what is the rule of recognition (and does it exist)?' Public Law & Legal Theory Research Paper Series <http://www.law.yale.edu/documents/pdf/Faculty/Shapiro_Rule_of_Regulation.pdf> accessed 9th September, 2015. Hart wrote; 'There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behavior which are valid according to the system's ultimate criteria of validity must be

Hart focused exclusively on judges.³⁵ John Finnis and Joseph Raz have also criticized Hart's theory, stating that the author does not explain what makes the rule of recognition a rule, as opposed to rules of recognition.³⁶ They question the oneness of the theory of recognition stipulating that the rule that validates the actions of Judges is not the same one that validates the rules, say, of the Presidency. Different rules guide different officials in their functions and in the premises, they are of the view that there ought to be a number of rules of recognition.

In any system, different officials will be under duties to apply different rules.³⁷ When this is so, there will be multiple rules of recognition and hence the rules that they validate will not be part of the same legal system.³⁸ However, oneness of the rule of recognition still holds true, for the reason that the law of a particular system consists of all the norms from which the rule of recognition emanates obligating its officials to apply. Hart's focus on judges as officials was simply to shed more light on a practical application of the rule of recognition and does not in any way isolate other officials from its application.

1.3. LITERATURE REVIEW

This part highlights and analyzes some key domestic and international legal instruments, domestic and international judicial decisions as well as academic texts books and other writings by scholars relevant to this research. The discussion subsequently identifies some gaps emerging from the literature reviewed, that this research seeks to fill.

Jacob Gakeri in his journal article³⁹ postulates that courts, with time have grudgingly accepted that they cannot cope with their ever increasing workload, and they are slowly embracing arbitration. Whereas this may be true, with the advent of constitutional supremacy over arbitration, this may not be the case. Article 165 (6) of the Constitution when invoked, may not leave much of an option to court but to address the constitutional concerns in the arbitral process. Article 47 of the Constitution, which led to the enactment of the Fair Administrative, Action Act ("the FAA Act") gives the court jurisdiction to entertain judicial review applications arising from the conduct of the arbitral tribunal.

generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behavior by its officials."

³⁵ Ibid "[I]t is the case that this rule of recognition ... is not only accepted by him but is the rule of recognition actually accepted and employed in the general operation of the system. If the truth of this presupposition were doubted, it could be established by reference to actual practice: to the way in which courts identify what it is to count as law and to the general acceptance of or acquiesce in these identifications."

³⁶ Ibid 12.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Jacob Gakeri, 'Placing Kenya on the Global platform: An evaluation of the Legal Framework on Arbitration and ADR' (2011) Vol. 1 No. 6 International Journal of Humanities and Social Science <<http://www.ijhssnet.com/journals/Vol.1.No.6;June.2011/25.pdf>> accessed 14th June, 2016.

Although there exists a wealth of literature in Arbitration, much of it has not examined in depth and/or addressed the reasons that lead to the dragging of the arbitral process where courts are concerned. In regard to arbitration in Kenya, Kariuki Muigua for example acknowledges there is need for legal provisions that will ensure that applications to court under the Arbitration Act, shall not be dismissed for want of form and that the courts shall endeavor to uphold such applications to ensure justice and fairness to the parties and to avoid delays in arbitration. He further adds that there is also need for the law to be amended to provide that arbitration related applications be heard on a priority basis. However, he does not state which particular provisions need to be amended to achieve this. That is the gap that this paper is going to address.

Prioritization of arbitration matters for example is a wholesome process that not only involves amendment of the Law, but involves all the stakeholders' participation. The Judiciary for example, would need to employ more Judges at the commercial division to help ease the backlog that exists. The Judiciary could also be releasing frequent commercial division practice directions that touch on arbitration, thereby creating more awareness on the expected standard of conduct of arbitration matters in our courts. It would also help if the Arbitration Act would be amended to reiterate the provisions of the Constitution, which stipulate that a court faced with an arbitral matter shall not pay undue regard to technicalities, which is similar to the express provision enshrined in the Employment and Labour Relations Court Act.⁴⁰

In Paul Ngotho's article⁴¹ while examining stay of proceedings in arbitration, states that there is no legal justification for the mere act of entering appearance to be used to disenfranchise a party of its legal right to arbitration. The author is of the view that the idea that entering appearance extinguishes a party's statutory right to arbitration is a fraud. However even though taking his opinion in isolation suggests the conclusion that he makes, that is not the position in practice. As will be discussed in chapter two, case law has proven that the mere entering of appearance does not imply consent to proceed with litigation. A party is given a window period of at least fourteen (14) days to file an application for stay. It is only when a party takes inordinately long that a party loses the right to apply for stay. The application, in those circumstances, would therefore be untenable and unable to succeed.

⁴⁰ Cap 234 B. Section 20 (1) provides thus; 'In any proceedings to which this Act applies, the Court shall act without undue regard to technicalities and shall not be strictly bound by rules of evidence except in criminal matters.'

⁴¹ Paul Ngotho, FCI Arb, Arbitrator, 'The Bastard Provision in Kenya's Arbitration Act' (2013) Southern Sun Hotel, Nairobi, Kenya < <https://www.ciarb.org/docs/default-source/default-document-library/annual-regional-conference-2013-zambia.pdf?sfvrsn=2>> accessed 8th December, 2015.

Ashraf El Motei,⁴² argues that, in interpreting article 8(1) of the Model Law, states that a court faced with an application for stay of legal proceedings is bound to refer the matter to arbitration for as long as the subject arbitration agreement is valid. He further states that the Model Law gives no discretion to the presiding judge to decide whether or not to refer the matter to arbitration because of the use of the word ‘shall’. The provision reads as follows: ‘A court before which an action is brought in a matter which is the subject of an arbitration agreement **shall**, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.’ However, and as will be elaborately discussed in chapter two, this is not the position in Kenya. There are other factors that the court puts into consideration and before exercising its discretion of whether or not to stay the matter *to wit*;

- a) Existence of a dispute between the parties with regard to matters agreed to be referred to arbitration; and
- b) The applicant for stay must be a party to the arbitration agreement.

Githu Muigai in his chapter⁴³, when examining the role of the court in arbitration when the arbitrator for any reason fails to act without undue delay, states that it is problematic to determine when undue delay has occurred. The author is of the view that once the proceedings have commenced, it is problematic for the parties to agree on whether undue delay has occurred, in particular, if one of the parties is not interested in the expeditious rendering of the award. However, what the author has not examined is that agreement of the parties on whether there has been undue delay is inconsequential. So long as one party is aggrieved and believes that there has been undue delay, s/he has recourse in a court of law without caring what the opposing party would think. This is because the right of access to justice is a fundamental freedom guaranteed under Article 48 of the Kenyan Constitution.

As arbitration continues to grow, so are the reforms in the Judiciary that help in streamlining the system. The Judiciary has in recent times gone through substantive reforms that place it on almost equal footing with Arbitration. Kamau Karori⁴⁴ notes that an increase in the number of Judges in Kenya, removal of technical objections and emphasis on case management procedures have resulted in expeditious disposal of matters. Courts are now therefore, able to resolve disputes in relatively short periods of time. He hastens to add that there is a very high likelihood that Courts may

⁴² Ashraf El Motei, ‘Local Court Intervention in International Arbitration’ (2009) <http://www.motei.com/local-court-intervention-in-international-arbitration> accessed 27th February, 2016.

⁴³ Githu Muigai, ‘The Role of Court in Arbitration Proceedings’ in Githu Muigai (ed), *Arbitration Law and Practice in Kenya* (lawAfrica) 81.

⁴⁴ Kamau Karori, ‘Emerging Perspectives and Challenges in Dispute Resolution’[2014] Vol.2, (2014) 1 Alternative Dispute Resolution <<http://www.ciarbkenya.org/International%20Conference%20Journal%202014.pdf>> accessed 13th February, 2015.

overtake arbitration in speed. Mr. Karori attributes this to the fact that disputes requiring arbitration are growing but the number of arbitrators has not been increasing at a level sufficient to match the increased workload. Advocates dealing with arbitrations are the same Advocates who appear in Court. There is also a limited number of qualified and experienced arbitrators which translates to higher fees and delay in publishing awards. The author therefore presupposes that arbitration may be unnecessary altogether, which in turn would undermine the role of court in arbitration that is the primary focus of this paper.

One of the ways forward proposed by Mr. Karori is that arbitrators should encourage parties to engage in settlement negotiations, thus reducing the issues for determination or resolving the dispute in its entirety. However, whether this is a viable route is quite questionable. Questions as to whether an arbitrator would genuinely push parties to negotiate and solve the dispute may not necessarily hold true, considering that such negotiations would rip some of them of at least KShs.25, 000.00 an hour for every arbitration sitting. These concern emerges because among the key drivers of venturing into arbitration by professionals, is the lucrative business aspect of it. Most professionals are certain of making lucrative business out of arbitration. Encouraging negotiations therefore, unfortunately offends this business need. On this basis therefore, the role of court in arbitration proceedings brings a positive aspect, as the court is able to nudge parties to settle a matter out of court, which in turn encourages arbitration proceedings.

An application for setting aside an arbitral award in Kenya can be made vide section 35 of the Arbitration Act, which is one way of the court's intervention in arbitration proceedings. One of the grounds in which the High Court can set aside an award is if it is in conflict with the public policy in Kenya. In *Christ for All Nations v Apollo Insurance Co. Ltd*⁴⁵ the Court held that an award might conflict with Kenya's Public Policy if it was either;- inconsistent with the Constitution or other law of Kenya, whether written or unwritten, inimical to the national interest of Kenya or contrary to justice and morality.

The above grounds were also relied upon in *Macco Systems India PVT Limited v Kenya Finance Bank Limited*.⁴⁶ The big question that arises from a reading of the definition of public policy herein is that it is a definition of the judge. The Arbitration Act in its interpretation section does not define what public policy is. The same is also not defined in the Kenyan Constitution and neither does the Judge give the source of his interpretation. It would be a reasonable presumption therefore, that the definition of public policy was a making of the judge. It is worthy of critical note that the function of judges is to interpret the law. The task of making laws in Kenya is a preserve of the National Assembly as encapsulated under Article 95 (3) of the Constitution of Kenya, 2010. By the Court defining public policy, hence making the law, and being the reference point for any definition of

⁴⁵ [2001] KLR 483.

⁴⁶ HCCC (Milimani) No. 173 of 1999.

public policy, the jurisprudential theory of legal realism⁴⁷, which defines law as predication of court decisions is enunciated. Legal realism offends the theories that this paper is hinged on.

Internationally, the recognition and enforcement of arbitral awards may be declined if it is contrary to the public policy of that country.⁴⁸ Charles C. Correll in the article does not even attempt to give a definition of public policy. Public policy is simply taken to be principles that have an absolute universal value. This kind of interpretation may be problematic as the said principles are not laid out expressly and depend on the assessment of the person who is keen on enforcing them, creating an avenue for abuse. Additionally, English Courts cannot enforce an award if it would be wholly offensive to a reasonable and fully-informed member of the public.⁴⁹ This then brings to question the reasonability test, and the issue of what is reasonable and to who, bringing forth an avenue for different interpretations.

Kimberley Chen Nobles⁵⁰ in *Emerging Issues and Trends in International Arbitration*, states that Companies choose international arbitration over pursuing judgment in domestic courts for among other reasons, elimination of perceived bias by domestic courts. However, this is a problematic statement as the court system has in place measures that would avoid any form of prejudice. In regards to appointment of arbitrators for example, even though parties can choose an arbitrator based on his expertise, e.g. Law, Architecture, Quantity Surveyor, the same is different from expertise as an arbitrator. The appointee is part time in arbitration and unlikely to have acquired the amount of experience a Judge acquires, being not full time on the job. The doctrine of precedent does not also apply, so arbitrators are not bound by what others, however eminent, have ruled in the past on similar issues. This is because awards are never published as arbitrations are confidential in their very nature. It is therefore highly likely that arbitrations get marred with bias, as being conducted in private affords no room of having them critiqued for errors and/or mistakes by Advocates and society.

⁴⁷ M.D.A. Freeman, *Lloyd's introduction to jurisprudence* (8th Edition, Sweet and Maxwell, 2008) 986. Mr. Justice Oliver Wendell Holmes both in his writings in his long tenure as a justice of the Supreme Court, played a fundamental part in bringing about a changed attitude to law. His emphasis on the fact that the life of the law was experience as well as logic, and his view of the law as predication of what courts will decide, stressed the empirical and pragmatic aspect of the law.

⁴⁸ Charles C. Correll, jr. ^ Ryan J. Szczepanik, 'No Arbitration is an island: The role of courts in aid of international arbitration' (2012) volume 6, No. 3 *World Arbitration and Mediation Review* at p. 590 <http://www.kslaw.com/imageserver/KSPublic/library/publication/2013articles/1-13WorldArbitrationMediationReviewCorrellSzczepanik.pdf> accessed 30th January, 2015.

⁴⁹ Ruth Hosking, 'The Role of the Court and experts in international arbitration' p. 12 <<http://clients.squareeye.net/uploads/quadrant/4%20The%20Role%20of%20the%20Court%20and%20experts.pdf>> accessed 30th January, 2015.

⁵⁰ Kimberley Chen Nobles, 'Emerging Issues and Trends in International Arbitration' Vol. 43, No. 1, Art. 5 *California Western International Law Journal*, p. 3 <[1.http://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1025&context=cwilj](http://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1025&context=cwilj)> accessed 13th February, 2015.

These authors have not addressed measures that can be put in place even by the courts so as to ensure that the arbitral tribunal is not treated as though it was an inferior branch of the judicial system. Section 28 of the Arbitration Act states that; ‘The arbitral tribunal, or a party with the approval of the arbitral tribunal, may request from the High Court assistance in taking evidence, and the High Court may execute the request within its competence and according to its rules on taking evidence.’ This section allows the High Court to undermine the arbitral process by giving it leeway to determine the rules of evidence to be applied, which offends section 2 of the Evidence Act⁵¹ that states; ‘This Act shall apply to all judicial proceedings in or before any court other than a Kadhi’s court, but not to proceedings before an arbitrator.’

1.4. OBJECTIVES OF THE RESEARCH

Whereas involvement of Court in arbitral proceedings is essential, this paper seeks to establish:-the necessary court involvement in the arbitral process and such interference that leads to the abuse of the court’s power. This paper also seeks to establish factors that frustrate the necessary court involvement in arbitration. The background to the foregoing being based on the fact that courts should seek to enforce parties’ intentions in any contract-being upholding the advantages that led parties to arbitration even when the court’s intervention becomes necessary or even mandatory. As a result, courts ought not to interfere in arbitration arbitrarily, as to deny the parties the fruits they hoped to achieve that flow from an arbitral process.

1.5. HYPOTHESIS

This research proceeds on the presumption that:-

- a) Arbitration may no longer be considered as an Alternative Dispute Resolution (ADR) as it cannot be so much differentiated from litigation. Marshall observes; ‘Arbitration aims at the provision of the final decision of a dispute by a private tribunal and this distinguishes it from several other procedures for the resolution of disputes, referred collectively as ADR. These include mediation and conciliation, where a third party is involved to assist the parties in a settlement of their dispute, but with no power to impose a final decision on the parties’.⁵²
- b) The Courts are an integral part of any arbitral process.
- c) A harmonious relationship between the Court and the Arbitral process would see to an efficient arbitral process.

⁵¹ Cap 80 Laws of Kenya.

⁵² Enid A. Marshal, *Gill: The Law of Arbitration* (4th Edition Sweet and Maxwell) 6.

1.6. RESEARCH QUESTIONS SOUGHT TO BE ANSWERED

- a) What is the extent of Court's intervention in Arbitration?
- b) Does Court's intervention constrain or restrain arbitration?
- c) What lessons can be learnt in regards to the role of the court's involvement in England?
- d) What are the possible areas of reform in the arbitral process?

1.7. METHODOLOGY TO BE USED

The study mainly involves primary and secondary data collection methods. The data collection method to be adopted will be qualitative to enable an in depth analysis of the research questions herein. The primary data collection methods will include questionnaires and interviews whereas the secondary sources will include books, legal texts and internet research. Statutes including; the Constitution of Kenya, 2010, Acts of Parliament of Kenya including; the Arbitration Act, Arbitration (Amendment) Act 2009, Case law from Kenya and other relevant jurisdictions and International legal instruments.

The target respondents for the questionnaires and face to face interviews to be administered will be arbitrators, judges and advocates. This is so as to garner an all rounded feedback from all the players in arbitration. In the premises, relevant and trustworthy data will be collected to enable the focus of this study to be maintained, and accurate conclusions and recommendations to be generated. The judges to be interviewed will be those sitting in the commercial division of the High Court, as they are the ones who handle all arbitration applications filed in the High Court. The criteria for choosing arbitrators for the interview in this study will be experience, and those of whom have undergone the various trainings to rise to become chartered arbitrators. It is believed that their appreciation of the arbitration law and procedure would be at an advanced level. The advocates chosen were those who confirmed to having dealt with an arbitration matter before, from which an application was filed in the High Court.

The reason for the choice of primary data collection methods is to enable this paper gather recent information as to the situation of the role of the Kenyan Courts, thereby generating useful findings. The use of interviews particularly, would allow expand the depth of this study, as feelings and thoughts of the target respondents would help solidify the findings, conclusions and recommendations herein.

1.8. CHAPTER BREAKDOWN

This paper will have five (5) chapters broken down as follows:-

1.8.1. Chapter 1-Introduction

The chapter starts by laying out the parameters of the research and the research problem that the paper seeks to answer. Additionally, the chapter also sets out the objectives of the research. It then briefly discusses the jurisprudential arguments, theory and school of thought relevant and which forms a basis to the research problem. Legal provisions and publications related to the problem are also reviewed and critiqued. The chapter then states the hypothesis that this paper sets out to test. Thereafter, an outlay of the sequence of the chapters as well as a brief summary of each of the chapters is set out. Finally, the chapter explains how the research informing this paper is to be conducted.

1.8.2. Chapter 2- Role of Courts before, during and after arbitration

This chapter will look at the role of courts in arbitration before commencement of arbitration proceedings. It will focus on various key parameters among them being, the arbitration agreement, choice of law, appointment of arbitrators, jurisdiction of the arbitrator, the challenge procedure among others. This chapter will also focus on any out of court negotiations that parties may explore before declaring a dispute to be determined by an arbitral process.

The chapter will then examine the instances the court comes in during the pendency of arbitration proceedings. This would include moving to court for; interlocutory orders for discovery, security for costs, summoning of witnesses, production of documents, taking evidence among others.

Finally, this chapter will examine the controversial issue of setting aside awards on the grounds of public policy, delivery of awards, recognition and enforcement of the same. This chapter will also look at the avenues in place for making applications to set aside arbitral awards.

1.8.3. Chapter 3- Comparative Study

This chapter will focus on the role the court in arbitration in England. It will then compare this to what is done in Kenya with a view to establishing what Kenya is doing well and what needs to be improved in arbitration practice.

1.8.4. Chapter 4- Data analysis on the role of courts in arbitration

This chapter will deal with an analysis, presentation and interpretation of the primary data collected from Judges, Arbitrators and Advocates. The data collected will be qualitative and therefore not concerned with the number of recipients, but an in depth response of the

questions, as the target recipients will be professionals and therefore experts in their field, who can authoritatively speak to the subject in question.

1.8.5. Chapter 5- Recommendation and Conclusion

This chapter sums up the discussions in the preceding chapters. The chapter makes a conclusion on the research problem, in light of the discussions. The hypotheses laid out at the beginning of the research, in chapter one, are then compared with the findings of the research; this either proves or disproves the hypotheses. Finally, the chapter makes recommendations on how to ensure a system that gives a harmonized and smooth relationship between arbitral tribunals and courts. In particular, the chapter recommends what can be done to the Kenyan system to make arbitration a friend of every advocate, thereby promoting Kenya as the hub of arbitration.

CHAPTER TWO

2.0. ROLE OF COURTS BEFORE, DURING AND AFTER REFERENCE TO ARBITRATION IN KENYA.

2.1. INTRODUCTION

Courts at all times intervene in arbitration matters in strict conformity with the provisions of the various arbitration statutes.⁵³ Therefore, there exists no inherent jurisdiction for the court to supervise arbitration outside the framework of the arbitration statutes. This position could arguably be one that existed before the Fair Administrative Action Act.⁵⁴

The FAA Act commenced on 17th June, 2015 and it significantly increases the scope of redress in regards to judicial review. Section 3 provides that the Act applies to all state and non-state agencies, including any person exercising administrative authority; performing a judicial or quasi-judicial function under the Constitution or any written law; or whose action, omission or decision affects the legal rights or interests of any person to whom the action, omission or decision relates. This therefore means that with the enactment of this new piece of legislation, the scope of judicial review has now extended to actions by private entities in addition to public bodies. This inevitably therefore means that it is now open for parties to approach the High Court seeking to review the order of an arbitral tribunal. Whereas judicial review of the arbitral tribunal's decision is an alien concept, the same cannot be ignored as the FAA Act which gives effect to Article 47 of the Constitution, has opened up this avenue.

Article 165 (6) of the Constitution provides that the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising judicial or quasi-judicial function, but not over a superior court. Clause 7 provides that for the purposes of clause 6, the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice. Going by the wording of clause (7), the record of proceedings would probably include the arbitrator's notes.⁵⁵ Thus, the High Court's scope in interfering in arbitral matters is open and unlimited. The unlimited jurisdiction of courts in

⁵³ Section 1 (c) of the English Arbitration Act; section 10 of the Arbitration Act.

⁵⁴ No. 4 of 2015.

⁵⁵ Dr. Kariuki Muigua 'Constitutional Supremacy over Arbitration in Kenya' [2016] (Volume 4) (2016) 4(1) Alternative Dispute Resolution 100.

arbitration matters was also enunciated in the Tanzanian case of *Dowans Holdings SA (Costa Rica) and Dowans Tanzania Limited v Tanzania Electric Supply Company Limited (Tanzania)*.⁵⁶

Section 4 (6) of the FAA Act provides that where the administrator (read as arbitral tribunal/arbitrator for our purposes), is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the arbitrator may act in accordance with that different procedure. Article 47 of the Constitution which is mirrored by section 4(1) of the FAA Act provides that “every person has the right to administrative action⁵⁷ that is expeditious, efficient, lawful, reasonable and procedurally fair. This therefore means that in the conduct of the arbitral procedure and particularly as stipulated under Part IV of the Arbitration Act *to wit*, equal treatment of parties, determination of rules of procedure, place of arbitration, commencement of arbitral proceedings, language, statement of claim and defence, hearing and written representations, default of a party, experts and court assistance in taking evidence, the arbitral tribunal’s procedure must conform to the principles of speed, efficiency, lawfulness and procedural fairness.

It is critical to note that in the event that the said arbitral tribunal’s procedure offends Article 47 and/or any other right and fundamental freedom enumerated under Part 2 of the Constitution, then the High Court is seized with the jurisdiction to hear and determine the said breach by the arbitral tribunal. Section 165 3 (b) of the Constitution provides thus; “Subject to clause (5), the High Court shall have—jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.” In *Jeremiah Gitau Kiereini v Capital Markets Authority & another*⁵⁸ the Hon. Mr. Justice Majanja at paragraphs 46 to 49 expressed himself as follows:-

Jurisdiction flows from the Constitution and the law and the power of this Court rests in Article 165(3) which provides in part that the High Court has “jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened” and “the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution”

I must at this early opportunity correct the submission by Mr Moimbo that this Court is not the appropriate forum to “review” the decision of the Committee or the CMA. This court has been called upon to intervene in what the petitioner alleges to be a breach of his

⁵⁶ [2011] EWHC 1957 (Comm), Case No: 2010 Folio 1539 in Dr. Kariuki Muigua & Ngararu Maina ‘Effective Management of Commercial Disputes: Opportunities for the Nairobi Centre for International Arbitration’ [2016] (Volume 4) (2016) 4(1) Alternative Dispute Resolution 155.

⁵⁷ Section 2 of the FAA Act defines an administrative action to include the powers, functions and duties exercised by authorities or quasi-judicial tribunals or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

⁵⁸ [2013] eKLR.

fundamental rights and freedoms and a contravention of the constitutional provisions by the respondents. This is clearly within the jurisdiction of the High Court by virtue of Article 165(3)(b) and 3(d)(ii). The Capital Markets Tribunal has no such mandate.

I would also add that holding otherwise would be tantamount to this court shirking from its very primary mandate and responsibility. As per the court of Appeal in R (G) v Immigration Appeal Tribunal [2005] 1 WLR 1445: “It is the role of the judges to preserve the rule of law. The importance of that role has long been recognized by Parliament. It is a constitutional norm recognized by statutory provisions that protect the independence of the judiciary....The common law power of the judges to review the legality of administrative action is a cornerstone of the rule of law in this country and one that judges guard jealously...” Similarly, Lord Browne-Wilkinson in R v Hull University Visitor, ex parte Page [1993] AC 682, 701 had this to say, “The fundamental principle...is that the courts will intervene to ensure that the powers of public decision-making bodies are exercised lawfully. In [most] cases...this intervention...is based on the proposition that such powers have been conferred on the decision-maker on the underlying assumption that the powers are to be exercised only within the jurisdiction conferred, in accordance with fair procedures and, in a Wednesbury sense, reasonably. If the decision-maker exercises his powers outside the jurisdiction conferred, in a manner which is procedurally irregular or is Wednesbury unreasonable, he is acting ultra vires his powers and therefore unlawfully.”

I find and hold that this matter is properly before this court and that this court has jurisdiction to hear and determine it.

This position was reaffirmed by the Court of Appeal in *Capital Markets Authority v Jeremiah Gitau Kiereini & another*⁵⁹ where it was held thus;

In the event, we cannot fault the trial court for resorting to the Constitution itself in resolving the allegations placed before it. The existence of an alternative remedy, in this case the Tribunal, would not be efficacious because the High Court does not share with it the powers under Article 165 of the Constitution. We are satisfied that the issue laid before the High Court under Article 47 was constitutional in form and substance and consequently the right forum for its adjudication was the High Court.

Justice Kroon in *Lufuno Mphaphuli & Associates (PTY) Ltd vs Nigel Andrews and Another*⁶⁰ brought out a myriad of issues that are of a constitutional nature that emanate during the pendency of arbitration proceedings for the court’s determination;

⁵⁹ [2014] eKLR.

⁶⁰ [2009] ZACC 6.

In my view a number of constitutional matters are at issue. First, the case involves the interpretation of section 34 of the Constitution and its application to arbitrations held in terms of the Arbitration Act. Allied thereto is the question of the correct approach to the grounds of review set out in section 33(1) of the Arbitration Act properly interpreted in the light of the right to a fair and impartial hearing guaranteed in section 34 of the Constitution. Relevant to these questions is an application of the provisions of section 39(2) of the Constitution. Second, the question arises whether, and to what extent, the parties, by entering into an arbitration agreement, are to be taken to have waived the constitutional right (entrenched in the Bill of Rights) to a fair and impartial hearing. Third, the role of the courts in confirming or setting aside arbitration awards involves the administration of justice, and that too is a constitutional issue.

This Chapter examines the court's role at all stages, before a matter is referred to arbitration, during the arbitral proceedings, and after an arbitration award has been published. This Chapter will demonstrate how the court's role in Kenya fits into the identified theories. By so doing, this chapter will address the first two research questions identified in Chapter one being; the extent of Court's intervention in Arbitration and whether court's intervention constrains or restrains arbitration.

2.1.1. THE NATURE OF THE COURT'S JURISDICTION.

The jurisdiction of the court can generally not be ousted especially where there is a breach of fundamental human rights where constitutional remedies are sought. In the case of *Indigo EPZ Limited – V – Eastern and Southern African Trade & Development Bank*⁶¹ the court held that:-

In any case.... (there) is a well settled general rule recognized (even) in the English courts which prohibits all agreements purporting to oust the jurisdiction of the court.' The Court further stated; '.....where parties have agreed to refer disputes to arbitration, the position is that the jurisdiction to deal with substantive disputes and differences is given to the arbitrator and the Kenyan Courts retain residual jurisdiction to deal with peripheral matters and to see that any disputes or differences are dealt with in the manner agreed between the parties under the agreement.

In Kenya, Section 10 of the Arbitration Act prohibits the courts from interfering with arbitration except as expressly provided therein. However, the Kenyan courts have not been entirely keen in upholding this cardinal arbitration principal. In the Court of Appeal case of *Sadrudin Kurji & another v. Shalimar Limited & 2 Others*⁶², the court held;

...arbitration process as provided for by the Arbitration Act is intended to facilitate a quicker method of settling disputes without undue regard to technicalities. This however, does not

⁶¹ Nairobi HCCC No.1034 of 2002 1KLR 2002.

⁶² [2006] eKLR.

mean that the courts will stand and watch helplessly where cardinal rules of natural justice are being breached by the process of arbitration. Hence, in exceptional cases in which the rules are not adhered to, the courts will perfectly be entitled to intervene and correct obvious errors.

The above decision offends the parties' choice to resolve their matters through arbitration. It also violates the parties' freedom of contract. This is because arbitration is a consensual process, where there is a meeting of the minds by the parties concerned to resort to arbitration instead of litigation. It is worthy to note that the limited interference in arbitral matters is not only an advantage to the contracting parties, but to the court as well. This is because less interference by courts allow the courts to focus more on the matters originally filed in the courts at first instance, or those appeals flowing from the lower courts and other tribunals. Additionally, it reduces the possibility of backlog caused by arbitration matters, therefore ensuring the efficient resolution of disputes in the courts. Flowing from this therefore, where Arbitration is unhampered by excessive court interference, Kenya becomes a potential hub for foreign investments, and an opportunity for Kenyans to actively participate in international trade becomes viable.

In a recent case, decided unanimously by the Court of Appeal, the place of arbitration was reinforced where the Court of Appeal struck out an appeal against the High Court's decision to set aside an arbitral award. In *Nyutu Agrovat Limited v Airtel Networks Limited*⁶³ the learned Justice Karanja found *inter alia*,

I also hold the view that Section 10 and 35 of the Arbitration Act must be interpreted within the context of the concept of finality as internationally recognized in arbitral proceedings conducted under the UNICITRAL model. They are not unconstitutional at all. Arbitration as a dispute resolution mechanism is not imposed on parties. They choose it freely when they incorporate the arbitration agreement into their contract, and at times even include the finality clause as was the case here.

When they do so, they send the message that they do not wish to be subjected to the long, tedious, expensive and sometimes inconvenient journey that commercial litigation entails. That is what party autonomy, a concept that the courts treats with deference is all about.

Indeed, this pronouncement by the Court of Appeal gives the contractual theory its full force, as this decision casts away any doubts as to the finality of arbitral awards, much to appreciation of parties who would want to venture into arbitration. It is imperative to note that just recently, (17th June, 2016), the Court of Appeal allowed an application by Nyutu Agrovat Limited to appeal to the

⁶³ [2015] eKLR.

Supreme Court against the judgment and orders of the Court of Appeal. The application was premised on two central issues of general public importance, namely:-

- a. The jurisdiction of the Court of Appeal to hear and determine appeals from the High Court in arbitral awards;
- b. The interpretation and scope of the law on court intervention in arbitration proceedings in Kenya given that alternative dispute resolution mechanisms now have Constitutional underpinning.

The decision flowing from the Supreme Court would definitely be of a defining jurisprudential character, as the same, stemming from the highest court in the land, would bind all the courts as relates the role of courts in arbitration. The Court of Appeal in allowing the application by Nyutu Agrovet Limited⁶⁴ at paragraph 35 expressed itself as follows;

This is not a case as the Respondent argued, where the applicant's interest is mere reinstatement of the award the arbitrator made in its favour. We do not think that the applicant merely wants to have a second bite at the cherry. The application for certification in our view is made *bonafide* and with a genuine desire to settle the law. A whole regime of law screams for settlement: can the concept of finality override clear Constitutional provisions? What is the importance and scope of contractual autonomy?.....isn't it because of perpetuating an injustice that Article 164 (3) of the Constitution has no limitation on the right of appeal to this Court? Should an incorrect decision of the courts below become part of our jurisprudence purely because of the concept of finality and contractual autonomy?

In *Tononoka Steels Limited v. E. A. Trade and Development Bank (PTA Bank)*⁶⁵ the Appellant entered into a loan agreement with the Respondent. The Agreement had an arbitration clause referring any arising disputes to the International Chamber of Commerce in London (ICC). When a dispute arose, the Appellant approached the High Court for *inter alia*, orders of injunction against the Respondent. The main issue arising was whether the High Court had jurisdiction. The Court held that the Kenyan Courts had jurisdiction to deal with peripheral matters whereas the ICC's was limited to substantive disputes. This, unfortunately, is one of the few ways the court imposes its jurisdiction even in glaringly clear circumstances where its involvement is legally not invited. The Court misconstrued the arbitration agreement to the detriment of the Respondent, setting a wrong precedent in regards to court's involvement in International Commercial Arbitration. The Court ought not to have proceeded with the matter for the reason that proceeding as it did, went contrary to the contractual theory, as the intention of the parties was to be subjected the ICC in case of a dispute.

⁶⁴ Civil Application Sup.3 of 2015.

⁶⁵ 2(2000) EA 536.

2.2. ROLE OF COURTS BEFORE REFERENCE TO ARBITRATION.

The court intervenes in two main ways before reference is made to arbitration namely:-

- i. Staying court proceedings; and
- ii. Issuance of interim measures of protection.

2.2.1 STAY OF PROCEEDINGS

This is the first way in which the Court intervenes before reference is made to the arbitral tribunal. The court has no power to compel arbitration, save indirectly, by refusing the claimant a remedy through the courts, so that if he wanted to pursue his claim, he could only do so by arbitration.⁶⁶ An order of stay of proceedings by the court is one of the most vital interventions the court makes to preserve the integrity of the arbitral process. Even where a valid arbitration agreement exists, the court is under no duty to oust its jurisdiction where a party to the arbitration agreement approaches it. The duty solely lies on the other party to the arbitration agreement to bring the same to the attention of the court, for the court's action. In the interest of enforcing the freedom of the parties to contract and the resultant agreement to arbitrate their disputes, the courts are given the powers to stay legal proceedings pending arbitration. This is necessary, given that the courts have no direct power, and of their own motion, to compel arbitration.⁶⁷

Whenever a party takes steps in court proceedings in a matter where a valid arbitration agreement exists and does not bring the same to the court's attention, that party automatically disqualifies itself to the arbitration process. In principle, an application for stay to refer the matter to arbitration brought after a party has taken actions in the court proceedings cannot suffice. In *Kisumuvalla Oil Industries Limited v Pan Asiatic Commodities PTE Limited & another*,⁶⁸ the Court of Appeal observed; 'the parties can of course expressly agree to ignore or disregard the clause. They may also do so by conduct. Once the parties have submitted to the jurisdiction of the court they cannot blow hot and cold and subsequently, without consent of each other, rely upon the condition precedent in the arbitration clause.'

The upshot of the foregoing is that, in upholding the principle of party autonomy that is fundamental in arbitration proceedings, parties can agree to disregard the arbitration clause and by consent, take the matter for adjudication by the court.

⁶⁶ David St. John Sutton, Judith Gill, Mathew Gearing; *Russel on Arbitration*, (23rd Ed, Sweet and Maxwell) 7-007.

⁶⁷ Kariuki Muigua, 'Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending and After Arbitration in Kenya.' A paper presented at the Chartered Institute of Arbitrators course on "Advocacy in Mediation and Arbitral Proceedings", on 5th February, 2009 (Revised on 1st March 2010) p.7. <http://www.kmco.co.ke/attachments/article/80/080_role_of_court_in_arbitration_2010.pdf>accessed 27th March, 2015.

⁶⁸ [1997] eKLR.

In *Peter Mwema Kaboro & another v. Benson Maina Gitetbuki*⁶⁹, a dispute arose in a matter where an arbitration agreement existed. The Plaintiff moved to court seeking *inter alia*, injunctive orders. The defendant entered appearance and filed his grounds of opposition. Subsequently thereafter, the defendant filed a chamber summons application seeking to strike out the plaintiff's suit and orders of stay of the proceedings. The Court held;

in the Application before me dated the 5th November 2005, the Defendant does not only seek to strike out the suit, which is beyond the ambit of Section 6 of the Arbitration Act, 1995 aforesaid, but has also failed to move the court to refer the parties to arbitration pursuant to the 13th August 1981 Agreement. In addition, and by filing the Grounds of Opposition dated the 5th November 2005, the Defendant has also actively taken another step in the proceedings and thereby waived his right to invoke and rely on the Arbitration Clause in the said Agreement. The result is that the Chamber Summons application dated the 5th November 2005 fails and it is ordered that the same be and is hereby dismissed with costs to the Plaintiffs.

Conditions precedent before Granting an Order of Stay of Proceedings.

- a) Existence of a valid arbitration agreement which is valid and enforceable.

This is echoed in arbitration statutes both in Kenya and in the United Kingdom. Section 6(1) of the Arbitration Act stipulates as follows:-

(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds'

(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

⁶⁹ [2006] eKLR.

b) Existence of a dispute between the parties with regard to matters agreed to be referred to Arbitration.

In the Kenyan case of *UAP Provincial Insurance Company Ltd (the Insurance Company) v Michael John Beckett*⁷⁰ the Court of Appeal sitting in Nairobi delivered its Ruling on 4th October, 2013 upholding the High Court's decision declining stay of proceedings on the ground that there was no dispute between parties capable of being referred to arbitration. In this case, Mr. Beckett lodged a claim with the insurance company with which he had taken out a comprehensive insurance policy, following the loss of his vehicle. The insurance policy had an arbitration clause but however, the insurance company repudiated Beckett's claim. Subsequently, after negotiations, the insurance company agreed to settle the claim by payment of Kenya Shillings Six Million (KShs. 6,000,000.00) to Beckett, which payment was never honored. Beckett then instituted a suit in the High Court to enforce the settlement agreement and sought judgment against the insurance company for, *inter alia*, Kenya Shillings Six Million (KShs. 6,000,000.00).

Following the institution of that suit by Beckett, the Insurance Company filed an application under Section 6 of the Arbitration Act, to stay that suit on the basis that under clause 10 of the Policy, all differences between the parties were to be referred to arbitration. That application was heard and dismissed in which the judge held that:

I decline to stay the proceedings herein as there is nothing to be referred to arbitration. There is no dispute between the parties. All there is, is the Plaintiff's right to be paid as per the agreement, and that has nothing to do with the policy document.

Aggrieved by that decision, the insurance company then instituted the present appeal. The Court of Appeal upheld the High Court decision and found that the High Court was right, in finding that the suit before him was for enforcement of the settlement agreement under which Beckett was pursuing his right to payment and that having regard to the settlement agreement, there was no dispute between parties capable of being referred to arbitration.

In *Abdul Aziz Suleiman v. South British Insurance Co. Ltd*⁷¹ the court held that where the parties have reached a settlement, there is nothing to be referred to arbitration. The same reasoning has also been sufficiently addressed in the case of *Addock Ingram East Africa Limited vs. Surgilinks Limited*⁷² where the court stated that if a certain portion of a claim is not in dispute, it is improper to refer the entire claim to arbitration.

⁷⁰ Civil Appeal 26 of 2007 available at < <http://kenyalaw.org/caselaw/cases/view/91425/>> accessed 7th April, 2015.

⁷¹ Civil Appeal No. 779 of 1964 [1965] E.A. 66, at p. 70.

⁷² [2012] eKLR.

- c) The applicant for stay must be a party to the arbitration agreement or at least a person claiming through a party e.g. a personal representative or trustee in bankruptcy.⁷³

This requirement is in view of the doctrine of privity of a contract, which is to the effect that only parties to a contract can enforce it, and a party not party to a contract cannot enforce it. In *Chevron Kenya Limited V Tamoil Kenya Limited*⁷⁴ the High Court held that the Defendant was not a party to the arbitration agreement and therefore not entitled to lodge the application for stay of proceedings.

- d) The party making the application for stay must not have taken steps in the proceedings to answer the substantive claim.

This helps to curb delaying tactics that are usually employed by the Respondent. The Defendant is thereby barred from bringing an application for stay of proceedings late in the day, which would majorly serve to frustrate the Plaintiff's case. Additionally, by taking steps to answer the substantive claim, the party submits or is at least taken to be submitting to the jurisdiction of the court and electing to have court deal with the matter rather than insisting on the right to arbitration. This remedy is also only available to the Defendant, and would be unprocedural and an abuse of court process for a plaintiff to proceed in this manner.

In *Pamela Akora Imenje vs. Akora Itc International Ltd & Another*⁷⁵ subsequent to the filing of suit, the Plaintiff made an application for stay of the proceedings and reference of the matter to arbitration. Mr. Justice Waweru held that;

The Plaintiff's application is wholly misconceived. Having chosen to file suit instead of invoking the arbitration clause in the Articles of Association of the 1st Defendant, she cannot now purport to have recourse to section 6 (1) of the Arbitration Act, 1995. That provision is available only to the Defendants. The very wording of the sub-section makes this plain and obvious....In the result, the Plaintiff's application by chamber summons dated 12th October, 2005 is refused. It is hereby dismissed with costs to the Defendants. Orders accordingly.

⁷³ Kariuki Muigua, "Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending and After Arbitration in Kenya." A paper presented at the Chartered Institute of Arbitrators course on "Advocacy in Mediation and Arbitral Proceedings", on 5th February, 2009 (Revised on 1st March 2010) p.10
<http://www.kmco.co.ke/attachments/article/80/080_role_of_court_in_arbitration_2010.pdf> accessed 27th March, 2015.

⁷⁴ [2007] eKLR.

⁷⁵ [2007] eKLR.

It should be noted that filing a memorandum of appearance does not amount to a step that would show the defendant admits to court's jurisdiction. In *Eagle Star Insurance Company Limited – vs – Yuval Insurance Company Limited*⁷⁶ Lord Denning MR as he then was stated as follows; On those authorities, it seems to me that in order to deprive a defendant of his recourse to arbitration a “step in the proceedings” must be one which impliedly affirms the correctness of the proceedings, and the willingness of the defendant to go along with the determination by the courts of Law instead of arbitration. However, when the memorandum of appearance is followed by a statement of defence, the defendant is taken to have admitted to the jurisdiction of the court. In the case of *Corporate Insurance Co. –Vs- Wachira*⁷⁷ the court held that; in the present Case, if the appellant wished to take the benefit of the clause, it was obliged to apply for a stay after entering appearance and before delivering any pleading. By filing a defence the appellant lost its right to rely on the clause. In *Fairlane Supermarket Limited –Vs-Barclays Bank Limited*⁷⁸ Odunga J. held that; “The option to refer the matter to arbitration was sealed when the defendant herein entered appearance and followed it with a defence.’

In *Safaricom Limited V Flashcom Limited*⁷⁹ the Learned Justice Mabeya stated;

It is clear from the foregoing, that an application by the defendant ought to have been for stay of proceedings and reference to arbitration. The same should also have been made before delivering a defence. In the words of the Section, the defendant ought not to have taken any other step in the proceedings after entering appearance but to have brought this application. Not only did the defendant deliver a defence, but it also delivered a counterclaim against the plaintiff. In view of this, I hold that the defendant did submit to the jurisdiction of this court and had waived its right to have this matter referred to arbitration.’

Even though an application for stay should be filed at the time of entering appearance or afterwards, the defendant should be wary of being indolent and thereby guilty of laches. The defendant ought to move with utmost speed when making the application for stay. In a very recent case of *Diocese of Marsabit Registered Trustees v Technotrade Pavilion Ltd*⁸⁰ Justice Gikonyo found that:-

Needless to state that arbitration falls in the alternative forms of dispute resolutions which under Article 159(2) (c) of the Constitution should be promoted by courts except in so far as they are not inconsistent with any written law. By these provisions of the Constitution and

⁷⁶ [1978] 1 Lloyds Rep.357.

⁷⁷ (1995-1998) 1EA 20.

⁷⁸ NAI HCCC No. 102 of 2011.

⁷⁹ [2012] eKLR.

⁸⁰ [2014] eKLR.

the fact that the process of arbitration is largely consensual, a party who fails to adhere to the law such as section 6(1) of the Arbitration Act forfeits his right to apply for and have the proceedings stayed or matter referred to arbitration. And for all purposes, such is an indolent party who should not be allowed to circumvent the desire and right of the other party from availing itself of the judicial process of the court. With that understanding, **a delay of fourteen (14) days becomes unreasonable** in the eyes of the law and the circumstances of the case. On that ground alone, the application herein having been made fourteen days after the filing of appearance, should fail.

The above case is a drastic shift and move from the decision of *TM AM Construction Group (Africa) V Attorney General*⁸¹ Where there was a Forty One (41) day delay before the application for stay was filed. In that case Judge Mbaluto (as he then was) stated;

I find that the Attorney General was obliged to apply for a stay not later than the time when he entered appearance. Accordingly, by filing appearance on 15th March, 2001 and waiting for some 41 days before applying for stay of the proceedings, the Attorney General lost his right to rely on the Arbitration Clause for that reason; the application is clearly untenable and cannot possibly succeed.

2.2.2. INTERIM MEASURES OF PROTECTION BEFORE ARBITRATION.

Section 7 of the Arbitration Act provides; ‘It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.’ In granting interim measures of protection, the court does not thereby assume jurisdiction over the matters to be resolved by the arbitral tribunal.⁸² It is therefore important to distinguish the court’s jurisdiction from that of the arbitral tribunal, as the latter has its own powers to grant interim measures of protection under section 18 of the Act.⁸³ Justice Nyamu in Safari Limited’s case (*infra*), observed that a court of law when asked to issue interim measures of protection, must always be reluctant to make a decision that would risk prejudicing the outcome of the arbitration. In the case of *Channel Group v Balfour Beatty Ltd.*⁸⁴ the English courts found as follows;

⁸¹ EALR (2001) EA pages 291-295.

⁸² Githu Muigai, ‘The Role of Court in Arbitration Proceedings’ in Githu Muigai (ed), *Arbitration Law and Practice in Kenya* (lawAfrica) 78.

⁸³ Ibid 78-79.

⁸⁴ [1993] Adj.L.R. 01/21 at p. 18 available at <<http://www.nadr.co.uk/articles/published/AdjudicationLawReports/Channel%20Tunnel%20v%20Balfour%20Beatty%201993.pdf>> accessed 12th April, 2015.

There is always a tension when the court is asked to order, by way of interim relief in support of an arbitration a remedy of the same kind as will ultimately be sought from the arbitrators: on the one hand, the need for the court to make a tentative assessment of the merits in order to decide whether the plaintiff's claim is strong enough to merit protection, and on the other, the duty of the court to respect the choice of tribunal which both parties have made and not to take out of the hands of the arbitrators (or other decision makers), a power of decision which the parties have entrusted to them alone. In the present instance, I consider that the latter considerations must prevail... If the court now itself orders an interlocutory mandatory injunction, there will be very little left for the arbitrators to decide.

The powers of the court could include those of making orders for preservation like attachment before judgment; interim custody or sale of goods (e.g. perishables) the subject matter of the reference or for detention or preserving of any property or thing concerned in the reference, appointing a receiver and interim injunctions.⁸⁵ In the Court of Appeal case of *Safari Limited –Vs– Ocean View Beach Hotel Limited & 2 Others*⁸⁶ Justice Nyamu stated that; ‘under our system of the law on arbitration the essentials which the court must take into account before issuing the interim measures of protection are:-

1. The existence of an arbitration agreement.
2. Whether the subject matter of arbitration is under threat.
3. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application?
4. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal's decision making power as intended by the parties?’

Justice Nyamu then rendered an interim measure of protection for 28 days only, to enable the parties to institute the necessary arbitral proceedings failing which the order would automatically cease to operate. Justice Nyamu's decision demonstrates further the enabling role that the courts play in arbitration through and through. Most importantly, Hart's rule of recognition gains preeminence in this discussion. The Court recognizes that an arbitral tribunal also has the power to grant interim measures of protection and is cautious of ripping an arbitrator of this power. As a result, the learned Judge issues the injunction for a few days prior to commencement of arbitration

⁸⁵ Kariuki Muigua, “Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending and After Arbitration in Kenya.” A paper presented at the Chartered Institute of Arbitrators course on “Advocacy in Mediation and Arbitral Proceedings”, on 5th February, 2009 (Revised on 1st March 2010) p.19.

⁸⁶ (2010) eKLR.

where after it lapses. Moreover, the learned judge is alive to the contractual theory-that parties opted to arbitration and not litigation. These Judges' ruling thereby resonates with these two theories which are the crux of this paper.

2.3. ROLE OF COURTS DURING ARBITRATION.

The Arbitration Act has provisions that allow for the instances in which the court can intervene during the pendency of arbitration proceedings. These include:

- i. Appointment of Arbitrators⁸⁷;
- ii. Challenging Arbitrators⁸⁸;
- iii. Termination of the Arbitrator's mandate⁸⁹;
- iv. Determining the Arbitral Tribunal's Jurisdiction⁹⁰;
- v. Interim measures of protection during arbitration⁹¹;
- vi. Court's assistance in taking evidence for use in arbitration⁹²; and
- vii. Determination of a question of law.⁹³

2.3.1. Appointment of Arbitrators.

Owing to the principle of party autonomy, the court cannot appoint an arbitrator, as arbitration is a party driven process. Courts, when faced with the issue of appointment of Arbitrators, must make decisions out of best judgment; acutely aware that arbitration is a consensual process; and with abundance of caution about the effect of appointment of an arbitrator by the Court under section 12(8) of the Arbitration Act-that the court's decision on appointment of arbitrators is final and not subject to appeal. This was as it was rightly held in the case of *Edward Muriu Kamau & 4 others all trading as Muriu, Mungai & Co. Advocates v John Syekei Nyandieka*⁹⁴ where the learned judge directed the Chairman for the time being of the Chartered Institute of Arbitrators, to appoint a sole arbitrator from a list of parties' nominees, even though the arbitration agreement did not provide for the same.

However, where one party moves to court challenging the appointment of an arbitrator, the court can grant an application to set aside an appointment of an arbitrator, only where it is satisfied that

⁸⁷ The Arbitration Act section 12.

⁸⁸ Ibid section 14.

⁸⁹ Ibid section 15.

⁹⁰ Ibid section 17 (5).

⁹¹ Ibid section 18 (2) & (3).

⁹² Ibid section 28.

⁹³ Ibid section 39.

⁹⁴ [2014] eKLR.

there was good cause for the failure or refusal of the party in default to appoint his arbitrator in due time.⁹⁵

Unless the parties otherwise agree, where each of two parties to an arbitration agreement is to appoint an arbitrator and one party (“the party in default”) has indicated that he is unwilling to do so, or fails to do so within the time allowed under the arbitration agreement, or fails to do so within fourteen days (where the arbitration agreement does not limit the time within which an arbitrator must be appointed by a party), the other party, having duly appointed an arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.⁹⁶ This position has recently been reaffirmed in the case of *Pan African Paper Mills (East Africa) Limited (In Receivership) v First Assurance Company Limited*.⁹⁷ In this case, and under the respective insurance policy, all differences arising out of the policy were to be referred to the decision of an arbitrator who was to be appointed in writing by the parties. However, the Plaintiff’s efforts to obtain agreement on the appointment of an arbitrator had been unsuccessful hence the application. There had been no response from the Defendant on the issue of the appointment of the arbitrator. The arbitration clause read as follows:-

All differences arising out of this policy shall be referred to the decision of an arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single Arbitrator, to the decision of two arbitrators one to be appointed in writing by each of the parties...

The court found that;

... I am satisfied that this Court can grant the orders for the appointment of a sole arbitrator. In making such appointment, the Court is enjoined to take into account qualifications required of an arbitrator by the agreement of the parties. The Court will also ensure the appointment of an independent and impartial arbitrator..... with regard to the impartiality of the proposed Arbitrator, there is nothing on Court record to show that he would be biased or there is a conflict of interest. The Defendant has not shown that they will suffer any prejudice if the said Arbitrator is appointed.

2.3.2 Challenging Arbitrators.

The question of challenging the appointment of an arbitrator ought to be brought to the High Court as an appeal from the arbitration tribunal’s decision. The doctrine of competence competence mandates every party unhappy with the appointment procedure to first make an application before the tribunal for its determination. It is upon the decision of the tribunal rejecting the challenge that a

⁹⁵ The Arbitration Act section 12 (4) & (5).

⁹⁶ Ibid section 12 (3).

⁹⁷ [2015] eKLR.

party approaches the High Court for its determination on the same.⁹⁸The decision of the High Court is final and binding, and not subject to any appeal thereof.⁹⁹

The grounds for such challenge need to be compelling and a party cannot, for instance, make a blanket allegation such as erosion of confidence. Erosion of confidence in the arbitrator is too wide a concept which is incapable of specific definition, or which could be tethered to a defined catalogue of incidents. It is the totality of the varied incidents a party may possibly plead in a challenge to the arbitrator. It will include allegations of bias, prejudice, misconduct, incompetence et al. The Court in *Zadock Furnitures Systems Limited & another v Central Bank of Kenya*¹⁰⁰ stated that the grounds raised, should justify only one and inescapable conclusion-that the integrity of the judicial process was so compromised such that no reasonable person will say the arbitrator will deliver justice to the party challenging the arbitrator. The appropriate test, therefore, is that lack of impartiality and independence must be -“manifest” as opposed to-“mere possibility”-“almost certain” when circumstances of the case are considered.

The Court held thus;

The Applicants have packaged the challenge in words and phrases which appear to be very powerful; but I think the actual grounds for the challenge are feeble in substance. Unless the court is careful, inflated trivial issues may easily pass for real and substantial grounds of removal of an arbitrator, which will run contrary to the constitutional principle of justice that courts should promote arbitration as one of the efficacious alternative dispute resolution mechanism. Needless to state, such challenges if they are not properly sieved will negate the intention of the Arbitration Act and the entire standards and practices in arbitration within the UNCITRAL Model Law. The court should be wary that those intent on obstructing arbitral process may file unmeritorious challenges of arbitrators in the High Court, thus, to defeat such maneuvers, courts should dispose of a challenge to arbitrator expeditiously. I find that there exist no circumstances that give rise to justifiable doubts as to the impartiality and independence of the arbitrator.

2.3.3 Termination of the Arbitrator’s mandate.

On an application by a party, the Court can terminate the mandate of an arbitrator where he is unable to perform the functions of his office or for any other reason, fails to conduct the proceedings properly and with reasonable dispatch, where he withdraws from his office, or where the parties agree in writing to the termination of the mandate. Inability to perform his functions may

⁹⁸ Ibid section 14 (3).

⁹⁹ Ibid section 14 (6).

¹⁰⁰ [2014] eKLR.

arise if the arbitrator is seriously ill or dies or perhaps where due to political controls, an arbitrator is physically or legally prevented from performing.¹⁰¹

Where an arbitrator withdraws from his office, he may, if prior notice has been given to the parties, apply to the High Court to grant him relief from any liability thereby incurred by him; and to make such order as the court thinks fit with respect to his entitlement (if any), to fees or expenses or the repayment of any fees or expenses already paid. Where the High Court is satisfied that, in the circumstances, it was reasonable for the arbitrator to resign, it may grant relief on such terms as it may think fit. The decision of the High Court shall be final and shall not be subject to appeal.¹⁰²

The question of whether an arbitral tribunal is delaying a matter before it may not be easy to ascertain, especially in adhoc arbitrations¹⁰³. Even in Institutional arbitrations, not all provide time limits for conduct of arbitration proceeding. WIPO¹⁰⁴ and AAA's¹⁰⁵ international arbitration rules do not impose any time limits. The ICC¹⁰⁶ Rules however provide time limits.¹⁰⁷ Under the ICC Rules for instance, an arbitrator is replaced on the Court's own initiative, when it decides that the arbitrator is prevented de jure or de facto from fulfilling his functions, or that the arbitrator is not fulfilling those functions in accordance with the Rules or within the prescribed time limits.¹⁰⁸

2.3.4 Determining the Arbitral Tribunal's Jurisdiction

A plea that the arbitral tribunal does not have jurisdiction may be raised at any time before the filing of a statement of defense.¹⁰⁹ The tribunal then addresses this plea as a preliminary question or in the arbitration award on its merits.¹¹⁰ Any party aggrieved by such a decision may approach the High Court in an appeal within thirty (30) days of the tribunal's ruling, and the decision of the court on the same shall be final and binding.¹¹¹

¹⁰¹ Githu Muigai, 'The Role of Court in Arbitration Proceedings' in Githu Muigai (ed), *Arbitration Law and Practice in Kenya* (lawAfrica) 81.

¹⁰² The Arbitration Act section 16 A.

¹⁰³ 'Ad hoc' or non-institutional arbitrations are those arbitrations in which the parties alone or with the arbitral tribunal, devise and administer their own procedures as opposed to 'institutional arbitrations' which are administered by an arbitral institution and conducted in accordance with the arbitration rules of such an institution (e.g. the ICC, LCIA, AAA/ICDR) Arbitral institutions are also generally willing to act simply as appointing authorities, to appoint an arbitrator for an arbitration which is otherwise *ad hoc*.

¹⁰⁴ The World Intellectual Property Organization (WIPO) Arbitration Centre.

¹⁰⁵ The American Arbitration Association.

¹⁰⁶ The International Chamber of Commerce in Paris.

¹⁰⁷ Article 24. Give the time limit.

¹⁰⁸ Article 15(2) of the ICC Rules.

¹⁰⁹ The Arbitration Act section 17 (2).

¹¹⁰ Ibid section 17 (5).

¹¹¹ Ibid section 17 (6 & 7).

2.3.5. Interim measures of protection during arbitration

It is important to note that, unlike interim measures of protection given by the court before reference to arbitration, those given by court during arbitration need the approval of the arbitral tribunal.¹¹²Courts should be cautious of delving into the substance of the Arbitration when faced with an issue of grant of interim measures of protection. The Court of Appeal rightly held in *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others*¹¹³ In the matter before us, the court went on to make orders which undermined the arbitration and the outcome of the arbitration contrary to Section 17 of the Arbitration Act. A court of law when asked to issue interim measures of protection must always be reluctant to make a decision that would risk prejudicing the outcome of the arbitration.”

The Court of Appeal exercised its caution in granting the injunctive relief. In essence, courts, in keeping with the contractual theory and the rule of recognition, issue injunctive orders that do not extend to barring parties with proceeding to arbitration. In the case above, an injunction was issued for a period of 28 days to enable the process of arbitration to commence.

In *Infocard Holdings Limited vs. the A-G & Another*¹¹⁴ the High Court found that; ‘the manner in which the parties have submitted on that issue is but a stealth enticement to the court to venture into the merits of the agreement, and if the court were to take that bait, it will be usurping the jurisdiction of the arbitral tribunal which by law is empowered to determine the validity or otherwise of the arbitration agreement.’

The above decision shows that the courts are now alive to maneuvers employed by counsel to frustrate arbitration. The above decision demonstrates that the courts are facilitative of arbitration and wouldn’t want their decisions to defeat arbitration.

2.3.6. Court’s assistance in taking evidence for use in arbitration

The Court’s role in taking evidence also requires the approval of the arbitral tribunal.¹¹⁵ The Court’s assistance entails issuance of summons to the witnesses to secure their attendance, the examination of a witness on oath before an officer of the court or any other officer, where the witness is outside the jurisdiction of the court, the issuance of an order for the taking of evidence by a commission or request for examination of a witness outside the jurisdiction.¹¹⁶

¹¹² Ibid section 18 (2).

¹¹³ [2010] eKLR.

¹¹⁴ [2014] eKLR.

¹¹⁵ The Arbitration Act section 28.

¹¹⁶ Dr. Kariuki Muigua, FCIarb, Ph.D, *Settling disputes through Arbitration in Kenya* (Lodana publishers) 184.

2.3.7. Determination of a question of law.

Applications to the High Court or a determination on a point of law may be made on agreement of the parties, or as an appeal from the decision of the arbitral tribunal.¹¹⁷ Where the point of law arises from an award, the court can either confirm, vary or set aside an arbitral award. The Court can additionally choose to remit the matter back to the tribunal for reconsideration. The decision of the High Court in this regard, is subject to appeal. However, and as was held in the case of *Kenya Shell Limited vs Kobil Petroleum Limited*¹¹⁸ public policy considerations may hinder a successful appeal, even where there are valid questions of law raised.

2.4. ROLE OF COURTS AFTER ARBITRATION.

The role of the court at this stage, essentially and principally revolves around the arbitral award. The court's jurisdiction is therefore invoked in the following scenarios:-

- i. Setting aside of an arbitral award¹¹⁹; and
- ii. Recognition and enforcement of arbitral awards¹²⁰.

2.4.1. Setting aside of an arbitral award.

There are various grounds the court considers, upon application by a party, before it can set aside an arbitration award.¹²¹ The most controversial of these is the setting aside of an award where the court finds that it is in conflict with the public policy in Kenya. In the case of *Christ for All Nations v Apollo Insurance Co. Ltd*¹²² the Court of Appeal found that an award may conflict public policy if it is inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or inimical to the national interest of Kenya; or contrary to justice and morality. These grounds were also relied upon in *Macco Systems India PVT Limited v Kenya Finance Bank Limited*¹²³ In *Glencore Grain Ltd v TSS Gain Millers Ltd*¹²⁴ In *Glencore Grain Ltd vs TSS Grain Millers Ltd*¹²⁵ the High Court which held that the enforcement of an arbitral award which awarded compensation for a contract, the performance of which would have released in the Kenyan market maize which had been certified as unfit for human consumption was contrary to public policy.

A party wishing to make an application for setting aside an arbitral award must move with speed as it cannot be made after the lapse of three months from the date the party making the application

¹¹⁷ The Arbitration Act section 39.

¹¹⁸ Civil Appeal (Nairobi) No. 57 of 2006.

¹¹⁹ The Arbitration Act section 35.

¹²⁰ Ibid section 36.

¹²¹ Ibid section 35 (2).

¹²² [2001] KLR 483.

¹²³ HCCC (Milimani) No. 173 of 1999.

¹²⁴ [2002] KLR 1.

¹²⁵ [2002] KLR 1.

received the arbitral award.¹²⁶ The Court of Appeal in the case of *Anne Mumbi Hinga vs Victoria Njoki Gathara*¹²⁷ stated that; ‘section 35 of the Arbitration Act bars any challenge even for a valid reason after 3 months from the date of delivery of the award.... All the applications filed in the superior court were incompetently brought before the superior court and the court lacked jurisdiction.’ The High Court, when required to set aside an arbitral award, may, where appropriate and so requested by a party suspend the proceedings to set aside the arbitral award for such period of time determined by it, in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award.¹²⁸

2.4.2. Recognition and enforcement of arbitral awards.

Having received an award made in its favour, a successful party can expect one of three things to happen:¹²⁹ -

- a) The award is honored i.e. the other party pays the successful party the amounts awarded to it without delay;
- b) The other party effectively ignores the award but takes no active steps to resist it; or
- c) The other party actively challenges the award and/or resists any attempt by the successful party to have the award recognized or enforced.

Faced with a recalcitrant opponent, a successful party may seek the assistance of the state courts to compel its opponent to give effect to the award. In doing so, the successful party will ask the courts to recognize and enforce the award. Before a court can enforce an award, the award needs to be recognized which entails the court accepting that the decision of the tribunal is valid and that it is binding on the parties. Thereafter, the court then enforces the award, which is the process of compelling the recalcitrant party to comply with the terms of the award.

A state that is a party to the New York Convention (NYC), such as Kenya, undertakes to enforce awards in accordance with its local procedural laws. The NYC¹³⁰ provides that a party seeking such recognition and enforcement should produce to the relevant court¹³¹:

- a) The duly authenticated original award or a duly certified copy thereof;
- b) The Original agreement referred to in Article II or a duly certified copy thereof.

¹²⁶ The Arbitration Act section 35 (3).

¹²⁷ [2009] eKLR.

¹²⁸ Githu Muigai, ‘The Role of Court in Arbitration Proceedings’ in Githu Muigai (ed), *Arbitration Law and Practice in Kenya* (lawAfrica) 86.

¹²⁹ Philip Capper, *International Arbitration: a handbook* 3rd Edition (London Singapore) 2004 at p. 121.

¹³⁰ Article IV.

¹³¹ See also section 36 (3) of the Arbitration Act.

The above documentation is critical, as was enunciated in the case of *Kundan Singh Construction Ltd v Kenya Ports Authority*¹³² where an application for recognition and enforcement of an arbitral award was struck out for failure to comply with section 36 (2) of the Arbitration Act. The Court found that there was not a duly authenticated original arbitral award or duly certified copy of it. Rather, the Court found that what was on the Court's record were photocopies of the arbitral award and arbitration agreement contrary to the requirements of section 36 (2) of the Act, which could only be waived upon application which had not been made.

The above can arguably be one of the bad decisions passed by the court in the exercise of its power. Striking out the application for recognition and enforcement was an extreme, drastic and draconian measure employed by the court. The court would have, at the very least, ordered for the production of the duly certified copy thereof, impose court adjournment fees, and then proceed to hear the application on its merits. The Court did not act fairly and unjustifiably ripped the applicant of the fruits of the award.

The NYC¹³³ further provides that if the award and the arbitration agreement are not in the official language of the country in which recognition and enforcement is sought, certified translations are needed.¹³⁴ The Court will then grant recognition and enforcement unless one or more grounds for refusal listed in the NYC exist¹³⁵. It is important to note that just like setting aside of arbitral awards, public policy is also a primary consideration before courts can recognize and enforce arbitral awards.¹³⁶ However, even if the grounds for refusal of recognition and enforcement are proved to exist, the enforcing court is not obliged to refuse enforcement. This is derived from the opening paragraphs (1) and (2) of Article V that state that enforcement **may** be refused¹³⁷. It does not state that the court **must**. The language is permissive and not mandatory. The same permissive language is replicated in the Arbitration Act.¹³⁸

In an ideal world, the provisions of the NYC would be interpreted in the same way by courts everywhere. Sadly, this does not happen. There are inconsistent decisions under the NYC just as there may be inconsistent decisions within a national system. Whilst these decisions have no binding authority on national courts in other jurisdictions, they may provide useful guidelines for the interpretation of a particular ground for refusal in a particular case.

¹³² HCCC No. 794 of 2003.

¹³³ Article IV.2.

¹³⁴ See also section 36 (4) of the Arbitration Act.

¹³⁵ Ibid section 37; Article V of the NYC.

¹³⁶ Ibid at section 37 (1) (b); Article V.2 (a) of the NYC.

¹³⁷ Ibid.

¹³⁸ Sections 35 (2) and 37 (1) of the Arbitration Act.

By and large and flowing from the foregoing, the courts in Kenya are very conscious and alive to the extent of their jurisdiction in arbitral matters. Whenever they are faced with applications in arbitration matters, their interpretation of the arbitration clauses has been commendable, giving the principle of party autonomy the eminence that it deserves and that is intended of arbitration. They have positively identified the parties bent on running away from these clauses and frustrating arbitration by referring such matters to arbitration. By so doing, courts are helping enforce parties' contracts and enhance arbitration, which has the net effect of placing Kenya as hub even for international commercial arbitration.

2.5. CONCLUSION

From the foregoing discussion, as brought out by the wealth of authorities, it is clear that the future of arbitration in Kenya is bright, but has the potential of growth on condition that a few recommendations made are considered. The fact that the court is given a discretion (may), as to whether to set aside or refuse to enforce an arbitral award even after proof of *inter alia*, the arbitration agreement being invalid, improper arbitration procedure that offends the arbitration agreement being followed, or the award being procured fraudulently ought to be amended. This is because, an avenue for different bad precedents being set forth exists. With the wording of the Arbitration Act as is,¹³⁹ there is no uniformity of the law as relates setting aside, enforcement and recognition of arbitral awards.

By and large, parties can have faith in the arbitral process and be confident that their wishes will, in most instances be taken into consideration, when the court's involvement becomes necessary. The Jurisprudential theories identified in chapter one, gain credence from an analysis of the cases in this chapter. The Arbitration Act and the NYC elaborately lay down the criteria that must be met, before a court can set aside, recognize and/or enforce an award. The contractual theory together with Hart's Rule of recognition's application are demonstrated *inter alia*, when a question of grant of an interim measure faces the court. The court is careful not to usurp the tribunal's powers thereby prejudicing the arbitration and ultimately, the parties' contractual intentions. In the premises, it is quite evident that a respectful relationship that acknowledges the extent of power and jurisdiction can be bolstered between the judges and arbitrators, which is a road map to a streamlined arbitration procedure in Kenya.

¹³⁹ Ibid.

CHAPTER THREE

3.0. COMPARATIVE STUDY

3.1. INTRODUCTION

Having considered and analyzed a number of cases in Kenya at every stage in arbitration in chapter two, this chapter now develops a comparative analysis with a different jurisdiction-England which is the common law mother, from which Kenya traditionally drew and heavily borrowed its laws and rules of procedure from. It is notable that, although England did not adopt the Model Law, very close attention was paid to the Model Law when drafting the English Arbitration Act of 1996 and both the structure and the content of the English Arbitration Act owe much to the Model Law.¹⁴⁰ England is notable for resisting the wholesale adoption of the Model Law despite the English Arbitration Act having similar provisions to those of the Model Law.

This chapter therefore focuses on answering the third question on what are the possible areas of reform in the arbitral process, this chapter therefore compares how courts in England partake in arbitration vis-a-vis Kenya, highlighting room for improvement, and what can be borrowed or disregarded from England. The Chapter will also show how the laws in England have ensured a balance in maintaining the role of the Courts to intervene in arbitration, and upholding arbitration as an Alternative to the Court process.

3.2. ENGLAND

In England, arbitration is governed by the Arbitration Act, 1996 (hereinafter “the English Arbitration Act”) which is the most radical piece of legislation in the history of English arbitration law.¹⁴¹ It rectifies many of the problems with the arbitration process that existed before its commencement.¹⁴²

Arbitration¹⁴³ has now become almost a transnational system of justice. This is not only because private parties systematically have recourse to it, but also because States recognize the importance of arbitration, in the interests of promoting international business transactions and to a greater or lesser

¹⁴⁰ Edward Nii Adja Torgbor, ‘A Comparative Study of Law and Practice of Arbitration in Kenya, Nigeria and Zimbabwe, with particular reference to current problems in Kenya’ (LL.D thesis, University of Stellenbosch 2013); Ashraf El Motei, ‘Local Court Intervention in International Arbitration’ (2009) <http://www.motei.com/local-court-intervention-in-international-arbitration> accessed 27th February, 2016.

¹⁴¹ Andrew Tweedale, Keren Tweedale, *Arbitration of Commercial disputes International and English Law Practice* (Oxford University press) para 15.51.

¹⁴² Ibid.

¹⁴³ Arbitration is a form of alternative dispute resolution in which parties to a dispute submit to the binding decision of a person acting in a judicial manner in private, rather than to a court of law. <<http://www.lexisnexis.com/uk/legal/search/journalssubmitForm.do>> accessed 13th September, 2015.

extent, tend to favor it, as is witnessed by the almost universal acceptance of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 9, 1958.¹⁴⁴

Just like section 10 of the Arbitration Act in Kenya¹⁴⁵ the English courts have reiterated the limited role of courts in arbitration. In *Lesotho Highlands v Impreglio SpA*¹⁴⁶ the House of Lords stated that ‘it has given to the court only those essential powers which I believe the court should have’. With this decision, modern Courts were compelled to refrain from addressing the question of whether the arbitration agreement was valid and left that question, at least in the first instance, to the arbitral tribunal.¹⁴⁷ In *Cetelem v Roust*¹⁴⁸ the Court of Appeal stated that a central and important purpose of the 1996 Act was to emphasize the importance of party autonomy and to restrict the role of the courts in the arbitral process, in particular, assisting the arbitral process and should not usurp or interfere with it.

The limited role of the court in arbitration has therefore been acknowledged by not only the High Court but also, the Court of Appeal. The force that Court of Appeal decisions have is that they are binding on the high court, which is the forum most arbitration related proceedings and applications are filed at the first instance. In the premises, a standard on the minimal court’s role is thereby set for the English legal system. This is also not to say that the court merely intervenes to frustrate the arbitral process. The minimal court’s role is in most instances, highly advantageous as will be brought out in the discussion below.

3.3. THE ROLE OF THE COURT BEFORE ARBITRATION

Section 1 (a) of the English Arbitration Act provides that the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense. It goes further to provide that the court should not intervene except as provided for in that part. This opening paragraph is partly friendly, and reassures the parties concerned that they are in control of the process from the very outset. This statement of principle, effectively defines the limit of the court’s role in arbitration.

3.3.1 Stay of legal proceedings.

The English Arbitration Act, quite differently from the Arbitration Act in Kenya, is express as to the mandate of the English courts to award applications for stay even where the Seat of the arbitration is

¹⁴⁴ Luca G. Radicati di Brozolo, *The Relation between Courts and Arbitration: Support or Hostility* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2125445 accessed 14th September, 2015.

¹⁴⁵ No. 4 of 1995.

¹⁴⁶[2006] 1 A.C. 221 at [18].

¹⁴⁷ Professor David A R Williams QC, ‘Defining the role of the court in modern international Commercial arbitration,’ http://www.globalarbitrationreview.com/cdn/files/gar/articles/david_williams_Defining_the_Role_of_the_Court_in_Modern_Intl_Commercial_Arbitra.pdf> accessed 15th September, 2015.

¹⁴⁸[2005] 1 W.L.R. 3555 at 3571.

not in England.¹⁴⁹ In the premises, the jurisdiction of the court cannot be questioned on this basis, when an application has been brought before it for its determination. The situation is contrasted in Kenya as our law is silent, leaving the courts with the responsibility of determining the same. In the case of *Civicon Ltd v Kivuwatt Limit*¹⁵⁰ The agreement was governed by the laws of England and Wales (clause 28.2) and any dispute arising from or connected therewith was subject to resolution by arbitration pursuant to clause 25.3 which was in the following terms; 'Any dispute arising in this agreement shall be submitted to binding arbitration of the International Chamber of Commerce, clause 25.2.2. The arbitration shall have its seat in Zurich, Switzerland and the arbitration shall be conducted in the English language'.

The Defendant contended that the Plaintiff failed to disclose that under the said contract, all disputes arising out of or in connection with the contracts or relating thereto were subject to a binding arbitration provision under the applicable rules of the ICC and that the seat for such arbitration was Zurich – Switzerland which ousted the jurisdiction of the Kenyan Courts.¹⁵¹ Justice Muya however, proceeded to grant an order for stay of proceedings pending the arbitration proceedings. Such was also the holding in the case of *Indigo EPZ Ltd. Vs Eastern Southern African Trade and Development Bank*¹⁵² where it was held that agreements purporting to oust the jurisdiction of our courts are prohibited. So even in as much as our statute law is silent as to the scope of our courts where the procedural law is not Kenyan, authorities have granted our courts jurisdiction, which is pretty much in line with jurisprudential theory of legal realism where Judges make law.¹⁵³

The primacy given to arbitration clauses was also noted in the case of *The Nerano*¹⁵⁴ the parties agreed English law and jurisdiction clauses on the front of the bill. On the back of the bill of lading was a further clause that provided that 'all terms and conditions ... and the arbitration clause of the [c]harterparty ... are herewith incorporated'. The arbitration clause in the charter party specified that 'disputes arising shall be determined in London, England'. The plaintiff sued in the English

¹⁴⁹Section 2(2) (a) which states; 'The following sections apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined sections 9 to 11 (stay of legal proceedings, &c)..'

¹⁵⁰[2013] eKLR

¹⁵¹The Plaintiff however contended that the jurisdiction of the Kenyan court to grant interim reliefs/preservatory orders pending arbitration was a matter of law and could not be ousted by agreement between parties regardless of the seat of arbitration as well as the governing law as that would amount to contracting outside the law.

¹⁵²Nairobi HCC No. 1034 of 2002.

¹⁵³M.D.A. Freeman, *Lloyd's introduction to jurisprudence* (8th Edition, Sweet and Maxwell, 2008) 986 Mr. Justice Oliver Wendell Holmes both in his writings in his long tenure as a justice of the Supreme Court, played a fundamental part in bringing about a changed attitude to law. His emphasis on the fact that the life of the law was experience as well as logic, and his view of the law as predications of what courts will decide, stressed the empirical and pragmatic aspect of the law.

¹⁵⁴ [1994] 2 Lloyd's Rep 50 accessed via Richard Garnett, *Coexisting and Conflicting Jurisdiction and Arbitration Clauses* (Journal of Private International Law, Hart Publishing 2013)

<http://www.lexisnexis.com/uk/legal/results/enhdocview.do?docLinkInd=true&ersKey=23_T22698501988&format=GNBFULL&startDocNo=1&resultsUrlKey=0_T22698503940&backKey=20_T22698503941&csi=385235&docNo=3> accessed 27th September, 2015.

Commercial Court for damage to cargo and the defendant sought a stay in favour of arbitration. A stay of proceedings was then granted and arbitration upheld. By contrast, litigation was rightly upheld in *MH Alshaya Company WLL v Retek Information Systems Inc.*¹⁵⁵

Conditions precedent before granting an order of stay of proceedings.

These conditions in England, are largely similar to the conditions factored in by the Kenyan Courts. They include;

a) There must be an arbitration agreement to which the section applies

An arbitration agreement is defined as an agreement to submit to arbitration present or future disputes, contractual or otherwise.¹⁵⁶ The Agreement has to be in writing, whether or not it signed by the parties,¹⁵⁷ when it is made by exchange of communications in writing¹⁵⁸, or if the agreement is evidenced in writing.¹⁵⁹

b) The Arbitration agreement must be valid.

Although not expressed in the English Arbitration Act as a condition precedent to making an application for stay, the arbitration agreement itself must be valid.¹⁶⁰ Even if the underlying contract is alleged to be void, the parties are presumed to have wanted their disputes resolved by an arbitral tribunal.¹⁶¹ This was the law even before the coming into force of the English Arbitration Act as was held in *Harbour Assurance Co. (UK) Ltd v. Kansa General Insurance Co. Ltd.*¹⁶² which reinforced sections 7¹⁶³ and 30¹⁶⁴. The Court of Appeal held

¹⁵⁵ Ibid [2001] Masons Computer Law Reports 99. The plaintiff commenced arbitration proceedings in respect of moneys payable under two contracts, a license agreement and a maintenance agreement. The license agreement contained an English exclusive jurisdiction clause and an arbitration clause but the maintenance agreement contained only an English exclusive jurisdiction clause. Because there was no arbitration clause in the maintenance agreement and the court construed the arbitration clause in the license agreement not to embrace the maintenance agreement claims, it allowed all of the claims to proceed in court. While the arbitration proceedings were clearly filed first, the English court was arguably the more appropriate forum since it had the capacity to resolve the whole dispute in a single proceeding.

¹⁵⁶Section 6 (1) of the English Arbitration Act.

¹⁵⁷Ibid 5 (2) (a)

¹⁵⁸Ibid 5 (2) (b)

¹⁵⁹Ibid 5 (2) (c)

¹⁶⁰David St. John Sutton, John Kendall, Judith Gill; *Russel on Arbitration*, (21st Edition, Sweet and Maxwell) 7-005.

¹⁶¹Ibid.

¹⁶²[1993] 3 All E.R. 897 The plaintiffs brought an action against the defendants for a declaration that certain insurance policies were void, and that the plaintiffs were not liable in respect of them on the grounds of non-disclosure of material facts and misrepresentation. The allegations of illegality were denied by the defendants, who applied for the action to be stayed under section 1 of the Arbitration Act, 1975 so that the dispute could be referred to arbitration. The Judge dismissed the application for stay of the proceedings in which the plaintiffs sought to establish that illegality, on the grounds that the principle of separability or autonomy of the agreement expressed in the arbitration clause could not extend so as to enable the arbitrator to determine whether or not the contract in which the arbitration clause was

that in English Law, the separability of the arbitration clause contained in a written contract could give jurisdiction to an arbitrator under that clause, provided that the arbitration clause itself was not directly impeached. In every case, the logical question was not whether the issue of illegality went to the validity of the contract, but whether it went to the validity of the arbitration clause.

c) The Applicant must be a party to the Arbitration Agreement.

This is as is stipulated at section 9 of the English Arbitration Act, whereby the applicant must be a party. Where there are several defendants, any one of them who is a party to the arbitration agreement with the plaintiff can make the application to have the action stayed; it is not necessary that all the defendants should join in the application for stay. The action will be stayed against those defendants who are a party to the arbitration agreement. This was as it was held in the case of *Willesford v. Watson*¹⁶⁵ where a bill was filed to restrain the lessees of a mine from doing certain acts. The lease contained an arbitration clause. Of three defendants, only two were willing to concur in an application to have the proceedings stayed, but a stay was granted against all the three defendants.

d) The Party making the application must not have delivered any pleadings or taken any other step in the proceedings.

This is similar to the Kenyan scenario. By taking steps in the court proceedings, a party impliedly submits to the jurisdiction of the court, and cannot thereafter obtain stay. This applies even where the party did not know of the agreement to arbitrate at the time the steps were taken. In *Parker, Gaines & Co., LIM. v. Turpin*¹⁶⁶ where the plaintiffs sued the defendant in the county court for breach of a contract of service which contained an arbitration clause. During the eight years the service continued, this agreement remained in the possession of the plaintiffs, and the defendant did not know of its contents, and had no copy. In the action, he applied for and obtained an order for particulars of claim. Subsequently, he obtained a copy of the agreement, and, having found that it contained an arbitration clause, he applied for a stay of the proceedings under section 4 of the Arbitration Act, 1889. A stay was granted, and the plaintiffs appealed. It was held that the Respondent had taken a 'step in the proceedings,' and that consequently, he was not entitled to have the action stayed.

contained was in fact void ab initio for illegality. The defendants appealed and their appeal allowed and the court proceedings stayed.

¹⁶³ Separability of the Arbitration Agreement.

¹⁶⁴ Competence of Tribunal to rule on its own jurisdiction.

¹⁶⁵ (1873) L.R. 8 Ch. 473.

¹⁶⁶ [1918] Vol 87 1 K.B. 358.

An action however, which would otherwise be regarded as a step in the proceedings, will not be treated as such, if the applicant has specifically stated that he intends to seek a stay.¹⁶⁷ In *Patel v Patel*¹⁶⁸ the applicant who applied for leave to defend as well as asked for a default judgment to be set aside, was considered not to have taken a step in the proceedings. In *Capital Trust v Radio Design*,¹⁶⁹ the applicant applied for summary judgment ‘in the event that its application for stay was unsuccessful’ was considered not to be a step. This is contrasted from the situation in Kenya, where the application for summary judgment would have been considered as a step thereby ousting the jurisdiction of the arbitral tribunal. In any event, applying for summary judgment if stay is not allowed amounts to jumping the gun and is not advisable.

Where the above conditions are satisfied, the court will be inclined to grant stay. Poverty has been raised as an issue in stay of legal proceedings and it has been held that it is not a ground for refusing to grant a stay.¹⁷⁰ When deciding whether to grant a stay, the court does not also take into account that fact that the claimant would be unable to receive legal aid for arbitration proceedings.¹⁷¹ It is also quite inconceivable that a party can oppose an application for stay for fear of not being able to raise the fees in arbitration, when resort to arbitration was a making of the same party when drafting the contract incorporating the arbitration agreement.

3.3.2 Injunctions to restrain arbitrations

There are exceptional circumstances where an injunction to restrain an arbitration may be obtained. Pursuant to section 32 of the English Arbitration Act, when all the parties to an arbitration agreement agree in writing to suspend arbitral proceedings, and move to court on an application, then despite their consent, the arbitral tribunal proceeds with a view to making an award. An injunction may also be issued where pursuant to section 32 (1) of the English Arbitration Act, a party moves to court for a determination on the question of substantive jurisdiction of the arbitral tribunal.¹⁷² An injunction may also be issued where a party successfully opposes an application for stay on the ground that the arbitration agreement is invalid, and then arbitral proceedings based on the invalid agreement continue in defiance of the court’s findings.¹⁷³

However, an injunction would not be issued where, a party after taking part in arbitral proceedings without objecting as to the arbitral tribunal’s jurisdiction thereof, moves to court seeking an

¹⁶⁷*Patel v Patel* [1999] 1 All E.R. (Comm) 923.

¹⁶⁸[1998] 3 W.L.R. 322, CA.

¹⁶⁹[2002] 2 All E.R. 159, CA.

¹⁷⁰David St. John Sutton, Judith Gill, Mathew Gearing; *Russel on Arbitration*, (23rd Ed, Sweet and Maxwell) 7-049.

¹⁷¹*Ibid.*

¹⁷²Section 72 (1) of the English Arbitration Act.

¹⁷³David St. John Sutton, Judith Gill, Mathew Gearing; *Russel on Arbitration*, (23rd Ed, Sweet and Maxwell) 7-058.

injunction restraining further conduct of the proceedings by the tribunal.¹⁷⁴ An injunction in these circumstances would only be issued where he can show the court that at the time he took part or continued with the proceedings, he did not know or could not with reasonable diligence, have discovered the grounds for the objection.¹⁷⁵

3.3.3 Extension of time

Where an arbitration agreement to refer future disputes to arbitration provides that a claim shall be time barred, or the claimant's right is extinguished if the claimant doesn't take the requisite steps within the time provided, the court has the power, on application, to extend that time¹⁷⁶. The court however, will only extend such time only when it is satisfied that the parameters have been met.¹⁷⁷ The Kenyan Arbitration Act does not however contemplate such a scenario. In *Vosnac Ltd. V Transglobal projects*¹⁷⁸ the court examines the relevant circumstances for each case. It was held that the court will not usually interfere with a contractual bargain 'unless circumstances are such that if they had been drawn to the attention of the parties when they agreed the provision, the parties would have at the very least, have contemplated that the time bar might not apply'. Ignorance of the agreed time limit is also insufficient and cannot be considered by the court¹⁷⁹.

3.4. THE ROLE OF THE COURT DURING ARBITRATION

3.4.1 Appointment of the Tribunal.

In furtherance to the principle of party autonomy, parties are always free to agree on the number of arbitrators to form the tribunal, and whether there is to be a chairman or umpire.¹⁸⁰ An agreement that the number of arbitrators shall be two or any other even number shall be understood as requiring the appointment of an additional arbitrator as chairman of the tribunal.¹⁸¹ Where there is no agreement as to the number of arbitrators, the tribunal shall consist of a sole arbitrator.¹⁸²

Just like the provisions of the Arbitration Act, in England, where one party refuses to make an appointment as agreed, the other party may proceed to appoint his arbitrator. He then notifies the other party of such appointment, and if he still fails to appoint his arbitrator, the appointed arbitrator shall act as the sole arbitrator, whose award shall be binding on both parties as if he had

¹⁷⁴Sections 70 (2), 72 and 73 of the English Arbitration Act.

¹⁷⁵Ibid section 73 (1).

¹⁷⁶Ibid section 12.

¹⁷⁷Ibid a) where circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and that it would be just to extend time; or b) that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question.

¹⁷⁸[1998] 1 W.L.R. 101.

¹⁷⁹*Grimaldi Compagnia di Navigazione Sp.A v Sekihyo Line Ltd* [1983] 3 All E.R. 943.

¹⁸⁰Section 15 (1) of the English Arbitration Act.

¹⁸¹Ibid 15 (2).

¹⁸²Ibid 15 (3).

been so appointed by agreement.¹⁸³ Upon such appointment, the party in default may, with leave of court, apply to the court which may set aside the appointment.¹⁸⁴ Where parties are not able to agree, any party may apply to the court to make directions as to the appointment thereof.¹⁸⁵ The court then proceeds to making an appointment, and such appointment is deemed as though it was made by agreement of the parties. A party dissatisfied with the court's decision may, with leave of court, appeal from the decision of the court.¹⁸⁶

The English scenario differs materially from the situation in Kenya, on the aspect of appointment of an arbitrator by the court. In Kenya, even though section 12 (7) of the Arbitration Act provides for the appointment of Arbitrators by the court, the courts are usually very slow in exercising this discretion that they possess, owing to the fact that it is final and binding.¹⁸⁷ The principle of party autonomy is strictly followed in Kenya, and courts have directed the Chartered Institute of Arbitrators, Kenya Branch to appoint arbitrators even where the arbitration agreement did not vest that power to any institution. This was the holding in *Edward Muriu Kamau & 4 others all trading as Muriu, Mungai & Co. Advocates v John Syekei Nyandieka (Supra)*.

3.4.2 Removal of an arbitrator.

Section 24 (1) (a) of the English Arbitration Act states that the court may, upon application, remove an arbitrator (and umpire) on the grounds that justifiable doubts arise as to his impartiality. The test differs from that of the Model Law in that the model law permits removal of an arbitrator who lacks independence as well as impartiality.¹⁸⁸ In *R v West London Coroner Ex p Daliaglio*¹⁸⁹ the test is whether a reasonable person would suspect that a fair hearing was not possible. Actual and apparent bias would include an arbitrator refusing to allow one side to put its case as was held in *Diamond Lock Grabowski and Partners v Laing Investments (Bracknell) Ltd.*¹⁹⁰

The fact that an arbitrator is a barrister practicing from the same chambers as counsel for one of the parties would not justify a removal of an arbitrator.¹⁹¹ This line of reasoning may lead to an outcry on the partiality of the arbitral process. This is because justice at all times should be done and also be seen to be done. An arbitrator who shares his chambers with counsel for one of the parties, however partial he may be, would raise conflict of interest issues, which defeats the very element of access to

¹⁸³ Ibid section 17 (1) & (2).

¹⁸⁴ Ibid section 17 (3) & (4).

¹⁸⁵ Ibid section 18.

¹⁸⁶ Ibid section 18 (5).

¹⁸⁷ Section 12 (8).

¹⁸⁸ Carole Murray, M.A., David Holloway, M.A., Daren Timson-Hunt, MEx., *Schmitthoff's Export Trade: The Law and Practice of International Trade*, (11th Edition, Sweet and Mawell) 572.

¹⁸⁹ [1994] 4 All E.R. 139.

¹⁹⁰ [1992] 60 B.L.R. 112.

¹⁹¹ Carole Murray, M.A., David Holloway, M.A., Daren Timson-Hunt, MEx., *Schmitthoff's Export Trade: The Law and Practice of International Trade*, (11th Edition, Sweet and Mawell) 572.

justice. An arbitrator may also be removed if he doesn't meet the qualifications stipulated in the arbitration agreement.¹⁹² It is therefore imperative that the chosen arbitrator has an understanding of the relevant subject matter.

3.4.3 Determination of questions of law during arbitration.

Unless otherwise agreed by the parties, the court may on the application of a party to the arbitral tribunal, determine any question of law arising in the course of proceedings, which the court is satisfied substantially affects the rights of one or more of the parties.¹⁹³ Given the need to seek leave of court for any appeal against a point of law during arbitration¹⁹⁴, parties should consider it more convenient for all concerned to have the point determined by the court from the outset, thus saving on time and money. It is critical to note that the involvement of the court at this juncture is upon agreement by the parties, failing which, the tribunal will have to determine the legal question raised, where after a dissatisfied party can appeal, upon being granted leave by the court.

The leave of the court is also not automatic and is subject to restrictions. The court only grants such leave upon being satisfied that¹⁹⁵; the determination of the question will substantially affect the rights of one or more of the parties, the tribunal already determined the matter, the tribunal erred in its finding, the question is of public importance and it is just and proper that the court determines the finding. The right to challenge an award on a point of law is however deemed to be incompatible with the nature of arbitration, as it frustrates the expeditious determination thereof. It also conflicts with the principle of party autonomy and increases the cost of commerce.¹⁹⁶

3.4.4 Ordering of Interim Injunctions.

When an application is made to the court, the court ought to consider the requirements of section 44 of the English Arbitration Act. The wording of this section is carefully crafted so as to ensure that the court does not usurp the powers of the arbitral tribunal.¹⁹⁷ The English court is able to

¹⁹² Section 24 (1) (b) of the English Arbitration Act.

¹⁹³ Ibid section 45 (1).

¹⁹⁴ Ibid section 69.

¹⁹⁵ Ibid subsection 3.

¹⁹⁶ Filip Celadnik, 'The English Approach to Challenge at the Seat: Should Courts Stay Away from the Challenges on the Merits as the Model Law Provides?' Czech (& Central European) Yearbook of Arbitration, Volume V, 2015 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2576783> accessed 15th September, 2015.

¹⁹⁷The English Arbitration Act section 44 (5); in any case, the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being, to act effectively.

order interim or protective measures in the form of an anti-suit injunction.¹⁹⁸ Injunctive reliefs therefore, can be issued by the arbitral tribunal. This position was largely accepted by the Court of Appeal in the case of *Cetelem SA V Roust Holdings Ltd*¹⁹⁹ which noted that;

The whole purpose of giving the court power to make such orders is to assist the arbitral tribunal in cases of urgency or before there is an arbitration on foot. Otherwise, it is all too easy for a party who is bent on a policy of non-cooperation to frustrate the arbitral process. Of course, in any case where the court is called upon to exercise the power, it must take great care not to usurp the arbitral process and to ensure, by exacting appropriate undertakings from the claimant, that the substantive questions are reserved for the arbitrator or arbitrators.

3.4.5 Taking and preservation of Evidence.

It may be necessary to resort to court, to secure the attendance of witnesses at the tribunal for their testimonies. This becomes essential because sometimes, the witnesses to be called have no relationship to the parties to the arbitration, or any other relationship, business or otherwise. Having them attend the tribunal therefore, may prove a daunting task which would require the courts intervention for orders in that respect. The Court intervention, however, is only subject to the parties' consent²⁰⁰, which is very much in line with the principle of party autonomy in arbitration. This principle is further bolstered by subsection 5 which states;

In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.

In the premises, the courts intervention is not automatic. In *Assimina Maritime Ltd v. Pakistan Shipping Corporation and another*²⁰¹ it was held that the court's supportive power to preserve evidence can even be used against non-parties to the arbitration in order to secure the provision of specified documents that are anticipated to bear directly on the resolution of the issues underlying the arbitral proceedings.

¹⁹⁸ Geoffrey G Gauci, *the power of the English court to order interim or protective measures in support of international arbitration revisited*, (Journal of International Banking and Financial Law, Reed Elsevier (UK) Ltd 2008) <http://www.lexisnexis.com/uk/legal/auth/checkbrowser.do?ipcounter=1&cookieState=0&rand=0.5263050382643525&bhcp=1> accessed 27th September, 2015.

¹⁹⁹ [2005] 1 W.L.R. 3555, per Clarke L.J.

²⁰⁰ Section 44 (1) of the English Arbitration Act.

²⁰¹ [2004] EWHC 3005 (Comm).

3.5. THE ROLE OF THE COURT AFTER ARBITRATION

3.5.1 Review/Challenge of the Award.

The principle of finality of awards in English law dates back even before the English Arbitration Act. In *Pioneer Shipping Ltd. v. BTP Tioxide Ltd; The Nema*²⁰² Lord Diplock stated thus;

...in weighing the rival merits of finality and meticulous legal accuracy there are, in my view, several indications in the Act itself of a parliamentary intention to give effect to the turn of the tide in favour of finality in arbitral awards...at any rate where this does not involve exposing arbitrators to a temptation to depart from 'settled principles of law.

Even though finality is a key consideration in arbitrations, there has been a long tradition in England that finality is a good thing, but justice is better.²⁰³ This therefore has the effect of turning an arbitral award the subject of long winding litigation, so long as the end result is justice for all. A challenge under the English Arbitration Act must be brought within 28 days of the arbitral award being made. The court can extend this period, but only in exceptional circumstances, where not granting the extension would result in a serious injustice.²⁰⁴ There are three ways in which the award can be challenged. As a result the court may, remit, confirm, set aside or vary the award.²⁰⁵

- a) Substantive jurisdiction of the tribunal (section 67);
- b) Ground of serious irregularity (section 68); and
- c) Appeal on the point of law (section 69).

1. Substantive jurisdiction

Sections 67 and 68 of the English Arbitration Act provides that a party may challenge an award as to its substantive jurisdiction. The matters which comprise substantive jurisdiction are those set out in section 30 (1) thereof²⁰⁶ and entail the right of the tribunal to hear the arbitration under the current agreement, or that right being available at all. This covers, for example, a case where a party did not

²⁰² [1982] A.C. 724 at 739-740.

²⁰³ Filip Celadnik, 'The English Approach to Challenge at the Seat: Should Courts Stay Away from the Challenges on the Merits as the Model Law Provides?' Czech (& Central European) Yearbook of Arbitration, Volume V, 2015 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2576783> accessed 15th September, 2015.

²⁰⁴ Natalya Zarakhovitch; Pinsent Masons LLP, 'Construction Law, Legal terms explained' (Reed Elsevier (UK) Ltd 2015)

<http://www.lexisnexis.com/uk/legal/results/enhdocview.do?docLinkInd=true&ersKey=23_T22698629396&format=GPNBFULL&startDocNo=0&resultsUrlKey=0_T22698637306&backKey=20_T22698637307&csi=280102&docNo=9> accessed 27th September, 2015.

²⁰⁵ Ibid.

²⁰⁶ whether there is a valid arbitration agreement, whether the tribunal is properly constituted, and what matters have been submitted to arbitration in accordance with the arbitration agreement.

submit to the arbitrator's jurisdiction as was the case in *Dallah Real Estate and Tourism v Ministry of Religious Affairs of the Government of Pakistan*²⁰⁷

2. Serious irregularity.

Section 68 provides for challenging an award on the basis of serious irregularity affecting the tribunal, the proceedings or the award. In *Egmatra AG v Marco Trading Co.*²⁰⁸ It was stated that not every irregularity will constitute 'serious irregularity' for the purposes of section 68; the party seeking to challenge the award must show that he has suffered substantial injustice. This was also the case in *Warborough Investments Ltd v Robinson & Son (Holdings) Ltd.*²⁰⁹ In a more recent case of *Abuja International Hotels Ltd v Meridien SAS*²¹⁰ It was held that a serious irregularity would only occur if the tribunal purported to exercise power that it did not have. The Court will not allow a party to use section 68 to challenge the tribunal's findings of fact.²¹¹ This standard puts a higher threshold on the party alleging serious irregularity not to hide other immaterial factors and is available in extreme cases, as confirmed in *Compania Sud-Americana De Vapores SA v Nippon Yusen Kaisha*²¹²

3. Appeal on a point of law.

In order for the appeal to be heard all the parties to the arbitration must agree or the court must give leave to appeal. This will be granted if : (i) it's just and proper for the court to determine the question; (ii) the tribunal's decision is wrong or open to serious doubt; (iii) the question of law is of importance for the general public; (iv) the decision will seriously affect the arbitration parties' rights; and (v) it is not a hypothetical question of law. The courts have been critical of attempts to present

²⁰⁷ [2010] UKSC 46. Natalya Zarakhovitch; Pinsent Masons LLP, 'Construction Law, Legal terms explained,' (Reed Elsevier (UK) Ltd 2015)
http://www.lexisnexis.com/uk/legal/results/enhdocview.do?docLinkInd=true&ersKey=23_T22698629396&format=GNBFULL&startDocNo=0&resultsUrlKey=0_T22698637306&backKey=20_T22698637307&csi=280102&docNo=9
accessed 27th September, 2015.

²⁰⁸[1999] 1 Lloyd's Rep. 862.

²⁰⁹[2003] All E.R. 108.

²¹⁰ Professor David A R Williams QC, 'Defining the role of the court in modern international Commercial arbitration,' http://www.globalarbitrationreview.com/cdn/files/gar/articles/david_williams_Defining_the_Role_of_the_Court_in_Modern_Intl_Commercial_Arbitra.pdf> accessed 15th September, 2015.

²¹¹ Ibid.

²¹² [2009] EWHC 1606 (Comm).

questions of fact as a question of law.²¹³ This was laid out in the case of *House of Fraser Ltd v Scottish Widows plc*.²¹⁴

The court should only allow review in circumstances where the arbitrator was obviously wrong.²¹⁵ In *Antaios Compania Naviera SA v SalenRederierna BA*²¹⁶ it was held that judicial review should only be allowed if a strong prima facie case has been made out that the arbitrator was wrong in his construction. The Court can also review an award on a point of law.²¹⁷ It should be noted that the parties can agree to oust the court's jurisdiction under this section. A party that is desirous to appeal must seek the agreement of all the other parties or the court. It is highly unlikely that any party would get the approval of its opponents in an adversarial system, hence the need for the fall back position-the leave of court. The court, in granting leave, must be satisfied *inter alia*, that the rights of one or more parties stand to be substantially affected by the determination of the question.²¹⁸

3.5.2 Recognition and Enforcement of Arbitral Awards.

Before embarking on arbitration, a party should be certain that it is possible to enforce any arbitral award obtained. In the event the respondent to the claim has no assets, pursuit of the claim becomes a waste of time and expense. Analogous to Judgements, arbitral awards are court orders by the tribunal to a party to do or refrain from doing something. The difference between a judgement of the Court and an Award is that a judgment is a court order that can be enforced immediately. However, arbitral awards are different. Unlike a court, an arbitral tribunal exercises its authority purely by consent of the parties. In the premises, a tribunal does not have at its disposal, the machinery of the state to enforce orders. An award is therefore only enforceable to the extent that the law of the enforcing state allows arbitral tribunals to be enforced. An award creditor will normally seek to enforce his award in a jurisdiction where the award debtor's assets are located.²¹⁹

²¹³ Natalya Zarakhovitch; Pinsent Masons LLP, *Construction Law, Legal terms explained*, (Reed Elsevier (UK) Ltd 2015) <http://www.lexisnexis.com/uk/legal/results/enhdocview.do?docLinkInd=true&ersKey=23_T22698629396&format=GPNBFULL&startDocNo=0&resultsUrlKey=0_T22698637306&backKey=20_T22698637307&csi=280102&docNo=9> accessed 27th September, 2015.

²¹³[1999] 1 Lloyd's Rep. 862.

²¹⁴ [2011] EWHC 2800 (Cb).

²¹⁵Section 69 (3) (c) (i) of the English Arbitration Act.

²¹⁶[1985] A.C. 191 at 203.

²¹⁷Section 69 of the English Arbitration Act.

²¹⁸Ibid 69 (3).

²¹⁹ Carole Murray, M.A., David Holloway, M.A., Daren Timson-Hunt, MEx., *Schmitthoff's Export Trade: The Law and Practice of International Trade*, (11th Edition, Sweet and Maxwell) 578. International arbitrations normally take place in a neutral venue mutually agreed by the parties. It is therefore not common, that an international arbitration will take place in the state in which the defendant is domiciled. The result of this is that an award debtor may not have any assets in the jurisdiction in which the arbitration was heard (or had its seat), and for that reason, an award creditor will normally seek to enforce an award, not in the jurisdiction in which it was made, but in another jurisdiction where the award debtor is domiciled or atleast where the award debtor's assets are located.

The statutory mechanism for enforcement is set out in the English Arbitration Act.²²⁰ Enforcement happens irregardless of whether the seat was in England or had not been designated at all.²²¹ Leave of court or permission is usually needed²²², but the other party need not be notified as was the case in *Walker vs Rome*.²²³ A party seeking enforcement must produce the duly authenticated original award or a duly certified copy of it, together with the duly certified arbitration agreement or a duly certified copy of it.²²⁴ If any of these documents is in a foreign language, a party must produce a translation of it sworn by an official.²²⁵ Recognition and enforcement of arbitral awards is not automatic, and may be refused on a number of grounds as stipulated in the English Arbitration Act.²²⁶ A New York Convention award may also with the leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.²²⁷

Although not mentioned in the English Arbitration Act, a party may be immune from enforcement proceedings. The defense of immunity is usually raised by sovereign states.²²⁸ It may also be available to other parties who do not participate in the arbitration proceedings. It is however not absolute and may be in some circumstances, be waived.²²⁹ The court may, on an application of the party claiming recognition or enforcement of the award, order the other party to give suitable security.²³⁰ The court uses its discretion before it can award this prayer. In *Yukos oil v Dardana Ltd*²³¹ the court appeal decided that it was not an appropriate case to order security. In *Gater Assets Ltd v Nak Naftogaz Ukrainniy*²³² payment of security was ordered on the basis that a prima facie case of fraud in procuring the award had been made out.

In the case of *Dallah*²³³ which involved enforcement of an international arbitral award, the court decided to review the competence of the tribunal. The Supreme Court, in its reasoning, rejected Dallah's claim that a reviewing court should adopt "a flexible and nuanced approach."²³⁴ The Court held that an enforcing court was neither bound nor restricted by the findings of an arbitral tribunal. This may arguably be one of the cases that creates a bad precedent as it erodes the confidence in engaging in arbitration, as the enforceability of an award only depends on the court's intervention.

²²⁰ Section 66.

²²¹ Ibid section 2(2).

²²² Ibid section 66(1).

²²³ [2000] 1 Lloyd's Rep. at 119.

²²⁴ Section 102 of the English Arbitration Act.

²²⁵ Ibid section 102 (2).

²²⁶ Section 103.

²²⁷ Section 101 (2).

²²⁸ David St. John Sutton, Judith Gill, Mathew Gearing; *Russel on Arbitration*, (23rd Ed, Sweet and Maxwell) 8-045.

²²⁹ Ibid.

²³⁰ Section 103 (5) of the English Arbitration Act.

²³¹ [2003] 2 Lloyd's Rep. 208.

²³² [2007] 1 Lloyd's Rep. 522.

²³³ Luca G. Radicati di Brozolo, *The Relation between Courts and Arbitration: Support or Hostility* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2125445 accessed 15th September, 2015.

²³⁴ Ibid.

Flowing from the above discussion, the role of courts in Kenya to a large extent, resembles the procedure adopted by the English Courts, save for a few differing scenarios which have been brought about by the court's decisions. By and large, what comes out in these decisions is that the courts role has been enabling of arbitration proceedings. The Courts have, in most instances, the best interests of arbitration at the back of their minds, with the overriding objective being to support access to justice through the parties' most preferred avenue-arbitration.

3.6. CONCLUSION

From the foregoing discussion, the application of the law and procedure governing the role of court in arbitration in England is largely similar to Kenya save for the instances noted to *wit:-* the English Arbitration Act is clear as to the application of English laws even where the seat is not in England. In Kenya, the Arbitration Act is silent but case law has stipulated that agreements and case law purporting to oust the jurisdiction of the Kenyan courts are prohibited (See *Indigo EPZ Limited –V- Eastern and Southern African Trade & Development Bank, supra*). The problem with this position being laid down by the cases in the High Court in Kenya is that the same is not binding on other high courts but merely of a persuasive value. The net effect of this is that should another High Court be faced with an arbitration application where the seat is not Kenya, the court is not bound to assume jurisdiction as was held in the indigo case, but may as well wash its hands off the matter for want of jurisdiction.

The step by step procedural rules mirror what is espoused in the Arbitration Act. Notably, and as expounded by the English Arbitration Act, there has been a reduced judicial involvement in the arbitral process and a consequential increase in the powers of the arbitral tribunal.²³⁵ This is a huge similarity with the Kenyan scenario, which further elevates the Rule of Recognition as propagated by Hart.

²³⁵ Professor David A R Williams QC, 'Defining the role of the court in modern international Commercial arbitration,' http://www.globalarbitrationreview.com/cdn/files/gar/articles/david_williams_Defining_the_Role_of_the_Court_in_Modern_Intl_Commercial_Arbitra.pdf> accessed 15th September, 2015.

CHAPTER FOUR

4.0 DATA ANALYSIS AND FINDINGS ON THE ROLE OF COURTS IN ARBITRATION

This chapter will deal with an analysis, presentation and interpretation of the primary data collected from Judges, Arbitrators and advocates. The data collected herein was qualitative and therefore not concerned with the number of recipients, but an in depth response of the questions, as the target recipients were professionals and therefore experts in their field, who could authoritatively speak to the subject in question. In so doing, the last two research questions being; whether Court's intervention constrains or restrains arbitration, and what are the possible areas of reform in the arbitral process will be answered. This will ultimately determine the conclusions and recommendations for this paper.

In analyzing the data collected, this chapter will seek to discover whether the role of court is indeed enabling or constraining by analyzing their responses thereof, as well as establish what can be done to improve the court's role in arbitration.

4.1. Data presentation and analysis from the Judges' responses.

The Judges interviewed were three (3), all of whom were sitting judges of the High Court commercial division, which is where all arbitration matters are filed. They all accepted to fill the questionnaires given to them, and were kind enough to find time for a face-to face interview. Owing to the fact that the research permit given was in respect to Nairobi County, Judges sitting in the commercial division of Milimani Law Courts were the target respondents, as Milimani is the only station in Nairobi County with a commercial division of the High Court. Below are the findings. Of critical note is that one of the judges is also a chartered arbitrator and the information received was therefore highly reliable.

Demographic Findings.

Table 4.1 (a): Number of Arbitrations handled

	Arbitration applications handled	Percentage
Judge 1	30	20
Judge 2	70	47
Judge 3	50	33
Total	150	100

This table shows that a good number of arbitrations are handled by the Judges in our courts.

Table 4.1 (b): Causes of delay in arbitration applications in the matters the Judges have handled.

	Frequency	Percentage
Lack of court dates	3	30
Laxity of parties	3	30
Frequent unnecessary adjournments	3	30
Few Judges	1	10
Total	10	100

This table shows that there are a number of factors that lead to applications in arbitration matters taking longer than anticipated in court. Apart from the parties being an impediment due to their laxity, there are also no available court dates for the hearing of these applications. The unavailability of the judges in as much it is a factor, it is not a key reason for delay.

One of the Judges attributed the lack of court dates to there being few judges at the commercial division. If judges at the division would be increased, the court dates would not be lacking.

Table 4.1 (c): Role of Court in arbitration as evidenced in the cases the Judges have handled.

	Frequency	Percentage
Facilitative	3	100
Intrusive	0	0
Total	3	100

This response affords all the players concerned a lot of comfort. The Judges unanimously agreed that they are a friend to the arbitration process.

Table 4.1 (d): How the role of Court in arbitration compares with other jurisdictions²³⁶ the judge is acquainted with.

	Frequency	Percentage
Excellent	2	67
Fair	1	33
Total	3	100

This table shows that the judges were of the opinion that the role of court in arbitration compares extremely well to other jurisdictions known to them.

Table 4.1 (e): Time an application in an arbitration matter²³⁷ takes to conclusion

	Frequency	Percentage
1 to 2 years	2	67
Less than 4 months	1	33
Total	3	100

The responses of the Judges to this question confirm the hypothesis made in chapter one-that arbitration may no longer be an ADR owing to the fact that the element of speed is particularly lacking.

Table 4.1 (f): Would you rather parties consent to litigation rather than arbitration?

	Frequency	Percentage
Yes	0	0
No	3	100
Total	3	100

²³⁶ The Judges were to a great extent comparing Kenya with England.

²³⁷ A matter whose underlying contract has an arbitration clause.

All the Judges were of the opinion that arbitration is their most preferred option as opposed to litigation. This shows that the judges hold the arbitration process in high regard and not in any way an inferior form of dispute resolution.

Table 4.1 (g): What are the prospects of arbitration in Kenya?

	Frequency	Percentage
Bright	2	67
Bleak	1	33
Total	3	100

Two of the Judges see a bright future in arbitration. However, one was of the view that arbitration is very expensive as to discourage parties who would wish to venture into it. The Judge added that, at a personal level, he would not consent to incorporation of an arbitration clause in a contract.

4.2. Data presentation and analysis from the Arbitrators' responses.

The Arbitrators interviewed were Four (4), 3 of whom are chartered arbitrators with over ten years of experience in arbitration practice. They therefore had vast experience in domestic arbitrations. The respondents are active members of the Chartered Institute of Arbitrators (Kenya Branch), which is Kenya's leading arbitration body. They accepted to fill the questionnaires given to them, and I additionally had a face-to face interview with two of them. Below are the findings.

Demographic Findings.

Table 4.2 (a): Number of Arbitrations handled

	Arbitration handled	Rank
Arbitrator 1	20-30	Chartered Arbitrator
Arbitrator 2	20-30	Chartered Arbitrator
Arbitrator 3	20-30	Chartered Arbitrator

Arbitrator 4	10-20	Member
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This table shows that a majority of the arbitrators interviewed are senior members of the profession. The Chartered arbitrators all had between 11-20 years of experience in arbitration whereas the Member had between 5-10 years of experience in arbitration. The responses given were therefore coming from an informed point of view.

Table 4.2 (b): Role of Court in arbitration in matters that were pending before them.

	Frequency	Percentage
Facilitative	3	75
Intrusive	1	25
Total	4	100

Deducing from the table, 75% of the arbitrators felt that the court's role is facilitative. However, there was a feeling by 25% that this role is divided, that sometimes it is facilitative whereas at other instances it becomes intrusive.

Table 4.2 (c): Time an arbitration matter takes to conclusion without court intervention.

	Frequency	Percentage
1 to 2 years	2	50
At least 6 months	2	50
Total	4	100

Even without the role of court, these responses show that arbitration may not be as expeditious as it may be imagined to be.

Table 4.2 (d): How many arbitrations have you concluded without the court's intervention?

	Frequency	Percentage
Over 50%	4	100
Less than 50%	0	0
Total	3	100

This table shows that a majority of the cases have been concluded without court intervention, all the more reason why the arbitrators would all consent to the incorporation of an arbitration agreement in a contract entered into in their private capacities and are of the view that the future of arbitration in Kenya is bright.

4.3. Data presentation and analysis from the Advocates' responses.

Eight (8) advocates were interviewed for the reason that they are the constant players in the entire process. The choice of the advocates as the target respondents was based on the fact that they all confirmed to having dealt with arbitration matters whereof an application was filed in court. The advocates also represent the parties in arbitrations and file the applications touching on arbitration in court. In the premises, they could speak to the role of court in arbitration, identifying the upside and drawbacks thereof. Below are the findings.

Demographic Findings.

Table 4.3 (a): Causes of delay in arbitration applications

	Frequency	Percentage
Lack of court dates	1	12.5
Laxity of parties to expeditiously dispose off applications	4	50
Frequent unnecessary adjournments	3	37.5
Total	8	100

This table shows that the major reason why arbitration matters lag in court is primarily, a making of the parties themselves, and the judiciary plays a minimal role in disposing off arbitration matters in court.

The reason for parties being the ones delaying their matters can be attributed by the involvement of Advocates who represented them. As was gathered from the interviews with the arbitrators, most advocates do not have an appreciation of arbitration law and procedure and therefore do not appreciate its rules and procedures.

Table 4.3 (b): Have you undergone formal training in arbitration?

	Frequency	Percentage
Yes	5 (undergraduate)	62.5
No	3	37.5
Total	8	100

As a follow up question, 62.5% the advocates answered that they underwent ADR training during their undergraduate level. 37.5% of the advocates had not gone through formal training in arbitration and the knowledge that they have has been acquired in practice.

What should be noted however is that ADR training that is offered at the undergraduate level does not primarily focus on arbitration, but generally looks at all the ADR methods as a whole. The arbitration training is therefore not deep rooted as the trainings offered by the Chartered Institute of Arbitrators.

Table 4.3 (c): Role of Court in arbitration

	Frequency	Percentage
Facilitative	7	87.5
Intrusive	1	12.5
Total	8	100

87.5% of the Advocates felt that the role of court in arbitration is to a large extent, facilitative. This definitely implies that if parties were to drive applications in court without dilatory maneuvers, then great strides would be seen in regards to faster disposal of arbitration applications in court.

Table 4.3 (d): Time an application in arbitration takes to conclusion.

	Frequency	Percentage
1 to 2 years	6	75
At least 6 months	1	12.5
No answer	1	12.5
Total	8	100

The respondents confirmed that applications in arbitration matters take inordinately long, and there is no much of a difference between an application in an arbitration matter and that of an ordinary commercial matter.

Table 4.3 (e): Has the role of court in arbitration achieved its full benefits of speed?

	Frequency	Percentage
Moderate achievement	8	100
Total	8	100

The respondents were of the view that the court's role is commendable, but there is still a lot of room for improvement.

Table 4.3 (f): Would you rather parties consent to litigation rather than arbitration?

	Frequency	Percentage
Yes	4	50
No	4	50
Total	8	100

50% of the Respondents preferred litigation to arbitration and vice versa. Among the reasons given was the cost element and the court's involvement which ultimately defeats the arbitration process.

Table 4.3 (g): Whether the Advocates would consent to the incorporation of an arbitration clause in a contract.

	Frequency	Percentage
Yes	5	62.5
No	3	37.5
Total	8	100

62.5% would readily incorporate an arbitration clause in their private contracts, whereas 32.5% would rather not.

4.4. CONCLUSION

It is positive to note that Judges have immense faith in the arbitral process, and as a result were unanimously of the view that parties ought to venture into arbitration unless the court intervention is absolutely necessary. The judges also added that they consistently push parties to explore the arbitration avenue rather than the court process. The judges' commitment to the arbitration process is further evidenced by the fact that delay in applications brought before them is primarily on the judicial system and parties' advocates, and not their doing as judges. The judges all considered the court's role as being facilitative of arbitration.

From the arbitrators' responses, a majority of the cases they have handled have been concluded without having the court's involvement, and are of the view that the courts do not interfere with their role, as it is facilitative of arbitration. This therefore proves the third hypothesis, that a harmonious relationship between the judges and the arbitral process exists, which to a great extent, has resulted into an efficient arbitral process.

This data collection exercise revealed that the advocates are the major barrier to the effective exercise of the role of court in arbitration. Whereas they viewed the role of court in arbitration as being facilitative, they admitted to being primarily responsible for adjourning arbitration applications. It was also gathered that Advocates generally have no clue as to the spirit behind arbitration procedure in Kenya. None of them had undergone the arbitration trainings offered by the Chartered Institute of Arbitrators (Kenya Branch), yet they are involved in arbitration matters. Those who had training in arbitration did it as an ADR unit in their undergraduate studies. The advocates also confirmed that applications in arbitration matters take inordinately long, and there is no much of a difference between arbitration matters in court and the determination of normal

commercial/non-arbitral matters. In this regard, their responses were divided as to whether they would encourage parties to consent to litigation rather than arbitration.

CHAPTER FIVE

5.0 CONCLUSION AND RECOMMENDATION

5.1. INTRODUCTION.

This chapter sums up the salient features of this study and is based on the findings of the previous chapters. After a close scrutiny of the texts available and strengthened by the feedback collected from the respondents, a host of proposals for reforms will now be given. This chapter will now exhaustively answer the third research question being; the possible areas of reform in the role of court in the arbitral process.

5.2. CONCLUSION.

Right from the outset, this paper sought to establish what amounts to appropriate court involvement, and factors that frustrate the necessary court involvement in arbitration. It then went ahead to address research questions that would meet the objectives intended herein. In answering the first two research question being the extent of Court's intervention in arbitration and whether court's intervention constrains or restrains arbitration, this paper has revealed that the intervention of the court is at every step to *wit* before, during and after arbitration and that this intervention has in many a times been beneficial to the arbitral process. The court has been careful not to usurp the tribunal's powers thereby making the role of court facilitative to arbitration.

The third research question sought to examine what the possible areas of reform in the arbitral process are. In answering this question, this paper delved into a comparative study, and collected data from judges, arbitrators and advocates with a view to establish the gaps in the Kenyan arbitration law and thereby identify the areas for reform. The recommendations enumerated here below have highlighted these areas and made a summary of the possible ways of reforming the arbitral procedure.

Following the study undertaken herein, the court is by no means an impediment to arbitration. That notwithstanding, there still exists some loopholes in the role of court that makes it not achieve the ideal standards it ought to be experiencing. All the more reason why there has been moderate achievement in the realization of the full benefits of speed, flexibility and cost in the role of court in arbitration. These are the few factors that may make arbitration not a viable option for some. It has emerged that one of the major setbacks in the role of court is its delay, which is principally caused by parties' advocates' and the judicial system. Its ripple effect has frustrated the fruits that justice brings about through the role of courts.

The Hypothesis laid out at the beginning of the chapter was also tested and in regards to the first, that Arbitration may no longer be considered as an ADR as it cannot be so much differentiated from litigation. This hypothesis has been proved. Arbitration is a dispute resolution mechanism *sui generis*. It can neither be classified as an ADR like negotiation and mediation as its decision is final

and binding and stems from a 3rd party (the arbitrator), as opposed to negotiation and mediation where the solution stems from the parties and is not binding. It can also not be classified as a litigation method as it is conducted in private and is primarily party driven.

The second hypothesis, that the Courts are an integral part of any arbitral process cannot be gain said. This has been proved in the entire paper and most importantly, in the interviews conducted by the Respondents herein. In regards to the last hypothesis that a harmonious relationship between the court and the Arbitral process would see to an efficient arbitral process, is not valid. This is because there are other key players involved in the process including *inter alia*, parties advocates, registry clerks and the judicial system in its entirety that, if they all worked harmoniously, would lead to an efficient arbitral process.

5.3. RECOMMENDATIONS.

1. One of the major causes of delay in the role of court in arbitration is a making of the parties through their advocates as was outlined in the preceding chapter. It was noted by some of the arbitrators and judges that most legal practitioners are not trained in arbitration. They therefore don't have the basic understanding and grasp of the arbitration law, practice and procedure. They view arbitration as an appendage to litigation, rather than an alternative dispute resolution method, that should not get close to the court room, and when it does, which is inevitable, should take the shortest time. There is therefore need to train advocates on arbitration. The membership course offered by the Chattered Institute of Arbitrators (Kenya Branch) should be taken by all advocates involved in arbitration matters.
2. Arbitration is also a unit not offered at the university level and when it is offered, it is taught under the umbrella of alternative dispute resolution mechanisms alongside others, like mediation and conciliation and not as a unit on its own. As a result, there is not an in depth understanding of what arbitration is. If arbitration was to be offered as a unit at the undergraduate level, where there is a thorough examination of the Arbitration Act, lawyers upon completion of their bachelor's degree would acknowledge the place of arbitration in the justice system in Kenya.
3. All applications in arbitration matters filed in court go through the similar processes other matters in the commercial division go through, thereby defeating the expeditiousness that should be seen in arbitration matters. In the premises, applications in arbitral matters should have a name tag say, 'Fast Track' to identify their uniqueness and priority that should be given to them. They could also be treated as certificates of urgency so that they are expedited. As will be noted from the responses of the advocates and the judges, they all recommended a shorter time frame for handling arbitration matters in court. By giving arbitration matters a special urgent tag, the registry staff would squeeze and find dates for

them in the court diary, even when the diary is closed. With such preferential treatment, speed in arbitration would inevitably be realized.

4. There is much that also needs to be done by the judiciary in terms of building capacity. There is a huge backlog of cases that hamper movement of arbitral matters however committed a judge is to the arbitral process. More judges need to be recruited to help ease the backlog of cases and allow a smooth flowing system at the commercial division. There could also be special arbitration courts that hear arbitral matters exclusively. With such courts in place, the entire staff (registry/courts clerks, secretaries and other support staff) could be sensitized on the nature of arbitral matters, hence see to a faster delivery of justice.
5. The Judiciary should also, apart from building capacity, encourage arbitration. There is so much weight and emphasis given to arbitration when a judge mentions it to advocates appearing before the court. Whenever the court keeps nudging parties to explore arbitration, there is every likelihood that parties will consider the same and give it a try, even if they hadn't contemplated going that route at the first instance.
6. Judges should also appreciate the role of arbitrators and not see them as their competitors. Judges sometime exude an attitude implying that they are in competition with 'private judges' and feel that they are sitting at an appellate position in arbitral matters. This attitude is bound to dampen the good working relationship between judges and arbitrators, which effect would trickle down to negatively affecting the arbitration case.
7. Public Policy should be taken out of the way as it interferes with finality of arbitral awards. There should be measures put in place, possibly in the Arbitration Act that would stress on the finality of arbitral awards.
8. An amendment of the Arbitration Act at the interpretation section so as to define who an arbitrator is and his qualifications would help in sealing any uncertainties that there may be, in the same manner that the Advocates Act has comprehensively defined who an advocate is and the qualification and training that s/he should undergo before qualifying as such. Perhaps this uncertainty as to who exactly arbitrators are in statute law have contributed to a majority of advocates involved in arbitration cases not to bother attending arbitration courses.
9. There should an amendment of the Arbitration Act to include a comprehensive definition of what public policy is and what amounts to public policy. This is because the definition that exists is one laid down by the court of appeal, which would not be binding on another court of appeal should a similar issue of public policy be up for determination.

10. The permissive nature (may) as expressly found in the Arbitration Act in regards to setting aside, recognition and enforcement of arbitral awards should be amended. The wording of that section ought to be in mandatory terms for consistency and uniform application of the law. Leaving it as is, gives the judges room to refuse to set aside, or even recognize and enforce awards arising from *inter alia* invalid arbitration agreements or awards induced by fraud or corruption.

BIBLIOGRAPHY

Books

1. Andrew Tweedale, Keren Tweedale, *Arbitration of Commercial disputes International and English Law Practice* (Oxford University press).
2. Brian Bix, *Jurisprudence Theory and Context* (5th Ed Sweet and Maxwell).
3. Carole Murray, M.A., David Holloway, M.A., Daren Timson-Hunt, MIEx., *Schmitthoff's Export Trade: The Law and Practice of International Trade*, (11th Edition, Sweet and Maxwell).
4. D.J Sutton, J.Kendall & J. Gill, *Russel on Arbitration* (21st Edition, Sweet & Maxwell 1997) para 7-001.
5. David St. John Sutton, John Kendall, Judith Gill; *Russel on Arbitration*, (21st Edition, Sweet and Maxwell).
6. David St. John Sutton, Judith Gill, Mathew Gearing; *Russel on Arbitration*, (23rd Ed, Sweet and Maxwell)
7. Dr. Kariuki Muigua, FCIarb, Ph.D, *Settling disputes through Arbitration in Kenya* (2nd Ed, Glenwood publishers limited 2012).
8. Emmanuel Gaillard, *Legal Theory of International Arbitration* Martinus Nijhoff Publishers (Leiden Boston).
9. Enid A. Marshal, *Gill: The Law of Arbitration* (4th Edition, Sweet and Maxwell).
10. Githu Muigai, *Arbitration Law and practice in Kenya* (Law Africa).
11. M.D.A Freeman, *Lloyd's introduction to Jurisprudence* (7th Edition, Sweet and Maxwell Limited).
12. Philip Capper, *International Arbitration: a handbook* 3rd Edition (London Singapore) 2004.
Dr.
[2011] EWHC 1957 (Comm), Case No: 2010 Folio 1539 in Dr. 155

Articles

13. Kamau Karori, *Emerging Perspectives and Challenges in Dispute Resolution* [2014] Vol.2, (2014) 1 Alternative Dispute Resolution.
14. Kariuki Muigua *Constitutional Supremacy over Arbitration in Kenya* [2016] (Volume 4) (2016) 4(1) Alternative Dispute Resolution.

15. Kariuki Muigua & Ngararu Maina *Effective Management of Commercial Disputes: Opportunities for the Nairobi Centre for International Arbitration* [2016] (Volume 4) (2016) 4(1) *Alternative Dispute Resolution*.
16. Kariuki Muigua, *Emerging Jurisprudence in the Law of Arbitration in Kenya: Challenges and promises*.
17. Kariuki Muigua, *Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending and After Arbitration in Kenya*. A paper presented at the Chartered Institute of Arbitrators course on “Advocacy in Mediation and Arbitral Proceedings”, on 5th February, 2009 (Revised on 1st March 2010).
18. Kimberley Chen Nobles, *Emerging Issues and Trends in International Arbitration’ Vol. 43, No. 1, Art. 5 California Western International Law Journal*.

Internet Sources

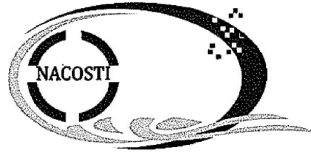
19. Anthony D’Amato, *Lon Fuller and Substantive Natural Law* <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1130&context=facultyworkingpapers> accessed 8th September, 2015.
20. Arun Krishnan, *A Concise Interpretation of Hans Kelsen's Pure Theory of Law*, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1521569> accessed 9th September, 2015.
21. Ashraf El Motei, ‘Local Court Intervention in International Arbitration’ (2009) <http://www.motei.com/local-court-intervention-in-international-arbitration> accessed 27th February, 2016.
22. Charles C. Correll, jr. ^ Ryan J. Szczepanik, ‘No Arbitration is an island: The role of courts in aid of international arbitration’ (2012) volume 6, No. 3 *World Arbitration and Mediation Review* at pg 555 <http://www.kslaw.com/imageserver/KSPublic/library/publication/2013articles/1-13WorldArbitrationMediationReviewCorrellSzczepanik.pdf> accessed 30th January, 2015.
23. Christoph Liebscher, Alice A. Fremuth-Wolf, *Arbitration Law and Practice in Central and Eastern Europe* <<https://books.google.co.ke/books?id=Pq5QDrECIPcC&pg=PR1068&lpg=PR1068&dq=>

schools+of+thought+in+arbitration&source=bl&ots=RCq1uzngFI&sig=JNFRIYSNg6cxs bAhpQljRzbfmik&hl=en&sa=X&ei=t0RTVZL9DMGdygPx-IGgBA&redir_esc=y#v=onepage&q=schools%20of%20thought%20in%20arbitration&f=false> accessed 13th May, 2015

24. Duke Law Journal,
<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2906&context=dlj> accessed 8th September, 2015.
25. Edward Nii Adja Torgbor, *A Comparative Study of Law and Practice of Arbitration in Kenya, Nigeria and Zimbabwe, with particular reference to current problems in Kenya* (LL.D thesis, University of Stellenbosch 2013).
https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKEwji19SPrKfNAhVdXR0KHeP2BTwQFggvMAE&url=https%3A%2F%2Fscholar.sun.ac.za%2Fbitstream%2Fhandle%2F10019.1%2F80182%2Ftorgbor_comparative_2013.pdf%3Fsequence%3D2&usq=AFQjCNHmCg8dMpSmi9qQGZiSdPuoIzZ-sQ&bvm=bv.124272578,d.d2s accessed 14th June, 2016.
26. Filip Celadnik, *The English Approach to Challenge at the Seat: Should Courts Stay Away from the Challenges on the Merits as the Model Law Provides?* Czech (& Central European) Yearbook of Arbitration, Volume V, 2015 <
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2576783> accessed 15th September, 2015.
27. Geoffrey G Gauci, *the power of the English court to order interim or protective measures in support of international arbitration revisited*, (Journal of International Banking and Financial Law, Reed Elsevier (UK) Ltd 2008)
<http://www.lexisnexis.com/uk/legal/auth/checkbrowser.do?ipcounter=1&cookieState=0&rand=0.5263050382643525&bhcp=1> accessed 27th September, 2015.
28. Jacob Gakeri, Placing Kenya on the Global platform: An evaluation of the Legal Framework on Arbitration and ADR (2011) Vol. 1 No. 6 International Journal of Humanities and Social Science <http://www.ijhssnet.com/journals/Vol._1_No._6;_June_2011/25.pdf> accessed 14th June, 2016.

29. John W. Van Doren, *Theories of Professors H.L.A. Hart and Ronald Dworkin - A Critique*, 22 <
<http://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=2144&context=clevstlr>
[ev](http://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=2144&context=clevstlr)> accessed 8th September, 2015.
30. Julian D.M. Lew, *Comparative International Commercial Arbitration*, <
https://books.google.co.ke/books?id=b1OgnDQ2UnwC&pg=PA77&lpg=PA77&dq=contractual+theory+arbitration&source=bl&ots=l6UjzFeuNR&sig=a6Uckyu7FiOPjqvAGEXVKga6F5I&hl=en&sa=X&sqi=2&redir_esc=y#v=onepage&q=contractual%20theory%20arbitration&f=false> accessed 16th July, 2015.
31. Kariuki Muigua, "Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending and After Arbitration in Kenya." A paper presented at the Chartered Institute of Arbitrators course on "Advocacy in Mediation and Arbitral Proceedings", on 5th February, 2009 (Revised on 1st March 2010) <
http://www.kmco.co.ke/attachments/article/80/080_role_of_court_in_arbitration_2010.pdf> accessed on 27th March, 2015.
32. Kariuki Muigua, *ADR: The Road to Justice in Kenya*, < <http://ciarbkenya.org/assets/paper-on-adr,-the-road-to-justice--in-kenya.pdf>> accessed 17th July, 2015.
33. Luca G. Radicati di Brozolo, *The Relation between Courts and Arbitration: Support or Hostility* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2125445 accessed 14th September, 2015.
34. Natalya Zarakhovitch; Pinsent Masons LLP, *Construction Law, Legal terms explained*, (Reed Elsevier (UK) Ltd 2015) http://www.lexisnexis.com/uk/legal/results/enhdocview.do?docLinkInd=true&ersKey=23_T22698629396&format=GNBFULL&startDocNo=0&resultsUrlKey=0_T22698637306&backKey=20_T22698637307&csi=280102&docNo=9 accessed 27th September, 2015.
35. Neal Wood, *Cicero's Social and Political Thought*, (University of California Press) 72 <
https://books.google.co.ke/books?id=Nb3LosCYq8cC&pg=PA58&lpg=PA58&dq=cicero%27s+school+of+thought&source=bl&ots=V2Tfa_jjvZ&sig=WP5oBIJMwDMA9hAUHvtljgNXiKI&hl=en&sa=X&redir_esc=y#v=onepage&q=cicero's%20school%20of%20thought&f=false> accessed 7th September, 2015

36. Patterson, D. (Ed.), *A Companion to Philosophy of Law and Legal Theory*, (2nd Ed., 2010, Blackwell Publishing Ltd) p. 211 <http://abookmedhin.files.wordpress.com/2010/10/a-companion-to-philosophy-of-law-and-legal-theory.pdf> accessed 17th July, 2015.
37. Paul Ngotho, FCI Arb, Arbitrator, 'The Bastard Provision in Kenya's Arbitration Act' (2013) Southern Sun Hotel, Nairobi, Kenya < <https://www.ciarb.org/docs/default-source/default-document-library/annual-regional-conference-2013-zambia.pdf?sfvrsn=2>> accessed 8th December, 2015.
38. Professor David A R Williams QC, 'Defining the role of the court in modern international Commercial arbitration', http://www.globalarbitrationreview.com/cdn/files/gar/articles/david_williams_Defining_the_Role_of_the_Court_in_Modern_Intl_Commercial_Arbitra.pdf> accessed 15th September, 2015.
39. Richard Garnett, *Coexisting and Conflicting Jurisdiction and Arbitration Clauses* (Journal of Private International Law, Hart Publishing 2013) http://www.lexisnexis.com/uk/legal/results/enhdocview.do?docLinkInd=true&ersKey=23_T22698501988&format=GNBFULL&startDocNo=1&resultsUrlKey=0_T22698503940&backKey=20_T22698503941&csi=385235&docNo=3 accessed 27th September, 2015.
40. Ruth Hosking, 'The Role of the Court and experts in international arbitration' p. 12 <http://clients.squareeye.net/uploads/quadrant/4%20The%20Role%20of%20the%20Court%20and%20experts.pdf> accessed 30th January, 2015.
41. Scott J. Shapiro, *what is the rule of recognition (and does it exist)?* Public Law & Legal Theory Research Paper Series http://www.law.yale.edu/documents/pdf/Faculty/Shapiro_Rule_of_Regulation.pdf accessed 9th September, 2015.
42. Torben Spaak, 'Kelsen and Hart on the Normativity of Law', <http://www.scandinavianlaw.se/pdf/48-24.pdf> accessed 9th September, 2015.
43. 'UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration' <http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf> accessed 27th February, 2016.



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Claire Wanjeri Mwangi
University of Nairobi
P.O. Box 30197-00100
NAIROBI.

RE: RESEARCH AUTHORIZATION

Following your application for authority to carry out research on *“The Role of Kenyan Courts in arbitration; enabling or constraining?”*, I am pleased to inform you that you have been authorized to undertake research in **Nairobi County** for a period ending **4th December, 2015**.

You are advised to report to **the Court Registrars of selected Courts, the County Commissioner and the County Director of Education, Nairobi County** before embarking on the research project.

On completion of the research, you are expected to submit **two hard copies and one soft copy in pdf** of the research report/thesis to our office.


SAID HUSSEIN
DIRECTOR-GENERAL/CEO

Copy to:

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Selected Court.

The County Commissioner
Nairobi County.

The County Director of Education
Nairobi County.