

**Towards an Overarching Policy: Understanding
Kenya's Alternative Dispute Resolution Mechanisms
Landscape and Culture**

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Abstract

Commercial disputes are considered as part and parcel of doing business the world over. While parties to contracts attempt and rely on the other side's commitment in delivering on their part of the bargain, there is always the likelihood of emergence of disputes and thus, there is always a need to have in place a dispute settlement procedure to address such disputes. The use of wrong forums or mechanisms in dealing with such disputes has nearly as adverse effects on the business relations as failure to settle the disputes at all. As such, parties and states are always seeking the best available alternatives to handle arising commercial disputes. This paper discusses the place of ADR in effective management of commercial disputes in Kenya and the need for a responsive and adaptive policy, legal and institutional framework that addresses the unique needs and characteristics of the business community and related disputes.

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1. Introduction

This paper discusses the practical challenges that hinder the growth of commercial disputes settlement sector in the country by assessing Kenya's legal system's responsiveness, adaptability and effectiveness in managing commercial disputes using Alternative Dispute Resolution mechanisms (ADR). The discourse is based on the need for a system that appreciates the unique characteristics and needs of the business community, both domestic and international, as far as management of commercial disputes is concerned. In order to achieve this, the paper discusses the nature and management of commercial disputes in the international arena and the main elements that make ADR the most appropriate mechanisms in dealing with these disputes across different jurisdictions.

It then deals with Kenya's ADR landscape and culture and examines the need for an overarching policy, legal and institutional framework to govern the same and make it efficacious.

2. The Nature of Commercial Disputes: The Practical Challenges in Management of Commercial Disputes

Commercial disputes have been defined as disputes arising in connection with trading contracts between enterprises or disputes commercial concerns and ultimate consumers.¹ Commercial disputes may also be international or domestic in nature, or between business entities or between business entities and consumers.²

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¹ Ferguson, R.B., "The Adjudication of Commercial Disputes and the Legal System in Modern England," *British Journal of Law and Society*, Vol. 7, No. 2 (winter, 1980), pp. 141-157 at p.141.

² See generally, Perritt Jr, H.H., "Dispute Resolution in Cyberspace: Demand for New Forms of ADR," *Ohio State Journal on Dispute Resolution*, 15, 2000, p.675; Oddiri, E.R., *Alternative Dispute Resolution*, Presentation at the Annual Delegates Conference of the Nigerian Bar Association, 22ND - 27TH AUGUST 2004, Le Meridien Hotel – Abuja, available at

<http://www.nigerianlawguru.com/articles/arbitration/ALTERNATIVE%20DISPUTE%20RESOLUTION.htm> [Accessed on 29/05/2018]; Schreuer, C., "The Relevance of Public International Law in International Commercial

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At the international level, commercial disputes may be dealt with using either ADR mechanisms such as international commercial arbitration, conciliation and mediation, or be settled through international commercial litigation before either tribunals or specialized courts for commercial and trade law.³

International commercial arbitration is defined as a system of private commercial law that enables firms to more effectively enforce contracts by allowing them to avoid inefficiencies that arise from domestic courts.⁴

Use of specialized courts has been the practice in a number of countries where commercial law disputes have long since been decided by specialized courts, in jurisdictions such as England, France and in various German-speaking countries.⁵ Notably, judicial proceedings as a means of settling commercial disputes are commonly used in litigation involving parties of the same nationality.⁶ Disputes are submitted before the courts of the country in which the parties are nationals.⁷ However, if parties are not residing at the same place, it then becomes necessary to determine at the outset the proper local seat of the court, where the parties can resolve this issue by including of a choice of forum clause in their contract.⁸ Where parties fail to stipulate any

Arbitration: Investment Disputes. *unpublished paper*) < www.univie.ac.at/intlaw/wordpress/pdf/81_csunpublpaper_1, 2006; Durosaro, W.O., "The Role of Arbitration in International Commercial Disputes," *International Journal of Humanities Social Sciences and Education (IJHSSE)*, Vol. 1, Issue 3, March 2014, pp.1-8; Emery, C., "International Commercial Contracts," March 2016, available at http://www.nyulawglobal.org/globalex/International_commercial_contracts.html [Accessed on 29/05/2018]; Wolski, B., "Using dispute systems design to identify, explain and predict trends in the settlement of international commercial disputes: the UNCITRAL and ICC ADR initiatives," *International Journal of Private Law*, Vol.6, No.2, 2013, pp.132-149; Houzhi, T., "Mediation is developing around the world," *Asia Pacific Law Review*, 17(sup1), 2009, pp.31-37; Sanders, P., "UNCITRAL's Model Law on International Commercial Conciliation" *Arbitration International*, Vol. 23, No.1, 2007, pp.105-142.

³ See generally, Wolski, B., "Recent Developments in International Commercial Dispute Resolution: Expanding the Options," *Bond Law Review*, Vol. 13, No.2, 2001, p.2.

⁴ Myburgh, A. and Paniagua, J., "Does International Commercial Arbitration Promote Foreign Direct Investment?" *The Journal of Law and Economics*, Vol. 59, No. 3 (August 2016), pp. 597-627 at p.597.

⁵ Jeloschek, C., "The Netherlands Commercial Court: The Future of Litigation in International Commercial Disputes," *Magna Charta*, June 2016, pp. 100-105 at p.101.

⁶ International Trade Centre (ITC), *Settling Business Disputes: Arbitration and Alternative Dispute Resolution*, (2nd ed. Geneva: ITC, 2016), p.17. Available at http://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/Arbitration_English_Full%20A4_Low-res.pdf [Accessed on 27/05/2018].

⁷ *Ibid.*, p.17.

⁸ *Ibid.*, p.17; See *The Hague Convention on Choice of Courts Agreement*, 44 I.L.M. 1294 (2005), which is to apply in international cases to exclusive choice of court agreements concluded in civil or commercial matters. For the purposes of Chapter II, a case is international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected

provision regarding settling disputes, when a dispute arises, courts are called upon to determine which tribunal has the jurisdiction either using conflict of law rules or by examining bilateral or multilateral treaties, a process that may result in considerable delay and in significant increased costs.⁹

Despite the availability of litigation, it is noteworthy that around the globe and throughout history, the commercial community has often shunned litigation before courts and preferred specialized tribunals as a result of businessmen's demands for three things: *a quicker and cheaper administration of justice; a less capricious decision-making procedure; and the ascription of priority in adjudication to norms based on commercial usage* (emphasis added).¹⁰ It has been argued that 'merchants and traders were deterred from going before courts in many instances ... a variety of disputed cases is not pursued because the cost would be very much greater than the amount involved.'¹¹ Tribunals of commerce were also preferred to the national courts on the basis that such courts or juries tended to lack the commercial acumen and experience which would

only with that State. (3) For the purposes of Chapter III, a case is international where recognition or enforcement of a foreign judgment is sought (Article 1).

Notably, (1) this Convention is to apply to exclusive choice of court agreements - a) to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party; b) relating to contracts of employment, including collective agreements. (2) This Convention shall not apply to the following matters - a) the status and legal capacity of natural persons; b) maintenance obligations; c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships; d) wills and succession; e) insolvency, composition and analogous matters; f) the carriage of passengers and goods; g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage; h) anti-trust (competition) matters; i) liability for nuclear damage; j) claims for personal injury brought by or on behalf of natural persons; k) tort or delict claims for damage to tangible property that do not arise from a contractual relationship; l) rights in rem in immovable property, and tenancies of immovable property; m) the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs; n) the validity of intellectual property rights other than copyright and related rights; o) infringement of intellectual property rights other than copyright and related rights, except where infringement proceedings are brought for breach of a contract between the parties relating to such rights, or could have been brought for breach of that contract; p) the validity of entries in public registers (Article 2).

⁹ See generally, the *Convention On the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, 1971 (Entry into force: 20-VIII-1979). This Convention applies to all decisions given by the courts of a Contracting State, irrespective of the name given by that State to the proceedings which gave rise to the decision or of the name given to the decision itself such as judgment, order or writ of execution. However, it shall apply neither to decisions which order provisional or protective measures nor to decisions rendered by administrative tribunals; See also *Convention On the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 1965; See also Supplementary Protocol to The Hague Convention On the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, 1971.

¹⁰ Ferguson, R.B., "The Adjudication of Commercial Disputes and the Legal System in Modern England," op cit. at p.142.

¹¹ Ibid., at p.143.

enable them to understand the evidence: as a result, verdicts contrary to the weight of the evidence were not unusual.¹²

In addition to the foregoing, it has rightly been argued that the costs of commercial litigation are not limited to financial expenses borne in the first instance by the parties, but also include the social costs resulting from the paralysis of a judicial system.¹³ As a direct consequence of that paralysis, citizens are also confronted by delays and costs in obtaining redress of their own grievances, particularly those of limited means.¹⁴

From a business point of view, business dealings can always give rise to disagreements and disputes, which makes dispute prevention and effective dispute resolution vital components of risk management for any company.¹⁵ Notably, in the international context, there are additional difficulties involving various jurisdictions, different legal traditions, laws and procedures, and sometimes multiple languages. International trade disputes also entail high costs, which particularly affect small firms trading across borders.¹⁶

It has rightly been observed that commercial disputes that end in courts of law are always costly and usually bitter.¹⁷ In addition, cases frequently drag through the courts for many years, and the ultimate winner of the lawsuit finds that he is out of pocket more than the amount of the judgment in their favor.¹⁸ Courts also tend to favour their own nationals and thereby further animosity is created between peoples of different countries who grow suspicious of the kind of deal that they will get from foreign nationals.¹⁹ Also noteworthy is the fact that courts of different countries have interpreted the rights and liabilities of buyers and sellers differently.²⁰ Public attention resulting from cases being aired in courts has also frequently added to the friction between disputants and has thereby created enough animosity to end business relationships.²¹

¹² Ibid., p.143.

¹³ Perlman, L. and Nelson, S.C., "New Approaches to the Resolution of International Commercial Disputes," *The International Lawyer*, 1983, pp.215-255 at p.218.

¹⁴ Ibid., at p.218.

¹⁵ International Trade Centre (ITC), *Settling Business Disputes: Arbitration and Alternative Dispute Resolution*, (2nd ed. Geneva: ITC, 2016), p.iii. Available at http://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/Arbitration_English_Full%20A4_Low-res.pdf [Accessed on 27/05/2018].

¹⁶ Ibid, p.iii.

¹⁷ Rosenthal, M.S., "Arbitration in the Settlement of International Trade Disputes," op cit., at p.809.

¹⁸ Ibid., p.809.

¹⁹ Ibid., p.809.

²⁰ Ibid., p.809.

²¹ Ibid., p.809.

As a result of the foregoing circumstances, it is noteworthy that the commercial community's search for the most reliable, least capricious fact-finding procedure led it to by-pass the courts as a trial forum. Consequently, in this sense the legal system failed to meet commercial needs. In modern times, however, it has atoned for this failure by making formal provision for its own circumvention.²² This is evidenced by the statutory requirements in many jurisdictions for parties to try out of court settlements before filing matters or even for the courts to refer matters to Alternative dispute resolution (ADR) mechanisms before hearing the parties. This requirement was even captured in the *Scott v Avery* Clause²³ which upheld a contract between two parties that they will submit any dispute between them to arbitration before taking any court action. *Scott v. Avery clauses* became standard in commercial contracts in and out of England from the 1850s.²⁴

3. ADR and Access to Justice in Commercial Disputes: Nature, Merits and Demerits of Alternative Dispute Resolution Mechanisms

²² Ferguson, R.B., "The Adjudication of Commercial Disputes and the Legal System in Modern England," op cit. at p.147.

²³ *Scott v Avery* 10 ER 1121 (1856); or 25 LJ Ex 308; or 5 HLC 811; See also Article ii (3) of the *1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards - The New York Convention*, which provides that "the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed"; See also section 6, *Arbitration Act, No. 4 of 1995 (No. 11 of 2009), Laws of Kenya*, which provides as follows:

6. Stay of legal proceedings

(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.

(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

(3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.

²⁴ Ferguson, R.B., "The Adjudication of Commercial Disputes and the Legal System in Modern England," op cit. at p.148.

The foregoing section has highlighted some of the problems that have over time led to the use of ADR mechanisms such as arbitration in dealing with commercial disputes instead of litigation. ADR mechanisms refer to all those decision-making processes other than litigation including but not limited to negotiation, enquiry, mediation, conciliation, expert determination, arbitration and others.²⁵ The need for inclusion of ADR mechanisms under the current Constitution of Kenya 2010 was informed by the fact that in the past, litigation has been the major conflict management channel widely recognised under our laws as a means to accessing justice. Litigation however did not and still does not guarantee fair administration of justice due to a number of challenges related to access to justice. These include high court fees, geographical location, complexity of rules and procedure and the use of legalese.²⁶

The court's role is also considered 'dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves'.²⁷

For the right of access to justice in commercial disputes to be realized, there has to be a framework based on the principles of: *expedition; proportionality; equality of opportunity; fairness of process; party autonomy; cost-effectiveness; party satisfaction and effectiveness of remedies* (emphasis added).²⁸

Recognition of ADR and traditional dispute resolution mechanisms is predicated on these cardinal principles to ensure that everyone has access to justice (whether in courts or in other informal fora) and conflicts are to be resolved expeditiously and without undue regard to procedural hurdles that bedevil the court system.²⁹

In a report on access to justice in Malawi, the authors appropriately noted that '*access to justice* does not mean merely access to the institutions, but *also means access to fair laws, procedures,*

²⁵ See also *Alternative Dispute Resolution*,

Available at http://www.law.cornell.edu/wex/alternative_dispute_resolution [accessed on 23/05/2018]

²⁶ *Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the Judiciary in the new Constitution*, ICJ Kenya, Vol. III, May, 2002; See also Kariuki Muigua, *Avoiding Litigation through the Employment of Alternative Dispute Resolution*, pp 6-7, a Paper presented by the author at the In-House Legal Counsel, Marcus Evans Conference at the Tribe Village Market Hotel, Kenya on 8th & 9th March, 2012.

Available at <http://www.chuitech.com/kmco/attachments/article/101/Avoiding.pdf> [15/05/2018].

²⁷ Ojwang, J.B., "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," Op cit.

²⁸ See Maiese, M., "Principles of Justice and Fairness," in Burgess, G. and Heidi Burgess, H. (Eds.) "Conflict Information Consortium", *Beyond Intractability*, University of Colorado, Boulder (July 2003).

²⁹ Muigua, K., *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, p. 6. Available at

<http://www.kmco.co.ke/attachments/article/111/Paper%20on%20Article%20159%20Traditional%20Dispute%20Resolution%20Mechanisms%20FINAL.pdf> [21/4/2018]

affordable, implementable and appropriate remedies in terms of values that are in conformity to constitutional values and directives' (emphasis ours).³⁰ Based on such an argument, litigation cannot score highly especially in terms of speed and affordability. On a positive note, ADR mechanisms can be flexible, cost-effective, expeditious; may foster relationships; are non-coercive and result in mutually satisfying outcomes. They are thus more appropriate in enhancing access to justice by the poor in society as they are closer to them. They may also help in reducing backlog of cases in courts.³¹ The net benefit to the court system would be a lower case load as the courts' attention would be focused on more serious matters which warrant the attention of the court and the resources of the State.³² Case backlog is arguably one of the indicators used to assess the quality of a country's judicial system.³³

Courts have also been depicted as being capable of delivering justice according to law and not what may be considered to be fair by the judge or any other person, especially if such conception would depart from statutes or any other established legal principles.³⁴ It has been observed that the perceived legitimacy of law may depend more upon the fact that it has been enacted through democratic process than because people think it is a good law. Further, the idea of justice for most people is said to be larger than "justice according to law"-going beyond allocation of rights, duties, liabilities and punishments and the award of legal remedies.³⁵ It is remarkable that litigation aims at promoting and achieving all these for the people but justice requires more than that in that it also entails a psychological aspect that needs to be addressed for full satisfaction.

To ensure that the constitutionally guaranteed right of access to justice is fully achieved and enjoyed by all especially in commercial disputes, it is therefore important to explore the potential

³⁰ Schärf, W., et al., *Access to Justice for the Poor of Malawi? An Appraisal of Access to Justice Provided to The Poor of Malawi by The Lower Subordinate Courts and The Customary Justice Forums*, p. 4, Available at <http://www.gsdc.org/docs/open/SSAJ99.pdf> [Accessed on 21/4/2018]

³¹ See Khadka, S.S., et al., *Promoting Alternate Dispute Resolution to reduce backlog cases and enhance access to justice of the poor and disadvantaged people through organizing Settlement Fairs in Nepal*, Case Studies on Access to Justice by the Poor and Disadvantaged, (July 2003) Asia-Pacific Rights and Justice Initiative, Available at <http://regionalcentrebangkok.undp.or.th/practices/governance/a2j/docs/Nepal-SettlementFair> [Accessed on 21/4/2018].

³² Ibid.

³³ Nicholls, A., *Alternative Dispute Resolution: A viable solution for reducing Barbados' case backlog?* P. 1, Available at <http://www.adrbarbados.org/docs/ADR%Nicholls> [Accessed on 21/4/2018].

³⁴ French, R., "Justice in the Eye of the Beholder" in 'The Commonwealth Lawyer' *Journal of the Commonwealth Lawyer's Association*, Vol. 22, No.3, December, 2013, pp. 17-20, at p. 19.

³⁵ Ibid, pp. 19-20.

and the extent to which ADR mechanisms serve this purpose, as most of them have been applied to achieve even the psychological aspect of justice.

Generally, proponents of ADR submit that its methods address many systemic problems in litigation and offer several benefits not available through traditional litigation. ADR could relieve congested court dockets while also offering expedited resolution to parties. Second, ADR techniques such as negotiation, mediation and party conciliation could give parties to disputes more control over the resolution process. The flexibility of ADR is also said to create opportunities for creative remedies that could more appropriately address underlying concerns in a dispute than could traditional remedies in litigation. ADR mechanisms are likely and do often achieve party satisfaction in terms facilitating achievement of psychologically satisfying outcomes. By offering the opportunity for consensus-based resolution, ADR also is arguably better suited than litigation to preserving long-term relationships and solving community-based disputes.³⁶ Most of the ADR mechanisms offer resolution³⁷ of conflicts as against settlement³⁸, with the exception of a few such as arbitration. It is noteworthy that although ADR generally promotes access to justice, not all of the mechanisms achieve this by resolution; others, like arbitration, are dispute settlement mechanisms, much the same way as litigation.

As such, ADR mechanisms are seen as viable for conflicts management because of their focus on the interests and needs of the parties to the conflict as opposed to positions, which is emphasized by common law and statutory measures on disputes and conflicts management.³⁹

³⁶Ray,B., 'Extending The Shadow Of The Law: Using Hybrid Mechanisms To Develop Constitutional Norms In Socioeconomic Rights Cases' *Utah Law Review*, (2009) [NO. 3] PP. 801-802,

Available at <http://epubs.utah.edu/index.php/ulr/article/viewFile/244/216> [Accessed on 21/4/2018].

³⁷ Resolution of conflicts gives rise to an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship. The outcome of conflict resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based outcomes (K. Cloke, *The Culture of Mediation: Settlement vs. Resolution*, The Conflict Resolution Information Source, Version IV, December 2005). A resolution digs deeper in ascertaining the root causes of the conflict between the parties by aiming at a post-conflict relationship not founded on power (M. Mwagiru, *Conflict in Africa: Theory, Processes and Institutions of Management* (Nairobi: Centre for Conflict Research, 2006), p. 42). Resolution is based on the belief that the causes of conflicts in the society are needs of the parties which are non-negotiable and inherent to all human beings (J. Bercovitch, *Mediation Success or Failure: A Search for the Elusive Criteria*, *Cardozo Journal of Conflict Resolution*, Vol.7.289, p.296).

³⁸ Settlement is an agreement over the issue(s) of the conflict which often involves a compromise (D. Bloomfield, *Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland*, *Journal of Peace Research*, vol. 32 no. 2 May 1995, pp. 151-164).

³⁹ Idornigie, P.O., "Overview of ADR in Nigeria", 73 (1) *Arbitration* 73, (2007), p. 73.D.

Commercial preference for arbitration over trial in a court of law is attributable to some extent to its speed and cost effectiveness.⁴⁰ While the average arbitration costs may be higher than in litigation, on the whole, arbitration is still considered potentially quicker and less expensive.⁴¹ Conflict management through litigation can take years before the parties can get justice in their matters due to the formality and resource limitations. Litigation is often so slow and too expensive and it may at times lose the commercial and practical credibility necessary in the corporate world.⁴²

It has been observed that neutrality and flexibility are basic reasons why arbitration and ADR processes such as mediation have been developed, with the support and cooperation of courts.⁴³ In addition, there are other considerations as well for using arbitration or ADR: time constraints, the need for specialized knowledge, confidentiality and, with arbitration, international enforceability.⁴⁴ Perhaps the most outstanding advantage of arbitration (and other applicable ADR mechanisms) over litigation is its transnational applicability in international disputes with minimal or no interference by the national courts, thus boosting the parties confidence of realizing justice in the best way achievable. Countries and various regions around the world have thus embarked on promoting international arbitration as the best dispute settlement approach in international commercial disputes.⁴⁵ There have been arguments that indeed, commercial mediation – which is different from arbitration – can give rise to quicker solutions and more tangible results than the more “legalistic” arbitration or court processes.⁴⁶ Indeed, mediation is argued to be so effective that it has become compulsory in some jurisdictions before starting a court procedure.⁴⁷ The central quality of mediation is its capacity to reorient the parties towards each other, not by imposing rules

⁴⁰ Ferguson, R.B., “The Adjudication of Commercial Disputes and the Legal System in Modern England,” op cit. at p.146.

⁴¹ Ibid., at p.147.

⁴² Muigua, K., *Avoiding Litigation through the Employment of Alternative Dispute Resolution*, op cit., p. 7; See also Mbote, P.K., et al., *Kenya: Justice Sector and the Rule of Law*, Discussion Paper, A review by AfriMAP and the Open Society Initiative for Eastern Africa, March 2011, Available at <http://www.opensocietyfoundations.org/sites/default/files/kenya-justice-law-discussion-2011> [Accessed on 27th May, 2018].

⁴³ International Trade Centre (ITC), *Settling Business Disputes: Arbitration and Alternative Dispute Resolution*, op. cit., p.ix.

⁴⁴ Ibid., p.ix.

⁴⁵ Sauviant, K.P. and Ortino,F., *Improving the international investment law and policy regime: Options for the future*, Background report prepared for the Seminar on Improving the International Investment Regime Helsinki, April 10-11, 2013 hosted by The Ministry for Foreign Affairs of Finland, 25 March 2013. Available at <http://www.formin.finland.fi/public/download.aspx?ID=113259&GUIDE>

⁴⁶ International Trade Centre (ITC), *Settling Business Disputes: Arbitration and Alternative Dispute Resolution*, op. cit., p.26.

⁴⁷ Ibid., p.26.

on them, but by helping them to achieve a new and shared perception of their relationship.⁴⁸ In conflict resolution processes like mediation, the goal, then, is not to get parties to accept formal rules to govern their relationship, but to help them to free themselves from the encumbrance of rules and to accept a relationship of mutual respect, trust, and understanding that will enable them to meet shared contingencies without the aid of formal prescriptions laid down in advance.⁴⁹ This is a demonstration of the importance of the various ADR mechanisms in addressing commercial disputes, based on the nature of each dispute.

On the other hand, while the ADR mechanisms have their advantages over litigation, litigation should not be entirely condemned as it comes in handy for instance where an expeditious remedy in the form of an injunction is necessary. Criminal justice (a commercial dispute may involve criminal offences such as fraud) in some of the very serious cases may also be achieved through litigation. Litigation is associated with the following advantages: the process is open, transparent and public; it is based on the strict, uniform compliance with the law of the land; determination is final and binding (subject possibly to appeal to a higher court).⁵⁰ However, the many shortcomings associated with litigation means that it should not be the only means of access to justice especially where parties wish for expeditious results and at times continued working relations. Litigation is not a process of solving problems; it is a process of winning arguments.⁵¹

In addition, it is worth noting that parties involved in court litigation generally have the possibility to seek conservatory or provisional measures with one or more of the following objectives: ensure that the subject matter of the dispute does not suffer damages before a final decision is rendered and enforced; regulate the parties' conduct and the relations between them during the proceedings; or preserve evidence and organize administration of the proceedings.⁵² On the other hand, arbitrators lack the powers to enforce provisional measures such as seizing property and assets or ordering third parties to attend a hearing and thus, in a majority of countries, courts

⁴⁸ Fuller, L.L., *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971) [Quoted in Ray, B., 'Extending the Shadow of the Law: Using Hybrid Mechanisms to Develop Constitutional Norms In Socio-economic Rights Cases' *Utah Law Review*, (2009) [NO. 3] op. cit. pp. 802-803].

⁴⁹ *Ibid.*

⁵⁰ Chartered Institute of Arbitrators, *Litigation: Dispute Resolution*, Available at <http://www.ciarb.org/dispute-resolution/resolving-a-dispute/litigation> Accessed on 27th May, 2018

⁵¹ Advantages & Disadvantages of Traditional Adversarial Litigation, Available at <http://www.beckerlegalgroup.com/a-d-traditional-litigation> [Accessed on 27th May, 2018].

⁵² International Trade Centre (ITC), *Settling Business Disputes: Arbitration and Alternative Dispute Resolution*, op. cit., p.18.

cooperate with arbitral tribunals and parties involved in arbitral proceedings by ordering such provisional measures that an arbitrator would not have the power to order.⁵³

With regard to other ADR mechanisms such as mediation and conciliation in commercial disputes, their efficiency depends on the goodwill of the parties, who are free to participate in the process or not, and to agree or not with the recommendations of a conciliator or mediator. However, if a party fails to comply, settlement agreements reached through conciliation and mediation may be enforced by a court based on the nature of the parties' agreement.⁵⁴ However, it is possible for parties to agree on a two-tier approach where disputes may first be submitted to mediation and if mediation is not successful, arbitration proceedings may be commenced. Such an agreement may tacitly be made by the parties in an attempt to resolve their dispute amicably prior to recourse to judicial or arbitral proceedings or formally in contract or when a dispute arises. For contracting parties involved in a long-term venture, combining arbitration and mediation is considered crucial to maintain a healthy, on-going relationship even when a dispute arises.⁵⁵

As such, despite the merits of ADR mechanisms, it is noteworthy that Arbitration and all ADR processes, which are generally out-of-court processes, do not compete with court proceedings.⁵⁶ Indeed, it has been argued that arbitration could not have flourished without court cooperation and ultimate control.⁵⁷ Thus, court proceedings, arbitration and ADR are considered *complementary processes* (emphasis added).⁵⁸ Based on the fact that numerous business disputes are resolved daily through litigation and are more suited to be resolved by courts, choices should be made according to the circumstances surrounding each contract.⁵⁹

4. Understanding the Basics: Kenya's Framework on Management of Commercial Disputes

⁵³ Ibid., p.18.

⁵⁴ International Trade Centre (ITC), *Settling Business Disputes: Arbitration and Alternative Dispute Resolution*, op. cit., p.22.

⁵⁵ Ibid., p.22.

⁵⁶ Ibid., p.ix.

⁵⁷ Ibid., p.ix.

⁵⁸ International Trade Centre (ITC), *Settling Business Disputes: Arbitration and Alternative Dispute Resolution*, op. cit., p.ix.

⁵⁹ Ibid., p.ix.

A number of statutes covering a wide range of sectors govern commercial activities in Kenya. There are disputes governed by the national laws on commercial matters especially in domestic business matters, and others fall within the purview of regional and international framework on settlement of commercial disputes. For instance, Kenya has ratified *the Treaty Establishing Common Market for Eastern and Sothern Africa*, 1994⁶⁰, which creates an additional obligation for all Member States to commit themselves to take necessary measures to accede to multilateral agreements on investment dispute resolution and guarantee arrangements as a means of creating a conducive climate for investment promotion by acceding to: the *International Convention on Settlement of Investment Disputes Between States and Nationals of Other States*, 1965⁶¹; the *Convention Establishing the Multilateral Investment Guarantee Agency*⁶²; and any other multilateral agreements designed to promote or protect investment.⁶³

Notably, most of the regional integration legal instruments such as the Treaty Establishing East African Community, Protocol On the Establishment of East African Customs Union and Treaty Establishing the African Economic Community, amongst others, establish or rely on regional Courts of Justice to deal with any disputes related to their application. However, even those courts often get their mandate extended to offer ADR services such as mediation, conciliation or arbitration.

⁶⁰ *Treaty Establishing Common Market for Eastern and Sothern Africa*, 1994, 33 ILM 1067 (1994).

⁶¹ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes [ICSID]) 575 UNTS 159. March 18, 1965, 4 I.L.M. 524 (1965), art. 63. Kenya ratified ICSID Convention in May 1966 and it came into force in February 1967. The Convention established the International Centre for Settlement of Investment Disputes (hereinafter called the Centre) whose purpose is to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of the Convention.

⁶² The Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) was submitted to the Board of Governors of the International Bank for Reconstruction and Development on October 11, 1985, and went into effect on April 12, 1988. The Convention was amended by the Council of Governors of MIGA effective November 14, 2010. (<https://www.miga.org/who-we-are/miga-convention>). Article 1: The Convention established the Multilateral Investment Guarantee Agency. Article 2: The objective of the Agency shall be to encourage the flow of investments for productive purposes among member countries, and in particular to developing member countries, thus supplementing the activities of the International Bank for Reconstruction and Development (hereinafter referred to as the Bank), the International Finance Corporation and other international development finance institutions. Notably, the Convention encourages use of ADR mechanisms in settlement of arising disputes beginning negotiation before seeking conciliation or arbitration. Kenya is a Member State to this Convention (<https://www.miga.org/who-we-are/member-countries/>).

⁶³ *Treaty Establishing Common Market for Eastern and Sothern Africa*, Article 162.

Kenya has also ratified the *United Nations Commission on International Trade Law (UNCITRAL Model Law on International Commercial Arbitration (1985))*⁶⁴ which obligates courts to uphold the principle of party autonomy in resolving commercial disputes.

The *Foreign Investments Protection Act*⁶⁵ was enacted to give protection to certain approved foreign investments and for matters incidental thereto. While this statute mainly concerns itself with investments, it is notably quiet on settlement of disputes. The lacuna is however addressed by the *Investment Disputes Convention Act*⁶⁶, which was enacted to give legal sanction to the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of other States.

The *Arbitration Act*⁶⁷ was enacted to repeal and re-enact with amendments the Arbitration Act and to provide for connected purposes. It provides the main framework and substantive law on arbitration and applies to both domestic arbitration and international arbitration. It makes attempts to place Kenya at par with global best practices by reducing court interventions with minimal role of the court and providing for the process of recognition and enforcement of arbitral awards.

The *Consumer Protection Act, 2012*⁶⁸ was enacted to provide for the protection of the consumer prevent unfair trade practices in consumer transactions and to provide for matters connected with and incidental thereto. The purposes of the Act are to promote and advance the social and economic welfare of consumers in Kenya by, *inter alia*, providing a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions.⁶⁹

The *Consumer Protection Act 2012* also provides that any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the High Court given under this Act.⁷⁰ Despite the foregoing, after a dispute over which a consumer may commence an action in

⁶⁴ *UNCITRAL Model Law on International Commercial Arbitration*, 24 ILM 1302 (1985).

⁶⁵ *Foreign Investments Protection Act*, Cap. 518, Revised Edition 2016 [2012], Laws of Kenya.

⁶⁶ *Investment Disputes Convention Act*, Cap. 522, Act No. 31 of 1966, Laws of Kenya.

⁶⁷ *Arbitration Act*, Act No. 4 of 1995 (2009), Revised Edition 2012 [2010], Laws of Kenya.

⁶⁸ *Consumer Protection Act*, No. 46 of 2012, Laws of Kenya.

⁶⁹ *Ibid.*, sec. 3(4)(g).

⁷⁰ *Ibid.*, sec. 88(1).

the High Court arises, the consumer, the supplier and any other person involved in the dispute may agree to resolve the dispute using any procedure that is available in law.⁷¹

While the foregoing legal instruments demonstrate a degree of Kenya's willingness to satisfactorily address commercial disputes using the best international practices and forums, it is arguable that this is yet to be achieved.

The Constitution of Kenya 2010 recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.⁷² The traditions, customs and norms of a particular community have always played a pivotal role in conflict resolution and they were highly valued and adhered to by the members of the community.⁷³ These mechanisms have often applied to an array of disputes both commercial and non-commercial.

Regionally most African countries still hold onto customary laws under which the application of traditional dispute resolution mechanisms is common. It has been observed that throughout Africa the traditions have since time immemorial emphasized harmony/togetherness over individual interests and humanness expressed in terms such as *Ubuntu* in South Africa and *Utu* in East Africa. Such values have contributed to social harmony in African societies and have been innovatively incorporated into formal justice systems in the resolution of conflicts.⁷⁴

As recognition of the above challenges associated with litigation, and as part of the trend around the world in addressing conflicts, the Constitution of Kenya 2010 under article 159 provides that alternative forms of dispute resolution including reconciliation, mediation, arbitration and Traditional Dispute Resolution Mechanisms should be promoted as long as that they do not contravene the Bill of Rights and are not repugnant to justice or inconsistent with the Constitution or any written law.⁷⁵

The Constitution of Kenya guarantees the right of every person access justice.⁷⁶ Access to justice could also include the use of informal conflict management mechanisms such as ADR and traditional dispute resolution mechanisms, to bring justice closer to the people and make it more

⁷¹ *Ibid.*, sec. 88(2).

⁷² Art. 11(1).

⁷³ Muigua, K., *Resolving Conflicts through Mediation in Kenya*, *op. cit.*, p. 35.

⁷⁴ Mkangi K, *Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualised Paradigm for Examining Conflict in Africa*, Available at www.payson.tulane.edu; Ikenga K. E. Oraegbunam, "The Principles and Practice of Justice in Traditional Igbo Jurisprudence," *African Journal Online*, p. 53, Available at <http://www.ajol.info/index.php/og/article/download/52335/40960> [Accessed on 26th April, 2018].

⁷⁵ Article 159(3).

⁷⁶ Art. 48.

affordable.⁷⁷ To facilitate this, it provides that in exercising judicial authority, the courts and tribunals are to be guided by the principles of *inter alia*: justice is to be done to all, irrespective of status; justice is not to be delayed; alternative forms of dispute resolution including *reconciliation, mediation, arbitration and traditional dispute resolution mechanisms* are to be promoted, subject to clause(3)⁷⁸ (emphasis added); justice is to be administered without undue regard to procedural technicalities; and the purpose and principles of this Constitution are to be protected and promoted.⁷⁹

As seen from the foregoing sections, courts act or are at least expected to complement ADR mechanisms in realisation of access to justice especially because most of the outcomes of these processes rely on courts for recognition and enforcement. The supportive role of Kenya's courts in ADR and especially arbitration has been demonstrated in a number of decisions, such *Nyutu Agrovet Limited v Airtel Networks Limited*,⁸⁰ where the Court, in supporting limited role of national courts, stated: “*Our courts must therefore endeavor to remain steadfast with the rest of the international community we trade with that have embraced the international trade practices espoused in the UNICITRAL Model. If we fail to do so, we may become what Nyamu J. (as he then was) in Prof. Lawrence Gumbo & Anor –v - Hon. Mwai Kibaki & Others, High Court Misc. Application No. 1025/2004 referred to as; “A Pariah state and could be isolated internationally (emphasis added).”*”

Kenyan Courts have also affirmed that the essence of the principle of party autonomy is that, where parties to a contract have consensually and in unequivocal terms provided for the forum through which to resolve their disputes, the courts are obligated to give effect to that choice of forum of dispute resolution.⁸¹ This has also been captured in the Court of Appeal case of *Nyutu Agrovet Ltd Vs Airtel Networks Limited (2015) eKLR* where the Court reaffirmed the supremacy of the principle of party autonomy in the resolution of commercial disputes in the following words:-

⁷⁷ See Muigua, K. and Kariuki F., ‘ADR, Access to Justice and Development in Kenya’. Paper Presented at Strathmore Annual Law Conference 2014 held on 3rd & 4th July, 2014 at Strathmore University Law School, Nairobi.

⁷⁸ Art. 159(3) “*Traditional dispute resolution mechanisms shall not be used in a way that—(a) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with this Constitution or any written law.*”

⁷⁹ Art. 159(2).

⁸⁰ *Nyutu Agrovet Limited v Airtel Networks Limited* [2015] eKLR, Civil Appeal (Application) No 61 of 2012.

⁸¹ See *Mungai Ngaruiya & 8 others v Maha Properties Limited* [2018] eKLR, ELC CIVIL SUIT NO. 634 OF 2017, para. 14.

“Our Section 10 is based on the United Nations Model Law on arbitration and all countries who have ratified it recognize and enforce the autonomy of the arbitral process. Courts of law can only intervene in the specific areas stipulated in the Act and in most cases that intervention is usually supportive and not obstructive or usurpation oriented. If the Kenyan courts refused to recognize this autonomy, we would become a pariah state and would be isolated internationally.”

It is worth pointing out that the Commercial and Tax Division of the High Court mainly deals with matters of commercial nature as a way of promoting commerce in the country. Notably, it is under the wings of the Judiciary that the pilot project on the Court Annexed mediation was hatched and nurtured, demonstrating their willingness to support the use of ADR in management of commercial and non-commercial disputes. Court Annexed Mediation and Court-Annexed Arbitration are taking root in the country, especially with the fairly successful Judiciary pilot project on Court Annexed Mediation, which commenced on 4th April, 2016 at the Family Division and Commercial and Admiralty Division of the High Court in Nairobi. The Pilot Project was entrusted to the following bodies: Mediation Accreditation Committee (MAC)⁸²; Alternative Dispute Operationalization Committee (AOC)⁸³; and the Secretariat (Technical Working Group (TWG)⁸⁴). The pilot project was mainly introduced as a mechanism to help address the backlog of cases in Kenyan court.

The active involvement of the Judiciary in settlement of commercial disputes is a demonstration of good will and what is thus required is an effective framework in place promoting complementary application of formal and informal mechanisms in addressing commercial disputes for economic growth of the country.

⁸² The Mediation Accreditation Committee (MAC) is a committee established under section 59A of the Civil Procedure Act, Cap 21, Laws of Kenya. The functions of the Committee include, inter alia, to determine the criteria for certification of mediators, propose rules for certification, maintain a register of qualified mediators, enforce the code of ethics and establish appropriate training programmes for mediators (Sec. 59A (4), Civil Procedure Act, Cap 21, Laws of Kenya).

⁸³ The Alternative Dispute Resolution Operationalization Committee (AOC) oversees the implementation of the Court Annexed Mediation project. It meets regularly to review the progress of the project, makes recommendations and formulates policies on how to guide the project. AOC was instrumental in the development of the Mediation Manual.

⁸⁴ CAMP has a secretariat which also doubles up as the Technical Working Group (TWG). The TWG is charged with the day to day running of the project. The team consists of 3 MDRs, MAC Registrar, 1 Communication specialist, an Interim Program Manager and 2 Program Officers, 2 Mediation Clerks, 2 Executive Assistants and 4 Interns.

5. Effective Management of Commercial Disputes in Kenya: The Disconnect

While it is clear that Kenya as the regional commercial hub supports the use of ADR in addressing commercial disputes, there is little evidence on any major success in attracting disputants and practitioners, either wishing to settle disputes around here. This may be attributed to the fact that despite various statutory provisions recognising or seeking to promote the use of ADR mechanisms in commercial and non-commercial disputes there is still lacking an overall policy, legal and institutional framework to guide the utilisation of these mechanisms. Thus, even with supportive judiciary and fairly knowledgeable citizenry on the benefits of using ADR mechanisms, the absence of a framework on their utilisation presents a challenge to both practitioners and intended consumers of ADR services.

A lot has been done to demonstrate the country's conducive environment for investments and business opportunities, for both locals and foreigners, but little has been done to boost the dispute settlement climate for change of attitude by the business community. Stakeholders could start with small steps towards creating a robust culture of use of ADR in managing commercial disputes. For instance, the Business Premises Rent Tribunal (established in 1965 through an Act of Parliament known as '*The Landlord and Tenant (Shops, Hotels and Catering Establishments Act) Cap.301, Laws of Kenya*') is one among many tribunals established under various laws enacted by Parliament to deal with disputes that arise in the course of the regulation and administration of certain matters.⁸⁵ There is minimal evidence of ADR proceedings before the Tribunal despite it being one of the most prominent small businesses dispute settlement forums.

Most of the laws still governing the mandates of these tribunals seem stuck in the culture of adversarial proceedings without creating room for out of court settlement for parties. Thus, as courts work towards reducing the number of matters filed for determination, the tribunals and other quasi-judicial bodies have not demonstrated reasonable efforts towards supporting the Judiciary's move.

⁸⁵ Ministry of Industry, Trade and Cooperatives, State Department for Trade, *Business Premises Rent Tribunal*, available at <http://www.industrialization.go.ke/index.php/departments/state-department-of-trade/432-business-premises-rent-tribunal> Accessed on 26th April, 2018.

6. Towards a Policy, Legal and Institutional Framework on Management of Commercial Disputers Through ADR mechanisms in Kenya

In the face of globalization, the need for effective and reliable mechanisms for management of commercial disputes as well as other general disputes involving parties from different jurisdictions has not only become desirable but also invaluable.⁸⁶

With time there has been and there will inevitably be an increasing number of disputes between sellers and buyers as the number of entrepreneurs grows and the volume of international trade expands.⁸⁷ It has also been rightly pointed out that those businessmen, who, in ever growing number, turn to arbitration for the settlement of their disagreements with each other, must know something, of the laws of different countries of the world and of the procedures necessary to fulfill legal requirements and make arbitration awards enforceable at law.⁸⁸ Scholars have argued that where the integrity of both parties to the contract is beyond reproach, where both parties even under the stresses generated by a controversy, will deal in absolute good faith, the legal and technical requirements of arbitration procedures are of subordinate importance.⁸⁹ However, the well-advised businessman must be prepared to deal effectively with the "fringe" group which, faced with the possibility of a weak or non-existent defense, will avidly exploit any deficiency in the proposed arbitration, either to circumvent it completely or to delay it inordinately.⁹⁰

It has been pointed out that in the field of international trade, since it is customary for parties who wish to use arbitration as a method of settling their disagreements to include an arbitration clause in their contract, it is also important that they also understand the laws of the countries with which they trade pertaining to the validity of arbitration clauses.⁹¹ This is because, when a dispute arises, there is the danger that the party with a weak case may refuse to abide by the agreement to

⁸⁶ *Alternative Dispute Resolution Methods*, Document Series No. 14, page 2, Paper written following a UNITAR Sub-Regional Workshop on Arbitration and Dispute Resolution (Harare, Zimbabwe 11 to 15 September 2000), Available at

http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document14/DocSeries14.pdf [21/4/2018]

⁸⁷ Rosenthal, M.S., "Arbitration in the Settlement of International Trade Disputes," *op cit.*, at p.808.

⁸⁸ *Ibid.*, at p.809.

⁸⁹ *Ibid.*, at p.810.

⁹⁰ *Ibid.*, at p.810.

⁹¹ *Ibid.*, at p.810.

arbitrate, and instead, may prefer to go to court where he or she can drag out the case and perhaps even obtain a favourable decision on a legal technicality quite remote from the merits of the case.⁹²

Also relevant to this discourse is the argument that generally speaking, arbitrators do not and should not ignore the commercial law, both statutory and decisional, of the countries in which they conduct arbitrations.⁹³ This is important to enable them appreciate the dynamics that may affect the procedure or outcome of the process.

There is thus a need to clearly define the policy, legal and institutional framework on settlement of commercial disputes in the country to make it easier for the business community as well as practitioners to understand and appreciate Kenya's position compared to other jurisdictions around the world.⁹⁴

The referral of African disputes to the European and Asian arbitral institutions for settlement is prohibitively expensive and unsatisfactory. Such referral also points to an explicit admission that the structure of arbitration in Africa has failed. However, it is imperative to note at the earliest that the importance of international commercial arbitration as the most viable approach to international disputes has been recognized and basic structures/institutions for arbitration are being established across the continent.⁹⁵

The business and investment community stands to benefit from international commercial arbitration in Africa as the same provides a viable system offering a proper mechanism for the settlement of international and regional disputes. The system would be cost efficient with venues in close proximity thus offering convenience. The existence of such a system has the capacity to boost cross-border trade and investment.⁹⁶

All stakeholders must realize that to achieve a culture of expedient settlement of commercial disputes, there must be demonstrated efforts to strengthen the framework and submission of

⁹² Rosenthal, M.S., "Arbitration in the Settlement of International Trade Disputes," op cit., at p.810.

⁹³ Ibid., at p.819.

⁹⁴ Wakim, M., "Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in The Middle East," *New York International Law Review*, vol. 21, No. 1, 2008, pp.1-51; OECD, *Policy Framework for Investment User's Toolkit*, 2011, available at <http://www.oecd.org/investment/toolkit/policyareas/investmentpolicy/41246110.pdf> [Accessed on 29/05/2018].

⁹⁵ See generally, Onyema, E., "Effective Utilization of Arbitrators and Arbitration Institutions in Africa by Appointors." (2008); Onyema, E., "Enforcement of Arbitral Awards in Sub-Sahara Africa," *Arbitration International*, Vol. 26, No.1, 2010, pp.115-138; Onyema, E., "Selection of arbitrators in international commercial arbitration," *International Arbitration Law Review*, Vol.8, no. 2 (2005), pp. 45-54; Georgetown University Law Library, *International Investment Law Research Guide*, available at <http://guides.ll.georgetown.edu/c.php?g=371540&p=2511836> [Accessed on 29/05/2018].

⁹⁶ Africa ADR – a new African Arbitration Institution, Op. Cit.

domestic disputes to the local ADR platforms and institutions. This may be one of the ways of winning the trust of foreigners into submitting their disputes to local ADR institutions.

There is need for Kenya to invest in a policy and legal framework that makes it attractive to the domestic business community as well as investors looking for conducive jurisdictions to settle their commercial disputes. Existing institutions and practitioners should collaborate with the policy and law makers to come up with market responsive policy, legal and institutional frameworks. For instance, the Nairobi Centre for International Arbitration (NCIA) as established under the *Nairobi Centre for International Arbitration Act, 2013*,⁹⁷ is mandated to, *inter alia* to: promote, facilitate and encourage the conduct of international commercial arbitration in accordance with this Act; administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices; ensure that arbitration is reserved as the dispute resolution process of choice; develop rules encompassing conciliation and mediation processes; to organize international conferences, seminars and training programs for arbitrators and scholars; and coordinate and facilitate, in collaboration with other lead agencies and non-state actors, the formulation of national policies, laws and plans of action on alternative dispute resolution and facilitate their implementation, enforcement, continuous review, monitoring and evaluation.⁹⁸ Effective and timely execution of this mandate can go a long way in entrenching arbitration and other ADR mechanisms as choice platforms for management of commercial disputes in Kenya.

7. Conclusion

Commercial disputes between traders are considered as one of the barriers to growth of international trade. This is because, a great many medium-sized and small companies find themselves in trouble when they have disagreements with their customers or their sources of

⁹⁷ *Nairobi Centre for International Arbitration Act*, No. 26 of 2013, Laws of Kenya (Government Printer, 2013, Nairobi, Kenya).

⁹⁸ *Ibid.*, sec. 5.

supply in other countries of the world and must think in terms of law suits or losses or both.⁹⁹ Furthermore, authors argue that larger companies are not as adversely affected by the expenses resulting from disputes with companies in other countries of the world as they can better afford to prosecute in courts of law and go through the series of appeals until a decision comes down from the highest court of the land, or, because of their great prestige, position and wealth they can frequently compel favourable settlement of a dispute.¹⁰⁰

This paper has made a case for use of ADR as one of the most viable means of dealing with commercial disputes, both domestic and international. Inasmuch as there is evidence of a general legal and institutional framework on settlement of disputes, there is still lacking a highly developed and specialized policy and legal framework on the use of ADR mechanisms in dealing with commercial disputes, which by their nature, may not be viable for settlement through domestic courts. This therefore calls for all stakeholders to work closely in order to come up with a framework that not only responds to the needs of the business community but also works as an incentive to the foreign and domestic commercial community to seek the services of the local institutions and practitioners to deal with their disputes.

There is a need for an overarching policy, legal and institutional framework to govern ADR within the Kenyan social, cultural and economic landscape.

References

Advantages & Disadvantages of Traditional Adversarial Litigation, Available at <http://www.beckerlegalgroup.com/a-d-traditional-litigation> [Accessed on 27th May, 2018].

Alternative Dispute Resolution Methods, Document Series No. 14, page 2, Paper written following a UNITAR Sub-Regional Workshop on Arbitration and Dispute Resolution (Harare, Zimbabwe 11 to 15 September 2000), Available at http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document14/DocSeries14.pdf [21/4/2018].

⁹⁹ Rosenthal, M.S., "Arbitration in the Settlement of International Trade Disputes," *Law and Contemporary Problems*, Vol. 11, no. 4 (1946), pp. 808-834 at p.808.

¹⁰⁰ *Ibid.*, p.808.

Towards an Overarching Policy: Understanding Kenya's Alternative Dispute Resolution Mechanisms Landscape and Culture

Alternative Dispute Resolution, Available at http://www.law.cornell.edu/wex/alternative_dispute_resolution [accessed on 23/05/2018].

Arbitration Act, Act No. 4 of 1995 (2009), Revised Edition 2012 [2010], Laws of Kenya.

Chartered Institute of Arbitrators, *Litigation: Dispute Resolution*, Available at <http://www.ciarb.org/dispute-resolution/resolving-a-dispute/litigation> [Accessed on 27th May, 2018].

Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes [ICSID]) 575 UNTS 159. March 18, 1965, 4 I.L.M. 524 (1965), art. 63.

Ferguson, R.B., "The Adjudication of Commercial Disputes and the Legal System in Modern England," *British Journal of Law and Society*, Vol. 7, No. 2 (winter, 1980), pp. 141-157.

Foreign Investments Protection Act, Cap. 518, Revised Edition 2016 [2012], Laws of Kenya.

French, R., "Justice in the Eye of the Beholder" in 'The Commonwealth Lawyer' *Journal of the Commonwealth Lawyer's Association*, Vol. 22, No.3, December, 2013, pp. 17-20.

Fuller, L.L., *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971).

Idornigie, P.O., "Overview of ADR in Nigeria", 73 (1) *Arbitration* 73, (2007), p. 73.

Ikenga K. E. Oraegbunam, "The Principles and Practice of Justice in Traditional Igbo Jurisprudence," *African Journal Online*, p. 53, Available at <http://www.ajol.info/index.php/og/article/download/52335/40960> [Accessed on 26th April 2018].

International Trade Centre (ITC), *Settling Business Disputes: Arbitration and Alternative Dispute Resolution*, (2nd ed. Geneva: ITC, 2016). Available at http://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/Arbitration_English_Full%20A4_Low-res.pdf [Accessed on 27/05/2018].

Investment Disputes Convention Act, Cap. 522, Act No. 31 of 1966, Laws of Kenya.

Jeloschek, C., "The Netherlands Commercial Court: The Future of Litigation in International Commercial Disputes," *Magna Charta*, June 2016, pp. 100-105.

Khadka, S.S., et al., *Promoting Alternate Dispute Resolution to reduce backlog cases and enhance access to justice of the poor and disadvantaged people through organizing Settlement Fairs in Nepal*, Case Studies on Access to Justice by the Poor and Disadvantaged, (July 2003) Asia-Pacific Rights and Justice Initiative. Available at <http://regionalcentrebangkok.undp.or.th/practices/governance/a2j/docs/Nepal-SettlementFair> [Accessed on 21/4/2018].

Maiese, M., "Principles of Justice and Fairness," in Burgess, G. and Heidi Burgess, H. (Eds.) "Conflict Information Consortium", *Beyond Intractability*, University of Colorado, Boulder (July 2003).

Mbote, P.K., et al., *Kenya: Justice Sector and the Rule of Law*, Discussion Paper, A review by AfriMAP and the Open Society Initiative for Eastern Africa, March 2011, Available at <http://www.opensocietyfoundations.org/sites/default/files/kenya-justice-law-discussion-2011> [Accessed on 27th May, 2018].

Towards an Overarching Policy: Understanding Kenya's Alternative Dispute Resolution Mechanisms Landscape and Culture

Ministry of Industry, Trade and Cooperatives, State Department for Trade, *Business Premises Rent Tribunal*, available at <http://www.industrialization.go.ke/index.php/departments/state-department-of-trade/432-business-premises-rent-tribunal> Accessed on 26th April, 2018.

Mkangi K, *Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualized Paradigm for Examining Conflict in Africa*, Available at www.payson.tulane.edu.

Muigua, K. and Kariuki F., 'ADR, Access to Justice and Development in Kenya'. Paper Presented at Strathmore Annual Law Conference 2014 held on 3rd & 4th July, 2014 at Strathmore University Law School, Nairobi.

Muigua, K., *Avoiding Litigation through the Employment of Alternative Dispute Resolution*, pp 6-7, a Paper presented by the author at the In-House Legal Counsel, Marcus Evans Conference at the Tribe Village Market Hotel, Kenya on 8th & 9th March, 2012. Available at <http://www.chuitech.com/kmco/attachments/article/101/Avoiding.pdf> [15/05/2018].

Muigua, K., *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*. Available at <http://www.kmco.co.ke/attachments/article/111/Paper%20on%20Article%20159%20Traditional%20Dispute%20Resolution%20Mechanisms%20FINAL.pdf> [21/4/2018].

Mungai Ngaruiya & 8 others v Maha Properties Limited [2018] eKLR, ELC Civil Suit No. 634 of 2017.

Myburgh, A. and Paniagua, J., "Does International Commercial Arbitration Promote Foreign Direct Investment?" *The Journal of Law and Economics*, Vol. 59, No. 3 (August 2016), pp. 597-627.
Nicholls, A., *Alternative Dispute Resolution: A viable solution for reducing Barbados' case backlog?* Available at <http://www.adrbarbados.org/docs/ADR%Nicholls> [Accessed on 21/4/2018].

Nyutu Agrovet Limited v Airtel Networks Limited [2015] eKLR, Civil Appeal (Application) No 61 of 2012.

Perlman, L. and Nelson, S.C., "New Approaches to the Resolution of International Commercial Disputes," *The International Lawyer*, 1983, pp.215-255.

Ray, B., 'Extending The Shadow of the Law: Using Hybrid Mechanisms to Develop Constitutional Norms in Socio-economic Rights Cases' *Utah Law Review*, (2009) [NO. 3].

Ray, B., 'Extending The Shadow Of The Law: Using Hybrid Mechanisms To Develop Constitutional Norms In Socioeconomic Rights Cases' *Utah Law Review*, (2009) [NO. 3], pp. 801-802.

Rosenthal, M.S., "Arbitration in the Settlement of International Trade Disputes," *Law and Contemporary Problems*, Vol. 11, no. 4 (1946), pp. 808-834.

Sauvant, K.P. and Ortino, F., *Improving the international investment law and policy regime: Options for the future*, Background report prepared for the Seminar on Improving the International Investment Regime Helsinki, April 10-11, 2013 hosted by The Ministry for Foreign Affairs of Finland, 25 March 2013. Available at <http://www.formin.finland.fi/public/download.aspx?ID=113259&GUIDE>

Schärf, W., Banda, C., Röntsch, R., Kaunda, D. and Shapiro, R., *Access to Justice for the Poor of Malawi? An Appraisal of Access to Justice Provided to The Poor of Malawi by The Lower Subordinate Courts and*

Towards an Overarching Policy: Understanding Kenya's Alternative Dispute Resolution Mechanisms Landscape and Culture

The Customary Justice Forums. Available at <http://www.gsdrc.org/docs/open/SSAJ99.pdf> [Accessed on 21/4/2018].

Scott v Avery 10 ER 1121 (1856); or 25 LJ Ex 308; or 5 HLC 811.

Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the Judiciary in the new Constitution, ICJ Kenya, Vol. III, May 2002.

Supplementary Protocol to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, 1971.

The Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, 1971 (Entry into force: 20-VIII-1979).

The Hague Convention on Choice of Courts Agreement, 44 I.L.M. 1294 (2005).

The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 1965.

Treaty Establishing Common Market for Eastern and Sothern Africa, 1994, 33 ILM 1067 (1994).

Treaty Establishing Common Market for Eastern and Sothern Africa, Article 162.