UNIVERSITY OF NAIROBI

COLLEGE OF HUMANITIES AND SOCIAL SCIENCES

SCHOOL OF LAW

A CRITIQUE OF THE PRINCIPLE OF FINALITY IN ARBITRAL PROCEEDINGS UNDER SECTION 39 (3) (B) OF THE ARBITRATION ACT, NO. 4 OF THE LAWS OF KENYA.

BY

MELISSA NGANIA

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SUPERVISOR: PROFESSSOR MUSILI WAMBUA

A THESIS SUBMITTED IN PARTIAL FULFILLMENT FOR THE AWARD OF THE DEGREE OF MASTER OF LAWS

DECLARATION

I, NGANIA MELISSA, do hereby declare that this Thesis is my original work, which has been done in line with the requirements and regulations of the University of Nairobi for the degree of Master of Laws (LLM). This Thesis has not been submitted for a degree in any other university.

Signature: …….. Date: ……

NGANIA MELISSA

This Thesis is submitted for examination with my knowledge and approval as University Supervisor.

Signature: …….

Date: …….

PROFESSOR PAUL MUSILI WAMBUA

SCHOOL OF LAW

UNIVERSITY OF NAIROBI

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I thank the Almighty God for the gift of good health and finances that enabled me pursue my studies uninterruptedly.

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DEDICATION

To my parents, Mr and Mrs. Ng'ania, thank you for always believing in me and for instilling in me the value of hardwork.

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LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
CIArb	Chartered Institute of Arbitrators-Kenya Branch
CPC	*Nouveau Code de Procedure Civile*
ICC	International Chamber of Commerce
JTI	Judicial Training Institute
KLRC	Kenya Law Reform Commission
LCIA	London Court of International Arbitration
LSK	Law Society of Kenya
Model Law	Model Law on International Commercial Arbitration adopted by UNCITRAL on June 21, 1985
NCIA	Nairobi Centre of International Arbitration
UNCITRAL	United Nations Commission on International Trade Law
UK	United Kingdom

TABLE OF KENYAN CASES

1. Anne Mumbi Hinga –vs- Victoria Njoki Gathara [2009] eKLR
2. Board of Governors Ng'iya Girls High School –vs- Meshack Ochieng' t/a Mecko Enterprises [2014] eKLR
3. EPCO Builders Limited –vs- Adam S. Marjan Civil Appeal No. 248 of 2005 (unreported).
4. Hermanus Phillipus Steyn –vs- Giovanni Gnechi-Ruscone [2013] eKLR
5. Kenya Shell –vs- Kobil Petroleum Limited [2006] eKLR
6. Narok County Government –vs- SEC & M Company Limited [2014] eKLR.
7. Nyutu Agrovet Limited –vs- Airtel Networks Limited [2015] eKLR

TABLE OF CANADIAN CASES

1. Dunsmuir –vs- New Brunswick [2008] SCC 9, at para 47
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3. Kourtessis v. Minister of National Revenue [1993] 2 SCR 53
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1. *Antaios Compania Naviera S.A v Salen Radevierna A.B* (1985) AC 191.
2. *Bunge SA –vs- Nibulon Trading BV* [2013] EWHC 3936 (comm),

TABLE OF KENYAN LEGISLATION

TABLE OF CANADIAN LEGISLATION

4. The Quebec Code of Civil Procedure SQ 2014, c 1.
5. The Uniform Arbitration Act, 2016
6. The Ontario Arbitration Act 1991 SO 1991 c. 17.

TABLE OF FRENCH LEGISLATION

1. The Decree No. 2011-48 of 13th January, 2011

TABLE OF UNITED KINGDOM LEGISLATION

1. The English Arbitration Act, 1979
2. The English Arbitration Act, 1950
3. The English Arbitration Act, 1996

ABSTRACT

Finality of arbitral proceedings is one of the major achievements introduced by the Arbitration (Amendment) Act, 2009; which buttressed the concept of party autonomy under the Arbitration Act, 1995. The Courts have been seen as an important player in domestic arbitration in Kenya. However, parties to arbitral proceedings have always used the instances permitted by the Arbitration Act, 1995 for the Court to intervene in arbitral proceedings to frustrate or undermine arbitral proceedings. This study seeks to critique the principle of finality in arbitral proceedings under section 39 (3) (b) of the Arbitration Act, 1995 to the extent that the section allows appeals to the Court of Appeal on points of law, which is an exception to section 10 and 35 of the Arbitration Act, 1995.

To holistically establish the question under study, this study will seek to look at; the effect of allowing appeals on points of law in section 39 (3) (b) of the Arbitration Act, 1995 to the Court of Appeal on finality of arbitral proceedings and propose recommendations.

The aim of the study is to contribute to the continued promotion of using Arbitration as a mode of Alternative Dispute Resolution (ADR) in Kenya by ensuring that the Court appellate process is not used by parties to frustrate or undermine arbitral proceedings; by proposing specific amendments to that effect and to bring the Arbitration Act, 1995 in conformity with the Constitution of Kenya, 2010.

CHAPTER 1

1.0 INTRODUCTION

The law on Arbitration in Kenya dates back to 1914 when the Arbitration Ordinance was enacted. It was used to resolve commercial matters instead of the Courts and it was modeled on English Arbitration Act, 1889.

The law on arbitration was first legislated in 1968 and was based on the English Arbitration Act of 1950. The rationale for the enactment of the Arbitration Act, 1968 was that it would minimize interference by the Court in arbitration. However, the 1968 legislation fell short of this necessitating the enactment of the Arbitration Act, 1995[1] which is based on the Model Arbitration Law of the United Nations Commission on Trade Law ("UNICITRAL)."[2]The major reform to the Arbitration Act, 1995 (The Arbitration Act, 1995) was the introduction of section 10 which limits the interference of the Court in arbitral proceedings.[3]

The Arbitration Act, 1995 also exhibited some shortcomings, central to this is the fact that the Arbitration Act, 1995 did not provide for finality of an arbitral award. There was therefore need to amend the Arbitration Act, 1995 hence the Arbitration (Amendment) Act, 2009.[4]

Arbitration in Kenya is also governed by the Arbitration Rules, 1997. The rules were formulated by the Chief Justice on 6th May, 1997 pursuant to section 40 of the Arbitration Act, 1995 which empowers the Chief Justice to, *inter-alia*, make such rules. There has also been enactment of the

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[1] Kariuki Muigua, The Arbitration Act, 1995s: A review of The Arbitration Act, 1995 of Kenya vis – a- viz Arbitration Act 1996 of United Kingdom, < http://www.kmco.co.ke/attachments/article/75/075>accesed on 24th February, 2018.

[2] United Nations Commission on International Trade Law (UNICITRAL), <https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed on 6th December, 2017.

[3] Paul Musili Wambua, 'The Challenges of implementing ADR as an alternative mode of access to justice in Kenya", (2013) 1 (1) Alternative Dispute Resolution Journal, <http://www.ciarbkenya.org/wp-content/themes/mxp_base_theme/mxp_theme/assets/final-vol-1-issue-1.pdf>, Accessed on 1st March, 2018.

[4] The Amending Act introduced a new Section 32A, which provides that an arbitral award is final and binding. This therefore introduces the principle of finality of arbitral proceedings that was lacking prior to the amendment.

Nairobi Centre for International Arbitration Act[5] which establishes the Nairobi Centre for International Arbitration (NCIA), whose function is to handle international commercial arbitration and other forms of dispute resolution.

1.1 BACKGROUND TO THE PROBLEM

Settling of disputes through arbitration has become a popular method used mainly by the business community due to the shortest time that it takes. Also parties to arbitral proceedings are at liberty to make rules for the conduct of the arbitration, limit interference of Court with the arbitration and set the time for which the arbitration ought to be concluded. This is coupled with the express provision of the Arbitration Act, 1995 barring Court's intervention in arbitral matters except under the circumstances allowed.[6] This is in contrast with the Court process where parties have no control and are solely at the mercy of the Court. However, arbitration has in recent times been prolonged by protracted applications in Court. The study seeks to analyze whether in allowing appeals from the High Court to the Court of Appeal on "points of law of general importance" irrespective of whether parties to the arbitral proceedings have agreed that such appeals should lie or not, frustrates or undermines arbitral proceedings.[7]It will also be of importance in this study to interrogate the rationale of allowing third parties in arbitration proceedings before the Court of Appeal.

1.2 STATEMENT OF THE PROBLEM

Finality of arbitral proceedings is central to settlement of disputes through arbitration. The circumstances under which the Court can interfere with arbitral proceedings is as provided in the

[5] No. 26 of 2013.
[6] The Arbitration Act, 1995, s 10.
[7] It will be of interest to interrogate whether the Act should be repealed to allow appeals to lie to the Supreme Court noting that the Arbitration Act, 1995 was assented and amended prior to the enactment of the Constitution of Kenya, 2010.

Arbitration Act, 1995.[8] However, section 39 of the Arbitration Act, 1995 provides for an exception to the rule set out in section 10 and 35 of the Arbitration Act, 1995 in allowing appeals to the Court of Appeal from the High Court on "matters of law of general importance," there by frustrating or undermining arbitral proceedings by going against the principle of finality and binding nature of arbitral proceedings as provided under section 32A of the Arbitration Act, 1995. The main problem to be addressed in this study is how section 39 (3) (b) of the Arbitration Act, 1995 has frustrated or undermined the principle of finality and binding nature of arbitral proceedings and give recommendations on the necessary amendments to the law.

1.3 JUSTIFICATION OF THE STUDY

The findings of this study will be relevant to stakeholders involved in arbitration which is a constitutionally recognized mode of dispute resolution,[9] to make recommendations to parliament for the repeal or amendment to section 39 (3) (b) of the Arbitration Act, 1995 to conform with the underlying principles of finality and binding nature of arbitral proceedings so at to promote arbitration as a mode of dispute resolution which is now constitutionally recognized.[10]

1.4 STATEMENT OF OBJECTIVE

We have seen clearly that party autonomy and finality of arbitral proceedings are central to settlement of disputes in arbitration. We have also seen that the circumstances under which the Court can interfere with arbitral proceedings is as provided for by the Arbitration Act, 1995.[11]However section 39 (3) (b) of the Arbitration Act, 1995 undermines the principle of

[8] The Arbitration Act, 1995, s 10 provides that the Court can only interfere with arbitral proceedings as provided by the Act. The Arbitration Act, 1995, s 35 provides that decisions of the Court under this section are not appealable to the Court of Appeal.

[9] The Constitution of Kenya, 2010, art 2 recognizes arbitration as one of the modes of alternative dispute resolution mechanisms.

[10] See The Constitution of Kenya, 2010, art, 159(2) (c).

[11] A five bench of the Court of Appeal in the case of *Nyutu Agrovet Limited –vs- Airtel Networks Limited [2015] eKLR* has held that there lies no appeal from the decision of the High Court arising under The Arbitration Act, 1995, s 35.

finality and binding nature of arbitral proceedings as provided for in section 32A of the Arbitration Act, 1995; which is an exception to section 10 and 35 of the Arbitration Act, 1995 by allowing appeals from the decision of the High Court to the Court of Appeal "on points of law of general importance" irrespective of whether parties to the arbitral proceedings have consented or not. The section is also silent on whether being dissatisfied with the decision of the Court of Appeal, a party can appeal to the Supreme Court[12] thus further prolonging arbitral proceedings. Therefore, the main problem to be addressed in this study is how section 39 (3) (b) of the Arbitration Act, 1995 has frustrated or undermined the principal of finality and binding nature of arbitral proceedings and give recommendations on the necessary amendments to section 39 (3) (b) of the Arbitration Act, 1995.

1.5 STUDY QUESTIONS

1. Does section 39 (3) (b) of the Arbitration Act, 1995 frustrate or undermine arbitral proceedings in so far as it allows appeals to the Court of Appeal?
2. Do the provisions of section 39 (3) (b) of the Arbitration Act, 1995 undermine the principle of finality and binding nature of arbitral proceedings?
3. What are the suggested legislative reforms with regard to section 39 (3) (b) of the Arbitration Act, 1995 in order to make arbitral proceedings more efficient.

1.6 HYPOTHESIS

If appeals to the Court of Appeal on points of law under section 39 (3) (b) of the Arbitration Act, 1995, frustrates and delays conclusions of matters in arbitration, thereby undermining the principle of finality and binding nature of arbitral proceedings. Then section 39 (3) (b) of the Arbitration Act, 1995 is in need of reforms.

[12] This is because the Section was enacted prior to the promulgation of the Constitution of Kenya that established the Supreme Court under The Constitution of Kenya, 2010, art 163.

1.7 THEORETICAL FRAMEWORK

In analyzing the legal issues concerned with this study, the study will look at the jurisprudence behind the legal questions. To understand the jurisprudence behind the issue of finality of arbitral proceedings, the study will look at the different theories that have been advanced by various scholars which support this arbitral concept.

There is no right or wrong theory on arbitration. This is because different scholars advance their theories basing on the different circumstances in which the theory is developed. For purpose of this study, the study will be based on the contractual theory. The choice of the contractual theory is informed by the fact that commencement of any arbitration is premised on the contract of the parties.

1.7.0 Contractual Theory

According to Belohlavek Alexander J;[13] the contractual theory is based on the presumption that the Arbitrator's jurisdiction to hear and resolve arbitral disputes rests solely on the contract between the parties. This theory only recognizes an agreement by the parties as a core element in that no arbitration can commence without the agreement of the parties. Therefore, there must be a contractual relationship between parties in order that a matter can be determined through arbitration. The basis of the contractual theory is the fact that the whole arbitral process is hinged on the contract of the parties and where the parties do not ordinarily honor the award, the breach may be enforced as a breach to the arbitration agreement. The contractual theory therefore underscores the concept of party autonomy in arbitral proceedings, which allows the parties to

[13] Belohlavek, Alexender J, *Arbitration and Basic Rights: Movement from contractual theory to jurisdiction theory* (October 17, 2013). ISBN: 978-963-642-559-3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2344701>accessed on 7th December, 2017.

conduct the arbitration the best way they desire.[14] The concept of party autonomy is in line with UNICITRAL Model of Arbitration Law[15] which the Arbitration Act, 1995 is modeled.

This theory is relevant and important in this study because under the Arbitration Act, 1995, a matter can only be resolved by arbitration where parties have a prior agreement.[16] The extent to which the Court can interfere with arbitral proceedings is as provided for in the Arbitration Act, 1995.[17]This theory will thus be important in analyzing whether section 39 (3) (b) of the Arbitration Act, 1995 frustrates or undermines arbitral proceedings by negating the contractual relationship of the parties and allowing third parties to appeal, thereby negating the principle of autonomy of parties vested upon the parties by an arbitration agreement.

Thus the contractual theory will be central in this study in that in analyzing whether section 39 (3) (b) of the Arbitration Act, 1995 frustrates or undermines arbitral proceedings, the study will interrogate how the section goes against the agreement of parties to arbitrate and to conduct the arbitration in a manner in which they deem fit and before an arbitral tribunal of their choice.

1.8 STUDY METHODOLOGY

The study will use both primary and secondary data collection methods. The primary data collection will include questionnaires and interviews whereas the secondary sources will include books, legal texts, internet and statutes.

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[14] Sunday A. Fagbemi, The doctrine of party autonomy in international commercial arbitration: myth or reality? Afe Babola University Journal of sust. Dev. Law and policy <https://www.ajol.info/index.php/jsdlp/article/viewFile/128033/117583> 224 accessed on 5th October, 2018.

[15] The UNCITRAL Model Law1985, art 7.

[16] The Arbitration Act, 1995, s 3.

[17] Kariuki Muigua, Making East Africa a hub for international commercial arbitration: a critical examination of the legal and institutional framework governing arbitration in Kenya. http://www.kmco.co.ke/attachments/article/114/Making%20East%20Africa%20a%20Hub%20for%20International%20Commercial%20Arbitration.pdf> accessed on 28th February, 2018.

The questionnaires to be administered will contain both structured/close ended questions and unstructured/open ended questions. A combination of both types of questions is informed by the fact that the structured/close ended questions are easy to administer and easy to analyze. The unstructured/open ended questions on the other hand will be useful in that it will enable the researcher get a greater depth of response from the respondents. The questionnaires will be self-administered by the respondents. This choice of administration of the questionnaires has been informed by the fact that the target respondents being Arbitrators and Advocates are learned people who can clearly read and comprehend the questions asked.[18]

The choice of interviews and questionnaires which are quantitative methods of data collection has been informed by the fact that in social science study these instruments have been tested and commonly used as data collection methods.[19]The target respondent interviews will be ideal unlike random sampling which will collect irrelevant and unworthy data, thus meet the specific objectives of the study.

1.9 LITERATURE REVIEW

This section will deal with domestic and international legal instruments, as well as textbooks and scholarly articles relevant to this study. In analyzing these materials, the study will identify some gaps emerging from the literature reviewed, which this study seeks to fill.

Musili Wambua acknowledges that arbitration is a preferred method of dispute resolution through ADR. According to Wambua, ADR has found favor with most litigants because of the long delays experienced in litigation and the attendant costs.[20]

[18] Olive M, and Abel M, *Study Methods: Quantitative and Qualitative Approaches* (1999 Acts Press Publishers Limited) 73-80.
[19] Ibid 71.
[20] Wambua (n 3) 21.

Wambua notes that ADR as a form of dispute resolution has a constitutional underpinning[21] which shows the importance in which the drafters of the Constitution of Kenya, 2010 placed on ADR as compared with litigation.[22]Wambua, further notes that despite ADR having a constitutional anchoring, the current laws are not in line with the Constitution. This according to Wambua is because most of the laws were enacted prior to the passing of the Constitution of Kenya, 2010.[23]Wambua proposes that the current laws on ADR should be reformed to bring them in conformity with the Constitution of Kenya, 2010.[24]This article is therefore important in this study because it highlights the constitutional importance of ADR, arbitration being one of them under Article 159 (2) (c) of the Constitution of Kenya, 2010.

With this constitutional underpinning and the importance put on arbitration as a final and quick process of dispute resolution, it is important to interrogate whether the Arbitration Act, 1995; and for purposes of this study section 39 (3) (b) of the Arbitration Act, 1995 undermines finality of arbitral proceedings thereby limiting the use of arbitration. If the section does undermine the principle of finality and binding nature of arbitral proceedings, it is important that the same be brought in conformity with the Constitution. This is one of the recommendations that Wambua proposes. The centrality and importance with which Wambua puts on arbitration as a preferred mode of dispute resolution than the Court is important in that this study will be analyzing whether section 39 (3) (b) of the Arbitration Act, 1995 does frustrates or undermines arbitral proceedings; and if so makes it unpopular.

[21] See The Constitution of Kenya, 2010, art 159(2) (c) which requires Courts and Tribunals in resolving disputes to be guided by alternative dispute resolution mechanisms which include amongst others Arbitration, subject to the restrictions at The Constitution of Kenya, 2010, art 159(3) and 189(4).
[22]Wambua (n 3) 23.
[23] Wambua (n 3)27.
[24] Wambua (n 3)31.

Though Wambua proposes some reforms to the Arbitration Act, 1995, he does not look at section 39 of the Arbitration Act, 1995 and specifically section 39 (3) (b) of the Arbitration Act, 1995 and its impact on the principal of finality of arbitral proceedings. It is this gap that this study will seek to address. Similarly, Wambua addresses the challenges of implementing ADR in a wholistic manner, this study will narrow done to specifically section 39 (3) (b) of the Arbitration Act, 1995 and how it undermines or frustrates arbitration; one of the methods of dispute resolution through ADR.

According to Alvin Gachie[25]the finality of an arbitral award means that even if the award is challenged, "the Court will not interfere with the findings of fact by an Arbitrator."[26]Gachie further notes that the concept of finality of arbitration means that parties to the arbitral reference cannot appeal the tribunal's decision unless parties have agreed. However, this does not mean that the arbitral award is not infallible. What finality of arbitral proceedings mean is that the reasons upon which an arbitral award may be reconsidered are very limited.[27]

Gachie acknowledges the fact that the hands of the Court of Appeal under section 39 of the Arbitration Act, 1995 are tied in as far as it requires parties to have consented to having an appeal lie to the Court of Appeal. According to Gachie, the consent must be in line with the grounds set under sections 35 and 37 of the Arbitration Act, 1995. This limitation according to Gachie, collaborates with the principle of finality of arbitral proceedings and the Courts are bound to accept the will of the parties.[28]

[25] Alvin Gachie, '*The Finality and Binding Nature of the Arbitral Award'* (2017) 13(1) The Law Society of Kenya Journal, 81.
[26] The concept of finality of arbitral proceedings is to be found under section 32A of the Arbitration Act, 1995. The section provides that an arbitral award is final and binding and the reasons for which an arbitral award may be reconsidered by the Court is as provided for in the Arbitration Act, 1995.
[27] Gachie (n 25) 88.
[28] Ibid 84.

Gachie looks at the position in United Kingdom (UK). Gachie notes that section 69 of the English Arbitration Act, 1996, which grants the parties the right of appeal has been interpreted by the Supreme Court of England[29] to mean that appeals from an arbitral tribunal and further to the Court of Appeal was one of finality. An appeal only lies where the parties have previously agreed; and the agreement to appeal not only involves the claimant and the respondent but extends to third parties.[30]He acknowledges that the Courts both in UK and Kenya respect the concept of party autonomy and when parties to an arbitral proceeding agree to submit a matter to arbitration, they also consent to the 'risks' which accompany arbitration. To Gachie, such 'risks' include the extremely limited grounds to challenge the award in Court.[31]

Gachie further observes that the position in UK has been criticized for being too permissive for Court interference in arbitral proceedings even though most cases filed challenging arbitral proceedings have not been allowed by the Courts.[32]However, Gachie does not give any justification for this. It is this gap that this study intends to fill.

According to Gachie; the meaning of the phrase 'final and binding' is four–fold; [33]where a matter has been heard and determined by an arbitral tribunal, the same becomes *re-judicata* and the Court will not intervene in an arbitration unless it is provided for under the Arbitration Act, 1995; the Court can only intervene on points of law and not facts; and, parties are bound by an arbitral award however uncomfortable they may feel. They can only challenge the same on grounds provided for under the Arbitration Act, 1995.

[29] NYK Bulkship (Atlantic) NV (Respondent) –v- Cargill International SA (Appellant)- The Supreme Court [2016] UKSC 20 (Supreme Court of the United Kingdom).
[30] Gachie (n 25) 84.
[31] Ibid 90.
[32] Ibid.
[33] Ibid 94.

Gachie notes that the principle of finality and binding nature of arbitral proceedings is akin to a contract under common law, and as such parties are bond. The contract according to Gachie, can only be vitiated through the same way it was entered and not on grounds that a party received a bad bargain. It is this principle of contract law that buttresses the concept of party autonomy under the Arbitration Act, 1995.[34]

This article is important to this study in that it gives a comparison between UK and Kenya. The article looks at section 69 of the Arbitration Act, 1996 which is equivalent to our section 39 of the Arbitration Act, 1995. It will therefore be a guide in making recommendations on how the UK has used section 69 of the Arbitration Act, 1996 to promote arbitral proceedings; noting that both statutes are based on the UNICITRAL Model of International Law. However, it is important to note that in making this comparison, Gachie does not go in detail to show the difference between section 69 of the Arbitration Act, 1996 and section 39 (3) (b) of the Arbitration Act, 1995. The article does not also analyze how section 39 (3) (b) of the Arbitration Act, 1995 which allows parties to appeal therefore goes against principles of contract law; a concept Gachie acknowledges is central to the concept of party autonomy under the Arbitration Act, 1995. It is this gap in this article that this study intends to address.

The article also gives the four (4) main grounds upon which the term 'final and binding' means. Though the grounds are accurate, the article does not interrogate how an appeal to the High Court and the Court of Appeal under section 39 (3) (b) of the Arbitration Act, 1995 goes against the four grounds. It is also this gap that this study intends to address.

[34] Ibid.

According to Aisha Abdallah and Noella Lubano in there chapter on Kenya,[35] they acknowledge that the rationale for the adoption of the UNCITRAL Model Law of arbitration was because of the fact that the 1968 Arbitration Act provided a considerable amount of leeway for Court to interfere with arbitration proceedings; thereby undermining the concept of autonomy of the parties and finality of arbitral proceedings.[36]

Abdallah and Lubano note that the Arbitration Act, 1995 was enacted so as to promote the concept of finality of arbitral awards. They note that the enactment of the Constitution of Kenya in 2010 has had a considerable impact on the legal regime governing arbitration in Kenya. This is because according to Abdallah and Lubano, the Constitution recognizes ADR mechanisms such as arbitration.[37]The effect of this is that Courts in Kenya now give greater importance to arbitration clauses and Court mandated Arbitration. Abdallah and Lubano further note that the Court of Appeal has re-affirmed that the concept of finality of arbitral awards is seen as a way in which the Courts have reaffirmed the constitutional obligation of the judiciary to promote ADR mechanisms and should not be seen as a conflict with the right of parties to access to the Courts.[38]

Abdallah and Lubano look at instances where parties can appeal in arbitral proceedings and acknowledge that appeals to the High Court and Court of Appeal are allowed in very limited circumstances. To them, such disputes are unlikely to reach the Supreme Court due to the very limited jurisdiction of the Supreme Court. They note that the Supreme Court has a very limited

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[35] Aisha Abdallah and Noella Lubano, 'The International Arbitration Review' (June 2015) 6 <http://www.africalegalnetwork.com/wp-content/uploads/2016/01/Kenya-Chapter-International-Arbitration-Review.pdf> accessed on 24th February, 2018.

[36] Ibid 377.

[37] Ibid 379. See also The Constitution of Kenya, 2010, art 159(2).

[38] Ibid (n 35) 379-378. See the ruling in Nyutu Agrovet Limited –vs- Airtel Networks Limited [2015] eKLR.

jurisdiction in that an appeal only lies where a "matter of general public importance" is involved[39]and according to them, commercial disputes are unlikely to meet this test.[40]

The article is important in that it buttresses the concept of finality of arbitral proceedings by acknowledging the fact that the High Court and the Court of Appeal has a limited role of interfering with arbitral proceedings on points of law. This will therefore help this study to interrogate whether section 39 (3) (b) of the Arbitration Act, 1995 widens the jurisdiction of the Court thereby undermining or frustrating arbitral proceedings. The article also addresses the jurisdiction of the Supreme Court. This is significant in that it will help this study in giving recommendation as to whether there is need to reform the Arbitration Act, 1995 to provide expressly for the jurisdiction of the Supreme Court.

Abdallah and Lubano acknowledges the fact that the issue of 'what amounts to matters of law of great public importance' needs to be clarified, they however take a narrow view to define what it means and concludes that; 'matters of commercial disputes are unlikely to meet that test.' This leaves room for contrary definitions and analysis. It is this gap that this study intends to fill by proposing that the jurisdiction of the Supreme Court ought to be expressly stated under the Arbitration Act, 1995 in order to cure this lacuna in law which may be interpreted in a manner that undermines the principle of finality and binding nature of arbitral proceedings.

Kariuki Muigua makes various observations on the role the Court plays in Arbitration. He acknowledges the fact that there is a consensus between practitioners and scholars that the Courts play an important role in arbitration. This according to Muigua, is due to the fact that the Courts not only provide supportive role but also help to intervene to ensure that the minimum requirement of procedural fairness are maintained in arbitral proceedings. For him, the question

[39] See The Constitution of Kenya, 2010, art 163(4) (b).
[40] Ibid (n 35) 385.

to be answered is "the extent in which the Court is to be allowed to intervene in arbitral proceedings."[41]

Muigua further looks at the applicability of section 39 of the Arbitration Act, 1995. To him, the section applies to a post hearing step in Arbitration; Muigua explains this to mean a step that parties undertake after the publishing of an award. He outlines the circumstances under which a party can appeal the Court of Appeal[42]. However, Muigua does not go deeper and interrogate how this right of appeal may contribute in frustrating or undermining arbitral proceedings. In classifying this as a post hearing step in arbitration, Muigua does not thus bring out a wholistic approach. Similarly, Muigua does not look at the appeal process in line with the Constitution of Kenya 2010 despite the work being published seven (7) years after the promulgation of the Constitution. It is this gaps that this study intends to fill. The work will however be important in making recommendations as to whether the Court should intervene in arbitral proceedings or not, an aspect in which Muigua captures exhaustively.

Githu Muigai makes various observations on what role the Court plays in arbitration.[43] He notes that an appeal to the High Court in Kenya is not as of right; parties ought to have expressly provided for the same in the arbitration agreement unlike the English Arbitration Act.[44] He further notes that an appeal is not a review application as provided in section 35 of the Arbitration Act, 1995 but that in an appeal, the Court is only called upon to look at issues/questions of law and not facts which is a preserve of the arbitrator.[45] Muigai does not give

[41] Kariuki Muigua, *Settling Disputes Through Arbitration In Kenya*, 3rd Edition, Glenwood Publishers Limited (2017) 159.
[42] Ibid 199-200.
[43] Githu Muigai, "The role of the Court in Arbitral Proceedings" in Arbitration Law & Practice in Kenya, (Law Africa 2011).
[44] Ibid.
[45] Ibid (n 43) 84.

the rationale for this. It is therefore important to interrogate of what importance is an appeal to the Court of Appeal on matters of law of great importance if facts will not be considered.

Muigai acknowledges the fact that the Arbitration Act, 1995 underscores the principle of finality of arbitral proceedings. He however does not look at how section 39 (3) (b) of the Arbitration Act, 1995 undermines finality of arbitral proceedings nor does he interrogate the rationale and impact of allowing third parties to appeal and how this may restrain or frustrate arbitral proceedings. It is therefore this gap that this study intends to fill. Despite this gap, the chapter is important in that it gives the conditions that ought to be satisfied before a party can appeal which is important as far as giving recommendations whether this section should be maintained.

Kariuki Muigua in his paper on Constitutional Supremacy over Arbitration in Kenya notes that arbitration in Kenya for a long time has been a state-sanctioned process and has never been constitutional law issue. Muigua notes that this may have to change with the enactment of the Constitution of Kenya.[46] This is because according to Muigua, arbitration as one of the methods of traditional dispute mechanism is now constitutionally recognized.[47] Muigua further notes that the traditional disputes resolution mechanisms have to be conducted within the confines of the Constitution.[48]According to Muigua, supremacy of the Constitution is a concept entrenched under Article 2.[49]

Muigua notes that prior to the enactment of the Constitution of Kenya, 2010; arbitration practice was not governed by the Constitution because arbitration disputes where private law matters and

[46] Kariuki Muigua, 'Constitutional Supremacy over Arbitration in Kenya' March 2016 <https://profiles.uonbi.ac.ke/kariuki_muigua/files/constitutional_supremacy_over_arbitration_in_kenya.pdf> accessed on 14th December, 2017.

[47] The Constitution of Kenya, 2010, art 159 (2) (c).

[48] Ibid art 159 (3) (c).

[49] Ibid (n 46) 6.

not public law; which the Constitution protected.[50]However, Muigua notes that the position has since changed with the current Constitution of Kenya, 2010 because the current constitution has a substantive and elaborate procedure on fundamental rights and freedoms.[51]Muigua observes that the Constitution of Kenya being the supreme law, is above arbitration law and its practice. He therefore proposes that there is need to review the Arbitration Act, 1995 so as to seal any loopholes that the act may have in so far as issues of procedural fairness and the manner in which arbitral proceedings are conducted. To him, if this is not taken into consideration, a party can challenge the Arbitration Act, 1995 in Court as unconstitutional.[52] It is important to note that Muigua does not look at the effect of the constitutional supremacy in light of the principle of finality of arbitral proceedings and party autonomy which are sacrosanct to arbitration. It is therefore important that in proposing whether the Arbitration Act, 1995 ought to be amended or not, the issue of supremacy of the Constitution over arbitration ought to be taken into consideration. Despite that shortcoming, the article is important in that it will be of guidance in coming up with recommendations to be made to the Arbitration Act, 1995.

Carbonneau[53] while commenting on the Arbitration Act, 1996 takes the view that it is a remarkable piece of legislation which represents a substantive improvement from the UK Arbitration Act, 1979. He further states that the fundamental principles of "world law" on arbitration which include party autonomy, validity of arbitration agreements, judicial assistance,

[50] Ibid (n 46) 13.
[51] Ibid.
[52] Ibid (n 46) 23.
[53] Thomas E. Carbonneau, 'A comment on the 1996 United Kingdom Arbitration Act' (1998) 22 Tul. Mar. l.J. 13 <http://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1307&context=fac_works> accessed on 14th December, 2017.

limited scrutiny of awards, the requirement of basic procedures of fairness and the need for finality and autonomy of arbitral proceedings are central to the 1996 Act.[54]

Carbonneau notes that though the Arbitration Act, 1996 is of a substantial quality, it is not perfect in all aspects. One of the imperfections is the provisions of review of an award by the court on merits and restricted appeal rights on questions during the proceeding and that parties have the underlying power to exclude the Court from interfering in arbitral proceedings.[55] He states that section 45 and 69 of the Arbitration Act, 1996 provides for instances of Court intervention in arbitral proceedings albeit with some restrictions. According to Carbonneau, the rationale for section 69[56] is to help protect the parties' rights in case of fundamental injustices committed by an arbitral tribunal by correcting exceptionally gross or flagrant abuse of adjudicatory authority.[57] To him, it is thus more remedial than regulatory.

Carbonneau analyses the flaws that are apparent in the Arbitration Act, 1996 which to him though it is of substantive quality, does not achieve substantial perfection.[58]The Arbitration Act, 1996 allows judicial supervision of arbitral proceedings on merit and it does not also sufficiently provide elaborate rules of procedure.[59] He concludes that the Arbitration Act, 1996 is an excellent law of arbitration, worthy of international emulation.[60] The proposal given by Carbonneau is worth taking into consideration though not wholesomely, in proposing the areas for reforms in the Arbitration Act, 1995. The piece meal adoption of Carbonneau's

[54] Ibid 132.
[55] Ibid.
[56] Which is an equivalent of to the Arbitration Act, 1995, s 39.
[57] Ibid (n 53) 151.
[58] Ibid 132.
[59] Ibid.
[60] Ibid 154.

recommendations is informed by the need to take into consideration the proposal by Muigua,[61] on the need to take into account the constitutional underpinning of arbitration in Kenya. It is therefore this wholistic approach that this study will adopt in order to come up with a comprehensive analysis of what reforms are needed under section 39 (3) (b) of the Arbitration Act, 1995 to ensure that the same is not frustrating or undermining arbitration proceedings.

Kariuki Muigua[62] analyses the comparison between the Arbitration Act, 1996 and the Arbitration Act, 1995. He notes that the two pieces of legislation were both in response to legal reforms with the aim of ensuring minimal interference of the Court in arbitration, uphold party autonomy while ensuring that arbitration remains expeditious.[63]According to Muigua, the Arbitration Act, 1996 succeeded while the Arbitration Act, 1995 failed necessitating amendment to the Arbitration Act, 1995 in order that it may be brought to per with the Arbitration Act, 1996.[64] Muigua notes that the Arbitration Act, 1996 has managed to expand party autonomy managed to limit the interference of the Court to a basic minimum. The Arbitration Act, 1995 has according to Muigua allowed unlimited interference of the Court in arbitration proceedings yet ironically parties at the same time have autonomy to arbitrate.[65] Muigua proposes that a total overhaul of the Arbitration Act, 1995 should be undertaken unlike the piece meal amendments that were undertaken by repeal or insertion of new sections.[66] This article will therefore be of importance in making recommendations as to what ammendments to the Artbitration should be made.

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[61] Ibid (n 46).
[62] Kariuki Muigua, 'The Arbitration Act, 1995s: A review of The Arbitration Act, 1995 of Kenya vis-à-vis Arbitration Act 1996 of UK' (2nd March, 2010), <http://www.kmco.co.ke/attachments/article/75/075_arbitration_act_review.pdf> accessed on 14th December, 2017.
[63] Ibid 27.
[64] Ibid.
[65] Ibid.
[66] Ibid 28.

Eric Thige Muchiri, analyses the right of appeal to the Court of Appeal under the Arbitration Act, 1995.[67] Muchiri acknowledges that the law on arbitration in Kenya was last amended in 2009, which was before the promulgation of the Constitution of Kenya, 2010. As such, the amendments were therefore not informed by the constitutional molding of the current arbitration law, practice and procedure.[68] He therefore cautions that care should be taken while amending the Arbitration Act, 1995 so that the right of access to appellate justice is not unnecessarily curtailed especially in regard to the High Court's original jurisdiction as provided for by the Arbitration Act, 1995. He stresses that the amendments should be pursued while aiming at emboldening party autonomy, finality of awards and restriction on involvement by the Courts in arbitration. The amendments should also conform to the treaties, and the general rules of international law while at the same time taking into consideration the best practices obtaining from around the world.[69] This recommendation by Muchiri is important to this study in that it will guide the recommendations on how the law on arbitration should be amended with the aim of upholding finality of arbitral proceedings making arbitration the best method of dispute resolution. The article however does not interrogate how appeals on points of law to the Court of Appeal undermine finality in arbitral proceedings which might be one of the reasons that may make arbitration unpopular. It is thus such gaps that this study intends to fill.

1.10 LIMITATIONS

1. The study will be limited to dealing with the right of the Court of Appeal to interfere with Arbitral proceedings as provided under section 39 (3) (b) of the Arbitration Act, 1995.

[67] Eric Thige Muchiri, 'Revisiting the Right of Appeal to the Court of Appeal Under the Arbitration Act, 1995' (2018) 6 (1) Alternative Dispute Resolution <http://www.ciarbkenya.org/wp-content/themes/mxp_base_theme/mxp_theme/assets/volume-6-issue-1.pdf> accessed on 2nd August, 2018.

[68] Ibid 11.
[69] Ibid 12.

2. Literature specifically dealing with the impact of section 39 (3) (b) of the Arbitration Act, 1995 in relation to finality and binding nature of arbitral proceedings is scarce. Most literature available is on the impact of the interference of the Court with arbitral proceedings generally.
3. Section 39 (3) (b) of the Arbitration Act, 1995 was enacted before the promulgation of the Constitution of Kenya, 2010 and as such this section did not contemplate appeals to the Supreme Court of Kenya.
4. The study is only limited to domestic arbitrations as provided under section 3(2) of the Arbitration Act, 1995.

1.11 CHAPTER BREAKDOWN

The study is divided into the following chapters:-

1.11.1 Chapter 1- Introduction

This section will deal with domestic and international legal instruments textbooks and scholarly articles relevant to this study, give the hypothesis and the questions the study intends to answer. The chapter will also set out the outline of the chapters giving a brief summary of each. Finally, the chapter will explain how the study will be conducted.

1.11.2 Chapter 2- Review of the Principle of Finality of Arbitral Proceedings under Section 39 (3) (b) of the Arbitration Act, 1995

The chapter will critically analyze the concept underlying the principle of finality and binding nature of arbitral proceedings, the background behind the enactment of section 39 of the Arbitration Act, 1995, the conditions to be met before the High Court and the Court of Appeal can hear applications under this section and how the Courts have interpreted what amounts to a

question of law of great public importance and its impact to the principle of finality and binding nature of arbitral proceedings and how this section impacts on the principle of finality of arbitral proceedings.

1.11.3 Chapter 3 Over view of Best Practices on Finality of Arbitral Proceedings in the Select Jurisdictions; United Kingdom, Canada and France.

This chapter will review the best practices on finality of arbitral proceedings and the right of appeal on points of law from three selected jurisdictions. The salient aspects of the right of appeal on points of law and how the same affects the principle of finality of arbitral proceedings in the selected common law and civil law jurisdictions will be distilled and discussed especially with regard to how it helps to enhance the effectiveness of arbitration as a mode of dispute resolution. The chapter will also highlight the divergent views from the three select jurisdictions and the Kenyan position and means of domesticating and institutionalizing the best practices in Kenya.

1.11.4 Chapter 4-Summary of Findings, Conclusions and Recommendations

This chapter will look at the preceding chapters, analyzing whether the hypothesis is true or not by comparing it with the findings so as to either prove or disapprove the hypothesis. The chapter will then give recommendations on whether section 39 (3) (b) of the Arbitration Act, 1995, undermines the principle of finality and binding nature of arbitral proceedings and if so, suggest the necessary legislative reforms.

CHAPTER TWO

REVIEW OF THE PRINCIPLE OF FINALITY OF ARBITRAL PROCEEDINGS UNDER SECTION 39 (3) (B) OF THE ARBITRATION ACT, 1995.

2.0. Introduction

This chapter analyzes the doctrine of finality and binding nature of arbitral proceedings as outlined in the Arbitration Act, 1995. The various aspects that entail the finality and binding nature of arbitral proceedings; with a detailed review of appeals to the Court of Appeal and interpretation by the Courts in diverse decisions reviewed.

The discussions and analysis in this chapter is organized around key thematic arguments based on an analysis of the statutory provisions and case law examined. In particular, the rationale for arbitration, the concept of finality and binding nature of arbitral proceedings; the intervention by the Court of Appeal on points of law. The analysis will establish whether the right of appeal under section 39 (3) (b) of the Arbitration Act, 1995 promotes or inhibits the process of arbitration.

2.1. The Rationale for Arbitration and the Right of Appeal to the Court of Appeal on Points of Law

The main reason why arbitration is the most preferred method of ADR is in its advantages it offers over litigation. Wambua, acknowledges that arbitration is most preferred ADR method that is favored by litigants due to unnecessary delay posed by litigation.[70]Firstly, arbitration is flexible. Being a private and a consensual process, parties can agree on how they want it to be

[70]Musili (n 3).

conducted and these rules can change at any time depending on the circumstances prevailing. There are no formal or unchangeable rules like those found in the Court rooms.[71] Arbitration has also been upheld because of its cost effectiveness which is achieved through the timeous settlement and disposal of the matters before the tribunal.

The growth and popularity of arbitration, as an alternative to litigation, reflects its advantages it has over the limitations and disadvantages of the Court proceedings. This can be seen from the increase in the number of arbitrations in the world and has even received constitutional anchoring.[72]Arbitration offers advantages that litigation from its nature, can never provide. It is however important to note that these advantages apply on a case by case basis.

The main advantage arbitration has is that it upholds freedom of parties in a contract to a dispute resolution and its finality over litigation. It promotes autonomy of the parties in the conduct of the arbitration and parties are free to make their own rules on how the arbitration will be conducted, how long will the arbitration take, the arbitral proceedings will take, how the award should look like, appointment of arbitrators among other aspects. The parties as such end up being the real "owners" of arbitration proceedings and they theoretically may create their own "code of arbitration proceedings."

The second one is its finality. This feature remains undisturbed by the infiltration of Courtroom tendencies. Most arbitration agreements expressly underscore finality of the award and as such

[71] Ibid (n 41) 5-6.
[72] In Kenya, it is a requirement that inter-governmental disputes are resolved by alternative dispute resolution mechanisms and arbitration is one of them.

parties can therefore have a quick decision and thereby save time. This will also help benefit the Court system by offloading it from an already overburdened cause list and backlog of cases.[73]

Allowing appeals to the Court of Appeal under section 39 (3) (b) of the Arbitration Act, 1995 underscores the attribute of arbitration being a fast process. Where an applicant files an application before the High Court for stay, the High Court will hear the application and any party dissatisfied can appeal to the Court of Appeal.[74]The appeal is either by consent of parties prior to the making of the award[75]or where the applicant meets the conditions under section 39 (3) (b) of the Arbitration Act, 1995. The application is filed pursuant to Rule 5 (2) (b) of the Court of Appeal Rules, 2010[76] and can either be certified urgent by the Court or declined in which case, it will be heard as an ordinary matter. From the determination, the parties will go back to the arbitrator to continue with the proceedings from the point they had left. In case of an application arising from an award, the procedure is the same save for the orders that the Court can make.

In case of the High Court, the award can be confirmed; varied or set aside or the matter remitted to the arbitral tribunal or, where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration.[77]A party aggrieved by the decision of the High Court can appeal to the Court of appeal, parties need not have consented to the appeal.[78]

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[73] Alfred Mutubwa, "Consistency and Predictability of the Law versus Finality of the Arbitral Award: Juridical Juxtaposition of Sections 32A, 35 and 37 of the Kenyan Arbitration Act," (2017) 5(1) Alternative Dispute Resolution <http://www.ciarbkenya.org/wpcontent/themes/mxp_base_theme/mxp_theme/assets/vol--5-issue-2--final-august-30th-.pdf> accessed on 24th February, 2018.

[74] The Arbitration Act, 1995, s 39 (3).
[75] The Arbitration Act, 1995, s 39 (3) (1).
[76] The applicant will have to demonstrate that the proceedings before the Court of Appeal will be rendered nugatory if the proceedings are not stayed. This is usually the situation after a party looses before the High Court and the parties had not consented that an appeal should lie to the Court of appeal. The applicant herein will thus be moving the Court of Appeal under the Arbitration Act, s 39 (3) (b).
[77] The Arbitration Act, 1995, s 39 (2) (b).
[78] The Arbitration Act, 1995, s 39 (3) (a) and (b).

Where the appeal has been heard and a determination made, the Court of Appeal can vary the award and the varied award shall have the same effect as that of the arbitral tribunal.[79]The same procedure applies in an application for setting aside an award. The Court of Appeal can "confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re-considerations or where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration."[80]

The above is an elaborate procedure that is even more prolonged than a hearing before the Court. It is even better for parties to institute proceedings in Court. With this kind of procedure, the arbitral proceedings become long, expensive, time wasting and complicated. It therefore underscores the rationale for arbitration.

2.2. The concept of finality in arbitral proceedings

Finality and binding nature of arbitration is central to any arbitral proceedings. It is based on the fact that parties want to resolve the dispute before the arbitrator without subjecting the dispute to Court system. It is the finality and binding nature of arbitral awards that make arbitration hailed as an advantage over litigation.[81]Parties who subject themselves to arbitration mainly do so with the expectation that the arbitral process will put an end to the matter. "Finality is a fundamental characteristic of arbitration and a key factor that attracts many parties to choose arbitration when providing for a contractual dispute mechanism."[82]Minimum challenge of an award is

[79] The Arbitration Act, 1995, s 39 (5).
[80] Ibid.
[81] Paul Nguyo, "Arbitration in Kenya: Facilitating Access to Justice by Identifying and Reducing Challenges Affecting Arbitration" (University of Nairobi 2015) <http://erepository.uonbi.ac.ke/bitstream/handle/11295/93192/Nguyo_Arbitration%20in%20Kenya:%20facilitating%20access%20to%20justice%20by%20identifying%20and%20reducing%20challenges%20affecting%20arbitration.pdf?sequence=3> accessed on 29th May, 2018.
[82] Francesca Richmond, 'When is an arbitral award final?', Kluwer Arbitration Blog, September 10 2009, <http://arbitrationblog.kluwerarbitration.com/2009/09/10/when-is-an-arbitral-award-final/?print=pdf > accessed on 24th May, 2018.

advantageous especially to the Claimant to save valuable time and costs.[83] The finality of an award means that even if the award is challenged in Court, the Court will not interfere with finding of facts by an arbitrator.[84] "Final" means that the parties can only call upon the Court in its supervisory capacity to oversee the administration of justice.[85]

However Courts will not step in the shoes of the arbitrator nor will they act in the capacity of an appellate body. It also means that the parties cannot appeal an award unless parties provide for. Further, the appeal ought to be on points of law and a party must obtain leave.[86]Finality of an arbitral award is equivalent to the principle of *res judicata* in litigation.[87]

The principle of finality of arbitral proceedings in Kenya was not a concept in the Arbitration Act, 1995 despite the fact that the Arbitration Act, 1995 made important contribution to arbitration law and practice in Kenya.[88] This necessitated an amendment to the Arbitration Act, 1995 by introduction of section 32A which provides that:

> "Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act."

[83] Ibid.
[84] Gachie (n 25) 86.
[85] Ibid 87.
[86] Harriet Mboce. 'Enforcement of International Arbitral Awards: Public Policy Limitation in Kenya' (LLM Thesis, University of Nairobi 2014) <http://erepository.uonbi.ac.ke/bitstream/handle/11295/77171/Mboce_Enforcement%20of%20International%20Arbitral%20Awards%20Public%20Policy%20Limitation%20in%20Kenya.pdf?sequence=4&isAllowed=y> accessed on 29th May, 2018.
[87] Ivan Cisar and Slavomir Halla, 'The finality of arbitral awards in the public international law' Grant journal ISBN <http://www.grantjournal.com/issue/0101/PDF/0101cisar.pdf> accessed on 25th May, 2018.
[88] This is mainly because the 1995 Act is substantially modeled on the provisions of the UNCITRAL Model Law of 1985 and as amended in 2009.

With the introduction of Section 32A, the Courts have upheld the principle of finality of arbitral proceedings as being central and are reluctant to interfere.

In the case of ***Board of Governors Ng'iya Girls High School –vs- Meshack Ochieng' t/a Mecko Enterprises,***[89] the Court held that when parties opt for arbitration, the parties are essentially telling the Court that they want the process of resolving their disputes to be final and binding. In this way, they chose not to be engaged in the rigmaroles of litigation. The Court further noted that it was for that reason that an Arbitral Award is final and binding upon the parties as envisaged in Section 32 A of the Arbitration Act, 1995.

Finality and binding nature of arbitral proceedings does not however mean that the jurisdiction of the Court is ousted. The Court still has supervisory jurisdiction over Arbitration. This is provided for under Section 10 of the Arbitration Act, 1995. In effect therefore, the Arbitration Act, 1995 permits the Court to only interfere in arbitration matters where the Act provides. It is therefore erroneous for parties to mistakenly believe that finality and binding nature of the arbitration acts as a complete restriction on the Courts from interfering with arbitration proceedings.[90]

2. 3. Analysis of the amendments to Section 39 of the Arbitration Act, 1995

The Amendments to the arbitration Act in 2009 amended section 39 of the Arbitration Act, 1995. As discussed above, the critical step that led to the amendment was so as to provide for finality and binding nature of arbitral proceedings. With that background, it is therefore paramount that section 39 of the Arbitration Act, 1995 is seen in light of whether it has upheld the principle of finality and binding nature of arbitration.

[89] [2014] eKLR para 35 and 36.
[90] Gachie (n 25) 93.

Court intervention under section 39 is two fold. Firstly in the course of the arbitral proceedings and secondly after the award has published. Section 39 applies to domestic arbitrations and parties must consent to the appeal or where the Court is "of the opinion that a matter of law of general importance is involved, the determination of which will substantially affect the rights of one or more of the parties."[91]The rationale for restricting appeals to only questions of law may be because the arbitral tribunals are the ones that sift through the evidence and are therefore in a better position to make awards.[92]

2.3. 1. Appeals under Section 39 (1) of the Arbitration Act, 1995

There were no substantive amendments made to section 39 (1) of the Arbitration Act, 1995 by the 2009 amendments save for clause (2) which made it compulsory for the High Court to grant reliefs sought under sub section two. The section requires that parties to the arbitral proceedings consent to an appeal. The Civil Procedure Rules, 2010 govern the proceedings before the High Court.

What is not however clear is how the application during the arbitration is presented in Court noting that the proceedings are ongoing and a decision has not been made by the Arbitrator. Mustill[93]sets out four (4) conditions that a party filing the application has to set out in an affidavit; firstly, show the question of law in issue; what facts the parties are asserting; what facts are common grounds and what facts are to be assumed for the purpose of the determination. This has to be well set out especially noting that it would come in handy before the Court of Appeal. So that a party is not precluded by the Court on grounds that it was not an issue before the High

[91] The Arbitration Act, 1995, s 39, Arbitration Act No. 4 of 1995. One of the respondents was of the view that the Act is not clear as to what amounts to domestic arbitration and as such, this can cause delay in hearing an application under the Arbitration Act, 1995, s 39 (3) (b) thereby undermining finality of arbitral proceedings.
[92] Muchiri (n 67).
[93] Sir Michael Mustill & Stewart Boyd, "The Law and Practice of Commercial Arbitration in England (2nd Edition, Butterworths 1989).

Court. Similarly, an applicant seeking an interpretation by the High Court has to satisfy the High Court that indeed a question of law arises and there is need for determination.

The appeals to the High Court under section 39 (1) of the Arbitration Act, 1995 are necessary especially due to the fact that all arbitrators are not lawyers and as such may not be in a position to interpret the law as expected. The intervention under this section is in line with section 10 of the Arbitration Act, 1995.

2.3.2. Appeals under Section 39 (3) (a) and (b) of the Arbitration Act, 1995

Section 39 (3) of the Arbitration Act, 1995 is an exception to section 10 and 35 of the Arbitration Act, 1995. As a result, parties keen on frustrating arbitral proceedings can thus use this section to derail the process. It is against this background that this study interrogates section 39 (3) of the Arbitration Act, 1995 noting that the same provides for appeals to the Court of Appeal as follows;

> "(3) Notwithstanding section 10 and 35 an appeal shall lie to the Court of Appeal against a decision of the High Court under subsection (2)-
>
> (a) if the parties have so agreed that an appeal shall lie; and
>
> (b) the High Court grants leave to appeal, or failing leave by the High Court, the Court of Appeal may exercise any of the powers which the High Court could have exercised under subsection (2)."

From the above, parties could appeal the decision of the High Court if they had agreed whether to appeal or not. The time at which this agreement ought to have been made was not specified by the Arbitration Act, 1995. Parties could agree to appeal the decision of the High Court even after the decision had been made and where only subjected to the timelines set out under the Court of

Appeal Rules. This undermined finality of arbitral proceedings in that it allowed a lot of uncertainties as to what point and time the agreement to appeal could be made. It is this loophole that the 2009 Amendments rectified by providing the fact that the agreement should be made before the award is published.[94]

Appeals to the Court of Appeal could also lie where the High Court granted leave or in cases where it failed, the Court of Appeal granted "special leave to appeal." This undermined finality of arbitral proceedings in that firstly, the application for leave ought to have been first made to the High Court and it would only be after the High Court had declined that it would be made to the Court of Appeal. The section never gave any grounds that the High Court ought to have considered in determining the application for leave. This mean that the High Court had to exercise its discretion in determining whether to grant leave to appeal.

Secondly, where the High Court declined "to grant leave for appeal," the Court of Appeal could grant "special leave to appeal." What amounted to **"special leave to appeal?"** was never defined by the Arbitration Act, 1995 and the same was to be determined by the Court of Appeal. This therefore further undermined the principle of finality and binding nature of arbitral proceedings as it gave the Court of Appeal a wide discretion to consider.

The section further escalated the arbitral process in that the application for leave ought to have first been made in the High Court and declined before a party could file the application in the Court of Appeal. This undermined the principle of finality and binding nature of arbitral proceedings hence necessitating the amendments.

Section 39 (3) (a) and (b) was amended and a new section 39 (3) and (a) (b) enacted as follows;

[94] The Arbitration (Amendment) Act, 2009, s 29 (b).

"(a) If the parties have so agreed that an appeal shall lie prior to the delivery of the award; and,

(b) the Court of Appeal, being of the opinion that a point of law of general importance is involved the determination of which will substantially affect the rights of one or more of the parties, grants leave to appeal, and on such appeal the Court of Appeal may exercise any of the powers which the High Court could have exercised under subsection (2)."

The right of appeal of the High Court in section 39 (3) (a) and (b) arises under two different circumstances;

Firstly, the parties must have agreed to appeal before the award is published.[95] This is premised on the consensual nature of arbitral proceedings and in line with the contractual theory upon which arbitral proceedings are founded. This position was stated in ***Anne Mumbi Hinga –vs- Victoria Njoki Gathara***[96]as follows;

'It is clear from the above provisions [section 39], that any intervention by the Court against the arbitral proceedings or the award can only be valid with the prior consent of the parties to the arbitration pursuant to Section 39 (2) of the Arbitration Act, 1995 1995. In the matter before us there was no such advance consent by the parties. Even where such consent is in existence the consent can only be on questions of law and nothing else. Again an appeal to this Court can only be on matters set out in Section 39 (2) … or with leave of this Court. All these requirements have not been complied with and therefore the appeal is improperly before us and is incompetent.'

[95] The Arbitration Act, 1995, s 39 (3) (a).
[96] [2009] eKLR 11.

Secondly, the Court of Appeal will grant leave where the Court is of the opinion "that a point of law of general importance is involved and that the point of law will substantially affect the rights of one or more parties."[97]The application under section 39 (3) (b) of the Arbitration Act, 1995 may be made by a party even without any prior agreement. What the applicant needs to satisfy the Court of Appeal is "the fact that the matter raises a point of law of general importance whose determination will substantially affect the rights of one or more of the parties." The procedure for approaching the Court of Appeal is governed by the Court of Appeal Rules.[98]

2.4 Finality of arbitral proceedings under section 39 (3) (b) of the Arbitration Act, 1995.

Arbitral proceedings are founded on contractual theory which is tied up with the concept of party autonomy which entails autonomy over the arbitrator and how the arbitration is to be conducted. Parties are at liberty to appoint an arbitrator and decide how the process will be conducted.[99]

In so far as appeals on point of law is concerned; the concept of party autonomy is well captured in section 39 (1) of the Arbitration Act, 1995. This is only possible by agreement of the parties. The section is also very clear in that it provides that; the agreement by the parties has to be made before the hearing commences.[100]

The autonomy of the parties is further provided for and captured by section 39 (3) (a) of the Arbitration Act, 1995 which allows the parties to agree on whether an appeal should lie in the Court of Appeal. The agreement should be entered into prior to the publishing of an award.

[97] The Arbitration Act, 1995, s 39 (3) (b).
[98] Ibid s 39 (4).
[99] Muigua (n 41) 3.
[100] Two of the respondents (arbitrators) interviewed were of the strong opinion that this is what makes the Kenyan position different from the UK's position in that the Kenyan position provides an "opt-in" provision while the UK position provides an "opt-out" thereby upholding the autonomy of the parties.

However, the autonomy of the parties is taken away by the Court of Appeal under section 39 (3) (b) of the Arbitration Act, 1995 which gives the Court of Appeal leeway to interfere with the powers of the parties by invoking the "opinion" of the Court of Appeal when deciding whether leave should be granted to a party seeking leave to appeal. This is absurd because the determination is based on an "opinion" meaning that there are no rules to be followed by the Court of Appeal in making a determination to allow application.

In giving the opinion, the Court of Appeal ought to be guided by the fact that "the point of law whose determination will substantially affect the rights of one or more parties." This section can be interpreted to mean that even third parties are allowed to make applications. A reading of section 3 of the Arbitration Act, 1995 which defines who a party is buttresses this point. The section defines a party as;

> "means a party to an arbitration agreement and includes a person claiming through or under a party."

The introduction of third parties in the purview of arbitration undermines contractual and consensual nature of arbitration which provides that it is only parties that have agreed to the arbitration that can participate as they create their own private system of justice.[101]These also goes against three (3) cardinal principles; firstly, "the principle of the contractual nature of arbitration which principle has acquired an inviolate and sacrosanct arbitration rule." Secondly, there is a view that parties get what they have bargained for and as such "third parties having made a considered view not to enter an arbitration agreement will have excluded themselves

[101] Margaret L. Moses, The Principles and Practice of International Commercial Arbitration (Cambridge University Press 2008) 17-18.

from the arbitration process." Thirdly, "underscores the importance of confidentiality in arbitral proceedings which will thus be compromised by multi-party arbitration proceedings."[102]

However, some authors have justified the involvement of third parties in arbitral proceedings arguing that they should be allowed especially where they "are an integral part of the substantive background of the arbitration" which should be read with "the principle of equality of the parties" and when parties agree to arbitrate, they should be aware of surrounding circumstance more importantly "that there are parties implicated in the commercial projects they are getting involved."[103]

Section 39 (3) (b) of the Arbitration Act, 1995 define "what amounts to a point of law of general importance." The definition has since been settled in ***Hermanus Phillipus Steyn –vs- Giovanni Gnechi-Ruscone***[104]the applicant sought leave to appeal on grounds that the matter raises "issues of general public importance" as provided in article 163 of the Constitution. The Court noted that "a matter of general public importance" was a vital one since it determined whether the Supreme Court had the jurisdiction or not.

In defining what amounts to matters of public importance, the Court stated that "it may vary in different situations – save that there will be broad guiding principles to ascertain the stature of a particular case. Besides, the comparative judicial experience shows that criteria of varying shades have been adopted in different jurisdictions. The general phraseology in the laws of most jurisdictions is, a point of law of general public importance;"

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[102] Dr. Stavros Brekoulakis, "The Relevance of the Interests of Third Parties in Arbitration: Taking a closer look at the Elephant in the Room" p. 1171 <http://pennstatelawreview.org/articles/113%20Penn%20St.%20L.%20Rev.%201165.pdf > accessed on 15th June, 2018.
[103] Ibid 1184.
[104] [2013] eKLR.

"But Kenya's Constitution, in Article 163 (4) (b) refers to a matter of general public importance, as a basis for invoking the Supreme Court's appellate jurisdiction. In our opinion, the Kenyan phraseology reposes in the Supreme Court, in principle, a broader discretion which, certainly, encapsulates also the point of law of general public importance."

It went ahead to establish the principles governing the "interpretation of the concept of matters of general public importance" and held as follows;

> "where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest and that such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination."

The Supreme Court in the above case noted that the "general phraseology in the laws of most jurisdictions is, **a point of law of general public importance"**[105]but the Constitution of Kenya, 2010 under Article 163 (4) (b) refers to "**a matter of general public importance**" which according to the Supreme Court encapsulates also "**a point of law of general importance."**[106]

The above definition is binding upon the Court of Appeal by dint of Article 163(7) of the Constitution. Thus in determining "what amounts to a point of law of general importance," the Court of Appeal has to follow the criteria set out above.

[105] The Arbitration Act, s 39 (3) (b) refers to "a point of law of general public importance."
[106] Which phrase is used under The Arbitration Act, s 39 (3) (b).

The Supreme Court in equating general importance to public interest brought yet another wide concept to be considered when granting leave by the Court of Appeal and as such creating an avenue to undermine the principle of finality in arbitral proceedings.

Public interest has not been defined by the Arbitration Act, 1995. The Black Laws Dictionary defines public interest as;

> "The general welfare of the public that warrants recognition and protection, something in which the public as a whole has stakes especially that justifies governmental regulation."

Thus, the categories as to what constitutes public interest is not closed and the burden is on the person seeking leave to satisfy the Courts that "the question carries specific elements of real public interest and concern."[107]

Courts have thus interpreted public interest in different forms. In the case of ***Kenya Shell –vs- Kobil Petroleum Limited***[108] public policy was considered to mean "that litigation must come to an end….in our view, public policy considerations may endure in favour of granting leave to appeal as they would discourage it. We think, as a matter of public policy, it is in the public interest that there should be an end to litigation and the Arbitration Act, 1995 under which the proceedings in this matter were conducted underscores that policy."

In the **Kenya Shell** case above, the Court of Appeal therefore interpreted public interest to include the fact that litigation must come to an end.

The uncertainty in law on what amounts to "public interest" will give rise to myriad of applications in section 39 (3) (b) of the Arbitration Act, 1995. Abdallah and Lubano argue that

[107] Ibid (n. 22)21.
[108] [2006] eKLR.

commercial matters are unlikely to meet the test of "what amounts to matters of law of great public importance."[109]This may well be true but such an uncertainty and absurdity may be used by lawyers and parties who are keen on abusing the Court process in order that the arbitration is derailed. A simple issue is reduced to a complex legal affair and thereby undermining the principle of finality and binding nature of arbitral proceedings.[110]The uncertainty in law and procedure may result in conflicting decisions by the Courts to the detriment of the parties and the growth of arbitration in the Country.[111]

Section 39 (3) (b) of the Arbitration Act, 1995 was enacted in 2009 way before the promulgation of the Constitution of Kenya 2010. The section therefore limited appeals to the Court of Appeal. The enactment of the Constitution established the Supreme Court.[112]Abdallah and Lubano have argued that arbitral matters are of a commercial nature and such they are unlikely to reach the Supreme Court because of the issue of jurisdiction as provided under Article 164 (b) of the Constitution, which jurisdiction, matters of commercial nature are unlikely to pass this test.[113]For a person to approach the Supreme Court, ***Hermanus Phillipus Steyn –vs- Glovanni Gnecchi-Ruscone*** case discussed above has laid down the test to be made. The position taken by Abdallah and Lubano[114] is a generalized position and each case would have to be determined on its own merits. Section 39 (3) (b) of the Arbitration Act, 1995 as it is does not bar a person from

[109] Abdallah and Lubano (n 35).
[110] Muigua (n 41) 184.
[111] This can be seen from the interpretation of the Court of Appeal in Kenya Shell Limited –vs- Kobil Petroleum Limited (Civil Appeal No. 57 of 2006 (UR)) and Nyutu Agrovet Limited –vs- Airtel Networks Limited [2015] eKLR. Though the cases dealt with appeals under Section 35 of the Arbitration Act, 1995, the Court of Appeal in Kenya Shell held that there was a right of appeal to the Court of Appeal under Section 35. The Court of Appeal in the Nyutu case held that the Court of Appeal had no right to hear an application under Section 35 of the Arbitration Act, 1995. This shows how the Court can reach two different decisions when exercising discretion.
[112] The Supreme Court is superior in the hierarchy and appeals lie before it by virtue of The Constitution of Kenya, 2010, art 163(4).
[113] Ibid (n 35).
[114] Ibid.

appealing to the Supreme Court. Indeed such lacuna is noted by Musili Wambua[115] who proposes reform. Until that is done, section 39 (3) (b) of the Arbitration Act, 1995 has the potential of undermining finality and binding nature of arbitral proceedings.

The emerging issues in domestic arbitration is also likely to undermine the principle of finality and binding nature of arbitral proceedings. With the enactment of the Constitution of Kenya 2010, the Constitution is supreme and a party can file a constitutional case to challenge an arbitral award on grounds of due process. As Kariuki Muigua[116] rightly points out; the holding by Githinji J; in the **EPCO Builders Limited –vs- Adam S. Marjan[117]**cannot stand in this era of constitutionalism under the current Constitution of Kenya 2010. "A party must have their day in Court however frivolous an application is, less the Court is accused of driving the litigant from the seat of justice." Thus undermining the principle of finality and binding nature of arbitral proceedings.

2.5. Conclusion

From the foregoing discussion, an appeal to the Court of Appeal is by agreement of the parties or where a party satisfies the Court of Appeal that; a point of law is of "general importance." In considering whether a point of law is of "general importance" whose "determination substantially affect the rights of one or more parties," the Court of Appeal has to exercise discretion and each case has to be determined on its own particular facts. Leaving this determination to the discretion of the Court creates a lot of uncertainty as to what the position of the Court will actually be. This only goes to further undermine the principle of finality and binding nature of arbitral proceedings.

[115] Musili (n 3).
[116] Muigua (n 46).
[117] Civil Appeal No. 248 of 2005 (unreported).

This chapter was to critically look at the principle of finality and binding nature of arbitral proceedings and whether the same is undermined by section 39 (3) (b) of the Arbitration Act, 1995.

As discussed at 2.2 and 2.4 above, section 39 (3) (b) of the Arbitration Act, 1995 frustrates and undermines arbitral proceedings. The section further undermines the principle of finality and binding nature of arbitral proceedings. There is therefore need to look at best practices offered by other jurisdictions on the principle of finality and binding nature of arbitral proceedings in light of appeals on points of law. This will be discussed in chapter three which discussion will inform what legislative reforms need to be proposed with regard to section 39 (3) (b) of the Arbitration Act, 1995 to enable efficient conduct and administration of arbitral proceedings and thus answering the third study question.

CHAPTER THREE

OVERVIEW OF BEST PRACTICES ON FINALITY OF ARBITRAL PROCEEDINGS IN THREE SELECTED JURISDICTIONS

3.0. Introduction

In chapter two, the study analyzed the finality of arbitration proceedings as provided in the Arbitration Act, 1995 and how section 39 (3) (b) of the Arbitration Act, 1995 undermines the rationale for arbitration and the finality of arbitral proceedings.

Chapter three reviews the laws and best practices on finality of arbitral proceedings in UK, Canada and France. The salient features of the principle of finality of arbitral proceedings in two common law jurisdictions (UK and Canada) and the Civil Law jurisdiction (France) are discussed with a specific focus on how this three jurisdictions have enhanced the effectiveness of arbitration by ensuing a balance of finality of arbitral proceedings and yet respecting party autonomy.

The chapter aims at showing how the Courts and the law in the three select jurisdictions have ensued a balance in promoting the rationale for arbitration, the principle of finality of arbitral proceedings and upholding arbitration as an alternative to the Court process despite the fact that their statutes provide for appeals on point of law.

UK is the mother of common law. The English Arbitration Act, 1996 adopted several principles from the UNCITRAL Model Law key being; party autonomy and minimum Court interference so as to make arbitration more effective and a much sought after dispute resolution mechanism. However it is important to note that in certain instances, it has departed from the UNCITRAL Model Law's by allowing appeals on points of law.

Canada is the first Country in 1986 to domesticate the UNCITRAL Model Law leading to several Countries following suit.[118]Canadian law on arbitration improved a great deal following the adoption of the UNCITRAL Model Law and the Courts have also played a significant role in promoting arbitration by a paradigm shift from Court proceedings to arbitration.[119]It would therefore be important to interrogate how Canadian law and Courts have strived to strike a balance in upholding the principle of finality of arbitral proceedings since the adoption of the UNCITRAL Model Law. It would be important to this study to see how Canada has managed to stand the test of time especially noting that our Arbitration Act, 1995 is a replica of the UNCITRAL Model Law.

France has maintained a trans-national character in international arbitration due to existence of several factors the most important being that French law is pro-arbitration. The first law in France was passed by the 1981 Decree and it was a modern law of arbitration in all aspects. France has also continued to have a more progressive arbitration law than most Countries in the world.[120]The Decree No. 2011-48 of 13th January, 2011 further modernizes the legal framework and incorporates the jurisprudence developed by French Courts. The law on arbitration in France is not modeled in line with the UNCITRAL Model Law and yet offers a more favourable arbitration regime than the one provided by the UNCITRAL Model Law.[121]It would therefore be ideal to look at how the law in France deal with the issue of finality of arbitral proceedings and thereby help this study make appropriate recommendation.

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[118] <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html> accessed on 2nd September, 2018.

[119] <https://corporate.findlaw.com/litigation-disputes/canadian-law-on-international-commercial-arbitration.html> accessed on 2nd September, 2018.

[120] International Arbitration 2018, France <https://www.globallegalinsights.com/practice-areas/international-arbitration-laws-and-regulations/france> accessed on 6th September, 2018.

[121] <https://www.globallegalinsights.com/practice-areas/international-arbitration-laws-and-regulations/france> accessed on 2nd September, 2018.

Courts in France have also contributed immensely to the growth of international arbitration by establishing a tradition of promoting arbitration through minimum interference. As long as there is evidence of an agreement to arbitrate, French Courts will decline to hear the matter. The award will only be set aside on six (6) limited grounds which are strictly construed.[122]

Lastly, France is home to the ICC since 1920s and has always been lauded as a favorable place to hold arbitrations. France has thus contributed a lot in making international arbitration popular dispute resolution mechanism; thus establishing itself as high sought after venue.[123]

3.2. Laws Governing Arbitration in the three select jurisdictions

3.2.1. *United Kingdom (UK)*

The 1950 English Arbitration Act gave Court wide powers to interfere with arbitral awards especially section 22 and 23 for "procedural mishap" or "misunderstanding"[124]which gave Courts very wide powers to remit awards to arbitrators. The 1979 English Arbitration Act was enacted to solve the insufficiency of The 1950 English Arbitration Act.

The 1979 English Arbitration Act limited appeals on points of law to principles set out by Lord Diplock in ***Pioneer Shipping Limited and others v B.T.P Tioxide Limited (Nema):***[125]

> "In deciding how to exercise his discretion whether to give leave to appeal under section 1(2) of the Arbitration Act, 1995, 1979, what the judge should normally ask himself…is not whether he agrees with the decision reached by the arbitrator but, does it appear upon

[122] Ibid.
[123] Jean de la Hosseraye, Stephanie de Giovanni and Juliette Huard-Bourgois, Cms 'Arbitration in France' <https://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_FRANCE.pdf> accessed on 27th August, 2018.
[124] See *King v McKenna Limited* [1991] 2 QB 480, per Lord Donaldson MR: "Parties to arbitration…are entitled to expect that the arbitration will be conducted without mishap or misunderstanding and that , subject to the wide discretion enjoyed by the arbitrator, the procedure adopted will be fair and appropriate."
[125] (1981) 2 All ER 1030.

perusal of the award either that the arbitrator misdirected himself in law or that his decision was such that no reasonable arbitrator could reach."

However, the 1979 Act did not sufficiently prevent the Courts from interfering with arbitral matters, since it left in place the Court's powers under sections 22 and 23 of the 1950 English Arbitration Act eliciting criticisms.[126] Indeed Department Advisory Committee's Report on the Arbitration Bill (DAC Report) by Lord Saville J noted as much:

> "there is no doubt that our law has been subject to international criticism that the Courts intervene more than they should in the arbitral process, thereby tending to frustrate the choice the parties have made to use arbitration rather than litigation as the means of resolving their dispute."[127]

Thus, Arbitration Act, 1996 was enacted *inter-alia* to rectify deficiencies of the 1979 Act and specifically to limit appeals to the Courts against arbitral awards. Section 58 (1) of the Arbitration Act, 1996 provides that:

> "Unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them."

[126] See *Antaios Compania Naviera S.A v Salen Radevierna A.B* (1985) AC 191.
[127] See paragraphs 20-22 of the DAC Report: Lord Justice Saville, "Department Advisory Committee's Report on the Arbitration Bill," Arbitration International, Volume 13, Issue 3, pp. 275-316 (1997).

This means that an award is conclusive as to the issues with which it deals, unless it is successfully challenged or appealed against.[128]Despite the right for an appeal, the Courts in England have held that it is usually difficult for such appeals to be allowed.

In ***NYK Bulkship (Atlantic) NV –vs- Cargill International SA***[129] the Supreme Court of the UK held that section 69 of the English Arbitration Act, 1996 is one provision that provide for finality: according to this provision, no appeal may be raised unless there is either an agreement of all the other parties including any third party; or where Court gives leave to proffer an appeal. Further, in case of multiple claimants or multiple respondents, again, all parties must be involved in the agreement to appeal. The award made by the arbitrator was upheld.

3.2.2. Canada

Canada is a federal state with ten (10) provinces and three (3) territories. Thus all jurisdictions within Canada have legislation governing arbitrations. The statutes contain numerous identical and similar provisions. Key being, ousting the jurisdiction of Courts in arbitral matters where parties have agreed to have the dispute referred to arbitration, stay of arbitration proceedings and non-interference of the Court where the law expressly provides for arbitration. Quebec Code of Civil Procedure[130] differs from the rest in that it is the only one that does not allow appeals of arbitral awards on point of law.[131]

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[128] David St. John Sutton, Judith Gill & Mathew Gearing, Russle on Arbitration (23rd Edition, London Sweet & Maxwell, 2007) 333.
[129] The Supreme Court [2016] UKSC 20. < https://www.latham.london/2016/07/supreme-court-upholds-finality-of-arbitral-awards/ > accessed on 29th June, 2018.
[130] SQ 2014, c 1.
[131]Blakes Canadian Lawyers, 'Litigation and Dispute Resolution in Canada', <http://www.blakesfiles.com/Guides/2012_Blakes_Litigation_Dispute_Resolution_in_Canada_EN.pdf> accessed on 18th August, 2018.

The Commercial Arbitration Act adopts the *Commercial Arbitration Code,* which is a replica of the UNCITRAL Model Law with only a few modifications. Otherwise, applies un-amended to awards and arbitration agreements.[132] The Commercial Arbitration Code applies to both domestic and international commercial arbitrations that involving federal government, federal crown, corporations and agencies.[133]

Canada has also the *Uniform Arbitration Act*[134] which provides guidance on future legislative changes to domestic arbitration statutes of the provinces.[135]

3.2.3. France

France adopted a new arbitration law in 2011, modernizing the rules applicable to both domestic and international arbitration. The new law codifies the principles developed in case law and aims to preserve the trust of international arbitration users in the French legal system.[136]

In 1980 and 1981, two revolutionary decrees were passed, introducing progressive arbitration provisions into the Nouveau Code de Procedure Civile, which was subsequently renamed Code de Procedure Civile (**CPC**). Decree No. 80-354 of 14 May 1980 related to domestic arbitration and Decree No 81-500 of 12 May 1981 related to international arbitration (1980-81 Decrees).[137]

In 2011, in order to maintain the attractiveness and efficiency that France has enjoyed over the years in arbitration, this was achieved through the codification of principles developed through case law leading to the enactment of "Decree No. 2011-48 of 13 January 2011 (2011 Decree),

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[132] <https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-17-2nd-supp/latest/rsc-1985-c-17-2nd-supp.html> accessed on 18th August, 2018.
[133] Ibid.
[134] Adopted on 15th August, 2016 by the Uniform Law Conference of Canada (ULCC).
[135] William G. Hurton, 'Reforming Arbitration Appeals: The new ULCC Uniform Arbitration Act' (2017) 75 (1) The Advocate < http://www.wgharb.com/wp-content/uploads/Reforming-Arbitration-Appeals_The-New-ULCC-Uniform-Arbitration-Act-75-Advocate-37_January-2017.pdf> accessed on 9th September, 2018.
[136] Ibid 333.
[137] Ibid.

which amended the arbitration provisions of the CPC."[138]Book IV of the CPC is the main arbitration statute governing both domestic and international arbitration.[139]

The French Courts also play a significant role by declining to interfere with arbitral process and by recognizing arbitral awards without accepting challenges that would amount to a review of the merits of the award.[140]

The CPC provisions relating to the law of arbitration were enacted before the UNCITRAL Model Law was passed and France has not modified its laws to resemble it in anyway.[141]

3.3. Finality of arbitral proceedings and the Right of Appeal in the three selected jurisdictions

3.3. 1. United Kingdom

In England, appeals on point of law is either on preliminary or on merit. Appeals in section 45 of the English Arbitration Act, 1996 is on preliminary point of law which provides that:

> "Unless otherwise agreed by the parties, the court may on the application of a party to arbitral proceedings (upon notice to the other parties) determine any question of law arising in the course of the proceedings which the court is satisfied substantially affects the rights of one or more of the parties."

The parties to an arbitration are however not bound by the provisions of section 45 and can agree that they are not keen on being bound by the same. Thus this section upholds finality of arbitral

[138] Ibid 335.
[139] Ibid (n 135).
[140] Michael Buhler and Pierre Heitzmann, Jones Day,'PLC Arbitration Book, France' Arbitration 2009/10, <https://www.jonesday.com/files/Publication/ee6ac2d0-adef-4f9e-8a82-fc3dbfadaf7b/Presentation/PublicationAttachment/0c4deb70-26ef-4d77-b5de-0171692d4971/PLC%20Arbitration%20Handbook%20-%20%20Articel%20MB%20(France.pdf).PDF> accessed on 30th August, 2018.
[141] Ibid.

proceedings by allowing an application that will substantially save on costs and time. One of the rationale for arbitration is its ability to save on time and costs. Some authors have opined that expedition and cost effectiveness of arbitration will soon make litigation fall in the shadows.[142]

3.2.1. Appeals to the High Court

Section 69 of the English Arbitration Act, 1996 deals with appeals of an award on merit. This will only be allowed where parties have consented in which permission to appeal will not be required but in order to succeed the party must have to fulfil other conditions of an appeal.[143] Where parties have not consented, an applicant must obtain leave from the Court upon fulfilment of four conditions which include; "that the determination of the question must substantially affect the rights of at least one party; the question has to be one which the tribunal was asked to determine; the decision of the tribunal on that question has to be obviously wrong or one of general public importance, and the decision of the tribunal has to be open to serious doubt; and despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all circumstances for the Court to determine the question, the appeal is also only restricted to English law and the onus solely rests with the appellant."[144]

The section is not applicable unless some rights have been exhausted. This can be in form of a review under section 57 of the English Arbitration Act, 1996.[145]Thus where the point of law arise from an accidental slip or ambiguity that could be corrected or by the failure of the tribunal to deal with an issue that was presented before it that could be subject of an additional award,

[142] Bello Adesina Temitayo, 'Cost and Time saving techniques Using the Scott Schedule: Bedrock to predict Resolution Base in Arbitration' <http://www.arabianjbmr.com/pdfs/KD_VOL_4_1/2.pdf> accessed on 16th July, 2018.
[143] The Arbitration Act, 1996 s 69 (3) and the appellant must exhaust any other remedies available and comply with the time limits set out in the Arbitration Act, 1996, s 70.
[144] The Arbitration Act, 1996, s 69 (3).
[145] The Arbitration Act, 1996, s 57 empowers the tribunal on its own initiative or by an application by any party to the arbitration proceedings to correct an award or to make an additional award.

section 69 of the English Arbitration Act, 1996 requires that an applicant requests the tribunal to correct the matter before appealing to the Court. It is only after the tribunal refusing the request or it is unable to deal with the question that the appeal can proceed.[146] "A question of law is defined under section 82 (1) of the English Arbitration Act, 1996"[147] to only mean English law.

The section also deals with issues of law and must not encroach on the facts. This was the position in the case of ***Geogas S A –vs- Trammo Gas*** Limited ***(The "Baleares")*** [148]where the Court held that; "arbitrators are the masters of fact. On an appeal the Court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the Court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be."

3.2.2. Appeals to the Court of Appeal

A party can appeal against a grant or refusal of permission to appeal or against any decision of the Court that hears an appeal.[149]In both cases, permission of the Court that made the decision is required. Under the second limb, the Court of Appeal must be of the view that the question of law concerned is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.[150]

[146] Sutton, Gill & Gearing (n 128) 507.
[147] For a court in England and Wales, it means a question of the law of England and Wales and for a court in Northern Ireland, it means a question of the law of Northern Ireland.
[148] [1993] 1Lloyd's Rep. 215 at 228, CA.
[149] The Arbitration Act, 1996, s 69 (8).
[150] Ibid.

A party must also obtain "permission" of the Court of Appeal in an application under section 69 (8) of the English Arbitration Act, 1996. In applications for "permission" in the Court of Appeal, *Nema* guidelines under section 69 (3) of the English Arbitration Act, 1996 does not apply. Rather, the test by the judge is "whether the question of law is worthy of consideration by the Court of Appeal." "Which can include situations where there are different schools of thought on an issue and the Court of Appeal given a chance, may support either of the positions."[151]

"The leave to appeal ought to be granted by the High Court. In ***Henry Boot Construction (UK) Limited –vs- Malmaison Hotel (Manchester) Limited"***[152]the issue was: "whether the Court of Appeal had jurisdiction to grant leave to appeal or review the High Court's refusal to appeal. The Court of Appeal held that there was no appeal from the judge's refusal to give permission on the merits nor could the judge give permission to appeal to the Court of Appeal because section 69 (8) of the English Arbitration Act, 1996 only applies if there has been a decision of the Court of first instance on an appeal. Where a judge refuses permission to appeal then there is no appeal."

In ***Kyla Shipping Company Limited –vs- Bunge SA***[153] the Court of Appeal declined leave to appeal. In considering Court's residual jurisdiction to entertain the application, Lord Justice Longmore concluded, "that a litigant complaining of a refusal of permission under section 69 (8) of the Act, 1996 has an extraordinarily high hurdle to surmount.' It was not enough to demonstrate an error of law; the owners had to demonstrate such a substantial defect in the fairness of the process so as to invalidate the decision by the High Court."

In theory, a further appeal is possible under section 69 (8) of the English Arbitration Act, 1996 from the Court of Appeal to the Supreme Court. However, this have rarely been granted. Indeed,

[151] Sutton, Gill & Gearing (n 128) 522.
[152] [2001]QB 388.
[153] [2013] EWCA.

few cases have addressed this issue. These cases are ***Jivraj v Haswani***[154] and ***NYK Bulkship (Atlantic) NV v Cargill International SA*** **(ibid).**

The decisions confirm the position that parties who have accepted to have their matters solved through arbitration have a very limited opportunity to appeal the arbitral award in English Court than when the matter is dealt with by English Court's from the onset.

The Court of Appeal may also impose such terms as it considers appropriate when hearing an application for "permission" to appeal. These terms may include security for costs or a requirement that the money ordered to be paid by the tribunal be deposited in Court. This helps to curtail parties who want to use the Court process to undermine the arbitral process thereby promoting finality of arbitral proceedings.

The Court of Appeal in exercising its discretion to grant orders set out in section 69 (7) of the English Arbitration Act, 1996 is constrained by the need to preserve the finality of arbitration awards as was held in ***Secretary of state for the Environment –vs Reed International Plc.***[155]

In an appeal, the Court of Appeal considers whether "the question is one of general importance" or "is one which for some special reason should be considered by the Court of Appeal."This is the criteria to be followed. However, it is rear that appeals reach the Court of Appeal because of the stringent conditions under section 69 (3) of the English Arbitration Act, 1995. This therefore helps to promote finality of arbitral proceedings as the Courts are reluctant to allow appeals.

Section 69 has been lauded for upholding the principle of finality of arbitral awards and party autonomy which are at the core of any arbitration. This is because the procedural requirements are stringent, extensive and profound, thereby leading to a few appeals being reviewed. It has

[154] [2011] UKSC 40.
[155] [1994] 06 E.G 137.

been argued that the threshold criteria under section 69 (3) of the English Arbitration Act, 1996 is set so high and "as a matter of general principle, English Courts strive to uphold awards."[156]

Section 69 appeals are therefore not common and very few have been allowed to the extent that a party who intends to bring an application must set out very clear and compelling reasons "for the Court to allow the appeal."[157]This therefore upholds the principle of finality and binding nature of arbitral proceedings.

The English Arbitration Act, 1996 is divided into mandatory and non-mandatory provisions and section 69 is a non-mandatory provision meaning that parties are at liberty to exclude the jurisdiction of Court from appeals on points of law. This therefore gives the parties autonomy to determine whether they wish to have an appeal on points of law thereby upholding contractual nature of arbitral proceedings which is at the heart of arbitration.

Where parties have agreed on an appeal on points of law, the party seeking to approach the Court will not only have to obtain permission from the Court but will have to fulfil the other conditions under section 69 (3) of the English Arbitration Act, 1996. In considering whether to grant leave to appeal, the Court will read the award in a "minute textual analysis and not astute to look for flaws." In ***Bunge SA –vs- Nibulon Trading BV***[158]the Court held that;

> "As a matter of general approach, the Courts strive to uphold arbitration awards. The approach is to read an arbitration award in a reasonable and commercial way, expecting as is usually the case, that there will be no substantial fault that can be found with it.

[156] Helen Conybeare Williams and Odean L. Volker, "Understanding English Arbitration: Appeal of a point of Law", <http://www.haynesboone.com/~/media/files/alert%20pdfs/2016/understandingenglisharbitration.ashx > accessed on 10th July, 2018.
[157] Challenging Arbitration Awards: Part 3 < https://www.penningtons.co.uk/news-publications/latest-news/challenging-arbitration-awards-part-3/> accessed on 10th July, 2018.
[158] [2013] EWHC 3936 (comm), citing principles enunciated by the Court of Appeal in MRI v Erdent [2013] EWCA Civ 156.

> Furthermore not only will the Court not be astute to look for defects, but in cases of uncertainty it will so far as possible construe the award in such a way as to make it valid rather than invalid."

The test set out in ***Bunge SA –vs- Nibulon Trading*** (above) means that "only a few number of appeals are substantively reviewed. The *ratio legis* for these limitation seems to be to allow revision only of the most serious and questionable awards. Therefore, judges have become even more reluctant to intervene than they were under the regime of the 1979 Act."[159]As such upholding finality of arbitral proceedings.

The above assertion has been confirmed by the statistics from the Commercial Court Users Group Meeting Report of 13th March, 2018 which shows that, [160]in 2015; of the 60 permission applications filed, 10 were granted and of the 10 only one (1) was successful. In 2016; of the 46 permission applications filed, none where granted and from 2017 to date; 56 permission applications were file, 10 were granted and of the 10 only one (1) was successful.

One other potential reason for the low number of applications for permission is the exclusion of section 69 in leading institutional rules such as those of the London Court of International Arbitration (LCIA) and International Chamber of Commerce (ICC) [161]thereby promoting finality of arbitral proceedings.

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[159] Philip Celadrik, 'The English Approach to Challenges at the Seat: Should Courts Stay Away from the Challenges on the Merits as the Model Law Provides?' (2015) Volume V Czech (& Central European) Yearbook of Arbitration <https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1882064 > accessed 18th July, 2018.

[160] <https://www.judiciary.uk/publications/commercial-court-users-group-meeting-report-march-2018/> accessed 18th July, 2018.

[161] Indeed it was emphasized by one of the respondents that parties to an arbitration agreement need to be careful at the drafting stage to expressly exclude the right of appeal because "this is the fulcrum" of an appeal on points of law.

The application before the Court is done through an arbitration claim for which "the question of law" and the grounds relied upon must be identified and categorically stated by a party seeking permission.[162]It is important therefore that a party satisfies the Court in a brief, eloquent and direct manner as to why leave to appeal ought to be granted. In ***The Northern Pioneer (CMA CGM SA v SA Beteiligungs KG[163]*** the Court criticized lengthy submissions holding that:

> "Any written submissions placed before the Court in support of an application for permission to appeal from findings in an arbitral award should normally be capable of being real and digested by the judge within half an hour….."

The application once filed, parties are not entitled to a hearing and the Court will determine the application basing on the evidence on record. This procedure differs from that of the previous legislation which permitted a brief hearing.[164]This therefore helps to shorten the Court process making arbitration more popular.

3.3. 2. Canada

The Commercial Arbitration Code applies to commercial disputes that are under the exclusive federal jurisdiction or where a party is the federal government or corporation and it does not allow appeals on points of law. This is because it wholly adopts the provision of UNCITRAL Model Law.There is significant diversity of grounds on which appeals on merits are available in domestic arbitrations in the several provinces of Canada.

[162] The Arbitration Act, 1996, s 69 (4).
[163] [2003] 1 Llyod's Rep. 212.
[164] Sutton, Gill & Gearing (n 128) 518.

In the case of **"On-Call Internet Services Ltd. v. Telus Communications Company"**[165] Court of Appeal adopted the words of Mr. Justice Henderson in explaining the purposes of arbitration that:

> "Arbitration is intended to provide a speedy and final resolution of the issues. No party may appeal any aspect of an arbitration as of right. The Court retains a certain discretion, to be exercised according to the criteria set out in s. 31(2), to grant or refuse leave after weighing the importance of the result of the arbitration and the point of law invoked. After most arbitrations, one party or the other, perhaps both, will be unhappy with the result. The substantial constraints on the granting of leave to appeal play an important role in preserving the integrity of the arbitration system. If leave were granted too readily, one of the beneficial and distinguishing features of arbitration (its finality) would be lost."

It is therefore evident that Courts in Canada strive to uphold finality of arbitral proceedings because the Courts acknowledge the fact that arbitration being preferred to litigation, has to be a fast process.

Even where an appeal is available, Courts in Canada review arbitral awards, generally speaking, using the test of "reasonableness" instead of "correctness", even in matters of pure question of law, subject to certain very narrow exceptions.[166]Application of "reasonableness" standard was defined in **Dunsmuir –vs- New Brunswick**[167] that, "certain questions do not lend themselves to one specific, particular result. Indeed, they may give rise to a number of possible, reasonable

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[165] [2013] BCCA 366.

[166] Will Moreira, 'Enforcement of and challenge to Arbitral Awards in Canada' International Arbitration Committee Newsletter, October, 2016 <http://www.iadclaw.org/securedocument.aspx?file=1/19/Intl_Arbitration_October_2016.pdf> accessed on 22nd August, 2018.

[167] [2008] SCC 9, at para 47.

conclusions. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law."

"The Ontario Arbitration Act provides for a right of appeal on law, fact and mixed fact and law if the parties agreement so provides. Sub-section 45 (1) states that,if the arbitration agreement does not deal with appeals on questions of law, then an appeal on a matter of law may be allowed with leave of the Court. Parties are bound by the statutory obligations unless they agree to contract out of them."[168]

In **High Bury Estates Inc –vs- Bre- Ex Limited,[169]** the Court held that:

> "By adopting arbitral rules which precludes an appeal, the parties thereby opt out of statutory appeal rights." "The Court further held that;[170]
>
> "where parties have turned their minds to the question and have decided that the decision of the arbitrator will be final and binding, and not subject to an appeal on a question of law, section 45 of the Act operates to exclude recourse to an appeal and the language in the arbitration agreement was sufficient to incorporate the arbitral rule excluding appeal, in this case Rule 47 of the National Arbitration Rules.The decision in Orgaworld, [171]was unequivocal that language such as was used in Rule 47 and incorporated into the

[168] 1991 SO 1991 c. 17.
[169] 2015 CarswellOnt 12073, 2015 ONSC 4966,257 A.C.W.S (3d) 22.
[170] Orgaworld Canada Ltd. v. Ottawa (City), *2015 ONSC 318 (Ont. S.C.J.), paras. 48-72,* Inforica Inc. v. CGI Information Systems & Management Consultants Inc. *(2009), 97 O.R. (3d) 161 (Ont. C.A.),* Ontario Hydro v. Dennison Mines Ltd., *[1992] O.J. No.2948 (Ont. Gen. Div.),* Piazza Family Trust v. Veillette, *2011 ONSC 2820 (Ont. Div. Ct.).*

[171] Ibid.

> Arbitration Agreement expresses the necessary intention by the parties to forgo a right to appeal, or to seek leave to appeal, on questions of law."

In British Colombia, The British Colombia Arbitration Act in section 31[172] provides that "a party to an arbitration may appeal to the Court on a point of law either by consent of the parties or where the Court grants leave to appeal." Leave will be obtained only after the grounds set out under section 31(2) are established. Thus section 31 and the jurisprudence from it affirms that once an arbitrator has rendered a decision, a party has limited options; either to appeal or set aside.[173]

In the case of **Sattva Capital Corporation –vs- Creston Moly Corporation[174]**

> "the issues before the Supreme Court focused on the analysis whether Creston's appeal related to a question of law or a question of mixed fact and law. Under section 31(1) of the Arbitration British Colombia's Arbitration Act, leave to appeal may be granted for the former but not the latter. The Supreme Court determined that construing the finder's fee provision of the Agreement that was critical to resolving the dispute required the arbitrator to have made a determination of mixed fact and law. While the Supreme Court did not exclude the possibility that decisions based on mixed fact and law could give rise to an appeal based on error of law, it cautioned that such circumstances would be rear. The Court went on to decide that the arbitrator's decision did not present an extricable question of law because factual issues were central to assessing how the agreement

[172] Arbitration Act RSBC 1996 c. 55 <http://www.bclaws.ca/civix/document/id/complete/statreg/96055_01> accessed on 22nd August, 2018

[173] Franco R. Cabanos, 'Commercial Arbitration in British Columbia' September 30, 2014 <http://www.whitelawtwining.com/news-articles/articles-publications/commercial-litigation/14-09-30/Commercial_Arbitration_in_British_Columbia.aspx> accessed on 22nd August, 2018.

[174] [2014] SCC 53.

should be interpreted. Accordingly, the Court determined the BC Court of Appeal had erred in granting Creston leave to appeal."

Notably, "the Supreme Court decision also provides that even if the BC Court of Appeal had correctly found that there was a question of law open to appeal, it should have denied leave to appeal because the leave application failed to meet the requirements under section 31(2) of the Arbitration Act, 1995. The Supreme Court further noted that as the statutory language is permissive, a Court retains discretion to deny leave even if an appellant demonstrates the requirements under section 31(2) are met. According to the Supreme Court, both the miscarriage of justice analysis under section 31(2) (a) and the residual discretion analysis under section 31(2) did not justify granting leave to appeal the arbitrator's decision. The Supreme Court's decision in respect of these components offers guidance on applying the statutory threshold for leave to appeal."

Regarding the "miscarriage of justice analysis, "the Supreme Court held that when a lower Court is determining whether the issue raised by an application for leave to appeal has arguable merit, or a reasonable prospect of success, it must do so against the standard of review that would apply to the appeal on its merits. In the case of a commercial arbitral decision, that standard of review is generally reasonableness. As such, a Court should not grant an application for leave to appeal absent reason to believe that an arbitrator's decision was unreasonable."

As regards scope of Court's exercise of residual discretion, the Supreme Court identified "a non-exhaustive list of factors a Court should consider when considering whether to deny an application for leave to appeal that might otherwise have merit: *conduct of the*

parties, existence of alternative remedies, undue delay and the urgent need for a final answer." Having identified the factors above, the Supreme Court also cautioned lower Courts to carefully consider the issue under appeal and the potential for a miscarriage of justice before rejecting an "otherwise eligible appeal."

The Supreme Court's decision has implications for all domestic arbitration regimes in Canada that permit appeals on questions of law alone, as opposed to mixed questions of fact and law. As long delays are associated with seeking leave to appeal and any resulting appeal in the Courts, parties who seek to achieve prompt resolution of disputes through arbitration should consider excluding the right to appeal so as to benefit from the rights that accrue from finality of the arbitration process.

In **Teal Cedar Products –vs- British Colombia,** [175]the Supreme Court revisited the standard of review applicable to commercial arbitration awards. The Court affirmed its previous ruling in ***Sattva*** that; "the standard of review in the commercial arbitration context is "almost always" reasonableness,"subject to the exceptions listed in the ***Sattva*** case above. ***Teal***, however, heightens the level of deference owed to commercial arbitrators by establishing that the nature of the question under review on appeal (i.e. factual, legal or mixed factual and legal) does not determine the standard of review. Unlike in appeals from civil proceedings, where the type of question on appeal before the Court establishes the standard of review, appeals from arbitral awards are not necessarily dependent on the kind of question the appeal Court has to decide.

[175] 2017 SCC 32.

While ***Teal*** did not go so far as establishing a presumption of reasonableness in appeals from arbitral awards, the Court held that legal questions, which in the civil context would attract correctness review, may still be subject to a reasonableness standard.

> "Justice Gascon (who authored the majority view) emphasized that; in the arbitration context, the applicable standard of review is not to be determined solely by the nature of the question that the Court is reviewing. That is, merely identifying a "question of law" does not imply that a Court will require the arbitrator's legal interpretation to be correct. Because it is a commercial arbitrator's decision (rather than a trial Court's decision), the standard of review is presumptively reasonableness—even on pure questions of law. As already noted, there are exceptions, and Justice Gascon's reasoning provides some guidance on when a correctness standard may apply. He concluded that "the question of law in *Teal* was not of central importance to the legal system as a whole because the interpretation of the B.C. *Forest Revitalization Act* was "limited … to a single province and a single industry". In addition, Justice Gascon concluded that "the legal question was not outside the expertise of the arbitrator because both parties chose him to adjudicate this very dispute. His expertise was therefore presumed. In addition, the parties had unambiguously affirmed their acceptance of his sufficient expertise."
>
> Justice Gascon's reasons disclose that the limited jurisdiction of the Court on appeal and the deferential standard of review both advance two central objectives of commercial arbitration: efficiency and finality. He concluded that "in awarding compensation to Teal under the statute, the arbitrator reasonably selected a valuation method. That selection

was within a range of possible, acceptable outcomes open to the arbitrator. There was no single reasonable interpretation of the legislation on determining compensation."

The decisions of "**Sattva"** and "**Teal"** limit Courts interference in arbitration matters thereby upholding finality and binding nature of arbitral awards. It has been rightly argued that; "depending in part on what terms are in the parties' agreement to arbitrate, appeals to Courts will usually be limited and success on appeal may be difficult to achieve."[176]

3.3. 3. France

Domestic awards in France can be challenged on merit in Court through an appeal where parties have agreed.[177]The award will be set aside upon satisfaction of grounds in Article 1492 of the CPC. Appeals on points of law is not one of those grounds provided under Article 1492. The restrictive grounds for appeal under French domestic law therefore upholds the principle of finality of arbitral proceedings.

The application for appeal and setting aside is made to the Court of Appeal of the seat of arbitration within a month when a party is notified of the award.[178]The appeal or the setting aside procedure suspends enforcement of the decision.[179]This further helps to support arbitral proceedings by making the process short in that the one stop shop is the Court of Appeal whose decision is final and binding.[180]

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[176] Andrew D. Little, 'The Appeal in Teal: SCC, Majority Restores Commercial Arbitrator's Award' June 28, 2017 <https://www.bennettjones.com/TheAppealinTealSCCMajorityRestoresCommercialArbitratorsAward> accessed on 25th August, 2018.

[177] The Civil Procedure Code, art 1483.

[178] The Civil Procedure Code, art 1494.

[179] The Civil Procedure Code, art 1596.

[180] Most of the respondents interviewed were of the opinion that the Arbitration Act, 1995 on appeals on point of law should be amended to provide a one stop forum; either the Court of Appeal or the High Court and not both. Though some preferred the High Court, majority were of the opinion that it should be the Court of Appeal. The rationale for this was that the Court of Appeal being constituted of three (3) judges, would in their opinion offer a substantive decision.

3.4. The Rationale for Appeals in the three selected jurisdictions

In the preceeding sections, we have seen that the Courts in England and Canada are reluctant to allow appeals on points of law. In France, appeals are equally restricted and can only be allowed on the grounds outlined in the CPC. The question that ought to be interrogated therefore is; what is the rationale for allowing appeals on points of law in England, Canada and France and yet the same is hardly granted by the Courts? In England, those who want the section abolished argue that limiting of appeals to the Court undermines the growth of English jurisprudence as most of the cases are decided privately and out of the legal system.[181]

However, the majority are of the view that the provision ought to remain. This is because the section has been applauded for promoting party autonomy, finality of arbitral proceedings by limiting Court's interference with the arbitral proceedings thereby making England a popular avenue for commercial dispute resolution.[182]

For the case of Canada and France, it has also been agreed that judicial scrutiny of awards is necessary if a balance between finality and fairness is to be achieved.[183]

3.5. Divergence of Findings

From the review of finality of arbitral proceedings and appeals on points of law in UK, Canada and France, it has emerged that appeals on points of law is restricted through legislations of the

[181] Michael O' Reilly, 'Appeals from Arbitral Awards: the section 69 Debate' <https://www.justice.gov.uk/courts/procedure-rules/civil/pdf/practice_directions/pd_part62.pdf> accessed on 19th July, 2018.
[182] Ibid.
[183] Hossein Abedian, 'Judicial Review of Arbitral Wards in International Arbitration, A case for an Efficient system of Judicial Review' <http://arbitration.ir/Uploads/Judicial%20Review%20of%20Arbitral%20Awards_M%20H%20%20Abedian.pdf> accessed on 2nd September, 2018.

three jurisdictions and the grounds upon which an appeal will be allowed clearly defined to ensure that appeals are rear; ensuring that there is no possibility of abuse.

In UK, Courts are reluctant to allow appeals on points of law. The English Arbitration Act, 1996 separates appeals on preliminary points of law and appeals on awards.[184]The same has to be made with the agreement of the parties. It has been observed that applications under section 45 of the English Arbitration Act, 1996, are not common since parties have been reluctant to seek Court's assistance in solving their disputes. Thus the silence of section 45 of the English Arbitration Act, 1996 is a big milestone in commercial arbitration.[185]

In UK, leave to appeal the arbitrators decision at the High Court can only be granted if the conditions in section 69 (3) of the English Arbitration Act, 1996 are met. The threshold is so high. This was the position taken by the DAC while drafting the 1996 Act that section 69 was intended to provide a narrow route of appeal.[186]This has been made possible by providing a number of safeguards. The safeguards are stated at section 69 (3) of the English Arbitration Act. The Courts in UK strictly apply these statutory safeguards in order to strive to uphold awards.

With this strict filter process, appeals to the Court of Appeal are very few and an appeal will only be considered if "it is one of general importance or is one which for some other special reason should be considered by the Court of Appeal."[187]

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[184] Section 45 and 69 of the English Arbitration Act, 1996 respectively.
[185] Rt. Hon. Lady Justice Arden DBE, 'Is commercial arbitration the future of commercial justice?' Lecture at International and Commercial Law Conference, June 2016 <https://www.judiciary.uk/wp-content/uploads/2016/07/lj-arden-speech-arbitration.pdf> accessed on 28th July, 2018.
[186] Kate Davies, 'In Defence of Section 69 of the English Arbitration Act,' Kluwer Arbitration Blog, Nov, 1 2010, <http://arbitrationblog.kluwerarbitration.com/2010/11/01/in-defence-of-section-69-of-the-english-arbitration-act> accessed on 16th July, 2018.
[187] The Arbitration Act, 1996, s 69 (8).

In **Canada in Kourtessis v. Minister of National Revenue,** [188]it was held that;

> "Appeals are solely creatures of statute; see R. v. Meltzer, [1989] 1 S.C.R. 1764, at p. 1773. There is no inherent jurisdiction in any appeal Court. Nowadays, however, this basic proposition tends at times to be forgotten. Appeals to appellate Courts and to the Supreme Court of Canada have become so established and routine that there is a widespread expectation that there must be some way to appeal the decision of a Court of first instance. But it remains true that there is no right of appeal on any matter unless provided for by the relevant legislature. There are various policy reasons for enacting a procedure that limits rights of appeal. Sometimes the opportunity for more opinions does not serve the ends of justice … A further policy rationale, and one that is important to the case before this Court, is that there should not be unnecessary delay in the final disposition of proceedings … As well, there is the simple value of a final decision to resolve a dispute without the costs, in time, effort and money, of further hearings."[189]

Thus Canadian law provides a two- tier legislation under the Federal Government and the legislations governing the provinces. Article 5 of The *Commercial Arbitration Code* provides that; *"In matters governed by this code, no Court shall intervene except where so provided in this code.*[190]*"*

These same approach has been followed by the province of Quebec under the *Quebec Code of Civil Procedure*[191] in chapter 947 in which the only recourse available is an application for annulment. The *Commercial Arbitration Code* and the *Quebec Code of Civil Procedure* uphold

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[188] [1993] 2 SCR 53.
[189] Ibid 69-70.
[190] <https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-17-2nd-supp/latest/rsc-1985-c-17-2nd-supp.html> accessed on 9th September, 2018.
[191] <http://legisquebec.gouv.qc.ca/en/ShowDoc/cs/C-25> accessed on 9th September, 2018.

finality of arbitral proceedings by not allowing any appeals on points of law after the award has been published.

The other provinces in Canada provide for appeals on points of law with varying circumstances. In British Colombia[192] the cases show that "the appellate process may take a longer time than the arbitration process." The laws of the provinces do not provide for appeals on preliminary point of law. The appeals on points of law is restricted to the award, a process that helps to shorten interference of the Courts thereby help in upholding finality of arbitral proceedings.

Differences in the statutes governing arbitration in the different provinces in Canadian necessitated the Uniform Law Conference of Canada on 1st December, 2016 to formally adopt a revised *Uniform Arbitration Act* that completely removed the possibility of appealing an award on mixed law and fact, allowing appeals only with the leave of the Court of Appeal of the enacting province, on questions of law on an "opt-in basis."[193]

The Uniform Arbitration Act limitation of appeals and the restriction on the appellant Court of the specific provinces help to limit the unduly protracted post-award litigation. It is therefore important that the objectives of the Act are achieved in order that challenging of awards in Court is strictly limited. This therefore strives to promote finality of arbitral proceedings within the different Canadian provinces by striking a balance between party autonomy and contractual nature of arbitral proceedings to the extent that parties can agree to appeal when it is important to them but again shortening the process by only allowing the Appellate Court to hear the said appeals thereby upholding finality and binding nature of arbitral proceedings.

[192] The rationale for British Colombia is the number and regularity of such cases from that province provide an excellent source of examples sharing a common legislative foundation and many examples forming the basis of the most significant Supreme Court of Canada jurisprudence on the subject. Similarly, the British Colombia Arbitration Act is similar with the Arbitration Act, 1995, s 39.
[193] The Uniform Arbitration Act, s 65.

In France, a party cannot appeal an award unless parties to the arbitral agreement. The CPC does not allow appeals on law and the grounds upon which an award can be challenged is as provided under article 1492 of the CPC. The challenge is heard by the Appellate Court and the decision is final and binding. Thus the CPC promotes contractual nature of arbitral proceedings by allowing appeals only where parties have consented and the grounds upon which an appeal can be challenged are well elaborated thus providing a one stop shop for challenge. The CPC also provides that it is only the Court of Appeal that has jurisdiction to determine an appeal. Its decision is final and binding. This helps to shorten the process thereby making arbitration a preferred mode of dispute resolution. The CPC does promotes finality and binding nature of proceedings and as such France has remained a favorable venue for arbitration.

In Kenya, appeal on point of law is provided for under section 39 of the Arbitration Act, 1995. The section does not separate appeals on preliminary points of law and awards and the section does not contain an elaborate filter process like the English Arbitration Act, 1996 and the British Colombia Arbitration Act. The Kenyan position allows appeals only were parties have consented and thus is in line with the contractual theory upon which arbitral proceedings are based. However, Kenyan Act makes the position very rigid and as such, a party that wishes to appeal though has not obtained consent from the other party, will always file a challenge in Court under other provisions of the law. This has been witnessed in practice, In the case of ***Narok County Government –vs- SEC & M Company Limited.***[194]

Section 39 only deals with domestic arbitration and what is domestic is defined under section 3 (2) of the Arbitration Act, 1995 and is limited to explaining the physical presence of the parties and does not envisage a situation where the parties may be domiciled in Kenya but chose to be

[194] [2014] eKLR.

bound by a law of another Country. In the UK, Canada and France, the position is expressly clear. This uncertainty undermines the principle of finality of arbitral proceedings in that a party may seek to delay the proceedings by seeking an interpretation of what amounts to a "domestic point of law."

Unlike Canada, the Arbitration Act, 1995 provides for appeals on both preliminary point of law and on the award. This undermines the principle of finality and binding nature of arbitral proceedings in that it makes the process longer. A party keen on delaying the arbitral proceedings will take advantage of this elaborate procedure to delay the proceedings thereby undermining finality of arbitration.

Section 39 of the Arbitration Act, 1995 provides for appeals from the High Court to the Court of Appeal. This two stop forum makes the process unnecessary long unlike France where it is only the Appellate Court that has jurisdiction and whose decision is binding.[195]One of the Respondent (Advocate) confirmed that an application for leave to appeal to the Court of Appeal is yet to be heard one and a half years after filing.

The UK Act is clear on the fact that an appeal from the Court of Appeal lies to the Supreme Court. The CPC limits the jurisdiction to hear an appeal on an award to the Appellate Court whose decision is final. However, the Arbitration Act 1995 is silent. The clarity in the UK and French statutes promotes finality of arbitral proceedings in that parties are aware of the scope permitted for the interference by the Court of arbitral in arbitration and thus help in minimizing or avoiding the unnecessary applications.

[195] The Uniform Arbitration Act has also made similar recommendations in Canada. This shows the popularity of the need of having a one stop forum.

3.6. Conclusion

This chapter has highlighted the practice on how the two leading Commonwealth jurisdictions, UK and Canada, and a leading Civil Law jurisdiction; France has dealt with appeals on points of law and its effect on finality of arbitral proceedings. It has emerged that the two Commonwealth Countries and the Courts in the UK and Canada have managed to strike a balancing between allowing appeals on point of law and upholding finality and binding nature of arbitral proceedings. This has been possible by ensuring an elaborate filter process by the legislations and the Courts of the two Countries interpreting the same provisions in a restrictive manner.

France has managed to strike a balance between finality of arbitral proceedings and fairness by providing a limited scope of review of arbitral awards; thereby upholding principle of finality and binding nature of arbitral proceedings.

The Chapter has also highlighted the divergence of views of the three selected jurisdictions and the Kenyan position thereby laying a basis on what legislative reforms are necessary with regard to section 39 (3) (b) of the Arbitration Act, 1995 thereby answering the third research question.

CHAPTER FOUR

SUMMARY OF FINDINGS, CONCLUSIONS AND RECOMMENDATIONS.

4.0. Summary of findings

From the discussion in Chapter Two, it emerged that section 39 (3) (b) of the Arbitration Act, 1995 undermines finality of arbitral proceedings by giving the Court of Appeal a wide discretion to read into the grounds upon which leave can be granted on appeal. It also emerged that section 39 (3) (b) of the Arbitration Act, 1995 provides a very elaborate appellate process that is even more prolonged than a hearing before the Court.

From the discussion in Chapter Three, it emerged that the legislation in Canada and France provides a restrictive approach upon which the Court can set aside an award. It also emerged that Courts in UK, Canada and France have been articulate in upholding the principle of finality of arbitral proceedings by being reluctant to allow appeals on points of law.

From the divergence of findings, it emerged that appeals on points of law in UK and Canada is expressly provided as based on the English and Canadian law respectively. It also emerged that the English Arbitration Act sets out a high threshold to be met before an appeal on points of law is allowed. In Canada, it emerged that appeals on points of law arise from an award only and not any preliminary point of law thereby shortening the Court process. In France, it emerged that an appeal lies only on the grounds provided for under the CPC and the Court with the jurisdiction is the Court of Appeal.

4.1. Conclusions

The study sought to critique the principle of finality of arbitral proceedings under section 39 (3) (b) of the Arbitration Act, 1995. The aim was to determine how the section undermines or curtails the principle of finality of arbitral proceedings in Kenya compared with the best practices from the three selected jurisdictions of UK, Canada and France.

The questions that the study sought to answer were: Does section 39 (3) (b) of the Arbitration Act, 1995 frustrate or undermine arbitral proceedings in so far as it allows appeals to the Court of Appeal; Do the provisions of section 39 (3) (b) of the Arbitration Act, 1995 undermine the principle of finality and binding nature of arbitral proceedings; and what are the suggested legislative reforms with regard to section 39 (3) (b) of the Arbitration Act, 1995 to make arbitral proceedings more efficient.

The hypothesis of the study was that appeals to the Court of Appeal on points of law under section 39 (3) (b) of the Arbitration Act, 1995 frustrates and delays conclusion of matters in arbitration, thereby undermining the principle of finality and binding nature of arbitral proceedings.

The theoretical basis upon which these conditions were grounded, rested on the contractual nature upon which arbitration is based. The hypothesis has been proved and firmly shown and concluded that section 39 (3) (b) of the Arbitration Act, 1995 undermines the principle of finality of arbitral proceedings and therefore, the need for reform of the law to improve its effectiveness.

The study methodology used was mainly desktop study given that most of the materials and literature are available as secondary data in the internet, books, journals, articles, reports and

relevant studies in the area. However, target respondent interviews was also used in order to obtain the opinion of key stakeholders in the arbitration sector.

The study was divided into four chapters. Chapter one introduced the background of the enactment of the Arbitration Act, 1995, the amendments made to the Act in 2009 which aimed at promoting/upholding the principle of finality of arbitral proceedings. Further, the chapter included a background of the study, theoretical framework and literature review as a way of laying the foundation for discussion in the other parts of the study.

Chapter Two critically reviewed the principle of finality in arbitral proceedings as outlined under the Arbitration Act, 1995 and the rationale for arbitration as a mode of dispute resolution. In addition, the concept of finality of arbitral proceedings as provided under the Arbitration Act, 1995.The discussion also focused on an analysis of section 39 of the Arbitration Act, 1995 and case law was examined.

Chapter Three reviewed best practices on the principle of finality of arbitral proceedings in UK, Canada and France. The salient features of appeals on points of law in two common law jurisdictions (UK and Canada) and civil law jurisdiction (France) were discussed with special focus on how the legislation and Courts have upheld the concept of finality of arbitral proceedings thereby making arbitration as an Alternative to the Court process.

From the divergence of findings, it emerged that appeals on points of law in UK and Canada is expressly provided as based on the English and Canadian law respectively. It also emerged that the Arbitration Act,1996 sets out a high threshold to be met before an appeal on points of law is allowed by the Court, in Canada, it emerged that appeals on points of law arise from an award only and not any preliminary point of law thereby shortening the Court process and in France, it

emerged that an appeal lies only on the grounds provided for under the CPC and it is only the Court of Appeal with jurisdiction to hear and determine the appeals.

4.2 Recommendations

The foregoing discussion renders it clear that finality of arbitral proceedings is one of the key attributes to arbitration. Appeals on point of law is crucial in arbitral proceedings as pointed out by all the Respondents interviewed; is the fact that parties can arbitrate before an arbitrator who has no legal background and as such may not be competent and also the fact that an arbitrator may honestly err on a point of law to the detriment of the parties to the arbitration and hence the need for a check and balance. But the same leaves a lot to be desired especially due to the elaborate procedure that is provided for in the Arbitration Act, 1995 thereby making the process unnecessarily long.

Many reforms are therefore needed if the appeals on points of law is to become facilitative of arbitration and to do away with the unnecessary provisions that render arbitration inexpedient and cumbersome.

The recommendations are categorized as short-term, mid-term and long-term. However, it is important to note that the recommendations cannot be fully implemented without sufficient resources and as such there is need for budgeting and allocation of funds by both the government and the private bodies. Without resources, then the recommendations will only remain on paper.

In the short-term, there is need for a total overhaul of the Arbitration Act, 1995. The Act came in force prior to the enactment of the Constitution of Kenya, 2010 and as such the same needs to be brought into conformity with the Constitution. This needs to be spear headed by the Kenya Law Reform Commission (KLRC) which is mandated to facilitate law reform conducive to social,

economic and political development through keeping all laws in Kenya under review, ensuring their systematic development in conformity with the Constitution of Kenya, 2010.[196]In spear heading the drafting of the legislation, the KLRC should work hand in hand with the Office of the Attorney General and relevant stake holders engaged in Arbitration like the CIArb.

In drafting the Act, key areas include, specifically limiting the jurisdiction of the Supreme Court to hear arbitration matters. There is also need to clearly provide that the appeal lies only on points of law in respect to Kenyan law. This clarity will help cure any ambiguity as to what is domestic thereby curbing against any need for interpretation. The grounds upon which a Court can grant leave also need to be categorically stated and the threshold to be met ought to be set so high. The approach taken by France though a civil law country can be of guidance. The current grounds on issues of matters of **"Great Public importance"** is akin to constitutional matters and as discussed in chapter two can pose a great challenge to the detriment of finality of arbitral proceedings.

Most of the Respondents were of the opinion that an appeal should lie only to the Court of Appeal and the same be final and binding. This one stop forum will help shorten the Court process thereby upholding the finality of the arbitral process and finally, the appeal only ought to lie from an award. Interlocutory applications should be avoided since the same makes the process unnecessarily long.

In the long-term, training is key. The business community, legal fraternity and our judges need to be sensitized. Appeals on points of law is hinged on the agreement of the parties. Parties ought to be encouraged to expressly include at the drafting of the arbitration agreement an express

[196] <http://www.klrc.go.ke/index.php/about-klrc/mission-and-vision> accessed on 9th November, 2018.

provision whether an appeal on points of law should lie or not. This will curb against unnecessary reading into the arbitration agreement.

Secondly, the Judges ought to be trained in order to appreciate the fact that arbitration is an alternative to litigation and not a rival and that arbitral agreements should be respected at all costs. It has been seen in Chapter Three above that despite the numerous applications, Courts in UK and Canada are reluctant to always entertain the same. The training of the Judges should be spear headed by the Judicial Training Institute (JTI).

Lastly, the training of the lawyers is also key. Most lawyers do not really understand their role in arbitration and as such most lawyers are bent on abusing Court intervention to drag the arbitration process. The problem with the adversarial system is that it often forces the Court to stand aside and watch as parties arbitrate each other's cause of action with all imaginable tricks like a lame duck. The training of the lawyers should be spearheaded by the Law Society of Kenya (LSK).

Arbitration is part of the justice system of Kenya that has a constitutional underpinning. The practices therefore need to be regulated and a code of ethics developed. Professional bodies like the LSK and affiliate bodies like the NCIA and the CIArb need to adequately orient their members on ADR and adopt specific policies and ethics for members to follow when involved in litigation affecting arbitration.

The foregoing discussion renders it clear that appeals on points of law is an important and integral aspect in arbitration in Kenya and cannot be dismissed as detrimental to the ideals of arbitration. Thus, reforms are needed in order that appeals on points of law become facilitative to

arbitration and to shake off aspects discussed above which unnecessarily render arbitration inexpedient and cumbersome.

It is important to note that the Courts cannot work alone in promoting finality of arbitral proceedings and it is therefore important that a new legislation must be passed so as to help the Courts bolter their decisions and give them a solid foundation in upholding finality and therefore the hypothesis has been proved.

From the foregoing, the emerging area for further research is the need to analyze why the questions of law to be interrogated are those that raise points of law of general importance. This is indeed central noting that the same requirement is considered under the UK and Canadian legislations; which Courts and the legislations in those Countries have not adequately dealt with.

APPENDIX 1- Letter of Introduction

Dear Respondent,

The undersigned is a Master of Laws student at the University of Nairobi conducting a study on **"A CRITIQUE OF THE PRINCIPLE OF FINALITY IN ARBITRAL PROCEEDINGS UNDER SECTION 39 (3) (B) OF THE ARBITRATION ACT, 1995, NO. 4 OF THE LAWS OF KENYA".** This research project is for purposes of my partial fulfillment of my Master of Laws degree.

The further objective of this research project is to critique the principle of finality of arbitral proceedings under section 39 (3) (b) of the Arbitration Act, 1995 which allows appeals to the Court of Appeal on points of law. Through your participation, I will eventually hope to understand whether allowing appeals to the Court of Appeal on points of law undermines or promotes arbitration practices and thereby make any appropriate recommendations.

The sample survey respondents to this questionnaires have been specifically identified as those who have engaged in arbitration either as arbitrators or as advocates. Enclosed with this letter is a three (3) paged questionnaire that asks questions which seeks to answer the objective of this research.

Your participation will be highly appreciated.

Sincerely,

Melissa Ngania
Master of Laws Student
University of Nairobi

APPENDIX II- List of Arbitrators and Advocates Interviewed

ARBITRATORS

1. Rtd. Judge Aron Ringera — Chartered Arbitrator.
2. Dr. Kariuki Muigua — Chartered Arbitrator.
3. Paul Ngotho — Chartered Arbitrator.
4. Kyalo Mbobu — Chartered Arbitrator.
5. Njeri Kariuki — Chartered Arbitrator.
6. Eunice Lumallas — Fellow.

ADVOCATES

1. Alfred Mutubwa — Fellow.
2. Samuel Mbiriri Nderitu — Fellow.
3. Fredrick Guandaru Thuita — Member.
4. Harriet Njoki Mboce — Member.
5. Noella Lubano — Member.
6. Steve Wairegi Gatetua — Member.
7. Mercy Akeyo Okiro — Member.

APPENDIX III- Questionnaire Administered on Arbitrators

INTRODUCTION

i. Name: …….

ii. Contacts: (optional) Email address and/or mobile phone number: ……

iii. Level of training on arbitration?

iv. For how long have you served as an arbitrator?

QUESTIONS

1. How many arbitration proceedings have you handled?
2. From the above number of arbitrations, how many have been appealed against in;
    A. The High Court under section 39 (1) of the Arbitration Act, 1995?
    B. Court of Appeal under section 39 (3) of the Arbitration Act, 1995?
3. Approximately how long does an arbitration take where the court does not intervene?
4. Do you think appeals on matters of law relating to arbitral proceedings should be allowed to them;
    A. High Court Yes ( ) No ( )
    B. Court of Appeal Yes ( ) No ( )
5. Give reasons for your answer above?

6. Is there need for an amendment to section 39 of the Arbitration Act, 1995? Yes ( ) No ( ).

   Give reasons for your answer above.

7. Do you agree that 3rd Parties should file appeals to the Court of Appeal under section 39 (3) (b) of the Arbitration Act, 1995? Yes ( ) No ( ).

   Give reasons for your answer above.

8. Do you think that appeals in respect of points of law of should lie to the Supreme Court?

   Yes ( ) no ( )

   Give reasons for your answer above

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Thank you for your co-operation and answers.

APPENDIX IV- Questionnaire Administered on Advocates

INTRODUCTION

1. Name: …….
2. Contacts: (optional) Email address and/or mobile phone number: ……
3. Years of practise as an advocate:
4. Level of training on arbitration
    a. Associate ( )
    b. Member ( )
    c. Fellow ( )
    d. Chartered Arbitrator ( )

QUESTIONS

5. How many matters have you handled before an arbitrator? .....
6. How many of the matters in four (4) above have been appealed to on points of law to the ;
    a) Court of Appeal; ……and or,
    b) High Court……
7. How long did the matter appealed to on points of law take to be heard and determined in the
    a. Court of Appeal?
    b. High Court?

8. Is there need for the court to intervene in arbitral proceedings on points of law in the;

   (a) High Court Yes ( ) No ( )

   (b) Court of Appeal Yes ( ) No ( )

9. Give reasons for your answer above.

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10. Should 3rd parties be allowed to file appeals to the court of appeal under section 39 (3) (b) of the Arbitration Act, 1995? Yes ( ) No ( )

    Give reasons for your answer above.

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11. Is there need for an amendment to section 39of the Arbitration Act, 1995? Yes ( ) No ( )

    Give reasons for your answer above.

12. Do you think that appeals should lie to the Supreme Court in respect of matters of law in arbitral proceedings?

    Yes ( ) No ( )

    Give reasons for your answer above

Thank you for your co-operation and answers.

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