

**UNIVERSITY OF NAIROBI**

**SCHOOL OF LAW**

**STAY OF LEGAL PROCEEDINGS PENDING ARBITRATION IN KENYA: JUDICIAL  
INTERPRETATION AND A CALL FOR LEGISLATIVE CHANGE**

**BY**

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**DECLARATION**

I, **JAKAILA JULIETTE LEORNARA AKOTH**, 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.

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

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## **DEDICATION**

To the memory of my beloved sister Jaki a beautiful soul gone too soon, your unwavering spirit made this journey possible.

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## ABBREVIATIONS

AC-	Appeal Cases
ADR-	Alternative Dispute Resolution
All ER (Comm) -	All England Reports (Commercial Cases)
All ER-	All England Law Reports
Bus LR. -	Business Law Report
Ch. -	Chancery Law Reports
CiArb-	Chartered Institute of Arbitrators
CLC-	Company Law Cases
CONTEMP. ASIA ARB. J. - <i>Contemporary Asia</i> Arbitration Journal	
DAC-	Departmental Advisory Committee on Arbitration Law
EA-	East African Law Reports
EACA-	Law Reports of the Court of Appeals for Eastern Africa
EKLR-	Electronic Kenya Law Reports
EWCA Civ-	Court of Appeal of England and Wales Decisions (Civil Division)
EWHC-	England and Wales High Court

HCCC-	High Court Civil Case
ICC-	International Chamber of Commerce
ICCA-	International Council for Commercial Arbitration
KLR-	Kenya Law Reports
KLRC-	Kenya Law Reform Commission
Lloyd's Rep. -	Lloyd's Law Reports
NIAC-	Nairobi International Arbitration Centre
P.O-	Notice of Preliminary Objection
QB-	Queen's Bench Reports
SIAC-	Singapore Commercial Arbitration Centre
UK-	United Kingdom
UNCITRAL-	United Nations Commission on International Trade Law

## **ABSTRACT**

The deviation from the prescribed procedure in Section 10 of the Arbitration Act, 1995 has caused unnecessary intervention by Courts in matters within the purview of arbitration. Legal elucidation of Section 6 (1) seems to clash with the principle of party autonomy causing an upsurge of arbitration disputes in courts.

This study seeks to critique the law as stipulated in Section 6 of the Arbitration Act, 1995. This provision gives party's leeway to delay arbitration matters through unnecessary court intervention which goes against the principle of non-intervention as stipulated under the Arbitration Act, 1995.

The study seeks to give credence to Arbitration as a mode of Alternative Dispute Resolution (ADR) in Kenya by ensuring that the judicial process is not initiated as a basis of undermining 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 ONE

### 1.0 Introduction

Kenya has come a long way, the local communities practiced alternative dispute resolution (ADR) conducted by community elders who spearheaded the resolution of disputes involving land, succession and livestock.<sup>1</sup>The Kenyan law on arbitration has its foundation in the 1914 Arbitration Ordinance, a duplication of English Arbitration Act, 1889. The 1914 Arbitration ordinance gave the court power to oversee the arbitration process which made minimal impact in promoting dispute resolution through arbitration.

After independence in 1963 various Arbitration legislations were enacted in Kenya. The independence Kenyan Government enacted the Arbitration Act, 1968 whose foundation was the English Arbitration Act of 1950 whose aim was to minimize court interference in Arbitration. It was later seen to be outdated and was consequently repealed paving way for the Arbitration Act, 1995(the “Act”) which is modeled around the Model Arbitration Law of the United Nations Commission on Trade Law (“UNCITRAL”).<sup>2</sup> A key modification to the Act, was the incorporation of Section 10 that puts restrictions on judicial powers in arbitral proceedings.<sup>3</sup>

The Act, evidenced certain short comings particularly on matters stay of proceedings this gave rise to the Arbitration (Amendment) Act, 2009. <sup>4</sup>This research analyses judicial construal of

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<sup>1</sup>Edward Torgbor, ‘A Comparative Study of law and Practice of Arbitration in Kenya, Nigeria and Zimbabwe, With particular Reference to current Problems in Kenya’, (PHD Thesis Stellenbosch) <<http://scholar.sun.ac.za/handle/10019.1/80182>>, accessed on 10<sup>th</sup> January, 2016.

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

<sup>3</sup> 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](http://www.ciarbkenya.org/wp-content/themes/mxp_base_theme/mxp_theme/assets/final-vol-1-issue-1.pdf)>, Accessed on 1<sup>st</sup> March, 2018.

<sup>4</sup> The Amending Act introduced changes to the wording in Section 6(1) to introduce the time frame within which an application for stay of proceedings should be lodged in court.

Sections 6 and 10 of the Act. In view of the seeming contradiction in the interpretation of the applicable statute by the judiciary, the research will seek to address this apparent discrepancy.

This research will attempt to determine what the framing generation understood the principle of stay of legal proceedings to mean without making any assumptions as to its original meaning and interpretation; the law as formulated does not seem to be working as was envisioned leading to unnecessary court interference in matters within the purview of arbitration. This is seen to be in complete disregard to the consensual agreement by parties to resolve grievances away from the rigors litigation.

## **1.1 Background of the Study**

Arbitration has undeniably grown into a popular dispute resolution process in the realm of trade and commerce. It is deemed to be independent of the limitations that govern law suits<sup>5</sup> and parties are free to choose a forum where their grievances can be adjudicated.<sup>6</sup>

The Arbitration clause takes away from judges their inherent powers to settle disputes contemplated under it.<sup>7</sup> Consequently, the courts should not seize jurisdiction over disputes envisaged in an arbitration agreement unless in instances set out in the law.<sup>8</sup> Nonetheless, the arbitral process has in recent times been inhibited by long-drawn-out suits in court.<sup>9</sup>

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<sup>5</sup>The Right Hon. Sir Michael Kerr in Ronald Bernstein ed., *Handbook of Arbitration Practice* (Sweet and Maxwell, 1987), at 3.

<sup>6</sup>Sara Lembo, 'The 1996 UK Arbitration Act and the UNICTRAL MODEL LAW –A contemporary Analysis, Rome, January, 2010.' <<https://eprints.luiss.it/694/1/lembo-20100713.pdf>>accessed on 15<sup>th</sup> January, 2016.

<sup>7</sup> Enid Marshall and William Gill: *The Law of Arbitration* (4th edn Sweet & Maxwell 2001), 1; Kariuki Muigua 'Heralding a New Dawn: Achieving Justice Through Effective Application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya' (2013) 1 (1) Alternative Disputes Resolution CiArb-Kenya Journal, 4.

<sup>8</sup> See section 10 Arbitration Act.

<sup>9</sup><<https://www.livelaw.in/see-court-see-court-burdened-judicial-system-can-adr-system-answer-part-ii/>> accessed on 28<sup>th</sup> December, 2018.

This research seeks to analyze whether declining to halt the hearing of a case before a judicial officer in favor of arbitration, occasioned by a party's failure to request for stay at the time of entering appearance frustrates arbitration.

The position taken by Kenya as stipulated in Section 10 appears to be as a result of her endeavor to operationalize the provisions of UNCITRAL which Kenya adopted in 1995.<sup>10</sup> Undeniably, Section 6 (1) is an exact replica of Article 8 (1) of the UNCITRAL.<sup>11</sup> Prior to 1995, the position prevailing in the Arbitration Act (Cap 49) (now repealed) was that the applicant would at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings.<sup>12</sup>

The outcry from arbitration stakeholders and the coming into effect of UNCITRAL provided parliament with an easy fix to enact a new statute. The 1995 Act,<sup>13</sup> is the current applicable Arbitration statute in Kenya. Section 6(1) makes provisions for stay of proceedings having amended the repealed section in Cap 49 as regards time frame within which the application for stay should be made. It provides as follows:

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

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<sup>10</sup>[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html) accessed on 15th January 20.

<sup>11</sup>Article 8 (1) UNCITRAL: A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests *not later than when submitting his first statement on the substance of the dispute*, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

<sup>12</sup> See Arbitration Act, Chapter 49 Laws of Kenya, section 6 (1) (a).

<sup>13</sup> Act No. 4 of 1995.

*agreement is null and void, inoperative or incapable of being performed; or (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.*” (Emphasis added)

Originally, the wording of Section 6 (1) before its amendment by the Arbitration (Amendment) Act, 2009<sup>14</sup> was that the applicant would make an application before filing a memorandum of appearance or making an answer to the claim or otherwise participating in the matter before court.

This study seeks to evaluate if the failure by the courts to halt proceedings before them, due to the fact that the applicant failed to lodge the stay application at the time of entering appearance frustrates or undermines arbitration.

It will also be of importance in this research to interrogate the rationale of the judicial approach in interpretation of the law; its ramifications on a party who is outraged due to a breach of a contractual agreement and wishes to settle the matter as contemplated in the agreement. This study will further seek to determine whether the judicial approach supports the intention behind the 2009 amendments.

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<sup>14</sup>Arbitration (Amendment) Act No. 11 of 2009, section 5.

## 1.2 Statement of the Problem

The idea of stay of proceedings is key in resolution of disagreements away from litigation. The conditions where the Judiciary's intervention in arbitral proceedings is allowed is as stipulated by law.<sup>15</sup>

Kenya's arbitration law and judicial outlook to arbitration is predisposed by the 1985 version of the UNCITRAL and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award ("New York Convention") which Kenya ratified on 10<sup>th</sup> February, 1989. The Act borrows profoundly from both Conventions. By acknowledging the values envisioned under these conventions, Kenya permeated into the realm of international arbitration principles and best practices. Needless to say, the muddled drafting of Section 6 (1) of the Act has allowed for the judicial intervention in instances where they have disallowed applications to bring up disagreements to arbitration in the pretext of exposing them to constitutional compliance.<sup>16</sup> This has frustrated arbitral proceedings by going against the principle of party autonomy and non-interference as detailed in Section 10.

The main problem to be addressed in this study is how the law in Section 6(1) together with judicial interpretation have dealt with the freedom of parties to decide how their contractual

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<sup>15</sup> In fact, section 6(1)(a) of the Act, stipulates that Court refuse to grant stay of proceedings where the arbitration agreement is null and void, inoperative or incapable of being performed.

<sup>16</sup> Kamau Karori and Ken Melly, 'Attitude of Kenyan Courts Towards Arbitration', in *Rethinking the Role of African National Courts in Arbitration*, available at [http://www.ikm.co.ke/export/sites/ikm/news/articles/2018/downloads/Chapter-13\\_Kamau-Karori-Ken-Melly.pdf](http://www.ikm.co.ke/export/sites/ikm/news/articles/2018/downloads/Chapter-13_Kamau-Karori-Ken-Melly.pdf) accessed on 29th November, 2018.

disputes should be determined outside of litigation and make recommendations for legislative change in the Act.<sup>17</sup>

### **1.3 Justification of the Study**

The subject of ADR has gained prominence in recent times.<sup>18</sup>The possibility of resolving disputes through ADR goes beyond the Kenyan Arbitration Act, this is because it is anchored in the Kenyan Constitution besides the United Nations Charter which addresses disputes involving member states.<sup>19</sup>

The conclusions of this research will be pertinent to the stakeholders involved in making recommendations to parliament for the repeal or make amendments to the law to enhance conformity to the underlying principles of party autonomy, non – interference and binding nature of arbitral proceedings so as to promote ADR.

This study will seek to advocate for a law to aid parties to be bound to exhaust the remedy of arbitration before exploring any other legal options for settling disagreements.

### **1.4 Research Objective**

The main objective this study seeks to resolve is how the drafting of the law has frustrated or undermined the principle of stay of proceedings as well as the freedom of parties to resolve disputes away from litigation.

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<sup>17</sup> Paul Ngotho *'The Bastard Provision in Kenya's Arbitration Act'* (2013) 1 (1) Alternative Disputes Resolution CiArb-Kenya Journal, 148-162.

<sup>18</sup> Article 159(2) (c) the Constitution of Kenya 2010.

<sup>19</sup> Article 2 the Constitution of Kenya, 2010 that declares the Constitution as being the supreme law of the land that binds all persons. See also Article 33 UN Charter.

The specific objectives of the study include;

- a) To determine the development of the law of stay of proceedings pending arbitration.
- b) To discuss the Kenyan judicial interpretation of the concept of stay of proceedings pending arbitration.
- c) To evaluate the best practices in the interpretation of the concept of stay of proceedings pending arbitration.
- d) To give proposals for legislative change.

### **1.5 Research Questions**

This research seeks to address the following questions.

- a) Does Section 6 (1) of the Act, frustrate or undermine arbitral proceedings in so far as it allows proceedings in the court where the contractual agreement of parties envisages arbitration?
- b) Do the provisions of the Section 6 (1) of the Act, undermine the concept of stay and the obligatory nature of arbitration agreements?
- c) How have the United Kingdom, Australia and France dealt with the concept of stay of proceedings where contracts are governed by arbitration agreements?
- d) What lessons can Kenya embrace to aid in legislative change of Section 6(1) of the Act?

### **1.6 Hypothesis**

The research will test the following hypotheses:

- a) If Section 6 (1) of the Act, frustrates or undermines arbitral proceedings in so far as it allows Court proceedings despite the contract envisaging arbitration, thereby undermining the obligatory nature of arbitration agreements.
- b) Whether the United Kingdom, Australia and France have demonstrated best practices which conform to the Constitution of Kenya.

## **1.7 Theoretical Framework**

This research argues that the law on stay of proceedings is designed to safeguard and promote arbitration as a mode of settling differences. The law was not only a response to the old legal aggression to arbitration contracts that occurred in courts, but also sought to create binding and enforceable arbitration agreements relating to commerce or in the realm of admiralty. In so doing, this provision simply makes the contracting party live up to his obligations under the agreement. The research will be premised on the contractual and party autonomy theories in order to generate the background information which will be used to analyse the law of stay of proceedings.

### **1.7.1 The Contractual Theory**

Proponents of the contractual theory such as Merlin, Martín Domke, Frederic-Edouard Klein and Voir T. Kitagawa contend that the arbitration clause originates the contractual appeal. Martin Domke states that arbitration only exists as a result of approval by the contracting parties.<sup>20</sup>

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<sup>20</sup> Martin Domke, *Commercial Arbitration*, Prentice Hall (1965)31.

Consequently, an arbitration arrangement states the parties' intent to select the forum to resolve their grievances and allow them to determine matters as presented before the tribunal.<sup>21</sup>

The advocates of the contractual theory trust that settling of disputes is devoid of state interference and the principle that contractual agreements must be upheld ought to triumph. In this regard Kitagawa posited that the obligatory power of the arbitration contract originates from the contract itself.<sup>22</sup>

Kellor gave an apt summary of the argument advanced by contractual theory believers:

*"Arbitration is wholly voluntary in appeal. The contract of which the arbitration clause is part of is an intentional agreement. No law requires the parties to make such a contract, nor does it give one party power to force it on another. When such an arbitration agreement is made part of the principal contract, the parties voluntarily relinquish established rights in favor of what they deem to be the greater advantages of arbitration".*<sup>23</sup>

The contractual theory therefore, underscores the concept of party autonomy which allows the parties to exercise autonomy in the manner in which proceedings are conducted.<sup>24</sup> This is in consensus with UNCITRAL<sup>25</sup> upon which the Act, is modeled.

This theory is relevant and important in this study because under the Act, a matter can only be resolved by arbitration where parties have a prior agreement.<sup>26</sup> The extent in which the Court can

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<sup>21</sup>Hong-lin Yu, 'A Theoretical Overview of the Foundations of International Commercial Arbitration,' 1(2) CONTEMP. ASIA ARB. J. 255 [2008], at 266.

<sup>22</sup>Voir Kitagawa, *Contractual Autonomy, in International Commercial Arbitration: Liber Amicorum for Martin Domke* 133, 138 (Pieter Sanders ed., 1967).

<sup>23</sup>See generally Frances Kellor, *Arbitration in Action: A Code for Civil, Commercial and Industrial Arbitrations* (1941), quoted by Stone *a Paradox in the Theory of Commercial Arbitration*, 21 ARB. J. 156, 182 (1966).

<sup>24</sup>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 5<sup>th</sup> October, 2018.

<sup>25</sup> Article 7 of the UNCITRAL Model Law 1985.

interfere with arbitral proceedings is as provided for in the Act.<sup>27</sup> This theory will thus be important in analyzing whether Section 6(1) of the Act, frustrates or undermines arbitral proceedings by negating the contractual relationship of the parties and allowing court intervention in instances where they become seized of the dispute.

### **1.7.2 The Theory of Party Autonomy**

An important rule of arbitration is the nature of party's intent to have their disagreements determined in this manner devoid of litigation. This self-governing manifestation of intent is known as party autonomy. As Ercus Stewart posits "*arbitration is a method of dispute resolution. It is not 'litigation without wigs', nor is it supposed to be litigation by another name*".<sup>28</sup>

The party autonomy theory highlights the entrenchment of arbitration in different legal systems, as a self-standing device that should not be incorporated under an incorrect legal grouping. In this logic, the theory projects the independence of parties to the character the courts will play in the arbitration, while not discounting the state as the precursor of that right.

Party autonomy manifests as a result of insistence made in most arbitration statutes for party agreements to override the provisions on the role of the court. The key weakness of the theory is its failure to take notice of the fact that in reality arbitration cannot stand alone in the wake of public interest in arbitration.

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<sup>26</sup> Section 3 of the Arbitration Act, 1995.

<sup>27</sup> 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 28<sup>th</sup> February, 2018.

<sup>28</sup> Ercus Stewart, *Arbitration: Commentary and Sources* (First law, 2003), at 2.

Thus, the Party autonomy theory will be central in this study in analyzing whether Section 6(1) of the Act, frustrates or undermines arbitral proceedings, the study will interrogate how the section goes against the agreement of parties to arbitrate and to select a tribunal of choice as well as the governing regulations.

### **1.8 Research Methodology**

The research procedure embraced in this research is grounded on qualitative data analysis, specifically the doctrinal approach.

Doctrinal approach involves the appraisal of primary and secondary data, which will comprise of literature on the research problem drawn from books, journals and articles, legal texts, policy documents, statutes as well as judicial decisions. An evaluation of the best practice in the United Kingdom, Australia and France will be done with a view to giving recommendations for legislative change on the Kenyan Arbitration Act 1995.

The choice of doctrinal approach as research method has been informed by the formulated humanities subjective, argument-based methodologies that have been tested as data collection methods. It is a research methodology that will interpret, assess and develop the doctrines, the concepts, rules and principles on the concept of stay of precedents.

### **1.9 Limitations**

The purpose of this study is to espouse the growth of the concept of stay of proceedings. In this regard the study seeks to demonstrate that this provision is oppressive to parties who comprehend too late that they waived their right to arbitrate based on the limitation of time.

Due to time constraints, the researcher is unable to conduct field study. Consequently, owing to the paucity of literature on the intended areas of research within this jurisdiction, the researcher is relegated to deducing the current status from judicial authorities and drawing presumptions from the select jurisdictions best practice analysis that will be used as a basis for making recommendations.

### **1.10 Literature review**

The reviewed literature is drawn from textbooks, article and journals, working papers, treatises, other scholarly papers and judicial authorities. The literature review is based on the specific theme under investigation. In examining these resources, the study will ascertain certain gaps which this study seeks to fill.

It is a norm of practice now well entrenched in the commercial world for contracting companies to elect an independent arbitrator to conduct the arbitration proceedings.<sup>29</sup>

Professor Musili Wambua, admits that it is a more preferred mode of (ADR). According to him, ADR has been accepted by many litigants owing to its flexibility<sup>30</sup>and the fact that alternative dispute resolution is grounded on the Constitution.<sup>31</sup>

Wambua notes that there is need to amend legislation enacted before promulgation of the current constitutional dispensation to ensure that the laws conform to it. Wambua's article on the

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<sup>29</sup> Haniz Zuraiha Zaharullil, (2009) 'Enforcement and Challenging of Arbitration Award.' Master Construction Contract Management <<https://studylib.net/doc/14597944/arbitration-practice-and-procedure---interlocutory-and-90>>, accessed on 10<sup>th</sup> January, 2016.

<sup>30</sup> Professor 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](http://www.ciarbkenya.org/wp-content/themes/mxp_base_theme/mxp_theme/assets/final-vol-1-issue-1.pdf)>, accessed on 1<sup>st</sup> May, 2018.

<sup>31</sup>Article 159(2) (c).

difficulties surrounding ADR in access to justice is therefore important to this research because it highlights the constitutional importance of arbitration as an ADR mechanism.

The importance that the researcher places on arbitration as a preferred mode to litigation is vital. This research will be analyzing whether or not Section 6 (1) of the Kenyan Act discourages arbitral proceedings.

Wambua, proposes some changes to the Act, however, he does not look at Section 6(1) and it is this gap that this research will undertake to address. Similarly, the researcher addresses the challenges of implementing ADR in a holistic manner; this research will narrow down specifically to the section under study to establish if it weakens arbitration.<sup>32</sup>

Githu Muigai and Jacqueline Kamau,<sup>33</sup> observe that arbitration is not as simple as it may appear. The authors acknowledge that there are certain misperceptions in case law on whether the provision of Section 6(1) requires the Defendant to move the court when filing a memorandum of appearance, when lodging the response to the claim or addressing other issues in the conduct of the matter in court.

The aforementioned article by Githu and Kamau has failed to provide a clear way forward in terms of creating certainty in decision making. Despite the gap, this chapter is important that it gives the conditions that ought to be satisfied before a party can be allowed to stay proceedings which is key in so far as giving recommendations whether Section 6 (1) should be maintained in our legislation.

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<sup>32</sup>Zaharullil note 29.

<sup>33</sup>Githu Muigai and Jaqueline Kamau 'The Legal Framework of Arbitration in Kenya', in *Arbitration Law and Practice in Kenya* Law Africa, Nairobi 2(2011). Chapter 1

This research seeks to reconcile the judicial pronouncements with the aim of creating a reform-based agenda as the foundation for legislative change. This will in turn create certainty in the doctrine of precedent to aid the judicial officers when confronted with applications touching on applicability of Section 6(1).

Dr. Kariuki Muigua,<sup>34</sup> makes various observations on the role the Court plays in arbitration. He acknowledges that there is a consensus between practitioners and scholars that the role played by Courts in arbitration is vital.<sup>35</sup> The justification for this, according to him, is the fact that the Courts not only provide a supportive role but similarly safeguards the rule of law in arbitral proceedings. According to him, the question to be answered is the extent to which the Court is to be allowed to intervene in arbitral proceedings.

Muigua, has given a concise analysis of the various cases prior to the 2009 amendment of the Section where the application of stay of proceedings has come into play, the various interpretations that the Court's addressing their mind to this issue have propounded. The case law that Muigua has taken into consideration was delivered preceding the promulgation of the new constitutional dispensation. This research aims at showing that the 2009 amendments did not create certainty with regard to the interpretation of the section and that there exists glaring rigidity. This study will attempt to give an analysis of the position today based on post Constitution of Kenya, 2010 while using the analysis done by Muigua as a stepping stone in tracing the developments.

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<sup>34</sup>Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya*, 3<sup>rd</sup> Edition, Glenwood Publishers Limited (2017).

<sup>35</sup>Ibid

Dr.Kariuki Muigua, looks at courts duty in facilitating the conduct of arbitration by giving proposals for reforms that will encourage non- interference.<sup>36</sup>According to Muigua, the English Arbitration Act, 1996 succeeded while the Act failed necessitating amendment to the Act, in order to bring it at per with the 1996 Act.<sup>37</sup>Muigua, further notes that the English Arbitration Act, 1996 has managed to expand party autonomy by limiting court interference to a bare minimum. The Act, according to Muigua has allowed unlimited interference of the Court in arbitration proceedings yet ironically at the same time parties have autonomy to arbitrate.<sup>38</sup> Muigua, proposes that a total overhaul of the Act, should be undertaken unlike the piece meal amendments that were undertaken by repeal or insertion of new sections.

Paul Ngotho, has analyzed the Kenyan law, in his article he put emphasis on the provisions of Section 6 in light of access to justice. Ngotho, opines that the provision of entering appearance is a barrier to arbitration. In his perspective the Act has an in-built inhibition that makes the law untenable. <sup>39</sup>

The remedy according to Ngotho is to change the Act by removing the offending words, Ngotho further opines that a regional approach towards arbitration law would be appropriate. This study however, disagrees with this approach since Tanzania's and Burundi's arbitration Acts do not conform to UNCITRAL while, Rwanda has a fairly new arbitration Act, this will be a limiting factor to the growth of international arbitration.

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<sup>36</sup>Kariuki Muigua, 'Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending and After Arbitration in Kenya' available at<[http://kmco.co.ke/attachments/080\\_role\\_of\\_Court\\_in\\_arbitration\\_2010.pdf](http://kmco.co.ke/attachments/080_role_of_Court_in_arbitration_2010.pdf)> (accessed on 2<sup>nd</sup> November 2014).

<sup>37</sup> Ibid.

<sup>38</sup> Ibid note 36

<sup>39</sup> Paul Ngotho '*The Bastard Provision in Kenya's Arbitration Act*' (2013) 1 (1) Alternative Disputes Resolution CiArb-Kenya Journal, 148-162

This research seeks to build on the work of Ngotho by evaluating the additional aspects of freedom of contract. Ngotho, also gives a comparison to the judicial interpretation in the United Kingdom but, this research will add onto the inconclusiveness that has been generated by Ngotho through exploring the law as set out in UK, Australia and France. This will influence the legislative recommendations for law reforms. This research calls for espousal of laws that are compatible with modern international commercial arbitration by increasing the necessity for a legislative change in the Act.

Jimmy Mwende, in a paper titled “A Critique of Section 6 of the Arbitration Act,”<sup>40</sup> states that disputes are bound to occur in any legal relationship and ADR is considerably favorable. According to Mwende, the Arbitration agreement excludes the court from entertaining disputes contemplated under the <sup>41</sup>agreement. However, section 6 (1) of the same Act goes against the principle of non-interference by courts in arbitration by mandating courts to uphold technicalities.

Mwende, opines that upholding technicalities has had the effect that disputes meant to be resolved by arbitration have found themselves in the Courts. The net effect has been delays, inconveniences and publicity. Mwende in advancing this argument is aided by the following theories: positivism; natural school of thought; and freedom of contract theory.

This research will seek to build on Mwende’s work by conducting an analysis on the best practices in stay of proceedings in the United Kingdom, Australia and France. This research will

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<sup>40</sup>Jimmy Mwende, ‘A critique of section 6 of the Arbitration Act’  
<http://erepository.uonbi.ac.ke/bitstream/handle/11295/77722/Jimmy%20A%20critique%20of%20section%206%20of%20the%20arbitration%20act.pdf?sequence=1> accessed on 15<sup>th</sup> January, 2018.

<sup>41</sup>Section 10 of the Kenyan Arbitration Act, 1995.

therefore, give a broader perspective of the doctrinal and comparative analysis approach to deal with the issue under study.

The study on stay of proceedings pending arbitration has gained prominence beyond what has been analysed by the Kenyan authors as discussed in the preceding section of this research. This study is enhanced by the works of foreign scholars as discussed below;

Indeed, Professor Sornarajah <sup>42</sup>acknowledges that one of the earliest rules to emerge was for judicial officers to resist the removal of their inherent power to deal with an arbitrable dispute leading to decline in advancement of commercial arbitration.<sup>43</sup> Judicial mandate in advancing ADR manifests in its refusal to entertain litigation as a means to enforce the agreement to arbitrate. Lord Selbourne restated this rationale as follows:

“If parties chose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary courts, then a *prima facie* duty is cast upon the courts to act upon such an agreement. The parties here have made that agreement. They probably knew the reasons in favor of determining these questions by arbitration were, the reasons against it and they made it part of their mutual contract that these questions should be so determined. The Plaintiffs cannot therefore be heard to complain if that part of their contract is carried into effect”.<sup>44</sup>

According to Professor Sornarajah, <sup>45</sup>a contracting party is estopped, <sup>46</sup>from bringing up arbitration where he has by conduct opted to have the matter settled within the confines of the

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<sup>42</sup> Muthucumaraswamy Sornarajah, ‘Stay of Litigation Pending Arbitration’. Singapore Academy of Law Journal, Vol. 6, p. 61, 1994 available at SSRN :< <https://ssrn.com/abstract=671403>>accesed on 15<sup>th</sup> January, 2016.

<sup>43</sup>*The Fehmarn* [1958] 1 WLR 159. Lord Denning refers to the overriding principle that “no one by his private stipulation can oust these Courts of their jurisdiction in a matter that properly belongs to them.”

<sup>44</sup> In *Willesford v. Watson* (1873) 8 Ch App 473.

<sup>45</sup> (1994) 6 SAclJ 61 at 73.

court system. This research seeks to advocate for the relaxation of such stringent conditions for grant of stay that have allowed courts to interfere in arbitration disputes.

UNCITRAL was established to deal with the divergence in the various domestic legislations on arbitration.<sup>47</sup> This was upon the discovery that the national laws were not conducive for international disputes. UNCITRAL considers the global unanimity on the values and finest practices in international arbitration.

Tomas Kennedy Grant,<sup>48</sup> focuses on seeing the facets of the character of Court's in arbitration proceedings especially their role in handling challenges to the arbitrator and arbitral jurisdiction, temporary measures of protection and remedy against and implementation of awards. The debate on Court's duty mainly midpoints on UNCITRAL and particularly Article 5 which provides that the "courts shall not interfere in matters governed by UNCITRAL other than in circumstances provided for under the law".

Grant, argues that the article has the effect of limiting the latitude for judicial intrusion to the circumstances specifically anticipated under the UNCITRAL. The researcher will show that despite international legal instruments that Kenya has ratified dealing with the matter with precision Kenya, has since not followed suit and has remained with an obsolete law that is creating confusion for potential investors.

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<sup>46</sup> Halvannon Insurance Co. Ltd. v. Companhia de Seguros do Estado de Sao Paulo [1995] LRLR 303 and in Patel v. Patel [2000] QB 551.

<sup>47</sup>UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration <<http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf>> accessed on 29<sup>th</sup> November, 2014

<sup>48</sup>Thomas Kennedy -Grant, 'The Role of Courts in Arbitration Proceedings', A paper presented at the UNCITRAL-SIAC Conference "Celebrating Success", held at the Pan Pacific Hotel, Singapore, on 22-23 September 2005 available at: <<http://www.kennedygrant.com/papers.htm>> (accessed on 2nd November, 2014).

Ashraf El Motei,<sup>49</sup> has argued that in the interpretation of Article 8(1) of UNCITRAL, consideration should be given to the fact that it does not give the judicial officer discretion to choose, premised on the mandatory inclusion of “shall” in the Law. This scenario however, does not play out in the Kenyan context as the judicial officers take into consideration other factors like entering appearance as will be seen in Chapter 2 of this research. Despite legal notoriety of the provisions of Section 6, the issue that the researcher seeks to canvass in this review is hardly obsolete.

The works of David St. John Sutton and Judith Gill<sup>50</sup> will be of use for purposes of picking out the best practices from the select jurisdictions under study. It will aid in ascertaining whether the factors taken into consideration for the grant of stay in UK and Australia are similar to those instilled under the Kenyan Act. The work of the authors is significant as it provides a broader perspective of the law of arbitration and how the judicial authorities have interpreted aspects of stay.

This research will rely on the works to review the various cases and ascertain whether the guiding principles for the courts in UK, Australia and France are similar to the ones in Kenya. The work of the authors will aid in giving guidance on the evolution of the arbitration law in the three jurisdictions. This will assist in filling the gaps and address the challenges occasioned by the interpretation of the law for the purposes of legislative change.

Stephen McCormish,<sup>51</sup> has given a concise analysis of the Australian Act of 1974. The researcher has given credence to the desire to position Australia as a center for resolving

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<sup>49</sup> Ashraf El Motei, ‘Local Court Intervention in International Arbitration’ (2009) <http://www.motei.com/local-Courtintervention-in-international-arbitration>>accessed 27th February, 2016.

<sup>50</sup> David St. John Sutton, Judith Gill, Mathew Gearing; ‘Russell on Arbitration, (23rd Ed, Sweet and Maxwell)

<sup>51</sup> Stephen Mc Cormish, ‘New Dawn for International Arbitration’, Lawyers Weekly.2<sup>nd</sup> September, 2010.

international trade disputes. This has taken effect as a consequence of the changes made to the law in 2010 which incorporated the key provisions of the amended UNCITRAL 2006. This study will rely on the literature to understand the law governing Arbitration in Australia and the applicable principles. This will be a basis for the comparative study to aid legislators in Kenya to come up with laws that are compliant with international best practices.

This study will seek to interrogate the circumstances under which the Court's in England, Australia and France, have dealt with matters governed by the arbitration agreement through a review of the Court decisions. This will be a guiding factor for the proposed lessons and legislative reform for Kenya.

### **1.11 Chapter Breakdown**

This study is divided into the following chapters

#### **Chapter One: Introduction**

Chapter one presents a background to the concept of stay of legal proceedings as a key tenet to prompting settlement of disputes through arbitration. The Chapter will also give a framework for this entire study since it will provide a background of the study, statement of the problem, justification for the study, research questions, research objectives, hypotheses, theoretical framework, research methodology, limitations of the study and literature review as a foundation for analysis of the other chapters in the study.

## **Chapter Two: Review of the Concept of Stay of Proceedings Under Section 6, Arbitration Act, 1995**

This section will critically analyze the concept underlying the principle of stay of proceedings pending arbitration, background behind enactment of the law and pre-conditions before Court's can entertain stay applications. It will further evaluate the judicial interpretation of what amounts to entering appearance, its impact on party autonomy and how the construction of the section by judicial officers has influenced stay of proceedings.

## **Chapter Three: Overview of Stay of Proceedings in the United Kingdom, Australia and France: Best Practices**

Chapter three will review the varying interpretations on the aspect of stay in United Kingdom, Australia and France. The salient features of the concept of stay of legal proceedings the select jurisdictions will be distilled with a view to ascertain how it helps to enhance party autonomy and arbitration. This research shall analyse the legislative framework and judicial interpretations of English, Australian and French arbitration legislations with a view to adapting best practices and lessons for Kenya that will aid in legislative reform.

## **Chapter Four: Findings, Conclusions and Recommendations**

This Chapter hosts a summary of the key findings in the study and a conclusion of the entire research taking into consideration whether or not the objective of the study has been met, research questions answered and hypothesis proved. The chapter will then give recommendations on whether Section 6(1) of the Act, undermines the concept of party autonomy and binding nature of arbitral proceedings. This chapter will also advocate for the legislative reform agenda on how to address applications to stay proceedings.

**CHAPTER TWO:**  
**REVIEW OF THE CONCEPT OF STAY OF PROCEEDINGS UNDER SECTION 6,**  
**ARBITRATION ACT, 1995**

**2.0 Introduction**

This Chapter analyzes stay of legal proceedings and party autonomy in arbitration. Particular focus will be given to the diverse aspects that occasion the stay of proceedings specifically entering appearance and what amounts to a step as analyzed from the various judicial interpretations.<sup>52</sup>

The discussion and analysis in this Chapter is organized around key thematic arguments founded on an examination of statutes and case law examined. In particular, the rationale of stay of proceedings and its effect on party autonomy in arbitral proceedings, how courts have interpreted entering appearance and what amounts to taking a step when faced with applications under Section 6 of the Act. The analysis will establish whether the Act, is consistent with the new constitutional dispensation. Consequently, it will ascertain whether the judicial decisions in the old and current constitutional era encourage or constrain the process of ADR.

**2.1 Rationale of Arbitration and the Concept of Stay of Legal Proceedings**

Arbitration is a highly favoured mode of ADR because of the benefits it offers in place of litigation. Wambua, posits that is favored by litigants due to unnecessary delay posed in litigation.<sup>53</sup> Such processes are becoming progressively widespread, unlike litigation, the privacy

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<sup>52</sup>Githu Muigai and Jaqueline Kamau 'The Legal Framework of Arbitration in Kenya', in *Arbitration Law and Practice in Kenya Law Africa*, Nairobi 2(2011). Chapter 1

<sup>53</sup>Musili, (note 2).

ensures parties can use better actual co-operation among all parties to circumvent stays and pointless expenses.<sup>54</sup>

Arbitration is founded in the Constitution,<sup>55</sup> due to its robust nature in comparison to the traditional methods of resolving disputes. This is envisioned from the upsurge in the number of arbitrations all over the world.

The central advantage arbitration has is that it supports independence of contracting parties in dispute resolution, as well as its finality over litigation. It promotes independence of the parties to decide on how the arbitration will be conducted, the length of the proceedings, form of the award, choice of arbitrators among other aspects. The contracting parties become the “owners” of the proceedings and technically form their own code of arbitration proceedings.

It is acknowledged by legal scholar’s world over that court’s jurisdiction is pertinent in regulating disputes at the commencement, during and after the arbitration process, one of these instances lies in the stay of legal proceedings pending arbitration.<sup>56</sup> A stay of proceedings is a court decision stopping litigation in order to give reverence to the parties’ free will to elect an arbitral forum taking into consideration the contractual agreement. The purpose of the determination by court is to ensure that parties keep to the obligatory nature of arbitration.

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<sup>54</sup> Ibid, at 5-6.

<sup>55</sup> In Kenya, it is a requirement that inter-governmental disputes are resolved by alternative dispute resolution mechanisms and arbitration is one of them.

<sup>56</sup>Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya*, 3<sup>rd</sup> Edition, Glenwood Publishers Limited (2017)

In an effort to halt the residual hindrances to global trade as a consequence of the differences in domestic legislations, UNCITRAL was adapted to harmonize and unify the law governing trade.<sup>57</sup> UNCITRAL, is characterized by a number of notable aspects, pertinent to this study is stay under Article 8. Article 8 (1) refers to timelines for which the application can be made. It also approves that the applicant is allowed to approach the forum court at any time not later than when they submit their first account on the elements of the dispute. To this, it is envisaged that after a party has lodged statements that answer the substantive claim before the court then they are precluded from resolving their dispute through arbitration.

Section 6 of the Act is akin to UNCITRAL. It seeks to set the time frame within which an aggrieved party may challenge court's jurisdiction to entertain matters governed by the contract. The policy behind the enactment of the section was to curtail unnecessary delay and obstruction from a Respondent seeking to avoid liability at all cost.<sup>58</sup>

On 5<sup>th</sup> January, 1996 three days after the 1995 Act was assented into law, the Court of Appeal made a landmark ruling with regard to stay applications in *Corporate Insurance Company v Loise Wanjiru Wachira*.<sup>59</sup> In this matter, during the initial proceedings at the High Court, the appellant after filing an appearance delivered a defence and made no application for stay. Gicheru, Kwach and Shah JJA in upholding the ruling by the trial court found the applicant to have surpassed the latitude stipulated in Section 6 (1).

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<sup>57</sup> United Nations Resolution 2205 (XXI); on the Establishment of the United Nations Commission on International Trade Law.

<sup>58</sup> Muigua, note 56.

<sup>59</sup> [1996] eKLR.

It is quite surprising that despite the new legal regime, the Court of Appeal did not make any reference to it nor did it take judicial notice of the amendments to Section 6 (1) albeit in an obiter decision. The Court of Appeal only commented on the efficacy of Section 6 (1) of the Act, in that an applicant is allowed to rely on arbitration if the said application is made prior to filing any pleadings but after entering appearance.

## **2.2 Judicial Interpretation of Section 6 (1) of the Arbitration Act, 1995**

Where summons to enter appearance <sup>60</sup>have been issued upon a defendant, he is required to notify the court within a specified period of his address of service.<sup>61</sup> As has been aptly stated by Ngotho, entering appearance is therefore nothing more than a procedural step in avoiding an adverse judgment against a party to whose attention it has been brought that a suit has been instituted against them.<sup>62</sup>

Whether the court has requisite jurisdiction to determine a matter should not arise due to entering appearance. It is a common practice that where one wishes to challenge the authority of court to entertain a matter, he can do so either by way of a Notice of Preliminary objection or raise an objection through the pleadings.<sup>63</sup>

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<sup>60</sup> The notification by an Advocate to Court that he or she would be representing a certain party in the proceedings.

<sup>61</sup> Civil Procedure Rules 2010, Order 6 rule 1.

<sup>62</sup> Ngotho, note 39.

<sup>63</sup> Civil Procedure Rules 2010, Order 2 rule 9.

### 2.2.1 Pre- 1995

After independence the law on arbitration was found in the repealed 1968, Act. As has been discussed by Muigua, it provided for Courts intervention in arbitral proceedings.<sup>64</sup> The relevant part of the section states:

... **“(a) any party to those proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings....”**

The Arbitration Act, 1968, did not encompass a corresponding Article 5 of the UNCITRAL, which stipulates court’s involvement in disputes ruled by arbitration. Courts during this time relied on the case of *Rashid Moledina v Hoima Ginnors*,<sup>65</sup> where the Court stated that it will be extremely cautious before it can interfere with an arbitration award by giving regard to party autonomy. Court intervention will only be necessitated in the administration of justice where it is clear that the tribunal had arrived at a wrong decision.

Despite this recognition of arbitration, it was only on paper, in practice, little or no regard was given to settling disputes through arbitration and the final decision rested with the Courts of law.<sup>66</sup>

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<sup>64</sup>Kariuki Muigua, ‘The Arbitration Acts: A Review of Arbitration Act, 1995 Of Kenya vis-a-vis Arbitration Act, 1996 Of United Kingdom,’ A lecture on Arbitration Act, 1995 and Arbitration Act 1996 of UK delivered at the Chartered Institute of Arbitrators-Kenya Branch Entry Course held at College of Insurance on 25-26<sup>th</sup> August 2008 (Revised on 2<sup>nd</sup> March 2010), at 1-2.

<sup>65</sup> [1967] EA 645

<sup>66</sup>Lucy Mair, ‘Primitive Government a study of the traditional political systems in East Africa (1977) at 212-215.

Indeed, Hancox JA, reiterated this point in *M’Kiara v M’Ikiandi*,<sup>67</sup> when he indicated, “*I do not see how a case before the (High) Court can validly be relegated to an oath administrator, even if it is not the administration of an oath in the sense previously understood by the people of Kenya.*”<sup>68</sup> The Justice further alluded that, “*consent of the parties to some unknown procedure for settlement of a given dispute does not oust the jurisdiction of a court properly seized of a suit.*”<sup>69</sup> The prima facie rule and practice of the Court during that era was against staying Court proceedings in favor of any other form of dispute resolution.

### **2.2.2 The period between 1995 and 2010**

The ratification of the UNCITRAL in 1985 paved way for the Act. The desire by parties in commercial dealings to resolve their disputes through arbitration gave the legislature impetus to enact a new statute. The aim of the law was to cater for the requirements of a credible ADR legislation in Kenya. The key feature of the legislation is that it limits the courts interference in arbitration.<sup>70</sup>

The original wording of Section 6 before the amendments introduced by the (Amendment) Act, 2009 was as follows:

*“A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceeding stay the proceedings and refer the parties to arbitration...”*

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<sup>67</sup>(1984) KLR 170.

<sup>68</sup> Mair, note 66 at 177.

<sup>69</sup> Ibid, at 179.

<sup>70</sup>Section 10 of the act and other ancillary provisions.

The law altered the position in the repealed Arbitration Act,1968 and provided that an application for stay can only be instituted when filing a memorandum of appearance <sup>71</sup>or before submitting an answer to the claim or otherwise participating in the proceedings before Court.<sup>72</sup> The Court therefore, has power to stop suits instituted before it pending the hearing and determination of arbitral proceedings.<sup>73</sup>

The 2009 amendments brought a construction change which sought to clarify the timeline within which the application for stay could be made. A thorough analysis of the wording of the amended Section 6 (1) in 2009 was to the effect that the law sought to limit the time for making an application for stay to end when a party formally acknowledges the court's jurisdiction. It envisages a situation where once the court has jurisdiction a request to stay the suit will be defeated. The court is only seized of jurisdiction if the Defendant files a defence in the case.<sup>74</sup>

In *Bedouin Enterprises Ltd v Charles Njogu Lofty and Joseph Mungai Gikonyo T/A Garam Investments*, <sup>75</sup>Githinji J, rejected the argument that reference to arbitration can be made at 3 stages, when filing a memorandum of appearance, responding to the specifics of the claim by way of pleadings or when carrying out any other action in the conduct of the suit.

In *Treadsetters Tyres Ltd v Elite Earth Movers Ltd*,<sup>76</sup> the judge cited the case of *Charles Njogu* above and ruled that since the Defendant had filed a defence after entering appearance he had consequently surrendered his right to depend on the arbitration clause, consequently, his grounds of opposition to the suit did not have merit and were dismissed.

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<sup>71</sup>TM-AM Construction Group Africa v Attorney General [2001] eKLR.

<sup>72</sup>Victoria Furnitures Limited v African Heritage Limited & another Nairobi HCCC NO.904 of 2001.

<sup>73</sup>Harnam Singh & others v Mistri [1971] EA 122

<sup>74</sup>*Niazsons (K) Limited v China Road & Bridge Corporation (K)* [2001] KLR.

<sup>75</sup> (Unreported) Civil Case No. 1756 of 2000.

<sup>76</sup> [2007] eKLR.

However, Lesiit J. has offered a different opinion with regards to Section 6(1) in *Lavington Security Guards Ltd v Kenya Electricity Generating Company*.<sup>77</sup> The judge stated that the defendant is permitted under Section 6 to apply for reference to arbitration either when entering appearance, or any time prior to lodging a pleading or taking action in the proceedings. The learned Judge even went further to state that the three conditions set under the law should be construed disjunctively and not conjunctively. In this regard, a stay application will only be allowed if the party files a memorandum of appearance and does not file a defence. In *Lavington Security* above the applicant had entered appearance and never took any further action in the case but filed the application for stay and referral to arbitration 14 days after entering appearance, the Judge deemed that its application was competent.

It is evident that the courts have considered that the request to stop litigation in favor of arbitration will only be considered if it is made at the time that the applicant enters appearance or before responding to the claim or participating in the proceedings. Any delay in making the application for stay would disenfranchise a Respondent from ADR.

However, we still need to define what amounts to a step. This thesis takes the view that a step in the proceedings arises only when the Defendant has submitted a statement that substantively responds to the alleged infractions by the Plaintiff. This reasoning is premised on the definition of pleadings that includes a statement of defence which contains a chronology of events showing how the purported breach of duty arose.

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<sup>77</sup> [2009] eKLR.

In certain instances, some judges sought to uphold arbitration by shifting the burden to the Respondent to prove why the arbitration agreement should not be upheld. For instance, in *Omino v Lalji Meghji Patel & Co. Limited*.<sup>78</sup>The Court held that the disgruntled party must provide sufficient reasons why the arbitration agreement should not be acknowledged.<sup>79</sup>

It is evident from legal decisions that a Respondent must seek stay at the time of entering appearance any lapse of time will be considered a relinquishment of the right to arbitrate.<sup>80</sup> It is worth mentioning that parties often put timelines within which an arbitration dispute may be heard.<sup>81</sup>

Therefore, the case of *Lavington Security* above should be the standard rather than the exception. It has already been shown that Lesiit J in that ruling held that the applicant therein entered appearance and took no further action in the case. That despite the application for stay was made 14 days after he had entered appearance, his application was still competent.

However, as Ngotho has stated by dint of the muddled drafting of section 6 this is not enforceable as it envisions a contemporaneous filing of both the application for stay and the memorandum of entering appearance. From the foregoing, it is apt to say that current formulation of the law undermines the principle of stay of proceedings and the obligatory nature of arbitration as postulated in the Constitution.<sup>82</sup>

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<sup>78</sup>[1995-98] 1 EALR 264.

<sup>79</sup>Kibaya Laibuta, *Principles of Commercial Law: Commercial Arbitration and Alternative Dispute Resolution* (Law Africa 2006), at 426.

<sup>80</sup> TM AM Construction Group (Africa) v Attorney General High Court [2001] eKLR.

<sup>81</sup> Cap. 22 of Laws of Kenya. It is the case that the arbitral tribunal must uphold the law.

<sup>82</sup>Ngotho note 39.

### 2.2.3 The Period after 2010 to date

Before the year 2010, the role of the Courts in ADR seemed settled. The position was that Courts of law in exercising authority recognise their supportive role to arbitration.<sup>83</sup> Therefore, the Court must present itself to the international circle as supporting arbitration and to respect parties' choice as binding.<sup>84</sup>

The aforementioned position is well grounded in *William Lonana Shena v HJE Medical Research International Inc*,<sup>85</sup> Court found that its unfettered jurisdiction did not oust the arbitration process governed by statute. Courts must therefore encourage commercial transactions and discourage obstruction by re-writing the contractual agreement between the parties.

Analysis of Kenyan jurisprudence has acknowledged that the latter segment which appears in the revised version of the Act, is indeed somewhat unclear when one takes into account the process of litigation before Court. It could mean that the Court must be moved to make an order for stay of proceedings simultaneously with lodging of the memorandum of appearance but then it is normal for appearance to be filed first, it is difficult to determine how else the Defendant could acknowledge the claim against which the objection to courts authority is required other than by entering appearance.<sup>86</sup>

A pertinent question that therefore lies in this research is whether the Court's intervention in staying proceedings based on the current formulation of Section 6 of the Act, renders its role in advancing arbitration as a friend or foe?

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<sup>83</sup>James H Carter, 'The International Arbitration Review' (June 2015) 6 <<http://www.africalegalnetwork.com/wp-content/uploads/2016/01/Kenya-Chapter-International-Arbitration-Review.pdf>> accessed on 17<sup>th</sup> June, 2018.

<sup>84</sup> *Bellevue Development Company Limited v Vinayak Builders Limited and another* [2014] eKLR, para 29.

<sup>85</sup>Case No.1096 of 2010(Unreported).

<sup>86</sup>*Trishcon Construction Co. Ltd v. Leo Investments Ltd* [2013] eKLR HCCC No. 645 of 2012 (per J.B. Havelock).

In the case of *Nanchang foreign Engineering Company (K) Limited v Easy properties Kenya Limited*,<sup>87</sup> the Defendant in the matter sought for stay before entering appearance. The Plaintiff opposed the application terming it a misuse of judicial time. The reasons advanced by the Plaintiff was that the Defendant was employing delay tactics, the claim before the Court was not arbitrable as alleged by the Defendant. The claim was for recovery of debt that the Defendant had refused to settle in compliance with the terms of the contract. In declining to grant stay, Justice Kamau, stated that referral of a matter to ADR is not geared towards causing untoward delay. She further stated that where a party is rightfully entitled to payment it is unnecessary to refer the matter to another dispute resolution forum.

Consequently, it is still the position of law that if a Respondent does not raise a challenge to court's authority they renounce the obligatory nature of arbitration.<sup>88</sup> The overriding rationale here is Section 6 does not render a suit filed where a dispute resolution clause exists frivolous in light of Order 6 Rule 13 of the Civil Procedure Rules<sup>89</sup> but gives an opposing party a right to have those proceedings stayed if found appropriate by the Court.<sup>90</sup>

Courts have stated that the Act is a “self-encompassing statute, one does not need to look beyond its provisions to determine legal questions”.<sup>91</sup> In the case of *National Oil Corporation of Kenya Limited v. Prisko Petroleum Network Limited*,<sup>92</sup> it was stated that “the Civil Procedure Act and Rules was not applicable in arbitration.”<sup>93</sup> It is only where the Act is silent on an issue that

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<sup>87</sup>[2014] eKLR.

<sup>88</sup>Zaid Iqubal Dean V Samuel Gakiria Kingori & another 115 [2014] eKLR; HCCC (Nairobi) No. 116 of 2013.

<sup>89</sup> Provides for striking out applications.

<sup>90</sup>Marge Enterprises Ltd v Kenya Alliance Insurance Company Ltd (2006) eKLR.

<sup>91</sup>James H Carter, ‘The International Arbitration Review’ (June 2015) 6 <<http://www.africalegalnetwork.com/wp-content/uploads/2016/01/Kenya-Chapter-International-Arbitration-Review.pdf>> accessed on 17<sup>th</sup> June, 2018.

<sup>92</sup> High Court (Milimani Commercial Courts) Civil Case No. 27 of 2014 [2014 eKLR].

<sup>93</sup> See also section 11 of the Arbitration Rules.

recourse can be had to the Civil Procedure Rules to fill in any gaps, but not so as to conflict with its aims and objectives”.

In *Peter Mwema Kahoro & Another v Benson Maina Githethuki*,<sup>94</sup> the Defendant contemporaneously entered appearance; filed Grounds of Opposition to the Plaintiff's application which had sought to prevent the Defendant from transferring or otherwise meddling with the subject matter before conclusion of the case. The Defendant also took out a Chamber Summons in which he sought orders to strike out the suit as it failed to disclose an action, further that the proceedings should be stayed. The Court dismissed the applications with costs to the Plaintiff.

While this research appreciates that the application in both cases above were strictly not stay applications, both courts seem to be of the view that making Preliminary Objections and filing grounds of opposition to a suit was a step in the proceeding precluding the application for a stay. This seems at odds with the very notion of a Preliminary Objection or grounds of opposition to the effect that they seek to oust court's jurisdiction.<sup>95</sup> The question that arises is how it can be deemed that by filing a Preliminary Objection or moving the court to consider grounds of opposition the applicant has acquiesced to the court's authority.

However, there seems to be logic in the fact that the applicant may file his application contemporaneously on the same day he enters appearance but also files a defence together with a counter-claim. Thus, in *Africa Spirits Limited v Prevab Enterprises Limited*<sup>96</sup> the Defendant entered appearance and contemporaneously filed an objection to the proceedings, a statement of

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<sup>94</sup> [2006] eKLR, Nairobi HCCC No.208 of 2014.

<sup>95</sup> Preliminary Objection and grounds of opposition are objections that should be raised at the earliest opportunity not when a matter has been substantially dealt with. See for a dicta on this, *Mukisa Biscuit Company v Westend Distributors Limited* (1969) EA 696.

<sup>96</sup> [2014] eKLR.

defence and a counter claim. In allowing the application the ruled that Section 6 requires stay applications to be filed at the earliest. The Court acknowledged that the challenge to its jurisdiction was raised at the instant of entering appearance and opted to safeguard the sovereignty of contract by referring the dispute to arbitration.

Following this logic then and with the nature of a memorandum to enter appearance, an application to stay proceeding pending arbitration should be allowed if it is made before filing of a defence or contemporaneously with summons to stay the proceedings. This argument has been advanced in *Adrec Limited -vs- Nation Media Group Limited*<sup>97</sup> where the Court held that;

*“Once a defendant, in a suit founded on a contract containing an arbitral clause, enters appearance or causes a notice of appointment of advocates to be filed on his behalf and prior thereto or contemporaneous with filing of such notice of appointment or entering appearance files an application for stay of proceedings, the court is statutorily obligated to stay the proceedings and to refer the parties to arbitration .....It should be emphasized that the right to seek and obtain stay proceedings under section 6(1) of the Arbitration Act is lost the moment a defence is filed in the proceedings.”*

It is concise from the decisions that an application for stay is to be addressed immediately as it is a challenge to the court’s authority. This is in line with the strategy behind the enactment of Section 6(1) that sought to prevent the unnecessary delay in resolution of dispute.

However, in recent times the Constitution has come into play to assist parties by allowing court to extend time, as in *Neelcon Construction Company Limited -vs- Kakamega County Assembly*<sup>98</sup>

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<sup>97</sup>[2017] eKLR

<sup>98</sup>[2018] eKLR

where the Court relied on Article 159(2) (c) to extend time to a defendant who entered appearance but failed to file a defence or apply for a stay and reference to arbitration.

Muigua has posited that the acknowledgment of arbitration is anchored on Constitutionalism.<sup>99</sup>The Constitution upholds the freedoms of parties to contract and non-conformity can be challenged as a violation of the fundamental rights of the citizenry.<sup>100</sup>

For instance, in *Albert Ruturi & Others v A.G & The Central Bank of Kenya*,<sup>101</sup> Court was of the view that the Constitution is the grand norm and any law that contradicts it is repugnant. The bottom line is that the Constitution of Kenya, 2010 must be construed in a manner that advances good governance.<sup>102</sup> The legislature as well as the judiciary is bound to comply with these principles.

In the case of *Kamlesh Mansukhlal Damji Pattni and Goldenberg International limited v the Republic*.<sup>103</sup> The Court stated that the High Court has the primary responsibility of safeguarding against contravention of the rule of law and the contravention, particularly with regard to fundamental rights and freedoms. This was also affirmed in the current Constitution of Kenya, 2010 which provides that the High Court has authority, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.<sup>104</sup>

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<sup>99</sup>Muigua Kariuki, 'Constitutional Supremacy over Arbitration in Kenya.' *Alternative Dispute Resolution (CiArb Kenya)*, 2016; 4(1):100-131, at 106.

<sup>100</sup>Liliana Mariana, 'The Constitution Supremacy' <[http://www.sustz.com/.../Jurj\\_Liliana\\_Mariana\\_2.pdf](http://www.sustz.com/.../Jurj_Liliana_Mariana_2.pdf)> accessed on 13<sup>th</sup> August 2016.

<sup>101</sup> High Court at Nairobi, Miscellaneous Civil Application No. 905 of 2001.

<sup>102</sup> Constitution of Kenya 2010, Article 259(1).

<sup>103</sup> High Court Misc. Application No. 322 of 1999 and No. 810 of 1999.

<sup>104</sup> Constitution of Kenya 2010, Article 23(1), however, it is noteworthy that Clause (2) thereof provides that Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental

In *Crispus Karanja Njogu v Attorney General*<sup>105</sup> the constitutional Court ruled that because of its sovereignty compared to other laws, during the interpretation of legislation in the Constitutional context the Judicial officer has a duty to establish if the Act is compliant with the tenets illustrated in the Constitution.

While Courts in most cases have acknowledged arbitration agreements on the basis of independence of the contracting parties', current cases obliterate the position in the pretext of constitutional conformity.<sup>106</sup> This is seen in *Bia Tosha Distributors Limited v Kenya Breweries Limited & 3 others*,<sup>107</sup> the Court in this case did not deem it necessary to refer the matter to another forum. The key consideration here was how the dispute was framed, the Court made a finding that only constitutional issues had been raised from the commercial agreement. It was the Courts view that the constitutional parameters of dispute resolution would override the freedom of contract between the parties.

The *Bia Tosha* decision pre-supposes that even where parties have agreed on a forum to resolve their disagreement, a party can try to evade the contractual obligations on account of the drafting of the suit. This trend is detrimental as it goes against the principle of non-interference and party autonomy.

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freedom in the Bill of Rights. This has since been achieved through the enactment of the Magistrates' Courts Act, 2015, No. 26 of 2015, which was passed to give effect to Articles 23(2) and 169(1) (a) and (2) of the Constitution; to confer jurisdiction, functions and powers on the magistrates' courts; to provide for the procedure of the magistrates' courts, and for connected purposes. S. 8(1) provides that subject to Article 165 (3) (b) of the Constitution and the pecuniary limitations set out in section 7(1), a magistrate's court shall have jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

<sup>105</sup>(Unreported) High Court Criminal Application No 39 of 2000. (Per Ojuk, Etyang and Rawal, J.J.J).

<sup>106</sup>Kamau and Melly note 16.

<sup>107</sup>Petition No. 249 of 2016, [2016] eKLR.

An arbitration clause that seems to handicap a party to it will not automatically be upheld by the courts. This was evident in *Laiser Communications Limited and 5 others -vs- Safaricom Limited*,<sup>108</sup> where the contract had a clause limiting liability of the respondent to Kshs.100, 000. The appellants claim was for more than the amounts capped under the contract. The Respondent successfully managed to stay the suit at the High Court. Nevertheless, on appeal the Court ruled that the limitation of accountability values was an impediment to the appellant's right to access justice.

The *Laiser* decision above seems to interfere with party autonomy and arbitrator's jurisdiction. Devoid of proof of coercion to enter into a contract, it is believed to have been executed at will and as such parties should be held to their respective bargains under the agreement. The limitation of liability clause in any event should be severed from the arbitration clause which is an independent contract and must not be seen to be used to invalidate an arbitration. This should be taken into consideration on view of the fact that Tribunals render their decisions based on Constitutional considerations that safeguard access to justice.

The decisions in *Bia Tosha and Laiser Communications* above seem to contradict Kenya's blue print of becoming a centre for commercial arbitration. There is therefore an obligation to adapt a more progressive interpretation of the arbitration law.<sup>109</sup>

Even though enacted 15 years before the endorsement of the Constitution of Kenya 2010, the Act should be streamlined to espouse the values and principles of constitutionalism this includes paramount provisions to promote arbitration where appropriate. In this regard then, the study

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<sup>108</sup>[2016] eKLR.

<sup>109</sup> The Nairobi Centre for International Arbitration Act.

adopts the view that if an Act of Parliament and the judiciary are seen to curtail the right to arbitration the same should be construed as nothing but unconstitutional.

### **2.3. Conclusion**

This chapter has revealed that the discretion of Courts to entertain oppositions to its authority in favor of arbitration is curtailed by the current formulation of the provisions of Section 6 and the stringent judicial interpretation. Courts have given prominence to the requirement to stay proceedings when entering appearance or otherwise lose this right. Ideally the rationale is that once a court has been seized of a matter, then recourse to arbitration is not plausible. It has however, been demonstrated that the nature of a memorandum of entering appearance does not seize a court with a matter and cannot be construed as a step in the proceeding.

This chapter took a critical look at the concept of stay of proceedings and the parties' free will to choose how to determine how to resolve their disputes and whether the same is undermined by the law as currently formulated.

The discussion in 2.2 and 2.3 has shown that the drafting of Section 6 is couched with ambiguity allowing Courts to arrive at decisions that undermine the principle of stay of proceedings and consequently frustrates party autonomy in arbitration. There is a need to review the practice in other jurisdictions on the principle of stay of proceedings with the aim ascertaining the best practices. This will aid in legislative reform as will be established in the next chapter.

**CHAPTER THREE**  
**OVERVIEW OF STAY OF PROCEEDINGS IN THE UNITED KINGDOM,**  
**AUSTRALIA AND FRANCE: BEST PRACTICES**

**3.0 Introduction**

The preceding section of this study evaluated the concept of stay as stipulated in the Kenyan Act. The Chapter explained how the current formulation of Section 6, undermines the rationale for stay of proceedings which is founded on the basis that arbitration is obligatory.

Chapter three reviews the best practices on stay of court proceedings pending arbitration proceedings in UK, Australia and France. The salient features of the concept of stay of proceedings in the three jurisdictions are analysed with a particular interest on how the select jurisdictions have promoted the effectiveness of arbitration by ensuring a balance of stay of proceedings pending arbitration while giving due regard to party autonomy.

The chapter aims at showing that the Court's in the three selected jurisdictions have adapted an interpretation that upholds party autonomy therefore promoting arbitration. This chapter will take into consideration the judicial interpretation of Section 9 of the United Kingdom Arbitration Act, 1996, Section 7(2) Australian International Arbitration Act, 1974, (IAA), Article 1448 French Code de Procedure Civile (CPC) and the lessons Kenya can draw from the best practices in UK, Australia and France.

It has been noted worldwide that most jurisdictions have a goal of becoming more competitive in their respective markets hence the desire to adapt rules and administrative processes that promote

international Arbitration.<sup>110</sup> The research has opted to do an analysis of the United Kingdom and Australia's legal regime because both countries are common law jurisdictions that rely on judicial precedents which have a binding force. On the converse France is a civil law jurisdiction and is considered in this discourse as a way of finding the best practices across jurisdictions.

United Kingdom is the foundation of common law principles.<sup>111</sup> The Arbitration Act, 1996 has taken into consideration certain principles as laid out in the UNCITRAL. Central to this study being party autonomy and minimum Court interference so as to make arbitration more effective and a much sought-after dispute resolution mechanism.

Australia is among the leading jurisdictions to accept the 2006 revisions to the UNCITRAL. In Australia, the adoption of the UNCITRAL at the national and state levels ensures that courts have legislative authority to facilitate the work of arbitrators. Equally important, the adoption of the UNCITRAL sends a clear signal to courts that it is desirable that they should exercise that authority consistently with the objectives to be found, expressly or impliedly, in the domestic enactments of the UNCITRAL.<sup>112</sup>

The French law upholds arbitration, compared to other states in the world<sup>113</sup> this is seen in the fact that it has but in place a transnational character in international arbitration.

The first law in France was passed by the 1981 Decree which was a modern law of arbitration. The Decree No. 2011-48 of 13<sup>th</sup> January, 2011 further transforms legislative framework and

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<sup>110</sup> Mc Cormish note 51

<sup>111</sup> <<https://www.britannica.com/topic/common-law/The-modernization-of-common-law-in-Great-Britain>> accessed on 6<sup>th</sup> December, 2018.

<sup>112</sup> Mc Cormish note 51

<sup>113</sup> International Arbitration 2018, France <<https://www.globallegalinsights.com/practice-areas/international-arbitration-laws-and-regulations/france>> accessed on 27<sup>th</sup> December, 2019.

integrates the jurisprudence advanced by French Courts. It is of key significance that the French arbitration law offers a more accepted arbitration management despite the fact that its arbitration law is not modeled in line with the UNCITRAL.<sup>114</sup>

It would consequently be perfect to look at how the law in France has dealt with the issue of stay of legal proceedings and provide this study with a basis for making suitable recommendations.

Courts in France have immensely advanced the development of international arbitration by establishing a practice of encouraging arbitration through minimum interference. Where there is evidence of a valid arbitration clause, French courts will automatically decline to hear the matter. France is equally considered as a favourable forum for conducting arbitration due to its progressive statutes.<sup>115</sup>

The research therefore, seeks to reconcile why Kenya has decided to abandon a position that seems popular with the three selected jurisdictions. The said jurisdictions have emerged as centers for international commercial arbitration on account of the progressive laws on stay of proceedings.

### **3.1 Laws Governing Stay of Proceedings in the Three Selected Jurisdictions**

The contemporary arbitration crusade stems from the aftermath of World War1.<sup>116</sup>The establishment in 1919 of the League of Nations led legislators to view arbitration as a means

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<sup>114</sup><<https://www.globallegalinsights.com/practice-areas/international-arbitration-laws-and-regulations/france>> accessed on 27<sup>th</sup> December, 2018.

<sup>115</sup>Jean de la Hossieraye, Stephanie de Giovanni and Juliette Huard-Bourgeois, Cms ‘Arbitration in France’ <[https://eguides.cmslegal.com/pdf/arbitration\\_volume\\_I/CMS%20GtA\\_Vol%20I\\_FRANCE.pdf](https://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_FRANCE.pdf)> accessed on 27<sup>th</sup> December, 2018.

<sup>116</sup><<https://www.khanacademy.org/humanities/us-history/rise-to-world-power/us-in-wwi/a/the-league-of-nations>> accessed on 22<sup>nd</sup> December, 2018

of promoting peace and international trade.<sup>117</sup>Enthusiasm for private dispute resolution was founded around UNCITRAL and the New York Convention.<sup>118</sup>

### 3.1.1 United Kingdom

The 1950 English Arbitration Act was a consolidation of the 1889 and 1934 Arbitration Acts. It incorporated the power of Courts to stay actions where there was an applicable arbitration agreement. However, it contained a rider on Section 4(1) that the authority would be implemented where there was no impediment as stipulated in the law.<sup>119</sup> During the period when the 1950 English act was in force, there was a perforation of varied interpretations with regard to what constituted a step when considering an application for stay. For example, in *Brighton Marine Palace v Wood House*,<sup>120</sup> Court stated that seeking extra time to respond to the claim does not amount to a step. While on the other hand, in *Ford's Hotel Company v Bartlett*<sup>121</sup> court stated that applying for extension of time to deliver pleadings was viewed as amounting to taking a step. In this regard thus, what amounted to taking a step was not clear and it depended on the interpretation of each judge with no apparent consistency evident.<sup>122</sup>

After the ratification of the Convention, England enacted a new Arbitration Act in 1975 to operationalize the Convention. This Act did not fundamentally alter the position that persisted in

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<sup>117</sup><<https://www.theatlantic.com/past/docs/issues/20oct/fosdick.htm>>accessed on 22<sup>nd</sup> December, 2018.

<sup>118</sup><<http://kmco.co.ke/wp-content/uploads/2018/08/Paper-on-Recognition-and-Enforcement-of-Foreign-Arbitral-Awards.pdf>>accessed on 28<sup>th</sup> December, 2018.

<sup>119</sup> Section 4 1950 English Arbitration Act.

<sup>120</sup> [1893] 2 Ch. 486.

<sup>121</sup> [1896] A.C 1. 486.

<sup>122</sup> R Breen & G James 'Arbitration: To Stay or Not to Stay? A Step, Estoppel and a Step Too Far- An Overview of Recent Judicial Decisions in Ireland,' available at <<http://www.lexology.com/library/detail.aspx?g=72eccbc4-964a-4236-9f31-9b601d7799da>> accessed on 24<sup>th</sup> August, 2016

<sup>122</sup> [1896] A.C 1. 486 quoted in R Breen & G James Ibid.

the 1950 Arbitration Act. In the situation of local arbitration agreements, the Court maintained the choice to allow the application for stay with regards to foreign arbitrations the UK Courts were mandated to refer a valid arbitral dispute.

The 1996 Arbitration Act is drafted to complement the mandatory provisions.<sup>123</sup>The 1996 Act limits court interference in the arbitral procedure except in situations contemplated by the Law.<sup>124</sup> Through the mandatory stay of court proceedings the English Act reduces the desire by parties to defer proceedings through unmerited applications.<sup>125</sup>

This study however, only focusses on the law that deals with mandatory stay of proceedings. The operative Section 9 states that:

*“A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to an arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.”*

As is evident this section has retained the traditional timeline when a Respondent intending to benefit from the dispute resolution clause may move the court, that is, after entering appearance (the procedural step) and before taking any action to respond to the issues raised in the suit. It is also evident that this provision enjoins English Courts to mandatorily promote arbitration and enforce the arbitration agreements unless they are content that the agreement is unenforceable.

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<sup>123</sup> Guy Pendell & David Bridge, ‘Arbitration in England and Wales,’ (n 116), at 302.

<sup>124</sup> UK Arbitration Act, 1996, section 1 (c).

<sup>125</sup> Ibid, section 9.

### 3.1.2 Australia

Australia is a federal state with six (6) states and two (2) territories.<sup>126</sup> Consequently, all jurisdictions in Australia contain legal systems that govern commercial disputes. The statutes contain numerous identical and similar provisions. Key being, ousting Court's jurisdiction in arbitral matters where parties have approved to have the disagreement referred to arbitration, stay of arbitration proceedings and non-interference of the Court where the law expressly provides for arbitration.<sup>127</sup>

The federal legal regime for arbitration is the IAA this was enacted to fulfil Australia's responsibility under the New York Convention. The 1974 IAA was modified in 2010 to meet the changes in the arena of international trade principally, the amendments made to the UNCITRAL in the year 2006.

Section 7 (2) of the IAA which deals with stay provides as follows;

*“Proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration; on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves*

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<sup>126</sup><<https://www.australia.gov.au/about-government/how-government-works/local-government>> accessed on 18th August, 2018.

<sup>127</sup> Section 7 (2) of the IAA. This is likely to apply to most arbitration agreements with international aspects: see s 7(1), and Garnett R 'the current status of international arbitration agreements in Australia' (1999) 15 Journal of Contract Law 29, 31.

*the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter.”*

In line with the Uniform Commercial Code, Australian Courts have the authority to look into the decisions of arbitral tribunals.

### **3.1.3 France**

France implemented a modern arbitration statute in 2011, the intent of the new legislation was to restructure the conduct of its national and global arbitration. The legislation enacted in 2011 was a codification of the legal principles advanced in case law and largely sought to uphold the confidence the French arbitration system has on international users.<sup>128</sup>

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).<sup>129</sup>

The operative provision of the code is Article 1448 of the CPC (paragraphs 1 and 2) which states as follows;

*“When a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable. A court may not decline jurisdiction on its own motion.”*

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<sup>128</sup>[https://uk.practicallaw.thomsonreuters.com/7-501-9500?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/7-501-9500?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1) accessed on 20<sup>th</sup> April, 2019.

<sup>129</sup>Jean de la Hosserye, Stéphanie de Giovanni and Juliette Huard-Bourgeois, ‘Arbitration in France’ <[https://eguides-test.cmslegal.com/pdf/arbitration\\_volume\\_I/CMS%20GtA\\_Vol%20I\\_FRANCE.pdf](https://eguides-test.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_FRANCE.pdf)> accessed on 29<sup>th</sup> April, 2019.

In order for the courts in France to exercise its powers not to entertain a dispute before it, the court must be moved by the party that seeks to enforce the arbitration agreement. This should be raised prior to responding to the substantive claim, or else one is deemed to have relinquished the right to arbitrate.<sup>130</sup>

The CPC provisions on arbitration were enacted before the UNCITRAL was passed and France has not modified its laws to resemble it in anyway.<sup>131</sup>

### **3.2 How Court's Have Interpreted Stay of Proceedings in the Three Selected Jurisdictions**

As already demonstrated herein, it is evident from the discussion above of the United Kingdom, Australia and France arbitration statutes, arbitration agreements are given effect by the mechanism of stay of judicial proceedings.<sup>132</sup> A Defendant in a claim or a claimant in a counter claim may institute an application to ouster courts authority to entertain the dispute placed before the Court where the agreement contains a valid arbitration clause.<sup>133</sup>

United Kingdom, Australia and France have adapted the New York Convention and largely promoted resolution of disputes through arbitration. It has been stated that individuals as well as entities that take part in commerce opt for arbitration so as to be outside the scope of the courts. This is based on their desire to avoid lengthy court proceedings while maintaining privacy and business relationships.<sup>134</sup>

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<sup>130</sup> Michael Buhler and Pierre Heitzmann, Jones Day, 'PLC Arbitration Book, France' Arbitration 2009/10, <[https://www.jonesday.com/files/Publication/ee6ac2d0-adeb-4f9e-8a82-fc3dbfadaf7b/Presentation/PublicationAttachment/0c4deb70-26ef-4d77-b5de0171692d4971/PLC%20Arbitration%20Handbook%20-%20-%20%20Article1%20MB%20\(France.pdf\).PDF](https://www.jonesday.com/files/Publication/ee6ac2d0-adeb-4f9e-8a82-fc3dbfadaf7b/Presentation/PublicationAttachment/0c4deb70-26ef-4d77-b5de0171692d4971/PLC%20Arbitration%20Handbook%20-%20-%20%20Article1%20MB%20(France.pdf).PDF)> accessed on 20<sup>th</sup> April, 2019.

<sup>131</sup> Ibid.

<sup>132</sup> Mustill & Boyd, Commercial Arbitration: Companion Volume (London 2001), at 267.

<sup>133</sup> Section 9(1), Arbitration Act 1996; as noted by Lord Woolf in *Patel v Patel* [2000] QB 551, at 556 CA.

<sup>134</sup> *West Tankers Inc v RAS Riunione Adriatica Di Sicurtà SPA* [2007] UKHL4 per Lord Hoffman at [17].

In general, most common law systems specifically stay proceedings in favour of lawful agreements. The mandatory construction of the provisions of the UK and Australian statutes precludes the courts from interference in arbitrable disputes, unless in circumstances specifically provided for under the particular statutes.<sup>135</sup>

Despite France being a civil law jurisdiction, it has in place a law that seeks to promote Arbitration the French arbitration law offers a more satisfactory arbitration management than the one provided by the UNCITRAL.<sup>136</sup>

Further, Courts will decline to grant a stay where it has jurisdiction over the matter and consider that the applicant has by their actions and omissions waived their rights to arbitrate the grievance. Judicial approach to stay of proceedings is discussed in the study hereunder.

### **3.2.1 United Kingdom**

The position of law in the UK is that an applicant having taken a step in recognizing the claim,<sup>137</sup> ought not to have answered to the substantive issues raised in the suit.<sup>138</sup> The determining factor is if the Defendant by rebutting issues raised in a claim has opted out of arbitration.

In *Patel v Patel*<sup>139</sup> the Court was of the view that party's right to arbitrate had not been abandoned when he sought to have the default judgment that had been entered set aside unconditionally and he be allowed to defend the claim. The Court here interpreted the Defendant's actions to mean that he had not relinquished his right to arbitrate the dispute.

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<sup>135</sup>Neil Andrews, "Arbitration and Contract Law: Common Law Perspectives, Springer Publishing Switzerland (2016), at 69.

<sup>136</sup><<https://www.globallegalinsights.com/practice-areas/international-arbitration-laws-and-regulations/france>>accessed on 20<sup>th</sup> April, 2019.

<sup>137</sup> Section 9 (3) English Arbitration Act, 1996.

<sup>138</sup>Mustill & Boyd, Commercial Arbitration (n 1), at 270-271; see also Roussel-Uclaf v Searle [1978] 1 Lloyd's Rep 225, at 231-232, Graham J.: defendant resisting application for interim injunction; this did not involve 'some positive act by way of offence on the part of the defendant,' who was instead parrying a blow').

<sup>139</sup> [2000] QB 551, CA.

The decision in *Capital Trust Investments Ltd v Radio Design TJ AB*,<sup>140</sup> addressed the issue further where it was determined that the Rubicon had not been crossed by the Defendant whose sought for stay and in the alternative summary judgment to be issued in his favour. The applicant's view was that the second limb of his request would only be necessary where the court became seized of the matter.

The learned Judge in the case of *Bilta (UK) Ltd v Nazir*<sup>141</sup> when faced with the same challenge opined that a request to have additional time prepare the necessary objections to a claim was not a forbidden step as construed under the English Act. It was an indication that his desire was to have sufficient time to ascertain whether the dispute was arbitrable.

In case the parties have taken a 'step' impugned by section 9 (3), the Courts have been helpful by encouraging the parties who intend to make an application for stay to indicate that early enough. For instance, at the time when a defendant is filing a defence they may indicate that '...at the opportune time the defendant shall seek to refer the matter to ADR.

Since the judicial decision made in the *Patel* case in 1978 judges have been reluctant to impugn a 'step' taken by the applicants. In effect the detailing of a response to the suit in the defence was considered taking a step as held in *Russell Bros. & Co. Limited v Lawrence Breen t/a L & E Properties*.<sup>142</sup>

The decision in *Lombard North Central plc & another v GATX Corporation*<sup>143</sup> gives a bird view on how the Courts in England will address the issue of deciding on matters touching on Section 9(1) of the 1996, Act. In order to comply with the New York Convention, England adopted a

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<sup>140</sup> [2002] EWCA Civ 135; [2002] 2 All ER 159; [2002] 1 All ER (Comm) 514; [2002] CLC 787, at 60-64.

<sup>141</sup> [2010] EWHC 1086 (Ch); [2010] Bus LR 1634; [2010] 2 Lloyd's Rep 29.

<sup>142</sup> (Pringle J., unreported, March 14, 1997).

<sup>143</sup> [2012] EWHC 1067 (Comm).

provision of law that prohibit suits that are brought in express contravention of the desire by parties as laid down in their contractual agreement to arbitrate a dispute.

Most recently in *Autoridad del Canal de Panama v Sacyr, S.A. & Ors*,<sup>144</sup> where the court considered a failed stay application relating to the International Chamber of Commerce arbitration. In a subsequent judgment, the English Court deliberated further on the practical repercussions of the analogous proceedings. The Court rejected the Consortium's argument and refused to entertain the challenge to the decision to decline to halt the proceedings.

In so doing, the Court interpreted the law to mean that an answer to the claim by the Consortium would not constitute a step to deprive the Appellate Court of its jurisdiction to grant a stay on appeal. Consequently, it allowed the proceedings awaiting the outcome of the Consortium's request to appeal.

The Courts in England have largely taken a pro – enforcement approach to arbitration agreements. This is mirrored in the courts extensive and liberal attitude to the construction of arbitration clauses. English Courts will rarely hold that the clause is void for uncertainty and will endeavour to uphold the agreement. In the event the provisions of Section 9 have not been adhered to the court is able to down its tools in line with its inherent jurisdiction.

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<sup>144</sup>[2017] EWHC 2337 (Comm).

### 3.2.2 Australia

Article 8, of UNCITRAL oversees the attitude of domestic courts in Australia where a party initiates a suit in complete disregard to the arbitration agreement.<sup>145</sup>

The Courts in Australia are in certain instances faced with a multiplicity of suits instituted by the same claimant. In such instances the judicial officers have adopted the approach of elimination and entertaining suits where it has jurisdiction.<sup>146</sup> The remaining suits are therefore referred to arbitration in compliance with party autonomy and freedom of contract.<sup>147</sup>

This is not to say that Courts are precluded from intervention however, the intervention must be necessary where a clear thought out process must have been laid out.<sup>148</sup> In spite of this the appellate Court in *Ahmad Al-Naimi v Islamic Press Agency*<sup>149</sup> asserted itself and opined that it has the inherent jurisdiction to stay proceedings and as such its role must not be taken for granted.

The said position has been firmly laid down in the Australian decision in *CSR v Gigna Insurance Australia Limited*<sup>150</sup> where the Court ordered a stay which had the effect of restraining deviation from the terms of the contract.

The stay of court proceedings is aimed at preventing vexatious and unfair behavior by a party who appears to abuse an arbitration agreement. Upon production of sufficient evidence of the

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<sup>145</sup> Peter Wood, Phillip Greenham and Roman Rozenberg, Minter Ellison, 'Arbitration in Australia' <[https://eguides.cmslegal.com/pdf/arbitration\\_volume\\_I/CMS%20GtA\\_Vol%20I\\_AUSTRALIA.pdf](https://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_AUSTRALIA.pdf)> accessed on 29<sup>th</sup> April, 2019.

<sup>146</sup> <<https://uk.practicallaw.thomsonreuters.com/>> Accessed on 25<sup>th</sup> August, 2018.

<sup>147</sup> (*Hi- Fert Pty Limited and Cargill Fertilizer Inc v Kiukiang Maritime Carriers Inc and Western Bulk Carriers (Australia) Limited* (1998) 159 ALR 142).

<sup>148</sup> *Vale Do Rio Dole Navegacao SA v Shanghai Bao Steel Ocean Shipping Co Ltd* (2000).

<sup>149</sup> [2000] APP.L.R. 0.

<sup>150</sup> (1997) 189 CLR 345 at 392.

existence of a valid agreement the Defendant must give reasons why he should not be ordered to adhere to his contractual promise.<sup>151</sup>

In order to constitute a waiver, the laid down requirements are high. In *Comandate Corporation v Pan Australia Shipping*, it was ascertained that the privileges accorded to parties by arbitration and litigation are consistent. Consequently, when a party takes part in the court process it does not imply that they have abandoned the obligations under the dispute resolution clause.<sup>152</sup>The Court went on to affirm the need to give credence and efficacy to the needs of international trade. To achieve this party autonomy and freedom of contract must be given consideration when trying to purposively refer disputes to arbitration.<sup>153</sup>

The law under Section 7 of the Act is mandatory in nature preventing the evasion of a contractual obligation by instigating a third party to commence litigation. The Courts will ordinarily decline to entertain such a claim so as to guard the clarity of the tribunal.

When persons who have no privity of contract are allowed to participate in arbitration proceedings it weakens the desire of parties to settle on the forum for addressing their grievances.<sup>154</sup>This violates the freedom of contract as well as party autonomy that is supreme in the scope of ADR. It would equally expose the proceedings to public scrutiny as the choice of forum will be based on those applicable to litigation. The Courts in Australia in *Flint Ink NZ Ltd v Huhtamaki Australia Pty Ltd*,<sup>155</sup> upheld this assertion by declining to entertain a suit instituted

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<sup>151</sup> Donohue-vs-Armco [2002] Lloyds Rep 425 at 432

<sup>152</sup> (2006)157 FCR 45[62].

<sup>153</sup>See Richard Garnett, 'Australia's International and Domestic Arbitration Framework' in GA Moens and P Evans, *Arbitration and Dispute Resolution in the Resources Sector* (New York, Springer, 2015) 9, available online: <[www.springer.com/cda/content/document/cda\\_downloaddocument/9783319174518-c2.pdf?SGWID=0-0-45-1507878-p177329726](http://www.springer.com/cda/content/document/cda_downloaddocument/9783319174518-c2.pdf?SGWID=0-0-45-1507878-p177329726)>. accessed on 20<sup>th</sup> August,2018.

<sup>154</sup> Margaret L. Moses, 'The Principles and Practice of International Commercial Arbitration,' (Cambridge University Press 2008) 17-18.

<sup>155</sup>(2014) 289 FLR 30.

by a third party. The purpose was that the Court made efforts to respect contractual obligations that is the mainstay of commerce in Australia.

The Australian companies are increasingly becoming aware of arbitration, this has led the Courts to place considerable importance in the arbitration process. The widespread adaption of the New York Convention in Australia is geared towards the desire by the Court to ensure that a pro arbitration approach will propel Australia to being a favourable forum for the settlement of international disputes.

### **3.2.3 France**

In France where proceedings are commenced in contravention of the contract to arbitrate, courts will not be seized of jurisdiction, unless in instances where the arbitration agreement cannot be implemented.<sup>156</sup> Parties must raise their opposition before filing any substantive response to the claim, or else they are considered to have consented to court's jurisdiction.

Whereas common law jurisdiction courts will halt the process the courts in France will not accept jurisdiction at the very outset. However, the courts cannot exercise this discretion on its own, it must be moved by a party seeking to have the matter determined by arbitration. The court's pronouncement on the matter may be challenged within 15 days under a distinctive process intended to circumvent expenses and stay<sup>157</sup>

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<sup>156</sup>Article 1448 CPC.

<sup>157</sup>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](https://www.justice.gov.uk/courts/procedure-rules/civil/pdf/practice_directions/pd_part62.pdf)> accessed on 19<sup>th</sup> July, 2018.

### 3.3 Lessons for Kenya

The preceding discussion has shown the evolution of stay of proceedings in UK, Australia and France which arose from the desire to make international arbitration friendly. In a bid to enhance these legislative changes the three select jurisdictions seem to have made major inroads where the Kenyan Act has failed in reducing unnecessary court intervention in matters under the realm of arbitration.

Article 8 (1) refers to timelines for which the application can be made. It also approves that the applicant is allowed to approach the forum court before lodging a rebuttal to the claim that has been put out in court. To this end all that the UNICITRAL is envisaging is, after a party has filled statements that answer the substantive claim before the court then they are precluded from enforcing the arbitration.

Unlike Kenya, the UK and Australia have not given any consideration and thought process to the issue of entering appearance. This is probably because the drafters of the law never envisioned this as a restricting factor to a grant of stay of proceedings. Similarly, under UNICITRAL entering appearance is inconsequential.<sup>158</sup> The silence on the aspect of entering appearance is therefore, a big step in promoting international commercial arbitration.

UNICITRAL presupposes that an intent to resolve the disagreement through arbitration can only be made if a party has not filed a substantive response to the issues raised in the suit. The Courts have often considered that the request must be made in due time.<sup>159</sup>

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<sup>158</sup> Paul Ngotho 'The Bastard Provision in Kenya's Arbitration Act' (2013) 1 (1) Alternative Disputes Resolution CiArb-Kenya Journal, 148-162, 148.

<sup>159</sup> UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration, United Nations Publication, Sales NO. E12, Volume 9(2012), at 33.

With regards to what amounts to a step in the judicial proceedings, English Courts have moved to define the same ensuring there is no lacuna in interpretation. From the study, it emerged that the prevailing policy for Court intervention in Australia is minimal court intervention while in France the court will decline jurisdiction. The key approaches in Court intervention in arbitration around the world seems to follow two key patterns; minimal intervention of the Court except in public interest and supporting arbitration in order to realize its obligatory role.

It must be underscored that Article 8(1) is couched in mandatory terms to the extent that its terms are binding and the courts are not given leeway to exercise discretion.<sup>160</sup> The law further allows the commencement of arbitration hearings before an arbitral tribunal during which an application challenging the Courts Jurisdiction can be raised. The rationale for this is to be viewed in light of Article 16 of the UNICITRAL which donates to the tribunal the capability to decide on whether or not it has power to entertain the dispute.<sup>161</sup>

A country is not obligated to follow the provisions of UNICITRAL in totality, alterations and adaptations that are relevant to the countries commercial needs are to be taken into consideration.<sup>162</sup> However, this does not mean enacting laws that are mismatched in comparison to the contemporary global practices in arbitration.

The 1996 Act and the 1974 IAA have clarified the law making it less susceptible to court challenges. The Act, took into cognizance UNICITRAL in tune with the clamor for legislative change. However, as a result of muddled drafting the provision of the law is ambiguous.

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<sup>160</sup>UNICITRAL Digest of Case Law on the Model Law on International Commercial Arbitration, United Nations Publication, Sales (N 18) at 37.

<sup>161</sup> Alan Uzelac, "Jurisdiction of the Arbitral Tribunal: Current Jurisprudence and problem areas under the UNICITRAL Model Law," INT.A.A.L.R. Issue 5, Sweet and Maxwell and Contributors (2005).

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The Act, has given impetus to party autonomy which has however, been abused by parties who seek to deviate from their contractual obligations by instituting Court proceedings to delay the process.

The Arbitration Act, 1996 and Australian Act, 1974 on the other hand, have been amended over time and due consideration given to the stakeholders affected by the law. In that regard the laws that have been enacted are progressive and adequately cater for the interests of commerce and trade in UK and Australia.

The Kenyan law is as a result of poor drafting. It is not without doubt that to blunder is human however we must correct the situation by making the law enforceable without undue regard to technicalities.

On the other hand, the Kenyan Act can be made progressive by taking into consideration the sole intent of the legislators of the Act as well as the Constitution and synchronize the law governing stay to cater for the ever growing need to settle international commercial disputes through arbitration. This is where we can borrow from the judicial interpretation in France.

The desire to annul the Act, through the Arbitration Bill 2009 was a welcome move that was viewed as a way to give Kenya a modern law. However, it ended up as a mere patching up of the statute and a complete repeal of the Act was not taken into consideration.

### **3.4 Conclusion**

This chapter has discussed the concept of stay of proceedings in the UK, Australia and France. It has emerged that the two Common law countries and the Courts in the UK and Australia have managed to strike a balance between interfering in matters arbitration and its obligatory nature.

France despite being a civil law jurisdiction has managed to strike a balance by declining jurisdiction in matter governed by the arbitration clause.

It has been established that in the UK and Australia there is synergetic association between the Courts of law and ADR in determining disputes. The Courts enforce their authority by giving respect to parties' freedom to determine the forum for resolution of their disputes.<sup>163</sup>

With respect to this research, the observation made is that the drafting of the Kenyan Act is substantially different from similar provisions in the UK, Australia and French Acts and international conventions that Kenya has acceded to, should offer a moment of reflection on the Kenyan regime.

The chapter has answered the third and fourth research questions by setting out the lessons for Kenya based on how the UK, Australia and France have dealt with applications for stay and has laid down the basis for legislative change as deliberated in the subsequent section.

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<sup>163</sup>Rares, Justice Steven --- "The role of Courts in arbitration" (FCA) [2012] FedJSchol 12  
< <http://www.austlii.edu.au/au/journals/FedJSchol/2012/12.html>> accessed on 29<sup>th</sup> August, 2018.

## **CHAPTER FOUR**

### **FINDINGS, CONCLUSION AND RECOMMENDATIONS**

#### **4.0 Summary of Findings**

This section of the research recaps the salient features of the study based on the findings from the preceding chapters. It will also lay down the proposals for legislative change arising from the observation that the interpretation of stay pending arbitration is inhibited by the muddled drafting of Section 6 of the Act. This coupled with the varied judicial interpretations emanating from our Courts have been a hindrance to Kenya being a centre of arbitration.

This research is founded on party autonomy theory as well as freedom of contract theory. These theories have aided the research in proposing the repeal of Section 6. Further, the freedom of contract theory has been the basis for proposing progressive interpretation of Section 6. This research has analysed and critiqued Section 6 of the Act in the context of the constitutional dispensation, the spirit of the Kenyan Act, UNICITRAL and legal rules in the UK, Australia and France which were the jurisdictions analysed in this research.

This study sought to make a case for parties to be bound to uphold the terms of their contractual agreements before exploring other options for resolution of their grievances. The study seeks to examine how Section 6 of the Act, has frustrated or undermined the principle of stay of proceedings pending arbitration and parties' autonomy to resolve their contractual disputes away from litigation.

The research has elucidated that based on the fact that acknowledging a claim is commenced by entering appearance, the failure to file an application after entering appearance but before making any substantive rebuttals to the claim should not be interpreted that a party has opted out of ADR. This is evaluated based on comparative jurisdictional elucidation of the concept of entering appearance with respect to stay of proceedings pending arbitration.

#### **4.1 Conclusion**

The researcher herein has been able to discern that the inadvertence to file a memorandum of appearance concurrently with the application for stay of proceedings should not be used to curtail intent to resolve disagreements as has been alluded to in Chapter 2 of the thesis.

The researcher reviewed various materials where an arbitration contract exists in Kenya, the United Kingdom, Australia and France. In addition to literature reviewed on stay of proceedings pending arbitration, the researcher analysed fairly a huge number of cases to determine the position of stay of proceedings in Kenya. The law in United Kingdom, Australia and France is discussed in Chapter 3. In the analysis, written texts and case law as well as codes of law were taken into consideration.

The need to uphold party contractual agreement and desire of parties to decide a mode of dispute resolution is posited on examination of the statutes governing arbitration, in addition to the law and practice in the United Kingdom, Australia and France.

To answer the first and second research questions being, whether Section 6 (1) of the Act, frustrate or undermine arbitral proceedings in so far as it allows proceedings in the court where the contract envisages arbitration and whether the provisions of the Section 6 (1) of the Act, undermine the concept of stay of which is founded on the obligatory nature of arbitration agreements.

The questions have been answered in the positive and the research proposes that the Courts should ensure limited interference in matters governed by agreement of parties. Failure by judicial bodies to decline jurisdiction is deemed to be a violation of rule of law and due process. This trend gives room for desecration of the contractual obligations leading to an innocent party being dragged through the process of rigorous litigation.

The questions have been answered by analysing the odd nature of construction of the Kenyan Act by the Courts that by entering appearance a party has taken a step acknowledging the claim thus estopped from arbitration. Therefore, unlike United Kingdom and Australia which do not make reference to entering appearance as a delimiting factor to stay, their laws have promoted and advanced the obligation of contracting parties. France on the other hand seems to be more progressive, the courts do not stay proceedings but they decline jurisdiction over arbitrable disputes.

In response to the third and fourth research questions on how the United Kingdom, Australia and France have dealt with the concept of stay of proceedings where contracts are governed by arbitration agreements and what lessons can Kenya embrace to aid in legislative change of Section 6(1) of the Act.

This research has considered at the historical expansion of the law of stay of proceedings. The best practices have adapted broad interpretation of the concept of stay of proceedings and upheld resolution of disputes based on internationally recognised methods outside of Courts jurisdiction.

The UK and Australia both common law jurisdictions have adapted provisions that are of a mandatory nature of arbitration which have ensured that party autonomy is upheld at all times save for constraints imposed by law. France on the other hand despite being a civil law jurisdiction has offered a more pro- active enforcement of the arbitration law than the one provided under the modern law.

The research begun on the hypotheses, whether Section 6 (1) of the Act, frustrates or undermines arbitral proceedings in so far as it allows proceedings in the court where the contract envisages arbitration, thereby undermining the obligatory nature of arbitration agreements. The second hypothesis was whether the United Kingdom, Australia and France have demonstrated best practices which conform to Kenyan Constitution which advocates for arbitration as ADR mechanism.

This research has shown that disregard to party autonomy contradicts the best practices in commercial arbitration world over as seen in the elucidation in chapters two and three of the research herein.

From the lessons for Kenya, the research has further evaluated how the United Kingdom and Australia have demonstrated best practices by upholding party autonomy and eliminating unnecessary court interference in arbitration. Conversely, France is home for the International Chamber of Commerce and despite being a civil law jurisdiction it has upheld the arbitration

agreement thereby upholding ADR. This is in conformity to Article 159 of the Constitution that endorses ADR.

The findings from the best practices have influenced the recommendation for the repeal of Section 6 of the Act to pave way for legislative change that is geared towards making Kenya a centre for international commercial arbitration.

#### **4.2 Recommendations**

The foregoing research has ascertained that stay of proceedings is one of the key attributes of arbitration. It has been shown that party autonomy is paramount to determination of disputes in arbitration. The research, has revealed conditions in which the Court can interfere in matters arbitration. Nevertheless, Section 6 of the Act undermines party autonomy and non-interference as provided by Section 10 of the Act by declining to stay proceedings on account of a party not lodging the application for stay at the time of entering appearance.

Many reforms are therefore needed if the principle of stay of proceedings is to uphold arbitration and eliminate unnecessary court intervention that makes arbitration burdensome. Court interference process is riddled with stringent parameters that give legal practitioners planning on postponement of arbitration proceedings an opportunity to create schemes.

#### **4.2.1 Integrated framework and policy**

There is need for an overhaul of the Arbitration (Amendment) Act, 2009 to fill the gaps and address challenges faced in conducting arbitration in Kenya. This is necessary to align the Kenya arbitration law with current trends in international arbitration.

A fully-fledged alternative dispute statute must be operationalized to actualize the gains of Article 159 of the Constitution. The Arbitration (Amendment) Act, 2009 should succinctly provide sound dispute referral mechanism and make it imperative for the parties to exhaust all the ADR mechanisms before resorting to courts and impose sanctions to parties who circumvent these provisions.

#### **4.2.2 Training and inculcating a culture of Alternative Dispute Resolution.**

The consensus appeared to be that the root cause of the problem is limited exposure to alternative ways of settling grievances. To limit the nature and approach to court intervention in arbitration in Kenya.

The business community, legal fraternity, our judge's new generation of lawyers and business people need to be sensitized and trained, there is need for a judiciary-led ADR initiative comprising awareness training for the judiciary, legal professions, academic and private sectors. The government through the Ministry of Planning and Devolution ought to guarantee a budgetary allocation for ADR structures. Judicial officers through the Judiciary Training Institute should be trained on the importance of ADR and how it can be used to reduce the backlog and clogging in the courts. Advocates should in turn be sensitized on ADR through their continuing

professional development organized by the Law Society of Kenya and the Chartered Institute of Arbitration. ADR programs should also be entrenched in law schools and legal clinics.

There is an eminent urgency for a practice direction to give priority to arbitration applications in court to ensure speedy disposal of arbitral matters. It is prudent to strengthen the Commercial Courts as well as enactment of time bound rules of procedure to ensure that arbitration applications in court are fast tracked and dispensed with within a specific period after filing.

#### **4.2.3 Robust institutional capacity**

Attention needs to be paid towards capacity building of institutions. National and County Governments need to collaborate with institutions like the Chartered institute of Arbitrators and the Dispute Resolution Centre to build capacity across the country by putting in place adequate infrastructure to train and equip ADR practitioners.

The researcher, therefore, calls on the Courts to support and not to choke arbitration by upholding technicalities. The mainstream court practice in Kenya paints a different picture. The Court came across as being inconsistent in the interpretation of its role in arbitration. Indeed, in most cases it seemed the Court considers its role as being parallel to the arbitrators.

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