ONLINE ARBITRATION: THE SCOPE FOR ITS DEVELOPMENT IN KENYA.

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS OF THE MASTER OF LAWS (LL.M) DEGREE IN INTERNATIONAL TRADE AND INVESTMENT LAW.

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I **ISOLINA KAWIRA** registration number **G62/64798/2010** do hereby declare that this project report is my original work and has not been submitted either in part or in whole and is not being currently submitted for a degree in any other University

Dated at Nairobi this day of November, 2012

Signed.....

Supervised by Yash Vias

Signed.....

DEDICATION

I dedicate this thesis to:

My inspiring, loving and ambitious son Loi.

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TABLE OF CONTENTS

ABBREVIATIONS AND ACRONYMS

1. ADR……Alternative Dispute Resolution
2. AOL..... American Online
3. ICANN .....Internet Corporation for Assignment and Numbers
4. E-Commerce…….….Electronic Commerce
5. E-Resolution…….…….Electronic Resolution
6. EFT..... Electronic Funds Transfer Systems
7. EDI..... Electronic Data Interchange
8. UNICITRAL……..United Nations Commission on Internal Trade Law
9. RFID…….…….Radio Frequency Identification
10. WIPO. .....World Intellectual Property Organization
11. IT.....Information Technology
12. ICA.....International Court of Arbitration
13. ICC.....International Chamber of Commerce

TABLE OF STATUTES

1. The Constitution of Kenya, 2010
2. The Arbitration Act, Cap 4 of 1995 and as amended in 2009
3. The Kenya Information and Communication Act, Cap 411A, Laws of Kenya and as amended in 2008
4. The Civil Procedure Act Cap 21 Laws of Kenya
5. The Civil Procedure Rules, 2010
6. The Evidence Act, Cap 80 Laws of Kenya
7. The Criminal Procedure Code Cap 75 Laws of Kenya.
8. The Electronic Transactions Bill of 2007

TABLE OF INTERNATIONAL CONVENTIONS AND FOREIGN LAWS

1. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.
2. The European Convention on International Commercial Arbitration (European Convention of 1961.
3. The United Nations Commission of International Trade Law (UNCITRAL).
4. UNCITRAL Model Law on Electronic Signatures
5. UNCITRAL Model Law on E-commerce
6. UNCITRAL Model Law on Arbitration
7. The International Institute for the Unification of Private Law (UNIDROIT);
8. Principals of International Commercial Contracts, 1994
9. The International Bar Association (IBA) Rules of Evidence in International Commercial Arbitration 1999;
10. Arbitration & Conciliation Act 1996(India)
11. Information Technology Act 2000(India)
12. The Contract Act, 1872(India)

TABLE OF CASES

Chapter One

The Framework of the Study

1.1. The background of the problem

In the recent past arbitration has been the preferred mode of resolving disputes by parties in international transactions.[1] This is due to the various advantages that arbitration has over litigation. Some of the advantages include:

First arbitration process is faster as compared to litigation and gives the parties autonomy to choose who is to arbitrate the dispute. In addition parties have an option of choosing an arbitral panel composed of experts from different areas.

Secondly arbitration is more flexible as compared to litigation in both procedure and time. There are no formal mechanisms like in a normal court proceeding.

Thirdly Parties in international transactions also prefer arbitration so as to avoid being subjected to litigation in courts of different jurisdictions other than their domestic courts.[2]

Fourthly arbitration is considered to be a confidential procedure where information exchanged during arbitration is not available to third parties. This is in contrast with judicial procedures where proceedings are public and information can be disclosed. Parties may want to keep the information regarding the arbitration confidential as sensitive information may be exchanged in the process.

[1]See **http://www.aua.am/aua/masters/law/pdf/InternationalArbitrationTheFundamentals(1).pdf** (accessed on 27th February 2012)
[2]Ibid

In addition, when compared to other alternative dispute resolutions methods like negotiation and mediation parties may prefer arbitration due to its binding nature.

The significance of arbitration is appreciated too in Kenya. Kenya has specifically enacted the Arbitration Act[3] to apply to both domestic and international arbitration in terms of the process, compliance and the enforceability of the award.[4] Despite the very advantages of arbitration, the process has been dogged by several challenges including: the costs involved in terms of remuneration which is normally done per hour and travelling costs;[5] and the length of time involved in arbitration.[6]

In an attempt therefore to improve on the administration of justice in an efficient and cost effective manner, online arbitration has gained prominence. Gabrielle Kaufmann-Kohler & Thomas Schultz [7] define online dispute resolution as follows:

> ***"Online dispute resolution is a broad term that encompasses many forms of alternative dispute resolutions and court proceedings that incorporate the use of the internet, website, emails communications, streaming media and other information technology as part of the dispute resolution process. Parties may never meet face to face when participating in online dispute resolution, rather they might communicate solely online."***

[3] Chapter 4 of 1995, Laws of Kenya.
[4] Section 2... Ibid.
[5]See Mary GreenWood "What are the disadvantages & disadvantages of Binding Arbitration Over going directly to the court" Article available at **http://eziniearticles.com/?What-Are-the-Advantages-and-Disadvantages-of-Binding-Arbitration-Over-Going-Directly-to-Court?&id=1741021** (accessed on 26th March 2012)
[6] See "Net Arbitration Overcomes Drawbacks to Cyber-Arbitration" Article available on **http://www.net-arb.com/arbitration_drawbacks.php** (accessed on 26th March 2012).
[7]Gabrielle Kaufmann-Kohler & Thomas Schultz Online Dispute Resolution: Challenges for Contemporary Justice, Kluwer Law International, Netherland,(2004) Pg. 7 & 8

As international commerce continues to increase in online volume, so will disputes arising out of that online commerce.[8] Since arbitration, over litigation in a national court, is the preferred method to resolve international commercial disputes, online arbitration could be an alternative dispute resolution norm in the near future. National courts simply might not have the ability, the capacity, or the authority to effectively resolve numerous disputes that could arise.[9]

Further, online Arbitration has become a legitimate dispute resolution method virtually everywhere in the world with varying degrees of scope and application.[10] For example, the World Intellectual Property Organization (WIPO) has recently recommended online arbitration to resolve domain name disputes. However, before online arbitration can be readily accepted, it must be determined which basic rules will govern matters of proper administration, choice of law, jurisdiction, enforcement, and review. Currently there is no legal framework designed specifically for the conduct of online arbitration procedures which means that for now the rules of traditional arbitration should be used.[11] However even though the rules of traditional arbitration allow the existence of the online version, due to its unique characteristic, online arbitration requires special rules designed for it.

Therefore, online arbitration requires a legal framework that regulates the use of electronic means of communication in the procedure, the way in which notifications shall be performed and acknowledgement of receipt granted. The legal framework should also prescribe the responsibility of all the parties involved to take the necessary measures to ensure that the security and confidentiality of all the information exchanged is maintained.

[8] See Tiffany J. Lanier "where on earth does cyber arbitration occur?:international review of arbitration awards rendered online" available at **https://litigationessentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid** (accessed on 26th March 2012)
[9] Ibid
[10] Ibid
[11] Ibid

Normally there are three approaches to online dispute resolution namely, cyberspace, non-adjudicative ADR and arbitration.[12] As a mode of alternative dispute resolution, Online arbitration can be defined as a process by which parties may consensually submit a dispute to a non-governmental decision maker, selected by or for the parties, to render a binding or non-binding award, issuing a decision resolving a dispute in accordance with neutral procedure which includes due process in accordance with the party's agreement or arbitration tribunal decision. [13] It can either be conducted totally online by online means of communication or partly online by a combination of online and offline means.[14]

The development of information technology has revolutionized arbitration in terms of traditional arbitral practices and procedures. Nowadays, electronic submissions by emails and video-conferencing pioneered the IT-intense online arbitration which has seen the conclusion of arbitration agreements, proceedings and even rendering of awards by electronic means in online setting.[15]According to Gabrielle Kaufmann-Kohler[16] looking at Online Dispute Resolution from a technological gadget, it has become a major phenomenon in dispute settlement which obviously affects day to day running of ICA. It is in recognition of this

[12] Gabrielle & Thomas. *op. cit* 7. P. 8. Cyber space centers on the internet, cyber space, high technology and e-commerce. It is focused on computers and how they have changed the world, the law and dispute resolution. On the other hand non-adjudicative ADR focuses on negotiations and Mediation and the approach to dispute resolution is based on interests, feelings, emotions and communications. The common reasoning in this field is to reconstruct an architecture online that resembles offline negotiation and mediation where appropriate communication tools must be provided. Lastly arbitration emphasis on rights and application of the law to resolve the dispute by way of a decision. The usual reasoning in this field is to think that arbitration works well offline and it should be simply adopted to the online world which means that the procedure rules should be amended to allow for online communications with the main concern being how arbitration laws govern online proceedings and online awards

[13] See Farzaneh Badiel, "Online Arbitration Definition and its Distinctive Features" article available on **http://ceur-ws.org/Vol-684/paper8.pdf** (Accessed on 2nd April 2012)

[14] *Ibid.* In totally online arbitration the entire process is conducted online by use of email, video-conferencing and web-based communications while in partly online it is conducted using a combination of emails, video-conferencing and web-based communications and offline features such as live in-person hearings and use of fax and post for the submission of evidence, communication between arbitrators, and deliberation of award.

[15] Gabrielle & Thomas. *op. cit* 7. P. 8.

[16] See Gabrielle Kaufmann-Kohler, 'Online Dispute Resolution & its Significance for International Commercial Arbitration' Article available at **http://www.lk-k.com/data/document/online-dispute-resolution-and-its-significance-for-international-commercial-arbitration-global.pdf** (Accessed on 17.01.2012)

reality that ICC issued guidelines on the use of Information technology in arbitration[17] and devised a web based system for conducting and managing arbitration.[18]

The impacts of online arbitration in dispute resolution are varied and include the instant transmission of documents at a modest cost and elimination of travelling costs amongst others.[19] In order therefore to build on this inventive step in dispute resolution this thesis shall seek to critically look at the concept of online arbitration and then propose a legal framework for the applicability of online arbitration in Kenya. The proposed legal framework shall seek to address the envisaged challenges of online arbitration ranging from legal issues, practical issues, cross-cultural issues and inappropriateness of the internet medium[20].

Legal issues relates to validity of online arbitration agreement, forms requirement, how and where proceedings are conducted and enforceability of online agreements. The practical issues include security of the online proceedings, lack of face-to-face encounters while cross-cultural issues include language barriers and cultural differences. Further courts may be less likely to enforce online arbitral awards if they perceive that due process protections available in offline arbitration have been shortchanged.[21] The major challenge with online arbitration is that it is a new concept that has been embraced by some developed nations.[22]Africa for example has lagged behind when it comes to online arbitration and this paper will seek to assert that time

[17] *Ibid*. Operating Standards for Using IT in International Arbitration ("The Standards")' in *Using Technology to Resolve Business Disputes*, ICC ICArb. Bull. Special Supplement (ICC Publishing, 2004) 75. See also "Guidelines for Arbitrating Small Claims under the ICC Rules of Arbitration" available on **http://www.iccwbo.org/court/arbitration/id4095/index.html** (Accessed on 17th April 2012).

[18] M. Philippe, 'NetCase: "A New ICC Arbitration Facility' in Using Technology to Resolve Business Disputes" ICC ICArb. Bull. Special Supplement (ICC Publishing, 2004) 53

[19] *Ibid.*

[20] See Chambers Young, et al 'International Commercial Arbitration" article available at **http://lawyer.20m.com/English/articles/arbitration.htm** (accessed on 23rd February 2012)

[21]Norman Solovay & Cynthia K. Reed, "The Internet & Dispute Resolution: Untangling the Web" available at **http://books.google.co.ke/books** (Accessed on 23rd February 2012)

[22]Indeed European Union has proposed a free online dispute resolution platform for traders and consumers to resolve dispute through online. See "outlaw-com" available on **http://www.theregister.co.uk/2011/12/05/ec_proposes_free_online_dispute_resolution_platform/)** . (Accessed on 23rd February 2012)

has come for Kenya and other African countries to embrace online arbitration as a measure of curving down the disadvantages of the traditional arbitration.

1.2. Statement of the problem

Online arbitration could be the solution to various challenges facing traditional arbitration because of the advantages that come with it. However despite the very advantageous nature of online arbitration, the process is poised to be dogged by several challenges if not adequately addressed in a legal framework and through proper public awareness. There are compelling reasons for regulating online arbitration including the lack of trust on the process, the issue of enforcement, the applicable law in terms of territorial jurisdiction giving rise to conflict of laws and the issue of confidentiality.

This thesis seeks to determine the feasibility and benefits of developing and managing online arbitration in Kenya. The study will seek to explore the nature of online arbitration in general, the legal framework of online arbitration in Kenya with a case study of two countries that practice online arbitration. Through this research the compelling issue as to the kind of legal mechanism available for online arbitration in Kenya based on the need to address the challenges envisaged and based on the comparative analysis will be addressed.

1.3. Objectives of the Research

1.3.1. General Objective

1. To find out the scope for the development of online arbitration in Kenya.

1.3.2. Specific Objectives

a) To discuss the concept and the relevance of online arbitration in Kenya.

b) To determine relevant laws and regulations needed for the development of online arbitration in Kenya.

c) To discuss the comparative jurisdictional applicability of online arbitration.

1.4. Research questions

a) What is the relevance of the applicability of online arbitration in Kenya?

b) What are the emergent legal and non-legal issues associated with online arbitration in Kenya?

c) What are the issues that legislation intended to regulate online arbitration ought to address?

d) What is the appropriate legal and institutional framework to govern the applicability of online arbitration in Kenya?

e) How have other jurisdictions practicing online arbitration addressed the challenges facing online arbitration?

1.5. Hypothesis

This paper will work with the following three hypotheses:

a) Online arbitration with effective working mechanisms offers more advantages than traditional arbitration in Kenya.

b) There is need for a clear and coherent institutional and legal framework governing online arbitration in Kenya.

c) That online arbitration can be practiced effectively in Kenya if there is a legal framework regulating it.

1.6. Justification of the study

The study is justified in that it shall seek to explore a legally sustainable approach to online arbitration in Kenya. The novelty in the application of the concept of online arbitration as a

mode of alternative dispute resolution provides the very essence for this research. The study shall therefore act as a reference piece of material to the business fraternity, researchers, members of public and other academicians in enlightening them on how to carry out online arbitration and the advantages. This is more so for those individuals who may wish to carry business on the internet and especially with parties in different jurisdictions.

The research will also serve as a future reference for researchers who may want to carry out further research on online arbitration. Through this study a legally sustainable jurisprudence supported by law shall be established. Further, the study will well inform the enactment of the law on online arbitration in Kenya. This is because this study will seek to provide ways in which we can incorporate online arbitration in our system as a way forward. With the coming into place of e-Commerce where transactions are being done online, it's important that arbitration also embraces other ways of carrying out the proceedings so as to keep up with the new developments. Obviously online arbitration offers a good alternative to traditional arbitration.

1.7. Theoretical framework

This study will premise on various theories of arbitration, e-commerce and other theories of online transactions. Arbitration readily lends itself to a legal theory analysis.[23] The fundamentally philosophical notions of autonomy and freedom are at the heart of arbitration.[24] Similarly essential are the questions of legitimacy raised by the parties' freedom to favor a private form of dispute resolution over national courts, to choose their judges, to tailor the procedure and to choose the applicable rules of law, and by the arbitrators' freedom to

[23] E. Gaillard (2010), Legal Theory of International Arbitration Martinus Nijhoff Publishers, p.9
[24] *Ibid.*

determine their own jurisdiction, to shape the conduct of the proceedings and to choose the rules applicable to the dispute.[25]

The contract theory provides that nowhere does the dichotomy between personal autonomy and the collective will as a conceptual source of rights arise so graphically as in the context of contractual arbitration.[26] This theory is based on the contractual nature of arbitration and argues that arbitration originates from a valid agreement between the parties.[27] According to this theory therefore, arbitration should be carried as per the wishes of the parties as reflected in their arbitration agreement.[28] This theory denies any relationship between the arbitration proceedings and the law of the place where arbitration takes place.[29]

Although most proponents of this theory agree that arbitration agreements and proceedings may be influenced by the laws of a particular state, they maintain that arbitration has a contractual nature that emanates from the parties arbitration agreement.[30] The arbitration agreement is therefore taken as a contract between the parties involved which clearly states the parties' intentions of having their dispute resolved by arbitration.[31] While this paper identifies with the arguments from this theory, this paper will attempt to show that although party

[25] *Ibid.*
[26] See Edward M. Morgan, "Contract Theory and The Sources of Rights: An approach to the Arbitrability Question" article available at **https://litigation-essentials.lexisnexis.com/** (Accessed on 27th March 2012)
[27] See Hong -Lin-Yu "A Theoretical Overview Of The Foundations Of International Commercial Arbitration" article available at **http://www.law.ntu.edu.tw/center/wto/project/admin/SharePics/A_01_05%20pp%20255_Hong-%20Lin%20Yu.pdf** (Accessed on 27th March 2012*), see also the case of* ***Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 US 614 - Supreme Court 1985***
[28] *Ibid.*
[29] *Ibid.*
[30] *Ibid.*
[31] *Ibid.* This kind of contract is voluntary made between the parties and allows them to choose the time and place of arbitration, arbitrators and the laws governing both procedural and substantive matters.

autonomy is the cornerstone of arbitration,[32] parties cannot enter into the arbitration agreement where there are no laws to govern arbitration, like in the case of online arbitration.

Jurisdictional theory revolves around the authority of a state to regulate all arbitrations conducted within its jurisdiction. [33]It maintains that the validity of the arbitration agreement, the powers of the arbitral and the enforcement of the arbitral award all derive from a particular national legal system.[34] This study will rely on this theory to show the importance of jurisdictional theory in having a state come up with laws to regulate online arbitration.

The hybrid theory on the other hand recognizes the dual influence that defines the nature of arbitration.[35] It is premised on the argument that although arbitration derives its effectiveness from the agreement of the parties as set out in the arbitration agreement, arbitration has a jurisdictional nature involving the application of the rules of procedure.[36] The researcher will use this theory in showing how important it is to balance party autonomy and state regulation when it comes to online arbitration.

The autonomy theory[37], insists that arbitration should be viewed in a broad context rather than emphasizing the structure of the institution. The proponents argue that emphasis should be placed on its goals and objectives and that a complete picture of arbitration can only be presented by considering its use and purpose and the way in which it responds to the needs of

[32]Anoosha Boralessa, "The Limitations of Party Autonomy in ICSID Arbitration" article available at **https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid** (Accessed on 17th April 2012)
[33]Hong-Lin-Yu "A Theoretical Overview of the Foundations of International Commercial Arbitration" **http://www.law.ntu.edu.tw/center/wto/project/admin/SharePics/A_01_05%20pp%20255_Hong-%20Lin%20Yu.pdf** (Accessed on 14th April 2012)
[34]*Ibid.*
[35] *Ibid.*
[36] *Ibid.*
[37] *Ibid.*

the parties. This is the foundation of online arbitration where its main objective is to meet the needs of the parties involved.

We also have delocalization theory, under which if the award is issued by electronic means, domestic laws governing the e-commerce will decide the validity of the award.[38] In the absence of such a choice, under the traditional territorial approach, the online award will probably not be enforced because of the New York Convention. According to this theory, parties can contract to free the arbitration from any procedural law for the sake of their interest.[39]

Delocalization of the arbitral process and the final award would therefore mean that parties remain unaffected by unforeseen and undesired local procedural law, and do not face the risk that non-compliance with such law would render their award unforeseeable.[40] This theory will be useful in showing how online awards can be enforced online.

Drawing from social cognitive theory[41] and its notable determinant, self-efficacy, the present study attempts to show how individual online customers perceive themselves and other parties that they are dealing with in a variety of situations. According to this theory, individuals have specific goals with expectation of outcome and actively think and perform behaviors responding to the external environment in order to achieve their own goals. The theory asserts that individuals with higher self-efficacy can monitor their performance environment actively and perform well. With respect to online arbitration, this theory provides a powerful and clear

[38] See China Papers "Delocalization of International Commercial arbitration" article available at ***http://mt.china-papers.com/3/?p=55142*** **(**Accessed on 30th March 2012)
[39] *Ibid.*
[40] *Ibid.*
[41] Robert LaRose, "On the Negative Effects of E-Commerce: A Socio-cognitive Exploration of Unregulated Online Buying" available at **http://jcmc.indiana.edu/vol6/issue3/larose.html** (accessed on 14th April 2012)

explanation that people transacting business online controls and directs their series of decisions and actions.[42]

1.8. Research Methodology

The study will be library-based and will involve review and analysis of relevant primary and secondary data on the concept of online arbitration. The libraries at the Chartered Institute of Arbitrators, United Nations at Gigiri, the University of Nairobi School of Law Library and Jomo Kenyatta Memorial Library and the Library at the Hon. Attorney General's Chambers will be of utmost importance as resource centers for this study. The library at the Chartered Institute of Arbitrators and The United Nations Library at Gigiri will particularly provide reference materials in terms of Treaties and Conventions of an international nature on online arbitration as applied for example by the European Union. The two libraries at the University of Nairobi shall provide text books references that shall inform the theoretical understanding of the concept of arbitration and other modes of alternative dispute resolution mechanisms. The library at the Hon. Attorney General's office shall provide critical guidance since the Hon. Attorney General as the Chief Legal Government Advisor is tasked with the Drafting of several government bills, policies and sessional papers. In this regard, the research will entail exploration of secondary material including various national and international pieces of legislations, international instruments and reports, books, articles, and other relevant literature on the law on arbitration.

Due to the novelty of the research topic, the use of internet shall be of critical importance since most libraries might not have stocked the recent publications on online arbitration.

[42] See Young Hoon Kim et al " Exploring Online Transaction Self-Efficacy in Trust Building in B2C E-Commerce" available at **http://www.irma-international.org/viewtitle/3851/** (Accessed on 23rd March 2012)

1.9. Scope and Limitation

This study will look at the scope of online arbitration in Kenyan generally. The study will be limited to how online arbitration can be introduced in Kenya. This being a new area more so in Kenya, it might be difficult to find local materials and books which might limit the researcher to internet materials.

The foreseeable limitations in this method of study are three fold; bureaucracy, confidentiality and adequacy. Gaining access to the United Nations and Government libraries involves seeking and getting permission from relevant officers hence time consuming. Further, one is always limited in terms of the amount of hours one is allowed to use the library. Some of the government documents might not-be availed especially because of the confidentiality of the documents either because they are sensitive or the government does not want to expose its pitfalls for criticism. Further, the number of relevant books and articles available in the various libraries are few. In addition, there may be restriction in terms of the number of books and duration one can borrow hence limiting the ability to thoroughly interrogate them. The use of Internet is restrictive because there is need for power, availability of computer and the network and above all the issue of subscription which is expensive.

1.10. Literature Review

According to **Henry Vries**[43]arbitral process is based on contract rather than legal norms established by the states for the creation of judicial settlement of disputes. He defines arbitration as a mode of resolving disputes by one or more third persons who derive their powers from agreement of the parties and whose decision is binding upon them. Therefore

[43] Henry P.De Vries "International Commercial Arbitration; A contractual Substitute for National Courts" Article available at **https://litigationessentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype** (Accessed on 1st April 2012)

looking at the above definition of arbitration, certain essential characteristics of arbitration comes out. The first one is the autonomous nature of arbitration.[44] The second characteristic that comes out is the consensual nature of arbitration. This remains the cornerstone of arbitration as the powers and jurisdiction of arbitrators are determined by the intention of the parties as reflected in their contractual agreement.[45]

This cordial nature of arbitration has led some writers to conclude that arbitration is a private system of adjudication and that it is the parties and not the state that control the process.[46] As much as these arguments promote the private nature of arbitration, they are misleading by portraying that parties to arbitration have the exclusive rights of the arbitral process. The importance of national laws in arbitration cannot be ignored. This paper will seek to advance the argument that as much as party autonomy and consensus by parties to arbitration is important, national laws are needed as guidance for online arbitration and parties cannot just consent to it.

According to **Jana Herboczkova,**[47]online dispute resolution, has been developed as a new form of alternative dispute resolution mechanisms adapted to unique nature of cyber space.[48]According to the author, the use of computer technologies has influenced and

[44] Party autonomy has been defined as a choice of law doctrine that permits parties to choose the law of a particular country or sovereignty to govern their contract that involves two or more jurisdictions. See Mo Zhang "Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law" Article available on **http://www.law.emory.edu/fileadmin/journals/eilr/20/20.2/Zhang.pdf** (Accessed on 1st April 2012)

[45] See Redfern A. & Hunter M. (1991) Law & Practice of International Commercial Arbitration 2d ed. Sweet and Maxwell, London. P. 69.

[46]See Lew, J. (1978) Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards. Oceana Publications, Debbs Ferry, NY. P. 103

[47] Jana Herboczkova, "Certain Aspects of Online Arbitration" available at **http://www.law.muni.cz/sborniky/dp08/files/pdf/mezinaro/herboczkova.pdf** (Accessed on 1st April 2012)

[48] *Ibid.* The author defines online dispute resolution as a dispute resolution method that makes use of internet advantages and web and computer technologies,

simplified the arbitration process.[49] The author argues that online arbitration are better suited for resolving of online disputes as they are better suited to deal with technically complex matters, can more readily answer to rapid developments and create better conditions for delocalized transactions.

In his conclusion the author states that as much as online dispute resolution mechanisms are becoming more common it is highly unlikely that arbitration will use fully electronic procedures. It will be a combination of both online and traditional arbitration. This study identifies with the views of Jana Herboczkova but argues that online arbitration can be independent of traditional arbitration.

Some scholars have argued that online arbitration is indeed an improvement of traditional arbitration method and the traditional rules and principles cannot be simply translated to cyberspace arbitration.[50]This research shall therefore improve on this line of argument by capturing the ambit in which online arbitration shall operate without necessarily translating the traditional rules and principles of arbitration.

According to **Berger, K.P.** for now there is a hybrid form of online arbitration which combines the elements of traditional concept of arbitration as well as new set of rules that make this form of dispute resolution more independent.[51] This study will go further to demonstrate whether indeed we can have an all inclusive system of online arbitration.

[49]*Ibid*. The author attributes this positive development to simultaneous translation software that has been developed to facilitate participation of multilingual parties in real-time video conferences.
[50]De Sylva M.O (2001), Effective means of resolving distance selling disputes, 67 Arbitration, p. 230-239
[51] See Berger, K.P., "Lex Mercatoria Online: The CENTRAL Transitional Law Data Base"at ***www.tldb.de*** (Accessed on 4th April 2012)

The article by **Sylvia Mercado**[52] will be useful in this study as the author gives an overview of the legal framework of online arbitration and how it is be carried out. The author justifies the urgent need of cyber arbitration to the growth of electronic commerce where by every industry is being affected by the internet. The author also cautions against the risks involved in cyber-arbitration and advises on proper mechanisms being put in place to minimize the risks of online arbitration. In coming up with the legal framework for online arbitration in Kenya and how it can be incorporated in our systems, this study will borrow a lot from this author.

According to **Farzaneh Badiel,** online arbitration differs from the traditional arbitration.[53]According to the author online arbitration proceedings are either conducted totally online by online means of communication or partly online by a combination of online and offline means. Of important is that the author outlines distinctive features that differentiate online arbitration with traditional arbitration. This information will assist the researcher to come up with a detailed system of online arbitration in Kenya.

According to **Pablo Cortes**[54]legal studies on online arbitration agree that the existing law and arbitral principles do not prevent arbitration from taking place online. He supports his arguments by the fact that most arbitration providers have introduced some online dispute resolution tools into the arbitration process to take care of online arbitration.[55] This study while agreeing that online arbitration can still take place under the laws of traditional arbitration, it will seek to show that the existing laws do not comprehensively address issues

[52]Sylvia Mercado Kierkegaard**, "**Legal Conundrums in Cyber Arbitration" Article available on **http://www.iadis.net/final-uploads/200406C016.pdf** (Accessed on 4th April 2012)

[53]Farzaneh Badiel, "Online Arbitration Definition and its Distinctive Features" Article available on **http://Ceur-WS.Org/Vol-684/paper8.pdf** (Accessed on 4th April 2012)

[54]Pablo Cortes (2011), Online Dispute Resolution for Consumers in the European Union, Routledge 270 Madison Avenue, New York 106-109

[55] *Ibid*. According to the author those tools include the parties to download claim forms, the submissions of documents through standard email or secure web-interfaced. Some of the institutions that are using these tools include American Arbitration Association, World Intellectual Property Organisation, Arbitration and Mediation Centre and the Judicial Arbitration & Mediation Centre.

of online arbitration. It will show that online arbitration is better of practiced under its own laws.

According to **Dr. Kariuki Muigua**[56]there is a bright future for arbitration and alternative dispute resolution in Kenya and around the world. He attributes this to the renewed quest for legal systems of the world over to finding new and more effective ways of providing services to meet the needs of the people in an even greater array of human transactions. He sees the future of ADR in Kenya as bright and really promising in bringing out a society where dispute are disposed of more expeditiously and at a lower cost. The author rightly concludes that the use of arbitration in commercial and all other disputes where it is amenable is thus the way of the future if access to justice is to be realized in Kenya. This research identifies with the sentiments of the author but argues further that to fully enjoy the benefits of arbitration, it is very crucial that arbitration in Kenya embraces use of technology and embrace online arbitration.

Talat Fatima[57]talks about electronic and digital signatures[58] and crimes in relation to electronic signatures. According to the author authenticity of the document and identification of its maker is what the digital signature aims at. He argues that when it comes to electronic signatures the issue has been how to fix the authenticity of an electronic document with the transformation of commercial activities from handwritten instruments to online contracts. To address the issue of authenticity, there then arose a need to give permanence to the e-commerce so that the finished contract could be easily and legally adduced to its originator

[56] Kariuki Muigua (2012) Settling Disputes Through Arbitration in Kenya Lodana Publishers, pp.215-223
[57] Talat Fatima (2011) CyberCrimes, Eastern Book Company LuckNow PP. 273-398, 89-222.
[58] *Ibid.* The author defines a signature as any memorandum, mark or sigh made with intent to authenticate any instrument or writing or the subscription of any person's thereto. It also implies personal commitment to writing. A digital signature is the advanced form of an electronic signature where more sophisticated technology is used to secure it well and to make it more reliable and acceptable.

making them less vulnerable to forgery. The author also talks about various challenges of electronic signatures and how to deal with them. The author also brings out various types of computer and cyber crimes[59], legal issues involved in countering cyber crimes and the solutions. This book will be of great significant to research in proposing the legal framework for online arbitration in Kenya and the concern issues and how to address them.

According to **Donn B. Parker[60]** handwritten signatures and face –to-face or paper based transactions are being supplanted, at least partially by the use of electronic mail, electronic funds transfer systems (EFT), data transmissions networks, computer time-sharing services and automated payments systems. The author expresses confident that a new means of validating signatures and the information conveyed with them can be provided to a far greater degree of effectiveness than ever before by automated digital signatures. He gives an example of the use of encryption which is basically encoding the message with the secret code key that belongs to the sender as one method of signing transmissions. The author also addresses various safeguards and practices for securing electronic information. This book will be useful to the study in providing various ways in which one can ensure that information exchange and conduct of online arbitration is made secure.

According to **Chris Reed[61]** Electronic Data Interchange (EDI)[62]offers their users two potential benefit which can be of immense commercial value. First the abolition (or near abolition) of the physical, paper documents which previously effected the transaction reduces the costs of transaction and secondly the complete automation of the ordering/delivery/payment cycle.

[59] I*bid.* The author defines computer crime as a crime in which the perpetrator uses special knowledge about computer technology and entails crimes not only committed on the Internet but also offences committed in relation to or with the help of the computer and cyber crime as a crime in which the perpetrator uses special knowledge of cyber space or crimes directed at a computer or a computer systems.
[60] Donn B. Parker (1983) Fighting Computer Crime, Charles Scribner's Sons/New York PP. 68-74
[61] Chris Reed (ed)(1996) Computer Law, Blackstone Press Limited/London P. 297
[62] *Ibid.* The author defines Electronic Data Interchange as a technology for exchanging information

This research identifies with the arguments of the author and argues that arbitration can also enjoy the benefits of Electronic Data Interchange by use of online arbitration.

According to **Donn B. parker** [63]confidentiality and security are paramount in electronic transactions. He argues that confidentiality is concerned with the policies and the rules for the disclosure of personal information and control of that disclosure while security is purely a technological and operational issue and a means by which the confidentiality policies and rules may be correctly and effectively carried out. Consequently it is important that there be put in place legislations that require that safeguard or certain actions or sanctions when a computer system containing a data bank or private data is compromised for whatever targets accidentally or intentionally. This information is crucial to the study in supporting the need to have legislation on online arbitration so as to address issues of confidentiality and security.

An arbitration agreement forms the heart of arbitration as it carries with it the intentions of the parties. [64] The UNCITRAL Model law on arbitration, The New York Convention and even the Kenyan Arbitration Act requires the arbitration agreement to be in writing. The question then arises as to what is to be deemed as constituting a written agreement more so in the electronic context. The UNCITRAL Model Law on arbitration provides that an arbitration agreement will be taken to have complied with the writing requirement if the agreement is part of documents signed by parties or contained in an exchange of letters telex telegrams or other

[63] Donn B. Parker(1976) Crime By Computer Charles Scribner's Sons, New York P. 248

[64] An arbitration agreement is defined as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. It may be in form of an arbitration clause in a contract or in the form of a separate agreement.(see Article 7 (1)(2) of UNCITRAL Model Law)

means of telecommunication which provide a record of the agreement.[65] This requirement is also seen in the Kenyan Arbitration Act and the New York Convention.[66]

The question that arises is whether this definition covers all types of electronic communications. This study will show that these definitions are not enough and we need laws specifically on online arbitration. It will also show that while the UNCTRAL has come up with UNCTRAL model law on electronic signatures, it does not adequately cater for online arbitration like arbitral proceedings and enforcement of awards.

The India Technology Information Act for 2000 was enacted to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as electronic commerce. Some of the notable features of the Act includes focusing on data privacy, focusing on Information Security, defining cyber cafe, making digital signature technology neutral, defining reasonable security practices to be followed by corporate, redefining the role of intermediaries, recognizing the role of Indian Computer Emergency Response Team, inclusion of some additional cyber crimes like child pornography and cyber terrorism and authorizing an Inspector to investigate cyber offences. The importance of this Act in this study is that in proposing a legal framework for online arbitration in Kenya, the study will highly rely heavily on the Act.

According to Singh & Lakshay Dhamija[67] in order to differentiate Conventional Arbitration which requires the applicability of Arbitration and Conciliation Act, 1996, the Online Arbitration, as the name suggests, besides the applicability of Arbitration and Conciliation

[65] See Article 7(2) of the UNCITRAL Model Law
[66] See Section 4 of the Arbitration Act and Article III of the New York Convention
[67] Singh & Lakshay Dhamija, "Online arbitration from India perspective", available at **http://www.lexology.com/library/detail.aspx?g=e09b721e-807b-4c8b-8451-da416874f39f** (Accessed on 24th November 2012)

Act, 1996 also requires the aid of technological related laws, particularly the Information Technology Act, 2000. In other words, it can be said that Online Arbitration is a blend of conventional Arbitration with the taste of technology in it. They argue that Online Arbitration should be a preferred way of dispute resolution since it is fast, economic and efficient. Online Arbitration in India is still conducted by traditional arbitration rules even though it is a new method to conduct dispute resolution. The parties and the arbitrators in an online arbitration should always consider the legality of the applicable arbitration agreements and procedures, choice of law, seat of arbitration and form of the awards. These precautions will assist online arbitration to work within the framework of existing national and international treaties. However, online arbitration should develop its own rules over the course of time. It is clear that Online Arbitration is not different from what the conventional arbitration is. The only difference is the omission of physical platform and introduction of a virtual platform.

According to Chenoy Ceil[68] the rapid expansion of commercial transactions and globalization has given rise to spiraling growth in arbitration at the national as well as international stages. Arbitration is one of the modern techniques of alternative dispute resolution that has gained a lot of prominence due to the freedom it offers to the disputants. Online Arbitration is a mixture of conventional Arbitration under Arbitration & Conciliation Act 1996, combined with technological features requiring application of Information Technology Act 2000. The author argues that the future of arbitration is online arbitration if India wants to cut down on its ever increasing backlog of cases and this form of ADR would allow quick settlements to international as well as domestic business entities. This paper will use the observations by the author to emphasis the reason why online arbitration is now ripe for practice in Kenya.

[68] Chenoy Ceil, "Dimensions of Online Arbitration in India" available at **http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2078896** (Accessed on 24th November 2012)

The Kenya Communication (amendment) Act 2008[69] is very relevant to this study. The Act in part VIA provides for electronic transactions by recognizing digital signatures and documents in electronic form. This study will rely on this Act to show that online arbitration can be conducted in Kenya by relying on the Arbitration Act[70] and the Kenya Communication (amendment) Act 2008. While relying on the provisions of the India Technology Information Act for 2000, the paper will show that although the amendments in the Kenyan Act is a step forward in recognizing the role of technology in e-commerce, it does not address most of the concerns of e-transaction. This therefore calls for standalone legislation on e-transactions.

1.11. Chapter Breakdown

Chapter One

Chapter One will give a brief background of the concept of online arbitration as a tool for efficient alternative dispute settlement. The aim of the chapter will be to lay a foundation and framework for the entire study. In this regard it provides for the statement of the problem of study, the objectives of the study, the research questions, the theoretical framework, the research methodology and the various literature materials to be used as references.

Chapter Two

Chapter Two will explore the scope of the concept of online arbitration. The chapter shall focus on the arguments for and against online arbitration. In this regard, the chapter will explore the advantages and disadvantages of online arbitration as compared to traditional arbitration. In order to bring out the arguments clearly, the chapter will look at ODR in general and its background. In particular an understanding of the rationale behind the concept of

[69] Act No. 1 of 2009
[70] Cap 49 Laws of Kenya

online arbitration will be justified since the study argues in support of it. The chapter will also look at the procedure for online arbitration and how the shortcomings of online arbitration can be addressed so as to maximize the benefits of online arbitration.

Chapter Three

Chapter three will deal with the legal framework for online arbitration in Kenya. The Chapter will highlight and discuss the emergent issues surrounding the applicability and regulation of online arbitration. In particular, the chapter discusses the relevant regulatory issues that need to be addressed in regulating online arbitration. In so doing, the chapter outlines urgent issues that must be addressed by any system of regulation of online arbitration for it to be effective including need for innovation, addressing customer protection issues, dealing with risks, the compliance and legal force of the process and the outcome. Through this well thought out, researched and informed recommendations on the way forward shall be offered. The chapter will also briefly analyse various legislations that affect online arbitration, their adequacy and how they can be improved.

Chapter Four

This chapter will look at comparative study of online arbitration. The study will look at two countries which has successfully incorporated online arbitration in their systems. These are Canada and India. The justification for using India is that India being a developing country like Kenya, we can borrow a leaf from them and apply it in our own legislation. Further India being a signatory to the model law, has embraced most of the principles declared therein in its legal systems. The country has also given recognition to many of electronic practices. For example, the definition of the term evidence has been amended to include the electronic evidence and giving electronic records legal recognition. This therefore makes India a good case study for this research.

On the other hand Canada has a legislation[71] to protect electronic documents. The Act in part two provides framework by which federal statutes and regulation may be adjusted to accommodate electronic alternatives to paper based means of communication.[72]In 2005, Secure Electronic Signature Regulations were enacted under the Act to enhance security for electronic signatures. In addition since Canada was amongst the first countries to experiment Online Dispute Resolution, Kenya can learn how it has evolved to where it is now. [73]

Chapter Five

Chapter Five will offer recommendations and conclusions on the study. The Chapter will sum up the findings in the preceding Chapters and offer a clear and understandable jurisprudence on the way forward. In this chapter, a clear regulatory model to realize the full potential of online arbitration in terms of legal standards on the use, compliance and the legal force of the award shall be proposed.

[71] Personal Information Protection and Electronic Documents Act, *S.C. 2000, c.*
[72] See sections 44, 45, 46, 42 and 39 which allows electronic signatures for sworn statements, statements declaring the truth, witnessed documents, originals and sealed documents.
[73] See Saleh Jaberi "Online Arbitration: A vehicle for Dispute Resolution in Electronic Commerce" Article available at **http://vu.academia.edu/SalehJaberi/Papers/1849896/Online_arbitration_A_vehicle_for_dispute_resolution_in_Electronic_commerce** (Accessed on 17th September 2012). The author argues that the first experiments in Online Dispute Resolution were made during 1996 in United States and 1997 in Canada.

Chapter Two

Online Arbitration

2.1. Introduction

The advent of arbitration as a tool in civil case management has ushered in a new management culture of cases in a manner aimed at achieving the just determination of the proceedings ensures the efficient use of the available judicial and administrative resources and results in the timely disposal of the proceeding at a cost affordable by the respective parties.

In order to attain this fore stated objectives that culture must include where appropriate the use of suitable technology. Of all existing dispute resolution mechanisms, arbitration seems to be the most natural to conduct online.[74] One reason for this is that the records brought into arbitration proceedings are mostly in writing and can easily be replaced by electronic files as most paper documents are nowadays generated using computers.[75] However, doubts might be expressed as to the feasibility of processing information electronically when, as is often the case in international arbitrations, huge quantities of documents are involved. [76]

A second reason for thinking that online procedures are particularly suited to arbitration is that the parties are often far apart and may even be on opposite sides of the globe. Such physical separation becomes insignificant online.[77]

[74] See Arno R. Lodder & Gerard A.W "Online Arbitration services at a Turning Point: an Appraisal" available at **http://pubs.cli.vu/pub184.php** (Accessed on 10th September 2012)
[75] *Ibid.*
[76] *Ibid.*
[77] *Ibid.*

It is therefore not surprising that one of the first ODR initiatives was an online arbitration project: Virtual Magistrate.[78] This project, which began in 1996, dealt with only one case. It was brought by American Online (AOL) and concerned spam on the Internet. However, the parties settled before a decision was rendered.[79]

In this regard the adoption and the practice of online arbitration will be much appropriate. The appropriateness of the online arbitration is further buttressed by the fact that electronic commerce is the largest and fastest growing market in the world, offering online consumers a vast selection of products and businesses an enormous customer base. Further, the increasing number of internet users is impacting in the growth of business to consumer e-commerce.[80] In Kenya for example, there has been a marked improvement on internet usage. According to the 2010 statistics, out of a population of 41,020,934 people, 3,995,500 people uses internet. This represents a 9.7 percent, an increase of almost 100 per cent where the percentage of users stood at 3.6 percent.[81]

It follows therefore that all provisions and rules in the relevant Statutes[82] governing arbitration must recognize and regulate the use of online arbitration. The online arbitration is certainly not going to be a magic potion capable of solving all our problems in the civil justice system. Instead it is a challenge to every party involved in every matter that comes up before it. The best design for each matter will be determined on a case to case basis; and above all the attainment of the objective at least in the short term will depend on the skills, innovativeness

[78] *Ibid.*
[79] *Ibid.*
[80] M. Kuneva, , "Consumer Strategy 2007-2013", Brussels, Press Conference, 13th March, 2007. Accessed from ***http://books.google.co.ke/books?id=OxayBHnZ6hQC&pg=PA244&lpg=PA244&dq=M.+Kuneva,+Commissioner+for+Consumer+Protection,+%E2%80%9CConsumer+Strategy+2007-*****.** **(**Accessed on 25th June 2012.)
[81] "Internet World Stats, Usage and Population Statistics in Kenya". Available at ***http://www.internetworldstats.com/af/ke.htm*****.** (Accessed on 25th June 2012)
[82] The Arbitration Act, Cap 4 of 1995.

and the commitment of the government, chartered institute of arbitrators and the business community and Kenyans at large in assisting towards the attainment of the objective by, for example, undertaking a continuous review of the rules so as to retain those that would serve the interests of the objective and shed off those that hinder the objective. In the long term, we believe that best practices and precedents will emerge for use and improvement by future generations.

To be able to understand the concept of online arbitration, then an understanding of what e-commerce is and the nature of electronic transactions is very crucial. In this regards, the chapter will briefly look at what e-commerce is all about and an overview of online dispute resolution.

This chapter shall then explore the scope of online arbitration. The study shall focus on the arguments for and against online arbitration. In particular an understanding of the rationale behind online arbitration will be justified since the study argues in support of it.

2.2. Overview of E-Commerce

With the rapid growth of technology, the increasing use of the Internet, and the advancement in information and communications technologies, businesses around the world are increasingly changing the way they do business. Furthermore, with the emergence of the global economy, e-commerce is fast being regarded as the way to go global at the touch of a button. This new development is faced with many challenges that include the use of the new technology and communication medium, and the flow of information from enterprise to enterprise, from enterprise to consumers, and also within the enterprise.

E-commerce is the buying and selling of goods and services on the Internet, especially the World Wide Web. In practice, this term and a newer term, e-business, are often used interchangeably. For online retail selling, the term e-tailing is sometimes used. E-commerce is gaining ground globally and Kenya as an emerging economy and regional reader lags behind in having a legal framework for e-commerce in place.

As e-commerce gains prominence so will the disputes arising out of those transactions will increase. This is where online dispute resolution mechanisms come into play since parties in e-commerce are normally in different jurisdictions. Therefore a comprehensive legislation dealing with e-commerce is needed. In recognition of the importance of e-commerce, Kenya amended The Kenya Information and Communication Act[83] in 2008 to legalize e-commerce transactions by recognizing electronic signatures. While this move is very commendable, it is important that Kenya enacts a standing legislation on electronic transactions to purely manage and control e-commerce risks.

In light of the speed with which technology is advancing, it remains questionable whether the current legislative frameworks are sufficient to deal with the challenges modern technology poses to businesses and consumers undertaking electronic transactions. It will be important for the legislature to remain abreast of the developments and implement safeguards as they become necessary.

2.3. The Nature of E-Commerce Disputes

The nature of online transactions makes entering into a contract much easier and certainly much more subtle. Technology is obviously challenging the essential requirements of contracts, which include the meeting of the minds, acceptance, consideration and in some

[83] Cap 411 Laws of Kenya

instances writing. Online methods of contracting, such as through email or through agreement, for example, when purchasing goods online, often do not highlight to the consumer how significant their actions are and that they are entering into binding contractual relations.

Some of the challenges of e-commerce are that it involves parties from different member states mostly in civil commercial matters, and the ambiguity of jurisdiction when dealing with Internet related affairs. Indeed in recent cases the European Court of Justice has held that the mere fact that a company offers their service via the Internet does not mean that they are being directed to consumers in other member states. The ruling highlighted the importance of protective jurisdiction for the consumer in cases of cross-border commercial dispute[84]

2.4. Types of Online Disputes

Online disputes can be divided into two types, contractual and non-contractual disputes. Contractual disputes are those that arise between the business enterprise and the Internet Service Provider or web-hosting services provider.[85] On the other hand non-contractual disputes arise out of the normal business between the parties but not out of the contract.

Contractual disputes can be divided into four types. The first one is Business-to-Business which is disputes between the enterprise and its suppliers.[86] The second type is Business-to-consumer which is a dispute between the enterprise and its customers.[87] It is between the enterprise and its customers that lay the greatest possible scope for disputes. The third type is

[84] **Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG (C-585/08) and Hotel Alpenhof GesmbH v Oliver Heller (C-144/09)**. Available at **http://curia.europa.eu/juris/liste.jsf?language=en&num=C-585/08** Accessed on 22nd November 2012)

[85] Such disputes may arise because of interruptions in service or breach in data security.

[86] Examples on Business-to-Business disputes are non-performance of contractual obligations, misrepresentations and complaints from customers regarding services by suppliers.

[87] Examples of such disputes include non-payment for goods or services, non-performance of contractual obligations, poor performance of contract, misrepresentations, breach of the privacy policy and breach of security of confidential information.

Customer to Customer where direct interaction between customers takes place.[88] The last one is Customer to Business where the customer requests a specific service from the business.

On the other hand non- contractual disputes are the common kinds of disputes that may arise in an online enterprise.[89] They include disputes regarding copyright[90], data protection[91], right of free expression[92] and competition law and domain name disputes.[93]

Although many of the issues like jurisdiction, choice of law, high cost of cross-jurisdictional litigation which arises in relation to the different categories of disputes are similar, the difficulties are perhaps more pronounced in respect of Business-to-Consumer transactional disputes which are often of small monetary value. Traditional methods of resolving cross-jurisdictional commercial disputes, such as international commercial arbitration, are often too costly, inconvenient and burdensome in the context of consumer disputes hence the need for ODR.

2.5. Back Ground of Online Dispute Resolution

The development of online dispute resolution can be divided into three phases. The first phase normally referred to as the elementary stage lasted until about 1995. The second phase referred to as the experimental stage is dated from 1995 to 1998 or 1999 and the third phase is

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[88] Where a customer lists items for sale with a commercial auction site and other customers access the site and place bids on the items.

[89] Text Available at **http://cyber.law.harvard.edu/ecommerce/disputes.html** (Accessed on 22nd November 2012)

[90] The enterprise might be liable for copyright infringement if it uses copyrighted material in excess of fair use, and without permission.

[91] The enterprise may be liable for sharing or revealing confidential data on customers, as discussed in the segment on Privacy

[92] The enterprise may be subject to defamation suits for defamatory material posted online.

[93] The enterprise may be subject to trademark infringement suits if it infringes a registered or otherwise legally recognized trademark

referred to as entrepreneurial stage which is the current phase.94 Indeed the first commercial spam case occurred in April 1994.[95]

The idea for ODR emerged out of a recognition that disputes would multiply as the range of online activities grew. Thus, the origins of ODR are traceable to a simple insight: the more online transactions there are, the more online disputes there will be.[96] ODR is intimately tied to the expansion and development of the Internet. The role of ODR in cyberspace will be greatest where there is a high degree of interactivity between a wide variety of users.[97]

E-commerce and the internet offer a wide range of opportunities. Indeed the use of internet has made it possible for businesses to expand their markets and render their services to a large group of e-consumers. As in all other transactions including offline transactions, e-transactions will most likely result in e-disputes. Therefore in order to boost the e-commerce it is crucial that all parties concerned feel that in the event a dispute occurs it can be resolved adequately.

It has been recognized that ODR will be a helpful means of solving the growing number of e-disputes.98 This is because of the uncertainties over the legal framework in national laws.[99]

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[94] Haitham A. Haloush & Bashar H. Malkawi, "Internet Characteristics and Online Alternative Dispute Resolution" Available at **http://www.hnlr.org/print/wp-content/uploads/2009/06/Haloush_Malkawi.pdf** (Accessed on 22nd |November 2012)

[95] R. Everett-Church, "The spam that started it all", Wired News, April 13, 1999, online: available at **<www.wired.com/news/politics/0,1283,19098,00.html>.** (Accessed on 22nd November 2012)

[96] Haitham & Bashar, *op cit* 95.

[97] E. Casey Lide (1996) ADR and Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation 12 Ohio St. J. on Disp. Resol. P.193.

[98] Esther Van den Heuvel, "Online Dispute Resolution As a Solution to Cross-Border E-Disputes" available at **http://www.oecd.org/internet/consumerpolicy/1878940.pdf** (Accessed on 22nd November 2012)

[99] See also "OECD Guidelines for Consumer Protection in the Context of Electronic Commerce" available at **http://www.oecd.org/dsti/sti/it/ec/index.htm** (Accessed on 22nd November 2012). The guidelines encourages businesses, consumer representatives and the governments to wok together to provide consumers with meangful access to fair and timely alternative dispute resolution and redress without undue cost and burden with special emphasis on the innovative use of information technology.

Online dispute resolution can be defined as a form of ADR that takes the advantage of the speed and convenience of the internet and technology to settle disputes. It is the best option for enhancing the redress of consumer grievances, strengthening their trust in the market and promoting the sustainable growth of e-commerce. In particular ODR is best suited in settling complaints that are characterized for being cross-border, low value high volume and occurred between internet users. [100]

There are two forms of ODR namely traditional and hybrid.[101] Traditional ODR restricts all negotiation to an online setting while, hybrid ODR is conducted partially online and in-person. Traditional ODR can be done through Computer program assisted ODR or A computer program is first used, but if that fails, a mediator will be introduced to assist the parties and also through Telecommunication.[102]

On the other hand hybrid ODR is done through a combination of online and offline meetings. It combines both the benefits of traditional ADR and the efficiencies of ODR. Parties meet initially in-person session, but break off into separate groups to think of a plan of settlement on their own. The parties are encouraged to relay the information and forth and to the mediator. The parties are free to discuss using online communication programs. Once the parties have made progress in their discussions, they may meet with the mediator again. The mediator acts as a moderator between the parties assigning homework to the parties. The mediator may instruct the parties to consider certain possibilities or come up with a draft agreement. This model of hybrid ODR is ideal with complex problems that would require traditional ADR. However, this model allows the parties more flexibility in travel and time.

[100] Pablo Cortes "What is Online Dispute Resolution?" Available at **http://www.csls.ox.ac.uk/documents/HandoutPC.pdf** (Accessed on 22nd November 2012)
[101] *Ibid.*
[102] *Ibid.*

Caucus is not restricted by location rental hours and parties are relieved from the pressure that the adverse party is physically close to them.[103]

2.6. Differences between ODR & ADR

Online dispute resolution utilizes the Internet as a more efficient medium for parties to resolve their disputes through a variety of ADR methods similar to traditional ADR. Using computer-networking technology, ODR brings disputing parties together online to participate in a dialogue about resolving their dispute.

The most challenging and perplexing difference between ODR and ADR seems to be the absence of boundaries in ODR.[104] Our real space legal jurisdictions are essentially defined by geography, by the physical boundaries of space. Issues of personal jurisdiction and choice of law in the real world depend on where the action takes place. In ODR, there are no geographic boundaries. Communication in ODR knows no borders. It is everywhere and nowhere in particular. It cuts across national borders and undermines the relationship between geographical location and the power of local government's efforts to regulate online behavior. How to deal with issues of boundary, jurisdiction, and choice of law across state and national boundaries are problems that are unique to the Internet.[105]

The role of technology in mediating communication between parties is seen as the main difference between ODR and other methods of dispute resolution.[106] Yet ODR applies technology to achieve the very same goal with ADR of helping people to resolve their disputes.

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[103] *Ibid.*
[104] Esther *op cit* 99
[105] *Ibid.*
[106] *Ibid.*

Generally, the complainant begins the ODR process by registering the complaint online with an ODR provider. The ODR provider will then contact the other party using the information provided, and invite that other party to participate in the ODR process. If the other party accepts the invitation, he or she will file a response to the complaint.

The role of ODR in the context of other dispute resolution mechanisms has been often viewed through the prism of achievements of the ADR movement. As noted by Katsh & Rifkin, "over the last quarter century, ADR has proven that moving justice away from the courthouse is often desirable and that the arena of dispute resolution, once thought to be the exclusive domain of law and courts, is markedly different from what it was several decades ago."[107] While ADR has moved dispute resolution away from litigation and the courts, online dispute resolution extends this trend even further. ODR represents a move from a fixed and formal process to a nonphysical to a virtual place[108], and makes dispute resolution even more flexible and convenient. The Internet has brought ADR directly to each individual's personal computer.[109] ODR can combine the effectiveness of ADR with the comfort of the Internet.[110]

ADR was the original model for ODR, and many goals and techniques of ADR will certainly remain goals and techniques of ODR.[111] Indeed ODR started out as the administration of ADR processes online and was seen as a way to replicate face-to-face interaction when such interaction was not possible. Today, since high-quality videoconferencing systems are not yet easily affordable, communications in ODR are mainly textual and asynchronous. The principal

[107] Katsh, Etan, Rifkin, Janet (2001), Online Dispute Resolution: resolving conflicts in Cyberspace Jossey Bass San Francisco. P. 39.
[108] Arno R. Lodder and John Zeleznikow (2005), "Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems in a Three-Step Model" 10 Harv. Negotiation L. Rev. 287 at 297.
[109] Martin C. Karamon (1996) ADR on the Internet 11 Ohio St. J. on Disp. Resol. 537 at p. 548.
[110] Lodder and Zeleznikow, *op cit* 74 p. 337.
[111] Ethan Katsh, (2004/2005) "Bringing Online Dispute Resolution to Virtual Worlds: Creating Processes through Code" vol. 49 N.Y.L. Sch. L. Rev. 271 at p.285 .

means of communication are thus email and web-based communications, i.e. chat rooms and bulletin boards.[112] Regardless of the quality and accessibility of videoconferencing however, of course ODR will never completely replace the face-to-face encounter. ODR should not be seen as a competitor or substitute for offline alternative dispute resolution, but rather a natural response to the emergence of new sphere of human activity and, consequently, new types of conflicts.

Although online dispute resolution borrows so much from ADR, its place is in a very different environment. In cyberspace, communication transcends time, space, and physical reality.[113] These unique characteristics inevitably influence the nature and type of disputes arising on the Internet, and thereby the type of dispute resolution process best suited for the forum.[114] As the Internet grows, new forms and techniques of ODR are being developed, such as software that helps parties to brainstorm, identify their interests and priorities, or organize and focus their conversation. As a result, ODR becomes increasingly independent from the world of offline ADR. Online technology presents us with opportunities to develop new tools for dispute resolution that might be employed in both online and offline environments.[115] While ODR still borrows much from ADR, it seems that in the future ADR will also borrow from ODR

2.7. Types of Online Dispute Resolution Methods

There are four categories of ODR systems. The first one is online settlement where an expert system is automatically used to settle financial claims. The second one is online resolution of consumer complaints using e-mail to handle certain types of consumer complaint, thirdly

[112] Thomas Schultz, (2004) "Does Online Dispute Resolution Need Governmental Intervention? The Case for Architectures of Control and Trust" 6 N.C. J.L. & Tech. 71 at p.74.
[113] *ibid.*
[114] *ibid.*
[115] *ibid.*

online mediation which is done using a website to resolve disputes with the aid of qualified mediators and lastly online arbitration which is the subject of this study.

The ODR providers employ one or more of the following dispute resolution techniques or mechanisms; arbitration, mediation, or negotiation. Arbitration involves a decision by an arbitrator, which parties have agreed by contract to be binding. Mediation involves facilitation of communication and problem-solving by a mediator. A settlement is reached only if both parties consent.

The arbitration and mediation processes utilize email, chat or messaging software, audio-conferencing or video-conferencing software for communication between the arbitrator/mediator and the parties.

Online negotiation may involve use of email or messaging, or may utilize heavily automated systems. Blind bidding refers to a system of settlement in which the ODR provider's software accepts confidential offers and demands from the parties, and records a settlement if the offer and demand are within a pre-specified range from each other. If there is no settlement, the other party will not know what the submitted bids were. So-called "peer pressure" services involve the use of publicity about the ongoing dispute to create an incentive for the online merchant to resolve the dispute.[116]

The first website to offer online negotiation was the Cybersettle in the United States of America[117] which offered settlement of financial disputes. The programme is initiated by the

[116] An example of an ODR provider that utilizes this technique is iLevel (Website) (iLevel).
[117] Isabelle Manevy, "Online Dispute Resolution: what future?". Available at ***http://www.juriscom.net.*** (Accessed on 25th June, 2012.)

claimant[118]who is assigned a password to ensure privacy and unauthorized access and enters three figures constituting demands in different amount. The other party is then notified that the case is online and available for settlement and also enters three amounts. The amounts are then compared. The advantage of this procedure is that it avoids conflicts that can occur in personal negotiations. In addition the non-disclosure of successful offers encourages the parties to be more realistic in their evaluation.[119]

Another website offering negotiation online is the ClickNSettle which offers two settlement options; one for personal injury and workers compensation claims and the other for other types of monetary disputes. [120] The complainant institutes settlement negotiations but has an option of resulting to mediation or arbitration if the negotiations are not successful. Parties are also given an option of closed or open negotiation model. Under closed model parties cannot see the other parties demand or offers while under open model party can view the other party's offer or demand but only after making the demand or offer.

The other website offering negotiations online is the smartsettle. [121]It offers support for simple and complex disputes through a patented neutral site by integrating interest-based negotiations principles with technology designed to optimize settlements.[122]There is a neutral that helps the parties to jointly model their negotiation problem and then assists each party individually input their confidential preferences from their private computers.

[118] Text available on **http://www.cybersettle.com** (Accessed on 25th November 2012)
[119] *Ibid*
[120] Isabelle, *op cit* 118.
[121] Text available at **http://www.smartsettle.com** (Accessed on 25th November 2012)
[122] Wiener, Alan "opportunities and Initiatives in Online Dispute Resolution" Society for Professionals in Dispute Resolution (SPIDR) News, Summer 2000, Vol. 24 available at **http://www.mediate.com/articles/BeyondWinWin.html** (Accessed on 25th November 2012)

On the other hand when it comes to online mediation, the complainant initiates the process by completing a confidential form on the providers' websites. A mediator then contacts the respondent in order for him to participate. Both parties set the mediation ground rules. If an agreement is reached it usually takes the form of writing.

An example of online mediation institute is the Online Resolution.com in America which offers online mediation and arbitration. After the complainant registers the dispute, the ODR service provider contacts the respondent. If the other party agrees, then mediation commences.

2.8. General Standards of Online Dispute Resolution

Just like in ADR, there should be minimum standards that need to be complied with when settling disputes through ODR. The first requirement of any ODR is that it must independence neutral and impartial. This means that the ODR provider must be sufficiently independent from both the online business provider and the consumer in order to guarantee the impartiality of its actions. Secondly ODR should be provided to consumers free of charge or at a moderate cost, while taking into account the need to avoid frivolous claims.[123] The third requirement is that ODR service should be easily accessible to consumers. Fourthly, the ODR process should provide quick decisions or settlements, as the case may be. An inefficient process adds to the total cost of dispute resolution that the online parties would have to bear. The fifth requirement is that ODR mechanisms should function according to published rules of procedure that describe unambiguously all relevant elements necessary to enable customers seeking redress to make fully informed decisions on whether they wish to use the ADR services offered.

[123] The Online Ombuds Office by Center for Information Technology and Dispute Resolution at the University of Massachusetts (Website) (UMass) does not charge for its service.

ODR procedure should also provide a reasonable opportunity for all parties to present their viewpoints before the ODR professional and to hear the arguments and facts put forward by the other party. The personnel employed to assist in resolving the dispute should also be properly qualified in dispute resolution and use of technology applied. The process should also be able to permit representation by third parties. The ODR providers may also reach decisions or settlements based on equitable principles and/or on the basis of codes of conduct rather than strict legal rules. The process should also be voluntary and without prejudice to consumers entitlement to seek redress in the courts. Lastly ODR should balance between the principle of confidentiality and means of ensuring public accountability.

2.9. Advantages of ODR

Online Dispute resolution offers various advantages over the offline alternative dispute resolution methods. Some of these advantages include**;** Efficiency savings are generally from the ability of the parties to conduct settlement discussions anywhere anytime regardless of time zone and location differences. Furthermore, those who require special accommodations can easily participate in the ODR process without making extra arrangements. With these efficiencies, disputes can be resolved more quickly and easily.

ODR also bypass jurisdictional problems that traditional ADR systems encounter. With more transactions taking place across borders, it is uncertain as to which laws the parties should follow. In traditional ADR, parties sometimes have the mistaken assumption that the laws where they reside should be the governing law. ODR, on the other hand, follows traditional internet community culture, also called “netiquette”. Many communities on the internet have its own set of rules and norms which users are expected to follow. As such, rather than applying the laws of a particular jurisdiction, settlement discussions can be governed by the

rules of that community. By following the norms of a virtual community, the power to determine the rules that govern people's conduct is put back at the user-level rather than an administrative level. All users of the virtual community have an opportunity to shape community standards by their participation. Hence, negotiation, mediation or arbitration based on the community set rules will be perceived as fair and predictable.

Traditional ODR that does not require face-to-face meetings between parties can eliminate any visual or audio discrimination parties may have against each other. Since none of the parties are aware of the appearance of the other participants, any presumptions about that person based on their appearance or manner of speech can be eliminated.

ODR can also ensure a friendlier tone of communication between parties. This is particularly true when the ODR process is based on written correspondence. Instead of allowing emotions to interfere with the ODR process, parties have the opportunity to calm down and deliberate on how they will craft and write out their response.

Online dispute resolution can save time and money than the traditional ADR. In terms of cost saving good example is Square Trade which offers its direct negotiation process for free but charges only when a mediator gets involved. In addition a consumer is more likely to accept ODR to resolve a dispute because there are no travel expenses and the overall costs will be reduced compared to traditional ADR.

When it comes to saving time since most ODR sites are open twenty four hour a day in all days of the week, parties can participate in ODR from their computers at wherever they are.[124] It also saves time that parties could have used to travel.

The convenience of ODR more so to parties that have access to the internet cannot be overstated. One can decide when to respond and there are even more process options open to them and ability to engage the services of an expert.[125]

2.10. Online Arbitration Vis a Vis Traditional Arbitration

Various authors have attempted to define the term arbitration. Khan[126]defines arbitration as a private consensual process whereby parties in dispute agrees to present their grievances to a third party for resolution. According to Dr. Kariuki Muigua[127] R. barnstein defines arbitration as: "***a mechanism for the resolution of disputes, which takes place usually in private, pursuant to an agreement between two or more parties under which the parties agree to be bound by the decision to be given by the arbitrator according to law or if so agreed other considerations after a full hearing, such decisions being enforceable at law"***

Therefore one can conclude that for a process to be termed as arbitration it should comprise various elements. Such elements include mutual consent to submit the dispute to arbitration, choice of arbitrators, due process and a binding decision. This study will analyze each of these elements in an attempt to compare online and traditional arbitration.

[124] Isabelle, *op cit* 118.
[125] *Ibid.*
[126] Farooq Khan, *Alternative Dispute resolution,* A Paper Presented at the Chartered Institute of Arbitrators-Kenya Branch during the Advanced Arbitration Course held on 8-9th March 2007, at Nairobi
[127] Kariuki, *op cit* 56, p. 223

2.11. Mutual Consent To Submit to Arbitration

Mutual consent is one of the basic elements of traditional arbitration and is very important to the legitimization of the arbitration process.[128] Therefore just like in any other contract, in arbitration agreements there should be due consideration, valid offer and acceptance and intentions to create legal obligations.[129]

However when it comes to online arbitration agreement may not always be consensual more so in cases where one party may have been indirectly forced to enter into arbitration agreement.[130] The question then remains whether in the absence of mutual consent online arbitration remains still valid.

There have been arguments for and against the issue with some authors arguing that where there is lack of choice to enter an arbitration agreement, then it would invalidate the arbitration clause and others insisting that rather than focus on contract formation, the fairness of the process should be the guiding factor. [131]

2.12. Choice of Arbitrators

According to Dr. kariuki Muigua[132] arbitration is as good as the arbitrator (s) handling it. The arbitrators are expected to be independence and impartial.[133] Consequently it is paramount that the arbitral tribunal discloses to the parties any circumstances likely to give rise to justifiable doubts as to the independence and impartiality of the tribunal.[134] Therefore when it comes to

[128] Byrnes, J. Pollman(2003) Arbitration, Consent and Contractual Theory: The Implications of EEOC V. Waffle House, 8Harv. Negot.l Rev p.290
[129] Farzaneh Badiei "Online Arbitration Definition and its Distincive Features" Article available at **http://ceur-ws.org/vol-684/paper8.pdf** (Accessed on 17th September 2012)
[130] *Ibid.* The author gives an example of a situation where lack of choice may be evident where there is monopoly of power.
[131] *Ibid.*
[132] Kariuki, *op cit* 56, p. 227
[133] See Steven Gatembu Kairu "The Conduct of the Arbitral Process" **Arbitration Law & Practice in Kenya**, (2011) Law Africa p.52
[134] *Ibid.*

online arbitration just like traditional arbitration, independence and impartiality of arbitrators should be considered as two of the main requirements of online arbitration[135].

2.13. Due Process

Basically due process in arbitration relates to the right to be heard, the right to adversary proceedings and the right to be treated equally.[136] In online arbitration, it might be a challenge to comply with all the requirements of due process as it may negatively impact the speed, costs and effectiveness of online arbitration.[137] This is important more so because speed and cost effectiveness are two of the advantages which makes online arbitration a more desirable means of dispute resolution than litigation and traditional arbitration.[138] The principle of due process has also been said to be flexible and therefore the degree required of due process may vary dependent upon the case or the category of cases and that the arbitral tribunal may adjust the degree of compliance to commensurate with the nature of disputes.[139]

2.14. Binding decisions

The binding nature of arbitral decisions is one of the most important elements of arbitration. In the case of ***Rashid Moledina and Company Ltd V. Hoima Ginners ltd***[140] the court stated that:

> ***"generally speaking the courts will be slow to interfere with the award in an arbitration having regards to the fact that the parties to the dispute have chosen this method of settling their dispute and have agreed to be bound by the arbitrators decision, but the courts will do so whenever this becomes necessary in the interests***

[135] Farzaneh, *op cit* 130
[136] *Ibid.*
[137] *Ibid.* Here the author argues that a limited due process is in favor of the parties in some cases, especially when more process raises costs to the point that parties who deserve to win on the merits cannot get access to adjudication and thus lose. Therefore limited due process which may provide a full access to justice is better than a full adjudicatory process which may be a barrier for the parties to have access to justice.
[138] *Ibid.* The author further argues that in some cases 'shortcuts' might be taken to keep the process from stalling and costs from rising.
[139] *Ibid.*
[140] (1967)EA 645

of justice and will act if it is shown as alleged in this case that the arbitrators in arriving at the decision have done so on a wrong understanding or interpretation of the law"

However when it comes to online arbitration decisions may not always be binding.[141]In this case the arbitration award may be non-binding for either of the parties or it may be unilaterally binding.[142] The rule is that where online arbitration award does not bind either of the parties, the process cannot be recognized as true arbitration since the decision is unlike a judgment, and the arbitrator does not have a judicial role.[143]

2.15. Form of Arbitration Agreement

One of the requirements of Article III of the New York convention is that an arbitration agreement must be in writing. The party invoking the arbitration agreement must provide evidence of its existence.

In electronic arbitration, the question has always been as to whether the arbitration agreement must be in writing. The general agreement is that the arbitration agreement need not be in writing. There are two ways in which consent to arbitration can be inferred without a written arbitration agreement. The first one is incorporation by reference.[144]in this regard the UNCITRAL Model on Electronic Commerce provides that "information shall not be denied legal effect, validity or enforceability solely on the grounds that it is not contained in the data message purporting to give rise to such legal effect, but is merely referred to in that data message".

[141] Farzaneh, *op cit* 130
[142] *Ibid.*
[143] *Ibid.* The author however argues that where the binding nature of arbitration depends upon one of the parties intention the process may be true arbitration if the party admits that the award has a biding effect after the award's issuance.
[144] United Nations, *Dispute Settlement: International Commercial Arbitration*, Available at

The second way that consent to online arbitration can be inferred without a written arbitration agreement is where a party clicks the 'accept' button on the website that provides for online arbitration. This is taken to signify the acceptance of the contract and the arbitral clause. Thus in the case of *I.Lan Systems, INC V. Netscout Service Level Corp*[145], the court held that the user of a software program who when downloading had clicked on the agree button at the bottom of the licensing contract was bound by the contract. The 'accept' button must however be visible and the internet user must be obliged to click on it to start the download. In the case of *Specht V Netscape Communications Corp*[146]the court held that general conditions containing an arbitral clause could not be invoked against a user who had downloaded a piece of software. In this instance the user was able to download the software directly by clicking on the download link without having to click on the accept button.

Another issue is whether the arbitral clause should be specifically highlighted among the general conditions. In the case of *Lieschke, Jackson & Simon v. Realnetworks*[147], the claimants alleged that they had not been able to consent to an arbitral clause hidden amongst the general conditions posted on the computer screen. The court held that while the clause was not specifically highlighted under the heading 'arbitration agreement' it was nonetheless perceptible.

In conclusion therefore, it can be said that an arbitration agreement need not always be in writing by the parties as it can be inferred from the circumstances of each case.

[145] Civ. Act No. 00-11489-WGY (D.Mass. January 2, 2002)
[146] 2001 WL. 755396, 150. Supp. 2d 585 (S.D.N>y. July 5, 2001)
[147] 2000 WL 631341 United States District Court, Northern District of Illinis, Eastern Division May 11 2000.

2.16. Enforcement of Arbitration Awards in National Courts

When it comes to traditional arbitration, enforcement of foreign award is taken care of by Article III and IV of the convention. Courts in the member states are obliged to enforce foreign awards so long as the party seeking recognition or enforcements produces a duly authenticated original award.

When it comes to electronic arbitration doubts exist as to whether requirements for the original can be met by the presentation of a computer file. However this challenge can be overcome by analyzing the functions of an original. The purpose of the original has been said to be a point of reference and a means of measuring the fidelity of the copies.148 Therefore an electronic document the integrity of which is guaranteed can be considered as an original. Therefore enforcement of an online award in national courts where the arbitrators have put their electronic signature with a certification authority guaranteeing that the pair of keys belongs to arbitrators should not be denied.[149]

2.17. The meaning and scope of online arbitration

Several authors and legal experts have attempted to define and provide a useful guide on the scope of online dispute resolution. Farzaneh Badiei[150] defines online arbitrations as :

> ***"A process which parties may consensually submit a dispute to a non-governmental decision maker, selected by or for the parties to render a binding, non-binding or unilaterally binding award, issuing a decision resolving a dispute in accordance with neutral procedure which includes due process in accordance with the parties agreement or arbitration tribunal decision. The online arbitration agreement may be conducted online or partly online by the use of internet technology"***

[148] Lucas A, Deveze & Frayssiner J. (2001) "Droit de l'Informatique et de l'internet/Law on IT and the Internet", Paris, PUF, p. 577.
[149] United Nations, *Dispute Settlement: International Commercial Arbitration*, Available at **http://unctad.org/en/docs/edmmisc232add34_en.pdf** (Accessed on 22nd November 2012)
[150] Farzaneh, *op cit* 130

Therefore online arbitration as per the above definition can be divided into five categories. The first category is totally online binding arbitration where the entire process is conducted online by use of email, video conferencing and web based communication and the decision of the arbitrator is binding on all parties.[151]The second category is the totally online non-binding arbitration where the process is conducted entirely online like the first one but the decision is not binding upon the parties. The third one is unilaterally binding online arbitration which is conducted entirely online like the first two but the decision on whether it's binding or not lies with the parties. The fourth one is partly online binding arbitration where arbitration is conducted using a combination of online means and offline features such as live-in person hearings and use of fax and post for the submission of evidence, communication between the arbitrators and the deliberation of the award. The fifth is partly online unilaterally binding arbitration where the process is like the fourth one but the decision on whether its binding or not lies with parties. The last one is partly online-non binding arbitration where by the decision of the tribunal is not binding.[152]

Esther van den Heuvel[153] on the other hand defines online dispute resolution as the deployment of applications and computer networks for resolving disputes with alternative dispute resolution methods. She identifies online arbitration as using a website to automatically settle financial claims.

[151] *Ibid.*
[152] *Ibid.*
[153] Esther *op cit* 99

Online arbitration can also be defined as a form of dispute resolution using the internet as the main medium in conjunction with other technology such as multi-point video-conferencing.[154] It is also known as cyber arbitration, virtual arbitration or cyberspace arbitration.[155]

As a mode of Alternative Dispute resolution, Online arbitration has also been defined as a process by which parties may consensually submit a dispute to a non-governmental decision maker, selected by or for the parties, to render a binding or non-binding award, issuing a decision resolving a dispute in accordance with neutral procedure which includes due process in accordance with the party's agreement or arbitration tribunal decision. [156] It can be either conducted totally online by online means of communication or partly online by a combination of online and offline means.[157]

Isabelle Manevy[158] identifies the scope of online arbitration. She states that online arbitration proceeds along different communication stages including process agreement, initial presentations, rebuttals, consideration, decision and award. Canada and the United States provide the best illustration on the scope and usage of online arbitration as they were the first countries to attempt online arbitration.[159]

[154] See Dr.Zulki Fli Hasan "Law of Arbitration" Article available at **http://zulkiflihasan.files.wordpress.com/2008/06/week-x-online-arbitration-concept.pdf** (Accessed on 18th September 2012)
[155] *Ibid.*
[156] Farzaneh, *op cit* 130
[157] In totality online arbitration the entire process is conducted online by use of email, video-conferencing and web-based communications while in partly online it is conducted using a combination of emails, video-conferencing and web-based communications and offline features such as live in-person hearings and use of fax and post for the submission of evidence, communication between arbitrators, and deliberation of award.
[158] Isabelle, *op cit* 118.
[159] Katsh, Etan and Rifkin, Janet(2001) Online Dispute Resolution: resolving conflicts in Cyberspace Jossey Bass San Francisco, p. 138.

Webdisputes .com[160] as an online arbitration service provider in the United States has practiced on line arbitration for long. In its practice, some basic guidelines need to be adhered to. First, the consent of both parties is required. Then, they need to mutually agree on an arbitration forum and sign an oath of participation. Parties then submit documents to the arbitrator and the other party and comment on the evidence submitted by both sides via email to the arbitrator. The arbitrator will notify the parties of his/her decision within twenty business days.

In Canada on the other hand, online arbitration is used by the e-resolution, a virtual tribunal to settle domain name disputes.[161] The arbitration is guided by the ICANN (Internet Corporation for Assignment and Numbers) Uniform Domain-Name-Dispute-Resolution Policy.[162] The scope of this service is that a domain name complaint can be submitted online by means of secure web based complaints form or by email. The arbitrator will deal with the parties' claims in conformity with the policy. When both parties have had the opportunity to make their case, the arbitrator will issue a legally binding decision. The process is designed to take a maximum of sixty days to complete from initial submission of the complaint to the final decision rendered.[163]

In its March, 1998 communication on the out of court settlement of consumer disputes[164] the European Union has presented the minimum standard to be observed when the consumers have waived further access to the court. First, the decision maker must be independent from

[160] http://www.eresolution.ca. (Accessed on 23rd September 2012)
[161] *Ibid.*
[162] **http://www.icann.org/udrp/udrp-policy-24oct999.htm.** (Accessed on 23rd September 2012)
[163] Lee, Christopher s (2001)"The development of arbitration in the resolution of internet Domain Name Disputes", 7Richmond Journal of Law and Technology, 2000(fall) , p.7.
[164] See **http://www.europa.eu.int/comm/consumers/policy/developments/acce_just/ut02/en.html.** (Accessed on 23rd September 2012)

any professional association which appointed him, second, the process should be transparent, third, all parties must be allowed to present their arguments to the decision maker and must have equal access to evidence; fourth, the consumer must be able to represent himself or herself in the procedure, which must be free or of moderate cost. The decision must be rendered rapidly and the decision maker must have an active role in the proceedings; and fifth, if the decision is to be binding on the consumer and further recourse to court excluded, the consumer should fully be aware of this in advance and have accepted it. Finally the consumer must be able to be represented or assisted by a third party, including a lawyer, at all stages.[165]

2.18. Procedure for Online Arbitration

It is important to note that online arbitration as a procedural form of dispute resolution is expression of party autonomy.[166] In this regard parties may chose arbitration online freely in accordance with their will, to be provided expeditiously, economically and in a just manner.[167] The first stage of online arbitration involves the formation of arbitration agreement. Normally arbitration agreement can be concluded in three forms in the cyber space[168]. The first form is where opposite parties announce their consent by referring the dispute to arbitration by email. The second approach is where the websites which sell goods and services put an arbitration clause in the 'terms and conditions' section of their website. The consumers declare their consent by clicking the 'accept' button. The third one is in the UNCITRAL Model law in which parties in the cyber space refer their dispute to a document containing an arbitration clause.

[165]Kunner Christopher, "legal obstacles to ADR in European Business to Consumer Electronic Commerce" December 2000, OECD Presentation, available at **http:// www.odrnews.com/library.html.p.14-15.** (Accessed on 13th July 2012)
[166] See "e-Arbitration: Challenging Validity of Online Arbitration Clauses in Light of Admissibility to Arbitration Courts, Legal Analysis" Available at **http://Zakon.ru/Blogs/OneBlog/1919** (Accessed on 13th July 2012)
[167] *Ibid.*
[168] Saleh Jaberi, *op cit* 73

The second stage relates to the process of online arbitration.[169] When it comes to online arbitration where a dispute has arisen, one party may inform the other through the email to select an arbitrator or in the alternative use a web-based arbitration. In this case the plaintiff refers to the website of arbitration institute and registers his request after which the institute informs defendant and sets an opportunity for sending documents and evidences.[170]

The thirds stage relates to sending the evidence.[171] In cases where a dispute arises in a transaction that was being carried on online, then evidence can be transferred electronically to the selected arbitrator or institute.[172]If not so, then the evidence will have to be converted into electronic form.[173]

The fourth stage is the arbitration procedure. This stage has been stated to be the most challenging in online arbitration.[174] This is so because some technology may not be available or accessible to all the parties involved. Other parties may also be techno-challenged.

The last stage involves arbitrators' discussions and issuing awards.[175]In this case it is possible to have arbitrators' discussions even if they are not in the same place by use of telephone, fax, or video-conference.[176] After ending discussions and giving the awards, parties are then informed of the decision. The notice is normally sent to the parties through cryptographic email or if the operation of an arbitral institution is a web-based, award will be put on the web-

[169] *Ibid.*
[170] *Ibid.*
[171] *Ibid.*
[172] *Ibid.*
[173] *Ibid.*
[174] *Ibid.*
[175] *Ibid.*
[176] *Ibid.*

site for specific time in a way that it will be accessible just for parties to safeguard confidentiality.[177]

Thus the arbitrators may make an award after discussing the case and any draft awards either by synchronous electronic means (such as audio-conference) or by asynchronous electronic means (such as circulation of drafts and comments by E-Mail), provided that:[178]

a) All the arbitrators agree to such electronic means;

b) All the arbitrators participate in the discussion, or one arbitrator is excluded for valid reasons such as illness or refusal to participate in any form of deliberation, including conventional physical presence;

c) The parties have not ruled out such electronic deliberations;

d) The agreement of the parties to such electronic deliberations, or, in the absence of such party agreement, the agreement of the arbitrators, is properly documented, for example in a procedural order.

When the arbitration is subject to institutional or other standard rules, care should be taken to ensure that the rules do not preclude electronic deliberations. If they do, then that point must be specifically overridden by an explicit agreement amongst the parties, since the rules are deemed to be an agreement amongst the parties, and violation of the rules would be a violation of the agreement of the parties, which could result in a refusal to enforce the award in accordance with Article. V (1)(d) of the New York Convention.

2.19. The impact of Online Arbitration

The impacts of online arbitration in dispute resolution are varied. The critique of its impact shall be based on its appropriateness in terms of the legal issues relating to the validity of

[177] *Ibid*
[178] *Ibid*

online arbitration agreement, forms requirement, how and where proceedings are conducted and enforceability of online agreements, the legal enforceability, the time duration it takes, the efficiency, the accuracy and confidentiality of its use etc.

The analysis of these issues shall be helpful in the proposed legal framework that shall seek to address the envisaged challenges of online arbitration ranging from legal issues, practical issues, cross-cultural issues and inappropriateness of the internet medium.[179] The practical issues include security of the online proceedings, lack of face-to-face encounters while cross-cultural issues include language barriers and cultural differences. Further courts may be less likely to enforce online arbitral awards if they perceive that due process protections available in offline arbitration have been shortchanged.[180] The major challenge with online arbitration is that it is a new concept that has been embraced by some developed nations.[181]

This paper shall therefore seek to highlight the advantages and disadvantages of online arbitration. This shall be evaluated against the tested systems in Canada and India:-

2.20. The Advantages of Online Arbitration

Arbitration is one of the mechanisms that are widely referred to as alternative dispute resolution mechanisms.[182] These mechanisms are set out in Article 33 of the United Nations Charter.[183]This is the legal basis for the application of alternative dispute resolution

[179]Chambers, *op cit* 20.

[180]Norman & Cynthia, *op cit* 21.

[181]Indeed European Union has proposed a free online dispute resolution platform for traders and consumers to resolve dispute through online. (See outlaw-com available on **http://www.theregister.co.uk/2011/12/05/ec_proposes_free_online_dispute_resolution_platform/** (accessed on 23rd February 2012)

[182]Kariuki, *op cit* 56, p. 225

[183] United Nations, *Charter of the United Nations*, 24 October 1995. 1UNTS XVI

mechanisms in disputes between parties whether the states or individuals.[184] The Charter provides that the parties to any dispute shall first of all seek solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, and resort to regional agencies or other peaceful means of their own.[185]

When we talk of the advantages of online arbitration we are referring to those compelling reasons that will make a party opt for online arbitration instead of the traditional arbitration. This thesis asserts that a party who opts for online arbitration stands to gain more than the one who opts for traditional arbitration. These benefits are analysed below.

a. Time efficiency

As compared to traditional arbitration methods and even litigation, online arbitration as practiced in America and Canada takes less time hence providing certainty and efficiency to the parties involved. Dispute resolution through litigation takes years before the parties get justice in their matters due to the formality and resource limitations placed on the legal system by competing fiscal constraints and public demands for justice, litigation is so slow and too expensive and it may at times lose the commercial and practical credibility necessary in the corporate world.[186] Courts in Kenya have encountered many problems related to access to justice for instance high court fees, geographical location, complexity of rules and procedure and the use of legalese. The court's role is also dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves. Traditional arbitration though

[184] Kariuki, *op cit* 56, p. 223
[185] United Nations, *op cit* 184
[186] Strengthening Judicial Reform in Kenya; Public Perceptions and Proposals on the Judiciary in the new Constitution, ICJ Kenya, Vol.III, May, 2002.

time efficient[187] can be delayed by other factors including time for travelling, scheduling of meetings and the voluminous materials involved that needs to be physically perused.[188]

In addition tasks like hearings, meetings and transfer of documents can be done faster so long as appropriate technology is employed. Using information technology in arbitration also saves time that could have been used in travelling and also it helps parties involved to find a common available period. This is more so in a dispute that has several parties where by it almost impossible to have all the parties available to attend a meeting or even a hearing. Time which could have been wasted in shipping documents is also saved hence increasing productivity for businesses.

As a result of all these challenges online arbitration has been developed as a solution. The time efficiency of online arbitration is enhanced largely by the speed and convenience of information communication technology which is eminently suited to the needs of e-commerce. In fact with the investments in optic fiber network in Kenya, the speed and efficiency of internet in Kenya is poised to be enhanced significantly.Webdispute.com as an example of online arbitration service provider based in the US requires that the arbitrator should notify the parties of his or her decision within twenty business days.[189]

[187] Farooq *op cit* 127.
[188] Brenda Brainch , "The Climate of Arbitration and ADR in Kenya, June 2003," published in the Commonwealth Lawyer 2003, Indian ICFAI Journal of ADR, Corporate Africa, CEDR (Centre for Effective Dispute Resolution) London.
Available at
http://www.disputeresolutionkenya.org/pdf/The%20Climate%20of%20Arbitration%20and%20ADR%20in%20Kenya.pdf. *(*Accessed on 26/6/2012.)
[189] **http://www.eresolution.ca**. (Accessed on 23rd September 2012)

b. Cost efficiency

The reduction of time barriers in online arbitration has a consequential effect of reducing cost coupled with the cost reduction in terms of travelling, meeting room charges and the cost of storage and perusal of the voluminous documents involved.[190] Averagely disputes referred to Webdispute.com costs an average of $100 to $600.[191] In addition to out of pocket expenses, the costs savings also include lost working time

Online arbitration also reduces costs for documents handling as opposed to traditional arbitration.

c. convenience

Online arbitration is more convenient in terms of the more level playing field, the availability of information and process options and the possibility of using experts. Online arbitration is also convenient for those who have internet access. The participants enjoy new power because they decide when they respond and they have more process options open to them and are able to use experts. Internet allows for more rapid transmission of information and a quick statement of position.

In addition, the electronic medium creates a distance between the participants that could be beneficial. Since the process is void of physical contact, parties do not risk feeling threatened by the other party. In addition, having the option of asynchronous discussions on the internet, which is impossible in a face to face environment, allow participants to craft their contributions as opposed to needing to respond in the moment may enhance the thoughtfulness of agreement reaching efforts.[192] Further, some sophisticated software allows the machine to

[190] *Ibid.*
[191] *Ibid.*
[192] Melamed, John, "the World Wide Web Main Street of the future is here today", available at ***http://www.mediate.com/articles/jimmjohn.cfm. (***Accessed on 26th June 2012)

assimilate the information presented by the parties and calculate resolutions that may provide each side with more than they themselves might be able to negotiate.[193]

Further electronic documents can be searched easily while using the find function. There is also the advantage of archiving the documents easily and ability to carry an enormous amount of files to a hearing without any consideration of the physical weight.

d. Easy Access to Information

Arbitrators need to work during their travelling time or at home without being burdened with hard copies of voluminous documents.[194] As an alternative of carrying documents with them on their laptops or CD-ROM, they will be able to access documents directly like in the case of NetCase.[195]The management of large quantities of electronic files, without hard copies necessarily being available, would therefore seem an entirely serious option.[196]

e. Delocalization

When it comes to online arbitration, the parties can act from any part of the world without being bound by any specific local legislation. Arbitrators need not be in the same location as they can discuss the award and other issues through teleconferencing.

f. Flexibility

In online arbitration parties can decide on creating a more flexible procedure and putting deadlines as they deem fit. Parties can also select the laws pursuant to which the dispute can be resolved.

g. Effectiveness

The use of technology in online arbitration makes various aspects of arbitral procedure more effective in the sense that tasks can be completed in a way that would not have possible in the

[193] *Ibid.*
[194] *Ibid.*
[195] *Ibid.*
[196] *Ibid.*

traditional arbitration.[197] For example in traditional arbitration, costs and time constraints may lead to compromise of certain procedures like hearing a witness who may not be available.

In addition to those advantages there are certain situations that the use of technology in arbitration is the most convenient. The first situation regards procedures that are time driven. In those kinds of situations, time becomes almost paramount and any solution that contributes to accelerating the procedures without reducing the quality of the procedure is very useful. These instances include hearing for provisional measures and fast-track arbitrations like in Olympics.[198]. The second situation is where the procedure is likely not to cost much. Online arbitration comes in handy to save on the travelling and shipping cost. The third situation is where parties require a short meeting of secondary importance. This is more so in situations where sense of reality and body language is not very crucial. The fourth situation is in regard to mass claims. In situations where the claimants are many, online arbitrations will definitely simplify the process. This may be for instance achieved by streamlining the submission phase using electronic forms as was done in the Iraq compensation program.[199] The last situation is where there are multiparty disputes. In this regard the more numerous the participants are in an arbitration, the more benefit they will reap from use of technology. There is no difference whether one or a very large number of copies are made of a file in electronic format.

In view of the above, there are no doubts that a party who opts for online arbitration stands to benefit more financially and in terms of saving time than the one who opts for traditional arbitration.

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[197] Gabrielle Kaufmann-Kohler & Thomas Schultz *The use of Technology in Arbitration, Available at* **http://www.lk-k.com/data/document/the-use-information-technology-arbitration-jusletter-5-december-2005-available-http-www.pdf (**Accessed on 22nd November 2012)

[198] *Ibid.*

[199] *Ibid.* Another example is the SquareTrade's online assisted negotiation and online mediation program normally used for eBay disputes which resolves around one million disputes in a year.

2.21. The Disadvantages of Online Arbitration

The disadvantages of online arbitration are not in terms of overriding challenges but the technicalities involved with internet operations and the use of the system. The highlighting of the challenges are helpful in formulating the appropriate legal system and the innovative step needed to address them in order to enjoy the advantages accruing as a result of the practice of online arbitration.

a. Data Security and Confidentiality

This issue involves the identity and signatures of the parties as well as the non- tampering of the date by unauthorized third parties who might have access to the information.[200] Scandals on websites hacking have been in the increase around the world.[201] Computer devices are increasingly becoming more sophisticated, which are capable of carrying out a growing range of operations and crimes. [202]

There may be ways for hackers and others to obtain data from mobile devices (*e.g*. Bluetooth, Radio Frequency Identification ("RFID") chip) and infect computer devices (*e.g*. through application downloads). Although spam is currently not as prevalent on mobile devices as on computers, as the use and value of mobile transactions grows, so will interest in obtaining personal and financial data and using mobile devices for spam scams, identity and theft. [203]

The use of electronic signature is therefore indispensable in the conduct of the proceedings in order to guarantee the identity of the person you are dealing with.[204] The use of electronic

[200] Chris, *op cit* 61.
[201] *Ibid.*
[202] *Ibid.*
[203] Talat, *op cit* 57
[204] The term electronic signature may be new but the relevance and importance of these had originated many years back in the business world when people had started using the Morse Code and telegraph to electronically

signature in this form of transaction assumes the character of message authentication. The message authentication code is in fact a security procedure applied to electronic systems verified by the service provider[205]. Though deemed and designed to serve as electronic signature, the authentication code or the personal identification number remains an open ended question whether they are electronic signature within the remit of the law.[206]

The United Nations General Assembly Resolution 56/80 adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Signatures in 2002. "Electronic signature" means data in electronic form, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message[207].'' However, only three countries have adopted the Model Law namely Thailand, Mexico, and China. [208]Electronic signature Legislation has also been drafted or adopted in several Latin American countries, including Argentina, Colombia, Chile, Ecuador, and Peru. In Africa, Egypt is the only country other than South Africa to have drafted electronic signature legislation[209].

Kenya has adopted the electronic signature in line with the recommendation of the United Nations General Assembly Resolution 56/80 adopted the United Nations Commission on

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accept contracts. Indeed the New Hampshire Supreme Court Explained in ***Howley V. Whipple*** *"it makes no difference whether the telegraph operator writes the offer or the acceptance in the presence of his principal and by his express direction , with a steel pen an inch long attached to an ordinary penholder, or whether his pen be a copper wire a thousand miles along. In either case the thought is communicated to the paper by the use of the finger resting upon the pen; nor does it make any difference that in one case common record ink is used, while in the other case a more subtle fluid, known as electricity, performs the same function"* see Talat, *op cit* 57

[205] Kethi D. Kilonzo, "An analysis of the legal challenges posed by electronic banking." Available at ***http://www.kenyalaw.org*** (Accessed on 14/6/2012).

[206] *Ibid.*

[207] UNCITRAL Model Law on Electronic Signatures Article 2. Available at **http://*www.steptoe.com/...html/.../Commentary on UNCITRAL Model Law*** *(*accessed on 12/06/2012).

[208] *Ibid.*

[209]David Porteous (2006) "The Enabling environment for cell phone banking in *Africa"*, (London: DFID,). Available at: http://www.qdocuments.com/ENABLING-ENVIRONMENT-FOR-CELL-PHONE-BANKING-IN-AFRICA--DOC.(Accessed on 26th June 2012*)*

Internal Trade Law (UNCITRAL) Model Law on Electronic Signatures in 2002. The Kenya Communication Amendment Act, 2009[210] recognizes advanced electronic signatures and electronic records as equal to written signatures and written (physical) records respectively.

Given the above discussion, the use of personal identification code or details as a mandate is fundamental in the service provider customer relationship. Within the wide range of paperless transfer, it poses a number of questions. Can a signature effectively verify an electronic transmission and will such transmission make it harder to see alterations? How effective legally is a replacement of the customer's signature by his personal identification number? This research asserts that an electronic signature that identifies the signatory and can be verified is as equally good as a written signature.

As a rule, instructions given to the service provider by its computers are authenticated by means of security procedures. The instruction to the service provider is the customer's mandate and is communicated through electronic means. The security procedure herein is analogous to a digital signature for it constitutes the service provider's authority to execute the mandate[211]. A law regulating electronic signatures would ensure that they are legally recognized and that they are admissible as evidence. Consequently, electronic signatures will not be denied legal validity, effect, or enforcement solely on the grounds that they are in the form of electronic data. They will be recognized in the same manner as hand written signatures.

[210] Sec 4 of the Act

[211] Alan Urbach & John Storck(1984) Alternatively, Electronic Technology and the Law, the 1984 Computer Law Symposium Conference Transports 21st and 22nd May, London, p.173.

On confidentiality, the only way to protect data and guarantee confidentiality is through encryption. Encryption is the automated process of making data inaccessible to unauthorized people by means of an algorithm and a key.[212]

This paper also asserts that the issue of security has been exaggerated when it comes to online transactions. Insecurity in the online world and offline word is a reality. The difference is that when it comes to online transactions people tend to be overly cautious. For example, one is comfortable swiping their credits cards in supermarkets and clubs but when it comes to paying on the net, consumers normally show great concern.

b. Conflict of the Law

The applicable law is sometimes made difficult especially in situations of cross border e-disputes.[213] However in most cases of online arbitration, parties usually voluntarily fulfill the award without having to apply for enforcement by the national courts.[214]This is because parties who enter into online transactions and agree to resolve their disputes in an online arbitration are driven by the intention to gain profits' and to retain their commercial relationship.[215] The problem comes in where one of the parties refuses to honour the award. In this case the winning party has to enforce the award through the national court which is required to examine the whole process of online arbitration before enforcing the award.[216] The question then remains in which state the award was made more so if the parties had not chosen the place of arbitration. In the absence of such a choice, it might be difficult for the winning party to enforce the award. However, this issue can be

[212] B.J. Koops(1999) The Crypto Controversy, A key conflict in the information society, 1st edition, The Hague/London/Boston, p. 35.
[213] D.Post,(1997) "Governing Cyberspace, in the 43 Wayne Law Review" Available at ***http://www.cli.org/DPost/ascl.htm***.*(* Accessed on 26th June 2012.)
[214] Bordone, R.C (1998), "Electronic Online Dispute Resolution: a System Approach: potential Problems and a Proposal" Harvard Negot. Law Review, No. 3 PP.175, 178
[215] *Ibid.*
[216] *Ibid.*

considered from the point of view of delocalization theory, under which if the award is issued by electronic means, domestic laws governing e-Commerce will decide the validity of the award.[217] However with this jurisdictional conflict of which country's law is applicable there is urgent need to harmonize conflict of laws by amending the New York Convention to expressly recognize awards made through online arbitration.

c. Inadequate statutory protection

The success of online arbitration depends on various key determinants namely; policy and regulation, sustainable business case for all actors, and client uptake. Primarily, policy and regulation sets the foundation stone of the online arbitration model. Regulation is essential for creating and maintaining an enabling environment for business. The current arbitration law and the Kenya Communication Amendment Act, 1998 are inadequate in this respect. With this lacuna customers are left exposed to the dangers associated with the technological innovative step.

In the last chapter of this study, the researcher will be recommending enactment of legislations dealing with online arbitration to curve this shortcoming.

d. Access and Awareness

One of the obstacles to creating acceptance of online arbitration is the fact that there is still a large group of people who are still not yet connected to the internet and those who are connected do not really appreciate its use. According to a survey only 9.7 of Kenyans use the internet.[218] This inadequate inaccessibility is further worsened by the nature of confidentiality of the data. Success stories cannot be published or used as examples to try and persuade

[217] Yu, H., Nasir, M.(2003) "Can Online Arbitration Exist Within the Traditional Arbitration Framework?" Journal of International Arbitration, No.20/5, p.471

[218] Internet World Stats, Usage and Population Statistics in Kenya. Available at ***http://www.internetworldstats.com/af/ke.htm***. (Accessed on 25th June 2012.)

potential users to try alternative dispute resolution on line. In order to create awareness to online arbitration, parties to an online arbitration can be requested to waive their right to confidentiality. In this regard, the tribunal can publish the cases done through online arbitration, how much they cost and the time spent. However the identity of the parties is to be withheld. Further proper education for all people who relate to the online arbitration on the use of information technology will be useful. In this regard members of public can be sensitized on the benefits of using online arbitration as compared to traditional arbitration. All the stake holders in arbitration should endeavor to publish articles on the benefits of online arbitration in the newspapers and other publications so as to sensitize the public. Television and radio interview will also aid in creating public awareness of online arbitration.

e. Seat of Arbitration

Basically, seat of arbitration is very crucial when it comes to arbitration. It determines the applicable law in arbitrations, supervision of awards is allocated to courts of arbitration. Seat and recognition and enforcement of award may be refused if the award has been set aside by a competent authority of the country in which the award was made.[219] In online arbitration, the obvious multiple location is an obstacle to determine the place of arbitration.[220] This is because not only that the parties may be in different countries, but also arbitrators may attend and discuss from different countries.[221] To solve this problem when it comes to online arbitration, the seat of arbitration has been defined as the place agreed to be the seat by the parties or by the arbitrators or an arbitral institution if such a power is nominated by the

[219] Saleh Jaberi, *op cit* 73
[220] *Ibid.*
[221] *Ibid.*

parties.[222] This therefore means that parties can agree on which place will be the seat of arbitration to avoid disputes over the same arising later.

f. Enforcement of Award

The main distinction between arbitration and other modes of alternative dispute resolution is the fact that awards awarded in arbitration are enforceable. The requirement that awards should be written and signed by arbitrators'[223] poses a challenge when it comes to online arbitration. However there are some jurisdictions that provide that digital signatures or record of an award will be sufficient.[224]

In addition the New York Convention which provides that the duly authenticated original award or duly certified copy is necessary for recognition and enforcement of award posses another challenge to enforcement of online awards.[225] Although the convention does not strictly provide for the award to be in writing with the arbitrators signature, strict interpretation of the Article will mean that if the original award is not produced, then the successful party cannot rely on the convention.[226]

To curve this shortcoming, some authors have argued that IV of the Convention should be interpreted by considering Article III of the Convention.[227] Article III provides that "Each contracting state shall recognize arbitral awards as binding and enforce them in accordance with the rules of the procedure of the territory where award is relied upon." This therefore

[222] *Ibid.* according to the author this approach has been accepted by Article 20 (1) of the UNICITRAL Model law, Article 15 of the Uniform Arbitration Act, Article 14(1) of ICC Arbitration rules and many other arbitration Codes.
[223] See Section 32(1) of the Arbitration Act No. 4 of 1995
[224] See Section 52 (1) English Arbitration Act of 1996 which provides that parties are free to agree on the form of the award and for United States the revised Uniform Arbitration Act of 2000 which provides for the use of Electronic Signatures by arbitrators. Article 19 provides that an arbitrator shall make a record of an award.
[225] See Article IV of the Convention
[226] Saleh Jaberi, *op cit* 73
[227] *Ibid.*

implies that if the state of enforcement accepts an electronic form of writing there should be no barrier to the enforcement of the electronic award.[228] The second solution is seen from the reasoning behind the requirement of Article 4 of the convention.[229] The proponents argue that the role of the original is essentially to be a point of reference and as a means of measuring the fidelity of the copies. [230] In these circumstances an electronic document, the integrity of which is guaranteed by third parties and by technology can be considered as original.[231]

2.22. Duties of an Arbitrator in Online Arbitration

The duties of an online arbitrator are not so different from the duties of an arbitrator in traditional arbitration. First the arbitrator has a duty consider any or all evidence offered by parties where the Arbitrator believes that evidence is necessary for the settlement of the dispute. Secondly the arbitrator has a duty to order for the specific performance of a contract or to make an interim award. Thirdly, it is the duty of the arbitrator to continue the Arbitration hearing to a subsequent date and put necessary interrogatories to the relevant parties and to appoint experts for his guidance in the question of a scientific or a technical nature.

Parties can also impose certain duties on the arbitrator either by the arbitration agreement or by a subsequent agreement and those duties may be imposed either, after or before the appointment of the arbitrator. First, the arbitrator must act impartially. Thus, impartial and independent behavior is expected from an online arbitrator throughout the process. He has a duty to be physically and mentally capable of conducting the online Arbitration proceeding. This therefore means that he must be able to use the technology being applied and also guide the parties who are challenged.

[228] *Ibid.*
[229] *Ibid.*
[230] Ibid.
[231] Ibid.

The online arbitrator has a duty to observe the rules of evidence based on principles of natural justice. Therefore, when the deadline for submitting online documents and evidence has passed, the online arbitrator should not admit any documents submitted after. He should also ensure that parties are accorded a fair trial more so when proceedings are being conducted by video conference.

As an online arbitrator one should not delegate his authority to somebody else as he was appointed in the mutual consent of the both parties to the dispute. While performing all his duties set out in Arbitration agreement, he should keep the arbitration confidential. Thus, the online arbitrator has a duty to preserve confidential and private nature of the arbitration proceedings.

The online arbitrator has a duty to ensure that after the award is made the same is posted on the website or electronically sent to the members.

2.23. Means of Carrying out Online Arbitration

a. Case Management Websites

Basically the best communication technology for arbitration proceedings is one that helps manage long and numerous documents conveniently and efficiently.[232] Case managements are specifically designed for the management of a legal case. Their main purpose is to provide a universally accessible but password protected platform for documents repository and constituting a web-based interface that allows users to communicate rapidly securely.[233] They can be institutionally implemented like the case of NetCase or ad hoc. Some of the advantages of case management websites is that they are able to allow uploading or downloading of the entire folder at a time with no limitation regarding the volume or the number of documents,

[232] Gabrielle & Thomas, *op cit* 198.
[233] *Ibid.*

they are more secure, documents are transmitted faster, they are accessible anywhere and at any time, they offer private forums, save on costs and lastly documents are organized in a systemic manner hence easily accessible.

b. Videoconferencing

Videoconferencing is an IT-based solution that enables meetings among persons using both telephony and closed circuit television technologies simultaneously.[234]It therefore allows two or more participants located in different places to communicate with no consideration for geographical distance sharing images and sounds.[235] It is mostly used where a witness cannot be present in person, cases where parties are far from each other and the amount of the dispute is low, deliberations amongst arbitrators, assessing and preparing witnesses and accelerated arbitration.

Of importance to note is that video-conferencing will always be second to face to face communication. However with the growth of e-commerce where parties are transacting in different geographical locations, videoconferencing comes in to bridge the geographical gap. It also ensures that parties are accorded oral hearings to avoid the award being challenged in future. In this regard when organizing for a video conference it is advisable that parties engage the services of a technician to ensure that the equipments are set well to avoid technical failures. There should also be a means of detecting when there is a technical failure by the arbitrators so that they can discontinue the proceedings until the equipments are restored to normal.

It is not in dispute that Kenya might be challenged when it comes to videoconferencing. This is because apart from the fact that very few people are knowledgeable when it comes to video conferencing, it is also expensive to maintain. However, video conferencing compared to face

[234] *Ibid*.
[235] *Ibid.*

to face communication might be cheaper as it saves on travelling costs amongst others. Institute like chartered institute of arbitrators should rethink of incorporating video conference services within the institute. It also expected that the initiative by the Law Society of Kenya and the Attorney General's office of starting a regional institute of arbitrators will have this kind of technology for more efficiency.

c. Virtual case Rooms

These are case management websites that are more specifically dedicated to the actual resolution of a dispute. As a result virtual case rooms may include more sophisticated means of communication including more developed boards, telephone conferencing facilities or videoconferencing software.[236]

2.24. Major Arbitration Institutions

a. ICC-Net Case

NetCase is an online arbitration platform developed under the auspices of the ICC International Court of Arbitration. It is used and promoted as an IT facility to support players in ICA arbitration proceedings according to the ICC rules of arbitration.[237] Of importance to note is that Netcase does not constitute an arbitral procedure or a standalone service for dispute resolution but it is meant to facilitate communication and organisation between the parties and the arbitrators by offering information throughout. The main advantages are that it provides security and confidentiality, speed, organisation, accessibility, private forums and saves costs.

[236] *Ibid.*
[237] GearBi: "Towards an online arbitration environment based on the design principles simplicity, awareness, orientation, and timeliness" available at **http://link.springer.com/article/10.1007%2Fs10506-006-9015-z?LI=true** (Accessed on 22nd November 2012).

Some of the main features of Netcase includes; one an address book that contains the details of all participants and the secretariat in charge of the case, general information giving an overall picture of the case, different stages of the case and the financial overview, a calendar of the proceedings and the assistant inform of an email address at which participants can contact the secretariat for help.

The ICC has also gone ahead to set guidelines to maintain standards in online arbitration proceedings.[238] These guidelines include:

i. File names should always be given a unique name/identifier for each electronic document for ease of identification.
ii. The same form of file naming system should be used throughout the arbitration for all electronic documents
iii. The file name and the date of the original document shall appear on the first page of the electronic document, either at the top right corner or at the bottom.
iv. If data loss occurs and the affected participant cannot itself reconstitute the lost electronic documents, the other participants shall help to reconstitute the electronic file (s) by providing copies of the pertinent files they control.
v. A uniform method of mode of transmission and storage of emails should be practiced.
vi. Whether any confirmation of receipt of email has to be given should be mentioned beforehand.
vii. File format for sending attachments like PDF, Doc, HTML, ASCII should be generally followed unless specifically mentioned otherwise.
viii. For Audio and video conferencing the arbitral tribunal in consultation with the parties is to issue directions giving details for the conference.[239]

[238] Text available at **http://www.lk-k.com/data/document/the-use-information-technology-arbitration-jusletter-5-december-2005-available-http-www.pdf (**Accessed on 22nd November 2012)

b. AAA-WebFile

The American Arbitration Association WebFile provides an online service that allows users to file claims online and to make payments, perform online case management, access rules and procedures, electronically transfer documents, select arbitrators, use a case customized message board and check a case status.[240]

Parties are required to fill the registration form and select a password in the Online Filing section. This then enables the parties to file an online claim and later return to view and manage the case filed.[241]There are three steps involved in filing the claim online. The first step is to select who is filing the claim which could be either the claimant or the personal representative, the second step is selecting the set of rules to apply and the type of dispute resolution procedure and the last step involves reviewing the agreement upon which the dispute is based and confirming that AAA is named in the arbitration or mediation clause.

c. WIPO_ECAF

The role of WIPO is to assist in resolving private international commercial disputes by providing ADR services including mediation, arbitration, expedited arbitration and mediation followed by arbitration.[242]Many of the disputes normally relates to intellectual property in the areas of technology and entertainment.

In recognition of the benefits of technology in arbitration, the centre created a secure web facility which seeks to facilitate the conduct of cases under the WIPO mediation, arbitration

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[239] Such details includes; day and hour and applicable time zone, places where a conference front-end is requires, who shall participate and number of persons at each front-end and special requirements such as visualization of documents.
[240] Gabrielle & Thomas, *op cit* 198.
[241] *Ibid.*
[242] *Ibid.*

and expedited rules referred to as Electronic Case Facility (ECAF). It enables the parties, the arbitral tribunal and the centre to file, store and retrieve case related submissions electronically. The centre is secure and allows for access from anywhere in the world using its website. It takes the form of a case management system, a central data base accessible through the internet that allows the participants to submit documents online and to access a case overview, contact information, time tracking, docket listing and a message board.[243]

2.25. The Role of the Courts in Online Arbitration

When we talk of the role of the courts in online arbitration the famous quote by Colin Rule that every court would soon have an ODR kiosk out front[244] is very relevant. This statement, in other words implies that as ODR grows so will be the courts be required to adopt modern technologies to deal with cases concerning ODR. Just like in traditional arbitration where a decision of an arbitrator can be challenged in court due to may be lack of impartiality, exceeding of jurisdiction, unfair trial and breach of the rules of natural justice, online arbitration is also not immune to such cases. Therefore intervention of the court in online arbitration cannot be ruled out. The question then remains as to whether the courts will have the necessary technological and human resources to deal with appeals arising from decisions made in online arbitration.

The courts will also provide legitimacy to online arbitration due to the fact that they can enforce judgments than the private online arbitration service providers. In addition courts are able to create predictability and confidence due to their ability to create rules and enforce them.

[243] WIPO, "WIPO Electronic Case Facility (ECAF)", available at **http://arbiter.wipo.int/ecaf/introduction.jsp** (accessed on 23rd November 2012)
[244] Brian A. Pappas, "Online Court: Online Dispute resolution and the Future of Small Claims", UCLA Journal of Law & Technology, vol. 12, issue 2 (2008) available at **www.lawtechjournal.com** (Accessed on 23rd November 2012)

Another very important role that the courts can play in online arbitration is to create public awareness of its existence. In this regard, if a dispute is brought in court and can be settled through online means, the court can advise the litigants to try and settle the dispute using online arbitration and if they cannot reach an agreement, then they can come back to court.

The courts will therefore be required to have a system of electronic registration allowing archiving of awards and electronic signature by the judge. This is to ensure that there is a connected and compatible electronic award installed in the registrar's office. This then means that electronic justice must develop in line with the electronic arbitration. With the Kenyan judiciary embracing modern technology, online arbitration will soon be a reality in Kenya.

When it comes to online arbitration, the practice under Uniform Domain Name Dispute Resolution Policy and Rules (UDRP) should be encouraged. UDRP does not bar either the complainant or the respondent from seeking judicial remedies. UDRP rules gives the panel the discretion to suspend, terminate or continue UDRP proceedings where the dispute domain name is subject of other legal proceedings.[245] This was also observed in the case of *August Storck V. Origan Firmware, WIPO case No. D2000-0576.*

Just like in traditional arbitration, parties in online arbitration cannot oust the jurisdiction of the court even through the arbitration agreement. In the case of *Indigo EPZ Ltd v Eastern and Southern African Trade and Development Bank*[246] the parties entered into an agreement in which the applicant loaned the respondent money which was secured by way of a debenture and a charge over a certain property. The agreement provided that all disputes concerning the

[245] Rule 18(a) of UDRP
[246] (2002)2 E.A. P.388

agreement be referred to arbitration and that the agreement be construed and governed in accordance with UK law. When the bank demanded repayment of the loan, Indigo EPZ Ltd moved to court seeking, among other things, an order for an injunction restraining the Eastern and Southern African Trade and Development Bank from disposing of the secured property and from appointing receivers under the debenture. The bank then made an application seeking to dismiss the suit on grounds that the court lacked jurisdiction under the agreement. It was held that the clause relied upon concerned matters of interpretation and not jurisdiction or applicability of Kenyan law to the agreement. It is a well-settled and recognized principle of law that all agreements purporting to oust the jurisdiction of the court are void.

2.26. Future of Online Arbitration

Online Dispute Resolution (ODR) and Online Arbitration have a lot of significance in the present world where technology drives almost every moment of our lives. The growth of e-commerce where business deals are being concluded online without the parties meeting physically means that online disputes will also increase. It may be also a challenge for the parties in a transaction if they are many to meet at ago if a dispute arises. In this regard online arbitration comes in handy to take care of those challenges.

Although online arbitration may present several challenges, it still remains a viable option in the growth of e-commerce. People who are skeptical about the online environment ought to be trained to gain trust in online arbitration. It is the obligation of the international community to assist developing countries to achieve global digital inclusion as e-commerce is global in nature. With proper human and institutional capacities to address online arbitration issues, the future of online arbitration seems bright.

2.27. Conclusion

The concept of online arbitration was noted to be a noble technological innovative step. The discussion in this chapter found out that the process is more or less along the same lines with that of traditional arbitration. It normally involves process agreement, initial presentations, rebuttals, considerations, decision and award. The point of departure is that while traditional arbitration is oral and written in nature, the online arbitration is dependent wholly on technology hence going against the usual traditional processes. The disadvantage with this is that the current arbitration laws do not recognize the technological processes in terms of validity.

It is noted, however, that the challenges regarding online arbitration can be addressed in order to enable the users enjoy fully its benefits. These genuine concerns of online arbitration must therefore be addressed in any framework touching on online dispute resolution of a country. In addressing them it is important to take into consideration the findings that have been captured herein. In addressing the challenges and the benefits, it is important to note that the impact of electronic handling and communication goes beyond management and security. Therefore, the technological means must be used that rule out any reasonable doubt that data produced as evidence have been altered.

Chapter Three

The Regulatory Framework governing a possible online Arbitration practice in Kenya

3.1 Introduction

The aim of this chapter is to discuss the relevance of the Constitution, the Current Arbitration Act, Kenya Communications Amendment Act, 2008 and the proposed electronic Transaction Bill with a view to find out their relevance to online arbitration practice in Kenya. The basis for this discussion is because of the complications of the current Arbitration Laws in Kenya to the practice of online arbitration and the fact that there is no evidence of its practice. The chapter will also attempt to provide a sample of a model law for online arbitration in Kenya.

3.2 The Constitution

The discussion of the Constitution in this chapter is important in two respects. Fist, it recognises the practice and application of arbitration generally, and secondly it recognises the application of international law in Kenya as one of the sources of law.

The Constitution provides that in exercising judicial authority, the courts and tribunals shall be guided by among others, the alternative dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms and that justice shall be administered without undue regard to procedural technicalities.[247] A purposive interpretation of these provisions indicates that by mentioning arbitration generally the Constitution does not limit the applicability of the online arbitration. Secondly, the words of undue regard to procedural

[247] Article 159(2) © and (d) of the Constitution.

technicalities connote non restriction on the modern technological evidential transactions including hearing, writing etc.

On the relevance of recognition of international law in Kenya, the same is important in that since we do not have a specific comprehensive legislation dealing in online arbitration in Kenya, we can borrow a leaf from developed rules of international law on online arbitration to guide the practice in Kenya. The Constitution provides that the general rules of international law shall form part of the law of Kenya. [248] That any treaty or convention ratified by Kenya shall form part of the laws of Kenya.[249]

Justice Majanja in the recent landmark decision in the case of ***Beatrice Wanjiru and Anor. V. Hon. Attorney General and Anor***[250] clarified the place of international law in our Constitution. He held that the use of the phrase "under this Constitution" means that the international conventions and treaties are subordinate to and ought to be in compliance with the Constitution. His reasoning was buttressed by the fact that Article 1 of the Constitution places a premium on the sovereignty of the people to be exercised through democratically elected representatives and a contrary interpretation would put the executive in a position where it directly usurps legislative authority through treaties thereby undermining the doctrine of separation of powers which is part of the constitutional setup. He said that the provisions under the Constitution should not be taken as creating a hierarchy of law akin to the Judicature Act, but must be seen in the light of the historical application of international law where there was reluctance by the courts to rely on international instruments even those Kenya had ratified in order to enrich and enhance the enjoyment of human rights.

[248] Article 2(5) of the Constitution.
[249] Article 2(6) of the Constitution.
[250] Milimani HCCC No. 190 of 2011

In essence the above discussions have emphasized the applicability of international law as part of laws in Kenya and therefore Kenyans at large should not be afraid to utilize them in advancing dispute settlement through online arbitration.

3.3 The Arbitration Act, 1996 as amended 2009

The Arbitration Act, 1995 was assented on 10th August, 1995 and came to force on 2nd January, 1996. It repealed and replaced Chapter 49 Laws of Kenya, which had governed arbitration matters since 1968. The 1995 Act is made of 42 sections and is divided into 8 parts. The Act is based on the Model Arbitration Act of the United Nations Commission on Trade Law. Subsequently, the 1995 has been amended vide the Arbitration (Amendment) Act 2009 which was assented to on 1st January 2010

This part is not intended to discuss the provisions of the Act in detail but to highlight the few provisions which relate online arbitration. The Act though not express in the recognition of online arbitration, it has some provisions that recognises electronic transactions. The Act provides that an Arbitration Agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement of which the agreement must be in writing.[251] Writing is defined thereof to include a document signed by the parties; an exchange of letters, telex, telegram, facsimile, electronic mail or other means of telecommunications which provide a record of the agreement; or an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other party.[252]

The Act governs receipt of communications including electronic communications. In particular it provides that unless otherwise agreed in writing between the parties, any

[251] Section 4 of the Act.
[252] *Ibid.*

communication made pursuant to or for the purposes of an arbitration agreement being a communication effected by facsimile or electronic mail is deemed to have been received if it is transmitted to a facsimile number or electronic mailing address, as the case may be, specified by the addressee as his number or address for service; and is deemed to have been received on the day on which it is so transmitted; or in any other case , is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; and is deemed to have been received on the day on which it was so delivered.[253]

The greatest complication with the Act is in terms of the contents and form of the award for it to be enforceable. The Act provides that an arbitral award shall be made in writing and shall be signed by the arbitrator or the arbitrators.[254] Even though the definition of writing as earlier mentioned in section 4 of the Act might covers this point, the complication still remains as to signing. This is a matter that shall be explored under the Kenya Communications (Amendment) Act, 2008.

By recognition of the New York Convention, the Act in itself recognises the validity of the arbitration awards made in other jurisdictions. The Act provides that an international arbitration award shall be recognised as binding and enforced in accordance to the provisions of the New York Convention or any other *convention to which Kenya is signatory and relating to arbitral awards. The New York Convention* is defined to mean the Convention on the Recognition and Enforcement of *Foreign Arbitral Awards adopted by the United Nations*

[253] Section 9 to the Act.
[254] Section 32 to the Act.

General Assembly in New York on the 10th June, 1958, and acceded to by Kenya on the 10th February, 1989, with a reciprocity reservation.[255]

The Act also provides for recourse to court to stay the proceedings by either of the parties. In this regards, a party can approach the court and stay proceedings where the other party has initiated court proceedings in disregard of the arbitration agreement. In granting stay of proceedings, the courts generally have regard to the following conditions. One, the applicant must prove the existence of an arbitration agreement which is valid and enforceable. The applicant for stay must also be a party to the arbitration agreement or at least a person claiming through a party e.g. a personal representative or trustee in bankruptcy[256]. In addition, it is necessary that the dispute which has arisen fall within the scope of the Arbitration Clause. The court is bound to stay the proceedings unless, *inter alia*, it finds that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.[257] This means that even in online arbitration, so long as the conditions for stay of proceedings are met, a party can compel the other party to arbitrate a dispute through a court order.

Section 7 of the Act empowers the courts to make interim orders for purposes of preserving the status quo pending and during the arbitration. The jurisdiction is however vested to the high court of Kenya. The powers could include making orders for attachment before judgment, interim custody or sale of goods, appointing a receiver and interim injunctions.[258] However, the law discourages the parties from making parallel applications before the arbitral

[255] Section 36 to the Act.
[256] **Chevron Kenya Limited-v-Tamoil Kenya Limited HCCC (Milimani) No. 155 of 2007.**
[257] Section 6(1) (b) of the Arbitration Act 1995. The section received an interpretation in TM AM Construction Group (Africa) v. Attorney General HCCC (Milimani) No. 236 of 2001
[258] ***Don-wood Co. Ltd-v-Kenya Pipeline Ltd*** **HCCC No. 104 of 2004,** where the court granting the orders sought held that the jurisdiction to grant the injunctive relief under section 7 of the Arbitration Act was meant to preserve the subject matter of the suit pending determination of the issues between the parties.

tribunal and/or the High Court by having section 7 (2) enjoin the court to adopt any ruling or finding on any relevant matter to the application as conclusive. Although online arbitrators can issue interim orders they have no way of compelling the parties to obey with the orders issued. This means that where the subject matter is of high value, it is better to apply for interim orders in the court as they can be enforced.

Section 11 and 12 of the Act provides for ways in which appointment of arbitrators is to be done. Section 11 provides that the parties are free to determine the number of arbitrators failing to which there will be only one arbitrator. Section 12 allows the parties to agree on the procedures for appointing arbitrators.

The Act also provides for what is expected from an arbitrator and cases of disqualifications and removal of an arbitrator.[259] An arbitrator can be challenged if he is not impartial and independence. The arbitrator is also required to always maintain the duty of confidentiality. These requirements are also required to be maintained by arbitrators in online arbitration. Any compromise of any of this principal will lead to the challenge of the arbitration award.

Section 18 empowers the arbitral tribunal to make any interim measures if need be. The section provides that; Unless the parties agree otherwise, an arbitral tribunal may, on the application of a party order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute, with or without an ancillary order requiring the provision of appropriate security in connection with such a measure; or order any party to provide security in respect of any claim or any amount in dispute; or order a claimant to provide security for costs.

[259] See Sections 13, 14 and 15 of the Act.

Part IV of the Act provides for the conduct of the arbitral proceedings. Parties are to be treated equally and each party should be given reasonable time to present their case.[260] Parties are however required to do all things necessary for the proper and expeditious conduct of the arbitral proceedings[261] section 20 of the Act gives the parties the discretion to agree on the procedure to be followed by the arbitral tribunal in the conduct of the proceedings. This means then the parties can agree to conduct their arbitration through electronic means if it suits all the parties.

When it comes to the place of arbitration, the Act under Section 21 allows the parties to agree on the juridical seat of arbitration and the location of any hearing or meeting. In this case parties who are involved in online arbitration can decide their seat of arbitration to avoid issues of jurisdiction when it comes to enforcement of online award.

Section 31 of the Act provides that an arbitration award shall be made in writing and signed by the arbitrators. While analysing the provisions of the Kenya Communication (Amendment) Act, this paper will show that an electronic award issued electronically but digitally signed by the arbitrators is as equally good as the traditional arbitration award.

There are instances where an arbitral award may be challenged in the High Court.[262] These instances includes; that a party to the arbitration agreement was under some incapacity, the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya, the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case, the arbitral award deals with a dispute not contemplated

[260] See section 19 of the Act
[261] See Section 19A of the Act
[262] Section 35 of the Act.

by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside, the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, such agreement, was not in accordance with the Act and lastly that the making of the award was induced or affected by fraud, bribery, undue influence or corruption.

Such instances may also arise in online arbitration where a party may be incapacitated in terms of technology amongst other challenges. Therefore when conducting online arbitration, care should be taken to ensure that instances that could cause the award be challenged are avoided or taken care of.

3.4 The Kenya Information and Communication Act, as Amended in 2008

The Kenya Information and Communication Act, as amended in 2008 aimed at facilitating the development of the information and communications sector including broadcasting, multimedia, telecommunications and postal services and electronic commerce[263]. This Act is relevant to this discussion mainly because online arbitration is a mode of electronic transaction.

Electronic transactions are provided for under part VIA of the Act which seeks to address some of the key issues that touch on online arbitration. The Act provides for the recognition of electronic records. This actually means that in case of a dispute as in the case of unauthorized

[263] This is expressed under section 2 of the Act.

transactions or identity, it can be construed that such evidence in the form of electronic records can be presented in the arbitration tribunal as evidence. In this respect, the Act provides that; ***"where any law provides that information or other matter shall be in writing then, notwithstanding anything contained in such law, such requirements shall be deemed to have been satisfied if such information or matter is rendered or made available in an electronic form and accessible so as to be used for a subsequent reference."***[264]

In regard to the above, the Act recognizes the validity of contracts entered into electronically. As such, electronic transactions are not void for all intents and purposes.[265] This provision has been reaffirmed by section 83K which further provides that; ***"As between the originator and the addressee of an electronic message a declaration of intent or other statement shall not be denied legal effect, validity or enforceability solely on the ground that it is in the form of an electronic message."***

This is to the effect that just because an intention to contract is expressed electronically, it does not make it less of an intention.

As far as authentication of electronic documents or electronic messages is concerned , the Act provides that such documents shall be evidenced through the use of electronic signatures and in this regard, such an electronic signature shall be held to be satisfactory if; "it is generated through a signature-creation device, if the signature data are within the context in which they are used, linked to the signatory and to no other person, the signature creation data were, at the time of signing , under the control of the signatory and of no other person, any alteration to the electronic signature made at the time of signing, is detectable and where the purpose of the

[264] Section 83G

[265] Section 83J which provides inter alia that 'in the context of contract formation, unless otherwise agreed by the parties, an offer and acceptance of an offer may be expressed by means of electronic message is used in the formation of a contract, the contract shall not be denied validity or enforceability solely on the ground that an electronic message was used for the purpose'

legal requirement for a signature is to provide assurance as to the integrity of the information to which it relates, any alteration made to that information after the time of signing, is detectable."[266] This provision therefore addresses the complication under section 32 of the Arbitration Act which required the award to be in writing and signed by the arbitrators.

The stringent requirements as to signature are aimed at preventing forgery and fraud and at the same time ensuring data protection. Such security steps are very useful in the field of online arbitration especially bearing in mind that there is a likelihood of hacking and faking signatures hence loosening acceptability and confidence in the process.

Section 83P which recognizes the validity of such signatures provides that

> ***"where any law provides that information or any other matter shall be authenticated by affixing a signature or that any document shall be signed or bear the signature of any person, then, notwithstanding anything contained in that law, such requirement shall be deemed to have been satisfied if such information is authenticated by means of an advanced electronic signature affixed in such a manner as may be prescribed by the Minister."***

In the same line the Act empowers the Minister to prescribe regulations regarding;

> ***"the type of electronic signature, the manner and format in which the electronic signature shall be affixed, the manner and procedure which facilitates identification of the person affixing the electronic signature, control of the processes and procedures to ensure adequate integrity, security and confidentiality of electronic***

[266] Section 83O

records or payments and any other matter which is necessary to give legal effect to electronic signatures."[267]

As far as the issue of unauthorized transactions and unauthorized access to computer data is concerned, the Act addresses them in this manner. The Act makes it an offence to commit such an unauthorized act and prescribes sanctions in form of a fine of two hundred thousand shillings or imprisonment of a term not exceeding two years or both.[268] It also provides for circumstances that will not amount to unauthorized access to data.[269] This provision acts as a deterrent to any person who would want to commit such an offence.

From the above analysis, it can be stated that the Act has to some extent sought to lift the dark cloud engulfing the practice of online arbitration by seeking to address some of the key issues affecting the acceptance and practice of online arbitration. This Act is very general and does not specifically address the issue of online arbitration, hence the need to come up with a regulatory framework for online arbitration.

3.5 The Electronic Transactions Bill of 2007

Even though this Bill has been overtaken by events through the enactment of the Kenya Information and Communications (Amendment) Act, 2008, a discussion on the major highlights is necessary because of the specialization in the Bill regulating the electronic issues instead of just a few provisions in the Kenya Communications (Amendment) Act, 2008. The

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[267] Section 83R

[268] Section 83U(1)

[269] Section 83U(2) provides inter alia that , 'a person shall not be liable under subsection (1) where he:-

a) Is a person with a right to control the operation or use the computer system and exercises such right in good faith
b) Has the express or implied consent of the person empowered to authorize him to have such an access
c) Has reasonable grounds to believe that he had such consent as specified under paragraph (b) above; or
d) Is acting in reliance of any statutory power for the purpose of obtaining information, or taking possession of any document or other property.

Electronic Transactions Bill of 2007 has been described as a Bill for an Act of Parliament aimed at facilitating and promoting the use of electronic transactions in Kenya by creating legal certainty and public trust around transactions which are conducted with various forms of information and technologies.[270]

In this respect it can be stated that this Bill, if passed to become law, will regulate the use of technology and encourage consumers to undertake electronic services.

The objectives of the Bill include: to facilitate and eliminate barriers to electronic commerce resulting from uncertainties over writing and signature requirements, and promoting the development of the legal and business infrastructure necessary to implement secure electronic commerce; to facilitate electronic government related transactions such as electronic filing of documents with government agencies and statutory corporations and to promote efficient delivery of government services by means of reliable electronic records; minimizing the incidence of forged electronic records, intentional and unintentional alteration of records, and fraud in electronic commerce and other electronic transactions; and promoting public confidence in the integrity and reliability of electronic records and electronic commerce through the use of electronic signatures to lend authenticity and integrity to correspondence in any electronic medium.[271]

A look at these objectives shows the government's recognition of the major role played by technological innovations in development and the existence of a legal vacuum in as far as use of technology is concerned.

[270] In this respect article 1 provides that, 'this Act may be cited as the 'Electronic Transactions Bill, 2007" and shall come into operation on such date as the minister may, by notice in the Gazette, appoint and in this regard the minister may appoint different dates for different provisions'
[271] Article 5(1)

The Bill proposes administrators of the Act if passed to include the Central Bank, the Communications Commission of Kenya, the National Communication Secretariat, the Directorate of E-government and other relevant stakeholders in the sector. This provides a more decentralised form of administration and ensures that all the major actors are represented, which is commendable.

The Bill recognizes the use of electronic version of documents and provides that no such information in the form of electronic form shall be denied legal effect on that basis. In this respect, such information shall be accorded legal effect, validity and shall be enforceable.[272] This forms the ground stone upon which online arbitration claim validity.

As far as data protection is concerned the Bill puts a responsibility on the holders of such information to take the precautions to safeguard such information. In this regard, the Bill calls on the holders of such information to ensure that the record is protected, by such security safeguards as it is reasonable in the circumstances to take against unauthorized access, use, modification, disclosure or loss. Where it is necessary for the record to be given to another party in connection with the provision of the service to the record keeper, this is to be done to prevent unauthorized use or disclosure of information.[273]

In effect, any party or the arbitrators are under a mandate to take all precautionary measures to ensure that all the data concerning online arbitration is well protected in order to reduce cases of identity theft and any other form of computer crimes. Any institution that fails to comply

[272] Article 6
[273] Article 34(1)

will thus be acting contrary to the law and will therefore be liable. In this regard, it is important to note that the Bill has sought to confer jurisdiction upon any court in Kenya.[274]

3.6 Sample of Model Law for Online Arbitration in Kenya

The sample of the model law does not show how amendments are to be framed in the Arbitration Act. It is only meant to provide for the content that a legislation regulating online arbitration in Kenya ought to have. Under each provision the researcher will explain the reasoning behind the proposed provision.

Amendments to the Arbitration Act of Kenya to Provide for Online Arbitration in Kenya ENACTED By the Parliament of Kenya as Follows:

PART 1 PRELIMINARY

Section 1; This law shall apply to online arbitration procedures. It will not override the Arbitration Act of 1996 or any other law or rule relating to traditional arbitration.

Explanation: This is because the proposed law is not to change the general rules of arbitration but only to provide for provisions relating to online arbitration.

Section 2; Unless there is a specific rule provided for online arbitration, the general rules of arbitration provided in the Arbitration Act will be applicable in online Arbitration

Explanation: This provision is to address any loopholes that may be left out by the proposed Legislation on Online Arbitration so that there is no Lacuna.

Section 3; In this Act unless the context otherwise requires:

"Online arbitration" means a form of dispute resolution using the internet as the main medium in conjunction with other technology such as multi-point video-conferencing.

"Traditional Arbitration" means arbitration prescribed under the Arbitration Act, 1996[275]

'Signature" includes electronic signature

[274] Article 37
[275] Cap 49 laws of Kenya

"Electronic signature" means authentication of any electronic record by a subscriber by means of the electronic technique and includes digital signature.[276]

"Electronic communication" means communication by computer

"Arbitration agreement" includes an agreement entered into by electronic means.

Section 4; The online arbitration agreement should contain the following;

a. The agreement to use Electronic means of communication in the procedure
b. The requirements of online arbitration agreement
c. The qualifications of online arbitrators and procedure for appointing online arbitrators
d. The means that will be used by the parties in communicating
e. The applicable law for the resolution of the dispute and the competent court for the enforcement
f. The Rules for presenting evidence
g. A statement to the effect that arbitration will be conducted through electronic means of communication
h. Measures that each party will undertake to ensure confidentiality of information exchanged is maintained.

Explanation: This section will ensure that there is no ambiguity on the contents of the arbitration agreement.

Section 5; The arbitral agreement shall be in writing. For the purposes of this Act the agreement will be deemed to be in writing when it is done in a document or through the exchange of letters, fax or through electronic means of communication provided it has a signature

Explanation: This section is meant to take into account arbitration agreements entered electronically.

[276] Talat, *op cit* 57

Section 6; Parties may choose any electronic means of communication provided it complies with the following;

a. It is accessible to all the parties
b. All the parties involved have knowledge on how to operate the means chosen
c. The means will afford each party a fair trial
d. The means chosen can record, display and reproduce the information and data transmitted for a specified time as agreed by the parties.
e. Parties have mutually consented to the use of the means of communication

Explanation: This Section is meant to provide the parties with the criteria that electronic means of communication used should fulfill.

Section 7; The procedure for online arbitration shall be carried according to the Arbitration Agreement. However the procedure chosen by the parties must comply with the following:

a. Parties shall be given enough notice of the hearing dates
b. Parties shall be given reasonable time to present their evidences
c. Parties will have unlimited access to the evidence and electronic documents of the other party

Explanation: This section ensures that the principle of due process is not compromised in online arbitration.

Section 8; Parties shall take all the necessary measures to ensure the integrity of all electronic documents produced during the proceedings. In this regard the documents should be complete and unaltered. Any party in breach of this rule shall be responsible for any damage incurred by the other party as a result of the breach.

Explanation: This section is to ensure that the principle of confidentiality is not compromised in online arbitration.

Section 9; All the documents exchanged, provided or produced during the proceedings shall be stored for a minimum of 10 years after the enforcement of the award.

Explanation: The section is meant to secure the evidence in case the dispute recurs.

Section 10; Unless otherwise agreed between the parties, the time for the dispatch of electronic communication shall occur whenever it leaves the information system of the party who is sending the information

Explanation: This is to lay the timelines as to when the communication is deemed to have taken effect for avoidance of doubts.

Section 11; Unless otherwise agreed between the parties, the time of receipt of electronic communication is determined as follows:

i. When parties have designated an information system for the purpose of receiving data messages, receipt occurs at the time when the message or communication enters the designated system

ii. In the absence of that, the receipt will occur when the data message enters an information system of the addressee.

Explanation: This is to lay specific rules as to when receipt of document is deemed to have taken place so as to avoid cases of parties claiming that they have not received documents.

Section 12; Unless otherwise agreed by the parties, any information concerning or related to the online arbitration proceedings or to the dispute out of which the proceedings arise shall be kept confidential except where applicable laws order its disclosure or if such disclosure is required for the enforcement of the award.[277]

Explanation: This is to emphasis the need to maintain the principle of confidentiality in online arbitration

Section 13; The arbitrators and the parties shall implement all the necessary security means to ensure the confidentiality of the information exchanged against any unauthorised access by a third party.

[277] UNICITRAL Model Law on International Conciliation Procedures, Article 9

Explanation: This gives the arbitrators the discretion to implement any measures that ensures that information disclosed during the proceedings is not accessed by people who were not part of the proceeding.

Section 14; Security measures shall be taken to protect the integrity of all the documents and information used during the procedure. There should be back-ups of all the documents related to the procedure.

Explanation: This acts like a cushion in the event that information exchanged via electronic means gets lost or tampered with.

Section 15; The parties may choose any seat of arbitration. In the event that parties do not choose the seat of arbitration then they shall:

a. Specify the substantive law with which the arbitrators shall sole the dispute.
b. The competent jurisdiction to solve any dispute arising from the arbitration procedure
c. The competent jurisdiction for the enforcement for the award

Explanation: This is to ensure that there is no confusion as to the place of arbitration when enforcement of award is being enforced.

Section 16; The rules in the Arbitration Act in relation to enforcement of the awards shall be applicable in online Arbitration.

Explanation: This section is in recognition that the procedures for enforcement of the award remain the same in both traditional and online arbitration.

3.7 Conclusion

It is noted that the challenges regarding the practice of online arbitration in Kenya is two-fold: Firstly, there is no express law governing on line arbitration hence left at the mercy of application by inference, and secondly, to allow the practice, key issues such as recognition of

the validity, access, confidence, and authentication need to be addressed specifically. These genuine concerns of on line arbitration must therefore be addressed in any framework touching on the same. In addressing them it is important to take into consideration what has been discussed in this chapter hence the import of the concluding chapter Five.

Chapter Four

Comparative Study of Online Arbitration

4.1 Introduction

This chapter takes a two pronged approach in its discussion; applicability of international law on online arbitration; and comparative study of India's and Canada's law on online arbitration. The applicability of international online arbitration is majorly administered by the United Nations and European general umbrella on trade vides several Conventions. The importance of the study is because the Constitution now recognizes international law as one of the sources of law in Kenya. The new constitution changed the status of international law instruments ratified in Kenya into a source of law in Kenya. International law and principles were considered not to form part of Kenyan law unless they were domesticated.[278]

The second part of the study deals with the comparative study of the India's applicability of the law of online arbitration. The import of this sample is twofold, one on the basis of its applicability being at its infancy stage and secondly is because the laws governing online arbitration are found in several statutes to which Kenya's laws bear resemblance. The third part on the other hand deals in the applicability and comparative study of online arbitration in Canada.

[278] Constitution of Kenya 2010, section 2.

4.2 International Online Arbitration

A number of arbitration institutions have already opened the possibility to perform arbitral proceedings online.[279] They have made an effort to either acclimatize their existing arbitration rules to the online environment, or to set up new sets of rules for online arbitration.[280] The legal framework for online arbitration requires multiple layers of regulation at different level. The international commercial arbitration not only encompasses the institutional rules of arbitration and private contractual agreements but also international conventions, bilateral treaties, model laws (such as UNCITRAL model laws) and national arbitration laws. All these aspects need to be taken care of even in online arbitration.[281]

International Online Arbitration is governed by several international Conventions including; New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention[282]). Kenya acceded to the convention on 10th February 1989, reserving it to the arbitral awards made in the territory of other contracting states. [283] The primary aim of the New York Convention is the recognition of foreign arbitral awards and the indirect enforcement of international commercial arbitration agreements.[284] Then there is The Model Law[285] which is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international

[279] See "global Development of Online Arbitration" Article available at **http://www.scribd.com/doc/89047084/Cyber-Arbitration-17dec** (Accessed on 7th September 2012)
[280] *Ibid.*
[281] *Ibid.*
[282] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, available at **http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf**. Accessed on 27th August, 2012.
[283] . See Attiya Waris & Muthomi Thiankolu(2011) "International Commercial Arbitration in Kenya" **Arbitration Law & Practice in Kenya**, Law Africa p.203

[284] *Ibid.*
[285] The UNCITRAL Model Law on International Commercial Arbitration 1985 (the UNCITRAL Model Law)

commercial arbitration.[286] It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award.[287] It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.[288]

Other conventions include; European Convention on International Commercial Arbitration (European Convention[289]); the United Nations Commission of International Trade Law (UNCITRAL) Arbitration Rules, 1978; the International Institute for the Unification of Private Law (UNIDROIT); Principals of International Commercial Contracts, 1994 and the International Bar Association (IBA) Rules of Evidence in International Commercial Arbitration 1999; amongst others.[290] The United States and most countries under the European Union have ratified the Treaties. These conventions cover several key issues including: arbitration agreement formed by electronic means; arbitration proceedings conducted by electronic means; selection of arbitrators; award and enforcement; and the confidentiality in online arbitration. Further in recognition of the development of E-commerce and in order to facilitate electronic contracts there has been put in place the UNCITRAL Model Law on e-commerce (the Model Law on E-commerce) which goes further by modernizing the concept of writing and signatures and thus facilitating e-commerce.[291] These are discussed hereunder.

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[286] Text available at **http://www.uncitral.org/uncitral/en/case_law/digests/mal2012.html** (Accessed on 27th August 2012)
[287] *Ibid.*
[288] *Ibid.*
[289] European Convention on International Commercial Arbitration of 1961, available at **http://www.law.berkeley.edu/faculty/ddcaron/Documents/RPID%20Documents/rp04011.html**. Accessed on 27th August, 2012. (last visited Dec. 10, 2007).
[290] Text available *at* **http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARB-only-rev06-e.pdf. (**Accessed on 27th August, 2012.)
[291] See UNICITRAL Model Law on Electronic Commerce with Guide to Enactment, 1996, available at **http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf** (Accessed on 3rd April 2012)

4.3 Arbitration agreement formed by electronic means

The foundation of every arbitration is an agreement to refer the dispute to arbitration.[292] It is an agreement where the parties undertake that specified matters arising between them shall be resolved by a third party acting as an arbitrator and that they will honour the decision made by that person. [293] As a consequence therefore, an arbitration agreement is a written contract in which two or more parties agree to use arbitration instead of the courts to decide all or certain disputes arising between them.[294]The legal principle that arbitration agreement should be in writing is addressed by the international law on online arbitration as follows. Article II (2) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards states that- ***"The term, agreement in writing, shall include an arbitral clause in a contract or arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."***

Article I (2) (a) of the European Convention, on the other hand, states that an arbitration agreement shall mean either an arbitral clause in a contract or an arbitration agreement being signed by parties, or contained in an exchange of letters, telegrams, or in a communication by teleprinter and, in relations between States whose laws do not require that an arbitration agreement be made in writing, any arbitration agreement concluded in the form authorized by these laws. Clicking a button on a Website that contains an offer, which refers to terms and conditions, including an arbitration clause, would be valid as well because there has been an exchange of information entirely analogous to the exchange that takes place when e-mails or

[292] Kyalo Mbobu (2011) "The Arbitration Agreement" **Arbitration Law & Practice in Kenya**,) Law Africa, p.11
[293] Kariuki Muigua(2012) Settling Disputes Through Arbitration in Kenya Lodana Publishers, p.20
[294] *Ibid.*

faxes are exchanged.[295]Using electronic signatures[296] in an arbitration agreement will help protect the parties.

4.4 Arbitration proceedings conducted by electronic means

The online arbitration should be conducted as per the agreement of parties. This provides the autonomy and confidence in the proceedings.[297] According to Article V (1) (d) of New York Convention, recognition and enforcement of the award may be refused if the procedure was not in accordance with the agreement of the parties. Similar to this, under Article IV of the European Convention, the parties to an arbitration agreement shall be free to organize the arbitration by agreement.

4.5 The seat of arbitration

The place of arbitration constitutes the seat of arbitration.[298]The seat of the arbitration is important because it determines the nationality of the award, (which plays a role when the arbitral tribunal seeks the assistance of local courts) and the jurisdiction of local courts for setting aside the award.[299] In online arbitration, the parties and arbitrators can interact from different places.[300]Whether it is an electronic arbitration or not, it is possible that arbitrators can solve the dispute without any hearings unless the parties have decided otherwise. The

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[295] Richard Hill (1999), "On-line Arbitration: Issues and Solutions", 15 ARBITRATION INTERNATIONAL 199, 202 Ziya Akıncı, *Elektronik Tahkim (Electronic Arbitration*), Uluslararası İnternet Hukuku Sempozyumu (International Internet Law Symposium), 429, 430 (Izmir, 2002).

[296] Electronic signature is a paperless way to sign a document using an electronic symbol or process attached or associated with the document. Electronic signature and digital signature may be used interchangeably. In fact, digital signature is a subset of electronic signature. http://en.wikipedia.org/wiki/Electronic_signature. Accessed on 27th August, 2012.

[297] Julian D.M. Lew, et a (2003) Comparative International Commercial Arbitration 1 Kluwer Law International,p. 1

[298] Alan Redfern, et al (2004), Law And Practice Of International Commercial Arbitration Sweet & Maxwell, p159.

[299] Nicolas De Witt (2001), Online International Arbitration: Nine Issues Crucial To Its Success, 12 The American Review Of International Arbitration PP.441, 451.

[300] U.N. Conference on Trade and Development. *Dispute Settlement Module 4.1*, COURSE ON DISPUTE SETTLEMENT 48 (World Intellectual Property Organization, 2003) *available at* **http://www.unctad.org/Templates/Page.asp?intItemID=2102&lang=*1***, (Accessed on 27th August, 2012.)

arbitrators do not have to actually physically meet and decide at the seat of arbitration. Once the parties have determined the seat of arbitration, all proceedings and hearings could be held electronically and the arbitrators need only state the seat of arbitration in the award itself, as the parties determined, and sign the award. There need not be any relationship between the award decision and the seat of arbitration. If the parties have not stated the seat of arbitration, then the arbitral tribunal or the arbitration institution would determine the seat of arbitration.[301] Article 20 of the UNCITRAL Model Law stipulates that if the parties have not decided the place of arbitration, then the place of arbitration shall be determined by the arbitral tribunal based on the circumstances of the case.

4.6 Selection of arbitrators

The parties are free to choose the arbitrators.[302] The arbitrators may let an electronic arbitration institution choose the arbitrators. Electronic selection of arbitrators may be via computer selection or computer drawing.[303] The doctrine suggests that in online arbitration, any type of court intervention in the appointment of the arbitrators should be avoided. The selection of an institution or organization that selects its arbitrators in a professional, neutral, transparent and even automatic and non-discretionary manner should be favored.[304]

4.7 Award and Enforcement

In online arbitration, the winning party would most likely want to enforce the arbitral award in a national court. At that time, the online arbitration would probably be examined by that national court. Since the Internet does not have any boundaries, the first point considered will be affirming the location of the award. According to the New York Convention, an award is

[301] Isabelle, *op cit* 118.
[302] Articles 10 and 11 of the United Nations Commission of International Trade Law
[303] Isabelle, *op cit* 118.
[304] *Ibid.*

deemed to be made at the seat of arbitration. The place of hearings or the place where the award signed and delivered by the tribunal is not dispositive.[305] So in online arbitration, the place which is indicated in the award should be affirmed as the seat of arbitration under the explanation in the preceding paragraph.

According to Article IV (1) (a) of the New York Convention, the authenticated original award, or certified copy, should be supplied to the court that will enforce the award. According to this Article, the electronic file would need to be printed for an online arbitration. The hard copy of the award should then be signed by the arbitrators. However if the arbitrators use their digital signatures will it fulfill this condition? A practical solution for this problem is to send the printed version of the award to the arbitrators to sign or use a trusted third party to confirm that the digital signatures belong to the arbitrators.[306] Therefore, even if the arbitration agreement and proceedings take place totally in the electronic environment, the arbitral award should still be presented and signed by the arbitrators to be enforced without any difficulties.[307]

4.8 Confidentiality of the Award

There are different opinions regarding publication of online arbitral awards. Some believe awards should be published to allow for the development of arbitral case law.[308] Transparency will also help develop trust in online arbitration. However, the private information of the parties should be masked when publishing the awards.

[305] Hong-lin Yu and Motassem Nasir (2003), "Can Online Arbitration Exist Within the Traditional Arbitration Framework?," 20 JOURNAL OF INTERNATIONAL ARBITRATION p.471
[306] U.N. Conference on Trade and Development. *Op Cit* 301.

[308] Under Internet Corporation for Assigned Names and Numbers (ICANN), Rules for Uniform Domain Name Dispute Resolution Policy, all decisions are published on the ICANN website. See the Rules *at* **http://www.icann.org/dndr/udrp/uniform-rules.htm.** (Accessed on 27th August, 2012.)

4.9 Applicability of Online Arbitration in India

Online Arbitration in India is in its infancy stage and it is gaining prominence day by day. There is no specific law(s) governing Online Arbitration but the practice is supported by functional equivalent or inference[309] from several pieces of legislations. Online Arbitration is a mixture of conventional Arbitration under Arbitration & Conciliation Act 1996, combined with technological features requiring application of Information Technology Act 2000 and the Contract Act, 1872. This section looks at the dimensions of online arbitration in India along with the difficulties, advantages and legal complexities that this form of dispute resolution entails in its applicability. With the enactment of Information Technology Act, 2000 in India, e-commerce and e-governance have been given a formal and legal recognition in India. In addition India has come up with Online Dispute Resolution India (ODRINDIA) Arbitration Rules 2006[310] to provide for procedure of online arbitration, form of online arbitration agreement and enforcement of online awards.

There can be three possible situations for submitting or referring a claim, dispute or difference to an online arbitration. Firstly, an e-contract containing an online arbitration clause, Secondly, a written contract providing for online arbitration; and lastly, reference to online arbitration after the dispute has arisen.[311]

The implementation of Online Dispute Resolution or Cyber arbitration in India gives rise to certain legal issues. For example, if a Mumbai based Cyber arbitration Agency conducts the online arbitration proceedings while the arbitrator is in Lucknow and one party is in Kolkata

[309] The "functional equivalent" approach is promoted by the Model Law on Electronic Commerce. See also: *Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce* (New York, 1997) at 20 (section 15).
[310] Text available at **http://odrindia.com/arbi_rule.php** (Accessed on 24th November 2012)
[311] Ceil, Chenoy, "Dimensions of Online Arbitration in India". Available at ***SSRN: http://ssrn.com/abstract=2078896 or* http://dx.doi.org/10.2139/ssrn.2078896.** (Accessed on 27th August, 2012.)

and other in Chennai, then following legal questions beg for consideration: Legal sanctity of Cyber arbitration proceedings; Legal sanctity of documents and written submission sent through e-mail; Legal sanctity of the award rendered that is required to be written and signed; and Legal issues pertaining to the court which will have the jurisdiction to enforce the award.

I now examine the interplay of these issues in details as hereunder:-

4.10 A written Arbitration Agreement

Section 7(3) of the Arbitration and Conciliation Act, 1996 provides that an arbitration agreement shall be in writing. However, if the parties agree online to refer the matter to cyber arbitration through an Online Dispute Resolution Service Provider, the question arises as to whether such a cyber agreement will be valid in law. Section 4 of Information Technology Act, 2000 lays down the following provisions on this point: ***"Where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is-***

(a) rendered or made available in an electronic form; and

(b) accessible so as to be usable for a subsequent reference ."

Thus Section 7(3) of the Arbitration and Conciliation Act, 1996 read with Section 4 of the Information Technology Act, 2000 make Cyber arbitration Agreement valid. This can be compared to section 4 of the Kenyan Arbitration Act Cap 4 of 1995 as read together with Section 84 G of the Kenya Information and Communication Act, as amended in 2008 which gives validity to electronic documents. Therefore borrowing from practice in India, there is no reason as to why Kenya cannot conduct online arbitration.

4.11 A written and signed Online Arbitration Award

Section 31(1) of the Arbitration and Conciliation Act, 1996 lays down that an arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal. It also makes it mandatory to incorporate the date and the place of the arbitration so that it shall be deemed to have been made at that place. Section 31(5)[312] states that after the arbitral award is made, a signed copy shall be delivered to each party. In this case the question arises whether Online Arbitration Award would have the same legal sanctity as the offline award. The writing requirement is already discussed above and given recognition by Section 4 of the Information Technology Act, 2000. As far as the 'signature' requirement is concerned, Section 15 of the Information Technology Act is applicable. It provides that-

> ***"Where any law provides that information or any other matter shall be authenticated by affixing the signature or any document shall be signed or bear the signature of any person then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied, if such information or matter is authenticated by means of digital signature affixed in such manner as may be prescribed by the Central Government."***

Electronic signatures can provide for both authenticity and integrity (they encrypt the contents of the message in such a way that its content cannot be altered without prior decryption and subsequent re-encryption). They are comparable to handwritten signatures and should carry the same evidential weight. Recognized electronic signatures should not be restricted to digital signature, but extend to all types of procedures used to electronically attach a signature to a document, provided they (a) identify the user, (b) are in the exclusive control of the user and

[312] The Arbitration and Conciliation Act, 1996.

(c) encrypt document in such a manner that any subsequent alteration is noticeable. It can be inferred from the combined reading of Sections 15 and 11 of the Information Technology Act, 2000 that a secure digital signature can be attributed to the originator of such signature. Thus, if an award is digitally signed by the arbitrator then it can be deemed to have been signed by him. Further, if the arbitrators digitally sign the award, the goal of the New York convention appears to be met. Would such a solution be recognized? This poses a double question: first, whether such certification is acceptable; second, who should be capacitated to certify.

The whole arbitral proceedings remain subject to the laws of the many jurisdictions in which arbitration takes place and in which award is to be enforced. If arbitral proceedings are conducted entirely online at a distance, with parties and arbitrators in distinct places, *prima facie*, it seems difficult, or even impossible, to determine the place, or seat[313], of the arbitration. It is indispensible to ascertain the seat or place of arbitration which is online.

The issues involving jurisdiction in online arbitration will be more complex as compared to conventional arbitration unless a formal seat of arbitration is decided either unanimously by the parties or by the Arbitration Rules or by the arbitral tribunal. Section 20(1) of the Act[314] states that the parties are free to agree on the place of arbitration. Importantly, Section 20(2) indicates that if the parties have not agreed to such place then arbitral tribunal would determine the place of arbitration having regard to the *circumstance of the case including the convenience of the parties.* Parties sometimes choose the place of institution to be the place of arbitration. Thus, deciding a place of online arbitration can be achieved through unanimous decision of parties (either directly or by reference to the arbitration rules) or by arbitrators if

[313]A.Vahrenwald, "Out-of-court dispute settlement systems for e-commerce online:" at <http://www.vahrenwald.com/doc/part4.pdf> p. 83. (Accessed on 11th August 2012)
[314] The Arbitration and Conciliation Act, 1996.

the rules are silent or if parties fail to decide the same unanimously. Case law allows the seat of arbitration to be ***"a strictly legal concept dependent on the will of the parties".***[315]

Section 31(1) of the can be compared to Section 32 of the Kenyan Arbitration Act which requires the Arbitration and Conciliation Act, 1996 arbitration award to be in writing and signed by the arbitrators. Just like Sections 15 and 11 of the Information Technology Act, 2000 that provides for digital signatures, Section 83 (O) of the Kenya Information and Communication Act makes provision for the digital signature. The India Information and technology Act however addresses the issue of digital signature more comprehensively than the Kenyan Information and Technology Act by providing for legal recognition of digital signatures and instances where they can be used.

4.12 The legality of the proceedings and Enforceability of the Online Arbitration Award

The agreement of the parties to refer their disputes to the decision of the arbitral tribunal must be intended to be enforceable by law and hence, it must satisfy the requirement of enforceability as prescribed by Section 10 of the Contract Act, 1872 with a clear intention of entering into a legally binding relationship and parties must be *ad-idem.* Exchange of letters, telex, telegrams or "*other means of telecommunication"* should signify an active assent by both parties and a demonstrable meeting of minds as to the arbitration agreements.[316]

Similarly the Honourable Supreme Court in the case of ***Trimex International FZE Ltd. v. Vedanta Aluminium Ltd***[317]affirmed this position. In this case, the Petitioner submitted

[315] The decision of Court of Appeal of Paris, 28 October 1997, Société Procédés de préfabrication pour le béton v. Lybie, Revue de l□arbitrage, 1998, at 399.
[316] **Shakti Bhog Foods Ltd. V. Kola Shipping Ltd., AIR 2009 SC 12**
[317] (2010) 3 SCC 1

commercial offer through email for supply of bauxite to Respondent. Respondent conveyed acceptance of offer through e-mail and the Parties entered into contract. The Contract contained an Arbitration Clause for resolution of disputes between the parties. Thereafter, Respondent refused to honour contract on the ground that there was no concluded contract between the parties and the parties were still not ad idem in respect of various essential features of the transaction. It was held by the Honourable Court that if the intention of the parties to arbitrate any dispute has arisen in the above offer and acceptance thereof, the dispute is to be settled through arbitration.

Once the contract is concluded, the mere fact that a formal contract has to be prepared and initialed by the parties would not affect either the acceptance of the contract so entered into or implementation thereof, even if the formal contract has never been initialed. More importantly, Section 4 of the Information Technology Act, 2000 renders legal recognition of such electronic transfer of communication which is admissible as evidence.

After the award is made by a Panel of online arbitrators, the question arises as to the enforceability of the award in terms of process, and the enforcing court. Section 36 of the arbitration and Conciliation Act, 1996 states that the award will be enforced under the Code of Civil Procedure, 1908 as if it were a decree of the court. The term ‘court' has been defined under Section 2(e) of the Arbitration and Conciliation Act, 1966 as the principal Civil Court of original jurisdiction in district. It also includes the High Court in exercise of its ordinary civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been subject-matter of a suit.

Therefore, the court in which the award will be enforced is dependent on the subject-matter of the arbitration and not the place where the arbitrator sits or renders the “award”. In case of International and Commercial Arbitration, Indian legal position is that award can qualify as a foreign award under Section 44 of the Arbitration and Conciliation Act, 1996 only when the following conditions are satisfied: It should be made in pursuance of an agreement in writing for arbitration to be governed by the New York Convention on the recognition and enforcement of Foreign Arbitral Awards, 1958; Such award should not be governed by the law of India; and It should have been made outside India in the territory of a foreign State notified by the Government of India as having made reciprocal provisions for enforcement of the Convention.

4.13 Data protection, confidentiality of the documents and evidence adduced during the arbitral proceedings and privacy of the parties

Section 72 of the Information Technology Act takes care of the confidentiality and privacy of the electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned. It provides that-

> ***"Save as otherwise provided in this Act or any other law for the time being in force, any person who, in pursuance of any of the powers conferred under this Act, rules or regulations made there under, has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned discloses such electronic record, boo, register, correspondence, information, document or other material to any other person shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to one lakh rupees, or with both."***

The confidentiality and security of the electronic records is also taken care of by Section 83H and 83N of the Kenyan Act.

In conclusion, it is quite clear that the laws governing online arbitration in India and Kenya are almost similar. The only difference is that India has a comprehensive legislation purely dedicated to electronic transactions. This puts India at a more advantage because even investors will always opt to invest in a country that has a law dedicated to e-commerce. This is to avoid any loopholes that may result in disputes which the investors always try to avoid. This therefore calls for Kenya to have a comprehensive legislation purely on electronic transactions. In the meantime borrowing a leaf from India, it's the high time Kenya embraced online arbitration.

4.14 Online Arbitration in Canada

Online arbitration is at the moment only being used by Canada based eResolution, a virtual tribunal to settle domain name disputes.[318] The ICANN (Internet Corporation for Assignment Names and Numbers) has accredited eResolution to settle domain name disputes online. The domain name disputes are resolved in accordance with the ICANN Uniform Domain-Name-Dispute-Resolution Policy.[319]

A domain name complaint can be submitted online by means of a secure web based complaints form or by e-mail. The arbitrator will deal with the parties' claims in conformity with ICANN's Policy[320] and ICANN 's Rules[321] and e Resolution's own supplemental rules.[322] When both parties have had the opportunity to make their case, the arbitrator will issue a legally binding decision. Anyone registering a domain name is bound by the ICANN Rules, because they are incorporated by reference into the Registration Agreement, and set forth the terms and conditions in connection with a dispute between parties other than the registrar over the registration and use of an Internet domain name registered by a party.[323]

4.15 Conclusion

Expansion of using online arbitration makes lots of questions pose about the validity of various aspects of it in the conventional framework of national and international law. Virtual arbitration agreements, devices of this kind of arbitration and also security concerns in this context of the study have shown how and where to make improvements. As noted in this

[318] **http://www.eresolution.ca .** (Accessed o 11th August 2012)
[319] **http://www.icann.org/udrp/udrp-policy-24oct99.htm .** (Accessed o 11th August 2012)
[320] **http://www.eresolution.ca/services/dnd/p_r/icannpolicy.htm** (Accessed o 11th August 2012)
[321] **http://www.eresolution.ca/services/dnd/p_r/ICANNrules.htm .** (Accessed o 11th August 2012)
[322] **http://www.eresolution.ca/services/dnd/p_r/supprules.htm .** (Accessed o 11th August 2012)
[323] **http://www.eresolution.ca/services/dnd/p_r/icannpolicy.htm , see par. 1 and 4.** (Accessed o 11th August 2012)

study, these challenges are solvable. Some practical problems have made online arbitration as a combination of traditional and virtual arbitration, although, it seems that it won't take a long time to reach a complete online arbitration.

As already observed, the world is now a competitive global village with aspirations to remove legal obstacles brought about by the law on jurisdictions. As such there is need for a practical and all inclusive Convention on online arbitration to which Kenya should subscribe to by virtue of its importance and the Constitutional requirement. The study has thus been of importance in highlighting the tested practice of online arbitration internationally and regionally.

Chapter Five

Conclusions and Recommendations

5.1 Conclusions

This study has revolved around the need for Kenyan justice system to incorporate online arbitration. The thesis has in particular discussed that the advent of technology has made online arbitration more advantageous. The advantages as discussed included the instant transmission of documents at a modest cost and elimination of travelling costs amongst others. The paper proceeded to hypothesis that there is need to formulate a legal framework that shall seek to address the operation and functioning of online arbitration since the Arbitration Act, 1996 does not incorporate the online arbitration.

With the above in mind the thesis was organized into five chapters. Chapter One basically provided the framework within which the concept was interrogated. The thesis was thus based on a multipronged theoretical framework of a legal theory analysis.

The meaning and rationale of online arbitration was the subject of Chapter Two of the study. The chapter considered the treatises from different authors and the practice from other jurisdictions.

Chapter Three of the study considered whether Kenya with its state of current legislations is ripe to practice online arbitration. Of particular consideration whether the Constitution, the

Arbitration Act, and the Kenya Communications Amendment act make room for online arbitration. What came out from the discussion was that though there is no specific mention of online arbitrations in these legislations, the generality or the mentions of the information technology in its various provisions can be exploited to practice online arbitration in Kenya.

Chapter Four of the study dealt with the comparative study of online arbitration from other jurisdictions. The chapter was informed by the desire for Kenya to consider the worst and the best practices while formulating its legal framework on online arbitration.

5.2 Recommendations

The recommendations in this thesis shall be geared towards making the practice of online arbitration enforceable in Kenya. Several; factors including impartiality, recognition of the award, security, confidentiality and access are the key considerations that should be addressed by the legal framework in order to legally and effectively practice online arbitration in Kenya.

This thesis does not in any way propose for an independent legislation covering online arbitration because in my view an independent legislation will only make reference to legislation difficult since it will create a pile of several different legislations covering a given subject in Kenya. It is therefore my submission that amendments should be made to the Arbitration Act in order to recognize the practice of online arbitration in Kenya.

Online arbitration, in my view, is just but a form of Arbitration which can be divided into traditional and online arbitration. In deed the Constitution recognizes the generality of arbitration without dividing it into specific form or example.[324] In order therefore to enhance the independence of the body administering online arbitration I propose that the Act

[324] Article 159(1)© of the Constitution.

specifically recognizes such a body with clear mandate and rules governing it. The independence of it should be enhanced by providing that the practitioners shall not be subject to any control or direction of any person or authority. There should be set qualification with clear guidelines on remuneration set forth in the Act or schedule thereto in order not to make arbitration expensive.

The validity of online arbitration should be provided for in the Act by recognition of validity of electronic documents, digital signature and encryption. I propose amendments along the same lines with that of the Kenya Communications Amendment Act, 1998 which provides that as far as authentication of electronic documents or electronic messages is concerned, the documents shall be evidenced through the use of electronic signatures and in this regard, such an electronic signature shall be held to be satisfactory and conclusive evidence. Accordingly, regulations regarding; ***"the type of electronic signature, the manner and format in which the electronic signature shall be affixed, the manner and procedure which facilitates identification of the person affixing the electronic signature, control of the processes and procedures to ensure adequate integrity, security and confidentiality of electronic records or payments and any other matter which is necessary to give legal effect to electronic signature*** should be adequately addressed in the Act.

On data protection and security, responsibility should be put on the holders of information to take the precautions to safeguard such information. In this regard, the Bill calls on the holders of such information to ensure that the record is protected, by such security safeguards as it is reasonable in the circumstances to take against unauthorized access, use, modification, disclosure or loss.

The Civil Procedure Rules, the Evidence Act and the Criminal Procedure Code should accordingly be amended along the above discussed lines so as to give legal effect to the adoption of the online arbitration award.

In addition one can opt to use electronic signatures, cryptographic emails and local network instead of the internet.[325] Indeed Kenya can borrow a leaf from the practice of International Chamber of Commerce. The Chamber has designed a management system for more security in the online arbitration in 2001 entitled "net vase". In this system accessibility of documents and arbitration proceedings is just possible for parties and members of arbitral institution. At the same time accessibility of parties and members is different with each other based on their position.[326]

As to the issue of enforcement of the award may be we can look at other ways of ensuring compliance with the decision of the tribunal instead of relying only on legal sanctions. In this case if the party who is required to comply with the award refuses to do so, he is then exiled from the internet.[327] If a party refuses to comply with the decision of the online arbitrator, then the account of the non-complying party can be terminated after it has been so contractually agreed between the online arbitration provider and the internet service provider who provides the account.[328]

[325] Saleh Jaberi, *op cit* 73
[326] *Ibid.*
[327] Santiago Dussan "Enforcement of Online Arbitration decisions through Reputation sanctions as a Knowledge Problem" Article available at http://www.odr2012.org/files/dussan.pdf (Accessed on 16th September 2012)
[328] Ibid

In addition when coming up with forms for online arbitration, the guiding principle should be to provide adequate support for users without creating undue complexity. In this regards some suggestions have been put forward for the design of the forms.[329] These are:

a. Information to be structured in obvious fields with not too much information for each field.
b. The instructions should be short; fuller instructions should be provided by means of links.
c. A different form should be used for each party.
d. Information already known to the provider should be included on the form.

In choosing the means of electronic communication for online arbitration the following should be taken into consideration:

First the means chosen should be accessible to both parties involved in the arbitration. Secondly, any technology used should be equally mastered by both parties so that there is no unfair advantage of one party over the other. Thirdly, the means used should be transparent enough to ensure that all the information submitted by the parties reach the arbitrators. Finally, means of communication must adhere to the principle of fair trial and ensure that every party is subjected to a just trial.

All in all new technology will allow arbitration and negotiation to become faster, more efficient and less expensive. Although procedures and law will have to be developed and modified as technology develops, many of the issues including security issues will only become apparent as these new technologies are deployed and tested by real lawyers and arbitrators. This is why continued research and development of a Cyber Arbitration system is so important to ensuring a bright and new technological future for arbitrations. Provided that appropriate precautions are taken, arbitration agreements can be concluded by electronic

[329] Lodder and Zeleznikow, *op cit* 74 p. 400.

means and arbitration proceedings can be conducted by electronic means, within the framework of existing national laws and international treaties.

Further technology already offers numerous opportunities for online arbitration, and this will be even more so in the future.[330] It is important, however, that technological solutions should always be used on a voluntary basis. Parties must themselves be convinced of the advantages to be drawn from the use of online arbitration and it should not be forced.[331]

The use of the Internet allows an arbitration procedure to be conducted more effectively, by offering access to case information at any time and from any place, by supporting both synchronous and asynchronous communication, and by allowing large volumes of files to be handled. [332] Additionally, it is expected that videoconferencing will soon become a standard tool capable of greatly reducing travel time and expense. [333] However despite the wealth of possibilities offered by modern technology, one of the major challenges in the design of future ODR platforms will be to develop a technology that does not simply mimic offline practices[334] Similarly, online arbitration, which is still in its infancy, requires greater institutional support. It also awaits greater education, awareness and legal maturity.

In conclusion therefore and as rightly observed by Slavomir Halla[335]that*: "although not all of the legal difficulties arising with regard to online arbitration may be easily resolved, there are*

[330] Ibid
[331] Ibid.In this connection, it may be noted that ICC's recent initiatives in this field – NetCase and the work of the Task Force on IT in Arbitration – both stress this voluntary nature of technology and Internet use.
[332] Lodder and Zeleznikow, *op cit* 74, p. 400.
[333] *Ibid.*
[334] *Ibid.*
[335] Slavomir Halla, "Arbitration Going Online-New Challenges in the 21st century" article available at **http://mujlt.law.muni.cz/storage/1327961100_sb_05-halla.pdf** (Accessed on 17th September 2012)

no insurmountable obstacles but modernization and amendment is necessary in order to keep track with the developments of modern society.

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