TITLE: ARBITRATION

TOPIC: AN EXAMINATION OF THE ARBITRATION CLAUSES AND THE EXLUSIONARY CLAUSES IN SUCH AGREEMENTS

DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE AWARD OF BACHELORS' DEGREE IN LAW FROM THE UNIVERSITY OF NAIROBI, LL.B 2005.

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DEDICATION

I dedicate this work to my Dear Mama Eunice and Auntie Lucio. Both of whom endeavored to nurture a frail that was once me, in patience and wisdom to this firm level without an iota of literacy. To me, you are much more learned that I am. These are the fruits of your labours and the sleepless nights. Thank you Dear Mamas. I can never repay you in any way possible for what you have done to me.

ACKNOWLEDGEMENTS

I am most indebted to my supervisor, Mr. E.M. Bikundo for his guidance and inspiration. Learning under you was, to mention the least, a great experience.

Thanks too to CIarb personnel. Engineer J. T. Thuo, S. P. Ondiek and Redempta for accommodating me even in your tight schedules. Thanks a lot for allowing me use your library resources without which, this work would not be where it is now. May God bless you abundantly.

To my dear friends back in Campus, Kamiri, Kwanusu, Evans, Njoro, Sam, Ratemo, Njuguna, Nyangweso, Anabaka and Nick. For those I never mentioned by names it is not lack of recognition that I could not do so but the exigencies of space and the format dictated otherwise. You are all appreciated as a whole.

Finally to my Beloved Mum and Auntie, siblings, Cornelious, Henry,Kibet, Melek, Betty, Marti and our lasty, Sistee, you all make a wonderful unity, I thank God for you all. Having saved this last line, it goes to my firefly, my soul-mate, Bridge, you are a priceless gem. May God grant you the blessings you richly so deserve.

Lastly to God almighty, Glory is to you oh most high.

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ABBREVIATIONS

- ADRs- Alternative Dispute Resolutions
- CIarb- Cahrtered Institute of Arbitrators
- UNCITRAL- United Nations Conference on International Trade Law
- CPC- Civil Procedure Code
- AA' –Arbitration Act
- DAC-Department of Advisory Committee
- ICC-International Centre for Conciliation

TOPIC: A LOOK AT THE ARBITRATION CLAUSES AND THE EXLUSIONARY CLAUSES IN AN ARBITRATION AGREEMENT.

INTRODUCTION.

Appreciating the fact that the world we are living in is replete of disputes which are inherent in human nature, that co-existence among the human beings cannot be done away with just because of disputes and misunderstandings. So men have designed ways and means of bringing back the relationship among themselves including those who wronged them and those they have wronged. Arbitration is one of such means of letting humans co-exist among themselves despite such disputes present at all times.

Arbitration in the current world has taken a centre stage in dispute resolution due to the advantages of it over other means of alternative dispute resolution and including litigation. This research will strive to study the scope of arbitration. It will seek to address the effectiveness of arbitration as a whole, arbitration agreement and incorporated exclusion clause(s) in it in dispute resolution appreciating the fact that the means is consent based. Despite the setbacks that are going to be looked into, albeit cursorily, arbitration has extended its borders of application. It has been a means through which parties despite having grave differences desire to amicably resolve the difference and remain in good terms notwithstanding the fact that the final award reached which is binding could be unfair to either of the disputants.

In analysing the status and application of this mode of dispute resolution, this research paper will critically look into how the parties to it engage themselves in an agreement to sire up a non-ambiguous procedure. The exclusion clause(s), which are normally but not always included in all arbitration agreements, are going to be analysed too. The research will also look at the procedures through

which parties to a dispute follow in ensuring that their resorted means of dispute resolution would be what they had had in their consensus *ad idem*.

OBJECTIVES OF THE STUDY

The research paper is to be designed to;

Clarify the meaning, scope and application of an arbitration clause in an arbitration agreement. Clarification of the meaning will not necessarily be an issue totally different from what has been in literatures but the study will strive to pin point some pertinent issues about their meaning and probable interpretations that disputants might fail to appreciate in their involvement in the agreement .The scope and application will be aimed at establishing a clearer understanding of the clause and when does it come to apply. We will explain on the difference between the agreement itself and the clause that is incorporated in it which in most cases is confusing;

Strive to improve the understanding on the effects (positive and or negative) and the

Effectiveness of arbitration clauses in an agreement, the study will be dedicated to a better appreciation of the effects of inclusion or otherwise of such clauses and probable effects which will enable parties to it to have a better look on the mode of dispute resolution.

Appraise on the provisions of the Kenyan Arbitration Act 1995 regarding arbitration agreements and clauses incorporated therein and other rules or regulation of procedures to be followed in any arbitral tribunal.

RESEARCH QUESTIONS

This research paper will examine and endeavour to answer the following questions;

- How is an arbitration agreement drafted and the subsequent incorporation of exclusion clauses in the agreement? How its contents are set to ensure

that it meets the intention of the parties. There will be a critical look at the provisions of the Kenyan *Arbitration Act 1995 and the relevant sections of the England Arbitration Act 1996.*

- Does an arbitration clause add anything the matter to an arbitration agreement? Is this clause anything of value to safeguard parties' interests within the agreement .The nature, form, substance and operation of an arbitration clause will be the gist of the explanation and fleshing of this question.

- Is there a standard set on drafting of an arbitration clause and exclusion clauses? The rules, which are to be adhered to in, the drafting of the agreement and the incorporation of the clause(s) will be considered in details. This will be thoroughly looked into through the appraisal of the provisions of the Act and also through various articles in the literature. Further to this will be the exploration on the conditionalities with regards to the alteration of the clause in order to ensure it does represent the real motive of the parties to it, once it has been made applicable through the agreement.

JUSTIFICATION AND STATEMENT OF THE PROBLEM

In Kenya today and the global world over, disputants have resorted to arbitration as an alternative means of dispute resolution. Analysis shows that arbitration has been preferred for litigation and even other alternative dispute resolution means like mediation, negotiation and reconciliation that do not provide binding decisions. This means has taken a position good enough to warrant an appraisal, to parties to it and those anticipating to be, to get a better understanding of the system so as to justify their preference of arbitration as an a means of resolving disputes.

METHODOLOGY.

The primary source of material to this research paper will be done through interviewing technical experts of arbitration, personal direct observation and reviewing of the existing literature by the researcher.

In addition to the primary source, the secondary source will through the use of published as well as unpublished materials. They include textbooks and research papers among other materials relevant to this study. The research paper work will entirely be a clarification on areas that is either already amended or new issues emerged. The Chartered institute of Arbitrators (Kenya Chapter) resource centre and the University of Nairobi Law Library will be the main areas of our resources to this research paper.

CHAPTER BREAKDOWN.

Chapter 1

Will have an overview of the historical perspective and the background of arbitration and its difference from other alternative dispute resolution means. We are also going to study how arbitration has advanced since it became a famous means of dispute resolution and a cursorily touch on the forms of Alternative Dispute Resolution will still be part of this study. It will also talk of the areas with which the means is being applied.

Chapter 2

Will critically look at the meaning and construction of an arbitration agreement. It will also appraise on the basic terms and wordings of the agreement .The scope and incorporation of this agreement from other contracts will be examined. There will be a look at other basic terms and areas relevant to arbitration and other forms of ADRs.

Chapter 3

Will endeavour to exclusively examine the exclusion clauses in an arbitration agreement, their meaning, when and how they are incorporated in such an agreement. The effects of such clauses on the rights of the parties will also be looked at closely. It will also examine on the provision of the Act with regards to the ousting of the court's jurisdiction when there is in an agreement an exclusion clause. There will be study on the provision of the Act that a waiver by a party of his right to have the matter resolved through arbitration by taking a step to litigation. We are going to study what involves the taking of a step in a matter that is subject to arbitration by a party who will be deemed to have waived his right and the jurisdiction of the courts of law in matters subject to arbitration.

Chapter 4

Will be the conclusion and the recommendations. It will include a summary on the preceding chapters that have already been dealt with but in a conclusive and summary manner. There will also be a revisit or otherwise of the provision of the Arbitration Act NO.4 of 1995 and other relevant statutes and possible recommendations to their provisions and in a conclusive manner the regulation of the system of dispute resolution in Kenya.

"I know that there has been a very great inclination in the courts for a good many years to throw obstacles in the way of arbitration...and hence the disputes between the different courts about the effect ...they had great jealousy of arbitration..."

Lord Campell.

CHAPTER 1

HISTORICAL PERSPECTIVE AND BACKGROUND

1.0.0 INTRODUCTION

This chapter is devoted to the evaluation of the history of arbitration as a means of dispute resolution, the meaning of the process and the development of arbitration both in the light of Kenyan and England arbitration laws. It will conclude by enlightening, albeit, cursorily the difference between arbitration and other ADRs and a touch on the merits of arbitration.

BACKGROUND

The global world over, mankind by the nature of humanity is ever replete of disputes. A dispute is defined as a specific disagreement over a matter of fact, law or in policy which a claim or assertion of one party is met with refusal, counter-claim or denial by another.

It can either be international, between states *inter se* or private persons or individuals domestically.[1] These disputes are inevitable and man has had to live with it no matter how inconveniencing it could be.

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[1] International dispute settlement, 3rd edition page 1, by J. G. merrils.

In the old times, antiquity and "*contest*" were the most distinguishable attributes. In those days, indeed, guilt or other wrongdoing was decided by a physical contest or battle. There is an inevitable part of international relations, domestic or otherwise whereby no matter the disputants, they must accept as regular part of human relations, and the problem therefore would be what to do about them. To resolve them without disrupting the normal social order was the intention of all and sundry. Renunciation of the use of force was therefore made the principle.

In 1945, however, with the consequences of the unbridled pursuit of national objectives still fresh in the memory, the founder members of the UN agreed to "*settle their international disputes by peaceful means in such manner that international peace, security, and justice, are not endangered*[2]."

Through the process of civilization, man devised techniques and means of ascertaining the rights of the parties or a genuine accommodation of their differences. Trial by physical battle disappeared and its place taken by verbal battle. The realization of the inherency of dispute in human co- existence and further civilization of man led to development of such techniques as arbitration and litigation whereby disputants would agree to forward their differences to a third party neutral for resolution.

Noteworthy herein is the fact that arbitration is not a creation of the law. Instead, the law developed in order to regulate the practice. Arbitration was well known long before any legal regime was in place[3]. Despite having said so, the arbitration as of then was not arbitration proper, so to speak. This is because arbitration as of now is governed by statutes and well developed rules in arbitral tribunals. The practice therefore inasmuch as we may say it is long time developed has gone through thorough surgery in its system of application and regulation in order to

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[2] Article 2(3) of The Charter of The United Nations.

[3] Paris J. arbitration, Principles and Practice, London 1983 at page 4.

keep pace with the current civilization and developments both in practice and procedure.

Suffice is to say that arbitration is as old as trade itself. It flourished in Britain certainly as early as Roman times and came into its own with the founding of the courts of Pie Powder in the 15th century[4]. The courts were presided over by law merchants where the emphasis was on speed, simplicity of procedure, and more importantly, privacy, all of which we are attempting to return to today. It is said that this process, arbitration, sprang out of a concern in the middle ages that the courts were inappropriately structured to deal with commercial disputes arising from the growing amount of trading between merchants. The basic problem was the cumbersome procedures of the courts, which prevented quick and economical resolution of the disputes[5].

Again for thousand years, there was and is still the Bible story of King Solomon who was called to determine among two contesting women who was to be given custody of a baby. The King ordered the baby be cut into half so that the two women could have half each. One screamed. The King knew then who was the mother and awarded her the baby[6], this was said to be a process that in it involved arbitration. But according to **Mark Cato**, an arbitrator has to act judicially and so to him, cutting the baby into half, or even threatening to, would not have passed muster.[7]

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[4] A corruption of the Norman French PIEDS POUDR'ES – Dusty feet—so named as it is said that the dispute was resolved before the litigants had time to shake dust from their feet.

[5] Litigation support: Butterworth by Christopher J. Lemar and Andrew J. Mainz 4th Edition, chapter 4 at Page 252.

[6] Donald Valentine. Part II Arbitration: law, practice and procedure, at page 26.

[7] Introduction to the book, "Do you really want to become an arbitrator?"

1.3.0 THE MEANING OF ARBITRATION

Arbitration is a private and consensual process. Parties in a dispute agree to present their grievances to a third party neutral for resolution. The third party should be knowledgeable in the subject matter and must be impartial. He is to render judgment in accordance with the merits of the case only and not to be influenced in anyway by extraneous circumstances.

Arbitration as a means of dispute resolution cannot be defined conclusively despite several attempts having been put forward in thrives for a definition.

Judicial attempts forwarded define arbitration as the reference to the decision of one or more persons either with or without an umpire, of some matter or matters in difference between parties, ***Romilly M Collins v. Collins***[8]. This definition however involved other Alternative Dispute Resolution Techniques.

The 1996 Arbitration Act (England) does not define arbitration but it begins with a statement of the objects of arbitration[9] and general principles with which arbitration is founded.

The Arbitration Act N0. 4 of 1995, Kenyan Arbitration Act, define arbitration as any arbitration whether or not administered by a permanent arbitral tribunal[10].
The two Acts does not give us any definition that we can conclusively attach to arbitration.

Nonetheless, scholars, literature writers and case law have given us other definitions. Under English law, arbitration has been defined as ***a mechanism for dispute resolution which takes place usually in private pursuant to an agreement between two or more parties under which the parties agree to be***

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[8] (1858) 26 Bear, 306, 312 reported in English cases at 916-919.
[9] Arbitration Act 1996 at Section 1.
[10] Arbitration Act No.4 1995 Section 3.

bound by the decision to be given by a panel of arbitrators or the arbitrator according to the law or if so agreed other considerations[11].

Gill in his book, "The law of Arbitration" defined arbitration as ***a reference of a dispute or difference between not less than two persons for determination after hearing both sides in a judicial manner by another person or persons, other than a court of competent jurisdiction***[12].

From the foregoing it is understandable that it is very difficult to identify the exact combination of features or a definition which one can conclusively say it defines arbitration and hence can not be entirely set aside from other ADRs, however, certain features are usually found in arbitration alone which thus can qualify some of the definitions forwarded.

1.3.0 DEVELOPMENT OF ARBITRATION.

1.3.1 SOURCES OF THE LAWS

- There is no single "*conclusive*" source of the England Arbitration law up to the 1996 Act; there was not even a partial statutory code for conduct of arbitrators except the Acts which were more less connected to the courts and a non conclusive reference to arbitration was put in place in either of those prior Acts. The 1950 –1979 Acts were only concerned with filling the gaps in incomplete arbitration agreements[13]. They were also concerned with specifying the powers of the High Court. The greatest source is attributed to the quotation below;

'A user of the process and his foreign or non foreign specialist adviser cannot quickly hope to ascertain, simply by reading the Arbitration Acts and other

[11] England Arbitration Act Section 29, referring to rules that parties chose and contract law applicable to the parties.

[12] 4th Edition at page 1.

[13] England Arbitration Act, Sec 6.

statutes which contain individual provisions concerning arbitration, how arbitration in England works in practice, and still less how to confront the kind of problem which is likely to arise if the conduct of the reference goes wrong. The law on these topics lies almost entirely in the reported cases, beyond the reach of lay users of arbitration, and indeed a non-specialist foreign and England lawyers[14]".

- Other sources include the civil Procedure Rules.
- The awards of various tribunals, which are generally not published.
- The case law and United Nations Conference on International Trade Law (UNCITRAL) model law.

The history of arbitration therefore dates back to long time ago when disputants would resolve their differences by submitting the matter to a council of neutral persons.
It is only that during this time there was no name as arbitration as the parties had not developed much to the level of fully recognizing the means.

In the recent years, arbitration and other alternative dispute resolution techniques has been used more and more, not as a means for ascertaining the rights of the parties or for a genuine accommodation of their difference, but as a procedural battle ground, similarly is the courts [15].

Then as arbitration became more procedurally complex, usually as parties tried to use it as a trial for strength rather than a journey for truth, alternative dispute resolutions develop sometimes building upon parties to use of third parties to decide matters informally, as experts; skill or tact, understanding and diplomacy. Despite such developments in ADR arbitration still took the center stage due to its binding nature of award and apparent finalization of the dispute.

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[14] Extract from paragraph 103 of DAC Report on the UNCITRAL Model law dated June, 1989

[15] Supra note 8

Arbitration was entirely meant to give answers to the parties fairly, honestly and justly. This intent gave the mode a prospect to develop and get preference among disputants.

1.3.2 ENGLAND ARBITRATION LAWS

As early as Saxon times, arbitration, on a formal or informal basis had taken place in England. The relationship between the courts and arbitrators was tenuous and unclear. What was accepted; however was that no court would enforce an arbitrator's award. To avoid this defect, parties disputing started an action in court, and then requested the judge to refer all or part of the dispute for the decision of an arbitrator. Arbitration was then regarded as a step in the action in court. The court, naturally, would enforce the award issued. That award was seen as a kind of sub-judgment, given not by the judge but by an arbitrator acting on behalf of that judge.

1.3.3 STATUTES OF DEVELOPMENT.

Arbitration Act Of 1698 And Development To 1854

The first Arbitration Act was passed in 1698. It was an Act for "rendering the award of arbitrators more effectual in all cases for the final determination of controversies referred to them by merchants and traders, or others".

The Act did not abolish the old procedure of arbitration being a stage in a court action. The court would enforce the award, unless the court found that the award has been "procured by corruption or other undue means" [16].

The problem was that once an arbitrator had issued his award, he had become ***fuctus officio*** (discharged his office) but was remedied by 1850s when courts held

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[16] This phrase, however, was so widely extended by the courts that by about 1780s the courts were setting
aside awards not merely for misconduct on the part of the arbitrator and for errors of laws.

that it was the arbitrator's duty to issue a valid award. Until he had done so, he had not discharged his office.

Common Law Procedure Act 1854

This Act expressly empowered courts to remit an award for reconsideration by the arbitrator. It also empowered courts to stay an action in court if the parties had agreed to take the dispute to arbitration.

The Arbitration Act 1889

This repealed the 1698 Act, and the whole procedure of obtaining a rule of court. It dealt with appointment of arbitrators and set out terms to be implied to arbitration agreement.

Arbitration Act 1934

The Act merely filled in the gaps in the law in an attempt to make arbitration more efficient.

Arbitration Act 1950

This was a consolidation of 1698 and 1934 Acts. It included the power of a court to stay actions where there was an applicable arbitration agreement however, it had a proviso[17].

The Act simply set out powers of an arbitrator and the court, when desirable, the power to appoint an arbitrator. It is concerned with making and enforcement of awards and the power of the court to remove an arbitrator when he had "misconducted himself or the proceedings."

Arbitration Act 1975

This Act gave effect to the New York Convention on Recognition and enforcement of Foreign Arbitral Awards 1958[18].

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[17] Section 4(1) that this power was only to be used if the court was " satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement."

[18] This is embodied in Section 100-103 of the 1996 England Arbitration Act

Arbitration Act 1979

The Act dealt with regulating the courts' powers to review arbitration awards and to determine any question of law arising in the course of an arbitration process[19].

Arbitration Act 1996.

The Act is different from every other Act of parliament. It is largely a "write it yourself Act". This Act was drafted to consolidate with amendments, the Arbitration Acts 1950 and 1975 and 1979 and other related enactments[20]. This was following a recommendation that there should be an Act to "set out in a logical order and expressed in a language which is sufficiently clear and free from technicalities to be readily comprehensible to the lay user"[21].

The intentions of the Act were to simplify procedure and rules of arbitration as was stated by **Lord Woolf**, the master of Rolls; "*The Act was intended to make the law of arbitration clear and straight forward. Furthermore, the Act makes the law less technical than it has been hitherto. It sets out in readily understandable terms to the parties to arbitration what is required of them*", **Patel v. Patel** [22].

Role Of Case Law

Though Statutes were slowly regulating arbitrations, courts were also assisting in the development of the law of arbitration. The courts were not isolating arbitration, instead, they were bringing them in as a full partner in the administration of the English Law, example is under the civil liability (contribution) Act 1978, when two defendants each partly liable for a wrong, a court, with no mention of an arbitrator was empowered to apportion the liability as between them. This was echoed in ***Wealands (Christine) v. CLC Contractors***

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[19] Sections 69-71 of the 1996 England Arbitration Act.
[20] The 1994 Bill produced by the England Parliamentary draftsmen.
[21] Recommendations from Department of Trade and Industry, Departmental Advisory Committee (DAC)
set up in 1989 to consider the state of Arbitration in England.
[22] (1999) WLR 322.

limited [23], where the court of appeal held that the arbitrator could exercise the same powers under the 1978 Act to apportion liability as a court could have done.

1.3.4 KENYAN ARBITRATION LAWS AND ITS DEVELOPMENT

Arbitration Act Of 1968. (Cap 49) Laws Of Kenya.

This was the first Act that was put in place to regulate the process of arbitration in the country. Before then, there was no any written law regulating the system[24].

The Act commenced on the 22nd day of November 1968. There were subsidiary legislation in 1983 to incorporate arbitration rules vide legal notice number 9 of 1983 and was also revised in 1985 and 1992 with amendments to section 2 thereof which then required an agreement to be in writing. In part IV of the Act amendments was to the effect that there was recognition of convectional awards, that is the New York Convention being enforceable in Kenya[25]. The provision in schedule II thereof recognizes and adopts the application of the protocol on arbitration clauses of 1923 in Kenya.

The Act was a lay down of the procedural law applicable. It was entirely based in the England Arbitration Act of 1950 although it was not as substantial and as comprehensive as the England Act. It only laid down the procedural law. The substantive laws applicable were the law of the seat chosen by the parties to the arbitration or if none are chosen, the substantial law of the land.

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[23] (1999) CILL 1569.

[24] This does not mean that there was no arbitration in the country before the enactment of the 1968 Act, it was there but only not in any written statute.

[25] Section 36 A (1).

The Arbitration Act No. 4 Of 1995

The Arbitration Act (1995), Act No. 4 of 1995 Cap 49 Laws of Kenya commenced on the 2nd of January 1996 by virtue of Legal Notice No. 394 of 1995. This date is important because prior to this statute we had an Arbitration Act 1968 that was based on different legal principles that dealt with instances under the repealed or previous England Acts, the courts had a wider role in the previous Arbitration Act than they do not have under the current Act. Parties to Arbitration under the previous statute had recourse to the High Court more than they do under the current Act. For instance under the old Arbitration Act a party could challenge an award of an arbitrator on the grounds that the arbitrator has misbehaved in the course of arbitration. Misbehavior on the part of an arbitrator suggested that it was a ground on which the award could be challenged which is not the case under the current law. Some cases may suggest that one might have recourse to the High Court when it is not so. Under the current Act the situations where one can go to court to complain after arbitration are limited; the Chief Justice is mandated to make rules of court that may affect arbitration proceedings[26].

The current Arbitration Act is based on a Model of the United Nations Commission on International Trade Law (UNCITAL), which was adopted in 1985 with a view to encouraging arbitration, and processes that would have global recognition. United Nations came up with a model of a statute that has been adopted by many countries. The essence of the Act is that it provides for very broad party autonomy in fashioning the Arbitration process. This means that parties who enter into an arbitration agreement are to a large extent at liberty to determine the process of adjudication of the disputes that will go to arbitration. Autonomy for example in deciding who the arbitrator will be, the venue of arbitration, the substantive law that will apply to that agreement or arbitration. Once a dispute has arisen, they also have autonomy with regards to how the arbitral process itself will be conducted. To a large extent, the Arbitration Act provides the default position in very many respects so that if parties in an

[26] Section 40 AA'1995

arbitration agreement have not provided the number of arbitrators, then the statute will tell you that the default position is the presumption that the parties intended for one arbitrator.

There are also rules supplementary to the provisions of the Act. As mentioned above, the Chief Justice is mandated to make rules applicable and to that effect in1997 rules governing arbitration practice in Kenya were made and were applicable in all arbitrations.
Also, there are The Chartered Institute of Arbitrators rules and the 1998 arbitration rules which were developed to effect the provisions of the Act.

1.4.0 DIFFERENCE BETWEEN ARBITRATION AND OTHER ADRs

ADR is an import from the United States of America and is enjoying a vogue allegedly because other alternatives are expensive. However, on a deep scrutiny, ADR can be as expensive, if not more so, than arbitration.

The distinction between ADR and arbitration is that the latter sets out to achieve a fair result in accordance with law and justice, while the former specifically does not[27].

Negotiation

This is the main form of ADR. It involves direct negotiations between the warring parties to resole a dispute without intervention of third parties where the parties are prepared to live with it and accept it. Simply it consists of successive taking, and then, giving up, a sequence of positions. It is an element of trading or bargaining leading to a reduction of the party's expectations may be, however, greater than that of the other.

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[27] Although there is the possibility of an equitable solution by agreement of the parties, which is not governed by any substantive law, since the enactment of Arbitration Act 1996 of England.

It is the common form of ADR especially for many commercial disputes. Its preference is because of the merit of retaining good will where there is an ongoing, or potentially on going, business relationship, which is a very important factor.

Mediation and Conciliation

The two means form the core of ADR.

Mediation is the intervention, by invitation of the parties, of an independent third party in the dispute, who, by shuffling between them in a series of individual meetings, attempts to draw them towards a settlement.

Conciliation is similar, but far less interventionist.

Clearly, if it works, it inevitably means a compromise with nobody winning; it is a horse deal, with the most powerful party probably compromising less than the other.

Their shortcoming is that there is no guarantee of any resolution; as such much time and resources can be wasted on an abortive attempt. It also does not lend itself to complex disputes such as occur in construction industry and finally that they offer a non-binding outcome which is only enforceable through suing on the contract - back to where it started.

A mediator is concerned only to get the parties to agree. He is not concerned whether that a agreement. He is not concerned whether that agreement is fair, or whether it bears any relation to the strength of each party's case.

The clear difference between mediation and conciliation lies in the role played by the neutral party. In mediation, he simply persuades the parties to change their respective positions in the hope of reaching a point where those positions coincide,[28] While in conciliation, he takes a more active role by the strength and

[28] A form of shuttle diplomacy without actively initiating any ideas as to how the dispute might be settled.

weaknesses of the parties' case, making suggestions, giving advise. In the latter, if parties fail to reach a n agreement, the neutral party is required to draw up and propose a solution which represents what, in his view, is a fair and reasonable compromise of the dispute.[29]

Adjudication

This is a process whereby an appointed neutral and impartial party is entrusted to take the initiative in ascertaining the facts and the law relating to a dispute and to reach a decision within a short period of time. A period of 28 days, extended by a further 14 days has been the practice in England.[30]

Adjudicator should be suitably qualified in the subject matter of the dispute. He may meet the parties together or separately.

With the exception of direct negotiations, all the foregoing methods of ADR differ from arbitration in that they involve a process whereby a third party is simply called upon to facilitate and to assist in reaching a settlement, by using a non-binding evaluation of the dispute and a recommendation of how it could be resolved. Arbitration on the other hand gives leads to a binding resolution to the dispute.

Other methods of dispute resolution are ***mini-trial***, which is within the scope of the aforesaid ADRs and ***litigation***. They have been intentionally excluded from this discussion.

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[29] This is a fundamental difference between mediation and conciliation. "Conciliation", John Tackaberry QC; a paper presented at the conference on New Concepts on Resolution of Disputes in International Construction Contracts, the Chartered Institute of Arbitrators, London, June 1989.

[30] Housing Grants, Construction and Regeneration Act 1996, Chapter 53, London.

1.5.0 MERITS AND DEMERITS OF ARBITRATION

- **Merits**

Arbitration as compared with other ADRs is preferred because of the merits it has over those other means.

We are going to state these advantages without a great deal of explanation.

- **Combines strength with flexibility**

The strength of the arbitrator yields an enforceable decision backed with judicial framework, which, in the last resort, can call upon the coercive powers of the state for enforcement. It is flexible because it allows the contestants to choose procedures fitting the nature of the dispute and the business context in which it occurs[31].

- **Limitation of issues and cost reduction**

The dispute relates mainly to facts, for example technical matters rather than legal issues and liabilities and there is the principle of limiting the issues to specific areas coupled with the fact that parties may represent themselves or be represented by someone without legal qualifications[32]. There are also limitations on orallity, discoveries, witnesses, and statements taken as evidence-in-chief *et al.*

- Personality of arbitrators is deemed to be important to both sides. The freedom of parties therefore to agree on their best-suited person to preside over the tribunal is very important, and this they are advantaged.
- There is a clear scope for economy by the fact that there is limitation of legal representation which can be entirely dispensed with a times.
- Arbitrators are not bound by court rules, though this is not always the case.
- Convenience of time and location.
- Minimal publicity.

[31] Said by the retired Hon.Lord. Mustill, the president of CIarbs.
[32] Although there are risks involved by such representations..

➢ **Demerits**

- Only two parties are involved, disputes of three or more parties tend to end up in courts for all sorts of technical reasons. Any monies previously sent in bi- partisan go to waste.
- The process do not have jurisdiction over third parties safe for powers of jointer and consolidation of action where parties are common to both and the substantive issue is also common.
- There is no transfer of rights reserved by the courts for example appointment of receiver and committing a party to prison.

1.6.0 CONCLUSION

The first Chapter has dealt with arbitration from the definition through to the historical growth both in England and Kenya's legal systems. We have seen that the process have undergone several amendments to reach the position it is now. Due to such amendments the mode has been preferred and has taken a commendable position in dispute resolution domestically and internationally between individuals among themselves, organizations and even governments in the international arena. The development of both law of procedure and substance in the world legal systems have been a boost to the development of arbitration too, hence the merits, listed are not conclusive as well as the demerits too.

"Law suits! I'd shun, with as much studious care,
as I would dens where hungry lions are"

John Pomfret (1790-1852), English Poet

CHAPTER 2

ARBITRATION AGREEMENTS

2.0.0 INTRODUCTION

The basis of an arbitration agreement is the existence of a valid contract between the parties. The foundation of the law of contract therefore is very relevant in that it parties to an arbitration agreement cannot be bound by such an agreement unless and until they have the capacity to contract in the first instance.

The law of contract governs the capacity of a party to enter into an arbitration agreement. Subject to the law of contract set out, principally, any individual or a corporate body or indeed any other entity recognizable by law can be parties to an arbitration agreement provided the conditions of entering into a valid contract are fulfilled by such party (ies).

The foundation of a contract is therefore very essential in that a party cannot be a party to any arbitration agreement unless they have the capacity so to contract.

2.1.0 Capacity of parties

The requirements for a party to enter into a valid contract

- Age
- Sanity
- Offer and acceptance
- Legality
- Capacity and identity

Verification of a person's identity to confirm his capacity is very crucial in entering into an arbitration agreement. This does not involve physical confirmation but the legal identity and confirmation. Identity and capacity goes both to individuals and corporate bodies.

Individuals under disability

These include minors, patients and bankrupts. Their capacity follows the general contract law requirements.

Minors[1]

An agreement to arbitrate by a minor will only be binding if it is related to supply of necessaries[2] or contract of service, ***Clements v. London and Northwestern Railway Company***[3]. Other contracts entered with a minor are voidable at the option of the minor. Arbitration agreements also apply that king of law as in the case of a normal contract.

Patients

Mental incapacity of a party may render an arbitration agreement entered by that person voidable. Persons of unsound mind cannot enter into any valid contract. If the insanity is one that lapses, the person can validly contract if it can be proved that he contracted during his lucid state and that he knew what he was doing during that time of contracting. The onus of proving sanity will be on the person claiming the sanity of that party.

Bankrupt

A bankrupt can submit to arbitration, ***Re milnes and Robertson***[4], he can't improve his position by such a submission.

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[1] Definition of a minor under children's Act 2001
[2] Sale of Goods Act
[3] (1849) 2 CB 482
[4] (1854) 15 C.B 451

Corporate bodies

Companies and statutory corporations have full capacity to enter into an arbitration agreement. This is so because they are legal persons recognized under statutes and can stand on there on with the characters of any natural person i.e. can contract, sue and be sued, own property etcetera.

Partnerships and unincorporated associations

Partnerships have full capacity to enter into a binding arbitration, though it is partners entering into ordinary commercial contracts containing arbitration clauses.

Unincorporated Associations are not legal entities. They therefore have no capacity to contract and hence cannot enter into an arbitration agreement. There are though exceptions based on statutory provisions.

States, State Entities and Public Authorities.

States have capacity to be a party to an arbitration agreement. Others depends n their constitution in order to have capacity to contract in any arbitration agreement. They however have immunities as to jurisdiction, enforcement and pre- judgment proceedings for example an application for a freezing injunction, however this might also be waived.

State entities and public authorities too are not limited from entering into arbitration agreement.

Offer and acceptance

These are the two most essential s to a contract, parties must have a consensus on the subject matter of the contract and this is through the exchange of communication. By offer and acceptance being communicated to either of the parties. In arbitration, there should be a consensus on the parties as to what are the subject matter of their agreement and that there must be an offer from one party to

the other over such an issue for its resolution should there arise any dispute over the contract latter on.

2.2.0 WHAT IS AN ARBITRATION AGREEMENT

Definition Under the Acts

Section 3(1) AA' 1995 defines an arbitration agreement 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.

Section (4) of the Act refers to the form of an arbitration agreement and the requirements thereto.

The England AA' Act 1996

Section 6 thereto provides that an arbitration agreement is "an agreement to submit to arbitration present or future disputes (whether they are contractual or not).

UNCITRAL Rules

Article 7 of the rules define it as " an agreement by the arties 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 a clause in a contract or in the form of a separate agreement, this agreement shall be in writing.

Reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such that to make such clause part of the contract[5].

An arbitrating agreement therefore is a contractual undertaking by two or more persons to resolve disputes by the process of arbitration, even if the dispute itself

[5] UNCITRAL Rules, Chapter II article 7(2), Kenya Arbitration Act 1995 Section 4(4).

is not based in the contract for example disputes involving claim of tort obligations[6], and restitutionary actions as stated in **Government of Gibraltor vs. Kennedy**[7].

An arbitration agreement must be in writing or evidenced in writing[8].

2.3.0 REFERENCE OF PRESENT OR FUTURE DISPUTES

Arbitration agreement applies to both:

Contractual clause where the parties agree that disputes between them arising in the future out of that contract will be referred to arbitration and;

Separate agreement not forming part of the contract but another contract to refer an existing dispute to arbitration, i.e. " a submission agreement or ad hoc agreement" for resolving the particular dispute which has arisen only. However various parts of the 1996 AA', England apply only to arbitration clauses and not submission agreements.

Submission agreement is an agreement to refer existing disputes to arbitration. The word "submission" is used to describe the proceedings and is frequently used to refer to statements written or oral made by a party to the tribunal. But in the context of the meaning of arbitration, it means the former.

Ad hoc is used to describe an agreement to refer an existing dispute to arbitration. It also means an agreement to refer either future or existing disputes to arbitration without an arbitration institution being specified to administer the proceedings.

In all cases, there must be a binding agreement in accordance with the general law. In particular, an agreement, which is "subject to contract", is not binding.

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[6] Wolf v. Collins Removal Services, (1948) 1 KB., 11.

[7] (1956) 2 QB 410.

[8] Section 4(2) of the 1995 AA'.

If the subject matter of the arbitration clause is as a matter of law not justifiable, the clause does not qualify as an arbitration clause (contractual term) and is null and void[9].

It is proper for the parties to incorporate an arbitration clause by reference to the terms of some other contract, in particular by reference to a set of standard arbitration rules, which the current version of the rules applicable at the commencement of the arbitration will suffice any change[10].

2.4.0 IMPLIED AGREEMENT TO REFER EXISTING DISPUTES TO ARBITRATION

This can be implied by the parties' conduct, ***Athletic Union of Constantinople v. National Basketball Association***[11]

The broad definition of writing under AA' 1996 means that in many cases, there will be a written agreement for the purpose of statute rather than implied arbitration agreement. In principle, however, the parties can enter into an implied agreement to arbitrate which would not constitute a written arbitration agreement as provided for by Section 5 of the 1996 AA'. This will take effect as an oral arbitration agreement to which the 1996 AA' will not apply.

2.5.0 FORMAL REQUIREMENTS OF AN ARBITRATION AGREEMENT

2.5.1 Drafting

Parties to an arbitration agreement need to be clearly identified either in the main contract or in the arbitration agreement itself. The agreement should be appropriate to the particular circumstances of the case.

Basic requirements.

1. There should be proper identification of the parties.

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[9] O'Callaghan vs. Coral Racing limited (1999) unreported

[10] Telkom Kenya Limited and Another v. Kamconsult Limited, (HCCC) Nos.262 and 267 (consolidated) 2001(OS) Nairobi.

[11] (2002) All ER (COMM) 70.

2. There should be a clear reference to arbitration;
3. The terms must be clear and certain, this position was stated in the case of ***Lobb Partnership limited v. Aintree Racecourse Company limited***[12].

The clause must envisage a procedure consistent with arbitration provision. ***In AIG Europe S.A. Vs. QBE International Insurance limited***[13], where the clause in question was held to be "at best a procedure for conciliation which might or might not result in a compromise to dispute" despite express reference to the appointment of "an arbitrator". Failure to have a clear reference might force the courts to conclude that there is no arbitration agreement at all[14]. It is fundamentally important for the parties to an agreement to clearly and unequivocally reflect their wish to make arbitration the means for final and binding resolution of the disputed between them.

4 The agreement should state the seat of arbitration. This is the place of arbitration. The parties' choice of a seat is extremely important both in relation to the procedural law applicable, the law of the arbitration agreement and the proper law of the substantive contract. Also the laws of a particular seat that may contain provisions having important consequences for the conduct of the proceedings.

5 The appointment of the tribunal and who appoints them must be provided for in the agreement. Their respective qualifications and the number of members to the tribunal is paramount.

6 The language of arbitration should also be indicated in the agreement.

Greater detail is desirable to achieve clarity and hence certainty on to achieve the parties' intentions, and to avoid unnecessary and expensive disputes prior to consideration the substantive issue. The agreement should demonstrate

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[12] (2000)B.L.R. 65.

[13](2001) Lloyds Reports 268.

[14] Al Midani v. Al Midani (1999) 1 Lloyds Rep. 923.

amply the intention of the parties that arbitration shall e the comprehensive and exclusive remedy, which is not to be permitted to fail for any reason.

2.5.2 Requirement in Writing

To constitute an arbitration agreement under the provisions of the Act, the agreement must be in writing. However, if it is not in writing, it is not completely ineffective.[15] The parties need not sign the agreement. It can also be found in an exchange of communications, which need not be signed.[16]

What constitutes writing

The AA' 1995 refers an arbitration agreement being in writing if it is contained in;

A) A document signed by the parties and evidenced in writing

B) An exchange of letters, telex, telegram or other means of telecommunications that provide a record of the agreement. An acceptance by telephone is communication by writing... there is communication but not in writing

C) An exchange of written statements of claim and defenses in which the existence of an agreement in some medium other than writing is alleged by one party and not denied by the other party.

An arbitration agreement therefore should meet the requirement of the Act for it to stand as having been written and thus valid for all purposes.

2.5.3 Incorporation of an agreement

The Act further states that reference in a contract to a document containing an arbitration clause shall constitute an arbitration agreement if the contract is in writing and the reference is such as to make that clause part of the contract, ***Telkom Kenya Limited and Another v. Kamconsult Limited***[17], and the provisions of the Act[18].

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[15] Section 81 (1) (b).

[16] English law does not demand signing, Kenyan and the New York Convention and the UNCITRAL Model law demand signing.

[17] (HCCC) Nos.262 and 267 (consolidated) 2001(OS) Nairobi.

2.5.4 Difficulty In Explanation

There is a problem in explaining the type of reference that can be referred to have been effectively made into a contract once incorporated and one, which cannot constitute a contract. In ***Trygg Hansa Insurance CO. Ltd v. Equitas***[19]**.** This case was concerned whether arbitration a clause in contract of primary insurance had been incorporated into a contract of re-insurance, which the parties had entered to. The words that had been used in the re-insurance contact were that that re-insurance contract would "follow the same terms... as the policy of the primary insurance". The matter in issue was whether there was an incorporation of the prior contractual terms by the subsequent contract or not. It was held that for the arbitration clause to have been incorporated there had to be some express indication of such incorporation, this was not so in this case for the wording as they were did not meet such requirements as are for incorporation.

A different view was however taken by Lord Denning in **The Annfield case**[20]**,** he accepted that a subsequent contract, made " on the same terms" as an earlier contract incorporated an arbitration agreement in the earlier contract. However, herein, the arbitration agreement so incorporated referred to, " disputes arising under this contract" hence the holding that the incorporation of these words did not change their meaning. " This contract" means the earlier contract and not the subsequent contract. The arbitration agreement therefore, although dully incorporated into the subsequent contract, was not effective to cover disputes arising under that subsequent contract.

The nature of an incorporated agreement therefore is that once it has been incorporated from one contract into a later contract, the arbitration agreement in that later contract is quite distinct from the "parent" arbitration agreement in

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[18] Section 4 (4) AA 1995

[19] (1998) 2 Lloyds Rep. 439.

[20] (1971) 68

the earlier agreement. The agreement in the later contract is therefore unaffected into existence or, for any reason becomes ineffective[21]. However general words of incorporation are not sufficient and so particular reference to the arbitration clause need to be made to comply with statutory provisions unless special circumstances exist. Such special circumstances, which might allow general words of incorporation to be sufficient, are for instance the standard form contracts like those of industrial practice[22]. In the absence of express words, which incorporate the arbitration clause, there will be incorporation only where the intention to incorporate is otherwise unequivocal.

2.6.0 THE NATURE OF AN ARBITRATION AGREEMENT

There is no prescribed wording needed in an arbitration clause. The agreement should only refer a dispute to a person, other than a court, who is to resolve the dispute with binding effect upon the parties[23].

Arbitral clauses vary considerably in their provisions, but apparently are constant in their comprehensive description of the scope of the obligation to arbitrate. Typically, they provide that, " any dispute" or "any and every dispute" relating to the contract, which is not otherwise settled, shall be settled by arbitration in accordance with the specifications of the agreement.

There are reliable standard form arbitration clauses[24]. However, these clauses are not conclusive and further consideration should also be given to confirm whether the particular features of the transaction suggest further provisions necessary.

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[21] Section 7 of the England AA' 1996.

[22] Supra note 19.

[23] David Wilson Homes v. Survey Services (2001)

[24] For example the 1998 Arbitration rules of ICC has standard form clauses.

Nevertheless, it is sufficient to mention that there is no conclusive standard form for arbitration agreement and thus, it solely rely on the agreement of the parties and the circumstances of the dispute involved. The existence and validity of an arbitration clause is subject to contrary clauses, matters for the arbitral tribunal to determine in the first instance.

2.7.0 THE SCOPE OF THE ARBITRATION AGREEMENT.

This part considers the extent of the subject matter over which the tribunal is to exercise its powers pursuant to the arbitration agreement.

The matters that are to be considered include:

2.7.1 Jurisdiction

The arbitration clause wording determines the matters within which the tribunal can decide. The tribunal must satisfy itself that it has jurisdiction from the parties' agreement and that the claim that it is subject to its adjudication is a bona fide one for the process to commence. The parties can raise objections, which must be timely citing such lack of jurisdiction. Given that the parties may loose their right to object, the tribunal may feel that there is no harm in proceeding since the parties having proceeded with the reference will confer jurisdiction.

Since the arbitral tribunal flows from the arbitration agreement once an agreement is valid, the tribunal is empowered to rule on its own jurisdiction and any objection to the existence or validity of the agreement is an issue that the tribunal has the power to rule on and such decision taken is binding [25].

The agreement is concluded once the tribunal has exercised its jurisdictional power of remission i.e. an award granted and is enforced by the court. The tribunal then becomes *fuctus officio* subject to statutory provisions.

2.7.2types Of Disputes Arbitrable

Parties may agree to submit contractual or non-contractual claims to arbitration. Consideration whether a dispute falls within the scope of the agreement depends

on the nature of the dispute. The dispute can be capable of being referred to arbitration at all if it is within the scope of the particular agreement. Arbitrability of the matter affects the reference. Not all disputes are arbitrable. There are some, which are reserved to the courts for example those whose award will be unenforceable, like custodial sentences which arbitral tribunal is not empowered to bestow.

2.7.3 Void and Voidable Contracts

Arbitration agreements are valid notwithstanding that the resulting award upholding the contract would be unenforceable due to illegality[26]. However, in ***O'collaghan v. Coral Racing ltd***[27], the court held that the arbitration clause could not survive independently. It is therefore apparent that the position does not always stand, it would be safe then to examine whether the agreement itself can be impeached to determine its scope over the matter at hand.

In the case of voidable contracts, agreements survive even if the main contract is voidable, for instance non-disclosure of relevant information when entering into the contract[28]. Generally, disputes involving rectification of the contracts or contracts where there is supervening illegality are within the scope of an arbitration agreement.

2.7.4 Privity of the agreement

Under English law, the scope of an agreement is limited to the parties who entered into it and those claiming through or under section 82 (2) AA' 1996. However, companies in international transactions not party to an agreement are bound by it because of their role and the group relationship to one of the contracting party. This is also he position in Kenya since the English law is applicable depending on the context they are referred by and the statutes.

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[25] Section 17 of the AA' 1995.

[26] Soleimany v. Soleimany [1999] QB 785

[27] The Times, Nov. 1998.

[28] Mackender Hill and White v. Feldia AG [1996] 2 Lloyds Rep. 449.

2.7.5 Condition precedent

Where there are conditions attached to an arbitration clause to precede its operation, its scope will be limited to the extent of such a condition being fulfilled before the operation of the clause[29].

2.8.0 SEPARABILITY OF AN ARBITRATION AGREEMENT

It is not unusual for the defendant in an arbitration proceeding to content that, since the contract or agreement in which the obligation to arbitrate is void, the obligation to arbitrate has vanished with the otherwise void contract. The principle of separability or severability has been applied such that far from the termination or even nullification of a contract, which contains an arbitration clause, the obligation to arbitrate survives, not least to determine the validity and consequences of the termination or nullification.

This principle evolved from the case of **Heyman v. Darwin**[30]. Where the House of Lords held that neither repudiation nor "accepted repudiation" entails the termination of the obligation to refer disputes to arbitration.

Lord Macmillan said,

"... What is commonly called repudiation or total breach of contract... does not abrogate the contract though all further performance of the obligations undertaken by each party in favour of the other party may cease. [The contract] survives for the purposes of measuring claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purpose of [this] contract have failed, but the arbitration clause is not one of the purposes of the contract."

From the provisions of the Act[31], arbitration clause may take the form of a clause within the main agreement or an entirely distinct contract contained in as separate documentation. Whether or not the arbitration agreement is physically distinct, the

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[29] Smith v. Martin [1925] 1KB 745.

[30] [1942] AC 356.

[31] Section 17 of the 1995 AA'.

agreement is severable from the main obligation and stands or falls in its own right. It constitutes a self- contained contract collateral or ancillary to the underlying contract[32]. The main agreement therefore, is not an arbitration agreement and need not in itself be in writing.

The severability of an arbitration clause is possible only if the wording is sufficiently wide. The clause may even still survive notwithstanding that the main contract never came into existence. A breach of a contract, which led to the termination of that contract, cannot preclude the reliance on the clause[33].

Where there are contracts, which plainly have no effect, arbitration clause despite it surviving, might lack anything to arbitrate. Those, which are palpably illegal or contrary to public policy, would make it of no effect to the arbitration provisions relating to them[34].

The recognition of the autonomy of the arbitration clause leads to a further proposition that the arbitrators are free to determine their own jurisdiction under the main agreement whether the arbitration agreement is void or illegal. However, the common law does not permit the arbitrators to have the final word on their own jurisdiction[35].

2.9.0 TERMINATION OF ARBITRATION AGREEMENT

By agreement to terminate

Parties wishing to end an arbitration agreement may do so by another agreement to terminate. This is possible since agreement to arbitrate is consensual and parties

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[32] Bremer Vulkan Schiffbau Und Maschinenfabrik v. South India Corporation Limited [1981] 1 Lloyds Rep.253.

[33] Juveidini V. National British and Irish Millers Insurance co. [1915] AC 499.

[34] Supra note 26.

[35] This position is also echoed by Section 17 of the AA' 1995, and Article 16 of the UNCITRAL Model Law.

can agree to vary their agreement and terminate it. However, the ending nature of an arbitration clause means that even if parties decide to adopt a different means of dispute resolution for a particular dispute arising under their contract, arbitration agreement continues to be in force[36]. Any subsequent dispute under the contract will fall within the ambit of the arbitration clause.

Repudiation of the right to arbitrate

A party may repudiate the arbitration agreement and if the other party accepts so, the agreement ends. Repudiation may be express or inferred from the conduct of the parties to the agreement[37]or by anticipatory breach of the arbitration agreement.

Abandonment of the arbitration agreement

A party may abandon its right to arbitrate by delay or inaction or even by commencing court proceedings in breach of the arbitration agreement. However, abandonment in itself does not necessarily mean that the arbitration agreement has been discarded.

Circumstances under which silence and inactivity can lead to an inference of abandonment are very limited. Indeed, unless the period of silence is so long that all possibilities other than an inferred agreement to abandon can be plainly excluded or at least that an agreement to abandon was the most probable inference. Mere silence can never amount to such an agreement to abandon[38]. It thus qualifies to state that an arbitration agreement can be referred to have ended when and where there is unreasonable inaction that a reasonable person would infer it to amount to a repudiation of the agreement to arbitrate. Or otherwise a conduct in which one concludes that there is an outright abandonment of the agreement.

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[36] This is recognition of the separability principle of arbitration clause.
[37] Traube v. Perelman (July 25th, 2001) Ch. D.
[38] International Services ltd. V. Eastern Counties Newspaper ltd. [1991] 1 Lloyds Rep. 538, CA.

2.10.0 CONCLUSION

This chapter was extensive in the look on the various aspects of arbitration agreement. It discussed on the essentials of a valid agreement and the requirements of a valid arbitration agreement as power the provisions of the Act. It also dealt with the scope of the arbitration agreement and concluded by having a look at the principle of separability, the principal that an arbitral tribunal has the power to rule on its jurisdiction.

"The court's authority, consisting of neither the purse nor the sword, rests ultimately on substantial public confidence in its Moral sanction."

American Jurist,
Justice Felix Frankfurter

CHAPTER 3

EXCLUSIOPN CLAUSES

3.0.0 INTRODUCTION

This chapter will be dedicated to the examination of the meaning of exclusion clauses contained in an arbitration agreement, their effects on the agreement itself and the rights and duties of the parties to it. There will also be an appraisal of the role of the courts in the process of arbitration and the circumstances under which the court can intervene. The powers of the judicial system as regards arbitration in the exercise of its control over the process as a demand of public policy will be discussed though in a superficial manner.

3.1.0 WHAT IS AN EXCLUSION CLAUSE

Exclusion clause, otherwise called the Scott and Avery clause is a clause named after the case of **Scott v. Avery**[1]. This clause states that arbitration is a condition precedent to any judicial proceedings, and the parties may bring an action only on the arbitrator's award. It necessarily ousts the general provision that judicial proceedings can be brought on a matter that has been made a subject of an arbitration agreement. It is contained in the contractual agreement or is sometimes associated with it.

In the case of Scott v. Avery[2], a mutual assurance company had inserted in all its policies a condition that when a loss occurs, the aggrieved member should give in

[1] [1856] 5 H.L CS 811.
[2] Supra note 1.

his claim and prove his loss before a committee of members appointed to settle the amount; that if any difference arose between the committee and the aggrieved member, the matter should be referred to arbitration and that no action should, except on the award of arbitration be brought. The House of Lords held in this case that this was not an illegal clause as ousting the jurisdiction of the court.

The clause performs two functions; first, it creates an obligation to arbitrate. This gives the defendant in any action the right to apply for a stay of the proceedings and secondly, it a condition precedent to the plaintiff's right of action, and as such, it gives the defendant a substantive defence to the claim.

The clause is very vital in that once parties have included it in their agreement or otherwise incorporates it therein; they can be kept to remain in good contractual relationships. This is so enabled by the fact that in the event of any dispute of whatever magnitude arising, they can resolve it within the provisions of their agreement and maintains their statue quo. The clause also binds the parties to their original bargains. This is enhancing justice especially where a party who, while he is yet to perform his obligation finds or thinks he could find favour in avoiding the obligation by bringing an action in court is barred from doing so. It thus discourages unconscionable advantage of one party over the other.

The validity of an obligation(s) in a clause is based on consideration of policy and convenience rather than simply on principles of justice. Since parties to an exclusion clause are the particular persons who contracted, they can vary certain rules to their agreement into the form, nature and the content to ensemble their wish. This in the onset outrightly is beneficial to the parties privy to the contract thus the importance of its inclusion in arbitration agreement.

3.2.0 STAY OF LEGAL PROCEEDINGS

The AA' 1995 in Section 6 provides for conditions which a party must fulfil before a court of law stays the legal proceedings which have been instituted in contravention of the arbitration agreement.

It states that any party to an arbitral agreement who is sued by his adverse party has a right to apply for a stay of proceeding of such a suit. The application is allowed for counterclaims too. However, an agreement to attempt to settle the matter in good faith prior to the commencement of arbitration proceedings is unenforceable on the basis that it is void for uncertainty.

The existence of a relevant arbitration clause in a contract between parties to a dispute is no impediment to resolving the dispute through court if neither side objects. However, if one party goes to court but the other wishes to enforce the arbitration agreement, then it is for the latter party to seek an order from the court staying the proceedings if there was already an application. Such an order if granted leaves the initiator of the court's proceedings with no option but to follow the provisions of the arbitration agreement if he wishes there too be a determination on the dispute. An application to the court for relief that is ancillary to substance of the dispute may however fall within the jurisdiction of the court and not a breach to the arbitration agreement[3].

3.2.1 Kinds of stay

Inherent jurisdiction to stay

The judicial courts have inherent powers to stay any proceedings, which it considers to be frivolous, vexatious, and oppressive, or an abuse of the process of the court. Applications which are in breach of an agreement to arbitrate, this will be exercised when it is virtually certain that there is an arbitration agreement or there is only a dispute about its scope.

This kind of stay is appropriate where there is no arbitration agreement within the provisions of **Section 4** of the AA'1995 but is virtually certain that there is an

[3] Toepfer v. Societe Crgil [1998] 1 Lloyd's Rep. 385.

arbitration agreement[4]. It is applicable where the arbitration clause is not immediately effective and where there are two defendants to court proceedings but one of whom is not a party to the agreement but claims through or under the other defendant by virtue of a contract of agency[5].

Stay under the Act

Section 6 of the AA' 1995 empowers the court to stay any proceedings where a party to the arbitration agreement makes an application to that effect provided the party making the application has not taken any step in the proceedings before the court. This is so possible for example where party A files a suit against party B and party B is of the view that the dispute, the subject matter of the proceedings is caught by the arbitration agreement between A and B. party B can apply to the court to stay the proceedings. Upon proof of a valid agreement, the party who instituted the suit will have to show strong reasons why he should not be ordered to adhere to his contractual promise. The court should for this instance be satisfied in evidence that there has been an actual or threatened breach of the agreement to grant the stay.

When the court must stay

This is in one line with the provisions of **section 6** of the AA' 1995. If an application is made at the right time, the court is obliged to stay the proceedings, unless the agreement is null and void, inoperative or incapable of being performed[6]. The application cannot be affected by a dispute resolution. The provision of the arbitration clause that other ADR procedures must be exhausted before arbitration can commence notwithstanding the application to the court.

Application to stay applies both to arbitration clauses and submission agreements and confers upon a party who is being sued in a court, and not in any other form of tribunal, the right to apply to the court for a stay in respect of that matter.

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[4] The section provides that the agreement shall be in form of an arbitration clause in a contract or in a separate agreement and **shall be in writing...**

[5] Ronssel Uclaf v. G.D Searle & company limited[1978] 1 Lloyd's Rep. 225.

[6] Section 6 AA' 1995

Application will be barred once the applicant has taken any step in the judicial proceedings, any attempt to defend the claim on its merits rather than on jurisdiction[7].

3.3.0 WHAT AMOUNTS TO TAKING A STEP IN LEGAL PROCEEDINGS

Section 6(1) of the Act, 1995 states,

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

"...Not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings". This is the most contentious issue with regards to taking a step. Taking a step therefore, involves serving a defence or taking any other step in the proceedings than just answering the substantive claim. The party taking a step is as well as said to have decided to submit to the jurisdiction of the court in respect of the claim and will not thereafter be able to obtain a stay requiring another party to pursue his claim, if at all, by arbitration.

Denning L.J said, a step in the proceedings is ***"step by which the defendant evinces an election to abide by the court proceedings and waives his right to ask for arbitration[8]"***. It means something in the nature of an application to court...some step such as taking summons or something of that kind which is in the technical sense a step in the proceedings...a step may be in the general direction of promoting the progress of the action or extinguishing it, for instance summons to strike out a claim, or an application to act for an order in respect of the proceedings[9].

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[7] Turner & Grundy v. Mc Connel [1985] 2 All ER 34
[8] Eagle Star v. Yuval (1978)1Lloyd's Rep. 358.
[9] Motokov v. Auto Garage limited (1970) E.A 249.

Step must be one which "impliedly affirms the correctness of the [court] proceedings and the willingness of the defendant to go along with the determination by the courts in stead of arbitration, filling a defence after entering an appearance therefore amounts to a step taken and the reliance on the Scott and Avery is lost as was the position in **Kisumuwala Oil Industries Limited v. Pan Asiatic Commodities PTE Limited and Another**[10].

The act in question, of taking a step in the legal proceedings must have the effect of invoking the jurisdiction of the court. But if the application states specifically that the party intends to seek a stay, it does not amount to a step, **Patel v. Patel**[11]. An application for leave to defend as well as asking for a default judgement to be set aside is also not a step taken in the proceedings.

Application for stay in itself should not be viewed as a submission to the jurisdiction of the court, nor is it already a step taken in the proceedings. Where then a party to an arbitration agreement has taken a step in the proceedings, they are barred from relying on the arbitral clause, for they are deemed to have waived their right of that reliance. The effects of such waive of the right means that the court shall proceed with the matter and make its decision. The party in default of the agreement can be sued by the other party for damages, in breach of the agreement. The party can also as well be ordered by the tribunal to pay costs and the tribunal's fees of the proceedings if at all there was an arbitral tribunal already set to have heard the dispute. Furthermore, in the event that there will arise any other dispute, the party cannot be entitled to go back for arbitration unless anew agreement is entered which then will give him new grounds for reliance.

3.4.0 WHAT IS A DISPUTE

This discussion regarding the meaning of a dispute is to provide for when it is appropriate for parties to an arbitration agreement to forward their case to the

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[10] Appeal Case No. 100 of 1995
[11] [1998] 3 W.L.R 322, CA

arbitrator for resolution. Arbitration proceedings should be commenced once actual dispute has arisen between the parties to a contract. Arbitral tribunal will not have jurisdiction to deal with the matter until a dispute or difference arbirtrable has occurred.

It is very difficult to distinguish between a "dispute" and a "difference" and which between the two amounts to what has been referred to arbitration by the parties. The England AA' 1996 states that a dispute includes difference[12]. The use of the words" dispute" or "difference" is very essential in defining its scope, since they mean more than the existence of a claim, about which there may be no dispute or difference.[13] In **F &G System v. Fine Fare (1962),** it was stated that failure to agree was a difference and not a dispute.

A dispute within this context is a "quarrel", a "controversy"

Where there is "not in fact any dispute" or just "dispute"

There should be a distinction between the provision that there is "not in fact any dispute" and just "dispute" within the meaning of an arbitration agreement which in the latter case matters are to be decided by the arbitral tribunal and in the former case they are outside the jurisdiction of the arbitral tribunal and should be decided by the courts. For instance where the plaintiff makes a claim and the defendant has no defence or where the plaintiff had done work for the defendant but the defendant ignored the plaintiff's bill or expressly refused to pay. These are situations where the courts are to determine and not the tribunal for they fall within the realm of "not in fact any dispute"

From the foregoing, a dispute cannot just cease to be a dispute because the adverse party has accepted liability. The claimant is entitled to obtain an arbitration award enforceable. This is so when the meaning of a dispute is taken broadly enough to include such issues as was taken in **Lesser Design & Building**

[12] Section 82 (1) AA' 1996, England
[13] Section 82 (1) AA' England 1996.

limited v. University of Surrey[14] where claims made under the building contract were held "to be in dispute" simply because they were not agreed.

It has been stated, "mere refusal to pay upon a claim which is not really disputed does not necessarily give rise to a "dispute" calling an arbitration clause into operation. It does not follow that the courts cannot be resorted to without previous recourse to arbitration to enforce the claim which is not disputed but which the trader is merely persistent in paying[15]. This position had earlier on been stated in the case of **Geomax Consuliting Engineers V. KPT**[16].

A condition precedent to the invocation of the arbitrator on whatever grounds is that a difference between the parties should have a risen, and this means a difference of opinion before the action is launched in the court. If for example a debtor agrees that money is due, but simply fails to pay it, there is obviously no dispute. The creditor can and must proceed by action, rather than by arbitration. Equally, silence in the face of a screaming claim does not constitute nor raise a dispute. Therefore, courts can be resorted to without previous recourse to arbitration to enforce a claim[17]. The dispute must be of matters, which are justifiable. This follows from the fact hat a valid arbitration award is one that is capable of being registered and enforced as a court judgement.

3.5.0 OUSTING THE JURISDICTION OF THE COURT

3.5.1 The role of the Court

In **Lee v. The Showmen's Guild of Great Britain**[18], *Roner L.J* stated, "The courts jealously uphold and safeguard the prima facie privilege of everyman to resort to them for determination and enforcement of his rights. As an example of

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[14] 56 Build. L.R 57

[15] Kandara Farmers Co-operative Society and 9 others v. Joseph Kanyua and 18 Others, HCCC No. 2646 of 1998.

[16] HCCC, No. 1210 of 1996

[17] London and Nothern Western & Great Westen Joint Railway Companies V. J. H. Billington Ltd.(1999)A.C. 79

[18] [1952] 2 QB 1237

this, it has been held that any attempt by testator to divert from the courts the power of deciding questions of construction that may arise on his will and vesting that power in his executors instead will fail ...on the ground that they are contrary to public policy".

This consideration of public policy acts as a fetter on attempts to oust the jurisdiction of the courts in questions of law by contractual considerations. It is therefore accepted that all agreements purporting to oust the jurisdiction of the court are prohibited.

Courts play a vital role in the arbitral processes. It prevents parties from circumventing the arbitration process in breach of an arbitration agreement. The court helps in the appointment of the arbitrators, ensure the attendance of witnesses to hearing whenever the parties or the tribunal approaches them and enforce the arbitrators' award.

The court also acts as a disciplinary body. It can remove an arbitrator; set aside an award, or remit the award to the arbitrator for reconsideration and if possible a fresh award be given or any correction done to the original award. Generally the court deals with the law.

3.5.2 Arbitration clauses and the courts

From the face of it, exclusion clauses in an arbitration agreement appears to be a contract between parties to settle their disputes in a tribunal of their own choice, apart from the courts. It is well established yet that the court's jurisdiction to entertain disputes cannot be ousted by any agreement. This was stated in the case of **Doleman and Sons v. Osset Corporation** [19]. Despite there being methods put in place for case withdrawal from the courts, the same courts have devised and placed under strict statutory limitations. The essence of the limitation is to

[19] (1912) 3 KB 257

safeguard the autonomy of the courts in controlling any judicial matter in order to enhance justice dispensation.

Arbitration as we have already seen acts as a condition precedent to any legal action to be instituted in court. From the decision in **Scott v. Avery**[20], it was stated that parties couldn't by contract oust the jurisdiction of the ordinary court. This doctrine depends on the general public policy that parties cannot enter into a contract, which contract will give rise to a right of action for breach of it, and then withdraw the jurisdiction on such a case from the ordinary judicial system.

The court have wide powers to enforce the agreement of the parties choosing, these powers are outlined in the AA' 1995 as including the power to grant interim measures[21] as requested by the parties while the arbitral proceedings are still on, the intervention in taking of evidence where the court can execute the request of parties for evidence to be taken according to its rules[22], the recognition and enforcement of awards, both foreign and international. There is also the intervention if the courts on questions of law arising out of domestic arbitration[23].

Notwithstanding the provisions of section 10 of the AA'1995, regarding the extend with which judicial courts can intervene in arbitration, the court has inherent powers to intervene in any proceeding and as such again the AA' still do provide for instances of court's assistance when requested by the parties as per their agreement. Where the wording of an agreement appears to evince the intention of the parties not to resort to court of law, the agreement is invalid and where that clause is incapable of being severed from the main agreement if it is incorporated. Severance or otherwise of a clause in any agreement is a matter for the trial court to too decide, it might call in some cases for examination of the facts and evidence in general, in the ultimate course, it will have intervened in the process.

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[20] Supra Notes 1 and 2.
[21] Section 7
[22] Section 28
[23] Section 39 AA' 1995.

It is necessary for parties to an arbitration to have recourse to courts only in respect of those powers, which the arbitrators under the agreement are precluded, from exercising, or, in respect of powers, which the arbitrators cannot exercise in default of the agreement. The powers available to the court are only available to the extent to which the arbitrators either do not posses themselves or are unable[24] to act having been precluded by the Act or the court is empowered d to intervene[25].

3.5.3 Substantive and procedural matters

The mere fact that the arbitration agreement provides that any dispute is to be submitted to the "exclusive jurisdiction" of the arbitrators does not operate to exclude the courts. There should be drawn a distinction between substantive matters and procedural matters. Exclusive agreements refers to substantive matters and not procedural matters and so the court can intervene at any stage in the later case, as was stated in **Re Q's Estate**[26].

Besides, there is further intervention of the courts where there is need to prevent a substantial injustice even if the matter is substantial and so the court in the ordinary sense is not suppose to come in as provided by the Act. This should only be in very exceptional al circumstances, **Bremer Vulkan Schifback v. South India shipping company**[27].

However, an arbitration agreement that confers exclusivity on the arbitrators not only in relation to the substantive issues but also as regards "other legal proceedings" may be construed as excluding recourse to curial courts[28]. That as it may be, the courts will still cleave in one-way or the other. An Act of Parliament

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[24] For example where the full panel has yet to be appointed and interlocutory relief pending the commencement of the proceedings is required.

[25] Section 7, power order an interim measure.

[26] [1999] 1Lloyd's Reports 931

[27] [1981] AC 909.

[28] Mantovani v. Carapelli SPA [1980] 1 Lloyd's Reports 375.

can only oust courts' jurisdiction. This provision is a clear recognition of the policy of party autonomy underlying the Act and the desire to limit and define the court's role in arbitrations so as to effect the policy.

The decision of the court on the point of law referred to it by the tribunal consent of the parties or by the parties themselves is an enforceable judgement. Although there can be an appeal on the substantive issue. Such an appeal is available where the court itself gives leave in circumstances that it is satisfied that the point is one either of general importance, or which, should, for special reasons be considered by the court of appeal[29]. Parties are under a duty to take without delay any necessary steps to obtain a decision of the court on a preliminary question of law.

3.6.0 CONCLUSION

The discussions above have been on various aspects of arbitration. We discussed about exclusion clauses in an arbitration clause with its effects to both the obligations and rights of the parties to the agreement, and a touch on the circumstances when they are applicable. The presence of a Scott and Avery clause in an agreement calling for many other important issues which the chapter also discussed among them, stay of legal proceedings already instituted in a court of law where a condition precedent, reference to arbitration has not been complied with by the parties. The jurisdiction of the court to entertain, and decide on matters arising from arbitration and the instances where the courts can intervene in order to ensure justice prevalence. The meaning of a dispute, the jurisdiction of the court, effects of arbitration agreements on the jurisdiction of the judicial court were also part of the discussed of the chapter.

[29] A clear instance of the intervention of the court where there is no need to inquire whether the issue is
substantial or procedural, provided in the court's opinion there is need to allow for appeal.

"Discourage litigation. Persuade your neigbour to compromise wherever you can. Point out to them how the nominal winner is often a real looser in fees, expenses, and waste of time".

Abraham Lincoln.

CHAPTER FOUR

4.0.0 Introduction

This chapter is designed to enlighten the general provisions and principles relating to Arbitration and ADR in general. The areas to be discussed herein are those, which were not mentioned, in the preceding chapters. There will be discussion on the powers and immunities of the arbitrators and the Tribunal in dispensing justice through arbitration. The rules of arbitration and regulations of the process are going to be discussed but not conclusively. It will also have the conclusion to this research work and recommendation(s) if any are to be outlined.

4.1.0 Immunity of Arbitrators and the tribunal

The common law has, perhaps grudgingly, recognized the immunity of arbitrators from suit. The only instance when tribunal or the arbitrator can loose immunity is when they have acted in bad faith. The protection is based primarily on the fact that for an action to stand once brought forth, it will be necessary to reopen the arbitration proceedings to determine whether there has been any culpable conduct on the part of the arbitrators. This position is very much discouraged by the judicial systems[1].

Under the provisions of the Act[2], arbitrators are immune with respect to matters done or omitted in the discharge or purported discharge of the arbitrators' function. One who fails to act at all is likely to be guilty of breach of contract, and

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[1] Sutcliffe v. Thackrah [1974] 1 ALL E R 859.

[2] Section 29 AA'1996 [England], Immunity of an arbitrator in his capacity as an arbitrator acting within the powers of the agreement of the parties and in good faith.

is stripped of his entitlement of fees if removed from the position of an arbitrator for cause and may face liability and the loss of the fees if he resigns irrespective of bad faith. An arbitrator who is removed by the court does not loose immunity from suit unless he has acted in bad faith. Acting in bad faith is a matter of fact to be decided by the courts and not a matter of law[3].

An arbitral tribunal is safeguarded from any liability by the Act even if it was negligent in the exercise of its powers to appoint an arbitrator or has failed to supervise or in any manner failed to exercise reasonable care to ensure justifiable dispensation of duties by their appointees i.e. the arbitrators[4].

4.2.0 POWERS OF AN ARBITRATOR

4.2.1 Sources of the powers

An arbitrator or tribunal derives its power from the express agreement, the implied agreement or from any statute that the agreement has referred to. The extent of his powers is determined by the agreement between the parties, which is the principle source of power to arbitration. The powers given under a statute are subject to the right of the parties to contract outside such powers; this means that the parties can decide to exclude entirely the application of the statute in their agreement thus making the statute inapplicable at all.

The extensive powers to arbitrators are important in enabling them to tailor the procedure to the needs of the particular dispute, rather that to take off the peg a procedure i.e. the litigation procedure designed to cater for widely different situations.

The powers are of essence where the arbitrator is satisfied that one party is deliberately and unreasonably seeking to delay the progress of the arbitration. The arbitrator as he is empowered to decide what is best so long as the same is within the arbitration agreement can take a stand and resolve the dispute by ensuring that

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[3] Section 24 of the AA' 1996 [England]
[4] Section 74 AA' 1996 [England].

the party with malevolence as to the resolution of the dispute is made to pay for the unnecessary delay and backtracking of the process of arbitration.

Arbitrators are so empowered to control the whole process way from the commencement to the award wherefrom if not before sought, the court will be invited to enforce the award. Suffice here is to say that the courts can intervene in the goings on of arbitration where it is deemed fit and on application of the parties to the court or where the arbitrator has sanctioned an application to the court while the arbitration process is still on. This can be for instance where there is need for an interpretation of the law or otherwise.

Once appointed, the first duties of the arbitrator is to conform that his appointment is in order and satisfying the requirements of the parties' agreement for instance, his possession of the special requisite qualifications. This confirmation is part of the powers entitled to an arbitrator. The arbitrator should then consider whether he has authority to decide the dispute before him and if that is in the affirmative to proceed to the preliminary meeting as empowered by the parties' agreement.

Under the Charted Institute of Arbitrators Rules of 1998, the tribunal is also empowered to decide on the place, time, hours of hearings or sittings, language etcetera in order to ensure expeditious and final determination of the dispute, provided this does not go beyond the agreement of the parties[5].

4.3.0 Domestic and International arbitration

The Arbitration Act 1995 provides that any arbitration is domestic if the agreement expressly or so by implication provides to be in Kenya, and that at the time when the parties are nationals of Kenya or are habitually resident in Kenya. If it is for any body corporate, incorporated in or where it's central management and control is exercised in Kenya. It is also domestic where substantial parts have

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[5] Rule 5 (1) of, this rule is applicable to the tribunal selected notwithstanding the provisions of **Section 21 of the AA' 1995**, which empowers the parties to choose the place of arbitration although there is a proviso to the effect that the tribunal can choose the place where the parties have failed so to do.

the relationship to be performed or the place with which the subject matter of the disputed is mostly closely associated or connected in Kenya[6].

On the other hand, arbitration is international if the parties to it have, at the time of the conclusion of that agreement, their places of business in different states, or any place where the substantial part of the obligation of the commercial relationship is to be performed or place with which the subject matter of the dispute is most closely connected is situated outside Kenya. It is also international where the parties have expressly agreed that the subject of the arbitration agreement relates to more than one state[7] or where the express agreement is to the application of a foreign arbitrator to resolve the matter as was the case in **De Chazal Du Mee & Company v. Ndungu Gathinji**[8]. Where the court ruled that despite the parties having expressly provided for arbitration to take place in Mauritius, the subject matter of the dispute that was at hand was not what the parties' agreement has provided for to take place in the foreign country. If then the dispute was within what the parties had provided for, it would have been international notwithstanding the fact that the business was being operational within Kenya.

Despite the distinction as to the type of arbitration on whether it is domestic or international, the procedures that govern the two types are the same. The parties' agreement and its terms are final and conclusive provided the dispute falls within the terms of the agreement and in essence arbitrable. Proceedings are similarly conducted and awards are enforceable through courts' judgment. Suffice here to say that the Arbitration Act 1949 (repealed) had separate provisions for foreign arbitration[9] but the current Act make no such distinctions.

4.4.0 Arbitration Rules

The process of Arbitration is sometimes governed by the arbitration rules where parties agreed to subject themselves to these rules. The rules are normally made

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[6] Section 3(2) AA' 1995, KENYA
[7] Section 3 (3) and (4) AA' 1995, KENYA
[8] Civil Case No. 128 of 1999.
[9] Part III of the 1949 AA' [Now repealed by the 1995 AA']

by the Chief Justice pursuant to **section 40** AA' 1995. The Chief Justice has once exercised this power in 1997. These rules are presently scanty and only deal with the modus operandi of, and fees for making applications to court under various sections of the Act.

Except in so far as an arbitrator may be affected by a ruling of a court following a party's application, the rules do not concern the arbitrator. The exceptions are where the arbitrator himself, with the consent of the parties, seeks assistance from the court under the Act[10].

There are also the Chartered institute of Arbitrators rules which are applicable in the event that the parties have not defined the rules to apply and where the institute has been approached by the parties to intervene in the resolution of any dispute. The rules were made in 1998 by the Branch and are applicable where the parties have not expressly stated the applicable rules and where the tribunal sees it prudent to apply such rules. These rules cover across the provisions of the Act. For instance the rules provides for the powers of the tribunal as well as their immunity from any liability. It also empowers the tribunal in matters of deciding any issue that in controversy and which is not the main subject matter of the dispute i.e. the place of the arbitration, cost of reference and abandonment or suspension of the proceedings by a party without notice in which case the tribunal is to rule on the action to be taken[11]. The rules also empowers the tribunal to determine the dispute at an informal session or hearing or even by the dint of the documents forwarded to it by the disputants without necessarily going through the detious long procedures. However, the tribunal can always embark at their discretion to order a formal hearing should they deem fit and necessary at any stage of their handling the matter[12].

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[10] Section 18 (2) and Section 28, AA'1995.
[11] Rules 12 and 13.
[12] Rule 13, Simplified Procedure.

4.5.0 REGULATION OF ARBITRATION AS A PROFESSIONAL BODY

In Kenya, arbitration in the strict legal; sense is not regarded as a profession. There is no professional body that regulates the conduct of arbitrators that is recognized within the legal system of Kenya i.e. through an Act of parliament.

The Chartered institute of arbitrators [Kenya chapter] is a society. An affiliate of the 1915 London Institute and in the stricter sense it is not a professional body. Being such an institute it is not only concerned with arbitration but also the promotion and facilitation of dispute resolution by other forms of ADR, which include, among others mediation and adjudication.

Membership to the institute requires one to be a member of a recognized discipline in which recourse to arbitration and other forms of ADR is an accepted mode of resolving dispute. There is an entry course, which is mandatory. On passing the administered examinations one is eligible to become an associate member. Further training is required for membership upgrading to the position of a full member, fellow and chartered arbitrator grades. There is maintenance of strict Continuous Professional Development (CPD) programme through workshops and seminars and informational exchange with other branches of the institute all over the world.

The institute does not accept responsibility or liability for the misconduct, negligence or any other professional misconduct of any of its members[13]. This is due to the fact that the institute has no statutory backing and so does not regulate arbitration in the strict sense.

The recourse thereof of an aggrieved party to an arbitration proceeding is to resort to court and sue for breach of contract. This process all over again coupled with the dispute at hand increases unnecessary cost and time waste, a fact that is discouraged the most by arbitration and other ADRs.

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[13] Rule 14 of the Chartered Institute of Arbitrators Rules 1998.

4.6.0 CASE FOR REFORM

As has been the endeavor of this paper, there is need to further strengthen the application of ADRs and more so arbitration in of dispute resolution. This is so by the consciousness of the attributes given to these processes.

There is need for a reformation of the system of administration and application of there modes and dire so in their control in order to enhance peoples penchant of the procedures and to let see the day the merits which these modes of dispute resolution have been accorded by the scholars who more that before have been advocating for the recognition and application of the means.

The case of reform in the Kenyan context utterly lies on the administering bodies or institutions of justice, these would therefore start from the point where legislations are to be enacted which will give a legal recognition to the institution of administration of the modes of dispute resolution under ADR.

Moreover, to advance arbitration, other than the provisions of the AA'1995 and the CIarb Rules of 1998, and the custom of the practice, there need be a professional body set out in law to regulate the practice and act as a disciplinary body to arbitrators. A disciplinary Commission requires to be established with statutory powers where complaints against wayward members are forwarded to for resolution. This will enhance discipline among practitioners and develop trust in those who will be dealing with them.

A legally recognized body should also be established and charged with the task of guarding the practice of arbitrators and even to grant licenses or certificates for practice, as does the Law Society of Kenya to practicing Advocates.

With regards to the fees for chargeable, there should be rules put in place for determining the limits to be charged by an arbitrator or the tribunal depending on the circumstances of each case. The tribunal should not merely be empowered to

determine the fees and expenses or the parties as provided for by the Act[14]. This will help in maintaining and upholding the advantage forwarded that arbitration is cheap compared to litigation sometimes coupled with other merits that the mode have been accorded.

4.7.0 CONCLUSION

It is acknowledged that a modern civil justice system must operate under a model of case flow management, a time and event managing system which facilitates faster resolution of cases, reduces delay and backlog and lowers the cost of litigation. In order to facilitate early resolution of case and reduction of delay and backlog, a civil justice system must focus on dispute resolution as a whole and make available to the public on an institutional basis, both the court adjudication process and ARDs.

ADRs, arbitration in particular as an integral component of civil case management and procedural reform may be used to curtail the disputants' freedom to engage in procedural maneuvers. As an element of case management and at an early stage, courts should explore the scope of ADR or settlement, and see whether there is any way in which the court could assist the parties to resolve their disputes without the need for trial, apply the ADRs simple procedures. Primary case rests on the broad principle that resolution of disputes by consensus and compromise contributes to the well being of the society as a whole[15].

Although judges are prepared by a nod and a wink to encourage settlement, they have shied away from actively participating in the process o f settlement. They must therefore be made to be more interventionists than hitherto, in controlling procedure, curbing delay, reducing costs and encouraging settlements. It is said that judges are poor mediators/arbitrators since they are used to decision-making

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[14] Section 32 (5) AA' 1995.

[15] ADR: Principles and Practice, 2nd Edition, 1999 Sweet and Maxwell by H.J Brown and A. L Marriot.

and adjudication. They experience great difficulty patiently watching a non-interventionist process unfold. Judges are
here to just do that-judge[16].

In conclusion it is discreet to admit that ADR is not a panacea. It is not suitable for all disputes, which go before the court. It is in its infancy. Arbitration offers ways of improving the systems of adjudication and, more importantly, of broadening and improving access to justice. Given the necessary backup, arbitration is developing as it already has a niche, mostly in the commercial sector, construction industry and employment contracts. Training and encouraging the public at large to appreciate this mode of dispute resolution will absolutely boost up the search for dispute resolution the best.

[16] An excerpt from a paper presented at conference on "the Role of Legal Ethics and Jurisprudence in Nation Building", Strathmore University, 29th October 2004 by Anthony Gross.

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