APSEA

Journal of the Association of professional societies in East Africa.

THE PROFESSIONAL

3RD EDITION, DEC 2021 THEME: PROFESSIONALISM & DISPUTE RESOLUTION

The
FUTURE *of* JUSTICE
Integrating Technology in ADR, & The Emergence of Innovative Tools

MEDIATION AS AN EFFECTIVE MECHANISM FOR RESOLVING TAX DISPUTES

DISPUTE RESOLUTION *in the* CONSTRUCTION INDUSTRY

Alternative Forms *of* DISPUTE RESOLUTION *in* LEGAL PRACTICE AS A CORE ASPECT OF ACCESS TO JUSTICE

Hon. Justice Martha K. Koome , EGH
Chief Justice & President of The Supreme Court Of Kenya.

ISSN 2076-5304

PROFESSIONALISM & DISPUTE RESOLUTION IN LEGAL PRACTICE | AND MORE INSIDE...

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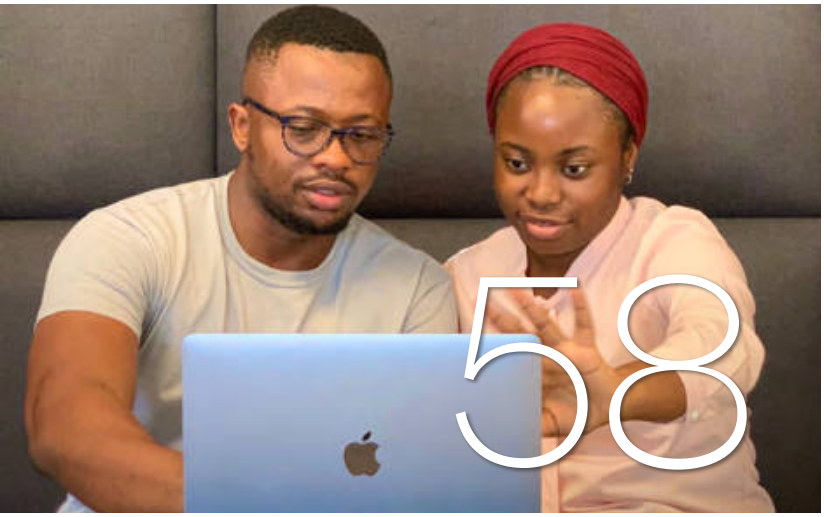

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Message from The Chairman

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Greetings from The Association of Professional Societies in East Africa(APSEA)

I hope all of you remain safe and healthy.

On behalf of the Council of APSEA, I would like to appreciate all the contributors and sponsors of our previous editions of The *Professional* magazine. The theme of our current edition is **"Professionals and Dispute Resolution.**" Dispute resolution is the process of resolving conflicts between parties. As professionals dispute is handled through conversation, focusing on behavior and events, not on personalities. Professionals listen carefully and develop plans to work on each conflict with a view to identify areas of disagreement and resolving them amicably.

COVID-19 issues dominated the year 2021. This led to massive loss of life, disruption of business and socio-economic order. It also tested the resilience of humanity to face life challenges, as was mentioned by a French author; Albert Camus (1913-1960).who won Nobel Prize in Literature at the age of 44 in 1957. In his book *"The Plague"*, he wrote about the Absurdity of Life. COVID-19 has made life absurd for us. This has challenged us to be versatile on how we handle problems of our times.

As a crisis of global scale, the pandemic has made us review the emerging trends and prepare ourselves to face the future with confidence. However, with determination and dedication of our stated vision *"A world-class Association of Professional Societies"*, I am confident that 2022 will be a year of steady and sustainable progress.

Once again, on behalf of the Council of APSEA, our thirty two (32) corporate members and over 500,000 individual members in East Africa, I would like to take this opportunity to thank our stakeholders, business partners, affiliates, communities, and well-wishers who have made this magazine successful.

God bless you all!

Felix Okatch, EBS,
APSEA Chairman

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ALTERNATIVE FORMS OF DISPUTE RESOLUTION

AS A CORE ASPECT OF ACCESS TO JUSTICE

Hon. Justice Martha K. Koome, EGH
Chief Justice and President of the Supreme Court of Kenya

While for a long time, Kenyans have approached the delivery of justice as the exclusive preserve of the Judiciary, the 2010 Constitution envisages a broader dispute resolution system. Article 159(2) of the Constitution points us to the possibility of open-ended pursuit of justice beyond the confines of state institutions. It does this by commanding the Judiciary to promote the use of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.

These alternative forms of dispute resolution allow for the resolution of disputes outside the courts. By commanding us to embrace the multi-door institutional approach to the pursuit of justice, the Constitution is alive to the need for efficient and timely delivery of justice.

It should be appreciated that the courts are not the sole forum for the delivery of justice. It is in appreciation of this reality that Marc Galanter has noted that :

> "Just as health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official justice-dispensing institutions. Ultimately, access to justice is not just a matter of bringing cases to a font of official justice, but of enhancing the justice quality of the relations and transactions in which people are engaged".

The multi-door approach to justice has the potential of deepening access to justice. The desirability and utility of this approach is that it has the potential to address the concerns around the cost-effectiveness and speed of delivery of justice.

By channeling a significant number of disputes for resolution outside the courts, we will avoid the

Marc Galanter, "Justice in Many Rooms" in Mauro Cappelletti (ed), Access to Justice and the Welfare State (Sijthoff and Noordhoff, Alphen aan den Rijn, 1981) pp 147, 161–162.

current problem of courts that are swamped and paralysed with disputes that might be better resolved elsewhere.

To illustrate this point, family disputes are better resolved in a non-adversarial process. Thus, mediation and reconciliation processes would be ideal for resolution of family disputes given that they are collaborative processes that foster long-term relationships. In contrast, court litigation takes an adversarial approach therefore tends to work against maintaining social harmony.

In a domain where time truly is money, parties to commercial disputes are increasingly embracing mediation and arbitration to resolve their commercial differences quickly so they can invest the money that would have been held up in courts in lengthy litigation processes. It is worth noting that there has been a significant rise in the uptake of mediation as an avenue for resolution of disputes in Kenya since the Judiciary rolled out court-annexed mediation in 2015. The resolution of significant number of commercial disputes through mediation has channelled a significant amount of money back into the economy for investment.

Another mechanism, beyond the traditional courts, that is within the menu of our dispute resolution system is the Small Claims Courts. These courts are aimed at ensuring that social grievances especially for the economically vulnerable members of the society are resolved expeditiously thus furthering the prospect of peaceful co-existence in vulnerable communities like slums and informal settlements and re-positioning Kenya in the global ease of doing business index.

To illustrate, the Small Claims Court at Milimani which has been in operation since 26th April 2021 reflects the impact the court will have in the overall administration of justice. For the period the court has been in operation more than 1,222 cases had been registered, 481 cases heard and determined in less than 100 days of establishment.

In addition, the Constitution urges us to dig up our indigenous systems of justice by instructing us to promote the use of traditional dispute resolution mechanisms. This unique constitutional requirement is in response to the fact that our communities have used elements of facilitated consensus-building in dispute and conflict resolution outside state structures for centuries.

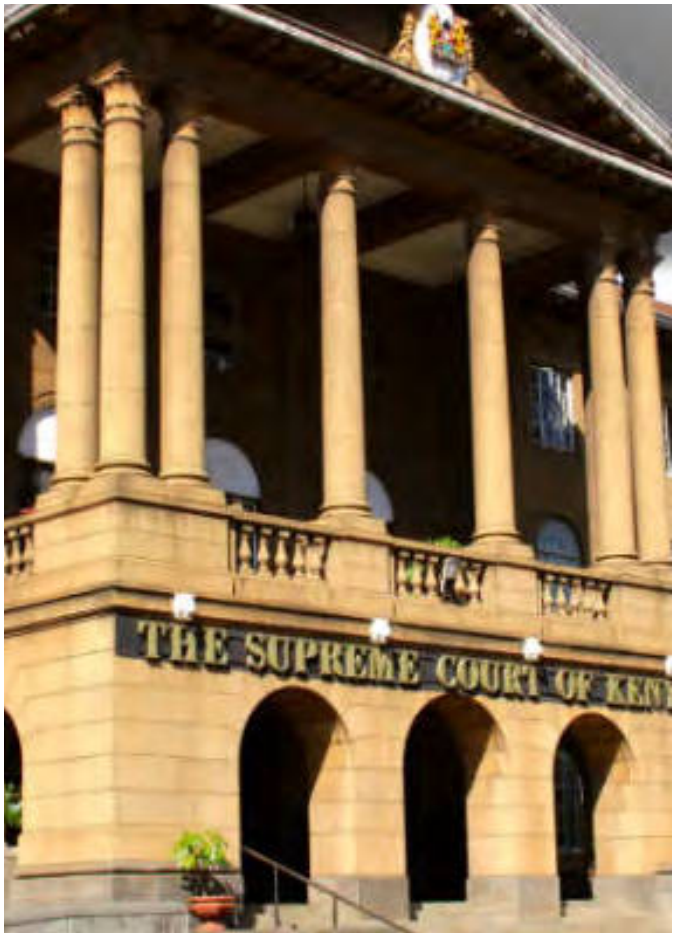
Indeed it is a truism that our traditional societies, without the trappings and paraphernalia of the modern state, had no coercive means of resolving disputes. So, consensus building was an inevitable and necessary part of the dispute resolution process. The court system only developed as a necessary by-product of the modern state. Thus, it is time for us to re-imagine and re-conceive these traditional mechanisms to serve our need for making justice accessible to our people.

The 'Social Transformation through Access to Justice (STAJ)' vision of the Judiciary that we recently shared with Kenyans places the promotion of the multi-door approach to

"It should be appreciated that the courts are not the sole forum for the delivery of justice."

the resolution of justice at the center of our goal to have an accessible, efficient, cost-effective and expeditious system of justice. We will strengthen the operations of the Traditional Justice System (AJS) and Alternative Disputes Resolution (ADR) mechanisms like mediation. Towards this end, we will provide Mediation and AJS Suites in court stations where we have the requisite physical infrastructure to accommodate the suites. We also intend to roll out Small Claims Courts throughout the country.

In conclusion, Kenyans should know that we have a diverse range of dispute settlement processes and the options available to an aggrieved person for access to justice are not confined to court litigation. These mechanisms are intended to respond to some of the challenges related to the accessibility of justice that we are grappling with in the court system such as rigidity, complexity and cost barriers. By embracing the Alternative Disputes Resolution Mechanisms, the public will be able to resolve their conflicts in an efficient way thus strengthening social harmony and state stability.



THE CHRISTIAN COUNSELING AND DISPUTE RESOLUTION CENTRE {CCDRC}.

Charles Kanjama
Chairman, Kenya Christian Professionals Forum

Alternative Dispute Resolution {ADR} mechanisms are frequently associated with numerous advantages over litigation. Generally, ADR and other Traditional Dispute Resolution Mechanisms {TDRM} are hailed as cost-effective, expeditious and lenient on most procedural requirements. In fact, in most scenarios, with an exception to Arbitration, ADR mechanisms seek to address the main cause of the conflict or dispute.

As the Kenya Christian Professionals Forum {KCPF}, we are cognizant of the important role ADR is playing in the administration of justice and its unrealized potential. Though justice is a relatively subjective notion, justice ought to demonstrate fairness, flexibility and affordability all of which can easily be achieved in ADR. Accordingly, KCPF, in the spirit of upholding and promoting the spirit of ADR in the country launched the Christian Counseling and Dispute Resolution Centre {CCDRC} in the year 2020.

The Christian Counseling and Dispute Resolution Centre {CCDRC} is a Christian values-based Centre. The Centre serves two main purposes; an Alternative Dispute Resolution Center and a Christian Counseling Center. As an alternative dispute resolution centre, the centre is anchored on five main principles:

Accessibility –The CCDRC is guided by article 48 of the Constitution of Kenya 2010 and shall seek to have justice that is accessible and user friendly to both parties.

Efficiency – The CCDRC process shall be guided by Article 47 (3) (b) of the Constitution of Kenya 2010 and the Eligible Disputes should be settled in a timely and efficient manner while the counseling procedures are accorded professionalism and effective counseling practices. All proceedings should be handled with the knowledge that justice delayed is justice denied

Impartiality – the process of the CCDRC is without undue favor or preference from any party. The procedures ensure that there is no real or perceived bias on any party being that justice must not only be done but be seen to have been done.

Independence – The counseling and resolution procedures are not under any external influence. All decisions of the Centre are a preserve of the Centre's analysis of the facts and the corresponding laws without undue external influence.

Transparency – The decisions that emanate from the CCDRC are conducted in a fair, free and verifiable manner.

The main objectives behind the formation of the centre are to:

To strengthen the statistical capacities of ADR and Mental health development of Kenya.

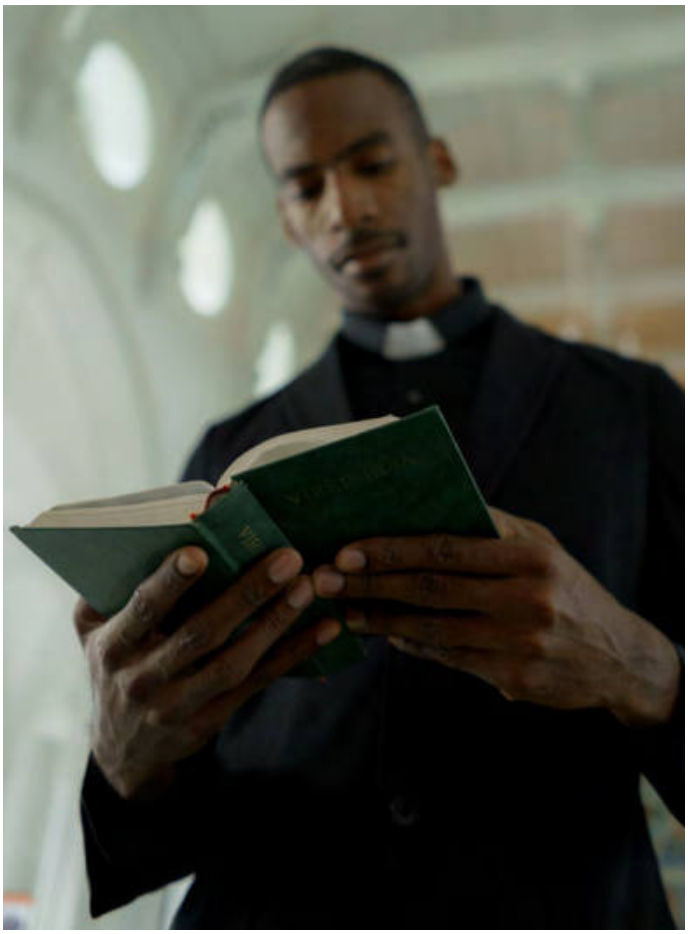
To address the need for an independent judiciary and to breach the gap in an underutilized ADR mechanism in local and other areas through methods like counseling, mediation, negotiation and reconciliation in dispute resolution in Kenya.

Noteworthy, some conflicts involve intense emotions and as such litigation may not result in the best outcome. Such conflicts involve relationships be it family relationships or marriage relationships. In these conflicts, litigation may be inappropriate. It is only ADR mechanisms that provide favorable avenues for addressing such conflicts.

This begs the question of whether ADR is an alternative to litigation in such cases or it is the most appropriate way to resolve such disputes? The beauty of ADR, for instance, conciliation, where a third party is involved, called the conciliator, who restores the damaged relationship between the conflicting parties, serves to reduce the tension between the parties.

It is therefore apparent that there exist severed relationships which require restoration, conciliation can therefore work best instead of the commonly preferred litigation.

In conclusion, not only do we need ADR in the promotion of access to justice but also for national healing and restoration of the damaged relationships in the country. We, therefore, call upon everyone to embrace ADR in resolving their disputes and CCDRC provides you with one of the platforms where you can take advantage of ADR.



CORPORATE GOVERNANCE
As the Foundation for Sustainable Businesses

Hosea Kili, OGW
CPF Group Managing Director/CEO

The role of corporate governance in running a successful enterprise cannot be gainsaid; every business needs a governing body that ensures that the enterprise is running in the right direction and running well. A series of corporate fraud, managerial misconduct and negligence cases, that caused a massive loss of shareholder wealth, saw the dramatic increase in the importance of corporate governance at the beginning of the twenty-first century.

In today's dynamic, fast-paced global business environment, we are seeing different opinions calling for change of approaches to corporate governance. This is rationalized by the need to control and manage organizations in a way that will continue to achieve both effective performance and achieve sustainable social accountability and responsibility. Owing to this, sustainability has gradually become a front-and-center discussion and challenge for organizations in recent years. The question is how businesses will respond to this challenge and how they can integrate this concept in corporate governance in order to obtain the benefits.

Sustainable development was first defined by World Commission on Environment and Development as development that meets the needs of the present without compromising the ability of future generations to meet their own needs. Planting a tree, whose shade you will not get to sit under; as the adage goes. As an ideology, it envisions a world in which an appropriate balance between economic, social and environmental goals are achieved.

In today's globalized and interconnected world, investors, creditors and other stakeholders have come to recognize that environmental, social, and governance responsibilities of an organization are integral to its performance and long-term sustainability. Today, these concerns help determine profits. For companies to operate successfully and sustain growth, boards must incorporate these new dimensions into their core decision-making processes. Recent trends within society support the development of the corporate sustainability concept and its implications in business management with sustainability measures permeating the entire organization's operations, procedures and processes; for successful integration. If sustainability is not included into the formulation of corporate goals, corporate strategies, policies and processes, the pursuit of sustainability becomes a mirage.

The COVID-19 crisis presents the prospects of a global financial crisis. This has inevitably heightened the need for corporate boards of directors to provide well-informed strategic direction and engaged oversight that stretches beyond short-term financial performance. Doing so prepares companies to more comprehensively address risks, by anticipating potentially adverse impacts on people and the environment. Additionally, it can also generate wealth by creating shareholder value through an increase in business opportunities and broader access to markets. A new vision of business is emerging; one where a set of core values,

encompassing human rights, environmental protection and anti-corruption measures, guide the board's oversight, relationship with management, and accountability to share owners.

In times such as these, organizations must be felt and must resonate with the immediate needs of their customers and other stakeholders given the unpredictable circumstances.

As a key player in the provision of financial Services, and as a pension and retirement benefits administrator, we realize that access to social security allows people to protect themselves from such risks. Social security helps them become, and remain, prosperous and resilient in old age. Moreover, we recognize that it alleviates old-age poverty.

To this end, we are increasingly expected to use our core capabilities to help communities and society become more resilient to these interconnected risks.

For these and other reasons, CPF Financial Services is an active member of the United Nations Global Compact (UNGC). Through the UNGC,

we are able to gain the best in class globally benchmarked best practices and reaffirm our commitment to ethical labor practices, the environment, anti-corruption, and support of the Sustainable Development Goals (SDGs).

Furthermore, we are gradually enhancing efforts to integrate sustainable business practices into our operations, procedures and processes while advancing the sustainability agenda in the context of corporate governance. Adherence to universally accepted corporate governance practices is not only becoming integral to our corporate culture but has been integrated into our organization's value system.

The principles and standards adhered to by the Board have been developed with close reference to guidelines on corporate governance issued by the Centre for Corporate Governance, Institute of Certified Secretaries, Kenya (ICS), the Mwongozo code of Governance for state corporations as well as other international best practices.

The Writer is the Group Managing Director/ CEO of the CPF Group – a group of companies offering a dynamic pool of services in Retirement Benefits, Insurance, ICT and Property Management.

DICHOTOMY BETWEEN

HARD SKILLS AND SOFT SKILLS

IN DISPUTE RESOLUTION

Jackton Olachi
Independent Arbitrator & Mediator

According to Carnegie Mellon Foundation Research and Stanford Research Institute International, 75% of long-term job success depends upon Soft skills mastery and only 25% on Technical skills. In addition, LinkedIn research shows that the future skills that will be in demand are Soft skills.

Thankfully, Soft skills are highly trainable, unlike IQ, which is largely static. Our whole lives- our emotional intelligence and self-awareness are flexible. The development of the two is nearly limitless and it is crucial for success in every field of our endeavors.

Soft skills include your personal skills; things that you do that make you great outside the technical skills that you possess. They may come naturally to you. Soft skills are those that help with interpersonal issues. In other words, dealing with people and navigating the world. As such, Soft skills are notoriously difficult to define.

Positive personal attributes, personality traits, ability to understand social cues, adapting to challenges, problem solving, effective communication, critical thinking, leadership, teamwork and punctuality, are all skills that can make you stand out as a Dispute resolver.

As a Dispute resolver, you are expected to possess recognizable Soft skills. This is manifested in your Empathy, Motivation, Self-esteem, Good decision making, Commitment and of course, interpersonal awareness coupled with a high standard of Self Awareness.

The people who seem to rise to the top of any industry, and stay there over an extended period of time, are typically people who have a pretty good sense of what they are good at and what they are not particularly good at. Self-awareness can be the best thing you can have going for you. So know yourself, then grow yourself.

Although Soft skills can be taught in school, there is no real metric to measure success or even curriculum that is universally accepted as there is with Hard skills. There is no linear path forward. Soft skills are like what is often referred to as “street smarts” and can be learned through trial and error; in other words, through lived experience.

Hard skill on the other hand, is a specific, teachable ability, something that can be measured and defined. You can quantify a hard skill. That is, it can be certified, or you might earn a degree in that discipline. Therefore, hard skills are acquired through formal education or training programs.

That can be in an academic environment or learning on the job as an apprentice. Many Dispute resolvers have gone through the Chartered institutes’ programs, examinations and certification. They therefore have the relevant hard skills set.

A combination of hard and soft skills are what Dispute resolvers need to possess in the 21st century. Even though you could have Hard skills, you need Soft skills because you are responsible for guiding disputing parties in the resolution of their conflict. People do not always act as you expect or respond to what you say.

Having the Soft skills to work with the diverse parties and be able to communicate effectively with them and resolve conflicts when they arise, are just as important as allocating your resources smartly. Both skills are therefore crucial and vital to performance.

As a Dispute resolver, below are six of some of the Soft skills that you may need to push your career forward.

1. **Good Communication Skills.**
   The ability to communicate with others is essential, especially colleagues

and disputing parties. It is not just when trying to get a point across, either. A good communicator should also be a good listener. He or she should have the ability to listen to others when necessary. Communication style has a lot to do with personality and instinct. It is that quality people sense when they interact with you; and it finds outward expression through the verbal and non-verbal messages you send out. It enables you as a dispute resolver to use questioning to elicit background, context and reasoning. That will ultimately assist you to discern and agree on what concerns that need to be addressed and their possible outcomes.

2. **Strong Work Ethic.**
   Work ethic is not taught in school. It is either a part of your DNA or your parents taught it to you. It is simple things like being punctual, getting things done on time and understanding that a job might be more than just punching in and punching out.
   Time management means making the most of each day and getting the most important things done first. As a Dispute resolver, take your career seriously and do what it takes to get the job done. You must develop the tenacity to work with challenges and setbacks.

3. **Problem Solving Skills.**
   Nobody wants a person who sees a tough situation and says; “Wow. I do not know what to do here.” They want to know that you can think logically and come up with ways to work around problems. The more creative, the better.
   As a good Dispute resolver, express your enthusiasm for tackling challenges. You must also know how to work with uncertainty and lack of clarity. Finally, you must expand your thinking to discover new ideas and solutions.

4. **Team Work.**
   Team work means you have the ability to work with others in a professional environment. If you believe that you know how to do the job and do not have faith in others to do their part, then you can create tension and hurt the overall efficiency. Learning to trust others,

working together, giving and accepting ideas; is a difficult skill to master; but if you can, you will be well ahead of the pack.

5. **Leadership.**
   It is one of the most important of the soft skills. Leadership skills can really be looked at as a combination of all the other soft skills. Your soft skills are the accessories which when added to your credentials, enable you as a Dispute resolver, to deliver on your mandate. Leadership is at the core of your cognitive performance, productivity and decision-making. It also enables you to build successful relationships that recognize and respect difference and diversity.

6. **Empathy**.
   As we go through tough times, struggle with burnout or find it challenging to find happiness at work and home, empathy can be a powerful antidote that can contribute to positive experiences for teams and individuals. Dispute resolvers can demonstrate empathy in two ways. First, they can consider someone else's thoughts through cognitive empathy (If I were in his/her position, what would I be thinking right now?). They can also focus on a person's feelings using emotional empathy (Being in his/her position would make me feel-----). But dispute resolvers will be most successful not just when they personally consider others, but when they express their concerns and inquire about challenges directly, and then listen to the responses.

   You do not have to be experts in Mental Health in order to demonstrate you care and are paying attention. It is enough to check in, ask questions and take cues from the parties in dispute about how much they wish to share. In brief, empathy contributes to positive relationships, organizational cultures and it also drives significant business results. For dispute resolvers therefore, empathy is a key component of your soft skills set.

Final Note.

The fast pace of disruption in existing models, has a direct impact on Hard skills. Across almost every field and profession, the impact of technological change is shortening the lifespan of professionals' existing skills. It is even happening in unexpected activities and there are no guarantees.

Soft skills have therefore emerged as the new essential skills for the work place, industry and academia. Virtual collaborations, work at home and online education are already the norm and not the exception. There is no doubt that the way we do business in the 21st century is evolving, but no one knows what the results are going to be.

The only thing that seems to be the common denominator in this ever changing world, is the ability to adapt. Here lies the unlocking potential of Soft skills in the work place. As Dispute resolvers, it is incumbent upon us to adapt quickly or be washed down the drain.

In a nutshell, hard skills are about what the professional man or woman knows, and the soft skills are about how he or she acts. After all, the real game changer will be Human Intelligence and Emotions. Incidentally, Soft skills feed from the two.

If at all as a Dispute resolver, you are investing in Soft skills, then take solace in the words of Benjamin Franklin; "Take a coin from your purse and invest it in your mind. It will come pouring out of your mind and overflow your purse."

"Soft skills get very little attention and respect, but they can make or break your career"
-Peggy Klaus.

DISPUTE

SETTLEMENT & MANAGEMENT

UNDER THE AFRICAN CONTINENTAL FREE TRADE AREA AGREEMENT

Oscar K. Gathura
Partner at Musili & Gathura Advocates

Introduction

The African Continental Free Trade Area (AfCFTA) Agreement is a pact establishing a Free Trade Area (FTA) within the African Continent. An FTA is an agreement between two or more nations to reduce barriers to imports and exports among them. Under a free trade policy, goods and services can be bought and sold across international borders with little or no government tariffs, quotas, subsidies, or prohibitions to inhibit their exchange.

The objective of the AfCFTA is to formulate an African Commodities Strategy for value addition of natural resources and acceleration of intra-African trade through free movement of people, investments, goods and services. Its scope relates to trade in goods, trade in services, investment, intellectual property rights and competition policy across member states. The implementation of the Agreement is among the Flagship Projects of Africa's Agenda 2063 which is aimed at increased economic cooperation among member states. With increased economic inter-dependence, it is expected that it will assist in combating conflict, preventing genocide, and ending all kinds of civil unrest and violence in the continent.

At present, all countries in the Continent, except for Eritrea, have signed the Agreement. It is now in its second phase of negotiations which cover investment, intellectual property rights and competition policy. The first phase was concluded at the time of entering the Agreement. It comprised of three key agreements: Protocol on Trade in Goods; Protocol on Trade in Services; and the Protocol on Dispute Settlement. In July 2020, Eritrea's Minister for Information was quoted saying that the reason for his country's non-commitment to AfCFTA was based on her long-standing position on prioritizing regional integration through nurturing Regional Economic Blocs (RECs) over the over-ambitious continental plans to

achieve sustainable cooperation in trade.

According to the recent projections of the World Bank, the implementation of the AfCFTA Agreement would make the largest FTA in the World in terms of participating countries, connecting approximately 1.3 billion people with a combined Gross Domestic Product of about 4.3 trillion US Dollars.

With the imminent expiration of the African Growth and Opportunity Act (AGOA) deal with the United States of America (USA) in 2025, the implementation of the AfCFTA is seen as an appropriate successor to making Africa a global economic powerhouse, going forward.

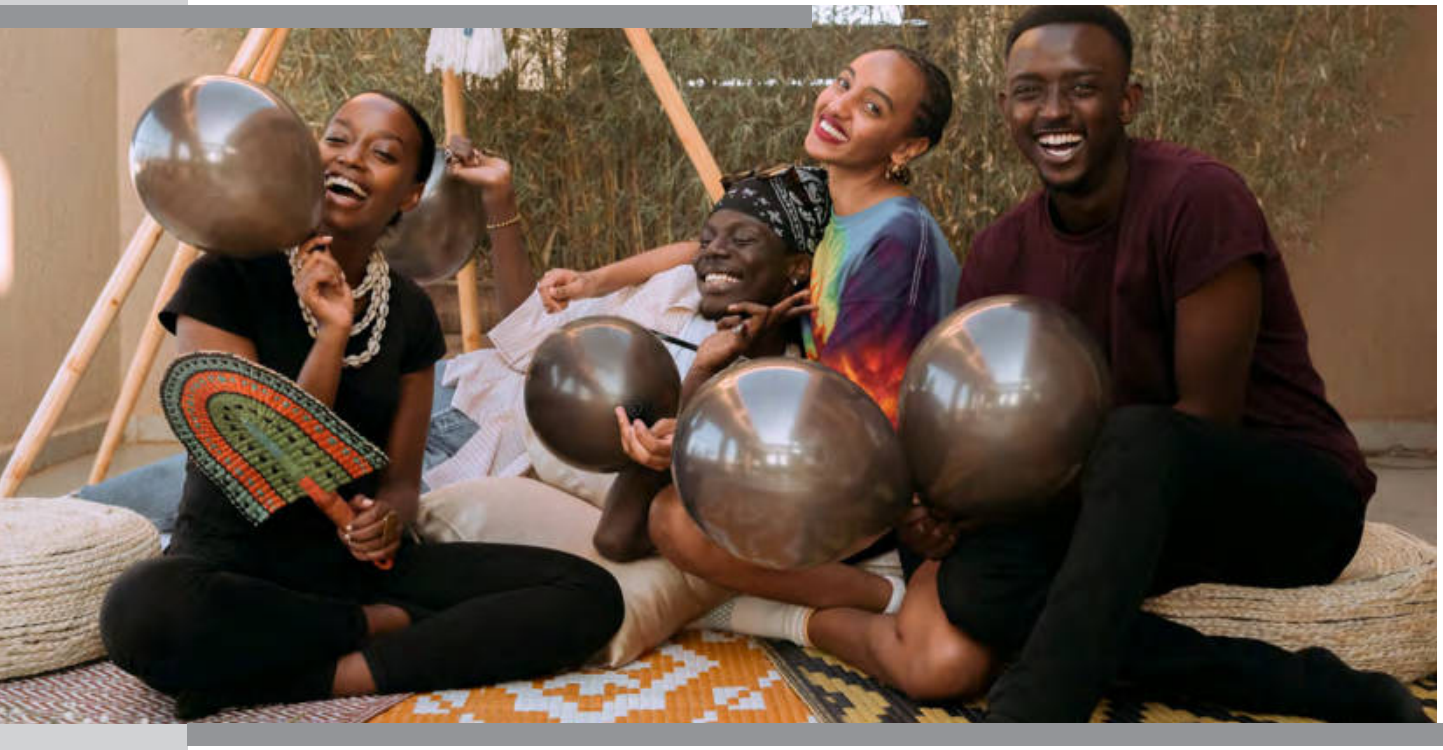
Kenya signed the AfCFTA Agreement in Kigali, Rwanda on 21st March 2018 and ratified it on 6th May 2018.

In a meeting organized by the United Nations Economic Commission for Africa and the country's State Department of Trade in Nairobi on 6th February 2020, it was reported that the country's participation in the implementation of the Agreement would promote intra-African trade through exports of goods and services, and free movement of people.

This would have the effect of increased competitiveness of important pillars of the Kenyan economy such as tourism and diversification of the source of livelihoods of the Kenyan people.

Dispute Settlement and Management under the AfCFTA

Among the objectives of the AfCFTA is to establish a mechanism for the



settlement of disputes arising from the parties' rights and obligations in the Agreement. This is with a view of making the resolution of disputes consistent, predictable, and certain, including in emergency situations.

Resolution of disputes relating to the implementation of the AfCFTA is governed by the Protocol on Dispute Settlement (DS Protocol).

> Under the provisions of the Protocol, the DSB can meet as many times as it may be prudent to do so and makes decision through consensus.

The Protocol came into force on 30th May 2019. As stated above, this Protocol was a result of the first phase of negotiations. It forms an integral instrument in the administration of the Agreement and the bodies created under it are bound to interpret it according to customary rules of public international law, including the Vienna Convention on the Law of Treaties.

1. What is a dispute under the Agreement?

A dispute is defined as "a disagreement between State Parties regarding the interpretation and/or application of the Agreement in relation to their rights and obligations". The inference of this definition is that first, only State parties rather than private citizens, have audience before the dispute resolution mechanisms established by

the Agreement. Second, those disputes must be limited to the scope of the Agreement.

This is a departure from the current situation where the Treaties establishing most of the RECs give audience to private citizens and causes of action can range from trade disputes to human rights through their established dispute resolution mechanisms. The result of this underpinning will be a trade-oriented dispute resolution mechanism that is focused on regional integration and economic inter-dependence.

2. Institutions in settlement and resolution of disputes under the Agreement

The AfCFTA Agreement establishes institutionalized dispute resolution that heavily takes after that of the World Trade Organization (WTO). This is through establishment of standing bodies mandated with the hearing and determination of disputes among member states.

The Agreement establishes the Dispute Settlement Body (DSB) with the mandate of administering the Protocol on Member States. It comprises of representatives of Member States and has the mandate to:

- Establish Dispute Settlement Panels (DSBs) and an Appellate Body (AB).
- Adopt Panel and Appellate Body reports.
- Maintain surveillance of implementation of rulings and recommendations of the Panels and Appellate Body; and
- Authorize the suspension of concessions and other obligations under the Agreement.

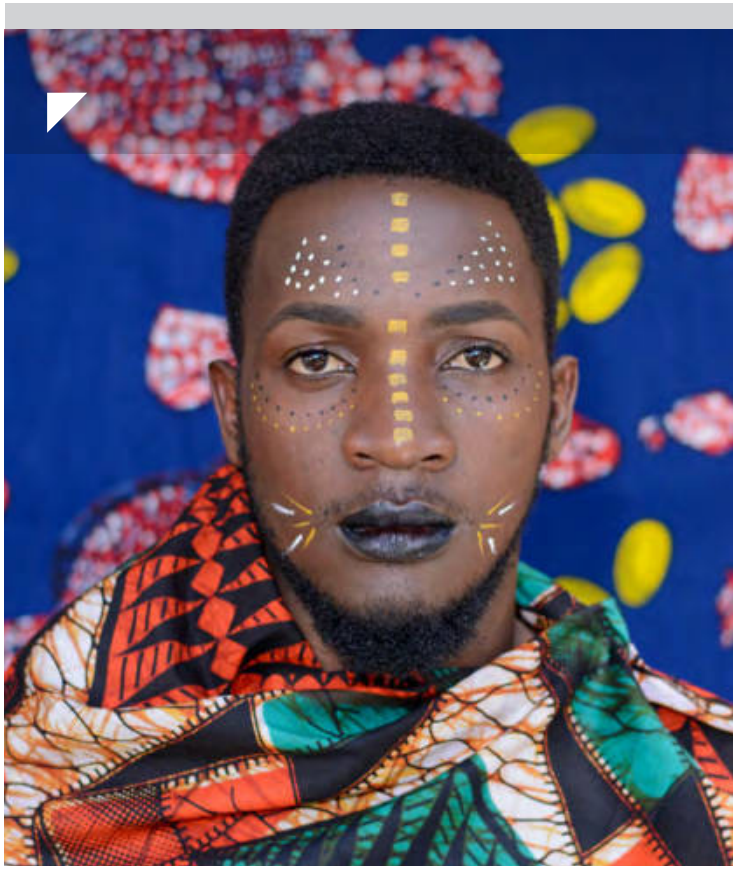
Under the provisions of the Protocol, the DSB can meet as many times as it may be prudent to do so and makes decision through consensus.

3. Procedures of settlement of Disputes

a. Consultations

When a dispute arises, parties shall first result to consultations with a view of coming up with an amicable solution. The respondent shall have ten days to respond to a request for consultations from a claimant and be bound to enter such consultations within thirty days of such receipt. In cases of perishable goods, this period is reduced from thirty to twenty days.

These consultations shall be confidential, and the parties have an obligation to notify the DSB in writing and reasons for the complaint and identify the specific violations. Where consultations prove futile, and the sixtieth day has lapsed since the receipt of the request for consultations, either party to the dispute may refer it to the DSB, requesting for setting up of a Panel to hear and determine the dispute. Parties will then proceed to make presentations to the Panel within the agreed timelines.



Third parties are defined to be State Parties with a substantial interest in a dispute. They can be enjoined to a dispute upon notifying the DSB in writing and it is the determination of the DSB that their interests are key to the dispute. This way, disputes are likely to be solved with finality and addressing all possible underlying causes. Notably, a decision by a Panel is final and binding on the parties not unless where the aggrieved party has notified the DSB of the intention to appeal within twenty days of circulation of the Panel's decision.

b. Good Offices, Conciliation and Mediation

At any point after a dispute has arisen, State parties are free to implore good offices, conciliation, and mediation towards reaching amicable settlements. These processes can also be terminated by either party at any stage and the complaining party may refer the dispute to the DSB. This gives disputants a range of avenues that they can explore to an amicable settlement.

c. Arbitration

Upon assessment of the dispute and parties form the opinion that the dispute could be expeditiously resolved through arbitration in the first instance, parties are free to have the dispute referred to arbitration. Upon conclusion of the arbitration, the DSB adopts the arbitral award as a decision of its own.

In all these forms of dispute resolution, parties are to engage in good faith and towards promoting expeditious dispute resolution.

Interaction of Investor-State Dispute Settlement as envisaged under Article 42 of the draft Pan African Investment Code (PAIC) and implementation of the AfCFTA

PAIC is a model Investment treaty negotiated under the auspices of the AU. The model was developed in 2016 with the objective of attaining sustainable development in Africa's developing and least-developed countries. The scope of the Code is to act as a guide to States and Investors with respect to investments in the territory of the Member States. Under its Article 4, investments are defined to include intellectual property rights thus making it relevant to the implementation of the AfCFTA.

a. With respect to disputes pitting investors and Member States, Article 42 of the Code makes the following proposals:

b. Party autonomy – Parties are free to decide their dispute resolution mechanisms when negotiating bilateral or multilateral investment treaties. These mechanisms will be the primary methods of dispute resolution.

c. A six-month timeline within which investments disputes are to be concluded.

d. Where arbitration is sought as a method of dispute resolution by the parties, it will be in accordance with the domestic law of the host State or as per the parties' agreement.

e. Arbitration under (c) above can be done by either private or public dispute resolution body (such as NCIA). The United Nations Commission on International Trade Law (UNCITRAL) rules shall govern the arbitration.

f. Whatever method of dispute resolution is sought, the decision of such negotiations, mediation or arbitration shall be final.

The interaction of the implementation of the AfCFTA and the PAIC (should it be adopted) are where the disputes:

i. Involve investments; and

ii. Involve parties who have chosen arbitration as their dispute resolution mechanism.

An arbitration should be conducted in conformity within the said timelines and under the UNCITRAL rules. Pursuant to Article 3 of PAIC, the provision of appeal by DSB appointing an AB stands. This would be in a case where a party is aggrieved by the decision of an arbitral tribunal. This is because the PAIC is merely a guiding instrument and secondary to any investment agreement between parties (in this case the AfCFTA).

Conclusion

The full implementation of the AfCFTA will be a huge step towards achieving economic prosperity among African States and make the continent a trade powerhouse. This will foster other forms of cooperation as envisaged under various RECs which are the blocks toward achieving full implementation of the Agreement.

Second, the provision of the DSB under the AfCFTA Agreement will mean consistent, predictable, and certain decision making in investment disputes thus building on the confidence of potential investors. This would be of great assistance especially during emergencies such as the current Covid-19 pandemic and the administration of vaccines with respect to intellectual property rights.

EVOLVING TO RESOLVE

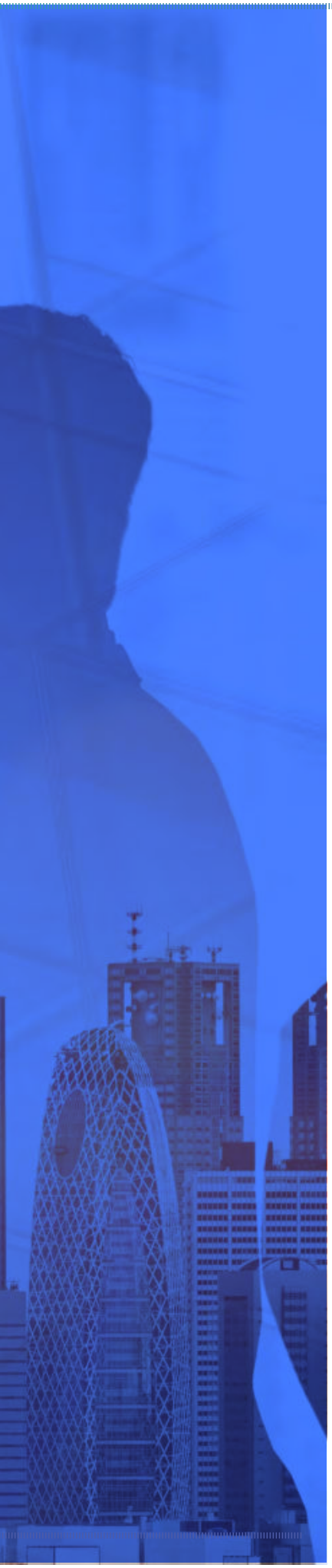
THE FUTURE OF DISPUTE RESOLUTION.
THE CHARTERD INSTITUTE OF ARBITRATOR's PERSPECTIVE

Dr. Wilfred A Mutubwa LL. D C. Arb FCIArb
Chairman, CIArb Kenya.

The Chartered Institute of Arbitrators is the leading professional and membership organization with its Head Quarters in London, United Kingdom, dealing with Alternative Dispute Resolution (ADR). It boasts of over 17,000 members in 149 countries, supported by 42 Branches across the globe. The Chartered Institute of Arbitrators Kenya Branch (CIArb Kenya) being one of them was established in 1984.

CIArb Kenya Branch is led by the Branch committee which is headed by the Chairman, Dr. Wilfred Mutubwa, FCIArb, C. Arb. The Branch also has a secretariat led by the CEO Ms. Chebett Koske. The Institute's Patron is the Honorable Chief Justice, Lady Justice Martha Koome.

CIArb Kenya has been the leader in offering ADR services within the country and region through Arbitration, Mediation, Construction Adjudication and many others. The Branch currently has over 1200 members' classified; based on cadres from Chartered Arbitrators, Fellows, Members and Associates. Its membership cuts across all professions; Lawyers, Architects, Quantity Surveyors, Finance Practitioners, Doctors, Human Resources, Engineers amongst many others.



Our main mandate is provision of world class training in ADR. We run what we call Pathway courses in Arbitration, Mediation & Construction Adjudication that provide our members with qualifications to practice and excel in their respective ADR paths. Kenya Branch as a whole has been providing the best dispute resolvers across the globe based on CIArb Centralized test results. This can be attributed to the highly experienced, hands on and dedicated team of tutors that drive the CIArb mentorship programs. By training with CIArb Kenya Branch, one is assured of preeminent quality, timeless dedication from not only the tutors but the support of the secretariat and the Branch at large.

In addition to the pathway courses, the Branch also provides Continuous Professional Development programs to ensure that our members have access to information and knowledge as well as the tools needed to achieve excellence and highest standards of professionalism in the field. Of these programs; we have ADR talks and conversation, Debates of ADR principles and emerging trends, Symposiums, Conferences & conventions, non-pathway courses among others.

In addition to training, CIArb Kenya also plays the vital role of Dispute resolvers' appointing authority. This is where any disputes arising from contracts with ADR clauses may apply to the Institute requesting appointment of either an Arbitrator, Mediator or Construction Adjudicator to hear their case and decide. This is enabled by the terms of the contract in dispute that may expressly state CIArb Kenya as the appointing authority or in instances that parties agree or where the powers of appointment are conferred by the High Court. CIArb Kenya is an Ad-hoc appointing authority as opposed to an Administered Authority and as such becomes functus officio upon conclusion of appointment.

The beauty of Alternative Dispute resolution is that disputes are referred to, in most instances, professionals from whence the dispute arose. This therefore means that the determinant of the dispute understands on a deeper level the intricacies of the issues and as such is able to make well informed solutions. In addition, ADR promotes expeditious resolutions of disputes compared to litigation. It assures the disputing parties of their confidentiality and in most cases, may prove economical as opposed to going to court. Currently CIArb Kenya Branch receives on average of 200 requests for appointments and the number has been on an upward trend meaning that more people are embracing ADR as a dispute resolution mechanism.

To encourage this trend and to continue creating awareness in ADR, CIArb has partnered with key Institutions and bodies. These partnerships have been manifested by signing MOUs and partnering in events to promote ADR.

This past year the Branch has signed MOUs with:

- The Judiciary
- The Law Society of Kenya- LSK
- The Institute of Certified Secretaries- ICS
- The Kenya National Chambers of Commerce & Industries- KNCCI

The future of ADR is bright!

As a leader in ADR, the Institute will continue taking center stage in platforms and events that promote ADR in the country and region as well as continue creating awareness on the role ADR plays in our country as well as the International arena.

- The Architectural Association of Kenya-AAK
- The Strathmore Law school among others.

Collaborations with professional bodies such as LSK, AAK, ICS, IQSK among others has provided CIArb Kenya with a platform to address, first hand, dispute management issues within the professions as well as identify the gaps that exist in the market and how best to bridge them. CIArb Kenya has hosted several free ADR sensitization symposiums to create awareness on the role of ADR and promote synergies that will see members of these organizations train at discounted rates and have access to the mentorship program.

The Branch has been very futuristic in its strategy. We believe that by supporting and mentoring young and upcoming professionals, the future of ADR will not only be bright but will be sustainable falling into the right hands. To this end, we have partnered with institutions of Higher Education such as the University of Nairobi (UoN), Strathmore University, Daystar

University, Mount Kenya University, Kenyatta University, Kenya School of Law (KSL) and these partnerships will continue to grow. The aim is to provide our world class training and qualifications to the students at affordable rates. This has led to 2 very successful training sessions in Arbitration & ADR for UoN students in April, and another one for KSL students in June & August. There is an upcoming training for the Strathmore University in November. The first 40 Hr Mediation Training for students is also on course from October.

The Branch has also been cognizant of the fact that young members have a lot to offer and have been providing platforms where this can be actualized. The Young Members Group launched its online Bulletin magazine where young professionals have been contributing with articles on issues of ADR. The award winning CIArb journal has also been instrumental in providing a platform where scholars and members alike have been publishing their research and papers ensuring content growth in ADR.

During the year, the Institute in conjunction with Dr. Kariuki Muigua, FCIArb, C. Arb, the CIArb African Trustee and Editor of the CIArb journal, launched the **Dr. Kariuki Muigua Annual Essay Awards.** The aim of this competition is to encourage the Young Members to research and write on matters and emerging trends in ADR. The event was a success and the winners received goodies which included among others; internships at the Branch, books & mentorship from both Dr, Kariuki & the Chairman Dr. Mutubwa. In addition to this, the Branch has recently launched its maiden research on the State of ADR in Kenya, a report that shall be tabled before the Chief Justice during the end of year conference in November.

As a leader in ADR, the Institute will continue taking center stage in platforms and events that promote ADR in the country and region as well as continue creating awareness on the role ADR plays in our country as well as the International arena.

Mr. Paul Matuku
Commissioner, Legal Services
& Board Coordination

Mediation as an Effective Mechanism for Resolving Tax Disputes

Alternative Dispute Resolution (ADR) refers to the procedure for settling disputes outside court. It provides a collaborative method of resolving disputes without going through an adversarial litigation process that is time consuming and costly.

Mediation - is an informal and non-adversarial process where an impartial mediator encourages and facilitates the resolution of a dispute between two or more parties. At first glance, mediation and arbitration seem incredibly similar.

However, one of the main differences is that in mediation, the mediator does not make any decision for the parties. The mediator assists the parties to agree on an acceptable settlement of the issues in dispute.

The Kenya Revenue Authority has adopted facilitated mediation as an option for tax dispute settlement.

Advantages of mediation in tax disputes resolution

Facilitated mediation is advantageous to the parties to tax disputes. Facilitated mediation;

a. Is usually a less confrontational alternative to the court system;
b. Is a voluntary and participatory process that gives the parties not only the option to choose the forum, but also the ability to control the process;
c. Is less formal than court thus more flexible in its processes; and
d. Is confidential, cost effective and often yields speedier settlements.

Legal Framework

Settlement of tax disputes out of Court or Tribunal is anchored in the Kenyan Constitution.

Article 159 of the Constitution stipulates that judicial authority is exercisable by the Courts, and Tribunals with the objective of promoting alternative forms of dispute resolution.

These methods include reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.

Settlement of tax disputes out of Court or

Tribunal is also provided for in various tax statutes including section 28 of Tax Appeals Tribunal Act, 2013, Section 55 of Tax Procedures Act, 2015 ("TPA") as well as the recently enacted Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

Time and process for settlement of tax disputes out of Court or Tribunal.

The TPA provides for the process of objecting to a tax decision including an assessment, a refund decision and demand for a penalty.

Under the TPA, a taxpayer who wishes to dispute a tax decision by the Commissioner should first lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision, before proceeding under any other written law.

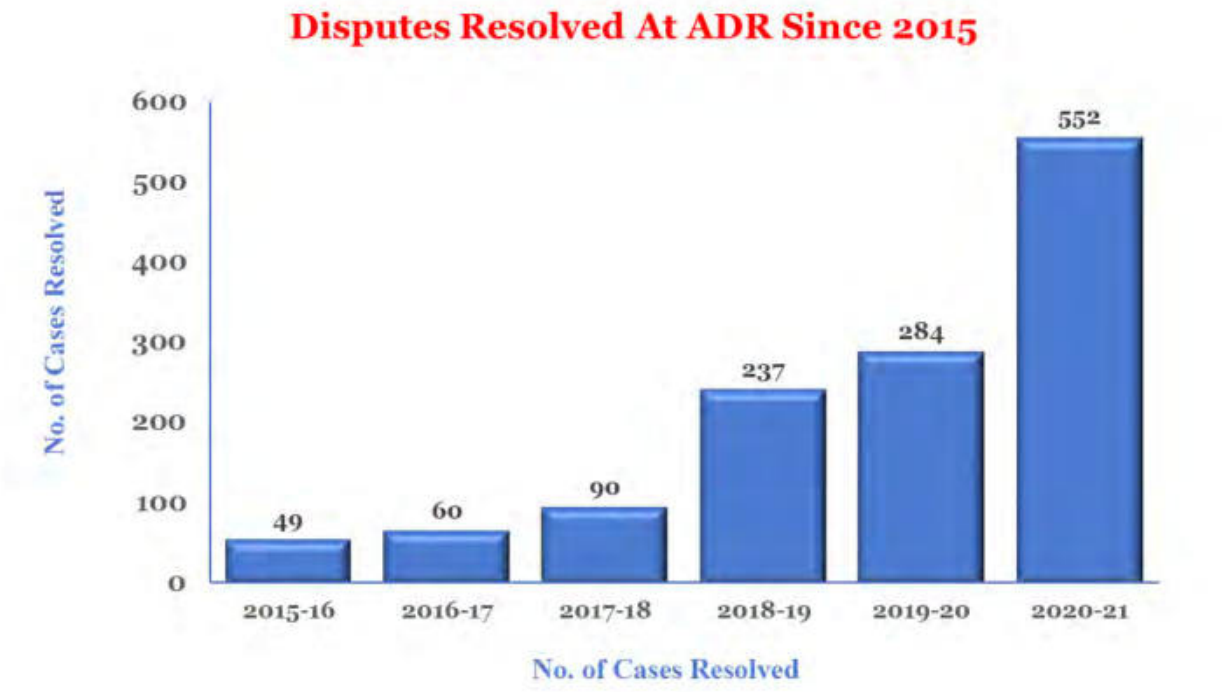
Where a notice of objection has been validly lodged within time, the Commissioner considers the objection and decides either to allow the objection in whole or in part, or disallow it. The Commissioner's decision is commonly referred to as an "objection decision".

Where a taxpayer is aggrieved with the objection decision, the taxpayer has a right of appeal to the Tax Appeals Tribunal (TAT) within thirty days. That notwithstanding, parties may at any time during proceedings, apply to the TAT for permission to settle the tax dispute out of the TAT. The TAT considers such requests and may grant the permission on such conditions as it may impose.

A taxpayer who is aggrieved by the decision of the TAT has a right to appeal to the High Court within 30 days of being notified of the decision and the sequence continues to the Court of Appeal and subsequently to the highest Court- the Supreme Court of Kenya.

The TPA provides that where a Court or the TAT permits the parties to settle a dispute out of Court or the TAT, as the case may be, the settlement shall be made within ninety days from the date the Court or the TAT permits the settlement. However, where parties fail to settle the dispute within the said ninety days, the dispute shall be referred back to the Court or the TAT that permitted the settlement.

The Tax Procedures (Settlement of Tax Disputes out of Court or Tribunal) Regulations, 2020 that came into force on 29th June, 2020 provides that where a tax



dispute has been permitted to be settled out of court in accordance with TPA, or the TAT Act, 2013, the settlement shall be done in accordance with the said regulations.

Disputes that are not suitable for settlement through the ADR Process

All tax disputes can be resolved through ADR unless ;-

a. The settlement would be contrary to the Constitution, tax laws or any other written law;

b. The dispute involves technical interpretation of law for which it is necessary for the Court to give an interpretation;

c. There is evidence that the tax payer has committed fraud in relation to tax.

Effectiveness of Mediation as an Alternative Dispute Settlement mechanism

Kenya Revenue Authority strongly encourages corporate and individual taxpayers to use facilitated mediation to settle tax disputes.

The Authority recognizes that the process of resolving a tax disputes can be a time-consuming process for a taxpayer's business.

KRA has established alternative dispute resolution systems where taxpayers aggrieved with objection decisions by the Commissioner can apply to settle their disputes out of Court or TAT.

The Facilitator of the mediation who is an experienced mediator is a neutral and independent person, who leads the parties to the dispute to make decisions to resolve the dispute. The facilitator does not make any decisions that are to bind the parties.

Using mediation, the

Authority has been successful in resolving significant portfolios of tax disputes for large businesses.

In recent times, the Authority has seen a significant and steady rise in the number of cases resolved through ADR. Consequently, mediation has now been embedded as an integral part of the Authority's operations as a way of resolving tax disputes.

The figure on the left page shows the growth of the case resolution through mediation in KRA since the year 2015.

Parties who are involved in tax disputes with the Kenya Revenue Authority are encouraged to consider, where suitable, the use of facilitated mediation offered by the Authority as a effective means of resolving the dispute.

The process is cost effective and expedient.

Professionals & Dispute Resolution

Naveen Agnihotri
Commercial Mediator at 4-5 Gray's Inn

Naveen is a barrister, commercial mediator and international arbitrator at 4-5 Gray's Inn, London

Whether operating as a sole practitioner, owner / partner in a business or employee in an organisation – as professionals, you will come across contentious scenarios which have the potential to be litigated as disputes in the courts.

For those of you that advise and guide clients – there are complex factors at play which need to be carefully considered (and balanced) before finalising a strategy to attempt successful resolution of a dispute.

Properly deployed, commercial mediation can be the ultimate method to rescue business relationships, maintain the

dignity of individuals as well as provide cost and time efficiency that courts cannot match. Consequently, it's essential that diligent professionals become the champions of this method so that the interests of those that they may serve remain best protected.

The role of a professional in mediation

The expediency of settlement and the savings in cost are persuasive in themselves – but for those that are unfamiliar with mediation, what will you do if the contract specifies it as the means for dispute resolution?

To be able to speak about the virtues of the process with clients, please try and experience it yourself. Attend and/or observe mediations that are taking place near you. This will also equip you to have sensible dialogue with the other side.

Professional trade associations, governmental organisations' and corporates are increasingly reverting to mediation as the preferred (and sometimes obligatory) method for dispute resolution.

Views from the bench

The Court of Appeal in England has made it clear that lawyers must discuss the possible alternatives to litigating disputes at court with their clients (see Halsey v Milton Keynes General NHS Trust [2004] 4 All ER 920).

Indeed, for parties (and/or their advisors) that fail to use mediation when it would be appropriate to do so – there could be adverse cost consequences - even if they succeed with their claim at court.

The recent decision of DSN v Blackpool Football Club Limited [2020] EWHC 670 (QB) has further illustrated the need for parties to engage with alternative dispute resolution (ADR) procedures in trying to resolve their disputes.

In this case, the judge, Mr Justice Griffiths found that the reasons given by the defendant for refusing to engage with ADR were inadequate and that 'no

Concluding an agreement

Parties may seek you out as the "go to" expert due to your experience, knowledge or specialism. They may not have the luxury of a lawyer and therefore rely on you to also guide them on whether a 'deal' is legally sound. Are you comfortable with this? Can you assist with drafting an agreement? Your technical input may be appreciated but don't try to extend yourself outside of your personal comfort zone irrespective of how much a client may want this. Let other professionals get involved where the situation requires it.

In symbolising the right of access to justice, the Constitution of Kenya [2010, Article 159 (2) (c)] mandates courts and tribunals where exercising judicial authority to give effect to alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. Consequently, a well drafted and properly executed settlement agreement is directly enforceable if there was a breach or non-adherence to the terms of an agreement. This provides comfort to commercial parties.

Mediation can be a great equalizer. Moreover, a skilled mediator can maintain empathy and acknowledge emotion whilst diffusing unwanted aggression.

defence, however strong, by itself justifies a failure to engage in any kind of alternative dispute resolution'.

The judge explained the practical virtues offered by ADR procedures over the court process when he stated that: 'Settlement allows solutions which are potentially limitless in their ingenuity and flexibility, and they do not necessarily require any admission of liability, or even a payment of money.'

Even if money is paid, that amount may compare favourably with the irrecoverable costs of an action that has been successfully fought. The judge also stated that trials typically involve a significant expenditure of time and costs and take a toll on the witnesses even for successful parties which a settlement could avoid.

Further, a settlement could include statements that fall short of accepting legal liability, which may still be of value for the claimant.

Managing expectations

The client may perceive you as being the expert, whereas your concern is becoming the scapegoat if the outcome doesn't go to plan! In litigation, there is a winner and a loser.

Mediation can be a great equalizer. Moreover, a skilled mediator can maintain empathy and acknowledge emotion whilst diffusing unwanted aggression.

Disputants want to be heard and understood – mediation provides that safe platform whilst placing them in the driving seat. A successful outcome – settlement – will be based on agreed terms.

Mediating equates to being weak

Obtaining a good outcome at a modest cost are usually the prime considerations for both client and advisor. However, there is often a reluctance by some professionals to broach the subject of settlement with an opposing number as they don't want to appear 'weak' by doing so.

Fortunately, the use of mediation providers and administrative centres has made it much easier for those guiding and representing disputants to utilise

the process whilst maintaining 'equality of arms'.

Selecting mediator(s)

Entrusting the dispute with the right person provides the best opportunity of it being resolved. There are various considerations before deciding upon who to appoint, including (but not limited to):

a. has the mediator undergone training and attained accreditation?
b. are they doing this exclusively or combining it with other work?
c. how experienced are they?
d. how often do they mediate? e) are testimonials from users available?

Are you prepared?

Mediation requires a concerted effort by the parties and representatives involved in order to obtain a successful outcome.

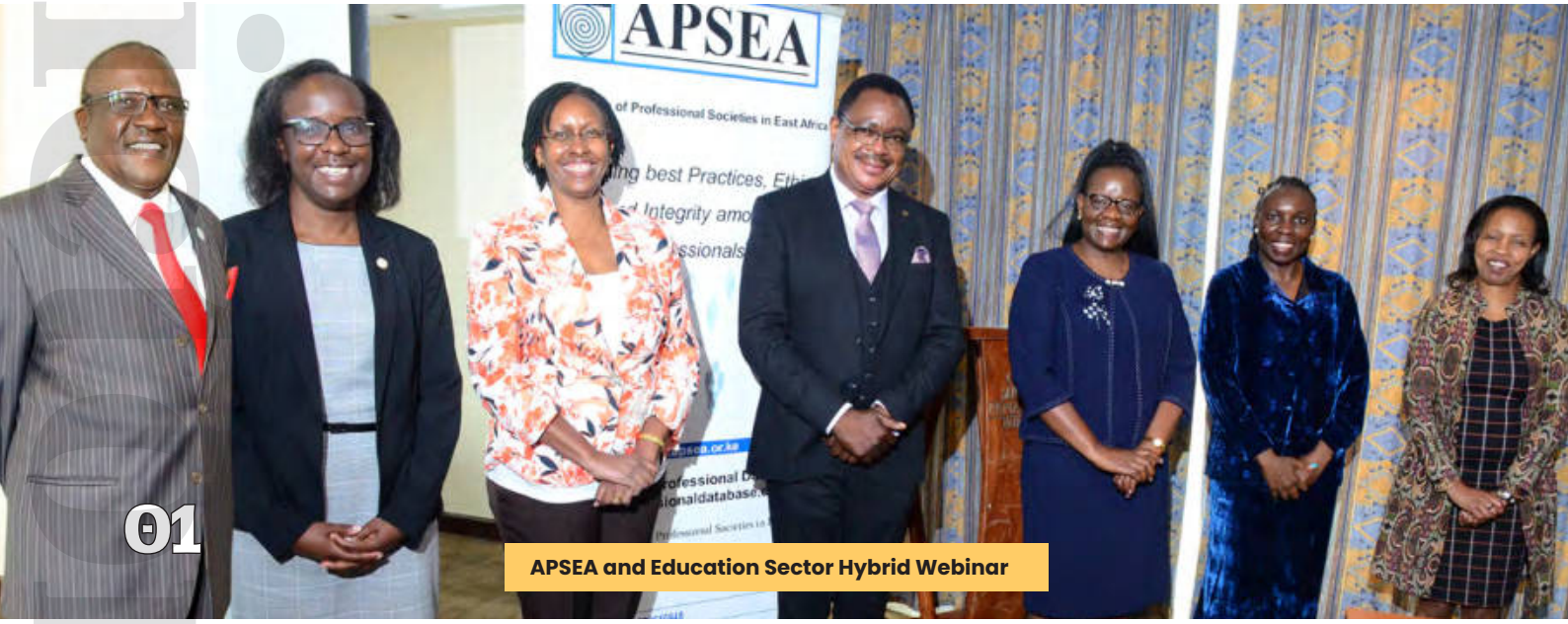
The mediator may look to the professionals for input at some stage and therefore being prepared means you're enabling the process.

a. What are the facts and issues?
b. What are the relevant documents?
c. What is your role?
d. What might settlement look like?
e. Is there a plan B? Are you relaxed?
f. Are you ready?

Endnote

History has illustrated that litigation can be fatal for some companies. Whether you're a novice or a seasoned professional, you can add significant value for your client by navigating them through the bumpy journey of a dispute and minimizing any scratches and bruises from the ride by advocating commercial mediation.

Pictorial Page



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APSEA and Education Sector Hybrid Webinar

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APSEA Courtesy call to Amb. Simon Nabukwesi, Principal Secretary, State Department of University Education and Research

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APSEA Chairman and Makueni Gov .H.E. Prof. Kivutha Kivutha during the 7th Devolution Conference Held in Makueni County

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Kenya Professionals Development Fund Strategic Plan Launch & Stakeholders Forum

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MOU signing between APSEA, the Centre for Corporate Governance(CCG), and CCG Alumni Network on Effective corporate Governance in Kenya.

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Professionalism & Dispute Resolution in Kenyan Legal Practice Today

Kenya today has experienced an incursion of foreign direct investment in recent years convalescing Kenya's economy immensely. This has made arbitration a preferred way of solving disputes especially when it involves foreign investors through investment arbitration.

Ms Ruth Jebet Rotich
Advocate of the High Court of Kenya
Commercial Law Advocate at CR ADVOCATES LLP.

Arbitration promotes the confidentiality nature of commercial disputes but the statistics and specifics in which the parties have been involved cannot be easily acquired. Companies in general have adopted arbitration as a way of solving disputes than the court system.

Some of the Arbitral laws include The Arbitration Act was passed in 1996 and amended in 2009, UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Law). Furthermore, the Nairobi Centre for International Arbitration (NCIA) was established in 2013 and is governed by the NCIA Act 2013 . The NCIA pays a vital role when it comes to training and obtaining information . The Chartered Institute of Arbitrators also provides training for members who wish to advance their careers as arbitrators in dispute resolution .

Advocates in legal practice in Kenya are encouraged to employ Alternative dispute resolution mechanisms. I must say that most cases in court today would have been solved if parties agreed to settle the case outside the court precincts thus reducing backlog of cases in Kenya. Article 159(c) (2) of the Constitution of Kenya, 2010 recognizes arbitration as part of the dispute resolution procedures as an important part and necessary element in the legal system altogether. This prevents obstruction of justice so as to implementation of all the available alternative methods including arbitration.

Subject to also article 189(4) of the Constitution of Kenya 2010, national legislation is required to offer procedures so as to solve intergovernmental disputes by negotiation, mediation and Arbitration.

In order to achieve s dispute resolution with the minimal resources, Alternative Dispute Resolution Mechanisms must be employed. Litigation should be a last resort.

The aim of arbitration in legal practice in Kenya is to maintain the intention of parties. Courts have been keen to actualize Article 159(c) of the Constitution of Kenya, 2010 by delivering judgments and enforcing arbitral awards accordingly.

POSITIVE ATTRIBUTES

As was stated in the case of *Bellevue Development Company Limited* v. Vinayak Builders Limited the court exercised caution when analyzing the merits of the case and took recognizance the full effect of the arbitration agreement and party autonomy . It was held thus:-.

> ***"This Court is thereby enjoined to breathe life into an Arbitration agreement to give effect to the intentions of the contracting parties who freely choose the said mode of dispute resolution in a private contract so as to take advantage of the trilogy of benefits which are said to be attendant to Arbitration".***

Section 17 of the arbitration Act, 1995 clearly encompasses the concept of *Kompetenz Kompetenz* highlighting that the Arbitration Clause in a contract is in itself a separate clause. This is to say that even though an arbitration clause is declared null and void, the contract in itself is still valid in all respects. Section 17 establishes that any challenge concerning the arbitral tribunal's jurisdiction must be dealt with by the arbitral tribunal itself and raised before the defense on the merits . The tribunal may decide the challenge as a preliminary matter or in the final arbitral award . The tribunal's decision is subject to a review by the Kenyan High Court if the aggrieved party files an application within 30 days. The Kenyan High Court's decision is not subject to appeal .

EXPEDITIOUS DISPOSAL OF CASES THROUGH ARBITRATION

The courts have made decisions promoting dispute resolution especially when it comes to Arbitration.

In the *World Duty Free Co Ltd v Republic of Kenya*, the claimant, a company incorporated in United Arab Emirates had won a concession to operate duty free shops at the Jomo Kenyatta and Moi International Airports in Nairobi and Mombasa respectively, but the Government of Kenya terminated the contract unprocedurally. The claimant referred the dispute to International Centre for Settlement of Investment Disputes (ICSID) and an award was made in its favour. Although it is prohibitively expensive to arbitrate under the aegis of ICSID, this cannot be the sole reason for the non-utilization of these facilities. Many foreign investors continue to rely on Kenyan courts in dispute resolution.

Further in the case of *Rashid Moledina v Hoima Ginners*, where Duffus JA observed that courts will be slow to interfere with the award in arbitration due to the binding decision by the arbitrator and the parties. This is so to say the only interference comes through interest of justice when necessary.

Most succinctly, Courts are encouraged to breathe life to arbitration laws and preserve privity of contracts. This will promote the intention of parties and the mode they wish to settle disputes.

This applies concurrently with the Arbitration Act 1995.

Arbitration seeks a forum of just and equity as the only who comes in equity shall be served with equity. There is a close correlation with the courts and arbitration to enable smooth and fast settling of disputes and easing the backlog of cases in Kenya.

In the case of J*ames Heather Hayes v African Medical and Research Foundation (AMREF)*, it was stated that the unique features an industrial court does to access of justice expeditiously at minimal costs without too much hurdles. Hence workers are advised to adopt ADR in the work place to enhance quick resolution of disputes without delay.

Also in the case of *Okenyo Omwansa And Another v Attorney General and 2 others*, it was held that access of justice is in the enshrinement of rights and understanding of the law and equal right of protection of these rights and a provision of good environment within the judicial system to allow expeditious disposal of cases and enforcement of judicial decisions without delay.

This is in focus of the setting of the balance between arbitration and litigation embracing change to our country.

In the case of *Dickson Mukwelukeine v Attorney General and 4 others*,the court is being encouraged to support arbitration which is a complimentary process to the judicial process in virtue of article 159(c) of the Constitution of Kenya.

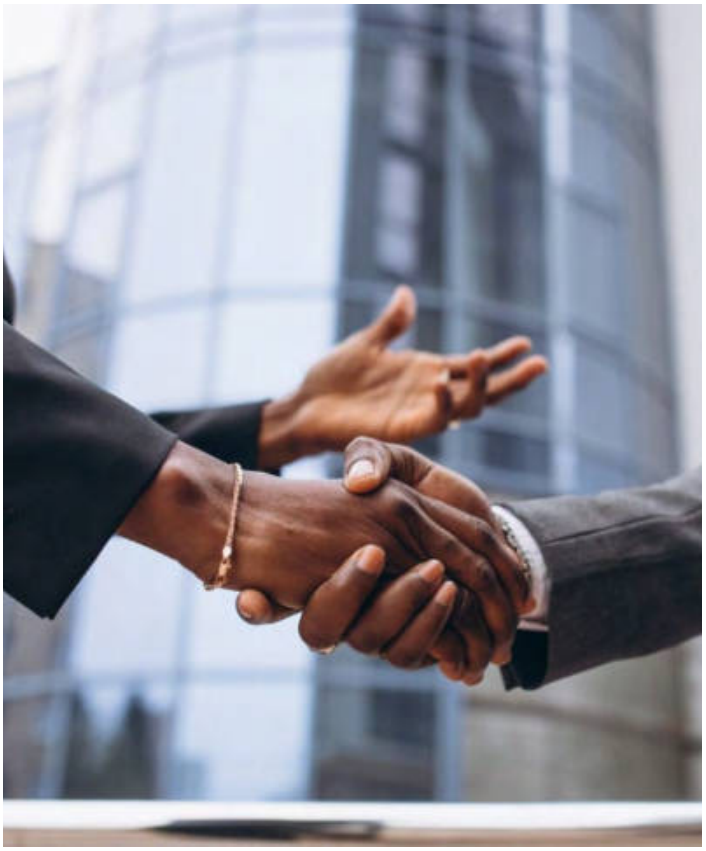
Arbitration is more of an attractive process that enhances the law system and seeks to improve and mend loopholes in the judiciary.

It is an occurrence that the courts fail to understand the essence of having an arbitration process since it is been seen as an interference. The courts are asked to proceed with the alternative remedy and adhere to the same.

In the *Epco case* Justice Deverell noted that parties shall be given full opportunity to represent their case and shall be treated equally in order to secure substantial delay.

LIMITATIONS

The Arbitration Act provides for any kind of dispute to be



referred to arbitration but some disputes such as criminal, tax law, insolvency and divorce law can't be subjected to arbitration.

For example in a divorce case, parties are unwilling to reconcile their differences; a marriage being irretrievably broken down. In this case the only solution that remains is dissolution of marriage because parties cannot agree. Section 37(b) establishes instances where an arbitral award cannot be enforced .

The limitation of Actions Act bars bringing a cause of action after six years. This being a contact, parties should make sure that the disputes are resolved before lapse of time . In light of the contract Act, arbitral agreements being contractual in nature have to be in writing for it to be enforceable in Kenyan jurisdiction.

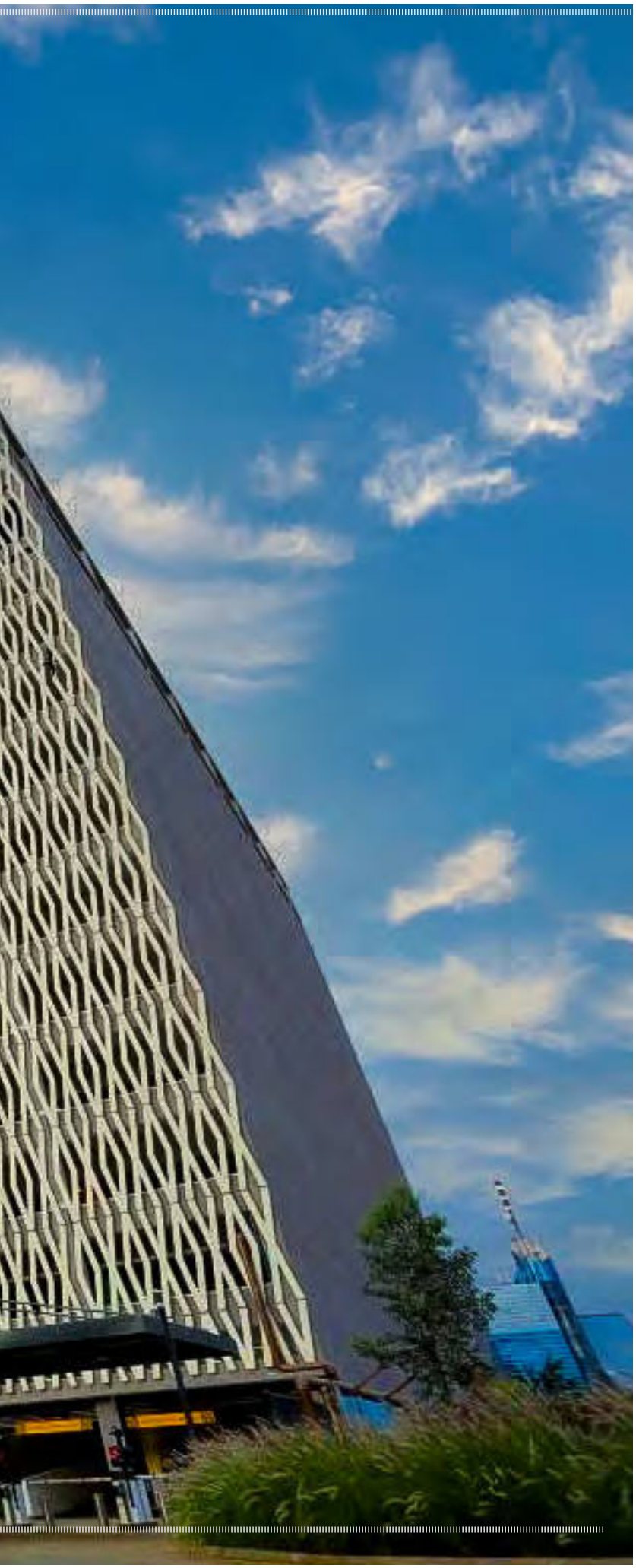
CONCLUSION

Most succinctly, Courts are encouraged to breathe life to arbitration laws and preserve privity of contracts. This will promote the intention of parties and the mode they wish to settle disputes.

Courts and litigants ought to embrace such avenues to facilitate quick dispute resolution to avoid many years of litigation in courts. Arbitration is growing and the more people train to become arbitrators, the better for the society as a whole. This in the end will reduce backlog of cases in court.

Julius K. Talaam
Senior Architect, Triad Architects

Dispute Resolution in the CONSTRUCTION INDUSTRY in Kenya



1. Background

Dispute resolution or dispute settlement is the process of resolving disputes between parties.

Dispute resolution techniques assist the resolution of antagonism between parties that can include citizens, corporations, and governments. – (Wikipedia)

In Kenya, the construction sector is run by several teams to achieve completion of various Construction projects. Each project contains two key contracting parties namely, the Employer/ owner of the project and the Contractor or the implementer of the project.

When the owner sets out to achieve his/her dream project, they hire/procure the services of several build Environments professionals namely, an architect, a structural engineer, a civil engineer, a Quantity surveyor, an electrical Engineer, a mechanical engineer and other specialized consultants depending on the need of the

project.

This team of professionals prepare adequate documentation in form of detailed construction drawings, specifications and bills of quantities sufficient to enable the contractor execute the works.

Before commencement of the works, the key parties execute a contract under the administration of the Architect and the Quantity surveyor. Some examples of contracts used in Kenya today include but not limited to; The JBC and the FIDIC contract.

These contracts always stipulate the dispute resolution mechanism and the applicable laws. During the execution of the works, the Architect becomes the administrator and arbitrator in case of disputes of the contract and ensures the contractor's performance therefore is as per the contract documents which reflect the requirements and interests of the project owner.

The contract administration process adopts various tools to ensure adequate recording of any changes through the duration in which the contract is executed.

In most cases the process of execution of the construction project goes smoothly and everyone goes home happy. However in some instances, disputes arise for various reasons. These disputes can arise in various forms which can be as per the examples below;

- Failure by the contractor to agree with the client on the excavation costs due to increased depths or variations in ground formation during foundation works.
- Delays by the client in honouring their payments on time which leads to interest in payments and overshooting the project budget.
- Poor workmanship in structural concrete works which can lead to abortive works and loss of funds.
- Consultants design anomalies can lead to non-performance of materials specified and disputes with the client.

In this article we seek to enlighten our readers on the various dispute resolution mechanisms available to the Client or the contractor whenever disputes arise.

In the proceeding chapters of this article, we will discuss in-depth the various dispute resolution mechanisms available in the construction industry. There after we will give examples of instances where disputes have arisen in the recent past and modes used to resolve this.

Before commencement of the works, the key parties execute a contract under the administration of the Architect and the Quantity surveyor. Some examples of contracts used in Kenya today include but not limited to; The JBC and the FIDIC contract.

can be awarded.

2. Methods of dispute resolution

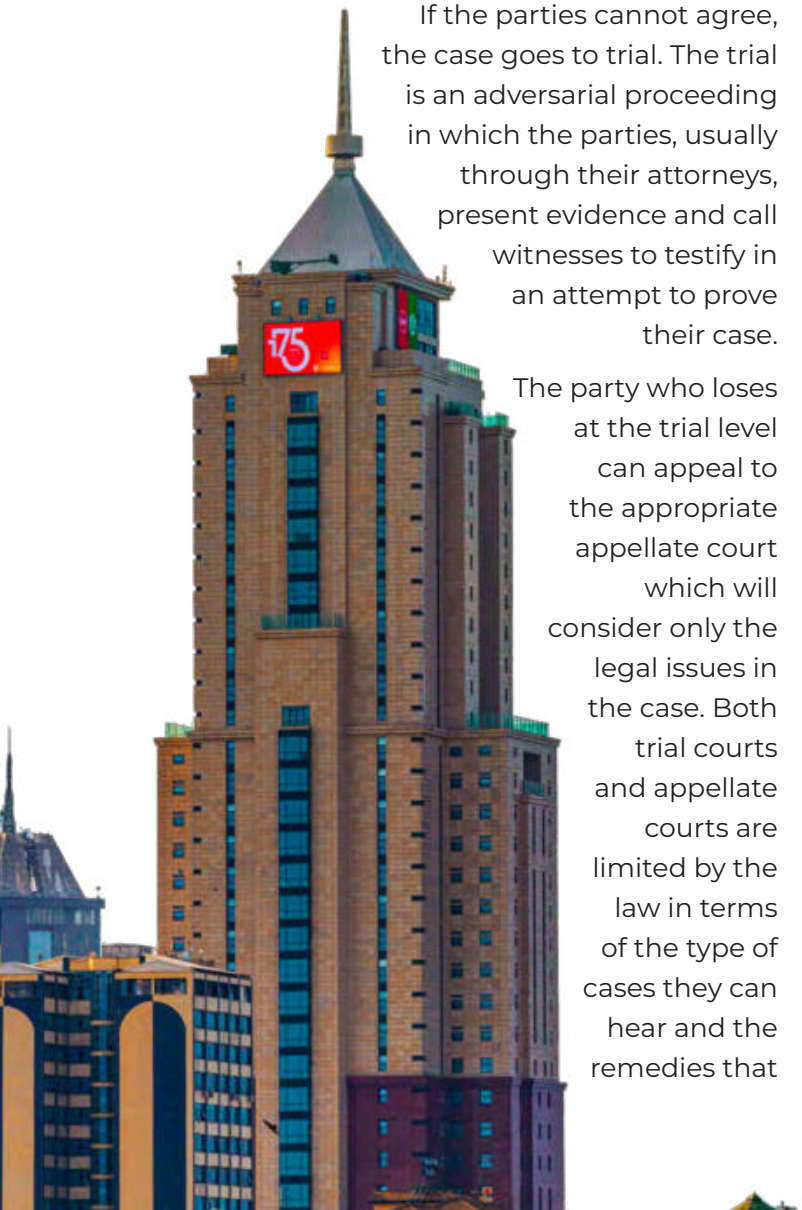
Dispute resolution processes fall into two major types:

- ***Adjudicative processes,*** such as litigation or arbitration, in which a judge, jury or arbitrator determines the outcome.
- ***Consensual processes,*** such as collaborative law, mediation, conciliation, or negotiation, in which the parties attempt to reach agreement. (Wikipedia)

These forms have been discussed in the foregoing chapters.

2.1. Litigation

This involves a case, controversy, or lawsuit being brought in the court. The filing party is called the plaintiff. The party being sued in a civil case, or who is being prosecuted in a criminal case, is called the defendant.



If the parties cannot agree, the case goes to trial. The trial is an adversarial proceeding in which the parties, usually through their attorneys, present evidence and call witnesses to testify in an attempt to prove their case.

The party who loses at the trial level can appeal to the appropriate appellate court which will consider only the legal issues in the case. Both trial courts and appellate courts are limited by the law in terms of the type of cases they can hear and the remedies that

2.2. Arbitration

Arbitration is a private process in which the disputing parties agree to allow one or several individuals to make a decision about their dispute. The arbitration process is procedurally very similar to a trial, although arbitration can usually be completed more quickly and is less formal. For example, often the parties do not have to strictly follow the rules of evidence in an arbitration hearing. At times, the arbitrator's only job is to interpret the contract that sent the parties to arbitration. After the hearing, the arbitrator issues an award. Some awards simply announce the decision, while others provide a "reasoned" award, which means the arbitrator give(s) an explanation of the decision. There are two type of Arbitration;

i. Binding arbitration. Awards in a binding arbitration can only be appealed on very narrow grounds. Collective bargaining agreements usually contain clauses providing for binding arbitration, like in standard construction agreements i.e JBC. The award issued as a result of binding arbitration is enforceable in court.

ii. Non-binding arbitration. In this the arbitrator's award is advisory and in effect, will only become final if accepted by the parties. Otherwise, the parties are entitled to still have a trial. Nonbinding arbitration is used frequently as part of a court annexed procedure Constitutional protections may prevent the courts from depriving some parties of jury trials.

2.3. Negotiation

Negotiation is a process in which disputing parties attempt to resolve their conflict. They do this unassisted by a neutral third party, but they may be represented by their attorneys.

As was previously mentioned, the great majority of lawsuits settle before there is a trial. Negotiation is largely unstructured, and as a practical matter, everyone engages in some form of negotiation every day with

family members, supervisors or employees, or store salesclerks.

2.4.Mediation

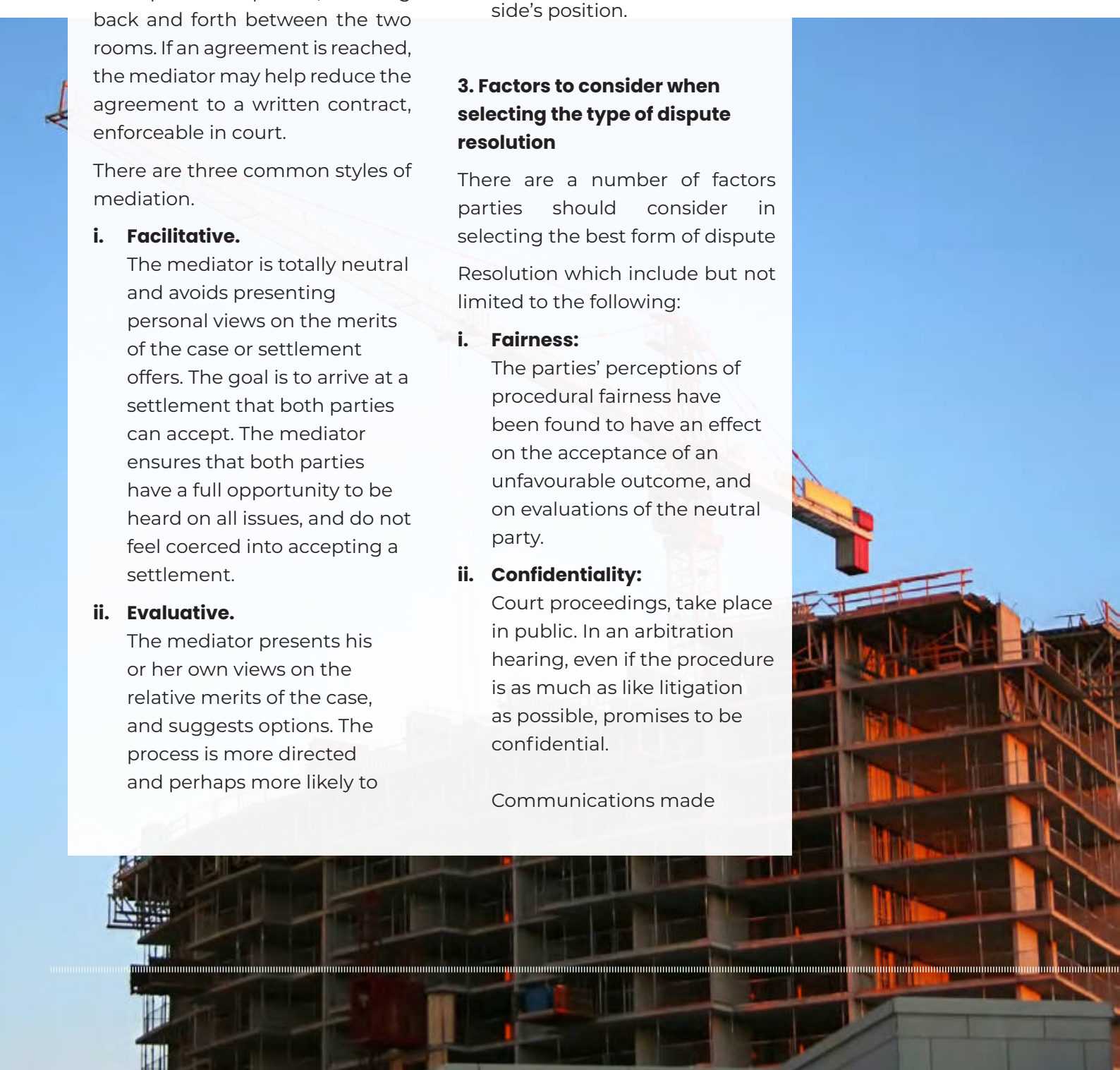
In mediation, a neutral third party or parties assist in settlement efforts. It is a private process. The process is considered to be "voluntary" because the courts do not mandate that the parties come to an agreement. Some mediators conduct the entire process with all parties in the room. However, other mediators will separate the parties, shuttling back and forth between the two rooms. If an agreement is reached, the mediator may help reduce the agreement to a written contract, enforceable in court.

There are three common styles of mediation.

i. **Facilitative.**
The mediator is totally neutral and avoids presenting personal views on the merits of the case or settlement offers. The goal is to arrive at a settlement that both parties can accept. The mediator ensures that both parties have a full opportunity to be heard on all issues, and do not feel coerced into accepting a settlement.

ii. **Evaluative.**
The mediator presents his or her own views on the relative merits of the case, and suggests options. The process is more directed and perhaps more likely to settle. The mediator places emphasis on the strengths and weaknesses of the cases or on the cost of not settling, rather than on a mutually beneficial solution.

iii. **Transformative.**
Transformative mediation is intended to give the disputants a voice in the result and the process through making their own decisions. The process also encourages knowledge and understanding of the other side's position.



3. Factors to consider when selecting the type of dispute resolution

There are a number of factors parties should consider in selecting the best form of dispute

Resolution which include but not limited to the following:

i. **Fairness:**
The parties' perceptions of procedural fairness have been found to have an effect on the acceptance of an unfavourable outcome, and on evaluations of the neutral party.

ii. **Confidentiality:**
Court proceedings, take place in public. In an arbitration hearing, even if the procedure is as much as like litigation as possible, promises to be confidential.

Communications made

during mediation are frequently protected by evidentiary rules, and are not admitted during a trial.

iii. **Cost:**
Cost is one of the primary reasons given for resorting to an alternative dispute resolution method.

Any reduced cost may be due in part to the reduced time involved. Less complex methods are probably less expensive than litigation.

Due to its informality and flexibility, and the fact that it can be conducted in any convenient location, mediation is often less expensive than more elaborate techniques.

iv. **Speed:**
Courts in most states are overcrowded, and trials are delayed. An arbitration hearing may be scheduled as soon as convenient for the parties and arbitrators schedules sometimes in a matter of weeks.
Arbitration rules frequently have a time limit for the arbitrator to enter an award. Due to its informality and flexibility, mediation is often speedier than more elaborate techniques.

v. **Maintenance of relationships:**
Court proceedings and arbitration are adversarial in nature, and damaging to a relationship. Mediation and negotiation are not.

4. Examples:

IN THE KENYA LAW REPPORT: CIVIL CASE NO. 232 OF 2018 BETWEEN WORLD VISION

INTERNATIONAL VERSUS SYNTHESIS **LIMITED 1ST DEFENDANT & MAVJI CONSTRUCTION COMPANY LIMITED 2ND DEFENDANT**

The Plaintiff intending to have its Regional office, within Karen area of Nairobi County entered into two separate agreements with the two Defendants for construction of an office building.

The 1st Defendant was the project architect while the 2nd Defendant was the project contractor. It was a term of the two contracts that disputes and differences between the Plaintiff and the two Defendants would be referred to Arbitration

It is the Plaintiff's case that on being advised by the two Defendants that the building was complete the Plaintiff relocated its office into that building. The Plaintiff alleges that it noted several defects soon after taking occupation.

The Plaintiff pleaded that the Defendants negligently misrepresented to the Plaintiff that the works were in accordance with the contracts, drawings, the contract bills, specification and condition of contract. The Plaintiff claims damages.

The Plaintiff set out the particulars of the 1st Defendant's breach of contract and of duty of care, thus:

"PARTICULARS OF THE 1ST DEFENDANT'S BREACH OF CONTRACT AND BREACH OF DUTY OF CARE – EXTRACTS

i. Failure to undertake a geotechnical survey/ site analysis prior to commencing the works despite full consultancy fees being paid.

ii. Failure to oversee and coordinating the input of the consultants commissioned by it.

iii. Failing to effectively supervise the work done by other consultants and ensuring that it meets the Plaintiff's requirements and approval as regards quality.

iv. Failing to construct all the beams and columns provided in the drawings particularly on 2nd floor.

v. Failing and/or refusing to remedy the defects.

vi. Misrepresenting to the Plaintiff that the works were in accordance with the contract drawings, the contract bills, specifications and conditions of contract."

vii. The Plaintiff pleaded the following particulars of the 2nd Defendants breach.

"PARTICULARS OF THE 2ND DEFENDANT'S BREACH OF CONTRACT AND BREACH OF DUTY OF CARE

i. Failing to carry out/ request for a geotechnical survey of the site prior to commencing the works.

ii. Failing to familiarize itself with the site and the soils therein.

iii. Using substandard material to construct the building other than what was described in the contract bills, the drawings and the specifications.

iv. Deviating from the contract specifications and drawings.

v. Failing and/or refusing to remedy the defects.

vi. Failing to exercise due care, skill and diligence in the performance of its duties under the contract.

vii. Misrepresenting to the Plaintiff that the works were in accordance with the contract drawings, the contract bills, specifications and conditions of contract."

The Plaintiff also sought for special damages in relation to the remedial works it under took and in that regards seeks against both Defendants jointly and severally for Kshs.268,783,496.90.

The courts determinations determination is as per the case reference Number.

5. Conclusion

Construction projects begin with big dreams of project owners wanting and construct building to serve the purpose. Due to many reasons, most at times the process of achieving this hits headwinds and leads to disputes. The many available dispute resolution mechanism ensure that all parries reach to an agreement and in case of litigation just award.

Professionals: Let's help move things along!

Kananu Kinya Mutea
Partner, Head of Dispute Resolution
Gikera and Vadgama Advocates

Conflict is inevitable, do you agree? Some of us are avoidant while others revel in engagement. What is necessary at the end of any conflict is to achieve a workable solution that allows parties to move on with minimal damage, whether this is financial or reputational.

There are times in conflict when professionals elect to be present but are "seen and not heard" in situations where conflict is rife.

There are many influences that create the right environment for conflict: cultural and generational influences, disparities in roles and experience, egos, differing attitudes, beliefs, expectations, priorities and it is not surprising that many struggle with the ability to navigate successfully through conflict.

We can learn a lot from observing our behavior and trying to make sense of how people connect, communicate, or succeed in relationships. Once we make these observations, we can see how we impact and influence people, both positively and negatively.

It is important that professionals who are expected to express their views on the direction of organizations, the implementation of policies, the finances, the strategic decisions find their "voice" and discover how they can use this meaningfully to navigate conflict.

Differences are not a bad thing, as a matter of fact, these can be useful in allowing critical evaluation of solutions.

If managed well, any situation giving rise to conflict can result in creative thinking and allow for deepened understanding that fosters improved relations within teams and with other businesses. The outcomes that follow proper management of conflict are often better and long lasting.

It is important that professionals consider training in mediation as this will help them understand the psychology behind conflict and provide the skills and knowledge to read the available clues in how people engage with conflict. These skills allow for the facilitation of dispute resolution in commercial, family, or employment matters.

There is no gainsaying the role of emotional intelligence: the understanding of the psychology behind behavior, as an essential tool in the successful management of any enterprise.

And this includes in the resolution of conflicts before and during litigation.

It should not be surprising that psychology plays a big role in effective negotiation and mediation.

This knowledge often helps in easing the highly strained environment.

It is important that professionals consider training in mediation as this will help them understand the psychology behind conflict and provide the skills and knowledge to read the available clues in how people engage with conflict.

When conflict escalates emotions are high and there is no objectivity, this tends to fuel the conflict regardless of how smart anyone is. Self-awareness and control in engaging in disputes is a useful tool that requires an investment in developing emotional intelligence.

This can be learned, and it starts with building our self-knowledge and control and consciousness of others and the relationships that need management. It is an interesting thing that the most difficult people are often quite well-educated, but this does not reflect in how they show up and impact situations and people, oftentimes quite negatively.

If professionals do not exercise self-awareness or pay attention to the behavioral clues presented when conflicts arise then they give way to fear and anxiety arising from the conflict which degenerates into anger and negative behavior. The approach by those who find themselves

IN MEMORY OF EDWARD NGUNJIRI, *PROGRAMMES OFFICER*-APSEA

APSEA Expresses Sincere Condolences To The Family And Friends Of Mr Ngunjiri Who Was Our Exemplary Hard-working Employee.
MAY HIS SOUL REST IN PEACE

in situations of conflict should be to create an environment of respectfulness and trust which facilitates a necessary environment for conflict resolution.

When the stakes are high and there are differing opinions, remaining focused and logical seems counterintuitive however, giving in to the emotions (fight, flight or freeze) is counterproductive as it does not allow for understanding the cognitions, behaviors, and reactions behind the conflict which is vital to resolving the conflict.

Engaging in conflict productively requires an understanding of emotions and personal differences. And it all starts in the mind, with a willingness to explore, rather than flee from, differences. It means acknowledging emotional reactions openly and exploring what led to them, rather than pretending they do not exist.

In many of the cases I have handled, whether these have been commercial, landlord-tenant, intellectual property claims, family matters etc. the driving force that overwhelms reason in dispute situations and explains the 'irrational' behavior that can result from those caught up in conflict, is emotion.

In most litigation whether these are construction disputes, bank litigation, corporate malfeasance there are professionals in the background making strategic decisions that impact the outcome of these cases. It is necessary that the

professionals charged with this responsibility consider how they engage with the situation and whether the perspectives they share are with a 360 view of the organization's interests.

In the cases that have had good strategy formulation and execution, the professionals I have dealt with have been deliberate in engagement, clear on the intended outcome, with considered (and often times reviewed) business considerations. It is clear to me that when we show up to negotiate, mediate or litigate from positions of self-awareness and strategy more than emotion, the outcome is considerably better. It boils down to choice!

Have you asked yourself any of these questions: "Why seemingly sensible, intelligent, rational people appear to act so irrationally? Why commercial businesspeople behave so unprofessionally and childishly when in conflict? What is it

that so quickly drives people into intense and bitter disputes?" The answers seem to lie in emotions attached to decision making but I defer to psychologists who interrogate these questions in much greater depth.

Winning in litigation does not usually produce the best solution, yet this is often the objective in litigated cases. It is a win if the outcome was strategically expected, and the process used measuredly. If not, then the entire process is a waste of resources and emotion. In cases where it is not strategically advantageous to litigate the best way to resolve disputes is through integration and synthesis of differences, not one person prevailing over the other and this is achieved through negotiation or mediation.

The reality is when conflicts arise those involved fervently believe their position (perspective) to be the one and only objective and universal truth. They are driven by a belief that a judge, arbitrator, mediator or lawyer will eventually agree with their view. However, our truth is subjective. No matter how intelligent, experienced, or advanced, we can only see or understand so much until we seek to understand how others perceive the same issue or circumstance.

It is imperative that one asks these questions: "How is that (position) working for you? Is it getting you what you want?" likely, you will begin to see or think of things differently. There is a quote by the poet Rumi "Out beyond ideas of wrong-doing and right-doing, there is a field. I will meet you there." This is most apt to conflict situations. Another apt quote from the same poet is "Yesterday I was clever, so I wanted to change the world. Today I am wise, so I am changing myself."

To penetrate conflict, I think professionals should be facilitative, irrespective of their primary professions and perhaps more so those who are in the dispute resolution arena. This way, we can help move conflicts along with some form of structure and goal. As I say this I am aware of the example given of drivers on the road, when driving, those overtaking you are maniacs and those driving too slow ahead of you are idiots! It is a question of perspective.

If we want to see a shift in how conflict and differences are managed within the professional bodies that we are parts of it starts with our being the change that we want to see. We all start with seeking to be understood, we could perhaps try to understand.

What does your mindset (or perspective) reflect when you are at the table? What are your attitudes or emotions that might just be getting in your way? Let us take time to develop our emotional intelligence and build understanding around the psychology of conflict!

The Future of Justice:
Integrating Technology in ADR, & the Emergence of Innovative Tools

Dr. Kenneth Wyne Mutuma
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Chartered Arbitrator, FCiArb, CPS, Gov. Auditor, MAAK, Advocate
Senior Lecturer, Faculty of Law, University of Nairobi (Parklands Campus)

Introduction

The current trends of digitizing the legal sector including ADR seems will keep going on for as long as the wide array of ever-evolving technological resources are available.

The Covid-19 pandemic has accelerated this trend towards leveraging smart technology to increase the quality and efficiency of ADR. The advent of Online Dispute Resolution (ODR) was met with skepticism and even resistance. This resistance came from traditional lawyers and was informed by untested assumptions about the deployment of technology in ADR. It was assumed that face-to-face resolution of disputes yielded better results and was thus more superior than that conducted online.

This assumption has been challenged by the hundreds of thousands of cases efficiently resolved online where also parties maybe located in different geographical locations.

This article discusses the contribution of information communication technology (including AI) to ADR and its primary role of promoting the access to justice through the different ADR platforms: arbitration, mediation, and negotiation. Various ICT tools and their uses in guaranteeing the efficiency of the ADR process are explored. More importantly, the question of whether it is technologically feasible to have an AI-powered machine to fully replace human ADR practitioners is critically analysed. The overarching argument is that information & communication technology (ICT) has catapulted efforts of quality justice delivery to the next level by guaranteeing cheaper and expeditious outcomes despite several limitations. Furthermore, contrary to the apocalyptic narrative of an AI takeover, the article argues that reality of AI-powered machines fully replacing ADR practitioners is far-fetched given complexity of cases and their need for persons with specialised knowledge.

Technological Integration in Negotiation

Electronic negotiation

(e-negotiation) is the process of conducting negotiations between business partners using electronic means. The interest in e-negotiation is motivated by its potential to provide business partners with more efficient processes, enabling them to arrive at better contracts in less time. There are two categories of e-negotiation media: servers which implement multiple protocols, and applications which implement a single protocol. Traditionally, applications have dominated negotiation design, but lately, the importance of servers has increased, and a need for servers that are configurable is being felt.

Attempts were made to design-though in ad-hoc manner- configurable e-negotiation media to support more than one negotiation protocol. Examples of these attempts were: the AuctionBot , GNP , and e-AuctionHouse . Recently, Kerstenet designed a configurable negotiation server that supports bargaining, based on a process model which organizes negotiation activities into phases; and a set of rules that govern the processing, decision-making, and communication. The main problem in designing e-negotiation media, in addition to the ad hoc manner in which they have been designed, is the lack of a systematic approach.

Technological Integration in Mediation

Parties to mediation have been able to utilise the various forms of technology to assist them from the initial stages of selecting a mediator to the actual day of the mediation conference, and all points in between due to rapid technological advancement.

This popularity and adoption of mediation procedures resulted in the clamour to make it more accessible and efficient to parties seeking to use mediation for dispute resolution .

This is where technological advancement comes in, in aiding development of mediation resulting to e-mediation .

Noam Ebner writes that where parties have never met because they are in different geographical areas or engage purely in online transaction are some of the main reasons for online mediation services during the 1990s. This was done mainly through emails. The development of ODR has been able to make mediation even more efficient and effective as parties are now able to not only conduct video conferences at the convenience of their locations but can also utilise ODR in making in-person mediation better by assisting traditional in-person mediators in the mediation room in accomplishing various tasks of mediation procedures and also mediation-related activities.

Some of the ways through which technological advancements has impacted positively on both the process and outcome of mediation are; as tool for selecting a proper mediator, tool for exchange and collection of information, and tool for online dispute resolution and video-based mediation.

Technological Integration in Arbitration

In the ADR sphere, arbitration enjoys a unique prominent status for reasons that it is a preferred route for parties who desire a consensual, and private process because of its binding outcome. Traditionally, arbitral tribunals consisted of human arbitrators who chaired proceedings physically. The emergence of new tools and technologies has increased efficiency, in terms of speed and costs, as well as the quality of the arbitration process.

Traditionally, applications have dominated negotiation design, but lately, the importance of servers has increased, and a need for servers that are configurable is being felt.

While the Covid-19 pandemic has accelerated this reality in the context of litigation, reliance on ICT has long been a feature upon which arbitration has relied upon given the

international dimension of many disputes over which arbitral tribunals preside.

Artificial Intelligence Applications that assist arbitrators in performing their duties can be categorized into three, that is, those that, assist in the management of cases, for fact checking and analysis, and assisting in decision making by providing models of predictions.

Future of AI in ODR

In recent years, internet-based video technologies have vastly improved and have become more commonplace in business and commerce with applications such as Skype and zoom. In fact, a majority of the smart phones and tablets that are sold today are capable of video conferencing.

Accordingly, practitioners and mediators have started to more commonly rely on video-environments for online mediations, in order to alleviate some of the aforementioned concerns related to ODR such as skype and google or even WhatsApp videocalls sites which are end to end encrypted. While some practitioners may still have apprehensions about utilizing these technologies, it seems that an increasing number of parties and mediators are becoming open to the idea of ODR and Video-Based Mediation.

There is a proposition for a new model for configurable e-negotiation systems in which "e-negotiation media" is the electronic marketplace (e-marketplace) where human and software participants meet to negotiate using negotiation software agents through an automated negotiation system. In this model, automated negotiation systems provide a framework for the existence of software agents. Furthermore, the e-market place enforces negotiation protocols, and makes these protocols available for consultation (by humans), and for automation purposes (by automated negotiation systems). Separating the protocols from the e-negotiation medium is a first step towards a configurable e-marketplace. Separating negotiation strategies from protocols will also give flexibility to the design of automated negotiation systems, which will have

a direct effect on the design of automated negotiation systems.

The occurrence of technological failure and the applications in use could stall the arbitration process. It has also now become necessary that arbitrators and parties to arbitration be technology savvy failure to which there may be power imbalance where one party leverages the benefits of using AI applications having the other party at a disadvantage. That said, there also occurs power imbalance between parties to an arbitration especially where one party has the resources to access technological applications thereby increasing their chances of putting forward a good case as compared to their opponent which could raise questions pertaining to fairness.
Moreover, where predictive analytics are used to determine an arbitrator before whom a matter may be completed fast, junior arbitrators may be prejudiced since the applications are more likely to select only prolific arbitrators.

When it comes to the examination of witnesses, the fact that parties are in different physical locations can make the arbitrator miss out on body language which is very important in determining the credibility of testimonies. Further, virtual sessions can encourage couching and prompting of witnesses which may put into question the credibility of the whole arbitral process.
Furthermore, arbitral awards are often confidential and are sealed. This, therefore, makes data collection, recognition, and characterization for the purpose of machine learning difficult. There are also several instances where cases are resolved via voluntary settlements. Therefore, it is difficult to determine conclusively what prior results have been for purposes of applying them to future conflicts when it is impossible to know the number of cases settled voluntarily and on what terms the settlement was based.

For complex cases, generalized intelligence would be required to deal with a myriad of issues. AI applications merely have specialized capabilities making them fit for only simple straightforward cases. There is also a risk of biased data or algorithms producing skewed results. With technology, however, there is always a sense of optimism as developments in the future could very well cure the shortcomings of today.

Conclusion

From the discussions above it can be seen that technology has in many ways increased the effectiveness and efficiency of ADR. This has been made possible by the advancements which have been made in the field of both technology and artificial intelligence. The covid-19 era has reminded the world of the importance of technology especially the internet and the notion that it can be used for various functions which are mostly done remotely and still deliver on substantial results which might even be better than if such functions were done remotely. ADR is not an exception in this regard.

The role of Intelligence Gathering & Management in curbing tax malpractices

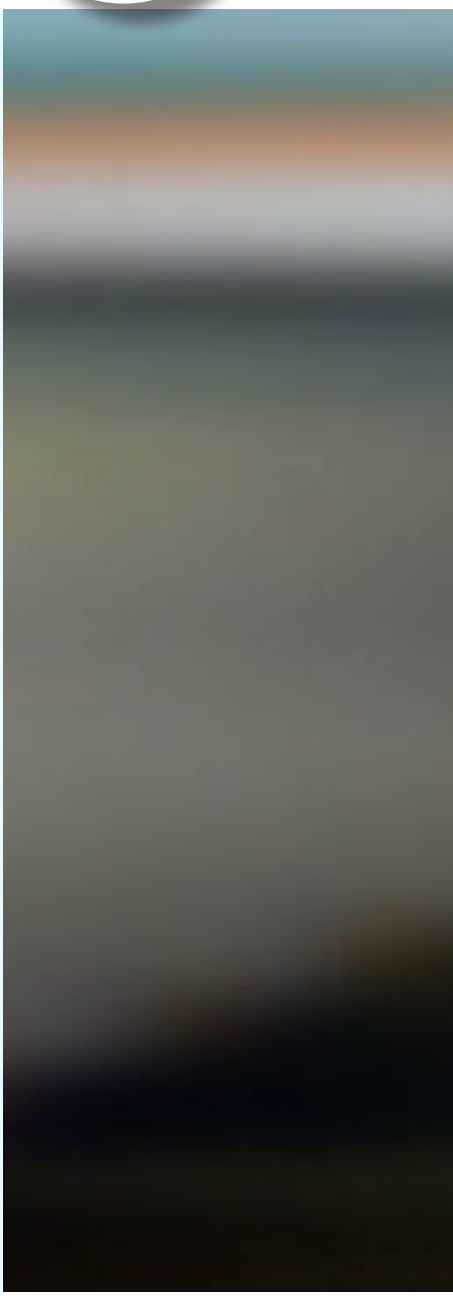
Cyrell Wagunda
Deputy Commissioner
Intelligence & Strategic Operations Department, KRA

Revenue mobilised and collected by tax agencies is the fulcrum of development and economic stability of different countries. Despite the crucial role that tax revenues play, malpractices such as tax evasion are a major impediment that stand in the way of effective revenue collection.

Myriad studies indicate that tax evasion and related malpractices account for a substantial revenue loss amounting to billions of dollars every year. Experts note that although big economies lose more revenue to tax malpractices than the developing economies, the latter are hit harder. As a result, developing countries are forced by the resultant revenue deficit in their budgets to turn to the developed world for foreign debts. According to the Global Alliance for Tax Justice (2020), higher income countries collectively lose over $382 billion annually to tax abuse whereas lower income countries lose $45 billion.

Integrity and ethics breach are the denominator factors that lead to tax malpractices that have continued to deprive governments of substantial amounts of revenue. Notably, the case has not been any different here in Kenya. Kenya's tax administration system has equally been susceptible to the risk of tax malpractices such as tax evasion. It is against this backdrop that Kenya Revenue Authority (KRA) has been on the frontline in implementing mechanisms and measures to combat these vices for enhanced revenue collection.

Apart from automation of both internal and external facing functions for enhanced efficiency in tax administration, KRA established an intelligence gathering and management



function to curb tax malpractices. This is managed under the Intelligence and Strategic Operations (I&SO) department. Research lists intelligence gathering and management as one of the most effective modern day tools for effective combating of tax malpractices.

Historically, commission of malpractices such as corruption and tax evasion have in most cases been a collusion between rogue tax agencies' staff and taxpayers. It is for this reason that KRA adopted a 'charity begins at home' approach in intelligence gathering and management in order to reign in on such vices. This has been actualised through lifestyle audits on staff, rigorous staff vetting for promotion purposes and thorough background checks before a staff member is recruited. Other in-house measures include ethics assessment

for approval of non-KRA sponsored business travels and staff investigations.
The establishment of the intelligence gathering and management function has to a significant extent enhanced KRA's capacity to profile, investigate and prosecute tax evaders.

As mentioned earlier, tax evasion is a major setback to revenue mobilisation and collection efforts, hence KRA's spirited combat against the vice. In the FY 2019/2020 financial year, for instance, KRA successfully foiled tax evasion schemes which could have seen the government lose approximately Ksh. 232.5 billion. Through intelligence gathering and analysis, KRA also managed to profile 1,309 taxpayers for tax purposes in the financial year that ended in June, 2020.

Audits were conducted and completed in 203 of the cases and assessments of Kshs. 70.85 billion raised. From the cases forwarded for investigation 50 we completed and assessments of Kshs. 29.12 billion raised. Of the cases forward to the Customs and Border Control Department 32 cases were completed and assessments raised of Kshs.12.94 billion.
In addition, through intelligence gathering and management, KRA has had an upper hand in tackling other vices such as illicit trade. Illicit trade equally accounts for a monumental share of government revenue that ends up in the insatiable pit of tax evasion.

Through intelligence management, KRA in conjunction with other government agencies, made 100 interceptions of assorted illicit products within the 2019/2020 financial year.

The intercepted products were valued at Ksh. 1.2 billion and largely comprised of electronics, alcoholic, cigarettes and assorted food products.
KRA cannot achieve the fight against tax evasion alone, since it gets sophisticated by the hour. This is a collective responsibility that calls

for a partnership between various stakeholders like taxpayers and the general public. It is for this reason that KRA has implemented a number of measures to build the capacity of the taxpayers and the general public in fighting corruption and tax evasion.

One such measure is the anonymous whistle-blower framework known as the iWhistle.

This framework enhances the capacity of the general public to anonymously provide information on corruption, tax evasion and any other malpractices without fear of reprisal, victimization or discrimination.

The anonymous voluntary reporting framework is incentivized through a reward programme which is KRA's gesture of appreciation to members of the public who come forward to report tax evasion cases.

Where such cases lead to recovery of tax revenues, KRA rewards the whistle-blower with five per cent of the recovered tax revenue or Ksh. 2 million, whichever is lower. Policy change is however underway to review the reward from the current maximum of Ksh. 2 million to Ksh. 5 million.

With such collaborative approaches and initiatives between KRA and different stakeholders in streamlining integrity and ethics, cases of tax evasion and related malpractices will slump. KRA shall continue expressing passion, dedication and vigour to combat fraud and corruption in the true spirit of public servanthood.

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