Arbitration: Weighing the Benefits and Limitations

Arbitration in Kenya

At a very basic level arbitration can be defined as a private dispute resolution mechanism. The disputants choose a "private" judge as it were, who proceeds to hear their respective positions and then makes a determination otherwise known as an award.

Arbitration, mediation, reconciliation and alternative dispute resolution mechanisms (ADR) received a major boost when the 2010 constitution was promulgated and elevated to a constitutional pedestal. Article 159 of the Constitution not only recognizes ADR but also mandates its promotion. In the 15 years of its existence, this edict has seen a proliferation of ADR which has been embraced by both the public and the courts.

Professor Stewart E. Sterk's remarks on America's adoption of ADR might equally apply in Kenya; -

"Arbitration is no longer an unwelcome stepchild in the courts. Judicial jealousy and mistrust of arbitration process have been replaced by an era in which arbitration is embraced as an effective and efficient mechanism for resolving disputes".[1]

Nonetheless, the boom in adoption of arbitration in Kenya has not been without its pitfalls. This article therefore outlines some of the advantages of arbitration, specifically, but weighs these against both inherent and emergent shortcomings.

The article concludes by providing some practical, pragmatic steps that may assist litigants, practitioners, and the public in avoiding the highlighted pitfalls which commonly occur in this arena of conflict resolution.

The Pros and the Cons of Arbitration

The classical advantages touted regarding arbitration include speed of conclusion, brevity of proceedings, cost effectiveness, privacy, and choice of arbitral tribunal. The court in the celebrated case of ***Goodison Sixty-One School Limited vs. Symbion Kenya Limited ML 2017 eLKR*** acknowledged these arbitral advantages thus, -

"This court is alive to the fact that arbitral proceedings are special avenues for dispute resolution that are voluntary in nature as the parties to the agreement opt to refer their dispute to an arbitrator for resolution mainly for purposes of speedy resolution…and in order to avert the procedural bottlenecks and delays…associated with the court proceedings".

Certainly, these advantages are justifiably trumpeted in contra-distinction to court proceedings which are typically lengthy, riddled with indecipherable legalese jargon, and held before imperious tribunals or persons that may exude an intimidating aura to the public. Of course, these stereotypical phenomena have reduced in recent times and most courts have progressively made conscious efforts to be more user-friendly.

Yet, the orthodox accolades reserved for arbitration have, however, come into sharp focus and pertinent questions are increasingly being asked as to whether arbitration really engenders speedy and cost-effective resolution of disputes. One of these questions relate to the aspect of privacy and judicial intervention in arbitration disputes. Traditionally, courts have made a valiant effort to steer away from re-litigating disputes delineated for arbitration and have repeatedly stated the principle that those who choose arbitration as an avenue for settling their disputes are bound by those choices and should not through craft seek to refer the disputes for court determination. As the *Goodison* case in fact affirmed: ***"…arbitration is firstly an inherently complete mechanism of dispute resolution alternative to the state court litigation system therefore, secondly, that intervention by courts in the arbitral process is extremely limited…***"

Still, the arbitral process and the award emanating thereof may be vitiated by a court process through limited grounds by invocation of **Section 35 of The Arbitration Act 1995**. This limited windows for judicial intervention means a matter may traverse from the arbitral tribunal to the High Court, onwards to the Court of Appeal, and ultimately, to the Supreme Court. Such circumstances would clearly erode the privacy of the dispute, rapidly eliminate any anticipated cost savings, and assume the nature of lengthy court proceedings, thus negating the very basis for choosing arbitration in the first place.

To its credit, the Supreme Court has emphasized that this window of judicial intervention is very limited, and the courts are called to balance between the interests of ***"finality in arbitration proceedings and the need to promote the right of access to justice"***.[1]

Even so, a more worrying aspect that threatens to destroy the arbitral edifice is the question of integrity of the stakeholders in arbitral proceedings, more so regarding the arbitrator. That integrity must be jealously guarded for the sake of the sustenance of the whole arbitral infrastructure cannot be overemphasized.

A recent article in the *Daily Nation* written by the renowned journalist Jaindi Kisero highlights the subject matter well. The article lays out an arbitration dispute gone wrong between Kenya Breweries Limited and a building contractor. What began as a private dispute resolution was now in the public domain. What began as a dispute of KES 163,000,000 had ballooned to an inflated KES 2.5 billion. What was expected to be easily resolved was now in its fourth year of litigation. More significantly, questions of the arbitrator's integrity had come to the fore and the Directorate of Criminal Investigations (DCI) had apparently been roped in and court orders granted allowing the DCI to inspect the bank accounts and call logs of the players.

This case demonstrates how easily the trust question can wipe out all the benefits that are expected to accrue from arbitration. What then can one do to avoid or at the very least mitigate against such risks?

[1] ***Nyutu Agrovet Limited Vs Airtel Networks Limited*** **2015 eLKR**

Some Practicable Solutions

For one, most of the problems that occur during arbitration can be avoided long before the dispute arises by ensuring foundational documents are diligently crafted. This calls for both a commonsense approach and in-depth learning & expertise by legal practitioners. For example, a practitioner or party to a transaction should ask themselves whether arbitration is the most efficacious and cost-effective forum for dispute resolution when crafting the contract or treaty documents. Woe unto those who copy-paste, as this has wrought havoc by complicating otherwise easy processes. Small financial transactions or minor undertakings should, as a rule of thumb, not contain an arbitration clause as other mechanisms, such as the Small Claims Court, are more suitable. Often overlooked is the fact that arbitrators are generally unwilling to take up matters of low economic value.

Having chosen arbitration as the forum, the next logical and practical step should be to determine the number of arbitrators. The writer has encountered copy-pasted contractual provisions that stipulate three arbitrators be appointed, even where such an arrangement could not possibly be feasible for fairly modest commercial transactions. The net effect of escalated costs, complicated hearings due to conflicting diary management of numerous persons involved, quickly dissolves whatever benefits that were to ideally accrue to the claimant.

Relatedly, choice of the "seat of arbitration" and the "governing law" is particularly pertinent to international arbitration which traverses nations. It is prudent when constructing the commercial document to consider the reputation of the jurisdiction, which arbitral rules will apply, the institution that will oversee the arbitration, ease of access, appropriateness of the venue for hearing, among others. Certainly, the choice of the applicable law should make sense to the parties, e.g. common law jurisdictions for common law practitioners make more sense than continental law. The issue of trust deficit on the part of the arbitral tribunal can be addressed by limiting the choice of arbitrator/arbitrators to professionally ran bodies that have vetted such practitioners. These include the Chartered Institute of Arbitrators Kenya Chapter or the Nairobi Centre for International Arbitration.

Lastly the arbitration clause can limit the choice of arbitrator to ***"profession"*** to ensure useful insight is brought to play during arbitration. A good example is in construction. A diligent engineer and/or architect will be familiar with FIDIC (International Federation of Consulting Engineers) – an internationally accepted standardization of construction contracts and their interpretation. Another useful tool gleaned from the author's interaction with American practice is the multi-firm approach where different law firms employ their synergies and capacities in handling an arbitration. This allows the different firms to harness their respective strengths in confronting the dispute.

Ultimately, arbitration can if properly managed be a useful tool in dispute resolution.

31st January 2025

Richard Mutiso, *Managing Partner* at **RMM Advocates LLP**. Richard has been lead counsel on multiple multi-million dollar arbitrations and specializes in commercial and road construction disputes. He has over 40 years of experience and is an alumnus of the international arbitration program at the American University in Washington.

RMM
ADVOCATES LLP

Committed to Excellence