Arbitrator Appointments In Non-Consensual Arbitrations

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Table of Contents

Abstract

In Kenya, judicial authority resides in its sovereign people, and is delegated to the Judiciary and independent tribunals, who shall exercise the said judicial authority only in accordance

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with the Constitution of Kenya, 2010. Independent tribunals are established by or under the Constitution, but not by Acts of Parliament. They include recognised local community initiatives for the resolution of land disputes, traditional dispute resolution mechanisms for the resolution of land and other disputes and arbitral tribunals. Resolution of intergovernmental disputes is provided for in the Intergovernmental Relations (Alternative Dispute Resolution) Regulations, 2021, covering both consensual and non-consensual dispute resolution among government entities, including providing for both consensual and non-consensual appointment of mediators, traditional dispute resolution bodies and arbitrators. Section 12(2)(c) of the Arbitration Act, 1995 does not solve the challenge of appointing a sole arbitrator in circumstances where the parties have failed to agree on the appointment procedure and have also failed to agree on the arbitrator appointment, a challenge that is solved by Article 11(2) and (3) of the UNCITRAL Model Law.

Non-consensual dispute resolution proceedings instituted before non-court independent and impartial tribunals under Article 50(1) of the Constitution of Kenya, 2010, including arbitral tribunals, are currently devoid of legislated procedural rules governing their conduct. Notwithstanding the absence of these procedural rules,such disputes must still be resolved, to give effect to the right under Article 50(1), provided the rules of natural justice are followed. This entails, where necessary, the non-consensual appointment of the said independent and impartial tribunals, including arbitral tribunals. Tribunals so appointed under Article 50(1) are clothed with judicial authority under Article 1(3)(c), and must exercise the said judicial authority only in accordance with this Constitution.

The Supreme Law Of Kenya

1. The supreme law of Kenya is the Constitution of Kenya, 2010 as provided for in its Article 2(1), which further provides that the same binds all persons and all State organs at both levels of government. In its preamble, the people of Kenya noted that they had exercised their sovereign and inalienable right to determine the form of governance of their country, and having participated fully in the making of this Constitution, adopted, enacted and gave this Constitution to themselves and to their future generations.

Source Of Judicial Authority In Kenya

2. Article 1(1) of the Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution. Article 1(3)(c) provides that sovereign power under this Constitution is delegated to specified State organs, which shall perform their functions in accordance with this Constitution, and include the Judiciary **AND** independent tribunals. Article 159(1) provides that judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established **BY OR UNDER** this Constitution.

Courts Versus Independent Tribunals

3. Article 161(1) of the Constitution provides that the Judiciary consists of the judges of the superior courts, magistrates, other judicial officers and staff. Article 162(1) provides that the superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2), which are courts with the status of the High Court to hear and determine disputes relating to – (a) employment and labour relations; and (b) the environment and the use and occupation of, and title to, land. Article 162(4) provides that subordinate courts are courts established under Article 169, or by Parliament in accordance with that Article. Article 169(1) provides that subordinate courts are – (a) the Magistrates courts; (b) the Kadhis' courts; (c) the Courts Martial; and (d) any other court or **local tribunal** as may be established by an Act of Parliament, other than courts established as required by Article 162(2). It is therefore the implication that "local tribunals", being established by Acts of Parliament, and classified as subordinate courts, are distinguished from "independent tribunals" as provided for in Article 1(3), as independent tribunals are categorised separately from the Judiciary, while local tribunals are part of the Judiciary.
4. It is noted that a local tribunal established by an Act of Parliament is a subordinate court. What about a tribunal established not by an Act of Parliament, but "under this Constitution", as provided for in Article 159(1) of the Constitution? Such a tribunal is not a subordinate court and falls under the category of "independent tribunal" as provided for in Article 1(3)(c).

Special Purpose Tribunals

5. The Constitution provides for a number of special purpose tribunals, including at Articles 144 – for inquiring into and reporting on the President's physical or mental capacity to perform the functions of office, 158 – for inquiring into and reporting on a petition for the removal from office of the Director of Public Prosecutions, 168 – for inquiring into and reporting on a motion for the removal from office of a judge of a superior court, and 251 – for inquiring into and reporting on a petition for the removal from office of a member of a commission or the holder of an independent office under Chapter Fifteen of the Constitution.

Other Independent And Impartial Tribunals Or Bodies

6. Article 159 of the Constitution provides that the exercise of judicial authority involves the resolution of disputes, by both the courts and tribunals. Article 50(1) provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

Recognised Local Community Initiatives

7. Article 60(1)(g) of the Constitution provides that land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with principles that include **encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution**. As the resolution of land disputes through "recognised" local community initiatives is distinct from a local tribunal established by an Act of Parliament, such recognised local community initiatives consistent with this Constitution fall under the category of independent tribunals, and must be independent and impartial tribunals to be compliant with Article 50(1). Article 60(1)(g) does not itself elaborate more on the manner such local community initiatives are "recognised" – such as by which persons in the local community, or the basis of recognition by the local community.

Traditional Dispute Resolution Mechanisms (TDRMs)

8. Article 67(2)(f) of the Constitution provides that the functions of the National Land Commission include to encourage the application of traditional dispute resolution mechanisms (TDRM) in land conflicts. TDRMs predate the Republic of Kenya and its State organs, and are not established by this Constitution or by an Act of Parliament. But that they are mentioned and encouraged in this Constitution shows that they are recognised in it as an acceptable dispute resolution mechanism, provided they are used in a manner compliant with this Constitution, as provided for in Article 159(3).

Independent Electoral And Boundaries Commission (IEBC)

9. Article 88(4)(e) of the Constitution provides that the Independent Electoral and Boundaries Commission (IEBC) is responsible for conducting and supervising referenda and elections to any elections body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results. In its resolution of electoral disputes, the IEBC acts as an independent and impartial body, as provided for in Article 50(1).

Arbitration

10. Article 159(2)(c) of the Constitution provides that in exercising judicial authority, the courts and tribunals shall be guided by principles including the mandatory promotion, subject to clause (3), of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. Article 159(3) provides that TDRMs shall not be used in a way that – (a) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with this Constitution or any written law. In other words, alternative dispute resolution mechanisms, including arbitration and TDRMs, must be consistent with this Constitution, including compliance with the Article 50(1) attributes of resolving disputes by the application of law in a fair and public hearing by an independent

and impartial tribunal.

Intergovernmental Disputes

11. Article 189(3) of the Constitution provides that in any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation. Article 189(4) provides that national legislation shall provide procedures for settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration. The concerned national legislation is the Intergovernmental Relations Act, 2012, together with its subsidiary legislation the Intergovernmental Relations (Alternative Dispute Resolution) Regulations, 2021 (IRADR Regulations) issued under Legal Notice No. 4 of 2022).

Appointing Authorities For Independent Tribunals

12. With respect to the special purpose tribunals provided for in the Constitution, Article 144(3) of the Constitution provides that the tribunal's appointing authority is the Chief Justice. Under Articles 158(4), 168(5) and 251(4) the appointing authority for the said tribunals is the President. What about the other independent and impartial tribunals already considered above? Who are the appointing authorities for the independent and impartial tribunals or bodies for the recognised local community initiatives for the resolution of land disputes under Article 60(1)(g), or for TDRMs under Articles 67(2)(f) and 159(2)(c) and (3), or for arbitrations under Articles 159(2)(c) and 189(3) and (4)?

Appointing Authorities For Intergovernmental Disputes

13. With respect to intergovernmental disputes, the IRADR Regulations provide processes for the resolution of such disputes. Regulation 2 includes the following definitions:

> ***"recognised institution"*** *means a registered institution that trains, accredits or validates alternative dispute resolution practitioners upon attaining the requisite standards;*
>
> ***"traditional body"*** *means an institution recognised by the parties or registered within*

the Republic of Kenya as an authority with respect to traditional knowledge and cultural practices relating to any ethnic community;

"traditional dispute resolution mechanism" *means an intergovernmental dispute resolution process carried out by a traditional body.*

14. Regulation 5 of the IRADR Regulations, concerned with application of these regulations, reads:

(1) These Regulations shall apply to the resolution of disputes arising – (a) between the national government and a county government; (b) amongst county governments; or (c) out of an agreement between the national government and a county government or amongst county governments ***where – (i) no dispute resolution mechanism is provided in the agreement****; or (ii) the agreement provides for a dispute resolution mechanism that does not accord with the provisions of section 32(2) of the Act.*

(2) These Regulations shall apply to State organs and public offices in both levels of government, particularly – (a) ministries, departments and agencies within the national government; and (b) county governments, county departments and agencies within a county government.

15. What regulation 5(1)(c)(i) of the IRADR Regulations provides is that a dispute resolution mechanism does not need to have been provided for among those to whom these regulations apply. These regulations apply to these governments, their ministries, their departments and agencies even in circumstances where a dispute resolution mechanism agreement does not exist between or among those in dispute.

16. With respect to the tribunal appointment process, regulation 12, dealing with arbitration, is illustrative of regulations 10 and 11, respectively dealing with mediation and TDR. Extracts from regulation 12 read:

(1) Where the parties agree to refer the dispute to arbitration, ***the parties shall within seven days of the initial meeting, identify and agree on an accredited arbitrator to be appointed by the Summit*** *through the Technical Committee, the Council or the intergovernmental structure to which the declaration was made.*

(2) ***Where the parties fail to agree on an arbitrator, the Summit*** *through the Technical Committee, the Council or the intergovernmental structure to which the declaration was made* ***shall, within seven days of the initial meeting and in writing, request a recognised institution to appoint an arbitrator****.*

...

(6) ***The Arbitration Act, 1995 and the arbitration rules of the institution selected by the parties shall apply to the arbitration process provided under this regulation***.

17. It is noted from regulation 12 of the IRADR Regulations that the Summit – the National and County Government Co-ordinating Summit, comprised of the President and the governors of the forty-seven counties, pursuant to section 7 of the Intergovernmental Relations Act – is the appointing authority for an arbitral tribunal where there is agreement between the disputing parties as to the arbitral tribunal. And where there is no agreement as to the arbitral tribunal, the Summit requests a recognised institution to appoint the arbitral tribunal. The IRADR Regulations therefore provide for the appointment of an arbitrator in circumstances where there is no agreement between the disputing parties as to the arbitrator for the resolution of their dispute. In this the IRADR Regulations provide that the Summit procures the services of a recognised institution for purposes of appointing an arbitrator, even though the disputing parties themselves have not granted jurisdiction to the Summit selected recognised institution to appoint the arbitrator for their dispute. **This regulation has therefore stepped in to avoid a paralysis in the dispute resolution process by arbitration, for the provisions of the Arbitration Act, 1995 do not provide a ready solution in the circumstances where a sole arbitrator needs to be appointed but the disputing parties have failed to agree on one, and their arbitration agreement does not provide for the manner of appointing a sole arbitrator in the event of their failing to agree on one**.

Deficiency In Sole Arbitrator Appointment Provisions In The Arbitration Act

18. Section 12(2) of the Arbitration Act reads:

The parties are free to agree on a procedure of appointing the arbitrator or arbitrators and any chairman and ***failing such agreement*** *– (a) in an arbitration with three arbitrators, each party shall appoint one arbitrator and the two arbitrators so appointed shall appoint the arbitrator; (b) in an arbitration with two arbitrators, each party shall appoint one arbitrator; and (c)* ***in an arbitration with one arbitrator, the parties shall agree on the arbitrator to be appointed***.

19. Section 12(2)(c) of the Arbitration Act is an unenforceable provision, on account of

its inconsistency. Subsection (2)(c) should be providing the solution in the circumstances of the parties failing to agree on a procedure of appointing the arbitrator, but it simply asserts that the parties shall agree on an arbitrator. What if, after negotiations, they still fail to agree on an arbitrator? Subsection (2)(c) does not provide a solution for the appointment of the arbitrator where the parties have failed to agree on the procedure for appointing the arbitrator, and have again failed to agree on the arbitrator!

UNCITRAL Model Law Provides Remedy

20. The UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law), from which the Kenyan Arbitration Act, 1995 is largely derived, is better drafted in its equivalent provisions. Its Article 11(2) and (3) reads:

> *(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.*
>
> *(3) Failing such agreement,*
>
> *(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;*
>
> *(b)* ***in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6****.*

Who Appoints Tribunals Under Article 50(1)?

21. What about the appointment of non-court independent and impartial tribunals for the resolution of disputes by the application of law as provided for in Article 50(1) of the Constitution? Disputes involving persons, rather than those exclusive to governments, their departments and their agencies? The resolution of disputes in a chosen forum as of constitutionally recognised right, rather than by the agreement of the disputants?

22. The Constitution appears, at face value, to be silent on the appointment procedure(s) to be adopted in such scenarios. Article 50(1) of the Constitution provides that every person has the **right** to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. Where a person exercises this dispute resolution right and selects a court as the chosen forum for the resolution of the dispute, this Constitution has provided clear provisions for the appointment of judges, magistrates and other judicial officers to hear and determine the disputes brought before the courts. But the same is lacking in this Constitution with respect to the appointments of members of independent and impartial tribunals established under this Constitution but outside the special purpose tribunals provided for in Articles 144, 158, 168 and 251.

23. Nevertheless, pursuant to Article 50(1), every person selecting a non-court independent and impartial tribunal or body as the forum of dispute resolution has as much a right to having that dispute resolved in that forum, just as if the dispute was placed for resolution before a court. Consequently, in these circumstances, how are non-court independent and impartial tribunals or bodies to be appointed in a manner that is lawful and also facilitates the fulfilment of a person's Article 50(1) right to having their dispute resolved by the application of law? And also taking note of Article 2(2) that provides that no person may claim or exercise State authority except as authorised under this Constitution?

No Procedural Rules For Appointing Article 50(1) Tribunals

24. Article 259(1) of the Constitution provides that this Constitution shall be interpreted in a manner that – (a) promotes its purposes, values and principles; (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance. Consequently, with respect to the Article 50(1) right to having one's dispute capable of resolution by the application of law decided in a fair and public hearing before a non-court independent and impartial tribunal or body, interpretation of this provision must be in a manner that promotes the resolution of one's dispute before such an independent and impartial tribunal or body, rather than resulting in the failure to resolve the said dispute on account of the absence of procedural rules with respect to the resolution of such disputes in such tribunals or bodies.

Also, as Article 50(1) is a right within the Bill of Right, its interpretation, to be given effect, must be in such a manner as to bring about its realisation – the absence of procedural rules for the same notwithstanding.

Absence Of Procedural Rules No Bar To Enforcement Of Article 50(1) Right

25. Article 22(4) of the Constitution provides that **the absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court**. Article 22(3) provides that the Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that – (a) the rights of standing provided for in clause (2) are fully facilitated; (b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation; (c) no fee may be charged for commencing the proceedings; (d) **the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities**; and (e) an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court. In other words, it is a principle of this Constitution that substance takes precedence over procedure. Consequently, with respect to the Article 50(1) right to have one's dispute resolved by the application of law before a fair and public non-court independent and impartial tribunal or body, the absence of procedural rules should not hamper the resolution of such dispute in such a tribunal or body, provided the rules of natural justice are observed.

Rules Of Natural Justice

26. The rules of natural justice are fundamental principles that ensure fairness and procedural propriety in legal and administrative proceedings. They are rooted in the common law tradition and have been incorporated into various legal systems around the world. These principles are designed to prevent arbitrary decisions and to ensure that individuals receive a fair hearing. The rules of natural justice primarily encompass two main principles: **audi alteram partem** (the right to be heard) and **nemo judex in causa sua** (the

rule against bias).

Right To Be Heard

27. The right to be heard principle ensures that all parties involved in a dispute are given an opportunity to present their case before a decision is made. It encompasses several key elements:

27.1. **Notice of hearing**. Parties must be given adequate notice of any proceedings that may affect their rights, obligations, or interests. The notice must include sufficient detail about the nature of the case, the issues involved, and the time and place of the hearing.

27.2. **Opportunity to present evidence and argument**. Parties must be allowed to present their evidence, arguments, and witnesses in support of their case. They must also have the opportunity to challenge and cross-examine the evidence and witnesses presented by the opposing side.

27.3. **Disclosure of evidence**. All relevant information and evidence that will be considered by the decision-maker must be disclosed to the parties involved. This ensures that parties can adequately prepare their case and respond to the evidence against them.

Rule Against Bias

28. The rule against bias principle ensures that the decision-maker in a case is impartial and has no interest or bias in the outcome. It involves several key aspects:

28.1. **Actual bias**. Decision-makers must not have any actual bias or vested interest in the outcome of the case. Any decision influenced by personal interest, favouritism, or prejudice would violate this rule.

28.2. **Apparent bias**. Even if there is no actual bias, a decision-maker must avoid situations where there might be a perception or appearance of bias. The standard here is whether a reasonable person, aware of all the circumstances, would suspect that bias might influence the decision.

28.3. **Conflict of interest**. Decision-makers should not have any conflicting interests that could affect their impartiality. This includes financial interests, personal relationships, or prior involvement in the case.

Additional Aspects Of Natural Justice

29. While the two primary principles form the core of natural justice, there are additional aspects that complement these rules:

29.1. **Reasoned decision**. Decision-makers should provide reasons for their decisions. A reasoned decision helps ensure transparency and allows parties to understand the basis for the decision, which is essential for any potential appeal or review.

29.2. **Right to legal representation**. Parties should be allowed to have legal representation if they so choose, especially in complex or serious matters. This ensures that parties can adequately present their case and understand the proceedings.

29.3. **Decision based on evidence**. Decisions should be based solely on the evidence presented during the hearing. This prevents extraneous factors or information from influencing the outcome.

Articles 47 And 50 Incorporate Natural Justice

30. Aspects of these rules of natural justice have been incorporated in Articles 47 and 50 of the Constitution, respectively dealing with **fair** administrative action and **fair** hearing. Article 47(1) provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and **procedurally fair**. Article 47(2) provides that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, **the person has the right to be given written reasons for the action**.

31. Article 50(1) of the Constitution has already been covered extensively in this paper. Article 50(2) provides, in part, that an accused person has the right to a fair trial, which includes the right – (b) to be informed of the charge, with sufficient detail to answer it; (c) to have adequate time and facilities to prepare a defence; (e) to have the trial begin and conclude without unreasonable delay; (f) to be present when tried, unless the conduct of the accused person makes it impossible for the trial to proceed; (g) to choose, and be represented by, an advocate, and to be informed of this right promptly; (i) to remain silent, and not to testify during the proceedings; (j) to be informed in advance of the evidence the

prosecution intends to rely on, and to have reasonable access to that evidence; (k) to adduce and challenge evidence; (l) to refuse to give self-incriminating evidence; (o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted. Article 50(3) provides that if this Article requires information to be given to a person, the information shall be given in a language that the person understands. Article 50(4) provides that evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

Limitations Applicable To The Article 50(1) Right

32. With respect to the Article 50(1) of the Constitution dispute resolution right not being limited by the absence of procedural rules, Article 19(3)(c) provides that the rights and fundamental freedoms in the Bill of Rights – (c) **are subject only to the limitations contemplated in this Constitution**. Article 24(1) provides that a right or fundamental freedom in the Bill of Rights **shall not be limited except by law**, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right or fundamental freedom; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

33. With respect to Article 50(1) of the Constitution, a limitation affecting it is contained in its own phrase – **"if appropriate"** – with respect to the hearing of disputes before a non-court independent and impartial tribunal or body. Another limitation contemplated in this Constitution is found at Article 50(2)(d), providing that every accused person has the right to a fair trial, which includes the right to a public trial before a court established under this Constitution. An accused person should therefore not be tried before a non-court independent and impartial tribunal or body. Another limitation contemplated in this Constitution is found at Article 163(3)(a), providing that the Supreme Court shall have

exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under Article 140. A non-court independent and impartial tribunal or body therefore does not have the jurisdiction to hear and determine disputes relating to the elections to the office of President arising under Article 140. Outside these limitations contemplated by this Constitution, as provided for in Article 19(3)(c), a non-court independent and impartial tribunal or body possesses jurisdiction to hear and determine **ANY dispute that can be resolved by the application of law**! And a person who selects to have his or her dispute resolved by the application of law in a fair and public hearing before such an independent and impartial tribunal or body must have this right fully facilitated and realised, even in the absence of procedural rules or laws covering the same.

34. For the absence of procedural laws covering the same is not a limitation contemplated in this Constitution limiting the Article 50(1) of the Constitution right to hearing before a court or other independent and impartial tribunal or body – even as expressly provided for in Article 22(4) with respect to the same right to hearing before a court. And since this right applies to both courts and non-court independent and impartial tribunals or bodies, **it is my holding that hearings of disputes that can be resolved by the application of law should be held before non-court independent and impartial tribunals or bodies, even in the absence of procedural laws covering the holding of such hearings in such dispute resolution forums, provided the rules of natural justice are followed**.

35. It should be noted that two key attributes of a person's right to have the resolution of his or her dispute that can be resolved by the application of law decided in a fair and public hearing before a non-court independent and impartial tribunal or body, are independence and impartiality. Meaning that the tribunal to hear the dispute must be independent and impartial in relation to the parties before it. Consequently, provided that the non-court tribunal or body hearing and determining the dispute is independent and impartial, this Article 50(1) of the Constitution right is indeed satisfied.

Court Lessons For Other Tribunal Appointments

36. With respect to the manner of appointing a non-court independent and impartial tribunal or body without contravening this Constitution, regard should be had to the fact that

a court is also an independent and impartial tribunal. Guidance can and should therefore be drawn from the manner that judges, magistrates and other judicial officers are appointed – as provided for in this Constitution.

37. Article 168 of the Constitution provides for the appointment of judges of superior courts. Key attributes include – (a) appointment by the President on the recommendation of the Judicial Service Commission; and (b) appointment from among persons who are adequately legally trained, possess adequate legal experience, and have a high moral character, integrity and impartiality. Article 172(1) provides that the Judicial Service Commission shall promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice and shall – (a) recommend to the President persons for appointment as judges; and (c) appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament.

38. Drawing from these provisions, it is my opinion that an entity involved in the appointment of members of an independent and impartial tribunal or body pursuant to Article 50(1) of the Constitution should possess these attributes that is required of the Judicial Service Commission – promoting and facilitating the independence and accountability of those appointed to independent and impartial tribunals or bodies. Those appointed should be from among persons who are adequately legally trained, possess adequate legal experience, and have a high moral character, integrity and impartiality.

Power Of Appointing Article 50(1) Tribunal Resides In Article 50(1) Right Holder

39. Article 50(1) of the Constitution acknowledges the right of every person to institute dispute resolution proceedings before a court or, if appropriate, another independent and impartial tribunal or body. This right is exercised unilaterally – without the agreement or consent of any other person with whom one is in dispute. When instituting dispute resolution proceedings before a court, once the matter has been filed, it is then for the court to allocate a judge or magistrate or other judicial officer to hear and determine the dispute. Likewise, when instituting dispute resolution proceedings before another independent and

impartial tribunal, one may directly approach that independent and impartial tribunal and place one's dispute with such for resolution, or approach an appointing authority or entity who undertakes, on one's behalf, to appoint an independent and impartial tribunal to resolve one's dispute. The primary mover – the person with the right to select the dispute resolution forum of choice, is the one with the power to make these decisions. Either forum choice decision made in the exercise of this right of selection holds legally.

40. Should the appointed tribunal not be independent or impartial, then the Article 50(1) of the Constitution right to institute dispute resolution proceedings before an independent and impartial tribunal or body would not have been exercised, and the appointed tribunal that is either not independent or not impartial would not have any dispute resolution jurisdiction under Article 50(1). Therefore, to ensure that the exercise of one's choice of dispute resolution forum holds, especially when that choice is not a court but is another independent and impartial tribunal or body, one must ensure that the chosen tribunal or body is indeed independent and impartial with respect to one and the other persons with whom one is in dispute. While there appears to be no legal bar to one directly appointing a truly independent and impartial tribunal or body to resolve one's dispute, procuring the services of an appointing entity to undertake the said task on one's behalf might be more acceptable to the other person or persons with whom one is in dispute.

Application To Arbitration

41. Section 3(1) of the Arbitration Act, 1995 provides that "arbitration" means any arbitration whether or not administered by a permanent arbitral institution. Acceptable international arbitration practice, as provided for in the UNCITRAL Arbitration Rules Article 6(1), applicable to arbitrations based on an arbitration agreement, rather than to arbitrations based on statute or Article 50(1) of the Constitution, provides that unless the parties have already agreed on the choice of an appointing authority, a party may at any time propose the name or names of one or more institutions or persons, including the Secretary-General of the Permanent Court of Arbitration at The Hague (hereinafter called the "PCA"), one of whom would serve as appointing authority. A permanent arbitral institution can therefore serve as an appointing authority for purposes of appointing an independent and impartial arbitral tribunal – and this is acceptable international practice and hence deemed

fair and reasonable, not just for consensual arbitrations, but even for non-consensual arbitrations, such as those empowered by Article 50(1) of the Constitution.

42. Consequently, with respect to compliance with Article 2(2) of the Constitution, that provides that no person may claim or exercise State authority except as authorised under this Constitution, an independent and impartial tribunal duly appointed by a person in possession of the Article 50(1) right to have his or her dispute that is capable of resolution by the application of law decided in a fair and public hearing by that independent and impartial tribunal, is authorised under this Constitution to so hear the said dispute. Such an independent and impartial tribunal is an Article 1(3)(c) independent tribunal, and so is a State organ to which judicial authority has been delegated by the sovereign people of Kenya! It matters not that the said appointment is effected by one or more parties to the dispute, provided that the party or parties so making the appointment, either directly or via a delegated appointing authority, are in possession of the Article 50(1) right.

Summary Of Findings And Holdings

43. In summary, the following are key findings and holdings:

43.1. In Kenya, judicial authority resides in its sovereign people. They have delegated the same to the Judiciary and independent tribunals, to be exercised only in accordance with the Constitution of Kenya, 2010.

43.2. Tribunals established by Acts of Parliament are categorised as subordinate courts, and so are part of the Judiciary. Independent tribunals are established by or under this Constitution, but not by Acts of Parliament.

43.3. Special purpose tribunals are established by the Constitution at Articles 144, 158, 168 and 251.

43.4. The Constitution recognises other independent and impartial tribunals or bodies, including recognised local community initiatives for the resolution of land disputes, TDRMs for the resolution of land and other disputes, the IEBC for the resolution of electoral disputes and arbitral tribunals.

43.5. The Intergovernmental Relations (Alternative Dispute Resolution) Regulations, 2021 (IRADR Regulations) provide for the resolution of intergovernmental disputes, both in circumstances where governments, their ministries, their departments and

agencies have or don't have existing dispute resolution mechanisms affecting those in dispute – that is, providing for both consensual and non-consensual dispute resolution.

43.6. Articles 144, 158, 168 and 251 provide for the appointing authorities for the special purpose tribunals established therein.

43.7. The IRADR Regulations provide for the appointments of independent and impartial tribunals or bodies in both consensual and non-consensual dispute resolution.

43.8. Section 12(2)(c) of the Arbitration Act, 1995 is an unenforceable provision, in that it does not provide a solution for the appointment of a sole arbitrator when the parties fail to agree on the procedure for the appointment of the same, and also fail to agree on the appointment of the same.

43.9. UNCITRAL Model Law Article 11 (2) and (3) provides the remedy that section 12(2)(c) of the Arbitration Act, 1995 fails to provide.

43.10. The Constitution of Kenya, 2010 is silent on the procedural rules for the appointment of non-court independent and impartial tribunals under Article 50(1).

43.11. The absence of procedural rules is not a bar to the enforcement of a person's Article 50(1) of the Constitution right to the resolution of his or her dispute by the application of law before a fair and public non-court independent and impartial tribunal or body, provided the rules of natural justice are followed.

43.12. The rules of natural justice primarily encompass two main principles: the right to be heard and the rule against bias. They also encompass: reasoned decision, right to legal representation and decision based on evidence.

43.13. Persons appointed to independent and impartial tribunals under Article 50(1) of the Constitution should be from among persons who are adequately legally trained, possess adequate legal experience, and have a high moral character, integrity and impartiality.

43.14. The legal power of appointing a non-court independent and impartial tribunal under Article 50(1) of the Constitution lies in the holder or holders of the Article 50(1) right, which power can be exercised directly or by delegation.

43.15. A non-court independent and impartial tribunal under Article 50(1) of the Constitution, including an arbitral tribunal, duly appointed by a person in possession of the Article 50(1) right, possesses judicial authority delegated by the sovereign people of Kenya, and must exercise the said judicial authority only in accordance with this

Constitution.

Conclusion

44. Every person, under Article 50(1) of the Constitution of Kenya, 2010, possesses the right to institute dispute resolution proceedings before an independent and impartial tribunal without the consent of any other party that he or she is in dispute with. This right is not limited to only the institution of the said proceedings, but extends to the non-consensual appointment of the non-court independent and impartial tribunal, either directly, or by delegating its tribunal appointment power to another person or appointing authority – this tribunal appointment right necessary in facilitating the resolution of the said dispute as provided for in Article 50(1). Non-court independent and impartial tribunals appointed solely by persons in possession of the Article 50(1) right are duly authorised under the Constitution to exercise judicial authority over the disputes before them, a judicial authority delegated to them by the sovereign people of Kenya, and must exercise the said judicial authority only in accordance with this Constitution.