

Effect Of Article 50(1) On Party Autonomy In Arbitration

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Abstract

Prior to the Constitution of Kenya, 2010 becoming effective on 27th August, 2010, almost all arbitration practice in Kenya was governed by the Arbitration Act, 1995. Notwithstanding this widespread practice, the Arbitration Act itself did not claim that it had universal application to all arbitrations, for it allowed for arbitrations empowered outside its provisions. This Constitution being the supreme law of Kenya requires that all existing law at the time it became effective be construed to conform to itself. Article 50(1) of this Constitution acknowledges the inherent right of all persons to dispute resolution either

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before a court or another independent and impartial tribunal or body, including an arbitral tribunal. Arbitrations in Kenya are therefore empowered not just by arbitration agreements, as provided for in the Arbitration Act, but also by the inherent right of a person, and even by other national legislation as contemplated in Article 189. Arbitrations empowered by the Article 50(1) right greatly limit and even extinguish the party autonomy principle in the institution of arbitration proceedings, in the appointment of the arbitral tribunal and in the choice of the juridical seat of arbitration, with the person exercising the Article 50(1) dispute resolution right unilaterally and validly making all these decisions, with the juridical seat being Kenya, by virtue of the empowering provision being the said Article 50(1).

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Arbitration Before Enactment Of Constitution Of Kenya, 2010

1. Prior to the enactment and coming into effect of the Constitution of Kenya, 2010 the primary law governing the practice of arbitration in Kenya was the Arbitration Act, 1995 – based on the UNCITRAL² Model Law on International Commercial Arbitration, 1985. Article 2(1) of this Constitution provides that it is the supreme law of the Republic and binds all persons and all State organs at both levels of government. Article 2(4) provides that any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid. Article 262 provides that the transitional and consequential provisions set out in the Sixth Schedule shall take effect on the effective date – 27th August, 2010. Article 264 20 provides that subject to the Sixth Schedule, for the avoidance of doubt, the Constitution in force immediately before the effective date shall stand repealed on the effective date. Section 7(1) of the Sixth Schedule provides that all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

Construing The Arbitration Act To Conform To The Constitution

2. Consequently, with respect to the Arbitration Act, 1995, any provision of it that is inconsistent with this Constitution is void to the extent of the inconsistency, and its

2 UNCITRAL stands for the United Nations Commission on International Trade Law.

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provisions shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution. In other words, this Constitution is superior in law to the Arbitration Act, 1995, and it is the Arbitration Act that must be construed to conform to the superior law – this Constitution.

Constitution Expressly Provides For Arbitration

- 3. This Constitution expressly provides for arbitration at Articles 159(2)(c) and 189(3) and (4). Article 159(2)(c) provides that in exercising judicial authority, the courts and tribunals shall be guided by principles including alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3). Article 159(3) provides that traditional dispute resolution mechanisms 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 and morality; or (c) is inconsistent with this Constitution or any written law. Article 189(3) provides that in any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided for under national legislation. Article 189(4) provides that national legislation shall provide procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.

Resolution Of Disputes By Arbitration As A Right

- 4. Within Chapter Four of this Constitution – the Bill of Rights, spanning Articles 19 to 59 inclusive, is contained a dispute resolution clause, at Article 50(1). It 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. Independent and impartial tribunals other than courts include arbitral tribunals. Therefore, the dispute resolution clause that is Article 50(1), provides for the resolution of a dispute by either a court or an arbitral tribunal.
- 5. Article 2(1) of this Constitution, already mentioned above, distinguishes between persons and State organs, providing that this Constitution binds **both** persons **and** State organs. This

implies, in the context of Article 50(1), that the dispute resolution right acknowledged therein, applies only to persons, and not to State organs. Implying therefore that for State organs to possess a right of dispute resolution, such as provided for in Article 50, there must be a separate empowering legal provision, such as is contemplated in national legislation as mentioned in Article 189(3) and (4) with respect to governments. Article 260 defines “**State organ**” to mean a commission, office, agency or other body established under this Constitution. And “**State**”, when used as a noun, means the collectivity of offices, organs and other entities comprising the government of the Republic under this Constitution.

6. Following setting the stage with these basic legal parameters, return is made to the main purpose of this paper – construing the Arbitration Act, 1995 to conform to this Constitution in the manner provided for in this Constitution. 10

Arbitration Act Does Not Apply To All Arbitrations

7. Section 2 of the Arbitration Act provides that **except as otherwise provided in a particular case** the provisions of this Act shall apply to domestic arbitration and international arbitration. It is therefore noted that the Arbitration Act is **not** a universal law applicable to all arbitrations in Kenya, as the Act itself expressly states that there may be exceptions to its application provided for in particular cases. Consequently, it is prudent not to give the Arbitration Act an overarching status that it itself does not claim for itself.

Only Live Disputes Can Be Resolved Before Independent & Impartial Tribunals

8. Section 3(1) of the Arbitration Act defines “**arbitration agreement**” to mean an **agreement** by the parties to submit to arbitration all or certain **disputes** which have arisen or **which may arise** between them in respect of a defined legal relationship, whether contractual or not. While the Arbitration Act provides for an agreement to submit to arbitration disputes which may arise between parties, Article 50(1) of this Constitution does not contemplate such! Article 50(1) addresses **disputes that have arisen**. Disputes that have not yet arisen, though they may arise, are not actual disputes, but are possible disputes. Disputes that have not yet arisen cannot be placed for resolution before a court or other independent and impartial tribunal or body, for the simple reason that there is as yet no dispute to be resolved 20

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before such a tribunal or body. Only live disputes – disputes that have arisen – are capable of being placed for resolution before independent and impartial tribunals or bodies.

Arbitration By Right Rather Than By Agreement

9. While the Arbitration Act provides for the submission of a dispute to arbitration for its resolution on the basis of an agreement between the parties in dispute or could possibly be in dispute, Article 50(1) of this Constitution provides for submission of a dispute to arbitration for its resolution on the basis of the dispute resolution right inherent in a person. No agreement is required between a person exercising his or her dispute resolution right in Article 50(1) and any other party with whom he or she is in dispute. The exercise of this dispute resolution right, in submitting a dispute to arbitration, is unilateral – without the agreement or consent of any other party! 10

Domestic Arbitration Under Article 50(1)

10. Section 3(2) of the Arbitration Act provides, in part, that an arbitration is domestic if the **arbitration agreement** provides expressly or by implication for arbitration in Kenya. As Article 50(1) of this Constitution's arbitrations are based on the right of a person in dispute, and not on an arbitration agreement, section 3(2) must be construed to exclude the existence of an arbitration agreement in the circumstances of an Article 50(1) arbitration that complies with other provisions of section 3(2). For example, an arbitration is domestic if the submission to arbitration under Article 50(1) of the Constitution provides expressly or by implication for arbitration in Kenya. 20

International Arbitration Under Article 50(1)

11. For arbitration submissions under Article 50(1) of the Constitution, section 3(3) of the Arbitration Act can be construed to read as follows:

An arbitration is international if – (a) the parties to the arbitration have, at the time of the submission of their dispute to arbitration, their places of business in different states; (b) one of the following places is situated outside the state in which the parties have

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their place of business – (i) the juridical seat of arbitration is Kenya, as the submission to arbitration is on the basis of Article 50(1) of the Constitution of Kenya, 2010; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or (c) the parties have expressly agreed that the subject-matter of the arbitration relates to more than one state.

12. Section 3(4) of the Arbitration Act can be construed as follows:

For the purpose of subsection (3) – (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration; and (b) if a party does not have a place of business, reference is to be made to his habitual residence.

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Article 50(1) Is An Arbitration Clause

13. To the extent that section 4 of the Arbitration Act is founded on the existence of an arbitration agreement, it is not applicable to arbitrations founded on the Article 50(1) of the Constitution dispute resolution right possessed by every person. Nevertheless, among the people of Kenya subject to the Constitution of Kenya, 2010, Article 50(1) can be viewed as an arbitration clause, as it is a dispute resolution clause that provides for arbitration as an alternative to court proceedings.

14. Section 5 of the Arbitration Act should be construed to remove any reference to the arbitration agreement, as such is not applicable to arbitrations under Article 50(1) of the Constitution.

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Stay Of Legal Proceedings In The Absence Of An Arbitration Agreement?

15. Section 6 of the Arbitration Act provides for the stay of legal proceedings in matters subject to an arbitration agreement. But an arbitration subject to Article 50(1) of the Constitution is not based on an arbitration agreement, but on the dispute resolution right of the person submitting the dispute for resolution to arbitration. Therefore, to the extent that a stay of legal proceedings is sought on the basis of a non-existent arbitration agreement, such is unlikely to be obtained.

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16. But in circumstances where a person has exercised one's dispute resolution right under Article 50(1) of the Constitution, and the party one is in dispute with institutes court proceedings in parallel with the arbitral proceedings instituted under Article 50(1), and subsequent to the institution of the arbitral proceedings, one may invoke the provisions of Article 159(2)(c). These provide that in exercising judicial authority, the courts and tribunals shall be guided by principles including alternative forms of dispute resolution including arbitration shall be promoted. A court in such circumstances should therefore promote dispute resolution by arbitration, and stay the court proceedings in favour of the previously instituted arbitral proceedings based on Article 50(1).

Construing Sections 7, 8 & 9 Of The Arbitration Act

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17. For purposes of arbitrations submitted under Article 50(1) of the Constitution, section 7(1) of the Arbitration Act may be construed as follows:

It is not incompatible with an arbitration subject to Article 50(1) of the Constitution for a party to request from the High Court, during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.

18. But considering that section 7(2) of the Arbitration Act acknowledges that arbitral tribunals possess jurisdiction to address matters spoken of in section 7(1), and, more pertinently, considering that Article 50(1) of the Constitution makes provision for the resolution of **any** dispute capable of resolution by the application of law being decided in a fair and public hearing before an independent and impartial tribunal or body, arbitral tribunals do indeed possess the jurisdiction to hear and determine proceedings for interim measures of protection. Parties before an arbitral tribunal established pursuant to the exercise of the Article 50(1) dispute resolution right should place motions for interim measures of protection before such tribunals, as such tribunals are possessed of jurisdiction in hearing and determining the same. 20

19. Section 8(1) of the Arbitration Act may be construed as follows:

An arbitration under Article 50(1) of the Constitution is not terminated by the death of any party thereto, either as respects the deceased or any other party, but in such event is enforceable by or against the personal representative of the deceased.

20. Section 9 of the Arbitration Act may be construed by replacing the phrase 30

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“arbitration agreement” with “arbitration under Article 50(1) of the Constitution”.

Section 12(2)(c) Of The Arbitration Act Is Unenforceable

21. Section 12(2)(c) of the Arbitration Act is an unenforceable provision. It provides that the parties are free to agree on a procedure of appointing the arbitrator or arbitrators and any chairman and failing such agreement – (c) in an arbitration with one arbitrator, the parties shall agree on the arbitrator to be appointed. But the parties may still not agree on the arbitrator to be appointed, especially in an arbitration under Article 50(1) of the Constitution, where a person exercises one's dispute resolution right to submit their dispute to arbitration unilaterally. Section 12(2)(c) must therefore be construed in accordance with Article 259(1), which provides that this Constitution shall be interpreted in a manner that – 10
- (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.

Construing Section 12(2)(c) Of The Arbitration Act To Make It Enforceable

22. A purpose of Article 50(1) of the Constitution is the resolution of a dispute before an independent and impartial tribunal or body. It is a person's right to have one's dispute resolved before such a tribunal or body, just as it is the person's right to select whether such a tribunal is a court or another independent and impartial tribunal. Since this right contains within it the right to select as between a category of tribunal, it is my opinion that the same right to selection extends to which independent and impartial tribunal where the tribunal 20
- selected is not a court. Without a tribunal in place it is not possible for a person to have one's dispute resolved. Consequently a person's right to dispute resolution by an independent and impartial tribunal or body necessarily entails the right to select as between a court or another tribunal, and if the selection is of another tribunal, the right to select the particular independent and impartial tribunal to hear and determine one's dispute.

Challenge Against Arbitrator Appointed Under Article 50(1)

23. Section 13(3) of the Arbitration Act provides that an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence, or if he does not possess qualifications agreed to by the parties or if he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so. None of these challenge grounds relate to the fact that an arbitrator was unilaterally appointed by a person exercising his or her dispute resolution right under Article 50(1) of the Constitution. Meaning that a person's unilateral appointment of a sole arbitrator that is an independent and impartial tribunal is legally valid, and may only be challenged on the grounds provided under section 13 of the Arbitration Act!

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Power Of Arbitral Tribunal To Rule On Its Own Jurisdiction

24. Section 17(1) of the Arbitration Act should be construed to exclude any reference to an arbitration agreement with respect to arbitrations under Article 50(1) of the Constitution, and should read:

The arbitral tribunal may rule on its own jurisdiction.

Limiting Freedom Of Choice Of Juridical Seat Of Arbitration

25. Section 21(1) of the Arbitration Act should be construed to limit the freedom of choice of the parties with respect to arbitrations under Article 50(1) of the Constitution. Such arbitrations are not based on the party autonomy principle that forms the foundation of arbitrations under the Arbitration Act. Such arbitrations derive their basis from a person's right under Article 50(1) of the Constitution of Kenya, 2010. Consequently, as the existence of such arbitrations is founded upon Kenyan law, it necessarily follows that the juridical seat of arbitration is Kenya.

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Resolution Of Disputes Outside Rules Of Law Prohibited

26. Section 29(4) of the Arbitration Act provides that the arbitral tribunal shall decide on the substance of the dispute according to considerations of justice and fairness without being

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bound by the rules of law, only if the parties have expressly authorized it to do so. Article 50(1) of the Constitution provides that every person has a right to the resolution of a dispute capable of resolution by the application of law. Consequently, arbitrations founded on Article 50(1) must be resolved by the application of law. The parties, and by extension the arbitral tribunal, do not have the jurisdiction in such arbitrations to resolve such disputes without application of the law. Section 29(4) may therefore be construed to read:

The arbitral tribunal shall have no power to decide on the substance of the dispute according to considerations of justice and fairness without being bound by the rules of law.

Construing Setting Aside & Recognition Provisions

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27. Section 35 of the Arbitration Act provides for the setting aside of arbitral awards. Article 50(1) of the Constitution affects the construction of section 35.

27.1. Section 35(2)(a)(i) is not applicable to Article 50(1) arbitrations, as such arbitrations are not founded on an arbitration agreement, but are founded on a person's dispute resolution right as acknowledged by Article 50(1).

27.2. With respect to section 35(2)(a)(ii), arbitrations claimed to be under Article 50(1) must be compliant with the same.

27.3. With respect to section 35(2)(a)(iv), Article 50(1) arbitrations can deal with any dispute that can be resolved by the application of law, just as is the case with court proceedings, save for two categories of disputes: criminal proceedings, on account of the right of an accused person to be tried before a court established under this Constitution pursuant to Article 50(2)(d), and presidential election dispute proceedings under Article 140 of the Constitution, on account of the exclusive jurisdiction of the Supreme Court to hear and determine the same pursuant to Article 163(3)(a).

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27.4. With respect to section 35(2)(b)(i), the comments in the preceding paragraph with reference to section 35(2)(a)(iv) apply. Only criminal proceedings and presidential election disputes under Article 140 of the Constitution are not capable of settlement by arbitration under the law of Kenya.

28. Section 36(3)(b) of the Arbitration Act is not applicable to arbitrations under Article 50(1) of the Constitution, as such arbitrations are not founded on an arbitration agreement

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but on the said constitutional provision. Section 36(3)(b) may therefore be construed as follows:

Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish – (b) a statement that the arbitration is empowered by Article 50(1) of the Constitution.

29. Section 37 of the Arbitration Act provides for grounds for refusal of recognition or enforcement of arbitral awards. As the grounds herein are similar to those for setting aside arbitral awards in section 35, the commentary above with respect to section 35 applies to like provisions in section 37.

Summary Of Holdings

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30. In summary, the following are key holdings:

30.1. The Arbitration Act, 1995, as an existing law at the time the Constitution of Kenya, 2010 became effective on 27th August, 2010, must be construed to conform to this Constitution.

30.2. The Arbitration Act, 1995 is not universally applicable to all arbitrations in Kenya, as it is subject to exceptions in particular cases.

30.3. While the Arbitration Act is concerned with arbitrations empowered by arbitration agreements, Article 50(1) of the Constitution provides for arbitrations empowered by the dispute resolution right inherent in all persons.

30.4. Article 50(1) of the Constitution provides only for the resolution of live disputes, and not for disputes that may occur, as only live disputes are capable of submission to a dispute resolution forum, be it a court or another independent and impartial tribunal or body. 20

30.5. Court proceedings instituted after the institution of arbitration proceedings ought to be stayed, pursuant to Article 159(2)(c) of the Constitution, providing courts with mandatory guidance to promote alternative dispute resolution mechanisms, including arbitration.

30.6. Section 12(2)(c) of the Arbitration Act, concerned with the appointment of a sole arbitrator in the event that disputing parties are not agreed on the same, is an unenforceable provision. Notwithstanding this, the exercise of the Article 50(1) of the 30

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Constitution dispute resolution right by a person facilitates the unilateral selection of arbitration as the mode of dispute resolution, and the unilateral selection of the arbitral tribunal, provided that the said tribunal is independent and impartial in relation to the parties in dispute.

30.7. Challenges against the appointment of an arbitrator in an arbitration empowered by Article 50(1) of the Constitution can be on the basis of lack of either or both of independence or impartiality.

30.8. Arbitrations empowered by Article 50(1) of the Constitution do not allow the parties to choose a juridical seat of arbitration other than Kenya, as the empowering provision for such arbitrations is the law of Kenya.

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30.9. Arbitrations empowered by Article 50(1) of the Constitution do not allow for the resolution of disputes outside rules of law, as Article 50(1) provides for the resolution of disputes that can be resolved by the application of law.

Conclusion

31. In conclusion, the ultimate law governing arbitrations in Kenya is the Constitution of Kenya, 2010, as read together with the Arbitration Act, 1995 as construed to conform to this Constitution. This Constitution provides for arbitration by way of inherent right, in Article 50(1), and by way of national legislation for governments, in Article 189, as contrasted with the Arbitration Act providing for arbitration by way of an arbitration agreement. Arbitrations empowered by Article 50(1) limit the party autonomy principle in the Arbitration Act with respect to the institution of arbitration proceedings, the appointment of the arbitral tribunal and the choice of the juridical seat of the arbitration. As the Arbitration Act does not cover for all arbitrations, arbitrations empowered by other legally valid provisions should also be appreciated.

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