

Implications Of Article 50(1) Of The Constitution Of Kenya, 2010 Being An Arbitration Agreement

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Overview

1. In arriving at the implications of Article 50(1) of the Constitution of Kenya, 2010 being an arbitration agreement, if indeed it is, the following issues must be addressed:

- 1.1. What is an arbitration?

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- 1.2. What is an arbitration agreement?
- 1.3. Does Article 50(1) of the Constitution of Kenya, 2010 fulfil the requirements of an arbitration agreement?
- 1.4. If so, what are the practical effects of this finding?

UNCITRAL Model Law

2. In answering the above questions, reference is made to the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration² (UNCITRAL Model Law), which forms the basis of the majority of arbitration legislation by various States the world over. In resolution 40/72 of 11th December, 1985 that gave birth to the UNCITRAL Model Law, the UN General Assembly recognised the value of arbitration as a method of settling disputes arising in international commercial relations. “Arbitration” was not defined, and it is taken that UN members understood what they meant by “arbitration”. Consequently, in an effort to understand what “arbitration” is, recourse is made to implications derived from the UNCITRAL Model Law.

Attributes Of Arbitration

3. Article 1(2) of the UNCITRAL Model Law provides that arbitration takes place in the territory of a State – meaning that it takes place in some geographical location. Article 2(a) provides that “arbitration” means any arbitration whether or not administered by a permanent arbitral institution. Article 2(b) provides that “arbitral tribunal” means a sole arbitrator or a panel of arbitrators – implying that there must be one or more arbitrators in an arbitration. Article 2(e) provides that where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement – meaning that an arbitration is comprised of parties and of an agreement between the parties.

Arbitration Agreement

4. Option I of Article 7(1) of the UNCITRAL Model Law provides that “arbitration

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agreement” is 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. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Article 7(2) provides that the arbitration agreement shall be in writing. Article 7(3) provides that an arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means. Arbitrations therefore have jurisdiction over disputes or potential disputes between parties in defined legal relationships, with arbitration agreements necessarily being in writing.

5. Option II Article 7 of the UNCITRAL Model Law provides that “arbitration agreement” is 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. It is noted that matters of form are not provided for under Option II, as compared to Option I, and all that is required is the existence of a defined legal relationship between the parties, and their agreement to submit to arbitration their dispute or disputes.

Arbitration Interface With Courts

6. Article 8(1) of the UNCITRAL Model Law provides that a court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. An action is instituted in court for the resolution of the dispute the subject of the action. So, for such an action to be referred to arbitration by a court, the purpose of an arbitration is the resolution of the dispute outside of a court. Arbitrations are therefore mechanisms for the resolution of disputes, outside of a court, between parties with defined legal relationships.
7. Article 9 of the UNCITRAL Model Law provides that it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such a measure. The implication of this provision is that to the greatest extent possible, arbitral proceedings and court proceedings should be kept separate, with a conjunction taking place between the two

different types of proceedings only in circumstances of necessity.

Independent And Impartial Arbitrators

8. Article 11(5) of the UNCITRAL Model Law provides, in part, that the court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of **an independent and impartial arbitrator** and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties. It is noted that key qualifications of an arbitrator are independence and impartiality.
9. Article 12(1) of the UNCITRAL Model Law provides that when a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his **impartiality or independence**. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him. Article 12(2) provides, in part, that an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. It should therefore be clear that impartiality and independence are fundamental non-derogable qualifications of an arbitrator, unless excused by the parties after full disclosure.

Severability Of Arbitration Clause From Contract

10. Article 16(1) of the UNCITRAL Model Law provides that the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the agreement is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

Commentary On The UNCITRAL Model Law

11. Paragraph 2 of the Explanatory Note to the UNCITRAL Model Law provides that the Model Law constitutes a sound basis for the desired harmonization and improvement of national laws. It covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a worldwide consensus on the principles and important issues of international arbitration practice. It is acceptable to States of all regions and the different legal or economic systems of the world. Since its adoption by UNCITRAL, the Model Law has come to represent the acceptable international legislative standard for a modern arbitration law and a significant number of jurisdictions have enacted arbitration legislation based on the Model Law.

Limiting Court Intervention

12. Paragraph 15 of the Explanatory Note to the UNCITRAL Model Law provides that recent amendments to arbitration laws reveal a trend in favour of limiting and clearly defining court involvement in international commercial arbitration. This is justified in view of the fact that the parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and prefer the finality and expediency of the arbitral process.

Arbitration Under UNCITRAL Model Law

13. Therefore, in answering the question of what an arbitration is, one can say that it is a dispute resolution mechanism, distinct from a court, for resolving a dispute between parties in a defined legal relationship in which the parties have entered into an agreement to subject the resolution of such a dispute to such mechanism conducted by an arbitral tribunal, which must be comprised of at least one arbitrator, who must be independent and impartial with respect to the parties.

Is Article 50(1) Of Kenya's Constitution An Arbitration Agreement?

14. In answering the question whether or not Article 50(1) of the Constitution of Kenya, 2010 fulfils the requirements of an arbitration agreement, it should be noted that the Constitution of Kenya, 2010 is simply a written agreement or contract the people of Kenya

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made among themselves to define or codify their legal relationships among themselves, and in relation to other people outside of themselves. The preamble to the Constitution reads:

*We, the people of Kenya – Acknowledging the supremacy of the Almighty God of all Creation; Honouring those who heroically struggled to bring freedom and justice to our land; Proud of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation; Respectful of the environment, which is our heritage, and determined to sustain it for the benefit of future generations; Committed to nurturing and protecting the well-being of the individual, the family, communities and the nation; Recognising the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law; Exercising our sovereign and inalienable right to determine the form of governance of our country and having participated fully in the making of this Constitution; **Adopt, Enact and give this Constitution to ourselves and to our future generations.** God bless Kenya.*

15. Article 50(1) of the Constitution of Kenya, 2010 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. This dual contractual and constitutional right provides for the resolution of “any dispute” that can be resolved by the application of law decided in a fair and public hearing before an independent and impartial tribunal that is NOT a court – an apt description of an arbitration presided over by an arbitral tribunal that must be independent and impartial in relation to the persons in dispute!

Article 50(1) Of Kenya's Constitution In Harmony With UNCITRAL Model Law Article 7

16. In other words, Article 50(1) of the Constitution of Kenya, 2010 is wholly in harmony with Article 7 of the UNCITRAL Model Law, under either Option I or II of the same. Article 50(1) is therefore an arbitration agreement that is applicable to all Kenyans, allowing any Kenyan person to institute either court proceedings or arbitral proceedings for the resolution of any dispute, as between that Kenyan person and another Kenyan person, that can be resolved by the application of law!

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Can Non-Kenyans Take Advantage Of Article 50(1) Of Kenya's Constitution?

17. But is this arbitration agreement applicable to Kenyans limited only to Kenyan persons, or is it applicable to a wider group of persons?
18. Article 50 of the Constitution of Kenya, 2010 is part of Chapter Four of the Constitution – The Bill of Rights, comprising Articles 19 to 59 inclusive. Article 19(3) provides that the rights and fundamental freedoms in the Bill of Rights – (a) **belong to each individual and are not granted by the State**; (b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised and conferred by law, except to the extent that they are inconsistent with the said Chapter; and (c) are subject only to the limitations contemplated in the said Constitution. Consequently, the Article 50(1) right to fair hearing is an inherent right belonging to each individual and has not been granted by the State. The people of Kenya simply acknowledged that all persons possess this right in their capacity as humans.
19. Article 20(1) of the Constitution of Kenya, 2010 provides that the Bill of Rights applies to all law and binds all State organs and all persons. Article 20(2) provides that **every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom**. Article 20(3)(b) provides that in applying a provision of the Bill of Rights, a court shall adopt the interpretation that most favours the enforcement of a right or fundamental freedom. Article 20(4) provides that in interpreting the Bill of Rights, a court, tribunal or other authority shall promote – (a) the **values that underlie an open and democratic society based on human dignity, equality, equity and freedom**; and (b) the spirit, purport and objects of the Bill of Rights.
20. Article 21(4) of the Constitution of Kenya, 2010 provides that the State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms. With respect to the fair hearing right possessed by every person acknowledged in Article 50(1), the right to have any dispute capable of resolution by the application of law decided in a fair and public hearing before an independent and impartial tribunal – including an arbitral tribunal, the State had already enacted the Arbitration Act, 1995, which remained valid law under section 7(1) of the Sixth Schedule of the Constitution, which provides that all law in force immediately before the effective date³

3 27th August, 2010

continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

Equality And Non-Discrimination Before The Law

21. Article 27(1) of the Constitution of Kenya, 2010 provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. Article 27(2) provides that equality includes the full and equal enjoyment of all rights and fundamental freedoms. Article 27(4) provides that the State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. Article 27(5) provides that a person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4). Article 2(1) provides that this Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government. Consequently, as this Constitution is law, and as every person is equal before the law and has the right to equal protection and equal benefit of the law, including the full and equal enjoyment of all rights and fundamental freedoms, it necessarily follows that every person, Kenyans and non-Kenyans alike, have the full and equal enjoyment of the fair hearing right in Article 50(1) – the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before an independent and impartial tribunal – including an arbitral tribunal!
22. It should be noted that Article 50(1) of the Constitution of Kenya, 2010 is a dispute resolution agreement, including an arbitration agreement, as among Kenyans, on account of this Constitution being an agreement, contract and law that they freely adopted to apply among them. It should also be noted that the people of Kenya acknowledge the inherent fair hearing right as captured in Article 50(1) that is possessed by all persons in equality, and is not granted by the Kenyan State or any other State for that matter. With respect to the possession of this inherent fair hearing right Kenyans and non-Kenyans alike are equal before the law, and enjoy this right fully. Meaning that there must be no discrimination as between a Kenyan and a non-Kenyan with respect to the enjoyment of the fair hearing right in Article 50(1).

Instituting Non-Consensual Dispute Resolution Proceedings

23. With respect to the exercise of the Article 50(1) of the Constitution of Kenya, 2010 fair hearing right before a court, a person may institute court proceedings against another without a separate dispute resolution agreement between the person and the other, instituting court proceedings by the exercise of constitutional right, rather than by reliance upon a separate dispute resolution agreement. Likewise, as the same Article 50(1) right applies to both courts and non-court independent and impartial tribunals – including arbitral tribunals, a person may institute arbitral proceedings against another without a separate dispute resolution agreement between that person and the other. Meaning that non-Kenyans in dispute with other persons, irrespective of their nationalities, can institute non-consensual arbitration proceedings anchored on Article 50(1) against other persons. With respect to rights and fundamental freedoms, what goes for a Kenyan goes for a non-Kenyan. Just as a Kenyan can institute arbitration proceedings against another person of whatever nationality without an arbitration agreement between that Kenyan and that other person, so also can a non-Kenyan institute arbitration proceedings against another person of whatever nationality without an arbitration agreement between that non-Kenyan and that other person. This right to institute dispute resolution proceedings decided in a fair and public hearing before an independent and impartial tribunal or body is inherent in all persons, and is recognised by the people of Kenya in their highest law – the Constitution of Kenya, 2010.

How Non-Kenyans Can Invoke Benefits Under Article 50(1) Of Kenya's Constitution

24. Can non-Kenyan persons invoke Article 50(1) of the Constitution of Kenya, 2010 in their arbitration proceedings, and thereby enjoy the benefits of this provision that are already enjoyed by Kenyans?
25. Article 20(1) of the UNCITRAL Model Law provides that the parties are free to agree on **the place of arbitration**. Failing such agreement, **the place of arbitration** shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties. Article 20(2) provides that notwithstanding the provisions of Article 20(1), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any

place it considers appropriate for consultation among its members, for hearing witnesses, experts or parties, or for inspection of goods, other property or documents. It should be noted that the legal place of arbitration may be determined either by the agreement of the parties – where there is one, or by the arbitral tribunal in the absence of an agreement by the parties, having regard to the circumstances of the case.

26. In circumstances where a party has invoked his Article 50(1) of the Constitution of Kenya, 2010 right to institute arbitration proceedings against another without the existence of a dispute resolution agreement between the parties, the place of arbitration in such a case is the State of Kenya – whose highest law recognises the party's right to institute arbitration proceedings pursuant to this constitutional provision and not pursuant to a separate dispute resolution agreement between the parties.
27. Article 31(3) of the UNCITRAL Model Law provides that the award shall state its date and the place of arbitration as determined in accordance with Article 20(1). The award shall be deemed to have been made at that place.

Recognising And Enforcing Awards Arising From Non-Consensual Arbitration

28. Article 36(1)(a)(iv) of the UNCITRAL Model Law provides that **recognition or enforcement of an arbitral award**, irrespective of the country in which it was made, **may be refused only** at the request of the party against whom it is invoked, **if** that party furnishes to the competent court where recognition or enforcement is sought **proof that the composition of the arbitral tribunal or the arbitral procedure** was not in accordance with the agreement of the parties or, **failing such agreement, was not in accordance with the law of the country where the arbitration took place**. It is evident that the UNCITRAL Model Law recognises both consensual and non-consensual arbitrations, with the latter recognised in circumstances where such are recognised by the law of the country where the arbitration took place. And in circumstances where a non-Kenyan has invoked Article 50(1) of the Constitution of Kenya, 2010 and instituted arbitration proceedings against another person without the existence of a separate dispute resolution agreement between them providing for arbitration under the law of Kenya, it is the law of Kenya that will apply with respect to the composition of the arbitral tribunal or the arbitral procedure. Meaning that if the provisions of the Arbitration Act, 1995 are complied with, an Act fashioned after the

UNCITRAL Model Law, as read together with Article 50(1), then recognition or enforcement of such an arbitral award subject to the law of Kenya, on account of Kenya being the place of arbitration, may not be refused.

29. In other words, a party seeking to institute arbitration proceedings against another in the absence of an arbitration agreement between them may indeed institute arbitration proceedings against the other by invoking its right under Article 50(1) of the Constitution of Kenya, 2010, and by so doing subject the resultant arbitration proceedings to the law of Kenya. Provided the arbitration proceedings fully comply with the law of Kenya, in this case the Arbitration Act, 1995 as read together with the Constitution of Kenya, 2010 – the highest Kenyan law, recognition or enforcement of that resultant arbitral award may not be refused elsewhere in the world! Meaning that **the place of arbitration for the institution of legally valid and enforceable non-consensual arbitration proceedings is Kenya!** For just as legally valid and enforceable court proceedings are instituted in most States around the world without the consent of the party proceeded against, so also legally valid and enforceable arbitration proceedings can and are instituted in Kenya without the consent of the party proceeded against.

Arbitrability Of Disputes Under Article 50(1) Of Kenya's Constitution

30. Article 50(1) of the Constitution of Kenya, 2010 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. In what circumstances is it “appropriate” to resolve disputes by the application of law before a non-court independent and impartial tribunal or body, such as an arbitral tribunal? Or, to put it differently, in what circumstances is it inappropriate to resolve disputes by the application of law before such tribunals?

Setting Aside Awards Arising From Non-Arbitrable Disputes

31. Article 34(2)(b)(i) of the UNCITRAL Model Law provides that an arbitral award may be set aside by the court specified in article 6 only if the court finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State. As it is important to avoid embarking on a futile dispute resolution or arbitration process, a

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process resulting in the setting aside of an arbitral award, it is pertinent that one is aware of the circumstances when it is not appropriate to resolve a dispute by arbitration in accordance with the law of Kenya.

Criminal Proceedings Not Arbitrable

32. Article 50(2)(d) of the Constitution of Kenya, 2010 provides 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. Article 25(c) provides that despite any other provision in this Constitution the right to a fair trial shall not be limited. Consequently, criminal proceedings can take place only in public before courts established under this Constitution. As the courts have exclusive jurisdiction over criminal proceedings, such proceedings may not take place in an arbitration.

President-Elect Election Challenges Not Arbitrable

33. Article 163(3)(a) of the Constitution of Kenya, 2010 provides 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. Article 140(1) provides that a person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election. Consequently, where the subject-matter of the dispute is a challenge to the election of the President-elect following declaration of the results of the presidential election, a subject-matter for the exclusive jurisdiction of the Supreme Court, it is not appropriate for an arbitral tribunal to hear and determine such a dispute in an arbitration.

All Other Disputes Arbitrable

34. Outside these two subject-matters, it is not appropriate to declare that the subject-matter of a dispute is not for resolution in an arbitration subject to the law of Kenya. For the fair hearing right inherent in every person as captured in Article 50(1) of the Constitution of Kenya, 2010 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 an

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independent and impartial tribunal or body. Article 19(3)(c) provides that the rights and fundamental freedoms in the Bill of Rights, including Article 50(1), are subject only to the limitations contemplated in this Constitution. Those limitations, as seen in Articles 50(2)(d), 25(c), 163(1)(a) and 140(1), cover only the exclusive jurisdiction accorded courts with respect to criminal proceedings, and the exclusive jurisdiction accorded the Supreme Court with respect to challenging the election of a President-elect following declaration of the results of a presidential election. No other limitations have been provided for expressly in the Constitution. The only other limitation contemplated in the Constitution is in accordance with Article 24.

35. Article 24(1) of the Constitution of Kenya, 2010 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. Article 24(2) provides that despite clause (1), a provision in legislation limiting a right or fundamental freedom – (a) in the case of a provision enacted or amended on or after the effective date⁴, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation; (b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and (c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content. As at the time of writing⁵, no legislation compliant with the limitation requirements in Article 24 has been enacted with respect to limiting the fair hearing right at Article 50(1). Consequently, the only subject-matter disputes that may not be heard and determined in arbitrations subject to Article 50(1) are criminal proceedings and presidential election proceedings challenging the election of a President-elect following the declaration of the results of a presidential election. All other subject matter disputes that are capable of resolution by the application of law can lawfully be resolved in arbitration under the law of Kenya!

4 27th August, 2010

5 16th January, 2024

Non-Kenyans Should Place Or Seat Their Arbitrations In Kenya

36. As at the time of writing⁶, most conduct and commentary with respect to the institution of legally valid and enforceable arbitration proceedings in the absence of an arbitration agreement between the parties in the said arbitration proceedings is in the realm of international investment arbitration, with relatively little in international commercial arbitration. Most arbitration is founded on privity of contract – agreement of the parties in dispute to subject their dispute to arbitration, with not much, relatively, on unilateral institution of arbitration proceedings, as is the case with most court proceedings. But with the law of Kenya recognising the inherent fair hearing right of every person on Earth, providing for the unilateral institution of either court or arbitration proceedings, parties engaging in international commercial transactions and/or with defined legal relationships should seriously consider instituting arbitration proceedings subject to the law of Kenya, thereby making Kenya the seat or place of arbitration, as arbitral awards from such arbitrations are legally valid and enforceable elsewhere in the world.

Facilitating Arbitral Proceedings In Kenya

37. To facilitate persons considering or seeking instituting arbitration proceedings without the existence of a separate arbitration agreement between a person and the other person proposed to be proceeded against, Aluochier Dispute Resolution, an arbitral institution based in Rongo, Kenya may be contacted to facilitate the same⁷. Its Aluochier Dispute Resolution Arbitration Rules provide for the administration of both arbitrations with arbitration agreements and arbitrations without arbitration agreements but reliant upon Article 50(1) of the Constitution of Kenya, 2010. Resultant awards are legally valid and enforceable in the 172 New York Convention⁸ States, with only about 24 States⁹ still not party to the New York Convention.

⁶ 16th January, 2024

⁷ Aluochier Dispute Resolution, P O Box 436-40404, Rongo, Kenya. www.aluochier.co.ke, info@aluochier.co.ke.

⁸ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)

⁹ Equatorial Guinea, Eritrea, Eswatini, Gambia, Grenada, Guinea-Bissau, Kiribati, Libya, Federated States of Micronesia, Namibia, Nauru, Niue, North Korea, Saint Kitts and Nevis, Saint Lucia, Samoa, Solomon Islands, Somalia, South Sudan, Togo, Tuvalu, Vanuatu and Yemen (Source: Wikipedia, https://en.wikipedia.org/wiki/Convention_on_the_Recognition_and_Enforcement_of_Foreign_Arbitral_Awards, 16th January, 2024.)

Summary Of Key Takeaways

38. In summary, the following are the key takeaways from this article:

38.1. While the UNCITRAL Model Law has defined various terms used in arbitration, it has not expressly defined the term “arbitration”, thereby necessitating an extraction of the various attributes of arbitration as provided for in the Model Law in arriving at a definition of “arbitration” as understood in the Model Law.

38.2. An “arbitration agreement” is 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. The UNCITRAL Model Law provides for two options, with one option insisting on making or evidencing in writing an arbitration agreement, while the other option makes no such insistence.

38.3. An “arbitration” as conceived in the UNCITRAL Model Law is a dispute resolution mechanism distinct from a court for resolving a dispute between parties in a defined legal relationship in which the parties have entered into an agreement to subject the resolution of such a dispute to such mechanism, conducted by an arbitral tribunal, which must be comprised of one or more arbitrators, who must be independent and impartial with respect to the parties.

38.4. Article 50(1) of the Constitution of Kenya, 2010 is a dispute resolution agreement that is applicable to all Kenyans, allowing any Kenyan person to institute either court proceedings or arbitral proceedings for the resolution of any dispute that can be resolved by the application of law, as between that Kenyan person and another Kenyan person!

38.5. An “arbitration” as conceived in Article 50(1) of the Constitution of Kenya, 2010 is a dispute resolution mechanism distinct from a court for resolving a dispute that is capable of resolution by the application of law, in a fair and public hearing, before an arbitral tribunal, which must be independent and impartial with respect to the persons in dispute.

38.6. The fair hearing right captured by Article 50(1) of the Constitution of Kenya, 2010 is possessed by every person, Kenyan and non-Kenyan alike, in full equality and without any discrimination.

38.7. Just as with respect to the exercise of the Article 50(1) of the Constitution of Kenya, 2010 fair hearing right before a court, whereby a person may institute court

proceedings against another without a separate dispute resolution agreement between the person and the other, instituting the court proceedings by the exercise of right, so also a person may institute arbitral proceedings against another without a separate dispute resolution agreement between that person and the other, instituting the arbitral proceedings by the exercise of right.

38.8. Non-Kenyan persons can invoke Article 50(1) of the Constitution of Kenya, 2010 in instituting arbitration proceedings against others, without the existence of a separate arbitration agreement between them, and thereby enjoy the benefits of this provision that are already enjoyed by Kenyans.

38.9. In circumstances where a non-Kenyan has invoked Article 50(1) of the Constitution of Kenya, 2010 and instituted arbitration proceedings against another person without the existence of a separate dispute resolution agreement between them providing for arbitration under the law of Kenya, it is the law of Kenya that will apply with respect to the composition of the arbitral tribunal and the arbitral procedure. Meaning that if the provisions of the Arbitration Act, 1995 are complied with, as read together with Article 50(1), then recognition or enforcement of such an arbitral award subject to the law of Kenya, on account of Kenya being the place of arbitration, may not be refused elsewhere in the world.

38.10. Criminal proceedings are for the exclusive jurisdiction of courts established under the Constitution of Kenya, 2010, and may not be conducted under arbitrations subject to the law of Kenya.

38.11. A challenge to the election of a President-elect following the declaration of results of a presidential election is for the exclusive jurisdiction of the Supreme Court, and may not be instituted before an arbitral tribunal subject to the law of Kenya.

38.12. The only subject-matter disputes that may not be heard and determined in arbitrations subject to Article 50(1) of the Constitution of Kenya, 2010 are criminal proceedings and presidential election proceedings challenging the election of a President-elect following the declaration of the results of a presidential election. All other subject matter disputes that are capable of resolution by the application of law can validly be resolved in arbitration under the law of Kenya!

38.13. On account of the benefits of non-consensual arbitration with Kenya as the legal place or seat of arbitration, including access to justice, fair procedural law, transparency,

vast range of disputes capable of resolution by arbitration, and the recognition and enforceability of its arbitral awards, the suitable place of arbitration for instituting legally valid and enforceable non-consensual arbitration is Kenya!

38.14. Every person, irrespective of nationality or geographical location, considering instituting an arbitration proceeding without the existence of an arbitration agreement should consult with Aluochier Dispute Resolution, an arbitral institution based in Rongo, Kenya, to facilitate the same and to eventually result in the issuance of a fair and lawful arbitral award that is recognised and enforceable in all New York Convention States worldwide.

Conclusion

39. In conclusion, while Article 50(1) of the Constitution of Kenya, 2010 is an arbitration agreement as among the people of Kenya, providing for dispute resolution by the application of law in either a court or another independent and impartial tribunal or body, such as an arbitral tribunal, it is also the codification of an inherent right possessed by every person on Earth, providing for the institution of dispute resolution proceedings in either a court or another independent and impartial tribunal, such as an arbitral tribunal, without the existence of a dispute resolution agreement between the parties in dispute. Taking advantage of this inherent right, every person seeking the fair and lawful resolution of a dispute before an independent and impartial tribunal that is recognised and enforceable in all 172 New York Convention States should do so by instituting arbitration proceedings subject to Article 50(1) of the Constitution of Kenya, 2010 and so fully subject to the law of Kenya. To facilitate the same, contact Aluochier Dispute Resolution, an arbitral institution based in Rongo, Kenya, at info@aluochier.co.ke or www.aluochier.co.ke.

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