

A Call For Public Arbitrations

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Abstract

Confidentiality in arbitration is of benefit to particular parties, but is not necessarily in the public interest. For every person has the right to have any dispute that can be resolved by the application of law decided in a public hearing before a competent, independent and impartial tribunal, a right that is limited only in the cases of protecting witnesses or vulnerable persons, morality, public order or national security. Under Kenyan law, arbitral tribunals are bound by the values of integrity, transparency and accountability, which necessitate the holding of public arbitration proceedings, rather than confidential or secret proceedings. Under international law, such as the International Covenant on Civil and Political Rights, ratified by 173 State parties covering over 80% of the world's population, the same right to a public hearing applies. Therefore, except in the specified cases, all arbitration proceedings should be public.

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Confidentiality In Arbitration

1. Confidentiality in arbitration is often touted as one of the significant advantages of arbitration over other forms of dispute resolution, such as court proceedings. Arguments favouring confidentiality in arbitration include: (a) allowing parties to keep their disputes private, protecting sensitive business information from public scrutiny; (b) ensuring that trade secrets, proprietary information, and business strategies remain protected; (c) helping preserve relationships between the parties involved, as the details of the dispute are not exposed to the public; (d) often leading to more efficient and expedited resolution of disputes, as parties are more willing to share information without fear of public backlash; and (e) parties having more flexibility in shaping the arbitration process, including the level of confidentiality that they desire.
2. On the flip side, arguments against confidentiality in arbitration include: (a) the nature of private arbitration means that decisions and awards do not create legal precedents, with this lack of transparency negatively impacting upon future cases; (b) the absence of public scrutiny reduces the accountability of arbitrators, as their decisions are not subject to the same level of external review as court judgments; and (c) disputes involving public interest or issues affecting the general public should be resolved in a public forum, and confidentiality hinders the pursuit of justice in such cases.
3. So which way forward with respect to confidentiality in arbitration? Does it or does it not have a place in arbitration? If it has a place in arbitration, in what circumstances does it do so?

Every Person's Right To A Public Hearing

4. A dispute resolution clause that applies to all disputes whose resolution is subject to the law of Kenya is Article 50(1) of the Constitution of Kenya, 2010. It provides that every person – worldwide – 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. It should therefore be clear that the default legal position in Kenya for the resolution of all disputes capable of resolution by the application of law is a public hearing, whether in or out of court!

Limitations To The Right To A Public Hearing

5. Article 50(8) of the Constitution of Kenya, 2010 provides that this Article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security. These are the only grounds expressly provided for in this Constitution that limit the right to a public hearing in the resolution of disputes subject to the law of Kenya. Meaning that any disputant seeking confidentiality in the resolution of a dispute the disputant is involved in must have the dispute qualify for confidentiality by invoking the mentioned attributes of protecting witnesses or vulnerable persons, morality, public order or national security. Outside these grounds a disputant would be hard pressed to demonstrate that its dispute qualifies for a non-public or confidential hearing.

International Arbitration Laws Silent On Confidentiality

6. It is observed that, despite the widespread approval of confidentiality in arbitration circles, nowhere is the attribute mentioned in the Kenyan Arbitration Act, 1995, the UNCITRAL² Model Law or in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention, 1958), ratified by 172 State parties covering over 98% of the world's population. These foundational arbitration laws root neither for nor against confidentiality in arbitration, or give any opinion on the subject matter.

Kenya's Supreme Law

7. Article 2(1) of the Constitution of Kenya, 2010 provides that this Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government. Article 2(3) provides that the validity or legality of this Constitution is not subject to challenge by or before any court or other State organ. 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

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

invalid. Article 2(6) provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

Binding Values Of Integrity, Transparency And Accountability In Arbitration

8. Article 10(1) of the Constitution of Kenya, 2010 provides that the national values and principles of governance in this Article **bind** all State organs, State officers, public officers and **all persons** whenever any of them – (a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. Article 10(2) provides, in part, that the national values and principles of governance include – ... (c) ... integrity, transparency and accountability ... Therefore all persons involved in the application or interpretation of law, such as those in dispute resolution forums, be they courts or out-of-court forums, including arbitral tribunals, are bound by the values and principles of transparency and accountability.
9. In the context of confidentiality in arbitration, upholding the values and principles of transparency and accountability calls for public arbitration hearings, rather than confidential arbitration hearings. And seeing that these principles are binding upon arbitral tribunals, unless a constitutionally contemplated limitation applies to the right to a public hearing, as provided for in Article 19(3)(c) of the Constitution of Kenya, 2010, all arbitration hearings should be public!

Limitations To Rights Under Kenyan Law

10. Chapter Four of the Constitution of Kenya, 2010 contains the Bill of Rights, spanning from Article 19 to Article 59. 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 or conferred by law, except to the extent that they are inconsistent with this Chapter; and (c) are subject only to the limitations contemplated in this Constitution.
11. 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, 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 its purpose.

12. Article 24(2) of the Constitution of Kenya, 2010 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 date, 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.

Confidentiality In Competition Disputes

13. To illustrate the interplay of issues with respect to the limitation of the right to a public hearing in any dispute resolution forum, in a manner contemplated by the Constitution of Kenya, 2010 as provided for in Article 19(3)(c), the provisions of the Competition Act, 2010 will be considered. These have greater legal weighting than a contractual provision in an arbitration agreement providing for confidentiality of the proceedings, as legislation ranks higher in the legal pecking order than private contractual provisions³. The Competition Act describes itself as an Act of Parliament to promote and safeguard competition in the national economy; to protect consumers from unfair and misleading market conduct; to provide for the establishment, powers and functions of the Competition Authority and the Competition Tribunal, and for connected purposes.

14. Section 20 of the Competition Act, 2010 reads:

(1) For the purpose of this section, “material” includes any information, document or evidence relating to any matter to which this Act applies.

(2) Any person who gives or discloses any material to the Authority, whether under

³ Article 94(5) of the Constitution of Kenya, 2010: “No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.”

compulsion of law or otherwise, **may claim confidentiality** in respect of the whole or any part of the material.

(3) The provision of this section shall not be deemed to be breached where material is disclosed to persons outside the Authority any time before a claim for confidentiality is made.

(4) In the case of oral evidence, the claim may be made orally at the time of giving the evidence and in all other cases it shall be in writing, signed by the person making the claim specifying the material and **stating the reason for the claim**.

(5) If the Authority is satisfied that **material is of a confidential nature** and –

(a) **its disclosure could adversely affect the competitive position of any person; or**

(b) **is commercially sensitive for some other reason,**

the Authority **shall grant confidentiality** for the material.

(6) The Authority shall give notice in writing to a person making a claim for confidentiality of the Authority's decision to grant or not grant confidentiality and, if it has not granted confidentiality, the Authority shall treat the material as confidential for a period of fourteen days after giving such notification.

(7) If a claim for confidentiality –

(a) is made in relation to material supplied to the Authority voluntarily; and

(b) the Authority decides not to grant confidentiality in whole or in part for the material,

the person who supplied the material may, within the fourteen days period provided under subsection (6), withdraw the material from the Authority together with other material supplied together with it.

(8) **Notwithstanding that the Authority has granted a claim for confidentiality under subsection (5), the Authority may disclose the material –**

(a) at any time without notice to any other person if –

(i) the disclosure is made to another person who is also performing a function under this Act;

(ii) the disclosure is made with the consent of the person who gave the material;

(iii) **the disclosure is authorised or required under any other law; or**

(iv) the disclosure is authorised or required by a court or a tribunal constituted by law; or

(b) if the Authority is of the opinion that –

(i) disclosure of the material would not cause detriment to the person supplying it or the person to whom it relates; or

(ii) although the disclosure of the material would cause detriment to the person supplying it or the person to whom it relates, the public benefit in disclosing it outweighs the detriment,

and the Authority has given fourteen days prior written notice to that person of its intention to disclose the material pursuant to this provision.

(9) Any person who is aggrieved by a decision of the Authority under this section not to grant a claim for confidentiality for material or to disclose confidential material may, at any time while the Authority is obliged by this section to keep the material confidential, appeal to the Tribunal against the decision and the Authority shall continue to treat the material as confidential pending determination of the appeal.

(10) Any person who discloses confidential information otherwise than as authorised by this section, commits an offence.

Hearings At The Competition Authority

15. Section 35(1)(a) of the Competition Act, 2010 provides that if an undertaking indicates that it requires an opportunity to make oral representations to the Authority, the Authority shall convene a conference to be held at a date, time and place determined by the Authority. Section 44(1)(c) provides that subject to subsection (2), the Authority shall consider and make a determination in relation to a proposed merger of which it has received notification in terms of section 43 if a hearing conference is convened in accordance with section 45, within thirty days after the date of conclusion of the conference. Section 45(1) provides that if the Authority considers it appropriate, it may determine that a conference be held in relation to a proposed merger. Section 51(1) provides that if any undertaking in the economic sector under investigation so requests, or the Authority considers it appropriate, it may determine that a hearing be held in relation to a proposed determination regarding unwarranted concentration of economic power.
16. From the above provisions of the Competition Act, 2010 it is evident that the Competition Authority conducts hearings of matters before it, and that it also, in the circumstances provided for in section 20(5), grants confidentiality over qualifying information, documents and evidence. The said circumstances are that the Authority deems

the alleged confidential material to indeed be confidential, and that either its disclosure could adversely affect the competitive position of any person, or the alleged material is commercially sensitive for some other reason. Therefore, in these specified circumstances, the hearings conducted by the Authority are confidential, and so are not open to the public.

Are Confidentiality Provisions In Competition Law Valid?

17. Article 19(3)(b) of the Constitution of Kenya, 2010 provides that the rights and fundamental freedoms in the Bill of Rights do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter. Section 20(5) of the Competition Act, 2010 grants a person confidentiality rights in the circumstances stated therein. But those stated circumstances are not consistent with Chapter Four of the Constitution.

Right To Privacy

18. Article 31 of the Constitution of Kenya, 2010 provides that every person has the right to privacy, which includes the right not to have – (a) their person, home or property searched; (b) their possessions seized; (c) information relating to their family or private affairs unnecessarily required or revealed; or (d) the privacy of their communications infringed. The circumstances provided for in section 20(5) of the Competition Act, a disclosure adversely affecting the competitive position of any person or information that is commercially sensitive for some other reason, do not fall under any of the grounds provided for in Article 31.

Right Of Access To Information

19. On the other hand, Article 35(1)(b) of the Constitution of Kenya, 2010 provides that every citizen has the right of access to information held by another person and required for the exercise or protection of any right or fundamental freedom. And Article 40(1)(a) provides that subject to Article 65⁴, every person has the right, either individually or in

⁴ Article 65(1) of the Constitution of Kenya, 2010: *"A person who is not a citizen may hold land on the basis of leasehold tenure only, and any such lease, however granted, shall not exceed ninety-nine years."*

association with others, to acquire and own property of any description. Consequently, where a citizen of Kenya is exercising or protecting a property acquisition or ownership right, the constitutional rights of that citizen should trump over the legislative confidentiality right provided in section 20(5) of the Competition Act, 2010. And taking note that the Constitution is the supreme law of Kenya, and so is superior to the Competition Act, a citizen's right of access to information for purposes of property acquisition or ownership supersede another person's legislative right to confidentiality in the circumstances of section 20(5) of the Competition Act.

Assessing Legislative Confidentiality Provisions Against The Constitution

20. The Competition Act, 2010 was assented to on 30th December, 2010⁵, while the Constitution of Kenya, 2010 became effective on 27th August, 2010. The Competition Act was therefore enacted after the Constitution's effective date. Pursuant to Article 24(2)(a) of the Constitution, a provision enacted or amended on or after the effective date 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. The Competition Act has not specifically expressed the intention to limit the Article 50(1) right to a public hearing in the out-of-court tribunal or body that is the Competition Authority. Consequently, section 20(5) of the Competition Act, as read together with other hearing provisions in the said Act already considered above, are not valid with respect to limiting a person's right to a public hearing before the Competition Authority. Meaning that any disclosures of information granted confidentiality by the Competition Authority would still need to be made for purposes of the public hearing!
21. Reading together Article 19(3)(a) of the Constitution of Kenya, 2010, together with the limitation grounds to a public hearing contained in Article 50(8), and taking note of section 20(5) of the Competition Act, 2010, it is my holding that the grounds for confidentiality in section 20(5) do not fall under any of limitation grounds in Article 50(8). Consequently, as these grounds for confidentiality are not contemplated in this Constitution, as required by Article 19(3)(a) for a limitation to a right or fundamental freedom to be valid, any confidentiality granted by the Competition Authority must be subjugated to the superior

⁵ Article 109(1) of the Constitution of Kenya, 2010: *"Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President."*

constitutional right to a public hearing.

Legislative Confidentiality Provisions Do Not Stand

22. Therefore, taking the totality of the constitutional provisions speaking to the subject matter of any confidentiality granted by the Competition Authority grounded on section 20(5) of the Competition Act, 2010, it is my holding that such confidentiality granted cannot legally stand in the face of superior constitutional rights in Articles 50(1), 35(1)(a) and 40(1) (a) of the Constitution of Kenya, 2010. Hearings in out-of-court tribunals or bodies, except where the limitation grounds in Article 50(8) apply, must be public!

Confidentiality In International Arbitration

23. The case for public arbitrations is made not just in the law of Kenya. It is also made in the multilateral treaty that is the International Covenant for Civil and Political Rights (ICCPR), that was adopted by the United National General Assembly on 16th December, 1966 and became effective on 23rd March, 1976, and has now been ratified by 173 State parties, covering over 80% of the world's population. Article 14(1) of the ICCPR reads: “***All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.***” It is every person's entitlement to a public hearing before a competent, independent and impartial tribunal.

Summary Of Holdings

24. In summary, I hold as follows:

24.1. 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 independent and impartial tribunal or body, save where, as provided for in Article 50(8), the press and other members of the public may be excluded, where necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security.

24.2. Arbitration laws in widespread use, including the Kenyan Arbitration Act, 1995, the UNCITRAL Model Law and the New York Convention, 1958, hold no view on confidentiality in arbitration, either positive or negative. It is a matter seemingly left to disputants to sort out among themselves.

24.3. Article 2(1) of the Constitution of Kenya, 2010 provides that this Constitution is the supreme law of the Republic and binds all persons and all State organs.

24.4. Article 10 of the Constitution of Kenya, 2010 that provides that the national values and principles of governance in this Article, which include integrity, transparency and accountability, **bind** all State organs, State officers, public officers and **all persons** whenever any of them – (a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. Arbitrators, who apply or interpret law, including this Constitution, are bound by the values and principles of integrity, transparency and accountability. They must therefore conduct arbitral proceedings with integrity, transparently and accountably. This means that arbitral proceedings should be public, and not confidential.

24.5. Confidentiality provisions, such as contained in section 20 of the Competition Act, 2010, or in arbitration agreements, being inferior to constitutional provisions, and not falling under any of the public hearing limitation grounds provided for in Article 50(8) of the Constitution of Kenya, 2010, or under other limitation provisions provided for in Articles 19 and 24, do not succeed in limiting a person's Article 50(1) right to a public hearing in the resolution of a dispute capable of resolution by the application of law. Therefore, unless any confidentiality provisions said to apply to an arbitration fall under any of these constitutionally recognised limitation grounds, all arbitrations should be public.

24.6. The case for public arbitrations is also made in the International Covenant for Civil and Political Rights (ICCPR), ratified by 173 State parties, acknowledging that every person is entitled to a public hearing before a competent, independent and impartial tribunal, save for reasons of morals, public order, or national security in a democratic society, or when the interest of the private lives of parties so requires.

Conclusion

25. In conclusion, it is an observation that while confidentiality in arbitration benefits individual parties, this veil of secrecy is adverse to the public interest in the use of arbitration as a dispute resolution mechanism, for such secrecy does not stand the tests of integrity, transparency and accountability – tests that are wholly necessary in engendering public confidence in arbitration as a dispute resolution mechanism. Both the supreme law of Kenya, the Constitution of Kenya, 2010 and the ICCPR, ratified by 173 State parties worldwide, recognise a person's right to a public hearing before a competent, independent and impartial tribunal. Parties to arbitrations, and arbitral tribunals, should recognise this inherent right possessed by all persons worldwide, and have arbitrations they are involved in conducted publicly.