

Unenforceable Arbitration Agreements

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Abstract

This article looks at the legal validity of arbitration agreements in widespread use, such as provided for in the Kenyan Arbitration Act, 1995, the UNCITRAL Model Law and the New York Convention, 1958, assessing the same using the Constitution of Kenya, 2010. It finds that every person in the world has an inherent right to select the forum for dispute resolution as between a court or, if appropriate, another independent and impartial tribunal, including arbitration, with the forum selection made after a dispute has arisen and not before. Arbitration agreements that provide for arbitration for disputes that may arise are

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void to the extent that they so provide, and so are unenforceable with respect to disputes referred to arbitration prior to their arising and not separately provided for after arising. Nevertheless, as the right to select either court or arbitration proceedings does not need the consent of another person, every person in the world can institute non-consensual arbitration proceedings, just as they can with court proceedings, rendering superfluous the existence of an arbitration agreement for purposes of selecting arbitration as the forum for dispute resolution after a dispute has arisen. Arbitration agreements are therefore useful only for agreeing details with respect to the arbitration, such as the composition or jurisdiction of an arbitral tribunal, or the conduct of arbitration proceedings.

What Is An Arbitration Agreement?

1. Under section 3(1) of the Kenyan Arbitration Act, 1995, an “arbitration agreement” means 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. Under Article 7 of the UNCITRAL² Model Law, 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. Under Article II(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. The definition of “arbitration agreement” is therefore identical in both the Kenyan Arbitration Act, 1995 and the UNCITRAL Model Law, and is essentially the same as in the New York Convention, 1958.

Are These Defined Arbitration Agreements Enforceable In Kenya?

2. Are arbitration agreements, as defined in both the Arbitration Act, 1995, the UNCITRAL Model Law and the New York Convention, 1958 enforceable under Kenyan law?

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

The Supreme Law Of Kenya

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 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 invalid. Article 2(6) provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution. Therefore in Kenya, both the Arbitration Act, 1995, based on the UNCITRAL Model Law, and the New York Convention, 1958 that is part of the law of Kenya under Article 2(6), are subsidiary to the Constitution, as the Constitution is the supreme law of the Republic, binds all persons and all State organs, and whose validity or legality cannot be challenged in any State organ in Kenya.

Dispute Resolution Clause In The Multilateral Contract

4. The Constitution of Kenya, 2010, additional to being the supreme law of Kenya, is also a multilateral contract that the people of Kenya entered into among themselves on 4th August, 2010 and became effective on 27th August, 2010, defining their legal interrelationships. This multilateral contract has a dispute resolution clause in Article 50(1), which 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. It is therefore every person's right to have a dispute resolved either in court or out-of-court, provided that in either case the decision making tribunal or body is independent and impartial. It is noted that an arbitral tribunal is an out-of-court tribunal that should be independent and impartial with respect to the dispute before it for a decision.

Disputes That Have Arisen And Those That May Arise

5. The Arbitration Act, 1995, the UNCITRAL Model Law and the New York Convention, 1958 all speak to disputes or differences that have arisen and those that may arise. A dispute that

has arisen is one in existence. A dispute that may arise is not yet in existence, with no certainty that it will come into existence. A dispute that may arise is, strictly speaking, not a dispute, as it is hypothetical and not in existence.

Can Law Be Applied In Resolving A Non-Existent Dispute?

6. The Article 50(1) of the Constitution of Kenya, 2010 right to select either a court or an out-of-court dispute resolution forum can be exercised in the circumstances of the existence of a dispute that can be resolved by the application of law. Absent the existence of such a dispute, a purported exercise of the selection of dispute resolution forum right would be an exercise of a choice shorn of its substratum – an actual dispute that has arisen that can be resolved by the application of law. It would just be a moot exercise! Therefore, absent an actual or live dispute, the right of choice of dispute resolution forum cannot be exercised, as no actual or live dispute would be placed for resolution before that forum.

Attributes Of The Bill Of Rights

7. 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.

Limitations Of The Article 50(1) Right

8. Reading together Article 50(1) of the Constitution of Kenya, 2010 together with Article 19(3), a person's right of choice of dispute resolution forum, once a dispute has arisen, is subject only to the limitations contemplated in the Constitution. In Article 50(1) itself, there is indeed a limitation that is contemplated therein in the phrase **“if appropriate”**. For while any dispute that may be resolved by the application of law may be brought before a court, the same applies to another independent and impartial tribunal or body only **“if appropriate”**.

9. Article 50(2)(d) of the Constitution of Kenya, 2010 provides that every accused person has the right to a public trial before a COURT established under this Constitution, which implies that other independent and impartial tribunals or bodies do not have the jurisdiction to try accused persons. Consequently, criminal proceedings are outside the jurisdiction of other independent and impartial tribunals or bodies.
10. Also, 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. These are petitions filed in the Supreme Court to challenge the election of the President-elect within seven days after the date of declaration of the results of the presidential election. Therefore, as disputes challenging the election of a President-elect following declaration of the results of a presidential election are in the exclusive jurisdiction of the Supreme Court, independent and impartial tribunals or bodies do not have the jurisdiction to hear and determine the same.
11. Outside these two categories of disputes the Constitution has not provided an express contemplation of a limitation in the types of disputes that may be brought for resolution before independent and impartial tribunals.
12. 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. Article 50(8) therefore expressly contemplates the limitation of the Article 50(1) right to a “public” hearing in the circumstances provided for in Article 50(8). Outside these mentioned circumstances, every person has the right to a public hearing before a court or an out-of-court tribunal or body.

Limitations By Law Of Rights Within The Bill Of Rights

13. 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.

14. Article 24(2) of the Constitution of Kenya, 2010 provides that despite clause (1), a provision **in legislation** limiting a right or fundamental freedom – ... (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.

Legislation And Convention Purporting To Limit Article 50(1)

15. The definition of “arbitration agreement” in the Arbitration Act, 1995 and in the New York Convention, 1958 purports to limit the Article 50(1) of the Constitution, 2010 right of every person to select their dispute resolution forum as between a court or an out-of-court tribunal **after a dispute has arisen**. For where the said definition provides for reference to arbitration of a dispute that may arise, that reference to arbitration denies a person the choice by right of dispute resolution forum after a dispute has arisen, as the choice was made prior to the dispute arising, and that choice was arbitration. These provisions in both the Arbitration Act, 1995 and the New York Convention, 1958 purport to limit a person's choice by right of dispute resolution forum after a dispute has arisen!

Reasonable And Justifiable Test

16. Pursuant to Article 24(1) of the Constitution of Kenya, 2010, is it reasonable and justifiable to limit the Article 50(1) right to select the dispute resolution forum, after a dispute has arisen, as between a court and an out-of-court forum? The said reasons and justifications are not provided in the Arbitration Act, 1995 or in the New York Convention, 1958. Also, pursuant to Article 24(1)(d), while one party to the dispute might enjoy the legislative and convention right of selecting arbitration, prior to a dispute arising, as the dispute resolution forum, the enjoyment of this legislative and convention right prejudices the constitutional right of another party to the dispute seeking to assert its choice of a court as the dispute resolution forum – a right of choice denied such a party by the legislative and convention right of arbitration having been selected as the dispute resolution forum prior to

the dispute arising. On account that the Arbitration Act, 1995 and the New York Convention, 1958 prejudice the right at Article 50(1) of selecting the dispute resolution forum after a dispute has arisen, thereby contravening Article 24(1)(d), it is my holding that the said limitation is not reasonable and justifiable, and so is void – pursuant to being inconsistent with the Constitution as provided for in Article 2(4)!

Clarity And Specificity Test

17. Pursuant to Article 24(2)(b) of the Constitution, 2010, the Arbitration Act, 1995 is not clear and specific that it seeks to limit the Article 50(1) right to select the dispute resolution forum, as between a court and an out-of-court forum, after a dispute has arisen, neither are its provisions clear and specific about the extent of the limitation of this Article 50(1) right. Consequently, on account of inconsistency with the Constitution, the purported limitation is void, pursuant to Article 2(4)!

Derogation Of Essential Content Test?

18. Pursuant to Article 24(2)(c) of the Constitution, 2010, by the Arbitration Act, 1995 completely removing a person's right of choice of dispute resolution forum, as between a court and an out-of-court forum, after a dispute has arisen, it has contravened Article 24(2) (c), in that its limitation has derogated the Article 50(1) right of choice of dispute resolution forum from its core or essential content. The purported limitation is therefore void, pursuant to Article 2(4)!

Construction Of Laws In Existence Prior To 2010 Constitution's Existence

19. The Arbitration Act, 1995 became effective on 2nd January, 1996, while the New York Convention, 1958 became effective on 7th June, 1959. These dates were well before 27th August, 2010 when the Constitution of Kenya, 2010 became effective.
20. Section 7(1) of the Sixth Schedule of the Constitution of Kenya, 2010 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. Consequently, construing the section 3(1)

definition of “arbitration agreement” in the Arbitration Act, 1995 to conform with Article 50(1) of the Constitution, it should read:

*“**arbitration agreement**” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen between them in respect of a defined legal relationship, whether contractual or not.*

21. Article II(1) of the New York Convention, 1958 should likewise be construed to read, to conform with Article 50(1) of the Constitution of Kenya, 2010:

Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

22. In both the Arbitration Act, 1995 and the New York Convention, 1958 the phrase “**or which may arise**” has been omitted in their construed versions to conform with Article 50(1) of the Constitution of Kenya, 2010. In other words, the law of Kenya recognises arbitration agreements entered into only after a dispute has arisen, and does not recognise a purported arbitration agreement entered into prior to a dispute arising. In Kenya, lawful arbitration agreements deal only with live or actual disputes, and not with possible, prospective or speculative disputes. Purported arbitration agreements dealing with disputes that are yet to arise are invalid to the extent that they deal with disputes that are yet to arise, pursuant to Article 2(4), and must not be recognised or enforced in law to that extent!

Every Person Possesses Dispute Resolution Forum Choice Right After A Dispute Arises

23. The effect of Article 50(1) of the Constitution of Kenya, 2010, and the construction of the “arbitration agreement” definition in both the Arbitration Act, 1995 and the New York Convention, 1958 to conform with Article 50(1), is to recognise that any party to a dispute that has arisen retains its right to select its dispute resolution forum as between a court and an out-of-court tribunal or body, including an arbitral tribunal, irrespective of any provision in a purported arbitration agreement to the effect that disputes that may arise be referred to arbitration. Such purported arbitration agreements are unenforceable in Kenya on my reading of the law as expounded on above. Every person retains their inherent right as recognised in Article 50(1) to select their dispute resolution forum, after a dispute has arisen,

as between a court and an out-of-court tribunal or body, including an arbitral tribunal.

Can Party Autonomy Limit Right To Select Dispute Resolution Forum After Dispute Arises?

24. But what about the principle of party autonomy, that is a foundational principle of arbitration, espousing that any two or more parties are free to agree on the basis and manner of resolving any dispute that has arisen or may arise between or among them? Doesn't party autonomy allow the parties to enter into an arbitration agreement that provides for disputes that may arise between or among them?
25. As already noted above, 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. Article 24(1) provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law. Is the principle of party autonomy law, or is it just a long held custom deeply embedded in arbitration practice?
26. Irrespective of whether the principle of party autonomy is law or is just a custom, as far as the law of Kenya is concerned it is subsidiary to the Constitution. As already noted in Article 24(1) of the Constitution of Kenya, 2010, no right in the Bill of Rights shall be limited except by law, and only as contemplated in this Constitution, as provided for in Article 19(3)(c). This Constitution does not contemplate a person willingly limiting rights inherent in the person – rights that are contained in the Bill of Rights. For example, in the context of the Article 26(1) right to life, the Constitution does not contemplate the right of a person to willingly revoke that person's inherent right to life, thereby allowing that life to be deprived intentionally in accordance with such a revocation. Or, in the context of the Article 50(2) right to a fair trial, the Constitution not only does not contemplate the right of a person to willingly revoke that person's inherent right to a fair trial, it actually expressly declares in Article 25(c) that the said right shall not be limited.
27. Therefore, the principle of party autonomy has no capacity to limit the Article 50(1) of the Constitution, 2010 right of a person to select a dispute resolution forum after a dispute has arisen. Party autonomy is subject to the Constitution, and where limitation of the inherent Article 50(1) right to select a dispute resolution forum after a dispute has arisen is not contemplated in the Constitution, party autonomy or the willing agreement of parties may not limit the said Article 50(1) right. Parties to an arbitration agreement subject to the

law of Kenya therefore do not have the legal capacity to limit the Article 50(1) right of a person to select a dispute resolution forum after a dispute has arisen.

Implications For International Arbitration

28. Are there any implications of this legal position with respect to international arbitration?
29. Arbitrations juridically seated or placed in Kenya are subject to the law of Kenya, even though the law governing the substance of the dispute may be that of another State or jurisdiction. As the law of Kenya does not recognise any agreement to arbitrate disputes that are yet to arise, all such purported arbitration agreements are not recognised by Kenyan law to the extent that they provide for disputes that are yet to arise. An arbitration agreement for an international arbitration can be made after a dispute has arisen, with Kenya chosen as the juridical seat or place of arbitration.
30. Article 50(1) of the Constitution of Kenya, 2010, as read together with Article 19(3) (a), recognises that the right to select a dispute resolution forum after a dispute has arisen belongs to each person and is not granted by the State. It is an inherent right not granted by the people of Kenya, but recognised by the people of Kenya. It is an inherent right belonging to all humans irrespective of State or nationality. In fact, the same fair hearing right is captured in Article 14 of the International Covenant on 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. It has now been ratified by 173 State parties.

Article 50 Of Kenya's Constitution Synonymous With Article 14 Of ICCPR

31. 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.”

32. That Article 14(1) of the ICCPR speaks of everyone's ENTITLEMENT in a suit at law to a fair and public hearing by a competent, independent and impartial tribunal established by law implies that a dispute has already arisen that must be resolved at law. That it is not specified whether or not that competent, independent and impartial tribunal established by law is a court or another tribunal implies that one has a choice in the dispute resolution forum, provided the attributes of competence, independence, impartiality and establishment by law prevail in that forum. In other words, just as a person has the right to choose under Article 50(1) of the Constitution of Kenya, 2010 the dispute resolution forum, as between a court and an out-of-court tribunal, after a dispute has arisen, so also everyone is entitled, under Article 14(1) of the ICCPR, to select the dispute resolution forum, after a dispute has arisen, from among those that are competent, independent, impartial and established by law. In other words, the right to choose a dispute resolution forum, after a dispute has arisen, from among those that are competent, independent, impartial and established under law, is the same in both the Constitution of Kenya, 2010 and the ICCPR.
33. Seeing that Article 50(1) of the Constitution of Kenya, 2010 is really based on Article 14(1) of the ICCPR, that has been ratified by 173 State parties worldwide, and considering that Article 27 of the Constitution of Kenya provides for equality before the law of all persons, even as provided for in Article 14 of the ICCPR, all persons worldwide can take advantage of the Article 50(1) right to select a dispute resolution forum after a dispute has arisen. By invoking Article 50(1), a person based outside Kenya, or a person of a nationality not Kenyan, submits his or her dispute resolution to the law of Kenya, and may select the dispute resolution forum to be either a court established by or under the Constitution of Kenya, 2010, or an arbitral tribunal established under Article 50(1), such as under the Arbitration Act, 1995 as construed to conform with this Constitution. This means that the arbitral proceedings, in the case of international arbitration, would be subject to the law of Kenya, with Kenya being the juridical seat or place of arbitration.

Dispute Resolution Proceedings Instituted Without Consent After A Dispute Arises

34. It should also be noted that the right to institute dispute resolution proceedings before a court or another independent and impartial tribunal, pursuant to Article 50(1) of the Constitution of Kenya, 2010, is not contingent upon the existence of a dispute resolution agreement separate from Article 50(1). As Article 50(1) is a constitutional provision recognising the inherent right of all persons worldwide to select their dispute resolution forum after a dispute has arisen, and subjecting that dispute resolution process to the law of Kenya, and as no agreement with other disputants is required prior to instituting court proceedings, likewise no agreement with other disputants is required prior to instituting arbitral proceedings under this provision. Proceedings in the chosen dispute resolution forum, chosen after a dispute has arisen, are instituted as of right – a right not contingent on the consent of any other person, but is inherent in one's own person.

Recognition Of Non-Consensual Arbitrations Under The New York Convention

35. But are such non-consensual arbitrations and the resultant arbitral awards recognised under the New York Convention, thereby facilitating recognition and enforcement of such awards in any of the 172 State parties to the New York Convention?
36. Article VII(1) of the New York Convention provides that *“the provisions of this present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon”*. Consequently, an arbitral award arising out of a non-consensual arbitration founded upon Article 50(1) of the Constitution of Kenya, 2010 – valid under Kenyan law, and in favour of any person of any nationality or residence anywhere in the world, is indeed recognisable and enforceable in any of the 172 New York Convention States, pursuant to Article III of the Convention³, and

³ Article III of the New York Convention reads: *"Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or higher charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."*

more so where such a State is also one of the 173 States that have ratified the ICCPR, of which its Article 14(1) is the foundation of Article 50(1) of the Constitution of Kenya, 2010.

Are Arbitration Agreements Really Necessary?

37. But before concluding, there is a nagging question that needs to be addressed: why should any person anywhere in the world bother with entering into an arbitration agreement for the resolution of a dispute when the person already has a legally recognised constitutional right in Article 50(1) of the Constitution of Kenya, 2010 entitling the person the select either a court or an out-of-court forum, including arbitration, for the resolution of a dispute, after a dispute has arisen, especially when the resultant arbitral award is recognised and enforceable in the 172 State parties to the New York Convention?
38. As already noted above, arbitration agreements as provided for in the Arbitration Act, 1995, the UNCITRAL Model Law and the New York Convention, 1958 are void to the extent that they deal with disputes that may arise – pursuant to both the Constitution of Kenya, 2010 and the ICCPR. Arbitration agreements are valid to the extent of dealing only with disputes that have arisen. But since all persons worldwide already possess the inherent right to select arbitration as their mode of dispute resolution, just as they are entitled to select a court for the same, without reference to anyone else, it is not necessary to enter into an agreement for the purpose of ensuring that a dispute is resolved by arbitration, just as it is not necessary to enter into an agreement for the purpose of ensuring that a dispute is resolved in court. All a person needs to do is to institute arbitration proceedings, just as they would for court proceedings. For the Article 50(1) right that entitles one to institute non-consensual court proceedings is the same right that entitles one to institute non-consensual arbitration proceedings.
39. In such circumstances, an arbitration agreement would be useful only for agreeing details with respect to the arbitration, such as composition and jurisdiction of the arbitral tribunal, or conduct of the arbitral proceedings, but not for ensuring that the dispute is resolved by arbitration, as every person has, once a dispute has arisen, the right to institute non-consensual arbitration proceedings, just as they have the right to institute non-consensual court proceedings. In taking advantage of one's right pursuant to Article 50(1) of the Constitution of Kenya, 2010 to select arbitration proceedings, one can contact Aluochier Dispute Resolution, an arbitral institution, and have one's arbitration administered under the

Summary Of Holdings

40. In summary, the following are my holdings:

40.1. As defined in the Kenyan Arbitration Act, 1995, the UNCITRAL Model Law and the New York Convention, 1958, an arbitration agreement provides for both disputes that have arisen and disputes that may arise.

40.2. Article 50(1) of the Constitution of Kenya, 2010 contemplates only disputes that have arisen, and does not contemplate disputes that may arise. Disputes that may arise, but have not yet arisen, cannot be heard before a court or another independent and impartial tribunal or body, as they are not yet in existence.

40.3. Article 14(1) of the ICCPR likewise contemplates only disputes or suits at law that have arisen, and does not contemplate those that may arise. Disputes that may arise, but have not yet arisen, cannot be brought in a suit at law before a competent, independent and impartial tribunal, as they are not yet in existence.

40.4. In Kenya the supreme law is the Constitution of Kenya, 2010, and it binds all persons and all State organs.

40.5. Attributes of the fair hearing right captured by Article 50(1) of the Constitution of Kenya, 2010 can be limited as contemplated in this Constitution, including by subsidiary law that is compliant with the limitation provisions in Article 24(1) and (2) of this Constitution.

40.6. Limitations to Article 50(1) of the Constitution of Kenya, 2010 that are contemplated in this Constitution include – (a) out-of-court tribunals having no jurisdiction or competence to hear and determine criminal proceedings or election dispute proceedings challenging the election of a President-elect following the declaration of the results of a presidential election; and (b) limitation of the right to a public hearing in the circumstances provided for in Article 50(8), which are similar to those provided for in Article 14(1) of the ICCPR, and include the protection of witnesses or vulnerable persons, morality, public order or national security.

40.7. The legal rights provided for in the Arbitration Act, 1995 and the New York

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Convention, 1958, allowing for arbitration agreements covering disputes that may arise, purport to limit the Article 50(1) of the Constitution of Kenya, 2010 right to select the dispute resolution forum after a dispute has arisen to the extent of completely denying a person the right to choose a court as the dispute resolution forum. As these purported limitations are in contravention of Article 24(1)(d) – prejudicing the right of persons to enjoy their dispute resolution forum selection right after a dispute has arisen, Article 24(2)(b) – not clear and specific that they seek to limit the right to select a dispute resolution forum after a dispute has arisen and the extent of that limitation, and Article 24(2)(c) – purporting to completely oust the right of choice of dispute resolution forum after a dispute has arisen, they are indeed invalidated by Article 2(4) and are void for purposes of the law of Kenya to the extent that they provide for disputes that may arise.

40.8. Section 7(1) of the Sixth Schedule of the Constitution of Kenya, 2010 provides for construing laws existing at the time this Constitution became effective in such a manner as to conform with this Constitution. Consequently, both the Arbitration Act, 1995 and the New York Convention, 1958, are construed to omit the phrase **“or which may arise”** in reference to disputes within the definition of an arbitration agreement. Arbitration agreements recognised under the law of Kenya concern only disputes that have arisen, and do not concern disputes that may arise, as these are not consistent with the Article 50(1) right to select a dispute resolution forum after a dispute has arisen.

40.9. Despite the foundational arbitration principle of party autonomy, parties to an arbitration agreement do not have the capacity to limit the Article 50(1) of the Constitution, 2010 right of a party to select its dispute resolution forum after a dispute has arisen, as such limitation is not contemplated in this Constitution. Parties to an arbitration agreement must therefore craft their agreement to remain wholly within the boundaries of the law of Kenya.

40.10. In the context of international arbitration, non-Kenyans or non-Kenyan residents seeking to exercise their right of choice of dispute resolution forum after a dispute has arisen, choosing international arbitration juridically seated or placed in Kenya rather than a Kenyan court, irrespective of any contrary provision in any dispute resolution agreement that they may have entered into, can indeed institute non-consensual arbitration proceedings subject to the law of Kenya, just as they can indeed institute non-consensual court proceedings in a court in Kenya if they so prefer.

40.11. The effect of Article 50(1) of the Constitution of Kenya, 2010, in the context of

dispute resolution, is that any person anywhere in the world has the right to select Kenya as the juridical place or seat of arbitration once a dispute has arisen – a dispute that can be resolved by the application of law, irrespective of whatever prior dispute resolution agreement that exists at that time. As Kenya is a New York Convention, 1958 State, and Article VII(1) of the Convention recognises arbitrations and arbitral awards recognised by law on account of legal rights held by parties, arbitral awards made in the juridical seat or place of Kenya are recognised and enforceable in all 172 State parties to the New York Convention, covering over 95% of the world's population.

40.12. As every person in the world, as recognised by Article 50(1) of the Constitution of Kenya, 2010, possesses the inherent right to select arbitration as the forum for the resolution of any dispute that has arisen that is capable of resolution by the application of law, just as they possess the right to select a court as that forum, it is not necessary to have an arbitration agreement prior to instituting arbitration proceedings, provided arbitration proceedings are instituted with Kenya as the juridical place or seat of arbitration. The value of any arbitration agreement entered into after a dispute has arisen lies in specifying details pertaining to the arbitration, such as the composition or jurisdiction of the arbitral tribunal, and the conduct of the arbitral proceedings.

Conclusion

41. Concluding, it should be noted that Article 50(1) of the Constitution of Kenya, 2010 acknowledges the inherent right of every person anywhere in the world to select the dispute resolution forum, as between a court in Kenya and an out-of-court independent and impartial tribunal or body subject to the law of Kenya, after a dispute has arisen. This right has not been limited by the inferior legal provisions in the Arbitration Act, 1995 and the New York Convention, 1958 purporting to give legal effect to agreements to refer to arbitration disputes that may arise but have not yet arisen, as it is the Constitution of Kenya, 2010 that is the supreme law of Kenya, and binds all persons and all State organs. Instead, complying with the mandatory provision in section 7(1) of the Sixth Schedule of the Constitution, and construing both the Arbitration Act and the New York Convention to conform with this Constitution, the phrase “**or which may arise**” in relation to disputes is omitted from both the Arbitration Act and the New York Convention, thereby providing for arbitration agreements to cover only disputes that have arisen and not cover disputes that may arise.

Additionally, as Article 50(1) provides every person with the right to non-consensual arbitration, it is not necessary to have an arbitration agreement in instituting legally valid arbitrations resulting in arbitral awards that are recognised and enforceable in all New York Convention States.