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Sessional Paper No. 4 of 2024

on

The National Alternative Dispute Resolution Policy

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Acronyms

ACRWC	African Charter on the Rights and Welfare of the Child
ADR	Alternative Dispute Resolution Mechanism/s
AJS	Alternative Justice System/s
CAJ	Commission on the Administration of Justice
CAM	Court Annexed Mediation
CIPK	Council of the Imams of Kenya
COFEK	The Consumers Federation of Kenya
CPA	Civil Procedure Act
CPC	Constituency Peace Committee
CSO	Civil Society Organization
DRB	Dispute Resolution Board
DRC	Dispute Resolution Mechanism
ECCEC	Electoral Code of Conduct Committee
FKE	Federation of Kenya Employers
ICCPR	International Convention on Civil and Political Rights
ICESCR	International Convention on Economic Social and Cultural Rights
ICMC	Institute of Chartered Mediators and Arbitrators
IEBC	Independent Electoral and Boundaries Commission
JTF	Judiciary Transformation Framework
KAM	Kenya Manufacturers Association
KBA	Kenya Bankers Association
KEPSA	Kenya Private Sector Alliance
KNCCI	Kenya National Chamber of Commerce and Industry
LSK	Law Society of Kenya
MTP	Medium Term Plan
NCIA	Nairobi Centre for International Arbitration
NCIC	National Cohesion and Integration Commission
PAC	Practice Area Committee
PLWD	Persons Living With Disability
PPDT	Political Parties Disputes Tribunal

SAGA	Semi-Autonomous State Agency
SDG	Sustainable Development Goals
SDRC	Strathmore University Dispute Resolution Centre
STF	Sustaining Judicial Transformation Framework
TDRM	Traditional Dispute Resolution Mechanism
UDHR	Universal Declaration on Human Right
UNCITRAL	United Nations Commission on International Trade Law
UNCRC	UN Convention on the Rights of the Child

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Executive Summary

On the 21st of March, 2023 the Cabinet approved this policy proposal for a National Policy on Alternative Dispute Resolution.

The policy development was initiated on the 27th day of January, 2020, by the then Honourable Attorney-General (Rtd.) Justice P. Kihara Kariuki who appointed a National Steering Committee (the Committee) to formulate a national policy on Alternative Dispute Resolution (ADR). For a period of One year the Committee conducted comparative research, and targeted consultation with lead stakeholders and experts in ADR. The work of the Committee benefited greatly from the extensive work accomplished through the joint efforts of the Nairobi Centre for International Arbitration (NCIA) and the Judiciary in developing the validated draft policy on alternative dispute resolution. In making this policy proposal, acknowledgment is made recognizing the contribution by agencies, non- state actors and the wide body of stakeholders and public consulted throughout the Republic and giving their input by appearances at public participation forums and submitting written memoranda.

The work of the Committee culminated in this Policy proposal – *National Policy on Alternative Dispute Resolution* which serves as a unified framework for implementation for ADR in Kenya.

The policy is anchored in the Constitution of Kenya, 2010 (CoK), International and Regional Human Rights instruments; Sustainable Development Goal (SDG) 16.3 on *the rule of law and access to justice*; the *political pillar of Kenya Vision 2030*; and the *Judiciary's 'Sustaining Judiciary Transformation Framework'*.

The rationale for this policy consists of the following facts:

(a) Article 48 of the CoK enshrines *the right of access to justice* for all Kenyans. The potential to realize this objective through use of ADR cannot be overemphasized given research shows that 90-96% of Kenyans access justice through ADR mechanisms.

(b) There is a nexus between dispute settlement, and attractiveness of an economy for Foreign Investment. The enforcement of contracts index in the World Bank Country ranking on "Ease of Doing Business" measures a Country's attractiveness in settling of disputes. Kenya's ranking on the World Bank 'Ease of Business Index' 2017-2019 rose to position three in Sub-Saharan Africa attributable to amongst other factors improvement in resolution of disputes through the Court Annexed Mediation program of the Judiciary.

(c) ADR has the potential to divert focus from litigation and thereby complement and de-clog the court system.

(d) Through its reconciliatory and mostly non-adversarial approach, ADR is a catalyst to peace and cohesion in the Country.

(e) ADR is a self-financing apparatus of dispute resolution where neutral third parties are paid by users of the service. From a cost-benefit perspective, supporting ADR development is beneficial to the Government of Kenya as it reduces the burden on the exchequer.

(f) Inadequate access to justice is negatively correlated to development.

(g) High transactional costs of litigation disempower and impoverish the indigent who cannot afford the means for redress.

The purpose of this policy therefore is to actualize the ideals of Articles 1, 10, 48, 67(2)(f), 113, 159(2) and 189(4) through a robust framework for strengthening, guiding and supporting the coordinated growth of ADR practice and uptake in Kenya. In so doing, it gives the Kenyan public the opportunity to resolve disputes through means fashioned to respond to the real and practical world in which they live and socialize. It aims to achieve this by proposing a balanced and necessary co-existence of ADR and the court system, while at the same time maintaining the autonomy of ADR as a distinct dispute resolution system.

The policy presents the current status of the ADR system in Kenya, and in discerning the problem identifies challenges, needs and gaps including: lack of uniform understanding of key ADR terms and concepts; inadequate institutional, legal and policy infrastructure; inadequate governance and regulatory mechanisms; weak intra-sector co-ordination and linkage with the court system; inadequate availability, accessibility and demand of ADR services; inadequate capacity within ADR practice areas; inadequate resources; lack of harmonized standards; and weak sectoral governance andoversight among other factors.

This Sessional Paper proposes several Government of Kenya commitments towards addressing these challenges and gaps, towards development of ADR including adapting an inclusive approach to the definition and scope of ADR. The policy provisions include the following interventions:

(a) Situating the oversight mandate for the sector in a national umbrella agency.

(b) Establishing Practice Area Committees (PACs) to champion growth and governance of respective areas of practice.

(c) Promoting self-regulation and governance of the sector.

(d) Enactment of an omnibus Dispute Resolution Act or in the alternative autonomous practice-based legislation which shall be the framework legislation for the ADR sector.

(e) Encouraging the establishment of an ADR Centre at the Judiciary as the focal point for linkage and co-ordination of the Judiciary with the ADR sector, and promotion of ADR in the Judiciary.

(f) Encouraging the establishment of a special ADR settlement agreements' registry and depository at the judiciary for the registration and depositing of ADR awards and settlements.

(g) Proposing strategies and modalities for the promotion of availability, accessibility, and uptake of ADR in the Country including compulsory subjection of disputes to ADR, and compulsory pre-court ADR information sessions.

(h) Inculcating ADR as a way of life through embedding, integrating, and mainstreaming it in all spheres of life such as through school curricula and agents of social change.

(i) Establishing regional ADR Centres at the locational level, hosted by administration unit offices in a collaborative initiative under the Ministry responsible for Interior and Co-ordination of National Government.

(j) Establishing programmes for capacity development; quality control; research and knowledge management and leveraging of Information Communication Technology (ICT) for ADR development.

(k) Developing a National Action Plan for the implementation of the policy, a financing strategy for it, and a monitoring and evaluation framework for progress monitoring.

This policy document is divided into five parts:

Part 1: Presents the background, and status of ADR in the Republic of Kenya which form the policy context.

Part 2: Presents the policy problem, that is, the challenges, gaps and needsin the ADR sector.

Part 3: Articulates the policy strategic framework, stipulating the rationale, vision, mission, objectives, risks, and assumptions of the policy.

Part 4: Presents Government of Kenya commitments presented in policystatements mapped on identified problem areas.

Part 5: Presents the policy implementation arrangements.

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THE POLICY DEVELOPMENT PROCESS

This policy has been developed through a process initiated in 2018 with the commissioning of a Baseline Survey[1] on ADR in Kenya as a background document for the policy formulation process. This process collected and collated data, material and literature used to conduct a thorough situational analysis of the state of ADR in Kenya.

The findings and observations made in the Baseline Survey informed the National Alternative Dispute Resolution Policy Memorandum[2] drawn up in April, 2019. The memorandum spelt out the parameters for the proposed policy as well as the formulation process. A Policy Formulation Consultation Paper[3] was developed that would form the key resource for a participatory policy formulation Workshop held in Naivasha in July, 2019. This Workshop drew participants from a wide representation of the ADR sector stakeholders nationwide. The core product of the Workshop deliberations was a Draft Zero policy document.

The Zero Draft Policy was subjected to further consultations with discussions by over 600 stakeholders in eight representative and participatory forums held in Western, Nyanza, Rift Valley, Central, Eastern, North Eastern, Coast and Nairobi regions[4]. The result of those consultations was refined Draft Policy which was thereafter subjected to a National Validation Forum[5] with wide representation of stakeholders. The Draft Policy was further improved with the comments from the Validation Forum to produce the Green Paper or validated version of the proposed ADR policy[6].

The Green Paper was submitted to the then Hon' Attorney-General who appointed the National Steering Committee for Formulation of the ADR

[1] See ADR Baseline Assessment Situation Analysis Report available at NCIA.https://www.ncia.or.ke/arbitration---downloads/

[2] See National Alternative Dispute Resolution Policy Memorandum available at https://www.ncia.or.ke/arbitration---downloads/

[3] See Policy Formulation Consultation Paper available at https://www.ncia.or.ke/arbitration---downloads/

[4] See stakeholder engagement report available athttps://www.ncia.or.ke/arbitration---downloads/

[5] See National Validation Forum Report available athttps://www.ncia.or.ke/arbitration---downloads/

[6] Available at https://www.ncia.or.ke/wp---content/uploads/2019/08/ZERO---DRAFT---NATIONAL---ADR---POLICY_P.pdf

policy (the Steering Committee). The mandate of this Steering Committee is set out in Clause 3 of the constitutive notice published in the *Kenya Gazette*[7]. The Steering Committee conducted comparative research, and targeted consultation with lead stakeholders and experts in ADR and proposed reforms to the legal and institutional framework as well appropriate amendments to the legal instruments with a view to harmonize ADR Practice in Kenya. This exercise resulted in the proposal for a National Alternative Dispute Resolution Policy.

The proposal for a National Alternative Dispute Resolution Policy was tabled and approved by the Cabinet on 21st March 2023. The Sessional Paper No. 4 of 2024 on the National Alternative Dispute Resolution Policy consolidates the Government of Kenya Policy on Alternative Dispute Resolution.

7 Gazette Notice No 678 dated 27th January 2020.

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1. POLICY CONTEXT

1.1 Background

1.1.1 ADR is a major apparatus for access to justice

ADR is commonly defined as any process or procedure for resolving a dispute other than a judicial determination by a judge/magistrate in a statutory court. To the extent that ADR results in a resolution or settlementof disputes, it is considered an apparatus for access to justice.

Access to justice is a fundamental right that generally guarantees every person access to an independent justice apparatus and an impartial process when that individual's liberty, property or other interests are at stake. It entails the availability of accessible, affordable, timely and effective means of redress and remedies through court or non-court processes and institutions of justice in compliance with constitutional and international human rights standards.

From a human rights perspective, *it is an enabling right* that helps individuals enforce other rights. From a development perspective *it is an important means to prevent and overcome* human poverty as it broadens and strengthens disadvantaged people's choices to seek and obtain a remedy for grievances and increases their agency to procure for themselves the goods and abilities, they need to live decent lives.

From a governance perspective access to justice *is an essential element* of the rule of law and democracy. The rule of law is essential for democracy and economic growth and is the backbone of human rights, peace, security, and development. It is the principle in governance that requires that all persons, institutions, and entities, including the state itself are accountable to the properly promulgated laws of the Country. The justice sector is critical to the rule of law because the legitimacy of any government depends on the fair and impartial administration of laws.

From an economic perspective, access to efficient systems of dispute resolution facilitates timely enforcement of contracts hence enabling realization and protection of property rights, and limits interruption to business processes. The restraint on government from predation on private property is also essential to economic performance, as is security, fairness,equality, cohesion, and effective application of the law which are products of the rule of law.

Under the logic of Article 159 (2) (c) of the CoK, the apparatus which facilitates access to justice consists of both the court system, ADR mechanisms, and the Alternative Justice Systems (AJS) traditional, informal and other mechanisms to borrow the definition proffered in the AJS Policy framework[8]. Justice in post-independence Kenya has however mostly been associated with the court systems. Studies have nevertheless established that only 4-10% of Kenyans access justice through the courts, and 90-96% do so through alternative dispute resolution mechanisms.[9][10] As such ADR is an essential pillar in *the project of access to justice* as it serves a majority of the population. It is also globally viewed as a commercial necessity that provides a range of advantages over litigation in resolving both domestic and international commercial disputes.

The growing acknowledgement of the utility of ADR to the delivery of justice has increased the uptake and infrastructure of ADR in Kenya especially after the promulgation of the 2010 Constitution which created a constitutional legitimacy base for its promotion under Articles 1, 10, 48, 67(2)(f), 113, 159(2) and 189(4)[11].

This growth has however been sporadic and unregulated, leading to fragmentation, duplication, inconsistency of standards and confusion among service providers over various sector issues such as ADR qualifications, standards, practices, inconsistency in the use of ADR terms, and inter-disciplinary competition among other challenges identified in thepolicy.

1.1.2 The normative framework for ADR

The normative framework for ADR has grown significantly over the last ten years after the promulgation of the CoK, 2010, as evidenced by

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8 https://www.judiciary.go.ke/download/alternative---justice---systems---baseline--- policy---and---policy---framework/

9 https://www.judiciary.go.ke/download/justice---needs---and---satisfaction---survey---in--- kenya---2017/

10 Legal Resources Foundation Trust, (2005),'*Balancing the Scales: A Report on Seeking Access to Justice in Kenya,*' Nairobi; Chopra, T., (2008), *'Building Informal Justice in Northern Kenya'* Legal Resources Foundation Trust, Research Paper, Nairobi, 2008; Chopra, T., (2007), '*Promoting Women's Right by Indigenous Means. An Innovative Project in Kenya,*' Justice for the Poor /The World Bank, Briefing Note, Vol.1.2.

11 http://kenyalaw.org/kl/index.php?id=398

provisions in many laws[12] that support and promote the use of ADR and that establish trigger and referral mechanisms in different sectors. Frameworks for internal rules of procedure for key areas of practice have also significantly developed such as in mediation and arbitration.

(a) Constitutional provision

Read in context Articles 1 of CoK provides for the sovereignty of the people of Kenya; Article 10 provides for the National values and principle of governance and particular reference to-human dignity; equity; social justice; inclusiveness; equality; human rights; non-discrimination; protection of the marginalized; good governance; integrity; transparency; accountability; rule of law; and participation of the people and Article 48 which enshrines *the right of access to justice* for all Kenyans.

Of direct relevance to ADR is Article 159(2)(C) which stipulates how judicial authority is to be exercised by stating: '*In exercising judicial authority, the courts and tribunals shall be guided by the following principles: justice shall be done to all irrespective of status; justice shall not be delayed; alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)* which states that ' *justice shall be administered without undue regard to procedural technicalities';* and that *'the purpose and principles of this Constitution shall be protected and promoted'*. Article 159 (3) provides for the promotion of traditional dispute resolution by providing that: '*Traditional dispute resolution mechanisms shall not be used in a way that: contravenes the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with this Constitution or any written law.'*

Several other provisions including Article 67(2)(f) which mandates the National Land Commission to use TDRM, promote the use of ADR. Through these provisions, the Constitution legitimizes, and opens wide the scope for the use of ADR in dispute resolution including traditional dispute resolution mechanisms.

[12] Available at the Kenya Law Reports Website at http://kenyalaw.org:8181/exist/kenyalex/index.xql

Article 113 provides for a mediation committee consisting of equal numbers of members of each house to attempt to develop a version of a Bill that both Houses will pass.

Article 189(4) provides that national legislation shall provide procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.

Article 252(1)(b) provides that each Constitutional Commission and Independent Offices has the powers necessary for conciliation, mediation and negotiation.

(b) International instruments

Access to justice is a right recognized under the major international and regional human rights instruments including: The Charter of the United Nations, the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (CESCR), the International Covenant on Civil and Political Rights (ICCPR), the United Nations Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC).

The ICCPR for instance Article 2 (3) requires that each State Party to the Covenant undertakes: '*To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity'; 'To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy'; and 'To ensure that the competent authorities shall enforce such remedies when granted'.*

There has further been increasing normative development on ADR at the international level, especially around arbitration resulting in many international and regional instruments. These are relevant to Kenya as it has ratified some of them, and they anchor the practice of international arbitration in the Country. For instance, Kenya acceded to the New York Convention on Enforcement of Foreign Arbitral Awards (New York

Convention)[13] on February 10, 1989. There have also been significant developments in bilateral treaties and soft law developments in ADR at the international level. Kenya has also signed the East African Community Treaty which provides for arbitration as one of the available means of settling disputes (Article 32)[14]. Furthermore, in its enactment of the Arbitration Act, 1995 Kenya adopted verbatim the United Nations Commission on Trade Law (UNCITRAL) Model Law on Arbitration[15].

In the area of mediation, the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention)[16] came into force on 20th December, 2018. This Convention focuses on increasing the enforceability of settlement agreements that arise out of mediation. It serves as an important step towards encouraging cross-border mediation by providing parties with the certainty of a framework for enforcement, and lending legitimacy to the process.

This instrument is pivotal for the development of international mediation. For Kenya, having already set the pace in the development of legal and institutional infrastructure for international ADR by the establishment of the NCIA, the Convention should serve as an indication of the next frontier for the Country in this endeavour. It is therefore imperative that the Country considers ratification and develops the requisite infrastructure for international mediation in order to keep Kenya in the leadership of international ADR on the Continent.

(c) National legislation

The Civil Procedure Act (CPA) and Rules, Chapter 21 contain provisions with some of the greatest potential for triggering ADR in the Country. They provide an opportunity for parties to a matter before the court to

[13] Available at https://www.uncitral.org/pdf/english/texts/arbitration/NY---conv/New---York---Convention---E.pdf

[14] Available at https://www.eacj.org//wp---content/uploads/2012/08/EACJ---Treaty.pdf

[15] Available at https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration [16] Available at https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements

utilize arbitration (section 59); mediation (section 59A, 59B & 59D)[17]; and any other method of alternative dispute resolution where the parties agree, or the court considers the case suitable for such referral. It is under these provisions that the Court Annexed Mediation, and the Mediation Accreditation Committee is established. Furthermore, Order 46 Rule 20 ofthe Civil Procedure Rules provides that the Court may utilize at its discretion any form of alternative dispute resolution.

The Arbitration Act, of 1995 and the Arbitration Rules of 1997 form the principal legal framework governing Arbitration in Kenya**.** The Nairobi Centre for International Arbitration Act No. 26 of 2013 establishes the Nairobi Centre for International Arbitration (NCIA) as a Centre for the promotion of international commercial arbitration and other alternative forms of dispute resolution.

Other important laws that promote the use of ADR include: The Intergovernmental Relations Act, 2012; the Land Act, 2012; The Employment and Labour Relations Act, 2011; Environmental and Land Court Act, 2011; Small Claims Act, No.2 of 2016; and The Commission onthe Administration of Justice Act, 2011 among others.

1.1.3 The National Development Context

Access to justice is considered a core pillar in development at all levels andis provided under all development blueprints. The (SDGs) that constitute Agenda 2030 are the global development policy blueprint. Agenda 2030 isa commitment by the global community to eradicate poverty and achieve sustainable development by 2030, world-wide, ensuring that no one is left behind. Kenya strategically maps each of the 17 SDGs with Kenya Vision 2030 Medium Term Plans (MTPs) objectives to ensure the global development framework and its implementation are directly linked towards achieving both Vision 2030 and SDGs. SDG 16.3 commits the international community to *promote the rule of law at the national and international levels and to ensure equal access to justice for all by 2030*.

Kenya Vision 2030 primarily aims to transform Kenya *into a globally competitive and prosperous nation with a high quality of life*. Under its political pillar, the Vision pinpoints specific strategies that must be

[17] Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/CivilProcedureAct.PDF

employed to ensure enactment and implementation of a policy, legal and institutional framework vital for promoting and sustaining fair*, affordable and equitable access to justice, including increasing service availability and access (or reducing barriers) to justice*. The MTP III outlines the main policies, legal and institutional reforms as well as programmes and projects that the Government plans to implement during the period 2018 – 2022.

The Judiciary's current strategy document, the 'Sustaining Judicial Transformation' (SJT) has as a core goal '*'a people-focused delivery of justice'*, with the specific objective to among others '*increase access to and expeditious delivery of justice'*. One key strategy towards this goal is *'promoting and facilitating Alternative Dispute Resolution (ADR)'*.

1.2 ADR Sector Overview

ADR and AJS predate conventional court adjudication of disputes in Kenya. In the pre-colonial era societies had established systems of resolution of communal conflict. In colonial Kenya, these systems co-existed with the judicial system albeit viewed as inferior forums and often suppressed. In post-colonial Kenya, the emergence of multiple urban nationalities and contemporary commerce was accompanied with adaptation of conventional forms of ADR. These latter forms of ADR have continued to define a space in the larger scheme of resolution of disputes. There is now a robustly developing sector catapulted by the promulgation of the 2010 Constitution.

1.2.1 Types of ADR mechanisms

The different mechanisms of ADR in Kenya are differentiated by the role of the third party or the 'neutral' in the ADR process. Based on this element, ADR practice can be classified along three primary types of mechanisms: *adjudication-based process; recommendation-based process and facilitation-based processes*. In some instances, there may be a combination of these processes.

In *adjudication-based processes*, the role of the neutral is to decide for the parties after some form of hearing or decision-making process. That decision is binding on the parties either by consent or by force of law. In these processes preserving the relationship of the parties is not an important consideration of the parties. Mechanisms and processes falling in this classification in Kenya include arbitration, expert evaluation, adjudication, and tribunals.

In *recommendation-based processes*, the neutral makes suggestions to the parties on how the dispute should be resolved. Although the parties are free to reject these recommendations, the neutral party's position and influence can be highly persuasive. Examples of mechanisms and processes falling in this classification in Kenya are conciliation and early neutral evaluation. In these processes preserving the relationship of the parties is an important consideration of the parties.

In *facilitation-based processes*, the neutral party has no formal role in the substantive decision making on how to resolve the dispute as that responsibility rests with the parties themselves. The neutral's role is to set up the process, merely facilitating the parties' communication towards decision making. Mechanisms and processes falling within this classification that are practiced in Kenya include: mediation; stakeholder facilitation; dispute resolution boards, and ombudsman processes, although the latter two sometimes combine facilitation and adjudication-based processes. In these processes, preserving the relationship of the parties is an important consideration of the parties.

Hybrid mechanisms is a growing field in ADR which allows combinations of different, tailor-made processes that are better suited to the circumstances of each dispute and the interests of the parties involved. In *hybrid mechanisms*, providers utilize creative adaptations and/or combinations of adjudication, recommendation, and facilitation processes, depending on the nature of the dispute and circumstances of the matter.

In Kenya, AJS utilizes hybrid ADR processes. Some major ADR providers who also utilize hybrid mechanisms in Kenya are the local administration and faith-based providers. Other mechanisms applied in Kenya include *convening, neutral fact finding, private judging, and peer review panels,* among others. The mechanisms that are most widely utilized in the Country are: negotiation, conciliation, mediation, and arbitration. This policy is an opportunity to harness the existing mechanisms and develop those that are in the embryonic stage and integrate them to provide a milieu of choice to parties in dispute.

1.2.2 The use of ADR practice in different sectors

Triggers for the practice of ADR have been established mostly by legislation in various key sectors in the Country, and ADR is already being practiced in most of those sectors. These sectors include electoral; commercial; family; environmental; land; taxation; energy; construction; employment and labour; and in criminal justice, among others.

(a) ADR in Electoral Justice

The Second Schedule of the Elections Act provides for the establishment of various mechanisms for ADR including the Electoral Code of Conduct Enforcement Committee (ECCEC); and the Constituency Peace Committees (CPCs). In addition, section 23 of the Schedule provides that all parties must outline the internal political party dispute resolution mechanisms. Some of these mechanisms such as the ECCEC are already operational and were instrumental in dispute resolution in the 2017 elections.

(b) ADR in family law

Section 68 of the Marriage Act provides for mediation and conciliation of disputes in customary marriages. Under the Children's Act, 2001, the office of the Director of Children's Services is among other things empowered to mediate family disputes involving children, and their parents, guardians or other persons who have parental responsibility in respect of the children, and to promote family reconciliation. Court Annexed Mediation, the National Legal Aid Services (NLAS), and Civil Society Organizations (CSOs) such as FIDA(K), CRADLE, and AJS also apply mediation and conciliation in family matters.

(c) ADR in the Commercial Sector

Arbitration under the Arbitration Act, 1995 is the foremost mechanism of ADR that is utilized in the commercial sector. Mediation is also fast becoming widely used in the sector. Legal and institutional infrastructure for commercial arbitration has grown significantly in recent years as evidenced by the establishment of the NCIA. Mediation infrastructure supporting commercial mediation includes the Court Annexed Mediation and NCIA which are actively promoting and utilizing it. ADR has been embraced in the commercial sector as it facilitates faster and confidential resolution of disputes hence limiting interruption to business processes.

(d) Consumer protection

The Consumer Protection Act, 2012 provides that after a dispute over which a consumer may commence an action in the High Court arises, the consumer, the supplier and any other person involved in the dispute may agree to resolve the dispute using any procedure that is available in law. The Act also established the Kenya Consumers Protection Advisory Committee whose functions include among other things: creating or facilitating the establishment of conflict resolution mechanisms on consumer issues, and investigation of any complaints received regarding consumer issues, among

other things.

(e) Taxation

The Tax Appeals Tribunal Act, 2013 was enacted to make provision for the establishment of a tribunal for: the management and administration of tax appeals; and connected purposes. Notably, section 28 of the Act provides that parties may*, at any stage during proceedings, apply to the tribunal to be allowed to settle the matter out of the tribunal, and the tribunal should grant the request under such conditions as it may impose*. Also, under the Tax Procedures Act, tax disputes can be resolved through ADR except if: the settlement would be contrary to the Constitution, the revenue laws or any other enabling laws; the matter borders on technical interpretation of law; it is in the public interest to have judicial clarification of the issue; there are undisputed judgments and rulings; or a party is unwilling to engage in ADR process.

(f) ADR in Environmental disputes

Traditional conflict resolution mechanisms have been employed for a long time in resolving environmental conflicts where the council of elders, peace committees, land adjudication committees and local environmental committees play a pivotal role in managing conflicts. *Mediation* is the most utilized method. The CoK provides for the encouragement of communities to settle land disputes through recognized local community initiatives consistent with the CoK, and communities commonly do so. Further, section 20 of the Environment and Land Court Act, 2011 allows the court to adopt and implement on its own motion, with the agreement of or at the request of the parties any other appropriate means of alternative dispute resolution including conciliation, mediation, and traditional conflict resolution mechanisms in accordance with Article 159(2)(c) of the Constitution. Where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court is mandated to stay proceedings until such condition is fulfilled.

(g) Land disputes

One of the functions of the National Land Commission established under Article 67(2)(f) of the CoK is to encourage the application of traditional conflict resolution mechanisms in land conflicts. section 4 of the Land Act 2012 lays down the guiding values and principles of land management and administration which include: the encouragement of communities to settle land disputes through recognized local community initiatives; and alternative

dispute resolution mechanisms in land dispute handling and management. Along the same lines, section 39(1) of the Community Land Act, 2016 provides that a registered community may use alternative methods of dispute resolution. Most of these communities utilize ADR to resolve their land-based disputes.

(h) ADR in Civil Justice

The bulk of ADR services are provided within the civil justice area, and mostly by private 'free standing' or institutional ADR service providers with and without referral from the court system. The Civil Procedure Act and Rules creates the opportunity for court referred ADR for matters already before the court. The court system also has created legislative imperatives for court promoted ADR. Section 26 (1) of the High Court (Organization and Administration) Act, 2015 for instance provides that *'in civil proceedings before the Court, the Court may promote reconciliation amongst the parties thereto and shall encourage and permit the amicable settlement of any dispute'*.

Section 26 (3) of the Act further provides that: '*nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution'*. Further, section 26 (4) provides that: *'Where an alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall by order, stay the proceedings until the condition is fulfilled'*.

(i) ADR in Criminal Justice

Court referred ADR is also enabled by section 176 of the Criminal Procedure Code which provides for the promotion of reconciliation. Reconciliation is promoted in proceedings for common assault, any other offence of a personal or private nature not amounting to a felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court. Courts have however taken bold steps to go beyond the jurisdictional scope of section 176 and have allowed ADR through TDRM even in felonious matters as witnessed in the murder cases of *Republic v Mohamed Abdow Mohamed [2013] eKLR*,[18] and *Republic v Ishad Abdi Abdullahi [2016] eKLR*[19]. Recon ciliation efforts must be initiated before the Court makes its final decision or discharges its duty in the matter.

[18] Available at http://kenyalaw.org/caselaw/cases/view/88947/

[19] Available at http://kenyalaw.org/caselaw/cases/view/128857

The use of plea-bargaining has also been promoted by courts and Office of the Director of Public Prosecutions (ODPP) as provided for under section 137A of the Criminal Procedure Code and further facilitated by the Criminal Procedure (Plea Bargaining) Rules, 2018. A plea bargain is an agreement between a defendant and a prosecutor, in which the defendant agrees to plead guilty or ''no contest'' (*nolo contendere*) in exchange for an agreement by the prosecutor to drop one or more charges, reduce a charge to a less serious offense or recommend to the judge a specific sentence acceptable to the defence.

A 'no contest' plea is a plea used in criminal proceedings as an alternative to a guilty or not guilty plea, whereby the defendant neither disputes nor admits to doing the crime. It literally means 'I do not wish to contend. The courts have also been using reparation and reconciliation, and increasingly diversion in juvenile matters amongst other forms of ADR, with the only challenge being that parties sometimes make the request too late in the process. Magistrates also utilize the insights provided by social context, and pre-bail reports from probation and children's officers' reports to screen the cases that can be settled by ADR and to encourage parties to settle certain matters out of court.

(j) ADR in Labour and Employment

The Employment and Labour Relations Court Act, 2011 contains provisions allowing the Court to stay proceedings and refer the matter to conciliation, mediation, or arbitration. It also provides that the court may adopt alternative dispute resolution and traditional conflict resolution mechanisms as envisaged in Article 159 of the Constitution.

(k) ADR in the Energy Sectors

The Energy (Energy Management) Regulations, 2012 provide that where a dispute arises between an energy facility owner or occupier and the energy auditor, the dispute shall be referred to the Commission for determination. A person aggrieved by a decision of the Commission may appeal to the Energy Tribunal. The Energy (Complaints and Dispute Resolution) Regulations, 2012 provide that where a dispute has been referred to the Commission under the Rules, the Commission is required to appoint a mediator who shall assist the parties to reach a settlement within thirty days from the date of such appointment. Under Regulation 16, the Commission may refer the dispute filed with it to experts or to a Dispute Resolution Panel, appointed from among persons in the database.

(l) ADR in Mining Sector

The Mining Act 2016 under Section 154 provides that '*a mineral agreement shall include terms and conditions relating to, inter alia: the procedure for settlement of disputes; and resolution of disputes through an international arbitration or a sole expert.* It also provides that *'any dispute arising as a result of a mineral right issued under this Act, may be determined in any ofthe following manners: by the Cabinet Secretary in the manner prescribed in this Act; through a mediation or arbitration process as may be agreed upon by the disputing parties or as may be stated in an agreement; or through a court of competent jurisdiction'*.

(m) ADR in Intergovernmental Disputes

Article 189 (4) provides that *'national legislation shall provide proceduresfor settling inter-governmental disputes by alternative dispute resolution mechanisms including negotiation, mediation and arbitration.'* Accordingly, the Intergovernmental Relations Act, 2012 was enacted to, among other things: *'...establish mechanisms for the resolution of intergovernmental disputes.'*. Section 30(2) of the Act requires national and county governments to take all reasonable measures to: resolve disputes amicably; and apply and exhaust the mechanisms for alternative dispute resolution provided under the Act or any other legislation before resorting to judicial proceedings.

According to section 32(1) of the Act any agreement between the national government and a county government or amongst county governments should: *'...include a dispute resolution mechanism that is appropriate to the nature of the agreement; and provide for an alternative dispute resolution mechanism with judicial proceedings as a last resort'*. Intergovernmental Relations (Alternative Dispute Resolution) Regulations, 2018 were developed to operationalize these provisions.

(n) Constitutional Commissions

The commissions and independent offices established under Chapter 15 of the Constitution have been clothed with the necessary powers for ADR under Article 252 (1) (b) of the Constitution which provides that: *'Each commission, and each holder of an independent office has the powers necessary for conciliation, mediation and negotiation'*. Most of these commissions such as the Kenya National Commission on Human Rights (KNCHR) and Commission on Administrative Justice (CAJ) have established and operationalized their complaints and dispute handling systems towards execution of this mandate.

(o) ADR in administrative justice

ADR in administrative justice is most visible in the functions of the CAJ under the Commission for Administrative Justice Act (2011), which include, among others, to: '*..work with different public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration'*. CAJ has, in collaboration with state and semi-autonomous state agencies, established complaint mechanisms within state agencies to deal with administrative complaints. The methods and procedures used in these mechanisms and the ombudsman function of CAJ are ADR methods such as mediation and conciliation.

(p) ADR in National Peace Building Initiatives

*T*he National Steering Committee on Peace Building and Conflict Management was established in 2001 by the Government of Kenya as partof the framework for addressing threats and challenges to national unity, and the need to among other things incorporate traditional justice resolution mechanisms into the infrastructure of conflict mitigation. Furthermore, the *National Policy on Peacebuilding and Conflict Management, 2012* was formulated to among other things: establish a Mediation Support Unit to provide and coordinate mediation and preventive diplomacy capacity to Kenya and its neighbouring states, and it recognizes the critical role of traditional conflict resolution mechanisms such as community declarationsand social contracts in line with the Constitution.

Furthermore, the National Cohesion and Integration Act, 2008 established the National Cohesion and Integration Commission (NCIC) whose object and purpose is to facilitate and promote equality of opportunity, good relations, harmony and peaceful co-existence between people of different ethnic and racial communities of Kenya, through among other ways: *promoting arbitration, conciliation, mediation and similar forms of dispute resolution mechanisms* in order to secure and enhance ethnic and racial harmony and peace.

1.2.3 Institutional framework in ADR

Institutional typology of ADR in Kenya is mainly public or private. Public institutions are those created by law such as the Nairobi Centre for International Arbitration; the Judiciary which houses the Court Annexed Mediation; Constitutional Commissions; and other institutional forms that are vested with ADR mandates by law.

Private ADR institutions include free standing for-profit and non-profit

organizations, religious organizations, and community-based entities such as councils of elders. The levels of institutional development vary depending on the area of practice.

(a) Mediation

In the public sector, the Judiciary through its Court Annexed Mediation program, provides an institutional framework for court connected mediation. the NCIA and the National Legal Aid Service (NLAS) are some of the state institutions offering mediation services. Many other state, or semi-autonomous institutions have been given mandates to utilize mediation as illustrated in the sections above on the analysis of the use of ADR in different sectors; electoral mechanisms; land and environmental agencies and national peace infrastructure among others. In the private and non-state sectors institutional actors include: The Strathmore University Dispute Resolution Centre; and FIDA(K), Tatua Centre, Institute of Chartered Mediators and Conciliators; Dispute Resolution Centre, Wasilianahub Mediators Africa and Kituo cha Sheria, among others.

1. (b) Arbitration

In the public sector, institutional actors in arbitration in Kenya are mainly: The Nairobi Centre for International Arbitration (NCIA) and Kenya Sports Disputes Tribunal whose mandate emanates from the Sports Act, 2013. In the private sector and other non-state sectors actors include the Chartered Institute of Arbitrators (Kenya) Branch; Dispute Resolution Centre (DRC); and The Strathmore Dispute Resolution Centre (SDRC).

(c) Alternative Justice Systems

In most rural communities, there exist various institutions established through traditional customs to maintain order, peace, and community cohesion. These institutions include community councils of elders, clan elders, age mate group panels, matriarchs, and patriarchs of extended households. The most established and widely used of these are councils of elders. A core responsibility of these institutions is dispute resolution.

(d) Civil Society Organizations

CSOs are champions of ADR in their access to justice work, through their community outreach and legal aid programs. They engage in ADR development through research and advocacy, and contribution to the development of the law and policy. Some relevant and active CSOs in this regard include Centre for Rights Education and Awareness (CREAW); FIDA

Kenya, Kenya Human Rights Commission, Muslims for Human Rights, Kituo Cha Sheria, International Commission of Jurists ICJ(K) amongst others.

(e) Faith-based organizations

Faith-based organizations are major actors in dispute resolution for the members of their congregations. The position of trust and eminence granted priests, pastors, Imams, Sheikhs, pujaris, and other religious leaders by the communities often finds them invited to facilitate the resolution of family and other disputes or conflicts. For Islam for instance, ADR is practiced under the *maslah* system, which is a principle of shariah law, and generally denotes prohibition or permission of a thing based on whether it serves the public interest of the Muslim community (*ummah*). The determination of disputes under this system is based to a great extent on this principle.

In some communities applying *maslah* such as the Somali in Northern Kenya however, the principles and institutions of religious law may be combined with cultural norms in a bid to adapt to the realities of the parties and communities and to arrive at a realistic settlement. National level institutions representing faith-based organizations include the National Council of Churches of Kenya (NCCK) and the Council of Imams and Preachers of Kenya (CIPK), and Hindu Council of Kenya, among others.

(f) Local Administration

The local administration through offices such as chiefs and DCs alsoprovides a widely used avenue for dispute resolution for communities. Chiefs conduct hearings involving minor disputes and conflicts. This is done in collaboration with community leaders and elders to promote peace and harmony in the community.

There is therefore a significantly established and growing network of laws and institutions promoting and providing ADR services at different levels and sectors in Kenya.

2. THE POLICY PROBLEM

Despite the noted legislative and institutional growth in the ADR sector, certain challenges, gaps and needs present dysfunctional conditions that undermine the full realization of the potential of ADR in the Country and inhibit its further development.

2.1 Conceptual and Definitional challenges and unclear scope of ADR

(a) Conceptual and definitional problems

Conceptual issues in ADR have to do with the definitions of key ADR terms such as ADR itself, its component terms of 'Alternative'; 'Dispute' and 'Resolution' and key terminologies used in ADR. There is no resource in the sector such as a 'glossary of terms' to guide practitioners, users and regulators on common terminologies used in ADR for uniformity of understanding and usage. There is also inadequate clarity as to what conceptions of justice are applied in ADR-whether it is the legal conception based on clearly stipulated rules, principles and individual rights, or other forms such as social and distributive justice which are based on distribution of wealth, opportunity and communal interests.

(b) Unclear Scope of ADR

The inadequate articulation of the scope of ADR is also an important conceptual gap, which undermines a holistic appreciation of the ambit of ADR in the Country. ADR is often narrowly viewed as consisting only of certain specific commonly known areas of practice such as arbitration and mediation. It is also wrongly assumed to be a service mostly offered in civil matters, and mostly by lawyers. This situation undermines the understanding of ADR for users, potential users, policy makers, practitioners and hence limiting its utility towards the goal of access to justice.

(c) Jurisdictional Challenges

Lack of clarity on the jurisdictional limits of ADR also undermines the development of ADR. For instance, there is a lack of consensus on the extent to which criminal justice can be dispensed through ADR. The underlying concern in criminal justice is primarily with the public good of security, order, and lawfulness and not restoration or reconciliation which are key concerns in most types of ADR in criminal matters. The challenge here is how to balance the state's aim of protecting the public good of security and order with the ADR's focus on the interests of the victim and the accused on the one hand, and the social goods of communal cohesion and peace on the other hand. It is also unclear whether, even if criminal justice were to be dispensed through ADR, mechanisms such as TDRMs are appropriate for those purposes. Further, it is not clear in what matters and circumstances ADR is not appropriate or legally acceptable.

(d) Question of Justiciability

Justiciability is a legal concept that concerns the limits upon legal issues over which a court can exercise its judicial authority. Elements of this include the concept of 'standing' which is used to determine if the party bringing the suit is the appropriate one to do so, and whether the court beforewhich the matter is brought possesses the ability to provide adequate resolution of the dispute. Other elements have to do with the substance of the matter, such as for instance whether parties are just seeking an advisory opinion. There must also be an actual controversy between the parties, thatis the parties should not be seeking the same result, but different outcomes.

Furthermore, the issue or question before the court must neither be unripe nor moot. An unripe question is one for which there is not yet at least a threatened injury to the plaintiff or where the available judicial alternatives have not all been exhausted. A moot question is one for which the potential for an injury has ceased to exist, or where the injury has been removed. Non- justiciable matters may also be matters that are impossible to resolve because of the unavailability of judicially discoverable and manageable standards for resolving them or no remedies available for them such as for instance claims of witchcraft.

There is no clarity as to whether these are matters of concern to ADR forumsas dispute resolution forums.

2.2 Legal gaps and challenges

(a) Inadequate implementation of existing laws

As illustrated in the analysis further above, pursuant to the 2010 Constitution, many statutes have provided for the application of ADR including TDRM in dispute resolution in their areas of focus. There has however been inadequate leveraging of these provisions for entrenching the use of ADR in the Country. These include: The Intergovernmental Relations Act, 2012; The Civil Procedure Act and Rules; the Land Act 2012; The Employment and Labour Relations Court Act, No. 20 of 2011; Environmental and Land Court Act, 2011; Small Claims Act, No 2 of 2016; and The Commission on the Administration of Justice Act, 2011 among others.

(b) Lack of sectoral framework legislation

The legislative developments though progressive are still very limited and fragmented and lack an enforcement mechanism. Different mechanisms and areas of practice have developed various forms of legislation such aspractice directions, rules of practice and codes of conduct. These are, however, disparate in form and quality and lack common guiding principles in their development and application.

Furthermore, there is a lack of a unifying governance and regulation

framework in the sector. These realities point to a need for a framework legislation, which would among other things: provide for coordination; sector regulation; provide guiding principles for legislative development in practice areas, and in standards development in training and accreditation of practitioners; and establishment of an oversight institution for the sector.

(c) Lack of legislative framework for practice areas of mediation and other key practice areas such as TDRMs and other informal justice systems

Mediation is the most used and fastest growing ADR mechanism in the Country. It is also increasingly used in the commercial sector. Its importance internationally has been underlined by the development of the Singapore Convention on Mediation which is set to increase its legitimacy even in cross-border disputes. It is therefore imperative that the practice area of mediation be supported by legislation much the same as the one in arbitration which would order and guide the growth of the sector and domesticate the international mediation norms.

TDRMs and providers such as provincial administration and faith-based providers are also not supported by any enabling legislation. Legislation guiding the growth and regulation of these providers of ADR may further their development, recognition and support, and their ability to coordinate with other mechanisms.

Inadequate and *ad hoc* Institutional development in the sector

(a) Inadequate Institutional development

Institutional development in ADR has been *ad hoc* and unstructured. In both the public, private and non-state sectors, it is concentrated in arbitration and mediation and is also city centric. Even though there are some well entrenched organizations, there are still very few relative to the legal and justice needs of Kenyans. Most public institutions with ADR mandates have not developed adequate infrastructure for promoting the practice and those that have developed them, have not publicized them enough to the public, as for instance constitutional and other commissions.

(b) TDRMs lack institutional support

TDRMs have inadequate institutional development. They operate through cultural institutions governed by customary norms. These institutions lack adequate governance and accountability structures and standards of operation within set constitutional parameters and have few links and collaboration with other ADR and formal justice institutions.

(c) Silo approach

Existing ADR institutions operate in silos with little coordination and collaboration. This occasions duplication, confusion and limits sectoral

harmony, and the development of a community of practice in ADR. Harmony and a community of practice would catalyze order and cohesive growth in the sector generally and in practice areas.

(d) Inadequate utilization of potential in other institutions

There are institutions with the potential for anchoring, promoting and being access points for the provision of ADR services within their infrastructure such as: universities; professional bodies such as: LSK, KAM, KNCCI, KEPSA, KBA, APSEA; government agencies and private corporations; trade unions; employer bodies; and Consumer organizations such as: COTU, FKE, COFEK; and CSOs especially those at the grassroots. The utilization of the institutional capital that these organizations already have for dispensing ADR services needs to be encouraged and structured.

(e) Lack of an oversight institution

The ADR sector also lacks an oversight institution, a situation that occasions fragmented growth, and a lack of common standards, co-ordination and effective regulation and governance.

2.4 CHALLENGES IN ADR MECHANISMS

2.4.1 Challenges in Arbitration

Challenges in arbitration include escalating costs of the service; increasing legal procedures which complicates the process; unethical behaviour amongst some practitioners where they deliberately slow down the process to their benefit; inefficient linkage of arbitration with court system for adoption and enforcement leads to long processes in the courts which compromises the efficiency gains of the arbitration process.

Furthermore, the arbitration practice area does not have a regulatory framework or standardized training curriculum or code of conduct and enforcement mechanism. Institutions operate in their own siloed environments with little coordination, collaboration and without any accountability structure. There is also inadequate awareness about arbitration in the Country, and an inadequate number of qualified arbitrators.

2.4.2 Challenges in Mediation

Mediation is the fastest growing ADR practice in the Country, and the most utilized process even in other mechanisms such as TDRMs, provincial administration and faith-based mechanisms. Development of the practice has been marked by the silo approach to institutional development with each of the key actors developing their own different rules, curricula, and training programs. This has led to duplication, disparate standards, and a disjointed practice.

The sector also has inadequate numbers of trained and training personnel and specialist mediation expertise in specialized dispute areas such as family and

commercial sectors, among others. This situation in the practicearea calls for framework legislation that would guide the growth of the sector and sets a framework for standards and capacity development.

2.4.3 Challenges in Negotiation

Negotiation is the most widely used method of dispute resolution in everyday life and within other mechanisms of ADR. It has the potential of assisting in resolving disputes before they escalate to unmanageable levels,and to promote peace and order through resolution of daily human conflictsand disputes.

It is however undermined by various challenges including lack of enforcement mechanism; being prone to exploitation of some parties by others due to power and negotiation skills imbalance; being prone todeadlocks; and the possibility of degenerating into confrontation since thereis no third party to moderate communication.

Many people do not have basic negotiation skills, and this makes it difficultfor them to diffuse and or resolve simple disputes in their lives. There is also no institution championing development of negotiation in the Country.It is partly because of poor negotiation capacities that most disputes escalate to un-negotiable levels.

2.4.4 Challenges in Conciliation

One major challenge in conciliation is that it is little known even though it is often used in many social disputes. As an area of practice, it also lacks institutional and legislative support and professional capacity building for its delivery. It is widely used for instance in family disputes but there is little professional expertise developed within that sector for conciliation. It is alsooften confused with mediation yet there are major distinctions in their practice. Conciliation is recommendatory while mediation is facilitatory.

2.4.5 Challenges in Adjudication

A major challenge in adjudication is that even though it renders justice expeditiously, it is commonly practiced in and associated with the construction sector. This may restrict its use by the public who may perceiveit as a preserve of the construction sector. There is a need for further publicawareness on the use of adjudication in other sectors. The Small Claims Courts Act creates a court-practiced ADR by bringing adjudication into the formal practice of the courts albeit maintaining its less stringent proceduralapproach.

Court-practiced adjudication needs to be distinguished from non-court practiced adjudication in the Act so as not to confuse the public to thinkingthat adjudication is purely a court process, administered by lawyers and one that is restricted to a specific pecuniary jurisdiction. The adjudication practice is challenged by inadequate training programmes and institutionalforms championing its practice as an ADR mechanism.

2.4.6 Challenges with Ombudsman

The mechanism of the ombudsman is under-developed and under-utilized in the Country. Generally, an organizational ombudsman is a designated neutral or impartial dispute resolution practitioner whose major function isto provide independent, impartial, confidential, and informal assistance to managers and employees, clients and other stakeholders an organization.

The ombudsman, who must be independent and not have any real orperceived conflict of interests often utilize ADR approach to address matters brought to them, and usually use mediation, conciliation and adjudication to facilitate conflict/dispute resolution. They are better known in the public sector where they receive public complaints on administrative mal-practice and human rights violations by the state, such as the CAJ.

In developed jurisdictions such as the USA and Canada, in the last two decades, the ombudsman idea has spread rapidly in the private sector. Thereare now several kinds of private-sector ombudsman, the most popular being corporate ombudsman appointed by business corporations to handle complaints from their employees and stakeholders such as customers,students, and patients, among others.

The newest and most rapidly growing type in the private sector is an ombudsman scheme created by a whole association of business firms, suchas the banking sector, to investigate complaints from customers against member firms. The potential for this mechanism is significant, and it is grossly unexploited in both the public and private sectors.

2.4.7 Challenges with Alternative Justice Systems

Key challenges in AJS include lack of: clarity of the scope of their jurisdiction; uniformity of guiding norms and procedures even amongst elders within the same community; a framework law governing AJS practice; an oversight institution to manage governance and set and enforcestandards in the practice area; a code of conduct for practitioners; sufficient capacity building for practitioners in order to adhere to the principles of justice, morality and the constitution; sufficient enforcement mechanisms and guidance as to the acceptable and constitutional awards and enforcement mechanisms; inadequate linkages with the formal justice systems and other ADR practice mechanisms; and a remuneration framework of practitioners which affects the availability of the service and creates an opportunity for abuse.

Linkage and coordination challenges

The relationship, linkage and interface between the court system and ADR mechanisms is critical for various reasons including enforcement of ADR settlements and the fact that the judiciary is a major referral agent for disputes to ADR. Similarly, ADR is beneficial to the court system as it de-clogs the courts, hence increasing their efficiency. Furthermore, the two are key

apparatus in the arena of dispute resolution. While caution should be taken not to co-opt ADR within the formal justice systems, there is a need to forge strategic linkages that are mutually beneficial to both.

Coordination within the ADR sector itself is weak as evidenced in the disparate development of standards, fragmented institutionalization, and vacuum in sector governance infrastructure.

Recognition and Enforcement Challenges

Court recognition of arbitral awards turns them into court decrees and increases their enforceability by making them *prima facie* agreements/contracts, admissible as evidence on their face unless successfully rebutted, or dis-proved. For mechanisms for which adoption is not required by law, some practices such as: registration; court approval; notarial deeds; co-signing of agreements by Counsel have been used in some jurisdictions for recognition.

For mechanisms for which adoption is not required by the law such as mediation, even though non-compliance with settlement agreements is very low (since parties will seldom refuse to adhere to agreements which they have spent time and money arriving at), mechanisms for adoption or registration of settlement agreements would be important as they would give more legitimacy to the process when parties know that their settlement will be registered or recognized and may encourage them to take the process more seriously.

Mechanisms such as AJS have some enforcement mechanisms, but some of these are unconstitutional. For those mechanisms that require court adoption by law such as arbitration, timeliness and confidentiality may be compromised due to delays in the court process, and its public nature. These delays are sometimes caused by unnecessary application of civil procedure rules on arbitration awards and mediation settlements in adoption processes. There is a need for custom made linkage between courts and ADR mechanisms such as for instance special registries for these settlements and a system of anonymity of details to preserve confidentiality.

2.8 Technological gaps

ICT has the potential to disrupt working models within ADR as it does in any other sector. It is therefore imperative that there is in-tandem development of ICT capacity in the sector. ADR is already being transformed by technology, with some forms such as mediation being conducted electronically in the commercial sector as well as the family dispute resolution sector.

This is done through webcams and video conferencing facilities among other devices to overcome cross-border or other distance separation. There is inadequate exploitation of the opportunity presented by this development in

Kenya despite the high mobile penetration and Kenya being a leading ICT user on the continent. Adoption of such technology may reduce the overall cost of ADR by doing away with travel and venue costs.

2.9 Gaps in sector regulation and governance

Some areas of practice, especially mediation and arbitration, have developed standards of practice. These are however not uniform in each practice area, hence creating confusion and challenging quality control. There are no standards in some areas such as TDRMS, provincial administration and faith-based provides. There is furthermore no framework of principles guiding development of standards nationally and no regulatory institutions to manage disciplinary processes and enforce standards for practitioners and institutions.

2.10 Inadequate and un-uniform public awareness and understanding of ADR

There is a lack of common and consistent use of ADR terms, and inadequate understanding of ADR, its mechanisms, their benefits *vis a vis* the courts, when the different mechanisms may be appropriate, what standards are to be expected and where ADR services may be accessed across the Country.This fundamentally undermines the uptake of ADR services.

3. POLICY STRATEGIC FRAMEWORK

3.1 The Rationale for the policy

The logic for the development of this policy is based on the following facts and realities:

(a) An efficient ADR service in the Country especially serving the commercial sector is a catalyst of commercial activity, and foreign investment as evidenced by the significant improvement of Kenya's ranking on the World Bank's 'Ease of Doing Business Index' hence making it a more attractive investment destination as a result of the establishment of the Court Annexed Mediation by the Judiciary.

(b) Only 4-10% of the population access through the formal system. 90-96% of Kenyans access justice through ADR mechanisms. The adversarial approach embedded in the public adjudication processes is alien to the community-centric culture that evidently regards ADR to be at the center rather than the periphery of resolving their disputes It is therefore imperative that these mechanisms are supported and developed further.

(c) Access to justice is an important right that enables the realization of other rights, the rule of law, and ultimately development. Realization of this right for the majority of Kenyans is a catalyst to the realization of the government's development goals.

(d) Through the non-adversarial and reconciliatory approach of most ofits processes, ADR is a useful tool for the promotion of peace and social cohesion, which are fundamental prerequisites for development.

(e) ADR has been proven to complement and assist in de-clogging the courts as evidenced by the CAM which has recorded a high success rate hence relieving the courts of hundreds of cases that would have unnecessarily taken up time and resources[20]. De- clogging the courts releases resources to areas that require judicial adjudication, and to improve their efficiency which is a key element of justice and business.

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(f) ADR is a self-financing apparatus of justice. The neutral third parties are not state employees, but independent private practitioners paid by users of their services. Increased use of ADR therefore in the long run will reduce the strain on the exchequer, a welcome development in the current state of austerity in the Country. From a cost-benefit analysis perspective it is instructive that the government invests in supporting the growth of ADR.

(g) The need for the promotion of ADR is anchored in the Constitution under Articles 1, 10, 48, 67(2)(f), 113, 159(2), and 189(4), 252(1)(b) national legislation, and international and regional human rights instruments. It is also provided for in development framework at all levels including in SDG 16.3; Vision 2030; and the Judiciary's Sustaining Judicial Transformation Framework.

(h) Inaccessibility to justice is negatively co-related with development, contributes to growing poverty and social exclusion and undermines investment, commercial activity, economic growth and democracy. The high transactional costs of litigation is a disadvantage to the indigent persons and strains the financial resources of litigants.

It is within this context that the development of the policy is imperative with the goal of enhancing the development of ADR as an apparatus of justice to increase its effectiveness, availability and accessibility to the public.

3.2 Policy Vision

The vision of the policy is that of:

A harmonious and cohesive Country, where ADR is the primary and preferred mode of dispute resolution.

The mission of the policy is:

'To promote public awareness of ADR, and the development of an efficient ADR sector that will offer quality, accessible and available ADR services.'

3.4 Policy Objectives

The objectives of the policy are:

(a) To provide definitions for key ADR terms, and to outline the scope of ADR.

(b) To strengthen the legal and institutional frameworks supporting the ADR sector.

(c) To increase harmony and efficiency in the sector by enhancing co-ordination, collaboration and linkage within the sector, and between ADR actors and the formal justice system.

(d) To strengthen sector governance, regulation, and capacity building.

(e) To strengthen different mechanisms of ADR.

(f) To enhance equality and innovation through research, knowledge development, community of practice and leveraging of ICT.

(g) To promote public awareness and use of ADR and to inculcate ADR in the Country; and

(h) To promote dispute prevention by inculcating a dispute resolution mentality and harmonious everyday living.

3.5. Guiding principles

The principles guiding the formulation and implementation of the policy include:

(a) *Article 10 of the Constitution.* and especially- human dignity; equity; social justice; inclusiveness; equality; human rights; non-discrimination; protection of the marginalized; good governance; integrity; transparency; accountability; rule of law; and participation of the people.

(b) *Subsidiarity (self-determination)*-the idea that a community of higher order should not interfere with the life of a community of a lower order, taking over its functions. Under the principle, government institutions such as the judiciary should undertake only those initiatives that exceed the capacity of individuals or private groups/sectors (such as the ADR sector) acting independently. The government should support the smaller community (ADR sector) and assist in the co-ordination of its activities with the rest of society for the sake of the common good.

3.6 Policy Approach

3.6.1 Human Rights approach

The human rights-based approach is about empowering people to know and claim their rights and increasing the ability and accountability of individualsand institutions who are responsible for respecting, protecting, and fulfillingrights. It is about ensuring that both the standards and the principles of human rights are integrated into policymaking as well as the day-to-day implementation of policies. Fundamental principles in applying a human rights-based approach in practice include participation; accountability; non- discrimination and equality; empowerment and legality. These principles are integrated into this policy and its envisaged implementation.

3.6.2 Transformative approach

The transformative approach adopted in this policy is based on the idea of transformative constitutionalism. It is about making any endeavour in implementation of the constitution, an endeavour to change the realities of the lives of Kenyans towards greater human dignity and increased abilities to realize their human potential. The policy envisages the promotion of ADR in this light.

3.7 Gender and equality considerations

(a) In the formulation and implementation of this policy, the issue of parties' differences, the power asymmetries and disadvantage it creates along *gender, age, disability, sexuality, religion, class, profession, culture, immigration status; and nationality* among others have been considered.

(b) In this regard, the National Dispute Resolution Council proposed in this policy is mandated to develop a gender and equality strategy forthe ADR sector, including the strategy of gender and equalitymainstreaming in all elements and activities of the sector such as training; appointment of third parties; and representation in the Council, in practice area committees and other entities, forums and opportunities in the sector.

3.8 Opportunities

(a) Reduction in formality and complexity of litigation.

(b) Reduction in time necessary for contract enforcement releasing funds for use by disputants.

(c) Use of technology will promote and enhance the administration ofADR.

(d) Use of technology will enhance the accessibility and reduction incost of ADR.

(e) Complement and de-congest the judicial system.

(f) Promote good governance and preserve relations and harmonious co-existence.

(g) Enhance consumer protection for e-commerce.

(h) Result in harmonization of global and cross-border standards andbest practice.

(i) Promote effective and efficient access to justice through technology and ADR.

(j) Improve accessibility and participation in ADR forums.

(k) Promote parliamentary processes.

3.9 Risks and assumptions

Risks

Risks that may undermine policy implementation if they materialize include:

(a) Over-formalization of the ADR sector will undermine its utility asa more flexible, faster, informal mechanism for justice.

(b) Technological disruption of working models in ADR.

(c) Resistance to change by stakeholders and users of ADR.

(d) Inadequate resources to implement the policy.

(e) The use of ADR to bypass corruption detection in the public adjudicative system thus conceals the vice.

(f) Use of ADR may stifle development of court jurisprudence inpublic interest disputes.

(g) Use of ADR may not promote consistent application of the law.

Assumptions

(a) That resources (monetary, technological, skilled–practitioners, institutions etc.) will be available for the implementation of the policy.

(b) That stakeholders will maintain the momentum for reform agenda envisaged by this policy.

SESSIONAL PAPER NO. 4 OF 2024 ON THE NATIONAL ALTERNATIVE DISPUTE RESOLUTION POLICY

4. POLICY STATEMENTS

4.1 Definitions

4.1.1 Meanings and definitions of key ADR terms

(a) This *policy* adopts the following meanings for key ADR terms:

‘’***Alternative Dispute Resolution***’’ refers to constitutionally compliant mechanisms, processes, and methods of dispute resolution, other than judicial determination.

‘’***Alternative***” as used in the policy is broad, and inclusive and may mean in different circumstances: other than a judicial determination; assisted; additional; appropriate; primary; informal; rights-based; interest-based; and among other similar terms.

*‘’**Dispute**’’* is used inclusively to refer to an unresolved complaint, grievance, or disagreement. It is used inclusively to include situations where parties or stakeholders consider that there is a conflict (of whatever magnitude); situations where no dispute exists but where there is a need for; clarification of a matter; establishing whether a dispute exists; fact finding; or where parties do not see themselves as being in disagreement or aggrieved.

*‘’**Resolution**’’* is used broadly and inclusively to include the determination of a dispute; narrowing the scope of a dispute; exchanging of information on a ‘without prejudice basis’; preparing parties to decide on forum; transforming understanding of the matter/dispute, relationships or behavior.

*‘’**ADR Practitioner**’* refers to a person offering ADR services to the public, and who is trained by accredited institutions to offer services in that specific area of practice of ADR; is certified and accredited by the relevant accrediting institutions. This definition does not apply to service providers in TDRMS, local administration and faith-based set-ups. For TDRMs, an ADR Practitioner must be a person who is by traditional custom of his/her community recognized and accepted as possessing the skills, wisdom and social standing required to offer that service. The term ‘**community**’ is used here in broad terms to include social units or groups brought together by different types of affinities such as: culture; dialect; race; family; neighbourhood; faith; business; age; and common interests among others.

This definition of ADR practitioner in this policy is exclusive to persons

offering ADR services *to the public*. The policy recognizes that ADR services are also widely offered in private *pro bono* set-ups by persons not formally trained or certified to practice ADR. Many social disputes are resolved this way. These providers are important actors in the continuum of ADR who play an important role in those private spaces. However, where a person holds themselves out as offering such a service to the public, or habitually offers that service to the public, whether or not it is paid for, will be required to obtain training and register as ADR practitioners for the service that they offer. The principle here is to ensure quality and protection of the public from possibilities of malpractice.

Whereas the requirement for certification and accreditation does not apply to traditional dispute resolution mechanisms and other alternative justice systems, local administration and faith-based providers, this policy recommends training of these providers in order to among other things ensure their adherence to Article 159(3) of the Constitution constitutional principles; mediation and conciliation processes; case management; adoption and enforcement processes; and basic legal principles in the main types of disputes handled under these mechanisms such as family; land; and environment among others.

*''**Adjudication**''* This is an informal, speedy, flexible, and inexpensive process where a neutral third party called the Adjudicator makes a rapid fair binding decision within disputes.

*"**Alternative Justice Systems**"* this policy adapts the definition of the Alternative Justice Systems Framework Policy[21]

*''**Arbitration**''* refers to a dispute settlement mechanism where a neutral third party is appointed by the parties or an appointing authority to determine disputes between parties and give a final and binding award.

*''**Conciliation**''* is a dispute resolution process where an independent third party, the conciliator, helps people in a dispute to identify the disputed issues, develop options, consider alternatives, and try to reach an agreement. The neutral makes suggestions to the parties on how the dispute should be resolved.

*''**Mediation**''* is the consensual, confidential process in which the disputants submit to the facilitation of a neutral third party who assists them in reaching a negotiated solution. The neutral's role is to set up the process, and to facilitate the parties' communication and own decision making.

*''**Negotiation**'' is the* dispute resolution mechanism where parties have complete autonomy over the forum, the process, and the outcome, and oftenreach a mutually acceptable decision without assistance from third parties.

*''**Ombudsperson**''* an organizationally designated person, receives, investigates, and facilitates the resolution of complaints, systemic problems and resolves disputes from individual complainants. The Ombudsman is characteristically independent and without conflict of interests.

*''**Traditional Dispute Resolution Mechanisms**'' are* methods and practices employed by communities in the management of conflict and resolution of disputes, and in which the dispute resolution service is provided by persons or groups of persons recognized by the community (according to community custom) as having the wisdom and social standing to provide that service. TDRM processes are often conducted and decided according to custom, and often employ mediation, conciliation and sometimes adjudication techniques.

[21] See the Alternative Justice Systems Baseline Policy and Policy Framework available athttps://www.judiciary.go.ke/download/alternative---justice---systems---baseline---policy---and--- policy---framework/

(b) The National Dispute Resolution Council, in collaboration with stakeholders, will develop a glossary of all other important and emerging ADR terms which will be reviewed periodically.

4.2 The scope of ADR

This Sessional Paper considers the implications of the Constitutions' provisions on ADR, the views expressed by stakeholders and the public towards a policy framework as a clear manifestation of the recognition of ADR as a part of the law and legal system in Kenya. There is now a broad consensus that multiple doors should remain open for the citizenry to ventilate their disputes and be empowered to find suitable solutions. As a country, we can expand access to justice by allocating dispute resolution to the most appropriate process. For this reason, this policy takes an inclusive approach to the scope of ADR, to encompass:

(i) All concepts and typologies of ADR practices, processes, and services, normally found in ADR practice globally.

(ii) Civil matters.

(iii) Criminal matters guided by the various practices of ADR incriminal jurisdiction globally.

(iv) All the practice mechanisms and sectors of application are covered by this policy.

(v) Matters that could be considered justiciable and those notjusticiable.

(vi) Private and public disputes.

(vii) Instances where no definitive dispute has crystallized but where parties may seek clarity in one form or another or are taking disputepre-emptive action.

(viii) New and innovative forms of ADR such as the Online Dispute Resolution (ODR).

4.3 Strengthening the Institutional Framework for ADR

4.3.1 The Oversight ADR Body and Practice Area Committees

The policy provisions in this Sessional Paper propose that the oversight of the ADR sector be a collaborative enterprise of State and non-state actors. The Government of Kenya through the office of state responsible for legal policy will establish a national body to provide leadership and oversight for the sector. In this regard this policy proposes.

(a) There be established a National Dispute Resolution Council for the ADR sector which shall be a body corporate under the Cabinet oversight of the Office of the Attorney General & Department of Justice.

(b) The principal role of the National Dispute Resolution Council will be to oversee the implementation and monitoring of this policy, andaccordingly its functions will be among others to—

(i) promote the public understanding of ADR as an apparatus for dispute resolution, and of ADR terminologies scope and processes.

(ii) promote further development of the legal and institutional frameworks supporting the ADR sector and its practice areas.

(iii) increase harmony and efficiency in the sector by enhancing and strengthening coordination, collaboration and linkage within the sector, and between the sector and the formal justicesystem.

(iv) enhance the quality, availability and accessibility of ADR services by strengthening sector governance and regulation.

(v) promote and engage in capacity building for the sector.

(vi) strengthen different mechanisms and the practice of ADR in allsectors of the Country.

(vii) promote and inculcate the culture of ADR in Kenya and to increase public confidence and adoption of ADR as the preferred mode of dispute resolution in the Country.

(viii) strengthen the ADR sector through research, knowledge development, community of practice and leveraging of ICT.

(ix) establish and provide oversight over the Practice Area Committees and provide advisory over mechanisms for ADR established by law within other state

agencies, except those established under or within the Judiciary.

(c) Section 5(f) of the Nairobi Centre for International Arbitration Act, 2013 (NCIA) provides as one of the functions of the Centre to: '*coordinate and facilitate, in collaboration with other lead agencies and non-State actors, the formulation of national policies,laws and plans of action on alternative dispute resolution and facilitate their implementation, enforcement, continuous review,monitoring and evaluation*.

(d) In keeping with the approach set elsewhere in this policy of leveraging the infrastructure of already existing institutions the National Dispute Resolution Council (NDRC) proposed in this policy will be inter-linked with the NCIA to leverage on existing structures while delineating the functional autonomy of the NDRC.

The Sessional Paper further proposes that for an inclusive and participatory management and development of the various disciplines which operate as autonomous practices and often interlink as hybrids with each other, Practice Area Committees be formed. As such this policy proposes that:

(a) *Practice Area Committees (PACs)*

The National Dispute Resolution Council in collaboration with the non-state actors in ADR will establish Practice Area Committees for ADR mechanisms of arbitration; mediation; adjudication and conciliation; judiciary ADR programs; for state actors such as the local administration and the Ombudsperson; and non-state actors such as faith-based institutions and other emerging areas of practiceas it will determine to be necessary for coordinated development andgrowth of the sector.

(b) The membership of the PACs will comprise of individual practitioners or practitioners from representative institutions in the respective practice area to be nominated and organized asdetermined by the Council.

The functions of the PACs will be to:

(a) enhance the quality of ADR services in their area of practice, through the development and enforcement of tools of regulation and governance including codes of conduct; standard operating procedures; remuneration schedules; training curriculums and certification and accreditation mechanisms; and Continuous Professional Development (CPD) programs among other things:

(b) promote public awareness of ADR practice and service.

(c) support the National Dispute Resolution Council in its oversight functions.

(d) promote coordination and collaboration with other practice areas and with the court system.

(e) promote policy and legislative development in their areas of practice in order to create alignment with the policy, and the proposed legislation, and to strengthen the practice.

(f) promote knowledge development and the growth of a community of practice of the ADR area of practice.

4.3.2 ADR centres

The Sessional Paper recognizes the aspirations of the Kenyan public as expressed in Articles 1, 10 and 48 of the Constitution. To give effect to thedesire for broadening access to justice and taking services where they are most impactful, this policy proposes that the National Dispute Resolution Council in collaboration with the department of state responsible for local administration, establish and facilitate the development and infrastructure capacity of ADR Centres at the constituency level.

The functions of the ADR Centres will be to:

(i) provide information on all forms of ADR mechanisms and processes to members of the public.

(ii) provide members of the public with lists of certified ADR practitioners nearest to them.

(iii) where possible, to offer a sitting facility for ADR sessions for members of the public.

(iv) provide a platform for receipt of feedback and complaints from thepublic related to ADR services.

(v) act as collection points for data on dissemination of information onADR, access and usage of ADR services and suggestions for improvements.

4.3.3 Judiciary ADR Centre

The Sessional Paper acknowledges that the judicial system is an indispensable ally of the dispute resolution mechanisms addressed in this Policy. The role of the judiciary cannot be supplanted by these mechanisms. Rather under the principle of subsidiarity the Judiciary will support the non-court connected mechanisms and promote those mechanisms within its proceedings that are envisaged under Article 159 (2) (c). Therefore, this policy proposes that.

The Judiciary is to establish an ADR Registry that will:

(i) house and expand the Court Annexed Mediation initiative andpromote other court-connected ADR.

(ii) promote judicial support for ADR by building the capacity of judges and other judicial officers.

(iii) provide information on all forms of court annexed ADR mechanisms and processes to litigants and members of the public.

(iv) provide litigants with lists of certified court annexed ADR practitioners nearest to them.

(v) where possible, offer a sitting facility for ADR sessions for litigants.

(vi) provide a platform for receipt of feedback and complaints from thepublic related to court connected ADR services.

(vii) act as collection points for data on the dissemination of information on court annexed ADR, access and usage of ADR services and suggestions for improvements.

(viii) Be the Judiciary focal point for linkage with the non-court connected ADR system and the National Dispute Resolution Council.

4.4. Strengthening the Legal Framework

The Sessional Paper proposes that there be enacted a Dispute Resolution legislation[22], which will be the framework legislation for ADR and to give effect to this policy. The legislation will set out the objectives and broad principles for ADR; make provision for the establishment of the National Dispute Resolution Council and connected purposes. Where it is alsodeemed necessary the legislation will provide a vehicle for existing and emerging ADR mechanisms. In addition, this policy proposes the followinglegislative intervention—

(a) There be enacted an omnibus[23] legislation to guide and direct the growth of and provide for mechanisms to strengthen the practice of—

(i) Mediation.

(ii) Conciliation.

(b) There be enacted distinct legislation to guide and direct the growth of and provide for mechanisms to strengthen the practice of Construction Adjudication.[24]

(c) There be enacted amendments to the Arbitration Act, 1995 to alignit to emerging practices and judicial pronouncement.

(d) There be enacted amendments to the Nairobi Centre for International Arbitration Act as shall be necessary to align it with this policy.

[22] See Proposed Dispute Resolution Bill in the annexures

(e) All new legislation enacted in the Country at both levels of government shall, where appropriate incorporate ADR provisions, and all amendment legislation shall where appropriate, introduce ADR provisions where none existed in the amended law.

(f) The Government of Kenya will consider the signing and ratifying o f the Singapore Convention on Mediation and take measures to domesticate its provisions in order to promote international mediation for the benefit of the Republic of Kenya.

(g) All laws that have existing provisions for ADR shall be amended to align them to this policy.

4.5 Strengthening Linkages, Coordination and Harmonization in the ADR sector

The Sessional Paper recognizes that Article 159(2)(c) of the Constitution explicitly requires the Judiciary to promote ADR as a principle and practice. There will be cases that will require a judge to listen to the parties, examine the evidence and decide for the parties and there will also still be others that can more appropriately be resolved without resort to the court. A good justice system is one where both options exist side by side and intersect at points of mutual benefit.

[23] Ibid

[24] See Proposed Construction Adjudication Bill in the annexures

As such, the Committee recommends that:

(a) This policy adapts the principle of subsidiarity in the linkage between the ADR and the court system with the intention of promoting autonomous operation and growth of the ADR sector.

(b) The linkage between the court connected and non-court connected ADR mechanisms will be in areas of mutual benefit such as enforcement and referral.

(c) All service providers in ADR are encouraged as good practice to collaborate with each other towards the end of dispute resolution.

4.5.1 Regulation and governance

The Sessional Paper recognizes that strengthening the ADR sector regulation and governance are of outmost importance in encouraging harmonization of the Sector. It is also worth acknowledging that the ADR sector is in its early stages of development as an organized discipline with potential for growth. Any measure towards regulation must be weighed against the need to improve and not stifle growth within the sector. For thesector to develop and thrive for the benefit of the Republic of Kenya this policy has considered the three options for regulation being: autonomous self-regulation, non-regulation and institutional self-regulation.

This policy has settled for a hybrid of autonomous self-regulation and institutional self-regulation. As a result, this policy proposes that:

(a) The National Dispute Resolution Council provides global oversight of the sector and develops guiding principles and models of standards of training and practice.

(b) Practice Area Committees will provide leadership and management of their areas of practice and, guided by the standards and guiding principles developed by National Dispute Resolution Council (NDRC) develop codes of ethics, training curriculums, and establish certification mechanisms for practitioners in their areas of practice for approval by the NDRC.

(c) Practice Area Committees will provide disciplinary oversight of practitioners in their areas and will towards these ends establish the appropriate mechanisms.

(d) Practice Area Committees will report to the National Dispute Resolution Council on governance and regulation in their practice areas.

4.5.2 Quality and Standards of Practice in ADR

The Sessional Paper takes cognizance of the need to learn from the prevalent perceptions that the norms and institutions formed to offer redress inadjudicative processes have become beholden to practices that alienate the public. The view that the system of litigation has become complex, cumbersome, and too detached from the real dispute should not transferredto ADR.

On the contrary, ADR enters the culture of the dispute and adapts itself to the ecosystem of that dispute. If applied by people who have the requisite skills, training, standards of conduct and practice it can be applied in a variety of different contexts. This requires a level of professionalism and accountability which at the time of this policy only exists in *ad hoc* formations[20]. Therefore, this policy proposes the harmonization of standards and training of ADR practitioners to maintain quality and community of practice that is responsive to the expectations of the public as follows–

(a) Training

Each ADR practitioner offering services to the public for a fee or regularly offering such services to the public without pay should be trained in their area of practice with curriculum made or approved by the National DisputeResolution Council in collaboration with the respective PACs.

The National Dispute Resolution Council will provide certification to ADR institutions for training purposes, and to appropriate professional institutions with the capacity to offer training services using the approved curriculum.

(b) Accreditation

There will be a two-tier accreditation model for the sector as follows—

(i) *Generalist accreditation* which will be given by the institutions certified by the National Dispute Resolution Council as accrediting institutions for specific areas of practice.

(ii) *Specialist accreditation* will be given by institutions certified by the National Dispute Resolution Council in consultation with PACs as accrediting institutions for specialized areas of practice. This will be further accreditation intended for practitioners who intend to practice under institutions such as the Mediation Accreditation Committee of the Court Annexed Mediation that requires practitioners to undergo further specialist training and accreditation.

(iii) The accreditation rules will be developed by the National

DisputeResolution Council in collaboration with PACs and other stakeholders.

In adapting the two-tier accreditation model, this policy proposes that the National Dispute Resolution Council implement a recognition and cross- registration standard to balance the requirements for specialist accreditation and the need to safeguard the interests of the professional against duplication of training and costs of accreditation.

(c) Continuous Professional Development (CPD)

The National Dispute Resolution Council in collaboration with PACs will develop and administer CPD programs for ADR practitioners.,

(d) Institutional ADR providers

All institutional providers of ADR services will be required to register withthe National Dispute Resolution Council, and to obtain a certificate of registration as an institutional ADR service provider. The National Dispute Resolution Council will, in collaboration with stakeholders, develop the criteria and preconditions for the certification, standards and codes ofconduct, renewal, de-certification, and other matters incidental to the registration.

(e) Standard Operating Procedures

PACs in collaboration with the National Dispute Resolution Council will develop and integrate into the training curricula, Standard Operating Procedures (SOPs) for special, sensitive and unique cases involving vulnerable groups and persons.

(f) Timeframes for ADR processes

PACs, in developing standards and internal rules of process will provide guidance as to reasonable time frames for ADR matters in their areas of practice for the purpose of maintaining as much as possible the quality of timeliness of ADR.

(g) Duty of Care and Limitation of Liability for practitioners

The proposed ADR Legislation will provide for the duty of care and, protection and immunity for practitioners, institutions, and staff in providing their professional services.

4.5.3 Recognition and Enforcement of ADR decisions

The Government of Kenya anticipates that this policy will create a robust environment where ADR can develop and grow, and a culture emerge for self-enforcement of ADR outcomes as the default. However, the benefits of ADR will be fully realizable where parties see avenues for recourse to enforce the outcomes of applying the

mechanisms in the event of non- performance.

To support the recognition and enforcement models adapted in legislation the Sessional Paper proposes the following interventions:

(a) The Judiciary is encouraged to develop a special ADR registry and depository for expeditious registration and depositing of ADR settlement agreements for parties who may wish to register and deposit their ADR agreements.

(b) In establishing the Special ADR Registry and Depository, the judiciary is encouraged to develop systems to promote confidentiality of ADR parties.

(c) The Judiciary is also encouraged to establish special mechanisms forthe express adoption of ADR awards and settlements that are provided for by law.

4.5.4 Capacity Building

(a) Additional training and mentoring of new practitioners

Over and above professional training, the National Dispute Resolution Council and accredited institutions, in liaison with PACs will:

(i) organize other trainings for practitioners on relevant matters;

(ii) organize Training of Trainers.

(iii) collaborate with NLAS, CSOs and institutional ADR providers to establish mentoring programmes for newly trained practitioners.

(b) Training for relevant government officers and agencies

The National Dispute Resolution Council will collaborate with the relevant state agencies to develop capacity building programmes for officers and agencies who carry out ADR services or who are otherwise strategically situated to offer these to members of the public in the course of their normal work including: the police; Court Users Committees; judges and magistrates; probation officers; children's officers, chambers of commerceand peace committees among others.

(c) Leveraging already existing infrastructure for ADR

With the support from the Government of Kenya, the National Dispute Resolution Council will assess the preparedness of Ministries, Departments and Agencies for infrastructure that can be used for ADR and take action tocollaborate with the respective agencies to leverage on existing infrastructure for mainstreaming ADR. For instance, the complaints departments in government offices established through CAJ initiative can be strengthened to also offer ADR services.

(d) ADR Guide for Users

The National Dispute Resolution Council will, in consultation with PACs develop an ADR guide for users of ADR services detailing key principles of ADR; glossary of terms of ADR; different mechanisms of ADR and their benefits. The online version of the guide will be updated regularly in tandem with sector developments.

4.5.5 ICT

The National Dispute Resolution Council in collaboration with area PACs will promote the use of ICT in ADR and towards this end, commission a study on the same, and develop and review periodically an ICT strategy for the ADR sector.

4.6 Increasing Availability, Accessibility and Uptake of ADR services.

4.6.1 Availability

The Government of Kenya recognizes that whilst the high transactional costs of litigation are an impediment to the ideal of access to justice for all, ADR offers an opportunity for broadening access both in quantitative and qualitative terms. To attract and maintain a high caliber of professional practice, the remuneration of ADR practitioners should be attractive enough and at the same time reasonable to not make the service unaffordable to most of the public.

The state and non-state actors with mandates for the implementation of this policy will endeavour to decentralize ADR to the local level with closest practicable proximity with the public. This Sessional Paper proposes some of the interventions which the National Dispute Resolution Council will adopt to realize decentralization to include–

(a) Leverage on the proposed ADR Centres, the existing institutions and the training of additional practitioners, among other initiatives proposed in this policy to increase physical availability of the service to the majority of Kenyans by devolving availability.

(b) Collaboration with the PACs and faith-based providers, and other non-state actors to remove barriers to the use of TDRMs for vulnerable and special groups such as women, youth, and children, and any other elements that may make the mechanisms unavailableconstitutionally.

4.6.2 Accessibility

The Sessional Paper has recognized that ADR consists of multiple systems of processes within an environment of shared principles which include consent of the parties, autonomy of the parties, and processual flexibility. In the longer term, the credibility and acceptability of the ADR project will depend on maintaining the core of the system while creating avenues for development and growth.

This policy proposes that the National Dispute Resolution Council in conjunction with the Nairobi Centre for International Arbitration, the Judiciary, PACs and other stakeholders develop strategies to promote the use of ADR. As a result–

(a) The National Dispute Resolution Council in collaboration with the PACs will establish a working committee that will develop harmonized remuneration guidelines for practitioners and party representatives for each practice area to serve as a guide in the sector. In so doing, the committee will balance affordability as a common characteristic of ADR, and market forces.

(b) The National Dispute Resolution Council and PACs in collaboration with the National Council for Persons Living with Disability (PLWD), will develop a strategy for promoting accessibility of ADR services to PLWD, and especially enhancing their abilities for direct self-representation in ADR processes, and for serving as ADRpractitioners.

(c) The National Dispute Resolution Council and PACs will leverage on use of ICT to reduce barriers inhibiting access for geographically dispersed population.

4.6.3 Uptake

The Sessional Paper recognizes that whilst the high transactional costs of litigation are an impediment to the ideal of access to justice for all, ADR offers an opportunity for broadening access both in quantitative and qualitative terms. To attract and maintain a high caliber of professional practice, the remuneration of ADR practitioners should be attractive enough and at the same time reasonable to not make the service unaffordable to most of the public.

This policy proposes that the National Dispute Resolution Council will collaborate with the PACs to engender practices that promote affordability and facilitate ease of access to ADR. In this regard this policy proposes as follows-

(a) ADR Clauses in contracts

The National Dispute Resolution Council, PACs and stakeholders will popularize, as a good practice, the inclusion of 'escalation' ADR clauses incontracts and agreements.

(b) Compulsory pre-court ADR for some matters

The Judiciary in conjunction with the National Dispute Resolution Councilland collaboration of other stakeholders will establish guidelines on civil and criminal matters for which court adjudication will not be available at the first instance, and which must be first submitted to ADR.

(c) Compulsory Pre-court ADR information sessions

The judiciary is encouraged, as a good practice, to require all parties filing matters in court to attend an ADR information session at the Judiciary ADR Centre, with their lawyers or with an ADR practitioner, and having done so,if they decide to proceed to court, file a certificate, with a statement of reasons why ADR is not pursued in their matter.

(d) Establish Pre-litigation ADR incentivization Scheme:

The judiciary is encouraged (in consultation with stakeholders) to establish an incentivization scheme for court users to attempt ADR as the default mechanism before resort to court. The scheme may include pre-litigation protocols and cost sanctions among other best practice incentives.

(e) ADR in education and training curricula

The Government of Kenya through the National Dispute Resolution Council in collaboration with the Ministry of Education and other relevant state actors will ensure that ADR is integrated into the national school curriculum at all levels as a core subject, and in specialist training curriculum such as that of the disciplined forces and local administration officers, among others.

(f) Promoting the ombudsman mechanism of ADR

(i) The National Dispute Resolution Council in collaboration with the MDAs and SAGAs at both national and county levels and the CAJ will collaborate to entrench institutional ombudsperson and encourage adaption of internal dispute management and institutionalADR policies.

(ii) The National Dispute Resolution Council in collaboration with the PAC responsible for ADR practice areas, the CAJ, private sector actors and industry associations will promote the

establishment of anombudsperson for the resolution of disputes in their industries.

(g) ADR policy for NGO and private entities

All non-governmental and private entities operating in the Country are encouraged as a good practice to develop institutional ADR policies, and where possible establish ombudsperson offices for their establishments.

(h) Public awareness

The National Dispute Resolution Council in liaison with the PACs organize public awareness programmes on ADR, in collaboration with county governments, local administration and various agents of social change including: the media, faith-based organizations; schools' system and CSOs.

(i) County governments' role

County governments are encouraged to support ADR Centres and TDRMsin their regions, and to promote public awareness on ADR.

(j) Promoting Innovation in ADR

The National Dispute Resolution Council together with stakeholders will; promote innovation, learning and integration of other types of ADR not yetadopted in the Republic of Kenya as shall be appropriate.

(k) Role of tribunals

Tribunals are encouraged where applicable, to establish a mandatory ADRdoor through which all disputants must pass before submitting their disputesto tribunals, except those seeking urgent injunctive relief. This door will bewithin the tribunal or through linkage with ADR providers including the Court ADR Centre.

4.6.4 Research

(a) The National Dispute Resolution Council and PACs will initiate research programmes and collaborate with academia and stakeholders on various areas of ADR with a view to generate information that will inform the growth and development of the sector.

(b) The National Dispute Resolution Council and PACs will develop a strategy for knowledge management within practice areas and in the ADR sector generally. To this end, they will among other things:

(i) Identify and disseminate lessons learnt and good practices

incollaboration with all stakeholders.

(ii) Ensure technical skills and knowledge are shared among allstakeholders.

(iii) Establish, manage, and monitor a sectoral knowledge platform and innovative approaches in practice areas, and stakeholder institutions.

4.6.5 Community of practice

The National Dispute Resolution Council and PACs will jointly and separately organize forums for sharing ADR knowledge and building cohesion, and community of practice in the ADR sector and respective practice areas.

5. POLICY IMPLEMENTATION ARRANGEMENTS

5.1 National Action Plan

This Sessional Paper proposes that a five-year term National Action Plan (NAP) be developed by the National Dispute Resolution Council to guide the implementation of the policy. Annual operational plans will be developed to guide and pace the NAP implementation.

5.2 Resourcing

The Government of Kenya shall integrate ADR into the national budget resource allocation cycle and through the National Dispute Resolution Council collaborate with the PACs and other stakeholders to facilitate resource mobilization for implementation of this policy. The Sessional Paper proposes that–

(a) The National Government allocates funding for the implementation of this policy.

(b) The National Dispute Resolution Council will also actively source funding from alternative sources including:

(i) Private Sector Funding

The private sector is a principal beneficiary of ADR and has an interest in ensuring timely and quality ADR services for fast enforcement of contracts and resolution of commercial disputes. The National Dispute Resolution Council will partner with the private sector to contribute to thestrengthening of ADR mechanisms.

(ii) Development Partners

The National Dispute Resolution Council will collaborate with development partners for technical and financial support towards the implementation of this policy.

(iii) Voluntary Organizations

The National Dispute Resolution Council will leverage the resources of voluntary organizations including NGOs, CBOs, FBOs, and foundations to strengthen and support ADR.

(iv) *Sector Development Fund*

The Sessional Paper proposes that there be established an Alternative Dispute Resolution Development Fund to be managed by the National Dispute Resolution Council. The Fund should be resourced by the revenue collected from various services offered by the National Dispute ResolutionCouncil to stakeholders, and any other fundraising initiatives including levies to stakeholders for support to the Fund. The monies paid into the Fundwill go towards supporting un-funded activities of the National Dispute Resolution Council.

5.3 Monitoring and Evaluation

The Sessional Paper proposes that a monitoring and evaluation framework should be developed to evaluate the progress made in the implementation of this policy. The National Dispute Resolution Council will prepare annual monitoring and evaluation reports and share with all stakeholders on the implementation progress. The National Dispute Resolution Council shall report to Parliament once every year on the implementation of this policy.

5.4 Policy Review

This policy will be reviewed periodically and at least once in each NAP period to take stock of the progress made in its implementation. This process will be undertaken in a participatory manner and in collaboration with other stakeholders.

-END-

5.5. Annexures

(i) Proposed Amendments to the Arbitration Act, 1995

CURRENT PROVISION	PROPOSED PROVISION
PART I – PRELIMINARY	
Section	
1. Short title.	
2. Application.	
3. Interpretation.	
PART II – GENERAL PROVISIONS	
4. Form of arbitration agreement.	
5. Waiver of right to object.	
6. Stay of legal proceedings.	
7. Interim measures by court.	
8. Death of a party.	
9. Receipt of written communications.	
10. Extent of court intervention.	
PART III – COMPOSITION AND JURISDICTION OF ARBITRAL TRIBUNAL	
11. Determination of number of arbitrators.	
12. Appointment of arbitrators.	
13. Grounds for challenge.	
14. Challenge procedure.	
15. Failure or impossibility to act.	
16. Termination of mandate and substitution of arbitrator.	
16A. Withdrawal of arbitrator.	
16B. Immunity of arbitrator.	
17. Competence of arbitral tribunal to rule on its jurisdiction.	
18. Power of arbitral tribunal.	
PART IV – CONDUCT OF ARBITRAL PROCEEDINGS	
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[Date of assent: 10th August, 1995.]	
[Date of commencement: 2nd January, 1996.]	
An Act of Parliament to repeal and re-enact with amendments the Arbitration Act and to provide for connected purposes	
[Act No. 4 of 1995, L.N. 394/1995, Act No. 11 of 2009, L.N. 48/2010.]	
PART I – PRELIMINARY	
1. Short title	
This Act may be cited as the Arbitration Act, 1995.	
2. Application	
Except as otherwise provided in a particular case the provisions of this Act shall apply to domestic arbitration and international arbitration.	
3. Interpretation	
(1) In this Act, unless the context	

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otherwise requires—	
"arbitration" means any arbitration whether or not administered by a permanent arbitral institution;	
"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;	
"arbitral award" means any award of an arbitral tribunal and includes an interim arbitral award;	
	"Arbitral Court" means the Arbitral Court established by Section 21 of the Nairobi Centre for International Arbitration Act, No. 26 of 2013. "Registrar" means the Registrar appointed under Section 9 of the Nairobi Centre for International Arbitration Act, No. 26 of 2013. "The Council" means the National Dispute Resolution Council established under section 81 the of Dispute Resolution Act.
"arbitral tribunal" means a sole arbitrator or a panel of arbitrators;	
"party" means a party to an arbitration agreement and includes a person claiming through or under a party.	
(2) An arbitration is domestic if the arbitration agreement provides expressly	

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or by implication for arbitration in Kenya: and at the time when proceedings are commenced or the arbitration is entered into—	
(a) where the arbitration is between individuals, the parties are nationals of Kenya or are habitually resident in Kenya;	
(b) where the arbitration is between bodies corporate, the parties are incorporated in Kenya or their central management and control are exercised in Kenya;	
(c) where the arbitration is between an individual and a body corporate—	
(i) the party who is an individual is a national of Kenya or is habitually resident in Kenya; and	
(ii) the party that is a body corporate is incorporated in Kenya or its central management and control are exercised in Kenya; or	
(d) the place where a substantial part of the obligations of the commercial relationship is to be performed, or the place with which the subject matter of the dispute is most closely connected, is Kenya.	
(3) An arbitration is international if—	
(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states;	
(b) one of the following places is	

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situated outside the state in which the parties have their places of business—	
(i) the juridical seat of arbitration is determined by or pursuant to the arbitration agreement; or	
(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or	
(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one state.	
(4) For the purpose of sub-section (3)—	
(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement; And	
(b) if a party does not have a place of business, reference is to be made to his habitual residence.	
(5) Where a provision of this Act, except section 29 leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party including an institution to make that determination.	

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(6) Where a provision of this Act refers to the fact that the parties have agreed or that they may agree or in any other way refer to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement.	
(7) Where a provision of this Act, other than sections 26 and 33(2)(a), refers to a claim, it also applies to a counterclaim, and where it refers to a defence it also applies to a defence to such counterclaim.	
PART II – GENERAL PROVISIONS	
4. Form of arbitration agreement	
(1) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.	
(2) An arbitration agreement shall be in writing.	
(3) An arbitration agreement is in writing if it is contained in—	
(a) a document signed by the parties;	
(b) an exchange of letters, telex, telegram, facsimile, electronic mail or other means of telecommunications which provide a record of the agreement; or	
(c) an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other party.	
(4) The reference in a contract to a document containing an arbitration clause	

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shall constitute an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.	
5. Waiver of right to object	
A party who knows that any provision of this Act from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is prescribed, within such period of time, is deemed to have waived the right to object.	
6. Stay of legal proceedings	
(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—	
(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or	
(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.	
(2) Proceedings before the court shall not be continued after an application under sub-section (1) has been made	Once proceeding are stayed, give

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and the matter remains undetermined.	
(3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.	(4) Where the Court stays the proceedings, the Court shall refer the parties to the Nairobi Centre for International Arbitration for appointment of arbitrator(s) unless the arbitration agreement provides otherwise. (5) Where the arbitration agreement provides for another appointment body, the Court shall refer the parties to that body and proceedings shall be deemed to have commenced before that body with 14 days of the reference.
7. Interim measures by court	
(1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.	
(2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.	(3) an injunction or other interim orders issued under sub-section (2) shall lapse at the end of 60 days or after such a time as extended by the Arbitral Tribunal.
8. Death of a party	
(1) An arbitration agreement is not discharged by the death of any party thereto, either as respects the deceased or any other party, but in such event is	

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enforceable by or against the personal representative of the deceased.	
(2) The authority of an arbitrator is not revoked by the death of any party by whom he was appointed.	
(3) Nothing in this section affects the operation of any law by virtue of which any right of action is extinguished by the death of a person.	
9. Receipt of, written communications	
(1) Unless otherwise agreed in writing between the parties any communication made pursuant to or for the purposes of an arbitration agreement—	
(a) being a communication effected by facsimile or electronic mail—	
(i) is deemed to have been received if it is transmitted to a facsimile number or electronic mailing address, as the case may be, specified by the addressee as his number or address for service; and	
(ii) is deemed to have been received on the day on which it is so transmitted; or	
(b) in any other case—	
(i) is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; and	
(ii) is deemed to have been received on the day on which it was so delivered.	
(2) Where, after reasonable inquiry, a	

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place of business or residential address specified by the addressee cannot be found, or where such a place or address, or any mailing address, facsimile number or electronic mailing address so specified appears never to have been, or to be no longer, that of the addressee, a written communication—	
(a) is deemed to have been received if it is sent to the addressee's last known place of business, residential address or mailing address, or last known facsimile number or electronic mailing address, or by any other means that provides a record of the attempt to deliver or transmit the communication; and	
(b) is deemed to have been received on the date specified in that record.	For the purposes of this Act, any notice, communication or proposal shall be in writing. Any such notice, communication or proposal may be delivered by hand, registered post or courier service, or transmitted by any form of electronic communication (including electronic mail and facsimile), or delivered by any other appropriate means that provides a record of its delivery. Any notice, communication or proposal shall be deemed to have been received if it is delivered: (i) to the addressee personally or to its authorized

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	representative; (ii) to the addressee's habitual residence, place of business or designated address; (iii) to any address agreed by the parties; (iv) according to the practice of the parties in prior dealings; or (v) if, after reasonable efforts, none of these can be found, then at the addressee's last-known residence or place of business.
(3) This section does not apply to the service of documents for the purpose of legal proceedings for which provision is made by rules of court.	
10. Extent of court intervention	
Except as provided in this Act, no court shall intervene in matters governed by this Act.	
PART III – COMPOSITION AND JURISDICTION OF ARBITRAL TRIBUNAL	
11. Determination of number of arbitrators	
(1) The parties are free to determine the number of arbitrators.	
(2) Failing such determination, the number of arbitrators shall be one.	
(3) Where an arbitration agreement provides that the reference shall be to two arbitrators, then, unless a contrary intention is expressed in the agreement, the agreement is deemed	
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to include a provision that the two arbitrators shall appoint a third arbitrator immediately after they are themselves appointed.	
12. Appointment of arbitrators	
(1) No person shall be precluded by reason of that person's nationality from acting as an arbitrator, unless otherwise agreed by the parties.	
(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators and any chairman and failing such agreement—	
(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator and the two arbitrators so appointed shall appoint the arbitrator;	
(b) in an arbitration with two arbitrators, each party shall appoint one arbitrator; and	
(c) in an arbitration with one arbitrator, the parties shall agree on the arbitrator to be appointed.	
(3) Unless the parties otherwise agree, where each of two parties to an arbitration agreement is to appoint an arbitrator and one party ("the party in default")	
(a) has indicated that he is unwilling to do so;	
(b) fails to do so within the time allowed under the arbitration agreement; Or	
(c) fails to do so within fourteen days (where the arbitration agreement does not limit the time within	

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which an arbitrator must be appointed by a party), the other party, having duly appointed an arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.	
(4) If the party in default does not, within fourteen days after notice under sub-section (3) has been given —	
(a) make the required appointment; and	
(b) notify the other party that he has done so, the other party may appoint his arbitrator as sole arbitrator, and the award of that arbitrator shall be binding on both parties as if he had been so appointed by agreement.	Or, (c) upon notice to the defaulting party request the Registrar to appoint an Arbitrator and notify both parties of such appointment. (d) the Registrar shall appoint an arbitrator within seven days of receipt of the request under this section, and the award of that arbitrator shall be binding on both parties as if he had been so appointed by agreement.
(5) Where a sole arbitrator has been appointed under sub-section (4), the party in default may, upon notice to the other party, apply to the High Court within fourteen days to have the appointment set aside.	(5) Where a sole arbitrator has been appointed under sub-section (4), the party in default may, upon notice to the other party, apply to the Arbitral Court within fourteen days to have the appointment set aside.
(6) The High Court may grant an	6) The Arbitral Court may grant

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application under sub-section (5) only if it is satisfied that there was good cause for the failure or refusal of the party indefault to appoint his arbitrator in due time.	an application under sub-section (5) only if it is satisfied that there was good cause for the failure or refusal of the party in default to appoint his arbitrator in due time.
(7) The High Court, if it grants an application under sub-section (5), may, by consent of the parties or on the application of either party, appoint a sole arbitrator.	(7) The Arbitral Court, if it grants an application under sub-section (5), may, by consent of the parties or on the application of either party, appoint the sole arbitrator.
(8) A decision of the High Court in respect of a matter under this section shall be final and not be subject to appeal.	(8) A decision of the Arbitral Courtin respect of a matter under this section shall be final and not be subject to appeal.
(9) The High Court in appointing an arbitrator shall have due regard to any qualifications required of an 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 the advisability of appointing an arbitrator of a nationality other than those of the parties.	(9) The Arbitral Court or the registrar of the Centre, in appointing an arbitrator shall have due regard to any qualifications required of an 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 the advisability of appointing an arbitrator of a nationality other than those of the parties.
13. Grounds for challenge	13. Grounds for challenge
(1) 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	(1) 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

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impartiality or independence.	doubts as to his impartiality or independence including the grounds that may satisfy a finding of impartiality enumerated in the Schedule to this Act.
(2) From the time of his appointment and throughout the arbitral proceedings, an arbitrator shall without delay disclose any such circumstances to the parties unless the parties have already been informed of them by him.	
(3) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence, or if he does not possess qualifications agreed to by the parties or if he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so.	
(4) A party may challenge an arbitrator appointed by him, or in whose appointment that party has participated, only for reasons of which he becomes aware after the appointment.	
14. Challenge procedure	
(1) Subject to sub-section (3), the parties are free to agree on a procedure for challenging an arbitrator.	
(2) Failing an agreement under sub-section (1), a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the composition of the arbitral tribunal or	

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after becoming aware of any circumstances referred to in section 13(3), send a written statement of the reasons for the challenge to the arbitral tribunal, and unless the arbitrator who is being challenged withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.	
(3) If a challenge under agreed procedure or under sub-section (2) is unsuccessful, the challenging party may, within 30 days after being notified of the decision to reject the challenge, apply to the High Court to determine the matter.	(3) If a challenge under agreed procedure or under sub-section (2) is unsuccessful, the challenging party may, within 7 days after being notified of the decision to reject the challenge, apply to the Arbitral Court to determine the matter.
(4) On an application under sub-section (3), the arbitrator who was challenged shall be entitled to appear and be heard before the High Court determines the application.	(4) On an application under sub-section (3), the arbitrator who was challenged shall be entitled to appear and be heard before the Arbitral Court determines the application. (5) the application under sub-section (3) shall be determined within 15 days of filing before the Arbitral Court. (6) the Arbitral Court may either before or after expiry of the period under sub-section (5) extend the period for not more than a further 15 days.
(5) The High Court may confirm the rejection of the challenge or may uphold the challenge and remove the	(7) The Arbitral Court may confirm the rejection of the challenge or may uphold the

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arbitrator.	challenge and remove the arbitrator.
(6) The decision of the High Court on such an application shall be final and shall not be subject to appeal.	(8) The decision of the Arbitral Court on such an application shall be final and shall not be subject to appeal.
(7) Where an arbitrator is removed by the High Court under this section, the court may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid.	(9) Where an arbitrator is removed by the Arbitral Court under this section, the Arbitral Court may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid.
(8) While an application under sub-section (3) is pending before the High Court, the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided, and such an award shall be void if the application is successful.	(10) While an application under sub-section (3) is pending before the Arbitral Court, the arbitral proceedings shall be stayed until the application is decided.
15. Failure or impossibility to act	
(1) The mandate of an arbitrator shall terminate if—	
(a) he is unable to perform the functions of his office or for any other reason fails to conduct the proceedings properly and with reasonable dispatch; or	
(b) he withdraws from his office; or	
(c) the parties agree in writing to the termination of the mandate.	
(2) If there is any dispute concerning any of the grounds referred to in sub-section (1)(a), a party may apply to the High Court to	(2) If there is any dispute concerning any of the grounds referred to in sub-section (1)(a), a party may apply to the Arbitral

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decide on the termination of the mandate.	Court to decide on the termination of the mandate.
(3) A decision of the High Court under sub-section (2) shall be final and shall not be subject to appeal.	(3) A decision of the Arbitral Court under sub-section (2) shall be final and shall not be subject to appeal.
(4) Where under this section or section 14(2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, that shall not imply acceptance of the validity of any ground referred to in this section or section 16(3).	
16. Termination of mandate and substitution of arbitrator	
(1) Where the mandate of an arbitrator is terminated under section 14 or 15, a substitute arbitrator shall be appointed in accordance with the procedure that was applicable to the appointment of the arbitrator being replaced.	
(2) Unless otherwise agreed by the parties—	
(a) where a sole arbitrator or the Chairman of the arbitral tribunal is replaced, any hearing previously held shall be held afresh; and	
(b) where an arbitrator, other than a sole arbitrator or the Chairman of the arbitral tribunal is replaced, any hearings previously held may be held afresh at the discretion of the arbitral tribunal.	
(3) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this	

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section shall not be invalidated solely because there has been a change in the composition of the arbitral tribunal.	
(4) The Authority of an arbitrator is personal and ceases on his death.	
16A. Withdrawal of arbitrator	
(1) Unless otherwise agreed by the parties, an arbitrator who withdraws from his office may, if prior notice has been given to the parties, apply to the High Court—	(1) Unless otherwise agreed by the parties, an arbitrator who withdraws from his office may, if prior notice has been given to the parties, apply to the Arbitral Court—
(a) to grant him relief from any liability thereby incurred by him; and	
(b) to make such order as the court thinks fit with respect to his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid.	
(2) Where the High Court is satisfied that, in the circumstances, it was reasonable for the arbitrator to resign, it may grant relief on such terms as it may think fit.	(2) Where the Arbitral Court is satisfied that, in the circumstances, it was reasonable for the arbitrator to resign, it may grant relief on such terms as it may think fit.
(3) The decision of the High Court shall be final and shall not be subject to appeal.	(3) The decision of the Arbitral Court shall be final and shall not be subject to appeal.
16B. Immunity of arbitrator	
(1) An arbitrator shall not be liable for anything done or omitted to be done in good faith in the discharge or purported discharge of his functions as an arbitrator.	
(2) Sub-section (1) shall extend to apply to a servant or agent of an arbitrator in respect of the discharge or	

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purported discharge by such a servant or agent, with due authority and in good faith, of the functions of the arbitrator.	
(3) Nothing in this section affects any liability incurred by an arbitrator by reason of his resignation or withdrawal.	
17. Competence of arbitral tribunal to rule on its jurisdiction	
(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose—	
(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and	
(b) a decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause.	
(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence, however, a party is not precluded from raising such a plea because he has appointed, or participated in the appointment of, an arbitrator.	
(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.	
(4) The arbitral tribunal may, in either	

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of the cases referred to in sub-section (2) or (3) admit a later plea if it considers the delay justified.	
(5) The arbitral tribunal may rule on a plea referred to in sub-sections (2) and (3) either as a preliminary question orin an arbitration award on the merits.	
(6) Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter.	(6) Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the Arbitral Court, within 30 days after having received notice of that ruling, to decide the matter. (7A) The other party shall file and serve on the applicant, a response to the application under sub-section (6), if any, within 14 days of receipt of the application. (8A) The Arbitral Court shall within 30 days of receipt of the response issue its decision on the application. Provided that the Arbitral Court shall still issue its decision notwithstanding the fact that a response has not been filed within the prescribed time.
(7) The decision of the High Court shall be final and shall not be subject to appeal.	(9) The decision of the Arbitral Court shall be final and shall not be subject to appeal.
(8) While an application under sub-section (6) is pending before the High Court the parties may	(10) While an application under sub-section (6) is pending before the Arbitral Court, the

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commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided and such award shall be void if the application is successful.	proceedings before the Arbitral tribunal shall be stayed until the application is decided.
18. Power of arbitral tribunal	
(1) Unless the parties otherwise agree, an arbitral tribunal may, on the application of a party—	
(a) order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute, with or without an ancillary order requiring the provision of appropriate security in connection with such a measure; Or	
(b) order any party to provide security in respect of any claim or any amount in dispute; or	
(c) order a claimant to provide security for costs.	
(2) The arbitral tribunal or a party with the approval of the arbitral tribunal, may seek assistance from the High Court in the exercise of any power conferred on the arbitral tribunal under sub-section (1).	
(3) If a request is made under sub-section (2) the High Court shall have, for the purposes of the arbitral proceedings, the same power to make an order for the doing of anything which the arbitral tribunal is empowered to order under	

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Sub-section (1) as it would have in civilproceedings before that Court, but the arbitral proceedings shall continue notwithstanding that a request has been made and is being considered by the High Court.	
PART IV – CONDUCT OF ARBITRAL PROCEEDINGS	
19. Equal treatment of parties	
The parties shall be treated with equality and each party shall subject to section 20, be given a fair and reasonable opportunity to present his case.	
19A. General duty of parties	19A. General Principles and Duty of the Parties
The parties to arbitration shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings.	1. The object of arbitration is to obtain a fair resolution of disputes by an impartial tribunal without a necessary delay or expense. 2. The parties shall be free to agree how their disputes are resolved subject only to the safeguards as necessary in the public interest. 3. The parties to arbitration shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings.
20. Determination of rules of procedure	
(1) Subject to the provisions of this Act, the parties are free to agree on the procedure to be followed by the	

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arbitral tribunal in the conduct of the proceedings.	
(2) Failing an agreement under sub-section (1), the arbitral tribunal may conduct the arbitration in the manner it considers appropriate, having regard to the desirability of avoiding unnecessary delay or expense while at the same time affording the parties a fair and reasonable opportunity to present their cases.	
(3) The power of the arbitral tribunal under sub-section (2) includes the power to determine the admissibility, relevance, materiality and weight of any evidence and to determine at what point an argument or submission in respect of any matter has been fairly and adequately put or made.	
(4) Every witness giving evidence and every person appearing before an arbitral tribunal shall have at least the same privileges and immunities as witnesses and advocates in proceedings before a court.	
(5) The tribunal may direct that a party or witness shall be examined on oath or affirmation and may for that purpose administer or take the necessary oath or affirmation.	(6) The parties and the tribunal may consider use of technology including electronic communications and examination of witnesses without requiring their physical presence in order to increase the efficiency and economy of the proceedings with an effect of hearing under section 25
21. Place of arbitration	
(1) The parties are free to agree on the juridical seat of arbitration and the location of any hearing or meeting.	
(2) Failing an agreement under	

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Sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case and convenience of the parties.	
(3) Notwithstanding sub-section (1) the arbitral tribunal may, unless otherwise agreed by the parties, meet at any location it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for the inspection of documents, goods or other property.	
22. Commencement of arbitral proceedings	
Unless the parties otherwise agree, the arbitral proceedings in respect of a particular dispute shall commence on the date on which a request for the dispute to be referred to arbitration is received by the respondent.	
23. Language	
(1) The parties are free to agree upon the language or languages to be used in the arbitral proceedings.	
(2) Failing an agreement under sub-section (1), the arbitral tribunal shall determine the language or languages to be used in the arbitral proceedings.	
(3) The agreement or determination under sub-section (1) or (2) shall, unless otherwise specified, apply to any written statement by a party, any hearing and any arbitral award, decision or other communication by the arbitral tribunal.	
(4) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed	

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upon by the parties or determined by the arbitral tribunal.	
24. Statement of claim and defence	
(1) Within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required particulars of such statements.	
(2) The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.	
(3) Except as otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.	
25. Hearing and written representations	
(1) Subject to any agreement to the contrary by the hearing parties, the arbitral tribunal shall decide whether to hold oral hearing for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials furnished under section 24.	
(2) Unless the parties have agreed that	

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no hearings shall be held, the arbitral tribunal shall hold oral hearings at an appropriate stage of the proceedings, if so required by a party.	
(3) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purpose of inspection of documents, goods or other property.	
(4) All statements, documents or other information furnished to, or applications made to, the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidential document on which the arbitral tribunal may rely in making its decisions shall be communicated to the parties.	
(5) At any hearing or meeting of the arbitral tribunal of which notice is required to be given under sub-section (3), or in any proceedings conducted on the basis of documents or other materials, theparties may appear or act in person or may be represented by any other person of their choice.	
26. Default of a party	
Unless otherwise agreed by the parties, if, without showing sufficient cause—	
(a) the claimant fails to communicate his statement of claim in accordance with section 24(1), the arbitral tribunal shall	

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terminate the arbitral proceedings;	
(b) the respondent fails to communicate his statement of defence in accordance with section 24(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;	
(c) a party which fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it;	
(d) the claimant fails to prosecute his claim, the arbitral tribunal may make an award dismissing the claim or give directions, with or without conditions, for the speedy determination of the claim;	
(e) a party fails to comply with any order or direction of the tribunal, the tribunal may make a peremptory order to the same effect, prescribing a time for compliance with the order;	
(f) a party fails to comply with a peremptory order of the tribunal to provide security for costs, the tribunal may make an award dismissing his claim;	
(g) a party fails to comply with any other peremptory order, the tribunal may—	
(i) direct that the party in default shall not be entitled to rely on any allegation or material that	

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was the subject-matter of the order;	
(ii) draw such adverse inferences from the noncompliance as the circumstances justify;	
(iii) proceed to an award on the basis of such materials as have been properly provided to it;	
(iv) make such order as it thinks fit as to the payment of costs of the arbitration incurred as a result of the noncompliance.	
27. Experts	
(1) Unless otherwise agreed by the parties, the arbitral tribunal may—	
(a) appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal; and	
(b) require a party to give the expert any relevant information or to produce or provide access to, any relevant documents, goods or other property for inspection.	
(2) Unless otherwise agreed by the parties, if a party requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties shall have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.	
(3) Unless otherwise agreed by the parties, the expert shall, upon the request of a party, make available to that party	

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for examination all documents, goods or other property in the expert's possession which were provided to him in order to prepare his report.	
28. Court assistance in taking evidence	
The arbitral tribunal, or a party with the approval of the arbitral tribunal, may request from the High Court assistance in taking evidence, and the High Court may execute the request within its competence and according to its rules on taking evidence.	
PART V – ARBITRAL AWARD AND	
TERMINATION OF ARBITRAL PROCEEDINGS	
29. Rules applicable to substance of dispute	
(1) The arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties as applicable to the substance of the dispute.	
(2) The choice of the law or legal system of any designated state shall be construed, unless otherwise agreed by the parties, as directly referring to the substantive law of that state and not to its conflict of laws rules.	
(3) Failing a choice of the law under sub-section (1) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances of the dispute.	
(4) The arbitral tribunal shall decide on the substance of the dispute	

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according to considerations of justice and fairness without being bound by the rules of law, only if the parties have expressly authorized it to do so.	
(5) In all cases, the arbitral tribunal shall decide in accordance with the terms of the particular contract and shall take into account the usages of the trade applicable to the particular transaction.	
30. Decision making by panel of arbitrators	
(1) Unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members.	
(2) Notwithstanding sub-section (1), if authorized by the parties or all the members of the arbitral tribunal, questions of procedure may be decided by the Chairman.	
31. Settlement	
(1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.	
(2) An arbitral award on agreed terms shall be made in accordance with section 32 and shall state that it is an arbitral award.	
(3) An arbitral award on agreed terms has the same status and effect as any other arbitral award on the substance	

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of the dispute.	
32. Form and contents of arbitral award	
(1) An arbitral award shall be madein writing and shall be signed by the arbitrator or the arbitrators.	
(2) For the purposes of sub-section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the arbitrators shall be sufficient so long as the reasons for any omitted signature are stated.	
(3) The arbitral award shall state the reasons upon which it is based, unless—	
(a) the parties have agreed that no reasons are to be given; or	
(b) the award is an arbitral award on agreed terms under section 31.	
(4) The arbitral award shall state the date of the award and the juridical seat of arbitration as determined in accordance with section 21(1), and the award shall be deemed to have been made at that juridical seat.	
(5) Subject to section 32B after the arbitral award is made, a signed copy shall be delivered to each party.	(5) Subject to section 32B after the arbitral award is made, a signed copy shall be delivered to each party. For the avoidance of doubt, the Award shall be considered to have been delivered to the parties 15 days after notification that the Award is ready for collection.
(6) An arbitral tribunal may, at any time, make a partial award by which some,	

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but not all, of the issues between the parties are determined, and the provisions of his Act applying to awards of an arbitral tribunal shall, except in so far as a contrary intention appears, apply in respect of such partial award.	
32A. Effect of award	
Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act.	
32B. Costs and expenses	
(1) Unless otherwise agreed by the parties, the costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration, shall be as determined and apportioned by the arbitral tribunal in its award under this section, or any additional award under section 34(5).	
(2) Unless otherwise agreed by the parties, in the absence of an award or additional award determining and apportioning the costs and expenses of the arbitration, each party shall be responsible for the legal and other expenses of that party and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration.	
(3) The arbitral tribunal may withhold the delivery of an award to the parties	

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until full payment of the fees and expenses of the arbitral tribunal is received.	
(4) If the arbitral tribunal has, under sub-section (3), withheld the delivery of an award, a party to the arbitration may, upon notice to the other party and to the arbitral tribunal, and after payment into court of the fees and expenses demanded by the arbitral tribunal, apply to the High Court for an order directing the manner in which the fees and expenses properly payable to the arbitral tribunal shall be determined.	(4) If the arbitral tribunal has, under sub-section (3), withheld the delivery of an award, a party to the arbitration may, upon notice to the other party and to the arbitral tribunal, and after payment to the Registrar of the fees and expenses demanded by the arbitral tribunal, apply to the Arbitral Court for an order directing the manner in which the fees and expenses properly payable to the arbitral tribunal shall be determined.
(5) The fees and expenses found to be properly payable pursuant to such an order shall be paid out of the moneys paid into court and the balance of those moneys. if any, shall be refunded to the applicant.	(5) The fees and expenses found to be properly payable pursuant to such an order shall be paid out of the moneys paid to the Registrar and the balance of those moneys if any, shall be refunded to the applicant.
(6) The decision of the High Court on an application under sub-section (4) shall be final and not subject to appeal.	(6) The decision of the Arbitral Court on an application under sub-section (4) shall be final and not subject to appeal.
(7) The provisions of sub-sections (3) to (6) have effect notwithstanding any agreement to the contrary made between the parties.	
32C. Interest	
Unless otherwise agreed by the parties, to the extent that the rules of law applicable to the substance of the dispute permit, an arbitral award may include provision for the payment of	

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simple or compound interest calculated from such date, at such rate and with such rests as may be specified in the award.	
[Act No. 11 of 2009, s. 24.]	**PART IVA – FAST TRACK ARBITRATION** **Section 32D** The provisions of this Part shall apply to a domestic arbitration unless the parties have otherwise agreed that it should not apply to the arbitration proceedings. **Section 32E Fast track procedure** (1) Notwithstanding anything contained in this Act, the parties to an arbitration agreement, may, at any stage either before or at the time of appointment of the arbitral tribunal, agree in writing to have their dispute resolved by fast track procedure specified in sub-section (3). (2) The parties to the arbitration agreement, while agreeing for resolution of their dispute by fast track procedure, may agree that the arbitral tribunal shall consist of a sole arbitrator who shall be chosen by the parties or by other procedure as may be agreed by the parties. (3) The arbitral tribunal shall follow the following procedure while conducting arbitration proceedings under

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	sub-section (1), — (a) Notwithstanding the provisions of section 25, the arbitral tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without any oral hearing; (b) the arbitral tribunal shall have power to call for any further information or clarification from the parties in addition to the pleadings and documents filed by them; (c) an oral hearing may be held only, if, all the parties make a request or if the arbitral tribunal considers it necessary to have oral hearing for clarifying certain issues; (d) the arbitral tribunal may dispense with any technical formalities, if an oral hearing is held, and adopt such procedure as deemed appropriate for expeditious disposal of the case. (4) The award under this section shall be made within a period of six months from the date the arbitral tribunal enters upon the reference. (5) If the award is not made

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	within the period specified in sub-section (4), the provisions of sub-sections (3) to (9) of section 32F shall apply to the proceedings. (6) The fees payable to the arbitrator and the manner of payment of the fees shall be such as may be agreed between the arbitrator and the parties or rules of an institution appointed by the parties. **Section 32F Time limit for arbitral award** (1) Unless the parties otherwise agree the award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference. Explanation. — For the purpose of this sub-section, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment. (2) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months. (3) If the award is not made within the period specified in sub-section (1) or the

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	extended period specified under sub-section (2), a party to the arbitration may apply to the Arbitral Court to terminate the mandate of the arbitrator(s). (4) Where the Arbitral Court is satisfied that, in the circumstances, there is sufficient cause to terminate the mandate of the arbitrator(s) it may grant the application under sub-section (4) or extend the specified upon such terms as it may deem necessary. Provided that while extending the period under this sub-section, if the Arbitral Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent for each month of such delay. (5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Arbitral Court. (6) While extending the period

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	referred to in sub-section (4), it shall be open to the Arbitral Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings may continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material. (7) In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal. (8) It shall be open to the Arbitral Court to impose actual or exemplary costs upon any of the parties under this section. (9) An application filed under sub-section (5) shall be disposed of by the Arbitral Court as expeditiously as possible and endeavor shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.
	(10) An order of the Arbitral Court made under this Section shall be final and enforceable as an order of the Court.

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33. Termination of arbitral proceedings	
(1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).	
(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where—	
(a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute;	
(b) the parties agree on the termination of the arbitral proceedings; or	
(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.	
(3) Subject to sections 34 and 35, the mandate of the arbitral tribunal shall terminate upon the termination of the arbitral proceedings.	
34. Correction and interpretation of arbitral award; additional award	
(1) Within 30 days after receipt of the arbitral award, unless a different period of time has been agreed upon by the parties—	
(a) a party may, upon notice in writing to the other party, request	
the arbitral tribunal to correct in the arbitral award any computation errors, any clerical or typographical errors or any other errors of a similar nature; and	

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(b) a party may, upon notice in writing to the other party, request the arbitral tribunal to clarify or remove any ambiguity concerning specific point or part of the arbitral award.	
(2) If the tribunal considers a request made under sub-section (1) to be justified it shall, after giving the other party 14 days to comment, make the correction or furnish the clarification within 30 days whether the comments have been received or not, and the correction or clarification shall be deemed to be part of the award.	
(3) The arbitral tribunal may correct any error of the type referred to in sub-section (1)(a) on its own initiative within 30 days after the date of the arbitral award.	
(4) Unless otherwise agreed by the parties, a party may upon notice in writing to the other party, within 30 days after receipt of the arbitral award, request the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.	
(5) If the arbitral tribunal considers the request made under sub-section (4) to be justified, it shall make the additional arbitral award within 60 days.	
(6) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under sub-section (2) or (5).	

(7) Section 32 shall apply to a correction or an interpretation of the arbitral award or to an additional arbitral award made under this section.	
PART VI – RECOURSE TO HIGH COURT AGAINST ARBITRAL AWARD	
35. Application for setting aside arbitral award	
(1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under sub-sections (2) and (3).	
(2) An arbitral award may be set aside by the High Court only if—	
(a) the party making the application furnishes proof—	
(i) that a party to the arbitration agreement was under some incapacity; or	
(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or	
(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or	

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or	
(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or	
(vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption;	
(b) the High Court finds that—	
(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or	
(ii) the award is in conflict with the public policy of Kenya.	

(3) An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award.	
(4) The High Court, when required to set aside an arbitral award, may, where appropriate and if so requested by a party suspend the proceedings to set aside the arbitral award for such period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award.	
[Act No. 11 of 2009, s. 26.]	(5) The leave of the Court of Appeal is required for any appeal from an order for grant or refusal to set-aside made by the High Court under this section. (6) In an application for leave under sub-section (5), the Court of Appeal shall not grant leave unless it is satisfied that in making the order appealed against the High Court has relied on grounds other than those contemplated in sub-section (2). (7) If the Court of Appeal grants

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	leave to appeal under sub-section (6), it may attach such conditions to the order granting leave as it considers just. (8) An application for leave to appeal under this section shall be made not later than 14days from the date of the decision appealed against. (9) On an appeal to the Court of Appeal, the court may – (a) uphold or set aside the decision of the High Court appealed against, and (b) confirm, vary, or set aside the whole or part of the award, (10) No further appeal shall lie from a decision of the Court of Appeal.
PART VII – RECOGNITION AND ENFORCEMENT OF AWARDS	
36. Recognition and enforcement of awards	
(1) A domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37.	
(2) An international arbitration award shall be recognised as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.	
(3) Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement	

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must furnish—	
(a) the original arbitral award or a duly certified copy of it; and	
(b) the original arbitration agreement or a duly certified copy of it.	
(4) If the arbitral award or arbitration agreement is not made in the English language, the party shall furnish a duly certified translation of it into the English language.	
(5) In this section. the expression "New York Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations General Assembly in New York on the 10th June, 1958, and acceded to by Kenya on the 10th February, 1989, with a reciprocity reservation.	
37. Grounds for refusal of recognition or enforcement	
(1) The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only—	
(a) at the request of the party against whom it is invoked, if that party furnishes to the High Court proof that—	
(i) a party to the arbitration agreement was under some incapacity; or	
(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that	

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law, under the law of the state where the arbitral award was made;	
(iii) the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or	
(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or it contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognized and enforced; or	
(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or	
(vi) the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made; or	

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(vii) the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence;	
(b) if the High Court finds that—	
(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or	
(ii) the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.	
(2) If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in sub-section (1)(a)(vi),the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party, claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security.	
PART VIII – MISCELLANEOUS PROVISIONS	
38. Bankruptcy	
(1) Where it is provided by a term in a contract to which a bankrupt is a party that any differences arising out of or in connection with the contract shall be referred to arbitration, then if the trustee in bankruptcy adopts the contract, that term is enforceable by or against him so far as relates to those differences.	

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(2) Where a person who has been adjudged bankrupt had, before the commencement of the bankruptcy, becomes a party to an arbitration agreement, and any matter to which the agreement applies requires to be determined in connection with or for the purposes of the bankruptcy proceedings, then if the case is one to which sub-section (1) does not apply—	
(a) any other party to the agreement or, with the consent of the committee of inspection, the trustee in bankruptcy may apply to the court having jurisdiction in the bankruptcy proceedings for an order directing that the matter in question shall be referred to arbitration in accordance with the agreement; and	
(b) the court, if it is of the opinion that, having regard to all the circumstances of the case, the matter ought to be determined by arbitration, may make an order accordingly.	
(3) This section shall apply in domestic arbitration or if the bankrupt person is a Kenyan or if the law of Kenya is applicable according to the rules of conflict of laws.	
39. Questions of law arising in domestic arbitration.	
Where in the case of a domestic arbitration, the parties have agreed that— (a) an application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or	

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(b) an appeal by any party may be made to a court on any question of law arising out of the award, such application or appeal, as the case may be, may be made to the High Court.	
(2) On an application or appeal being made to it under sub-section (1) the High	
Court shall—	
(a) determine the question of law arising;	
(b) confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re-consideration or, where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration.	
(3) Notwithstanding sections 10 and 35 an appeal shall lie to the Court of Appeal against a decision of the High Court under sub-section (2)—	
(a) if the parties have so agreed that an appeal shall lie prior to the delivery of the arbitral award;or	
(b) the Court of Appeal, being of the opinion that a point of law of general importance is involved the determination of which will substantially affect the rights of one or more of the parties, grants leave to appeal, and on such appeal the Court of Appeal may exercise any of the powers which the High Court could have exercised under sub-section (2).	

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(4) An application or appeal under this section shall be made within the time limit and in the manner prescribed by the Rules of Court applicable, as the case may be, in the High Court or the Court of Appeal.	
(5) When an arbitral award has been varied on appeal under this section, the award so varied shall have effect as if it were the award of the arbitral tribunal concerned.	
40. Rules	
The Chief Justice may make rules of Court for—	
(a) the recognition and enforcement of arbitral awards and all proceedings consequent thereon or incidental thereto;	40 A. Decisions of the Arbitral Court. Any decision of the Arbitral Court under this Act shall be deemed to be an order of the Court and enforceable as an order of the Court.
(b) the filing of applications for setting aside arbitral awards;	
(c) the staying of any suit or proceedings instituted in contravention of an arbitration agreement;	
(d) generally all proceedings in court under this Act.	
41 Codes of Practice	41. Codes of practice 1. For the purpose of domestic arbitration

	practice the Council shall, in consultation with the arbitration practice area committee — (a) prepare and publish a code or codes of practice to set standards for arbitrations, or (b) approve a code or codes of practice prepared by an arbitration body. 2. A code of practice referred to in section 41 may include provisions in relation to any of the following: (a) continuing professional development training requirements for arbitrators; (b) procedures to be followed by arbitrators in the conduct of a arbitrators; (c) procedures to be followed by arbitrators in the conduct of an arbitration requiring consultation, by an arbitrator, with a child; (d) ethical standards to be observed by arbitrators during an arbitration; (e) confidentiality of an arbitration; (f) procedures to be followed by a party for redress in the event of dissatisfaction with the

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	conduct of an arbitration; (g) determination of the fees and costs of an arbitration; and (h) any other matters relevant to the conduct of arbitration. 3. Before publishing or approving a code of practice under sub-section 1, the Council shall— (a) publish a notice in at least one daily newspaper with a national circulation in Kenya— (i) indicating the proposal to publish or approve a code under the section, (ii) indicating that the proposed code is available for inspection on the website for a period specified in the notice .and (iii) stating that submissions in relation to the proposed code may be made in writing to the Council before a date specified in the notice (and have regard to any submissions received pursuant to paragraph (a) (iii). 4. Where the Council prepares or approves a code of practice under this section, a notice of

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	the preparation or approval shall be published by notice in the gazette and the notice shall specify the date from which the code shall come into operation. 5. Subject to sub-section (6),the Council may— (a) amend or revoke a code of practice prepared or approved under this section, or (b) withdraw approval in respect of any code of practice previously approved under this section. 6. The requirements of sub-sections (1) and (2) shall, with all necessary modifications, apply to a code of practice that the Council intends to amend or revoke or in relation to which the Council intends to withdraw the approval. 7. Where the Council amends or revokes, or withdraws approval in respect of, a code of practice under this section, a notice to that effect shall be published in the Gazette specifying- (a) the code to which the amendment, revocation or withdrawal of approval,

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	as the case may be, relates, (b) whether the code is to be amended or revoked or whether approval in relation to the code is to be withdrawn, (c) if the code is to be amended, particulars of the amendment, and (d) the date from which the amendment, revocation or withdrawal of approval, as the case may be, commences.
41. Government to be bound	
This Act shall bind the Government.	
42. Repeal of Cap. 49 and saving	
(1) The Arbitration Act (Cap. 49) is repealed.	
(2) The repeal of the Arbitration Act (Cap. 49) shall not affect any arbitral proceedings commenced before the coming into operation of thisAct.	
(3) For the purposes of this sub-section, any arbitral proceedings shall be deemed to have commenced on the date the parties have agreed the proceedings should be commenced or, failing such agreement, on the date of receipt by the respondent of a request for the dispute to be referred to arbitration.	

(ii) Draft Construction Adjudication Bill

THE CONSTRUCTION ADJUDICATION BILL

An Act of Parliament to provide a mechanism for speedy dispute resolutionthrough adjudication, to facilitate regular and timely payment, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters.

Short title

This Act may be cited as the Construction Adjudication Act.

1. Interpretation

(1) In this Act, unless the context otherwise requires—

"adjudication certificate" means a certificate issued by the Adjudicator under section 10 of this Act;

"adjudication decision" means the decision made by an adjudicator under section 8 of this Act;

"adjudication practice area committee" means a committee established for adjudication under section 82 of the Dispute Resolution Act;

"adjudication proceedings" means the process of adjudication under this Act;

"adjudicator" means an individual appointed to adjudicate a dispute under this Act;

"claimant" means an aggrieved party in a construction contract who initiates adjudication proceedings;

"construction contract" means an agreement with a person for any of the following—

(a) the carrying out of construction operations;

(b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise;

(c) providing his own labour, or the labour of others, for the carrying out of construction operations.

(2) References in this Act to a construction contract include an agreement—

(a) to do architectural, design, or surveying work, or

(b) to provide advice on building, engineering, interior, or exterior decoration or on the laying-out of landscape, in relation to construction operations.

"construction work" means the construction, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling, or demolition of—

(a) any building, erection, edifice, structure, wall, fence or chimney, whether constructed wholly or partly above or below ground level;

(b) any road, harbour works, railway, cableway, canal or aerodrome;

(c) any drainage, irrigation or river control work;

(d) any electrical, mechanical, water, gas, oil, petrochemical, or telecommunication work; or

(e) any bridge, viaduct, dam, reservoir, earthworks, pipeline, sewer, aqueduct, culvert, drive, shaft, tunnel, or reclamation work, and includes—

(i) any work which forms an integral part of, or are preparatory to or temporaryfor the works described in paragraphs (a) to (e), including site clearance, soil investigation and improvement, earth-moving, excavation, laying of foundation, site restoration and landscaping; and

(ii) procurement of construction materials, equipment or workers, as necessarily required for any works described in paragraphs (a) to (e);

"natural person" means an individual and does not include a corporation;

"non-paying party" means a party against whom a payment claim is made pursuant to a construction contract;

"construction adjudication body" means a person accredited under section 18;

"payment" means a payment for work done or services rendered under theexpress terms of a construction contract;

"payment claim" means a claim submitted under section 4 of this Act

"payment schedule" means a schedule submitted under section 4 of this Act;

"principal" means a party who has contracted with and is liable to make payment to another party where that other party has in turn contracted with and is liable to make payment to a further person in a chain of constructioncontracts;

"respondent" means the person on whom the notice of adjudication and adjudication claim has been served;

"site" means the place where the construction work is affixed whether on-shore or off-shore;

"unpaid party" means a party who claims payment of a sum which has not been paid in whole or in part under a construction contract;

"working day" means a calendar day but exclude weekends and public holidays.

(3) For the purpose of section 2(2) "dispute" includes any unresolved complaint, grievance or disagreement arising out of a construction contract.

2. Application

(1) This Act applies to a construction contract made in writing relating to construction work carried out wholly or partly within Kenya.

(2) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication in accordance with this Act.

(3) This Act does not apply to a construction contract where a differentprocedure is prescribed by or under law or the contract.

3. Agreement to Adjudicate

(1) A construction contract shall be in writing and shall provide for resolutionof disputes arising under that contract through adjudication.

(2) A party may give notice in writing at any time of his intention to refer a dispute to adjudication.

(3) An agreement to adjudicate disputes is in writing if it is contained in—

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegram, facsimile, electronic mail or other means of telecommunications which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence ofan agreement is alleged by one party and not denied by the other party.

4. Payment Claim and Payment Schedules

(1) Claimant may serve a payment claim upon the Respondent in respect of works, goods services that have become due and payable.

(2) The payment claim must be served in accordance with the provisions of the contract or not later than 30 days from days from the date of completion ofthe works.

(3) The payment claim shall state the claimed amount together with any supporting documents.

(4) The respondent named in a payment claim shall respond by providing a payment schedule which comprises the following—

(a) The respondent's response which shall identify the payment claim, shall state the amount if different and the reasons for the difference as well as anyreason for any amount withheld.

(b) The respondent may vary a payment claim in accordance with a payment schedule in writing.

5. Commencement of Adjudication

(1) A claimant may apply to a construction adjudication body, chosen by the claimant, for adjudication of a payment claim (an adjudication application)if—

(a) the respondent provides a payment schedule under this part, but—

(i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim; or

(ii) the respondent fails to pay the whole or any part of the scheduled amount tothe claimant by the due date for payment of the amount; or

(b) the respondent fails—

(i) to provide a payment schedule within 14 days after the payment claim is given; and

(ii) to pay the whole, or any part of, the claimed amount to the claimant by thedue date.

(2) An adjudication application to which paragraph (b) applies shall not be made unless—

(a) the claimant has within 30 days immediately following the due date for payment, notified the respondent of the claimant's intention to apply for adjudication of the payment claim; and

(b) the respondent had an opportunity to provide a payment schedule to the claimant within 7 days after receiving the claimant’s notice.

(3) The notice of adjudication shall be sent to all parties concerned and shallinclude the following—

(a) The name and contact details of the parties in the contract;

(b) The nature and a brief description of the dispute;

(c) The remedy sought; and

(d) The name and contact details of the specified adjudicator, if any, or the relevant dispute adjudication board provided in specific contracts.

(4) An adjudication application—

(a) shall be in writing; and

(b) if the application is made under sub-section (1) (a) —shall be made within14 days after the claimant receives the payment schedule; and

(c) if the application is made under sub-section 1 (a) (ii) - shall be made within30 days after the due date for payment; and

(d) if the application is made under sub-section 1 (b)—shall be made within14days after the earlier of—

(i) the end of the 7-day period mentioned in sub-section 1 (b); and

(ii) the day the claimant receives the payment schedule.

(e) if the construction adjudication body has set an application fee—shall be accompanied by the application fee; and

(f) shall identify the payment claim and any payment schedule to which it relates; and

(g) may contain the submissions relevant to the application that the claimant chooses to include.

(5) The construction adjudication body shall refer the application to an eligible adjudicator within 14 days from the date of receipt of the adjudication application.

(6) The adjudication application under this Section shall state;

(a) the amount claimed and due date for payment of the amount claimed;

(b) details to identify the cause of action including the provision in the construction contract to which the payment relates;

(c) description of the work or services to which the payment relates; and

(d) a statement that it is made under this Act.

(7) Where a construction adjudication body refers an adjudication application to an adjudicator, the adjudicator may give a notice of acceptance to the claimant and the respondent.

(8) Where an adjudicator gives a notice of acceptance under sub-section (6) the adjudicator shall give the respondent a copy of the adjudication application.

(9) Where an adjudicator gives a notice of acceptance under sub-section (6), the adjudicator is taken to be appointed as the adjudicator for the adjudication application from the later of—

(a) the day the claimant receives the notice of acceptance; and

(b) the day the respondent receives the notice of acceptance.

6. Adjudication Response

(1) A respondent may give an adjudicator a response to a claimant's adjudication application (the adjudication response) within 10 days after therespondent receives a copy of the adjudication application.

(2) The adjudication response—

(a) shall be in writing; and

(b) shall identify the adjudication application to which it relates; and

(c) may contain submissions relevant to the response.

(3) The respondent may give an adjudication response only if the respondent has provided a payment schedule to the claimant within the time mentionedin section 5(1) (b) or section 5(2) (b).

(4) The respondent shall not include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant.

(5) A copy of the adjudication response shall be given to the claimant not laterthan 2 days after the response is given to the adjudicator.

7. Adjudication Procedure

(1) The adjudicator shall not decide on the adjudication application until after the end of the period within which the respondent may give an adjudicationresponse.

(2) The adjudicator shall not consider an adjudication response unless the respondent gives the response to the adjudicator within the time required bysub-section 3.

(3) A respondent may give an adjudicator a response to a claimant's adjudication application (the adjudication response) within 10 days after the respondent receives a copy of the application.

(4) The adjudicator shall decide an adjudication application as soon as possible but not later than—

(a) Where the respondent is entitled to give an adjudication response under sub-section 3 - 14 days after the earlier of—

(i) the date on which the adjudicator receives the adjudication response; and

(ii) the date on which the adjudication response is required to be given to the adjudicator under sub-section 3 or

(b) Where the respondent is not entitled to give an adjudication response undersub-section 3 - 14 days after the respondent receives a copy of the adjudication application; or

(c) Where a further time is agreed between the claimant and the respondent, thefurther agreed time.

(5) In a proceeding to decide an adjudication application, an adjudicator may ask for further written submissions from either party; and

(a) where a further submission is lodged by a party—shall allow the other partyto comment on the submission;

(b) may set deadlines for further submissions and comments by the parties;

(c) may call a conference of the parties;

(d) may carry out an inspection of any matter related to the claim.

(6) Where the adjudicator calls a conference—

(a) the conference shall be conducted informally; and

(b) the parties may be represented at the conference.

(7) The adjudicator’s power to decide an adjudication application is not affected by the failure of a party—

(a) to provide a response; or

(b) to make a submission within time; or

(c) to comment on a submission within time; or

(d) to comply with the adjudicator's call for a conference.

8. Adjudication Decision

(1) The adjudicator shall decide—

(a) the amount if any, to be paid by the respondent to the claimant (theadjudicated amount); and

(b) the day on which the amount became or becomes payable; and

(c) the rate of interest, if any, payable on the adjudicated amount.

(2) In deciding an adjudication application, the adjudicator shall only considerthe following:

(a) this Act;

(b) the construction contract to which the application relates;

(c) the payment claim to which the application relates, together with any submission, including relevant documentation, properly made by the claimant in support of the claim;

(d) the adjudication application;

(e) the payment schedule, if any, to which the application relates, together with any submission, including relevant documentation, properly made by the respondent in support of the schedule;

(f) the adjudication response, if any; and

(g) the result of any inspection by the adjudicator of any matter related to theclaim.

(3) The adjudicator's decision shall—

(a) be in writing; and

(b) include the reasons for the decision, unless the claimant and the respondenthave both asked the adjudicator not to include the reasons in the decision.

(4) Where the adjudicator values construction work or related goods and services, the adjudicator and any other adjudicator shall give the work, or the goods and services—

(a) in a later adjudication involving the valuation of the work or of the goods and services—the same value as the value decided by the adjudicator; or

(b) where the claimant or respondent satisfies the adjudicator that the value of the work, or the goods and services, has changed since the valuation—a different value to the value decided by the adjudicator.

(5) The adjudicator may, on his own initiative or on the application of the claimant or the respondent, correct a decision for—

(a) a clerical or arithmetical mistake or defect of form; or

(b) a material miscalculation of figures; or

(c) a mistake in the description of any person, thing or matter mentioned in thedecision.

(6) For purposes of sub-section 5, the application of the claimant or the respondent for the correction must be made within 5 days of receipt of an adjudicator's decision and such correction shall be made not later than 30 days.

9. Payment of Adjudicated Amount

Where an adjudicator decides that a respondent shall pay an adjudicated amount to a claimant, the respondent shall pay the amount to the claimant on or before—

(a) seven days after the date the adjudicator's decision is rendered; or

(b) the date on which the adjudicator determines the amount becomes due andpayable.

10. Failure to pay adjudicated amount

(1) Where an adjudicator has issued an adjudicator's decision and the respondent fails to pay the whole, or any part of, an adjudicated amount pluscosts or interest to the claimant under Section 9, the claimant may—

(a) ask the adjudicator to provide an adjudication certificate within 3 days fromthe date of the request; and

(b) give the respondent notice of the claimant's intention to suspend carrying out construction work, or to suspend supplying related goods and services,under the construction contract.

(2) An adjudication certificate shall state the following:

(a) the name of the claimant;

(b) the name of the respondent;

(c) the adjudicated amount;

(d) the date when payment of the adjudicated amount was required to be paidto the claimant;

(e) where part of an adjudicated amount has been paid—the amount of thepart payment.

11. Application of the Evidence Act

(1) The Evidence Act Cap 80 shall not apply to proceedings under this Act.

12. Jurisdiction of the High Court

(1) Except as provided in this Act, no court shall intervene in matters governed by this Act.

13. Enforcement of adjudication decision as judgment debt

(1) An adjudication certificate may be enforced as a decree of the High Court.

(2) The adjudication certificate shall be accompanied by the Adjudicator's Decision and an affidavit by the applicant stating the outstanding amount atthe time the certificate is filed or relief granted.

(3) Where the affidavit states that part of the adjudicated amount has been paid,the amount to be recovered is the unpaid portion of the adjudicated amount.

14. Application for setting aside

(1) Where any party to an adjudication commences proceedings to set aside theadjudication determination or the decree obtained pursuant to section 13, he shall pay into the court as security the unpaid portion of the adjudicated amount that he is required to pay, in such manner as the court directs, pending the final determination of those proceedings.

(2) The grounds on which a party to an adjudication may commence proceedings under sub-section (1) include, but are not limited to, the following:

(a) the payment claim was not served in accordance with section 4;

(b) the claimant served more than one payment claim in respect of a progress payment, otherwise than permitted under section 4;

(c) the payment claim was in respect of a matter that has already been adjudicated on its merits in proceedings under this Act;

(d) the adjudication application or the adjudication review application was not made in accordance with the provisions of this Act;

(e) the adjudicator failed to comply with the provisions of this Act in making the adjudication determination;

(f) the adjudication determination requires the claimant to pay an adjudicatedamount to the respondent;

(g) a breach of the rules of natural justice occurred in connection with the making of the adjudication determination;

(h) the making of the adjudication determination was induced or affected by fraud or corruption.

(3) A respondent may not commence proceedings under sub-section (1) on any ground if the objection to support that ground was not included in the respondent's adjudication response, unless —

(a) the circumstances of the objection to support that ground only arose after the respondent lodged the adjudication response with the authorised nominating body; or

(b) the respondent could not reasonably have known of those circumstances when lodging the adjudication response with the authorised nominating body.

15. Proceedings at the High Court

(1) All proceedings under this Act shall be commenced by way of Notice of Motion accompanied by a supporting Affidavit.

16. Substitution of Adjudicator

(1) This part applies where—

(a) a claimant fails to receive an adjudicator's notice of acceptance of an adjudication application within 5 days after the application is made; or

(b) an adjudicator who accepts an adjudication application fails to decide the application within the time allowed by section 7 (4) being 14 days after receipt of respondent's adjudication response or 14 days after respondent receives the adjudication application if he is not entitled to issue an adjudication response.

(2) The claimant—

(a) may by notice in writing served on the adjudicator or construction adjudication body, appoint a new adjudicator; and

(b) the adjudication application shall proceed within the timelines under section 7.

17. Adjudicator qualifications

(1) A person is eligible to be an adjudicator if the person has successfully completed an approved training course and is accredited in accordance withthe accreditation rules made or approved by the Council.

(2) Notwithstanding the generality of sub-section 1 an adjudicator in a construction adjudication shall-

(a) be impartial and independent of the parties;

(b) declare any matter that raises a conflict of interest;

(3) An adjudicator may with the consent of all the parties adjudicate on more than one dispute arising under the same contract.

18. Construction Adjudication body

(1) The Council may, subject to section 20 grant accreditation to a person to perform the services of a construction adjudication body for the purposes of this Act.

(2) The Council shall set the requirements for a person to qualify for accreditation as a construction adjudication body.

(3) No person shall act as a construction adjudication body in proceedings commenced under this Act except where the person is accredited by the Council.

19. Application for construction adjudication body

(1) A person may apply to the Council to be accredited as a

constructionadjudication body.

(2) On an application for accreditation the Council may—

(a) accredit the applicant as a construction adjudication body if the applicant is suitable under section 20; and

(b) refuse to accredit the applicant as a construction adjudication body if theapplicant is not suitable under section 20.

20. Construction adjudication body —suitability for accreditation

(1) In deciding whether an applicant is suitable for accreditation the Council shall have regard to the following:

(a) whether the applicant, or a person engaged or employed by the applicant, has been convicted, or found guilty, in the five years before the applicationis made, whether in this Act or elsewhere, of an offence-

(i) involving fraud or dishonesty; or

(ii) punishable by imprisonment for at least one year;

(b) whether the applicant is bankrupt or insolvent;

(c) whether the applicant, or a person engaged or employed by the applicant, atany time in the five years before the application is made, was involved in the management of a corporation when—

(i) the corporation became the subject of a winding-up order; or

(ii) a liquidator or administrator was appointed;

(d) whether the applicant at any time in the one year before the application is made had—

(i) an accreditation to be a construction adjudication body cancelled, suspended or withdrawn under this Act or any other law; or

(ii) been refused accreditation to be a construction adjudication body under thisAct or under any other law;

(e) if the applicant represents the interests of a particular section of the building and construction industry—whether the applicant's representation makes the applicant unsuitable to appoint adjudicators.

(2) In this Section: any other law means a law that provides for regulation of the building and construction industry.

21. Terms of accreditation

(1) An accreditation under this section is effective for four years starting on thedate the Council gives the accreditation.

(2) An accredited Construction adjudication body may apply for renewal of theaccreditation.

22. Suspension, cancellation or withdrawal of accreditation

(1) The Council may suspend for up to 12 months, or cancel, a construction adjudication body's accreditation if the Council is satisfied on reasonable grounds that—

(a) the construction adjudication body has contravened this Act; or

(b) the construction adjudication body is no longer suitable for accreditation, having regard to the matters listed in Section 20.

(2) Where the construction adjudication body has contravened this Act, before deciding to suspend or cancel a construction adjudication body accreditation, the Council shall have regard to—

(a) the extent to which the construction adjudication body, or a person engaged or employed by the construction adjudication body, is responsible for the contravention; and

(b) the impact of the contravention on one or more of the following:

(i) the rights or entitlements of a person under this Act;

(ii) the integrity of the construction adjudication process under this Act;

(iii) any construction adjudication process undertaken by the construction adjudication body.

(3) Where the Council is satisfied the construction adjudication body's accreditation should be suspended or cancelled, the Council shall, in writing—

(a) inform the construction adjudication body that the Council intends to suspend or cancel the accreditation; and

(b) give the construction adjudication body reasons for the suspension or cancellation; and

(c) give the construction adjudication body at least 14 days after the notice is given to the construction adjudication body to make representations to the Council about the matter.

(4) The Council shall consider any representations made by the construction adjudication body within the time set out in the notice before making a decision to suspend or cancel the construction adjudication body's accreditation.

(5) The council may withdraw accreditation where the Council is satisfied on reasonable grounds that information given to the Council by the construction adjudication body in relation to the construction adjudication body's suitability for accreditation was false or misleading.

23. Costs and expenses— Construction adjudication body

(1) The Council may determine the maximum amount that a construction adjudication body may charge for costs and expenses for any service provided by the body in relation to an adjudication application.

(2) A construction adjudication body may charge costs and expenses—

(a) Where the Council has made a determination under section 22(3) — up to the maximum amount for any service provided by the construction adjudication body in relation to an adjudication application; or

(b) Where the Council has not made a determination under section 22(3)— up to a reasonable amount having regard to the work done and expenses incurred by the Construction adjudication body

(3) The claimant and respondent are—

(a) each liable to pay any costs and expenses charged by a construction adjudication body; and

(b) each liable to contribute to the payment of any such costs and expenses—

(i) in equal proportions; or

(ii) if the adjudicator decides a different proportion—the proportion decided.

24. Report— Construction Adjudication Body

(1) A construction adjudication body shall provide a report to the Council onrequest.

(2) A report shall include the following—

(a) the activities of the construction adjudication body under the Act;

(b) costs and expenses charged by the construction adjudication body for any service provided by the body in relation to an adjudication application madeto the body; and

(c) any other information determined, in writing, by the Council.

25. Adjudicator's fees and expenses

(1) An adjudicator is entitled to be paid for adjudicating an adjudication application—

(a) when an amount of costs and expenses is agreed between the adjudicator and the parties to the adjudication—the agreed amount; or

(b) when an amount of costs and expenses is not agreed—a reasonable amount having regard to the work done and expenses incurred by the adjudicator.

(2) An adjudicator who is required to travel outside their place of business to conduct a site visit is entitled to reimbursement by the parties of prescribed rates for applicable expenses or where there are no prescribed rates, the expenses reasonably incurred.

(3) The claimant and respondent are jointly and severally liable to pay the adjudicator's costs and expenses.

(4) The claimant and respondent are jointly and severally liable make payment of the adjudicator's costs and expenses —

(a) in equal proportions; or

(b) where the adjudicator decides a different proportion—the proportion so decided.

(5) An adjudicator may withhold the delivery of an adjudication decision or an adjudication certificate to the parties until full payment of the fees and expenses of the adjudicator is received.

(6) Where the adjudicator has, under sub-section (5), withheld the delivery of an adjudication decision or an adjudication certificate, a party to the adjudication may, upon notice to the other party and to the adjudicator, and after payment into the Council of the fees and expenses demanded by the Adjudicator, apply to the Council for an order directing the manner in which the fees and expenses properly payable to the adjudicator shall be determined.

(7) The fees and expenses found to be properly payable pursuant to such an order shall be paid out of the moneys paid into Council and the balance of those moneys if any, shall be refunded to the applicant.

(8) The decision of the Council on an application under sub-section (6) shall befinal and not subject to appeal.

(9) An adjudicator is not entitled to be paid costs or expenses in relation to the adjudication of an adjudication application if the adjudicator fails to makea decision on the application within the time allowed by section (7) 4.

(10) Sub-section 9 does not apply—

(a) where the failure to make a decision is because the application is withdrawn or the dispute between the claimant and respondent is resolved; or

(b) where an adjudicator exercises a lien under sub-section 5; or;

(c) in circumstances prescribed by or under law.

26. Protection from Liability for Adjudicators and ConstructionAdjudication Body

(1) An adjudicator is not personally liable for anything done or omitted to be done in good faith—

(a) in exercising a function under this Act; or

(b) in the reasonable belief that the act or omission was in the exercise of a function under this Act.

(2) A construction adjudication body, and a person exercising a function relating to the business affairs of a construction adjudication body under this Act, are not personally liable for anything done or omitted to be done in good faith—

(a) in exercising a function under this Act; or

(b) in the reasonable belief that the act or omission was in the exercise of a function under this Act.

27. Codes of practice

(1) The Council shall, having had regard to the matters specified in sub-section 2 —

(a) prepare and publish a code or codes of practice to set standards for adjudicators, or

(b) approve a code or codes of practice prepared by a construction adjudication body.

(2) A code of practice referred to in this section may include provisions in relation to any of the following:

(a) continuing professional development training requirements for construction adjudicators;

(b) procedures to be followed by adjudicators in the conduct of a construction adjudication;

(c) procedures to be followed by adjudicators in the conduct of a construction adjudication requiring consultation, by a construction adjudicator, with an expert witness;

(d) ethical standards to be observed by adjudicators during a construction adjudication;

(e) confidentiality of a construction adjudication;

(f) procedures to be followed by a party for redress in the event of dissatisfaction with the conduct of a construction adjudication;

(g) determination of the fees and costs of a construction adjudication; and

(h) any other matters relevant to the conduct of a construction adjudication.

(3) Before publishing or approving a code of practice under sub-section 1, the Council shall—

(a) publish a notice in at least one daily newspaper with a national circulation in Kenya—

i) indicating the proposal to publish or approve a code under the section;

ii) indicating that the proposed code is available for inspection on the website for a period specified in the notice; and

iii) stating that submissions in relation to the proposed code may be made in writing to the Council before a date specified in the notice, and

(b) have regard to any submissions received pursuant to paragraph (a) (iii).

(4) Where the Council prepares or approves a code of practice under this section, a notice of the preparation or approval shall be published by notice in the *Gazette* and the notice shall specify the date from which the code shall come into operation.

(5) Subject to sub-section (6), the Council may—

(a) amend or revoke a code of practice prepared or approved under this section, or

(b) withdraw approval in respect of any code of practice previously approved under this section.

(6) The requirements of sub-sections 1 and 2 shall, with all necessary modifications, apply to a code of practice that the Council intends to amend or revoke or in relation to which the Council intends to withdraw the approval.

(7) Where the Council amends or revokes, or withdraws approval in respect of, a code of practice under this section, a notice to that effect shall be published in the *Gazette* specifying —

(a) the code to which the amendment, revocation or withdrawal of approval, asthe case may be, relates,

(b) whether the code is to be amended or revoked or whether approval in relation to the code is to be withdrawn,

(c) if the code is to be amended, particulars of the amendment, and

(d) the date from which the amendment, revocation or withdrawal of approval,as the case may be, commences.

28. Rules

(1) The Council shall have power to make regulations and issue forms to provide for any matter referred to in this Act.

(2) Notwithstanding the generality of sub-section 1 the Council shall have power to make regulations with respect to;

(a) for a definition of unprofessional conduct and for determining the mode of inquiry into and the method of dealing with such conduct and the penalties which may be imposed upon any accredited construction adjudicators foundguilty of such conduct;

(b) for the guidelines or scales of fees to be charged by accredited constructionadjudicators for professional advice, services rendered, and work done;

(c) for the fees to be paid for accreditation under this Act;

(d) for the conduct of trainings authorised or permitted under the provisions ofthis Act and for the carrying into effect of any scheme or curriculum for education construction adjudication formulated under the provisions this Act;

(e) for prescribing the procedure to be followed by persons applying for accreditation;

(f) for prescribing the conditions under which persons accredited under this Act may practise as limited liability companies, and for requiring professional indemnity insurance in the case of unlimited companies and private firms;

(g) for instructions and orders conducive to the maintenance and improvementof the status of construction adjudicators in Kenya;

(h) individual and corporate membership, convening and other conduct for the adjudication practice area committee.

SESSIONAL PAPER NO. 4 OF 2024 ON THE NATIONAL ALTERNATIVE DISPUTE RESOLUTION POLICY

MISCELLANEOUS PROVISIONS

FIRST SCHEDULE

MODEL FORMS: (Section 28)

Form No……

IN THE MATTER OF A CONSTRUCTION ADJUDICATION PURSUANT TO THE CONSTRUCTION ADJUDICATION ACT, ……

AND

PURSUANT TO

… .....(name adopted procedure)

Between

	CLAIMANT
	RESPONDENT

NOTICE OF INTENTION TO REFER TO A DISPUTE TO ADJUDICATION

TO:

The Respondent

TAKE NOTICE that the Claimant intends, pursuant to the Construction Adjudication Act, ……. (the "Act") [and in accordance with [ADJUDICATION PROCEDURE], to refer to Adjudication the dispute of which particulars are set out in this Notice of Intention to Refer a Dispute to Adjudication AS FOLLOWS: -

1.0 THE PARTIES:

1.1 The Claimant is a..... [FE/MALE ADULT/LIMITED LIABILITY COMPANY etc.] [NAME] and is a [TYPE OF BUSINESS].

1.2 The Responding Party is a.....[FE/MALE ADULT/LIMITED LIABILITY COMPANY etc.] [NAME] and is a [TYPE OF BUSINESS].

2.0 THE CONTRACT:

2.1 The contract was made on [DATE] and is in the terms of [IDENTIFY CONTRACT CONDITIONS AND CONTRACTUAL DOCUMENTS] (the "Contract"). ANNEXURENO…….

2.2 The Contract is a construction contract for the purposes of the Act.

2.3 The Referring Party is entitled to refer the dispute referred to below to Adjudication in accordance with the Act.

2.4 The parties are engaged in a project for [DESCRIBE PROJECT].

2.5 The Referring Party's role in the project is/was as [IDENTIFY REFERRING PARTY'S ROLE IN PROJECT].

2.6 The Responding Party is required under the Contract to [IDENTIFY RESPONDING PARTY'S ROLE IN PROJECT].

3.0 **THE DISPUTE:**

3.1 A dispute has arisen between the Referring Party and the Responding Party particulars of which are set out below.

3.2 Issues have arisen in respect of [OUTLINE ISSUES FORMING PART OF THE DISPUTE].

……
..

……

3.3 As a result, there is a dispute as to [IDENTIFY THE EXACT SCOPE OF THE DISPUTE (WHICH MAY NOT BE ALL THE DISPUTED ISSUES BETWEEN THE PARTIES) AND ANY CONTRACTUAL PROCEDURES WHICH ARE RELEVANT TO THE FORMATION OF A DISPUTE].

3.4 The location where the dispute arose is [IDENTIFY LOCATION].

4.0 **THE REDRESS SOUGHT BY THE REFERRING PARTY**

4.1 The Referring Party seeks redress of the following nature: [IDENTIFY NATURE OF REDRESS SOUGHT e.g. payment of the sum of Kes[FIGURES] plus interest in respect of the loss and damage incurred by the Referring Party as a result of the breaches of contract referred to.]

4.2 The Referring Party seeks redress in the form of a decision of the Adjudicator that [IDENTIFY DETAILS OF REDRESS

SOUGHT. FOR EXAMPLE]:

4.2.1 *payment by the Responding Party by [DATE] of Kes.[FIGURES],or such other sum as the Adjudicator sees fit;*

4.2.2 *interest at such rate and in such amount as the Adjudicator thinks fit;*

4.2.3 *any declaratory relief sought e.g. if a specified event is or is not a relevant event, or a declaration that the Responding Party is in breach of contract, or a declaration as to the meaning of a clause inthe contract.*

4.2.4 *the Referring Party is awarded an extension of time to the Date for Completion until [DATE]; and*

4.2.5 *the Referring Party is awarded damages of [AMOUNT], or such other sum as the Adjudicator sees fit; and*

4.2.6 *the Adjudicator orders the Responding Party to pay the Adjudicator's fees and expenses] [and to reimburse to the Referring Party the cost, to the Referring Party, of securing the Adjudicator'sappointment]*.

5.0 **CRYSTALLISATION OF THE DISPUTE**:

5.1 The Referring Party issued a Payment Claim to the Responding Party dated …… [APPENDIX ….]

5.2 By letter dated [DATE], the Referring Party wrote to the Responding Party seeking [SET OUT PECUNIARY OR DECLARATORY CLAIM].

5.3 By letter of response dated [DATE], the Responding Party expressly rejected the Referring Party's claim for the following reasons:[DETAILS].

5.4 The Responding Party has since refused to engage with the Referring Party on the question of [DETAILS].

6.0 **APPOINTMENT OF ADJUDICATOR**:

6.1 The Referring Party will apply to the [NAME OF NOMINATING BODY] for the appointment of an Adjudicator OR [ADJUDICATOR NAMED IN THE CONTRACT plus contact details] to act as the Adjudicator in this dispute.

6.2 The named Adjudicator has been sent a copy of this notice and they are requested to confirm in writing within …… days whether or not s/he are willing and able to act.

6.3 In default of compliance with 6.2 above the Referring Party will request [NOMINATING AUTHORITY] to appoint an Adjudicator.

7.0 **RELEVANT ADDRESSES**:

7.1 The names and addresses of the parties [and the addresses which the parties have specified for the giving of notices] to the Contract are set out below:

7.1.1 **Referring Party**:

(1)	Name: Designation: Email: Telephone: Mailing Address: Physical Address:	[FULL COMPANY DETAILS]
(2)	Name: Designation: Email: Telephone: Mailing Address: Physical Address:	[REPRESENTATIVE'S DETAILS]

7.1.2 **Responding Party**:

	Name: Designation: Email: Telephone: Mailing Address: Physical Address:	[FULL COMPANY DETAILS]
(2)	Name: Designation: Email: Telephone: Mailing Address: Physical Address:	[REPRESENTATIVE'S DETAILS]

DATED at …… this …… day of ……. 20….

Signed:_____

REFERRING PARTY

Payment Claim:

This is a payment claim issued pursuant to the provisions of the Construction Adjudication Act, 20…..

FROM:

Referring Party:

(1)	Name: Designation: Email: Telephone: Mailing Address: Physical Address:	[FULL COMPANY DETAILS]
(2)	Name: Designation: Email: Telephone: Mailing Address: Physical Address:	[REPRESENTATIVE'S DETAILS]

TO:

Responding Party:

(1)	Name: Designation: Email: Telephone: Mailing Address: Physical Address:	[FULL COMPANY DETAILS]
(2)	Name: Designation: Email: Telephone: Mailing Address: Physical Address:	[REPRESENTATIVE'S DETAILS]

1.0 **CONTRACT DETAILS:**

The contract was made on [DATE] and is in the terms of [IDENTIFY CONTRACT CONDITIONS ANDCONTRACTUAL DOCUMENTS] (the "Contract").

2.0 PAYMENT CLAIM:

2.1 The total amount of this Payment Claim is Kes. _____

2.2 The construction work or related goods and services in respect of which this Payment Claim is made and the method of calculation of the total amount of the claim are set out in the Attachment(s) to this Payment

Claim.

DATED at …… this …… day of ……. 20….

Signed:_____

REFERRING PARTY

Form No……

IN THE MATTER OF A CONSTRUCTION ADJUDICATION PURSUANT TO THE CONSTRUCTION ADJUDICATION ACT,

AND

PURSUANT TO

… .....(name adopted procedure)

Between

	REFERRING PARTY
	RESPONDING PARTY

ADJUDICATION APPLICATION

1.0 THE PARTIES:

1.1 The Referring Party ..... is a [FE/MALE ADULT/LIMITED LIABILITY COMPANY etc.] [NAME] and is a [TYPE OF BUSINESS].

1.2 The RespondingParty..... is a [FE/MALE ADULT/LIMITED LIABILITY COMPANY etc.] [NAME] and is a [TYPE OF BUSINESS].

2.0 THE CLAIM:

2.1 [SUMMARIZE DISPUTE & CLAIM]

2.2 The Referring Party claims from the Responding Party the sum of kes. [FIGURES], plus VAT for [BRIEF DETAILS OF CLAIM], or such other amount as the Adjudicator shall decide.

2.3 These monies are due under the terms of the engagement of the Referring Party as [ROLE] for [WORKS OR SERVICES], full particulars of which are set out below.

2.4 The Referring Party also claims interest on the monies due pursuant to [clause [NUMBER], of the Contract]

2.5 The Referring Party seeks a declaration from the Adjudicator that [IDENTIFY NATURE OF DECLARATORY RELIEF SOUGHT
e.g. if a specified event is or is not a relevant event.].

3.0 THE CONTRACT:

3.1 The contract was made on [DATE] and is in the terms of [IDENTIFY CONTRACT CONDITIONS AND CONTRACTUAL DOCUMENTS] (the "Contract"). ANNEXURENO…….

3.2 The Contract is a construction contract for the purposes of the Act.

3.3 The Referring Party is entitled to refer the dispute referred to below to Adjudication in accordance with the Act.

3.4 The parties are engaged in a project for [DESCRIBE PROJECT]

3.5 The Referring Party's role in the project is/was as [IDENTIFY REFERRING PARTY'S ROLE IN PROJECT].

3.6 The Responding Party is required under the Contract to [IDENTIFY RESPONDING PARTY'S ROLE IN PROJECT].

3.7 The Referring Party relies on the whole of the terms of the Contract for its true meaning intent and effect.

3.8 The following provisions are relevant to this dispute [INSERT AND EXPLAIN RELEVANT CLAUSES].

3.9 In summary, the contractual position is as follows [SUMMARISETHE CONTRACTUAL POSITION].

4.0 APPLICATIONS & RELEVANT NOTICES:

4.1 The Referring Party issued a Payment Claim dated .....which the Responding Party failed, neglected and/or refused to settle or [SET-OUT RELEVANT PAYMENT DETAILS, IN FULL];

4.2 The Referring Party issued a Notice of Intention to Refer the matter to Adjudication dated.....attached as APPENDIX…..;

4.3 The Responding Party is yet to settle Kes .....which remains due and outstanding.

4.4 [SET OUT ANY OTHER NOTICES IN FULL INCLUDING DELAY NOTICES ETC]

5.0 **THE FACTS:** [SET OUT THE FACTS]

6.0 EXPERT EVIDENCE:

6.1 Experts were instructed on ..... [date]

6.2 Expert Report(s) dated are attached as APPENDIX ….;

6.3 The Experts were instructed to produce their opinion on the following—

6.4 The Experts opinion(s) can be summarised to be as follows:-

……

……...

7.0 **WITNESS STATEMENTS**:

7.1 The following witnesses have prepared Witness Statements:

(1) …….

(2) …….

7.2 The Witness Statements are attached as APPENDIX…….

8.0 **THE CLAIM**:

AND the Referring Party claims the following:

9.0 THE REDRESS SOUGHT BY THE REFERRING PARTY

9.1 The Referring Party seeks redress of the following nature: [IDENTIFY NATURE OF REDRESS SOUGHT e.g. payment of the sum of Kes.[FIGURES] plus interest in respect of the loss anddamage incurred by the Referring Party as a result of the breachesof contract referred to.]

9.2 The Referring Party seeks redress in the form of a decision of theAdjudicator that [*IDENTIFY DETAILS OF REDRESS SOUGHT]*

DATED at …… this …… day of ……. 20….

Signed:

REFERRING PARTY/AUTHORISED REPRESENTATIVE

PURSUANT TO THE CONSTRUCTION ADJUDICATION ACT, ……

AND

PURSUANT TO

… .....(name adopted procedure)

Between

	REFERRING PARTY
	RESPONDING PARTY

RESPONSE

DATED at …… this …… day of ……. 20….

Signed:

RESPONDING PARTY/AUTHORISED REPRESENTATIVE

PURSUANT TO THE CONSTRUCTION ADJUDICATION ACT, ……

AND

PURSUANT TO .....(name adopted procedure)

Between

	REFERRING PARTY
	RESPONDING PARTY

ADJUDICATOR'S DECISION

1.0 THE CONTRACT:

2.0 THE APPOINTMENT:

3.0 THE PROCEDURE AND DIRECTIONS:

4.0 THE DISPUTE:

5.0 THE EXPERTS, WITNESSES:

6.0 THE HEARING, PARTIES SUBMISSIONS ETC:

7.0 SUMMARY OF CLAIM & RELIEF/REDRESS SOUGHT:

8.0 DECISION:

(c) INTEREST & COSTS:

DATED at …… this …… day of ……. 20….

MADE and PUBLISHED by me .....ADJUDICATOR.

Signed:_____

ADJUDICATOR

Form No……

IN THE MATTER OF A CONSTRUCTION ADJUDICATION

PURSUANT TO THE CONSTRUCTION ADJUDICATION ACT, ……

AND

PURSUANT TO … .....(name adopted procedure)

Between

	REFERRING PARTY
	RESPONDING PARTY

ADJUDICATION CERTIFICATE

THE CLAIM:

The Referring Party having referred the claim to Adjudication under the Act pursuant to an Adjudication Application dated …… seeking the following redress:

[REDRESS CLAIMED]

AND the Responding Party having responded per the Response dated …… to the following effect:

[DEFENCE PRESENTED]

AND FURTHER having considered the Adjudication Claim, the Response and the parties' supporting documents and submissions presented to the Adjudicator the Adjudication Decision dated ……. was delivered to the parties on …….. AND IT IS HEREBY ORDERED AS FOLLOWS:

(1) THAT the Adjudicated Amount due and payable herein is KSh. .....;

(2) THAT the date the Adjudicated Amount became due and payable was KSh. .....;

(3) THAT the Adjudicated Amount which remains due and outstanding is KSh. …….;

(4) THAT interest at the rate of ….. % is payable by the..... ;

(5) THAT the amount of interest payable as at the date of this Adjudication Certificate is.....;

(6) THAT the amount of interest that continues to accrue daily is ……..;

(7) THAT costs are payable by the …… in the amount KSh. .....*or are subject to be taxed by the taxing master;*

(8) THAT pursuant to Section …. of the Construction Adjudication Act, 20…. The Adjudication Decision is enforceable as a

judgment debtin the High Court of Kenya.

DATED at …… this …… day of ……. 20….

MADE and PUBLISHED by me.....ADJUDICATOR.

Signed:_____

ADJUDICATOR

(iii) Draft Dispute Resolution Bill

DISPUTE RESOLUTION ACT

AN ACT of Parliament to make provision for the settlement of disputes by alternative means of resolution including conciliation, and mediation; to set out the guiding principles applicable; to provide for the establishment, powers, and functions of the National Dispute Resolution Council, and for connected purposes.

PART 1 - PRELIMINARY

1. Short title

This Act may be cited as the Dispute Resolution Act, 2021.

2. Interpretation

In this Act, unless the context otherwise requires—

"Cabinet Secretary" means the Cabinet Secretary charged with the responsibility for law and justice;

"Conciliation" means a voluntary process during which one or more conciliators, facilitates communication between parties to a dispute with the purpose of assisting the parties in finding a solution or in proposing to the parties, based on the facts of conciliation and the progress of conciliation proceedings, a solution to the dispute;

"Conciliator" means a neutral third party who listens to the arguments presented by both opposing parties and renders a non-binding suggestion ofhow to resolve the conflict" and includes—

(a) a neutral third party responsible for helping two opposing parties to come to an agreement and

(b) an individual appointed to conciliate a dispute under this Act;

"Conciliation body" means a body or institution which is recognized under section 74 of this Act to act as a conciliatory body;

"Mediation" means a confidential, facilitative and voluntary process in which parties to a dispute, with the assistance of one or more mediators, attempt to reach a mutually acceptable agreement to resolve the whole or part of the dispute;

"Mediation process" means all the steps taken in an attempt to resolve a dispute by mediation from the time a dispute is referred to Mediation or a party sends an invitation to submit a dispute to mediation to the other partyup to the time the mediation report is drawn up;

"Mediation session" means a meeting (including a meeting conducted by electronic communication, video conferencing or other electronic means) between the mediator, or one or more mediators (where more than one mediator is appointed for a mediation), and one or more of the parties to thedispute, and includes any activity undertaken (whether by a

mediator, a party to the dispute or some other person) —

(a) to arrange or prepare for such a meeting, whether or not the meeting takes place;

(b) parties to voluntarily reach an agreement;

(c) to identify the issues in dispute;

(d) to explore and generate options;

(e) parties to communicate with one another; and

(f) to follow up on any matter or issue raised in such a meeting.

"Mediation agreement" means an agreement by 2 or more persons to refer the whole or part of a dispute which has arisen, or which may arise, betweenthem for mediation;

"Mediation body" means a body or institution established under section 32 of this Act;

"Mediator" means an impartial person accredited by or by a means approved by the Council and registered to facilitate mediation process;

"Mediation Registrar" means a registrar appointed under section 59A of the Civil Procedure Act. Cap. 21;

"The Council" means the National Dispute Resolution Council established under Section 5 of this Act;

"The Centre" means the Nairobi Centre for International Arbitration established under the Nairobi Centre for International Arbitration Act No.26. of 2013;

3. The object of this Act is to—

(a) give effect to Article 159(2) (c) of the Constitution;

(b) provide an effective mechanism for settlement of disputes through conciliation;

(c) provide an effective mechanism for settlement of disputes through mediation;

(d) provide for the establishment, powers, and functions of an oversight body to be known as the National Dispute Resolution Council;

(e) to facilitate accessibility of alternative means of dispute resolution including conciliation and mediation services to all Kenyans;

(f) facilitate access to justice; and

(g) enhance individual involvement in dispute resolution.

4. The following principles shall apply to alternative dispute resolution under this Act –

(a) participation in alternative dispute resolution process is voluntary;

(b) the parties to alternative dispute resolution process have theright to resolve a dispute and be informed of this right before alternative dispute resolution process commences;

(c) an alternative dispute resolution process is confidential subject to the provisions of this Act;

(d) the parties and the practitioners shall seek to complete the alternative dispute resolution process in the shortest time practicable taking into account the nature of the dispute;

(e) parties shall take reasonable measures in resolution of disputes as provided for under this Act;

(f) a practitioner shall be impartial and disclose to the parties' circumstances which may affect the practitioner's impartiality;

(g) a practitioner shall facilitate disputes which the practitioner is competent;

(h) a practitioner shall not provide legal advice to a party; and apractitioner shall not use information acquired during

the alternative dispute resolution process for personal gain or to the detriment of any person.

PART II

NATIONAL DISPUTE RESOLUTION COUNCIL

5. Establishment of the Council

(1) There is established a Council to be known as the National Dispute Resolution Council which is an unincorporated body.

(2) The Council shall consist of —

(a) a chairperson qualified to be appointed a judge of the High Court, with an expertise in Alternative Dispute Resolution appointed by the Cabinet Secretary;

(b) a representative of the Judiciary;

(c) a representative of the Attorney-General;

(d) a representative of the Nairobi Centre for internationalarbitration;

(e) a representative of faith-based organizations;

(f) a representative of the private sector;

(g) a representative of an accredited consumer organization;

(h) one member each nominated by the following bodies—

(i) Law Society of Kenya.

(ii) Chartered Institute of Arbitrators (Kenya) Branch.

(iii) Federation of Kenyan Employers.

(iv) Board of Registration for Architects and Quantity Surveyors.

(v) Federation of Women Lawyers (FIDA – Kenya).

(vi) Central Organization of Trade Unions (COTU - K).

(vii) Kenya Bankers Association.

6. Functions of the Council

(1) The functions of the Council shall be—

(a) promote the public understanding of alternative dispute resolution as an apparatus for dispute resolution, and of alternative dispute resolution terminologies scope and processes;

(b) promote further development of the legal and institutional frameworks supporting the alternative dispute resolution sector and its practice areas;

(c) increase harmony and efficiency in the sector by enhancing and strengthening coordination, collaboration and linkage within the sector, and between the sector andthe formal justice system;

(d) enhance the quality, availability and accessibility of alternative dispute resolution services by strengthening sector governance and regulation;

(e) promote and engage in capacity building for the sector;

(f) strengthen different mechanisms and the practice of alternative dispute resolution in all sectors of the country;

(g) promote and inculcate the culture of alternative dispute resolution in Kenya and to increase public confidence and adoption of alternative dispute resolution as thepreferred mode of dispute resolution in the country;

(h) strengthen the alternative dispute resolution sector through research, knowledge development, community of practice and leveraging of information Communication technology;

(i) establish and provide oversight over the Practice Area Committees and over all mechanisms for alternative dispute resolution established by law within other state agencies, except those established under or within the Judiciary;

(j) perform such other functions as may be conferred on it by this Act or any other written law.

7. Term of Office

(1) Other than the Chairperson, a member of the Council other than *ex-officio* members shall, subject to the provisions of this Act, hold office for a period of four years, on such terms and conditions as may be specified in the instrument of appointment, but shall be eligible for re-appointment for one further term.

(2) The members of the Council shall be appointed at different times so that the respective expiry dates of the members' terms of office shall fall at different times.

(3) The Chairperson shall hold office for the period of his appointment as a member of the Council or for the term specified in the instrument of appointment as such and shall be eligible for reappointment for one further term.

8. Vacancy

The office of the chairperson or a member of the Council shall becomevacant if the holder—

(a) dies;

(b) resigns from office, by a notice in writing addressed to the Cabinet Secretary;

(c) is declared bankrupt or insolvent.

(d) is convicted of a felony and sentenced to imprisonment;

(e) is absent from three consecutive meetings of the Council without good cause;

9. Filling of a vacancy

(1) Whenever a vacancy arises in the membership of the Council, the Secretariat shall within fourteen days, notify the Cabinet Secretary.

(2) Upon receipt of the notification, the Cabinet Secretary shall—

(a) request the respective nominating body to submit the names of at least three nominees within twenty-one days of the request; and

(b) appoint the nominee in compliance with the provisions of this Act.

10. Conduct of business and affairs of the Council

(1) The conduct and regulation of the business and affairs of the Council shall be as provided in the First Schedule.

(2) Except as provided in the First Schedule, the Council may regulate its own procedure.

11. Funds of the Council

(1) The funds of the Council shall consist of—

(a) Such sums as may be granted to the Council by the Cabinet Secretary for purposes of the Council pursuant tosub-section (2);

(b) all monies from any other source provided for or donated or lent to the Council including grants, gifts, donations orother endowments given to the Council;

(c) such funds, fees, monies or assets as may vest in or accrue to the Council in the performance of its functions under this Act or under any other written law.

(2) There shall be made to the Centre, out of the monies provided by Parliament for that purpose, grants towards the expenditure incurred by the Centre in the exercise of its powers or the performance of its functions under this Act orany other written law

(3) The receipts, earnings or accurals for the Fund and its balances at the close of each financial year shall not be paid into the Consolidated Fund, but retained for the purposes ofthe Fund.

12. Establishment of the Fund

(1) There is established a fund of the Council to be known as the General Fund.

(2) The Fund shall vest in the Council and shall beadministered by the Council

(3) The Fund shall consist of

(a) all monies received as subventions, grants or donation tothe Fund

(b) such sums as may be appropriated by Parliament for thepurpose

(c) monies earned or arising from any investment of the Fund

(d) foreign aid and assistance from bilateral and multilateral agencies

(e) all other sums which mat in any manner become lawfullypayable to, received by or vested in the Centre, relating to any matter incidental to its duties and functions under thisAct.

(4) The Fund shall be used for meeting the capital and current expenditure relating the function of the Council under this Act or any other written law.

13. Remuneration of the Council

The Chairperson and members shall be paid such remuneration, fees or allowances as may be determined by the Cabinet Secretary in consultation with the Salaries and Remuneration Commission.

14. Committees of the Council

(1) The Council may establish such committees including liaison committee for practice areas as it may deem appropriate to perform such functions and responsibilities asit may determine.

(2) The Council shall appoint the chairperson of a committee established under sub-paragraph (1) from amongst its members.

(3) The Council may where it deems appropriate, co-opt any person to attend the deliberations of any of its committees.

(4) All decisions by the committees appointed under sub-paragraph (1) shall be ratified by the Council.

15. Disclosure of interest

(1) A member who has an interest in any contract, or other matter present at a meeting shall at the meeting and as soon as reasonably practicable after the commencement, disclose the fact thereof and shall not take part in the consideration or discussion of or vote on, any questions with respect to the contract or other matter, or be counted in the quorum of the meeting during consideration of the matter.

(2) A disclosure of interest made under sub-section (1) shall be recorded in the minutes of the meeting at which it is made.

(3) A member of the Council who contravenes sub-section (1) commits an offence and is liable to a fine not exceeding two hundred thousand shillings.

16. Secretary to the Council

(1) The Registrar of the Nairobi Centre for International Arbitration shall be the Secretary to the Council.

(2) The Secretary shall, in the performance of the functions and duties of office, be responsible to the Council.

(3) The Secretary shall be responsible for—

(a) carrying out of the decisions of the Council;

(b) day-to-day administration and management of theaffairs of the Council;

(c) the performance of such other duties as may beassigned by the Council.

(4) The Centre shall provide the secretariat and administrative services to the Council.

17. Protection from personal liability

Nothing done by a member of the Council or by any person working under the instructions of the Council shall, if done in good faith forthe purpose of executing the powers, functions, or duties of the Council under this Act, render such member or officer personally liable for any action, claim or demand.

18. Practice Area Committees

(1) The Council shall establish committees to be known as Practice Area Committees in fields of dispute resolution thatit determines to be necessary or as is required by this Act orany other law, as independent member subscription bodies.

(2) Notwithstanding the generality of sub-section (1), the Council shall establish the following standing Practice Area Committees—

(a) Arbitration Practice Committee;

(b) Construction Adjudication Practice Committee;

(c) Mediation Practice Committee;

(d) Conciliation Practice Committee.

(3) The Council shall in establishing the practice area committees, have regard to the following;

(a) the maximum number of members necessary for theefficient administration and management of the functions of the committee;

(b) the professional expertise, competence and skills required for the practice area;

(c) the composition is representative of the elements of diversity in gender and age, and persons living with disabilities;

(d) the individual members nominated to the committeecomply with the requirements of Chapter Six of the Constitution.

(4) The functions of the Practice Area Committees shall be—

(a) promote public awareness of the respective dispute resolution practice and service;

(b) promote co-ordination and collaboration with other practice areas and with the court system.

(c) promote policy and legislative development in dispute resolution practice in order to create alignment with the national dispute resolution policy, and to strengthen the practice;

(d) promote knowledge development and the growth of a community of practice of the dispute resolution area of practice;

(e) support Council in its oversight functions;

(f) in accordance with this Act or the requirements of any other law, to enhance the quality of dispute resolution services, through the development and enforcement of tools of regulation and governance including codes of conduct; standard operating procedures; remuneration schedules; training curriculums and certification and accreditation mechanisms; and Continuous Professional Development (CPD) programs among other things;

(g) perform such other functions as may be conferred on it by the Council, this Act or any other written law.

(5) The Practice Area Committee shall, not later than 30 June in each year, make a report to the Council on the performance of its functions under this Act and on its activities during thepreceding year.

(6) The report referred to in sub-section 4 shall be in such form and include information regarding such matters as the Practice Area Committee considers appropriate or as the Council may from time to time direct, including such information as the Council may require relating to— any matter concerning the policies and activities of the Practice Area Committee, or any specific document or account prepared by the Practice Area Committee.

(7) The Practice Area Committee may from time to time make other reports to the Council on the performance of its functions.

(8) The Council shall convene an annual forum for Practice Area Committees as the focal point for exchange of information regarding the dispute resolution practice.

19. Codes of practice

(1) The Council shall, in consultation with the practice area committee —

(a) prepare and publish a code or codes of practice to set standards for dispute resolution practice including mediation, conciliation, and adjudication; or

(b) approve a code or codes of practice prepared by an accredited body.

(2) A code of practice referred to in this section may include provisions in relation to any of the following—

(a) continuing professional development training requirements for dispute resolution practice including mediation, conciliation and adjudication;

(b) procedures to be followed by for dispute resolution practice including by mediators, conciliators and adjudicators in the conduct of a for dispute resolution process;

(c) procedures to be followed by an accredited dispute resolution practitioner including a mediator, conciliator, or adjudicator in a process requiring consultation, by a mediator, conciliator, or adjudicator, with a child;

(d) ethical standards to be observed by an accredited dispute resolution practitioner including a mediator, conciliator,or adjudicator during a process;

(e) confidentiality of an accredited dispute resolution practitioner including a mediator, conciliator, or adjudicator;

(f) procedures to be followed by a party for redress in the event of dissatisfaction with the conduct of a dispute resolution practitioner including a mediator, conciliator,or adjudicator;

(g) determination of the fees and costs of a dispute resolution process and a practitioner including a mediator, conciliator, or adjudicator; and

(h) any other matters relevant to the conduct of dispute resolution process including mediation, conciliation, or adjudication.

(3) Before publishing or approving a code of practice under sub-section 1, the Council shall—

(a) publish a notice in at least one daily newspaper with a national circulation in Kenya—

(i) indicating the proposal to publish or approve a code under the section;

(ii) indicating that the proposed code is available for inspection on the website for a period specified in the notice; and

(iii) stating that submissions in relation to the proposed code may be made in writing to the Council before a date specified in the notice; and

(b) have regard to any submissions received pursuant to paragraph (a) (iii).

(4) Where the Council prepares or approves a code of practice under this section, a notice of the preparation or approval shall be published by notice in the gazette and the notice shall specify the date from which the code shall come into operation.

(5) Subject to sub-section (6), the Council may—

(a) amend or revoke a code of practice prepared or approved under this section; or

(b) withdraw approval in respect of any code of practice previously approved under this section.

(6) The requirements of sub-sections (1) and (2) shall, with all necessary modifications, apply to a code of practice that the Council intends to amend or revoke or in relation to which the Council intends to withdraw the approval.

(7) Where the Council amends or revokes, or withdraws approval in respect of, a code of practice under this section, a notice to that effect shall be published in the Gazette specifying —

(a) the code to which the amendment, revocation, or withdrawal of approval, as the case may be, relates;

(b) whether the code is to be amended or revoked or whether approval in relation to the code is to be withdrawn;

(c) if the code is to be amended, particulars of the

amendment; and

(d) the date from which the amendment, revocation, or withdrawal of approval, as the case may be, commences.

20. Regulations

(1) In performance of its functions under this Act, the Council shall have powers to develop rules and procedures to be gazetted by the Cabinet Secretary.

(2) Notwithstanding sub-section 1 the Council shall have powerto make regulations with respect to —

(i) for a definition of unprofessional conduct and for determining the mode of inquiry into and the method of dealing with such conduct and the penalties which may be imposed upon any accredited dispute resolution practitioner including mediators, conciliators, adjudicators found guilty of such conduct;

(ii) for the guidelines or scales of fees to be charged by accredited dispute resolution practitioners' mediators,conciliators, adjudicators for professional advice, services rendered, and work done;

(iii) for the fees to be paid for accreditation under this Act;

(iv) for the conduct of trainings authorized or permitted underthe provisions of this Act and for the carrying into effectof any scheme or curriculum for education in dispute resolution mediation, conciliation, adjudication formulated under the provisions this Act;

(v) for prescribing the procedure to be followed by persons applying for accreditation;

(vi) for prescribing the conditions under which persons accredited under this Act may practise as limited liabilitycompanies, and for requiring professional indemnity insurance in the case of unlimited companies and privatefirms;

(vii) for instructions and orders conducive to the maintenance and improvement of the status of dispute resolutionpractitioners including mediators, conciliators, adjudicators in Kenya;

(viii) individual and corporate membership, convening and other conduct for a practice area Committee.

PART 3A – MEDIATION

21. Application

(1) This Part applies to, or in relation to, any mediation conducted under a mediation agreement where —

(a) the mediation is conducted wholly or partly in Kenya; or

(b) the agreement provides that this Act or the law of Kenya is to apply to the mediation.

(2) This Part shall not apply to —

(a) proceedings arising out of infringements under Chapter 4 ofthe Constitution of Kenya;

(b) disputes related to children matters where there is child abuse, child neglect, defilement, domestic violence, or related criminal or other illegal purposes;

(c) disputes falling within the Protection Against Domestic Violence Act and Sexual Offences Act;

(d) any other circumstance prescribed in this Act or by or under law.

(3) Nothing in this Part shall be construed as replacing a mediation or other dispute resolution process provided for in any other enactment or instrument.

(4) In prescribing, under paragraph (d) of sub-section (3), a dispute or proceedings relating to a dispute for the purposes of that section, the Act shall consider —

(a) the unsuitability of mediation as a means of resolving the dispute or proceedings relating to a dispute;

(b) the availability and suitability of means, other than mediation, of resolving the dispute or proceedings relating to a dispute.

22. Mediation Agreement

(1) A mediation agreement may be in the form of a clause in a contract or in the form of a separate agreement.

(2) A mediation agreement must be in writing.

(a) a mediation agreement is in writing if its content is recorded in any form, whether or not the mediation agreement has been concluded orally, by conduct or by other means.

(b) a mediation agreement is in writing if its content is recorded in any language, and may be subject to translation as and when required.

(c) reference in a contract to any document containing a mediation clause constitutes a mediation agreement in

writing if the reference is such as to make that clause part ofthe contract.

(d) a reference in a bill of lading to a charter party or any other document containing a mediation clause constitutes a mediation agreement in writing if the reference is such as to make that clause part of the bill of lading.

(3) For the purposes of sub-section 2 the mediation agreement should contain the following information —

(a) the manner in which the mediation is to be conducted;

(b) the manner in which the fees and costs of the mediation will be paid;

(c) the place where the mediation is to be conducted;

(d) the fact that the mediation is to be conducted in a confidential manner;

(e) subject to the mediator withdrawing from mediation anytime with prior notice to the parties, the manner in which the mediation may be terminated;

(f) such other terms (if any) as may be agreed between the parties and the mediator.

23. Conduct of mediation

(1) The parties to a dispute may engage in mediation as a means of attempting to resolve the dispute.

(2) Participation in mediation shall be voluntary at all times.

(3) The fact that proceedings have been issued in relation to the dispute shall not prevent the parties engaging in mediation at anytime prior to the resolution of the dispute.

(4) A party may—

(a) withdraw from the mediation at any time during the mediation;

(b) be accompanied to the mediation, and assisted by, a person(including a legal advisor) who is not a party; or

(c) obtain independent legal or other advice at any time during the mediation.

(5) Subject to sub-section (4) (a), the mediator and the parties shall, having regard to the nature of the dispute, make every reasonable effort to conclude the mediation in an expeditious manner whichis likely to minimize costs.

(6) It is for the parties to determine the outcome of the mediation.

(7) The fees and costs of the mediation shall not be contingent on

its outcome.

24. Role of a mediator

(1) The mediator shall, prior to the commencement of the mediation, make such enquiry as is reasonable in the circumstances to determine whether he or she may have any actual or potential conflict of interest, and not act as mediator in that mediation if, following such enquiry, he or she determines that such conflict exists.

(2) The mediator shall—

(a) during the course of the mediation, declare to the parties anyactual or potential conflict of interest of which he or she becomes aware or ought reasonably to be aware as such conflict arises and, having so declared, shall, unless the parties agree to him or her continuing to act as the mediator,cease to act as the mediator;

(b) act with impartiality and integrity and treat the parties fairly;

(c) complete the mediation as expeditiously as is practicable having regard to the nature of the dispute and the need for the parties to have sufficient time to consider the issues; and

(d) ensure that the parties are aware of their rights to each obtain independent advice (including legal advice) prior to signing any mediation settlement.

(3) Subject to sub-section 4, the outcome of the mediation shall be determined by the mutual agreement of the parties and the mediator shall not make proposals to the parties to resolve the dispute.

(4) The mediator may, at the request of all the parties, make proposals to resolve the dispute, but it shall be for the parties to determine whether to accept such proposals.

25. Withdrawal of the Mediator

(1) Unless otherwise agreed by the parties, a mediator who withdraws from his office may, if prior notice has been given to the parties, apply to the High Court—

(a) to grant him relief from any liability thereby incurred by him; and

(b) to make such order as the court thinks fit with respect to his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid.

(2) Where the High Court is satisfied that, in the circumstances, it was reasonable for the mediator to withdraw, it may grant relief on such terms as it may think fit.

(3) The decision of the High Court shall be final and shall not be subject to appeal.

26. Confidentiality

Subject to section 27, no person shall disclose any matter relating to the mediation process to a third party.

27. Disclosure

(1) A person may disclose any matter relating to the mediation process to a third party where —

(a) the disclosure is made with the consent of —

(i) all the parties to the mediation; and

(ii) for a mediation communication that is made by a person other than a party to the mediation, the makerof the mediation communication;

(b) the content of the mediation communication is informationthat has already been made available to the public at the time of its disclosure, other than information that is only inthe public domain due to an unlawful disclosure;

(c) there are reasonable grounds to believe that the disclosureis necessary to prevent or minimize —

(i) the imminent threat to the life, health, or property of a person; or

(ii) the abuse, neglect, abandonment or exploitation ofany child or other person;

(d) the disclosure is made for research, evaluation or educational purposes without revealing, or being likely toreveal, whether directly or indirectly, the identity of the maker of the mediation communication or any person to whom the mediation communication relates;

(e) the disclosure is required by or under any law or by an order of court;

(f) the mediation communication relates to the commission of any offence under any law or was made in furtherance of any illegal purpose.

(2) Despite sub-section (1), a person may, with leave of a court or anarbitral tribunal disclose a mediation communication to a third party to the mediation —

(a) for the purpose of enforcing or disputing a mediated settlement agreement;

(b) for the purpose of establishing or disputing an

allegation or a complaint of professional misconduct against a mediator or any other person who participated in the mediation in a professional capacity;

(c) for the purpose of discovery or other similar procedures inany court proceedings or arbitral proceedings (as the case may be) which have been instituted, where the person whois a party to those proceedings is required to disclose documents in the person's possession, custody or power; or

(d) for any other purpose that the court or arbitral tribunal (as the case may be) considers justifiable in the circumstances of the case.

(3) A mediation communication is not to be admitted in evidence inany court, arbitral or disciplinary proceedings except with the leave of a court or an arbitral tribunal under sub-section 5.

(4) A court or an arbitral tribunal may, on application by any person, grant leave for a mediation communication to be disclosed under sub-section 5 or admitted in evidence under sub-section 2.

(5) For the purposes of sub-section 4, the court or arbitral tribunal (as the case may be) shall take into account all of the following matters in deciding whether to grant leave—

(a) whether the mediation communication may be or has been disclosed under sub-section 2;

(b) whether it is in the public interest or the interests of the administration of justice for the mediation communication tobe disclosed or admitted in evidence;

(c) any other circumstances or matters that the court or arbitral tribunal (as the case may be) considers relevant.

(6) Where the mediation communication is sought to be disclosed or admitted in evidence in proceedings —

(a) before a court, the application shall be made to the court before which the proceedings are heard;

(b) before an arbitral tribunal, the application shall be made to the arbitral tribunal before which the proceedings are heard;and

(c) in any other case, the application shall be made to the High Court.

(7) In this section "disclosure", in relation to information, includes permitting access to the information.

28. Stay of proceedings

(1) Where any party to a mediation agreement institutes any proceedings before a court against any other party to that agreement in respect of any matter which is the subject of that agreement, any party to that agreement may apply to that court to stay the proceedings so far as the proceedings relate to that matter.

(2) The court hearing the application may make an order, upon such terms or conditions as the court thinks fit, staying the proceedings so far as the proceedings relate to the matter.

(3) The court may, in making an order under sub-section 2, make such interim or supplementary orders as the court thinks fit for the purpose of preserving the rights of the parties.

(4) For the purposes of this part, a reference to a party includes a reference to any person claiming through or under such party.

29. Performance of a mediated settlement agreement

(1) The settlement agreement shall be performed within 30 days from the date when copies of the agreement were transmitted to the parties unless a different time period is stipulated in the agreement.

(2) Where a settlement agreement is not performed within the time period referred to in sub-section 1, any of its parties is entitled toapply to the High Court to adopt the agreement as an order of the court.

(3) Any party to the agreement may, with the consent of all the other parties to that agreement, apply to a court to record the mediation settlement agreement as an order of court.

(4) A settlement agreement that is adopted under this section as a decree of the court may be enforced in the same manner as a judgment given or an order of the court.

(5) The court may refuse to adopt a mediated settlement agreementas a decree of court if —

(a) the agreement is void or voidable because of incapacity, fraud, misrepresentation, duress, coercion, mistake or any other ground for invalidating a contract;

(b) the subject matter of the agreement is not capable of settlement;

(c) any term of the agreement is not capable of

enforcementas a decree of court;

(d) where the subject matter of the dispute to which the agreement relates involves the welfare or custody of a child, one or more of the terms of the agreement is not in the best interest of the child; or

(e) the adoption of the agreement as a decree of court is contrary to public policy.

30. Authentication of a settlement agreement

(1) A settlement agreement shall be in writing and signed by all the parties in the presence of the mediator.

(2) The mediator shall explain to the parties the legal significance of authentication of the settlement agreement.

(3) The settlement agreement shall be authenticated by the mediator by affixing their signature on the agreement.

(4) The settlement agreement shall state the date when it is made.

(5) Subject to section 29, a signed copy of the settlement agreement shall be delivered to each party.

(6) The authenticated settlement agreement shall be binding on the parties

31. Foreign Mediated Settlement Agreement

An international mediated settlement agreement to which this Act applies may be adopted as an order of court and subject to section 29 be enforced in the same manner as a judgment of the court.

32. Mediation Body

(1) The Council may, subject to such terms and conditions as the Council thinks fit to impose —

a) designate a body or institution to be a designated mediation body for the purposes of this Act; and

b) designate any accreditation or certification scheme administered by a designated mediation body to be an approved accreditation or certification scheme for the purposes of this Act.

(2) Notice of every designation shall be published in the *Gazette.*

PART 3B - COURT ANNEXED MEDIATION

33. Referral to Mediation

(1) This Part shall apply where a suit is filed in Court.

(2) Subject to the provisions of this Act or any other law on the suitability of mediation as a means of resolving the dispute or proceedings relating to a dispute, the court-

(a) in all suits, shall within 21 days after close of pleadings convene a scheduling conference with the parties and or their counsels for directions; and

(b) may in suitable cases conduct the mediation unless there is an objection from any party or refer the suit to the Mediation Registrar.

(3) Where court-initiated mediation fails, the Court shall forthwith refer the suit to the registry for hearing by another court.

(4) Where a suit is referred to the Mediation Registrar under sub-section 2, the Mediation Registrar shall convene the first scheduling conference within thirty days for the purpose of referring the suit to Mediation.

(5) The Mediation Registrar shall give a notice to the parties indicating the date and time for the first scheduling conference and requiring the parties and or their representatives to attend.

(6) The parties to a suit shall be required to attend the scheduling conference as directed in the notice given under sub-section 5 by the Mediation Registrar.

34. Appointment and List of Mediators

(1) The Mediation Registrar shall maintain and make available to all parties to whom this section applies and the public, a list of persons qualified to serve as Mediators.

(2) During or after the scheduling conference, the Mediation Registrar shall appoint a Mediator who will conduct the Mediation and who will be—

(a) a person chosen by agreement of the parties from the list; or

(b) a person assigned by the Mediation Registrar from the list; or

(c) a person who is not named on the list if the parties' consent to his appointment.

(3) Every person appointed as Mediator under sub-section 2 shall comply with the provisions of this section and with the code of ethics in the Third Schedule of this Act.

(4) The list referred to in sub-section 1 shall be the list compiled by the Committee appointed under section 59B of the Civil Procedure Act and shall be approved by the Rules Committee from time to time.

35. Mediator's Fee

(1) The Chief Justice may with the recommendation of the Rules Committee prescribe and regulate the remuneration of Mediators under this Part.

(2) Each party shall pay an equal share of the Mediator's fees for the mandatory session at least seven days before the session provided that if none of the parties has paid the Mediator's fees, the Mediator shall cancel the Mediation and immediately file with the Mediation Registrar a certificate of non-compliance.

(3) The Mediator's fees for the mandatory session shall cover up to three hours of Mediation.

(4) After the first three hours of Mediation, the Mediation may be continued if the parties and the Mediator agree to do so and if the parties agree in advance to pay the Mediator an agreed hourly rate.

(5) Where a Mediator cancels a session under sub-section 2 because a party fails to make payment of the share for Mediator's fee that party shall pay such cancellation fees as may be set from time to time by the Accreditation Committee.

(6) Where a Mediator cancels a session under sub-section 2 because a party fails to attend within the thirty minutes of the session, the party who fails to attend shall pay such cancellation fees as may be set from time to time by the Accreditation Committee.

(7) Where all the parties fail to comply or attend, as the case may be, they shall pay the cancellation fees in equal shares.

(8) A party's failure to pay a share referred to in sub-section 2 or 3 shall not affect the liability of the other party or parties.

(9) A party who has instituted a suit as a pauper with respect to the proceedings is not required to pay fees under this section.

36. Time for Mediation

(1) A Mediation shall take place within three (3) months from the date of the referral order under section 33.

(2) The time given in sub-section (1) may be extended by the Court for further two (2) months having regard to the number of parties or the complexity of issues or with the consent of the parties which consent shall be filed in Court.

37. Mandatory session

Upon a referral order being made the Mediator shall within 14 days convene a mandatory session.

38. Mediation Session

(1) The Mediator shall, immediately after the mandatory session, fix a date for the Mediation and shall, at least fourteen (14) days before the date, serve on every party a notice in the prescribe form stating the place, time and date of the Mediation session and that their attendance shall be mandatory.

(2) The Mediator shall file a copy of the notice in Court.

39. Procedure before Mediation

(1) Every party shall at least seven (7) days before the Mediation comply with the following conditions—

(a) prepare a statement in the prescribed form and provide a copy of the same to every other party and the Mediator;

(b) the statement in sub-section 1(a) shall identify the factual andlegal issues in dispute and briefly set out the position and interest of the party making the statement; and

(c) attach to the statement in sub-section 1(a) documents in support of the statement.

(2) Where it is not possible to conduct a Mediation session because a party fails to comply with sub-section (1), the Mediator shall—

(a) unless he is satisfied that such non-compliance is for good reason, cancel the session and immediately file with the Mediation Registrar a certificate of non-compliance;

(b) where the Mediator is satisfied that such non-compliance is for good reason, he shall reschedule another session consistent with the provisions of section 35 (4).

40. Attendance at Mediation

(1) The parties and their legal or other representatives, where the parties are represented, shall attend the Mediation unless the Mediator orders otherwise.

(2) Where the party is a company, corporation, partnership, government agency or entity other than an individual, an officeror director of sufficient rank with authority from such entity to settle the suit or matter, shall attend.

(3) Where it is not possible to conduct a scheduled Mediation because a party fails to attend within the first thirty minutes of the time appointed for commencement of the Mediation, the Mediator shall cancel the Mediation and immediately file with the Mediation Registrar a certificate of non-compliance.

41. Role of Mediator

(1) At the commencement of Mediation, the Mediator shall explain to the parties the statement of understanding on the role of the Mediator in the prescribed form and shall require the parties to sign the Form.

(2) Provided that where either or both of the parties fail to sign the Form, such failure shall not preclude the Mediator from proceeding with the Mediation.

42. Non-Compliance

(1) Where a certificate of non-compliance is filed, the Mediation Registrar shall within 14 days summon the parties by notice specifying the time and place at which they are required to attendbefore the Mediation Registrar for further directions in the suit.

(2) Upon attendance by the parties the Mediation Registrar may make any of the following orders—

(a) an order that further mediation shall take place on such terms as the Court shall consider appropriate; or

(b) an order that the suit shall proceed to trial; or

(c) such orders as to costs as is appropriate in the circumstances; or

(d) such other order as is appropriate in the circumstances.

43. Confidentiality and without prejudice

All communication in the course of a Mediation, the Mediator's notes and records shall be confidential and shall be deemed to be without prejudice.

44. Mediator's Report

Within ten (10) days after the Mediation is concluded, the Mediatorshall give the Mediation Registrar and parties a report on the Mediation in the prescribed form.

45. Agreement

(1) Where there is an agreement resolving some or all of the issues in dispute, it shall be reduced into writing and signed by the parties and shall be filed in Court by the Mediator within ten (10) days after the Mediation is concluded.

(2) Where the agreement settles the suit, the Mediator shall file in Court a notice to that effect and the Court shall register the agreement and enter judgement in terms of the agreement.

(3) The judgment entered under sub-section 2 will be enforced in

the same manner as a judgment of the court.

(4) Where no agreement is reached the suit shall be set down for hearing.

46. Consent Order for additional Mediation

(1) With the consent of the parties the Court may at any stage in the suit, make an order requiring the parties to participate in further Mediation.

(2) The Court may include any necessary directions in the Order.

47. No appeal against judgement on settlement

No appeal shall lie against a judgment entered under section 45(2).

48. Admissibility in Court Proceedings

(1) Anything said during a Mediation session shall be inadmissible in any legal proceedings as evidence.

(2) Neither the Mediator nor any person present at the Mediation may be summoned, compelled, or otherwise required to testify or to produce records or notes relating to the Mediation in any proceedings before any court of law.

(3) A Mediation shall not be taped nor any transcripts of it be made;

(4) Any record of what took place at Mediation shall not be admissible before any court of law, unless the parties agree in writing.

(5) The provisions of this section do not apply to—

(a) a mediated agreement; or

(b) prevent the admission of factual evidence relating to the cause of action that would be admissible notwithstanding sub-section (1) and (2).

49. All applications under section 59D of the Civil Procedure Act

All applications under section 59 D of the Civil Procedure Act shall be filed and served on the other party within 7 days of the filing.

50. Opposition to the Agreement

Where there is no opposition to the agreement within seven (7) days of service, the agreement shall be registered as a judgement of the Court.

51. Application for opposition

Where the application is opposed, it shall be heard and determined within 21 days.

52. Mediators Report

(1) Following a direction by the court under section 33 (2) the parties to the proceedings concerned engage in mediation and subsequently apply to the court to re-enter the proceedings, the mediator shall prepare and submit to the court a written report which shall set out—

(a) where the mediation did not take place, a statement of the reasons as to why it did not take place; or

(b) where the mediation took place—

(i) a statement as to whether or not a mediation settlement has been reached between the parties in respect of the dispute the subject of the proceedings; and

(ii) if a mediation settlement has been reached on all, or some only of the matters concerning that dispute, a statement of the terms of the mediation settlement.

(2) Except where otherwise agreed or directed by the court, a copy of a report prepared under this section shall be given to the parties at least 7 days prior to its submission to the court.

PART IV – CONCILIATION

53. Application

(1) This Part applies to, or in relation to, any conciliation conducted under a conciliation agreement where —

(a) the conciliation is wholly or partly conducted in Kenya;or

(b) the agreement provides that this Act or the law of Kenya is to apply to the conciliation.

(2) This Part shall not apply to—

(a) proceedings in respect of alleged infringements of the Bill of Rights Chapter Four of the Constitution of Kenya;

(b) any other circumstance prescribed in this Act or under any other law.

(3) Nothing in this Part shall be construed as replacing a conciliation or other dispute resolution process provided for inany—

(a) other law or instrument made under any other law; or

(b) contract or agreement.

(4) In prescribing, under paragraph (b) of sub-section 2, a dispute orproceedings relating to a dispute for the purposes

of that sub-section, the Council shall consider—

(a) the unsuitability of conciliation as a means of resolving the dispute or proceedings relating to a dispute;

(b) the availability and suitability of means, other than conciliation, of resolving the dispute or proceedings relating to a dispute; and

(c) the rights (if any) of the parties to the dispute or proceedings relating to a dispute to engage in proceedings before a court to resolve the dispute or proceedings relating to a dispute.

54. Confidentiality

(1) Conciliation proceedings shall be confidential unless otherwise ordered by Court or required by law or with the consent of the parties.

(2) The conciliator has a duty of confidentiality in respect of the facts of the conciliation proceedings which he or she has become privy to in the course of the proceedings or outside theproceedings.

(3) The conciliator provides information regarding the facts of the conciliation proceedings only to the parties to the proceedings and their representatives.

(4) A conciliator who is heard as a witness may not be asked questions about or required to explain the facts of the conciliation proceedings which the conciliator has become privy to in the course of those proceedings.

(5) Unless otherwise provided by law, the duty of confidentiality in respect of the facts of conciliation proceedings also extends to third parties who have in their possession documents containing information described in sub-sections 2 to 4 of this section or who have access to such documents.

(6) Despite sub-sections 1 to 5 the duty of confidentiality may be vacated where—

(a) a court before which a criminal, civil or administrative proceeding is heard orders a conciliator to provide information regarding the facts of conciliation proceedings for the reason that disclosing the information either—

(i) is justified by a substantial public interest; or

(ii) is required for the protection of a child's interests; or

(iii) concerns a threat to a person's health or life;

(iv) is required by an investigative body for purposes of an investigation authorized by law;

(b) a court relieves the conciliator from the duty of confidentiality—

(i) when a party is dies without successors;

(ii) when it is shown to be impossible to establish communication with the party;

(c) a party to conciliation proceedings or their successor or representative relieves the conciliator from the duty of confidentiality in respect of an act by providing a corresponding written consent.

55. Independence

(1) A conciliator shall be independent and impartial towards parties to conciliation proceedings.

(2) When a conciliator commences conciliation proceedings, he or she shall explain to the parties the nature and legal consequences of the conciliation proceedings and the conciliator's remuneration arrangements.

(3) A conciliator may not direct conciliation in a manner that gives the parties the impression that the conciliator has power to make binding decisions in respect of the parties' dispute.

(4) The conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject of the conciliation proceedings

(5) The conciliator shall not be presented by the parties as a witness in any arbitral or judicial proceedings.

(6) In addition to requirements set out in sub-sections 1 and 2 of this section, a professional appointed to perform the duties of conciliator shall also observe the independence and impartiality requirements established by law or code of conduct which governs the profession.

56. Invitation to conciliation

(1) Any party to a dispute to which this Act applies may initiate conciliation.

(2) The party initiating conciliation shall send to the other party a written invitation to conciliate under this Part, briefly identifying the subject of the dispute.

(3) The conciliation proceedings shall commence when the other party accepts in writing the invitation to conciliate.

(4) Where the other party rejects the invitation, there will be no

conciliation proceedings.

(5) Where the party initiating conciliation does not receive a reply within fourteen days from the date of receipt of the invitation, or within such lesser period as specified in the invitation, he may elect to treat that as a rejection of the invitation to conciliate; andif he so elects, he shall inform in writing the other party accordingly.

(6) Where a court has directed the parties to a dispute to refer their dispute to a conciliator, the conciliator may, at the request of a party, establish the preparedness of the other party to participate in conciliation proceedings.

57. Conciliator panel

(1) There shall be one conciliator unless the parties agree that there shall be more than one conciliator.

(2) Where there is more than one conciliator, the conciliators shall, as a general rule, act jointly.

58. Appointment of conciliator by parties

(1) Subject to sub-section 2—

(a) in conciliation proceedings with one conciliator, the parties may agree on the name of a sole conciliator;

(b) in conciliation proceedings with two conciliators, eachparty may appoint one conciliator; and

(c) in conciliation proceedings with three conciliators, each party may appoint one conciliator, and the two conciliators shall appoint the third conciliator who shall act as the presiding conciliator.

(2) Parties may request for a conciliation body to appoint a suitable person as a conciliator.

(3) Any person appointed by the parties, or by a conciliation body to act as a conciliator or presiding conciliator must before acceptance of the appointment disclose any conflict of interest.

59. Conciliation Meetings

(1) The conciliator may invite the parties to attend a conciliation meeting or communicate with them orally or in writing.

(2) The conciliator may meet or communicate with the parties together or with each of them separately.

(3) Unless the parties have agreed upon the place where meetingswith the conciliator are to be held, that place shall

be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings.

60. Disclosure of Communication

When the conciliator receives information concerning the dispute from a party, the Conciliator shall disclose the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which the Conciliator considers appropriate;except that when a party gives any information to the conciliator subject to a specific condition that it be kept confidential, the conciliator shall not disclose that information to the other party.

61. Settlement agreement

(1) When it appears to the conciliator that there exist elements of a settlement which may be acceptable to the parties—

(a) the conciliator shall formulate the terms of a possible settlement and submit them to the parties for their observations;

(b) After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

(2) If the parties reach agreement on a settlement of the dispute, they may draw up and sign a written settlement agreement.

(3) If requested by the parties, the conciliator may draw up, or assist the parties in drawing up, the settlement agreement.

(4) When the parties sign the settlement agreement, it shall be final and binding on them.

(5) The conciliator shall authenticate the settlement agreement by affixing their signature on the agreement and furnish an authenticated copy to each of the parties to the conciliation proceedings.

62. Costs and fees

(1) Subject to sub-section 5 the parties to conciliation proceedings shall pay to the conciliator the agreed conciliator's fee for conducting the proceedings and to cover the related costs.

(2) The conciliator may require the parties to make an advance payment on the conciliation fee.

(3) The parties to conciliation proceedings are jointly and severally liable for payment of the agreed-upon fee to the conciliator.

(4) Unless otherwise agreed by the parties each party shall bear their own costs of the conciliation.

(5) Where conciliation proceedings are conducted by an order of Court or under rules of a conciliation body, any subsequent distribution of costs between the parties to such proceedings is determined by the Court or Rules, respectively.

63. Advance deposit

(1) The conciliator may direct each party to deposit an equal amount as an advance for the costs referred to in section 62(2)which he expects will be incurred.

(2) Where the required deposits under sub-section 1 are not paid in full by both parties within fourteen days, the conciliator may suspend the proceedings or may make a written declaration oftermination of the proceedings to the parties, to take effect on the date specified in the declaration.

(3) Upon termination of the conciliation proceedings, the conciliator shall render an account to the parties of the deposits received and shall return any balance to the parties.

64. Non-admissibility of conciliation proceedings

(1) The parties shall not rely on or introduce as evidence in arbitration or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings—

(a) views expressed or suggestions made by the otherparty in respect of a possible settlement of the dispute;

(b) admissions made by the other party in the course of the conciliation proceedings;

(c) proposals made by the conciliator;

(d) the fact that the other party had indicated his or her willingness to accept a proposal for settlement made by the conciliator.

65. Experts and witnesses

(1) Subject to sub-section 2 at the request of a party and provided that the conciliator deems it necessary, an expert may be asked to provide an opinion to clarify the facts of the dispute.

(2) The conciliator may hear the other party on the request for expert opinion.

(3) Experts and witnesses may be asked to participate and may be heard in a conciliation meeting pursuant to the procedure specified in sub-section 1.

(4) Any expert and witness costs shall be paid by the parties in advance.

(5) Unless agreed otherwise, the costs are paid by the party at whose request the expert or witness is called to participate in the proceedings.

66. Termination of conciliation

(1) Conciliation proceedings are deemed to have terminated when—

(a) the parties sign the settlement agreement;

(b) the parties to the proceedings settle their dispute in the course of the proceedings;

(c) a party to the proceedings expresses its intention in writing to discontinue the proceedings; or

(d) the conciliator discontinues the proceedings in the casesspecified in sub-section 2 of this section.

(2) The conciliator may discontinue the conciliation proceedings—

(a) when the likelihood of the parties reaching an agreementis no longer justified; or

(b) all things considered, and taking into account the interests of the parties, the conciliator cannot be expectedto continue the proceedings; or

(c) when the case is essentially unsuitable for conciliation proceedings.

CONCILIATION PROCEEDINGS

67. Application to conciliation body

(1) A person may make an application in writing for conciliation to a conciliation body.

(2) The application shall state—

(a) the name, address and other contact information of the applicant;

(b) the name, address and other contact information of the other party;

(c) the facts of the dispute;

(d) the applicant's request and the facts upon which the applicant found his or her request.

(3) Documentary evidence may be annexed to the application, including documents recording the course of any negotiations conducted so far with the other party, such as the other party's reply to the applicant's request.

(4) In the application, the applicant may put forward his own settlement proposal.

(5) If the applicant acts through a representative, the representative's authority to represent shall be annexed to the application.

68. Dismissing an application

(1) A conciliation body will dismiss an application if—

(a) the conciliation body is not competent to deal with the dispute; or

(b) a final ruling has been made by a court in the dispute.

(2) The applicant shall be immediately informed of the dismissal of the application and of the grounds of the dismissal.

(3) Where an application does not include all required information, the conciliation body shall give the applicant a 7- day period bywhich he is required to provide the missing information.

(4) Where the applicant fails to provide the missing information by the time period, the conciliation body may dismiss the application, informing the applicant thereof.

69. Commencing conciliation proceedings

(1) The conciliation body shall within 7 days of receipt transmit a copy of the applicant's application to the respondent who shall provide a written reply within 7 days of the date of receipt.

(2) In the cases and pursuant to the procedure provided by law a conciliation body may order a party to participate in the proceedings.

(3) The conciliation body shall explain to the respondent the facts related to the conciliatory character of the proceedings, to legally binding effects of the outcome of the proceedings and to the duty to participate in the proceedings.

(4) In the reply, the respondent may make proposals to resolve the dispute by way of entering a settlement agreement.

(5) The conciliation body transmits a copy of the reply referred to in sub-section 2 to the applicant.

(6) The applicant shall inform the conciliation body within the established time period whether they agree to the proposal which the respondent has made to resolve the dispute.

(7) Where the applicant and the respondent agree to the settlement proposal, a written settlement agreement between the parties is authenticated by the conciliator pursuant to section 72.

70. Conciliation meeting

(1) Where the applicant and the respondent have failed to reach a settlement pursuant to section 71 of this Act, the conciliation body shall arrange a conciliation meeting between the applicant and the respondent or their representatives.

(2) A representative may participate in the meeting only if they areauthorized to execute a settlement agreement on behalf of the party they represent.

(3) The conciliation body shall set the time and place of the meeting and send an invitation for attendance to the applicant and the respondent.

(4) Where appearance at the meeting is mandatory, the requirementto attend and the consequences of the failure to appear at the meeting shall be explained in the invitation.

(5) The meeting shall be arranged within one month from the date the application is lodged. The time period may be extended for a good reason.

(6) Any meetings which take place during conciliation proceedings are confidential.

(7) The conciliator appointed by the conciliation body shall preside over the conciliation meeting and hear the parties' presentation of their issues and examine any documents or other evidence presented in the proceedings.

(8) Where the applicant and the respondent agree to the settlementproposal, a written settlement agreement between the parties is authenticated by the conciliator pursuant to section 72 of this Act.

(9) The conciliator and the parties may consider use of technology including electronic communications without requiring their physical presence in order to increase the efficiency and economy of the meetings.

71. Proposal to resolve the dispute and conclude a settlement agreement

(1) Where the parties fail to reach a settlement during a conciliation meeting under section 54, the conciliator may present to the parties a proposal.

(2) When the conciliator presents to the parties a proposal under sub-section 1, the conciliator shall give reasons for the proposal to the parties.

(3) The conciliator shall transmit the proposal to the parties within7 days of the conciliation meeting.

(4) Where it is just and reasonable in light of the facts of the disputeand the conciliation proceedings, the conciliator may recommend in the proposal that a party reimburse to the other party reasonable expert, translation and witness costs which have been or are to be paid by the other party.

(5) The parties may within 14 days as of the date of receiving the proposal respond by either accepting or rejecting it.

(6) Failure by a party to respond under sub-section 6 shall be deemed to be a rejection of the proposal.

(7) Where the parties have accepted a conciliator's proposal, the parties shall sign a settlement agreement to be authenticated by the conciliator under section 72.

72. Authentication of a settlement agreement

(1) A settlement agreement shall be in writing and signed by all the parties in the presence of the conciliator.

(2) The conciliator shall explain to the parties the legal effect of authentication of the settlement agreement.

(3) The settlement agreement shall be authenticated by the conciliator by affixing their signature on the agreement.

(4) The settlement agreement shall state the date when it is made.

(5) Subject to section 62, a signed copy of the settlement agreement shall be delivered to each party.

(6) The authenticated settlement agreement shall be binding on the parties.

73. Termination of conciliation proceedings

(1) Subject to sub-section 2, the conciliator or the conciliation bodymay deem conciliation proceedings to have been terminated—

(a) when a party declares to the conciliator that it wishes to discontinue the proceedings;

(b) when a party's conduct demonstrates an unwillingness to participate in the proceedings, including when the party—

(i) fails to provide a written reply to the conciliator within an established time period; or

(ii) fails to carry out a required procedural step without avalid reason; or

(iii) otherwise impedes the conduct of conciliation proceedings;

(c) where there is a rejection of a conciliator's proposal referred to in section 71.

(d) when the conciliation body informs the parties of the termination of conciliation proceedings pursuant sub-section (a) and (b).

(2) Where a person has been ordered by Court or other body to participate in conciliation proceedings pursuant to the procedure provided in this Part, the conciliation proceedings may not be terminated pursuant sub-section (1) (a) and (b) before—

(a) the conciliator has presented a proposal pursuant to section 71; and

(b) the conciliator has submitted to the Court or that other body a written report giving reasons for the termination.

CONCILIATION BODY

74. Conciliation body

(1) The Council may, subject to section 76 grant accreditation to a person to perform the services of a conciliation body for the purposes of this Act.

(2) The Council shall set the requirements for a person to qualify for accreditation as a conciliation body.

(3) No person shall act as a conciliation body in proceedings commenced under this Act except where the person is accredited by the Council.

75. Application for Conciliation Body

(1) A person may apply to the Council to be accredited as a Conciliation Body.

(2) On an application for accreditation the Council may—

(c) accredit the applicant as a Conciliation Body where thea pplicant is suitable under section 76; or

(d) refuse to accredit the applicant as a Conciliation Body where the applicant is not suitable under section 76.

76. Conciliation Body – Suitability

(1) In deciding whether an applicant is suitable the Council shall have regard to the following—

(a) whether the applicant meets the requirements set under section 74(2);

(b) whether the applicant, or a person engaged or employed by the applicant, has been convicted, or found guilty, in the fiveyears before the application is made, whether in the Act or elsewhere, of an offence—

(i) involving fraud or dishonesty; or

(ii) punishable by imprisonment for at least one year;

(c) whether the applicant is bankrupt or insolvent;

(d) whether the applicant, or a person engaged or employed by the applicant, at any time in the five years before the application is made, was involved in the management of a corporation when—

(i) the corporation became the subject of a winding-uporder; or

(ii) a controller or administrator was appointed.

(e) whether the applicant at any time in the one year before the application is made had—

(i) an accreditation to be a Conciliation Body cancelled, suspended, or withdrawn under this Act;or

(ii) been refused accreditation to be a Conciliation Body under this Act or under any other law.

77. Terms of accreditation

(1) An accreditation under this section is effective for four years starting on the date the Council gives the accreditation.

(2) An accreditation Conciliation Body may apply for renewal of the accreditation.

78. Suspension, cancellation, or withdrawal of accreditation

(1) The Council may suspend for up to 12 months, or cancel, a Conciliation Body's accreditation if the Council is satisfied on reasonable grounds that—

(a) the Conciliation Body has contravened this Act; or

(b) the Conciliation Body is no longer suitable for accreditation,having regard to the matters listed in section 76.

(2) Where the Conciliation Body has contravened this Act, before deciding to suspend or cancel a Conciliation Body's accreditation, the Council shall

have regard to—

(a) the extent to which the Conciliation Body, or a personengaged or employed by the Conciliation Body, is responsible for the contravention; and

(b) the impact of the contravention on one or more of the following—

(i) the rights or entitlements of a person under this Act;

(ii) the integrity of the conciliation process under this Act;

(iii) any conciliation process undertaken by the conciliation body.

(3) Where the Council is satisfied that the Conciliation Body's accreditation should be suspended or cancelled, the Council shall, in writing—

(d) inform the Conciliation Body that the Council intends to suspend or cancel the accreditation; and

(e) give the Conciliation Body reasons for the suspension or cancellation; and

(f) give the Conciliation Body at least 14 days after the notice is given to the Conciliation Body to make representations tothe Council about the matter.

(4) The Council shall consider any representations made by the Conciliation Body within the time set out in the notice before making a decision to suspend or cancel the Conciliation Body's accreditation.

(5) The Council may withdraw accreditation if the Council is satisfied on reasonable grounds that information given to the Council by the Conciliation Body in relation to the ConciliationBody's suitability for accreditation was false or misleading.

79. Cost and expenses – Conciliation Body

(1) The Council may determine the reasonable amount that a Conciliation Body may charge for costs and expenses for any service provided by the body in relation to a conciliation application.

(2) A Conciliation Body may charge costs and expenses—

(a) where the Council has made a determination under section
78 (3)— up to the maximum amount for any service provided by the body in relation to a conciliation

application;or

(b) where the Council has not made a determination under section 78 (3)—up to a reasonable amount having regard to the work done and expenses incurred by the ConciliationBody.

(3) The claimant and respondent are—

(a) each liable to pay any costs and expenses charged by a Conciliation Body; and

(b) each liable to contribute to the payment of any such costs and expenses—

(i) in equal proportions; or

(ii) if the conciliator decides a different proportion—the proportion decided.

80. Report – Conciliation Body

(1) A Conciliation Body shall provide a report to the Council on request.

(2) A report shall include the following—

(a) the activities of the Conciliation Body under the Act;

(b) costs and expenses charged by the Conciliation Body for any service provided by the body in relation to a conciliation application made to the body;

(c) any other information determined, in writing, by the Council.

PART V – MISCELLANEOUS PROVISIONS

81. Court Annexed Mediation Rules

The Chief Justice may with the recommendation of the Rules Committee established under section 81 of the Civil Procedure Act make rules under Part 2B of this Act.

82. Forms

The parties to a mediation commenced under Part 2B shall use the Forms Nos. 1 to 7 of the Second Schedule for the respective purposes therein mentioned.

83. The Chief Justice may by order prescribe forms under Part 2B of this Act.

84. General Rules

(1) Except for matters provided for by Section 81 and section 83, the Council may by regulations provide for any matter referred to in this Act as prescribed or to be prescribed.

(2) Without prejudice to any provision of this Act, regulations

under this section may contain such incidental, supplementary and consequential provisions as appear to the Council to be necessary or expedient for the purposes of the regulations.

85. Limitation

(1) In reckoning a period of time for the purposes of a limitation period specified by the Limitation of Actions Act, Public Authorities Limitations Act or any other law on limitation, the period beginning on the day on which a request for mediation ismade or conciliation initiated and ending on the day which is 30days after either—

(a) 7 days after service of the request for mediation or conciliation without response.

(b) a mediation or conciliation settlement is signed by the parties; or

(c) the mediation or conciliation is terminated, whichever first occurs, shall be disregarded.

(2) The Mediator or conciliator in a mediation or conciliation respectively shall inform the parties in writing of the date on which the mediation or conciliation ends.

86. Protection from Liability for Conciliators, Mediators, Conciliation Body, and Mediation Body

(1) A conciliator or mediator is not personally liable for anything done or omitted to be done in good faith—

(a) in exercising a function under this Act; or

(b) in the reasonable belief that the act or omission was in the exercise of a function under this Act.

(2) A conciliation body or a mediation body, and a person exercisinga function relating to the business affairs of a conciliation body or mediation body under this Act, are not personally liable for anything done or omitted to be done in good faith—

(a) in exercising a function under this Act; or

(b) in the reasonable belief that the act or omission was in the exercise of a function under this Act.

(3) A mediator in exercising a function under Part 2B shall have theprotection in the same manner and to the same extent as grantedunder section 6 of the Judicature Act to judges, magistrates and other persons acting judicially.

FIRST SCHEDULE

(Section 10)

PROVISIONS RELATING TO THE CONDUCT OF BUSINESS AND AFFAIRS OF THE COUNCIL

(1) The Council shall have at least four meetings in every financial year and not more than four months shall elapse between one meeting and the next meeting.

(2) Notwithstanding subparagraph (1), the chairperson may, and upon requisition in writing by at least five members, convene a special meeting of the Council at any time for the transaction of the business of the Council.

(3) Unless three quarters of the total members of the Council otherwise agree, at least fourteen days' written notice of every meeting of the Council shall be given to every member of the Council.

(4) The quorum for the conduct of the business of the Council shall be five members.

(5) A meeting shall be presided over by the Chairperson or in his absence, by a person elected by the Council at the meeting for that purpose and the person so elected shall have all the powers of the chairperson with respect to that meeting and the business transacted there at.

(6) Unless a unanimous decision is reached, a decision on any matter before the Council shall be by a majority of the votes of the members present and voting, and in case of an equality of votes, the chairperson or the person presiding shall have a casting vote.

(7) No proceedings of the Council shall be invalid by reason only of a vacancy among the members.

(8) Nothing in this paragraph shall prevent the chairperson from authorizing a member to use live telephone conferencing or other appropriate communication or multimedia facilities to participate in any meeting of the Council where, prior to the meeting, the member, by notification to the chairperson, has requested for such authorization.

(9) Subject to the provisions of this Schedule, the Council may determine its own procedure and the procedure for any committee of the Council and for the attendance of other persons at its meetings and may make standing orders in respect thereof.

(10) Minutes of all Council meetings shall be kept and entered in books kept for that purpose.

SECOND SCHEDULE

(SECTION 83)

THIRD

SCHEDULE

(SECTION 34 (3)