Review of The Principle of Finality in Arbitral Proceedings Under Section 39 (3) (B) of The Arbitration Act, 1995

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1.0 Introduction

The Arbitration Act, 1995 which governs the conduct of arbitral proceedings in Kenya is based on the Model Arbitration Law of the United Nations Commission on Trade Law ("UNICITRAL)[1]. The major reform to the Arbitration Act, 1995 was the introduction of section 10 which cushions arbitral proceedings from Court's interference.[2] The Arbitration Act, 1995 despite the amendments still exhibited some shortcomings; central to this is the fact that the Arbitration Act, 1995 did not provide for finality of an arbitral award. There was therefore need to amend the Arbitration Act, 1995 hence the Arbitration (Amendment) Act, 2009 which was assented to on 1st January, 2010 ("the Amending Act)[3]. This led to the introduction of section 32A of the Arbitration, Act, 1995.

Despite the amendment, the Arbitration Act still retained section 39 (3) (b) of the Arbitration Act, 1995[4] which allows appeal on points of law to the Court of Appeal either by agreement of the parties or with the leave of the Court of Appeal. This article therefore explores how the principle of finality of arbitral proceedings is undermined by the right of appeal to the Court of Appeal on points of law.

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[1] United Nations Commission on International Trade Law (UNICITRAL), <https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed on 6th December, 2017.

[2] Professor Paul Musili Wambua, 'The Challenges of implementing ADR as an alternative mode of access to justice in Kenya", (2013) 1 (1)Alternative Dispute Resolution Journal, <http://www.ciarbkenya.org/wp-content/themes/mxp_base_theme/mxp_theme/assets/final-vol-1-issue-1.pdf>, p. 26. Accessed on 1st March, 2018.

[3] The Amending Act introduced a new Section 32A, which provides that an arbitral award is final and binding. This therefore introduces the principle of finality of arbitral proceedings that was lacking prior to the amendment.

[4] The section provides that it is an exception to the rule provided under section 10 and 35 of the Arbitration Act, 1995. It should also be noted that there is no similar provision in the UNICITRAL Model Law and this particular provision was adopted from the UK Arbitration Act, 1995.

1.1 The Rationale for Arbitration and the Right of Appeal to the Court of Appeal on Points of Law

The main appeal of arbitration as a mode of dispute resolution is in its advantages over litigation. Prof. Musili Wambua, acknowledges that arbitration is the most preferred method of alternative dispute resolution that has found favor with most litigants because of the long delays experienced in litigation[5]. Arbitration is flexible, being a private and a consensual process, parties can agree on how they want it to be conducted and these rules can change at any time depending on the circumstances prevailing. There are no formal or unchangeable rules like those found in the Court rooms.[6] Arbitration has also been upheld because of its cost effectiveness which is achieved through the potentially timeous settlement and disposal of the matters before the tribunal.

The growth and popularity of arbitration, as an alternative to litigation, reflects its advantages it has over the limitations and disadvantages of the Court proceedings. This can be seen over the increasing use of arbitration in many Countries in the world and has even received Constitutional anchoring[7]. Arbitration offers advantages that litigation from its nature, may not provide. However, it is important to note that these advantages vary on a case to case basis.
The main advantages of arbitration are that it upholds the freedom of the parties to a contract to resolve their disputes and its finality over litigation. The principle of party autonomy runs through the arbitral proceedings. Parties are free to agree on the procedure they will adopt, the time the arbitral proceedings will take, how the award should look like, appointment of arbitrators among other aspects. The parties as such end up being the real "owners" of arbitration proceedings and they theoretically may create their own "code of arbitration proceedings."

The second most important attribute that Arbitration boasts over litigation is its finality. This feature remains undisturbed by the infiltration of courtroom tendencies. Most arbitration agreements expressly underscore that the decision of the arbitrator or tribunal is final. With finality, the persons to arbitration can therefore have a quick decision and thereby save time. This will also help benefit the court system by offloading it from an already overburdened cause list and backlog of cases.[8]

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[5] Ibid n. 2 .
[6] Kariuki Muigua, "Settling Disputes Through Arbitration in Kenya, 3rd Edition, 2017, Glenwood Publishers Limited". P. 5-6.
[7] In Kenya, it is a requirement that inter-governmental disputes are resolved by alternative dispute resolution mechanisms and arbitration is one of them.
[8] Alfred Mutubwa, "Consistency and Predictability of the Law versus Finality of the Arbitral Award: Juridical Juxtaposition of Sections 32A, 35 and 37 of the Kenyan Arbitration Act,"(2017) 5(1) Alternative Dispute Resolution
http://www.ciarbkenya.org/wpcontent/themes/mxp_base_theme/mxp_theme/assets/vol--5-issue-2--final-august-30th-.pdf Accessed on 24th February, 2018.

Allowing appeals to the Court of Appeal under section 39 of the Arbitration Act, 1995 underscores the attribute of arbitration being a fast process. Where an applicant files an application during the course of the arbitration before the High Court and since it is by agreement of the parties, the parties can consent to the stay of the proceedings before the arbitrator. The application will be heard by the High Court and any party dissatisfied by the decision of the High Court will appeal to the Court of Appeal[9]. The appeal will arise either as a result of the consent of the parties prior to the making of the award[10]or where the applicant satisfies the conditions under section 39 (3) (b) of the Arbitration Act, 1995. The application before the Court of Appeal will be filed by the applicant under Rule 5 (2) (b) of the Court of Appeal Rules, 2010[11]. Upon hearing the application, the Court of appeal will determine the question of law[12]. From the determination, the parties will go back to the arbitrator to continue with the proceedings from the point they had left. In case of an application arising from an award, the procedure is the same save for the orders that the High Court or the Court of Appeal can make.

In case of the High Court, the award can be confirmed, varied or set aside or remit the matter to the arbitral tribunal or, where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration[13]. Any party aggrieved by the decision of the High Court can appeal to the Court of appeal and the parties need not have consented to the appeal.[14] Where the appeal has been heard and determined by the Court of Appeal, the Court of Appeal can vary the award and the varied award shall have the same effect as that of the arbitral tribunal[15]. The procedure is the same for an application arising out of an award. The Court of Appeal can confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re-considerations or where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration.[16]

The above is an elaborate procedure that is even more prolonged than a hearing before the Court. It is even better for parties to institute proceedings in Court. With this kind of procedure, the arbitral proceedings become long, expensive, time wasting and complicated. It therefore underscores the rationale for arbitration.

[9] Section 39 (3) of the Arbitration Act.
[10] Section 39 (3) (1) of the Arbitration Act.
[11] The applicant will have to demonstrate that the proceedings before the Court of Appeal will be rendered nugatory if the proceedings are not stayed. This is usually the situation after a party loses before the High Court and the parties had not consented that an appeal should lie to the Court of appeal. The applicant herein will thus be moving the Court of Appeal under section 39 (3) (b) of the Arbitration Act, 1995.
[12] Section 39 (2) (a) of the Arbitration Act, 1995
[13] Section 39 (2) (b) of the Arbitration Act, 1995
[14] Section 39 (3) (a) and (b) of the Arbitration Act, 1995
[15] Section 39 (5) of the Arbitration Act, 1995
[16] Section 39 (2) (b) of the Arbitration Act, 1995

1.2 The concept of finality in arbitral proceedings

Finality and binding nature of arbitral proceedings is at the centre of any arbitral proceedings. It is based on the fact that parties want to settle the dispute before the arbitral tribunal without subjecting the dispute to the Court system. It is the finality and binding nature of arbitral awards that make arbitration hailed as an advantage over litigation[17]. Parties that subject themselves to arbitration mainly do so with the expectation that the arbitral process will put an end to the matter. Finality is a fundamental characteristic of arbitration and a key factor that attracts many parties to choose arbitration when providing for a contractual dispute mechanism[18]. This is because with the minimum challenge of an arbitral award helps a party especially a Claimant to save valuable time and costs.[19] The finality of an award means that even if the award is challenged in Court, the Courts will not interfere with finding of facts by an arbitrator[20]. "Final" means that the parties can only call upon the Court in its supervisory capacity to oversee the administration of justice[21].

However, it is important to note that the Courts will not step in the shoes of the arbitrator nor will they act in the capacity of an appellate body. It also means that the parties cannot appeal a decision of the tribunal, unless the parties provide for. Further, an appeal to the Court of Appeal from the decision of the High Court, would have to be on a point of law, where there is leave provided by either the High Court or the Court of Appeal[22]. The finality of an arbitral award is linked with the authority of the principle of *res judicata* in litigation[23]. The principle of finality of arbitral proceedings in Kenya was not a concept enshrined in the Arbitration Act despite the fact that the Arbitration Act made an important contribution to arbitration law and practice in Kenya[24]. This necessitated the Amendment to the Arbitration Act through the Arbitration (Amendment) Act 2009 which saw the inclusion of Section 32A which provides that;

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[17] P.W. Nguyo, "Arbitration in Kenya: Facilitating Access to Justice by Identifying and Reducing Challenges Affecting Arbitration" (University of Nairobi 2015) http://erepository.uonbi.ac.ke/bitstream/handle/11295/93192/Nguyo_Arbitration%20in%20Kenya:%20facilitating%20access%20to%20justice%20by%20identifying%20and%20reducing%20challenges%20affecting%20arbitration.pdf?sequence=3 Accessed on 29th May, 2018.

[18] Francesca Richmond, 'When is an arbitral award final?', Kluwer Arbitration Blog, September 10 2009, <http://arbitrationblog.kluwerarbitration.com/2009/09/10/when-is-an-arbitral-award-final/?print=pdf > pg 1. Accessed on 24th May, 2018.

[19] Ibid.

[20] Alvin Gachie, 'The Finality and Binding Nature of the Arbitral Award' Law Society of Kenya Journal, Volume 13(1) 2017 p. 86.

[21] Ibid p. 87.

[22] H.N Mboce. 'Enforcement of International Arbitral Awards: Public Policy Limitation in Kenya' (LLM Thesis, University of Nairobi 2014) 35

[23] Ivan Cisar & Slavomir Halla, 'The finality of arbitral awards in the public international law' Grant journal ISBN <http://www.grantjournal.com/issue/0101/PDF/0101cisar.pdf> accessed on 25th May, 2018.

[24] This is mainly because the 1995 Act is substantially modeled on the provisions of the UNCITRAL Model Law of 1985 and as amended in 2006.

> *"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."*

With the introduction of Section 32A, the Courts have upheld the principle of finality of arbitral proceedings as being central and are reluctant to interfere. In the case of *Board of Governors Ng'iya Girls High School –vs- Meshack Ochieng' t/a Mecko Enterprises*[25], the Court held that when parties opt for arbitration, the parties are essentially telling the court that they want the process of resolving their disputes to be final and binding. In this way, they chose not to be engaged in the rigmaroles of litigation. The Court further noted that it was for that reason that the Arbitral Award is final and binding upon the parties as envisaged in Section 32 A of the Arbitration Act. Finality and binding nature of arbitral proceedings does not however means that the jurisdiction of the Court is ousted. The Court still has supervisory jurisdiction over Arbitration. This is provided for under Section 10 of the Arbitration Act.

In effect therefore, the Arbitration Act permits the Court to only interfere in arbitration matters where the Act provides. It is therefore erroneous for parties to mistakenly believe that finality and binding nature of the arbitration process is a complete restriction on the Courts from interfering with arbitration proceedings[26].This right cannot be taken away from the Court by parties to an Arbitration.

1.3 Analysis of the amendments to Section 39 of the Arbitration Act

The 2009 Amendments amended Section 39 of the Arbitration Act, 1995 as discussed above, the critical step that led to the amendment of the Arbitration Act in 2009 was in order to provide for finality and binding nature of arbitral proceedings. With that background, it is therefore paramount that an analysis of section 39 of the Arbitration Act, 1995 is seen in light of whether it has upheld the principle of finality and binding nature of arbitral proceedings.

The intervention of the Court under section 39 of the Arbitration Act, 1995 is twofold. Firstly, during the course of the arbitral proceedings and secondly after the award has been made. The section only applies to domestic arbitrations and it has to be by agreement of the parties or in the case of the Court of Appeal, where the Court is of the opinion that a matter of law of general importance is involved, the determination of which will substantially affect the rights of one or more of the parties[27]. The rationale for restricting appeals to only questions of law may be because

[25] [2014]eKLR para 35 and 36.
[26] Ibid n. 20. P. 93.
[27] Section 39, Arbitration Act,1995.

the arbitral tribunals are the ones that sift through the evidence and are therefore in a better position to make awards.[28]

1.3.1 Appeals under Section 39 (1) of the Arbitration Act

There were no substantive amendments made to section 39 (1) of the Arbitration Act, 1995 by the 2009 Amendments. The only amendment was under clause (2) to make it mandatory for the High Court to grant the reliefs sought under sub section two. The section requires that parties to the arbitral proceedings consent that an application may be made to the High Court in the course of the proceedings before an arbitrator where a point of law arises or an appeal by any party arising out of the award. The application to the Court under Section 39(4) of the Arbitration Act is governed by the Rules of Court applicable. In this case, the Civil Procedure, 2010.

What is not however clear is how the application in the course of the arbitration is to be presented in Court noting that the proceedings are ongoing and a decision has not been made by the Arbitrator. Mustill[29] sets out four (4) conditions that a party filing the application has to set out in an affidavit; firstly, show the question of law in issue; what facts the parties are asserting; what facts are common grounds and what facts are to be assumed for the purpose of the determination. This has to be well set out especially noting that the Court of Appeal will rely on the High Court record in making its determination. Similarly, the applicant seeking the interpretation by the High Court has to satisfy the High Court that indeed a question of law arises and there is need for determination.

The appeals to the High Court under section 39(1) of the Arbitration Act, 1995 are necessary noting that all Arbitrators are not lawyers and as such may not be in a position to interpret the law as expected. The intervention under this section falls within the permissible purview of section 10 of the Arbitration Act. Without the support of the Court, arbitral proceedings may falter or be ineffective.

1.3.2 Appeals under Section 39 (3) (a) and (b) of the Arbitration Act

Section 39 (3) of the Arbitration Act, 1995 is an exception to the provisions of section 10 and 35 of the Arbitration Act. As a result, parties keen on frustrating arbitral proceedings can thus use this section to derail the process. It is against this background that this section interrogates the provisions of section 39 (3) of the Arbitration Act, 1995 noting that it expressly provides for appeals to the Court of Appeal.

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[28] Thige Muchiri, 'Revisiting the Right of Appeal to the Court of Appeal under the Arbitration act' (2018) 6(1) Alternative Dispute Resolution < http://www.ciarbkenya.org/wp-content/themes/mxp_base_theme/mxp_theme/assets/volume-6-issue-1.pdf> accessed on 8th May, 2018.

[29] Sir Michael Mustill and Stewart C. Boyd "The Law and Practice of Commercial Arbitration in England', 2nd Edition, Butterworths.

Section 39 (3) of the Arbitration Act, 1995 provided as follows;

> *(3) Notwithstanding section 10 and 35 an appeal shall lie to the Court of Appeal against a decision of the High Court under subsection (2)-*
> *(a) if the parties have so agreed that an appeal shall lie; and*
> *(b) the High Court grants leave to appeal, or failing leave by the High Court, the Court of Appeal may exercise any of the powers which the High Court could have exercised under subsection (2).*

From the above, the parties could appeal the decision of the High Court if they had agreed whether to appeal or not. The time at which this agreement ought to have been made was not specified by the Arbitration Act, 1995. This therefore led parties to agree to appeal the decision of the High Court even after the decision of the High Court had been made and where only subjected to the timelines set out under the Court of Appeal Rules as provided by section 39(4) of the Arbitration Act, 1995. This undermined the principle of finality of arbitral proceedings in that it allowed a lot of uncertainties as to what point and time the agreement to appeal could be made. It is this loophole that the 2009 Amendments rectified by providing the fact that the agreement should be made prior to the delivery of the arbitral award.[30]

The appeals to the Court of Appeal could also lie where the High Court granted leave or in cases where the High Court failed to grant leave, the Court of Appeal granted "special leave to appeal". This undermined the principle of finality of arbitral proceedings in that firstly, the application for leave ought to have been first made to the High Court, the High Court would decline then the same application be made to the Court of Appeal. The section never gave any grounds that the High Court ought to have considered in determining the application for leave to appeal to the Court of Appeal. This meant that the High Court had to exercise its discretion in determining whether or not to grant leave to Appeal.

Secondly, where the High Court declined to grant leave for appeal, the Court of Appeal could grant "special leave to appeal". The meaning of **"**special leave to appeal**?"** was never defined by the Arbitration Act, 1995 and the same was to be determined by the Court of Appeal. This therefore further undermined the principle of finality and binding nature of arbitral proceedings as it gave the Court of Appeal a wide discretion to consider.

The section further escalated the arbitral process in that the application for leave ought to first have been made in the High Court and upon the High Court refusal to grant leave to appeal that a party could file an application to the Court of Appeal. This undermined the principle of finality and binding nature of arbitral proceedings hence necessitating the amendments.

[30] Section 29(b) of the Arbitration (Amendment) Act, 2009.

Section 39 (3) (a) and (b) was amended and a new section 39 (3) and (a) (b) enacted as follows;

> *(a) If the parties have so agreed that an appeal shall lie prior to the delivery of the award; and,*
> *(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 subsection (2).*"

The right to appeal the High Court decision under section 39 (3) (a) and (b) of the Arbitration Act, 1995 arises under two different circumstances;

Firstly, the parties must have agreed, prior to the delivery of the arbitral award, that questions of law arising in the arbitral award will be appealable to the Court of Appeal.[31] This is premised on the consensual nature of arbitral proceedings and in line with the contractual theory upon which arbitral proceedings are founded. This position has been affirmed by the Court of Appeal in the case of *Anne Mumbi Hinga –vs- Victoria Njoki Gathara*[32] where the Court stated as follows;

> *'It is clear from the above provisions [section 39], that any intervention by the court against the arbitral proceedings or the award can only be valid with the prior consent of the parties to the arbitration pursuant to Section 39 (2) of the Arbitration Act 1995. In the matter before us there was no such advance consent by the parties. Even where such consent is in existence the consent can only be on questions of law and nothing else. Again an appeal to this Court can only be on matters set out in Section 39 (2) … or with leave of this Court. All these requirements have not been complied with and therefore the appeal is improperly before us and is incompetent".*

Secondly, the Court of Appeal will grant leave where it is of the opinion that a point of law of general importance is involved and that the point of law will substantially affect the rights of one or more parties[33]. The application under Section 39 (3) (b) of the Arbitration Act can be made by a party even without any agreement prior. What the applicant needs to satisfy the Court of Appeal is the fact that the matter raises "a law of general importance whose determination will substantially affect the rights of one or more of the parties. "The procedure for approaching the Court of Appeal is as provided for by the Court of Appeal Rules[34].

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[31]) Section 39 (3) (a) of the Arbitration Act, 1995.
[32] [2009] eKLR p. 11.
[33] Section 39 (3) (b) of the Arbitration Act, 1995.
[34] Section 39 (4) of the Arbitration Act, 1995.

1.4 Finality of arbitral proceedings under Section 39 (3) (b) of the Arbitration Act.

Arbitral proceedings are founded on the contractual theory which is tied up with the concept of party autonomy. The parties have autonomy over the arbitrator and the process. The parties are also free to choose the panel of the arbitrators and decide how the process will be conducted[35].
In so far as appeals on point of law is concerned; the concept of party autonomy is well captured under Section 39 (1) of the Arbitration Act, 1995. This can only be possible subject to the agreement by the parties. The section is also very clear in that it provides that the agreement by the parties has to be entered into before the commencement of the arbitral proceedings with the arbitrator.

The same concept of party autonomy is further provided for and captured by section 39 (3) (a) of the Arbitration Act, 1995 which section gives the parties an opportunity to agree on whether an appeal should lie in the Court of Appeal. The agreement should be made prior to the delivery of the award. This in essence binds the parties and they agree to the fact that they are ready to proceed to the Court of Appeal on such an issue.

However, the concept of party autonomy is taken away from the parties by the Court of Appeal under section 39 (3) (b) of the Arbitration Act, 1995. The section gives the Court of Appeal the leeway to interfere with the powers of the parties by invoking the "opinion" of the Court of Appeal in determining whether to grant leave to the party seeking leave to appeal. This is absurd because the determination is based on "opinion" meaning that there are no hard and fast rules to help the Court of Appeal reach a decision whether to allow the application or not.

In making the opinion, the Court of Appeal is to be guided by the fact that the point of law whose determination substantially affect the rights of one or more parties. This section can be interpreted to mean that even third parties can raise issues that the point of law affects them. A reading of section 3 of the Arbitration Act, 1995 on the definition of a party buttresses this point. The section defines a party to mean;

> "*a party to an arbitration agreement and includes a person claiming through or under a party*".

The introduction of third parties to the purview of arbitral proceedings undermines the contractual and consensual nature of arbitral proceedings which underlies the fact that it is only parties that have agreed to the arbitration that can participate as they create their own private system of justice[36]. These go against three (3) cardinal principles; firstly, the principle of the contractual nature of arbitration which principle has acquired an inviolate and sacrosanct

[35] Ibid n 6p. 3.
[36] Margaret L. Moses, "The Principles and Practice of International Commercial Arbitration" Cambridge University Press, P. 17-18.

arbitration rule. Secondly, there is a view that parties get what they have bargained for and as such third parties having made a considered view not to enter an arbitration agreement will have excluded themselves from the arbitration process. Thirdly, underscores the importance of confidentiality in arbitral proceedings which will thus be compromised by multi-party arbitration proceedings[37].

However, some authors have justified the involvement of third parties in arbitral proceedings arguing that third parties should be allowed especially where they are an integral part of the substantive background of the arbitration. This should be read with the "principle of equality of the parties" and the fact that when parties enter into an arbitration, they should be aware of surrounding circumstance more importantly that there are parties implicated in the commercial projects they are getting involved.[38]

Section 39 (3) (b) nor the Arbitration Act, 1995 does not define "what amounts to a point of law of general importance". The definition has since been settled by the Supreme Court of Kenyan in the case of *Hermanus Phillipus Steyn –vs- Giovanni Gnechi-Ruscone.*[39] . The applicant made an application seeking leave to appeal the decision of the Court of Appeal on grounds that the matter raises issues of general public importance as provided under article 163 of the Constitution. The Court noted that "a matter of general public importance" was a vital one since it determined whether the Supreme Court had the jurisdiction or not.

In defining what amounts to matters of public importance, the Court stated that it may vary in different situations – save that there will be broad guiding principles to ascertain the stature of a particular case. Besides, the comparative judicial experience shows that criteria of varying shades have been adopted in different jurisdictions. The general phraseology in the laws of most jurisdictions is, "a point of law of general public importance"; but Kenya's Constitution, in Article 163 (4) (b) of the Constitution of Kenya, 2010 refers to "a matter of general public importance", as a basis for invoking the Supreme Court's appellate jurisdiction. In our opinion, the Kenyan phraseology reposes in the Supreme Court, in principle, a broader discretion which, certainly, encapsulates also the "point of law of general public importance".

The Court went ahead to establish the principles governing the interpretation of the concept of matters of general public importance and held as follows;

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[37] Dr. Stavros Brekoulakis, "The Relevance of the Interests of Third Parties in Arbitration: Taking a closer look at the Elephant in the Room" p. 1171 <http://pennstatelawreview.org/articles/113%20Penn%20St.%20L.%20Rev.%201165.pdf > accessed on 15th June, 2018.

[38] Ibid p. 1184.

[39] [2013] eKLR.

> *"where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest and that such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination."*

The Supreme Court in the above case noted that the general phraseology in the laws of most jurisdictions is, "a point of law of general public importance[40]" but the Constitution of Kenya, 2010 under Article 163 (4) (b) of the Constitution of Kenya, 2010 refers to "a matter of general public importance" which according to the Supreme Court encapsulates also "a point of law of general importance[41]."

The above definition by the Supreme Court is binding upon the Court of Appeal by dint of Article 163 (7) of the Constitution of Kenya, 2010. Thus in determining what amounts to a point of law of general importance, one has to follow the criteria set out by the Supreme Court above. The Supreme Court in equating general importance to public interest brought yet another wide concept to be considered when granting leave by the Court of Appeal and as such creating an avenue to undermine the principle of finality in arbitral proceedings. Public interest has not been defined by the Arbitration Act, 1995. The Black Laws Dictionary defines public interest as;

> *"The general welfare of the public that warrants recognition and protection, something in which the public as a whole has stakes especially that justifies governmental regulation."*

From the above definition, the categories constituting public interest are not closed and the burden is on the person seeking leave to satisfy the Courts that the question carries specific elements of real public interest and concern[42].

The Courts have thus interpreted public interest in different forms. In the case of *Kenya Shell –vs- Kobil Petroleum Limited*[43] the Court of Appeal considered the issue of public policy in light of the proposition that it is in the public interest that litigation must come to an end. The court held inter alia, as follows: "….in our view, public policy considerations may endure in favour of granting leave to appeal as they would discourage it. We think, as a matter of public policy, it is in the public interest that there should be an end to litigation and the Arbitration Act under which the proceedings in this matter were conducted underscores that policy." In the *Kenya Shell* case above, the Court of Appeal therefore interpreted public interest to include the fact that litigation must come to an end.

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[40] Section 39 (3) (b) of the 1996 Act refers to "a point of law of general public importance."
[41] Which phrase is used under section 39(3) (b) of the Arbitration Act, 1995.
[42] Ibid n. 22 p. 21.
[43] [2006] eKLR.

The uncertainty in law on what amounts to "public interest" will thus give rise to a myriad of applications under section 39 (3) (b) of the Arbitration Act, 1995. Abdullahi and Lubano suggest that commercial matters are unlikely to meet the test of "what amounts to matters of law of great public importance[44]". This may well be true but such an uncertainty and absurdity may be used by lawyers and parties who are bent on abusing the court process to clog the arbitration process. A simple issue is reduced into a complex legal affair and thereby undermining the principle of finality and binding nature of arbitral proceedings[45].

The uncertainty in law and procedure may result in conflicting decisions by the Courts to the detriment of the parties and the growth of arbitration in the Country[46]. Section 39 (3) (b) of the Arbitration Act, 1995 was enacted in 2009 way before the promulgation of the Constitution of Kenya 2010. The section therefore limited appeals to the Court of Appeal, which was the Highest Court in the land at the time. With the enactment of the Constitution, the Supreme Court was established[47]. Abdallah and Lubano have argued that matters before arbitration are of a commercial nature and such they are unlikely to reach the Supreme Court because of the jurisdiction of the jurisdiction as provided under Article 164 (b) of the Constitution, which jurisdiction, matters of commercial nature are unlikely to pass this test. For a person to invoke the jurisdiction of the Supreme Court, one has to establish the principles laid down in the *Hermanus Phillipus Steyn –vs- Glovanni Gnecchi-Ruscone* case discussed above. It would therefore not be possible to agree with Abdallah and Lubano's[48] generalized position and each case would have to be determined on its own merits. Section 39 (3) (b) of the Arbitration Act, 1995 does not bar a person to appeal to the Supreme Court. It is indeed such lacuna that Prof. Musili Wambua[49] proposes reform. Until that is done, section 39 (3) (b) of the Arbitration Act, 1995 has the potential of undermining finality and binding nature of arbitral proceedings.

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[44] Aisha Abdallah and Noella C. Lubano on their Chapter on Kenya in James H Carter, 'The International Arbitration Review' (June 2015) 6 <http://www.africalegalnetwork.com/wp-content/uploads/2016/01/Kenya-Chapter-International-Arbitration-Review.pdf> accessed on 24th February, 2018.

[45] Ibid n6 p. 184.

[46] This can be seen from the interpretation of the Court of Appeal in Kenya Shell Limited –vs- Kobil Petroleum Limited (Civil Appeal No. 57 of 2006 (UR)) and Nyutu Agrovet Limited –vs- Airtel Networks Limited [2015] eKLR. Though the cases dealt with appeals under Section 35 of the Arbitration Act, the Court of Appeal in Kenya Shell held that there was a right of appeal to the Court of Appeal under Section 35. The Court of Appeal in the Nyutu case held that the Court of Appeal had no right to hear an application under Section 35 of the Arbitration Act. This shows how the Court can reach two different decisions when exercising discretion.

[47] The Supreme Court is superior in the hierarchy and appeals lie before it by virtue of article 163(4) of the Constitution of Kenya.

[48] Ibid n44.

[49] Ibid n 2.

The emerging issues in domestic arbitration is also likely to undermine the principle of finality and binding nature of arbitral proceedings. With the enactment of the Constitution of Kenya 2010, the Constitution is supreme and a party can file a constitutional case to challenge an arbitral award on grounds of due process. As Kariuki Muigua[50] rightly points out; the holding by Githinji J; in the *EPCO Builders Limited –vs- Adam S. Marjan*[51]cannot stand in this era of Constitutionalism under the current Constitution of Kenya 2010. A party must have their day in Court however frivolous an application may be; less the Court is accused of driving the litigant from the seat of justice. Thus undermining the principle of finality and binding nature of arbitral proceedings.

1.5. Recommendations

There is need to amend the Arbitration Act, 1995 in order to; First, align section 39 (3) (b) of the Arbitration Act, 1995 with the Constitution of Kenya, 2010 by providing that appeals under this section only lie to the Court of Appeal and not the Supreme Court; second, the grounds upon which an appeal should lie before the High Court should be stringent, extensive and profound. This will set a high threshold and as a result limiting appeals to the Court of Appeal and thereby upholding the principle of finality of arbitral proceedings.

The Courts should also borrow best practices especially those set by the Court in the United Kingdom. Appeals under section 69 of the United Kingdom Arbitration Act, 1996 rarely succeed. This was stated in the case of *NYK Bulkship (Atlantic) NV –vs- Cargill International SA*[52] where the Supreme Court of the UK found that the effect of section 69 of the UK Arbitration Act of 1996 was one of finality: according to this provision, no appeal may be raised unless there is either an agreement of all the other parties to the proceedings; or if the court gives leave to proffer the appeal. The agreement to appeal includes not only the claimant and the respondent, but also any third party involved in the claim. Further, where there are multiple claimants or multiple respondents, again, all the parties must be involved in the agreement to appeal.

1.6. Conclusion

From the foregoing discussion, an appeal lies to the Court of Appeal upon agreement of the parties or where a party satisfies the Court of Appeal that a point of law is of "general importance". In considering whether the point of law is one of "general importance" whose determination substantially affect the rights of one or more parties, the Court of Appeal has to exercise discretion and each case has to be determined on its own particular facts. Leaving this determination to the discretion of the Court creates a lot of uncertainty as to what the position of

[50] Kariuki Muigua, "Constitutional Supremacy over Arbitration in Kenya", http://www.kmco.co.ke/attachments/article/120/Constitutional%20Supremacy%20over%20Arbitration%20in%20Kenya_03_dec.pdf Accessed on 14th December, 2017.
[51] Civil Appeal No. 248 of 2005 (unreported).
[52] The Supreme Court [2016] UKSC 20.< https://www.latham.london/2016/07/supreme-court-upholds-finality-of-arbitral-awards/ > accessed on 29th June, 2018.

the Court will actually be. This only goes to further undermine the principle of finality and binding nature of arbitral proceedings.

The above coupled with the enactment of the Constitution of Kenya, 2010 has led to a reconsideration of the principal of finality and binding nature of arbitral proceedings from the initial concept of a contractual arrangement which bound the parties even where a party received a bad bargain, it would be against the fundamentals of contract law for that party to back out of its commitment. Section 39 of the Arbitration Act, 1995 therefore needs to be reviewed in order that the principle of finality of arbitral process may be upheld.