The Open-Hearing Mandate: Article 50(1), National Values, and Contractual Confidentiality in Kenyan Seat Arbitration

Isaac Aluochier[1], S.Adj, S.Arb, CPM

In international commercial dispute resolution, confidentiality is widely treated as an inherent advantage of arbitration. Parties routinely select private dispute resolution specifically to keep sensitive financial allocations, trade secrets, and internal governance disputes away from the public gaze.

However, when Nairobi is selected as the seat of arbitration—or when proceedings are conducted under the Aluochier Independent Tribunals Administrative Rules (**AITAR**) or Aluochier Independent Succession Tribunals Administrative Rules (**AISTAR**)—transnational practitioners face a fundamental constitutional exposure: **the presumption of open justice**.

THE CONSTITUTIONAL TENSION IN KENYA	
TRADITIONAL ARBITRAL PRACTICE	KENYAN CONSTITUTIONAL MANDATE
* Default Confidentiality * Private In-Camera Proceedings * Non-Disclosure Agreements * Closed-Door Awards	* Article 50(1): Public Hearing * Article 1(3)(c): Sovereign Delegated Power * Article 10: Transparency & Accountability

The Constitutional Open-Hearing Requirement

Under **Article 50(1)** of the Constitution of Kenya 2010, every person has the right to have any dispute that can be resolved by the application of law decided in a **fair and public hearing** before a court or, where appropriate, another independent and impartial tribunal.

This mandate creates a structural obstacle for parties expecting automatic confidentiality:

1. **Strict Textual Exceptions (Article 50(8)):** The Constitution explicitly enumerates the sole permissible grounds for excluding the press or public from proceedings: protecting witnesses or vulnerable persons, morality, public order, or national security. Private commercial convenience or a mutual desire for secrecy is not listed.

2. **The Inefficacy of Private Contractual Waivers:** Under **Article 24(1)**, any limitation of a Bill of Rights protection must be "by law". A private arbitration agreement or confidentiality clause is a contractual covenant, not a law, and cannot validly restrict a constitutional right.

3. **Delegated Sovereign Power & National Values:** Under **Article 1(3)(c)(ii)**, independent tribunals exercise delegated sovereign power belonging to the people of Kenya. Anyone exercising or interpreting this delegated sovereign authority is bound by **Article 10(2)** national values, which explicitly command **transparency and accountability**. Because public open-hearing mandates

1 Isaac Aluochier is Chief Adjudicator and President of Independent Tribunals at Aluochier Dispute Resolution, an arbitral and administrative action institution based in Rongo, Kenya, reachable at info@aluochier.co.ke and www.aluochier.co.ke. 9th September, 2026.

protect the sovereign's interest in overseeing how its judicial power is deployed, individual litigants cannot simply agree between themselves to waive openness.

THE ARTICLE 50(1) OPEN-HEARING CONUNDRUM	
Article 50(1) Public Hearing Right	
EXPRESS EXCEPTIONS: ART. 50(8)	PRIVATE CONTRACT CLAUSE
* Morality / Public Order * Protection of Vulnerable Persons * National Security Valid Constitutional Ground	* Confidentiality Agreement * In-Camera Preference Cannot limit Article 50(1) (Fails Article 24 "by law" test)

Comparative Analysis: Confidentiality and Open Justice
The open-hearing exposure in Kenya highlights a distinct dividing line when compared across global legal traditions:

Jurisdiction	**Primary Legal Anchor**	**Confidentiality Baseline**	**Open Justice Standard & Public Exceptions**
United Kingdom	Common Law (*Emmott v Michael Wilson & Partners Limited [2008] EWCA Civ 184; [2008] 1 Lloyd's Rep 616; [2008] 2 All ER (Comm) 193*)	Implied Default Duty	Private by default; public disclosure allowed only by consent, court order, or public interest.
United States	FAA (Title 9 U.S.C.)	No Automatic Implied Duty	Confidentiality depends entirely on express contract clauses or institutional rules.
France / Spain	Code of Civil Procedure / Arbitration Acts	Codified Statutory Default	Statutory privacy defaults protect domestic commercial arbitration proceedings.
KENYA	**Const. Arts. 1(3)(c), 10, 50(1)**	**Presumed Open / Public**	**Public hearing mandatory; exceptions restricted to Article 50(8) grounds**.

The Enforcement Risk: Article V(1)(d) Challenges
This constitutional reality creates a tactical vulnerability in cross-border enforcement under the **1958 New York Convention**:

- **The Ground:** Article V(1)(d) allows an enforcing court to refuse recognition of an arbitral award if *"the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place."*

- **The Trap:** If parties include a confidentiality clause and conduct an AITAR or Kenyan-seated arbitration behind closed doors, a losing party can challenge the resulting award under **Article V(1)(d)**, alleging that the closed procedure violated the mandatory procedural law of the seat (**Article 50(1)**). Conversely, if the tribunal enforces an open hearing to satisfy Article 50(1), the losing party may argue the tribunal breached their private agreement.

While reported judicial decisions in Kenya have historically allowed private arbitrations to proceed behind closed doors out of deference to legacy practice, this gap between daily practice and textual constitutional commands remains an unextinguished risk. Transnational counsel should flag this exposure before a disgruntled party raises it to set aside an adverse award.

Strategic Solutions for Dispute Resolution Professionals

To insulate cross-border proceedings and protect sensitive commercial matters, practitioners operating under Kenyan procedural law or seated in Nairobi should implement a clear risk-mitigation strategy:

STRATEGIC CLAUSE DRAFTING FRAMEWORK
1. SEPARATE CLAUSES: Draft Seat, Substantive Law, and Confidentiality as three independent provisions in the contract.
2. CARVE-OUT TO MEDIATION: Route genuinely sensitive commercial disputes to mediation under Article 159(2)(c) (bypassing Article 50(1)).
3. RECORD ART. 50(8) APPLICATION: Formally petition the tribunal for confidentiality based on explicit statutory/constitutional grounds.

1. **Uncouple Contractual Elements:** Draft the seat, substantive governing law, and procedural rules as three distinct, unbundled contract clauses.

2. **Route Sensitive Matters to Mediation:** For commercial disputes where absolute secrecy is non-negotiable, specify mandatory **Mediation** under **Article 159(2)(c)** of the Constitution. Because a mediator facilitates a voluntary consensus rather than issuing a binding adjudicative decree under state power, mediation does not trigger Article 50(1) public hearing requirements.

3. **Establish an Article 50(8) Evidentiary Record:** If a matter must proceed to AITAR or AISTAR adjudication or arbitration, file a formal pre-trial application requesting closed proceedings anchored explicitly to one of the four grounds in Article 50(8) (such as protecting sensitive trade secrets essential to public order or protecting vulnerable individuals).