



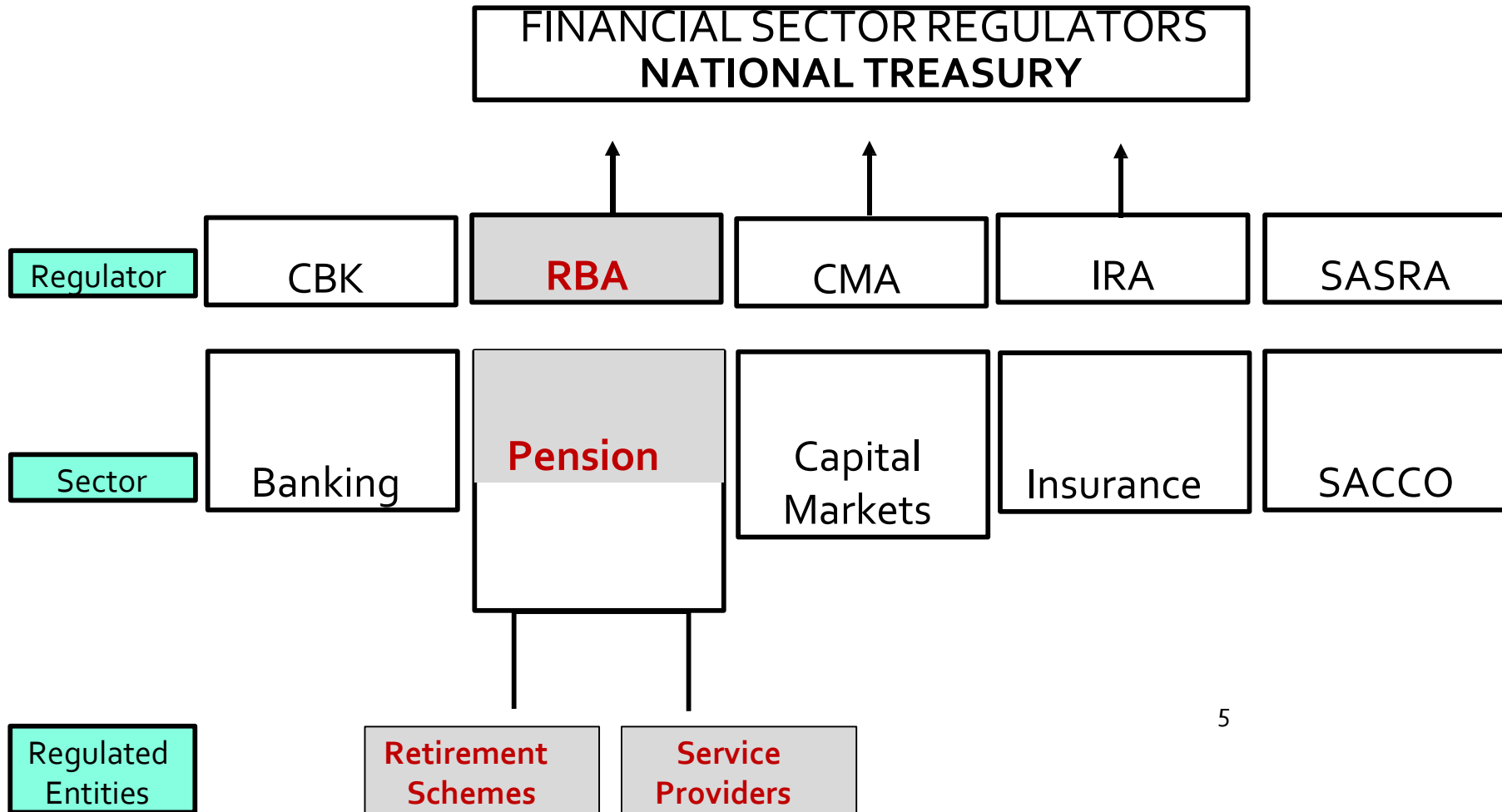
PENSION LAW AND ALTERNATIVE DISPUTE RESOLUTION

- ❖ **BACKGROUND - RETIREMENT BENEFITS AUTHORITY (RBA) & SECTOR**
- ❖ **LEGAL FRAMEWORK FOR ADR IN PENSIONS**
- ❖ **TYPES OF DISPUTES IN RB SCHEMES**
- ❖ **RBS DISPUTE RESOLUTION MECHANISMS**
- ❖ **OPERATIONAL FRAMEWORK OF THE APPEAL TRIBUNAL FOR RBS**
- ❖ **CHALLENGES AND EMERGING ISSUES**



RBA & SECTOR BACKGROUND

- The Retirement Benefits sector in Kenya is covered under the Retirement Benefits Act No. 3 of 1997 .
- The Act also established the Retirement Benefits Authority (RBA), which is the retirement benefits regulatory body under the National Treasury.
- RBA began its operations in October 2000 with the gazettelement of RBA Regulations & commencement of the Act
- All schemes required to register with RBA



KEY STAKEHOLDERS

- **SCHEME MEMBERS**
- **SCHEME TRUSTEES**
- **RETIREES**
- **GENERAL PUBLIC**
- **EMPLOYERS / SPONSORS.**

INDUSTRY PLAYERS

- Administrators
- Fund Managers
- Custodians
- Actuaries
- Auditors
- Approved Issuers

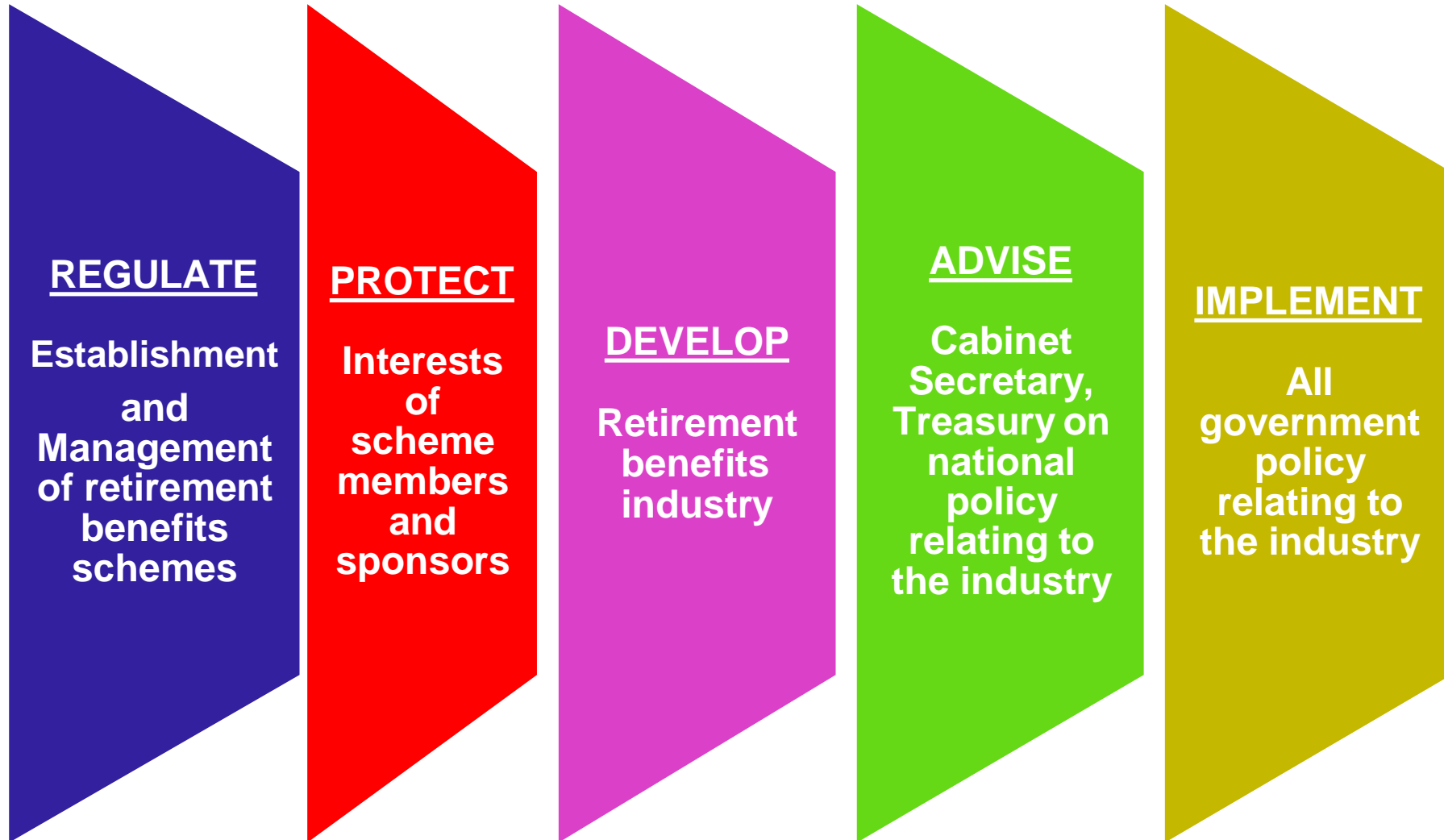


REGIONAL : ASSOCIATIONS

- International Organization of Pension Supervisors (**IOPS**)
- International Social Security Association (**ISSA**)
- African Pension Supervisors Forum (**APSF**)
- East African Pension Supervisors Association (**EAPSA**)
- East Africa Social Security Association (**ECASSA**)

LOCAL : ASSOCIATIONS

- Association of Retirement Benefits Schemes (**ARBS**)
- Fund Managers Association (**FMA**)
- Association of Pension Trustees & Administrators of Kenya (**APTAK**)
- The Actuarial Society of East Africa (**TASK**)
- Association of Kenya Insurers (**AKI**)



LEGAL FRAMEWORK FOR ADR IN PENSIONS

- ADR has always been mistaken to be an ad hoc and secondary means of resolving conflict.
- However, what is christened as ADR is the normal and mainstream response to disputes.
- The foundation of ADR is created under the constitution of Kenya which explicitly requires that ADR be promoted in every institution.
- Trustees are required to implement ADR in pension schemes.

- The constitution under Article 159 encourages ADR. The constitution provides that alternative forms of dispute resolution including reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms shall all be promoted.
- ADR is promoted in Schemes TDR as an alternative for trustees to explore.
- ADR is promoted under the Good Governance Guideline 2018 and Treating Customers Guideline 2019.
- The traditional court systems are procedural, complex, costly and time consuming.
- ADR enhances access to justice and promotes healthy relationship in schemes.

- Article 48 of the Constitution provides that the state is obligated to ensure access to justice to all persons.
- Article 159 of the Constitution, provides that alternative forms of dispute resolution including reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms shall all be promoted as long as they do not contravene the Bill of Rights and are not repugnant to justice or inconsistent with the Constitution or any written law.
- The spirit of ADR is also encouraged between National and County Government as per Article 189 (4).

- ❖ Any member of a scheme who is dissatisfied with a decision of the manager, administrator, custodian or trustees of any scheme may request, in writing, that such decision be reviewed by the Chief Executive Officer with a view to ensuring that such decision is made in accordance with the provisions of the relevant scheme rules or the Act under which the scheme is established.
- ❖ Section 46 introduces a way of resolving disputes other than the court process and is what is referred to as doctrine of exhaustion.
- ❖ It is therefore important to note that ADR is already encouraged in pension industry and trustees should embrace the same.

- Courts have come out clearly that issues concerning retirement benefits should be referred to CEO, RBA as an alternative before coming to court.
- **Abdalla Osman & 628 others v Standard Chartered Bank(K) Limited & 11 others [2018] eKLR-** Matter referred to RBA – “I have further found that under the doctrine of exhaustion, the court ought to withhold its jurisdiction in favour of the alternative dispute resolution mechanism provided by the constitution or statute.”
- **Jimmy R. Kavilu & 16 others v Stanbic Bank Kenya Limited & 7 others [2019] eKLR-** Case referred to CEO, RBA for determination after nearly 20 years.
- **Supreme court case- Albert Chaurembo Mumba & 7 others (Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others [2019] Eklr.** “disputes in pension cases are to be adjudicated by the CEO or the Authority..”

- Good governance guideline provides for trustees to explore alternative dispute resolution for trustees-development policy e.g. complaints policy.
- Treating Customers Fairly Guideline- encourages formation of a complaint's mechanism in Schemes
- Retirement Benefits (Minimum Funding Level and Winding-up of Schemes) Regulations, 2000- encourages remedial plans in cases of unremitted contributions or deficits
- Inspection of Scheme under section 41 of the act encourages remedial plan in cases of breach of law, mismanagement or lack of skills.
- Directives Issued By Authority section 38 and others all refer to remedial plans and negotiations.
- Section 53A and 53B all refer to negotiations and mediations in cases of unremitted contributions.

- Trust Deed and Rules registered with the Authority all provide for an alternative dispute resolution be implored within the schemes.
- The Good Governance Guideline and TCF Guideline all require dispute mechanism and policy implemented by schemes.
- It is therefore clear that trustees need to actualise this provisions and use the correct ADR method in resolving disputes.

- Withholding of benefits
- Delays in payment of benefits
- Attachment of benefits
- Miscalculation of benefits
- Underpayment of benefits
- Unremitted contributions
- Withholding of information
- Distribution of death benefits

RETIREMENT BENEFITS SCHEMES DISPUTE RESOLUTION MECHANISMS

- The trustees are the first line of defence for dispute resolution in a scheme.
- The responsibility emanates from:
 - ✓ Trust Deed and Rules registered with the Authority all provide for an alternative dispute resolution be implored within the schemes.
 - ✓ The Good Governance Guideline and TCF Guideline all require dispute mechanism and policy be put in place.
- It is therefore clear that trustees need to actualise this provisions and use the correct ADR method in resolving disputes.

- Legal owners of the scheme and responsible for exclusive management and administration of the scheme;
- Trustees have legal control of a scheme and hold the assets of the scheme in trust for the benefit of the beneficiaries;
- Fiduciary responsibility – Expected to act in the best interests of the beneficiaries;
- Trustees have a fiduciary role to develop internal complaints resolution mechanism for its members.
- Trustees have a role to amend the trust deed and rules to accommodate a ADR method that is suitable for resolution of complaints.
- Trustees have a role to develop policy and sensitise the members on ADR methods available for them.

- Provide a formal route through which members, sponsors, and service providers can bring disputes to trustees.
- Less formal than a court process
- Intention is that the least acrimonious solution is reached
- The procedure aims to:
 - ✓ Be accessible so that anyone with a complaint can lodge it
 - ✓ Provide an effective and appropriate response
 - ✓ Allow speedy handling of complaints within reasonable time frame
 - ✓ Respect complainants' confidentiality
 - ✓ Maintain relationship with members.

- Any member of a scheme who is dissatisfied with a decision of the manager, administrator, custodian or trustees of any scheme may request, in writing, that such decision be reviewed by the Chief Executive Officer with a view to ensuring that such decision is made in accordance with the provisions of the relevant scheme rules or the Act under which the scheme is established.
- A copy of every request under this section shall be served on the manager, trustees or custodian of the scheme.
- RBA must investigate the matter and provide a directive like a court process.
- Member might incur costs in filing the dispute at RBA.
- May take time in resolution.
- Trustees or service providers maybe issued with directives or penalties that are detrimental to the scheme and individual trustees.

- Any person aggrieved by a decision of the Authority or of the Chief Executive Officer under the provisions of this Act or any regulations made thereunder may appeal to the Tribunal within thirty days of the receipt of the decision.
- The appeal should be filed within thirty (30) days from the date the aggrieved person is served with the document embodying the judgement- it is procedural.
- The Tribunal consist of a chairman and four other members who shall be appointed by the Minister and who shall hold office for a period of three years.The quorum is the chairperson and any two members
- It has a Tribunal Clerk appointed by the Board of Directors of the Authority whose duty is day-to-day management and administration of the affairs of the Tribunal.
- The chairman of the Tribunal shall be an advocate of the High Court of Kenya of not less than seven years standing.
- The tribunal is independent of the Authority.

- This is an arm of the Judiciary of Kenya.
- The decision of the Tribunal sets a precedent and binds the parties before the Tribunal.
- There is no right of appeal on the decision of the Tribunal. See cases of *George Omondi & 210 others v Retirement Benefits Appeals Tribunal & 2 others [2020] eKLR* and *Kenya Commercial Bank Staff Retirement Scheme (2006) & Another –V- Ann Wangui Ngingi and 524 Others (2018)*
- The jurisdiction of the Tribunal is only supervised by the High Court on judicial review.
- The full procedure for filing, service, defense and hearing of appeals in the Tribunal is set out in the Retirement Benefits (Tribunal) Rules, 2000 and Civil Procedure Act (Cap. 21).
- An appeal under section 48(1) of the Act shall be entered by presentation of a memorandum of appeal with five copies thereof together with the prescribed fee to the clerk within thirty days of receipt of the decision of the Chief Executive Officer.

- Amendment of TDR to accommodate mediation and other practical ADR process.
- Develop internal dispute resolution mechanism specialised in mediation and other practical ADR methods.
- Training to enhance skill and capacity in ADR.
- Proper record management and procedures for dispute resolution
- Court cases be referred to mediation and avoid litigation
- Timely response to complaints through ADR

CHALLENGES FACED BY TRUSTEES-REGULATOR'S PERSPECTIVE

- Can ADR be used in the following cases:
 - ✓ Recovering unremitted contributions;
 - ✓ Calculation of benefits- mostly DB schemes;
 - ✓ Payment of death benefits esp. where there are no nominated beneficiaries;
 - ✓ Independence of the BOT/ interference by sponsor;
 - ✓ Balancing interests-Sponsor, members, meeting expectations and/or demands;
 - ✓ Litigation/ cases in court against the scheme



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