

CREDIT INFORMATION SHARING LEGAL AND REGULATORY FRAMEWORK – OPPORTUNITIES FOR IMPROVEMENT

A PAPER PRESENTED AT THE THIRD (CIS) REGIONAL
CONFERENCE, NAIROBI, KENYA, FEBRUARY 24, 2016.

BERNARD OTIENO, ADVOCATE



Introduction

- **Why the need for CIS** - Negative effect of information asymmetry on the stability of the financial services sector.
- Central Bank spearheads creation of enabling legal environment through amendments to the Banking Act–
 - Permission to share
 - Minister mandated to make regulations

Foundation for CIS is Laid

- Promulgation of the **Banking (CRB) Regulations, 2008** on **11th July 2008** coming into operation on **2nd February 2009**.
 - ❑ **Mandatory sharing of negative information**
 - ❑ **Discretionary sharing of positive information**
- This effectively setting the stage for the legal and regulatory framework for CIS.

Additional Players

- Amendments to the Microfinance Act and the Sacco Societies Act
 - ❑ Mandated to share negative information

Immediate shortcomings

- As practice would show, institutions resorted to only sharing negative information.
- Secondly, the new players were also left out of the mechanism

Corrective measures

- Promulgation of the **Credit Reference Bureau Regulations, 2013 -17th January 2014**

Changes

- Besides netting in microfinance institutions into the CIS mechanism, the new regulations introduced the following changes:

- ❖ Made it mandatory for **banks** to share positive information {**R. 18 (2)**};
- ❖ Expanded the permitted business of the bureaus to include credit scoring {**R. 15 (2)**};

- ❖ Introduced the use of agents in the CIS mechanism (**R. 16**);
- ❖ Cushioned players against legal legal action (**R. 19**);
- ❖ Permitted bureaus to collect information from third party sources: companies registry, licensing authorities, land registries, counties, court registries, registrar of persons and other relevant public bodies {**R. 23 (1)**},

- ❖ Enabled third parties to obtain customer information from bureaus **subject to consent {R. 26 (1)}**, and
- ❖ Generally enhanced the supervisory role of the Central Bank over CIS business.

Constitutionality of CIS

- Is CIS in tandem with article 31 of the Constitution?

“Every person has the right to privacy, which includes the right not to have—

- (a) their person, home or property searched;
- (b) their possessions seized;
- (c) information relating to their family or private affairs unnecessarily required or revealed; or
- (d) the privacy of their communications infringed.

- On the question of consumer rights, article 46 provides as follows:

Consumers have the right—

- (a) to goods and services of reasonable quality;
- (b) **to the information necessary for them to gain full benefit from goods and services;**
- (c) **to the protection of their** health, safety, and **economic interests;**
and
- (d) to compensation for loss or injury arising from defects in goods or services.

- We shall in the process seek to establish whether the CIS system fulfils principle 4 of the World Bank principles of credit reporting, namely, that:

***“The overall legal and regulatory framework for credit reporting should be clear, predictable, non-discriminatory, proportionate and supportive of data subject and consumer rights. The legal and regulatory framework should include effective judicial or extrajudicial dispute resolution mechanisms.*”**

Nature of Credit Information

- Credit information is without a doubt information relating to a persons private affairs –
 - any arbitrary abrogation would therefore meet constitutional challenges.

Previous Attempts to Challenge the System

- In **Petition No. 209 of 2012 (Kennedy Odhiambo Nyagudi vs. Central Bank of Kenya & Others)**, the Petitioner sought to have the then Banking (Credit Reference Bureau) Regulations, 2008 declared unconstitutional on the key ground that the sharing of his confidential financial information amounted to a violation of his economic and consumer rights under articles 43 and 46 of the constitution.

- The trial Judge dispensed with the petition as follows:

“The regulations provide for customers rights of access to information held by the CRB and the right to correct erroneous information. I am therefore constrained to agree with the position taken by the CBK that the complaints raised by the petitioner are provided for under regulation 20 of the regulations.”

New attack frontier

- Shortly thereafter, in **Petition No. 538 of 2013 (Barbra Georgina Khaemba vs. The Cabinet Secretary for Finance & The Attorney General)**, the Petitioner sought a declaration that the Banking (Credit reference Bureau) Regulations 2008 are a gross violation of the petitioner's constitutional rights as protected under the constitution. The rights alleged to have been infringed included the right to equality and freedom from discrimination and the right to privacy (of information).

- The Petitioner in this case made extremely interesting arguments as follows:

“Presently, for me to access any credit facility, all institutions will have to share my private details and if there are no details for instance (since I have not been referred to any bureau), I stand the risk of being advanced a loan at exorbitantly high rates since my credit history is not in the public domain! This is the hardship I have been facing!!”

- She then proceeded to assert that...

“On the other hand, I enjoy the constitutional right to privacy under article 31 which includes the right not to have information relating to me and my family or private affairs unnecessarily required or revealed.”

So, what are some of the safeguards?

❖ **R. 20 (1)** - Prohibited information –

❑ belief, colour, ethnicity, religion, political affiliation, sexual orientation, physical and mental handicaps, state of health or medical information

❖ **R. 22 (1)** – Requirement for identification prior to disclosure

❖ **R. 22 (3)** – Customer may be accompanied by a person of his choice

❖ **R. 22 (4)** - requirement for permission for bureau to disclose information in the presence of a third party

❖ **R. 22 (5)** duty on part of bureau to provide trained personnel to explain information where required

❖ **R. 23 (3)** Requirement for customer consent for third party information providers to furnish credit information to bureaus

❖ **R. 23 (4)** CBKs' powers to prohibit information from third parties or public sources

- ❖ **R. 25 (1)** Pre-listing notice
- ❖ **R. 25 (3)** provider not to provide information if notified by the customer that the information is inaccurate
- ❖ **R. 25 (4)** Right to be informed (within 30) after listing
- ❖ **R. 26 (1)** - Bureaus' duty to protect the confidentiality of customers
- ❖ **R. 27 (n)** – bureaus to maintain a complaint resolution mechanism
- ❖ **R. 28 (1)** – bureaus to prepare a summary of the rights of customers
- ❖ **R. 27 (1) and 29 (4)** – duty upon bureaus and subscribers to safeguard information loss or unauthorized access

❖ **R. 35 (1)** – right to know what information an institution has submitted to a bureau


❖ **R. 35 (2)** – right to access credit reports kept in a bureau's database

❖ **R. 35 (3)** – right to free copy annually

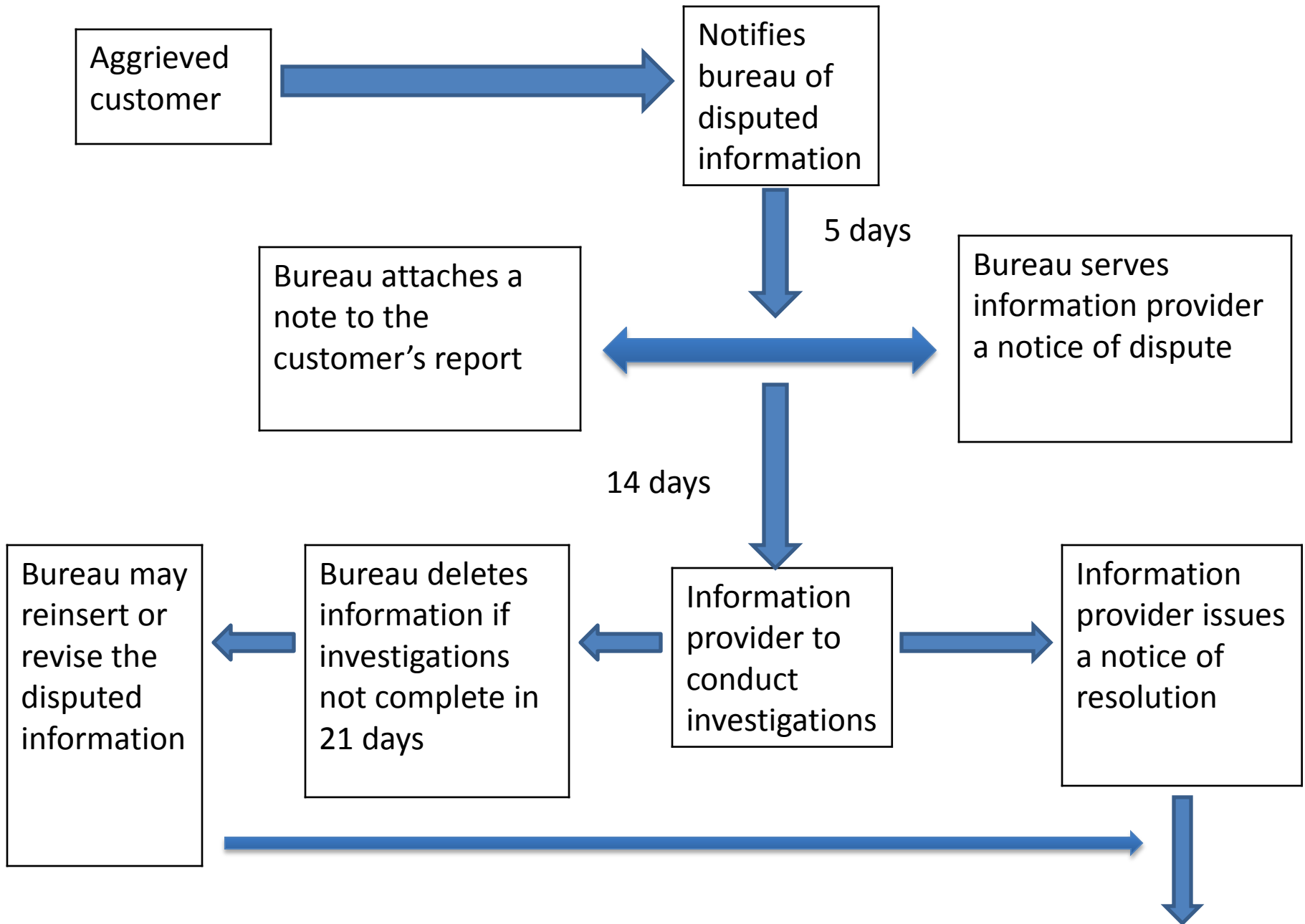
❖ **R. 35 (5) – (13)** – right to dispute information and have it corrected

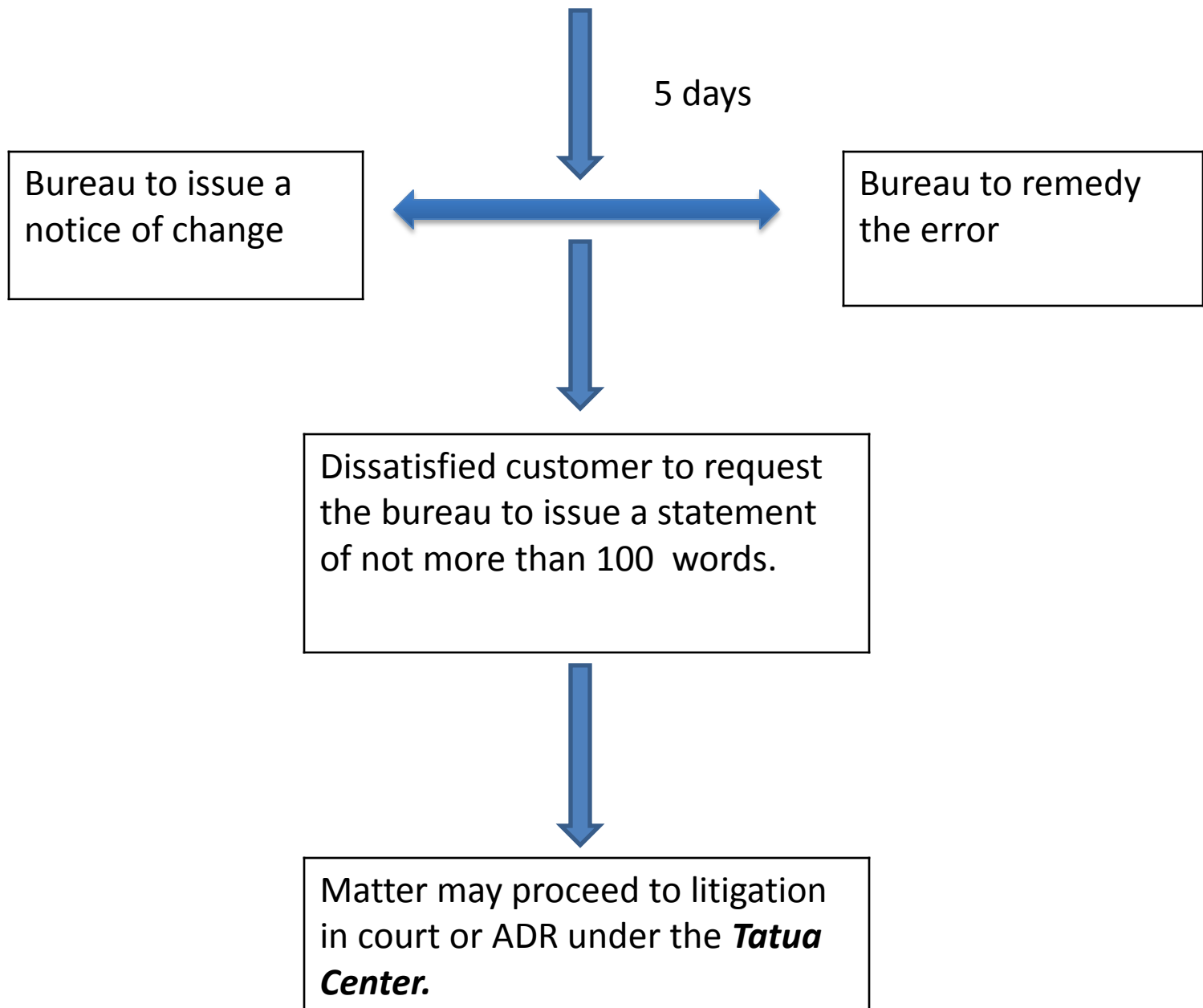
❖ **R. 50 (1)** – right to an adverse action notice

Regulation 35 (5) – (13)



**Right to dispute
information and
have it corrected**





Case study

- In ***High Court Petition No. 17 of 2013 – Amy Kagendo Mate vs. Prime Bank & CRBA***, the Petition sidestepped these dispute mechanism and instead attempted to have the Court to order her information to be expunged. This is how the trial judge reacted to that request:

- ***“The petitioner has not pleaded that she invoked the provisions of regulation 20 and what the outcome thereof was. On the pleadings before me, it appears that the petitioner sought the assistance of this Court after by-passing the statutory remedy ... I would agree ... that this petition is improperly before me.”***

Common Causes of CIS Disputes

- Unresponsiveness to customer queries
- Disputed debt amounts
- Lack of Notice
- Accuracy of Information
- Fraud
- Language – *'Defaulter, You have been black listed, Go clear your name with the CRB!'*
- Problematic areas
- Genuine Errors

Dispute mitigation

- ❖ Keep proper records and documentation
- ❖ Timely response
- ❖ Eliminate ignorance both by staff and customers
- ❖ Establish a clear dispute resolution mechanism
- ❖ Consider moratorium periods
- ❖ Avoid “mechanical and emotional submissions”

Weaknesses of the existing legal framework for CIS

- Existing mechanism not inclusive
- Absence of uniform regulatory system
- Lack of clarity on participation of 'third parties'
- Restrictions on cross sharing
- Legal framework is precariously anchored
- Lack of a legislative framework for cross-boarder sharing
- Credit Reports are not homogenous

Proposals forms Reform

- ❑ Stand alone Act – CIS Bill
- ❑ Amendments to existing legislation – CIS Laws (Amendment) Bill;
 - Agricultural Development Corporation Act
 - Agricultural Finance Corporation Act
 - Banking Act, Chapter 488
 - Central Bank of Kenya Act, Chapter 491
 - Companies Act Chapter 486
 - Companies Act, 2015

- Consumer Protection Act
 - Cooperative Societies Act, Chapter 490
 - Energy Act
 - Higher Education Loans Board Act, Cap 213A
 - Industrial and Commercial Development Corporation Act
 - Kenya Information and Communications Act
 - Microfinance Act, Chapter 493D
 - Sacco Societies Act, Chapter 490B
 - Tourism Act
 - Water Act
- Sensitization of judicial officers.

Conclusion

- As I conclude, the two questions remain to be conclusively addressed:

① *Whether and how to involve public utility companies in the mechanism*

① *Who will be the regulator?*

Thank you ladies and gentlemen! 😊