

**Book Review (Free Download Link): “Settling Disputes Through Arbitration in Kenya”
by Dr. Kariuki Muigua**

Introduction

After the Constitution of Kenya 2010 entrenched and widened the application of ADR and arbitration by requiring the incorporation of ADR mechanisms, including negotiation, mediation and arbitration in the settlement of disputes, it became necessary to encourage students and professionals to acquire skills and expertise in ADR. Dr. Kariuki Muigua, the Chairperson of the Chartered Institute of Arbitrators (Kenya) at the time, took up the challenge to write a book that takes readers through the process of arbitration in a simplified, yet comprehensive manner, along with highlights of the latest key amendments and case law on arbitration in Kenya. The result was “Settling Disputes Through Arbitration in Kenya,” the foremost arbitration textbook and practitioners guide in Kenya and the larger East Africa region.

Dr. Kariuki Muigua recently offered the book for free download in his law firm Kariuki Muigua & Co. Advocates website for limited duration in a quest to realize the key objective of its publication, promoting knowledge on key aspects of arbitration. Dr. Muigua noted in the Author’s Note to the current edition: “I recommend this book to ADR students, teachers and tutors of ADR, ADR practitioners and to the general public interested in acquiring knowledge on the various ADR mechanisms in Kenya and their role in resolving or settling disputes occurring in everyday life.... In addition, this book has a place as a core textbook for the popular Entry Course in Arbitration, offered by Chartered Institute of Arbitrators-Kenya around East Africa and for postgraduate students of international commercial arbitration, to whom it will offer basic foundational knowledge.”

Chapter One - Introduction to Arbitration

This chapter introduces arbitration as one of the mechanisms that are commonly referred to as Alternative Dispute Resolution mechanisms (ADR) as set out in Article 33 of the Charter of the United Nations. The Chapter also explores attributes of arbitration which make it ideal mode of dispute resolution and the different types of arbitration which include: ad hoc, institutional, statutory, look-sniff, flip-flop, documents-only, domestic

and international and how to determine which type of arbitration is appropriate or relevant for the given case. Arbitration in Kenya Kenyan context is also explored as recognized under the Constitution under Article 159 and entrenched under the Arbitration Act 1995, the Arbitration Rules, Civil Procedure Act and the Civil Procedure Rules 2010. The Chapter also juxtaposes arbitration and other modes of dispute resolution to unearth the occasions when it is the most fitting mode of dispute resolution.

Chapter Two - Arbitration Agreement

The second chapter discusses the arbitration agreement as the basis of arbitration. The chapter makes an introduction to arbitration agreements and clauses and critically examines their salient features. The Chapter includes a general overview of arbitration agreement, arbitration clauses, contractual requirements in arbitration agreements, formal requirements of an arbitration agreement and gives guidance on drafting effective arbitration agreements to avoid ambiguity and non-recognition or non-enforcement of the arbitration clause.

Chapter Three - Stay of Legal Proceedings for Arbitration

This chapter deals with instances where Stay of Legal Proceedings for Arbitration occurs and how to deal with it both as a party and as counsel or party representative and how to avoid recourse to it in drafting arbitration clause. The Chapter discusses grounds for stay of proceedings for arbitration addresses issues and procedure for application of stay of proceedings.

Chapter Four - Commencing an Arbitration and the Appointment of an Arbitral Tribunal

The fourth chapter addresses “Commencing an Arbitration and the Appointment of an Arbitral Tribunal” from communication of a notice of arbitration up to commencement of arbitration. The various modes of appointing arbitrators and the relevant legal provisions are discussed as well as the factors to be considered in choosing an arbitrator and issues incidental to the appointment of arbitrators such as challenge of arbitral tribunal, immunity of arbitrators, withdrawal of arbitrators, termination of arbitrators and the aftermath of challenge and termination of arbitrators.

Chapter Five - Jurisdiction and powers of an arbitrator

This chapter discusses issues touching on the “jurisdiction and powers of an arbitrator” under the laws of Kenya. It defines the jurisdiction of the arbitrator, discusses types of jurisdiction, jurisdiction of the courts in arbitration, Prerequisites of Jurisdiction of an Arbitrator, Sources of Jurisdiction and Powers generally and under Arbitration Act, 1995, and limitations on the jurisdiction and powers of the Arbitrator.

Chapter Six - Modes of opposing and challenging arbitration reference

It deals with “Modes of opposing and challenging arbitration reference” including issues relevant and related to opposing arbitration references. In particular, Dr. Muigua discusses at length issues relating to challenging the appointment of the arbitral tribunal and the jurisdiction of the arbitral tribunal, the teething issues that may come about before and after commencement of the arbitration process. The chapter also explores the objections that may be raised including allegation as to lack of binding arbitration agreement between parties, objection on whether the dispute is within the scope of the arbitration agreement, objection that the reference is time-barred, challenges to the appointment of arbitrators and challenges to the jurisdiction of the arbitral tribunal. As it is, the arbitral tribunal has two options open to it when the question of jurisdiction is raised by a party. It may rule on the matter as a preliminary question or wait to address it in an arbitral award on the merits. The ruling of the arbitral tribunal in the former instance may be challenged by the aggrieved party by way of an application to the High Court.

Chapter Seven - Preparation for arbitration proceedings

The seventh chapter tackles issues that relate to “preparation for arbitration proceedings.” The chapter discusses what the arbitrator does upon appointment, in preparation for commencement of the arbitral proceedings, namely, convening a preliminary meeting and issuing directions pursuant to the meeting. Issues relating to pleadings in arbitration are also explored including the various types of pleadings used in arbitration and the relevant legal provisions touching on them. The chapter also deals with pre-hearing procedures that are related to pleadings in that they are used to enhance documentation in arbitration. Here, issues relating to seeking further (and better)

particulars, discovery (disclosure and inspection) and amendment of pleadings are examined. Finally, interlocutory proceedings in arbitration and the steps taken under Section 7 and Section 18 of the Act and application for security of costs are examined as they constitute steps that are taken mainly to compliment or augment the arbitral process.

Chapter Eight - Arbitration Hearing

This chapter describes generally what takes place in an arbitration hearing. In particular, the chapter entails a description of the procedure that is usually followed from the opening to the closing of the arbitration proceedings to give a picture of what transpires in arbitration hearing. The Chapter also discusses the key aspects of arbitration proceedings which contrast it with litigation and other methods of dispute management.

Chapter Nine - Arbitral Awards, Costs and Interest

On the other hand, Chapter Nine discusses what an arbitral award is, the statutory requirements concerning arbitral awards as well as the provisions of the Arbitration Act, 1995 on arbitration costs and interest. The chapter also outlines the law and the contemporary issues relating to arbitral awards and to costs and interest in arbitration relevant to the Kenyan scenario.

Chapter Ten - Role of the Court in Arbitration

Chapter Ten revisits the role of the court in arbitration in Kenya as stipulated under the Arbitration Act of 1995. The analysis centres on the provisions for court intervention before, during and after arbitration hearing in Kenya. In addition, Dr. Kariuki Muigua proposes necessary reforms as far as court intervention is concerned are proposed. The principle of court intervention in arbitration in Kenya as enunciated in the Arbitration Act, 1995 and the specific legal provisions in the Arbitration Act, 1995 which give the court power to intervene in arbitration are discussed in the context of the Kenyan case law and legal practice. A critical analysis of the role of the court in arbitration in Kenya is also done as part of the debate whether court intervention is a friend or a foe to the expeditious and fair determination of arbitral matters.

Chapter Eleven

This Chapter is on “Post-Hearing Steps in Arbitration” discusses the steps that take place after the conclusion of the arbitration hearing and the publishing of the arbitration award. The focus is on the applications that may be made to the court for the purpose of enforcing or setting aside or appealing against the arbitral award and applications for setting aside of the award (if any) as well as recognition and enforcement of arbitral awards. The chapter also discusses cases where a party may also apply to a court to determine a question of law arising in the cause of the arbitration and appeal against arbitral award.

Chapter Twelve - Arbitration Practice in Kenya

Finally, Chapter Twelve explores the practice of arbitration in Kenya and discusses the contemporary issues surrounding professional arbitration practice in the country, what it takes for one to qualify as an arbitrator in Kenya, the nature of arbitration as a profession and the future of arbitration in Kenya and around the world. This is the perfect primer for anyone seeking a career as an arbitration practitioner in Kenya and East Africa in general.