

Book Review

Title: Settling Disputes Through Arbitration in Kenya

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If there ever was a literally desert in Kenya, it was in the field of arbitration and other Alternative Dispute Resolution (ADR) procedures. There wasn't, until recently, a single Kenyan book on arbitration. Standard books on commercial law give arbitration passing treatment at best. Little wonder that people and organisations who find themselves in disputes believe that court is their only lawful recourse.

Dr Kariuki Muigua's competence to write such a book arises from his excellent qualifications and experience. A practicing arbitrator, he holds a PhD in law from the University of Nairobi, where he teaches law. He is a Fellow of the Chartered Institute of Arbitrators, a London-based worldwide professional body of arbitrators with a vibrant branch in Kenya. He is also a member of several international organisations, including the prestigious London Court of International Arbitration.

Chapter 1 is fully loaded. In it the author defines arbitration as a voluntary private process in which a neutral third party resolves a dispute by listening to the disputing parties and giving a “ruling”. The disputes could be of commercial or non-commercial nature, while the parties might be individuals, organisation or states. He defines the other ADR procedures like negotiations and mediation. He also discusses, without undue emphasis, party autonomy, confidentiality, cost savings and the other off-the-shelf merits of arbitration over litigation.

Chapter 2 is wholly dedicated to the Arbitration Agreement. Arbitration is primarily a creation of contract and essentially belongs to the realm of the law of contract. Yet, most strangely, an arbitration agreement could be valid even if it is not signed by the parties and even if the principal contract in which it is contained is itself invalid. The author explains those and other unique features of an arbitration agreement easily, unhurriedly and convincingly.

The subsequent chapters explain the arbitration process logically from the choice, appointment and challenge of the arbitrator, the arbitration procedure itself and the enforcement of the arbitrator's decision.

Chapter 10 discusses the interface between arbitration and the courts. Section 10 of the Arbitration Act of Kenya states that “except as provided in this Act, no court shall intervene in matters governed in this Act” while other sections specify exactly when the courts could interfere. The Arbitration Acts of many other countries have identical or similar provisions. The interplay of arbitration and courts is a fertile and perennial subject for discussion in arbitration conferences the world over.

The book refers to a healthy mix of over 50 Kenyan, English and a few American court decisions. This gives readers insight of arbitration as a universal discipline. The Kenyan cases are particularly welcome. Over-reliance on English cases, which, while persuasive and usually relevant, cannot in some situations hit the nail on the head owing to the fact that they are based a different Act.

Dr. Muigua has maintained the right balance necessary to reach both the serious practitioner and the lay person. For example, he eases the flow by defining non-English phrases, which tend to alienate non-lawyers from reading anything legal, on the spot. Writing an entry-level book, he stays clear of

controversies like whether an arbitrator should also play the role of mediator or the benefits of 3-person arbitration tribunal compared to a sole arbitrator. He is content to explain how a sole arbitrator and a 3-person arbitration tribunal are appointed.

Dr Muigua's boldness in writing on what is, in Kenya, virgin territory is commendable. However, while his knowledge of the subject comes through, his voice as a practitioner has been subdued. That is probably due to the fact that Kenyan arbitrators are extremely secretive about their experiences. This leaves practitioners and students with no alternative but to turn to foreign sources for samples, albeit disguised ones, of actual arbitration awards and for inside story accounts.

The 255-page book is probably too short on a subject that is so vast. Yet that is also the beauty of this book. The average reader can go through it in a few hours. The absence of a word index is compensated for by the detailed 4-page table of contents.

Publication of such a book is timely, if not overdue, in light of the revision of the Arbitration Act of Kenya in 2009 and of section 159 (2) (c) of the new constitution, which for the first time anchors ADR in the fundamental law of the land.

Nothing is more bewildering to a practitioner in any field than the absence of a local book on the subject. Dr. Muigua has given the Kenyan arbitrator and student of arbitration a good companion.

Paul Ngotho, Arbitrator