THE RIGHT OF APPEAL AGAINST HIGH COURT'S DECISIONS ON ARBITRAL AWARDS

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The Supreme Court of Kenya, the Apex Court, has to date rendered three decisions on the right of appeal in Arbitration. Join the Women in ADR (WADR) and our distinguished panellists in reviewing the impact of these decisions on Kenya's Arbitration landscape

IDLO

Save the date

18th August 2021 at 16.00 Hrs. EAT

THE CHARTERED INSTITUTE OF ARBITRATORS
(CIARB-KENYA BRANCH)

VIRTUAL WEBINAR HELD 18TH AUGUST, 2021

IMPACT OF SCORK DECISIONS ON THE RIGHT OF APPEAL FROM THE HIGH COURT ON ARBITAL AWARDS

The Women in ADR (WADR) in collaboration with the Chartered Institute of Arbitrators-Kenya Branch (CIArb) and the International Development Law Organization (IDLO) held a virtual webinar on the ***Impact of SCORK decisions on the Right of Appeal from the High Court*** on 18th August, 2021 at 4:00 PM EAT. It was hosted by WADR and had leading ADR practitioners Professor Won Kidane, a lecturer of Law at the University of Seattlein Washington DC and Fulbright scholar, Mr. Lawrence Muiruri Ngugi; CEO/ Registrar of the NCIA as speakers and was moderated by Ms. Pauline Mcharo, Deputy Chief State Counsel and Director at NCIA.

The webinar is part of CIArb's Women in ADR series in the push for professionalism and gender empowerment in Dispute Resolution. In attendance was Ms. Eunice Lumallas, FCIArb CIArb Branch Committee member and WADR Chairperson who lauded the collective effort of the institute in engaging women in the progressive discourse of Alternative Dispute Resolution in Kenya.

At the heart of the debate by the panelists is the emerging jurisprudence from the Kenyan courts with respect to the issue of appeals in arbitration and particularly, the impact of Supreme Court of Kenya (hereinafter referred to as SCORK) decisions on the right of appeal from the High Court on Arbitral Awards.

Mr. Muiruri enlightened the participants on landmark arbitration cases at SCORK which *inter alia* include the *Nyutu Aggrovet case*, *the Synergy case*, the *Geochem Middle East case* and the *Safaricom Holdings case*.

This conversation comes at the backdrop of the integration of Arbitration and ADR into Kenya's legislative framework under Article 159 (2) (c) of the 2010 Constitutional dispensation. Mr. Muriuri having worked at the Hon. AG Chambers as Chief State Counsel stated that, by experience, the decision in the *Nyutu case* reaffirmed the place of Arbitration in Kenya. While referring to the decision, he averred that the SCORK stated that arbitration must have limited court intervention. It is anticipated, the Supreme Court declared, that the Court of Appeal must jealously guard arbitration to prevent opening the floodgates of Appeal.

Arbitration is conducted in conformity with the principle of party autonomy as provided for in the UNCITRAL Model Law and which is embodied in Kenya's Arbitration Act of 1995. The principle entitles contracting parties to consent to an arbitration through an arbitration clause/agreement. The outcome of an Arbitration proceeding is an arbitral award which must be legally enforceable by virtue of recognition at the High Court.

That notwithstanding, an arbitral award can be set aside if the grounds outlined in S. 35 of the Arbitration Act 1995 are satisfied. Prof. Kidane stressed the shortcomings associated with appealing arbitral decisions. Criticism against an appellate process of an arbitral award has been informed by the preference of a judicial remedy to an arbitration decision raising the question whether Arbitral decisions are inferior to judicial decisions.

He dismisses the notion that section 35 of the Arbitration Act 1995 is unconstitutional for restricting the right of appeal against an arbitral award to specified grounds such as being contrary to the Public policy. He also stresses the need to embrace UK's default approach where parties by consent can give up the jurisdiction to appeal. Having examined the Act, the Professor of Law at Seattle University states that parties can opt out of an appeal procedure.

Recourse against an arbitral award raises the elements of finality and correctness of out-of-court processes. Mr. Muiruri argues that an Arbitral Tribunal must adhere to the principles of competence, coherence and consistency. He says that the competence of an Arbitral tribunal must meet a standard legal threshold and must also be comprised of an arbitrator(s) competent to an average trial judge.

Mr. Muiruri, also the CEO/Registrar at NCIA, challenged arbitral institutions to train arbitrators who are capable of determining issues before a tribunal correctly, to follow the arbitration law with the aim of avoiding inconsistency at appellate instances, to give arbitral decisions that can withstand judicial scrutiny and explain the reasons for the award.

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