

THE ADR BULLETIN

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YMG: What are we About?



The CI Arb Young Members Group (YMG) targets members of the Chartered Institute of Arbitrators, Kenya Branch, who are aged 40 and below. The YMG consists of members who organize seminars, talks, social events and other functions for the promotion of alternative dispute resolution to younger generations of professionals in Kenya.

The activities organised by YMG include inter alia talks, seminars, structured mentorship for young members and training. These result in better exposure to the young Kenyan Alternative Dispute Resolution practitioner in the areas of arbitration and mediation and other ADR mechanisms. The group also provides a networking platform to its members both with their peers and more experienced practitioners.

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Adoption of a Hybrid Dispute Resolution Process

by **Nekoye Masibili, MCIArb**

The COVID-19 pandemic is a great catalyst to embracing technology in dispute resolution. Parties and practitioners have adapted to virtual platforms, recreating the traditional face-to-face approaches and rapidly retrofitting their obligations around technology. However, the question of whether Online Dispute Resolution (ODR) will replace the current mode of ADR methods for all arbitral proceedings remains debatable.

Neither ODR nor traditional ADR is enough on their own. Therefore, in a bid to ensure expeditious, ethically motivated and just outcomes, dispute resolution practitioners must be decisive in merging both ADR and ODR in case-specific approaches, being careful not to extinguish the procedural robustness afforded by the human touch.

ADR and Flexibility

by **Alema Edgar Usagi, MCIArb**

ADR boasts of many great advantages when determining conflict and dispute resolution choices available for disputants. The ensuing conflict and dispute are subjected to a creative, cost-effective, flexible & confidential process under the control of the parties. Of these advantages, flexibility stands out as an anchor to the others. It allows the parties to exercise control over the strengths of ADR, whilst minimizing on the inevitable challenges. This makes it both a sword and a shield in dispute resolution.

This is mostly evident in procedural flexibility that is indirectly proportional to the level of regulation and/or legislation supporting the ADR mechanism. As such ADR mechanisms such as Arbitration, Mediation and Negotiation have an increasing level of flexibility in the order as presented above Arbitration being the least flexible while Negotiation being the most flexible mechanism of the three.

Notwithstanding, all ADR mechanisms aim to enhance access to justice and as a result are all inherently flexible in comparison to the preexisting judicial mechanisms in place. Because of this, Kenyan courts have incorporated this flexibility in their Court Annexed Mediation program for example that provides the option of a more flexible mechanism, mediation, to enhance access to justice.





What is ISDS?

by James Ngotho Kariuki, FCI Arb

Investor-state dispute settlement (ISDS) is a form of resolution of disputes between foreign investors and the state that hosts the investment (host-state). ISDS allows foreign investors to initiate dispute settlement proceedings against a host-state, normally by means of arbitration proceedings. ISDS mechanisms are commonly provided for in trade / investment agreements between two states (bilateral) or more than two states (multilateral).

They can also be found in domestic legislation or contracts. Both the foreign investor and the host-state must consent to ISDS before the proceedings may commence. Usually, the consent of the host-state is contained in the trade / investment agreement. The foreign investor consents to ISDS by submitting its claim to be resolved by ISDS proceedings.

Party Autonomy as a Pillar in Arbitration

by Wambui Muigai, MCI Arb

Party Autonomy is the freedom of parties in arbitral proceedings to choose. This may be through incorporation of an arbitration clause in a contract or through a subsequent agreement between the parties to refer a dispute to arbitration.

The foundation of arbitral proceedings is the free will and election of parties to participate in the mechanism. Parties possess the discretion to elect the arbitral tribunal, the seat of arbitration, the language to be adopted in proceedings, and the rules that govern the proceedings including the taking of evidence.

