

THE ADR BULLETIN

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Appeals in Arbitration

By Wambui Muigai, MCI Arb

Arbitration has long prided itself on the finality of its Awards contrary to Court Judgments. Over time, this salient feature of Arbitration has been understood by practitioners to mean the prohibition of appeals of an Award on its merits.

However, section 39 of the Arbitration Act Cap 49 provides that any party to arbitral proceedings may institute an Appeal in the High Court against a domestic award on any question of law arising out of the Award. Granted section 39 may only be invoked where the parties have or had previously agreed so.

Further, an additional appeal may lie to the Court of Appeal against the determination of the High Court if the parties had agreed so prior to the delivery of the Award or if the Court of Appeal is of the opinion that a point of law of general importance is involved the determination of which will substantially affect the rights of one or more parties.

Non-payment of Arbitral Tribunal Fees and Expenses

By Arch. Nekoye Masibili, MCI Arb

Section 32 of the Arbitration Act, 1995 details applicable law pertaining to costs and expenses of arbitration, for which, unless otherwise agreed, parties are jointly and severally liable. What happens when either party is unable or unwilling to pay its share of the tribunal's fees?

The Act empowers the tribunal in these ways. First, the tribunal may suspend or terminate the arbitral proceedings. Secondly, the tribunal may direct that the willing or able party pay an amount in excess of its share of liability, for reimbursement by the defaulting party at a future date. Thirdly, the tribunal may exercise lien on the final award until full payment is received. Last but not least, the tribunal can file a lawsuit for non-payment against the defaulting party.





ADR in International Trade Disputes (AfCFTA)

By: Edgar Usagi Alema, MCIArb

There are ongoing negotiations by Member States in the African Continental Free Trade Area Treaty (AfCFTA). The negotiations entail how the treaty will be regulated across the Member States. Of particular importance is the dispute resolution system that will guide the Member States in resolving their disputes. The treaty heavily mirrors the Treaty forming the World Trade Organization (WTO) including its Dispute Settlement Understanding (DSU). Therefore, the negotiating parties have a responsibility to compare the advantages and disadvantages of such a system.

One of the main challenges facing WTO Member States is over reliance on the DSU which has proved unreliable in certain instances. Furthermore, the arbitration and mediation options offered by the WTO are rarely invoked by the WTO Members citing reasons including the high public importance nature of trade disputes. The AfCFTA presents a rare opportunity to encourage the use of arbitration and mediation in international trade disputes, as they offer a more reliable system especially considering the diplomatic relations the Member States have. DSU, like the court system, focuses on rights of the parties while arbitration and mediation tend to focus on preserving the commercial relationship of the disputing parties

Impact of COVID-19 on International Dispute Resolution

By: Martin Mavenjina, MCIArb

The Covid-19 pandemic has significantly impacted on International Dispute Resolution in most parts of the world as parties can no longer be able to physically meet to solve disputes. This has compelled practitioners, arbitral institutions, arbitral tribunals and parties to embrace innovative ways like the use of technology to virtually meet and exchange important documents and hear evidence.

Some arbitration institutions have published guidance notes to encourage parties to arbitral proceedings to hold virtual hearings. For instance, the Australian Centre for International Commercial Arbitration (ACICA) has allowed virtual hearings to be held and has also published draft order for the use of online dispute resolution technologies as well as CIARB's Remote Procedures Guideline" for dispute resolution during COVID-19 restrictions available on their respective websites. The pandemic has presented an opportunity for practitioners and parties to embrace the use of technology in International Dispute Resolution.

