

THE ARBITRATION (AMENDMENT) ACT, 2009

**AN ACT of Parliament to amend the Arbitration Act,
1995**

ENACTED by the Parliament of Kenya, as follows -

Short title and
commencement.

1. This Act may be cited as the Arbitration (Amendment) Act, 2009 and shall come into operation on such date as the Minister may, by notice in the Gazette, appoint.

Amendment of
section 3 of No.
4 of 1995.

2. Section 3 of the Arbitration Act 1995, in this Act referred to as “the principal Act”, is amended -

(a) in subsection (2), by deleting paragraphs (a), (b) and (c) and substituting therefor the following new paragraphs -

(a) where the arbitration is between individuals, the parties are nationals of Kenya or are habitually resident in Kenya;

(b) where the arbitration is between bodies corporate, the parties are incorporated in Kenya or their central management and control are exercised in Kenya;

(c) where the arbitration is between an individual and a body corporate -

(i) the party who is an individual is a national of Kenya or is habitually resident in Kenya; and

(ii) the party that is a body corporate is incorporated in Kenya or its central management and control are exercised in Kenya; or

(d) the place where a substantial part of the obligations of the commercial relationship is to be performed, or the

place with which the subject-matter of the dispute is most closely connected, is Kenya.

(b) in subsection (3), by deleting paragraph (b) (i) and substituting therefor the following new subparagraph-

(i) the juridical seat of arbitration is determined by or pursuant to the arbitration agreement; or

(c) in subsection (5), by deleting the expression “section 31” and substituting therefor the expression “section 29”.

Amendment of
section 4 of No.
4 of 1995.

3. Section 4 of the principal Act is amended in subsection (3) (b) by inserting after the word “telegram” the words “facsimile, electronic mail”.

Amendment of
section 5 of No.
4 of 1995.

4. Section 5 of the principal Act is amended -

(a) by deleting the word “by” appearing immediately after the words, “who knows” and substituting therefor the word “that”;

(b) by deleting the words “shall be” appearing immediately before the word “deemed” and substituting therefor the word “is”.

Amendment of
section 6 of No.
4 of 1995.

5. Section 6 of the principal Act is amended -

(a) in subsection (1), by deleting the words “files any pleadings or takes any other step in the proceedings” and substituting therefor the words “or otherwise acknowledges the claim against which the stay of proceedings is sought”.

(b) by deleting subsection (2) and substituting therefor the following new subsections -

(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

(3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.

Replacement of
section 9 of No.
4 of 1995.

6. The principal Act is amended by repealing section 9 and replacing it with the following new section -

Receipt of
written
communicatio
-ns.

9.(1) Unless otherwise agreed in writing between the parties, any communication made pursuant to or for the purposes of an arbitration agreement -

(a) being a communication effected by facsimile or electronic mail -

(i) is deemed to have been received if it is transmitted to a facsimile number or electronic mailing address, as the case may be, specified by the addressee as his number or address for service; and

(ii) is deemed to have been received on the day on which

it is so
transmitted; or

(b) in any other case -

(i) is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; and

(ii) is deemed to have been received on the day on which it was so delivered.

(2) Where, after reasonable inquiry, a place of business or residential address specified by the addressee cannot be found, or where such a place or address, or any mailing address, facsimile number or electronic mailing address so specified appears never to have been, or to be no longer, that of the addressee, a written communication -

(a) is deemed to have been received if it is sent to the addressee's last known place of business, residential address or mailing address, or last known facsimile number or electronic mailing address, or by any other means that provides a record of the

attempt to deliver or
transmit the
communication; and

(b) is deemed to have been
received on the date
specified in that record.

(3) This section does not apply to the
service of documents for the purpose of
legal proceedings for which provision is
made by rules of court.

Amendment of
section 11 of No.
4 of 1995.

7. Section 11 of the principal Act is amended by
inserting the following new subsection immediately
after subsection (2) -

(3) Where an arbitration agreement provides
that the reference shall be to two arbitrators,
then, unless a contrary intention is expressed in
the agreement, the agreement is deemed to
include a provision that the two arbitrators
shall appoint a third arbitrator immediately
after they are themselves appointed.

Amendment of
section 12 of No.
4 of 1995.

8. Section 12 of the principal Act is amended -

(a) in subsection (2)-

(i) by inserting the words “and any
chairman” immediately after the
words “arbitrator or arbitrators”;

(ii) by deleting paragraph (b) and
substituting therefor the following
new paragraphs -

(b) in an arbitration with two arbitrators, each party shall appoint one arbitrator; and

(c) in an arbitration with one arbitrator, the parties shall agree on the arbitrator to be appointed.

(b) by deleting subsection (3), (4) and (5) and substituting therefor the following new subsections -

(3) Unless the parties otherwise agree, where each of two parties to an arbitration agreement is to appoint an arbitrator and one party ("the party in default") -

(a) has indicated that he is unwilling to do so;

(b) fails to do so within the time allowed under the arbitration agreement; or

(c) fails to do so within fourteen days (where the arbitration agreement does not limit the time within which an arbitrator must be appointed by a party),

the other party, having duly appointed an arbitrator, may give notice in writing to the party in default

that he proposes to appoint his arbitrator to act as sole arbitrator.

(4) If the party in default does not, within fourteen days after notice under subsection (3) has been given -

(a) make the required appointment; and

(b) notify the other party that he has done so,

the other party may appoint his arbitrator as sole arbitrator, and the award of that arbitrator shall be binding on both parties as if he had been so appointed by agreement.

(5) Where a sole arbitrator has been appointed under subsection (4), the party in default may, upon notice to the other party, apply to the High Court within fourteen days to have the appointment set aside.

(6) The High Court may grant an application under subsection (5) only if it is satisfied that there was good cause for the failure or refusal of the party in default to appoint his arbitrator in due time.

(7) The High Court, if it grants an application under subsection (5), may, by consent of the parties or on the application of either party, appoint a sole arbitrator.

(8) A decision of the High Court in respect of a matter under this section

shall be final and not be subject to appeal.

(e) by renumbering subsection (6) as subsection (9).

Amendment of
section 13 of No.
4 of 1995.

9. Section 13 of the principal Act is amended in subsection (3) by adding the following words immediately after the word “parties” appearing at the end thereof –

“or if he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so”.

Amendment of
section 14 of No.
4 of 1995.

10. Section 14 of the principal Act is amended by deleting subsection (3) and substituting therefor the following subsections -

(3) If a challenge under agreed procedure or under subsection (2) is unsuccessful, the challenging party may, within 30 days after being notified of the decision to reject the challenge, apply to the High Court to determine the matter.

(4) On an application under subsection (3), the arbitrator who was challenged shall be entitled to appear and be heard before the High Court determines the application.

(5) The High Court may confirm the rejection of the challenge or may uphold the challenge and remove the arbitrator.

(6) The decision of the High Court on such an application shall be final and shall not be subject to appeal.

(7) Where an arbitrator is removed by the High Court under this section, the court may make such order as it thinks fit with respect to

his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid.

(8) While an application under subsection (3) is pending before the High Court, the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided, and such an award shall be void if the application is successful.

Amendment of
section 15 of No.
4 of 1995.

11. Section 15 of the principal Act is amended in subsection (1) -

(a) by deleting the words “act without undue delay” appearing in paragraph (a) and substituting therefor the words “conduct the proceedings properly and with reasonable dispatch”;

(b) by inserting the words “in writing” immediately after the word “agree” appearing in paragraph (c).

Amendment of
section 16 of No.
4 of 1995.

12. Section 16 of the principal Act is amended -

(a) in subsection (2) -

(i) by deleting the words “presiding arbitrator” appearing in paragraph (a) and substituting therefor the words “the Chairman of the arbitral tribunal”;

(ii) by deleting the words “presiding arbitrator” appearing in paragraph (b) and substituting therefor the Chairman of the arbitral

tribunal”;

- (b) by inserting the following new subsection immediately after subsection (3) -

(4) The Authority of an arbitrator is personal and ceases on his death.

Insertion of sections 16A and 16B in No.4 of 1995.

13. The principal Act is amended by inserting, the following new sections immediately after section 16 -

Withdrawal of arbitrator.

16A. (1) Unless otherwise agreed by the parties, an arbitrator who withdraws from his office may, if prior notice has been given to the parties, apply to the High Court -

- (a) to grant him relief from any liability thereby incurred by him; and
- (b) to make such order as the court thinks fit with respect to the his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid.

(2) Where the High Court is satisfied that, in the circumstances, it was reasonable for the arbitrator to resign, it may grant relief on such terms as it may think fit.

(3) The decision of the High Court shall be final and shall not be subject to appeal.

Immunity of arbitrator.

16B. (1) An arbitrator shall not be liable for anything done or omitted to be done in good faith in the discharge or purported discharge of his functions as an

arbitrator.

(2) Subsection (1) shall extend to apply to a servant or agent of an arbitrator in respect of the discharge or purported discharge by such a servant or agent, with due authority and in good faith, of the functions of the arbitrator.

(3) Nothing in this section affects any liability incurred by an arbitrator or reason of his resignation or withdrawal.

Amendment of
section 17 of No.
4 of 1995.

14. Section 17 of the principal Act is amended -

(a) in subsection (1), by deleting the words “independent agreement” appearing in paragraph (a) and substituting therefor the words “agreement independent”;

(b) in subsection (8), by deleting all the words appearing immediately after the words “High Court” and substituting therefor the following words –

“the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided, and such award shall be void if the application is successful.”

Amendment of
section 18 of No.
4 of 1995.

15. Section 18 of the principal Act is amended by deleting subsection (1) and by substituting therefor the following new subsection -

(1) Unless the parties otherwise agree, an arbitral tribunal may, on the application of a party -

- (a) order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute, with or without an ancillary order requiring the provision of appropriate security in connection with such a measure; or
- (b) order any party to provide security in respect of any claim or any amount in dispute; or
- (c) order a claimant to provide security for costs.

Amendment of
section 19 of
No. 4 of 1995.

16. Section 19 of the principal Act is amended by deleting the words “be given full opportunity of presenting his case” and substituting therefor the words and the expression “subject to section 20, be given a fair and reasonable opportunity to present his case”.

Insertion of
section 19A in
No.4 of 1995.

17. The principal Act is amended by inserting the following new section immediately after section 19 -

General duty
of parties.

19A. The parties to arbitration shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings.

Amendment of
section 20 of No.
4 of 1995.

18. Section 20 of the principal Act is amended -

- (a) by deleting subsection (2) and substituting therefor the following new subsection -

(2) Failing an agreement under subsection (1), the arbitral tribunal may conduct the arbitration in the manner it considers appropriate, having regard to

the desirability of avoiding unnecessary delay or expense while at the same time affording the parties a fair and reasonable opportunity to present their cases.

- (b) in subsection (3), by adding the following words immediately after the word “evidence” appearing at the end thereof –

“and to determine at what point an argument or submission in respect of any matter has been fairly and adequately put or made”;

- (c) by inserting a new subsection immediately after subsection (4) as follows -

(5) The tribunal may direct that a party or witness shall be examined on oath or affirmation and may for that purpose administer or take the necessary oath or affirmation.

Amendment of
section 21 of No.
4 of 1995.

19. Section 21 of the principal Act is amended -

- (a) in subsection (1), by deleting the words “place of arbitration” and substituting therefor the words “juridical seat of arbitration and the location of any hearing or meeting”;
- (b) in subsection (3), by deleting the word “place” and substituting therefor the word “location”.

Amendment of
section 26 of No.
4 of 1995.

20. Section 26 of the principal Act is amended -

- (a) in paragraph (c), by deleting the words “any party which” and substituting therefor the words “a party”;

(b) by inserting the following new paragraphs immediately after paragraph (d) -

- (e) a party fails to comply with any order or direction of the tribunal, the tribunal may make a peremptory order to the same effect, prescribing a time for compliance with the order;
- (f) a party fails to comply with a peremptory order of the tribunal to provide security for costs, the tribunal may make an award dismissing his claim;
- (g) a party fails to comply with any other peremptory order, the tribunal may -
 - (i) direct that the party in default shall not be entitled to rely on any allegation or material that was the subject-matter of the order;
 - (ii) draw such adverse inferences from the non-compliance as the circumstances justify;
 - (iii) proceed to an award on the basis of such materials as have been properly provided to it;
 - (iv) make such order as it thinks fit as to the payment of costs of the arbitration incurred as a result of the non-compliance.

Amendment of
section 27 of No.

21. Section 27 of the principal Act is amended -

4 of 1995.

(a) in subsection (2), by deleting the word “so” appearing immediately after the words “if a party”;

(b) in subsection (3), by deleting the word “was” appearing before the words “provided to him” and substituting therefor the word “were”.

Amendment of
section 30 of No.
4 of 1995.

22. Section 30 of the principal Act is amended in subsection (2), by deleting the words “a presiding arbitrator” and substituting therefor the words “the Chairman”.

Amendment of
section 32 of No.
4 of 1995.

23. Section 32 of the principal Act is amended -

(a) in subsection (2), by deleting the words “is stated” and substituting therefor the words “are stated”;

(b) in subsection (4), by deleting the word “place” wherever it occurs and substituting therefor the words “juridical seat”;

(c) in subsection (5) by inserting the words “subject to section 32 B” immediately before the word “after”;

(d) by deleting subsection (6) and substituting therefor the following new subsection -

(6)An arbitral tribunal may, at any time, make a partial award by which some, but not all, of the issues between the parties are determined, and the provisions of this Act applying to awards of an arbitral tribunal shall, except in so far as a contrary intention appears, apply in respect of such partial

award.

Insertion of
sections 32A,
32B, and 32C in
No.4 of 1995.

24. The principal Act is amended by inserting the following new sections immediately after section 32 -

Effect of
award.

32A. Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act.

Costs
and
expenses.

32B. (1) Unless otherwise agreed by the parties, the costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration, shall be as determined and apportioned by the arbitral tribunal in its award under this section, or any additional award under section 34 (5).

(2) Unless otherwise agreed by the parties, in the absence of an award or additional award determining and apportioning the costs and expenses of the arbitration, each party shall be responsible for the legal and other expenses of that party and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration.

(3) The arbitral tribunal may withhold the delivery of an award to the parties until full payment of the fees and expenses of the arbitral tribunal is received.

(4) If the arbitral tribunal has, under subsection (3), withheld the delivery of an award, a party to the arbitration may, upon notice to the other party and to the arbitral tribunal, and after payment into court of the fees and expenses demanded by the arbitral tribunal, apply to the High Court for an order directing the manner in which the fees and expenses properly payable to the arbitral tribunal shall be determined.

(5) The fees and expenses found to be properly payable pursuant to such an order shall be paid out of the moneys paid into court and the balance of those moneys, if any, shall be refunded to the applicant.

(6) The decision of the High Court on an application under subsection (4) shall be final and not subject to appeal.

(7) The provisions of subsections (3) to (6) have effect notwithstanding any agreement to the contrary made between the parties.

Interest.

32C. Unless otherwise agreed by the parties, to the extent that the rules of law applicable to the substance of the dispute permit, an arbitral award may include provision for the payment of simple or compound interest calculated from such date, at such rate and with such rests as may be specified in the award.

Amendment of
section 34 of No.
4 of 1995.

25. Section 34 of the principal Act is amended -

(a) in subsection (1) -

(i) by deleting the words “may request” and substituting therefor the words “may, upon notice in writing to the other party, request”;

(ii) by deleting paragraph (b) and substituting therefor the following new paragraph -

(b) a party may, upon notice in writing to the other party, request the arbitral tribunal to clarify or remove any ambiguity concerning specific point or part of the arbitral award.

(b) by deleting subsection (2) and substituting therefor the following subsection -

(2) If the tribunal considers a request made under subsection (1) to be justified it shall, after giving the other party 14 days to comment, make the correction or furnish the clarification within 30 days whether the comments have been received or not, and the correction or clarification shall be deemed to be part of the award.

(c) in subsection (4), by inserting the words “upon notice in writing to the other party” immediately after the words “a party may”.

Amendment of
section 35 of No.
4 of 1995.

26. Section 35 of the principal Act is amended -

(a) in subsection (2) -

(i) by deleting the words “law of Kenya” appearing in subparagraph (a)(ii) and substituting therefor the words “laws of Kenya”;

(ii) by inserting the following new paragraph immediately after paragraph (v) -

(vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption;

(b) in subsection (3), by deleting the expression “section 36” and substituting therefor the expression “section 34”;

(c) in subsection (4), by inserting the word “if” immediately after the words “appropriate and”.

Replacement of
section 36 of No.
4 of 1995.

27. The principal Act is amended by repealing section 36 and replacing it with the following new section -

Recognition
and
enforcement
of awards.

36. (1) A domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37.

(2) An international arbitration award shall be recognised as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.

(3) Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish-

- (a) the original arbitral award or a duly certified copy of it; and
- (b) the original arbitration agreement or a duly certified copy of it.

(4) If the arbitral award or arbitration agreement is not made in the English language, the party shall furnish a duly certified translation of it into the English language.

(5) In this section, the expression “New York Convention” means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations General Assembly in New York on the 10th June, 1958, and acceded to by Kenya on the 10th February, 1989, with a reciprocity reservation.

Amendment of
section 37 of No.
4 of 1995.

28. Section 37(1) of the principal Act is amended in paragraph (a) by inserting the following new subparagraph immediately after paragraph (vi) -

(vii) the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence.

Amendment of
section 39 of No.
4 of 1995.

29. Section 39 of the principal Act is amended -

- (a) in subsection (2), by deleting the words “may, as appropriate” appearing immediately after the words “the High Court” and substituting therefor the

word “shall”;

(b) in subsection (3) -

(i) by deleting the word “and” appearing at the end of paragraph (a) and substituting therefor the words “prior to the delivery of the arbitral award; or”;

(ii) by deleting paragraph (b) and substituting therefor the following new paragraph -

(b) the Court of Appeal, being 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 of the parties, grants leave to appeal, and on such appeal the Court of Appeal may exercise any of the powers which the High Court could have exercised under subsection (2).

Transitional provision.

30. The amendments made to the principal Act by this Act shall not affect any arbitral proceedings commenced before the commencement of this Act, but shall have effect in relation to any such proceedings afterward commenced, whether the arbitration agreement that gave rise to them was entered into before or after the commencement of this Act.

