

Paper Laid
By the leader of
majority party
on Wednesday

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27/2/18

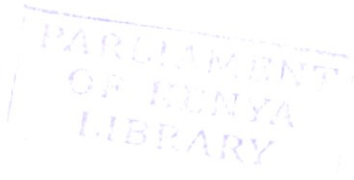
LEGAL NOTICE NO.

THE INTERGOVERNMENTAL (ALTERNATIVE DISPUTE RESOLUTION) REGULATIONS, 2018

REGULATION

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Mr. Moses Lemwa
Registers and
Case to be
tabled
on 28/2/18
27/2/18

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SCHEDULE

- Form 1-Notice of intention to declare an intergovernmental dispute
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LEGAL NOTICE NO.

THE INTERGOVERNMENTAL RELATIONS ACT, 2012
(No. 2 of 2012)

IN EXERCISE of the powers conferred by section 38 of the Intergovernmental Relations Act, 2012, the Cabinet Secretary makes the following Regulations—

**THE INTERGOVERNMENTAL (ALTERNATIVE DISPUTE RESOLUTION)
REGULATIONS, 2018**

PART I - PRELIMINARY

Citation.

1. These Regulations may be cited as the Intergovernmental (Alternative Dispute Resolution) Regulations, 2018.

Interpretation.

2. In these Regulations —

No. 2 of 2012.

“Act” means the Intergovernmental Relations Act, 2012;

“arbitral panel” means a sole arbitrator or a panel of arbitrators;

“alternative dispute resolution mechanisms” means any method of resolving disputes without litigation that is used by the parties to resolve issues in controversy or any dispute and may include negotiation, conciliation, facilitation, mediation, arbitration or any combination thereof;

“award” means the final decision of an arbitral panel, with respect to an intergovernmental dispute;

“Council” means the Council of County Governors established under section 19 of the Act;

“dispute” means an intergovernmental dispute as defined under section 30 of the Act;

“intergovernmental forum” means any intergovernmental forum and includes such forum as may be established pursuant to section 13(2) or 38(2)(e) of the Act;

“issue in controversy” means a disagreement between the national government and a county government or amongst county government before the formal declaration of a dispute;

“Summit” means the National and County Government Co-ordinating Summit established under section 7 of the Act;

“Technical Committee” means the Intergovernmental Relations Technical Committee as established under section 11 of the Act and

“traditional dispute resolution mechanism” means an intergovernmental dispute resolution process that is carried out by a recognised traditional body;

Objects and purposes of the Regulations

3. The objects and purposes of these regulations are to—
 - (a) facilitate consultation and cooperation between the national government and a county government or amongst county governments in accordance with Article 6(2) of the Constitution;
 - (b) foster mutual trust and good faith between the national government and a county government or amongst county governments;
 - (c) enable parties to a dispute to exhaust the alternative dispute resolution mechanisms provided in these Regulations before resorting to judicial proceedings;
 - (d) promote and ensure amicable resolution of intergovernmental disputes as contemplated under Article 189(3) and (4) of the Constitution; and
 - (e) provide for the effective, efficient and impartial resolution of intergovernmental disputes.

Guiding principles

4. These Regulations shall be guided by the following principles—
 - (a) prompt and amicable resolution of disputes before resorting to judicial proceedings;
 - (b) prudent use of public funds in the resolution of intergovernmental disputes;

- (c) upholding the Constitutional principles of consultation and co-operation;
- (d) compliance with the processes and procedures outlined in these regulations; and
- (e) respect for the decisions and outcomes made through the dispute resolution mechanisms.

Application of Regulations

5. These Regulations shall apply to the resolution of disputes arising —
- (a) between the national government and a county government; and
 - (b) amongst county governments.

PART II - PROCEDURE BEFORE FORMAL DECLARATION OF A DISPUTE

Procedure before formal declaration of a dispute

6. (1) Pursuant to section 33(1) of the Act, parties shall, within reasonable time, undertake all necessary measures to amicably resolve issues in controversy through consultation, negotiation or conciliation before a dispute is formally declared.

(2) The measures envisaged under paragraph (1) may include—

- (a) direct negotiations between parties; or
- (b) consultations with either—
 - (i) a Constitutional commission or Independent office;
 - (ii) a line Ministry;
 - (iii) a statutory body which may include the Technical Committee or the Council;
 - (iv) an intergovernmental forum;
 - (v) a joint committee constituted pursuant to section 23 of the Act;
 - (vi) a recognised traditional body; or
 - (vii) any other relevant body as the parties may agree to consult.

(3) Where, pursuant to paragraphs (1) and (2), parties resolve the issues in controversy, the parties shall within thirty days enter into a written agreement stating—

- (a) the parties;
- (b) the nature and particulars of the dispute; and
- (c) the resolution.

(4) The Parties shall submit a copy of the agreement reached under paragraph (3) to the Cabinet Secretary, the Technical Committee and the Council.

(5) The Cabinet Secretary shall, within thirty days of receipt of the agreement, publish in the Kenya Gazette a summary of the agreement for public information.

(6) Where the parties fail to resolve the issue in controversy, an aggrieved party shall issue a fourteen days' notice of intention to declare a dispute as set out in Form 1 in the Schedule.

(7) Nothing in this regulation shall preclude parties from agreeing on the procedure for conducting negotiations or consultations provided under paragraph (2).

PART III - FORMAL DECLARATION OF A DISPUTE

*Formal declaration
of a dispute*

7. (1) Upon expiry of the notice issued under regulation 6(6), a party may formally declare a dispute to the Summit through the Technical Committee, the Council or any other intergovernmental structure established under the Act.

(2) The declaration of a dispute shall be made in Form 2 as set out in the Schedule and shall be served upon—

- (a) the relevant parties;
- (b) the line Ministry;
- (c) the Cabinet Secretary;
- (d) the Technical Committee where the dispute is between the National government and a county government;
- (e) the Council where the dispute is between county governments; and
- (f) the relevant intergovernmental forum where the matter is of a policy or functional nature.

*Initial meeting
between the Parties*

8. (1) The Technical Committee, the Council or the intergovernmental structure to which the declaration is made shall, within twenty-one days of receipt of the notice of formal declaration of a dispute and in accordance with section 34(1) of the Act, convene an initial meeting between the parties or their designated representatives.

(2) The parties at the initial meeting convened under paragraph (1) shall—

- (a) determine the precise issue in dispute;
- (b) determine any material issues that are not in dispute;
- (c) determine the nature of dispute including whether the dispute—
 - (i) relates to the assignment or implementation of functions;
 - (ii) relates to the interpretation of statute;
 - (iii) is of a fiscal nature;
 - (iv) relates to a written agreement between the parties;
 - (v) is a boundary dispute;

- (vi) relates to natural resource management; or
 - (vii) relates to any other form of intergovernmental dispute; and
- (d) identify and agree on the appropriate alternative dispute resolution mechanism that will be applied by the parties in settling the dispute, which may include—
- (i) mediation;
 - (ii) conciliation;
 - (iii) arbitration;
 - (iv) negotiation;
 - (v) traditional dispute resolution mechanisms; or
 - (vi) any other alternative dispute resolution mechanisms provided by other legislation.

(3) The parties shall, at the conclusion of the initial meeting, enter into a written and signed agreement detailing—

- (a) the nature of the dispute;
- (b) the precise issues in dispute;
- (c) any material issues that are not in dispute; and
- (d) the dispute resolution mechanism agreed to.

(4) The notice and the minutes of the meeting shall be duly signed and filed by the institution to which the declaration of a formal dispute was made.

PART IV– ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

Mediation

9. (1) Where the parties agree to refer the dispute to mediation, the parties shall identify and agree on an accredited mediator.

(2) Where the Parties do not agree on a mediator, the Technical Committee, the Council or the intergovernmental structure to which the declaration has been referred, shall in writing, request an accredited mediation institution to appoint a mediator.

(3) The mediator shall convene the parties and assist the parties to resolve the dispute within twenty-one days.

(4) Except as otherwise provided in these Regulations, the appointed mediator and the parties shall determine their own procedure.

(5) Upon conclusion of the mediation process, the mediator shall submit a report to the appointing authority, which report shall contain—

- (a) the documents filed by both parties;
- (b) a copy of the mediation proceedings;
- (c) the outcome of the mediation; and
- (d) any other information relating to the dispute that the mediator may consider necessary.

Costs of Mediation

10. (1) Unless otherwise agreed, each party to a mediation shall bear its costs.

(2) The costs and expenses of the mediation process shall be shared equally by the parties, which costs and expenses may include —

- (a) the fees of the mediator;
- (b) the charges incidental to the mediation; and
- (c) any costs in respect of an expert witness.

(3) For purposes of paragraph (2)(c), the mediator shall, before appointing an expert witness, consult the parties.

Arbitration

11. (1) Where the parties agree to refer the matter to arbitration, the parties shall identify and agree on an accredited arbitrator.

(2) Where the parties do not agree on an arbitrator, the Technical Committee, the Council or the intergovernmental structure to which the dispute has been referred, shall in writing, request an accredited arbitration institution to appoint an arbitrator.

(3) The arbitrator shall, subject to paragraph (4), hear and determine the dispute referred to arbitration within sixty days of the date of commencement of the arbitration proceedings.

(4) The parties may, despite paragraph (3), consent to extend the arbitration proceedings for a period not exceeding thirty days.

No 4 of 1995

(5) The provisions of section 32B of the Arbitration Act, 1995 shall apply with respect to the costs and expenses of the arbitration proceedings.

(6) The arbitral award issued by the appointed arbitrator shall be binding on the parties.

(7) Upon the conclusion of the arbitration proceedings, the arbitrator shall submit to the appointing authority—

- (a) the arbitral award; and

(b) any other documents relating to the arbitration proceedings that the appointing authority may consider necessary.

No 4 of 1995.

(8) The Arbitration Act, 1995 and the arbitration rules of the institution selected by the parties shall, with necessary modifications, apply to an arbitration process provided under this regulation.

Traditional dispute resolution

12.(1) Where parties agree to resolve a dispute through a traditional dispute resolution mechanism, the parties shall identify and agree on the traditional body suitable to undertake the process and shall record their agreement in writing.

(2) Where the parties do not agree on a traditional body, the parties may request the Technical Committee, the Council or the intergovernmental structure to which the dispute has been referred, to assist in identifying and appointing a suitable traditional body.

(3) The Technical Committee, the Council or the intergovernmental structure shall, within seven days of identifying the traditional body under paragraph (1), communicate the appointment to the traditional body and the parties.

(4) The appointed traditional body shall, in writing, accept the appointment to undertake the dispute resolution proceedings within fourteen days.

(5) Except as otherwise provided in these Regulations, the traditional body and the parties shall determine their own procedure.

(6) The traditional body shall conduct the process in conformity with the provisions of Article 159 (3) of the Constitution.

(7) The traditional body shall, subject to paragraph (8), determine the dispute within sixty days of the commencement of the proceedings.

(8) The parties may, despite paragraph (7), consent to extend the proceedings for a period not exceeding thirty days.

(9) Each party shall, unless otherwise agreed, bear its costs of the process.

(10) The costs and expenses of the traditional process shall be shared equally by the parties which costs and expenses may include—

- (a) the fees of the traditional body;
- (b) the charges incidental to the traditional process; and
- (c) any costs in respect of expert advice or expert witnesses who attend or provide such advice with the consent of the parties.

(11) Upon conclusion of the traditional process, the traditional body shall submit to the appointing authority the decision of the process and any other documents relating to the process that the appointing authority may consider necessary.

Mechanisms under other legislation

13.(1) Where the parties agree that they shall resort to alternative dispute resolution mechanisms established by other legislation, the parties shall make every reasonable effort to resolve the dispute in terms of the mechanism or procedure established by that legislation.

(2) Where the parties agree to resolve the dispute through a mechanism established under other legislation, the Technical Committee, the Council or the intergovernmental structure to which the dispute has been referred shall within seven days, in writing, notify the relevant body—

- (a) of the decision to utilise that body and the mechanisms for dispute resolution; and
- (b) of the period within which the body should finalize the process.

(3) The body shall—

- (a) hear and determine the dispute in accordance with its own procedure; and
- (b) communicate its decision, in writing, to the Committee, the Council or the intergovernmental structure to which the declaration was submitted.

Referral to the Summit

14. (1) A party aggrieved by the determination of a dispute as provided under these Regulations, shall within fourteen days notify the Summit through the Technical Committee.

(2) The notice under paragraph (1) shall contain the report and proceedings of the dispute resolution process.

(3) The Summit may, pursuant to paragraph (9) of the Schedule to the Act, establish a standing committee to hear and make recommendations on an appropriate course of action to resolve the dispute referred to it under this regulation.

(4) Upon receipt of the recommendations of the standing committee under paragraph (3), the Summit may—

- (a) adopt the recommendations of the standing committee with or without amendments; or
- (b) reject the recommendations of the standing committee and recommend an appropriate course of action for the resolution of

the dispute which may include seeking an advisory opinion from the Supreme Court, pursuant to Article 163(6) of the Constitution.

(5) Any party aggrieved by the decision of the Summit may institute Judicial proceedings as provided under section 35 of the Act.

PART V- MISCELLANEOUS PROVISIONS

Obligation of parties

- 15.** A Party to an intergovernmental dispute shall—
- (a) comply with the procedures set out in these Regulations;
 - (b) promptly respond to requests for information;
 - (c) not institute parallel proceedings in respect of the same subject matter pending the determination of the dispute and
 - (d) ensure that provision of services in respect of the subject in dispute is not adversely affected in the course of the dispute resolution process.

Non-disclosure and Confidentiality.

16. (1) A party to a dispute or any person involved in any dispute resolution process, shall not, without authorisation in writing from the body in charge of the dispute resolution process, disclose the contents of any document, communication, or information which relates to the dispute.

(2) A party to a dispute or any person involved in a dispute resolution process shall sign a confidentiality agreement.

Joinder of third parties

17. (1) Where a person, other than the parties involved in the dispute has an interest in the subject matter of the dispute instituted under these Regulations, the person may request the Technical Committee, the Council or the intergovernmental structures to which the dispute has been referred to be enjoined in the matter.

(2) Upon receipt of a request under paragraph (1), the Technical Committee, the Council or the intergovernmental structure shall, forward such request for consideration by the body in charge of the dispute resolution process.

(3) The body in charge of the dispute resolution process shall, within 7 days and before the next sitting of parties involved in the dispute, make a decision on the request and inform the Technical Committee, the Council or the intergovernmental structure to which the dispute has been referred of its decision.

(4) The Technical Committee, the Council or the intergovernmental structure to which the dispute has been referred shall, inform the party seeking to be

enjoined, of the decision of the body in charge of the dispute resolution process, to—

- (a) accept its request; or
- (b) reject its request with reasons,

within fourteen days from the date of receipt of the initial request.

Reporting

18. (1) The Council and other intergovernmental structures shall submit a report to the Technical Committee on the intergovernmental disputes referred and determined by the Council or the intergovernmental structure, as the case may be.

(2) The Technical Committee shall compile a report on disputes referred and determined under these Regulations which report shall form part of the quarterly report submitted to the Summit and the Council pursuant to section 14 of the Act.

(3) The Summit shall consider the report under paragraph (2) and may make recommendations thereof.

(4) The Technical Committee shall, within seven days of receipt of the decision of the various bodies in charge of the dispute resolution processes, make available for the Cabinet Secretary, a copy of the determination.

Guidelines

19. The Cabinet Secretary may, in consultation with the Summit, issue Guidelines for the better carrying out of the provisions of these Regulations.

*Publication of
outcome of
alternative dispute
resolution process*

20. The Cabinet Secretary shall, within thirty days of determination of a dispute, publish in the Kenya Gazette a summary of the outcome or agreement reached thereto, for public information.

SCHEDULE

FORM 1

(r. (6(6))

NOTICE OF INTENTION TO DECLARE AN INTERGOVERNMENTAL DISPUTE

BETWEEN

.....
AND
.....

To:

..... (name)
.....(address)

Take notice that (insert name) being a party to the negotiations/ consultations of the issues arising out of
.....
(state the precise issue in controversy), and having failed to reach an amicable settlement, we intend to declare a dispute between..... (Party A) and..... (Party B)

Take Further Notice THAT we will formally declare a dispute within Fourteen Days of the receipt of this notice, unless the following steps/ measures are undertaken—

- (a).....
- (b).....
- (c).....

Dated AT..... this..... day of.....20.....

Name

Designation.....

Signature.....

SEALED WITH THE COMMON SEAL OF.....

INTERGOVERNMENTAL DISPUTE DECLARATION FORM

BETWEEN

.....

AND

.....

To:

..... (name)

.....(address)

DECLARATION OF A DISPUTE

Take Notice that following the lapse of the Notice of intention to declare a dispute dated the..... (date of the notice) and upon failure to amicably resolve the issues in controversy, we (Party A) hereby formally declare a dispute between (Party A) and (Party B) in relation to (the nature of dispute)

The parties have in compliance with the provisions of the Intergovernmental Relations Act, 2012 and Regulation 6 of the Intergovernmental (Alternative Dispute Resolution) Regulations, 2018 held the requisite consultations/negotiations/conciliations.

Take further notice that the Technical Committee/ Council/ Intergovernmental Structure to which the declaration is made, shall within 21 Days of receipt of this Notice of formal declaration convene an initial meeting between the parties in accordance with regulation 8 of the Intergovernmental (Alternative Dispute Resolution) Regulations, 2018.

Dated at..... this..... day of.....20.....

Name

Designation.....

Signature.....

SEALED WITH THE COMMON SEAL OF.....

***NOTE:**

To be served upon

- (a) the relevant parties;
- (b) the line Ministry;
- (c) the Cabinet Secretary;

- (d) the Technical Committee where the dispute is between the National government and a county government;
- (e) the Council where the dispute is between county governments; and
- (f) the relevant intergovernmental forum where the matter is of a policy or functional nature.

Made on the, 2018.

EUGENE L. WAMALWA, EGH
Cabinet Secretary,
Ministry of Devolution and ASAL