Dispute Resolution 2019

Contributing editors
Martin Davies and Kavan Bakhda

LEXOLOGY®
Getting The Deal Through

© Law Business Research 2019

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer–client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between April and June 2019. Be advised that this is a developing area.

© Law Business Research Ltd 2019
No photocopying without a CLA licence.
First published 2003
Seventeenth edition
ISBN 978-1-83862-126-1

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Dispute Resolution 2019

Contributing editors
Martin Davies and Kavan Bakhda
Latham & Watkins

Lexology Getting The Deal Through is delighted to publish the seventeenth edition of *Dispute Resolution*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on India and Kenya.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Martin Davies and Kavan Bakhda of Latham & Watkins, for their continued assistance with this volume.

LEXOLOGY
Getting The Deal Through

London
June 2019

Reproduced with permission from Law Business Research Ltd
This article was first published in July 2019
For further information please contact editorial@gettingthedealthrough.com

© Law Business Research 2019

Contents

© Law Business Research 2019

© Law Business Research 2019

Kenya

Desmond Odhiambo and Ian Nyanchoga
Kieti Advocates LLP

LITIGATION

Court system

1 | What is the structure of the civil court system?

The civil court system in Kenya finds expression under the Constitution of Kenya 2010 (the Constitution) and through various other Acts of Parliament. The court system is structured in a hierarchical assembly consisting of both superior and subordinate courts.

The superior courts are comprised of the Supreme Court, the Court of Appeal and the High Court. Alongside the High Court is the Employment and Labour Relations Court (ELRC) and the Environment and Land Court (ELC), which have equal status to the High Court. The subordinate courts are comprised of the Magistrates' Court, the Khadi's court, the Court Martials and any other court or local tribunal established by an Act of Parliament. The High Court exercises supervisory jurisdiction over all subordinate courts as well as persons, bodies and authorities who or which exercise a judicial or quasi-judicial function but not over any other superior court.

The Supreme Court sits at the apex of the civil court structure and is conferred with exclusive and original jurisdiction to determine presidential election disputes as well as appellate jurisdiction to determine appeals from the Court of Appeal or any other court or tribunal prescribed by law. It is a precursor that for an appeal to lie in the Supreme Court, it must be certified to be of general public importance or revolve around the application and interpretation of the Constitution. The Supreme Court and the Court of Appeal both have the power of certification. The Court of Appeal is an appellate jurisdiction court and therefore not a court of first instance. It entertains appellate matters from the High Court or any other court or tribunal prescribed by law.

The High Court has unlimited original jurisdiction in civil matters and appellate jurisdiction as conferred on it by statute. The High Court also determines questions on the Bill of Rights on whether a right or a fundamental freedom has been denied, violated, infringed or threatened. The ELRC and ELC enjoy similar status to the High Court. The ELRC has jurisdiction to determine employment and labour relation disputes while the jurisdiction of the ELC extends to disputes concerning environmental matters as well as the title and occupation of land.

The Magistrates' Courts are subordinate courts presided over by different classes of Magistrates. Each class is governed by fixed pecuniary jurisdiction. For example, a resident magistrate may hear a civil dispute where the value of the subject matter does not exceed 5 million Kenyan shillings, whereas chief magistrate's jurisdiction is capped at 20 million Kenyan shillings. The jurisdiction of the Khadi's Court is limited to civil cases relating to Islamic law. Parties who wish to be governed by the Khadi's court must profess the Muslim faith and submit to its jurisdiction. Lastly, the Courts Martial are courts of a military nature where matters involving members of the Kenya Defence Forces are heard and determined with an appealable right to the High Court.

Judges and juries

2 | What is the role of the judge and the jury in civil proceedings?

The civil court system in Kenya is adversarial in nature and so the judges play a passive role. Juries play no part in civil proceedings. The judge determines issues of both law and fact and arrives at a conclusion based on the evidence and arguments placed before him or her.

Limitation issues

3 | What are the time limits for bringing civil claims?

The prescribed time limits for instituting civil claims are defined by law and specifically in the Limitation of Action Act (Cap 22). The limitation periods for civil claims vary in extent and are largely dependent on the nature of the civil claim. Different limitation periods therefore apply to different claims.

A claim founded on contract must be brought within six years from the date on which the cause of action arose, while an action founded on tort may only be brought within three years, barring an action for libel or slander, which may only be within 12 months from the date the cause of action arose. A claim for damages for unfair termination from employment may only be brought within one year from the date of termination.

Actions for enforcement of recognisance, enforcement of awards, recovery of sums due under law and claims of equitable relief must be brought within six years, while an action based on a judgment issued by the court must be brought within 12 years from the date the judgment was delivered.

The Limitation of Action Act further preserves the right to extend periods of limitation for civil claims in instances of fraud, disability or where a person acknowledges or effects part payment of a debt. Parties are not at liberty to suspend time limits unless it falls within one of the exceptions aforementioned.

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

As soon as an aggrieved party becomes aware that they are likely to file a civil claim, the aggrieved party is required to send a formal demand letter to the offending party. Ideally once in receipt, the offending party should acknowledge the demand letter and respond to it formally within a reasonable time frame. This then opens an avenue for communication with an aim of arriving at a settlement ensuring that access to the court is an avenue of last resort.

The failure to write a demand letter before initiating a civil suit may bar any claim for costs against the offending party even if the claim proves successful.

There are no other pre-action protocols required other than issuing of a demand letter.

© Law Business Research 2019

Starting proceedings

5 | How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

Civil proceedings are commenced by filing pleadings at the civil court registry. A plaint is usually the first pleading filed by an aggrieved party (the plaintiff) to initiate a civil suit unless the Civil Procedure Rules 2010 provides otherwise. The plaint is an avenue of presenting material allegations of facts as relied upon by a plaintiff to prove his or her claim. It must disclose the legal cause of action and the plaintiff's prayers for relief against the offending party (the defendant). At the time of filing, a plaint must be accompanied with an affidavit by the plaintiff verifying the averments of the plaint along with the plaintiff's list of witnesses to be called upon in the event of a trial, their respective witness statements and copies of all documents the plaintiff wishes to rely upon to prove his or her claim. Once these pleadings have been filed, a suit is deemed to have commenced.

The defendant is notified of a suit against him or her through summons to enter appearance ('summons') calling for their appearance and response to the plaintiff's claim. Summons are more than a request as they are clothed with legal authority. They are usually signed by the judge within 30 days of the suit being filed and stamped with the seal of the court. The plaintiff must thereafter serve the defendant with the summons together with their plaint and its accompanying documents unless the court directs to effect service to the defendant by other means. If the defendant does not respond to the summons within the specified time frame either personally or through a duly appointed legal representative, default judgment may be entered against them without the need for a trial.

Summons are valid for 12 months from the date of issue. This affords the plaintiff adequate time to serve the defendant. Where the plaintiff is unable to trace the defendant within 12 months, the plaintiff may apply to the court to renew the validity of the summons for a further 12 months or request the court for leave to serve the defendant through substituted means of service.

A multitude of cases are filed within the Kenyan court system, which has resulted in a backlog of cases that has often proved a challenge to the judiciary. One of the things that have been introduced to reduce the case backlog is the court-annexed mediation process. This an alternative dispute resolution mechanism where parties resolve their disputes amicably with the assistance of a third party called a mediator. As soon as a case is filed, the court registry determines whether it is suitable for mediation. For example, parties seeking interim reliefs at the outset, such as an injunction, would not be compelled to go through the mediation process. If a case qualifies for mediation during the screening process, then the parties would be notified to appear before a mediator. It is, however, not mandatory for the parties to reach an amicable resolution at the mediation but a total disregard to the process would invite penalties of costs to the offending party.

If the parties reach an amicable settlement, a settlement agreement would be drawn up by the parties or their lawyers and signed by the mediator. This would then be binding and can only be set aside on similar grounds that would justify setting aside a contract.

Timetable

6 | What is the typical procedure and timetable for a civil claim?

Once a suit has been instituted, the defendant must appear in the case personally or through a legally appointed representative within 15 days of being served with the summons. The period of the defendant's appearance may vary depending on the time frame stipulated in the summons. The defendant would thereafter be required to respond to the suit through a statement of defence within 14 days of entering appearance. The statement of defence should be accompanied with the defendant's list of witnesses, witness statements and any evidence the defendant shall rely upon to disprove the claim. Once filed, the defendant must serve the plaintiff with his or her pleadings within 14 days. The plaintiff may thereafter elect to reply to the defence within another 14 days, after which parties will close their pleadings.

The case will then be screened by the mediation registrar to determine if it is suitable for mediation as discussed above. If an amicable settlement is reached at the mediation, then the matter would end at that juncture. If the mediation is not successful, the case would proceed for case management conference for pre-trial directions. These include identifying the issues for trial, identification of a test suit where applicable and creating a timetable for the proceedings.

The timetable for each claim varies as this is dependent on the nature of the case, its complexity, the court's diary and the parties' willingness to comply with procedural timelines under the Civil Procedural Rules 2010.

Case management

7 | Can the parties control the procedure and the timetable?

The parties have limited control of the timetable and the procedure because they cannot opt out of the procedural rules. The timetable also largely depends on the available dates in the court diary, which is often stretched to capacity.

Evidence – documents

8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

It is not mandatory to share documents that are unhelpful to your case. The opposing party may, however, apply for an order of discovery.

Evidence – privilege

9 | Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Privileged communications are guarded under the Evidence Act (Cap 80). These include advocate–client communications, communications made on a 'without prejudice' basis, communication between spouses and confidential government communications, among others.

Communications between a lawyer and a client are considered privileged. This extends to local in-house lawyers that are admitted to practice as advocates under the Advocates Act. Foreign in-house lawyers may also enjoy the same privileges based on common law provisions that recognise them as professionally qualified members of professional bodies with disciplinary powers to enforce their rules and owe a duty to the court. A lawyer has a duty to protect his or her client's interest and may only disclose privileged communication with the client's express consent.

The above notwithstanding, a lawyer also has a duty to the court and may be compelled to disclose privileged client communication to the court where the lawyer becomes aware in his or her professional employment that such communication was made in furtherance of an illegal purpose or disclose the commission of a fraudulent or criminal act by the client. This obligation subsists even after the lawyer–client relationship comes to an end.

© Law Business Research 2019

Evidence – pretrial

10 | Do parties exchange written evidence from witnesses and experts prior to trial?

Yes. As discussed in question 5 and 6, this is a mandatory requirement under the civil procedure rules.

Evidence – trial

11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

The principal method of giving evidence at trial is through oral evidence, whether factual or expert. Some civil courts also have video link conference facilities available for witnesses who seek to present their testimonies from different jurisdictions.

An exception to the general rule is where the parties agree that the expert reports may be produced without calling their makers. Another exception is if the author of the document or affidavit is deceased.

Interim remedies

12 | What interim remedies are available?

The interim remedies available include prohibitory injunctions, *Mareva* injunctions, *Anton Pillar* orders, attachment before judgment, security for costs, contempt of court orders and appointment of receivers.

Remedies

13 | What substantive remedies are available?

A successful party may be awarded:

- damages, including punitive or exemplary damages for particularly grave or wrongful acts;
- a declaration of rights;
- a permanent injunction;
- equitable remedies such as specific performance, rescission, rectification, account for profits, tracing, constructive trusts, subrogation or quasi-contract;
- public law remedies such as a 'quashing order', a 'mandatory order' or a 'prohibiting order' against a public body; and
- interest on damages either contractual or at court rates.

Enforcement

14 | What means of enforcement are available?

If there is non-compliance a judgment creditor or decree holder may enforce the decree by:

- delivery of any property decreed to the decree holder;
- attachment and sale or by sale without attachment of any property of the judgment debtor;
- attachments of debts through garnishee proceedings;
- committal of the judgment debtor to civil jail for up to a maximum of six months;
- appointment of a receiver over the judgment debtor's property or in such other manner as may be granted; and
- contempt of court proceedings.

Public access

15 | Are court hearings held in public? Are court documents available to the public?

The right to have a fair and public court hearing in Kenya is a constitutional right under article 50 in the Bill of Rights. Similarly, once court documents are filed, they become part of public records that are accessible to the public upon payment of a nominal prescribed fee. Nonetheless, courts retain the right to exclude the public from attending cases for lawful reasons such as to protect the identity and dignity of a witness, to protect a vulnerable witness such as children or to preserve public order and national security.

Costs

16 | Does the court have power to order costs?

The general rule is that costs follow the event unless ordered otherwise. In exercise of this discretion, the court may determine by whom, out of what property and to what extent costs are to be paid. It must, however, act judicially based on legal principles taking into consideration the conduct of the parties prior to and during the trial.

A claimant that does not reside in the country or does not have assets within the country may be required to provide security for the defendant's costs.

Funding arrangements

17 | Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

Section 46(c) of the Advocates Act and the Code of Conduct and Ethics for Advocates prohibits contingency or conditional fee arrangements. It does not prohibit parties bringing in proceedings using third-party funding. It, however, prohibits any agreement to divide the litigation proceeds with a third party who supports or helps to enforce the claim.

Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

It is available as part of specific liability policies such as professional indemnity, directors' liability cover, general liability cover for property damage or bodily injury. Under these covers, the litigation costs would be paid or reimbursed.

Class action

19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

It is permissible for a litigant to join in one action as a plaintiff to institute court proceedings as a member of, or in the interest of, a group or class of person seeking collective redress. To do so, the litigants must demonstrate to the court that the collective redress they seek emanates from the same act or transaction or a similar series of acts or transactions whether jointly or severally and in the alternative that if each litigant were to bring a separate action, a common question of law or fact would arise.

Each party must therefore be a necessary and proper party to the suit to enable the court to effectively adjudicate the issues in the suit. A necessary and proper party is one who may be joined in the action but whose failure would not prevent the court from hearing the case, whereas a person who has no material interest in the subject of the litigation or in the relief demanded would not qualify as a necessary and proper person and may not be joined as party to the action.

© Law Business Research 2019

Appeal

20 On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

The right to appeal must be expressly provided for in statute or in the constitution. Parties may appeal an original decree or order of a subordinate court to the High Court as provided by the Civil Procedure Act (Cap 21) and Civil Procedure Rules 2010.

A party aggrieved by the original decree or order of a subordinate court may prefer an appeal to the High Court on a question of law or fact. However, in exercising a right of further appeal to the Court of Appeal, the appeal must address a question of law only.

An appeal from the original decree or order of the High Court may be preferred to the Court of Appeal unless provided otherwise under the law. However, a right of further appeal to the Supreme Court shall only exist as of right in any case involving the interpretation or application of the Constitution of Kenya. In any other case, the right of further appeal to the Supreme Court shall lie where the Court of Appeal or the Supreme Court certifies such a matter to be of general public importance.

Foreign judgments

21 What procedures exist for recognition and enforcement of foreign judgments?

The recognition and enforcement of foreign judgments in Kenya is governed by the Foreign Judgments (Reciprocal Enforcement) Act 1984. This law gives provision in Kenya for the enforcement of judgments made in countries outside Kenya that accord reciprocal treatment to judgments given in Kenya. These countries include: Australia, Malawi, the Seychelles, Tanzania, Uganda, Zambia, the United Kingdom and Rwanda.

Prior to enforcement of a foreign judgment in Kenya, a judgment creditor is required to apply to the High Court to have the judgment registered in Kenya. This ought to be done within six years from the date the judgment was made. The application may be made ex parte and where the court is satisfied that the judgment debtor was served with process in the foreign court or where the time set to appeal the judgment has lapsed, it shall proceed to hear the application ex parte and if not, direct that summons be issued to the judgment debtor.

In making the application to the High Court, the judgment creditor shall accompany the application for recognition of the foreign judgment with a certificate as provided for under the Schedule to the Act or a certificate issued by the foreign court under its seal and signed by a judge or registrar that has the same effect as the certificate in the Schedule, or an affidavit with the same effect. The application must also have attached a certified or duly authenticated copy of the judgment issued by the foreign court and an affidavit stating that at the time of the application, the judgment had not been satisfied, that it is capable of enforcement by the foreign court through execution and if required, the parts of the judgment that the judgment creditor would require registered along with any other relevant evidence as may be prescribed. Where the application concerns a judgment of a superior court of the Commonwealth, the application would also need to be accompanied with a certificate under seal and signature of a judge or registrar certifying that the court is indeed a superior court.

Once the High Court is satisfied that the judgment creditor's application meets the requirement of Foreign Judgments (Reciprocal Enforcement) Act 1984, it shall pass an order that the foreign judgment be registered in Kenya. Once registered, the foreign judgment shall be, for purposes of enforcement and execution as discussed in question 14, of the same force and effect as a judgment by the High Court of Kenya as at the date of registration.

If no reciprocal agreement exists, it may be enforced through common law provisions. This entails filing a plaint at the High Court. The plaint will provide a concise statement of the nature of the claim, and the amount of the judgment debt. It will be supported by a verifying affidavit, list of witnesses and bundle of documents intended to be relied upon. A certified copy of the foreign judgment should be exhibited to the plaint. It is open to a defendant to challenge the validity of the foreign judgment under the grounds set out in section 9 of the Civil Procedure Act:

- where it has not been pronounced by a court of competent jurisdiction;
- where it has not been given on the merits of the case;
- where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of Kenya in cases in which such law is applicable;
- where the proceedings in which the judgment was obtained are opposed to natural justice;
- where it has been obtained by fraud; or
- where it sustains a claim founded on a breach of any law in force in Kenya.

If the foreign judgment creditor is successful after trial, the judgment creditor will have the benefit of a High Court judgment and the judgment creditor will be entitled to use the procedures of the Kenyan courts to enforce the foreign judgment, which will now be executed as a Kenyan judgment.

Foreign proceedings

22 Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

Not applicable.

ARBITRATION

UNCITRAL Model Law

23 Is the arbitration law based on the UNCITRAL Model Law?

Yes. The Arbitration Act, 1995 is based on the UNCITRAL Model Law.

Arbitration agreements

24 What are the formal requirements for an enforceable arbitration agreement?

The Arbitration Act 1995 provides that an enforceable arbitration agreement in Kenya must be in writing either in the form of an arbitration clause within a contract or in the form of a separate agreement.

An arbitration agreement is considered to be in writing where it is contained in a document signed by the parties or in an exchange of letters, telex, telegram, facsimile, electronic mail or any other means of telecommunication that provide a record of the agreement or where through exchange of court pleadings one party alleges the existence of an arbitration agreement that the other party does not refute.

Choice of arbitrator

25 If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

The Arbitration Act 1995 affords parties autonomy to determine and appoint any given number of arbitrators. However, where the arbitration agreement and rules are silent, there shall be one arbitrator.

© Law Business Research 2019

If one party is unwilling to participate in the appointment of an arbitrator within 14 days of notice to do so, the other party is at liberty to forward a written notice to the defaulting party naming and signifying the intention of appointing an arbitrator of their choice. If the defaulting party continues in default, the other party may proceed to appoint their nominated arbitrator and the appointment of this arbitrator shall be binding on both parties as if it were made in agreement.

The appointment of an arbitrator may be challenged only if there are circumstances that give rise to justifiable doubts as to an arbitrator's impartiality, independence, qualifications or physical or mental incapacity. The challenge must be brought within 15 days of a party being aware of the composition of an arbitral tribunal or at the earliest opportunity of being aware of any such circumstance.

Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

Parties may elect to choose arbitrators from a wide range of bodies domestically and internationally. Some of the domestic arbitration bodies that are available in Kenya include the Charted Institute of Arbitrators Kenya branch and the Nairobi Centre for International Arbitration.

Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

Arbitration in Kenya affords parties the utmost autonomy in determining the rules and procedures to be followed by the arbitral tribunal in the conduct of arbitration proceedings. Nevertheless, in the absence of such rules and procedures, the Arbitration Act provides for default rules and procedures to which parties must adhere. No matter the rules or procedures used, the Arbitration Act requires that during the conduct of arbitral proceedings, each party must be treated equally and afforded a fair and reasonable opportunity to present their case. Parties are also under an obligation to do all things necessary for the proper and expeditious conduct of the arbitral proceedings.

Court intervention

28 | On what grounds can the court intervene during an arbitration?

The Arbitration Act affords parties autonomy in the arbitration process and to that extent limits the circumstances that a court may interfere in arbitral proceedings. These circumstances include:

- to set aside the appointment of a sole arbitrator where the defaulting party has good cause for the failure or refusal to appoint the arbitrator in due time;
- to issue interim measures of protection;
- to assist an arbitral tribunal to take evidence by issuing summons to a witness that has refused to appear;
- on an application to set aside an arbitral award;
- on an application for removal of an arbitrator;
- to enforce an arbitral award including recognition and enforcement of a foreign award; and
- to determine appeals where a right of appeal from the decision of an arbitral tribunal lies to the High Court.

Interim relief

29 | Do arbitrators have powers to grant interim relief?

Yes. An arbitrator may, on the application of a party, order interim measures of protection that it considers necessary in respect of the subject matter of the dispute.

The arbitral tribunal or a party with the approval of the arbitral tribunal, may also seek assistance from the High Court to enforce the peremptory orders of protection.

Award

30 | When and in what form must the award be delivered?

A final award is issued at the end of proceedings. It determines all issues in the arbitration or those issues that remained outstanding following earlier awards dealing with only some of the issues in the arbitration. It must be made in writing, signed, dated and the juridical seat of arbitration indicated. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all the arbitrators shall be sufficient so long as the reasons for any omitted signature are stated.

The arbitral award should state the reasons upon which it is based unless it is a consent award or the parties have agreed to do without the reasons. If it is a partial award, it should specify the issues addressed in it.

Appeal

31 | On what grounds can an award be appealed to the court?

An award can be appealed to the High Court on questions of law only if the parties have agreed to have a right of appeal prior to the delivery of an arbitral award. In the absence of such an agreement, the award shall be final and binding.

An award may, however, be set aside on limited grounds that include:

- a party to the arbitration agreement was under some incapacity;
- the arbitration agreement was not valid under the laws of Kenya or the law to which it was subjected by the parties;
- lack of proper notice of the appointment of an arbitrator or arbitral proceedings or a party was unable to present his or her case;
- the award deals with a dispute not contemplated by or not falling within the terms of reference;
- the composition of the arbitral tribunal or procedure was not in accordance with the parties' agreement unless that agreement was in conflict with the Arbitration Act, to which the parties cannot derogate, or failing which agreement was not in accordinance with the act; or
- the award was induced by fraud, bribery, undue influence or corruption.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

A domestic arbitral award shall be recognised as binding and upon application to the High Court shall be enforceable in Kenya subject to relevant provisions of the Arbitration Act 1995. An international arbitral award shall be recognised as binding and enforceable in Kenya in accordance with the provisions of the New York Convention (Convention on the Recognition and Enforcement of Foreign Arbitral Awards) or any other convention to which Kenya is a signatory relating to arbitral awards.

Unless the High Court orders otherwise, the party relying on a domestic or foreign arbitral award or applying for its enforcement will

© Law Business Research 2019

have to furnish the original arbitral award or a duly certified copy of it as well as the original arbitration agreement or a duly certified copy of it to the High Court prior to enforcement. The arbitral award and the arbitration agreement must be in English and if not, the party ought to furnish the High Court with a duly certified translation in the English language.

Costs

33 | Can a successful party recover its costs?

Unless otherwise agreed, a successful party can recover its costs under the general rule of costs follow the event. An arbitral tribunal must satisfy itself that the arbitration agreement does not put a constraint on its power to make an award on costs. The kind of costs that can be recovered include costs of the reference and costs of the award.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 | What types of ADR process are commonly used? Is a particular ADR process popular?

The following ADR processes are commonly used in Kenya:

- negotiation;
- mediation;
- dispute review board;
- arbitration;
- med-arb (a combination of mediation and arbitration); and
- adjudication.

Arbitration is commonly used to settle large commercial disputes, whereas negotiations are often resorted to in debt collection matters. Traditional dispute resolution mechanisms are also common in rural Kenya and enjoy recognition under the law, provided the process does not offend the Bill of Rights or is repugnant to morality and justice.

Requirements for ADR

35 | Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

The Constitution encourages parties to consider ADR processes where applicable. Where appropriate, the court can compel parties to participate in the court-annexed mediation, which is done under the umbrella of the court as discussed in question 5.

MISCELLANEOUS

Interesting features

36 | Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

In 2009, the Civil Procedure Act was amended to give rise to a principle known as the 'overriding objective', which provides that the court in exercise of its powers or interpretation of the procedural rules should seek to give effect to the just, expeditious, proportionate and affordable resolution of civil disputes. The period before this amendment was characterised by undue regard to technical rules over the merits of a case. The overriding objective was further anchored in the new Constitution passed in 2010.

Desmond Odhiambo
dodhiambo@kieti.co.ke

Ian Nyanchoga
inyanchoga@kieti.co.ke

CVS Plaza, Lenana Road
PO BOX 22602-00505
Nairobi
Kenya
Tel: +254 204 409 918 / +254 731 086 649 / + 254 710 560 114
www.kieti.co.ke

UPDATE AND TRENDS

Reforms and recent cases

37 | Are there any proposals for dispute resolution reform? When will any reforms take effect?

The judiciary introduced court-annexed mediations in April 2016 on a pilot basis in the commercial and family divisions of the Nairobi High Court. The settlement rate as at May 2017 was 53 per cent for commercial cases, which then led to its implementation in other high courts of the country on 23 October 2018.

All civil matters filed at the court are subjected to mandatory screenings as discussed in question 5 and if found suitable are referred to mediation. Based on the success of the pilot phase, it is expected that implementation of the court-annexed mediation will enhance the expeditious resolution of disputes countrywide.

© Law Business Research 2019

Other titles available in this series

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Defence & Security Procurement
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Litigation Funding
Loans & Secured Financing
M&A Litigation
Mediation
Merger Control
Mining
Oil Regulation
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public Procurement
Public-Private Partnerships
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
Sports Law
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Technology M&A
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

lexology.com/gtdt

ISBN 978-1-83862-126-1

© Law Business Research 2019