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IBA ARBITRATION COMMITTEE

Arbitration Guide

KENYA

UPDATED APRIL 2025

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I. Background

(i) How prevalent is the use of arbitration in your jurisdiction? What are seen as the principal advantages and disadvantages of arbitration?

In Kenya, arbitration is widely embraced as a prominent alternative to litigation, aligning with the constitutional encouragement of alternative dispute resolution under Article 159 of the Constitution of Kenya, 2010 (hereafter referred to as the Constitution). This constitutional provision underscores the judiciary's mandate to support such alternative approaches.

Arbitration brings several notable advantages. Firstly, it provides a speedier and more flexible mechanism for dispute resolution compared to the often-protracted litigation process, a significant benefit given the judiciary's backlog of cases. The process involves simplified rules of evidence and procedure, making it less complicated than litigation. Additionally, its nature as a private dispute resolution method ensures that evidence and arguments are kept confidential, an appealing factor for parties concerned about potential reputational damage. Parties also enjoy the freedom to choose an expert tribunal, contributing to a more nuanced understanding of the issues in dispute. Moreover, Kenya's pro-enforcement regime enhances arbitration's attractiveness, ensuring both domestic and foreign awards are likely to be enforced.

However, it is crucial to note that in the past, one of the major advantages of arbitration was that unfavourable arbitral awards had limited avenues for challenge, as decisions were considered final and binding unless the arbitration agreement explicitly provided for a right of appeal. This characteristic, while providing parties with more certainty compared to prolonged court cases, has faced a shift in the landscape due to a recent Supreme Court decision introducing a potential loophole.

In Nyutu Agrovet Limited v Airtel Networks Kenya Limited and Another [2019] eKLR (hereafter referred to as 'Nyutu'), the Supreme Court's established that parties, under exceptional circumstances, now possess the right to appeal a High Court decision arising from an application seeking to set aside an arbitral award under the Arbitration Act, No. 4 of 1995 (hereafter referred to as 'the Arbitration Act' or 'the Act'). This newfound-right challenges the previously perceived finality of arbitration decisions, introducing a small chance of appealing a decision under exceptional circumstances. While the finality of awards has traditionally been considered a cornerstone of arbitration law, the Nyutu case has led to a surge in challenges to awards on reasonably strong grounds. The consequence of this legal development is that parties must now carefully weigh these factors when contemplating whether to include arbitration clauses in their commercial agreements. It is important to point out that the Supreme Court rejected Nyutu's argument that Section 10 of the Arbitration Act, which provides for the extent of the Court's intervention in arbitration matters, was unconstitutional to the extent that it limited the Court of Appeal's jurisdiction to hear appeals from the High Court. The Supreme Court affirmed the need to have minimal court intervention. The Supreme Court held that an appeal from the High Court should be allowed in exceptional circumstances, where a manifestly wrong decision was made.

(ii) Is most arbitration institutional or ad hoc? Domestic or international? Which institutions and/or rules are most commonly used?

In Kenya, specific statistics for comparing the prevalence of ad hoc versus institutional arbitration are lacking. The choice between these approaches often depends on the specifics of each arbitration case. However, despite the absence of specific statistics, ad hoc arbitrations are commonly observed.

Regarding the domestic or international nature of arbitration, the trend is influenced by the industry in question. Notably, there has been a notable upswing in international arbitration, particularly within sectors such as mining, oil and gas, and renewable energy. This surge is attributed to the legislative framework, bilateral agreements, and contracts governing projects in these sectors explicitly designating arbitration as the preferred method for dispute resolution. Furthermore, the foreign counterparts involved in these contracts often prefer international arbitration, driven by the perception that international arbitral tribunals offer neutrality and impartiality. Additionally, the willingness of Kenyan courts to enforce foreign awards adds to the appeal of international arbitration.

In terms of commonly used arbitration institutions, several arbitration institutions play a significant role in facilitating arbitration in Kenya, depending on whether the arbitration is international or domestic. For international arbitration, the International Chamber of Commerce (ICC) and the London Court of Arbitration (LCIA) are commonly utilized. On

the domestic front, the Chartered Institute of Arbitrators (CIArb) Kenya Rules and the Nairobi Centre for International Arbitration (NCIA) Rules are widely adopted. Notably, the NCIA has experienced increased adoption as a preferred arbitral institution. The Government of Kenya has actively promoted the use of the NCIA by incorporating a policy that includes an NCIA default clause in contracts with state entities.

(iii) What types of disputes are typically arbitrated?

The Act does not explicitly specify which matters may not be arbitrated. There is a commonly held agreement that issues of a criminal nature, for example, are generally considered non-arbitrable. In addition to claims arising from commercial and construction projects, arbitration is widely employed in sectors such as mining, oil and gas, renewable energy, and infrastructure projects. There has been a notable increase in the use of arbitration for disputes in employment matters as well.

(iv) How long do arbitral proceedings usually last in your country?

The duration of arbitral proceedings varies widely and is influenced by several factors. In cases where the dispute is relatively straightforward, parties cooperate, and an expedited procedure is chosen, arbitration proceedings can be concluded within six months or so. However, in more substantial arbitration cases—whether domestic or international—that involve complex facts, multiple witnesses and experts, as well as post-hearing submissions, the arbitration timeline could extend over several years. The flexibility of arbitration procedures allows parties to tailor the process to the specific needs and complexities of their dispute, contributing to the variation in the duration of arbitral proceedings.

(v) Are there any restrictions on whether foreign nationals can act as counsel or arbitrators in arbitrations in your jurisdiction?

There are currently no restrictions on whether foreign nationals can serve as counsel or arbitrators in arbitration proceedings. The Arbitration Act explicitly states that a person's nationality shall not preclude them from acting as an arbitrator unless otherwise agreed upon by the parties. Additionally, the Act specifies that, at any meeting, hearing, or proceedings, a party has the option to appear in person or be represented by any person of their choosing.

II. Arbitration Laws

(i) What law governs arbitration proceedings with their seat in your jurisdiction? Is the law the same for domestic and international arbitrations? Is the national arbitration law based on the UNCITRAL Model Law?

Arbitration proceedings with their seat in Kenya are governed by the Arbitration Act, which is modelled on the UNCITRAL Model Law. The Arbitration Act applies to both domestic and international proceedings.

(ii) Is there a distinction in your arbitration law between domestic and international arbitration? If so, what are the main differences?

Yes, the Arbitration Act distinguishes between domestic and international arbitration. According to the Act, arbitration is considered domestic under the following circumstances:

- When the dispute is between individuals, and both parties are Kenyan nationals or habitually reside in Kenya;
- When the dispute is between a body corporate, and the company is incorporated in Kenya, or the control of its business is exercised in Kenya; or
- When the dispute is between an individual and a body corporate, and the individual is a Kenyan national while the body corporate is incorporated in Kenya.

On the other hand, arbitration is deemed international if, at the time of the agreement's conclusion, the parties had their places of business in different states, and they have agreed that the subject matter of the arbitration agreement relates to more than one state.

In terms of recognition and enforcement, while domestic arbitral awards are subject to the provisions of the Arbitration Act, the recognition and enforcement of foreign arbitral awards are governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention).

(iii) What international treaties relating to arbitration have been adopted (e.g., New York Convention, Geneva Convention, Washington Convention, Panama Convention)?

Kenya is a party to (and has therefore adopted) the New York Convention and the Washington Convention.

(iv) Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

Yes, the Arbitration Act in Kenya provides guidance to the arbitral tribunal regarding the substantive law to apply to the merits of the dispute. The Act stipulates that the tribunal must apply the law chosen by the parties for the resolution of the substance of the dispute. In situations where the parties have not specified their choice of law, the tribunal is vested with the authority to apply the rules of law that it deems appropriate, taking into consideration all the circumstances of the dispute.

III. Arbitration Agreements

(i) Are there any legal requirements relating to the form and content of an arbitration agreement? What provisions are required for an arbitration agreement to be binding and enforceable? Are there additional recommended provisions?

Yes, there are legal requirements specified in the Arbitration Act regarding the form and content of an arbitration agreement in Kenya. According to the Act, for an arbitration agreement to be binding and enforceable, it must be in writing. The term 'writing' is interpreted broadly and includes a document signed by the parties, an exchange of correspondence that records the agreement, or an exchange of statements of claim and defence where one party alleges the existence of an agreement, and the other party does not deny it. Moreover, if a contract in writing refers to a document containing an arbitration clause, that reference makes the arbitration clause part of the contract and constitutes a valid arbitration agreement.

(ii) What is the approach of courts towards the enforcement of agreements to arbitrate? Are there particular circumstances when an arbitration agreement will not be enforced?

Courts in Kenya generally have a supportive stance towards the enforcement of arbitration agreements. They are inclined to enforce such agreements unless specific circumstances exist that render the agreement null and void, inoperative, incapable of being performed, or if there is, in fact, no dispute between the parties regarding the matters being referred to arbitration. Essentially, as long as the arbitration agreement is valid and there is a genuine dispute falling within its scope, Kenyan courts are likely to uphold and enforce such agreements.

(iii) Are multi-tier clauses (e.g., arbitration clauses that require negotiation, mediation, and/or adjudication as steps before an arbitration can be commenced) common? Are they enforceable? If so, what are the consequences of commencing an arbitration in disregard of such a provision? Lack of jurisdiction? Non-arbitrability? Other?

Multi-tier clauses are common and enforceable in Kenya. Article 159 of the Constitution mandates that courts support alternative methods of dispute resolution, including reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms. Consequently, these clauses are recognized and enforceable.

If parties disregard a multi-tier clause and proceed directly to arbitration, the court will likely intervene. The court, in line with its jurisdictional mandate, would direct the parties to follow the agreed-upon procedure outlined in the dispute resolution clause. Non-compliance with the agreed-upon process could result in the court holding that it lacks jurisdiction until the prescribed steps, such as negotiation or mediation, have been exhausted.

(iv) What are the requirements for a valid multi-party arbitration agreement?

While there are no specific requirements in the Arbitration Act pertaining to multi-party agreements, all the parties need to consent in writing to arbitration.

(v) Is an agreement conferring on one of the parties a unilateral right to arbitrate enforceable?

While legislative similarities with other common law jurisdictions, such as England, suggest a potential acknowledgment of such clauses, the actual application by Kenyan courts remains uncertain. However, as long as the clause reflects the intention of the parties, the agreement was freely entered into, and the agreement is not illegal or contrary to public policy, the courts generally uphold the agreement based on the principle of 'freedom to contract'. Unless there is an aspect of unfairness, the courts are likely to uphold a unilateral clause.

(vi) May arbitration agreements bind non-signatories? If so, under what circumstances?

In Kenya, the doctrine of privity of contract is applicable, meaning that individuals cannot be bound to a contract to which they are not a party. As a result, non-signatories generally cannot be compelled to participate in arbitral proceedings. However, there are exceptions to this rule. An arbitration agreement may be enforceable against a deceased party's personal representative. In cases of bankruptcy, the trustee in bankruptcy may adopt the contract and its terms, making the arbitration agreement binding. Additionally, a third party is not bound by an agreement between two primary parties if the third party did not authorize or accept such an arrangement. The principle of privity remains unless the third party expressly or impliedly accepts the terms of the arbitration agreement. These exceptions provide limited circumstances under which arbitration agreements may extend to non-signatories in Kenya.

(vii) How do the courts in the jurisdiction determine the law governing the arbitration agreement?

In Kenya, the courts determine the law governing the arbitration agreement by adhering to English common law principles. This process involves a three-stage inquiry:

1. Express choice of law: The courts first examine whether the parties have expressly chosen a governing law in the arbitration agreement.
2. Implied choice: If there is no explicit choice of law, the courts then consider whether there is an implied choice based on the circumstances surrounding the agreement.
3. Closest connection: Finally, if neither an express nor an implied choice of law is evident, the courts assess the closest and most real connection to the agreement to determine the applicable law.

(viii) Do courts in your jurisdiction distinguish between the seat (or legal place) of the arbitration and the venue of meetings/hearings?

Yes, in Kenya, courts do distinguish between the seat (or legal place) of the arbitration and the venue of meetings or hearings. According to the Act, parties are granted the freedom to mutually agree upon the juridical seat of arbitration as well as the location for any hearings or meetings related to the arbitration proceedings.

(ix) Are blockchain- and NFT-related disputes arbitrable in your jurisdiction?

There is no explicit prohibition in the Arbitration Act regarding the arbitrability of blockchain- and NFT-related disputes.

(x) Are there circumstances in which courts find that a valid arbitration agreement has become inoperable?

In Kenya, courts have interpreted the concept of an arbitration agreement becoming 'inoperable' under the Arbitration Act. A valid arbitration agreement may be deemed inoperable if it ceases to be effective as a binding contract. This can occur through various means, such as discharge by breach, waiver, estoppel, election, or abandonment. Notably, an arbitration agreement may be considered inoperable when a party commits a repudiatory breach of the agreement, and the innocent counterparty accepts the repudiation.

IV. Arbitrability and Jurisdiction

(i) Are there types of disputes that may not be arbitrated? Who decides – courts or arbitrators – whether a matter is capable of being submitted to arbitration? Is the lack of arbitrability a matter of jurisdiction or admissibility?

In Kenya, the Arbitration Act does not expressly prohibit any particular type of dispute from being arbitrated. However, as mentioned earlier, there is a general understanding that matters of public policy, such as criminal and constitutional matters, may not be arbitrated. Additionally, disputes related to child custody and guardianship, matrimonial causes, testamentary disputes, and insolvency are considered non-arbitrable due to public policy considerations. The determination of arbitrability is considered a matter of jurisdiction.

Typically, the arbitral tribunal has the authority to decide whether a matter is arbitrable or not. However, in certain situations, the courts may intervene and make a determination on a case-by-case basis. The question of arbitrability may arise at different stages of the proceedings, including in the setting aside of an award. The lack of arbitrability is regarded as a matter falling within the realm of jurisdiction rather than admissibility.

(ii) What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an arbitration agreement? Do local laws provide time limits for making jurisdictional objections? Do parties waive their right to arbitrate by participating in court proceedings?

In situations where court proceedings are initiated despite the existence of an arbitration agreement, the procedure involves either party applying to the court to have the proceedings stayed. The Arbitration Act mandates that courts stay proceedings and refer parties to arbitration upon the application of either party when there is an arbitration agreement.

It is important to note that the application for a stay of proceedings should be made no later than when the party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought. This provision sets a time limit for making jurisdictional objections based on an arbitration agreement.

Parties may potentially waive their right to arbitrate by participating in court proceedings, except when challenging jurisdiction. Challenging jurisdiction is recognized as an exception where participation in court proceedings does not amount to a waiver of the right to arbitrate.

(iii) Can arbitrators decide on their own jurisdiction? Is the principle of competence-competence applicable in your jurisdiction? If yes, what is the nature and intrusiveness of the control (if any) exercised by courts on the tribunal's jurisdiction?

In Kenya, the principle of competence-competence is provided for under the Arbitration Act. This doctrine allows the arbitral tribunal to decide on its own jurisdiction. If a party disagrees with the tribunal's ruling on jurisdiction, they have the right to challenge it by making an application at the High Court. The application must be filed within 30 days of the tribunal's decision asserting its jurisdiction.

During the period when such an application is pending before the High Court, the parties are allowed to commence, continue, and conclude the arbitral proceedings. However, any award resulting from these proceedings cannot take effect until the High Court decides on the jurisdictional challenge. If the application is successful, the award will be deemed void.

It is crucial to highlight that the courts are generally restrained from intervening in matters governed by the Act, emphasizing the autonomy and authority granted to arbitral tribunals in determining their jurisdiction.

V. Selection of Arbitrators

(i) How are arbitrators selected? Do courts play a role?

Arbitrator selection is determined by the process outlined in the arbitration agreement, and in the absence of such provisions, the default procedure specified in the Act applies. In cases involving three arbitrators, each party nominates one arbitrator, and these two arbitrators jointly select the third. If only two arbitrators are needed, each party nominates one. For situations requiring a single arbitrator, both parties collaboratively choose the arbitrator.

According to the Act, unless otherwise agreed, if both parties must appoint an arbitrator and one party fails to do so within the prescribed time, the compliant party can issue a written notice proposing their appointed arbitrator as the sole arbitrator.

If the defaulting party does not appoint an arbitrator within 14 days, the compliant party can designate their arbitrator as the sole arbitrator, and the resulting award binds both parties as if the appointment were mutual. Within the subsequent 14 days, the defaulting party can petition the High Court to annul the sole arbitrator's appointment. The Court may only annul the appointment if it finds reasonable cause for the default or refusal to appoint an arbitrator promptly.

Should the Court nullify the appointment, it may, with the parties' consent or upon either party's request, appoint a sole arbitrator. Decisions made by the Court on this are not subject to appeal.

(ii) What are the requirements in your jurisdiction as to disclosure of conflicts? Do courts play a role in challenges, and what is the procedure?

The requirement for disclosing conflicts is stipulated in the Arbitration Act. When approached for a potential appointment as an arbitrator, individuals must disclose any circumstances that could reasonably give rise to justifiable doubts about their impartiality or independence.

Throughout the arbitral proceedings, arbitrators are obligated to promptly disclose such circumstances to the parties regarding their impartiality, unless the parties have already been informed by the arbitrator.

An arbitrator may be challenged if circumstances arise that create justifiable doubts about their impartiality and independence, if they lack the agreed-upon qualifications, if they are physically or mentally incapable of conducting the proceedings, or if there are justifiable doubts about their capacity to do so.

(iii) Are there limitations on who may serve as an arbitrator? Do arbitrators have ethical duties? If so, what is their source, and generally what are they?

There are generally no limitations on who may serve as an arbitrator. However, under the Arbitration Act, an arbitrator may be challenged if they do not possess qualifications agreed upon by the parties, if they are physically or mentally incapable of conducting the proceedings, or if there are justifiable doubts about their capacity to do so.

As for ethical duties, arbitrators are bound by principles of independence, neutrality, and impartiality. These ethical obligations derive from the Arbitration Act, which mandates that anyone approached for potential appointment as an arbitrator must disclose any circumstances likely to give rise to justifiable doubts about their impartiality or independence. Failure to maintain impartiality and independence constitutes grounds for challenging the arbitrator. Additionally, arbitrators are expected to avoid unnecessary delays and expenses and may adopt measures to expedite the resolution of the dispute.

In the case of domestic arbitration, the CIArb Kenya Rules, 2020, and the NCIA Rules, 2015, also underscore the importance of ensuring impartiality and independence. These rules specifically require arbitrators to sign written declarations attesting to their impartiality and independence.

(iv) Are there specific rules or codes of conduct concerning conflicts of interest for arbitrators? Are the IBA Guidelines on Conflicts of Interest in International Arbitration followed?

In Kenya, specific rules and codes of conduct concerning conflicts of interest for arbitrators are in place, and the applicability depends on whether the arbitration is domestic or international.

For domestic arbitrations, the NCIA Code of Conduct for Arbitrators, 2021, outlines principles that arbitrators must adhere to, particularly in addressing potential conflicts of interest. Principle 1 of this code requires arbitrators to conduct reasonable inquiries regarding potential conflicts of interest arising from their appointment for a specific matter, which may impact impartiality and independence. Importantly, the IBA Guidelines on Conflict of Interest are referenced in determining the disclosure requirement and assessing whether an arbitrator is conflicted. Additionally, under the CIArb (Kenya) Rules, 2020, the third Schedule provides 'matters for potential consideration by the parties and the Arbitral Tribunal at the case management conference.'

In the case of international arbitrations, it is customary for parties and the court to refer to and follow the IBA Guidelines on Conflicts of Interest in International Arbitration.

VI. Interim Measures and Emergency Arbitration

(i) Can arbitrators issue interim measures or other forms of preliminary relief? What types of interim measures can arbitrators issue? Is there a requirement as to the form of the tribunal's decision (order or award)? Are interim measures issued by arbitrators enforceable in courts?

Arbitrators in Kenya possess the authority to issue interim measures or other forms of preliminary relief, on an application by any party. These interim measures of protection may include injunctive relief, security related to a claim, and security for costs. Importantly, there is no specific requirement regarding the form of the tribunal's decision, allowing flexibility in how these decisions are expressed, whether in the form of an order or an award.

In the exercise of these powers, the tribunal is empowered to seek assistance from the High Court, enhancing the effectiveness of implementing and enforcing the interim measures. As a result, interim measures issued by arbitrators

are generally enforceable in courts, reinforcing the authority of the arbitral process and the protective measures it can provide.

(ii) Will courts grant provisional relief in support of arbitrations? If so, under what circumstances? May such measures be ordered after the constitution of the arbitral tribunal? Will any court ordered provisional relief remain in force following the constitution of the arbitral tribunal?

Yes, under the Act, the High Court is authorized to grant provisional relief in support of arbitration upon the request of a party to an arbitration agreement. This provision applies both before and during arbitral proceedings. The courts have jurisdiction to make such orders as to preserve the status quo of the subject matter of the arbitration.

It is noteworthy that a party can seek court-ordered provisional relief even after the constitution of the arbitral tribunal. This flexibility allows parties to address urgent or significant matters through court intervention, even if an arbitral tribunal has been formed.

Importantly, if a party applies to the High Court for interim relief, and the arbitral tribunal has already ruled on a relevant matter, the High Court is required to treat the tribunal's ruling, or any finding of fact made during the ruling, as conclusive for the purposes of the application.

(iii) To what extent may courts grant evidentiary assistance/provisional relief in support of the arbitration? Do such measures require the tribunal's consent if the latter is in place?

Courts have the authority to grant evidentiary assistance and provisional relief in support of arbitration proceedings. The Act allows the arbitral tribunal, or a party with the approval of the arbitral tribunal, to request the assistance of the High Court in taking evidence. The High Court is empowered to execute such requests within its competence and in accordance with its rules on taking evidence.

In the context of provisional relief, as mentioned in a previous response (Section VI(ii)), courts may grant interim measures upon the request of a party to the arbitration. Importantly, the tribunal's consent is not a prerequisite for the court to provide such interim relief. Courts are empowered to grant these measures even after the constitution of the arbitral tribunal.

(iv) Are decisions by emergency arbitrators enforceable in your country?

In Kenya, decisions by emergency arbitrators are not explicitly addressed in the Arbitration Act. The Act primarily empowers the High Court to issue interim measures of relief, even before the constitution of an arbitral tribunal.

However, if the arbitration is domestic and under the NCIA Rules, there are provisions for emergency measures. Rule 28 of the NCIA Arbitration Rules allows a party, at any time before the formation or expedited formation of the arbitral tribunal, to make an application for emergency measures. Notably, Rule 28(5) specifies that an order or award made by the emergency arbitrator shall cease to be binding under certain circumstances. These include if the arbitral tribunal is not constituted within 90 days of the order or award, if the arbitral tribunal makes a final award, or if the claim is withdrawn.

Rule 28(6) emphasizes that the ruling or award by the emergency arbitrator shall be binding upon the parties, but the arbitral tribunal may, upon application by a party or on its own motion, confirm, vary, discharge, or revoke, in whole or in part, an order or award of the emergency arbitrator. The Second Schedule to the rules provides further details on the Emergency Arbitrator Rules.

In summary, while the Arbitration Act does not specifically address the enforceability of decisions by emergency arbitrators, the NCIA Rules provide a framework for emergency measures in domestic arbitrations, including provisions on the binding nature of decisions and the role of the subsequent arbitral tribunal.

(v) What is the approach in your country to anti-suit injunctions or injunctions by arbitrators preventing parties from initiating litigation proceedings?

In Kenya, the authority to issue anti-suit injunctions or injunctions preventing parties from initiating litigation proceedings is vested in the High Court. The Act provides that the Court may grant anti-suit injunctions upon the application of a party who has entered appearance or otherwise acknowledged the claim unless the arbitration agreement is declared null and void, or there is no dispute between the parties.

(vi) Do courts provide assistance in aid of foreign-seated arbitrations, including for disclosure of documents?

In Kenya, the legal framework regarding the courts' authority to provide assistance in aid of foreign-seated arbitrations, including the disclosure of documents, lacks clarity. The issue is compounded by conflicting judicial rulings. Some court decisions assert jurisdiction to issue interim relief in support of foreign-seated arbitrations, while in other instances, courts have refrained from granting such relief, particularly when there is a foreign governing law or jurisdictional clause alongside a foreign seat.

This lack of uniformity in judicial decisions reflects the absence of a clear legislative provision or a widely accepted legal precedent on the extent to which Kenyan courts can assist foreign-seated arbitrations. Parties involved in foreign-seated arbitrations in Kenya should carefully consider the specific circumstances of their case and seek legal advice to navigate the current uncertainty surrounding the courts' role in providing assistance.

VII. Disclosure/Discovery

(i) What is the general approach to disclosure or discovery in arbitration? What types of disclosure/discovery are typically permitted?

In Kenya, the general approach to disclosure or discovery in arbitration is outlined in the Arbitration Act. This Act emphasizes the necessity for parties to agree on the regulations and procedures that will govern the arbitration process, including the specifics of disclosure and discovery.

While the Act does not prescribe specific documents for disclosure, it requires that the disclosed documents must be materially pertinent to the arbitration. In instances where the parties are unable to agree on procedural rules, the tribunal has the authority to establish these rules at its discretion.

It is crucial to recognize the substantial powers vested in the tribunal to determine the admissibility, relevance, materiality, and weight of any evidence presented during the arbitration proceedings. This empowers the tribunal to maintain control over the discovery process and ensures that only relevant and significant information is considered. The flexibility provided by the Act allows the parties and the tribunal to customize the disclosure and discovery process to suit the specific requirements of each arbitration.

Moreover, even though the Arbitration Act does not expressly provide for discovery and disclosure, if the arbitration is domestic and falls under the CIArb (Kenya) Rules, 2020, Rule 52 of these rules empowers the tribunal to order parties to produce documents, exhibits, or other evidence it deems necessary or appropriate. Rule 53 additionally allows a party to make an application, or the tribunal may, if it considers it necessary, collect and adduce further evidence. This highlights the procedural flexibility in the context of domestic arbitrations governed by specific rules.

(ii) What, if any, limits are there on the permissible scope of disclosure or discovery?

See Section VII(i) above.

(iii) Are there special rules for handling electronically stored information?

There are no specific rules.

VIII. Confidentiality

(i) Are arbitrations confidential? What are the rules regarding confidentiality?

In Kenya, arbitrations are generally considered confidential, even though the Arbitration Act does not explicitly include provisions on confidentiality. The confidentiality of arbitration proceedings is typically maintained unless the parties agree otherwise.

In the context of domestic arbitrations under the CIArb (Kenya) Rules, 2020, Rule 134 of these rules explicitly addresses confidentiality. According to Rule 134, the proceedings of the arbitration are to be confidential and private. More specifically, no disclosure is to be made at any time, other than to the parties, of various aspects such as the claim, defence/counterclaim, proceedings, contents of document bundles, witness statements (whether of fact or opinion), records of meetings and hearings, and the award.

(ii) Are there any provisions in your arbitration law as to the arbitral tribunal's power to protect trade secrets and confidential information?

There are no provisions in the law.

(iii) Are there any provisions in your arbitration law as to rules of privilege?

The Arbitration Act provides that every witness giving evidence and any person appearing before an arbitral tribunal shall have at least the same privileges and immunities as witnesses and advocates in proceedings before a court. These privileges and immunities are specified in the Evidence Act, CAP 80.

IX. Evidence and Hearings

(i) Is it common that parties and arbitral tribunals adopt the IBA Rules on the Taking of Evidence in International Arbitration to govern arbitration proceedings? If so, are the Rules generally adopted as such, or does the tribunal retain discretion to depart from them?

It is common for parties and arbitral tribunals to adopt international rules, such as the IBA Rules on the Taking of Evidence in International Arbitration, to govern arbitration proceedings. However, the adoption of such rules is not automatic, and it is subject to the agreement of the parties. The Tribunal retains the discretion to depart from them if such departure is agreed upon or deemed necessary.

(ii) Are there any limits to arbitral tribunals' discretion to govern the hearings?

Yes. According to the Arbitration Act, the parties are free to agree on the procedure to be followed by the arbitral tribunal in the conduct of the proceedings, which can limit the tribunal's discretion.

(iii) How is witness testimony presented? Is the use of witness statements with cross-examination common? Are oral direct examinations common? Do arbitrators question witnesses?

Witness testimony is presented through testifying, and the use of witness statements is common. In oral hearings, the party questions the witness it has put forward in direct examination before offering them for cross-examination by the opposing counsel. It is common for arbitrators to question witnesses.

(iv) Are there any rules on who can or cannot appear as a witness? Are there any mandatory rules on oath or affirmation?

There are no rules as to who can or cannot appear as a witness. Under the Arbitration Act. 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. The Oaths and Statutory Declaration Act empowers persons who can by law or consent of the party's authority receive evidence to administer oaths and affirmations.

(v) Are there any differences between the testimony of a witness specially connected with one of the parties (e.g., legal representative, director, or employee) and the testimony of unrelated witnesses?

No, there are no differences between the testimony of a witness connected with the parties and the testimony of unrelated witnesses. The Act provides the arbitral tribunal with unfettered power to determine the admissibility, materiality, and weight of any evidence presented during the arbitration proceedings.

(vi) How is expert testimony presented? Are there any formal requirements regarding the independence and/or impartiality of expert witnesses?

In Kenya, there are no specific formal requirements regarding how expert testimony should be presented. It is common for experts to present their testimony in the form of a report, but the exact format may depend on the preferences of the parties or the arbitral tribunal.

Regarding the independence and impartiality of expert witnesses, if the arbitration is domestic and falls under the CIArb (Kenya) Rules, Rule 61 of these rules provides guidance. According to Rule 61, an expert appointed by the tribunal is required, before accepting the appointment, to submit to the arbitral tribunal and the parties a description of their qualifications and a statement of their impartiality and independence.

(vii) Is it common that arbitral tribunals appoint experts besides those that may have been appointed by the parties? How is the evidence provided by the expert appointed by the arbitral tribunal considered in comparison with the evidence provided by party-appointed experts? Are there any requirements in your jurisdiction that experts be selected from a particular list?

In Kenya, it is challenging to determine the commonality of arbitral tribunals appointing experts alongside those appointed by the parties due to the confidential nature of arbitration proceedings.

While the Arbitration Act grants the tribunal the power to appoint experts, it is generally not common for the tribunal to appoint experts in addition to those appointed by the parties. Parties typically have the opportunity to appoint their own experts, and the tribunal may evaluate the evidence presented by these experts during the arbitration process.

The Arbitration Act does not specify any predetermined difference in the weight accorded to the testimony of a tribunal-appointed expert compared to a party-appointed expert. The tribunal retains the discretion to determine the significance and credibility of the evidence provided by both tribunal-appointed and party-appointed experts.

Importantly, there are no specific requirements in Kenya that mandate experts to be selected from a particular list. The flexibility provided by the Arbitration Act allows for the appointment of experts based on the specific needs of the arbitration, with the tribunal having the authority to decide on the suitability of the chosen experts.

(viii) Is witness conferencing ('hot-tubbing') used? If so, how is it typically handled?

Witness conferencing is not used in Kenya.

(ix) Are there any rules or requirements in your jurisdiction as to the use of arbitral secretaries? Is the use of arbitral secretaries common?

While there are no specific rules or requirements governing the use of arbitral secretaries in Kenya, they are not a commonly adopted practice.

(x) Are there any ethical codes or other professional standards applicable to counsel and arbitrators conducting proceedings in your jurisdiction?

There are no specific ethical codes or professional standards that are universally applicable to counsel and arbitrators conducting proceedings in the context of arbitration. However, Advocates of the High Court in Kenya, who may act as either counsel or arbitrator in arbitral proceedings, remain subject to the Standards of Professional Practice and Ethical Conduct.

(xi) Have arbitral institutions in your jurisdiction implemented rules empowering arbitral tribunals to exclude counsel based on conflicts of interest or other reasons?

Arbitral institutions in Kenya have not implemented rules empowering arbitral tribunals to exclude counsel based on conflicts of interest or other reasons.

(xii) Has your jurisdiction adopted any rules with regard to remote hearings, and have there been any court decisions on the same?

The national courts and arbitral tribunals have embraced remote or virtual hearings as a viable alternative to in-person arbitration proceedings. This positive shift has been influenced by directives issued by both the Chief Justice and the Acting Chief Justice, encouraging the integration of technology in dispute resolution. While initially prompted by the imperative to curb the spread of Covid-19, the ongoing use of virtual hearings reflects a sustained adaptation to the changes introduced during the pandemic.

X. Awards

(i) Are there formal requirements for an award to be valid? Are there any limitations on the types of permissible relief?

Yes, formal requirements for the validity of an arbitral award are outlined in the Arbitration Act.

Pursuant to the Act, the following key criteria must be met for the validity of an arbitral award:

- The award must be in writing.
- The arbitrator or arbitrators overseeing the proceedings must sign the award. In cases where there is more than one arbitrator, the signatures of the majority are acceptable, provided reasons for any omitted signature are provided.
- The award must articulate the reasons upon which it is based, unless the parties have mutually agreed that no reasons need to be given, or it is a settlement award under the Act.
- The arbitral award must specify the date of its issuance and the juridical seat of arbitration.

- A signed copy of the award must be delivered to each party involved in the arbitration proceedings following its rendering.
- It is important to note that the arbitral tribunal has the authority to issue partial awards, addressing specific issues between the parties, while all provisions applicable to awards of an arbitral tribunal remain in force unless a contrary intention is evident.

Regarding limitations on the types of relief, the Arbitration Act does not explicitly prescribe the specific remedies that the tribunal can provide for the prevailing party. Consequently, there is no explicit restriction on the range of remedies that the tribunal can award. However, the tribunal's authority may be influenced by the reliefs initially sought in the statement of claim and defence. While the Act does not impose specific restrictions on the types of relief, the tribunal's discretion is likely to be guided by the scope and nature of the claims presented by the parties during the arbitration proceedings.

(ii) Can arbitrators award punitive or exemplary damages? Can they award interest? Compound interest?

There is no explicit provision in the Arbitration Act regarding whether an arbitral tribunal can award punitive or exemplary damages.

As for interest, the determination of the interest rate and any intervals for rests is at the discretion of the tribunal unless the parties have agreed otherwise. The interest awarded may be in the form of simple or compound interest, allowing the tribunal flexibility to tailor the award based on the specifics of the case.

(iii) Are interim or partial awards enforceable?

Yes, interim or partial awards are enforceable. In accordance with the Act, the arbitral tribunal, or any party, with the approval of the tribunal, may seek the assistance of the courts to enforce preliminary relief and interim measures ordered by the arbitral tribunal.

(iv) Are arbitrators allowed to issue dissenting opinions to the award? What are the rules, if any, that apply to the form and content of dissenting opinions?

There is no explicit prohibition against arbitrators issuing dissenting opinions. However, they are relatively uncommon in practice.

(v) Are awards by consent permitted? If so, under what circumstances? By what means, other than an award, can proceedings be terminated?

Yes, awards by consent are permitted under the provisions of the Arbitration Act in Kenya. If, during the course of arbitral proceedings, the parties reach a mutual settlement to resolve their dispute, the arbitral tribunal is obligated to terminate the proceedings. Moreover, if requested by the parties and not objected to by the arbitral tribunal, the settlement can be officially recorded in the form of an arbitral award on agreed terms. This award on agreed terms is then made in accordance with the Act, clearly indicating its status as an arbitral award. It is important to note that an arbitral award on agreed terms carries the same legal standing and effect as any other arbitral award addressing the substantive aspects of the dispute.

(vi) What powers, if any, do arbitrators have to correct or interpret an award?

The Act provides that arbitral tribunals have the power to clarify, correct, or amend an arbitral award. It further provides that within 30 days of receipt of the award, a party may request the arbitral tribunal to correct in the arbitral award any computation errors, any clerical or typographical errors or any other errors of a similar nature to clarify or remove any ambiguity concerning a specific point or part of the arbitral award. The tribunal has 30 days upon receipt of the comments on the request for correction to make any corrections or clarifications. The tribunal may, of its own volition, correct any clerical or typographical errors or any other errors of a similar nature. A party may request the arbitral tribunal

to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award within 30 days of receipt of the award. The tribunal is required to make the additional award within 60 days if it considers the application justified. The courts have decided that in exceptional circumstances, they can use their inherent powers to extend the 30 days for application for correction. The exceptional circumstances may include the period of delay, the reason for delay, the merit of the application, and the prejudice it might cause the respondent should the application be allowed.

XI. Costs

(i) Who bears the costs of arbitration? Is it always the unsuccessful party that bears the costs?

Parties are entitled to recover fees and costs. The Act provides that, unless the parties agree otherwise, the tribunal shall determine fees and other expenses and apportion the same in the award or an additional award. In the absence of an award determining the cost and other expenses, each party shall be responsible for its legal and other expenses and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration. In this regard, the tribunal will apply the general rule that 'costs follow the event', and if the tribunal in its discretion departs from this general rule, it ought to give its reasons for such departure.

(ii) What are the elements of costs that are typically awarded?

Costs and expenses of an arbitration include the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal and other expenses related to the arbitration.

(iii) Does the arbitral tribunal have jurisdiction to decide on its own costs and expenses? If not, who does?

Yes, the arbitral tribunal has jurisdiction to decide on its own costs and expenses.

(iv) Does the arbitral tribunal have discretion to apportion the costs between the parties? If so, on what basis?

Yes, the arbitral tribunal has discretion to apportion the costs between the parties as discussed herein above.

(v) Do courts have the power to review the tribunal's decision on costs? If so, under what conditions?

Yes, courts in Kenya possess the authority to review the tribunal's decision on costs under specific conditions outlined in the Arbitration Act. If the tribunal withholds the delivery of an award due to non-payment of its fees and expenses, a party can, upon notice to the other party and the tribunal, apply to the High Court. This application must be accompanied by payment into the court of the demanded fees and expenses. The High Court is then empowered to determine how the fees and expenses payable to the arbitral tribunal should be decided. Importantly, the decision of the High Court on such an application is final and not subject to appeal. These provisions apply notwithstanding any agreement to the contrary made between the parties.

XII. Challenges to Awards

(i) How may awards be challenged and on what grounds? Are there time limitations for challenging awards? What is the average duration of challenge proceedings? Do challenge proceedings stay any enforcement proceedings? If yes, is it possible nevertheless to obtain leave to enforce? Under what conditions?

Rights of Appeal/Challenge

The recourse available to a party depends on whether the arbitral proceedings were domestic or international.

For domestic arbitration, a party can appeal on a point of law arising in the course of the arbitration or out of the award to the High Court. However, this recourse to the High Court is subject to the parties' agreement that such an appeal can be made. The High Court's decision is appealable to the Court of Appeal if the parties had agreed so or if the court grants leave on the basis that the matter substantially affects the rights of the parties. Local arbitral awards can also be set aside on the grounds provided under the Act.

For international arbitral awards, the only recourse available to parties is setting aside as provided for under the Arbitration Act.

Grounds and Procedure

A party makes an application to the High Court for the award to be set aside within three months of receipt of the award. The grounds for challenge include:

- A party to the arbitration agreement was incapacitated;
- The agreement is not valid under the law it is subject to;
- The applicant was not given enough notice of the appointment of the arbitrator;
- The award deals with a dispute not contemplated or not falling within the terms of reference to arbitration;
- The composition of the tribunal or arbitral procedure was not in accordance with the agreement;
- The making of the award was induced or affected by fraud, bribery, undue influence, or corruption;
- The subject matter is not arbitrable;
- The award conflicts with Kenyan public policy.

The time duration for challenging the proceedings varies; it could take more than three years. The challenge proceedings do not stay enforcement; an application for a stay of execution must be made.

(ii) May the parties waive the right to challenge an arbitration award? If yes, what are the requirements for such an agreement to be valid?

Party autonomy and consent are the most important considerations in arbitration. As such, the parties may agree to exclude any basis of challenge against the arbitral award, but this should be done in writing, and the parties should be aware of the public policy considerations.

(iii) Can awards be appealed in your country? If so, what are the grounds for appeal? How many levels of appeal are there?

The Arbitration Act stipulates that in the case of domestic arbitration, if the parties have agreed that either an application by any party may be made to a court to determine any question of law arising in the course of the arbitration, or an appeal by any party may be made to a court on any question of law arising out of the award, such appeals may be brought before the High Court.

Furthermore, the Act outlines that an appeal from the High Court decision lies with the Court of Appeal under two circumstances: first, if the parties have agreed to such an appeal before the delivery of the arbitral award; second, if the Court of Appeal, deeming a point of law of general importance to be involved, which will substantially affect the rights of one or more parties, grants leave to appeal.

(iv) May courts remand an award to the tribunal? Under what conditions? What powers does the tribunal have in relation to an award so remanded?

Yes, the court may remand an award to the tribunal. On an application or appeal being made under the Act on questions of law, the High Court may remit the matter to the arbitral tribunal for reconsideration or, where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration.

(v) Is there a specialist arbitration court in your jurisdiction?

Kenya does not have a specialised arbitration court.

(vi) To what extent do courts in your jurisdiction allow arbitrators to amend and/or replace wrongly invoked law or the law not invoked by the parties (iura novit arbiter)? Could this be a basis to set aside the award?

In our jurisdiction, courts typically avoid intervening in matters governed by the Arbitration Act, except under specified circumstances outlined in the Arbitration Act. These circumstances include instances where the tribunal seeks assistance in evidence-taking, challenges to arbitrator appointments, determination of jurisdiction, issuance of interim protection orders during arbitration and resolution of questions of law upon application by the parties.

Under the Act, arbitral tribunals are also granted the authority to clarify, correct, or amend an arbitral award. Within 30 days of receiving the award, a party may request corrections for computational, clerical, typographical errors, or any similar errors, as well as seek clarification or removal of ambiguity concerning specific points or parts of the award. The tribunal, after receiving comments on the correction request, has a 30-day period to make necessary corrections or clarifications. Additionally, the tribunal is empowered to independently correct clerical, typographical, or similar errors.

If a party believes that the tribunal omitted claims presented in the proceedings from the initial award, they can, within 30 days of receiving the award, request the tribunal to issue an additional award. The tribunal must respond to such requests within 60 days if it deems the application justified.

While courts generally refrain from intervening in arbitration matters, they acknowledge that, in exceptional circumstances, they can exercise inherent powers to extend the 30-day period for correction requests. Factors influencing this decision include the duration and reason for the delay, the merit of the application, and potential prejudice to the respondent. Nevertheless, courts maintain a reluctance to set aside an award solely based on the arbitrator's exercise of the *iura novit arbiter* principle, prioritising procedural fairness and the parties' right to be heard.

XIII. Arbitrator Liability

(i) Does the arbitration law in your jurisdiction expressly provide for the immunity of arbitrators, experts, translators, interpreters, and/or other participants in arbitration proceedings from civil liability in connection with their mandate? If so, are there exceptions to this immunity?

An arbitrator enjoys immunity and cannot be held liable for any actions or omissions undertaken in good faith while discharging their functions as an arbitrator. This immunity also extends to the servant or agent of an arbitrator, provided that such individual, acting with due authority and in good faith, is discharging or purportedly discharging the functions of the arbitrator.

Moreover, the Arbitration Act establishes that every witness providing evidence and every person appearing before an arbitral tribunal is entitled to, at a minimum, the same privileges and immunities as witnesses and advocates in proceedings before a court. Essentially, witnesses are afforded the same privileges and immunities as those granted in court proceedings.

It is important to note that while the Arbitration Act provides broad immunity for arbitrators and those involved in the arbitration process, the immunity is contingent on actions being conducted in good faith. Additionally, the Act does not shield participants from liability if their actions are not in good faith or if they exceed the scope of their authority.

(ii) Does this immunity, if any, extend to criminal liability?

Immunity does not extend to criminal liability. While this is not explicitly provided for in the Act, immunity from criminal liability is limited to judicial officers. This immunity would not extend to participants in arbitral proceedings as a private means of dispute resolution.

XIV. Recognition and Enforcement of Awards

(i) What is the process for the recognition and enforcement of awards? What are the grounds for opposing enforcement? Which is the competent court? Does such opposition stay the enforcement? If yes, is it possible nevertheless to obtain leave to enforce? Under what circumstances?

In Kenya, the recognition and enforcement of awards involve distinct processes for domestic and foreign awards.

Domestic awards:

A domestic award is recognized as binding and can be enforced through an application to the High Court. The party seeking recognition must initiate the process by filing a miscellaneous application with the commercial and admiralty division of the High Court. Subsequently, notice must be given to the opposing party, and a date for the application hearing is requested.

Foreign awards:

Kenya, having ratified the New York Convention, extends the recognition and enforcement of foreign awards under the New York Convention. However, the award must originate from a signatory state.

To seek enforcement, the party must present the original award, along with the arbitration agreement or certified copies.

Grounds for opposition:

The High Court may refuse to recognize and enforce an award based on grounds akin to those for setting aside an award, as outlined above in Section XII (i) above. An additional ground for refusal is if the award has not yet become binding on the parties or has been set aside or suspended by a court of the origin state.

Limitation period:

The Limitation of Actions Act establishes a six-year limitation period for actions to enforce an award, irrespective of whether it is domestic or foreign. The incorporation of the New York Convention into the Arbitration Act subjects foreign awards to the same six-year limitation.

Procedural duration:

In terms of timelines, the duration of challenge, appeal and enforcement proceedings varies, ranging from a few months to four or more years at the domestic level. The complexity of the issue influences the timeline. Foreign awards may take even longer due to factors such as the involvement of foreign parties, differing jurisdiction practices, and language considerations, further complicating the resolution of the claim.

(ii) If an exequatur is obtained, what is the procedure to be followed to enforce the award? Is the recourse to a court possible at that stage?

Once the arbitral award is recognized by the courts, it will be enforced in the same manner as when one obtains a judgement from the courts by applying for the execution of the decree.

(iii) Are conservatory measures available pending enforcement of the award?

While not expressly provided for in the Act, conservatory measures such as freezing orders are generally available to parties seeking enforcement of an award or decree from the courts in Kenya.

(iv) What is the attitude of courts towards the enforcement of awards? What is the attitude of courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

The courts will recognize and enforce domestic arbitral awards unless there are grounds not to do so. An international arbitration award shall be recognised and enforced in accordance with the New York Convention. However, courts will not enforce an arbitral award that has been set aside by the court at the place of arbitration.

(v) How long does enforcement typically take? Are there time limits for seeking the enforcement of an award?

This depends on whether the award has been contested or not. If it has been contested, this could take three to four years, if not more. As there may be a right of appeal, this could take a longer period.

XV. Sovereign Immunity

(i) Do state parties enjoy immunities in your jurisdiction? Under what conditions?

States enjoy immunity by virtue of the Privileges and Immunities Act, and courts typically uphold the defence of state immunity unless it can be shown from a particular set of facts that the immunity should not apply.

(ii) Are there any special rules that apply to the enforcement of an award against a state or state entity?

See Section XV(i) above.

(iii) Are there any requirements for arbitrations involving sovereign entities?

See Section XV(i) above.

XVI. Investment Treaty Arbitration

(i) Is your country a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States? Or other multilateral treaties on the protection of investments?

Yes. Kenya signed the ICSID Convention on 24 May 1966 and ratified the same on 3 January 1967, and the Convention entered into force in Kenya on 2 February 1967.

(ii) Has your country entered into bilateral investment treaties with other countries?

Kenya has entered into BITs with the following countries: Burundi (2009); China (2001); Finland (2008); France (2007); Germany (1996); Iran (2009); Italy (1996); Japan (2016); Korea (2014); Kuwait (2013); Libya (2007); Mauritius (2012); the Netherlands (1970); Qatar (2014); Turkey (2014); Slovakia (2011); Switzerland (2006); the United Arab Emirates (2014); and the United Kingdom (2009). Kenya is also party to Treaties with Investment Provisions (TIPs), which include: the COMESA Investment Agreement, which it signed in 2007 but is not yet in force; the Cotonou Agreement (2000); the EAC Treaty; the COMESA Treaty; and the AU Treaty, which are all in force. Additionally, there are multilateral, intergovernmental agreements which Kenya is part of, including the: New York Convention; ICSID Convention; General Agreement on Trade in Services (GATS); Multilateral Investment Guarantee Agency (MIGA) Convention; Agreement on Trade-Related Investment Measures (TRIMS); and Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Furthermore, there are guidelines and resolutions which Kenya has adopted, including the World Bank Investment Guidelines, Charter of Economic Rights and Duties of States, and UN Guiding Principles on Business and Human Rights.

(iii) Have there been any recent court decisions in your country in relation to intra-European investor-state arbitration?

No.

XVII. Resources

(i) What are the main treatises or reference materials that practitioners should consult to learn more about arbitration in your jurisdiction?

The Arbitration Act is the main reference material on arbitration in Kenya. The Kenya law website provides cases that parties have sought recognition and enforcement, as well as the setting aside of arbitral awards.

(ii) Are there major arbitration educational events or conferences held regularly in your jurisdiction? If so, what are they, and when do they take place?

The Chartered Institute of Arbitrators has an annual conference that occurs in June/July. The NCIA organized its inaugural Nairobi Arbitration Week in September 2023, and it is scheduled to take place every year. The East Africa International Arbitration Conference takes place annually in August, and the venue of the conference rotates amongst the East African Community every year.

XVIII. Trends and Developments

(i) Do you think that arbitration has become a real alternative to court proceedings in your country?

Not entirely. Kenya's pro-enforcement regime and arbitration-friendly landscape have lent this method of dispute resolution popularity as an alternative to litigation. It resonates with the cultural frameworks of the country, and their gradual recognition as formal methods of dispute resolution has enabled strong and decisive dispute resolution stakeholder engagements at the CIArb Kenya, and like-minded institutions such as the NCIA. These organizations have been enabled to better engage with the judiciary, led by successive chief justices as well as the attorney generals of the country since the promulgation of the Constitution. However, despite all this growth, arbitration is yet to become a real alternative to litigation.

(ii) What are the trends in relation to other ADR procedures, such as mediation?

The courts in Kenya have enthusiastically embraced alternative dispute resolution (ADR) mechanisms, including mediation, as a means to provide alternative avenues for justice and enhance access to the legal system. The Court Annexed Mediation Project, initially introduced as a pilot project in Nairobi within the High Court commercial division, exemplifies this commitment. Court-Annexed Mediation involves mediating disputes under the umbrella of the court, and this approach has been expanded to cover most parts of the country.

In this process, the court assesses the cases to determine their suitability for mediation. A notable advantage is the cost-effectiveness, as the expenses of mediation are covered by the Judiciary. Additionally, the process is time-efficient, with a mandate for mediation to conclude within 60 days. An impactful outcome of these initiatives is the significant reduction in case backlog, marking a substantial gain in the overall efficiency of the judicial system.

(iii) Are there any noteworthy recent developments in arbitration or ADR?

There is a growing recognition of the Alternative Justice System (AJS) in Kenya. Article 159 of the Constitution mandates that courts and tribunals promote alternative dispute resolution methods, including traditional ones, provided they adhere to constitutional principles and legal standards. In 2017, the judiciary conducted a 'Justice Needs and Satisfaction Survey,' revealing that only 10 per cent of those with justice needs sought assistance from formal justice institutions.

In response, the Alternative Justice Systems Policy was developed to promote AJS usage in the country. The National Steering Committee on Implementation of the Alternative Justice Systems Policy (NaSCI-AJS) oversees its execution. While initially introduced in select counties, there are plans to expand the system nationwide. A key aspect of the AJS is its alignment with cultural practices prevalent in many Kenyan communities, where disputes are traditionally resolved by elders and religious leaders.

(iv) Are there any official plans to reform the arbitration laws and practice in your jurisdiction?

In 2021, an Alternative Dispute Resolution Bill was tabled in Parliament in order to put in place a legal framework to govern the settlement of certain civil disputes by conciliation, mediation, and traditional dispute resolution.

(v) Are there any rules governing third-party funding in your jurisdiction? Is there an obligation to disclose the identity of any non-party who has an economic interest in the outcome of the proceedings, including any third-party funder? Have there been any recent court decisions in your jurisdiction in relation to third-party funding?

In Kenya, the Advocates Act invalidates agreements that involve the purchase of a client's interest, relieve advocates from professional responsibilities, or stipulate payment based on the success of a suit or proceeding. As a result, contingency fees in both litigation and arbitration are prohibited, being considered champertous agreements. Currently, third-party funding is not permitted in Kenya.

(vi) Has your country implemented a sanctions regime? Do the courts in your jurisdiction consider international economic sanctions as part of their international public policy? Have there been any recent court decisions in your country in relation to the impact of sanctions on international arbitration proceedings?

Kenya, having signed the UN Charter in 1963 and ratified it in 1994, considers it part of its laws as per Article 2(6) of the Constitution. Notably, Kenya does not currently have an autonomous sanctions regime in place.

The position of Kenyan courts regarding the alignment of international economic sanctions with international public policy has not been explicitly stated in jurisprudence. There have been no recent court decisions addressing the impact of sanctions on international arbitration proceedings in the country.