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International Arbitration

Kenya
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Law and Practice

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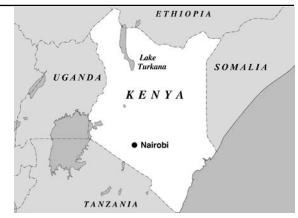

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1. General

1.1 Prevalence of Arbitration

Increased activity in the mining, oil and gas, and renewable energy sector, as well as an increase in infrastructure projects, which are mainly implemented under public-private partnership (PPP) arrangements, have increased the prevalence of international arbitration as a mode of resolving disputes in Kenya. This is mainly because the legislation, bilateral agreements or contracts governing projects in these sectors provide for arbitration as a dispute resolution mechanism. The construction industry has also seen an increase in international arbitration activity owing to increased foreign and bilateral investments.

Most of the contracts in respect of the aforesaid sectors and projects have foreign counterparties who would prefer to have disputes resolved by international arbitration for various reasons, including the perception that international arbitral tribunals are likely to be neutral and impartial, the final nature of arbitral awards, international arbitration's appreciation and accommodation of diverse legal cultures, the willingness of court in Kenya to enforce foreign awards, and the perceived backlog of cases in Kenyan courts.

Domestic Parties

Domestic parties prefer to resolve disputes through litigation and the local courts mainly because of the perceived high cost of international arbitration. They are, however, not averse to domestic arbitration as it does not have the same cost implication as an international arbitration. However, there is no restriction on domestic parties resorting to the use of international arbitration. An arbitral process is deemed to be an international arbitration under Kenyan law if:

- at the time of conclusion of the agreement, the domestic parties had their places of business in different states;
- the juridical seat is outside the state in which the parties carry on business; or
- the subject matter relates to more than one state.

International Arbitration

As stated above, most of the disputes that have been resolved through international arbitration have foreign entities as parties or state-owned entities. They would also ordinarily involve disputes in the mining, oil and gas, and renewable energy sector and infrastructure projects that are implemented under PPP arrangements because the legislation, bilateral investment agreements and/or the contractual documents governing projects in the said sectors provide for arbitration as the preferred dispute resolution mechanism.

It is also very common to find international arbitral awards being enforced in Kenya as the attitude of the Kenyan courts in this regard has so far been fairly positive and supportive.

The authors are not, however, aware of any international arbitrations that have been seated in Kenya. Both domestic and foreign parties seem to prefer foreign seats such as Dubai and London, with the latter being particularly popular. However, given the recent establishment of international arbitration centres in Kenya, Rwanda and Tanzania, and the high cost of arbitration that is associated with foreign seats, the authors anticipate that in future more international arbitrations will be seated in East Africa.

1.2 Trends

One of the main issues affecting arbitration that has generated a lot of debate in Kenya is the question of the finality of arbitral awards. Recently, the Supreme Court of Kenya – in the case of Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR – settled the questionon whether there was a right of appeal against a High Court decision relating to the setting aside of an arbitral award under Section 35 of the Arbitration Act, 1995 (the "Arbitration Act"). The Court held that considering there was no express bar to appeals under Section 35 of the Arbitration Act, an unfair determination by the High Court should not be absolutely immune from appellate review. It was of the view that in exceptional circumstances the Court of Appeal had residual jurisdiction to enquire into such unfairness. However, it emphasised that an appeal can only lie to the Court of Appeal against a High Court determination under Section 35 of the Arbitration Act where in setting aside an award, the High Court stepped outside the grounds set out in Section 35 and thereby made a decision so grave and so manifestly wrong that it denied the parties justice. The court also cautioned that the Court of Appeal should only assume jurisdiction in the clearest cases.

The advent of COVID-19 has necessitated the use of technology to facilitate international and domestic arbitration. With several executive and judicial restrictions in place, arbitrations have been conducted through videoconferencing and e-filing of documents.

1.3 Key Industries

As stated in **1.1 Prevalence of Arbitration**, the areas that are experiencing more international arbitration activity in Kenya are mainly the mining, oil and gas, and renewable energy sector and infrastructure projects that are implemented under PPP arrangements. This is mainly because the legislation, bilateral agreements or contracts governing projects in these sectors provide for arbitration as a dispute resolution mechanism. The

construction industry has also seen an increase in international arbitration activity owing to increased foreign and bilateral investments.

1.4 Arbitral Institutions

Kenya has had some investor-state disputes referred to the International Centre for Settlement of Investor Disputes (ICSID) owing to the fact that Kenya is a party to the International Centre for Settlement of Investment Disputes Convention.

Other commonly used arbitration centres are the International Chamber of Commerce (ICC), the Chartered Institute of Arbitrators (CIArb) and the London Court of Arbitration (LCIA).

More recently, however, the authors have seen an increase in the selection of the Nairobi Centre for International Arbitration (NCIA) as a preferred arbitral institution and given the popularity of the Kigali International Arbitration Centre (KIAC), there are likely to be more Kenyans referring disputes to it in the future.

2. Governing Legislation

2.1 Governing Law

Kenya is among 74 states and 104 jurisdictions around the world where legislation based on the Model Law has been adopted (see Goodison Sixty-One School Limited v Symbion Kenya Limited [2017] eKLR). Arbitration in Kenya is governed by three primary pieces of legislation:

- the Constitution of Kenya, 2010 – Article 159 of the Constitution explicitly recognises the need for courts and tribunals to encourage and promote alternative forms of dispute resolution, including arbitration;
- the Arbitration Act, No 4 of 1995 – the Arbitration Act is modelled entirely on the UNCITRAL Model Law, and except for the limitations set out in the Act, it applies to both domestic and international arbitrations; the Arbitration Act is supplemented by the Arbitration Rules 1997; and
- the Nairobi Centre for International Arbitration Act, No 26 of 2013 – this act is aimed at providing for the establishment of the NCIA, the primary function of which is to promote, facilitate and encourage the conduct of international (and domestic) arbitration.

The above pieces of domestic legislation are supplemented by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), which Kenya ratified in 1989. The New York Convention is made a part of domestic law in Kenya by virtue of Article 2(6) of the Constitution, which states that any treaty or convention ratified by Kenya shall form part of the laws of Kenya.

Section 36(2) of the Arbitration Act further complements the New York Convention by providing that an international arbitration award shall be recognised as binding and enforced in accordance with the provisions of the New York Convention or any other convention to which Kenya is a signatory.

Finally, Kenya has also ratified the ICSID Convention, which is the framework applicable to legal dispute resolution and conciliation between international investors.

Kenya's arbitration legislation does not depart from the UNCITRAL Model Law in any significant way. The laws reflect most of the UNCITRAL Model Law principles, including finality of arbitral awards, limited court intervention or interference, and principles such as separability and *Kompetenz-kompetenz* (competence-competence).

2.2 Changes to National Law

However, the Arbitration Act was amended in 2010 to reflect contemporary developments in arbitration practice and procedure. The primary additions to the Act in line with this amendment are with regard to the withdrawal of an arbitrator (Section 16A), the immunity of an arbitrator (Section 16B), the duty of parties to an arbitration to do all things necessary and proper (Section 19A), the effect of an arbitration award (Section 32A), costs and expenses (Section 32B), and interest (Section 32C).

3. The Arbitration Agreement

3.1 Enforceability

An arbitral agreement under Kenyan law, like any contract, must satisfy the essential requirements of a contract; namely, validity, capacity and form. In particular, Section 35(2)(1) of the Arbitration Act empowers the court to set aside an award if it is proved that one of the parties to the arbitration agreement was under incapacity. In addition, parties to an arbitration must ensure that the agreement they are entering into is valid under the laws of Kenya or the laws under which the parties have subjected it, otherwise courts in Kenya may refuse to enforce it pursuant to Sections 6(1)(a) and 37(1)(a)(ii) of the Arbitration Act. Finally, pursuant to Section 4 of the Arbitration Act, an arbitration agreement must be writing.

3.2 Arbitrability

There is no set list or express provisions of the matters that are not arbitrable in Kenya. However, Kenyan courts have considered some matters as non-arbitrable disputes, including rights and liabilities arising from criminal offences, matrimonial dis-

putes, child custody and guardianship matters, and insolvency and winding-up proceedings.

The general consideration in Kenya with regard to arbitrability is whether a dispute raises issues of public interest or that the issues concern public policy. An example is criminal matters that are considered as an affront against the state rather than just the individual or individuals affected by the criminal act or actions. In such cases, the state has an interest in the matter and would be reluctant to allow the matter to be determined or resolved through an arbitral forum or other private forum.

3.3 National Courts' Approach

Article 159(2)(d) of the Constitution of Kenya, 2010, which is the supreme law in Kenya (with all other laws being null and void to the extent that they are inconsistent with the Constitution), expressly recognises alternative forms of dispute resolution, such as arbitration. As such, the attitude of the courts in Kenya is generally very supportive and it is more often than not willing to enforce an arbitration agreement.

However, the courts may decline to grant stay orders if the arbitration agreement is invalid or inoperable. Further, the courts have drawn a distinction between disputed and undisputed claims. Where a dispute exists and the parties agreed to arbitration, the courts will generally stay any proceedings filed in court in breach of an arbitration agreement and refer the parties to arbitration.

However, if the claim is undisputed – for instance, where there has been a clear admission of liability by the respondent – the courts will decline to enforce the arbitration agreement or to refer the dispute to arbitration on grounds that there exists no dispute capable of being referred to arbitration (see Niazsons (K) Ltd v China Road & Bridge Corporation Kenya [2001] eKLR).

Further, whereas the courts in Kenya are generally willing to enforce arbitration agreements, it is incumbent upon a party seeking to enforce an arbitration agreement to apply to have a dispute that has been filed in court in breach of an arbitration agreement referred to arbitration at the earliest opportunity. An indolent party or one who acquiesced or participated in court proceedings is likely to be barred from subsequently referring the dispute to arbitration (see Eunice Soko Mlagui v Suresh Parmar & 4 others [2017] eKLR).

Arbitration agreements are usually enforced in Kenya, save for instances where the arbitral agreement is considered null and void, inoperative or the dispute is not within the matters agreed to be referred to arbitration (see also **3.1 Enforceability**).

3.4 Validity

Kenyan law recognises the rule of separability. Section 17(1)(b) of the Arbitration Act provides that "a decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause", which means that invalidity of the agreement does not render the arbitral clause or contract invalid since the two are treated as separate contracts.

The High Court in Kenya Airports Parking Services Ltd & Another v Municipal Council Of Mombasa [2010] eKLRheld that "where there exists an agreement with an arbitration clause, under the principle of separability of the arbitration clause, if a party to the agreement is of the opinion that the agreement is unlawful and therefore invalid, such view does not invalidate the arbitration clause in the agreement."

A similar finding was held by the Court of Appeal in Kenya Anti-Corruption Commission & another v Nedermar Technology BV. Limited [2017] eKLR that "the arbitration clause in a contract is considered to be separate from the main contract, and as such it survives the termination of the contract."

As discussed above, the separability rule is enshrined under Section 17(1)(a) of the Arbitration Act. Arbitration clauses contained in an invalid agreement do not suffer the invalidity of the main contract (see above).

4. The Arbitral Tribunal

4.1 Limits on Selection

There are no limits under Kenyan law on a party's right to select arbitrators. Section 11 of the Arbitration Act provides that parties are free to determine the number of arbitrators in their dispute, and failing such agreement, the number of arbitrators shall be one.

The court in Nyoro Construction Company Limited v Attorney General [2018] eKLR expounded on this when it said: "As a general rule, since Arbitration is based on a contract, the parties are in principle free to choose their arbitrator. They can appoint anyone with legal capacity to act as an arbitrator. Party autonomy is thus the principal controller of the appointment process... Alternatively, the parties can agree on appointment procedure by submitting their dispute to arbitration rules which provide for the appointment of arbitrators. In this regard, Section 11 of the Arbitration Act, No 4 of 1995, provides that, the parties are free to determine the number of arbitrators and failing such determination, the number shall be one. Similarly, Section 12 of the Act provides that the parties are free to agree on the procedure of appointment of the Arbitrator."

4.2 Default Procedures

In the event that the parties' chosen method for selection of an arbitrator fails, the default procedure is outlined under Section 12 of the Arbitration Act. In summary:

- in an arbitration with three arbitrators, each party shall appoint one arbitrator and the two arbitrators so appointed shall appoint the third arbitrator;
- in an arbitration with two arbitrators, each party shall appoint one arbitrator; and
- in an arbitration with one arbitrator, the parties shall agree on the arbitrator to be appointed.

Section 12(3) of the Arbitration Act further stipulates that where one party to an arbitration indicates that it is unwilling to appoint an arbitrator, or fails to do so within the time allowed under the arbitration agreement (and where there is no time limit under the arbitration agreement, within 14 days), then the party that has duly appointed an arbitrator may give notice to the party in default that he or she proposes to appoint the chosen arbitrator to act as a sole arbitrator.

Multi-party arbitrations have not been expressly dealt with under the Arbitration Act. As such, the parties are free to come to an agreement in such cases. However, the Nairobi Centre for International Arbitration Rules 2015 (the "NCIA Rules") stipulates that the Centre takes the reigns where there are multiple claimants and/or respondents who are unable to agree on an arbitrator(s).

In particular, Rule 7(10) of the NCIA Rules states that where there are multiple claimants or multiple respondents, and where the dispute is to be referred to three arbitrators, the parties are to jointly nominate an arbitrator for confirmation. However, where this is deemed impossible by virtue of the parties failing to agree, Rule 7(12) dictates that the arbitration agreement shall, for all purposes, be considered as an agreement by the parties for the appointment of a three-member arbitral tribunal by the NCIA. In such a case, the Centre shall be free to appoint each member of the tribunal and shall designate one of the members to act as president of the tribunal.

4.3 Court Intervention

Under Section 12(5) of the Arbitration Act, the High Court can intervene, and set aside, appointment of an arbitrator where a sole arbitrator was appointed in default of one party participating in the appointment (see **4.2 Default Procedures**). The High Court may intervene to set aside the appointment of the arbitrator only if it is satisfied that there was good cause for the failure or refusal of the party in default to appoint his arbitrator in good time. It is important to note, however, that the decision of the High Court in this respect shall be final and not subject to appeal (see Section 12(8) of the Arbitration Act).

Section 12(9) of the Arbitration Act requires that when the High Court is appointing an arbitrator, it is to be guided by the qualifications required of an arbitrator by the agreement of the parties. In addition, the High Court should take into account considerations that are likely to secure the appointment of an independent and impartial arbitrator. This was clearly highlighted by the court in Edward Muriu Kamau & 4 others all t/a Muriu, Mungai & Co Advocates v John Syekei Nyandieka [2014] eKLR, where it was held that: "Section 12(9) of the Arbitration Act is relevant as it sets out some guiding factors when the Court is appointing the sole arbitrator. The Court should have regard to any qualifications required of an arbitrator by the agreement of the parties, such considerations as are likely to secure the appointment of an independent and impartial arbitrator, and in case of a sole arbitrator, take into account the advisability of appointing an arbitrator of a nationality other than those of the parties. These prescriptions are broadly cast due to the nature of the varied arbitral disputes which may arise; some relate to accounting, others on fraud, corruption, tax evasion, performance of contracts, etc. Almost invariably, in all arbitral proceedings, most often the arbitrator may need to determine purely and typical legal issues of jurisdiction and interpretation of the contract. Even the way the profession of arbitration is structured answers to the law."

4.4 Challenge and Removal of Arbitrators

Pursuant to Section 13(3) of the Arbitration Act, an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence, or if he does not possess qualifications agreed to by the parties or if he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so. Also, a party may challenge an arbitrator appointed by him, or in whose appointment that party has participated, only for reasons of which he becomes aware after the appointment.

4.5 Arbitrator Requirements

Section 13 (1) of the Arbitration Act requires arbitrators to disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence. From the time of their appointment and throughout the arbitral proceedings, arbitrators are required to disclose any such circumstances without delay to the parties unless the parties have already been informed of them by him.

5. Jurisdiction

5.1 Matters Excluded from Arbitration

As previously discussed, matters of a criminal nature are within the exclusive and original jurisdiction of courts. Also, as a matter of public policy, disputes relating to insolvency, child custody and guardianship, matrimonial causes and testamentary disputes may not be referred to arbitration.

5.2 Challenges to Jurisdiction

The principle of competence-competence is provided for under Section 17(1) of the Arbitration Act, which affirms the arbitral tribunal's power to rule on its own jurisdiction.

5.3 Circumstances for Court Intervention

In general, the courts in Kenya are reluctant to intervene in matters that are subject to arbitration save where such court intervention has been expressly sanctioned in the Arbitration Act.

However, where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter. The decision of the High Court in such cases shall be final and shall not be subject to appeal.

It should also be noted that while an application on the jurisdiction of the arbitral tribunal is pending before the High Court, the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided and such award shall be void if the application is successful.

A party aggrieved by the arbitral ruling on jurisdiction may appeal to the High Court as provided under Section 17(6) of the Arbitration Act.

5.4 Timing of Challenge

A party challenging the jurisdiction of an arbitral tribunal to hear a dispute ought to do so at the earliest opportunity and in any event not later than the submission of the statement of defence (Section 17(2) of the Arbitration Act).

However, a party aggrieved by the decision of the arbitral tribunal on jurisdiction may apply to court within 30 days of receipt of the notice of the ruling. A party therefore approaches the court only after an award has been rendered by the arbitral tribunal on the question of its jurisdiction.

5.5 Standard of Judicial Review for Jurisdiction/ Admissibility

The courts have generally interpreted their role as supporting the arbitration process and have shied away from dealing with the merits of disputes that are subject to arbitration. In this regard, the courts in Kenya will generally defer to the findings of an arbitral tribunal.

However, with regard to issues of jurisdiction and admissibility, it appears that the court will exercise its jurisdiction de novo as the applicable standard of review. This was evidenced in the case of Assumption Sisters Of Nairobi Registered Trustee v Stanley Kebathi & Another [2008] eKLR where the court began its enquiry into the arbitrator's jurisdiction to hear and determine the dispute by considering whether there existed an agreement between the parties by virtue of which the arbitrator could vest himself of authority and or jurisdiction to arbitrate on the matter.

5.6 Breach of Arbitration Agreement

Courts in Kenya will generally stay or suspend court proceedings that have been commenced in breach of an arbitration agreement. This power is provided under Section 6 of the Arbitration Act. In order for the court to stay or suspend the proceedings, the party seeking to have the dispute referred to arbitration has to apply to the court not later than the time of entering appearance, otherwise they may be deemed to have submitted to the jurisdiction of the court (see also **3.3 National Courts' Approach**)

There is a general reluctance on the part of Kenyan courts to allow court proceedings to continue where parties agreed to refer the dispute to arbitration. However, there is a duty on the other party to object to the court proceedings before entering appearance in the matter. If a party has delayed in raising an objection with respect to the court proceedings, the court may find that such party has waived its right to contest the jurisdiction of the court.

5.7 Third Parties

There is no express legislation that permits third parties to be joined to arbitral proceedings. However, there are rare instances where the rights and obligations of a party to the arbitration can be assumed by a third party with the result that the arbitral tribunal would assume jurisdiction over the third party concerned. These include cases where a personal representative of the deceased party steps in place of the deceased party or where a trustee is appointed in relation to a bankrupt party.

With respect to agency, the court in Kenya National Highways Authority v Masosa Construction Limited & another [2015] eKLR observed that a principal (as a third party) may be bound

to an arbitration agreement if evidence is produced to show that he authorised or ratified the arbitration agreement.

Except as discussed above, an arbitral tribunal cannot assume jurisdiction over third parties. Parties aggrieved with the conduct of a third party can only seek recourse in a court of law.

6. Preliminary and Interim Relief

6.1 Types of Relief

Arbitral tribunals in Kenya are permitted to award preliminary and/or interim relief under both the Arbitration Act as well as the institutional rules applicable within the Kenyan jurisdiction. In particular:

- Section 18(1)(a) of the Arbitration Act states that an arbitral tribunal can order a party to take such interim measure of protection as it deems necessary or appropriate;
- Rule 18(2)(i) of the CIArb Arbitration Rules states that an arbitral tribunal has jurisdiction to make one or more interim awards, including injunctive relief and measures for conservation of property; and
- Rule 27(1) of the NCIA Rules 2015 allows an arbitral tribunal (subject to the agreement between the parties) to make a range of interim or conservatory orders in the arbitration.

Such interim awards are binding by virtue of the fact that under the Arbitration Act and institutional rules, an "arbitral award" is taken to mean any award of the arbitral tribunal, including interim awards.

There is no express limit on the types of interim relief that can be awarded by an arbitral tribunal. In the case of Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others [2010] eKLR: "Interim measures of protection in arbitration take different forms and it would be unwise to regard the categories of interim measures as being in any sense closed (say restricted to injunctions for example) and what is suitable must turn or depend on the facts of each case before the Court or the tribunal."

6.2 Role of Courts

Section 7(1) of the Arbitration Act provides that the High Court may allow applications for interim measures when so moved by either of the parties. The primary objective of courts when intervening is to ensure that the subject matter of the arbitration proceedings is not jeopardised before an award is issued, thereby rendering the entire proceedings of no value.

This purpose was well elaborated in the case of CMC Holdings Limited v Jaguar Land Rover Exports Limited [2013] eKLR: "In practice, parties to international arbitrations normally seek interim measures of protection. They provide a party to the arbitration an immediate and temporary injunction if an award subsequently is to be effective. The measures are intended to preserve assets or evidence which are likely to be wasted if conservatory orders are not issued. These orders are not automatic. The purpose of an interim measure of protection is to ensure that the subject matter will be in the same state as it was at the commencement or during the arbitral proceedings. The court must be satisfied that the subject matter of the arbitral proceedings will not be in the same state at the time the arbitral reference is concluded before it can grant an interim measure of protection."

Section 7(2)(b) states that where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.

Foreign-Seated Arbitrations

The existing law in Kenya is not clear on whether courts can grant interim relief in foreign-seated arbitrations as there are conflicting decisions on the matter. In some cases the courts have found that they have jurisdiction to grant interim relief, while in other cases, the courts have declined to grant interim relief where there is a foreign governing law clause or jurisdiction clause and a foreign seat.

In the case of Skoda Export Limited v Tamoil East Africa Limited [2008] eKLR the court was faced with an application for interim measures of protection brought pursuant to Section 7 of the Arbitration Act where the contract in question contained an English governing law clause with London as the designated seat of the arbitration. In declining to issue any interim relief, the courts held that: "In my understanding the jurisdiction of the court in arbitration matters is either given by statute or by consent of the parties or that it is in the general interest of justice to intervene to give an interim measure of protection. A court does not become a competent judicial authority by virtue of a party coming before it with a dispute which requires a judicial intervention. The intervention of the court can only arise when there is in existence judicial mandate to do so. The idea of the place and law applicable to the dispute between the parties was mooted and mutually agreed between the parties and having mutually agreed to refer any dispute arising between them to International Arbitration, none of them has any recourse to any Municipal court like ours."

There is no express limit on the types of interim relief that can be awarded by an arbitral tribunal. As was said in the case of Safaricom Limited v Ocean View Beach Hotel Limited & 2 Oth-

ers [2010] eKLR: "Interim measures of protection in arbitration take different forms and it would be unwise to regard the categories of interim measures as being in any sense closed (say restricted to injunctions for example) and what is suitable must turn or depend on the facts of each case before the Court or the tribunal."

Emergency Arbitrators
There is no reference to emergency or expedited arbitration in the Arbitration Act, Arbitration Rules or CIArb's Arbitration Rules. However, the NCIA Rules are modelled on international arbitrational institutional rules and contain provisions governing both expedited and emergency arbitrations.

Rule 10 of the NCIA Rules states that in exceptional circumstances or due to an emergency, prior to or on the commencement of the arbitration, a party may apply to the NCIA for the expedited formation of an arbitral tribunal. The application needs to be made in writing to the Registrar, copied to all other parties to the arbitration, and clearly set out the exceptional circumstances/urgency that necessitates the expedited formation of a tribunal.

Rule 28 of the NCIA Rules allows a party to make an application for the appointment of an emergency arbitrator prior to the appointment of an expedited arbitral tribunal, which application is to be made in accordance with the procedure set out in the Second Schedule to the NCIA Rules 2015. Under Rule 28(4), upon expedited formation of the arbitral tribunal, the emergency arbitrator shall have no further power to act in the dispute.

Under Rule 28(6) of the NCIA Rules, an order or award made by the emergency arbitrator is binding on all the parties upon being issued. However, under Rule 28(5), an order or award made by the emergency arbitrator shall cease to be binding where:

- the arbitral tribunal is not constituted within 90 days of the order/award;
- the arbitral tribunal proceeds to make a final award; or
- the claim is withdrawn.

Furthermore, Rule 28(8) allows the arbitral tribunal, upon formation, either on an application by one of the parties or on its own motion, to vary, discharge or revoke in whole or in part an award of the emergency arbitrator (except an award referring to the arbitral tribunal).

There is no provision in the Arbitration Act or institutional rules that sanctions court intervention once an emergency arbitrator has been appointed. Nor are the authors aware of any decisions on the matter. The authors are, however, of the view that the courts would treat an award of an emergency arbitrator like any other arbitral award and, as such, a party aggrieved by the award could apply to set it aside on the limited grounds set out in the Arbitration Act.

6.3 Security for Costs
Section 18(1)(c) of the Arbitration Act allows the arbitral tribunal to award security for costs as an interim measure of protection. Similarly, Rule 18(2)(j) of the CIArb Arbitration Rules and Rule 26(1) of the NCIA Rules make provision for security for costs.

7. Procedure

7.1 Governing Rules
The Arbitration Act, the NCIA Rules and the CIArb Arbitration Rules are the commonly applied rules that govern the procedure of arbitration in Kenya. While the rules under the Arbitration Act automatically apply to arbitrations that are governed by Kenyan law or are seated in Kenya, the NCIA or the CIArb rules would only apply if adopted by the parties or provided in the contract in question. This notwithstanding, pursuant to the principle of party autonomy, parties are at liberty to choose the applicable laws and rules for their arbitration. However, in the event that parties fail to agree on the rules and laws, the arbitral tribunal may proceed with the arbitration in a manner it considers appropriate having regard to cost, time and fairness (Section 20 of the Arbitration Act). This power extends to the tribunal determining relevance, admissibility and materiality and weight of evidence.

7.2 Procedural Steps
There are no procedural steps that are required to be followed in arbitral proceedings conducted in Kenya.

7.3 Powers and Duties of Arbitrators
Parties are encouraged to agree on the powers of the arbitrator. Otherwise, an arbitrator will generally have the power to:

- determine the applicable rules where parties have failed to do so (Section 20 of the Arbitration Act);
- order interim measure of protection (Section 18 of the Arbitration Act);
- order provision of security for claim or amount in dispute (Section 18 of the Arbitration Act;)
- order provision of security for cost (Section 18 of the Arbitration Act);
- seek court assistance in exercising the above-mentioned powers (Section 18 of the Arbitration Act);
- award interest (Section 32C of the Arbitration Act); and
- determine place of arbitration (Section 21 of the Arbitration Act).

7.4 Legal Representatives

There are no specific qualification requirements for representatives appearing on behalf of parties to an arbitration conducted in Kenya. Parties may appear or act in person or may be represented by any other person of their choice. However, with regard to applications to the High Court arising from the arbitration, representatives appearing for parties in Kenya must be qualified citizens of Kenya, Uganda, Rwanda, Burundi and Tanzania (Section 12 of Advocates Act, Chapter 16). The Advocate Act defines a qualified advocate as:

- one who is admitted as an advocate;
- one whose name is on the Roll; and
- one who has in force a practising certificate.

With respect to foreign legal representatives, the Attorney General has the power to admit an advocate from a Superior Court of a Commonwealth (Section 11 of the Advocates Act). The foreign advocate must pay the prescribed admission fee and must appear with an advocate.

8. Evidence

8.1 Collection and Submission of Evidence

Section 20 of the Arbitration Act gives parties the freedom to decide on the procedure to be adopted by the arbitral tribunal in the conduct of proceedings, and failing such an agreement the tribunal is free to adopt the procedure it considers appropriate.

Further, Section 20(4) of the Act states that every witness giving evidence and appearing before the arbitral tribunal shall have the same privileges and immunities as witnesses and advocates in proceedings before court. Furthermore, Section 10(5) – while not addressing the rules pertaining to cross-examination per se – states that the arbitral tribunal may direct that a party or witness be examined on oath or affirmation, and may for that purpose administer oath or affirmation.

The Arbitration Act does not make specific provision for, or rules governing, discovery of documents or disclosure. However, Rule 9(3) of the CIArb Arbitration Rules allows the arbitral tribunal to, at any time during proceedings, order parties to produce documents, exhibits or evidence it deems necessary or appropriate.

8.2 Rules of Evidence

Section 20(3) of the Arbitration Act gives the arbitral tribunal the power to determine the admissibility, relevance, materiality and weight of any evidence and to determine at what point an argument or submission in respect of any matter has been fairly and adequately put or made.

Domestic matters in Kenya are governed by the Evidence Act (Chapter 80, Laws of Kenya). However, Section 2(1) of the Evidence Act explicitly states that it does not apply to proceedings before an arbitrator.

The court in Goodison Sixty-One School Limited v Symbion Kenya Limited [2017] eKLR held: "In court litigation, the law of evidence – also known as the rules of evidence – which encompasses the rules and legal principles that govern the proof of facts in a legal proceeding, the quantum, quality, and type of proof needed to prevail in litigation, is paramount. In arbitration, strict application of the rules of evidence is obviated... Any hard-boiled litigation lawyer would find it intolerable to proceed with a hearing whose parameters are not circumscribed by the law of evidence. Such a trial could well be labelled unconstitutional for not providing adequate safeguards to an involved party, and that is understandable in a normal litigation. But this is one of the distinctions that underscore the difference in approach to dispute resolution between arbitration and litigation, and also the reason that any person can be an arbitrator who is able to abide by the rules of natural justice."

8.3 Powers of Compulsion

Section 28 of the Arbitration Act makes provision for court assistance in taking evidence. It states that the arbitral tribunal, or a party with the approval of the arbitral tribunal, may request from the High Court assistance in taking evidence, and the High Court may execute the request within its competence and according to its rules on taking evidence.

9. Confidentiality

9.1 Extent of Confidentiality

There are no express legal provisions for confidentiality of arbitrations other than those set out in Rule 34 of the NCIA Rules. As stated above, the NCIA Rules only apply if parties have agreed to adopt them. Parties are, however, free to agree on the degree of confidentiality of the proceedings, pleadings, documents and award. Nonetheless, courts have generally held that arbitral processes, whether international or domestic, are absolutely confidential (see Nedermar Technology BV Ltd v Kenya Anti-Corruption Commission & Another [2006] eKLR). Where parties have agreed that the arbitral process should remain confidential, the same cannot be disclosed in subsequent proceedings.

10. The Award

10.1 Legal Requirements

Section 32 of the Arbitration Act sets out comprehensively the form and contents of an arbitral award. To be binding, an arbitral award must be in writing; signed by the arbitrator(s) (where there is more than one arbitrator, it may be signed by a majority of the arbitrators as long as the reason for any omitted signature is stated); dated; and state the juridical seat of the arbitration. In addition, the award must also state the reasons upon which it is based, unless:

- the parties have mutually agreed that no reasons are to be given; or
- the parties have agreed to record a settlement in the form of the arbitration award (under Section 31 of the Act).

The Arbitration Act does not provide a time limit on delivery of the award. However, Rule 29 of the NCIA Rules provides that the arbitral tribunal shall make its award in writing within a period of three months from the date of close of hearing.

10.2 Types of Remedies

Generally, there are no express limits to the types of remedies that an arbitral tribunal may issue. However, Section 35(2)(iv) of the Arbitration Act stipulates that an arbitral award cannot deal with a dispute that does not fall within the terms of reference to arbitration, neither can it contain matters beyond the scope of the reference to arbitration. Therefore, if the arbitral tribunal awards any remedies on matters not referred to the tribunal, then that part of the decision is susceptible to being set aside by the High Court.

10.3 Recovering Interest and Legal Costs

In Kenya, save in very exceptional circumstances, courts and tribunals generally take a "costs follow the event" approach.

Section 32B of the Arbitration Act states that unless the parties to the arbitration agree otherwise, the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal, and all other expenses of the arbitration shall be determined by the arbitral tribunal in its award. In the absence of an award apportioning these legal costs and expenses, each party is deemed responsible for their own legal expenses and for an equal share of the fees and expenses of the tribunal.

Section 32C of the Arbitration Act deals with interest, and states that unless parties agree otherwise, and to the extent that the rules of law applicable to the substance of the dispute permit, an arbitral award may include provision for payment of compound or simple interest calculated from such rate, at such rate and with such rests as may be prescribed in the award.

11. Review of an Award

11.1 Grounds for Appeal

Arbitral awards are considered final and binding in Kenya with no recourse to an appeal save for cases where the parties have agreed to adopt the provisions of Section 39 of the Arbitration Act, which permits parties to appeal an arbitral award on points of law only.

Recourse to the High Court against an arbitral award may, however, be made only by an application for setting aside the award pursuant to Section 35 of the Arbitration Act if:

- the award was induced by fraud, undue influence, corruption and bribery;
- a party to the arbitration agreement was under some incapacity;
- the award dealt with disputes not falling within the terms of reference to arbitration;
- the award contains decisions on matters beyond the scope of reference to arbitration;
- the arbitral agreement was invalid under the applicable laws or laws of Kenya;
- the arbitral tribunal composition or procedure was not as per the agreement of the parties;
- a party was not given proper notice of the arbitrator's appointment or proceedings;
- the dispute is not capable of settlement by arbitration under the law of Kenya; and
- the award is contrary to public policy.

As stated above, the Supreme Court of Kenya – in the case of Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR – settled the questionon whether there was a right of appeal against a High Court decision relating to the setting aside of an arbitral award under Section 35 of the Arbitration Act, 1995 (the "Arbitration Act"). The Court held that considering there was no express bar to appeals under Section 35 of the Arbitration Act, an unfair determination by the High Court should not be absolutely immune from appellate review. In exceptional circumstances the Court of Appeal has residual jurisdiction to enquire into such unfairness. An appeal can only lie to the Court of Appeal against a High Court determination under Section 35 of the Arbitration Act where in setting aside an award, the High Court stepped outside the grounds set out in Section 35 and thereby made a decision so grave and so manifestly wrong that it denied the parties justice. The Court of Appeal should only assume jurisdiction in the clearest cases.

11.2 Excluding/Expanding the Scope of Appeal

While parties may exclude a ground of challenge, they cannot expand the grounds of challenge beyond those set forth under Section 35 of the Arbitration Act. The scope of appeal, on the other hand, is dependent on whether the arbitration is international or domestic. While the Arbitration Act is silent regarding international arbitration, parties in domestic arbitration may agree on the right of appeal to the High Court on a question of law arising out of the award or in the course of arbitration (Section 39 of the Arbitration Act).

Further appeal to the Court of Appeal against the decision of the High Court shall be permissible only if the parties agreed prior to the delivery of the award, or the High Court is of the view that the appeal raises a point of law of general importance.

11.3 Standard of Judicial Review

In principle, courts in Kenya are reluctant to intervene in matters or disputes that are subject to arbitration unless expressly allowed in the Arbitration Act. The courts in Kenya view their role in arbitral proceedings as supportive. Section 10 of the Arbitration Act discourages court intervention in arbitration disputes. As explained by the court in Kangethe & Company Advocates v Kenya Pipeline Company Limited Civil Appeal No 211 of 2006 [2011] eKLR: "In Kenya the role of the court is limited by section 10 of the Arbitration Act and its role or intervention must remain as specified in the Arbitration Act. Indeed, the aim of the Act is to drastically reduce the extent of the Court intervention in the arbitral process. In practice this must in turn involve balancing the right of party autonomy against abuse of process which may occur in the hands of the arbitral tribunals. Courts and arbitration must of necessity remain close partners in the situation such as those described in this matter for reasons which include, inter alia, the observation by Lord Mustill in the Kenyan originated case of Coppee Lavalin S A NV Ren Ken Chemicals and Fertilizers Ltd [1995] 1 AC 38 at 64:- 'It is only a court with coercive powers that would rescue an arbitration which is in danger of foundering.'"

In cases where the court is faced with an application to set aside an arbitral award, it would be reluctant to exercise this jurisdiction "de novo" and defer to findings of fact and in some cases conclusions of law reached by an arbitral tribunal. For instance, in the case of Brookside Dairy Limited v Limuru Milk Processors Limited & another [2020] eKLR, the court noted that: "Taken as a whole the gravamen of the Applicant's argument is that the Arbitrator misconstrued the evidence and misapprehended the law. The Applicant is clearly dissatisfied with the findings of fact made by the Arbitrator and claims that the Award reached by the Arbitrator is not supported on the evidence presented in Arbitral proceedings. These are arguments which would typically be made by a party in support of an appeal. The Applicant is in effect asking this court to re-examine the evidence placed before the Arbitrator and arrive at a different conclusion. A court sitting on appeal can do this but Section 35 does not authorize the High Court to sit on appeal over an Arbitral Award. The High Court under Section 35 is only concerned with the propriety of the Arbitral process and must restrict itself to the specific grounds for setting aside an Arbitral Award as specified in Section 35. To do otherwise could mean this court would be exceeding its mandate under the Arbitration Act."

Similarly, in the case ofMahican Investments Ltd & others v Giovanni Gaida & 2 Others [2005] eKLR, Hon Justice Ransley (as he then was) observed that: "A court will not interfere with the decision of an Arbitration even if it is apparently a misinterpretation of a contract as this is the role of the Arbitrator. To interfere would place the Court in the position of a Court of Appeal which the whole intent of the Act is to avoid. The purpose of the Act is to bring finality to the disputes between the parties."

Likewise, in the case of Kenyatta International Convention Centre (KICC) v Greenstar Systems Ltd [2018] eKLR, the court reiterated the principle that an arbitrator's finding of fact cannot be challenged under Section 35, as follows: "The arbitrators are the masters of the facts. On an appeal the court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. Parties who submit their disputes to arbitration bind themselves to agreement to honour the arbitrators' award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrators' findings of fact."

Finally, in the case of Zakhem International Construction Limited v Quality Inspectors Limited [2019] eKLR, the court noted that: "Whilst Zakhem has criticized the Arbitral Award as being contrary to Public Policy, all it has done is to assail the Arbitrator's appreciation of the evidence tendered. What Zakhem is inviting this Court to do is to re-assess or re-evaluate the evidence placed before the Arbitrator with a view to reaching a different outcome. That, typically, is the task that an appellant court is required to undertake in an appeal on issues of fact. It would be inimical to the concept of finality of arbitration if the courts were to routinely interfere with the findings of fact of an arbitral tribunal. On this, the decision in Christ for all Nations vs. Apollo Insurance Co. Ltd (supra) has this useful holding:

'In my judgment this is a perfect case of a suitor who strongly believed the arbitrator was wrong in law and sought to overturn the award by invoking the most elastic of the grounds for doing so. He must be told clearly that an error of fact of law or mixed fact and law or of construction of a statute or contract on the part of an arbitrator cannot by any stretch of legal imagination be said to be inconsistent with the Public Policy of Kenya. On the contrary, the Public Policy of Kenya leans towards finality of arbitral awards and parties to arbitration must learn to accept awards, warts and all, subject only to the right of challenge within the narrow confines of sections 35 of the Arbitration Act.'"

12. Enforcement of an Award

12.1 New York Convention

Kenya ratified theConvention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") in 1989. The New York Convention is made a part of domestic law in Kenya by virtue of Article 2(6) of the Constitution, which states that any treaty or convention ratified by Kenya shall form part of the laws of Kenya. As per Article I(3) of the Convention, the Convention is applicable to the recognition and enforcement of arbitral awards only if they originate from the territory of another contracting state.

12.2 Enforcement Procedure

Section 36 of the Arbitration Act substantively deals with recognition and enforcement of awards. A domestic arbitral award shall be recognised as binding and be enforced upon a written application being made to the High Court. As for an international arbitration award, it shall be recognised as binding and enforced in accordance with the provisions of the New York Convention (or any other convention to which Kenya is a signatory and relating to arbitral awards). In order to apply for enforcement of an arbitral award, the party seeking such enforcement must provide the High Court with:

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

The courts in Kenya appear to apply the provisions of Article V(1)(e) of the New York Convention when faced with an application to enforce an international award that was been set aside in the seat of arbitration. This provision permits the court to exercise discretion on the matter.

Article V(1)(e) of the New York Convention provides that an award *may* be denied recognition and enforcement by the enforcement court if a competent court in the arbitral seat or primary jurisdiction annuls the award. Under Article V(1)(e), enforcement courts have the discretion to:

- treat the annulled award as an invalid underlying judgment that ceases to exist, hence there is nothing to enforce;
- accord some deference to the annulment judgment but reserve the right to enforce the award if deemed justified according to the domestic laws of the enforcement jurisdiction; or
- disregard the annulment judgment and make an independent decision on whether to enforce the annulled award.

The Kenyan court in the case of Glencore Grain Ltd v TS.S.S Grain Millers Ltd [2012] eKLR discussed Article 1(V)(e) as follows: "I am further fortified in my persuasion by the fact that the Arbitration (Amendment) Act Number 11, 2009, which commenced on 15th April, 2010, now provides the new approach to enforcement of international awards in Kenya... This Article, [v] may be used to stay enforcement of the award, and avoid a ruling on the confusing issue whether the award is 'binding'. The court's authority to delay enforcement pursuant to Article VI is discretionary... it is likely that the court before which the enforcement is sought will adjourn its decision on enforcement if it is prima facie convinced that the request for setting aside or suspension of the award in the country of origin is not made on dilatory tactics, but is based on reasonable grounds... This Article clearly now avails to both an enforcer and a resisting party under the 2010 Arbitration Amendment Act to seek stay of enforcement. This is a previously non-existent procedure."

Section 4 of the Privileges and Immunities Act (Chapter 179 of the Laws of Kenya) brings into force certain provisions of the Vienna Convention on Diplomatic Relations. Under those provisions, immunities and privileges are accorded to diplomatic missions or consular posts and to persons connected with such missions or posts.

In addition, the doctrine of sovereign and diplomatic immunity is also recognised in Kenya as a principle of international law. This doctrine provides that as a general principle, states (and state entities) are immune from legal suits in other states. The effect is that the state enjoys immunity in respect of itself and its property from the jurisdiction of the courts of another state.

However, the court in Ministry of Defence of the Government of the United Kingdom v John Ndegwa [1983] eKLR held that this immunity is not absolute but restrictive. The court held that the "test is whether the foreign or sovereign government is acting in a governmental capacity under which it can claim immunity, or a private capacity, under which an action may be brought against it."

It is therefore the nature of the dispute that is critical in determining whether Kenyan courts will take cognisance of a dispute where immunity is pleaded (see Unicom Limited v Ghana High Commission [2016] eKLR).

The court in Tononoka Steels Limited v Eastern and Southern Africa Trade Development Bank [1999] eKLR held that where a state engages in purely private commercial activities, it would be prejudicial and contrary to public policy to uphold sovereign immunity.

12.3 Approach of the Courts

Courts in Kenya generally take cognisance of both domestic and foreign arbitration awards, and enforce them upon an application being made in accordance with Section 36 of the Arbitration Act. However, Section 37 of the Act lists the following grounds on which a court can decline to recognise or enforce an arbitral award.

- If, at the request of the party against whom it is invoked, that party furnishes to the High Court proof that:
  - (a) a party to the arbitration agreement was under some incapacity;
  - (b) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the state where the arbitral award was made;
  - (c) the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;
  - (d) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or it contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognised and enforced;
  - (e) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place;
  - (f) the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made; or
  - (g) the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence.
- If the High Court finds that:
  - (a) the subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or
  - (b) the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.

In the case of Tanzania National Roads Agency v Kundan Singh Construction Limited [2013] eKLR, the High Court said: "In deciding whether to recognize and enforce the arbitral Award, the court will be guided by the provisions of section 37 of the Arbitration Act..."

The importance of an award being aligned with Kenyan public policy concerns is highlighted in Section 35(3)(b) of the Arbitration Act, which states that an arbitral award may be set aside if the High Court finds that:

- the subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or
- the award is in conflict with the public policy of Kenya.

The definition of public policy has been expounded upon severally. The court in Rwama Farmers Co-operative Society Limited v Thika Coffee Mills Limited [2012] eKLR quoted the case of Glencore Grain Limited v TSS Grain Millers Limited [2002] 1 KLR 606, where it was held that: "A contract or arbitral award will be against the Public Policy of Kenya in my view if it is immoral or illegal or that it would violate in clearly unacceptable manner basic legal and/or moral principles or values in the Kenyan society. It has been held that the word illegal here would hold a wider meaning than just 'against the law'. It would include contracts or acts that are void. 'Against Public Policy' would also include contracts or contractual acts or awards which would offend conceptions of our justice in such a manner that enforcement thereof would stand to be offensive."

What amounts to a "public policy consideration" was also expounded upon in Kenyatta International Convention Centre (KICC) v Greenstar Systems Limited [2018] eKLR, where the court held that "public policy is an indeterminate and fluid principle which fluctuates with time and circumstances. Nevertheless, there is a beaten path in terms of precedents which show the key factors to take into consideration in determining whether or not an award is in conflict with public policy. In Christ for all Nations v Apollo Insurance Co. Ltd. (2002) EA 366, for instance, Ringera, J (as he then was) had occasion to consider the concept of public policy from the prism of Section 35 (2)(b)(ii) and had the following to say: 'An award could be set aside under page 35(2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with the Constitution or to other laws of Kenya, whether written or unwritten or (b) inimical to the national interest of Kenya or (c) contrary to justice or morality.'"

13. Miscellaneous

13.1 Class-Action or Group Arbitration

The Arbitration Act does not provide for class-action arbitration, presumably because once a party has submitted to an arbitration clause, they are bound by it and hence a waiver to a right to group arbitration.

13.2 Ethical Codes

There is no specific law that governs the ethical conduct or professional standards of arbitrators and counsels conducting arbitrations in Kenya. However, where the arbitrator and/or counsels are Kenyan-qualified advocates, or where the parties have adopted Kenyan law as the governing law or seat of the arbitration, they shall be bound by the stipulation of the Advocates Act, Advocate Practice Rules, 1966, and the Code of Standards of Professional Practice and Ethical Conduct (Gazette Notice 5212 of 26 May 2017). These laws and rules provide that:

- no advocate may couch any witness in the evidence to be given before an arbitrator;
- no advocate shall charge a fee less than the remuneration prescribed;
- the advocate shall provide legal service competently, diligently and ethically;
- the advocate shall not convert client's property;
- the advocate shall not represent both parties;
- the advocate shall be bound by the rule of confidentiality;
- the advocate shall represent the client honourably without illegality and subversion of the law;
- the advocate shall, in a timely fashion, honour any professional undertaking;
- the advocate shall use social media in a manner that upholds the standing and dignity of the legal profession;
- the advocate shall ensure that outside interest does not jeopardise the competence, integrity and independence of the legal profession; and
- the advocate must maintain the higher standard of integrity and honesty with its clients, colleagues and general public.

13.3 Third-Party Funding

There are no express rules or restrictions on third-party funders. However, advocates are expressly forbidden from entering into a champertous agreement. Section 46 of the Advocates Act prohibits retention agreements whose payment is contingent on the success of the suit. Advocates are further prohibited from purchasing interests or part of the interest in a client's suit (Section 45 of the Advocates Act).

13.4 Consolidation

Although the Arbitration Act is silent on the issue of consolidation, parties may by consent agree on consolidation of arbitral proceedings. Where parties have expressly provided that consolidation would be subject to parties' consent, the court, in exercising its supervisory power, cannot intervene and order consolidation where parties have not expressly consented to this (see Hanif Sheikh v Alliance Nominees Limited & 17 others [2014] eKLR). Courts in Kenya have generally been reluctant to grant consolidation of arbitral proceedings applications in instances where the arbitral agreement is silent on consolidation (seeWorld Vision International v Synthesis Limited & another [2019] eKLR).

13.5 Third Parties

See **5.7 Third Parties**. Courts in Kenya can intervene and grant interim measures against foreign third parties, as provided under Sections 7 and 10 of the Arbitration Act.

Oraro & Company Advocates is a full-service, market-leading African law firm located in Nairobi that was established in 1977. Working closely with the larger disputes practice, the firm's arbitration practice is comprised of five partners and a team of associates, who have represented clients in local and international arbitration tribunals, including the International Centre for Settlement of Investment Disputes (ICSID), the London Court of International Arbitration (LCIA) and the International Chamber of Commerce (ICC) in energy, financial services and construction sectors. Notably, the team recently represented a Canadian-based energy company as co-counsel in the ICSID proceedings brought against the government of Kenya in respect of the unlawful revocation of the company's geothermal licence worth USD312.7 million.

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Paul Kamara is a legal assistant at the firm who works largely in the Dispute Resolution Department. He has been involved in complex litigation and arbitration disputes, particularly in the commercial and construction sectors. Kamara is an avid researcher, with an increasing wealth of knowledge in arbitration, insolvency, construction, energy and data protection. He was part of the task force that drafted the Privacy and Data Protection Policy and Bill in Kenya. He was also involved in preparing a Desk Study for UNEP on wood fuel-biomass production and utilisation in Africa.

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