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LEGAL & KENYAN

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Beyond boundaries: Issue six

Greetings!

We are very pleased to present to you, our readers, the sixth issue of our firm's Newsletter, Legal & Kenyan. In cricket terms, one would say that we have just gleefully smashed the ball straight over the boundary for "a six".

As usual, we endeavour to share with you the latest developments in the Kenyan legal field, which we trust you find both interesting to read and useful for your business needs. Through this publication, we strive to go beyond the boundaries of normal client-care, to ensure that our clients are always up to speed and in the know.

Joining the ranks of external contributors in this issue is JMiles&Co. a legal services entity that provides specialised services in the fields of international arbitration and legal consulting.

In this issue, our authors deliver an exciting array of reading delights:-

Juliet C. Mazera and Gibran Darr discuss the need for regulation in the Islamic banking sector in Kenya while Walter Amoko delivers a piece on the use (or misuse) of riders by Parliament when passing legislation. Jacob Ochieng highlights the key points to look out for in an M&A deal from a buyer's perspective while Georgina Ogalo-Omondi and Sandra Kavagi examine the meaning and effect of collective bargaining agreements for both workers and employers. Nelly Gitau and Angela Ogang provide an analysis of the new Movable Property Security Rights Act, 2017 while Walter Amoko and Beryl Rachier discuss our latest anti-dumping laws. Georgina Ogalo-Omondi and Angela Ogang discuss the "A to Z" for foreigners seeking to work in Kenya while Pamella Ager gives an overview of the recently operationalised Water Act, 2016. Last, but certainly not least, Laura Lusiji and Rose Makena of JMiles&Co. take us through the art of drafting effective arbitration agreements.

Enjoy the read!

Sincerely,

John Mbaluto,
Editor

Senior Partner's Note

So far, 2017 has been a dynamic year and we look forward to the last quarter of the year. In the spirit of that famous African proverb that goes, "After we fry the fat we see what is left", we feel it is time to take stock of the latest Kenyan legal developments and share our lawyers' perspectives on the same. As always, we share these legal insights as our commitment to going above regular legal advice and representation to give our clients proactive knowledge to help them tailor their own business strategies and respond to these changes faster and better. Enjoy the read and see you in the next edition!

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Recent accolades

"Oraro & Company Advocates has an outstanding dispute resolution practice."

Legal 500, 2017.


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ISLAMIC BANKING:

THE REGULATORY IMPERATIVE

In recent years, the rapid growth of Islamic banking products, not only in Kenya but globally, has been significant enough that the International Monetary Fund (**IMF**) commissioned a working paper in 2014 on the need for legal and prudential regulation of the sector. The working paper relied on a survey of a wide spread of areas including the Middle East, Indonesia, the United Kingdom, North Africa and Sub-Saharan Africa. More recently, in January 2017 the IMF published a Multi-Country Report (**the Report**) in which it recognised that the legal framework in Kenya has not adapted to the specificities of Islamic banking and that there are remaining gaps in the *shari'ah* governance framework in Kenya. While the Report made reference to the 2014 working paper and noted that a significant number of banks and financial institutions were offering Islamic banking products, with Kenyan banks being the key players in the market, there was a growing need for regulation of the sector to ensure that Islamic banking was being practised within the accepted parameters of *shari'ah* compliance.

Regulatory Challenges

The concept of Islamic banking is rooted in certain elements that are prohibited since they are innately haram (or forbidden) in Islam and for this reason the said elements must be excluded from any contract between contracting parties, as such a contract would be rendered non *shari'ah* compliant if it incorporates these elements. The said elements include *riba* (interest), *gharar* (uncertainty), *maysir* (gambling) and *qimar* (speculation). From a financing perspective, a bank offering Islamic banking products to its customers would thus need to ensure that the said elements do not form part of any financing transaction for a contract to be considered *shari'ah* compliant.

In essence, the unique nature of *shari'ah* compliance from a financial perspective immediately poses challenges that current regulatory legislation such as the Banking Act (Cap. 488) and the Central Bank of Kenya Act (Cap. 491) (**the CBK Act**) do not sufficiently deal with. The Kenya Deposit Insurance Corporation Act, 2012 which aims to protect depositors of troubled banks, is equally not well suited to cater for depositors of banks that provide Islamic banking products, as well as conventional banking as deposit premiums from account holders of purely Islamic financial products are not segregated from premiums of regular deposit holders. The premiums from Islamic banking products would need to be aligned to the *takaful* insurance model which is an Islamic alternative to commercial insurance and also emphasises avoidance of *riba*, *maysir* and *qimar*.

The need for a regulatory framework has become even more pressing, based on the fact that international banks offering Islamic products are keen on breaking into the Kenyan financial market in order to exploit the full potential of Islamic banking, the most recent entry being that of Dubai Islamic Bank, which is one of the largest banks in the United Arab Emirates. It has recently been granted a licence to operate in Kenya.

The Malaysian Model

The regulation of the *shari'ah* model in the Kenyan context should draw significant inspiration from the Malaysian model of regulation which started with a primer for the Islamic banking business with the enactment of the Islamic Banking Act, 1983 and later made strides toward incorporation of regulation of *shari'ah* based financial activity by amendments to the Central Bank of Malaysia Act, 1958 in the year 2003 to incorporate provisions for regulation of the Islamic banking industry by amongst other things, establishing a *Shari'ah* Advisory Council (**SAC**) as the authority for ascertainment of Islamic laws that would be applicable to *shari'ah* financial products. On 1st July 2013 the Islamic Financial Services Act (**IFSA**) was enacted and it repealed the IBA to give way for a consolidated and contract based framework for Islamic finance.

The SAC in Malaysia initially played the role of a referee for court or arbitration proceedings and while the rulings of the SAC were binding on arbitration proceedings, they were only of persuasive value to the courts. The repeal and replacement of the Central Bank of Malaysia Act , 1958 with the Central Bank of Malaysia Act , 2009 changed this position and made it mandatory for courts to take into consideration the rulings of the SAC.

The challenges that a SAC would face in the Kenyan context would be in having the commercial division of the High Court consider rulings by the SAC which would be decided on Islamic finance principles as opposed to other sources of law such as English contract law, and common law as it does now. However, the obstacle is surmountable on the basis that Malaysia, like Kenya, has a system where only matters related to Muslim marriage and divorce matters are adjudicated upon by Kadhis, while all commercial matters are adjudicated upon by secular courts. In so far as an interpretation of Islamic law is not at odds with the English contract law position, the commercial courts in Kenya would be able to apply the principles espoused by a SAC to an adjudication before it.

The need for a SAC is underpinned by fact that *shari'ah* law has its primary sources being the *Quran* (the Holy Scripture) and *Sunnah* (the way of the prophet Mohamed). The model is much like English law which has its primary foundations in statute and subsidiary legislation, the application of which, over time, has developed common law as a secondary source. In Islamic law, the branch of religious knowledge known as *fiqh* (understanding) informs the theoretical basis and jurisprudence of *shari'ah* law which in turn is developed by *itjihad* (interpretation) of the primary sources. The different schools of *fiqh* inform the interpretation of the principles of Islamic law and the application of these principles through a SAC would be vital in codification and regulation of the sector as it will result in a blue print of the dos and don'ts for the drafting and structuring of Islamic finance contracts by banks. With a SAC in place, law firms would also be in a better position to advise on accepted practice and viability of the structuring of Islamic finance contracts on accepted industry practice within SAC and regulator acceptable guidelines.

The Interpretation Challenge

In Islamic banking, one of the core contracting principles is that a sale is allowed as it is a real transaction and provides for a fair distribution of risk and results in real value while *riba* is forbidden. The application of the principle can be seen in the most basic home financing agreement, also known as the diminishing *musharkah* agreement in Kenya. This involves a back to back buying and selling where the customer of the bank will first sell the asset to the bank at a spot price and the bank will immediately sell the asset back to the customer at a higher price, on a deferred payment basis. The model sits squarely within the principles of Islamic banking as the parties are contracting on an ascertainable asset which will result in a profit for the bank on the deferred payment basis and the transaction will result in ascertainable value for the customer thereby knocking out the forbidden elements of *riba*, *gharar* and *qimar*. The bank will usually protect its interest by registering a charge over the property.

> *The need for a regulatory framework has become even more pressing, based on the fact that international banks offering Islamic products are keen on breaking into the Kenyan financial market in order to exploit the full potential of shari'ah banking.*

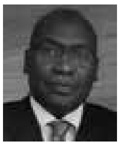
A separate form of the diminishing *musharakah* contract exists known as the *bay al' inah,* which is a form of personal financing where the customer has nothing to sell but is in need of obtaining cash in the form of personal financing, In the *bay al' inah* contract the bank, as the original owner, will sell the asset to the customer on a deferred payment basis and the customer, being the new owner, will immediately sell the asset back to the bank, at a lower spot payment price in order to obtain personal financing. In this case there is no charge over the asset as it is a mode of personal financing and the same will usually be secured by a pledge or personal guarantee. This form of Islamic finance is from the *Shafi fiqh* and is validated by some scholars as it conforms with the essential elements of a sale i.e. the subject matter is ascertainable and the transaction involves profit on a deferred payment basis. On the other hand, some schools of thought and some *Shafi* scholars have disapproved of it on the basis that it involves two sales in one and is a legal device intended to circumvent the prohibition of *riba*.

Conclusion

The Report recognises that the Central Bank of Kenya has accommodated Islamic banks by exempting them from provisions of the CBK Act that prohibit trading or investment in consideration of their business, but does not provide adequate guidance on the Islamic concepts applicable in Kenya.

The introduction of regulation and the establishment of a SAC will ensure that there is a uniform application of the principles and concepts of Islamic banking and with authoritative determinations from a panel of experts, plus, a sure footed regulatory and governance structure and law firms would also be able to authoritatively advise clients on the best practice on structuring finance agreements, without running the regulatory risk of being adjudged as having breached essential *shari'ah* compliant elements. This form of regulation would also ensure bank customers that the Islamic finance products that they are subscribing to, fit within established guidelines and they do not run the risk of being subjected to contracts that have been innovatively disguised as *shari'ah* compliant.

In conclusion, the regulation of the Islamic banking sector would not only prevent it from possible and perceived breaches but would ensure its robust development in the Kenyan market.



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A 'DEFT' TOUCH:
THE KENYAN PARLIAMENT'S RIDERS IN LEGISLATION

Despite the very high premium that is placed on the right to be heard, sometimes it is necessary for the exercise of a right to be held back, however temporarily. It is of course a step that causes, or should trigger, anxiety for it goes against the grain of one of the rights we deem most fundamental - the right not to be condemned unheard, and in principle, one always ought to be granted a full hearing.

Interim Relief

Conscious of this, the courts have developed a variety of tests depending on the context, encapsulated in the phrase "balance of equities" for determining whether or not to grant temporary orders. However expressed - *prima facie* case with a probability of success, irreparable loss, and if in doubt balance of convenience; arguable appeal which will be rendered nugatory; statutes are presumed to be constitutional but there is no public interest in the enforcement of unconstitutional ones - the basic underlying spur is similar – do what is likely to cause the least injustice. Regardless of the interim relief sought, inquiry is always directed at making an educated guess whether the injustice caused to the party seeking the relief if such relief was denied, would be greater than that which would be caused to the counter-party should the relief be granted.

Multiple amendments to the applicable rules as well as occasional doctrinal adjustments to the tests to be applied, reflect an anxiety that we are yet to get the balance right, as abuse of such temporary orders abound. For example, Order 40 of the Civil Procedure Rules, 2010 under which temporary injunctions in civil suits are granted, is almost always revised whenever those rules are amended.

All this presumes that some kind of hearing (even if *ex parte*) will take place on whether or not interim relief should be granted, but that is not always the case. Sometimes, by instituting an action, the whole process under challenge is frozen. That used to be case with respect to Tax appeals as well as Constitutional proceedings under previous rules. Another well known instance is Public Procurement - the contract cannot be signed until the period for lodging the request for review has lapsed and if a review has been filed, until that review is heard and determined. Loose professional lexicon refer to such statutory provisions as "automatic stays." To ameliorate their potential injustice, there are usually strict timelines for the conclusion of the proceedings upon which they are predicated.

The Environmental Management and Co-ordination Act, 1995

Another example of an automatic stay but without any corresponding strict timelines is found in section 129(4) of the Environmental Management and Co-ordination Act, 1995 (**EMCA**) which freezes (*status quo to be maintained*) any action, challenged matter or activity until the appeal before the National Environmental Tribunal (**the Tribunal**) is determined. This rule implements an important tenet of environmental law - the precautionary principle under which prudential considerations dictate that the benefit of doubt is given to environmental conservation or protection. However the rule has turned to operate as an albatross on parties whose activities form the subject of challenge. Calls for reform, which admittedly have neither been concerted nor sustained, have generally fallen on deaf ears.

Yet, after years of stony silence, earlier this year, Parliament awoke from its slumber in a strikingly odd manner. By section 29 of the Prevention of Torture Act, 2017, section 129(4) of EMCA was repealed and substituted with the following provisions:

4) Upon any appeal to the Tribunal under this section, the Tribunal may if satisfied upon application by any party, issue orders maintaining the status quo of any matter or activity which is the subject of the appeal until the appeal is determined; upon application by any party, review any orders made under paragraph(a).

(5) Any status quo automatically maintained by virtue of the filing of any appeal prior to the commencement of subsection(4) shall lapse upon commencement of this section unless the Tribunal, upon application by a party to the appeal, issues fresh orders maintaining the status quo in accordance with subsection (4)(a).

Passing of the Prevention of Torture Bill, 2016

When originally published back in November 2016, as the Prevention of Torture Bill, 2016 (**the Bill**) there was no indication that the Bill was intended to amend EMCA in any way. The object of the Bill, as suggested by its title, was to fulfil Kenya's obligations under one of the great Human Rights instruments in International law – the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, (commonly known as the United Nations Convention against Torture).

The Bill gathered momentum early this year, working its way through the legislative process within four (4) months having been adopted as a Government Bill after seven (7) years of slumber as a Private Member's Bill. Section 29A was proposed on the floor of Parliament as an amendment on 6th April, 2017 when the National Assembly was sitting as a committee of the whole House. During that intense debate in which three members were actively contributing (mostly by dropping or confirming proposed amendments) and following a recess for a short 'caucus', the Leader of the Majority rose and addressed the August House thus:

"Temporary Deputy Chairman, I beg to move (after introducing the amendment)….Basically, it is the current section of the Act to allow for the use of automatic conservatory orders of stay for any matter appealed to the Tribunal with regard to environmental issues. This has the effect of delaying the implementation of either individual or Government projects. I beg to move and request the Chair of the Departmental Committee to second."

The Chairman who had previously protested against introduction of non-torture related matters, faithfully signified his assent – *"I am happy to second that amendment. It helps us to improve the other law. Thank you."* The Hansard then records that the proposed amendment was then read for the first time and passed. After a minute or two spent identifying to a member precisely what the amendment was (there is no record what the member had been up to, when it had initially been read), it was read for the second time and passed. That is the sum total of the debate on the amendment.

Later that evening, the Bill, as a report of the committee of the whole House, was tabled in Parliament. The Leader of the Majority moved for the third reading with the ringing endorsement from a member who gratefully informed the House that:

"I thank the Leader of the Majority Party for his leadership on this Bill which was languishing as a Private Member's Bill. I know that as a first-time Member of Parliament, moving a Private Member's Bill is very difficult. I thank the Departmental Committee on Justice and Legal Affairs for considering the Bill, its merits and helping us to shape it. I would also like to thank our friends outside Parliament for their thinking and resourcefulness on how we can best make a Bill that works for Kenya and meets our international obligations. I am happy to support and second."

It was amidst such gushing felicitations that the Bill was passed, readily assented to by the President within a week and hailed a milestone in entrenching the prohibitions against torture, setting mechanisms for accountability by state organs for torture, providing specific harsh penal sanctions as well as means for redress for victims, protection for officers who defy instructions to get into torture, enhanced witness protection, amongst other platitudes.

Problematic Riders

Riders, which essentially are introduction of amendments unconnected with the bill in issue - are the bane of the legislative process. Almost always sneaked in at the last minute without prior notice thus allowing little room for discussion or debate, they rarely promote public interest. The motivations for including riders vary but generally it is because their sponsors know full well that they would not otherwise pass. Riders present a real risk for manipulation by powerful but unpopular or otherwise disreputable interests. At their worst, most riders consist of poison-pill provisions which kill the very legislation ostensibly being passed or all for pork spending connected with such legislation and to benefit the sponsor of the amendment.

Riders, which essentially are introduction of amendments unconnected with the bill in issue - are the bane of the legislative process. Almost always sneaked in at the last minute without prior notice thus allowing little room for discussion or debate, they rarely promote public interest.

The American Congress is infamous for its pork-barrel legislation which despite being viciously lampooned and condemned, is still rampant. The American House of Representatives has tried, without much success, to cabin the rider-problem by a relevance rule. It has proved ineffective because it is quite easy to work around, as its application can be excepted and the American Senate does not have a similar rule. Also amendments coming from the Senate are not covered. A more effective solution, the line-item veto, which would have allowed the President to specifically target such riders without shooting down the entire legislation, did not pass constitutional muster before the American Supreme Court, on separation of powers grounds as it amounted to executive amendment of legislation.

Historians teach us that riders are not of recent vintage. The 17th and 18th century British House of Commons in order to immunise provisions from interference by the Lords, 'tacked' irrelevant amendments to money bills, as the latter could not amend such bills. The English have now tried to restrict the practice by requiring amendments to be relevant to the bill in question as determined by its full title. This is also not quite as effective for those long titles invariably include the phrase, and for connected purpose, which opens a window for misconduct.

Comparative experiences show that once allowed to creep in, getting rid of riders will be a problem. Whatever position one takes of automatic stays, the issue required that time be taken for consideration of the amendment and debate. A full and robust debate might have resulted in more effective alternatives to the delay on projects under challenge before the Tribunal.

The changes wrought to section 129(4) of EMCA have the effect of introducing temporary injunctions to proceedings before the Tribunal. Yet the experience of the courts is hardly a testament to the success of contested hearings, on whether or not interim relief should be granted as a measure of eliminating delays. Both the hearing of the application as well the trial can be quite protracted.

The Tribunal's main problem was and remains the interminable delays in the conclusion of appeals, not the automatic stay. The solution to this is already available and has worked successfully in other contexts - time limits for the determination of appeals. It is mark of success of such a strategy that the courts themselves are increasingly dangling the prospect of an early and expedited hearing as a means of dispensing with protracted determinations of applications for interlocutory relief.

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OF PURCHASES & PROTECTION:

SPOTLIGHT ON M&A TRANSACTIONS

With the Kenyan banking sector being brought into the spotlight for a projected increase in Mergers and Acquisitions (**M&A**), it is important for businesspersons to have a basic understanding of this type of transaction. Buyer protection in any M&A is at the forefront and is also the reason that any Share Purchase Agreement (**SPA**) in a majority of cross-border transactions is composed primarily of the seller's representations and warranties. The need for this protection is particularly enhanced when there is more than one potential buyer involved in the transaction from the outset, as multiple potential buyers give the seller a chance to sway the representations and warranties in the SPA to its favour, leaving the buyers vulnerable in the event that the target company does not perform as projected.

The scope and detail of these representations and warranties are often heavily negotiated and tailored to reflect not only the essence of the target company and its business, financial status and operations, but also the relative negotiating strength of the buyer and the seller. Representations and warranties also help in providing information to the buyer, thereby allowing for a fair allocation of risk between the contracting parties with respect to the matters covered by the representations and warranties.

Representations and warranties, for purposes of simplicity, may be defined as "promises" - they are the contractual tool that buyers and sellers use in an M&A transaction to allocate the risk of any imperfections in the deal. On the other hand, indemnities serve as "protection" to the buyer for issues related to the target company that are discovered during the due diligence. What are some of the important representations, warranties and indemnities that a buyer should look out for within an SPA?

Balance Sheet Warranties

The balance sheet warranty in an SPA is arguably the most important warranty for a buyer, as it paints a complete picture (to the extent possible) of the financial standing of the target company. It normally entails a warranty over all, or at least the important, balance sheet data. However, it is common practice to extend the warranty to the income and loss statements of the target company, as well as to the notes in the financial statements.

A diligent buyer to a transaction should ensure that he is not only receiving a subjective (soft) warranty but also an objective (hard) warranty. The difference is that the seller´s objective warranty confirms that not only has he complied with applicable law, but also that the balance sheet is objectively true, and thus gives a complete and fair view of the assets, financials and earning position of the target company. Furthermore, objective warranties are governed by the law of strict liability, which means that a buyer can bring an action against the seller regardless of whether or not the defect in the target company that accrued and was linked to the balance sheet was the direct fault of the seller. A subjective warranty on the other hand, confirms that the provisions of the balance sheet warranty are in compliance with applicable accounting principles.

It should also always be borne in mind that balance sheet warranties do not extend to the period between signing and closing of the transaction, which means there is often a period (usually a couple of months) where if the situation of the target company changes, the buyer will have little or no protection. In such a situation a diligent buyer should request a "closing balance sheet" which covers this period. Monitoring the performance of the target company during this period, and comparing the returns on the closing balance sheet to the last audited balance sheet, will allow the buyer to ascertain with confidence that the target company is performing as was projected. In the event that the target company does not perform to the standards expected, the closing balance sheet places the buyer in a favourable position to be able to negotiate the purchase price downwards.

Materiality and Knowledge Qualifiers

In negotiating the SPA, the seller and the seller's lawyers will have an incentive to keep the representations and warranties as narrowly drawn as possible. The buyer, on the other hand, would want full coverage for any possible eventuality and so would ideally want the representations and warranties to be as broad as possible. One way through which a seller tries to limit liability is to qualify the representations and warranties to its "knowledge" or "materiality".

Materiality qualifiers entail the use of phrases such as, "*could reasonably be expected to have a material adverse effect.*" Phrases such as these immediately protect the seller for any eventuality that could not reasonably have been foreseen by a third party, or eventualities which to the buyer would be a major development but to the seller are not "material" enough as to warrant a reduction in the purchase price or indemnification from the seller.

Buyer protection in any M&A is at the forefront and is also the reason that any SPA in a majority of cross-border transactions is composed primarily of the seller's representations and warranties.

Knowledge qualifiers are phrases such as, "*to the best of the seller's knowledge.*" Once again, as in the case of materiality qualifiers, these protect the seller from any legal issues that may arise which could not reasonably have been foreseen.

It is therefore important for a buyer to be prudent when reviewing the SPA and to ensure that all connotations of materiality or knowledge are taken out from the seller's representations and warranties, so as to achieve complete coverage and protection even after the transaction is complete.

Tax Indemnities

Tax is notoriously known to be one of the most contentious areas of any M&A transaction, as tax liabilities are hard to predict with absolute certainty and often entail the buyer taking a substantial risk. The ideal scenario with respect to tax indemnities would be for the buyer to get full protection in the event of any pre-closing tax liability, arising subsequent to completion. In Kenya however, this is still an emerging area of the law that is yet to be formally legislated upon. Buyers and sellers will usually negotiate the period of time to which the liability for tax extends.

Tax indemnities have the reputation of being the part of any SPA where the buyer's and seller's lawyers will have to employ their most savvy contracting techniques, especially where it is a cross-border deal. Ordinarily, the process of sending repeated amended drafts of the SPA to and fro will be quite intense as both sets of lawyers attempt to secure the best deal for their respective client. The buyer's lawyer in this situation will usually have close contact with the target company's auditors so as to ensure that every problem flagged during the due diligence is covered by a specific indemnity to protect the buyer.

Liability Limitations

These are provisions within the SPA that limit the amount of exposure the target company, or the buyer, might face in the event that a claim is made against the target company.

Firstly, the buyer must look out for the "survival period" clause in the SPA that dictates the length of time within which a claim may be brought against the seller for any eventuality arising out of the status of the target company as at the time of sale. As a buyer, one should always try and maximize the amount of time to bring a claim, bearing in mind that core provisions (such as ownership of shares in the target company) warrant longer survival periods.

Another important liability limitation to look out for as a buyer would be the "caps", which are the maximum liability clauses. Indeed it is argued that these are often the single most important clauses in the entire SPA. The main aim as a buyer would be to try and secure as high a cap as possible to ensure maximum protection.

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STRENGTH IN NUMBERS:

THE WAY FORWARD IN COLLECTIVE BARGAINING AGREEMENTS

The upsurge in the number of strikes called in recent times by various cadres of workers, including teachers, doctors, nurses and lecturers, has witnessed a common thread – an outcry for the implementation of Collective Bargaining Agreements (**CBAs**) between the workers and their respective employers. This has caused a natural spike in the Kenyan public's interest in the concept of a CBA - what it is, what it entails and what its implementation means for both the workers and the employers.

What is a CBA?

The concept of collective bargaining is entrenched in the Constitution of Kenya under Article 41 which provides for rights relating to labour relations, including the right to fair labour practices, the right to reasonable working conditions, the right to join and participate in the activities of a trade union and the right to go on strike. Article 4(d) specifically provides for collective bargaining on terms that, *"every trade union, employers' organisation and employer has the right to engage in collective bargaining."*

Section 2 of the Labour Relations Act, 2007 (**the Act**) defines a "collective agreement" as a written agreement concerning any terms and conditions of employment made between a trade union and an employer, group of employers or organisation of employers. On the other hand, a "recognition agreement" is defined as an agreement in writing made between a trade union and an employer, group of employers or employers' organisation regulating the recognition of the trade union as the representative of the interests of unionisable employees, employed by the employer or by members of an employers' organisation.

Ordinarily, the employer first enters into a recognition agreement with the trade union so as to recognise the trade union for purposes of collective bargaining. The recognition agreement has to be in writing, in line with the provisions of section 54(3) of the Act and it sets out the terms upon which the employer recognises a trade union. Thereafter, the employer and the trade union may negotiate and enter into a CBA which sets out the terms and conditions of employment of the workers.

Simply put, the recognition agreement is the initiating document that provides the enabling environment for trade unions and employers to enter into a CBA. A CBA covers a number of issues affecting the employees concerned, including; hours of work, salaries payable percentages of salary increments, promotions of the employees and the process to be followed in case of termination of their services including redundancy.

Legal Effect of a CBA

Section 59(5) of the Act provides that a CBA becomes enforceable and shall be implemented upon registration by the Employment and Labour Relations Court (**ELRC**) and shall be effective from the date agreed upon by the parties. Registration of a CBA with the ELRC is therefore a mandatory requirement for it to be legally valid and enforceable. This is the main issue that plagued the 2016/2017 doctors' strike where doctors in the public sector were seeking a three hundred per cent (300%) pay increase pursuant to a CBA between the doctors' union and the Ministry of Health on behalf of the Kenyan Government. The Government's position was that the CBA had never been registered with the ELRC and was therefore unenforceable.

The Act further provides that once a CBA is signed, it becomes binding on the parties to the agreement, for the period of the agreement, while the terms of the CBA are incorporated into the employment contracts pursuant to the provisions of section 59(3) of the Act.

For example, during the recent doctors' and nurses' strikes, issues of promotions and allowances took centre stage and the case advanced in support by the unions was that these were matters covered under the respective CBAs and ought therefore to be implemented as part and parcel of the employment contracts.

Applicability and Relevance

Due to changing circumstances in the world of business and financial constraints in the current world economy, many private companies have been re-structuring their businesses and cutting-back on the number of employees that they maintain. As a result, there is a marked increase in the number of terminations of employment, on account of redundancy.

The challenge that these companies are facing in carrying out the redundancy processes is that whether out of omission or commission, they often times do not comply with the prescribed procedures set out in the CBA. Matters such as giving the concerned union at least one (1) month's notice before effecting a redundancy process and the fact that the company usually has to consider compensating the employees for the number of years served for example, are issues that companies do not always take into consideration.

The concerned employees end up suing the company, whether as individuals or through their unions and the ELRC has not hesitated to apply the provisions of the Act, by finding that the terms of the CBA are binding and ought to be implemented.

Court Decisions

There have been several key decisions handed down by the ELRC in connection with CBAs. In the case of *Kenya Plantation & Agriculture Workers Union v Coffee Research Foundation (2014) eKLR* the Union brought that claim on behalf of ten (10) Claimants who were the Respondent's security guards. Here, the ten (10) Claimants had worked for the Respondent for periods exceeding five (5) years, during which the Respondent had concluded a CBA with the Union. The CBA contained a thirteen per cent (13%) wage increment for each year and benefits including termination benefits under the retrenchment clause, which the Respondent chose to ignore when it terminated the Claimants' services. The ELRC found that the Respondent had discriminated against the Claimants and ordered implementation of the CBA with respect to pay in arrears underpayment of wages and pay of redundancy benefits.

In *Kenya Union of Commercial Food and Allied Workers v Kenya National Library Service (2016) eKLR*, the Respondent had concluded a CBA with the Claimant union but the Respondent had partly implemented the CBA by paying new salaries, allowances and part of the arrears. The balance which was left unpaid, it was argued by the Respondent, was an amount that had been factored into the Respondent's 2014/2015 budget submitted to the parent Ministry, but no funds had been availed to enable the Respondent implement the CBA. It was the Respondent's defence therefore that they had not refused to fully implement the CBA but that its hands were tied by the unavailability of funds from the National Treasury.

A CBA covers a number of issues affecting the employees concerned, including; hours of work, salaries payable, percentages of salary increments, promotions of the employees and the process to be followed in case of termination of their services including redundancy.

The ELRC was unimpressed and held that once a CBA has been registered, as was the case in the claim before it, section 59(5) of the Act had already taken effect and therefore the CBA was binding and enforceable and failure to implement any part of the CBA gave the wronged party a remedy of specific performance. The ELRC further held the view that since the Respondent was claiming inability to pay due to acts of a third party, nothing prevented it from joining any such party/parties to the case for them to bear responsibility of the owing dues. In the upshot of its decision, the ELRC entered Judgment for the Claimant against the Respondent for specific performance of the terms of the CBA.

Cases such as the above set strong precedents for the notion that there are no shortcuts to implementing a CBA.

Way Forward?

Public bodies and private entities alike ought to appreciate that collective bargaining is a constitutionally guaranteed right, duly entrenched under the Bill of Rights and that there can be no avoiding of CBAs. All parties ought to be keen at the negotiation table of CBAs, so that they fully understand what they are binding themselves to. If any terms seem complex or difficult to decipher, it is advisable to consider seeking legal advice on the same so that those provisions are well interpreted and understood by the parties prior to agreeing to the same.

Employers also need to consider the long term financial effects of CBAs before negotiation and execution, as it is no defence to blame a third party for non-compliance with a CBA. Unions also need to be aware of the necessary steps to be taken to ensure that a CBA is legally valid and enforceable, so as not to become unstuck at the crucial time of agitating for implementation of the CBA.


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SAFE AND SECURE:

THE NEW MOVABLE PROPERTY SECURITY RIGHTS ACT

The Movable Property Security Rights Act No. 13, 2017 (**the Act**) was assented to by President Uhuru Kenyatta on 10th March, 2017 and came into force on 16th May, 2017. Its general purpose is to facilitate the use of movable property as collateral for credit facilities, to establish the office of the Registrar of Security Rights and to provide for the registration of security rights in movable assets through the newly established Register of Security Rights.

Security Rights

The Act brings within its ambit the creation of security rights over movable property, which were previously dealt with under the Chattels Transfer Act (Cap. 28) (now repealed). However, the Act does not apply to the creation, lease or transfer of an interest in land. This means that charges over land will continue to be governed by the provisions of the Land Registration Act, 2012, and the Land Act, 2012. The Act defines "security right" as a property right in a movable asset that is created by an agreement to secure payment or other performance of an obligation, regardless of whether the parties have denominated it as a security right, and regardless of the type of asset, the status of the grantor or secured creditor or the nature of the secured obligation.

The Act lists the security rights that are capable of securing payment or performance of an obligation as a chattel mortgage, credit purchase transaction, credit sale agreement, financial lease, floating and fixed charge, pledge, trust indenture, trust receipt and any other transaction that secures payment or performance of an obligation. The most commonly used forms of securities over movable assets in Kenya are fixed charges, floating charges and chattel mortgages.

An interesting feature of the Act is that it makes it possible for a security right to secure one or more obligations of any type, including tangible and intangible assets, future assets, parts of assets and undivided rights in movable assets and generic categories of movable assets. The expression, "tangible assets" refers to all types of goods including motor vehicles, crops, machinery and livestock, while intangible assets include receivables, choses in action (right to sue), deposit accounts, electronic securities and intellectual property rights.

Security Agreements

The Act lays down certain requirements which will need to be complied with, to ensure the security agreements that create security rights are enforceable. In particular, security agreements must be in writing and signed by the grantor who must have rights in the asset to be encumbered or the power to encumber it. Security agreements must also identify the grantor, the secured creditor, describe the secured obligation and collateral in sufficient detail. A description that indicates that the collateral consists of all the grantor's movable assets, or of the grantor's movable assets within a generic category satisfies the standards imposed under the Act. Moreover, the Act states that a description will reasonably identify the collateral if it identifies the collateral by specific listing, category, type of collateral defined in the Act or quantity.

Registration of Notices

The Act provides that a security right in a movable asset is effective against third parties once a notice has been registered with the Registrar of Security Rights (**the Registrar**), whose mandate is to receive, store and make accessible to the public information on registered notices, with respect to security rights and rights of non-consensual creditors. The Act makes it possible for security rights created by the grantor under one or more security agreements with the same creditor to be registered under a single notice.

For the registration to be effective, the initial notice must be authorised by the grantor in writing, for instance through a written security agreement, but the Act also provides that a notice may be registered before the creation of a security right or the conclusion of a security agreement, as long as there is evidence of the authorisation in writing. Additionally, the initial notice must be in English and include the identifier and address of the grantor and secured creditor, a description of the collateral and the period of effectiveness of the registration, not exceeding ten (10) years. Once the notice is registered, the secured creditor must send the information contained in the notice to the grantor within ten (10) days of receipt.

The registration of the initial notice is effective from the date and time when the information contained therein is entered into the records of the Registry. The period of effectiveness may be extended for another ten (10) years by registering an amendment notice provided that the extension is sought within six (6) months prior to its expiry.

In contrast to the repealed Chattels Transfer Act, the Act does not provide that an affidavit is required for registration. It is however provided that further rules on the process of registering a notice will be enacted through regulations.

Rights and Obligations of Parties to Secured Transactions

The Act provides that the grantor and the secured creditor in possession of the collateral must exercise reasonable care to preserve the asset and its value. Additionally, the secured creditor has the right to inspect the collateral in the possession of the grantor or another person. On termination of a security right in the collateral, the secured creditor is required to register a cancellation notice.

Enforcement of Security Interests

Under the Act, if there is a default with respect to any obligation, the secured creditor is required to serve on the grantor a notification, in writing or in other form agreed between the parties, to pay the money owing or perform and observe the agreement, as the case may be. The notice should include the information in respect of the nature and extent of the default; the actual amount and the time by the end of which payment must be completed; the act the grantor must do or desist from doing, so as to rectify the default and the time by the end of which the default must have been rectified; the consequence and the right of the grantor in respect of certain remedies to apply to the court for relief against those remedies.

Upon non-compliance with the notice, the secured creditor may sue the grantor for any payment due and owing under the agreement; appoint a receiver of the movable asset; lease the movable asset; take possession of the movable asset; sell the movable asset; exercise any right as provided in the written agreement.

Any person whose rights are affected by the enforcement process is entitled to redeem the collateral, by repaying or performing the secured obligation in full . This is including reasonable costs of enforcement. This right of redemption may be exercised before the asset is sold or before the expiry of the security agreement.

Prior Security Rights

A prior security right is defined as a right that is covered by a security agreement entered into before the coming into force of the Act that is a security right within the meaning of the Act and to which the Act would have applied if it had been in force at the time when the security right was created.

The Act provides that a prior security right that was effective against third parties under prior law continues to be effective against third parties under the Act, despite the fact that its creation did not comply with the creation requirements of the new Act, until the earlier of the time it would have ceased to be effective under the prior law or the expiration of nine (9) months after the coming into force of the Act i.e. 16th February, 2018.

This means that prior security rights that have ceased to be effective under prior law, or that will soon become ineffective against third parties must be registered with the Registrar at the earliest opportunity and certainly before the lapse of the nine (9) months grace period. As noted above, one of the requirements under the Act is that the initial notice must be authorised by the grantor in writing. Fortunately, the Act provides that a written agreement between the grantor and the secured

An interesting feature of the Act is that it makes it possible for a security right to secure one or more obligations of any type, including tangible and intangible assets, future assets, parts of assets and undivided rights in movable assets and generic categories of movable assets.

creditor creating a prior security right and entered into before the coming into force of the Act is sufficient, to constitute authorisation by the grantor for purposes of registering a notice relating to a prior security right. However, the initial notice would also need to satisfy the other, "third party effectiveness" requirements outlined in the Act for it to be effective against third parties.

Third Party Effectiveness

In the event that the third party effectiveness requirements of the Act are satisfied before the third party effectiveness of a prior security right ceases, the prior security right will continue to be effective against third parties under the Act, from the time that it was made effective against third parties under the prior law. On the other hand, if the third party effectiveness requirements of the Act are satisfied after the third party effectiveness of a prior security right ceases, the prior security right will only be effective against third parties under the Act, from the date and time when the initial notice is entered into the records of the Registry.

In terms of priority, the Act provides that the time to be used to determine the priority of a prior security right is the time it became effective against third parties. The priority of a prior security right will be determined by the prior law if the security right and the rights of all competing claimants arose before the coming into force of the Act and the priority status of these rights has not changed since the coming into force of the Act.

Register of Security Rights

The Act establishes a centralised online Register of Security Rights (**the Register**), which recently went live. The Register is accessible through the eCitizen platform and allows for the registration of notices at no cost. It should however be noted that the Register is only a register of the security agreements and there is no way of uploading the agreements themselves or any other document. The Register simply captures the relevant information contained in the security agreements by way of notices and once a notice is registered, the system generates a form that should be kept as evidence of registration of the notice.

A search request may be made to the Registrar in the prescribed form. It is also possible to conduct searches online upon paying the search fee of five hundred shillings (KES 500). The search will be carried out based on the identifier of the grantor or the serial number of the collateral and a certificate will be issued by the Registrar as proof of its contents. The public records would reveal any other competing interest in the movable assets.

A search certificate issued by the Registrar is reliable as proof of its contents. Furthermore, the Act provides that the Registrar shall not, on his own motion, amend or delete information contained in the Registry records, and shall remove information in a registered notice only upon the expiry of the period of effectiveness of the registration of a notice. While the Register does not contain sufficient information at this point, the Registry has confirmed that banks and microfinance institutions have been sensitised and have begun registering notices. It is anticipated that the Register will be more reliable once the nine (9) months' grace period for registering prior security rights expires (on 16th February 2018) and as more and more notices are registered.

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NO DUMPING HERE:

KENYA'S LATEST ANTI-DUMPING LAWS

International trade is one area where there is a vast chasm between economists and ordinary mortals. Economists are on the whole, wedded to David Riccardo's comparative advantage theory and have no doubt that trade between two countries overall increases income on both sides - an idea that has proven to be a hard sale. A particular issue that draws the ire of economists is anti-dumping provisions in international trade law which as part of the notion of ensuring fair competition, seeks to curb the exportation of goods at below market rates, as a means of gaining market share.

Reflecting what may well be a consensus amongst his peers that such provisions are thinly disguised but approved forms of protectionism, Fred Smith quipped-*"If our antidumping laws applied to U.S. companies, every after-Christmas sale in the country would be banned."* This perspective is well explained in the textbook on international trade co-authored by Nobel laureate, Paul Krugman thus:

"Economists have never been very happy with the idea of singling dumping out as a prohibited practice. For one thing, price discrimination between markets may be a perfectly legitimate business strategy… Also, the legal definition of dumping deviates substantially from the economic definition. Since it is often difficult to prove that foreign firms charge higher prices to domestic than export customers, [countries] often try to calculate a supposed fair price based on estimates of foreign production costs. This "fair price" rule can interfere with normal business practices: A firm may well be willing to sell a product for a loss while it is lowering its costs through experience or breaking into a new market."

Still, anti-dumping has proven to be a politically resilient and necessary mechanism for ensuring trade liberalisation as it deflects worries that commercially established foreign entities will flood local markets with cheap imports at the expense of local companies with attendant social and economic costs for example, factory closures, job losses and price surges, once local competition is eliminated. Without the assurance that the international trade system is not rigged against it, no country will sign up to it. Such basic notions of fairness inform and drive human life. The danger of course is that those allegedly vulnerable local companies might well capture the system of anti-dumping laws as a means of insulating themselves from foreign competition and thus deprive the consumers of the benefits of free trade.

The key issue then is how governments can effectively deploy available trade remedies to effect remedial action against imports that may cause harm to a domestic industry without engaging in protectionism. The three primary types of trade remedies include anti-dumping, countervailing measures and safeguards. This article focuses on the Kenya Trade Remedies Act, 2017 (**the Act**) and in particular its provisions insofar as dumping and antidumping remedies are concerned.

The Act which was signed into law on 21st July, 2017, represents Kenya's latest attempt at getting the balance right. Not surprisingly, given its recent passage, the Act has not yet been operationalised. However, provisions with respect to trade remedies are not new. Sections 125, 125A and 126 of the Customs and Excise Act (Cap. 472) (now repealed) provided for investigations by an advisory committee as well as the imposition of anti-dumping and countervailing measures upon the recommendation of that committee.

The Act seeks to overhaul the entire system by setting up a more elaborate institutional framework. Its objects are *"to enable the Government to take necessary action to protect domestic industries from foreign competition and unfair trade practices arising from dumping, subsidisation and import surges."*

To accomplish this, the Act establishes an independent investigation body, the Kenya Trade Remedies Agency (**the Agency**) to investigate and determine the existence of dumping and subsidisation, in imported products and recommend the appropriate measures to be taken by the Government. The Act also seeks to fulfill Kenya's commitments and obligations under the World Trade Organization (**WTO**) Agreements on Trade Remedies.

The Agency

Being a statutory body, the Agency is to be primarily financed from allocations from the public finances. The Agency is managed by a Board comprising nine (9) members, four (4) statutory offices, three (3) other members (whose qualification is prescribed in the Act), appointed by the Cabinet Secretary in charge of matters relating to international trade (**the Cabinet Secretary**), a Chief Executive Officer as its Secretary and a Chairperson appointed by the President on the recommendation of the Public Service Commission.

Provided that the statutory criteria for membership is met, it is up to the Cabinet Secretary to determine the identity of those members unlike other statutory bodies in which the mode of appointment is designed to ensure wide representation across the spectrum of the committee, by requiring nomination by various sectors. However, the Act requires that the members (save for the statutory office holders) be appointed through a competitive process thus assuring a level of meritocracy.

Investigations

According to the Second Schedule to the Act, *"an imported good is considered to be dumped if it is introduced into the commerce of Kenya at a price which is less than its normal value."* Paragraphs 3 and 4 of that Schedule to the Act, prescribe the methodologies by which such normal value is to be determined, which is through comparisons of the prices payable at various instances, a process that gets more elaborate depending on the state of the market of the good in question both in Kenya, as well as the exporting country. There are also provisions for determination of export prices as well as injury occasioned by dumping.

The Agency can initiate investigations only in special circumstances however, the usual practice being through an application from a manufacturer of a like product or an authorised person in the industry for the conduct of the investigation or evaluations of either alleged dumping or import of subsidised goods that have caused, or threaten to cause serious injury to an industry. The application will only be considered as made by, or on behalf of the domestic industry if it is supported by domestic producers whose collective output is more than fifty per cent (50%) of the total production of the like product, produced by the portion of the domestic industry that supports the application.

The application should contain information as detailed in the Second Schedule to the Act and include the volume, value and technical characteristics of the domestic product of the like product, the country in which the investigated product is manufactured or produced and the identity of the exporter. The Agency is to notify the Government of an exporting country once the investigation is initiated.

An investigating officer of the Agency may obtain a warrant from Court, allowing him to enter and search any premises where it is shown there are reasonable grounds that a person is in control or in possession of anything connected with the investigation.

The Agency thereafter undertakes an evaluation of the normal value as compared to the export price of the alleged dumped goods as well as the threat of injury which is to be based on fact and not mere allegation, conjecture or remote possibility of a threat of material injury. The Act offers more guidance on factors the Agency is to consider when determining the existence of a threat, than the provisions of the repealed Customs and Excise Act. The final hurdle requires the Agency to be satisfied that the dumped imports are in fact causing injury before a determination or recommendation is made.

Where a person is aggrieved by a determination, recommendation or decision of the Cabinet Secretary or Agency, the person may appeal to the High Court within thirty (30) days of the determination, recommendation or decision.

Request for Information and Right to Confidentiality

The Agency has the power to request any person for information in relation to any investigation. This request is to be in writing. However, in the era of fierce competition, individuals or companies may be reluctant to fully cooperate as information requested may be commercially sensitive. The Act therefore recognises the need to protect confidentiality where a person who has been directed to provide information to the Agency, may make a claim and identify all or any part of the information

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as confidential in writing and setting out the grounds for treating the information as confidential.

The Agency is prohibited from disclosing to any unauthorised person information that is confidential until it determines the extent to which confidentiality shall be extended regarding the information. Where the Agency finally determines the extent of the confidentiality of information, it may only disclose to unauthorised persons such information that has not been determined confidential.

If the Agency makes a decision whereby the confidential information is contained, it is expected to give notice of at least fourteen (14) days to the person who provided the information before the decision is published. However, the person is not left without recourse as they may approach the High Court within fourteen (14) days of receiving the notice for an order to protect the confidential information.

Remedies

The Cabinet Secretary has the power to impose an anti-dumping duty in an amount equal to or less than the margin of dumping of the imported goods, and the anti-dumping duty is levied until such a time the injury cause has been counteracted. The results of the investigations and any recommendations are to be provided to the Cabinet Secretary and where the Cabinet Secretary is required to act on the recommendation to impose any of the measures, the Cabinet Secretary is required to take action on the recommendation within sixty (60) days of receiving it. This is a similar time frame as was applicable under the repealed provisions of the Customs and Excise Act.

Impact on Local Industries

By the latest WTO review of the trade policies and practices of Burundi, Kenya, Rwanda, Tanzania and Uganda undertaken on November 2012, it was reported that despite the existence of the Protocol on Establishment of the East African Community (**EAC**) Customs Union, there have been no cases reported since the last review of the EAC. In particular, it was reported that Kenya had never applied anti-dumping, countervailing or safeguard measures under the WTO. It is however worth noting that the review was conducted almost five (5) years ago and there have been developments on other fronts in the intervening period. For example Kenya has resorted to Common Market for Eastern and Southern Africa (**COMESA**) safeguards with respect to threats of imports from Egypt in the past.

The lack of any remedial action has been partly blamed on the lack of establishment of legal and institutional framework to provide for trade remedies. With the implementation of the Act it is therefore expected that the Agency will take an active role in investigating applications submitted to it. It is also imperative that manufacturers or producers provide sufficient information so as to assist in the Agency's determination. It is also hoped that any recommendations made to the Cabinet Secretary eventuate into remedial actions that strive to protect the local industries.

Once the Act comes into operation and the Board of the Agency is constituted, it is expected that the Agency will publish and disseminate manuals and guidelines, relating to its functions and to conduct public awareness and the training of stakeholders.


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PERMISSION TO ENTER AND WORK:

WHAT FOREIGNERS NEED TO KNOW ABOUT WORKING IN KENYA

Kenya has one of the largest and fastest growing economies in East and Central Africa, specifically in the areas of agriculture, manufacturing and mining. As a thriving regional business market, the country has seen many multinationals and non-governmental organisations set up base here. This has caused a large number of foreign nationals to migrate into the country for work. Despite the growing economy, unemployment levels remain very high for locals and for this reason the Government has put in place laws to protect jobs that can be undertaken by locals, while at the same time putting up stringent legal processes for foreign nationals to gain work in Kenya.

The Kenya Citizenship and Immigration Act, 2011 (**the Act**) was enacted to provide for matters relating to citizenship, travel documents and immigration. The Act provides under section 34(1) that the presence in Kenya of a person who is not a citizen of Kenya shall be unlawful unless that person holds a valid work permit, residence permit or pass.

The Act makes it an offence for a foreign national to engage in any employment, occupation, trade, business or profession without being authorised to do so. It is also an offence under the Act for a person to employ a foreign national whom the employer knows or has reasonable cause to believe is not authorised to work in Kenya. Further, the Act empowers the Cabinet Secretary in charge of matters relating to citizenship to make an order in writing, directing that any person whose presence in Kenya is unlawful to be removed from and remain out of Kenya either indefinitely or for such period as may be specified in the order.

Duties and Obligations of Employers

Section 45(1) of the Act provides that no person shall employ a foreign national who entered Kenya illegally or whose status does not authorise that person to engage in employment. Employers are also prohibited from employing foreign nationals on terms different from those authorised in their status. Under section 45(2) of the Act, every employer must apply for and obtain a work permit or special pass conferring on the foreign national the right to engage in employment before granting the foreign national employment.

For the purpose of section 45, a person who performs any work or service of any kind which is commonly performed by a person in employment for the benefit of or at the request of another person is deemed to engage in employment and that other person shall be considered to employ that person. It should also be noted that the Citizenship and Immigration Regulations, 2012 (**the Regulations**) empower the Director of Immigration Services (**the Director**) to inspect places of employment and businesses with or without prior notice for the purpose of verifying information contained in a work permit or special pass application and monitoring compliance with the terms and conditions contained in permits and passes issued.

In the case of an employee ceasing to work for the employer for any reason, the employer specified in the work permit is required to report in writing to the Director within fifteen (15) days that the holder of a permit has ceased to engage in the employment in respect of which the permit was issued and any employer who fails to do so commits an offence.

Types of Permits

There are nine (9) classes under which a work permit may be issued, namely:

- **Class A** is for a person who intends to engage, whether alone or in partnership, in prospecting for minerals or mining in Kenya who has obtained a prospecting or mining right or license and has a minimum of USD 100,000 for that purpose
- **Class B** applies to a person who intends to engage, whether alone or in partnership, in agriculture or animal husbandry in Kenya and who has all permissions necessary to acquire an interest in land of sufficient size and suitability for that purpose and sufficient capital or resources at his disposal for that purpose
- **Class C** is for members of a prescribed profession who intend to practise that profession, whether in partnership or alone, in Kenya. The applicant must possess the prescribed qualification, have sufficient capital or resources for that purpose and be registered with a professional body, association or institute in his own country. The prescribed professions include medical practitioners, dentists, advocates, surveyors, estate agents, valuers and land agents, architects and quantity surveyors, pharmacists, veterinary surgeons, engineers, nurses, physiotherapists, accountants, chartered secretaries, actuaries, scientists and information technology experts
- **Class D** relates to persons who are offered specific employment by a specific employer and who have skills or qualifications that are not available in Kenya. The processing fee is USD 100 and the issuance fee is USD 2,000. This permit tends to be more difficult to obtain due to the need to show that local expertise is not available, a requirement which stems from a ministerial policy aimed at preventing companies from employing foreign nationals for work that Kenyans can perform
- **Class F** applies to a person who intends to engage, whether alone or in partnership, in a specific manufacture in Kenya who has obtained a license, registration or other permission that may be necessary for that purpose and who has at least USD 100,000 at his disposal for that purpose
- **Class G** applies to persons who wish to engage, whether alone or in partnership, in a specific trade, business, consultancy or profession in Kenya (other than a prescribed profession, which are covered under Class C)
- **Class I** is reserved for persons who are members of institutions registered under the Societies Act (Cap. 108) and who are engaged as missionaries, members of companies limited by guarantee, and members of trusts registered under the Trustee Act (Cap. 167)
- **Class K** is designed for ordinary residents who are over thirty five (35) years and have funds or an assured annual income of at least USD 24,000 or its equivalent in Kenya Shillings and undertake not to accept employment (paid or unpaid) or engage in any income generating activity of any kind without a permit of the relevant class. The income must be derived from sources outside of Kenya which will be remitted to Kenya or from a pension or annuity payable from sources in Kenya
- **Class M** is for persons who have been granted refugee status in Kenya and the only supporting document required is a recommendation letter from the Department of Refugee Affairs. A person to whom a Class M work permit has been issued and the spouse of such person may engage in any occupation, trade, business or profession

The Regulations provide that an application for a work permit shall be made to the Director in Form 25. The application must include a signed cover letter from the employer, applicant or organisation addressed to the Director, copies of the applicant's national passport, two (2) recent coloured passport size photographs and a copy of the applicant's current immigration status if in the country.

However, the Protocol has maintained the requirement for a work permit. Consequently, EAC nationals who wish to work or establish a business in Kenya are still required to submit a work permit application to the Immigration Department.

The Director will issue a work permit in any of the classes specified above upon payment of the applicable fees and if satisfied that the requirements of that particular class have been met and the engagement or the applicant's presence in Kenya will be of benefit to Kenya. While the Act provides that permits will be issued for a period not exceeding five (5) years, at the moment work permits are only issued for a maximum period of two (2) years.

Special Pass

A person who is applying for a work permit or wishes to enter or remain in Kenya to temporarily to conduct any business, trade or profession may apply to an immigration officer in Form 32 for a special pass in accordance with the Regulations. Special passes are often applied for to perform a specific task within a specified period of time, for example installation and repair of machines, auditing of accounts, training and other specialist jobs for which Kenya lacks expertise.

The special pass will be issued for a period not exceeding six (6) months once the issuance fee of USD150 per month has been paid and will allow the permit holder to re-enter Kenya at any time during the period of validity of the pass. The special pass may be renewed for a further six (6) months upon payment of the prescribed fees.

East African Community

The East African Community Common Market Protocol (**the Protocol**), which came into force on 1st July 2010, permits certain classes of workers who are nationals of a Partner State to move freely within the East African Community (**EAC**) region in pursuit of employment opportunities. The Protocol also guarantees EAC nationals the right to establish a business and pursue economic activities as self-employed persons in any Partner State and requires that Partner States remove all nationality-based restrictions on the right of establishment with respect to companies and self-employed persons.

Additionally, the Protocol grants holders of work permits and their families the right of residence in the Partner State where they are employed or established. To this end, Partner States are required to issue residence permits to holders of work permits and their families.

As far as work permits are concerned, Kenya and Rwanda have already waived the applicable fees for all Partner States while Uganda has done so on a reciprocal basis. This means that an EAC national is not required to pay the prescribed fees when applying for a work permit in Kenya.

However, the Protocol has maintained the requirement for a work permit. Consequently, EAC nationals who wish to work or establish a business in Kenya are still required to submit a work permit application to the Immigration Department.

The Protocol also grants competent authorities of Partner States the power to reject an application for a work permit. While the grounds for rejection are a matter left to national legislation, the Protocol does make provision for the right to be notified in writing of the reasons for the rejection and a right to appeal against the rejection. In case of cancellation of a work permit, for instance where the holder ceases to engage in the employment for which the work permit was issued, the Protocol grants the worker thirty (30) days within which to regularise his status or leave the Partner State.

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A FOUNTAIN OF HOPE:

KENYA'S LATEST WATER LEGISLATION

The Water Act, 2016 (**the Act**) came into operation on 21st April, 2017. Prior to this, the Water Act, 2002 (**the repealed Act**) was the legal framework that governed the management and regulation of water resources in Kenya. The repealed Act was enacted in 2002 with the objective of, *"providing for the management, conservation and use, control of water resources and for the acquisition and regulation of rights to use water, to provide for the regulation and management of water supply and sewerage services and for related purposes."*

The repealed Act separated water resources management from the delivery of water services. Part III of the repealed Act was devoted to water resources management, while a section of Part IV provided for water and sewerage services; one to regulate the management of water resources and the other to regulate the provision of water and sewerage services.

The Water Resources Management Authority (**the Authority**) established under section 7 of the repealed Act was the body tasked with the responsibility of management of water resources. The Authority was responsible for among other things, the allocation of water resources through a permit.

The regulatory functions for the provision of water and sewerage services were vested with the Water Services Regulatory Board (**the Board**) that was created under section 46 of the repealed Act. The Board was mandated to *inter alia* license all providers of water and sewerage services that supplied water to more than twenty (20) households.

For the years that the repealed Act was in operation, it was heavily criticised for being state-centred and privatising or commercialising provision of water services. There was no direct obligation or responsibility upon the Government to set up and develop water provision facilities across the country. The service was highly commercialised and not operated in accordance with sound business principles, with no laid down structures on how it was to be availed to enable it reach a majority of the public.

As a result of these aforesaid shortcomings, water provision services were majorly concentrated in municipalities and towns, leaving most of the country, particularly rural areas without a proper water and sewerage services system.

Constitutional Change

The Constitution of Kenya, 2010 (**the Constitution**) brought with it radical changes including enshrining under Article 43, the right of every Kenyan to clean and safe water in adequate quantities. With the right to water being given Constitutional standing, it was important to come up with proper legislation that would take into consideration the devolved system of Government and come up with structures that will progressively have the right to clean water being actualised by every Kenyan. There was also a need to put the obligation of developing and maintaining the water service provision system upon the state, with the concern being the accessibility to clean and safe water.

This article aims at interrogating the various provisions of the Act, with a view to examining whether indeed, they are sufficient to safeguard the water resources in accordance with section 3 of the Act which stipulates that, *"the purpose of the Act is to provide for the regulation, management and development of water resources and water sewerage services in line with the Constitution."*

Water Resources Authority

The Water Resources Authority (**the WRA**) was established under section 11 of the Act. The functions of the WRA under section 12 are *inter alia* to formulate and enforce standards, procedures and regulations for the management and use of water resources and flood mitigation and to regulate the management and use of water resources, in consultation with the National Land Commission.

The WRA is placed with the sole responsibility of regulating the management and use of water resources. It is to receive water permit applications for water abstraction, water use and recharge, determine issues, vary water permits, and enforce the conditions of those permits.

Section 36 of the Act provides that a permit is required for any use of water from a resource, except as provided under section 37 which provides that a permit is not required for the abstraction or use of water without the employment of works from any water resource for domestic purposes, by any person having lawful access to the water resource.

A permit is also required for the drainage of any swamp or other land, the discharge of a pollutant into any water resource and any other acts carried out in relation to a water resource. A person who without a permit constructs or employs works, commits an offence. Slightly different rules apply to domestic use of water resources together with riparian owners who are basically the owners of land next to a watercourse.

The protection of underground water is provided for under section 56 and the Fourth Schedule of the Act. Under the Act, a person shall not construct or begin to construct a borehole or well, without having first given the WRA notice of his or her intention to do so. However, the WRA may by notice, whether conditionally or subject to specified conditions, exempt any person, in such circumstances, as may be specified in the notice, from the requirement of notifying the WRA prior to construction of a well or a borehole.

National Water Harvesting and Storage Authority

A new and important provision in the Act is a move to establish the National Water Harvesting and Storage Authority (**the NWHSA**), under section 30 of the Act. The functions and powers of the NWHSA are *inter alia* to undertake on behalf of the national government, the development of national public water works for water resources storage and to maintain and manage national public water works infrastructure for water resources storage.

The main objectives of the Act in relation to flood risk management is to provide effective defence against flooding from rivers together with the provision of adequate arrangements, for flood forecasting and warning. Flooding has perennially been of devastating effect in Kenya and a move to have its control properly stipulated in legislation, should be applauded.

Water Services Strategy

Under section 63 of the Act, every person in Kenya has the right to clean and safe water, in adequate quantities and to reasonable standards of sanitation as stipulated in Article 43 of the Constitution. In a bid to effectuate this right, the Act provides under section 64 that the Cabinet Secretary responsible for matters relating to water (**the Cabinet Secretary**) shall, within one (1) year of the commencement of the Act and every five (5) years thereafter, following public participation, formulate a water services strategy (**the Strategy**).

The objective of the Strategy is to provide the Government's plans and programmes for the progressive realisation of the right of every person in Kenya to water.

The Strategy shall contain details of the existing water services, the number and location of persons who are not provided with a basic water supply and sewerage services; standards for the progressive realisation of the right and resource mobilisation strategy, for the implementation of the plans.

Water Works Development Boards

The Cabinet Secretary is equally tasked with the responsibility of establishing one (1) or more water works development agencies, together with defining the geographical area of jurisdiction of each agency. The power and functions of the water works development agencies shall include development of national public water works for water services and formulation of development and investment plans for rural and urban areas.

Upon the development of the national public water works the same shall be handed over to the respective County Governments for their management and operation. Under section 77 of the Act, a County Government shall establish water service providers. As a result, the obligation of ensuring that each citizen has access to clean and safe water is initially placed with the National Government, but progressively the responsibility will lie with the respective County Governments.

The Constitution of Kenya, 2010 brought with it radical changes including enshrining under Article 43 the right of every Kenyan to clean and safe water in adequate quantities.

Water Services Regulatory Board

In a bid to de-commercialise the provision of water services, the Act establishes the Water Services Regulatory Board (**WSRB**) whose principal object is to protect the interests and rights of consumers in the provision of water services was established. The key functions and powers of the WSRB include to determine and prescribe national standards for the provision of water services and asset development for water services providers and to evaluate and recommend water and sewerage tariffs to the county water services providers.

The WSRB is also tasked to monitor progress in the implementation of the Strategy and make appropriate recommendations thereon, together with setting the commercial viability of the water companies.

Water Sector Trust Fund

There is also established the Water Sector Trust Fund (**WSTF**) under section 113 of the Act. The object of the WSTF is to provide conditional and unconditional grants to counties, in addition to the Equalisation Fund under the Constitution and to assist in financing the development and management of water services in marginalised areas or any area which is considered by the WSTF's Board of Trustees to be underserved.

The powers and functions of the WSTF include managing and mobilising resources and to formulate and implement principles, regulations and procedures in consultation with County Governments for financing of projects.

The WSTF is also required to implement measures to ensure the efficient and equitable sharing of the resources and to maintain and make public available information, on the projects financed as well as the impact of such projects.

Public Private Partnerships

The Act also recognises public private partnerships (**PPPs**) which allow private companies to provide water and sewerage services to the public. The following provisions are made in relation to PPPs under the Act:-

- A water services provider may enter into a PPP for the exercise and performance by another person, of some or all of its functions as a licensee with respect to a part or the whole of its area of water service provision
- The PPP shall be in writing subject to the approval of the respective County Government executive and the Regulatory Authority
- Where the persons entering into an agreement with the water services provider, owns or possesses assets or infrastructure used for the provision of water services, the agreement shall set out the terms and conditions under which the assets may continue to be so used
- A power or function conferred by a licence or otherwise conferred under the Act may be exercised or performed by another person acting under an agreement with the licensee and shall be deemed, when exercised performed by that other person, to have been exercised or performed by the licensee

Conclusion

The Act is a laudable attempt to introduce a solid legal framework that is aimed at protecting and managing water resources in Kenya. The different authorities established under the Act must now work in tandem, to ensure that the water resources in Kenya are protected sustainably for generations to come. Equally the need for meaningful cooperation and goodwill between the two levels of Government, is key for the successful implementation of the Act.

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IN ACCORDANCE:

DRAFTING EFFECTIVE ARBITRATION AGREEMENTS

Section 3 of the Arbitration Act, 1995 (**the Act**) defines an arbitration agreement as an agreement by the parties to submit to arbitration all, or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

The acceptable form of an arbitration agreement depends on the jurisdiction in question. In Kenya, the agreement may be an arbitration clause in a contract or as a separate agreement, which is an internationally accepted standard. It is required that the arbitration agreement be in writing, which serves as an essential method of protection. This is because in concluding an arbitration agreement, parties not only create their own dispute resolution mechanism (a prorogation of jurisdiction) but also deprive themselves of normal access to national courts (a derogation from jurisdiction). Any such derogation is viewed as a serious step, worthy of special scrutiny, since the right of access to court is a fundamental right of every citizen in a civilised state.

When drafting an arbitration clause, parties should consider whether to administer the arbitration through an institution, or through *ad hoc* means.

Institutional arbitration is conducted with the assistance of an arbitral institution such as the International Chamber of Commerce (**ICC**) in Paris and the London Court of International Arbitration (**LCIA**). There is now a proliferation of arbitral institutions in Africa, such as the LCIA-MIAC Arbitration Centre in Mauritius, the Kigali International Arbitration Centre in Rwanda and the Nairobi Centre for International Arbitration in Nairobi, amongst others.

The arbitral institution's role includes setting the arbitrator's fees; facilitating the exchange and dissemination of pleadings, enforcing procedural deadlines and reviewing the arbitral award. The advantages of institutional arbitration are that they are tried and tested rules of procedure, there is administrative support which saves on time, and the credibility of the institution backs the award. The value of these supervisory functions must be weighed up against the likely additional time and cost to be devoted to them.

Ad hoc arbitration on the other hand is governed by an arbitration agreement which, either by omission or design, does not require an arbitration to proceed under the auspices of an arbitral institution. The main features are that: the parties choose the tribunal themselves without reference to an arbitral institution, there is no supervision or support from any institution in relation to the conduct of the proceedings and there is no review of the award by an arbitral institution. *Ad hoc* arbitrations may save parties time and costs, compared to institutional arbitrations. They often adopt existing rules of procedure, such as the United Nations Commission on International Trade Law (**UNCITRAL**) Rules, rather than setting out a tailor-made procedure.

Arbitrators

A proper arbitration clause should provide a mechanism for appointment of a tribunal including a default mechanism. It should also specify the number of arbitrators in the tribunal, the nationality and language of the arbitrators should the parties consider this a point of relevance, the qualifications of the arbitrators, which should be well defined to narrow down the pool of arbitrators and prevent satellite disputes or the tribunal lacking jurisdiction, and any other legal and cultural considerations. The parties may also defer to the institutional rules they may have elected to apply to their agreement as such rules contain provisions relating to qualifications and number of arbitrators.

Governing law

To ensure certainty, the arbitration agreement should contain provisions for:

- Laws governing the underlying contract: This is the substantive law that governs the interpretation and validity of the contract, the rights and obligations of the parties, the mode of performance and consequences of breach. The underlying contract is severable from the arbitration clause, thus should parties wish to have separate laws governing both, it is best to make provisions to that effect. Where there is a possibility of doubt, either the governing law should expressly refer to the arbitration clause, or the arbitration clause should contain an express choice of law
- Laws governing the arbitration agreement: Usually it will be more convenient for the governing law of the arbitration agreement to coincide with the seat (this is explained further below), in order to avoid any conflict of laws issues. It also determines the form and validity of the agreement

Seat of Arbitration

When deciding on the seat or place of the arbitration, parties should consider the prospect of enforcement of the award pursuant to the New York Convention, the practical enforceability of the agreement and the availability of interim or supportive remedies from the local courts. Further, consider the procedural effect it might have on the conduct of the arbitration. Other practical considerations include parties and their preferences, cost implications, availability of hearing facilities, availability of witnesses and witness evidence, and willingness of arbitrators to participate in proceedings in that place.

Language

If the language of the arbitration might otherwise be open to debate, it is preferable, in order to save time and costs, to make an express selection in the arbitration agreement. The language chosen should generally be that of the underlying contract and/or the majority of the documentation. Where parties do not agree, arbitrators determine the language applicable.

Finality

A provision that the award is, "final and binding and not subject to appeal to the extent permitted by law" is important to prevent hurdles in enforcement. For example, the New York Convention provides that: *"Recognition and enforcement of an award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: the award has not yet become binding on the parties…"*

> *In Kenya, the agreement may be an arbitration clause in a contract or as a separate agreement, which is an internationally accepted standard. It is required that the arbitration agreement be in writing, which serves as an essential method of protection.*

In many cases institutional rules of arbitration do not permit appeals on points of law and this highlights the importance of selecting institutional rules. The right to appeal can be excluded by agreement by expressly stating that such rights are excluded in the agreement, or in any applicable rules.

Confidentiality

Though arbitration by its very nature provides for more confidentiality than litigation, the parties should define the degree of confidentiality required in the clause and remedies for breach. Though confidentiality is not statutorily provided for in Kenya, it is considered an essential element of arbitration. The effect is that parties are exclusively precluded from disclosure, especially of the award, unless the parties consent to it or are compelled by law.

Capacity

Just as with any other contract, the parties to an arbitration agreement must have the capacity to contract. Where there are multiple parties to the agreement, it is best to provide for consolidation of suits to prevent multiplicity and to reduce costs of disputes arising out of, or in connection with the contract. Some institutional rules such as LCIA's provide for consolidation.

Other considerations

Stepped Arbitration Clauses

The parties can opt for stepped dispute resolution. This may for example, start with consultation, then mediation and should that fail, arbitration. The clause must be clear and precise as to time stipulations for each step in the process to avoid undue delays. The advantage of the stepped process is that, it may reduce the monetary and time resources spent in arbitration should the dispute be settled before then.

Arbitrability

A dispute is arbitrable if it concerns a subject matter capable of settlement by arbitration. Objective arbitrability is where the aptitude of parties to submit a dispute to arbitration is independent of the quality of the parties or their will, unlike subjective arbitrability. Parties should consider whether the subject matter of the contract is one which is barred from arbitration by the applicable national laws. This is because the validity of the arbitration agreement and the tribunal's competence depend on this law.

Waiver of Sovereign Immunity

Waiver of sovereign immunity provisions are important where one of the parties is a state or a state organ. A state or state organs may try to raise the defence of sovereign immunity to challenge the jurisdiction of the arbitral tribunal or to avoid enforcement of the arbitral award. Questions of sovereign immunity must be considered in relation to jurisdiction and execution, both of which can be waived. Any waiver from execution must be express to be enforceable.

Conclusion

There is a marked increase in referral of disputes by parties to international arbitration, especially due to the growing number of cross-border investment agreements. It is prudent for parties involved in such agreements or otherwise, to ensure that the above points are included in the arbitration agreements for validity and efficiency.

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Corporate & Commercial

Key work highlights

- Advised the Kenyan Government and KenGen (Kenya's largest power producing company) in the sale of 30% of the former's stock in the latter at the NSE
- Advised Ascent Rift Valley Fund Ltd (a Mauritius based private equity fund) that invested in Kisumu Concrete Products Ltd which deals with the manufacture and supply of building materials
- Advising CNPC and the Kenyan Government in a government-to-government collaboration in a proposed project development of up to 350 MW of geothermal power

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Dispute Resolution

Key work highlights

- Successfully acted for one of the bidders with respect to Lot 6 of a 10,000 km Kenyan annuity road project, before the PPP Petition Committee
- Acting in an anti-suit injunction application involving EACP (a technology, media and telecommunications sector-focused venture capital fund manager, investing in the greater Eastern Africa region) where parties not party to a shareholder agreement and management agreement between certain entities and a fund manager threatened to institute suit against the fund manager despite provisions for arbitration
- Represented Telkom Kenya Ltd in an employment dispute arising from a 2006 redundancy exercise where approximately two thousand and six hundred (2,600) employees were retrenched

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Intellectual Property

Key work highlights

- Acting for a software developer at the High Court of Kenya in a copyright infringement claim

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Real Estate, Conveyancing and Securities

- Advising on a joint venture transaction with landowners in regard to a one thousand (1,000) acres mixed-use development
- Advised a private limited liability company engaged in the business of advanced medical care that was undertaking the construction of a multimillion dollar hospital
- Advised one of Kenya's largest public universities in a major one thousand (1,000) acres real estate project

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Tax

Key work highlights

- Represented Vivo Energy in a tax dispute before the Kenyan High Court. The matter involved some intellectual property aspects, specifically the tax treatment of royalties paid in consolidation for transfer of the economic right in trademarks from overseas companies to the holding parent company
- Advised BIDCO (a market leader) in East and Central Africa manufacturing edible oils and hygiene products in a suit stemming from an assessment raised on the basis of offsetting foreign exchange losses. It was significant because the judgement basically stated that you do not have to physically convert foreign exchange losses to the local currency in order to realise the same
- Advised Rent Works (East Africa), on the tax aspects of their share restructuring and group reorganisations in regard to significant capital investment by global private equity investors

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