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Stronger Together

Greetings!

Edward Everret Hale said, *"coming together is a beginning; keeping together is progress; working together is success."* This year, we at Oraro & Company have adopted the theme "stronger together" as our mantra and this Newsletter, which is a culmination of diverse efforts from various individuals, both internal and external, is a fine example of this mantra at work.

Once again, we are delighted to have the honour of featuring an article from an external contributor, this time in the form of Lewis Buckley, a director at the Jersey based Helm Trust Company Ltd. Lewis gives an insightful overview of Trust law in the jurisdiction of Jersey, making it clear why Jersey is a leading choice for off-shore investments, particularly through the setting up of Trusts. Karibu sana, Lewis!

From the home stable, Jacob Ochieng and Sheila Nyakundi expound on the preference, amidst difficult economic times, for sale and leaseback transactions as a means of raising capital over the more conventional debt and equity financing model. Walter Amoko considers both the Kenyan and the United Kingdom courts' approach to the enforceability of illegal contracts, and he later on teams up with Gibran Darr in evaluating the efficacy of Public Private Partnerships (PPPs) in Kenya following the recent publication of a benchmarking report on PPPs by the World Bank. Patricia Mutiso joins the fray with an analytical piece on the potential impact of Islamic Capital Markets on the Kenyan economy, in the context of newly introduced regulatory and governance structures. Eva Mukami and I address recent amendments to land laws and land institutions in Kenya while Walter Amoko and Lena Onchwari serve up an eye-opening article on disclosure requirements under the Common Reporting Standards. Last but certainly not least, Angela Ogang and I look at the various consumer protection laws that apply in the Kenyan construction industry.

All this and more, await your reading pleasure.

Enjoy the read!

Sincerely,

John Mbaluto,
Editor

Senior Partner's Note

With the economy gaining significant ground in the first quarter, we are optimistic that 2018 will be a dynamic year as we continue to keep pace with changes in legal developments locally and globally. As we share our eighth edition of Legal & Kenyan, I do hope that we affirm our commitment to offering practical legal insights in helping you respond to the changes in the market to make all-encompassing growth strategies for your business. This edition, as is now the norm, promises great legal insights. Enjoy the read.

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"The firm continues to lead the way and has great litigators."

Chambers Global, 2018

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ONWARD FORWARD:

GROWTH OF ISLAMIC CAPITAL MARKETS IN KENYA

A capital market is a medium for the buying and selling of equity securities (shares) and debt securities (bonds), in order to raise medium to long-term financing. A company may issue securities either through shares or bonds to raise money. Bonds may also be issued by entities who are in need of long term cash such as national governments. Securities are issued at a primary market and traded in a secondary market. In a primary market, a company would have face-to-face meetings with investors in order to place its securities. Alternatively, a company may work with an investment bank which would act as an intermediary and underwrite the offering. In a secondary market the original investors may sell the securities they have purchased to third parties. The trading of securities in a secondary market is opened up to all participants in the market. One of the main functions of a capital market is to spur economic growth by providing a medium where the demand for funds may be matched with the supply of funds. Capital markets should be supervised and controlled by regulatory bodies to ensure that the highest levels of professionalism and ethics are maintained by all participants.

Islamic Capital Markets

Islamic capital markets (**ICMs**) refer to capital markets where *sharia'h* complaint financial assets are transacted. ICMs function as a parallel market to the conventional capital market by helping investors find *sharia'h* compliant investments. ICMs also play a complementary role to the Islamic banking system in broadening and deepening the Islamic financial markets. There are presently no Islamic–only securities exchanges. ICM instruments are traded on many of the world's leading securities exchanges (where conventional market instruments are traded). ICMs do not have an organised regulatory authority because they are in the infant stage so the conventional capital market authority in any given country or region ordinarily supervises the ICM as well. An example of this is Malaysia, where the Securities Commission of Malaysia has a *sharia'h* council that is specifically responsible for *sharia'h* related matters of ICM activities. Regulatory agencies in other nations with active ICMs have followed suit, including Kenya.

In a typical ICM, transactions are carried out in ways that do not conflict with the teachings and tenets of Islam. There is certainly an assertion of Islamic law that ICMs are free from activities prohibited in Islam such as usury/interest (*riba*), gambling (*maisir*), ambiguity (*gharar*) and speculation (*qimar*).

Market Trends

There are various factors that have led to the increased demand for ICM products, including the increase of wealth among Muslim investors (especially from nations that are part of the Gulf Cooperation Council i.e. Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and United Arab Emirates); the growth of the Muslim population in regions such as Africa, Asia, Middle East and South America, especially in Asia and Africa, which currently account for over ninety five per cent (95%) of the world's Islamic population and which are projected to grow by a further thirty five per cent (35%) by the year 2030. These regions also contain large 'unbanked' populations, which can be harnessed by Islamic banking models. Growth in the retirement population is also creating demand for Islamic pension and asset management products whilst there is also an increased awareness about Islamic banking and finance and a rise in per capita income and wealth held by Muslims in line with the trends in other faith-based groups. Africa is currently ranked as the third fastest growing Islamic finance region in the world after Asia and Middle East according to the African Development Bank. This growth signifies an increased demand for *sharia'h* compliant products and services.

The Global Islamic Finance Report (**GIFR**) 2010, was the first publication to report that the Islamic financial assets had exceeded USD 1 trillion by the end of 2009. GIFR 2017 reports that the global Islamic financial services industry stood at USD 2.293 trillion at the end of December 2016 which is USD 150.01 billion more than 2015 when the industry stood at USD 2.143 trillion. GIFR 2017 states that the assets under management of the banks offering Islamic financial services was USD 1.719 billion which is seventy five per cent (75%) of the total Islamic financial assets. There are expectations of the market size growing to USD 3.4 trillion by end of 2018, an eighty one per cent (81%) growth according to the Islamic Financial Services Industry Stability Report 2016. The second largest sector in terms of assets under management is Islamic bonds (*sukuk*), which comprises fifteen per cent (15%) of the global Islamic financial services industry. In the first half of 2015, the global *sukuk* amount outstanding stood at USD 291 billion, while Islamic funds assets figure was USD 71.3 billion. Islamic investment funds have not yet seen any significant growth and so is the case for *takaful* (insurance) and the emerging business of Islamic microfinance.

The Kenyan Approach

Kenya is positioning itself as a hub for *sharia'h* financial services in East and Central Africa. The country's Muslim population is estimated to be about eleven per cent (11%) of the total population while the non-Muslim population may also be keen on taking up Islamic finance products. This outstrips the two percent (2%) penetration of Islamic finance in the global economy hence the reason why Kenya has potential for Islamic finance products and services. Currently, the Capital Markets Authority (**CMA**) has registered two (2) Islamic Collective Investment Schemes and one (1) Islamic Fund Manager.

The strategy to accelerate Islamic finance uptake is underpinned by the ambition to transform Kenya into an International Finance Centre as part of the implementation of the Capital Market Master Plan, which is a Vision 2020 flagship project. As part of this strategy, the CMA was admitted by the Council of the Islamic Financial Services Board (**IFSB**) as an associate member of the IFSB based in Kuala Lumpur, Malaysia. The decision to admit the CMA was made at the 29th IFSB Council meeting held in Cairo, Egypt on 14th December, 2016. The role of the IFSB which is a global standard setting body is to promote the development of a prudent and transparent Islamic financial services industry.

In line with the Government's aspiration to position Kenya as an Islamic finance hub in the region and deepen the application of Islamic finance within the economy, the CMA has achieved various milestones, including:-

Kenya is positioning itself as a hub for sharia'h financial services in East and Central Africa. The country's Muslim population is estimated to be about eleven per cent (11%) of the total population while the non-Muslim population may also be keen on taking up Islamic finance products.

- Hosting the joint financial sector regulators Project Management Office (**PMO**) on Islamic Finance which was launched in October 2017. The PMO is overseen by the National Treasury with the technical and financial assistance of Financial Sector Deepening Africa, and under the mandate delegated to it by Kenya's Financial Sector Regulators Forum. The PMO is led by Islamic Finance Advisory & Assurance Services, an international consultancy firm specialised in Islamic finance, in collaboration with Simmons & Simmons - an international law firm.
- Driving a raft of targeted measures which were included in the Finance Act, 2017 designed to support the growth of Islamic finance in Kenya. The measures included amendment to the Capital Markets Act, 2000 to provide for *sharia'h* compliant capital market products; amendment of the Income Tax Act (Cap. 470) to provide for equivalent tax treatment of *sharia'h* compliant products with conventional financial products; exemption from payment of stamp duty on transfers of title relating to *sukuk* and amendment to the Public Finance Management Act, 2012 to allow for Government to raise capital through issuance of *sukuk*.

Another significant development in Islamic finance in Kenya is the appointment of members of the Islamic Finance Consultative Committee (**IFCC**) by the National Treasury. The IFCC is an industry stakeholder committee whose main objective is to provide support and feedback on the proposed Islamic finance policies and regulatory changes to facilitate operations in this complementary form of finance. The IFCC is a key governance committee that shall be next in line to the apex committee – the Islamic Finance Steering Committee (**IFSC**). The IFCC may refer issues that require urgent resolution to the IFSC for expeditious guidance.

In the long term, CMA intends to integrate *sukuk* issuance within the national public debt management framework so that it is used to raise funds by Government (issuer) on condition that the underlying transaction is structured based on various *sharia'h* principles or contracts. In addition, CMA should allow for the following products to investors who are interested in investing in ICMs:

i. *Sharia'h* compliant derivatives products which are either exchange-traded such as Futures and Single Stock Futures (provided the underlying shares are *sharia'h*-compliant) or Over the Counter which can either be Islamic profit rate swap; foreign exchange swap and cross currency swap.
ii. *Sharia'h* compliant securities, Islamic indexes, Islamic unit trusts, Islamic venture capital/private equity, Islamic exchange traded fund, Islamic fund management, Islamic real estate investment trusts, Islamic structured products and Islamic stock broking.

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ON THE DOTTED LINE:

COURTS' APPROACH ON ENFORCEABILTY OF ILLEGAL CONTRACTS

Laymen who abide by lawyers' admonition that all agreements should be in writing are shocked when informed that despite taking this precaution, they are unable to enforce the contract because of some breach of the law. The Courts are averse to being used as mechanisms for legitimatising illegal conduct as was stated in plain English more than two and a half centuries ago *"No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."*

It may be a hard swallow for most people to understand why they are unable to vindicate their rights under a contract. The underlying rationale for the rule *"is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may say"* provides cold comfort for an injured plaintiff who sees the defendant laughing at him all the way to the bank something Judges have always recognised as presenting *"the dilemma that by denying relief on the ground of illegality to one party, it appears to confer an unjustified benefit illegally obtained on the other."*

Throughout the years since *Holman v Johnson (1775) 1 Cowp 341* was decided, Courts have stroven mightily to amend what was regarded as the injustice wrought by a mechanical rote application of the illegality defence (known to lawyers in short-hand legal Latin as *ex turpi causa*). This diverse collection of exceptions to the rule were best summarised by the Indian Supreme Court:

"The correct position in law, in our opinion, is that what one has to see is whether the illegality goes so much to the root of the matter that the plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered. If the illegality be trivial or venial, as stated by Williston and the plaintiff is not required to rest his case upon that illegality, then public policy demands that the defendants should not be allowed to take advantage of the position. A strict view, of course, must be taken of the plaintiff's conduct, and he should not be allowed to circumvent the illegality by resorting to some subterfuge or by misstating the facts. If, however, the matter is clear and illegality is not required to be pleaded or proved as part of the cause of action and the plaintiff recanted before the illegal purpose was achieved, then, unless it be of such a gross nature as to outrage the conscience of the Court, the plea of the defendant should not prevail."

In other words, provided the conduct disclosed was not patently offensive, the Courts would enforce the contract. There was some measure of judgment to determine whether or not to enforce an illegal contract. Attempts in the 1980s and 1990s by lower English Courts to give form and structure to how such discretion would be exercised produced a shock to the conscience test, a test shot down by the House of Lords in *Tinsley v Milligan (1993) UKHL 3,* allowing no discretion especially when dependant on imponderable factors. The Law Lords were, however, unable to agree on what should replace that public conscience test with a majority adopting a procedural rule that *ex turpi causa* would only apply when the plaintiff has to rely on the illegality.

However, this was an arbitrary rule dependant not upon application of settled legal principles to facts of a case, but skillful presentation of a claim. It attracted a barrage of criticism including that of the Law Commission of England and Wales, which at one stage encouraged lower Courts to ignore *Tinsley v Milligan* and continue, as before, the practice of using a range of policy factors when evaluating whether or not the defence applied. Justice McHugh of the High Court of Australia spoke of a good number of critics:

"*The Bowmaker's rule has no regard to the legal and equitable rights of the parties, the merits of the case, the effect of the transaction in undermining the policy of the relevant legislation or the question whether the sanctions imposed by the legislation sufficiently protect the purpose of the legislation. Regard is had only to the procedural issue; and it is that issue and not the policy of the legislation or the merits of the parties which determines the outcome. Basing the grant of legal remedies on an essentially procedural criterion which has nothing to do with the equitable positions of the parties or the policy of the legislation is unsatisfactory, particularly when implementing a doctrine which is founded on public policy.*"

Already facing the hostility of lower Courts busy devising all kinds of ways to avoid (whether overtly or covertly) its artificial rigidity, *Tinsley v Milligan* prospects were hardly assisted by its fate before the House of Lords (and subsequently the Supreme Court). Several Law Lords still found lots of room for discretion in the application of the *ex turpi causa* defence. For example, in one case, Lord Phillips did not see the reliance test as applying across the board. Speaking, it seems, for himself only, he did not think the reliance test ought to be applied mechanically – there was still room for discretion taking into account the underlying policy. Another example, though in the context of a claim in tort – Lord Hoffman pooh-poohed *ex turpi causa* as a rule of law commenting "*the maxim ex turpi causa expresses not so much a principle as a policy. Furthermore, that policy is not based upon a single justification but on a group of reasons, which vary in different situation.*"

For the past few years, the Supreme Court of the United Kingdom has sought to give order to the mess which hostility to *Tinsley v Milligan* and its failure to command universal assent has wrought. Initial attempts, for one reason or another, largely failed as the Judges have not spoken with one voice. In *Hounga v Allen (2014) UKSC 47*, the Court was unanimous in adopting and applying a balancing policy framework (though disagreeing on one aspect of policy) while over the dissents of a spirited minority, in *Les Laboratoires Servier & Anor v Apotex Inc & Others (2014) UKSC 55 and Jetivia SA v Bilta (UK) Ltd (2015) UKSC 23*, other Judges attempted to reinstate and affirm a narrowly-tailored rule for the illegality defence.

Then comes *Patel v Mirza (2016) UKSC 42* a case, gushingly described by its fans as the most significant private law decision in a generation while its critics decry it as merely perpetrating the mess under different garb. Lord Toulson delivered the majority Judgment propounding a three-part framework for applying a range of factors to determine what the justice of the case required whenever *ex turpi causa* was raised.

"So how is the court to determine the matter if not by some mechanistic process? In answer to that question I would say that one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without a) considering the underlying purpose of the prohibition which has been transgressed, b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality. We are, after all, in the area of public policy. That trio of necessary considerations can be found in the case law."

Kenyan Courts are adamant that entertaining claims that have a whiff of illegality or immoral is inimical to the business of courts that is always geared toward upholding the rules of law and/or legality.

The inquiry is directed at *"whether the public interest in preserving the integrity of the justice system should result in denial of the relief claimed"*. Within this three-part framework, a range of factors may require evaluation as part of the analysis in determining what the proportionate response under the third part is appropriate. These non-exhaustive factors include the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability.

Locally, we have to a large extent been spared doctrinal free-for-all at the heart of the illegality defence. Kenyan Courts are adamant that entertaining claims that have a whiff of illegality or are immoral is inimical to the business of Courts that is always geared toward upholding the rules of law and/or legality. As was held in *Mapis Investment (K) Ltd v Kenya Railways Coperation (2006) eKLR, "Courts ought not to pronounce themselves on obligations that are founded on illegal business or allow itself to be made an instrument of enforcing obligations arising out of illegal business."* Even when the Courts cite a decision in which the extent of illegality has been qualified, those concerns are not even noted.

There is an exception to this. Without relating it to the various binding decisions of the Court of Appeal, Justice Ngaah observed in relation to *Patel v Mirza* the UK Supreme Court appeared to depart from "*this age-old principle and restricted the application of the maxim ex turpi causa oritur non actio only to those actions seeking enforcement of what would otherwise be illegal contracts.*"

While Justice Ngaah referred to various passages from Lord Toulson's Judgment, it is far from clear that his understanding of the ratio of the case is, with respect, correct. The UK Supreme Court did not so much restrict application of the legal principle of *ex turpi causa* but changed how it is to be applied rejecting application of supposed rigid mechanistic tests of a rule of law in preference for a discretionary approach driven by a range of factors. It is not clear what Justice Ngaah means by illegality defence being restricted to "*those actions seeking enforcement of what would otherwise be illegal contracts.*" It may be that, with at least one Judge citing it, local Courts will be forced to review our case law.

It would be foolhardy to predict whether our higher up Courts are prepared to venture into the potential doctrinal minefield of *ex turpi causa* and how it will pan out if they do. Intellectually curious Judges may well find a doctrinal feast before them as they confront the rival approaches displayed in *Patel v Mirza*.

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KEEPING TABS:

CONSUMER PROTECTION LAWS EVERY HOMEBUYER SHOULD KNOW

The international publishing, research and consultancy firm Oxford Business Group recently observed in the Construction & Real Estate chapter of The Report: Kenya 2017 that the construction industry has been "*accelerating at a rapid pace and making a substantial contribution to the country's strong GDP growth figure*"' amidst rising demand for residential developments. Be that as it may, homebuyers continue to face a number of risks ranging from delays in completion and handing over of construction projects, poor and defective workmanship and encumbrances on land titles to false representations, fraud and extortion by unscrupulous developers and other actors in the real estate and construction industry.

Recent media reports of collapsed structures, often involving the loss of life, are equally alarming. Such incidences are often attributed to poor designs and defective construction works but other culprits include cost-cutting and use of substandard materials, non-compliance with construction requirements, lack of quality control and incompetence. This list is not exhaustive and there are many other factors that could seriously affect the use and enjoyment of property.

Kenyan law appreciates the Latin principle of *caveat emptor*, which places the onus on the buyer to uncover potential problems, and the principle of freedom of contract, which dictates that parties are free to enter into binding contracts on their own terms with limited outside interference. Nevertheless, the law acknowledges that homebuyers may not be as sophisticated as contractors and developers in matters of construction and are therefore in need of protection.

Constitution of Kenya

The Constitution of Kenya, 2010 (**the Constitution**) recognises that consumer rights are human rights that can be legally enforced. In particular, Article 46 provides that consumers have the right to goods and services of reasonable quality and the right to information necessary to gain full benefit from such goods and services. Further, consumers are entitled to protection of their health, safety and economic interests and to compensation for loss or injury arising from defects in goods and services. This provision is considered a notable milestone for consumer protection in the country.

Pursuant to these express constitutional provisions, homebuyers may sue for damages with respect to goods and services provided by financiers, estate agents, contractors and other actors in the construction industry. It should be noted, however, that Kenyan Courts have been reluctant to apply the Constitution directly to private bodies and individuals where specific legislation exists that addresses the issues raised, as the Courts have held that the Constitution provides for the rights, while Parliament enacts laws that set out the modes and processes through which the rights are to be exercised.

Consumer Protection Act

Part II of the Consumer Protection Act, 2012 (**the Act**) has indeed given consumers a wide range of rights, including the right to full pre-contractual information to enable them make informed decisions, the right to raise a complaint with regards to quality, delays in provision of rectification and the price of goods and services, and the right to cancel the agreement.

Consumers are also empowered under the Act to cancel agreements and sue for damages where a service provider engages in unfair practices, which include making false, misleading or deceptive representations. Representing that goods or services have certain characteristics that they do not have or representing that goods or services are of a particular standard or quality when they are not are all considered unfair practices. In such cases, the Court is expressly permitted to award exemplary or punitive damages in addition to any other remedy that would have been available to the consumer.

A notice is required where the consumer intends to rescind the agreement or to seek other forms of relief. The notice can be made verbally or in writing and may be expressed in any way as long as it sets out the reasons relied upon and complies with any requirements that may be prescribed.

A major benefit of the Act is that it provides a low-cost mechanism for consumers to seek redress against any wrongs inflicted on them without the need to go to Court. However, the Act only protects consumers of goods and services.

Homes are not legally recognised as goods and are usually purchased from private home owners who are not in the business of selling homes and who would therefore not qualify as *suppliers*. Thus, the average homebuyer may not always be able to rely on the provisions of the Act. But this is not necessarily the case where the homebuyer is dealing with professional developers who are in the business of selling properties and the agents of such developers.

National Construction Authority Act

The construction industry is principally regulated by the National Construction Authority Act, 2011 (**the NCA Act**) which provides for the establishment, powers and functions of the National Construction Authority (**the NCA**) and connected purposes.

The NCA oversees the construction industry and coordinates its development. The NCA's further mandate of accrediting, registering and regulating professional undertakings of contractors is aimed at ensuring that consumers of construction industry services are protected from exploitation and unfair practices. The NCA has the responsibility of detecting errant behaviours, responding to the same and enforcing the National Construction Authority Regulations (**the NCA Regulations**) in the interest of justice. The NCA Regulations require that contractors, whether foreign or local, be registered under the category of construction works they propose to undertake.

Additionally, the NCA Act establishes a Board of the NCA (**the Board**) with powers to inquire into the conduct of a contractor on its own initiative and sets out suspension conditions for contractors. Consumers may also forward complaints to the NCA for appropriate action. Such complaints are made to the Board in writing to enable the Board investigate and prosecute the case. The Board proceeds to investigate and where appropriate, prosecute the case. The NCA Act also establishes the Appeals Board which makes rules concerning the filing, hearing and disposal of appeals. While parties should ordinarily exhaust all the appeal avenues under the NCA Act before resorting to Court, this does not operate to oust the Court's jurisdiction.

Estate Agents Act

Another statute that polices the Kenyan construction industry is the Estate Agents Act (Cap. 533) (**the EA Act**). The EA Act establishes the Estate Agents Registration Board (**the Registration Board**), which is charged with the responsibility of registering estate agents and ensuring that the conduct of practicing agents is of a sufficiently high standard to ensure the protection of the public, including homebuyers.

The EA Act sets out the qualifications and process required to register as an estate agent and prohibits unauthorized practice. Estate agents also owe clients fiduciary duties that include acting in the client's best interest and disclosing to all concerned in whose interest one is acting. These duties are geared towards ensuring that homebuyers are protected against unscrupulous intermediaries.

Pursuant to these express constitutional provisions, homebuyers may sue for damages with respect to goods and services provided by financiers, estate agents, contractors and other actors in the construction industry.

While an estate agent's main duty is to the vendor, some of the issues that arise in this context includes the agent not telling homebuyers about problems with the home that they know of or ought to have known about, including misleading or false statements that are made regarding properties offered for sale. This is in breach of the EA Act, which prohibits dishonest practices and makes it a criminal offence to knowingly and wilfully make any statement, oral or written, which is false in any material way or misleading with a view to gaining an advantage or privilege under the EA Act whether for himself or for another.

The Registration Board is permitted under Part VI of the EA Act to institute an inquiry into an act or omission of an estate agent that is contrary to the public interest or the professional misconduct of estate agents on receipt of a complaint. If found guilty, the Board may suspend the estate agent's registration, caution the individual, impose a fine or order that the name of the individual be deleted from the register.

The EA Act is currently under review and there is an ongoing push for the establishment of a code of conduct for real estate agents to eliminate fraud and restore public confidence. This is particularly true for investors in the diaspora who have fallen victims to scams by unscrupulous agents and fraudsters.

Competition Act

The Competition Act, 2010 (**the Competition Act**) works in line with the existing consumer protection laws. It establishes the Competition Authority of Kenya (**CAK**) whose mandate is to enforce the Competition Act with the objective of enhancing the welfare of the Kenyan consumers by promoting and protecting effective competition in markets, including the construction sector, and preventing misleading market conduct.

A consumer may file a complaint with the CAK. However, prior to doing so, the consumer should attempt to settle any issues with the supplier of goods or service provider. This might be done via a telephone call, a complaint letter or a face to face meeting. The consumer should be prepared to furnish the supplier with any documentation that the supplier requires to assess the claim and the appropriate remedy. This will also serve as proof that the matter was raised with the supplier and could form the basis of a formal complaint to the CAK. The CAK has powers to mete out financial penalties and/or award compensation to the consumer in the event it finds that the supplier breached any consumer protection provisions of the Competition Act. In addition, the CAK may recommend prosecution of the supplier.

If the complaints mechanisms under the various statutes outlined above do not resolve the issues, the only avenue available to the consumer would be to go to Court. This may involve considerable expense and the Court process may take time. It is therefore essential that homebuyers carry out sufficient due diligence to avert some of the avoidable risks and safeguard their interests.

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SEALING THE LOOPHOLES:

PROPOSED DISCLOSURE RULES UNDER THE COMMON REPORTING STANDARDS

As is now well-known, Kenya has signed on to the multi-lateral framework for the sharing of financial information that enables tax authorities detect those seeking to use international borders to avoid paying tax. The Multilateral Convention on Mutual Administrative Assistance in Tax Matters established the Common Reporting Standards (**CRS**) that were approved by the Organisation for Economic Co-operation and Development (**OECD**) in July 2014, and which have made it possible for tax authorities of participating countries to access financial information of their tax residents.

While it has been a great international success story, CRS's full potential is still being undermined by tax-payers who, with assistance of their advisers, are still able to hide their assets and income under various cross-border devices, taking advantage of gaps within CRS to avoid detection. For example, CRS is limited to financial institutions that are located in participating jurisdictions. It is therefore easy to avoid its ambit by restricting one's dealings to financial institutions located in non-participating countries which are not required to report any financial information in regards to a reportable person – a boon to aggressive tax planners hatching tax avoidance schemes.

The Model Rules

In line with their continuing programme of improving mutual disclosure requirements which are uniform but sensitive to local needs, on 9th March 2018, the OECD published the Model Mandatory Disclosure Rules for Common Reporting Standard Avoidance Arrangements and Opaque Offshore Structures (**the Model Rules**) which specifically target all categories (compendiously referred to as intermediaries) tax advisers. The OECD recognises detecting and deterring offshore tax avoidance schemes *"is key both for the integrity of the CRS and for making sure that taxpayers that can afford to pay advisors and to put in place complex offshore structures do not get a free ride"*

As with other rules by the OECD on collection and access of relevant financial information for tax purposes, the Model Rules were developed so as to give a shared model for countries on the contents and structure of their own local regulatory framework in respect to professional service providers such as accountants, tax and financial advisors, banks, lawyers *"to inform tax authorities of any schemes they put in place for their clients to avoid reporting under the OECD/G20 Common Reporting Standard (CRS) or prevent the identification of the beneficial owners of entities or trusts."*

The Model Rules are targeted at CRS Avoidance Arrangements or Opaque Offshore Structures. The former is *'...any arrangement where it is reasonable to conclude that it has been designed to circumvent, or has been marketed as or has the effect of circumventing CRS legislation..."* while the latter *" ... a passive offshore vehicle that is held through an opaque structure" and passive vehicle defined as "legal person or legal arrangement that does not carry on a substantive economic activity supported by adequate staff, equipment, assets and premises in the jurisdiction where it is established or is tax resident."* Whilst not exactly crystal clear from the various examples provided, it is possible to get a sense of what activities and/or structures the Model Rules have in mind. CRS avoidance relates to efforts to exploit gaps within the relevant legislative or administrative framework to avoid disclosure of the information required under CRS.

An opaque structure may also be described as the application of the well known commercial purpose test of an entity to CRS. The idea here is to isolate genuine financial arrangements serving an identifiable commercial purpose from those designed for concealing income and assets and thus avoid disclosure under the CRS regime.

Inquiry is directed at whether the structure has the effect of not allowing the accurate identification of the beneficial owners and specifically identifies well recognised tax planning techniques that can be used to achieve this outcome, such as the use of nominee shareholders, indirect control arrangements or arrangements that provide a person with access to assets held by, or income derived from, the offshore vehicle without being identified as the beneficial owner.

Intermediary's Role

The Model Rules define *"intermediaries"* as those persons responsible for the design or marketing of CRS Avoidance Arrangements and Opaque Offshore Structures *"promoters"* as well as those persons that provide assistance or advice with respect to the design, marketing, implementation or organisation of that Arrangement or Structure *"service providers"*.

The knowledge and actions of an intermediary include those of their employees acting in the course of their employment, as well as contractors working for an employer, and the disclosure obligation and the penalties for a failure to disclose are imposed on that employer.

To be subject to the obligations imposed by the Model Rules, intermediaries must have a connection – "*sufficient nexus*" – with the reporting jurisdiction which extends to intermediaries operating through a branch located in that jurisdiction as well as one who is resident in, managed or controlled, incorporated or established under the laws of that jurisdiction.

An intermediary is required to file disclosure in respect of a CRS Avoidance Arrangements or Opaque Offshore Structures at the time the Arrangement is first made available for implementation, or whenever an Intermediary provides services in respect of the Arrangement or Structure. This ensures that the tax administration is provided with early warning about potential compliance risks or the need for policy changes as well as ensuring that it has current information on the actual users of the scheme at the time it is implemented.

Disclosure Obligations

There may be certain instances where the user of a CRS Avoidance Arrangement or Opaque Offshore Structure may have disclosure obligations under the Model Rules. More specifically, in instances where the intermediary is not subject to disclosure obligations as well as those cases where the intermediary is unable to comply with its disclosure obligations under the Model Rules either because it has no nexus with that jurisdiction or because it is relying on an exemption from disclosure such as professional secrecy.

The information required to be disclosed includes the details of the Arrangements or Structures, as well as the clients and actual users of those Arrangements or Structures, and any other intermediaries involved in the supply of the Arrangements or Structures. The requirements under the Model Rules are designed to capture the information that is likely to be most relevant from a risk-assessment perspective and to make it relatively straight forward for a tax administration to determine the jurisdictions

> ***CRS's full potential is still being undermined by tax-payers who, with assistance of their advisers, are still able to hide their assets and income under various cross-border devices taking advantage of gaps within CRS to avoid detection.***

with which such information should be exchanged.

The Model Rules do not require an attorney, solicitor or other recognised legal representative to disclose any information that is protected by legal professional privilege or equivalent professional secrecy obligations but only in respect to the scope of such protected information.

All relevant non-privileged Arrangements or Structures that are within the legal representative's knowledge, possession or control should still be provided. While understandable and correct for legal professional privilege is now accepted as a component of the fundamental right to privacy, this might limit the Model Rules' efficacy as more and more reliance is placed on practitioners in respect to whom such privilege attaches i.e. lawyers. Efforts by accountants to have legal professional privilege extended to them while giving legal advice, have thus far failed.

Striking a Balance

The information requirements of the model rules seek to strike a balance between the compliance burden on intermediaries to a minimum and still capturing the information that is likely to be most relevant. The requirement to separately identify the jurisdictions where the scheme has been made available for implementation and to specify the tax details of all the intermediaries, clients and reportable taxpayers in connection with that arrangement is intended to make it relatively straightforward for a tax administration to determine the jurisdictions for whom the disclosed information will be relevant for information exchange purposes.

Enforcement

The rules have put in place punitive measures for non-disclosure in the form of penalties. However the same are not cast in stone but are to be determined by each jurisdiction depending on its unique circumstances. However it is expressly stipulated that such penalties are to be set at a level that encourages compliance and maximises their deterrent effect.

Conclusion

The Model Rules are a continuation of concerted international efforts to tighten the noose around tax cheats or dodgers seeking to exploit international borders. As Arthur Vanderbilt remarked "*taxes are the lifeblood of government and no taxpayer should be permitted to escape the payment of his just share of the burden of contributing thereto.*" While the problem of cross-border tax avoidance affects most countries, the less developed countries are, by a significant factor, the most affected and disproportionately so. It will therefore come as no surprise if Kenya adopts the Model Rules as part of its CRS regime.

Even as the Government moves to implement CRS, a national debate on our entire tax system may well be warranted. It is a recurring question on which no answers are available and, as far as we can tell, has never fully engaged us as citizens despite the constant complaint that we are being overtaxed. It may well be possible that our tax system is inhibiting economic activity and thus, ironically, undermining rather than boosting revenue collection.

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TWO CENTS:

THE SALE & LEASEBACK MODEL ALTERNATIVE

Conventional debt and equity financing models have become largely inaccessible amidst the economic slump that has been occasioned by the global financial crisis. The ramifications of this have been felt in Kenya where there has been a slow-down on lending to the private sector. This has inadvertently resulted in a deceleration of economic growth as traditional lenders have scaled back on loan disbursements. This has also been exacerbated by the capping of interest rates chargeable by banks and financial institutions which was introduced in 2016.

The decline in credit issuance and uptake has had an effect on the recent slowdown of Kenya's economic performance due to the general election in 2017 which greatly affected the country's economic outlook. These are clear manifestations of a paradigm shift needed in Kenya in the manner in which capital is raised by various entities. But there is hope, with the world economy bouncing back from the global recession in 2010, reforms have been made in the traditional financing models in Kenya. Against this backdrop, companies now have the recourse to explore alternative financing models to remain competitive and profitable.

Sale and Leaseback Transactions

Sale and leaseback financing has proved to be an attractive option for some companies that seek to keep up with their growth strategies. Essentially a sale and leaseback transaction involves a sale of an interest in property with a reservation on the possessory terms. The underlying characteristic of these kind of transactions is that, the seller acts as a lessee and they raise the capital through property that they hold by transferring the property to a buyer through sale. This transaction enables the seller to dispose of the property and obtain capital injection for the business, while maintaining the use of the same property at an agreed lease premium for a specified term. This is especially beneficial to a buyer who seeks to incur the least possible maintenance costs of the property.

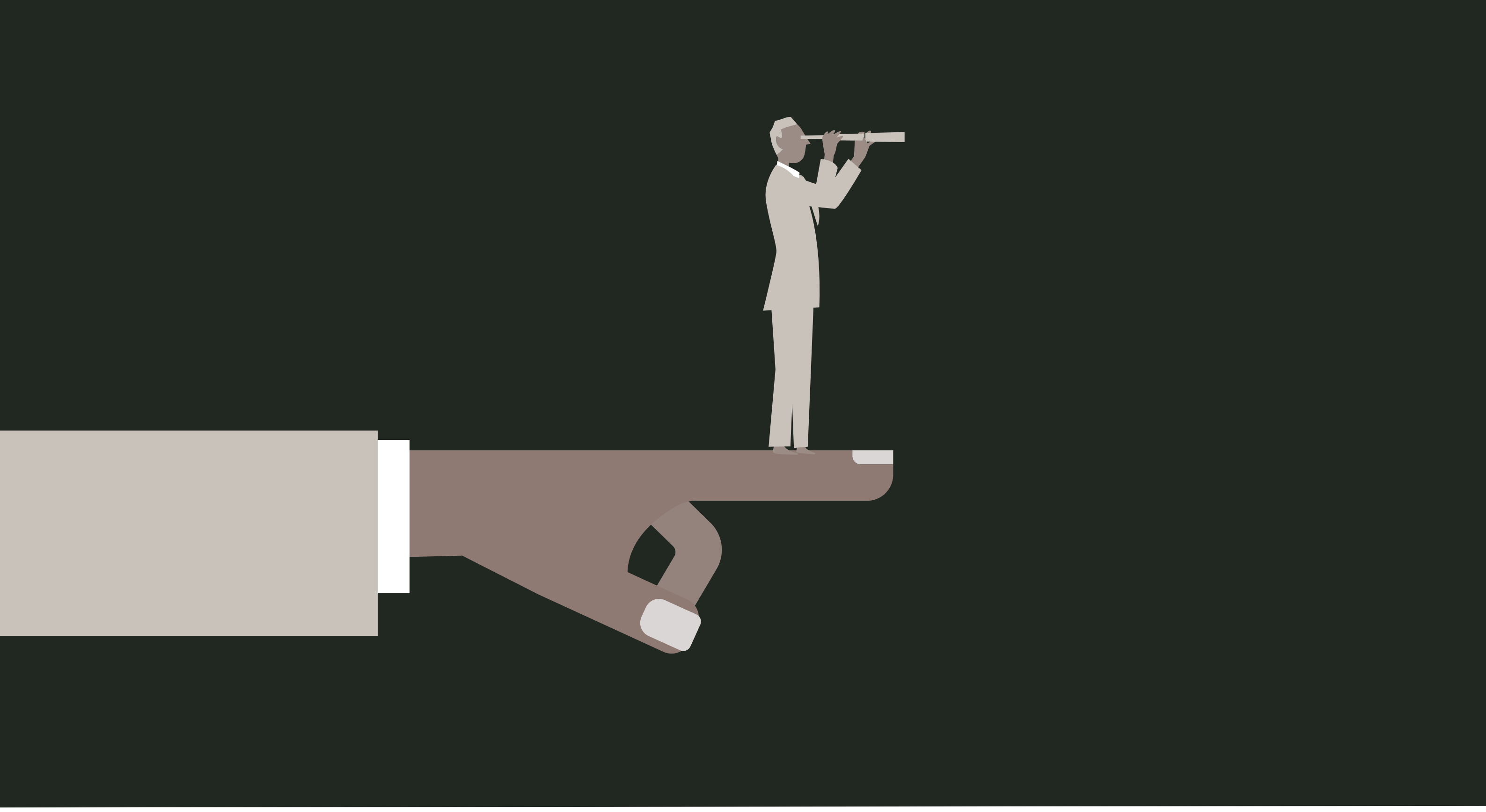
Characteristics

A sale and leaseback financing model varies from traditional financing models because it typically entails:

- A sale of assets by an entity that desires to raise capital from the property to an investor who seeks to achieve a low-risk, high yield investment
- Simultaneous obtaining of a long-term lease of the property by the seller-lessee from the buyer-lessor which enables the continuing possession and use of the property by the seller-lessee in exchange for payment of rentals at an agreed premium
- The retention by the seller-lessee of most of the risk and rewards incident to ownership save for the right to mortgage where the lease is an operating lease
- Transfer of substantially all the risks and rewards incident to ownership where the lease is a capital lease.

Classification of Leases

Whether a lease shall be classified as an operating lease or a capital lease is usually agreed upon at the inception of the transaction. It is important to classify the lease the parties intend to enter into as both have different effects on the parties.



A lease will be classified as an operating lease where the rental premiums are considered as operating expenses in the seller-lessee's book of accounts, and the property leased does not form part of the seller-lessee's balance sheet. On the other hand, a capital lease is considered as a loan to the seller-lessee and stated as such in the seller-lessee's books of account. Most leases in a typical sale and leaseback transaction will be operating leases. However, a capital lease would arise where there is a buyback agreement contained in the lease; there is a buyback option with a defined price in the lease; or the lease value is greater than ninety per cent (90%) of the value of the property.

Advantages and Disadvantages

Certain advantages have been identified to inure with sale and leaseback financing model. One key motivation for adopting this financing model is the tax advantages that flow from these transactions. It has been noted that in majority of these transactions, the seller is usually motivated by the need to realise immediate loss which is used to offset the seller's operating income. The seller in essence receives proceeds from the sale of a non-liquid asset, yet retains for a term the use and possession of the asset.

The seller in a sale and leaseback transaction obtains a greater amount of capital through a leaseback than when they opt for conventional types of borrowing. Needless to say, this financing model is essential in providing working capital to the seller-lessee who will realise approximately one hundred per cent (100%) of the market value of the property unlike debt and equity forms of financing which may not result in the same returns. This is especially important in markets experiencing fluctuations in conventional lending sources.

For the buyer-lessor, this financing model allows it to have a hands-off approach to the management of the property as it incurs no responsibility for the operational or managerial aspects of the property which is left to the seller-lessee.

Sale and leaseback financing has proved to be an attractive option for some companies that seek to keep up with their growth strategies.

A sale and leaseback transaction also comes with its fair share of challenges, a notable one being a high interest rate on the lease that the rental property may attract. Tax implications may also be evident with recent changes in the International Financial Reporting Standards.

The fact that the property is no longer under the ownership of the seller-lessee also means that the seller-lessee may have no say with regards to the interest that the buyer-lessor will charge on the leased property. This may in the long run mean that the seller-lessee has to incur higher costs in using and managing the property as this responsibility does not rest with the buyer-lessor. This denotes an inherent risk that is evident in many lease arrangements.

It is clear that the sale and leaseback financing model is an option Kenyan companies could consider in their quest to raise capital to finance their growth strategies in the market. Numerous advantages can be drawn from the adoption of this model, especially in light of the drawbacks of conventional financing models.

Moreover, this model is attractive to entities that are unable to attract a wide variety of financing. This financing model may be useful for companies that may want to accrue some capital to use for their expansion initiatives. Ultimately, these entities could benefit from unlocked real estate value, reduction in a company's investment in non-core business assets, such as buildings and land and freeing-up of the entity's cash in exchange for executing a long-term lease.

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BENCHMARK:

EFFECTIVENESS OF PUBLIC PRIVATE PARTNERSHIPS IN KENYA

In 2017, the World Bank published a report entitled Benchmarking Public Private Partnerships (**World Bank Report)** following the review of legislation and practices of eighty-two (82) countries (including Kenya). The objective of the World Bank Report was to give empirically based authoritative guidance on Public Private Partnerships (**PPPs**). This comparative analysis was conducted under the framework of the four (4) main areas of a PPP cycle being preparation, procurement, contract management and approach to unsolicited proposals (**USPs**).

World Bank Report

The World Bank Report assesses the relative performance of each country against a maximum score of a hundred (100) in each area. Kenya was assessed to have achieved above average scores of sixty seven (67) in the area of preparation of PPP's, sixty five (65) in procurement and fifty two (52) in the area of contract management. Before popping the champagne bottle, it should be borne in mind that there is a paucity of PPP projects (according to the PPP Unit there are only seven (7) on-going PPP projects with a rather suspicious list of past projects) even though we have had the law on PPPs in our books for many years beginning with regulations under the Public Procurement and Asset Disposal Act and since 2013, a fully-fledged Act- the Public Private Partnership Act, 2013 (**the Act**).

Without making a fetish of the numbers (which admittedly are somewhat arbitrary), rather tellingly, by the World Bank's ratings, South Africa significantly outperformed Kenya in each of these areas while some of our neighbours were ranked better in some aspects. For example, for procurement Tanzania was assessed at eighty (80) while for management Uganda scored sixty eight (68).

But such raw numbers teach us nothing. The real value of the World Bank Report, despite the inherent difficulties of lack of thorough analysis given such a high sample size and the inherent difficulties in comparing politically and economically diverse countries, is its provocative value. The results present an opportunity for identifying potential trouble-spots in our legislative landscape and for reflection as to whether we can do better.

One such area is USPs, also referred to as Privately Initiated Proposals (**PIPs**), flagged as the area of most concern and least progress earning against what the authors of the World Bank Report viewed as good practice. The principal weakness of our system of USP/PIPs, which we apparently share only with Vietnam, is the absence of a competitive procuring procedure. A USP presents the rather unique form of PPPs as it is where the private party initiates the process.

Unlike procured PPPs for which there is a comprehensive regulatory framework under the Act – see generally sections 29 to 57 – with competition at its heart, the law on USPs/PPPs is much less extensive. The sum total of this is to be found in section 61:

"(1) A contracting authority may consider a privately initiated investment proposal for a project and procure the construction or development of a project or the performance of a service by negotiation without subjecting the proposal to a competitive procurement process where—

(a) there is an urgent need for continuity in the construction, development, maintenance or operation of a facility or provision of a service and engaging in the competitive procurement process would be impractical: Provided that the circumstances giving rise to the risk of disruption were not foreseeable by the contracting authority or the result of an unreasonable failure to act by the contracting authority;

(b) the costs relating to the intellectual property in relation to the proposed design of the project is substantial;

(c) there exists only one person or firm capable of undertaking the project, maintaining the facility or providing the service or such person or firm has exclusive rights over the use of the intellectual property, trade secrets or other exclusive rights necessary for the construction, operation or maintenance of the facility or provision of the service; or

(d) there exists any of the circumstance as the Cabinet Secretary may prescribe.

(2) A contracting authority shall, before commencing negotiations with a private party under this section—

(a) prescribe a criteria against which the outcome of negotiations shall be evaluated;

(b) submit the proposal to the unit for consideration and recommendation;
(c) upon obtaining the recommendations of the unit, apply for and obtain approval from the Committee to negotiate the contract; and
(d) conduct the negotiations and award the tender in accordance with the prescribed process in the regulations to this Act.
(3) A contracting authority shall not consider a project for procurement under this section unless it is satisfied that—
(a) the project shall provide value for money;
(b) the project shall be affordable; and
(c) the appropriate risks are transferred to the private party

The Act provides for three (3) circumstances under which USPs/PIPs are possible, with seemingly unguided discretions conferred on a member of the executive to increase. As is clear, all the circumstances are situations where the legislature has decided competition is not feasible or possible. This appears to be something that the blunderbuss one-size fits all criteria adopted by the World Bank does not take into account. USPs are an exception to the norm and save for the rather anomalous discretion given to the Cabinet Secretary to expand them, they are restricted to situations in which competition is not a practical alternative. It is therefore difficult to follow the argument that our system should be faulted for the absence of competition. Of note is that according to the PPP Unit, four (4) of the seventy (70) PPP projects currently underway are USPs.

Perhaps a more valid criticism is why the availability of opportunities for PPPs should be so restricted for if the public can benefit from private sector finance in so many areas that were previously the exclusive reserve for the public. Surely, ideas and innovations on those areas should be equally welcomed. The concern should be how to ensure that this is not abused which is where competition becomes relevant and the World Bank Report is useful. Both of our neighbours, Tanzania and Uganda scored higher on USPs but that is only because of the rather arbitrary three-part criteria adopted by World Bank for assessment.

The Bangladeshi Perspective

While not as high scoring, lessons can be drawn from Bangladesh which has a broader regulation. Bangladesh's primary legislation does not restrict the areas in which USPs are available but there is the subject of extensive subsidiary legislation, though we should add that we have not considered their enforcement.

Some of the salient guidelines are set out below:

Non-Mandatory Nature of Concept Note and/or Unsolicited Proposal

The guidelines ensure that the Government is not obligated to consider and accept a Concept Note and is not prohibited from using the asset that is the subject of the Concept Note in a conventional Government Project.

Process for Submission of a Concept Note and Sector Policy Review

The guidelines establish a framework through which the Original Proponent of a Concept Note submits the same to the Contracting Authority while keeping the PPP Authority and Applicable Line Ministry in copy. This provides for a forum for discussion to clarify the scope of the Concept Note and ensure that the project is aligned with sector development plans and is likely to deliver a positive socio-economic benefit. There is a requirement for endorsement by the Applicable Line Ministry where the Concept Note is successful as well as provision for rejection and resubmission with Applicable Line Ministry feedback.

Kenya was assessed to have achieved above average scores of sixty seven (67) in the area of preparation of PPP's, sixty five (65) in procurement and fifty two (52) in the area of contract management.

Assessment of Eligibility of the Concept Note and the PPP Project Proposal

This process provides for detailed assessment and a screening criteria through the Applicable Line Ministry, which formally submits the endorsed Concept Note and the PPP Project Proposal to the PPP Authority for processing of the same and in principal approval and makes provision for the PPP Authority to use of its own resources or seek professional support from qualified consultants in conducting its assessment. The PPP Authority may also contact the Contracting Authority, the Applicable Line Ministry and other relevant Government agencies to get more clarity on the Project.

A cursory reading of the guidelines suggests that the Government of Bangladesh has identified some of the possible exceptions and loopholes that may be created by a non-exhaustive statutory provision on USPs, the most notable of which is the provision that ensures that notwithstanding the submission of a USP, the contracting authority is not precluded from applying a project concept on a conventional project or what may be termed a solicited proposal. In addition, the fact that the guidelines make provisions and give a leeway for the use of external consultants by the Bangladeshi PPP Authority (the equivalent of the Kenyan PPP Unit) and allows it to seek support from appropriate sector line ministry resources when making its assessment gives the USP process further legitimacy and competitive justification on procedure.

The provisions of the Bangladeshi USP guidelines therefore serve as guideposts should we go the way of USPs. One only needs to take a look at the model of USP guidelines in Bangladesh to identify that a gaping hole and possibility of USP proponent litigation against the Government of Kenya and contracting authorities is real where the waters are muddied between solicited proposal tendering and a USP proposal in a situation where a project that formed the basis of a previous USP is later subjected to the conventional tendering process for solicited proposals.

Quite apart from protection of the contracting authority, the existence of USP guidelines would also ensure that the legitimacy of the USP process is not easily called into a question once a contract is awarded to a private entity, especially where a framework exists to ensure that the USP process itself was fair, competitive and received a nod of approval from sector consultants and specialists.

Conclusion

If Kenya decides to open up the circumstances in which USPs should be available, there will be need for guidelines and regulation of USPs in order to protect both the private contracting entity as well as the contracting authority. While the World Bank Report has noted that in developing economies the lack of USP regulations may be a consequence of an express desire of the public sector not to use USP procurement, it suggests that the subject may not have been considered.

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CHANGING FIELDS:

RECENT AMENDMENTS TO LAND LAWS AND LAND INSTITUTIONS IN KENYA

The Land Laws (Amendment) Act, 2016 (**the Amendment Act**) came into force on 21st September 2016, bringing with it amendments to the Land Registration Act, 2012, the National Land Commission Act, 2012 and the Land Act, 2012. The amendments introduced some pertinent changes to land law and conveyancing in Kenya that are important to note.

The Ministry of Lands and the National Land Commission

A clear distinction has now been drawn between the roles of the Cabinet Secretary for matters relating to land (**the Cabinet Secretary**) vis-à-vis the National Land Commission (**the NLC**). Further, the mandates of both the Ministry of Lands and the NLC have been expanded by the Amendment Act.

The NLC is the body responsible for managing public land on behalf of national and county governments including the maintenance of records and data in respect of public land. However, the decision to allocate any part or parcel of public land is to be made by the national or county government. The role of the NLC is only to implement the decision to allocate.

Previously, the powers and functions of the Cabinet Secretary in land management included developing policies on land upon the recommendation of the NLC; facilitating the implementation of land policy and reforms; coordinating the formulation of standards of service in the land sector; regulating service providers and professionals, including physical planners, surveyors, valuers, estate agents, and other land related professionals, to ensure quality control; and monitoring and evaluating the land sector performance. The Amendment Act however expanded the Cabinet Secretary's mandate to include:

- Providing policy direction regarding all classes of land in consultation with the NLC where appropriate;
- Coordinating the development and implementation of a National Land Information System in collaboration with the NLC; and
- Administering and undertaking all dealings including registration of private land interests.

The NLC on the other hand is charged under Article 67(2) of the Constitution to; manage public land on behalf of the national and county governments, recommend a national land policy to the national government, advise the national government on a comprehensive programme for the registration of title in land throughout Kenya, conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities, initiate investigations, on its own initiative or on a complaint into present or historical land injustices, and recommend appropriate redress, encourage the application of traditional dispute resolution mechanisms in land conflicts; assess tax on land and premiums on immovable property in any area designated by law, and monitor and have oversight responsibilities over land use planning throughout the country. The Amendment Act has expanded NLC's mandate to include:

- Ensuring that public land under the management of the designated state agencies is sustainably managed for the intended purposes; and
- Developing and maintaining an effective land information system for the management of public land.

Historical Land Injustices

The Amendment Act has also provided direction on the NLC's mandate to deal with historical land injustices. A historical land injustice means a grievance which was occasioned by a violation of right in land on the basis of any law, policy, declaration, administrative practice, treaty or agreement; resulted in displacement from their habitual place of residence which occurred between 15th June 1895 when Kenya became a protectorate under the British rule and 27th August 2010 when the Constitution of Kenya, 2010 was promulgated and has not been sufficiently resolved and exists up to the period specified.

A historical land claim may only be admitted, registered and processed by the NLC if it meets the following criteria:

- It is verifiable that the act complained of resulted in displacement of the claimant or other form of historical land injustice;
- The claim has not or is not capable of being addressed through the ordinary court system on the basis that the claim contradicts a law that was in force at the time when the injustice began or the claim is time barred;
- The claimant was either a proprietor or occupant of the land upon which the claim is based;
- No action or omission on the part of the claimant amounts to surrender or renouncement of the right to the land in question; and
- It is brought within five (5) years from the date of commencement of the National Land Commission Act.

The amendments brought about by the Amendment Act are laudable of practical advantage

After conducting investigations, the NLC may recommend restitution; compensation, if it is impossible to restore the land; resettlement on an alternative land; rehabilitation through provision of social infrastructure; affirmative action programmes for marginalized groups and communities; creation of wayleaves and easements; order for revocation and reallocation of the land; order for revocation of an official declaration in respect of any public land and reallocation; sale and sharing of the proceeds; refund to bona fide third party purchasers after valuation; or declaratory and preservation orders.

Pre-emptive Rights

Kenyan citizens whose leasehold titles are about to expire have a pre-emptive right to apply for the re-allocation of the land. Before the expiry of the leasehold tenure, the NLC shall within five (5) years of the expiry date, notify the lessee by registered mail, of the date of expiry of the lease and inform the lessee of his or her pre-emptive right to allocation of the land upon application, provided that such lessee is a Kenyan citizen and that the land is not required by the national or county government for public purposes.

Controlled Land

The Amendment Act has introduced the concept of controlled land. Controlled land means land in Kenya which is within a zone of twenty-five (25) kilometers from the inland national boundary of Kenya or within the first and second row from high water mark of the Indian Ocean.

The Amendment Act provides that no transaction in controlled land to an ineligible person shall be dealt with without the prior written approval of the Cabinet Secretary. An ineligible person means an individual who is not a Kenyan citizen; the government of a country other than Kenya or a political subdivision of a country other than Kenya, or any agency of such government or political subdivision, or a body corporate which has non-citizens as shareholders shall be deemed to be a non-citizen.

Abolition of the Land Compensation Fund

The Land Compensation Fund has been abolished by the Amendment Act. Its purpose was to provide compensation to any person who suffered any loss of any rights or interests in land as a result of the implementation of any of the provisions of the Land Act by the national government or county government.

No Requirement to Surrender Freehold Title

Kenyan law recognises various forms of tenure in land such as freehold, leasehold, partial interests e.g. easements and customary land rights where the same are consistent with the Constitution. Previously, a registered proprietor was required to surrender his/her freehold Title in exchange for a leasehold Title as a condition for granting planning permission such as change of user. It is now expressly provided that a registered proprietor cannot be obliged to surrender a freehold interest in exchange for a leasehold interest as a condition for granting planning permission.

Execution of Documents

The Amendment Act provides that the execution of any instrument by a corporate body, association, co-operative society or other organisation shall be effected in accordance with the provisions of the relevant applicable law and in the absence of provisions on execution of instruments, the execution shall be effected in the presence of either an advocate of the High Court of Kenya, a magistrate, a judge or a notary public.

Previously, the Land Registration Act, 2012 gave different requirements for documents executed within the Commonwealth and those executed outside of the Commonwealth. However, this distinction has been removed. The Amendment Act now provides that an instrument executed outside Kenya shall not be registered unless it has been endorsed or is accompanied by a certificate in the prescribed form completed by a notary public or such other person as the Cabinet Secretary may prescribe.

Contracts

The Amendment Act provides that no suit shall be brought upon a contract for the disposition of an interest in land unless the contract upon which the suit is founded is in writing, signed by all the parties thereto and the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party. The following contracts are however excluded from this requirement:

- A contract made in the course of a public action
- The creation or operation of a resulting, implied or a constructive trust
- Any agreement or contract made or entered into before 21st September, 2016, provided that the verbal contracts shall be reduced to writing within two years from this date

Spousal Consent

There is no longer a requirement to obtain spousal consent for any dealing with or disposition of interests in land save for consent of a spouse to a charge over the matrimonial home under section 79(3) of the Land Act, 2012 and any requirement for such consent under the Matrimonial Property Act, 2013.

Co- ownership

Unless it is expressly provided, where land is co-owned, it will be presumed that the proprietors are holding as tenants in common in equal shares. Previously, joint tenancies could only arise where land was co-owned between spouses – that restriction has now been removed and accordingly, any two or more parties may be registered as proprietors as joint tenants regardless of the relationship between them.

Charges

There have been a number of changes as regards charges. Highlights of the same are summarised as follows:-

1) **Retrospective application**
   The Land Act, 2012 previously provided that it applied retrospectively to charges created before the Act which created a lot of controversy. This has however been amended, save for the requirement to serve notice to spouses and other persons who were not required to be served under the repealed Land Acts of Parliament in the realisation of any charge.
2) **Priority of charges**
   Parties to a charge can now provide for the ranking of the charge within the provisions of the charge.
3) **Remedies of a chargee/lender**
   Previously, the period of notice to be given to the borrower to remedy a default of the charge was two (2) months. However, this time has now been increased to ninety (90) days. The borrower's default must continue for a period of one (1) month before this notice can be given.
4) **Chargee's power to enter into possession**
   A chargee/lender is entitled to use only reasonable force to regain possession of the charged property. It is also important to note that the chargee/lender may only exercise this power after obtaining a Court order.

Prohibition of Unlawful Occupation of Land

The Amendment Act prohibits the unlawful occupation of private, community or public land. It provides for the eviction of unlawful occupants, subject to compliance with the following procedure-

- Proper identification of those taking part in the eviction or demolitions
- Presentation of the formal authorisations for the action
- where groups of people are involved, government officials or their representatives should be present during the eviction
- The eviction should be carried out in a manner that respects the dignity, right to life and security of those affected
- Inclusion of special measures to ensure effective protection to vulnerable groups such as women, children, the elderly, and persons with disabilities
- Inclusion of special measures to ensure that there is no arbitrary deprivation of property or possessions as a result of the eviction
- Inclusion of mechanisms to protect property and possessions left behind involuntarily from destruction
- Upholding the principles of necessity and proportionality during the use of force
- Giving the affected persons the first priority to demolish and salvage their property

The amendments brought about by the Amendment Act are laudable of practical advantage and indeed were necessary to rectify inconsistencies and overlap of mandates in the Land laws that had resulted in difficulties in the implementation of the various Land Acts.

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TRUST IN JERSEY:

AN OVERVIEW OF TRUST LAW IN JERSEY

A trust is a legal arrangement which distinguishes between legal and beneficial ownership of property. In a trust, legal ownership is transferred to a trustee who manages and administers the property for the benefit of the beneficiaries. It is an arrangement intended for the protection, enhancement and eventual disposal of property.

Jersey is a leading jurisdiction for the establishment and management of trusts. It has a large and well qualified professional trust sector, modern trusts legislation and a highly effective and mature legal and judicial system. Jersey is in the top division of international finance centres in the regulation and supervision of its financial services industry.

Common types of Jersey trusts
In a private wealth context, the following are the most common types of Jersey law trusts used:

Discretionary trusts
Whilst some settlors wish to specify in the trust instrument the precise circumstances in which beneficiaries are to be given the income and/or capital of the trust fund, most settlors prefer to give trustees sufficient flexibility to take account of changes in circumstances of the beneficiaries. A discretionary trust gives the trustees wide powers to administer the assets and to distribute them at their absolute discretion. The trustees will usually be guided by a letter of wishes from the settlor which, although not legally binding, sets out how the settlor wishes the trust fund to be administered and distributed to the beneficiaries. The settlor can update and revise the letter of wishes from time to time.

Non-charitable purpose trusts
It is possible for Jersey law trusts to be established partly or wholly for non-charitable purposes. Purpose trusts can be used in corporate transactions to hold underlying assets 'off balance sheet'. More commonly in a private wealth context such trusts can be used to protect family heirlooms or to hold certain assets such as the shares in a family trading company. An enforcer is required to be appointed to enforce the terms of a trust in relation to its non-charitable purposes.

Settlor reserved power trust
It is possible for a settlor to reserve certain powers for himself or herself under the terms of a trust instrument. Such powers might include the power to give binding directions to the trustees in relation to the investment of the trust fund, the power to vary or amend the terms of the trust, the power to remove a trustee and the power to change the proper law of the trust.

Typical features of Jersey trusts

Revocability of trusts
A Jersey trust may be revocable or irrevocable. If a trust is revocable, the settlor may terminate the trust and regain ownership of the trust fund

held on trust on the date revocation takes effect. For this reason, revenue authorities may argue that the settlor has always controlled the trust fund and careful advice is required if a trust is to be revocable in nature. An irrevocable trust cannot be revoked. Generally, this is the preferred form of trust settled under Jersey law.

Protectors

The settlor of a discretionary trust may wish to ensure certain controls are placed around the key powers of the trustees. This can be achieved by the appointment of a Protector requiring the trustees to obtain the consent of the Protector before exercising such powers. The obligations and powers of a protector are set out in the trust instrument and usually include the trustees' power to appoint new trustees, the addition and removal of beneficiaries and the distribution of capital from the trust fund. Often, the protector is a close friend, relative or professional adviser of the settlor.

A Jersey law trust may exist for a limited or unlimited period of time.

Practical uses of trusts

Jersey trusts are generally used by individuals and companies for personal, business and investment activities. It is important that professional advice from a legal and tax perspective is sought in each jurisdiction which affects the settlor, the beneficiaries and the trust fund. Some practical ways in which trusts can be used are:

Asset protection and management

Settling assets onto trust can serve important asset protection functions. A discretionary trust can serve to ensure that family wealth is maintained, that the assets are not available to creditors and that the assets are protected in the event of family breakdown among members of the beneficial class. Assets managed by the trustee ensure diversification of investments on terms which can be agreed with the settlor.

Avoidance of probate formalities

Assets owned by an individual usually pass to the beneficiaries uporn the death of the individual in accordance with the terms of a will. If there are assets which are held in a wide variety of countries it may be necessary to obtain a grant of probate to the will in each country where assets are located. This can be expensive and time-consuming. There may also be estate duties and taxes payable before the estate can be settled and the assets distributed to the heirs of the deceased.

If such assets are held in a trust, they can continue to be held for the benefit of succeeding generations in accordance with the terms of the trust instrument. The death of the settlor should have no detrimental consequences for the continued operation of the trust.

Forced heirship

Assets held in a trust can be distributed in any manner that the settlor desires. An individual from a country with rigid legal or religious inheritance laws may wish to arrange for a distribution of assets on his death, different to that required under the law. By establishing a trust outside that country in Jersey, and depending on the location of the assets that will constitute the trust fund, the desired distribution plan can often be formulated and implemented.

Privacy, confidentiality and anonymity

Trusts are generally created by a private document to which the settlor and the trustees are the only parties. The trust instrument does not have to be

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filed with any public body in Jersey and information relating to the trust is not accessible by the general public. There are however certain exceptions to this, in particular, beneficiaries of a trust may be entitled to financial information relating to the trust.

Prevention of division of assets

An individual who has built up a sizeable private company may have some children who are interested in the running of the business and some who are not. The individual may wish to benefit the children equally but would not like any of them to be able to dispose of their interest in the family company to non-family members. Such arrangements can be achieved through the use of a trust.

Family assets may also take the form of works of art or real estate which, by their nature, cannot be divided but from which a number of individuals benefit. Such property can be held in trust for the beneficiaries without disturbing the underlying property.

Control of spending

In some cases, individuals may be unfit to manage their own affairs due to age, infirmity or profligacy. A trust structure can allow trustees to help in the management and preservation of wealth by controlling the manner in which trust funds are spent.

Commercial uses

There are also a range of uses to which trusts are put in the commercial sphere, including trusts established:

- For conferring benefits and incentives on employees (e.g. employee benefit trusts)
- As a vehicle for the administration of pension funds
- As a platform for investment funds allowing investors to spread risk by acquiring limited stakes in a large portfolio of investments (e.g. a unit trust)
- To hold security over a borrower's assets for the benefit of lenders under syndicated loans
- As an 'orphaning' mechanism to hold assets 'off balance sheet', and in the creation of 'bankruptcy remote' structure

Jersey taxation of trusts

In Jersey, the taxation rules for trusts are relatively straightforward provided the beneficiaries of the trust are not resident in Jersey. In general terms trusts with no Jersey resident beneficiaries are only liable to tax on Jersey source income. However by concession, Jersey bank deposit interest is not treated as Jersey source income when received by trustees of a trust with no Jersey resident beneficiaries. There is no inheritance or capital gains tax in Jersey.

Conclusion

A trust is a flexible arrangement which can be structured to meet the objectives of a settlor. Tax advice should be obtained by the settlor and in some cases the beneficiaries before a trust is established, to ensure the terms of a trust are tailored appropriately.

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Why us?

Oraro & Company Advocates is a top tier full service Kenyan law firm with a robust legal practice established over 40 years ago. We are committed to offering our clients with legal advice drawing from local knowledge and global perspectives built over the years. We invest in client relationships to understand our client's needs in order to exceed their expectations through our collaborative approach.

We advise both local and foreign clients, private clients, leading corporates, governments, regulators, and not-for-profit organisations from target industry sectors such as Agribusiness, Banking & Financial Services, Construction & Real Estate, Consumer Goods & Retail, Energy, Government & Public Sector, Infrastructure & Projects, Manufacturing & Industrial, Maritime & Shipping, Non- Governmental Organisations, Transport & Logistics, Telecoms, Media & Technology.

Our Reputation

We are proud to be to be consistently ranked by global legal directories Chambers & Partners, IFLR 1000 and Legal 500 as the go to firm for dispute resolution in Kenya. Oraro & Company Advocates has a strong reputation for offering legal advisory and transactional legal services in the following practice areas:

Banking & Finance

Our banking and finance practice advises local and regional banks as well as other market participants in all forms of financing. We advise on a broad spectrum of financial products, including asset finance, Islamic finance, projects and infrastructure finance and real estate finance.

Our practice also prepares lending and security documentation in corporate lending transactions for structured finance, syndicated loans and trade finance. We recently advised:

- Acting in the preparation and perfection of security documentation (debenture, charges, corporate guarantees and the relevant board resolutions) for Barclays Bank in respect to their lending to Dale Flora to facilitate acquisition of a horticultural farm
- Advising one of the largest sugar manufacturing companies in Kenya and one of Kenya's largest publicly listed companies in the restructuring of its debt, owing from local and international lenders
- Undertaking a comprehensive securities audit for a Pan African bank with a regional outreach. The assignment involves the audit of the top customers in the Bank's loan book with a view to advising on the validity and enforceability of the securities held by the Bank and reviewing and advising standard documents and processes of the Bank in order to minimise risk

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Corporate & Commercial

Our Corporate & Commercial practice area has experience in advising complex mergers, acquisitions, takeovers and joint ventures on structuring and regulatory advice from various sectors including energy, financial services and manufacturing. Our practice area seeks to understand our client's businesses and transactional goals in order to provide comprehensive legal advice. Our corporate & Commercial practice was involved in advising:

- The Government (through the office of the Attorney General) on the proposed capital restructuring of Kenya Airways PLC in which the Government is a significant shareholder, including the legal implications of relinquishing of its security
- Acting as legal counsel in relation to equity finance transaction for a client in the construction sector
- Advising one of the leading private banks in Kenya on the purchase of shares in the target company which deals in insurance

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Employment & Labour

Our employment and labour practice area is well regarded by Chambers Global Guide and Legal 500 for advising some of Kenya's high profile employment matters. We have advised and acted for both employers and employees on all aspects of employment law including employment contracts, employee benefits, collective bargaining agreements and employee stock ownership plans and pensions. Our recent experience includes:

- Advising and acting for the Teleposta pension scheme in defending a judgement by the Retirement Benefits Tribunal for the sum in excess of USD 70 million by former employees of Telkom Kenya Limited (a company in which France's Orange previously held a stake, Orange sold a 60% stake to Helios Investment Partners, a UK-based private equity investing firm operating in Africa, with additional offices in Nairobi, Kenya) as being the total of their unpaid retirement dues
- Acting in an appeal challenging the decision of the Supreme Court that held that our client's proposed redundancy and in particular the notices contravened clause II of the Collective Bargaining Agreement and Section 40 of the Employment Act

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Energy, Projects & Infrastructure

Our energy, projects and infrastructure practice area combines legal and sector experience in advising public and private sector players, procuring entities on diverse infrastructure projects, public-private partnerships (**PPPs**), energy (geothermal, solar and coal), and social infrastructure (health, housing and transport). We regularly advise on a range of transactional matters including:

- Acting as the lead legal advisor to the government to government collaboration between the Government of the Republic of Kenya and the Government of the People's Republic of China represented by China National Petroleum Corporation (a state corporation based in China)) in a proposed project to develop up to 350MW of geothermal power.
- Advising a bidder on the proposed construction of a 2000 km road in Kenya via a PPP arrangement known as an annuity scheme.
- Acting in a road project under the Kenyan Road Annuity Program

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International Arbitration

Our international arbitration practice advises from the onset of a dispute, through to enforcement of an award of high value. We advise on all aspects of arbitration, from drafting suitable clauses to advising on the type and seat of arbitration, the formation of a tribunal, arbitral procedure and enforcement of the award. Our recent transactions include:

- Representing a Pan African bank in a claim brought by a Zambian borrower who claims he never authorised the bank to disburse funds to the borrower (the Company). It is an ICC matter, the seat is in London
- Giving Kenya law advice and representing a Canadian based energy company as co-counsel in the ICSID proceedings brought against the Kenyan Government in respect of the unlawful revocation of the company's geothermal licence

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"Oraro & Company Advocates is a top player in the dispute resolution arena, and the firm continues to lead the way and has great litigators."

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Tax

Our niche tax practice advises corporate clients on a full range of international and domestic tax issues, tax compliance, real estate tax, transfer tax, VAT, income tax, capital gains tax, transfer pricing and tax litigation to a wide range of clients both locally and internationally.
We advise on the tax implications of M&A, capital markets transactions, banking and finance transactions. We have recently represented:

- A Kenyan mining company in a matter that involved an assessment raised against the company in respect of VAT, withholding tax and corporation tax (resulting from an intercompany transaction)
- A leading Kenyan supermarket chain in a tax appeal before the High Court in regards to which the taxman raised a withholding tax claim in regards to a loyalty card claim

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