Arbitration

Contributing editors
Gerhard Wegen and Stephan Wilske

2018

GETTING THE DEAL THROUGH

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Arbitration 2018

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Gleiss Lutz

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Arbitration 2018

Thirteenth edition

Getting the Deal Through is delighted to publish the thirteenth edition of *Arbitration*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

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

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Cyprus, Finland, Liechtenstein, Lithuania, Panama, Russia and South Africa.

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

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

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Gerhard Wegen and Stephan Wilske of Gleiss Lutz, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
January 2018

Kenya

John Miles and Leah Njoroge-Kibe
JMiles & Co

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

The New York Convention came into force in Kenya on 11 May 1989. The government of Kenya declared, it would apply the Convention to arbitral awards made only in the territory of another contracting state pursuant to article 1(3). Kenya ratified the UNCITRAL Model law in 1989 and became a contracting state of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) in 1967.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Kenya has signed bilateral investment treaties (BITs) with Burundi, Finland, France, Germany, Italy, Kuwait, the Netherlands, Switzerland and the UK, which are in force. BITs with Turkey, Slovakia, Mauritius, Libya, Iran, China, Qatar and the UAE have been signed but are not in force. Kenya recently enforced BITs with Korea and Japan on 3 May 2017 and 9 September 2017 respectively.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

Arbitration in Kenya is governed by the Constitution of Kenya 2010, the Arbitration Act 1995 (the Act) and the Nairobi Centre for International Arbitration Act of 2013. The Act applies to both domestic and international and foreign arbitration, governing proceedings and enforcement of the awards. The New York Convention governs the enforcement of international arbitral awards in the country and is incorporated into the Arbitration Act.

An arbitration is considered international under section 3(3) of the Act if:

- the parties' places of business were in different states at the time of conclusion of the agreement;
- the juridical seat of the arbitration and any place where a substantial part of the obligations of the commercial relationship is to be performed or the place most closely connected to the subject matter of the dispute are outside the state; and
- the parties expressly agreed that the subject matter of the arbitration agreement relates to multiple states.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The Act, as amended in 2010, is based entirely on the UNCITRAL Model Law. Initially, it was a mirror copy of the Model Law, but with the 2010 amendments, the Act now encompasses recent developments in arbitration practice and procedure. Sections such as 16(A) and (B), 19(A), and 32(A), (B) and (C), were amended to be reflective of the realities of both domestic and international arbitrations.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The Act contains several mandatory provisions:

- waiver of the right to object, stay of legal proceedings, interim measures by court and death of a party (sections 5–8);
- extent of court intervention (section 10);
- grounds for challenge (section 13);
- failure to act and substitution of an arbitrator (section 15 and 16(1));
- withdrawal of an arbitrator (section 16a);
- competence of arbitral tribunal to rule on its jurisdiction (section 17);
- equal treatment of and general duties of the parties (sections 19 and 19a);
- rules applicable to substance of dispute (section 29); and
- settlement, form and contents of arbitral award, effect of award, costs and expenses, interest and termination of arbitral proceedings (sections 31–33).

The Mining Act of Kenya, which came into force on 27 May 2016, makes it mandatory under section 117(2)(i), for a mineral agreement to include terms and conditions relating to the resolution of disputes through international arbitration or a sole expert.

Section 154(b) of the Act on the other hand makes provision for the use of arbitration or mediation process with respect to disputes arising out of a mineral right under the Act.

6 Substantive law

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

Parties have freedom to choose the substantive law governing the dispute. Failing this, the tribunal determines the matter applying the rules of law it considers to be appropriate given all the circumstances of the dispute, and according to considerations of justice and fairness without being bound by the rules of law, if the parties are so authorised. In all cases, the tribunal decides according to the terms of the contract, taking into account the usages of the trade applicable to the particular transaction (section 29).

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

The Nairobi Centre for International Arbitration (the NCIA) was established by the NCIA Act No. 26 of 2013. The NCIA is located at:

Co-operative Bank House, 8th floor
Haile Selassie Avenue
www.ncia.or.ke

The Act under section 21 establishes an arbitral court with exclusive original and appellate jurisdiction to hear matters referred to it under the Act. The NCIA (Arbitration) Rules 2015 apply to arbitrations under the Rules.

The Chartered Institute of Arbitrators (the CIArb) was established in Kenya in 1984 and registered under the Societies Act Cap 108, Laws of Kenya. It runs a secretariat with physical facilities in Kenya for alternative dispute resolution located at:

Kindaruma Lane
Nicholson Drive, Off Ngong Road
Nairobi
www.ciarbkenya.org

The institution published the CIArb Arbitration Rules which came into effect on 1st December 2012.

The Centre for Alternative Dispute Resolution Limited (the CADR) was incorporated under the Companies Act (Cap 486 of the Laws of Kenya) as a not-for-profit company limited by guarantee. The founding members of the Company are all members of CIArb Kenya, which sponsors CADR. Its website is www.cadr.or.ke.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

There is no statutory law that limits the use of arbitration to a particular subject matter. Article 159 of the Constitution provides that in promoting ADR methods, the ends of justice must be met, giving the appearance that it allows the application of arbitration to any dispute. The article is, however, clear that such an application must not be repugnant to justice and morality. Section 37 of the Act sets out grounds for the courts to refuse to enforce an award where the subject matter is 'not capable of settlement by arbitration'. In practice, arbitration is not applied to criminal, land, insolvency, bankruptcy, divorce and tax matters.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

Section 4 of the Act deals with the formal requirements of an agreement. It can be in the form of an arbitration clause in a contract or as a separate agreement. It is a mandatory requirement that the agreement be in writing. An agreement is considered to be in writing if it contains:

- a written document by the parties;
- an exchange of letters, telex or other means of telecommunications; and
- an exchange of statements of claims and defence in which the existence of the agreement is alleged by one party and not denied by the other.

An agreement can exist where there is a reference to a document containing an arbitration clause as long as the contract is in writing and the reference is such that it makes the clause part of the contract. Under the Act, parties cannot waive formal requirements.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

The doctrine of separability applies in Kenya. Arbitration agreements are treated as separate from the underlying contract, that is, independent of the other provisions of the host contract by virtue of section 17 of the Act. This position is reflected in case law including *Nedermar Technology Ltd v Kenya Anti-Corruption Commission & Another* [2006] eKLR where the court stated that an arbitration agreement survives the termination of the contract. Since an arbitration agreement is treated as a contract, it is unenforceable if any of the factors that render a contract null and void are proved. This includes lack of intention to create legal relations, legal incapacity, lack of consensus and termination of the agreement. These must directly impeach the agreement.

Where death and insolvency occur, the agreement is not terminated. The obligations or rights under the agreement fall to the executors, administrators or personal representatives of the individuals respectively.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

The Act provides that agreements are binding on the parties to the agreement, following the privity of contract principle. One cannot be bound by a contract to which one is not party to and, therefore, cannot be enjoined to arbitral proceedings. Case law reflects this position.
Exceptions to this premise include the following:

- upon the death of a party, the Act provides that the agreement is enforceable against or by the personal representative of the deceased; and
- in the event of bankruptcy, section 38 provides that the trustee in bankruptcy adopts the contract and the terms are enforceable by or against him or her.

The Act is silent on the position of individuals such as agents and heirs in relation to the arbitration agreement. The court in *KNHA v Masosa* [2015] eKLR determined that where there are facts arising that could lead the court to conclude that the third party had authorised the parties to the contract to enjoin it to their contract, or the third party had chosen to accept the terms of the agreement, this would lead to the conclusion that the third party is bound by the agreement.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

The Act is silent on joinder or participation of third parties. The court's approach has been that a party who is not a party to the agreement cannot be bound by it and cannot take part in the proceedings. Where the dispute cannot be resolved without the presence of a third party, the court in *Damaris Wanjiru Nganga v Loise Naisiae Leiyan & Another* [2015] eKLR held that the arbitration agreement becomes inoperable because of the presence of the third party. This seems to be a reflection of section 6(1)(a) of the Act.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

The doctrine does not have presence in Kenya. Should such a scenario arise, the parent or subsidiary non-signatory company would be treated as a third party unless the factors in *KNHA v Masosa* are applicable.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

The Act neither provides for nor prohibits multiparty arbitration agreements. Where there is a binding agreement between three or more parties, they are subject to the arbitral proceedings. The claimants in such proceedings form one party and the defendants the other. Should the third party have no dispute under the agreement, it can be enjoined as an interested party.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

Parties to an agreement are free to choose an arbitrator and the only binding parameters are those they set out in the agreement. The Act under section 12(1) provides for non-discrimination, stating that no person is precluded by reason of his or her nationality from acting as an arbitrator. This provision is, however, qualified: should the parties agree, a person from a specific state can be precluded from being an arbitrator. Nationality is the only basis of preclusion allowed.

16 Background of arbitrators

Who regularly sit as arbitrators in your jurisdiction?

Appointments are usually merit based. The considerations for appointment to sit as an arbitrator would generally be dependent on the nature and complexity of the dispute. The CIArb-Kenya regularly appoints non-lawyers in matters where specialised or technical knowledge in the subject matter is required, for example, construction, energy and IT disputes. As far as we are aware, there is no apparent bias on both CIArb-Kenya and NCIA appointments based on gender and ethnicity.

As at 6 November 2017, the Chartered Institute of Arbitrators was a signatory to the Equal Representation in Arbitration (ERP) Pledge, which promotes the appointment of female arbitrators in international arbitral tribunals.

17 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

Under the Act, the default number of arbitrators is one, and the parties have to agree on the arbitrator. Where the parties agree to three arbitrators, each appoints one, and the two appointees appoint the chair. Where there are two arbitrators, each appoints one. The court only¬ intervenes when it grants an application to set aside an appointment where it is satisfied there was good cause for failure or refusal by the party in default to appoint his or her arbitrator in due time. Only upon granting such an application and consent of the parties, can the High Court appoint a sole arbitrator.

The CIArb Rules' provisions on appointment are similar to the Act with the exception that where a tribunal is not constituted, the CIArb-Kenya chairperson will make an appointment (according to the requirement of parties) of a sole arbitrator; two arbitrators and an umpire; or a third arbitrator (where parties have agreed on a tribunal made up of three arbitrators).

The NCIA Rules specifically provide that a sole arbitrator will preside over an arbitration subjected under the rules unless parties agree on three arbitrators presiding over the dispute. The NCIA Rules also mirror the CIArb Rules, save that the time stipulated for appointment by the Centre is 15 days for a sole arbitrator. Where three arbitrators are involved, the third is appointed by the Centre unless the parties agree otherwise, in which case the nomination is subject to confirmation. Where there is no provision for the number of arbitrators, the Centre appoints one except where it deems it necessary to have three.

18 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

Grounds for challenging an arbitrator arise from circumstances giving rise to justifiable doubts as to his or her impartiality and independence, such as:

- not possessing the qualifications agreed upon by the parties;
- being physically or mentally incapable of conducting the proceedings; or
- doubts concerning capacity to do so.

These grounds can only be relied upon when the party challenging the appointment of the arbitrator becomes aware of them after the appointment. If he or she was aware of them before the appointment, it is taken that he or she waived the grounds and agreed to the appointment (section 13).

Generally, the parties can agree on the procedure for challenging the arbitrator. If the parties have not agreed, a party that intends to challenge sends a written statement of the reasons for the challenge to the tribunal within 15 days of becoming aware of the composition of the tribunal or of the grounds for challenge. The tribunal then decides on the challenge. If the challenge is unsuccessful, the challenging party can within 30 days of receiving the decision to reject the challenge apply to the high court to determine the matter. The decision of the High Court is final and not subject to appeal. While the court application is pending, parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings takes effect until the application is decided. The award is void if the application is successful (section 14).

In international arbitrations, parties and the court may refer to the IBA Guidelines on Conflicts of Interest in International Arbitration in selection of arbitrators.

19 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration and expenses of arbitrators.

Domestic law is silent on the relationship with parties and neutrality of an arbitrator. In practice, parties sign an agreement providing that the arbitrator is impartial and will inform the parties of any conflict of interest as soon as it arises. It, therefore, adheres to international benchmarks set by institutions such as the LCIA and ICC, and UNCITRAL Rules.

The Act provides that the tribunal has power to determine and apportion its fees and expenses in the award or additional award. Unless the parties had agreed otherwise, each is responsible for an equal share of such fees and expenses. The tribunal has a right of lien over the award if its expenses and fees have not been paid by the parties (section 32B)

20 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

The immunity of an arbitrator relates to things done or omitted to be done in good faith in the discharge or purported discharge of his or her duties as an arbitrator. This immunity extends to his or her servants and agents who have due authority and good faith. An arbitrator is, however, not immune from any liability incurred by reason of his or her resignation or withdrawal (section 16B).

Jurisdiction and competence of arbitral tribunal

21 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

The defendant makes an application for stay of the proceedings under section 6 of the Act. The application has to be no later than the time when the party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought. The court refers the parties to arbitration unless it finds that the agreement is null and void or the dispute is not covered by the agreement.

22 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

The jurisdiction of an arbitrator derives from the agreement of the parties. The preconditions for an arbitrator to have jurisdiction include the following:

- existence of a binding agreement to arbitrate;
- the arbitrator must have been validly appointed; and
- there must be a dispute that the parties had agreed to arbitrate.

The challenge to jurisdiction may take the form of an attack on the validity of the agreement, or on the jurisdiction of the tribunal over certain subject matters, among others (Muigua, 92-94; 119-121).

The doctrine of *Kompetenz-Kompetenz* applies in Kenya and is provided for under section 17. The plea for lack of jurisdiction should be raised before submitting the statement of defence. Where the issue is that the tribunal has exceeded the scope of its authority, the plea shall be raised as soon as the matter alleged to be beyond scope is raised during the proceedings. The tribunal decides the matter either as a preliminary question or in an arbitration award on the merits. Any party aggrieved by the ruling can apply to the High Court within 30 days to decide the matter. The decision of the High Court is final and not capable of appeal.

Arbitral proceedings

23 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

Sections 21 and 23 of the Act provide that failure of prior agreement by parties gives the tribunal power to determine the place of arbitration and the language to be used in the proceedings.

24 Commencement of arbitration

How are arbitral proceedings initiated?

Section 22 of the Act provides that arbitral proceedings commence on the date on which a request for the dispute to be referred to arbitration is received by the respondent unless the parties agree otherwise.

CIArb (K) Rules provide that a party wishing to commence arbitration and have an arbitrator appointed should send to the secretary a written request for the appointment of an arbitrator. The request should include the names and addresses of all parties to the arbitration. If the arbitration agreement provided for party nomination, the request be accompanied by:

- the nominees' details and copies of the contractual documents forming the basis of the arbitration;
- a statement of the nature and circumstances of the dispute;
- an indication of the value of the subject matter;
- a statement of any consensus as to conduct of the arbitration; and
- any experience they wish the tribunal to have; a statement of compliance with the contractual machinery on appointment of the arbitrator and confirmation of service of the request to the other parties.

Under the NCIA Rules, commencement is through a request for arbitration sent to the registrar and served to the other party. It is marked as the date the registrar receives the request. Rule 5 provides that the request should contain:

- the personal details and contacts of the parties;
- a copy of the contract containing arbitration clause;
- a statement of the nature and circumstances of the dispute;
- a statement specifying the seat and language of arbitration;
- details of the party's nominee if required;
- confirmation of service of the request and supporting documents to the other parties; and
- an accompanying non-refundable registration fee.

25 Hearing

Is a hearing required and what rules apply?

Hearings are part and parcel of the proceedings. Parties can agree on oral or written submissions. In the absence of such an agreement, the tribunal decides between the two. The tribunal holds oral hearings at an appropriate stage of the proceedings, and parties are required to give sufficient notice of any hearing and any meeting of the tribunal for inspection of documents, goods or other property. All the evidence adduced by one party is communicated to the other, and expert evidence that may be relied upon by the tribunal is communicated to the parties by (section 25).

26 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Parties are free to agree on the arbitral procedure to be followed by the tribunal, but should they disagree, the tribunal proceeds as it deems fit. In doing so, it has power to determine the admissibility, relevance, materiality and weight of any evidence. Evidence that is adducible includes witness evidence. Witnesses have the same privileges and immunities as those before a court (section 20). Documentary evidence may be adduced accompanied by translations into the language agreed upon by the parties (section 23(4)). Should a party fail, without showing sufficient cause, to produce documentary evidence, the tribunal can make its award on the evidence before it. The tribunal or a party with the approval of the tribunal can request the High Court's assistance in taking evidence.

Expert evidence is for the benefit of the tribunal more than the parties: they are appointed to help the tribunal reach an appropriate conclusion. They report to the tribunal on issues determined by it. After delivery of the report, the expert is required to participate in an oral hearing where the parties have an opportunity to put questions to him or her and present expert witnesses in order to testify on the points at issue. Where experts are in conflict, it will be up to the arbitrator to decide (Muigua; 144).

27 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

Court intervention is allowed:

- when the tribunal requests assistance in taking of evidence;
- where parties institute procedures to challenge the appointment of an arbitrator;
- to determine the jurisdiction of the tribunal;
- to give interim orders of protection during arbitration; and
- to determine questions of law on application by the parties.

28 Confidentiality

Is confidentiality ensured?

There is no statutory provision on confidentiality of proceedings and awards, but it is understood as a core feature of arbitration and enforced to the highest degree. Generally, parties include a confidentiality clause in the arbitration agreement or it is covered by the rules they adopt for arbitration.

Interim measures and sanctioning powers

29 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Under section 7 of the Act, the court can grant interim orders to maintain the status quo of the subject matter of the arbitration. This includes interim injunctions, interim custody or sale of goods among others. The High Court is also empowered to enforce the peremptory orders for protection given by the tribunal.

30 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

Interim measures are only provided by the court prior to the constitution of the tribunal (section 7). The Act has no provision for emergency arbitrators. The NCIA Rules provide for the appointment of an emergency arbitrator under rule 28 and the Second Schedule. The CIArb (K) Rules provide for emergency arbitrators and their rules in article 26 and Appendix 1.

31 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

The Act provides that the tribunal has power to order any party to take such interim measure of protection as it considers necessary in respect of the subject matter of the dispute, with or without an ancillary order requiring the provision of appropriate security in connection with such a measure. The types of relief are not specified in the Act. It can order any party to provide security in respect of any claim or any amount in dispute; or order a claimant to provide security for costs (section 18).

32 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

The Act does not grant tribunals sanctioning power and neither do the CIArb and NCIA Rules. Practitioners are subject to professional ethical standards established by their respective bar associations. Under the Advocates Act (Chapter 16), only the Advocates Disciplinary Committee has sanctioning power.

Awards

33 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Section 30 of the Act provides for majority decision-making. Questions of procedure may be decided by the chair if authorised by the parties or all the tribunal members.

34 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

Decisions made by a tribunal with more than one arbitrator are made on a majority basis. Where there is a three-member panel, the decision of the majority stands.

35 Form and content requirements

What form and content requirements exist for an award?

An award should be in writing, be dated, state juridical seat of arbitration and be signed by the arbitrators, although a majority can sign and a reason be given for why one has not signed. The award is published to the parties and should state reasons upon which it was based except where parties agree otherwise.

36 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

There are no time limits specified within which an award should be rendered after the end of the hearing.

37 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

Parties may apply for correction of the award, an additional award or interpretation within 30 days of receipt (section 34). An application for setting-aside of the award to the High Court must be within three months of the date of receipt of the award.

38 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

The tribunal can give interim or partial awards determining some of the issues between the parties under section 32(6). It can also make a provisional award ordering a part of the claim to be paid 'on account' subject to a final decision later. The parties must confer the tribunal with such powers. Consent under section 31 incorporates the terms of the settlement negotiated by the parties. Final awards are under section 32A, and additional awards under section 34(4), the latter being upon application of the parties.

39 Termination of proceedings

By what other means than an award can proceedings be terminated?

The tribunal can give an order for termination where (section 33):

- the claimant withdraws the claim unless there is an objection from the respondent;
- the parties agree on the termination; and
- the tribunal finds that continuation of the proceedings has become unnecessary or impossible.

40 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

An arbitrator has power to provide for costs under section 32B of the Act. This provision on award of costs is subject to party agreement on costs allocation. In the absence of such an agreement, the arbitrator determines and allocates the costs. The Act recognises costs as legal and other expenses of the parties, fees and expenses of the arbitration, and legal and other expenses of the tribunal. The award of costs can be at the award stage or after the award. In default of the award of costs and expenses, parties are equally responsible for the costs and expenses of the arbitration.

41 Interest

May interest be awarded for principal claims and for costs and at what rate?

Interest is awarded at a rate and with such rests as the tribunal deems fit. This is subject to the parties having agreed otherwise. It can be simple or compound interest.

Proceedings subsequent to issuance of award

42 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Interpretation is at the behest of the parties while correction is at the behest of the parties or the tribunal. Either party can, upon written notice to the other party, apply to the tribunal within 30 days of receiving the award. The tribunal, after giving the other party 14 days to comment, makes the correction or clarification within 30 days whether comments were supplied or not.

43 Challenge of awards

How and on what grounds can awards be challenged and set aside?

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

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

44 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

The recourse available to a party after the award is twofold. The party can apply for the award to be set aside in the High Court. The other party may apply for suspension of such proceedings and the court may in its discretion suspend the proceedings. The Act does not provide for further appeal beyond the High court.

On the other hand, a party can appeal on a point of law arising in the course of the arbitration or out of the award to the High Court under section 39. This is subject to the parties' agreement that such an appeal can be made. The decision of the High Court is appealable to the Court of Appeal if the parties had agreed so or if the court grants leave on the basis that the matter substantially affects the rights of the parties.

45 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Domestic awards are recognised as binding and are enforced on application to the High Court in writing. Foreign awards are recognised and enforced under the New York Convention. The award has to, however, have been awarded in a signatory state. The party wishing to rely on an award or to enforce it produces the original award and arbitration agreement or certified copies. The High Court can refuse to recognise and enforce the award on grounds quite similar to the grounds for setting aside an award listed above, the additional ground being that the award has not yet become binding on the parties or has been set aside or suspended by a court of the origin state.

46 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Such an award is not recognised or enforced.

47 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

The Act has no provisions for emergency arbitrators. The CIArb Rules provide that an emergency arbitrator can award interim measures as they have similar powers to an arbitral tribunal. The Rules do not expressly provide for enforcement of the orders. They provide that an award by the emergency tribunal may be modified or confirmed by the arbitral tribunal, and if the tribunal does neither, it automatically expires. This implies that the modified or confirmed order is then enforced as an order by the tribunal.

The NCIA Rules are silent on the enforcement of the orders, only providing that the parties who consent to arbitration under the rules undertake to carry out an order or award of an emergency arbitrator immediately and without delay (rule 28 (8)).

48 Cost of enforcement

What costs are incurred in enforcing awards?

The procedure for enforcement of awards is basically a court action, and all costs connected with such proceedings apply. These might include court filing fees, legal fees, valuator's fees (where valuation of the debtors assets is needed to enable attachment), disbursements, investigator's fees and auctioneer's fees (if ordered by court).

Other

49 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

As Kenya is primarily a common law jurisdiction, rules on production of evidence are followed especially when it touches on discovery. Most tribunals and the Act favour the court's approach on delivery and production of evidence.

50 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

Professional and ethical rules that apply to advocates in the national legal sphere are relevant to arbitration proceedings as well. In Kenya, standards of professional ethics were formulated by the Law Society of Kenya through the Law Society of Kenya Code of Ethics and Conduct for Advocates (January 2016). The Advocates Act sets out misconduct offences and establishes an enforcement and sanctions mechanism to deal with professional misconduct by advocates. These rules complement the IBA Guidelines especially with regard to fiduciary duties to the client and conflict of interest. Their applicability largely depends on the parties and the tribunal, which may agree to be bound by them in an international arbitration.

51 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

The Advocates Act prohibits advocates from entering into agreements where they purchase any interest in a client's claim in a contentious proceeding or agree to be remunerated based on a contingency fee. This prohibition applies to both litigation and arbitration. The law prohibits champertous arrangements. It is unclear as to whether this rule

applies to third parties, such as financial institutions, who may be willing to fund arbitration proceedings for a share in the proceeds of the award. Costs-of-litigation funding is recoverable under Order 33 of the Civil Procedure Rules only in relation to pauper briefs.

52 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Under section 11 of the Advocates Act, foreign counsel require special admission to appear in court. The foreign counsel's appearance is restricted to the matter in which he or she has been instructed. For the duration of his or her admission, the foreign counsel is bound by the Advocates Act rules on professional conduct. Both CIArb Rules and the NCIA Rules provide that a party may be represented by a representative of its choice. The Act places no restrictions on the appointment of foreign counsel or arbitrators in international or domestic arbitrations. The foreign counsel or arbitrator will be required to obtain a visa, work permit or special pass (as the case may be) from the Immigration Department depending on the duration of stay.

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