



HERBERT  
SMITH  
FREEHILLS



# A MULTI-JURISDICTIONAL REVIEW

DISPUTE RESOLUTION  
IN AFRICA

**LEGAL GUIDE**

SECOND EDITION

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# PREFACE

Welcome to the second edition (2016) of Herbert Smith Freehills' Guide to Dispute Resolution in Africa. We are delighted to be updating and reissuing a publication that presents dispute resolution procedures and trends in every one of Africa's 54 diverse jurisdictions. We understand this guide to be unique in terms of content and scope.

Since its publication in 2013, the first edition of the Guide has proved to be an invaluable resource for our clients exploring the tremendous growth opportunities across Africa. It is a first port of call not just for those facing disputes in Africa but for anyone who is considering investing in unfamiliar territory and would like to understand better the legal landscape of that country.

Whether you want to know the basics of the legal system, details on litigation and arbitration procedures, whether Alternative Dispute Resolution (ADR) is embraced in a particular country, or what the applicable limitation periods or privilege rules are, this publication will help you.

Our leading Africa practice has been advising clients on all aspects of investment and risk across almost all of the continent's countries for over 30 years. For this updated Guide we have drawn on the combined experience of our Africa practice lawyers from our London, Paris and Johannesburg offices, together with experienced local counsel in each jurisdiction – to whom we extend our warmest thanks. Contact details for each contributor can be found at the end of each chapter and full Herbert Smith Freehills global contacts at the back of the Guide.

As Africa's investment star continues to rise, it is inevitable that this will bring with it a need to resolve disputes – whether through formal processes or commercial settlement. We therefore hope that you find this updated Guide both timely and useful. We look forward to answering any questions you may have.



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# OUR AFRICA PRACTICE

Herbert Smith Freehills enjoys a market leading and long-established reputation in Africa, having acted on numerous matters throughout the continent over the past three decades.

Our Africa offering has been further strengthened with the launch of an office in Johannesburg, South Africa. The combined strength of the Johannesburg partners and the firm's other Africa specialists located across our international platform enables the firm to provide a true pan-African offering, including Francophone Africa.

We have one of the largest teams of common and civil law lawyers advising almost exclusively in relation to Africa, a number of who are singled out by industry benchmarks as leaders in their field. Our team comprises lawyers from a diverse range of cultures and backgrounds, including African nationals or lawyers who have lived and worked on the continent. The language skills within the team include English, French, Arabic, Spanish, Portuguese, Swahili, Afrikaans and German.

The breadth and duration of our experience in Africa has provided us with a deep understanding of the continent's local and regional legal systems (including OHADA), business practices, local cultures and socio-political considerations. We also offer in-depth knowledge of specific countries and regions at individual partner level.

We believe that the combination of our strong cross-industry expertise, multi-disciplinary skills and deep Africa know-how and experience, enables us to provide a real value added service to our clients in Africa, whether you are a new entrant to the African market or an established operator looking to expand your operations on the continent.

Ranked top for Africa-wide:  
Dispute Resolution

**CHAMBERS GLOBAL  
2016, 2015, 2014**

"They are heavily committed to Africa"

**CHAMBERS GLOBAL 2016  
(AFRICA-WIDE DISPUTE RESOLUTION)**

"The Johannesburg presence now gives the firm a virtually unrivalled offering in Africa..."

**LEGAL 500 EMEA 2016 (AFRICA)**

"They are interactive, proactive and have a very good understanding of what goes on in Africa."

**CHAMBERS GLOBAL 2016  
(AFRICA-WIDE DISPUTE RESOLUTION)**

"One of the leading dispute resolution groups in Africa sought after for its geographical reach and depth of resources. Has extensive experience working with African governments, state entities and multinationals operating in Africa. Highly active on disputes relating to oil and gas, energy and infrastructure projects."

**CHAMBERS GLOBAL 2015  
(AFRICA-WIDE DISPUTE RESOLUTION)**

"They've given us very incisive advice. They have a deep knowledge of Africa."

"They have really one of the best Africa practices."

**CHAMBERS GLOBAL 2015  
(AFRICA-WIDE DISPUTE RESOLUTION)**

"...a go-to group for contentious matters on the continent."

**CHAMBERS GLOBAL 2014  
(AFRICA-WIDE DISPUTE RESOLUTION)**

**Our experience in Africa spans all key sectors and practices. Recent key highlight experience includes advising:**

**Contentious**

- **BP** on all contentious matters in multiple jurisdictions arising from the terrorist attack at the In Amenas gas processing facility in Algeria between 16-19 January 2013
- **Standard Chartered Bank** in a series of ICSID arbitrations against Tanzania arising out of a number of investment treaty breaches in respect of a power station
- **Vedanta Resources Plc** and **Konkola Copper Mines Plc** in relation to a collective action by more than 2,000 claimants regarding alleged environmental issues arising from mining operations in Zambia
- **Bharti Airtel** on a series of major disputes with Econet Wireless Limited in relation to Bharti's subsidiary in Nigeria
- **Goldman Sachs** in relation to claims brought by the Libyan Investment Authority to recover substantial sums in respect of derivatives trades executed in 2008
- the owner of a **LNG terminal** in an ICC arbitration concerning a long term gas supply agreement relating to an offshore African field
- further 10 countries in Africa, and related joint venture arrangements with the Darling Group
- **CPCS Transcom** and the **Nigerian Bureau of Public Enterprises** on the privatisation, through share sales or granting of concession, of 17 of the electricity industry assets and companies which are successors to the Power Holding Company of Nigeria
- **EDF, Rio Tinto Alcan, International Finance Corporation and Government of Cameroon** on the development of the Nachtigal Hydroelectric Project in Cameroon
- **Rio Tinto** on its world class Simandou iron ore integrated project in Guinea for the continued exploration, mining and processing of iron ore and the construction of the related infrastructure facilities, including in particular a rail link and deepwater mineral port
- **Mitsui** on the negotiation of the acquisition from Vale of an interest in the Moatize coal mine in Mozambique and in the related Nacala rail and port infrastructure
- **Vitol SA** on the project finance aspects of its US\$7 billion oil and gas project in Ghana with ENI supplying gas for power generation, reportedly the largest single project Foreign Direct Investment inflow to Ghana since Independence
- **BTG Pactual** on a US\$1.525 billion joint venture with Petrobras for the exploration and production of oil and gas in Africa
- **ZESCO** on the development and financing of the 750MW Kafue Gorge Lower Hydroelectric Project in Zambia
- **Stanbic Bank** and other lenders on the project financing of the US\$150 million Kinangop Wind Farm Project in Kenya

**Non-contentious**

- **Danone** on its acquisition, in partnership with the Abraaj Group, of Fan Milk International, a leading manufacturer and distributor of frozen dairy products and juices in West Africa
- **Bharti Airtel** on its US\$10.7 billion acquisition of the 15 African mobile networks of Zain Africa
- **IHS Holding** on all aspects of its acquisition of 1,100 telecommunication towers in Rwanda and Zambia from Bharti Airtel
- **Godrej Consumer Products** on its acquisition of interests in the Darling Group's artificial hair production and distribution businesses in Nigeria, Republic of South Africa, Mozambique and Kenya and in a

**KEY AFRICA CONTACTS**



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# OVERVIEW

## INTRODUCTION

Covering almost 12 million square miles and home to over a billion people, Africa accounts for over 20% of the earth's land mass and 15% of its population. Never far from the news, yet often misunderstood, historically Africa has in the large part remained relatively untapped from an investment perspective. Yet the statistics suggest this situation is changing, with the continent showing enormous growth potential in recent years.

In the last 10 years for example, the gross domestic product of the 11 largest countries in sub-Saharan Africa increased by 51% – more than twice the world average of 23%. Indeed, over the last decade, for those willing and able to seek out its opportunities, Africa represents the world's latest – and potentially greatest – emerging market. Inbound corporate investment has soared from the BRICS (Brazil, Russia, India, China, and South Africa) countries, accompanied increasingly by interest from the Gulf Region and Australia. In the 21st century these economies are gathering alongside the former “classical investors”, namely Great Britain, France, Canada and the US.

International investors have long focused on the perceived “traditional” African resource extraction industries – oil, gas and mining. Investment in these sectors, originally limited in geographical scope, is now booming across large pockets of the continent. But investment in Africa is no longer restricted to natural resources. In recent years we have seen huge growth in the infrastructure and construction industries, as well as telecoms and banking, as society in many African countries becomes more urbanised.

The most recent projections for 2018 forecast that economic growth in the MENA region (3.6%) and Sub-Saharan Africa (4.4%) will be above the global average of 3.0% and comfortably above those of the advanced economies (1.9%), the United States (2.1%) and the Euro Area (1.5%). And with 435 million youths to enter into the continent's job markets in the next 15 years, there remains huge scope for further investment. As a growing African middle class demands increasingly sophisticated consumer products, ever greater private investment is drawn into Africa in the billions of dollars. Multinationals, private equity groups, financial institutions and manufacturers are all investing in domestic production to compete with foreign imports on a wide range of consumer goods.

Corruption, political instability and civil unrest remain in some jurisdictions, however, and these are serious factors to be borne in mind by anyone considering doing business in Africa. But confidence is catching and Africa no longer appears to deter commercial interest in the way it once did. Its status as the final investment frontier increasingly outweighs the risks. But as long as those risks exist, the chance of being involved in a complex dispute remains real. We hope that this Guide will be your first step in identifying, managing and mitigating those risks.



### AFRICA'S POTENTIAL

- World's second largest continent but still largely untapped from an investment point of view
- Economic growth projected to be above world average and faster than that of the world's largest economies
- Demographic statistics showing a huge inflow into the job markets in the coming years
- 10 markets account for ~77% of Africa's GDP: Nigeria, Egypt, South Africa, Algeria, Morocco, Angola, Sudan, Kenya, Ethiopia and Tanzania

**A CONTINENT OF CULTURAL AND LEGAL DIVERSITY**

Africa's legal landscape comprises a patchwork of legal systems, predominately either civil law (largely the Francophone jurisdictions) or common law (largely the Anglophone jurisdictions). There are variations, however, due largely to the division of Africa by the European colonial powers. By the early 1900s, the map of African European settlement

comprised not just France and the United Kingdom, but Germany, Belgium, Spain, Italy and Portugal. Add to this the influence of Sharia (Islamic) law and Arabic culture, as well as indigenous customary laws common to all countries, and Africa's legal systems present a complex kaleidoscope.

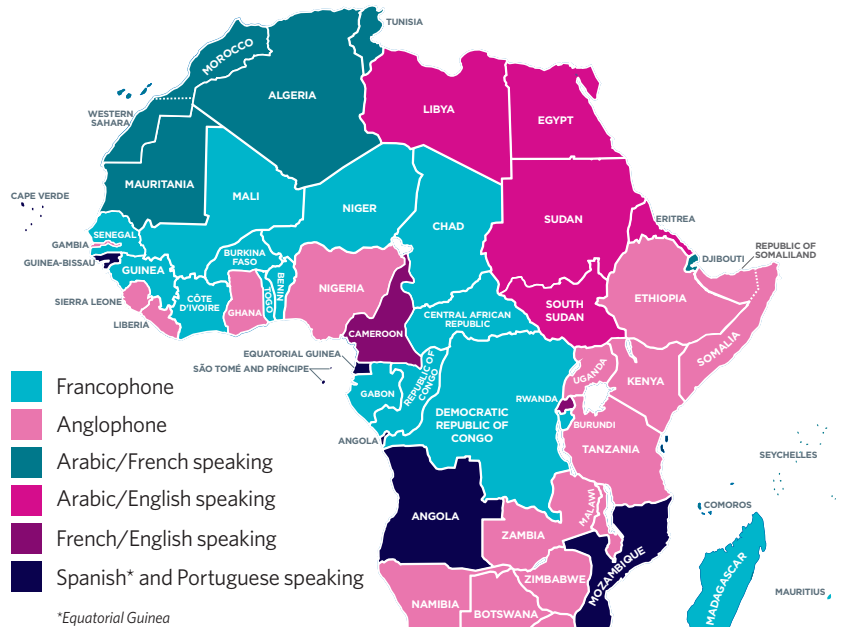
The maps below summarise the languages and legal systems underpinning the continent.

**AFRICA IS A CONTINENT OF DIVERSITY...**

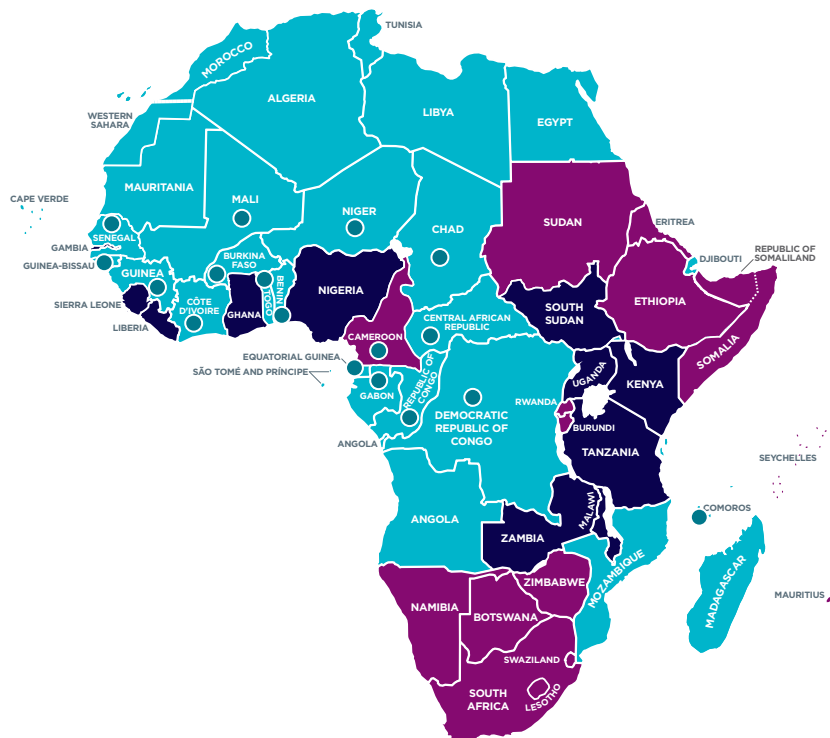
- 54 sovereign nations
- 4/5 sub-regions
- over 1 billion inhabitants

**...WITH DIFFERENT INFLUENCES AND LANGUAGES**

Many of the world's 6,000 languages are spoken in Africa - but English and French are the continent's main lingua francae



**LEGAL SYSTEMS**



**COMMON LAW AND CIVIL LAW TRADITIONS**

Two legal systems in Africa (occasionally complemented by Islamic law or customary law)

- Systems based on civil law principles
- Systems based on common law principles
- Mixed civil law / common law based systems
- OHADA signatory States



## HOW THIS GUIDE WAS PREPARED

We devised a series of questions on litigation, arbitration, ADR and reform for local counsel in the various jurisdictions. Most jurisdictions answered 32 questions. Others, often those where arbitration is less developed, answered a reduced set of questions. We have sought to conform the chapters for ease of reference but this has not always been possible, notably where we could not obtain answers to certain questions. We have cited sums in local currencies throughout the Guide, due to fluctuating exchange rates.

As we have not addressed investment protection in the body of the chapters, we deal with this important topic separately on page 11 below.

## DISPUTE RESOLUTION

The majority of disputes in Africa are solved through commercial settlement, with companies and States alike preferring negotiation over the uncertainties of litigation or arbitration. With the sharp increase in foreign investment across an array of sectors, however, the scope for formal dispute resolution in Africa will inevitably increase. Whilst international companies may seek contractually to confine the conduct of litigation to their own shores, or to nominate international arbitral rules (for example of the ICC or LCIA), this is not always possible. Contracting African State entities may require that any disputes be resolved through their local courts applying local law, or via domestic arbitration. Importantly, litigation may ensue when seeking to enforce an international judgment or arbitral award against assets held in an African jurisdiction, or when dealing with local regulators. As such, a sound understanding of the legal systems pervading Africa and the specific laws governing the resolution of disputes within its jurisdictions is essential.

## INTER-GOVERNMENTAL AGREEMENTS

In understanding the dispute resolution landscape it is important to bear in mind that at the supra-national level, a number of inter-governmental agreements harmonise commercial laws, particularly across Francophone Africa.

Of the various agreements, OHADA (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires* – Organisation for the Harmonisation of Business Law in Africa) is the most influential and far-reaching from a disputes perspective. The OHADA Treaty was signed on 17 October 1993. Seventeen countries are Member States of OHADA (Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Republic of Congo, Senegal, Togo).

Under the OHADA Treaty, the Council of Ministers of Justice and Finance adopt "Uniform Acts" which are directly applicable and enforceable in each of the Member States. In the sphere of dispute resolution, the OHADA Treaty governs certain matters such as enforcement of judgments. Within the context of arbitration, the Uniform Act on Arbitration within the Framework of the OHADA Treaty was adopted on 11 March 1999 and came into force on 11 June 1999 (the Uniform Act). The Uniform Act is directly applicable and governs virtually the entire arbitral procedure where the seat of the arbitration is in one of the Member States. Any national arbitration law in a Member State must therefore be construed in accordance with the Uniform Act.

## Other inter-governmental agreements include:

**Economic Community of West African States (ECOWAS):** founded in 1975 (with the signing of the Treaty of Lagos), the ECOWAS is a regional organisation of 15 West African countries (Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, Togo). Its mission is to promote economic integration across the region in "*all fields of economic activity, particularly industry, transport, telecommunications, energy, agriculture, natural resources, commerce, monetary and financial questions, social and cultural matters.*"

**Common Market for Eastern and Southern Africa (COMESA):** formed in 1994, replacing a Preferential Trade Area which had existed since 1981, COMESA is a free trade area with 19 member states (Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, Zimbabwe). It was established "*as an organisation of free independent sovereign states which have agreed to co-operate in developing their natural and human resources for the good of all their people*". Its objectives include the promotion of peace and security in the region.

**West African Economic and Monetary Union (WAEMU/UEMOA):** created in 1994 (by a Treaty signed in Dakar, Senegal), the WAEMU is an organisation of eight West African states (Benin, Burkina Faso, Côte d'Ivoire, Guinea-Bissau (joined 2 May 1997), Mali, Niger, Senegal, Togo). Its mission is to promote economic integration among countries that share the CFA franc as a common currency.

**Central African Economic and Monetary Community (CAEMC):** created in 1994, the CAEMC became operational after the Treaty's ratification in 1999. It is composed of six states (Gabon, Cameroon, Central African Republic (CAR), Chad, Equatorial Guinea, Republic of Congo). Together with the larger Economic Community of Central African States (ECCAS), CAEMC is one of the Central African regional Communities established to promote cooperation and exchange among its members.

**Economic Community of Central African States (ECCAS):** is an Economic Community of the African Union for promotion of regional economic co-operation in Central Africa. Composed of 11 States (Angola, Burundi, Cameroon, Central African Republic, Chad, Democratic Republic of Congo, Equatorial Guinea, Gabon, Republic of Congo, Rwanda, São Tomé and Príncipe), it "*aims to achieve collective autonomy, raise the standard of living of its populations and maintain economic stability through harmonious cooperation*". Its ultimate goal is to establish a Central African Common Market.

**Southern African Development Community (SADC):** formed in Zambia in 1980, following the adoption of the Lusaka Declaration, the SADC is an inter-governmental organisation headquartered in Gaborone, Botswana. Its goal is to further socio-economic cooperation and integration as well as political and security cooperation among 15 southern African states (Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar (suspended), Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe). Most Member States had been allocated the responsibility of coordinating one or more sectors, by proposing sector policies, strategies and priorities, and processing projects for inclusion in the sectoral programme, and monitoring progress.

## LITIGATION

Litigation procedures derive in the large part from applicable pre-independence legal systems. Broadly speaking, these are either based on codified civil law or common law traditions. As such, those familiar with either French or English litigation will observe many similarities both in terms of procedure and substantive law.

In all jurisdictions, a framework for civil litigation exists, and often the procedures are well identified. However, in many jurisdictions, litigation is hampered by delays and/or enforcement issues. A number of jurisdictions estimate that first instance actions run for a matter of months on average (Algeria and Liberia notably indicate that cases can be concluded in between two and six months). In most jurisdictions, however, the time frames are much longer. Indeed, several jurisdictions with advanced civil litigation laws note particular challenges – in Egypt, for example, enforcement actions often take longer to conclude than the underlying merits suit.

In terms of commencing proceedings, African countries tend to adopt largely similar systems to those in place prior to independence. There are particularities, however. For example, in a number of Francophone jurisdictions (Côte d'Ivoire, Mali, Morocco and Mauritania), civil claims can be commenced before the courts not only in writing but also orally.

All jurisdictions have some form of disclosure of documents, although, predictably, the non-Anglophone countries do not import anything akin to the English concept of “disclosure”. Witnesses more often than not provide evidence orally, and whilst procedures for expert evidence exist in almost all jurisdictions, they are not often deployed in many countries. Interim relief and appeal rights are ubiquitous in some form or another.

Regarding enforcement of foreign judgments, this is not straightforward and will largely depend on reciprocity agreements being in place. Usually, these are limited, meaning enforcement of foreign judgments against assets in Africa can often be complex and uncertain.

Another trend regarding enforcement is that whilst most State entities have no immunity from prosecution (subject to applicable international agreements), in a large number of African jurisdictions, State entities enjoy executorial (enforcement) immunity. This is a significant consideration to bear in mind when considering dispute resolution and against whom you will want to enforce any judgment/award.

The courts in all jurisdictions have the power to award costs. These generally encompass lawyers' fees in the Anglophone jurisdictions but not in the Francophone countries. Security for costs is something that can almost always be applied for and, in many cases, will be routine.

As a general point, it is important to note that, aside from the civil court system, traditional courts often play a major role in rural areas in a large number of jurisdictions. Village elders or specialist lower courts/tribunals may determine property and family disputes under customary law. Sometimes (for example in Chad and Liberia) the application of customary law permeates through the entire court system and all judges have jurisdiction to apply both statutory and customary law. Specialist Khadi/Cadi courts exist in a significant number of jurisdictions (such as Comoros, Ethiopia, Gambia, Kenya, Nigeria and Sudan). These courts apply Sharia (Islamic) law exclusively in matters within their jurisdiction (usually concerning family disputes amongst people of Islamic faith).

Finally, it is worth noting that the intervention of foreign lawyers before African courts is in most countries subject to a condition of reciprocity.

## COMMERCIAL ARBITRATION

The questions regarding arbitration in this Guide focus on resolution of commercial disputes by arbitration. An overview of investment arbitration as it relates to investment in Africa is provided on page 11 below.

An arbitration framework of some description exists in all of the 54 jurisdictions, although practice and experience varies drastically. In certain countries, arbitration is very much in its infancy. In others – Namibia, for example – relatively sophisticated rules exist (dating from before Namibia's independence from South Africa), yet arbitration is not widely used in the commercial context and reliance on precedent from South Africa, which is persuasive but not binding, introduces uncertainty. Across the continent, one sees countries where historic arbitration legislation still applies, and those where the domestic legislation has been brought up to date although it has not yet been thoroughly tested.

A significant number of jurisdictions have sought to align their arbitration rules and practices with international standards. These include adopting the UNCITRAL Model Law and embracing arbitration on an international level by participation in OHADA (see above in relation to inter-governmental agreements), and acceding to or ratifying the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). In most jurisdictions in which arbitration is well-established, contributors note that parties agree to resolve disputes following institutional rules rather than including *ad hoc* clauses in their transactions (whereby procedure is determined by the parties' agreement, the tribunal and any national law provisions).

The UNCITRAL Model Law on International Commercial Arbitration was created by the United Nations Commission on International Trade Law (the Model Law). The Model Law provides a definition for what constitutes an arbitration agreement, and covers all phases of the arbitral process (including enforcement). It reflects what UNCITRAL has found to be the worldwide consensus position, with each aspect of the procedure having been accepted in numerous jurisdictions across the globe. The UNCITRAL Model Law is designed to assist states in shaping their own national arbitration laws (unlike the OHADA Uniform Act, States may choose not to adopt its provisions on a wholesale basis). Ten of Africa's jurisdictions have adopted the UNCITRAL Model Law in some respect into their national arbitration laws,<sup>1</sup> with a number of other contributors reporting that the Model Law has influenced drafters of their national legislation. Indeed, even in countries in which the Model Law was not followed, internationally recognised principles (such as the need for an impartial tribunal and the binding nature of arbitral awards) were often present in the national arbitration law. The Uniform Act governing arbitration within the OHADA countries is not based on the UNCITRAL Model Law but is nevertheless aligned with the fundamental principles of international commercial arbitration and key features of the UNCITRAL Model Law.

The New York Convention is the most widely-used regime for the enforcement and recognition of foreign arbitral awards. The Convention requires the courts of signatory states to give effect to private agreements to arbitrate disputes and to recognise and enforce foreign arbitral awards, subject to specific limited exceptions and

reservations (including, in many cases, a requirement of reciprocity). It applies to arbitrations that are not considered domestic awards in the State where recognition and enforcement is sought. Since the last edition of this Guide, the New York Convention has entered into force in Burundi, Comoros and the Democratic Republic of Congo. The New York Convention is now ratified in 35 of Africa's 54 jurisdictions,<sup>2</sup> meaning enforcement of arbitral awards in those jurisdictions should be more straightforward. This, of itself, promotes arbitration over litigation, where enforcement is dependent on reciprocal international agreements and experience on the part of the local judiciary to recognise and enforce a foreign court judgment.

In general terms, the main African arbitral centres include Mauritius, Egypt, Nigeria and, for the purposes of arbitration under the OHADA Uniform Act, Côte d'Ivoire. Mauritius has launched itself as an international arbitration centre and, having adopted a modern arbitration law, is seeking to establish itself as a regional hub for international disputes. The Mauritian courts have a proven track record of issuing decisions supportive of arbitration. In association with the London-based international arbitration institution, the LCIA (LCIA-MIAC), the country successfully bid to host the biennial ICCA conference in May 2016. Egypt has a modern arbitration law based on the UNCITRAL Model Law and the Cairo Regional Centre for International Commercial Arbitration (CRCICA), in operation since 1979, has a deserved good reputation. The CRCICA Arbitration Rules have historically been based on the UNCITRAL Arbitration Rules and were amended in 2011 to take into account the 2010 UNCITRAL Arbitration Rules. Côte d'Ivoire is significant as it is home to one of the most important characteristics of OHADA arbitration - the Common Court of Justice and Arbitration (*Cour commune de justice et d'arbitrage*) (the CCJA). This acts as both a permanent arbitration institution and a supreme court of arbitration for OHADA Member States in relation to arbitration seated in a Member State. The CCJA has reached a number of arbitration-related decisions, some of which have represented a positive step for arbitration in the region but others of which have set back the reputation of arbitration under the OHADA regime.<sup>3</sup>

In light of the increasing number of trade disputes in Africa arising as a natural consequence of increased investment and trade on the continent, in June 2016 the International Court of Arbitration of the International Chamber of Commerce announced plans to partner with OHADA to help strengthen and develop the practice of international commercial arbitration across Africa.

Most of the Maghreb countries have improved their arbitration laws to achieve what is expected under international standards. Algeria and Morocco have largely aligned their laws with French arbitration rules and Tunisia has followed the UNCITRAL Model Law.

Overall, in relation to arbitrations seated within the continent and enforcement of foreign awards, the outlook across Africa is varied but certainly not bleak. Less sophisticated courts may continue to grapple with the degree of intervention they should exercise in the process, particularly in the context of foreign-seated arbitrations. However, the commercial reality is that arbitration will increasingly be the chosen dispute resolution process for international contracting parties, partially because they would prefer to avoid courts with which they are unfamiliar but predominantly because of the benefits offered by the New York Convention on enforcement of arbitral awards.

## NEW YORK CONVENTION SIGNATORIES AS AT 22 JULY 2016

State	Notes	Ratification Accession (*) Approval (†) Acceptance (‡) or Succession (§)	Entry into force	State	Notes	Ratification Accession (*) Approval (†) Acceptance (‡) or Succession (§)	Entry into force
Algeria		07/02/1989(*)	08/05/1989	Madagascar	(a), (c)	16/07/1962(*)	14/10/1962
Angola		Not a signatory <sup>1</sup>		Malawi		Not a signatory	
Benin		16/05/1974(*)	14/08/1974	Mali		08/09/1994(*)	07/12/1994
Botswana	(a), (c)	20/12/1971(*)	19/03/1972	Mauritania		30/01/1997(*)	30/04/1997
Burkina Faso		23/03/1987(*)	21/06/1987	Mauritius		19/06/1996(*)	17/09/1996
Burundi	(c)	23/06/2014(*)	21/09/2014	Morocco		12/02/1959(*)	07/06/1959
Cameroon		19/02/1988(*)	19/05/1988	Mozambique	(a)	11/06/1998(*)	09/09/1998
Cape Verde		Not a signatory		Namibia		Not a signatory	
Central African Republic	(a), (c)	15/10/1962(*)	13/01/1963	Niger		14/10/1964(*)	12/01/1965
Chad		Not a signatory		Nigeria	(a), (c)	17/03/1970(*)	15/06/1970
Comoros		28/04/2015(*)	27/07/2015	Republic of Congo		Not a signatory	
Côte d'Ivoire		01/02/1991(*)	02/05/1991	Rwanda		31/10/2008(*)	29/01/2009
Democratic Republic of Congo		05/11/2014(*)	03/02/2015	São Tomé and Príncipe		20/11/2012(*)	18/02/2013
Djibouti	(a), (c)	14/06/1983(§)	27/06/1977	Senegal		17/10/1994(*)	15/01/1995
Egypt		09/03/1959(*)	07/06/1959	Seychelles		Not a signatory	
Equatorial Guinea		Not a signatory		Sierra Leone		Not a signatory	
Eritrea		Not a signatory		Somalia		Not a signatory	
Ethiopia		Not a signatory		South Africa		03/05/1976(*)	01/08/1976
Gabon		15/12/2006(*)	15/03/2007	South Sudan		Not a signatory	
Gambia		Not a signatory		Sudan		Not a signatory	
Ghana		09/04/1968(*)	08/07/1968	Swaziland		Not a signatory	
Guinea		23/01/1991(*)	23/04/1991	Tanzania	(a)	13/10/1964(*)	11/01/1965
Guinea-Bissau		Not a signatory		Togo		Not a signatory	
Kenya	(a)	10/02/1989(*)	11/05/1989	Tunisia	(a), (c)	17/07/1967(*)	15/10/1967
Lesotho		13/06/1989(*)	11/09/1989	Uganda	(a)	12/02/1992(*)	12/05/1992
Liberia		16/09/2005(*)	15/12/2005	Zambia		14/03/2002(*)	12/06/2002
Libya		Not a signatory		Zimbabwe		29/09/1994(*)	28/12/1994

For an up-to-date list of signatories, see [www.uncitral.org](http://www.uncitral.org).

1. It has been reported that legislation in Angola ratifying the Convention came into effect on 12 August 2016. However, at the time of going to print, this had not been officially notified to UNCITRAL and recorded on its website.

#### Declarations or other notifications pursuant to article I(3) and article X(1)

- (a) This State will apply the Convention only to recognition and enforcement of awards made in the territory of another Contracting State.
- (b) With regard to awards made in the territory of non-Contracting States, this State will apply the Convention only to the extent to which those States grant reciprocal treatment.
- (c) This State will apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law.

## ALTERNATIVE DISPUTE RESOLUTION (ADR)

ADR is, on its face, a natural dispute resolution process for the continent. With its emphasis on flexibility and informality over consideration of strict legal rights and obligations, one would expect ADR to be more prevalent. Yet it remains generally underdeveloped in the commercial sphere, despite often being an adjunct to arbitration (usually through the official national arbitration centre).

That said, a number of jurisdictions have incorporated mandatory mediation or conciliation procedures of some form into certain civil litigation processes (such as Algeria, Chad, Equatorial Guinea, Gabon, Ghana, Malawi, Namibia, Nigeria, Republic of Congo, Rwanda, Senegal, Sierra Leone, Tanzania, and Uganda). Generally, however, ADR is not compulsory unless the parties have contractually agreed to it, which is rare. It is generally regarded as a positive process, though, in need of wider application. A number of local counsel have noted that reform in the context of ADR is on the horizon in their countries.

## INVESTMENT PROTECTION

Investment protections are significant in the context of Africa because foreign investors are conscious of a risk profile that may exceed their usual risk tolerance (historically in relation to sub-Saharan Africa and, more recently, in the context of North Africa).

Investment protection refers to the legal protections available to investors investing in foreign states. This growing area of international law provides mechanisms whereby investors can mitigate the risks and uncertainties associated with investing in foreign and often unfamiliar “host” states. Conversely, such protective mechanisms are offered by host states to attract foreign investors.

Broadly, these mechanisms fall into the following categories: (1) host state investment legislation; (2) investment contracts directly between the investor and the host state government; (3) bilateral investment treaties (BITs) between the governments of the foreign investor’s home state and the host state; and (4) multilateral investment treaties between the governments of more than two states. We will focus on the third of these, BITs, as they are the most common means by which foreign investors seek to protect their investments.

## BILATERAL INVESTMENT TREATIES (BITs)

BITs have proliferated in recent years, such that there now exist more than 2,200 in force globally, of which approximately 480 involve African states as parties. While BITs initially were entered into between capital-rich developed states and capital-desirous developing states, this paradigm is shifting such that increasing numbers of developing states are entering into BITs with each other. This shift can be seen by the increasing number of intra-Africa BITs. A comprehensive table setting out African States’ BIT counterparties is at page 13.

In summary, a BIT provides protection for an investment that meets a prescribed (usually broad) definition in the BIT, made by a qualifying foreign investor of one signatory state, in the territory of the other signatory state. The specific provisions and protections will of course vary across BITs, however generally a BIT will provide that each of the states guarantee the other state’s investors certain substantive protections. These protections usually consist of both absolute and

comparative guarantees. The most common substantive protections in BITs include:

- i) protection from expropriation without compensation
- ii) a guarantee of fair and equitable treatment (FET)
- iii) a guarantee of national treatment no less favourable than that given to nationals of the host state in like circumstances
- iv) a guarantee of full physical protection and security
- v) a guarantee of treatment no less favourable than that given to investors from a third state (“most-favoured nation treatment”)
- vi) promises that the host state will comply with all obligations or commitments it has accepted in relation to investments made by investors from the other signatory state

Protection from expropriation without compensation is considered to be the most fundamental and traditional investment protection and therefore is ubiquitous across BITs. This protection prevents a host state from expropriating (directly or indirectly) or nationalising the investment without just compensation and thereby depriving the investor of the value of its investment. Another commonly-invoked protection is FET, wherein the host state is prevented from taking any arbitrary or discriminatory measures against foreign investments.

In addition to providing substantive protections to foreign investors, a distinctive feature of BITs is that they often provide for dispute resolution through international arbitration, which most foreign investors will consider to be a preferred alternative to litigating disputes in the host state’s domestic courts. International arbitration under the auspices of the World Bank’s International Centre for the Settlement of Investment Disputes (ICSID) in accordance with ICSID’s Arbitration Rules is the most common dispute resolution mechanism referenced in BITs, however, it is not uncommon for BITs to provide for the settlement of investor-state disputes through arbitration administered by other well-known arbitral institutions such as the ICC, the Permanent Court of Arbitration, and the Stockholm Chamber of Commerce. Some BITs provide a choice of forum for the investor. We take a closer look at ICSID in the next section below.

Potential investors wishing to benefit from the protections offered by BITs will want to structure their transaction(s) with the particular BIT(s) in mind, not least to ensure that they and their investment qualify as “investors” and “investments” under the BIT(s). Potential investors will also want to bear in mind other potential jurisdictional issues which may affect their ability to avail themselves of the protections in the BIT(s). Of particular importance are temporal issues. For example, measures taken by a host state before a BIT takes effect generally are not covered, and an investment cannot be restructured after a dispute has arisen as a means to gain protection under a BIT.

## ICSID

Established by the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Convention), ICSID is an international institution facilitating arbitration and conciliation of international investment disputes between investors and the host states in which they invest. Although based in Washington, DC, ICSID has supranational jurisdiction and therefore ICSID proceedings and awards are independent of any involvement or review

by the US or any other domestic courts. It is impossible to appeal an ICSID award on the merits; however, ICSID offers an annulment procedure in which the procedural correctness of an award will be reviewed on very limited grounds.

By ratifying the Convention, ICSID contracting states agree to treat an ICSID award as equivalent to a final judgment of a court in their states. Thus, ICSID awards are directly enforceable in ICSID Member States and do not need to be enforced under domestic procedures pursuant to the New York Convention. It bears emphasis, however, that a host state's ratification of the Convention is necessary, but not sufficient, to commencing ICSID proceedings against that host state. This is because ICSID's jurisdiction rests on the parties' consent to arbitrate. The host state evidences such consent by not only ratifying the Convention but also by providing consent through a BIT or one of the investment protection mechanisms discussed above such as an investment contract, a host-state investment law, or a multilateral investment treaty.

There are currently 152 contracting Member States which have ratified the Convention, including 45 of the 54 African States considered in this Guide. A further 3 member states have signed but not ratified the Convention – Ethiopia, Guinea-Bissau and Namibia fall into this category. Angola, Djibouti, Equatorial Guinea, Eritrea, Libya and South Africa all have yet to sign the Convention. A full list of the status of African states vis-à-vis ICSID can be found at page 13.

In addition to the ICSID Rules which govern disputes between signatory host states and nationals of other signatory states, ICSID has Additional Facility Rules to deal with disputes where, among other things, one of the parties is not a signatory state or is not a national of a signatory state. For example, Spain is a contracting party to the Convention, however Ethiopia has only signed (and not ratified) the Convention. Accordingly, the Ethiopia-Spain BIT provides for arbitration under the ICSID Additional Facility Rules in the event that one of the parties is not an ICSID contracting party at the time the dispute arises. Thus, it is possible for parties to arbitrate their disputes under the auspices of ICSID even if one of the parties has not ratified the Convention. Awards made pursuant to the Additional Facility Rules do not, however, benefit from the provisions on recognition and enforcement of awards found in the Convention. Therefore, an award under the Additional Facility Rules would be equated to an international commercial arbitral award, such as those rendered under the ICC Rules or the LCIA Rules, and would have to be recognised/enforced pursuant to some other enforcement regime such as the New York Convention.

## INVESTOR-STATE DISPUTES INVOLVING AFRICAN STATES

Given that international arbitrations can be confidential, can be conducted under the auspices of numerous arbitral institutions, and are not always published, there is no single database providing a list of or access to all investment claims.<sup>4</sup> According to publicly available information, as of 18 March 2016, a total of 121 claims have been registered against African states, with all 121 of these being conducted under the various ICSID rules. To put this figure into perspective, to date some 563 claims have been registered at ICSID, thus claims involving African states comprise approximately 21% of ICSID's total caseload.

### i. Concluded proceedings and awards

Of these 121 claims, 85 resulted in concluded proceedings and 36 claims are presently pending. Of the 85 concluded proceedings, 46 have resulted in an award, of which 27 have been published. Of the 27 cases with published awards, 14 were based on bilateral investment treaties, 11 arose out of contracts which granted jurisdiction to resolve disputes to ICSID, and 2 arose from other grounds. The claimant investor was successful in obtaining some remedy (whether complete or partial) in 9 out of these 27 cases. Claims of expropriation were made in 25 out of these 27 cases, and findings of expropriation were made in 8 of these cases. Further, of these 27 cases, breaches of treaty provisions guaranteeing FET or full protection and security were made in 25 cases, with findings in 6 cases.

### ii. Pending cases

As regards the 36 pending cases, 35 of them are arbitration proceedings and 1 is a conciliation proceeding. Of these 36 claims, 11 are against the Arab Republic of Egypt and many of them are attributable to the Arab Spring. 13 out of 36 of these claims concern natural resources. Although many of these pending claims involve contractual issues, in some claims against Zimbabwe and Egypt the disputes have political origins. In addition, changes in law or regulations are also a cause for claims brought against Senegal and Algeria.

### iii. Themes

It bears mentioning that some African cases involve a backdrop of alleged corruption on the part of the host state, often also involving the investor. In a claim against Kenya, the ICSID tribunal refused to hear the claim on the basis that the foreign investor had been involved in corrupt practices, and held that the involvement of Kenyan officials in those corrupt practices did not absolve the investor of liability.<sup>5</sup> A concluded claim against the Arab Republic of Egypt had similar allegations of corruption but was discontinued upon settlement by the parties.<sup>6</sup> It should also be noted that NGOs and other third parties have been known to act as *amicus curiae* in African investment claims, on account of environmental or human rights issues. This practice is increasing as a result of a change in the ICSID Arbitration Rules which now specifically provide, in rule 37, for the intervention of third parties by way of *amicus* submissions and, in rule 32, for the attendance of third parties at hearings. The first ruling made by a tribunal under rule 37 was in a claim against the United Republic of Tanzania.<sup>7</sup>

## Conclusion

A significant number of African states have signed the ICSID Convention and growing numbers are signing (and, importantly, ratifying) BITs with states both inside and outside the continent. With appropriate foresight, these and other investment protections can enable investors to develop careful strategies which maximise protection of their investments and minimise the risks often associated with investing in African host states.

**AFRICAN BITs AS AT 22 JULY 2016<sup>8</sup>**

Country	ICSID	# BITs ratified and countries
Algeria	✓	28 – Argentina, Austria, Bahrain, Belgium-Luxembourg, Bulgaria, China, Cuba*, Czech Republic*, Denmark, Egypt, Ethiopia, Finland, France, Germany, Greece, Indonesia*, Iran, Italy, Jordan, Korea (Republic), Kuwait*, Libya*, Malaysia*, Mali, Mauritania*, Mozambique, Netherlands, Niger*, Nigeria*, Oman, Portugal, Qatar*, Romania, Russian Federation*, Serbia, South Africa*, Spain, Sudan*, Sweden, Switzerland, Syria*, Tajikistan*, Tunisia*, Turkey*, UAE, Ukraine*, Vietnam*, Yemen*
Angola		4 – Brazil*, Cape Verde, France*, Germany, Italy, Portugal*, Russian Federation, Saudi Arabia*, South Africa*, Spain*, UK*
Benin	✓	6 – Belgium-Luxembourg, Burkina Faso*, Canada, Chad*, China*, Germany, Ghana*, Guinea*, Lebanon*, Mali*, Mauritius*, Morocco*, Netherlands, Switzerland, Turkey*, UAE*, UK
Botswana	✓	2 – Belgium-Luxembourg*, China*, Egypt*, Germany, Ghana*, Malaysia*, Mauritius*, Switzerland, Zimbabwe*
Burkina Faso	✓	8 – Belgium-Luxembourg, Benin*, Canada*, Chad*, Comoros*, Germany, Ghana*, Guinea, Korea (Republic), Malaysia, Mauritania*, Morocco, Netherlands, Singapore*, Switzerland, Tunisia*
Burundi	✓	5 – Belgium-Luxembourg, Comoros*, Germany, Kenya*, Mauritius, Netherlands, UK
Cameroon	✓	9 – Belgium-Luxembourg, Canada*, China, Egypt*, Germany, Guinea*, Italy, Mali*, Mauritania*, Mauritius*, Morocco*, Netherlands, Romania, Switzerland, Turkey*, UK, US
Cape Verde	✓	7 – Angola, Austria†, China, Cuba, Germany, Italy*, Netherlands, Portugal, Switzerland
Central African Republic	✓	2 – Egypt*, France*, Germany, Morocco*, Switzerland
Chad	✓	3 – Benin*, Burkina Faso*, China*, Egypt*, France*, Germany, Guinea*, Italy, Lebanon*, Mali*, Mauritius*, Morocco*, Qatar*, Switzerland
Comoros	✓	1 – Belgium-Luxembourg*, Burkina Faso*, Burundi*, Egypt, Mali*, Mauritius*
Democratic Republic of Congo	✓	4 – Belgium-Luxembourg*, China*, Egypt*, France, Germany, Greece*, India*, Israel*, Italy*, Jordan*, Korea (Republic)*, Portugal*, South Africa*, Switzerland, Ukraine*, US
Côte d'Ivoire	✓	7 – Belgium-Luxembourg, Canada, China*, Germany, Ghana*, Italy*, Netherlands, Singapore*, Sweden, Switzerland, Tunisia*, UK
Djibouti		3 – China*, Egypt*, France, India*, Iran*, Italy, Malaysia*, Switzerland, Turkey*
Egypt	✓	75 – Albania, Algeria, Argentina, Armenia, Australia, Austria, Azerbaijan*, Bahrain, Belarus, Belgium-Luxembourg, Bosnia and Herzegovina, Botswana*, Bulgaria, Cameroon*, Canada, Central African Republic*, Chad*, Chile*, China, Comoros, Congo (Democratic Republic)*, Croatia, Cyprus, Czech Republic, Denmark, Djibouti*, Ethiopia, Finland, France, Gabon*, Georgia*, Germany, Ghana*, Greece, Guinea*, Hungary, Iceland, India, Indonesia†, Iran*, Italy, Jamaica*, Japan, Jordan, Kazakhstan, Korea (Democratic People's Republic), Korea (Republic), Kuwait, Latvia, Lebanon, Libya, Macedonia*, Malawi, Malaysia, Mali, Malta, Mauritius, Mongolia, Morocco, Mozambique, Netherlands, Niger*, Nigeria*, Oman, Pakistan*, Palestinian Territory, Poland, Portugal, Qatar, Romania, Russian Federation, Saudi Arabia, Senegal*, Serbia, Seychelles*, Singapore, Slovakia, Slovenia, Somalia, South Africa*, Spain, Sri Lanka, Sudan, Swaziland*, Sweden, Switzerland, Syria, Tanzania*, Thailand, Tunisia, Turkey, Turkmenistan, UAE, Uganda*, UK, Ukraine, US, Uzbekistan, Vietnam, Yemen, Zambia*, Zimbabwe*
Equatorial Guinea		3 – China, Ethiopia*, France, Morocco*, Portugal*, Russian Federation*, South Africa*, Spain, Ukraine*
Eritrea		1 – Italy, Netherlands*, Qatar*, Uganda*
Ethiopia	✓ (signature only)	25 – Algeria, Austria, Belgium-Luxembourg, China, Denmark, Egypt, Equatorial Guinea*, Finland, France, Germany, India*, Iran, Israel, Italy, Korea (Republic), Kuwait, Libya, Luxembourg, Malaysia, Mauritius*, Netherlands, Nigeria*, Russian Federation, South Africa*, Spain*, Sudan, Sweden, Switzerland, Tunisia, Turkey, UAE*, UK*, Uganda*, Yemen

AFRICAN BITs AS AT 22 JULY 2016<sup>8</sup>

Country	ICSID	# BITs ratified and countries
Gabon	✓	8 – Belgium-Luxembourg, China, Egypt*, France*, Germany, Italy, Lebanon*, Mali*, Mauritius*, Morocco, Portugal*, Romania, South Africa*, Spain, Switzerland, Turkey*
Gambia	✓	6 – Guinea*, Iran*, Libya*, Mali*, Mauritania*, Kuwait*, Morocco, Netherlands, Qatar, Spain*, Switzerland, Taiwan, Turkey*, UK, Ukraine*
Ghana	✓	8 – Benin*, Botswana*, Bulgaria*, Burkina Faso*, China, Cuba*, Côte d'Ivoire*, Denmark, Egypt*, France*, Germany, Guinea*, India*, Italy*, Malaysia, Mauritania*, Mauritius*, Netherlands, Romania*, Serbia, South Africa*, Spain*, Switzerland, UK, Zambia*, Zimbabwe*
Guinea	✓	6 – Benin*, Burkina Faso, Cameroon*, Canada*, Chad*, China*, Egypt*, Ethiopia*, France*, Gambia*, Germany, Ghana*, Italy, Lebanon*, Malaysia, Mali*, Mauritania*, Mauritius*, Morocco*, Portugal*, Serbia, South Africa*, Switzerland, Tunisia*, Turkey*
Guinea-Bissau	✓ (signature only)	1 – Morocco*, Portugal
Kenya	✓	6 – Burundi*, China*, Finland*, France, Germany, Iran*, Italy, Kuwait*, Libya*, Mauritius*, Netherlands, Slovakia*, Switzerland, Turkey*, UK
Lesotho	✓	3 – Germany, Switzerland, UK
Liberia	✓	5 – Algeria*, Belgium-Luxembourg*, France, Germany, Qatar*, Spain, Switzerland, Syria, Turkey*
Libya		23 – Algeria*, Austria, Belarus, Belgium-Luxembourg, Bulgaria, China*, Congo*, Croatia*, Cyprus, Egypt, Ethiopia, France, Gambia*, Germany, India, Indonesia, Iran, Italy, Kenya*, Korea (Republic)*, Malta, Morocco, Portugal, Qatar*, Russian Federation, San Marino*, Serbia, Singapore, Slovakia*, South Africa*, Spain, Switzerland, Syria, Tunisia*, Turkey, UK*, Ukraine*
Madagascar	✓	8 – Belgium-Luxembourg, China, France, Germany, Mauritius, Mongolia*, Norway, South Africa*, Sweden, Switzerland
Malawi	✓	3 – Brazil*, Egypt, Italy, Malaysia*, Netherlands, Taiwan*, Zimbabwe*
Mali	✓	7 – Algeria, Benin*, Cameroon*, Canada*, Chad*, China, Comoros*, Egypt, Gabon*, Gambia*, Germany, Guinea*, Korea (Democratic People's Republic)*, Morocco, Netherlands, Qatar*, Senegal*, Switzerland, Tunisia*
Mauritania	✓	7 – Algeria*, Belgium-Luxembourg*, Burkina Faso*, Cameroon*, Gambia*, Germany, Ghana*, Guinea*, Italy, Korea (Republic), Kuwait*, Lebanon, Lithuania*, Mauritius*, Morocco, Qatar*, Romania, Spain*, Switzerland, Tunisia*
Mauritius	✓	25 – Barbados, Belgium-Luxembourg, Benin*, Botswana*, Burundi, Cameroon*, Chad*, China, Comoros*, Congo, Czech Republic, Egypt*, Ethiopia*, Finland, France, Gabon*, Germany, Ghana*, Guinea*, India, Indonesia, Kenya*, Korea (Republic), Kuwait, Madagascar, Mauritania*, Mozambique, Nepal*, Pakistan, Portugal, Romania, Rwanda*, Senegal, Singapore, South Africa, Swaziland*, Sweden, Switzerland, Tanzania, Turkey*, UAE*, UK, Zambia*, Zimbabwe*
Morocco	✓	47 – Argentina, Austria, Bahrain, Belgium-Luxembourg, Benin*, Bulgaria, Burkina Faso*, Cameroon*, Central African Republic*, Chad*, China, Croatia*, Czech Republic, Denmark*, Dominican Republic, Egypt, El Salvador, Equatorial Guinea*, Estonia, Finland, France, Gabon, Gambia*, Germany, Greece, Guinea*, Hungary, India, Indonesia, Iran, Iraq*, Italy, Jordan, Korea (Republic), Kuwait, Lebanon, Libya, Macedonia, Malaysia, Mali, Mauritania, Netherlands, Oman, Pakistan*, Poland, Portugal, Qatar, Romania, Senegal*, Serbia*, Slovakia*, Spain, Sudan, Sweden, Switzerland, Syria, Tunisia, Turkey, UAE, UK, Ukraine, US, Vietnam*, Yemen*
Mozambique	✓	21 – Algeria, Belgium-Luxembourg, Brazil*, China, Cuba, Denmark, Egypt*, Finland, France, Germany, India, Indonesia, Italy, Japan, Mauritius, Netherlands, Portugal, South Africa, Spain*, Sweden, Switzerland, UAE*, UK, US, Vietnam, Zimbabwe*
Namibia	✓ (signature only)	8 – Austria, China*, Congo*, Cuba*, Finland, France, Germany, Italy, Malaysia*, Netherlands, Russian Federation*, Spain, Switzerland, Turkey*, Vietnam*
Niger	✓	2 – Algeria*, Egypt*, Germany, Switzerland, Tunisia*



AFRICAN BITs AS AT 22 JULY 2016<sup>8</sup>

Country	ICSID	# BITs ratified and countries
Nigeria	✓	15 – Algeria*, Austria*, Bulgaria*, Canada*, China, Egypt*, Ethiopia*, Finland, France, Germany, Italy, Jamaica*, Korea (Republic), Kuwait*, Netherlands, Romania, Russian Federation*, Serbia, South Africa, Spain, Sweden, Switzerland, Taiwan, Turkey*, Uganda*, UK
Republic of Congo	✓	8 – China, Germany, Italy, Korea (Republic), Libya*, Mauritius, Namibia*, Portugal*, South Africa*, Spain*, Switzerland, Tunisia*, UK, US
Rwanda	✓	5 – Belgium-Luxembourg, Germany, Korea (Republic), Mauritius*, South Africa*, Switzerland, US
São Tomé and Príncipe	✓	0 – Portugal*
Senegal	✓	14 – Argentina, Canada*, Egypt*, France, Germany, India, Italy, Korea (Republic), Kuwait*, Malaysia*, Mali*, Mauritius, Morocco*, Netherlands, Portugal*, Qatar*, Romania, South Africa*, Spain*, Sweden, Switzerland, Syria*, Taiwan*, Tunisia*, Turkey, UK, US
Seychelles	✓	2 – , China*, Cyprus, Egypt*, France, India*
Sierra Leone	✓	2 – China*, Germany, UK
Somalia	✓	2 – Egypt, Germany
South Africa		15 – Algeria*, Angola*, Argentina, Austria†, Belgium-Luxembourg†, Brunei Darussalam*, Canada*, Chile*, China, Congo (Democratic Republic)*, Congo (Republic of)*, Cuba, Czech Republic, Denmark†, Egypt*, Equatorial Guinea*, Ethiopia*, Finland, France†, Gabon*, Germany†, Ghana*, Greece, Guinea*, Iran, Israel*, Italy, Korea (Republic), Libya*, Madagascar*, Mauritius, Mozambique, Netherlands†, Nigeria, Paraguay, Qatar*, Russian Federation, Rwanda*, Senegal*, Spain†, Sweden, Switzerland†, Tanzania*, Tunisia*, Turkey*, Uganda*, UK†, Yemen*, Zimbabwe*
South Sudan	✓	0
Sudan	✓	14 – Algeria*, Bahrain*, Belgium-Luxembourg*, Bulgaria*, China, Egypt, Ethiopia, France, Germany, India, Indonesia*, Iran, Italy*, Jordan, Kuwait*, Lebanon, Malaysia*, Morocco, Netherlands, Oman, Qatar*, Romania*, Switzerland, Syria, Tunisia*, Turkey*, UAE*, Yemen*
Swaziland	✓	2 – Egypt*, Germany, Kuwait*, Mauritius*, Taiwan*, UK
Tanzania	✓	11 – Canada, China, Denmark, Egypt*, Finland, Germany, Italy, Jordan*, Korea (Republic)*, Kuwait*, Mauritius, Netherlands, Oman*, South Africa*, Sweden, Switzerland, Turkey*, UK, Zimbabwe*
Togo	✓	3 – Belgium-Luxembourg*, Germany, Portugal, Switzerland, Tunisia*
Tunisia	✓	34 – Albania*, Algeria*, Argentina, Austria, Belgium-Luxembourg, Bulgaria, Burkina Faso*, Chile*, China, Congo*, Czech Republic, Côte d'Ivoire*, Denmark, Egypt, Ethiopia, Finland, France, Germany, Greece, Guinea*, Hungary*, Indonesia, Iran, Italy, Jordan, Korea (Republic), Kuwait*, Lebanon, Libya*, Mali*, Malta, Mauritania*, Morocco, Netherlands, Niger*, Oman, Pakistan*, Poland, Portugal, Qatar*, Romania, Senegal*, South Africa*, Spain, Sudan*, Sweden, Switzerland, Syria, Togo*, Turkey, UAE, UK, US, Yemen*
Uganda	✓	7 – Belgium-Luxembourg*, China*, Cuba*, Denmark, Egypt*, Eritrea*, France, Germany, Italy, Netherlands, Nigeria*, Peru*, South Africa*, Switzerland, UK, Zimbabwe*
Zambia	✓	5 – Belgium-Luxembourg*, China*, Croatia*, Cuba*, Egypt*, Finland*, France, Germany, Ghana*, Italy, Mauritius*, Netherlands, Switzerland, UK*
Zimbabwe	✓	7 – Austria*, Botswana*, China, Croatia*, Czech Republic*, Denmark, Egypt*, France*, Germany, Ghana*, India*, Indonesia*, Iran, Italy*, Jamaica*, Kuwait*, Malawi*, Malaysia*, Mauritius*, Mozambique*, Netherlands, Portugal*, Serbia, Singapore*, South Africa*, Sweden*, Switzerland, Tanzania*, Thailand*, Uganda*, UK*

\*denotes countries that have signed but not ratified the BIT

† On 31 March 2013, the BIT between Austria and Cape Verde was terminated. For investments entered into prior to the date of termination, the BIT remains in force for a period of 10 years from the date of termination.

† On 30 November 2014, the BIT between Egypt and Indonesia was terminated. For investments entered into prior to the date of termination, the BIT remains in force for a period of 10 years.

† On 11 October 2014, the BIT between Austria and South Africa was terminated. For investments entered into prior to the date of termination, the BIT remains in force for a period of 20 years.

- † On 7 September 2012, South Africa notified its intention not to renew the BIT with the Belgo-Luxembourg Economic Union. The BIT terminated on 13 March 2013, when its 10 year term expired, although qualifying investments existing at the date enjoy a further 10 years of protection.
- † On 31 August 2014, the BIT between Denmark and South Africa was terminated. For investments entered into prior to the date of termination, the BIT remains in force for a period of 10 years.
- † On 1 September 2014, the BIT between France and South Africa was terminated. For investments entered into prior to the date of termination, the BIT remains in force for a period of 20 years.
- † On 22 October 2014, the BIT between Germany and South Africa was terminated. For investments entered into prior to the date of termination, the BIT remains in force for a period of 20 years.
- † On 1 November 2013, the BIT between the Netherlands and South Africa was terminated. For investments entered into prior to the date of termination, the BIT remains in force for a period of 15 years.
- † On 23 December 2013, the BIT between Spain and South Africa was terminated. For investments entered into prior to the date of termination, the BIT remains in force for a period of 10 years.
- † On 1 November 2013, the BIT between Switzerland and South Africa was terminated. For investments entered into prior to the date of termination, the BIT remains in force for a period of 20 years.
- † On 1 September 2014, the BIT between the UK and South Africa was terminated. For investments entered into prior to the date of termination, the BIT remains in force for a period of 20 years.

1. As notified to UNCITRAL: Egypt, Kenya, Madagascar, Mauritius, Nigeria, Rwanda, Tunisia, Uganda, Zambia and Zimbabwe.
2. A comprehensive table setting out which African states have ratified the New York Convention is at page 10.
3. For example, in November 2015, the CCJA ruled that an award made under the CCJA rules should be set aside on the grounds that the arbitrators had entered into a separate fee agreement with the parties to the arbitration and thereby exceeded their mandate and deliberately excluded the mandatory provisions of OHADA arbitration rules providing that the parties are bound by the fees set by the CCJA.
4. Unless otherwise indicated, our conclusions are based on publicly available information from those sources we believe to have the most reliable information.
5. *World Duty Free Company Limited v. Republic of Kenya* (ICSID Case No. ARB/00/7).
6. *Hussain Sajwani, Damac Park Avenue for Real Estate Development S.A.E., and Damac Gamsha Bay for Development S.A.E. v. Arab Republic of Egypt* (ICSID Case No. ARB/11/16).
7. *Biwater Gauff (Tanzania) Ltd. V. United Republic of Tanzania* (ICSID Case No. ARB/05/22).
8. Source of this table: UNCTAD Investment Policy Hub, Kluwer Arbitration.

# ALGERIA



## INTRODUCTION

Algeria's legal system is derived from the Constitution of 28 November 1996 and Organic Law No. 05/11 of 17 July 2005 relating to judicial organisation.

The Algerian legal system is widely considered as a civil law system based on codified laws. Islamic law plays a role in specific areas including personal status, family and inheritance matters.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

The legal profession is governed by Law No. 13-07 of 29 October 2013 on the organisation of the legal profession.

To practise law in Algeria, a candidate must be registered with the Algerian Bar and meet certain requirements, including:

- having Algerian nationality (subject to judicial agreements)
- holding a law degree (*licence en droit*) or a recognised equivalent diploma
- holding a certificate of capacity to practise law
- benefiting from political and civil rights
- being of good moral character

The profession is organised by the Bar Association (*Conseil de l'Ordre*), which ensures compliance with the rules governing the profession and takes any necessary disciplinary measures.

Lawyers admitted to the Bar may appear before any court. They may practise either individually or in a practice structure.

There is no distinction between solicitors (*avocat conseil*) and barristers (*avocat plaidant*).

Foreign lawyers can appear before Algerian courts with permission from the President of the Bar (*bâtonnier*) having jurisdiction over the relevant court. A reciprocity rule is also provided in certain agreements entered into between the Bars of each country.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The judicial system includes the ordinary judicial order and the administrative judicial order. The court system in Algeria forms a three-tiered pyramid:

- the courts of first instance:
  - *tribunaux* (courts) which have jurisdiction for all civil matters
  - administrative courts which have jurisdiction for all administrative matters
- the Courts of Appeal (*Cours d'appel*) which hear appeals against decisions from the courts of first instance
- the highest courts:
  - the Supreme Court (*Cour suprême*) is the highest court, determining only whether the rules of law were correctly applied by the lower courts (appeals to the Supreme Court cannot relate to questions of fact)
  - the State Council (*Conseil d'Etat*) is the highest administrative court which hears appeals against decisions made by the administrative courts on both the facts and the law of administrative matters

The existence of two sets of courts may give rise to conflicts of jurisdiction between them, for example when there is uncertainty as to whether a case should fall within the jurisdiction of the civil or administrative courts. The Conflicts Tribunal (*Tribunal de Conflits*) is the specialised court charged with resolving these conflicts.

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

As a matter of principle, the time limit for bringing a civil claim (be it contractual, commercial or based on tort) is 15 years from the beginning of the obligation. Specific limitation periods apply to certain types of actions, such as:

- the limitation period applicable to periodic and renewable claims (rent, arrears, salaries, wages and pensions) is five years
- the limitation period applicable to taxes and duties owed to the State is four years
- the limitation period applicable to claims relating to debts owed to doctors, surgeons, dentists, midwives, pharmacists, lawyers, engineers, architects, experts, trustees, brokers, professors or teachers, as part of their work, is two years

Parties may not alter the limitation period through private agreements.

The limitation period may be interrupted when a claim is brought (even before a court that does not have jurisdiction), by formal requests to pay (*commandement de payer*), by attachment (*saisie*), or by acknowledgement by the debtor of the creditor's right (whether express or tacit).

#### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

Communications between a lawyer and a client are confidential.

The principle of confidentiality applies to all communications with clients.

A breach of the duty of confidentiality may expose a lawyer to disciplinary sanctions and/or civil liability.

#### 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

Civil actions are filed with the court by filing a writ with the court registrar. The writ should be signed and dated by the claimant or its representative or lawyer. The court registrar will indicate the first hearing date on the copies of the petition instituting proceedings. A copy is served on the defendant by a bailiff.

The period between the date of service of the writ to the defendant and the date on which the defendant should appear must be at least 20 days, unless provided otherwise by law. This timeframe is extended by three months if the defendant lives abroad.

In practice, the defendant must submit its defence within one to three weeks.

These time limits do not apply for urgent proceedings (*procédure de référé*). In cases of extreme urgency, the first court hearing may even take place the same day the action is filed.

Mediation and conciliation are mandatory for all actions and the judge shall suggest mediation to the parties at the beginning of any trial and before any exchange of arguments. The parties may also ask the judge to officially facilitate their conciliation.

#### 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

Written and oral evidence (eg contracts, witness statements, etc) may be submitted depending on the subject of the dispute and the amount involved. There is no equivalent to the English law concept of "disclosure" in Algerian law.

Evidence should be submitted to the court at the same time as submissions. Evidence may only be presented in the first instance and before the Court of Appeal. The other party must be able to reply on any such evidence presented. A party cannot submit new evidence before the Supreme Court.

The court may order a party to produce evidence if he/she refuses to disclose evidence. If necessary, this order could be subject to a penalty if the timeframe and the terms for producing evidence are not complied with. The court may also order the production of evidence by third parties.

The judge may (*ex officio* or at the request of the parties) appoint one or more experts. Although the judge is not bound by the report issued by the expert(s), he/she may, however, base a decision on the findings of the expert(s). In addition, the judge must justify any rejection of the findings of an expert. The fees of the experts are determined by the President of the court based, in particular, on the work carried out by the expert, compliance with deadlines and quality of work.

#### 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

In principle, the parties do not control the procedure and the procedural timetable is set at the discretion of the court depending on its caseload and records. Parties can only seek extensions of time, which are subject to the discretion of the court. The length of the proceedings depends on various factors such as the complexity of the case, the subject matter of the dispute, the workload of the court, and the amount at stake.

In practice, proceedings before a court of first instance would normally take approximately two to three months. Before higher courts (*Cours d'appel*), proceedings would take between approximately three to five months.

The parties are able to terminate proceedings by mutual agreement (*conciliation*). The claimant may also withdraw from the proceedings (*désistement d'instance*). In such a case, the defendant's approval may be required depending on the status of the proceedings.

#### 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

The courts have power to freeze a party's assets pending judgment where there is *prima facie* evidence of a good arguable case against the owner of the assets and a credible risk that they may be dissipated to defeat a judgment.

Where appropriate, the court may also, upon demand by the claimant, grant injunctions or make other prohibitory or mandatory orders in order to preserve the *status quo* until the trial.

Interim orders are also available (if appropriate, without notice to the defendant(s)), permitting a party to trace the flow of funds through financial institutions, or to enter a defendant's premises to search for and seize evidence.

In criminal cases, the courts also have jurisdiction to order that a defendant, or a debtor under a judgment, be prohibited from leaving Algeria.

#### 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

Unless provisional enforcement is automatic or has been ordered by the court, a decision is deemed to be enforceable when it becomes final (ie once it can no longer be challenged by an opposition or by an appeal) and becomes *res judicata* (*force de chose jugée*). Judgments issued by administrative courts are fully enforceable.

In all cases, in order to be enforced, the judgment must be subject to an enforcement order.

The judge may suspend the enforcement of a judgment. As a matter of principle, such suspension should not exceed six months in general, but it could be extended to a maximum of one year when it concerns immovable seizures.

Enforcement measures available under Algerian law include, but are not limited to:

- an auction sale of assets to satisfy the judgment
- issuance of an order for an examination of the debtor (or a corporate debtor's directors) to disclose all assets (the failure of which will result in criminal sanctions)

Enforcement proceedings will depend on the type of assets at stake (movable and immovable seizures – *saisies mobilières ou immobilières*).

For judgments making prohibitory or other mandatory orders, there are few practical means of enforcement in the case of non-compliance. The only means of enforcement is through sanctions. There is no contempt of court in Algeria, so the court indirectly compels the judgment debtor by way of a monetary penalty.

#### 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

The unsuccessful party bears the judicial costs unless the court decides otherwise. However, each party covers its own lawyer fees. In practice, courts tend to be restrictive on the amounts recovered which rarely cover the actual costs.

No security for costs can be ordered.

#### 11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

Judgments of the first instance courts may be appealed before the Courts of Appeal within one month from the date on which the judgment is served in person on the unsuccessful party and within two months if the judgment is not served in person. Orders and interim orders may be appealed within 15 days.

In principle, the appeal before the Court of Appeal suspends the enforcement of the judgment. Excluding those decisions that automatically benefit from immediate enforcement and notwithstanding appeals or applications to annul, the court must order immediate enforcement, when requested to do so, in all cases involving an official instrument, an acknowledged obligation or a previous decision against a party by way of a *res judicata* decision.

An appeal before the Supreme Court (*pourvoi*) can be filed within two months from the day on which the Court of Appeal's decision is served in person on the unsuccessful party and three months if not served in person. Only the Supreme Court may determine whether the rules of law have been correctly applied by the Court of Appeal (appeals to the Supreme Court cannot relate to questions of fact). The Supreme Court may rule on an appeal and may either quash the appealed decision (in which case the Supreme Court will remand the case back to another Court of Appeal), or dismiss the *pourvoi*. An appeal before the Supreme

Court does not suspend the enforcement of the judgment unless it concerns the status or the capacity of an individual or if it is related to fraud.

#### 12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

Algerian State entities are not entitled to immunity from civil proceedings, save within the scope of administrative acts, which may be submitted to the administrative courts (administrative proceedings). If the acts are purely civil in nature, they may be submitted to the ordinary courts. However, assets of administrative bodies cannot be seized for enforcement purposes.

Foreign State entities may only claim immunity under diplomatic immunity rules applicable to diplomats of foreign States, subject to the principle of reciprocity.

#### 13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

It is possible to recognise and enforce a foreign judgment in Algeria by leave of the Court of First Instance (*exequatur*) (or the Court of Appeal) at the place of residence of the defendant or, where applicable, the place of enforcement.

*Exequatur* is granted when the conditions below are fulfilled:

- the foreign judgment was rendered by a competent court in the relevant jurisdiction
- the foreign judgment is enforceable under the law in which it was issued and is final
- the parties have been properly represented and
- the decision is not contrary to Algerian public policy

In addition, *exequatur* is subject to a condition of reciprocity. A foreign judgment will be enforced in Algeria under the same conditions applied by foreign courts when enforcing Algerian judgments.

In practice, *exequatur* may be easily obtained if the judgment does not hinder public policy.

### ARBITRATION

#### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

The Code of Civil and Administrative Procedure established by Law No. 08/09 of 25 February 2008 entered into force in April 2009 and repealed the previous regulations on arbitration. It is not based on the UNCITRAL Model Law.

#### 15. WHAT ARE THE MAIN NATIONAL ARBITRATION INSTITUTIONS?

The Mediation and Arbitration Centre of the Algerian Chamber of Commerce and Industry is the main national arbitration institution.

**16. ARE THERE ANY RESTRICTIONS ON WHO MAY REPRESENT THE PARTIES TO ARBITRATION?**

No.

**17. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?**

In domestic arbitrations, the arbitration agreement must be in writing.

In international arbitrations, the arbitration agreement may be in writing "or in any other form of which evidence in writing may be established".

The arbitration agreement can be included either in the contract itself or in a separate contract.

Regarding the content of the arbitration agreement, it must fulfil the requirements set forth by the law selected by the parties, the law governing the dispute or the law considered appropriate by the arbitrator(s).

**18. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?**

If a dispute that has already been submitted to arbitration under an arbitration agreement is subsequently referred to a national court, the latter must, at the request of the defendant and before a ruling has been made on the merits, hold the proceedings to be inadmissible until the completion of the arbitration or the termination of the arbitration agreement.

If the request for arbitration has not been submitted, the court must also declare the proceedings to be inadmissible (at the request of the defendant) unless the arbitration agreement is manifestly invalid.

**19. IF THE ARBITRATION AGREEMENT AND ANY RELEVANT RULES ARE SILENT, HOW MANY ARBITRATORS WILL BE APPOINTED, AND WHO IS THE APPOINTING AUTHORITY?**

In domestic arbitrations, if no agreement has been made between the parties regarding the number of arbitrators, the arbitral tribunal comprises a single arbitrator or an odd number of arbitrators.

In international arbitrations, there are no specific rules on the number of arbitrators.

If the parties fail to appoint the arbitrator(s), any party may:

- if the seat of arbitration is in Algeria, apply to the presiding judge of the court in the jurisdiction of the seat of arbitration or
- if the seat of arbitration is outside Algeria, and if the parties have decided to apply Algerian procedural rules, apply to the presiding judge of the Court of Algiers

If the arbitration agreement does not mention the appointing authority, the court having jurisdiction at the place in which the agreement was concluded or is performed will be consulted.

**20. WHAT RIGHTS ARE THERE TO CHALLENGE THE APPOINTMENT OF AN ARBITRATOR?**

An arbitrator may be challenged by a party if:

- he/she does not possess the qualifications required by the parties
- the circumstances raise legitimate doubts over the independence of an arbitrator, particularly due to direct or indirect economic or family ties with a party or
- one of the reasons set out in the rules of arbitration adopted by the parties is met

A party may only challenge the arbitrator that he/she has appointed (or to whose appointment he/she contributed) for a reason that occurs or that is discovered after the appointment of the arbitrator.

The arbitral tribunal and the other party must be informed of the reason for the challenge at the earliest opportunity. In the event of a dispute (and if the parties or the rules of arbitration make no provision for the procedure to be followed in these circumstances), the relevant court will issue an order at the request of any party which is not subject to appeal.

**21. DOES THE DOMESTIC LAW CONTAIN SUBSTANTIVE REQUIREMENTS FOR THE PROCEDURE TO BE FOLLOWED?**

The arbitration agreement may establish substantive requirements for the procedure to be followed. It may do so directly or by reference to rules of arbitration. It may also submit the proceedings to the procedural rules of its choice.

If the arbitration agreement does not contain any relevant provisions, the arbitral tribunal will establish the rules of procedure as necessary, either directly or by reference to a law or rules of arbitration.

**22. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED INSIDE THE JURISDICTION?**

Local courts can intervene in respect of the appointment and challenge of arbitrators and in relation to conservatory measures ordered by an arbitral tribunal (see question 24 below).

**23. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?**

Please refer to question 22 above.

**24. DO ARBITRATORS HAVE POWERS TO GRANT INTERIM OR CONSERVATORY RELIEF?**

Unless the parties have agreed otherwise, the arbitral tribunal may order any interim or conservatory measures that it deems necessary at the request of a party.

If the party in question fails to comply with the order issued by the tribunal, the latter may request assistance from the relevant court. The court will then apply its own law.

The arbitral tribunal or the court may order the requesting party to provide appropriate security in return for granting interim or conservatory measures.

## 25. WHEN AND IN WHAT FORM MUST THE AWARD BE DELIVERED?

If the arbitration agreement or the applicable arbitration rules do not indicate the timeframe for issuing the award, the arbitral tribunal will have four months from the date on which the last arbitrator was appointed, or four months from the date on which the case was referred to the arbitral tribunal.

The award must be handed down in writing, signed by the arbitrator(s) and must include a brief summary of the parties' claims and arguments. It must provide reasons for the decision and include the following information:

- the first and last names of the arbitrators
- the date
- the seat of arbitration
- the first and last names of the parties and their addresses and the company name of any legal entities and the address of their registered offices
- the first and last names of the lawyers or persons who represented or assisted the parties (if applicable)

## 26. CAN A SUCCESSFUL PARTY RECOVER ITS COSTS?

The Code of Civil and Administrative Procedure does not indicate whether costs are borne by the unsuccessful party or by all the parties. In practice, the allocation of costs will be settled by the arbitrators.

## 27. ON WHAT GROUNDS CAN AN AWARD FROM AN ARBITRATION SEATED IN THE JURISDICTION BE APPEALED TO THE COURT?

Appeals may be filed against domestic arbitral awards if the parties have not waived their right to appeal in their arbitration agreement. The domestic award may be appealed before the relevant court (according to the seat of arbitration) within one month of being handed down.

An international arbitral award rendered in Algeria can be challenged within one month of its issuance.

If the parties have waived their right to appeal, they have no other remedy against the arbitral award.

## 28. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

A foreign arbitration award cannot be appealed before the local courts. However, the order granting enforcement (*exequatur*) of the award can be appealed.

## 29. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF: (I) AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION AND (II) DOMESTIC AWARDS?

In international arbitration, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) has been ratified by Algeria in 1989.

It is possible to enforce a foreign arbitral award in Algeria by leave of the President of the court. The President of the court can refuse to enforce the award on the grounds of article V of the New York Convention.

In relation to domestic arbitration, the award is made enforceable by order of the presiding judge of the court under whose territorial jurisdiction it was handed down. An original copy of the award must be registered by either of the parties with the relevant court clerk.

## 30. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

Domestic courts are not entitled to review foreign arbitral awards. Domestic courts can only refuse to enforce foreign arbitral awards in accordance with the conditions set out in the New York Convention.

## ALTERNATIVE DISPUTE RESOLUTION

### 31. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

The Code of Civil and Administrative Procedure contains provisions regarding alternative dispute resolution procedures (mediation and conciliation).

Algerian law requires the court to offer mediation to the parties in all matters except for family and employer-employee matters and in cases that may infringe public policy.

In addition, the court may act as conciliator at any time during the proceedings with the agreement of the parties.

## REFORMS

### 32. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

To the best of our knowledge, there are currently no plans to introduce any reforms of civil procedure in the near future.

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# ANGOLA



## INTRODUCTION

The Angolan legal framework is based on the Constitution of 2010 and on the Civil Code, which is derived from Portuguese law.

The Angolan legal system is Roman Germanic, largely codified, and supplemented by harmonising decisions of the Government and Parliament, known as "resolutions" which are incorporated into law and are binding. Angolan procedural law is influenced by pre-independence Portuguese legislation.

The courts are independent of the political power and have a pyramid structure, with the Supreme Court at the apex.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

Lawyers in Angola practise as both barristers and solicitors, providing legal services directly to their clients and conducting proceedings in court. There is no split profession.

To be a lawyer and member of the Angolan Bar Association, an individual must:

- be an Angolan citizen
- hold a degree in law
- be in full enjoyment of his/her civil rights
- not have any criminal convictions or have behaved dishonourably

A foreign national can only become a member of the Bar Association and only practise as a lawyer if he/she satisfies the requirements above.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

There are superior courts and lower courts. The superior courts comprise the Constitutional Court (which has exclusive

jurisdiction in relation to the enforcement or interpretation of the Constitution) and the Supreme Court.

The lower courts comprise Courts of Appeal and County Courts. Courts of Appeal will have jurisdiction over County Courts.

Courts of Appeal, County Courts and the Supreme Court are divided according to their speciality.

The Supreme Court hears appeals:

- from Courts of Appeal (if possible, according to the law)
- against judges and prosecutors relating to the performance of their duties
- concerning conflicts of jurisdiction between courts (including divisions of the same court)

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

Under the Angolan Civil Code, the general limitation period is 20 years. However, certain actions are barred after a period of five years, such as claims concerning rents or commercial interests.

Parties can agree time limits contractually between themselves, but this does not supersede the provisions of the Civil Code.

### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

Yes, there is an absolute obligation of confidence between lawyer and client.

This obligation only ceases where it is necessary to disclose such communications to defend the rights, interests or dignity of the client or the lawyer.

### 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

Civil proceedings begin with the filing of a writ of summons by the plaintiff. The defendant may file a statement of defence within 20 days of the date of the summons. If the defendant fails to reply, default judgment may be entered. In certain cases, depending on the value of the claim, the parties may have the right of rebuttal and/or second reply. The pleadings should set out the facts and legal bases upon which the parties rely, and append key documents.



## 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

The documents a party intends to rely on should be submitted either with the writ of summons or the statement of defence. If they are not submitted with the pleadings, documents can be submitted until the close of the trial with the court's permission, which in practice is never withheld. However, a party will be fined unless it can prove that it could not have submitted the evidence with the pleadings.

The common procedure with witnesses is that they give oral evidence at trial, not written witness statements. Such evidence, together with any documents tendered, is recorded as evidence-in-chief. The other party can cross-examine the witness. Subject to the court's discretion, re-examination may be directed on matters referred to in cross-examination. Judges are allowed to question witnesses directly. A witness cannot be recalled without the leave of the court.

The court's permission is required to adduce expert evidence. Such evidence is provided by an industry expert in the form of a written report. Experts are not cross-examined at trial.

## 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

Procedural rules govern certain steps (for example the Angolan Civil Procedure Code contains deadlines for presenting the plaintiff's complaint, the defendant's answer or the plaintiff's reply). However, the judge has ultimate power to control the timetable.

Where procedural deadlines are not complied with, penalties include admission of facts or, sometimes, discontinuance/dismissal of the claim.

Litigation can be a drawn out process, taking one to two years from issue to trial.

## 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

Several interim remedies may be applied for, namely specified temporary injunctions and unspecified provisional remedies.

Specified temporary injunctions include provisional alimony, restitution, temporary possession (including temporary refund of the asset), and suspension of corporate resolutions.

Unspecified provisional remedies include orders to perform certain acts, a summons ordering the defendant to refrain from certain conduct, or the delivery of movable or immovable assets which are the subject of the action.

## 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

To enforce judgments/orders, a party must commence further proceedings called executive proceedings.

The main methods of enforcing judgments are:

- execution orders (to pay a sum of money by selling the debtor's assets)

- delivery up of assets
- provision of information on the whereabouts of assets

## 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

The court has discretion to award costs of and incidental to proceedings and the power to determine by whom and to what extent those costs are to be paid.

The court takes into consideration a wide number of factors, including the expenses (including court fees) incurred by the parties or their lawyers, the length and complexity of the proceedings, the conduct of the parties before and during the proceedings, and any previous orders as to costs made in the proceedings.

The parties or their lawyers may briefly address the court on the question of costs before any such award is made. When the parties are notified of a costs award, they can file a complaint.

Foreign claimants are not required to provide security for costs.

## 11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

There is a general right of appeal against first instance decisions.

The Civil Procedure Code also provides for appeals, namely ordinary and extraordinary appeals:

- ordinary appeals consist of first appeals, review appeals, interlocutory appeals and full court appeals
- extraordinary appeals consist of further appeals and third-party interventions

Generally, an appeal does not operate as a stay of the decision of the lower court unless it is expressly provided for in the Civil Procedure Code.

## 12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

Domestic and foreign States do not have immunity from civil proceedings.

Some domestic State entities such as public institutions, the Government, the ministries, and public agencies are subject to the jurisdiction of the administrative courts as opposed to civilian courts.

## 13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

The Angolan Civil Procedure Code states that foreign final court judgments and arbitral awards are enforceable in Angola subject to "foreign decision recognition".

To establish "foreign decision recognition":

- there must be no doubt as to the authenticity of the decision

- the decision must be final and unappealable under the law of the country in which it was made
- the decision must be recognised under Angolan conflicts rules and must not be contrary to Angolan public policy
- the defences of *lis pendens* or *res judicata* must be unavailable
- the defendant must have been duly served, unless Angolan law has dispensed with service of process or judgment in default was obtained

## ARBITRATION

### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

The Angolan Arbitration Law (Law 16/2003 of 25 July) (the Arbitration Law) is largely based on the old Portuguese Arbitration Law (Law 31/1986 of 29 August), but is also influenced by the UNCITRAL Model Law.

In general terms, the Arbitration Law provides that the procedure should rest on the principles of fair and equal treatment, adversarial process, and hearing of the parties (article 18). The parties can freely determine the procedure that they wish to apply to their dispute, including which institutional rules (article 16). The parties can also agree that the tribunal will rule according to equity or according to certain institutionalised customs (either domestic or international) (article 24, n 1).

The most innovative features of the Arbitration Law are that it makes specific provision for domestic and institutional arbitration, and also, for international arbitration.

The law specifically distinguishes "domestic arbitration" from "international arbitration" and provides specific parts for each. An "international arbitration" (articles 40 to 44) is defined as one that covers the settlement of disputes in which international trade interests are at play. The Arbitration Law provides a description of several examples (article 40, n 1). The definition is intended to cover all arbitration proceedings relating to operations that involve cross-border movement of goods, services and capital. In the case of international arbitration, the parties can also choose the language applicable to the procedure.

In relation to the production of evidence, the Arbitration Law provides that all kinds of evidence that are legally admitted by the general civil law in Angola, may be admitted in an arbitration (either by request of the parties, or by initiative of the tribunal (article 21, n 1)).

It should also be noted that the Arbitration Law embodies a general principle of independence of the arbitration procedure from the national courts. The principle of "*Kompetenz-Kompetenz*" is embodied in article 31. Nevertheless, the national courts can provide assistance in several matters such as the appointment of arbitrators (article 14), interim measures/preliminary orders (article 22, n 2), deposit of the arbitration award (article 30), annulment of awards (article 34), appeal (article 36), and enforcement of the award (article 37).

Also, article 4, n 2 institutes the "principle of separability", providing that the invalidity of the contract does not necessarily result in the invalidity of the arbitration agreement.

The Arbitration Law is also complemented by other important legislation concerning arbitration.

The Private Investment Base Law (Law No 14/15 of 11 August) requires that the arbitration of disputes that arise from private investments in the country must be seated in Angola, and also, that the substantive law applicable to such disputes must necessarily be Angolan law.

Decree No 04/2006 of 27 February authorises the creation of institutionalised arbitration centres (although they have not been created yet). The Securities Law No 22/15 of 31 August also allows that disputes arising between the participants in the securities market may be submitted to arbitration.

Finally, the Law of Petroleum Activities (Law No 10/2004 of 12 November) provides in article 89 that arbitration is mandatory in the case of disputes that emerge from contractual relations between the Ministry and the licensed companies. In such cases, the tribunal should apply the Angolan law and the procedure should be conducted in Portuguese.

Although there exists a legal arbitration framework, arbitration practice in Angola is still at a primary stage. Angola is neither a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), nor to the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention). However, the constant flow of foreign investment that continues to reach the country may very well start to change this scenario in a relatively short period of time, favouring the future adoption of these Conventions.

### 15. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

Under the Angolan Civil Procedure Code and the Arbitration Law, the parties must execute a written agreement (*Convenção de Arbitragem*) to submit present or future disputes to arbitration (articles 1, 2 and 3).

Article 3, n 2 defines an agreement in writing as one that is contained in any document signed by the parties, or in any correspondence exchanged between them, in which there is proof in writing, namely through means of telecommunication, that such documents or correspondence directly contain the agreement to arbitrate, or if they refer to another written document in which there is an arbitration agreement.

The agreement must accurately define the scope of the disputes covered and should also clearly demonstrate the will and the agreement of the parties to refer disputes to arbitration. It should also specify the number of arbitrators (either a sole arbitrator or three arbitrators). Under the Arbitration Law, the default position in the absence of agreement is three arbitrators (article 6, n 2). The seat of the arbitration should be specified. If there is no seat determined in the agreement or afterwards, the seat will be determined by the arbitrators (who may have a natural tendency to choose Angola as the arbitration seat).

## 16. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?

The courts will stay litigation if there is a valid arbitration clause signed by both parties and if this issue is raised by one of the parties (article 288, n. 1, e and article 494, n. 1, h of the Civil Procedure Code). However, the local courts can re-examine the substantive questions if there is an invalid arbitration clause.

In theory, considering that the Arbitration Law specifically acknowledges the existence of international arbitration, the local courts should respect a valid arbitration agreement even if the seat of arbitration is outside Angola.

## 17. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?

At the request of the parties, the Angolan national courts can support an arbitration with a seat outside Angola, for example, by granting an injunction for the preservation of documents or assets.

The powers of the court to assist arbitrations are included in the Angolan Arbitration Law (see question 14 above).

## 18. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

The Arbitration Law provides two different ways to challenge an award: either by appeal (article 36), or by annulment (articles 34 and 35).

Regarding domestic arbitrations, arbitral awards are subject to appeal on the merits where the parties have not expressly waived this right. Under article 36 of the Arbitration Law, it is possible to use all the forms of appeal that are available for the decisions issued by judicial courts, although applications to appeal a domestic award should be filed at the Supreme Court. However, it should be emphasised that if the parties agree that the tribunal may decide the dispute according to principles of equity, this will necessarily mean that the parties have waived the possibility to appeal.

Domestic awards may also be annulled by the Angolan courts for any of the following reasons (which are found in articles 34 and 35 of the Arbitration Law):

- the dispute is not able to be settled by arbitration
- the award was rendered by a tribunal that was incompetent to proceed with the case (and if such matter was duly raised during the procedure, the tribunal declared itself as competent or did not rule on the subject)
- the tribunal was improperly constituted (where such irregularity had a decisive influence on the final award)
- expiry of the arbitration agreement
- failure to provide reasons/grounds for the award (where such irregularity had a decisive influence in the outcome of the dispute)
- violation of the principles of equality and adversarial process where such violation decisively influenced the dispute resolution process (for example, one party was not given a fair hearing)

- the tribunal ruled on matters not within the reference or failed to rule on all matters of dispute put to it
- the tribunal, whenever ruling according to equity and usages and customs, did not respect the public order principles of the Angolan legal system

The action for annulment must be filed before the Supreme Court within 20 days from the notification of the arbitral award (article 35, n 1). Depending on the grounds for annulment, the court may remit the award to the tribunal for reconsideration. The right to request annulment of the decision cannot be waived by the parties (article 34, n 6).

If the arbitral award is "international" (in the sense of article 40, as described above), it will not be subject to an appeal, unless the parties have previously agreed this, and also, if they have settled the specific terms for the appeal regime (article 44).

## 19. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION?

Angola is not a party to the New York Convention<sup>1</sup> and therefore, foreign arbitral awards are not automatically recognised by the Angolan courts.

If the award is foreign, it is subject to the process of foreign decision recognition. The decision will be internally recognised if:

- there is no doubt regarding the authenticity of the decision
- the decision is final and binding under the law of the country in which it was made
- the decision is issued by a competent tribunal and not contrary to Angolan public policy
- the defences of *lis pendens* or *res judicata* are unavailable
- the defendant was duly served
- where the award has been issued against an Angolan citizen, and if Angolan law should apply, the decision must not disrespect the Angolan private law framework

The competent court for such procedure is the Court of Appeal of the residence of the defendant. The initial petition should contain the arbitral award which seeks recognition. The counter-party can oppose within eight days of the notification.

The time it takes to enforce a foreign award depends on the circumstances (availability of the courts, if the other party opposes it, etc), but a year is a reasonable estimate.

## 20. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

As stated above, Angola is not a signatory to the New York Convention<sup>2</sup>, which makes the enforcement of arbitral awards more complicated and exclusively dependent on internal contingencies. Depending on the seat of the arbitration, certain procedures would have to be followed before recognition of a foreign arbitral award in Angola.

Should the seat of the arbitration be Portugal, the rules of the Treaty on Civil Procedure between Portugal and Angola of 1995 apply. This Treaty contains specific provisions on the recognition of foreign judgments and arbitral awards and applies to the recognition in Angola of arbitral awards seated in Portugal.

This Treaty does not make Portuguese arbitral awards enforceable in Angola without recognition, but simply makes the recognition process easier, clearer and quicker.

Should the seat of arbitration be any other State, the arbitral award would need to be recognised by the Angolan courts pursuant to the rules of the Angolan Civil Procedure Code applicable to the recognition of foreign judgments (see question 13 above). The approximate timescale is one year, and the merits of the award may be scrutinised by the enforcing court if enforcement is contested. This may slow down the procedure.

## ALTERNATIVE DISPUTE RESOLUTION

### 21. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

There is no legal requirement to submit to any alternative dispute resolution before or during court or arbitral proceedings, unless the parties enter into an express agreement.

## REFORMS

### 22. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

The Government programme foresees the reform of the Civil Procedure Code as one of its main measures in the civil justice area, but the precise content of such reforms and their timeframes are still unknown.

Nevertheless, in December 2012, the Ministry of Justice and Human Rights announced that the Angolan State wishes to create Institutionalised Arbitration Centres for commercial and consumer protection disputes (giving substance to Decree No 04/2006 of 27 February which authorised their creation).

## FOOTNOTES:

1. Ed. - It has been reported that legislation in Angola ratifying the Convention came into effect on 12 August 2016. However, at the time of going to print, this had not been officially notified to UNCITRAL and recorded on its website. Accession to the Convention should of course render enforcement in Angola of foreign awards more straightforward.
2. Ed. - see footnote 1 above.

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# BENIN



## INTRODUCTION

Benin's legal system is derived from the Constitution of 11 December 1990 and Law no. 2001-37 of 27 August 2001 organising the court structure in the Republic of Benin. Benin is a member of OHADA, UEMOA and ECOWAS. Its Supreme Court (*Cour suprême*) has final jurisdiction over matters not governed by the laws of these inter-governmental bodies.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

A supranational regulation governs the legal profession within the UEMOA region, of which Benin is a member.

This law is Regulation n°05/CM/UEMOA of 25 September 2014 relating to the harmonisation of the rules governing the legal profession within the UEMOA region.

In order to practice as an attorney in Benin, an individual must be registered on the official roster or on the internship roster of a UEMOA Bar Association.

Three conditions are required in order to be admitted to the internship roster:

- holding a Masters II in law recognised by the African and Malagache Higher Education Council (*Conseil Africain et Malagache de l'Enseignement Supérieur*)
- being over 21 years of age
- holding the Certificate of Aptitude for the Profession of Lawyer (*Certificat d'aptitude à la profession d'avocat*) (CAPA)

The profession is organised by the *Conseil de l'Ordre*, which ensures that members abide by the rules governing the profession and applies any necessary disciplinary measures. Lawyers (*avocats*) registered with the Bar (*Barreau*) can appear before any court and assist their clients. They can practise either individually or as part of a legal practice either through an *association* or a *société civile professionnelle*, as an employee (*salarié*) or an associate (*collaborateur*).

No distinction is made between transactional lawyers and litigators.

Foreign lawyers can plead before the Beninese courts on an occasional basis provided that Beninese lawyers have reciprocal rights in their home country and subject to notifying the Chairman of the Bar Association (*bâtonnier*) of their presence and of the case in which they wish to represent their client.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The court system forms a three-tiered pyramid:

- the first instance courts:
  - the *tribunaux de conciliation*, which have jurisdiction over any claims, except as provided by law, particularly modern civil and criminal law matters, employment disputes and matters related to personal status. Jurisdiction is non-exclusive. In case of total or partial conciliation, the decision is submitted to the *Tribunal de première instance* for authentication. The law does not impose any limitation in terms of the amount in dispute
  - the *tribunaux de première instance*, which have jurisdiction over civil, commercial and public law matters that do not fall within the remit of the *tribunaux de conciliation*
- the Courts of Appeal (*Cours d'appel*) (in Cotonou, Abomey and Parakou), which have jurisdiction over all decisions issued by first instance courts arising under their jurisdiction and appealed within the time limits and procedure required by law
- the Supreme Court (*Cour suprême*), which is the State's highest court and has jurisdiction over the State's administrative, litigation, and accounting affairs

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

Limitation periods vary depending on the type of action and the parties involved:

- the ordinary limitation period for bringing an action for damages in contract is 30 years
- the ordinary limitation period for bringing a non-contractual action for damages is 30 years
- the limitation period applicable to commercial actions is five years (article 16 of the Uniform Act on General Commercial Law (*Acte uniforme sur le droit commercial general*))

Specific limitation periods apply to certain types of actions. For example, the time limit is two years for matters concerning commercial sales.

Limitation periods are governed by public policy rules. The main reasons for resetting a limitation period are the commencement of legal proceedings, or an acknowledgment.

#### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

Communications between lawyers and clients are confidential.

Lawyers found to have breached their confidentiality obligations face disciplinary action from the *Conseil de l'Ordre*. However, clients can release their lawyers from their confidentiality obligations.

#### 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

Civil or commercial proceedings are filed:

- by written petition to the presiding judge of the relevant court for claims involving real and personal property when the amount in dispute does not exceed CFA 500.000
- by joint petition, in personal status matters
- by summons, where the claimant calls the defendant to appear before the competent court

The time limit between the issue date of the notice or summons to appear in court and the hearing date is set as follows: eight days if the party invited to appear or summonsed is domiciled within the jurisdiction of the court; 15 days if the party is domiciled in an area adjoining that jurisdiction; one month for other areas in Benin; and two months for parties domiciled outside Benin. These limits do not apply to urgent matters.

There is no particular timeframe within which defendants must submit their arguments under Beninese law.

In employment disputes, parties must always undertake preliminary conciliation.

#### 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

As a general rule, all ordinary legal forms of evidence (notarised agreement, testimony, private instrument, statement, etc) are permitted. It is possible to ask the judge to order a party or a third party to produce evidence.

There is no equivalent to the common law concept of "disclosure" under Beninese law.

Evidence must be disclosed with the party's claims. Nevertheless, the procedural judge may take any necessary steps to carry out a full investigation of the matter. An expert investigation may be ordered where the statements or consultations are not sufficient for the court to make a decision.

New evidence may be produced on appeal, prior to the deliberations.

As the Supreme Court only rules on issues of law pertaining to arguments already made before the Court of Appeal, producing new evidence at this stage is not advisable but not prohibited by law.

#### 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

The parties do not control the procedure. Once the proceedings have commenced, the timetable is set at the discretion of the court and in practice depends on various factors, such as the complexity of the case, the degree of urgency and the court's caseload. Nevertheless, the parties may end the proceedings at any time by mutual agreement.

#### 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

Interim proceedings can be brought in Benin to protect parties' interests pending a judgment on the merits:

- *référé* proceedings allow a party to obtain an interim ruling urgently, without affecting the court's decision on the merits of the case. The claim is reviewed at a hearing held by the presiding judge of the court. The requirements for obtaining a *référé* judgment are as follows:
  - urgency, lack of a serious challenge to the claim, and the need to stop an unlawful situation or prevent imminent harm
- conservatory measures: the party will need to demonstrate that it has an uncontested debt and that there is a risk that it will not be able to collect it (only OHADA provisions are applicable here). The law provides for the possibility of shorter time periods for such procedures
- *ex parte* applications (*ordonnances sur requête*) are issued by the presiding judge of the court to protect the rights and interests of a party in the absence of the other party, due to the circumstances at issue. *Ex parte* orders are thus immediately enforceable

#### 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

Judgments are only enforceable to the extent that, being no longer subject to appeal with suspending effect, they are *res judicata*, save where immediate enforcement is provided by law or has been ordered. Unsuccessful parties can apply for a grace period.

The enforcement measures available under Beninese law are those provided for in the OHADA Uniform Act Organising Simplified Recovery Procedures and Measures of Execution. The principal measures are:

- seizure and sale (*saisie-vente*): "any creditor in possession of a writ of execution showing a debt due for immediate payment may [...] proceed to the seizure and sale of the tangible property belonging to his debtor [...] in order to be paid from the sale price"
- crops seizure (*saisie des récoltes sur pied*): this type of measure enables a creditor in possession of a writ of execution to seize pending crops in order to sell them
- attachment of earnings (*saisie des rémunérations*): this type of measure allows a creditor in possession of a writ of execution to seize a pre-determined portion of the debtor's wages
- attachment order (*saisie-attribution de créances*): "any creditor in possession of a writ of execution showing a debt due for immediate payment may [procure the seizure] in the hands of a third party [of] the debt owed by his debtor in the form of a sum of money"
- anticipatory order (*saisie-appréhension*)

- penalty payment (*astreinte*): creditors who obtain an injunction from a court ordering their debtors to accomplish a particular task or to cease and desist may ask the court to team the injunction with a penalty for non-compliance, payable by day/week/month
- real property foreclosure (*saisie immobilière*): this enforcement mechanism is applied as a last resort when the seizure of personal property or of debts was unfruitful or insufficient. The insufficiency must be authenticated by a bailiff (*huissier de justice*); only then may the creditor initiate a *saisie immobilière*

### 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

The unsuccessful party bears the court costs, save where the court decides to order a different party to bear all or part of them. However, the successful party is not entitled to recover its attorneys' fees.

Persons wishing to appeal to the Supreme Court must deposit sufficient funds to cover the court costs. Save as provided otherwise by international agreement, foreign claimants may be asked, at the defendant's request, to pay a deposit to cover any damages or other expenses that may be awarded against it. Security is not required for interim matters.

### 11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

Parties have 15 days to appeal first instance judgments to the issuing authority (where applicable), or one month to a higher authority. Appeals must be filed by way of a summons or a petition addressed to the court registrar. It is not possible to make new claims on appeal, save for damages or where the new claim is an argument in defence against the main claim. If filed in due time, appeals suspend the enforcement of the judgment, save where the court has ordered immediate enforcement. Petitioners must have been party to the first instance proceedings to lodge an appeal.

Appellate judgments and judgments not subject to appeal before the Court of Appeal can be appealed to the Supreme Court. The Supreme Court can only rule on issues of law and not facts. If the appeal to the Supreme Court is successful, the case is remanded to a new court for a second judgment. In principle, the remand court is not required to abide by the Supreme Court's decision but in practice this is the case.

### 12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

Proceedings can be brought against the Government or public authorities before the judicial and public law courts. State-owned companies do not have jurisdictional immunity.

In terms of foreign entities, any jurisdictional immunity rights that can be applied derive from international agreements on diplomatic or consular relationships.

### 13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

In Benin, foreign judgments are automatically deemed final and binding if they meet the following conditions:

- the dispute is plainly connected to the country in which the case was brought and the choice of forum was properly selected
- the decision is final, binding and enforceable under the laws of that country
- the parties were served, represented, or found in default with due process of law
- the decision is not contrary to public policy rules in Benin

Enforcement decisions are made by the presiding judge of the *Tribunal de première instance* of the place in which the judgment is to be enforced, regardless of the amount in dispute. The President of the court will simply verify that the judgment meets the above conditions.

## ARBITRATION

### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

Benin is a Member State of OHADA (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires* - Organisation for the Harmonisation of Business Law in Africa). The OHADA Treaty was first signed on 17 October 1993. Under the OHADA Treaty, the Council of Ministers of Justice and Finance adopt "uniform acts" that are directly applicable and enforceable in each of the Member States. Arbitration in the OHADA Member States is governed by the Uniform Act on Arbitration within the Framework of the OHADA Treaty, which was adopted on 11 March 1999 and came into force 90 days later (the Uniform Act). The Uniform Act is not based on the UNCITRAL Model Law. It was drafted separately but is nevertheless consistent with the fundamental principles of international commercial arbitration and main features of the UNCITRAL Model Law.

The Uniform Act applies to both national and international arbitration and governs all arbitration proceedings with a seat in a Member State.

One of the most important characteristics of OHADA arbitration is the Common Court of Justice and Arbitration (*Cour commune de justice et d'arbitrage*) (the CCJA), which acts as both a permanent arbitration institution and a supreme court of arbitration for OHADA Member States.

Prior to the adoption of the Uniform Act, arbitration law was governed by French arbitration laws from the 1960s, namely articles 1003 to 1028 of the French Civil Procedure Code (*Code de procédure civile*) of 1806, and the law of 31 December 1925 on the legality of an arbitration clause in commercial matters and case law. These rules are no longer applicable as the general body of law governing arbitration is the Uniform Act.

### 15. WHAT ARE THE MAIN NATIONAL ARBITRATION INSTITUTIONS?

The main arbitration institution in Benin is the *Centre d'arbitrage et de médiation et de conciliation* of the Chamber of Commerce and Industry, in Cotonou. It is mainly used by businesses.

A second arbitration institution, the *Chambre de conciliation et d'arbitrage* of the *Association interprofessionnelle du coton*, also located in Cotonou, caters for the cotton industry.

At the supranational level, the CCJA, which was created by the OHADA Treaty and is based in Abidjan, in Côte d'Ivoire, can also hear arbitration matters. The CCJA, which is also a supreme court, acts as an arbitration centre and administers proceedings governed by the CCJA Rules of Arbitration. The CCJA is different from other arbitration centres as it is not a private institution but was created and organised by OHADA. To apply to the CCJA as an arbitration centre, article 21 of the OHADA Treaty stipulates that all or part of the contract in question must be performed within the territory of one or more Member States, or that at least one of the parties must be domiciled or usually reside in a Member State. According to legal authors, it should also be possible to go to arbitration under the CCJA Rules even if these conditions are not met, if the parties have provided for this possibility in their arbitration agreement.

Arbitration clauses are becoming increasingly popular in Benin, especially clauses providing for CCJA arbitration.

#### **16. ARE THERE ANY RESTRICTIONS ON WHO MAY REPRESENT THE PARTIES TO AN ARBITRATION?**

The Uniform Act does not set any restrictions on persons who can represent parties in an arbitration. They are entitled but not required to instruct counsel (article 20 of the Uniform Act). Parties may be represented by foreign counsel.

#### **17. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?**

Article 3 of the Uniform Act states that the arbitration agreement must be made in writing or by any other means of which evidence can be produced. No particular format is required. The Uniform Act also provides that contracts can rely on an arbitration agreement contained in a different document.

Findings that formal requirements are not met are rare.

#### **18. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?**

Article 13 of the Uniform Act provides that national courts must decline jurisdiction where there is an arbitration agreement and where the arbitral tribunal has not yet been composed, save where the arbitration agreement is "manifestly void". Courts cannot decline jurisdiction at their own discretion.

If the arbitral tribunal has already been composed, the national court must decline jurisdiction at the request of a party.

In practice, Beninese judges apply this article and acknowledge their lack of jurisdiction if the criteria are met and themselves call the parties to recognise the application of the clause, if they have not already done so.

Parties governed by an arbitration agreement do have the option to appear before a national court to obtain interim or conservatory measures that do not require a review of the case on the merits, in circumstances that have been "recognised and reasoned" as urgent.

National courts can also intervene in very limited circumstances with a view to assisting the arbitration process (see questions 22 and 23 below).

#### **19. IF THE ARBITRATION AGREEMENT AND ANY RELEVANT RULES ARE SILENT, HOW MANY ARBITRATORS WILL BE APPOINTED, AND WHO IS THE APPOINTING AUTHORITY?**

The Uniform Act does not stipulate a specific number of arbitrators if the arbitration agreement is silent on this point. It does provide that an arbitral tribunal must have a sole arbitrator or three arbitrators.

If the parties are unable to appoint one or more arbitrators, the task falls on to the competent court in the Member State in which the seat of arbitration is located. In Benin, this request is filed by means of a petition addressed to the presiding judge having jurisdiction over the area in which the defendant is domiciled or by means of interlocutory proceedings.

Based on the application of the Uniform Act in Benin to date, it is not possible to determine if arbitral tribunals would be composed of one or three arbitrators where no corresponding decision has been made by the parties.

#### **20. WHAT RIGHTS ARE THERE TO CHALLENGE THE APPOINTMENT OF AN ARBITRATOR?**

Article 7 of the Uniform Act sets the rules for challenging an arbitrator. Arbitrators must notify the parties of "any circumstance about him/herself" for which they may be challenged. Any disputes will be settled by the competent court of the Member State, which declares itself competent in accordance with general law, save where the parties have provided for a different procedure for challenging arbitrators. Decisions are not subject to appeal.

Arbitrators may only be challenged for grounds that come to light after their appointment.

#### **21. DOES THE DOMESTIC LAW CONTAIN SUBSTANTIVE REQUIREMENTS FOR THE PROCEDURE TO BE FOLLOWED?**

The Uniform Act requires parties to receive equal treatment and to have an opportunity to exercise their rights (article 9); arbitrators may not base their decisions at their own discretion without first allowing parties to submit observations (article 14).

Article 18 of the Uniform Act provides that the deliberations must be kept secret.

The Uniform Act also provides that the duration of the arbitration may not exceed six months from the date upon which the last arbitrator accepts the terms, save where extended by agreement of the parties or by petitioning the presiding judge (article 12).

#### **22. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED INSIDE THE JURISDICTION?**

In principle, pursuant to the Uniform Act, where there is an arbitration agreement, the national courts cannot intervene in a dispute until the award has been issued.



Nevertheless, parties may petition the competent court in Benin in the following circumstances:

- to resolve difficulties encountered with composing the arbitral tribunal, to appoint the sole arbitrator or the third arbitrator (articles 5 and 8)
- to rule on challenges against arbitrators where the parties have not provided for a different procedure (article 7)
- to extend the deadline for the conclusion of the arbitration where there is no agreement between the parties to do so, at the request of a party or the arbitral tribunal (article 12)
- to order interim or protective measures when urgently necessary (recognised and reasoned circumstances) or when the measure would be performed in a non-OHADA State, provided the measures do not require a review of the case on the merits (article 13)
- to assist the arbitral tribunal, at its request, with the collection of evidence (article 14)

### **23. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?**

As indicated above (question 22), an intervention by the national court is in principle ruled out in the presence of an arbitral agreement. Moreover, any measures concerning the formation of the arbitral tribunal and the conduct of proceedings are the responsibility of the competent court in the country within which the seat of arbitration is located.

However, the intervention of a national court apart from the competent court in the country within which the seat of arbitration is located is possible, for the purpose of taking protective or interim measures, under the conditions set out above under question 18 (article 13<sup>1</sup>).

### **24. DO ARBITRATORS HAVE POWERS TO GRANT INTERIM OR CONSERVATORY RELIEF?**

Although this matter is not dealt with directly in the Uniform Act, legal authors generally agree that it is possible for arbitrators to order interim or conservatory relief, save where the parties have agreed otherwise.

### **25. WHEN AND IN WHAT FORM MUST THE AWARD BE DELIVERED?**

Save as agreed otherwise by the parties, arbitral awards must be issued within six months from the date on which all of the arbitrators have accepted their arbitrating functions. This term can be extended by agreement between the parties by the presiding judge either at the request of a party or the arbitral tribunal (article 12).

Parties can set special requirements for awards. Failing this, awards are issued by majority, where the tribunal counts three arbitrators, and must lay down the grounds for such awards. They must be signed by at least two of the three arbitrators.

### **26. CAN A SUCCESSFUL PARTY RECOVER ITS COSTS?**

The Uniform Act contains no provisions on this.

Where arbitration is conducted under the aegis of the CCJA, the arbitrator is empowered to award costs.

### **27. ON WHAT GROUNDS CAN AN AWARD FROM AN ARBITRATION SEATED IN THE JURISDICTION BE APPEALED TO THE COURT?**

The only remedy against an arbitral award is an application to set aside that award brought before the competent court in the Member State in which it was issued, within one month from the date of service of the award once rendered enforceable (articles 25 and 27).

The circumstances in which an application to set aside can be brought are as follows (article 26):

- the arbitral tribunal ruled without an arbitration agreement or with respect to an invalid or expired agreement
- the arbitral tribunal was not properly composed
- the arbitral tribunal did not rule in compliance with the terms of arbitration
- due process was not met
- the arbitral tribunal breached a public policy rule of the OHADA Member States
- there are no reasons for the award

Bringing an application to set aside an arbitral award suspends enforcement, unless the tribunal ordered immediate enforcement. The decision can only be appealed to the CCJA (articles 25 and 28).

This is the only remedy available to parties before a national court. The other remedies, third party opposition and the application for a review of the award, must be submitted to the arbitral tribunal (article 25).

### **28. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?**

No. Please see question 27 above.

### **29. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF: (I) AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION AND (II) DOMESTIC AWARDS?**

To enforce awards issued within an OHADA Member State, the Uniform Act requires parties to obtain the recognition of the award from the presiding judge having jurisdiction over the area in which enforcement is to take place.

This requires producing the original arbitral award, together with the arbitration agreement or copies of these documents meeting the necessary authentication conditions and, where necessary, a sworn translation into French (article 31).

Decisions refusing to recognise an arbitral award can be appealed to the CCJA, but decisions granting recognition are not subject to appeal (article 32).

Awards issued in a different OHADA Member State are recognised in other Member States under the conditions set out in the applicable international agreements or, otherwise, under the conditions stated in the Uniform Act.<sup>2</sup>

Benin is party to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which facilitates recognition and enforcement proceedings between Contracting States. Aside from the New

York Convention and with regards to arbitral awards issued by a non-OHADA Member State, article 1168 of the Code of Civil, Commercial, Administrative, Labour and Accounting Procedures states that unless otherwise provided, the request for recognition of foreign arbitral awards are heard by the presiding judge having jurisdiction over the area in which enforcement is to take place. This request must comply with the rules applicable to interim procedure.

### **30. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?**

In practice, foreign awards are readily enforceable in Benin, although there are not many concrete examples of this.

## **ALTERNATIVE DISPUTE RESOLUTION**

### **31. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?**

Subject to specific provisions applicable in certain areas of law (eg in employment disputes, parties must always undertake preliminary conciliation), parties are not obliged to undertake conciliation or mediation proceedings prior to legal action. However, either party may request this on the basis of the dispute when the proceedings are first filed and prior to the submission of arguments on the merits (article 490 of the Beninese Civil Procedure Code). The parties may also go to conciliation or mediation of their own accord or on the initiative of the judge at any time during the proceedings (article 491 of the Beninese Civil Procedure Code).

## **REFORMS**

### **32. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?**

To the best of our knowledge, there are currently no plans to make any significant reforms of civil or commercial procedure in the near future.

## **FOOTNOTES:**

1. This article is the only one to refer to a "jurisdiction" instead of to "the competent court in the Member State". It also provides for interim or protective measures that must be implemented in a country that is not an OHADA Member State.
2. Article 34 of the Uniform Act does not expressly refer to foreign awards. Nevertheless, legal authors agree that it does apply to foreign awards. It may be advisable to verify this point with local counsel.

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# BOTSWANA



## INTRODUCTION

The Botswana legal system combines elements of English common law, Roman-Dutch law and customary law, which is the indigenous law of the land. There is a Constitution and a substantial number of the laws are codified in statutes.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

Lawyers in Botswana practise as attorneys and advocates; there is no split profession. All lawyers have rights of audience before all trial courts except the Customary Courts.

Training as a lawyer in Botswana typically involves an academic stage and a pupillage stage.

During the academic stage one must first obtain a Bachelor of Laws (LLB) degree from the University of Botswana. The duration of the programme is five years. After completing this, the graduate qualifies to be admitted as a legal practitioner provided he or she fulfils the requirements under the Legal Practitioners Act, namely that he or she is a fit and proper person to practise, has obtained an LLB degree and passed such practical examinations as may be prescribed.

After admission and enrolment, a legal practitioner who intends to practise must undergo a pupillage of at least 12 months under a pupil master of not less than seven years' standing. On completion, the pupil obtains a certificate of pupillage which will enable him or her to acquire a practising certificate. Students graduating from the University of Botswana need not complete Bar examinations, whilst students studying at prescribed universities outside Botswana are required to sit them.

Foreign lawyers are permitted to practise in Botswana if they satisfy the High Court that:

- they are a fit and proper person
- they have complied with the education requirements, namely passed the LLB programme and any other exams as may be prescribed
- they have passed the Bar Examination

Foreign lawyers may be exempted from these provisions if they satisfy the court that they are qualified to practise in a prescribed Commonwealth country having a sufficiently analogous system of law.

The Law Society of Botswana is the controlling body of legal practitioners which was set up under the Legal Practitioners Act and deals with complaints against lawyers.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The judiciary sits in the superior courts and the lower courts. The superior courts consist of the:

- Court of Appeal
- High Court
- Industrial Court

The lower courts consist of the:

- Magistrates' Courts
- Customary Courts
- Land Tribunal

The highest court is the Court of Appeal, which hears appeals from the High Court, Industrial Court and the Customary Court of Appeal. Decisions of the Court of Appeal are binding on all lower courts. The High Court is vested with original unlimited jurisdiction in both criminal and civil matters under section 95 of the Constitution. The High Court also has powers of appeal from lower courts. The Industrial Court is tasked with settling trade disputes and securing and maintaining good industrial relations in the country.

Magistrates have both civil and criminal jurisdiction. Each magistrate grade operates within the limits set out in their warrant schedule. The Customary Courts have civil jurisdiction and criminal jurisdiction. Appeals from the Customary Courts are made to a higher court or the Customary Court of Appeal. The Land Tribunal adjudicates on appeals against the enforcement of Land Boards decisions on the use of tribal land.

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

Statutory limitation periods for bringing civil claims are set out in the Prescriptions Act (Cap 13:01). The limitation periods vary depending on the cause of action.

A limitation period of 30 years applies in respect of mortgage bonds and court judgments.

A limitation period of six years applies in respect of written contracts including bills of exchange but excluding mortgage bonds.

A three-year limitation period applies in respect of:

- any oral contract
- any remuneration or disbursement due for services rendered or work done
- the price of movables sold and delivered, materials provided or board or lodging supplied
- rent due upon any contract
- interest due upon any contract including a mortgage bond
- actions for damages other than those for which another period is laid down in the Act
- fraud/deceit claims

A one-year limitation period applies in respect of defamation claims, and claims for the reduction/return of the price of defective sold goods (*iactio rebitoria and actio quanti minoris*).

#### **4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?**

Communications between a client and lawyer are privileged and confidential. The client can choose to waive privilege.

#### **5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?**

Generally, civil proceedings are commenced by filing a writ of summons if proceedings are commenced by way of action, and by filing a notice of motion if proceedings are commenced by way of application. In action proceedings, after being served with the writ of summons, the defendant has 14 days to enter an appearance to defend if the place of service is within 100km of the High Court. If the place of service is more than 100km from the High Court, the defendant has 21 days to respond and enter an appearance to defend.

#### **6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?**

The main objective of pre-trial procedures is to facilitate an orderly and speedy trial, which in turn saves costs and reduces attempts to adduce unexpected evidence at trial. In addition, pre-trial procedures may bring to light evidence which may enhance and promote settlement.

The process of discovery of documents in Botswana operates in three successive stages:

- the disclosure of relevant documents including any claims to privilege
- court applications for production of the documents disclosed either for inspection by the opposite party or the court and

- the inspection of documents disclosed, other than those for which privilege or other objection to production is properly claimed

Discovery will not be ordered if the court considers that it is not necessary for the fair disposal of the matter. In addition there are grounds upon which discovery can be resisted as of right, including if it is incriminatory or penal (privilege against self-incrimination), if it is privileged, or if it is injurious to public interest (public interest immunity).

If any party fails to comply with any order for discovery or inspection of documents, he or she may be subject to committal, or may have his or her case dismissed or struck out.

The usual method of placing evidence before a trial court is by a witness giving *viva voce* evidence in open court (including cross-examination). If a witness cannot give evidence in person, subject to requirements being present, he may be allowed to give evidence by way of interrogatories, or by way of affidavit. There is also provision for video conferencing.

Expert evidence may be admitted but notice must be given that an expert will be called, including details of what the expert will be called to testify.

The plaintiff will present his or her evidence and close his or her case. Thereafter the defendant will present his or her evidence and close his or her case. The plaintiff has the right to adduce rebuttal evidence in certain circumstances.

#### **7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?**

Each claim is allocated a judge once it is filed with the High Court Registry. The judge is responsible for case management and draws up a timetable which both parties must adhere to. The judge is responsible for setting a date for the commencement of the trial. The dates which the judge allocates are subject to change.

The length of the process will depend on the allocation of the case to a judge and what the parties have agreed at the pre-trial conference. Order 42 rule 1(1) deals with pre-trial conferences. The rule provides that an attorney desirous of setting an action down for trial or of obtaining a date for the hearing must request as soon as possible after the close of the pleadings a pre-trial conference with his opposing attorney, with a view to reaching agreement on ways of curtailing the duration of the trial. At the conclusion of the conference, the attorneys must draw up and sign a minute of the matters upon which they are agreed.

At the commencement of the trial, counsel for the respective parties must report whether such conference has been held and if so, provide to the court the signed minute.

Before the trial proceeds, the judge may call into his or her chambers counsel for the parties with a view to securing agreement on any matters likely to curtail the duration of the trial.

#### **8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?**

The court may, at any time, preserve a party's interest in a case upon that party's application for the relevant interim remedy pending judgment. The available interim remedies include an

order for an interlocutory or interim injunction, and custody or preservation of any property which is the subject matter of the suit and is within the court's jurisdiction. An application for an interlocutory or interim injunction or interdict may be made before or after trial.

## 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

Judgments or orders may be enforced by a variety of methods.

Judgments in which the debtor is ordered to pay a sum of money are enforceable against the property of the defendant whether movable, immovable or *incorporeal*, by means of a writ of execution.

Other auxiliary methods of enforcement include attachment of debts or garnishee proceedings and enforcement against the debtor's person, known as civil imprisonment.

Judgments in which a person is ordered to perform, or refrain from performing certain acts are enforceable against the debtor's person by way of committal for contempt.

There are other methods available in respect of maintenance orders and enforcement of foreign civil judgments.

## 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

The court has discretion to award costs. The loser pays the winner's costs taxed on a "party to party" costs basis, which covers only essential costs of the litigation.

Rule 57 of the High Court provides that foreign claimants may be required to provide security for costs at the request of the defendant if they are not resident within Botswana. The defendant must apply to the court on notice for security for costs.

## 11. ON WHAT GROUND CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

A party who is not satisfied with a final decision of a court of first instance may, subject in certain instances where leave is required, appeal such decision to a higher court. An appellant can appeal on a point of law or a point of fact. No appeal lies except with the leave of the High Court or Magistrates' Courts from an order made *ex parte*, or by consent, or as to costs only, which by law are left to the discretion of the court.

Enforcement may be suspended pending an appeal. In civil matters, an appeal does not operate as a stay of execution or proceedings under a judgment unless the High Court, Magistrates' Courts or Customary Court so orders, and no intermediate actor proceeding is invalid, except insofar as the court directs.

## 12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

Generally domestic State entities cannot claim immunity from civil proceedings. However, the judicial and legislative bodies enjoy a certain degree of immunity. A claim cannot be brought against a judicial officer who acts during proceedings. The National Assembly

(Powers and Privileges) Act provides immunity to members of Parliament who act within the precincts of Parliament.

The Diplomatic and Privileges Act grants foreign entities immunity from civil proceedings in the exercise of their diplomatic and consular activities, but they cannot claim immunity in respect of commercial transactions.

## 13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

There is no single regime. Foreign judgments may be directly enforced by registration under Part 1 of the Judgments (International Enforcement) Act or by registration (maintenance orders) under Part 3 of the said Act. Foreign judgments may also be enforced at common law by action on the judgment. The Commonwealth and Foreign Acts of State and Judgments Act (Cap 10.03) states that judgments of courts of foreign States may be proved by the production of authenticated copies of the judgment purporting to be sealed with the seal of the foreign court.

Every foreign judgment sought to be enforced in Botswana must be registered within six years from the date of the judgment.

The judgment must be final and conclusive between the parties and, for this purpose, it is deemed final, notwithstanding that the judgment is subject to an appeal in the courts of the country of the original court.

## ARBITRATION

### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

Arbitration is governed by the Arbitration Act (Cap 6:01). The arbitration law in Botswana is not based on the UNCITRAL Model Law. Currently, the Alternative Dispute Resolution Bill has been placed before Parliament but this has not yet been passed. It contains sections that are based on the UNCITRAL Model Law.

### 15. WHAT ARE THE MAIN NATIONAL ARBITRATION INSTITUTIONS?

The Botswana Institute of Arbitrators is the only arbitration institute in the country. The Institute publishes its own set of arbitral rules.

### 16. ARE THERE ANY RESTRICTIONS ON WHO MAY REPRESENT THE PARTIES TO AN ARBITRATION?

The Arbitration Act does not make any provision in relation to who may represent a party in arbitration proceedings and there are therefore no restrictions.

### 17. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

Under the Arbitration Act, there must be a written agreement by the parties to submit present or future disputes to arbitration. This is known as a "submission". There is persuasive authority to the effect that if there is a document which the parties have accepted or have confirmed, even if orally, that any disputes should be referred to arbitration, then that document will be deemed a valid arbitration agreement. Parties who have contracted to refer their disputes to arbitration must, unless good cause is shown, act in accordance with the terms of that agreement.

Under the High Court Rules the parties in a pending action in court may also apply to the court to refer the matter to arbitration.

**18. WILL THE COURT STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?**

The Arbitration Act makes provision for persons who have previously agreed to arbitrate to elect to litigate when a dispute arises.

Under section 6(1) of the Arbitration Act, if a party to a submission to arbitration commences legal proceedings in a court against any other party to the submission in respect of any matter agreed to be referred to arbitration, the other party may at any time before delivering pleadings or taking any other step in the proceedings apply to the court to stay the proceedings. If the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration, it may stay the court action and refer the parties to arbitration. Once the *prima facie* existence of a submission has been proven, the burden of establishing a reason why the proceedings should not be stayed passes to the party pursuing litigation. However, since the provision supplies the court with a discretion to stay proceedings, it appears that the courts are at liberty to continue to hear the action notwithstanding the submission agreement. The court should satisfy itself that the dispute falls within the ambit of the arbitration agreement.

The Arbitration Act does not distinguish between arbitrations seated inside and outside Botswana.

**19. IF THE ARBITRATION AGREEMENT AND ANY RELEVANT RULES ARE SILENT, HOW MANY ARBITRATORS WILL BE APPOINTED, AND WHO IS THE APPOINTING AUTHORITY?**

The submission usually provides for the parties to the arbitration to appoint an arbitrator each. If the submission is silent then the reference is to a sole arbitrator.

Unless the parties agree otherwise, where a submission refers to two arbitrators, it is deemed to include a provision that the two arbitrators immediately appoint an umpire. Any time after appointment of an umpire, and notwithstanding anything to the contrary in the submission, either party to the reference may apply to the court for an order that the umpire enter upon the reference in lieu of the arbitrators as if he or she were sole arbitrator.

Where a submission provides that the reference shall be determined by three arbitrators, one appointed by each of the parties and the third appointed by the two parties together, the submission shall have effect as if it provided for the appointment of an umpire by the two arbitrators appointed by the parties. Where a submission provides for three arbitrators appointed otherwise than as described above, an award of the majority will be binding.

The court may in certain instances appoint an arbitrator or arbitrators. Such instances include cases where the parties have failed to agree on the appointment of the arbitrator, where an appointed arbitrator refuses to act, and where the appointed arbitrator dies or is incapable of acting.

**20. WHAT RIGHTS ARE THERE TO CHALLENGE THE APPOINTMENT OF AN ARBITRATOR?**

The right to challenge an appointment can be exercised only by an application to the court.

Where the arbitrator is appointed by the court then the order appointing him or her, being a ruling of the High Court, is subject to the normal review and appeal jurisdiction of the courts.

Where the agreement provides for two arbitrators, one to be provided by each party and a party's failure to appoint results in only one arbitrator entering on the reference, the defaulting party can challenge such appointment by an application to the court.

Where the arbitrator is appointed by agreement, the party seeking to challenge the appointment is required to apply to the court for leave to revoke the authority of the arbitrator.

**21. DOES THE DOMESTIC LAW CONTAIN SUBSTANTIVE REQUIREMENTS FOR THE PROCEDURE TO BE FOLLOWED?**

The domestic law contains substantive requirements for the procedure to be followed in the form of the Arbitration Act. Be that as it may, the parties are mainly guided by the arbitration agreement or submission into which they have entered.

**22./23. ON WHAT GROUNDS CAN THE COURT INTERVENE DURING ARBITRATIONS?**

The court may generally only intervene with regards to the appointment or removal of an arbitrator.

In addition, the Arbitration Act grants the court certain interlocutory powers, which the court may exercise in support of the arbitration, on application of one of the parties.

The court may grant an order for the examination of a witness, for the discovery of documents, for evidence to be given by affidavit in the same circumstances as litigation, for an interim injunction or similar relief, for directing an issue by way of interpleader between two parties to a submission for the relief of a third party desiring to so interplead, and for another party to give security for costs.

**24. DO ARBITRATORS HAVE POWERS TO GRANT INTERIM OR CONSERVATORY RELIEF?**

Subject to contrary agreement by the parties, the tribunal or umpire may, if he/she thinks fit, make an interim award.

**25. WHEN AND IN WHAT FORM MUST THE AWARD BE DELIVERED?**

The Arbitration Act provides that arbitrators have powers to make an award at any time. The time for making an award may be extended by the court or a judge. The award should be made within a reasonable time. An arbitrator who fails to use all reasonable dispatch in entering and/or proceeding with and making an award may be removed by the court where such application is made by one of the parties.

With regards to the form of award, although the Arbitration Act does not prescribe any particular form an award should take, awards are usually in writing, signed by the arbitrator and contain a summary of the facts of the case, the positions of the parties and the arbitrator's reasons for making the award similar to a judgment in a court of law.

## 26. CAN A SUCCESSFUL PARTY RECOVER ITS COSTS?

The costs of the reference and award are within the discretion of the tribunal. It may direct which party and what portion of the costs shall be paid, tax or settle the amount of costs to be paid, and award costs to be paid as between lawyer and client.

## 27./28. ON WHAT GROUNDS CAN AN AWARD BE APPEALED TO THE COURT?

Arbitral awards are deemed to be final and binding on all parties. The Arbitration Act is silent on the issue of appeals. However, there is case law which points to the fact that arbitration awards may be reviewed by the High Court if the arbitrator acted in bad faith.

In dealing with matters on review, the court is not concerned with the decision under review but rather with the process by which the decision was arrived at, as well as the legality of the decision rather than the merits.

## 29. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF: (I) AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION AND (II) DOMESTIC AWARDS?

Both domestic and foreign awards may be enforced, by leave of the High Court, in the same manner as a judgment or order of the court. Botswana is a party to the New York Convention on the Recognition and Enforcement of Foreign Awards (the New York Convention).

Enforcement of foreign and domestic awards is governed by the Recognition and Enforcement of Foreign Arbitral Awards Act. Foreign awards may also be enforced under the Judgments (International Enforcement) Act. The main requirement is that there should have been a valid submission to the arbitration. A foreign award may be recognised and enforced in Botswana, provided that the country in which the award was made is a designated country where substantial reciprocity of treatment is extended to judgments of the High Court of Botswana, and the award has been registered with the High Court.

## ALTERNATIVE DISPUTE RESOLUTION

### 30. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

Parties to arbitration are generally not required by law to consider or submit to ADR before or during proceedings, unless the underlying agreement requires it of the parties. However, with respect to labour disputes, parties are required by the Trade Disputes and Employment Act first to attempt mediation before proceeding to arbitration.

As regards litigation, parties are not required to mediate before issuing proceedings, unless the underlying agreement requires it. The courts encourage the parties to settle during the case management process but do not compel them to mediate. However, the Chief Justice recently made reference to ADR/mediation procedures to be introduced.

## REFORMS

### 31. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

As stated above, there have been calls for reform of the arbitration framework. It has been suggested that Botswana should adopt the UNCITRAL Model Law for the purpose of international commercial arbitration. This would, it is hoped, attract direct foreign investment and make Botswana a more attractive venue for international arbitration.

The question remains whether the UNCITRAL Model Law should be extended to domestic arbitration. The country requires well-established and tested arbitration practices, which the UNCITRAL Model Law could provide. The Arbitration Act is antiquated and a complete overhaul is called for. It is also anticipated that new procedures in relation to ADR will be introduced. However, it is unclear at this stage when the Alternative Dispute Resolution Bill will be passed.

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# BURKINA FASO



## INTRODUCTION

Burkina Faso has a civil law-based legal system, founded on the Constitution of 2 June 1991, duly ratified or approved treaties and agreements, as well as laws and regulations. As Burkina Faso is also a member of CEMAC, UEMOA and OHADA, the Supreme Court (*Cour de cassation*) has final jurisdiction over matters not governed by the laws introduced by these inter-governmental organisations.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

The legal profession is governed by Law 016-2000/AN of 23 May 2000 and Decree 2000-426/PRES/PM/MJ of 13 September 2000. To practise law in Burkina Faso, potential lawyers must be registered with the Burkina Faso Bar Association (*Ordre des avocats*) and meet certain conditions, including:

- being of age and of Burkinabé nationality
- unless exceptions apply, holding the Certificate of Aptitude for the Profession of Lawyer (*Certificat d'Aptitude à la Profession d'Avocat*) (CAPA)

The profession is organised by the *Conseil de l'Ordre*, which ensures that members abide by the rules governing the profession and applies any necessary disciplinary action. Lawyers (*avocats*) registered with the Bar (*Barreau*) can appear before any court and can practise individually or as part of a practice structure.

Foreign lawyers admitted to the Bar in a State that has a reciprocity agreement with Burkina Faso can ask to be registered with the Bar and be admitted to practise law in Burkina Faso.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The court system (excluding the criminal courts) forms a three-tiered pyramid:

- the first instance courts:
  - the *Tribunaux départementaux* and *Tribunaux d'arrondissements* (departmental and urban district courts) have jurisdiction in all non-dispute-related situations relevant to individuals such as

declarations and certificates relating to birth, marriage, death, succession, guardianship and personal status. In addition, they hear:

- civil and commercial disputes where the sum at issue is no more than XOF 100,000 and
- civil disputes over wandering livestock, destruction of fields, crops in the field or harvested crops, or broken fences where the claim amount is more than XOF 100,000
- *Tribunaux d'instance*, which have jurisdiction over cases where the amounts at stake are between XOF 100,000 and XOF 1 million
- *Tribunaux de grande instance* (there are 10), which have first instance jurisdiction over civil and commercial disputes that do not come under the jurisdiction of the *tribunaux d'instance*

There are also specialised courts (for employment and for trade).

- appellate jurisdictions:
  - *Tribunaux d'instance* hear appeals of decisions handed down by the *Tribunaux départementaux et d'arrondissement* on any subject matter. These judgments are open to further appeal to the Court of Appeal
  - *la Cour d'appel* (the Court of Appeal) is the appellate court for decisions on civil and commercial issues handed down by the *Tribunaux d'instance* and the *Tribunaux de grande instance*
- *la Cour de cassation* (the Supreme Court)

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

Limitation periods vary depending on the type of action and the parties involved:

- the ordinary limitation period for bringing a civil action is 30 years
- for disputes between traders, the limitation period is five years

Specific limitations apply to certain types of claims. For example, claims against architects and contractors for the guarantee on major structural work they performed or supervised is time-barred after 10 years.

The limitation period may be shortened or extended by contract in commercial matters only. The limitation cannot, however, be reduced to less than one year or extended to more than 10 years.

The main interruptions of the limitation periods come from the filing of legal actions (even before a court lacking jurisdiction) or *actes de reconnaissance* (acknowledgement of parenthood).



#### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

Lawyers have an absolute confidentiality obligation in all contexts (both as adviser and as counsel). Any breach of the confidentiality obligation by lawyers may result in criminal, civil and disciplinary sanctions.

Clients cannot release their lawyers from their confidentiality obligations.

#### 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

Civil claims are brought before the courts:

- in an oral or written petition (*requête*) submitted by the claimant
- through an appearance in court together with a declaration for which minutes are drawn up by the Registrar
- in a joint petition (*requête conjointe*) submitted to the Registrar for the competent court, in which the parties submit their respective claims to the court stating the points on which they disagree and their respective arguments
- through a summons by which the claimant has the opposing party summoned to appear before the competent court

The period for entering an appearance is at least 15 days from service of the summons, with an additional 15 days for parties domiciled outside the territorial jurisdiction of the court and two months for parties residing abroad.

In interlocutory matters (especially commercial matters), it is possible for the presiding judge to issue a summons in a shorter period of time (day to day or hour to hour).

The Burkinabé legal system does not require parties to go to mediation or conciliation to settle their disputes. However, parties do sometimes use such methods voluntarily for reasons of speed or fairness.

#### 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

The Burkinabé Civil Procedure Code does not specify what type of evidence is admissible, but generally speaking, all methods of proof may be admitted by the court.

Evidence is disclosed to the court at the same time as the parties' claims, and in all cases before the hearing phase has been closed.

At the request of one of the parties, the courts may order the other party to produce any piece of evidence it deems necessary to judge the case. If the assistance of a person with technical skills is necessary to make observations, estimates or conduct research, the court may order an expert review either of its own motion or on request from a party.

New evidence can always be submitted on appeal. The Supreme Court, on the other hand, only rules on points of law, and so no new evidence can be admitted. The parties may, however, present new arguments provided these are purely legal in nature.

#### 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

The parties do not control the procedure. Once the proceedings have commenced, the timetable is set at the discretion of the court and in practice depends on various factors, such as the complexity of the case, the degree of urgency and the caseload of the court. Nevertheless, the parties may end the proceedings at any time by mutual agreement.

#### 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

The following proceedings can be brought in Burkina Faso to protect the parties' interests while a judgment on the merits is pending.

- *référé* proceedings can be used to obtain interim measures in urgent circumstances without affecting the court's decision on the merits of the case. The claim is reviewed at a hearing held by the presiding judge of the court. The conditions for bringing *référé* proceedings are urgency, the lack of a serious challenge, and the need to prevent imminent harm or, even in the event of a serious challenge, to put an end to a clearly unlawful disturbance.
- *ex parte* orders (*Ordonnances sur requête*) issued by the presiding judge containing any measure to preserve the parties' rights and interests where circumstances require that the order be issued without a hearing of all parties. *Ex parte* orders are immediately enforceable
- protective attachment (*Saisie conservatoire*): evidence must be adduced for the existence of a claim in principle and the circumstances that are jeopardising recovery of the claim. This petition is submitted to the presiding judge of the court.

#### 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

The enforcement measures available under Burkinabé law are those provided for in the OHADA Uniform Act Organising Simplified Recovery Procedures and Measures of Execution. The principal measures are:

- seizure and sale (*saisie-vente*): "any creditor in possession of a writ of execution showing a debt due for immediate payment may[. . .] proceed to the seizure and sale of the tangible property belonging to his debtor[. . .] in order to be paid from the sale price"
- attachment order (*saisie-attribution de créances*): "any creditor in possession of a writ of execution showing a debt due for immediate payment may [procure the seizure] in the hands of a third party [of] the debt owed by his debtor in the form of a sum of money"
- penalty payment (*astreinte*): creditors who obtain an injunction from a court ordering their debtors to accomplish a particular task or to cease and desist may ask the court to combine the injunction with a penalty for non-compliance, payable by day/week/month
- real property foreclosure (*saisie immobilière*): this enforcement mechanism is applied as a last resort when the seizure of personal property or of debts was unfruitful or insufficient. The insufficiency must be authenticated by a bailiff (*huissier de justice*); only then may the creditor initiate a *saisie immobilière*

The court or presiding judge may grant a grace period to the unsuccessful party.

#### 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

The unsuccessful party bears the costs unless the court decides to charge them to the successful party.

The successful party can recover its lawyer's fees if such costs are requested. In most cases the reimbursement for lawyer's fees ordered by the court has been close to those actually incurred.

If the defendant so requests, foreign claimants must provide a personal guarantee (*caution*) and pay the amount for any fees and damages that they could be sentenced to pay. The judgment ordering the guarantee payment also sets the amount.

#### 11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

The right of appeal is automatic. Parties have two months to appeal from the date the judgment is issued, if it was after a full hearing of all parties, or two months from service of the judgment if it is handed down by default. Appeals are possible in all types of matter, including appeals to the issuing authority (*appel gracieux*). Appeals are filed by way of a bailiff's instrument filed with the Registrar for the *Tribunal de grande instance* or the Court of Appeal. It is not possible to make new claims on appeal, save for damages or where the new claim is an argument in defence against the main claim.

Appeals are heard *de novo*, which allows the court to determine the case and rule anew on all of the factual and legal points. An appeal lodged within the deadline for appeal suspends enforcement of a lower court decision unless it also ordered immediate enforcement.

Appellate decisions and those handed down as a final judgment can be appealed to the Supreme Court. The Supreme Court considers the law and not the facts of the case, and the proceedings do not suspend the enforcement of the lower court's decision. If the appeal to the Supreme Court is successful, the case is remanded to a new court for a second appellate judgment. In principle, the remand court of appeal is not required to abide by the Supreme Court's decision. Only a second Supreme Court ruling on the same grounds as the first, by the full Supreme Court, constitutes a precedent that must be followed by the remand court of appeal.

#### 12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

In Burkina Faso, proceedings can be brought against the Government, public authorities and State-owned companies before the judicial courts (liability of the State for judicial malfunction) and before the public law courts.

In terms of foreign entities, any jurisdictional immunities (in civil, criminal, or public law matters) that can be applied derive from the Vienna Convention on Diplomatic Relations of 1961. Burkina Faso ratified this convention on 4 May 1987 and it came into effect on 3 June 1987.

#### 13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

In Burkina Faso, the *Tribunal de grand instance* for the place where enforcement is to take place has jurisdiction to grant *exequatur* of foreign court judgments (*decision contentieuse*) and decisions by issuing authorities (*décision gracieuse*).

The presiding judge of the court verifies only whether the decision submitted for recognition meets certain conditions set out under the laws of Burkina Faso. A foreign judgment can only be recognised as enforceable if:

- it is *res judicata* under the laws of its State of origin
- it is capable of being enforced in its State of origin
- the official copy must satisfy all criteria for being deemed authentic pursuant to the laws of the State of origin
- it must have been handed down by a court with competent international jurisdiction

A foreign court has competent international jurisdiction in cases where:

- the courts of Burkina Faso do not have exclusive jurisdiction for the subject matter in question
- the dispute is clearly linked to the State where the matter was submitted to the court
- the choice of jurisdiction was not fraudulent

In practice, it is unusual for parties to encounter major difficulties in obtaining *exequatur* of a foreign judgment.

### ARBITRATION

#### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

Burkina Faso is a Member State of OHADA (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires* – Organisation for the Harmonisation of Business Law in Africa). The OHADA Treaty was first signed on 17 October 1993. Under the OHADA Treaty, the Council of Ministers of Justice and Finance adopt "uniform acts" that are directly applicable and enforceable in each of the Member States. Arbitration in the OHADA Member States is governed by the Uniform Act on Arbitration within the Framework of the OHADA Treaty, which was adopted on 11 March 1999 and came into force 90 days afterwards (the Uniform Act).

The Uniform Act is not based on the UNCITRAL Model Law. It was drafted separately, but is nevertheless aligned with the fundamental principles of international commercial arbitration and key features of the UNCITRAL Model Law.

The Uniform Act applies to both national and international arbitration and governs all arbitration proceedings with a seat in a Member State.

One of the most important characteristics of OHADA arbitration is the Common Court of Justice and Arbitration (*Cour commune de justice et d'arbitrage*) (the CCJA), which acts as both a permanent arbitral tribunal and the supreme court of arbitration for all OHADA Member States.

## 15. WHAT ARE THE MAIN NATIONAL ARBITRATION INSTITUTIONS?

The main arbitration institution in Burkina Faso is the *Centre d'Arbitrage, de Médiation et de Conciliation de Ouagadougou* (the CAMCO), which operates under the aegis of the Chamber of Commerce. CAMCO is of particular interest in cases involving commercial disputes.

At the supranational level, there is the CCJA, which was created by the OHADA Treaty and is based in Abidjan, in Côte d'Ivoire. The CCJA, which also has a judicial function, acts as an arbitration centre and administers proceedings governed by the CCJA Rules of Arbitration. The CCJA is different from other arbitration centres as it is not a private institution but was created and organised by OHADA.

For the CCJA Rules to be applicable, article 21 of the OHADA Treaty stipulates that all or part of the contract in question must be performed within the territory of one or more Member States or that at least one of the parties must be domiciled or habitually resident in a Member State. According to legal commentators, it should also be possible to go to arbitration under the CCJA Rules even if these conditions are not met if the parties have provided for this possibility in their arbitration agreement.

It is rare to find contracts containing CCJA arbitration clauses in Burkina Faso, due to the high cost of arbitration proceedings for individuals or medium-sized companies.

## 16. ARE THERE ANY RESTRICTIONS ON WHO MAY REPRESENT THE PARTIES TO AN ARBITRATION?

The Uniform Act does not set any restrictions on persons who can represent parties in an arbitration. They are entitled, but not required, to instruct a lawyer (article 20 of the Uniform Act).

The parties may be assisted by a foreign lawyer if he/she elects domicile at the offices of a local Burkinabé law firm.

## 17. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

Article 3 of the Uniform Act states that the arbitration agreement must be made in writing or by any other means which provides proof of the existence of the clause. No particular format is required. The Uniform Act also provides that contracts can refer to an arbitration agreement contained in a different document.

Generally speaking, local courts interpret the formal requirements for arbitration broadly, and restrict themselves to ascertaining consent to an arbitration agreement.

## 18. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?

Article 13 of the Uniform Act provides that national courts must decline jurisdiction where there is an arbitration agreement and where the arbitral tribunal has not yet been composed, save where the arbitration agreement is "manifestly void". Courts cannot decline jurisdiction at their own discretion.

If the arbitral tribunal has already been composed, the national court must decline jurisdiction at the request of one of the parties.

In practice, in such circumstances the courts tend to decline jurisdiction.

Parties governed by an arbitration agreement do have the option of consulting a national court to obtain interim or conservatory measures that do not require a review of the case on the merits, in circumstances that have been recognised as urgent and where reasons have been given, or where the measure must be performed in a State that is not part of OHADA.

National courts can also intervene in very limited circumstances with a view to assisting the arbitration process (see questions 22 and 23 below).

Where the seat of arbitration is outside OHADA, the Burkinabé court may issue protective or interim measures where these do not require any examination of the merits of the case, as only the arbitral tribunal would have jurisdiction.

## 19. IF THE ARBITRATION AGREEMENT AND ANY RELEVANT RULES ARE SILENT, HOW MANY ARBITRATORS WILL BE APPOINTED, AND WHO IS THE APPOINTING AUTHORITY?

The Uniform Act does not stipulate a specific number of arbitrators if the arbitration agreement is silent on this point. It does provide that an arbitral tribunal must have a sole arbitrator or three arbitrators.

If the parties do not appoint one or more arbitrators, the task falls to the competent court in the Member State of the seat of arbitration. In Burkina Faso, this is the presiding judge of the *Tribunal de grande instance*.

## 20. WHAT RIGHTS ARE THERE TO CHALLENGE THE APPOINTMENT OF AN ARBITRATOR?

Article 7 of the Uniform Act sets the rules on challenging an arbitrator. An arbitrator must notify the parties of "any circumstance about him/herself" for which they may be challenged. Any disputes will be settled by the presiding judge of the *Tribunal de grande instance*, save where the parties have provided for a different procedure for challenging arbitrators. Decisions are not subject to appeal.

However, if the parties are informed of grounds for a challenge, and do not actually make a challenge, they are deemed to have waived the right to rely on such grounds.

Arbitrators may only be challenged for reasons that come to light after their appointment.

## 21. DOES THE DOMESTIC LAW CONTAIN SUBSTANTIVE REQUIREMENTS FOR THE PROCEDURE TO BE FOLLOWED?

The Uniform Act requires parties to receive equal treatment and to have every opportunity to exercise their rights (article 9); arbitrators may not base their decisions on reasons considered at their own discretion without first allowing the parties to submit observations (article 14).

Article 18 of the Uniform Act provides that the deliberations must be kept secret.

The Uniform Act also provides that the duration of the arbitration may not exceed six months from the date upon which the last

arbitrator accepts the terms, save where extended by agreement of the parties or by consulting the *Tribunal de grande instance*, which has jurisdiction in Burkina Faso (article 12).

## 22. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED INSIDE THE JURISDICTION?

In principle, where there is an arbitration agreement, the national courts cannot intervene in a dispute until the award has been issued.

Nevertheless, parties may consult the competent court in Burkina Faso in the following circumstances:

- to resolve difficulties encountered with constituting the arbitral tribunal, to appoint the sole arbitrator or the third arbitrator (articles 5 and 8)
- to rule on challenges against arbitrators where the parties have not provided for a different procedure (article 7)
- to extend the deadline for the conclusion of the arbitration where there is no agreement between the parties to do so, at the request of a party or the arbitral tribunal (article 12)
- to order interim or protective measures recognised as urgent and where reasons have been given, or when the measure would be performed in a non-OHADA State, provided the measures do not require a review of the case on the merits (article 13)
- to assist the arbitral tribunal, at its request, with the collection of evidence (article 14)

## 23. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?

As stated above (question 22), national courts cannot intervene in an arbitration seated outside their jurisdiction where there is an arbitration agreement. In addition, all measures relating to the composition of the arbitral tribunal and conduct of the proceedings fall under the jurisdiction of the courts of the country in which the arbitration is seated.

However, it is possible for national courts other than the competent court of the Member State in which the arbitration is seated to intervene to order conservatory or interim relief under the conditions described above in question 18 (article 13').

## 24. DO ARBITRATORS HAVE POWERS TO GRANT INTERIM OR CONSERVATORY RELIEF?

Although this matter is not dealt with directly in the Uniform Act, legal commentators generally agree that it is possible for arbitrators to order interim or conservatory relief, save where the parties have agreed otherwise.<sup>2</sup>

In arbitrations conducted under the aegis of CAMCO, the arbitral tribunal may order protective measures (article 27 of the CAMCO Arbitration Rules).

## 25. WHEN AND IN WHAT FORM MUST THE AWARD BE DELIVERED?

Save as agreed otherwise by the parties, arbitral awards must be issued within six months from the date on which all of the arbitrators have accepted the terms. This term can be extended by agreement between the parties or by order of the competent court of the Member State, the *Tribunal de grande instance* in Burkina Faso, at the request of a party or the arbitral tribunal (article 12).

If the arbitration is governed by the CAMCO rules, an extension of the timeframe is submitted to the CAMCO mediation and arbitration committee (article 29 of the CAMCO Arbitration Rules).

If arbitration is governed by the CCJA rules, this authority is allocated to the CCJA (article 15.4 of the CCJA Arbitration Rules). Parties can set special requirements for the form of the award. Failing this, awards are issued by majority, where the tribunal counts three arbitrators, and must be reasoned. They must be signed by at least two of the three arbitrators.

## 26. CAN A SUCCESSFUL PARTY RECOVER ITS COSTS?

The Uniform Act does not contain any provisions in this respect.

In practice, and notwithstanding the silence of the Uniform Act, arbitrators determine arbitration fees and decide which party is to bear the costs, or how the costs are to be shared between them.

For an institutional arbitration, the relevant arbitration rules (CCJA or CAMCO) clearly state that arbitrators set arbitration fees and determine which party is to bear the costs, or how the costs are to be shared between them.

## 27. ON WHAT GROUNDS CAN AN AWARD FROM AN ARBITRATION SEATED IN THE JURISDICTION BE APPEALED TO THE COURT?

The only remedy against an arbitral award is an application to set aside that award brought before the competent court in the Member State in which it was issued, within one month from the date of notification that an enforceable award has been issued (articles 25 and 27).

The circumstances in which an application to set aside an award can be brought are as follows (article 26):

- the arbitral tribunal ruled without an arbitration agreement or with respect to an invalid or expired agreement
- the arbitral tribunal was not properly constituted
- the arbitral tribunal did not rule in compliance with the terms of arbitration
- due process was not met
- the arbitral tribunal breached a public policy rule of the OHADA Member States
- there are no reasons given for the award

Bringing an application to set aside an arbitral award postpones enforcement, unless the tribunal ordered provisional enforcement. The decision can only be appealed to the CCJA (articles 25 and 28).

This is the only remedy available to parties before a national court. The other remedies, namely third party challenge and the application for a revision of the award, must be submitted to the arbitral tribunal (article 25).

## 28. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

No.

## 29. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF: (I) AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION AND (II) DOMESTIC AWARDS?

To enforce awards issued within an OHADA Member State, the Uniform Act requires parties to obtain the recognition of the award from the competent court in that Member State (article 30), namely, the presiding judge of the *Tribunal de grande instance*.

This requires producing the original arbitral award, together with the arbitration agreement or copies of these documents meeting the necessary authentication conditions and, where necessary, a sworn translation into French (article 31).

Decisions refusing to recognise an arbitral award can be appealed to the CCJA but decisions granting recognition are not subject to appeal (article 32).

Awards issued in a non-OHADA Member State are recognised in other Member States under the conditions set out in the applicable international agreements or, failing this, under the conditions stated in the Uniform Act<sup>3</sup> (article 34).

Burkina Faso is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (the New York Convention), which facilitates the recognition and enforcement of foreign arbitral awards. For awards handed down outside OHADA Member States, the criteria under national law are those set out in the New York Convention, ratified by Burkina Faso on 23 March 1987, effective since 21 June 1987.

*Exequatur* proceedings are subject to a hearing of all parties; they are brought by petition (*requête*). The court primarily hears procedural issues and examines the requirements for international jurisdiction and due process.

Appeals against a refusal to grant recognition are brought before the Supreme Court. Where the court does grant *exequatur*, an award is enforceable regardless of whether any Supreme Court appeal is brought.

## 30. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

Yes, provided they are first granted recognition. As soon the award has been recognised, it is enforceable on the same terms as national judgments.

## FOOTNOTES:

1. This article is the only one that refers to "jurisdiction" (*une juridiction*) rather than the "Member State court with jurisdiction" (*juge compétent dans l'Etat-partie*). It pertains to protective or interim measures to be performed in a non-OHADA Member State.
2. This understanding is derived in particular through a reverse reading of article 13, which limits national court intervention to clearly urgent circumstances (in domestic cases).
3. Article 34 of the Uniform Act does not expressly refer to foreign awards, but legal authors agree that it does apply. It would, however, be advisable to verify this point with a local practitioner.

## ALTERNATIVE DISPUTE RESOLUTION

### 31. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

Proceedings are not subject to any mandatory prior mediation or conciliation unless the law provides otherwise. However, in all areas, parties may enter a voluntary appearance before the competent court for the purposes of conciliation. Claimants may also issue a summons to defendants requiring conciliation, so long as the period for issuing the summons is observed (article 451 of the Code of Civil Procedure).

## REFORMS

### 32. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

None that we are aware of.

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# BURUNDI



## INTRODUCTION

Burundi's legal system is based on the Constitution of 18 March 2005, Law No 1/08 of 17 March 2005 relating to Court Organisation and Jurisdiction, and Law No 1/07 of 25 February 2005, which governs Burundi's Supreme Court.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

The profession of lawyer (*avocat*) in Burundi is governed by Law No 1/014 of 29 November 2002, which reformed the legal profession. In order to practise as a lawyer, a candidate must have been an intern for at least two years. This requirement is waived for judges with at least six years' experience, doctors of law, university professors and lawyers who have practised for at least two years as government lawyers (*avocat du gouvernement*).

In order to become an intern, a person must:

- have Burundian nationality
- have a degree in law from a Burundian university or a recognised foreign university diploma
- have no criminal record for matters relating to honour, probity or ethics
- not have been revoked from the judiciary, the civil service or the armed forces
- not have been declared personally insolvent or been found guilty of professional misconduct
- not have previously been admitted to a Bar (*Barreau*) and struck off
- satisfy a moral character test background check carried out by the Bar Association (*Conseil de l'Ordre*)

The profession is organised by the *Conseil de l'Ordre*, which ensures compliance with the rules governing the profession and takes any necessary disciplinary measures. Lawyers (even interns) may appear before any court and assist their clients. Lawyers may practise either individually or in a practice structure.

There is no distinction between solicitor (*avocat conseil*) and barrister (*avocat plaidant*).

A foreign lawyer may be authorised by a Burundi court to assist or represent a party appearing before the same court. The foreign lawyer's request must be presented to the Chairman of the Bar Association (*Bâtonnier*), who may give an opinion on the request to the court concerned.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The Burundian court system is organised as a three-tier pyramid:

- the courts of first instance:
  - the *Tribunaux de résidence*, which hear civil matters between private persons for claims of no more than BIF 1 million, actions concerning unregistered land, actions concerning succession provided that the amount is no more than BIF 1 million, personal and family matters which are not referred to a different court, and the eviction of defaulting tenants or those unlawfully occupying premises
  - the *Tribunaux de grande instance*, which hear all civil matters, where the material or territorial jurisdiction is not given to another court, and appeals against decisions made by the *Tribunaux de résidence* within their jurisdiction
- the Courts of Appeal (*Cours d'appel*), of which there are four: Bujumbura, Gitega, Ngozi and Bururi (created in 2014 pursuant to Decree No 100/140 of 9 June 2014). They hear appeals of judgments issued by the *Tribunaux de grande instance*
- the Supreme Court (*Cour suprême*), which has a judicial division, a supreme court of appeal and an administrative division. The Supreme Court hears appeals from final judgments issued by first instance courts. When ruling on an appeal, the Supreme Court does not address the merits of the case but ensures that the judges have correctly applied the law

There are also specialist courts, for example, two Labour Courts (in Gitega and Bujumbura), one Commercial Court (in Bujumbura), and two Administrative Courts (in Gitega and Bujumbura). These courts hear appeals of final judgments issued by commercial and labour courts.

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

In principle, the time limit is 30 years, without any precondition or good faith requirements.

However, time limits vary depending on the area of law:

- the time limit under general law to bring an action based on contract is 30 years
- for claims between merchants, the time limit is five years

- the time limit under general law to bring an action based on tort is three years
- in administrative dispute the time limit to initiate a legal action is very short (three months)

Certain time limits apply specifically to different types of actions. For example:

- an action by an employee to recover wages is prescribed after six months
- an action by doctors or surgeons to obtain payment for their medical care is prescribed after one year
- an action by merchants to recover merchandise sold to non-merchants is prescribed after one year.

Time limits are suspended primarily when filing a claim or by taking enforcement measures for a foreign judgment.

Time limits are matters of public policy and may not be adjusted contractually.

#### **4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?**

Yes, all communications between a lawyer and a client are confidential.

Criminal sanctions may apply when in breach of the duty of confidentiality. Those sanctions are set out in the Burundian Criminal Code. Civil fines may also apply as provided in the law relating to the legal profession and disciplinary measures may be taken pursuant to the Burundian Bar Association's Code of Professional Conduct.

The client may release the lawyer of his/her confidentiality duty, subject to certain public policy exceptions (ie as part of a criminal investigation).

#### **5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?**

Civil matters are referred to the court by a summons, by voluntary submission or by interlocutory application, which may occur during an on-going procedure.

In order to initiate proceedings through the filing of a summons, the plaintiff submits a complaint to the court clerk of the competent court, identifying the parties, and setting out a brief statement of the claim and the arguments raised in support. This motion may also be presented orally, in which case the clerk drafts it and has it signed by the plaintiff.

The court clerk asks the claimant to pay a sum into court to cover court fees equivalent to BIF 2,000 and gives the claimant a receipt bearing the case number. The case will not be listed until the payment into court has been made. The case will be struck out if any additional sum subsequently requested is not paid. Public authorities are exempted from making this payment. The same applies for public persons which operate with State subsidies.

The petition or summons prepared by the clerk is served on the defendant, who must appear, irrespective of where he/she

resides. He/she must appear within eight days if the defendant resides in the area over which the court has jurisdiction. If the defendant resides abroad, in a country where there is air transport to and/or from Bujumbura, the time limit for appearing is extended to one month. For other individuals residing outside of Burundi, this time limit is extended to two months.

For interlocutory proceedings, the judge may shorten the time limits.

#### **6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?**

Each party must prove the facts underlying his or her case. Forms of proof under ordinary law are admitted (written arguments, notarised documents, witness testimony, etc).

##### **Documents**

The party intending to rely on an exhibit must disclose it in advance to every other party. If this is not done, the court may be asked to order disclosure. The court sets the time limit and, if necessary, the means of disclosure.

The claimant must disclose all of his/her exhibits at the first hearing, under threat of dismissal from the general list. The defendant must disclose his/her exhibits before the first hearing and in any event, under threat of an order to file submissions and plead, at the latest by the second hearing fixed by the court.

If, during the hearing, a party wishes to refer to a document to which it is not a party or to an exhibit held by a third party which it cannot obtain, it may ask the court to order disclosure of the exhibit. If the court considers that the request is justified, it may order the disclosure or production of the document or exhibit, whether an original, copy or extract, if necessary under threat of a daily fine.

##### **Experts**

The court may order an expert opinion. In practice, however, such opinions are rarely requested in Burundi given the lack of technical facilities. If such an opinion is sought, the court may ask the parties to appoint from one to three experts. The expert(s) may not issue an opinion on the merits of the case, but must comply with the terms of their mission as requested by the judge. However, if the understanding of the issues in dispute requires technical skills which are unfamiliar to the judge, he/she may appoint one to three expert(s), either by request of the parties or at his/her own discretion. The scope of the experts' mission will have to be confined to their field(s) of expertise so as not to interfere with the judge's overall interpretation of the dispute.

Subject to appeal or reformation, the requested opinion may only be disregarded to the extent that the request was deceptive, provided the judge has a factual basis for substituting his/her own technical knowledge for that of the expert.

Experts may decline to pursue a mission on any grounds. The judge will then appoint a new expert. By request from the expert, the judge may appoint an additional expert. The expert will undertake under oath, whether orally or in writing, to carry out his/her mission faithfully. The expert has access to any procedural documents and is bound by a professional duty of confidentiality.

The judge is not bound to abide by the expert's assessment. However, he/she may validate all or part of the expert opinion as

his/her own. When the judge validates an expert opinion, he/she is not obliged to justify any of the grounds derived from the opinion although the judgment must expressly refer to the expert opinion upon which the judge based his/her conclusion.

## 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEEDINGS AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

The parties do not control the procedure. The procedural timetable is fixed by the court and depends on a number of factors, such as the complexity of the matter, whether or not an expert opinion is needed, the availability of judges (strikes, transfers etc). The parties may make an application to the presiding judge of the court to speed up the procedure, or to defer proceedings to a later date.

## 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

In urgent matters, the court may make an interim order for any measures in respect of which there is no serious challenge to the claim or which is justified by the existence of a dispute. This power covers all matters where no particular emergency procedure exists. Further, in the time period between the filing of the complaint and the first hearing date, the judge may initiate, via an order, any measure which he deems necessary to the safeguard of the parties's rights pending the hearing date.

In the event of an emergency and if debt recovery appears at risk, the judge may, at the creditor's request, authorise the seizure of all or part of the debtor's recoverable goods.

The court may be asked to deliberate on problems encountered with the enforcement of a decision or other enforcement order by request addressed to the presiding judge in charge of enforcement mentioning the difficulties to be overcome.

## 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

Decisions only become enforceable when they become final, unless provisional enforcement is automatic or has been ordered. The debtor may, however, benefit from a grace period. No grace period is available to defendants when the judgment is *res judicata*, except for voluntary submission. The defendant in question must formally present his/her proposal for deferred enforcement, which requires the court's approval and the winning party's consent.

The main enforcement measures available under Burundi law are as follows:

- seizure and sale (*saisie-exécution*): this must be preceded by an order to pay made to the debtor personally or at the debtor's residence, at least 24 hours before the seizure; this order must set out the details of the claim, if this has not already been done. After this period, a bailiff carries out the seizure, without the creditor's presence, assisted by a witness who will sign the original and copies of the order
- attachment order (*saisie-arrêt*): a creditor with an enforceable claim may request an attachment order against a third party for any money and goods belonging to the debtor. If there is no enforceable claim, the court with jurisdiction for the third party's place of residence may authorise an attachment order on the basis of a petition. Authorisation is given by the court with jurisdiction for the amount of the debt

- seizure claim (*saisie-revendication*): the holder of a re-sale right over one or more goods held by a third party may file a petition with the presiding judge of the court with jurisdiction, depending on the value of the goods, in order to obtain an immediately enforceable order to have the goods in question placed in the custody of the court until a final decision has been made
- penalty order (*astreinte*): the court may, even on its own initiative, make a penalty order to ensure the enforcement of their decision, in particular in the case of an obligation to perform or remedy

## 10. DOES THE COURT HAVE POWER TO ORDER COSTS?

In principle, the court orders the unsuccessful party to pay the costs, including court fees, witness expenses, expert fees and other procedural costs, unless the court, making a special and reasoned decision, orders the other party to bear all or part of these costs. However, the successful party cannot recover legal fees.

## 11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

The deadline for making an appeal against first instance decisions is one month from the date of the notification of the decision. An appeal is lodged either by the filing of a statement duly received and stamped by the court clerk, either by a registered letter with acknowledgment of receipt sent to the court clerk of this jurisdiction, or by the carrier with acknowledgement of receipt.

No new claim may be raised on appeal. However, a party may submit additional arguments, exhibits or evidence in order to further support the claims raised before the courts of first instance.

An appeal made before the deadline suspends the original decision, unless the court has ordered provisional enforcement.

An appeal may be filed by the losing party (*appel principal*) or by the winning party when it considers that it was not fully compensated (*appel incident*).

The appeal is filed by way of submission of pleadings and by paying all applicable court fees.

After a first appeal, it is possible to appeal to the Supreme Court. The Supreme Court hears only points of law and not of fact. An appeal to the Supreme Court does not suspend the decision. If the appeal to the Supreme Court is successful, the case is remanded to a new court to be re-heard. In principle, the Supreme Court decision is not binding on the new court which re-hears the case. In practice, however, the new court complies with the Supreme Court's decision.

The court hearing the matter on the merits does not have to comply with the directive of the Supreme Court. This is the reason why a judicial review conducted by a panel of judges representing all chambers may be available in order to deliberate on the merits.

## 12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

Claims may be brought against the State or public authorities before both the judicial and administrative courts.



For foreign State entities, any immunity they may have will be derived from international agreements on diplomatic and consular relations.

### 13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

Unless a contrary bilateral agreement exists, decisions handed down abroad in civil matters are only enforceable in Burundi if they meet the following conditions:

- the decision contains nothing which is contrary to public policy in Burundi
- the decision has the force of *res judicata* under the laws of the State where it was handed down
- according to these same laws, the copy produced meets the necessary authenticity conditions
- rights of defence have been respected
- the foreign court's jurisdiction was not exclusively founded on the claimant's nationality

Enforcement is readily granted when in compliance with the Code of Judicial Organisation and Competence (*Code de l'organisation et de la compétence judiciaire*).

## ARBITRATION

### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

Burundi arbitration law is not based on the UNCITRAL Model Law relating to international commercial arbitration.

Arbitration in Burundi is governed by Law No 1/010 of 13 May 2004 enacting articles 337 to 370 of the Burundi Code of Civil Procedure (*Code de procédure civile*).

Even though Burundi is not a party to OHADA, Law No 1/010 was enacted with the aim of making the Burundi legal arbitration environment equivalent to that of the OHADA Member States.

### 15. WHAT ARE THE MAIN NATIONAL ARBITRATION INSTITUTIONS?

The Burundi Centre for Arbitration and Conciliation (*Centre Burundais d'Arbitrage et de Conciliation*) (CEBAC) was set up in 2004. It is the only national arbitration institution.

CEBAC arbitrators are not necessarily lawyers. The arbitral tribunal may be made up of lawyers or specialists from various sectors (university professors, bankers, insurance experts, architects, construction engineers, etc).

If a party decides to appoint an arbitrator who is not on the CEBAC list, this arbitrator must be approved in advance by CEBAC.

### 16. ARE THERE ANY RESTRICTIONS ON WHO MAY REPRESENT THE PARTIES TO AN ARBITRATION?

The parties may be represented by a lawyer of their choice. There are no restrictions as to the people authorised to represent the parties to arbitration.

If the representative is a foreign lawyer who is not admitted to the Burundi Bar, he/she may be authorised by the Burundi court to assist or represent the party before the same court.

### 17. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

The arbitration clause must be in writing and included in the main agreement or in the document to which it refers, or it risks being declared a nullity. It must either appoint the arbitrator(s) or set down the appointment procedure (article 345 of the Code of Civil Procedure). The arbitration clause is valid even if it does not set down a time limit for the award.

The arbitration clause must state the scope of the dispute and identify the arbitrators, failing which it will be null and void. It determines and circumscribes the arbitrator's mission. It must be authenticated by a Burundi public notary (*notaire publique*) even when the seat of arbitration is abroad. The foreign arbitrator will refer to it when authenticating the clause.

These conditions are strictly interpreted by the courts.

### 18. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?

The national courts have no jurisdiction over a dispute already subject to arbitration.

### 19. IF THE ARBITRATION AGREEMENT AND ANY RELEVANT RULES ARE SILENT, HOW MANY ARBITRATORS WILL BE APPOINTED, AND WHO IS THE APPOINTING AUTHORITY?

The arbitral tribunal may have either one or three arbitrators. For *ad hoc* or institutional arbitration, if there is more than one arbitrator, the first two are appointed by the parties, and the third is appointed either by mutual agreement of the parties or, failing this, by the arbitration institution.

### 20. WHAT RIGHTS ARE THERE TO CHALLENGE THE APPOINTMENT OF AN ARBITRATOR?

An arbitrator does not represent the parties and must fulfil his/her mission in an independent manner (article 353 of the Code of Civil Procedure). The Code of Civil Procedure specifies that arbitrators may be challenged by the parties for a reason which either pre-dates the arbitration agreement or which arises afterwards if this was not known at the time of signing the arbitration agreement.

### 21. DOES THE DOMESTIC LAW CONTAIN SUBSTANTIVE REQUIREMENTS FOR THE PROCEDURE TO BE FOLLOWED?

The arbitral tribunal follows the procedural rules set down for judicial courts. The parties may, however, either directly or by reference to an arbitration rule, decide on the arbitration procedure to be followed. They may also submit the arbitration procedure to the procedural law of their choice (article 358 of the Code of Civil Procedure). The arbitration procedure must be set down in writing (article 359 of the Code of Civil Procedure).

The arbitrators must conduct the arbitration procedure with full respect of the parties' agreement. They will make their award on the basis of the rules of law indicated by the parties or, failing this, they will themselves decide on the most appropriate rules, which will, as necessary, take account of international legal practice.

They may also act as an *amiable compositeur*, if the parties give them this power (article 361 of the Code of Civil Procedure).

Once he/she has accepted his/her mission, the arbitrator is obligated to issue an award, failure to do so resulting in him/her being liable for the payment of damages.

## **22. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED INSIDE THE JURISDICTION?**

If the parties have opted for arbitration in order to resolve any dispute, a national court cannot intervene in the arbitration proceedings.

## **23. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?**

The same answer as for question 22 applies.

## **24. DO ARBITRATORS HAVE POWERS TO GRANT INTERIM OR CONSERVATORY RELIEF?**

Article 357 of the Code of Civil Procedure allows the arbitral tribunal to grant interim measures to protect the rights of the parties, when required in the circumstances.

## **25. WHEN AND IN WHAT FORM MUST THE AWARD BE DELIVERED?**

The time limit within which the award must be made is generally set out in the arbitration agreement. The arbitral tribunal generally complies with the procedural rules set down. The length of the procedure may therefore vary, depending on the progress of the procedure before the arbitral tribunal and the complexity of the matter.

If the arbitration agreement does not provide for any time limit, the award should be made within six months from the date of the agreement, unless otherwise agreed by the parties (article 338 of the Code of Civil Procedure).

The type of award is governed by the formal conditions applicable to the ordinary domestic courts.

The award is made on a majority vote of the arbitral tribunal. It must be reasoned and signed by each arbitrator. If one arbitrator refuses to sign, the other arbitrators mention this and the award will have the same effect as if it had been signed by all arbitrators (article 363 of the Code of Civil Procedure). Article 362 of the Code of Civil Procedure allows any member of an arbitral tribunal to attach his/her opinion, whether or not dissenting.

## **26. CAN A SUCCESSFUL PARTY RECOVER ITS COSTS?**

As the appointment of arbitrators and the payment of procedural costs (lawyers' and arbitrators' fees) are voluntary and optional, it is not possible for the successful party to recover its costs.

## **27. ON WHAT GROUNDS CAN AN AWARD FROM AN ARBITRATION SEATED IN THE JURISDICTION BE APPEALED TO THE COURT?**

The Code of Civil Procedure rules out any possibility of an appeal against arbitration awards. According to article 340(2), the arbitration award is final and cannot be appealed, in addition, the

third paragraph provides that the parties, "by submitting their dispute to arbitration waive any other right of recourse to which they could be entitled".

However, an appeal on the ground of interpretation may be made in writing to the *ad hoc* tribunal which made the award, or to the authorised bodies in the case of institutional arbitration, for any dispute between the parties concerning the meaning or scope of the arbitration award (article 369 of the Code of Civil Procedure).

## **28. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?**

Burundian law does not provide for the possibility of an appeal against a foreign arbitration award in the local courts.

## **29. WHAT PROCEDURES EXIST FOR THE ENFORCEMENT OF: (I) AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION AND (II) DOMESTIC AWARDS?**

Burundi is now a party to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) (Law No 1/16 of 9 May 2014 on the Adhesion by the Republic of Burundi to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards). The Convention was ratified by Burundi on 23 June 2014 and entered into force on 21 September 2014.<sup>1</sup> However, the Act of 9 May 2014 makes the following reservations:

*"Burundi will apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under Burundian law".*

The procedure for enforcing foreign arbitration awards is set out in the Burundi Code of Civil Procedure. The claimant must make the request to the presiding judge of the Court of Appeal (article 365(2) of the Code of Civil Procedure). The procedure is the same if arbitration takes place in Burundi (article 365(1) of the Code of Civil Procedure).

The presiding judge of the Court of Appeal has jurisdiction to enforce in Burundi financial damages by a foreign State in accordance with laws applicable to final judgment rendered within its territory.

There can be no appeal against an enforcement order (article 366 of the Code of Civil Procedure). Such an order must, however, contain a formal execution seal.

## **30. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?**

Adhesion to the New York Convention is likely to facilitate the enforcement of foreign awards.

## **ALTERNATIVE DISPUTE RESOLUTION**

### **31. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?**

Referral to alternative dispute resolution methods before or during a trial or arbitration procedure is optional. However, the use of this type of mechanism may be made compulsory by an agreement of the parties.

## REFORMS

### 32. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

No reforms are pending as far as we are aware.

## FOOTNOTE:

1. [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html)

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\* Herbert Smith Freehills is not licensed to practice in Burundi

# CAMEROON



## INTRODUCTION

As a result of inheriting from both cultures when it gained independence, Cameroon has two legal systems: a civil law based system applicable to eight of the 10 regions (Adamaoua, Centre, Est, Extrême-Nord, Littoral, Nord, Ouest and Sud) and a common law based system covering two English-speaking regions (North-West and South-West).

The Constitution, which is regarded as the highest law in Cameroon's legal order, was adopted on 18 January 1996, and subsequently amended by a law dated 14 April 2008. The court system is organised under Law No 2006/015 of 29 December 2006, which was amended by Law No 2011/027 of 14 December 2011, and Law No 2006-016 of 29 December 2006 relating to the organisation and operation of the Supreme Court (*Cour suprême*), plus implementing instruments. Cameroon is a member of OHADA, ECCAS and CEMAC.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

The legal profession is governed by Law No 90/059 of 19 December 1990 and Ministerial Order No 41/DPJ/SG/MJ of 12 April 2005. To practise law in Cameroon, prospective lawyers must be registered with the Cameroon Bar Association (*Ordre des avocats*) and meet certain requirements, including:

- having Cameroonian nationality and enjoying full civil rights
- holding the *Certificat d'Aptitude à la Profession d'Avocat* (CAPA)

The profession is organised by the Bar Council (*Conseil de l'Ordre*), which ensures that members abide by the rules governing professional conduct and applies any necessary disciplinary measures.

Lawyers (*avocats*) admitted to the Bar (*Barreau*) can appear before any court and can practise either individually or as part of a professional legal entity (*Société civile professionnelle*). There is no split profession.

No distinction is made between transactional lawyers and litigators. Foreign lawyers can plead before the Cameroonian courts on an occasional basis with permission from the presiding judge (*président*), provided that Cameroonian lawyers have reciprocal rights in their home country. In addition, pursuant to the applicable international agreements, the Minister of Justice may, after consulting with the *Conseil de l'Ordre*, issue authorisations to foreign lawyers to practise law or to undertake an internship in the country.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The court system (excluding the criminal courts) forms a three-tiered pyramid:

- the first instance courts:
  - the *tribunal de première instance*, which has jurisdiction over civil and commercial matters where the amount in dispute is less than or equal to XAF 10 million
  - the *tribunal de grande instance*, which has jurisdiction for all matters where the amount in dispute is over XAF 10 million
- there are 10 courts of appeal (*cours d'appel*), which hear appeals brought against the decisions issued by the first instance courts
- the Supreme Court (*Cour Suprême*)

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

Limitation periods vary depending on the type of action and the parties involved:

- the ordinary limitation period for bringing an action for damages arising out of contract is 30 years
- the ordinary limitation period for bringing an action for damages in non-contractual claims is 30 years
- the limitation period applicable to commercial claims is five years

Specific limitation periods apply to certain types of actions:

- the limitation period for actions against architects and contractors for construction work that they have carried out or supervised is 10 years

- the limitation period for recovering interest on loans and, more generally, any amounts payable per annum or at shorter regular intervals is five years

In commercial matters, the limitation period may be shortened or extended by agreement between the parties. Nevertheless, it may not be less than one year or more than 10 years. Parties may also agree to add grounds for suspending or resetting the limitation period.

Limitation periods may be suspended by circumstance or by the courts. The former case applies where the holder of property rights is deprived of enjoyment for more than one year either by the former owner or even by a third party. The latter involves the service of notice of a legal action, an order to pay delivered by a bailiff (*commandement*) or seizure on the debtor.

#### **4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?**

Lawyers have an obligation to keep all information pertaining to client relationships confidential, even where the client has expressly released them from that obligation (correspondence, consultations, memoranda, files, etc). Confidentiality must be maintained even after the lawyer-client relationship has ended and if the lawyer ceases to practise law. It extends to all persons working for/with lawyers, regardless of whether or not they are also lawyers.

Absolute confidentiality is required in all circumstances, from advising clients to defending them in court.

Correspondence between lawyers, regardless of the form it takes, cannot be seized or produced as evidence in court or declared non-confidential.

However, pursuant to article 62.2 of the Cameroon Bar Association Rules, correspondence marked "official", as well as agreements between lawyers that bear that marking, are not confidential and are therefore not covered by the confidentiality obligation.

#### **5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?**

Civil proceedings are filed in one of two ways. First, they may be filed by way of a written petition addressed to the presiding judge of the relevant court. Within 24 hours of receiving the petition, a judge must issue an order setting a hearing date and forward the case file to the court registrar who will then send a copy within 24 hours to the claimant and defendant by registered post with acknowledgement of receipt. Divorce applications or applications concerning parties domiciled over 20 kilometres outside the jurisdiction of the court consulted should be filed by petition. Nevertheless, in the latter case, this method is now rarely used.

Civil proceedings may also be filed by issue of a summons (*assignation*). This method is used in all cases save for divorce applications.

The timeframe for the first hearing is eight days for defendants domiciled within the jurisdiction of the court or 30 days for defendants domiciled in other parts of the country. It is extended to two months for defendants in Africa and Europe, three months for the Americas and four months for the rest of the world.

These timeframes do not apply to interim proceedings and there is no timeframe provided for defendants to submit their arguments in defence.

#### **6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?**

Evidence can be presented by any means: written documents (established privately, publicly or before a notary), witness testimony, testimony under oath, witness statements, etc. The types of evidence allowed do not depend on the court. There is no equivalent in Cameroon of the English law concept of "disclosure".

Evidence must be disclosed to the opposing party. This may occur over time, as submissions are filed, but must be completed before the case goes to deliberation. Parties may apply to halt deliberations to produce new evidence. In any event, evidence does not have to be disclosed at a specific stage during the proceedings.

Under Cameroonian law, parties are not prohibited from producing new evidence on appeal or before the Supreme Court. It follows that this evidence is admissible.

The court, or the judge ruling on interim proceedings (*juge des référés*), can appoint one or three experts with a specific assignment and a deadline within which to provide his/her report.

#### **7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?**

The parties do not control the procedure. Once the proceedings have commenced, the timetable is set at the discretion of the court and in practice depends on various factors, such as the level of complexity of the case, the degree of urgency and the caseload of the court. Nevertheless, the parties may end the proceedings at any time by mutual agreement.

#### **8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?**

Proceedings known as "*référé*" can be brought in Cameroon to obtain interim measures without affecting the court's decision on the merits of the case. The claim is reviewed at a hearing held by the presiding judge of the *Tribunal de première instance* or a judge to whom the presiding judge has delegated this task.

*Référé* proceedings can be brought in urgent situations, for a flagrant offence (known as "*voie de fait*", ie where a situation is clearly unlawful and causing damage to a party) or to request an expert investigation or obtain interim or conservatory relief, including the stoppage of work, appointment of a temporary administrator, eviction of a party, sequestration of property, etc. Proceedings are held in the presence of all parties (known as "*contradictoire*").

The presiding judge of the *Tribunal de première instance* can order a *saisie conservatoire* (protective/conservatory attachment or sequestration), under which a debtor's movable assets (cited by the order) are frozen, thus preventing the debtor from disposing of them to the detriment of the creditor. This procedure may be ordered where there is a high risk that the petitioner will be prevented from collecting an indisputable debt.

## 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

The enforcement measures available under Cameroonian law are those provided for in the OHADA Uniform Act Organising Simplified Recovery Procedures and Measures of Execution. The principal measures are as follows:

- seizure and sale (*saisie-vente*): "any creditor in possession of a writ of execution showing a debt due for immediate payment may proceed to the seizure and sale of the tangible property belonging to his debtor in order to be paid from the sale price"
- attachment order (*saisie-attribution de créances*): "any creditor in possession of a writ of execution showing a debt due for immediate payment may (procure the seizure) in the hands of a third party of the debt owed by his debtor in the form of a sum of money"
- penalty payment (*astreinte*): creditors who obtain an injunction from a court ordering their debtors to accomplish a particular task or to cease and desist may ask the court to team the injunction with a penalty for non-compliance, payable by day/week/month
- real property foreclosure (*saisie immobilière*): this enforcement mechanism is applied as a last resort when the seizure of personal property or of debts was unfruitful or insufficient. The insufficiency must be authenticated by a bailiff (*huissier de justice*), only then may the creditor initiate a *saisie immobilière*

The court may either decide to postpone or stagger the payment of the amount due for a period of no more than one year, except for maintenance payments (*dette d'aliments*) or debts pertaining to negotiable instruments (*dettes cambiaires*). It may also decide that payments must first be set off against the principal of the debt or require the debtor to take steps to facilitate or guarantee the payment of the debt. Extra time may also be granted outside an enforcement context, even by the judge ruling on interim proceedings if the situation is urgent.

## 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

The unsuccessful party bears the other party's court costs in the jurisdiction which issued the decision, save where the court decides to divide the costs between the parties. Expense claims taxed by the court that issued the decision constitute a remuneration owed to the attorney but are separate from attorneys' fees. Expenses are taxed pursuant to a pre-determined scale. Recoverable costs include procedural advances (procedural fees, expert expenses and fees, investigation and transportation costs, etc, if such measures were ordered during the proceedings). Recoverable legal fees do not correspond to the actual fees paid to the lawyer; the court sets the amount based on a scale of charges.

With the exception of legal aid cases, all claimants are required to deposit sufficient funds with the registrar's office of the court before which they intend to file suit to guarantee the payment of procedural fees, including the registration of the case. Failing this, the case will not proceed. Subject to sponsorship agreements and international agreements, all foreign parties are required, if requested by the defendant, to pay a guarantee to cover procedural fees and any damages that may be awarded.

## 11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

Parties have three months to appeal first instance judgments. Appeals must be filed by way of a petition addressed to the court registrar. It is not possible to make new claims on appeal, save for damages or where the new claim is an argument in defence against the main claim. If filed in due time, appeals suspend the enforcement of the judgment, save where the court has ordered immediate enforcement.

Appeals may only be brought against judgments of the *tribunal de première instance* or *tribunal de grande instance* handed down after a hearing of all the parties (*contradictoire*) or deemed as such in the first instance. There is no need to obtain leave to appeal. Appeals are heard *de novo*, which allows the Court of Appeal to determine the case and rule anew on all of the factual and legal points of the lower court's decision. The case is therefore reviewed in full.

After the appellate stage, it is possible to apply to the judicial chamber of the Supreme Court to reverse a decision handed down on appeal. Supreme Court proceedings consider the law and not the facts of the case and do not suspend the enforcement of the lower court's decision (article 258 of the French Code of Civil Procedure). If the appeal to the Supreme Court is successful, the case is remanded to a new court of appeal for a second appellate judgment (save where it is possible for the Supreme Court to issue a decision on the merits) namely where the facts of the case, already assessed by the lower courts, are such that the Supreme Court can simply apply the appropriate rule of law. In principle, the remand court of appeal is not required to abide by the Supreme Court's decision but will nevertheless do so in certain cases.

Decisions handed down by the judicial chamber (*chambre judiciaire*) of the Supreme Court sitting as a full court are binding on lower courts in judicial matters on all points of law that have been determined on the merits.

## 12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

Proceedings can be brought against the Government or public authorities before the judicial and public law courts. State-owned companies do not have jurisdictional immunity but do have immunity from enforcement measures.

In terms of foreign entities, any jurisdictional immunity rights that can be applied derive from international agreements on diplomatic or consular relationships.

## 13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

The foreign judgment must have been issued by a competent court in the country of origin, it must be enforceable in that country, must not be contrary to Cameroonian public policy or to a final court decision handed down in Cameroon, and the parties to the decision must have been served due notice of the legal proceedings, entered an appearance in court or have been found to have defaulted.

Enforcement is usually granted where all the legal requirements are met, save in the event of an error of judgment by the court.

## ARBITRATION

### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

Cameroon is a Member State of OHADA (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires* - Organisation for the Harmonisation of Business Law in Africa). The OHADA Treaty was first signed on 17 October 1993. Under the OHADA Treaty, the Council of Ministers of Justice and Finance adopt "uniform acts" that are directly applicable and enforceable in each of the Member States. Arbitration in the OHADA Member States is governed by the Uniform Act on Arbitration within the Framework of the OHADA Treaty, which was adopted on 11 March 1999 and came into force 90 days later (the Uniform Act).

The Uniform Act is not based on the UNCITRAL Model Law. It was drafted separately but is nevertheless consistent with the fundamental principles of international commercial arbitration and main features of the UNCITRAL Model Law.

The Uniform Act applies to both national and international arbitration and governs all arbitration proceedings with a seat in a Member State.

Prior to the adoption of the Uniform Act, arbitration law was governed by Book 3 of the French Civil and Commercial Procedure Code (*Code de procédure civile et commerciale*) of 1806. The Uniform Act has now replaced all existing domestic law on the subject, save for any non-contrary provisions.

One of the most important characteristics of OHADA arbitration is the Common Court of Justice and Arbitration (the CCJA) (*Cour commune de justice et d'arbitrage*) which acts as both a permanent arbitral tribunal and the supreme court of arbitration for all OHADA Member States. As a supreme court, the cases heard by the CCJA, include disputes relating to the validity and enforceability of its own awards.

### 15. WHAT ARE THE MAIN NATIONAL ARBITRATION INSTITUTIONS?

The main arbitration institution in Cameroon is the GICAM Centre (*Centre d'Arbitrage du Groupement Interpatronal du Cameroun*), which was established for businesses and is located in Douala. The GICAM Centre has a High Council (*Conseil supérieur*), a Permanent Committee (*Comité permanent*) and a Secretariat, which also acts as the registry.

A Permanent Centre for Arbitration and Mediation (*Centre permanent d'arbitrage et de médiation*) was also recently established in Cameroon.

It should also be noted that, in August 2015, the Chamber of Commerce, Industry, Mines and Handicrafts of Cameroon (CCIMA) announced the creation of an arbitration centre, which will be known as, the Centre for Arbitration, Mediation and Conciliation (CAMC).

At the supranational level, the CCJA, which was created by the OHADA Treaty and is based in Abidjan, in Côte d'Ivoire, can also hear arbitration matters. The CCJA, which is also a supreme court, acts as an arbitration centre and administers proceedings governed by the CCJA Rules of Arbitration. The CCJA is different to other arbitration centres as it is not a private institution but was

created and organised by OHADA. To apply to the CCJA as an arbitration centre, article 21 of the OHADA Treaty provides that all or part of the contract in question must be performed within the territory of one or more Member States, or that at least one of the parties must be domiciled or usually reside in a Member State. According to legal authors, it should also be possible to go to arbitration under the CCJA Rules, even if these conditions are not met, if the parties have provided for this possibility in their arbitration agreement.

Arbitration clauses included in contracts generally provide for Cameroonian arbitration centres such as the GICAM Centre rather than CCJA arbitration.

### 16. ARE THERE ANY RESTRICTIONS ON WHO MAY REPRESENT THE PARTIES TO AN ARBITRATION?

The Uniform Act does not set any restrictions on persons who can represent parties in an arbitration. They are entitled but not required to instruct counsel (article 20 of the Uniform Act).

Cameroonian law No 90/059 of 19 December 1990 on the organisation of the legal profession gives lawyers (*avocats*) the monopoly over representing parties before the courts, save in the exceptional circumstances defined in the same law. Insofar as arbitral tribunals qualify as courts, parties can only be represented by a foreign lawyer in accordance with the international agreements concluded by the Cameroonian Government and the home country of the foreign lawyer.

### 17. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

Article 3 of the Uniform Act states that the arbitration agreement must be made in writing or by any other means of which evidence can be produced. No particular format is required. The Uniform Act also provides that contracts can refer to an arbitration agreement contained in a different document.

Local courts tend to apply a narrow interpretation to the provisions of article 3 of the Uniform Act.

### 18. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?

Article 13 of the Uniform Act provides that national courts must decline jurisdiction where there is an arbitration agreement and where the arbitral tribunal has not yet been composed, save where the arbitration agreement is "manifestly void". Courts cannot decline jurisdiction at their own discretion.

If the arbitral tribunal has already been composed, the national court must decline jurisdiction at the request of a party.

In practice, Cameroonian courts tend to decline jurisdiction in the situations defined in article 13 of the Uniform Act.

Parties governed by an arbitration agreement do have the option of petitioning a national court to obtain interim or conservatory measures that do not require a review of the case on the merits, in circumstances that have been "recognised and reasoned" as urgent or where the measure must be performed in a State that is not part of OHADA.

National courts can also intervene in very limited circumstances with a view to assisting the arbitration process (see questions 21 and 22 below).

The location of the seat of arbitration does not affect the application of article 13 of the Uniform Act. As a result, any party can petition the Cameroonian courts to obtain interim or conservatory relief where the assets at stake are located in Cameroon, regardless of the nationality of the other party and/or the seat of arbitration.

### **19. IF THE ARBITRATION AGREEMENT AND ANY RELEVANT RULES ARE SILENT, HOW MANY ARBITRATORS WILL BE APPOINTED, AND WHO IS THE APPOINTING AUTHORITY?**

The Uniform Act does not stipulate a specific number of arbitrators if the arbitration agreement is silent on this point. It does provide that an arbitral tribunal must have a sole arbitrator or three arbitrators.

If the parties are unable to appoint one or more arbitrators or where the parties must appoint an even number of arbitrators, according to the principle of subsidiarity, the arbitral tribunal will be completed in accordance with the parties' intentions or, where the agreement is silent on this point, by the arbitrators already appointed. If the arbitrators are unable to agree, the task falls to the presiding judge of the *Tribunal de première instance* of the seat of arbitration.

### **20. WHAT RIGHTS ARE THERE TO CHALLENGE THE APPOINTMENT OF AN ARBITRATOR?**

Article 7 of the Uniform Act sets the rules on challenging an arbitrator. Arbitrators must notify the parties of "*any circumstance about him/herself*" for which they may be challenged. Any disputes will be settled by the presiding judge of the *Tribunal de première instance* of the seat of arbitration, save where the parties have provided for a different procedure for challenging arbitrators. Decisions are not subject to appeal.

Arbitrators may only be challenged for reasons that come to light after their appointment.

### **21. DOES THE DOMESTIC LAW CONTAIN SUBSTANTIVE REQUIREMENTS FOR THE PROCEDURE TO BE FOLLOWED?**

The Uniform Act requires parties to receive equal treatment and to have an opportunity to exercise their rights (article 9); arbitrators may not base their decisions on reasons considered at their own discretion without first allowing parties to submit observations (article 14).

Article 18 of the Uniform Act provides that the deliberations must be kept secret.

The Uniform Act also provides that the duration of the arbitration may not exceed six months from the date upon which the last arbitrator accepts the terms, save where extended by agreement of the parties or request to the presiding judge of the *Tribunal de première instance* of the seat of arbitration or a judge to which the presiding judge has delegated this task.

### **22. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED INSIDE THE JURISDICTION?**

In principle, where there is an arbitration agreement, the national courts cannot intervene in a dispute until the award has been issued.

Nevertheless, parties may petition the competent court in Cameroon in the following circumstances:

- to resolve difficulties encountered with composing the arbitral tribunal, or with appointing the sole arbitrator or the third arbitrator (articles 5 and 8)
- to rule on challenges against arbitrators where the parties have not provided for an alternative procedure (article 7)
- to extend the deadline for the conclusion of the arbitration where there is no agreement between the parties to do so, at the request of a party or the arbitral tribunal (article 12)
- to order interim or protective measures when urgently needed (recognised and reasoned circumstances) or when the measure would be performed in a non-OHADA State, provided the measures do not require a review of the case on the merits (article 13)
- to assist the arbitral tribunal, at its request, with the collection of evidence (article 14)

Otherwise, Book 3 of the French Civil and Commercial Code, which applied to arbitration prior to the adoption of the Uniform Act, did not provide any particular governance for the circumstances in which the courts can intervene in an arbitration. Article 588 of this Code, which provided that "*arbitrators shall release the parties to apply*" to the courts in the event of forgery or a criminal incident, is still applicable where the seat of arbitration is in Cameroon.

### **23. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?**

In principle, national courts cannot intervene in an arbitration seated outside their jurisdiction where there is an arbitration agreement, as indicated above. In addition, all measures relating to the composition of the arbitral tribunal and conduct of the proceedings fall under the jurisdiction of the courts of the country in which the arbitration is seated.

However, it is possible for national courts other than the competent court of the Member State in which the arbitration is seated to intervene to order conservatory or interim relief under the conditions defined above.

### **24. DO ARBITRATORS HAVE POWERS TO GRANT INTERIM OR CONSERVATORY RELIEF?**

Although this matter is not dealt with directly in the Uniform Act, legal writers generally agree that it is possible for arbitrators to order interim or conservatory relief, save where the parties have agreed otherwise.



## 25. WHEN AND IN WHAT FORM MUST THE AWARD BE DELIVERED?

Save as agreed otherwise by the parties, arbitral awards must be issued within six months from the date on which all of the arbitrators have accepted their arbitrating functions. This term can be extended by agreement between the parties or by order of the presiding judge of the *Tribunal de première instance* at the request of a party or the arbitral tribunal (article 12).

Parties can set special requirements for awards. Failing this, awards are issued by a majority, where the tribunal counts three arbitrators, and must lay down the grounds for such awards. They must be signed by at least two of the three arbitrators.

## 26. CAN A SUCCESSFUL PARTY RECOVER ITS COSTS?

Neither the Uniform Act nor local law contains any provisions on this.

However, article 24.1 of the Arbitration Rules of the CCJA provides that arbitrators can order that the costs be payable by one party or fix the proportions in which they will be paid.

Where arbitration is conducted under the aegis of the CCJA, the arbitrator is empowered to award costs.

## 27. ON WHAT GROUNDS CAN AN AWARD FROM AN ARBITRATION SEATED IN THE JURISDICTION BE APPEALED TO THE COURT?

The only remedy against an arbitral award is an application to set aside that award brought before the competent court in the Member State in which it was issued, within one month from the date of service of the award once rendered enforceable (articles 25 and 27).

The circumstances in which an application to set aside can be brought are as follows (article 26):

- the arbitral tribunal ruled without an arbitration agreement or with respect to an invalid or expired agreement
- the arbitral tribunal was not properly composed
- the arbitral tribunal did not rule in compliance with the terms of arbitration
- due process was not met
- the arbitral tribunal breached a public policy rule of the OHADA Member States
- there are no reasons for the award

Bringing an application to set aside an arbitral award suspends enforcement, unless the tribunal ordered immediate enforcement. The decision can only be appealed to the CCJA (articles 25 and 28).

This is the only remedy available to parties before a national court. The other remedies are third party opposition and the application for a review of the award, must be submitted to the arbitral tribunal (article 25).

## 28. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN LOCAL COURTS? IF SO, ON WHAT GROUNDS?

Awards issued in an OHADA Member State cannot be appealed. The only possible remedy in this case is an application to set aside an award to the Court of Appeal.

Enforcement proceedings may be brought for the recognition of awards issued outside the OHADA area but they cannot be appealed or set aside.

## 29. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF: (I) AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION AND (II) DOMESTIC AWARDS?

To enforce awards issued within an OHADA Member State, the Uniform Act requires parties to obtain the recognition of the award from the competent court in that Member State (article 30), namely, in Cameroon, the presiding judge of the *Tribunal de première instance*.

This requires producing the original arbitral award, together with the arbitration agreement or copies of these documents meeting the necessary authentication conditions and, where necessary, a sworn translation into French (article 31).

Decisions refusing to recognise an arbitral award can be appealed to the CCJA but decisions granting recognition are not subject to appeal (article 32).

Awards issued in a different OHADA Member State are recognised in other Member States under the terms set forth in the applicable international agreements or, failing this, under the conditions stated in the Uniform Act. Cameroon is party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Regarding awards issued outside the OHADA territory, the enforcement procedure is governed by Cameroonian Law No 2007/001 of 19 April 2007 establishing a special judge for enforcement-related disputes, including setting the conditions for the enforcement of foreign court decisions, official documents and arbitration awards in Cameroon and by the above-mentioned law.

The competent court is the presiding judge of the *Tribunal de première instance* (or a judge to which the presiding judge has delegated this task) of the place in which the award is to be performed or, as applicable, the place in which the defendant is domiciled. The presiding judge may hear petitions or *ex parte* motions. The party must produce the original arbitral award, together with the arbitration agreement or copies of these documents meeting the necessary authentication conditions, in French or in English.

The proceedings are not adversarial. The judge's review is confined to verifying that the arbitral award and arbitration agreement exist and that the award complies with Cameroonian public policy.

Decisions refusing enforcement may only be appealed to the CCJA. On the other hand, decisions granting enforcement are not subject to appeal, save in the event that an application to set aside is brought against the award itself, which will ultimately result in an appeal against the enforcement decision. Applications to set aside suspend the enforcement of the award, save where the arbitral tribunal ordered immediate enforcement.

**30. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?**

Foreign awards are generally enforceable under Cameroonian law. The enforcement of interim or partial awards or non-monetary awards will depend on the circumstances and scale of the case but there are no such restrictions on monetary awards.

**ALTERNATIVE DISPUTE RESOLUTION****31. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?**

Parties are not required to undertake preliminary conciliation proceedings in Cameroon. Nevertheless, they may volunteer for conciliation before the competent court and the claimant may make the decision to opt for conciliation unilaterally. The judge may endeavour to conciliate the parties, who may be assisted by their lawyers at any stage of the proceedings.

**REFORMS****32. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?**

To the best of our knowledge, there are no plans to make any significant reforms of civil or commercial procedure in the near future.

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# CAPE VERDE



## INTRODUCTION

The Cape Verdean legal framework is based on the Constitution of 1992 and the Civil Code, which is derived from Portuguese law.

The Cape Verdean legal system is Roman Germanic, largely codified, and supplemented by harmonising decisions of the Government and Parliament, known as "resolutions", which are incorporated into law and are binding.

The courts are wholly independent of the political power and have a pyramid structure, with the Supreme Court at the apex.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

Lawyers in Cape Verde practise as both barristers and solicitors, providing legal services directly to their clients and conducting proceedings in court; there is no split profession.

To be a lawyer and member of the Cape Verdean Bar Association, an individual must:

- be a Cape Verdean citizen
- hold a degree in law
- be in full enjoyment of his/her civil rights
- not have any criminal convictions, or have behaved dishonourably

A foreign national can only become a member of the Bar Association and practise as a lawyer if he/she satisfies the requirements above and has permanent residence in Cape Verde.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

There are superior courts and lower courts. The superior courts comprise the Supreme Court of Justice (which is also the Constitutional Court with exclusive jurisdiction in relation to the enforcement or interpretation of the Constitution), and the Courts of Second Instance.

The lower courts are the District Courts. District Courts have jurisdiction over municipal areas.

The Supreme Court is divided into three sections: civil, criminal and other matters not covered by the other two sections. The Supreme Court hears appeals:

- from Courts of Appeal
- against judges and prosecutors relating to the performance of their duties
- concerning conflicts of jurisdiction between courts (including divisions of the same court)

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

According to the Cape Verdean Civil Code the general limitation period is 20 years. However, certain actions are barred after a period of three and/or five years, such as claims concerning rents or commercial interests.

Parties can agree time limits contractually between themselves; this does not supersede the provisions of the Civil Code.

### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

Yes. There is an absolute obligation of confidence between lawyer and client. This obligation only ceases where it is necessary to disclose such communications to defend the rights, interests or dignity of the client or the lawyer.

### 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

Civil proceedings begin with the filing of a writ of summons by the plaintiff. The defendant may file a statement of defence within 20 days of the date of the summons. In certain cases, depending on the value of the claim, the parties may have the right of rebuttal and/or second reply. The pleadings should set out the facts and legal bases upon which the parties rely, and append key documents.

### 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

The documents a party intends to rely on should be submitted either with the writ of summons or the statement of defence. If

they are not submitted with the pleadings, documents can be submitted until the close of the trial with the court's permission, which is never withheld.

However, the party will be fined unless it can prove that it could not have submitted the evidence with the pleadings.

As to witnesses, the common procedure is that they give oral evidence at trial, not written witness statements. Such evidence, together with any documents tendered, is recorded as evidence-in-chief. The other party can cross-examine the witness. Subject to the court's discretion, re-examination may be directed on matters referred to in cross-examination. Judges are allowed to question witnesses directly. A witness cannot be recalled without the leave of the court.

The court's permission is required to adduce expert evidence. Such evidence is provided by an industry expert in the form of a written report, which can consist of examination, survey and/or evaluation. Experts are not cross-examined at trial.

#### **7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?**

Procedural rules govern certain steps (for example, the Cape Verdean Civil Procedure Code contains deadlines for presenting the plaintiff's complaint, the defendant's answer or the plaintiff's reply). However, the judge has ultimate power to control the timetable, so it cannot be predicted with certainty.

Where procedural deadlines are not complied with, penalties include admission of facts or, sometimes, discontinuance/dismissal of the claim.

Usually, the time period from issue of proceedings to conclusion at trial is around one year. High value claims may take longer.

#### **8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?**

Several interim remedies may be applied for, namely specified temporary injunctions and unspecified provisional remedies.

Specified temporary injunctions include provisional alimony, restitution, temporary possession (including temporary refund of the asset), and suspension of corporate resolutions.

Unspecified provisional remedies include orders to perform certain acts, a summons ordering the defendant to refrain from certain conduct, or the delivery of movable or immovable assets which are the subject of the action.

#### **9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?**

To enforce judgments/orders, a party must commence further proceedings called executive proceedings. The main methods of enforcing judgments are:

- execution orders (to pay a sum of money by selling the debtor's assets)
- delivery up of assets
- provision of information on the whereabouts of assets

#### **10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?**

The court has discretion to award costs of and incidental to proceedings and the power to determine by whom and to what extent those costs are to be paid.

The court takes into consideration a wide number of factors, including the expenses (including court fees) incurred by the parties or their lawyers, the length and complexity of the proceedings, the conduct of the parties before and during the proceedings, and any previous orders as to costs made in the proceedings.

The parties or their lawyers may briefly address the court on the question of costs before any such award is made. When the parties are notified of a costs award, they can file a complaint.

Foreign claimants are not required to provide security for costs.

#### **11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?**

There is a general right of appeal against first instance decisions.

The Civil Procedure Code also provides for appeals, namely ordinary and extraordinary appeals:

- ordinary appeals consist of appeals, review appeals, interlocutory appeals and full court appeals
- extraordinary appeals consist of appeals and third-party proceedings

Generally, an appeal does not operate as a stay of the decision of the lower court unless it is expressly provided for in the Civil Procedure Code.

#### **12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?**

Domestic and foreign States do not have immunity from civil proceedings.

Some domestic State entities such as public institutions, the Government, the ministries and public agencies are subject to the jurisdiction of the administrative courts, as opposed to civilian courts.

#### **13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?**

The Cape Verdean Civil Procedure Code states that foreign final court judgments and arbitral awards are enforceable in Cape Verde, subject to "foreign decision recognition".

To establish "foreign decision recognition":

- there must be no doubt as to the authenticity of the decision
- the decision must be final and unappealable under the law of the country in which it was made
- the decision must be recognised under Cape Verdean conflicts rules and must not be contrary to Cape Verdean public policy
- the defences of *lis pendens* or *res judicata* must be unavailable

- the defendant must have been duly served unless Cape Verdean Law has dispensed with service of process or judgment in default was obtained

## ARBITRATION

### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

The Cape Verdean Arbitration Law (Law 76/VI/2005 of 16 August) (the Arbitration Law) is largely based on the old Portuguese Arbitration Law (Law 31/1986 of 29 August), but is also influenced by the UNCITRAL Model Law.

In general terms, the Arbitration Law provides that the procedure should rest on the principles of fair and equal treatment, adversarial process, and hearing of the parties (article 24). The parties can freely determine the procedure they wish to apply to their dispute, including which institutional rules should apply (article 23). The parties can also agree that the tribunal will rule according to equity or according to certain institutionalised customs (article 31).

The most innovative feature of the Arbitration Law is the fact that it makes specific provision for domestic and institutional arbitration, and also for international arbitration.

Similar to the old Portuguese Arbitration Law, the Arbitration Law specifically distinguishes "internal (or domestic) arbitration" from "international arbitration" and provides specific parts for each. An "international arbitration" (articles 40 to 44) is defined under two different formulas: (a) when, at the time of entering the arbitration agreement, the parties have domiciles in two different States; or (b) when the legal relationship that gives rise to the dispute affects international trade interests (article 40). The Arbitration Law specifically provides that, if the parties have so agreed, in the cases of international arbitration the tribunal may decide the dispute as "*amiable compositeur*" weighing the balance of the interests at stake, but only if the parties have agreed to it (article 43).

It should also be noted that the law embodies a general principle of independence of the arbitration procedure from the national courts. The principle of "*Kompetenz-Kompetenz*" is embodied in article 30. Nevertheless, the national courts can provide assistance in several matters such as interim measures/ preliminary orders, appointment of arbitrators, gathering of evidence, annulment of awards and enforcement.

Also, article 7 of the Arbitration Law institutes the "principle of separability", providing that the invalidity of the contract does not necessarily result in the invalidity of the arbitration agreement.

In relation to the production of evidence, the Arbitration Law provides that all kinds of evidence that are legally admitted by the general civil law in Cape Verde may be admitted in an arbitration (article 26, n 1).

The Arbitration Law is complemented by other separate legal provisions like Decree 8/2005 of 10 October, which regulates the creation of arbitration centres. The first arbitration centre was inaugurated in July 2011 aiming to provide alternative dispute solutions and support the process of membership to the World Trade Organisation, contributing, therefore, to a better business framework in the country.

Also, Decree 30/2005 of 9 May, altered by Decree 62/2014, regulates the creation of mediation centres. Decree No 62/2005 of 10 October creates the "Houses of Law" designed to promote the access to justice for Cape Verde citizens, promote a culture of peace, citizenship and respect for human rights, and also, operate as mediation centres.

Although a legal framework for arbitration exists, arbitration practice in Cape Verde is still at a primary stage. Cape Verde is not party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). However, the country has been a member of the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention) since January 2011. This factor may well represent a turning point on the path of acceptance, recognition and development of international arbitration as a valid and more widely accepted dispute resolution mechanism.

### 15. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

Under the Cape Verdean Civil Procedure Code and the Arbitration Law, the parties must execute a written agreement to submit present or future disputes to arbitration (articles 3 and 5 of the Arbitration Law).

Article 5, n 2 defines an agreement in "writing" as one which is contained in a document signed by the parties, or an exchange of letters, telex, telegrams, email or other records of telecommunications, in which there is an agreement or which refer to another document in which there is an agreement to arbitrate.

The document must accurately define the scope of the disputes covered by the arbitration agreement, and should also clearly demonstrate the will and agreement of the parties to refer disputes to arbitration, as well as appoint the arbitrators. It is not mandatory to name individuals in advance. The parties should specify the seat; if no seat is specified it will be determined by the arbitrators (article 23, n. 3). The parties should include the number of arbitrators. In cases where the process for appointment of an arbitrator/arbitrators is lacking, the president of the court of the region of the seat of arbitration will appoint them. If the seat has not been designated, it will be the court of domicile of the applicant (article 19, n. 1).

The Arbitration Law also states that the following claims are not arbitrable:

- disputes directly relating to inalienable rights
- disputes that involve the intervention of minors, or legally incapable/incapacitated persons under the civil law, even if properly represented

Certain disputes must be exclusively submitted to a judicial court or to "legal/mandatory" arbitration. Such disputes must be resolved by arbitration because the law requires it, rather than because the parties have contractually agreed to do so.

### 16. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?

Yes, the courts will stay litigation if there is a valid arbitration clause signed by both parties. Article 6, n 1 of the Arbitration Law

provides that the signature of an arbitration agreement implies that the parties waive their right to present the matters under the agreement to a judicial court. Also, article 6, n 3 states that the court which is confronted with a dispute that is subject to an arbitration agreement should refer the parties to arbitration, as soon as it knows about such agreement. This will not happen if the court considers that the agreement to arbitrate is "null".

Although there is not yet much jurisprudence on this subject, and it would depend on the specific circumstances of each case, there is no reason for the court to adopt a different approach in relation to foreign-seated arbitrations, given that the Cape Verdean legal framework specifically recognises international arbitration.

### **17. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?**

The Arbitration Law is generally aimed at domestic arbitrations as opposed to international arbitrations. This extends to the assistance the courts will give to support arbitration.

However, this does not mean that the Cape Verdean courts cannot provide assistance to foreign-seated arbitrations. Article 6 of the Arbitration Law states that although the parties have agreed to enter an arbitration agreement, that fact does not exclude the possibility of the courts ordering interim measures before or during the arbitration procedure, as long as they are compatible with national laws. Based on this article, it is possible that a Cape Verdean court could issue an interim measure in the context of a foreign-seated arbitration (for example, granting an injunction for the preservation of documents/assets located in Cape Verde). Of course this will always depend on the specific circumstances of each case.

Other means of assistance by the courts (eg the appointment of arbitrators) will generally be more appropriately determined by the courts that provides assistance to the foreign-seated arbitration, rather than the Cape Verdean court.

The courts support domestic arbitrations by granting interim measures/preliminary orders (article 6, n. 2), appointing arbitrators where the parties have failed to do so (article 19), gathering of evidence (article 26, n. 2), annulment (article 36), and enforcement of the award (article 38).

### **18. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?**

Cape Verdean Arbitration Law states that if an arbitration is "international" (in the sense of article 40), it will not be subject to an appeal unless the parties have previously agreed on the same, and further, if they have settled the specific terms for the appeal regime (article 42).

Moreover, although it is not an "appeal" in the strict sense of the word, the recognition of a foreign arbitral award may be refused if the party against whom the decision was made is able to demonstrate that (article 45, n. 1):

- the arbitration agreement is not valid under the law that the parties have subjected it to, or if such law was not previously designated, under the law of the State where the arbitral award was issued

- the party was not duly informed of the designation/nomination of an arbitrator or the arbitration procedure; or that it was impossible to uphold its own rights due to another reason
- the arbitral award is related to a dispute that is not within the scope of the arbitration agreement, or contains decisions that exceed the terms of the agreement (however, it should be noted that matters within the scope of the arbitration agreement may be dissociated from those not submitted to the agreement. As such, only the part of the decision which is not within the scope of the arbitration agreement will not be recognised or enforced)
- the constitution of the arbitral tribunal or of the arbitration procedure is not in accordance with the agreement of the parties, or if such agreement is lacking, not in accordance with the law of the State where the arbitration was seated
- the arbitral award is not yet final, or it was annulled/suspended by a competent court of the State where the decision was issued, or of the State under which law the award was delivered

The recognition of the award may also be refused, if the court finds that:

- the object of the dispute is not arbitrable (under article 4 of the Arbitration Law)
- the recognition of the award is against the public order of the State of Cape Verde
- the State in which the arbitral award was issued would deny the recognition of such decision if it was delivered in Cape Verde

Finally, it should also be noted that if a request for annulment or suspension of an arbitral award has been presented to a competent court of the State where the decision was issued, or of the State under which law it was delivered, the Cape Verde court can delay its decision to recognise/enforce, if it considers appropriate. If the party which files for the recognition/enforcement of the award so requests, the court may also demand that the other party provide security.

Finally, regarding domestic arbitrations, the law foresees that the awards may also be annulled by the Cape Verdean courts for any of the following reasons (which are found in article 36 of the Arbitration Law):

- the dispute is not able to be settled by arbitration
- the award was rendered by a tribunal that was not competent to proceed with the case, or which was improperly constituted
- there was a breach of the principles of fair and equal treatment, adversarial process, and hearing of the parties (article 24) with a decisive influence in the outcome of the dispute
- the arbitral award lacked reasons/grounds or did not contain the signature of the arbitrator(s)
- the tribunal ruled on matters which were not within the scope of the arbitration agreement, or failed to rule on matters that it was supposed to do so

### **19. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION?**

Cape Verde is not a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the

New York Convention) and, therefore, foreign arbitral awards are not automatically recognised by the Cape Verdean courts (see question 13 above).

Nevertheless, both article 53, n 3 of the Cape Verdean Civil Process Code and article 44, n 1 of the Arbitration Law state that a foreign arbitration award has the same force as a decision of a national court. Therefore, if a party directs a written request to the competent court, the arbitral award should be enforced as long as it fulfils all necessary requirements.

As a matter of procedure, the party should present the original of the arbitration award and of the arbitration agreement (or an authenticated copy). If the decision is not written in the Portuguese language, the party should provide a duly authenticated translation (article 44, n. 2).

The Arbitration Law provides several grounds for refusal of enforcement of a foreign arbitral award. These grounds are exactly the same as the ones providing for refusal of recognition of court judgments (see question 13 above).

## 20. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

As stated above, Cape Verde is not a signatory to the New York Convention. This fact makes the enforcement of arbitral awards more complicated and exclusively dependent on internal contingencies (availability of the courts, whether enforcement is opposed, etc).

A party who wishes to enforce a foreign-seated award must apply to the local court to have the award recognised pursuant to the rules of the Cape Verdean Civil Procedure Code applicable for the recognition of foreign judgments and the process of enforcement and articles 44 and 45 of the Arbitration Law. The procedure takes around one to two years, depending on several factors, such as the volume of lawsuits in the court, and also, whether or not it is opposed.

## ALTERNATIVE DISPUTE RESOLUTION

### 21. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

There is no legal requirement to submit to any alternative dispute resolution before or during court or arbitral proceedings, unless the parties enter into an express agreement.

Decree No 30/2005 of 9 May 2005 (altered by Decree 62/2014) created mediation centres and Decree No 31/2005 (also altered by Decree 62/2014) introduced rules regulating the mediation procedure. These decrees seek to facilitate the use of mediation as an alternative dispute resolution forum, but mediation is not commonly used in Cape Verde.

## REFORMS

### 22. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

The Government programme foresees the reform of the:

- Civil Procedure Code
- Penal Procedure Code

- Penal Code
- Labour Procedure Code
- Fiscal law
- Administrative law
- Air law
- Customs Code

and

- the installation of the Constitutional Court
- the installation of the County Ombudsman

However, the timelines for these are not known.

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# CENTRAL AFRICAN REPUBLIC



## INTRODUCTION

The Central African Republic (CAR) is a civil law country. The legal system is based on the Constitution of 27 December 2004, Law No 95.0011 and other laws and implementing decrees.

As the Central African Republic is a member of OHADA and CEMAC, the Supreme Court (*Cour de cassation*) has ultimate jurisdiction for matters which do not fall within the scope of these inter-governmental organisations.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

The legal profession is governed by Law No 10.006 of 26 June 2010.

In order to practise as a lawyer in the CAR, the person must satisfy certain conditions, and in particular:

- have CAR nationality or be a national of a State with which the CAR has a bilateral right of establishment or reciprocity agreement
- have a degree or master's degree in law
- have obtained the Certificate of Aptitude for the Profession of Lawyer (*Certificat d'Aptitude à la Profession d'Avocat*) (CAPA)
- be admitted to the Bar or be on a list of registered interns
- be sworn in as a lawyer

They may practise either individually or in a practice structure.

Lawyers practising in a country which has a reciprocity agreement with the CAR may plead before the CAR courts but must, if needs be, have procedural acts carried out by a CAR lawyer. These lawyers must introduce themselves to the Chair of the Bar Council or his/her delegate, who will introduce them to the presiding judge of the court before which they wish to appear.

There is no distinction between solicitor (*avocat conseil*) and barrister (*avocat plaidant*).

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The CAR court system is organised as a three-tier pyramid:

- the first instance courts:
  - the *tribunaux d'instance* have first instance jurisdiction for all individual civil and commercial matters for amounts up to CFA 100,000. They also hear oral and written landlord and tenant matters up to a maximum of CFA 100,000 per month, and claims for maintenance payments up to a maximum of CFA 100,000
  - the *tribunaux de grande instance* which hear all civil matters at first instance
  - special courts (commercial court, employment courts, children's courts, etc)
- the Appeal Courts (in Bangui, the West Appeal Court and the East Appeal Court)
- the *Cour de cassation*

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

The time limit under the ordinary rule of law for bringing an action for damages in contractual matters is 30 years. The time limit under the ordinary rule of law for bringing an action in non-contractual matters is three years.

CAR law does not set down any particular time limit for disputes between traders. However, the revised Uniform Act on general commercial law provides that "*the obligations arising in connection with trade between traders or between traders and non-traders, are prescribed after five years if they are not subject to shorter requirements*" (article 16).

Special limitation periods apply for certain types of action, for example a claim for wages under employment law is time-barred after five years.

The parties to a contract can adjust the time limit in contractual matters by agreement.

The time limit is suspended in the case of a procedural act.

### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

All information given to a lawyer by a client relating to a procedure or matter is legally privileged.



A lawyer who breaches this confidentiality obligation may incur civil, professional or criminal liability. The client cannot release the lawyer from this obligation.

The confidentiality obligation survives the end of the lawyer/client relationship and also when the lawyer ceases to practise.

## 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

Subject to any rules specific to each court, civil proceedings are filed:

- by petition (*requête*) filed with the registrar, further to which the presiding judge or delegate makes an order authorising the summoning of the defendant to a hearing, the date and time of which are fixed by the court. In civil matters, a referral is made to the court by filing a copy of the summons served on the defendant, at least three days before the hearing date. If the summons has been properly served on the defendant and if the claimant fails to appear without good reason, the defendant may request a default judgment
- by written or oral statements: in the employment courts, proceedings are commenced by an oral or written statement made to the registrar

The decision to give time to the defendant to prepare his/her defence is made at the discretion of the court concerned.

The practice in civil matters is to have two types of hearings which alternate every week (every Tuesday): a pre-trial hearing and a pleading hearing. The defendant is thus generally given 15 days to prepare.

In employment matters, there is mandatory conciliation before the employment inspector. The employment inspector has two months in which to reconcile the parties, failing which the case is transferred to the court with jurisdiction.

## 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

Evidence can be produced by any means. In civil and commercial matters, evidence is provided in written documents (private, notarised or publically available), confession and witness testimony.

The court may accept statements made by third parties which throw light on the facts of the matter, of which they have personal knowledge. These statements are made by way of an affidavit or by way of investigation, depending on whether they are written or oral.

If, during proceedings, a party intends to rely on a notarised instrument or a private agreement to which it is not a party, or an exhibit held by a third party, it may ask the court to order the production of the instrument or exhibit.

On appeal, the parties may raise new grounds, produce new exhibits or offer new evidence.

There is no equivalent of disclosure in the CAR legal system.

An expert may only be appointed if the parties' arguments or consultations with one another are not sufficient for the court.

## 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

The parties do not control the procedure. Once the proceedings have commenced, the timetable is set at the discretion of the court and in practice this depends on various factors, such as the complexity of the case, the degree of urgency and the caseload of the court. Nevertheless, the parties may end the proceedings at any time by mutual agreement.

Proceedings before the *tribunaux de grande instance* last an average of two years. The length is about half of this before the specialist courts.

## 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

- *référé*: in urgent matters, the court may make an interim order for any measures in respect of which there is no dispute or which is justified by the existence of a dispute. It is incumbent on the claimant to show the urgency of the requested measure, and the application must not relate to the merits of the claim. The court may order either protective or restoration measures or measures relating to difficulties encountered with the enforcement of court decisions
- *ordonnance sur requête*: when circumstances do not require that these measures be decided in an adversarial manner, the presiding judge may on petition order any necessary protective or restoration measures in order to prevent imminent damage
- *saisie conservatoire*: any person whose claim is founded in principle may, by way of a petition, ask the court with jurisdiction over the debtor's domicile/place of residence for authorisation to seize the debtor's tangible and intangible goods, with no need for prior warning, if the creditor can prove that there are circumstances which could threaten collection of the debt

## 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

Decisions only become enforceable when, once they can no longer be suspended by an appeal, they become final, unless provisional enforcement is automatic or has been ordered. The debtor may, however, benefit from a grace period.

Enforcement measures available under CAR law are those provided for in the OHADA Uniform Act Organising Simplified Recovery Procedures and Measures of Execution. The principal measures are as follows:

- seizure for sale (*saisie-vente*): "any creditor in possession of a writ of execution showing a debt due for immediate payment may [...] proceed to the seizure and sale of the tangible property belonging to his debtor [...] in order to be paid from the sale price"
- seizure-award of debts (*saisie-attribution de créances*): "any creditor in possession of a writ of execution showing a debt due for immediate payment may [procure the seizure] in the hands of a third party [of] the debt owed by his debtor in the form of a sum of money"
- penalty payment (*astreinte*): creditors who obtain an injunction from a court ordering their debtors to complete a particular task or to cease and desist may ask the court to combine the injunction with a penalty for non-compliance, payable by day/week/month

- real property foreclosure (*saisie immobilière*): this enforcement mechanism is applied as a last resort when the seizure of personal property or of debts was unfruitful or insufficient. The insufficiency must be authenticated by a bailiff (*huissier de justice*), only then may the creditor initiate a *saisie immobilière*

#### 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

The unsuccessful party only bears the costs and fees of the other party if the other party makes a claim for such and the court orders it.

CAR law does not provide for any payment into court in order to guarantee the proceedings.

#### 11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

Any interested party may lodge an appeal, if it has not waived this right. In non-contentious matters, the appeal process is also available to third parties who have been notified of the decision. The appeal court will deliberate again on points of law and of fact.

Parties have two months to appeal against first instance decisions and one month in non-contentious matters.

It is not possible to make new claims on appeal, except in the case of a claim for damages or where the new claim is an argument in defence against the main claim.

An appeal decision can be reviewed by the *Cour de cassation*. The *Cour de cassation* only reviews points of law and not issues of fact. The *Cour de cassation* decision is not binding on the appeal court, as the appeal court re-hears the case.

#### 12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

Proceedings can be brought against the Government or public authorities relating to their relationship with individuals before the judicial courts for civil matters, or before the administrative courts for administrative matters. State-owned companies do not benefit from immunity.

In terms of foreign entities, any jurisdictional rights of immunity that may be applied derive from international agreements on diplomatic or consular relationships.

#### 13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

In the CAR, decisions made by foreign courts are enforceable, subject to the provisions of international agreements, once they have been declared enforceable by the presiding judge of the *tribunal de grande instance* following a request for an enforcement order.

An enforcement order will be made under the following conditions:

- the foreign decision is final
- the foreign decision was made by a court with competent jurisdiction

- the foreign decision was lawfully obtained and the right to defence was respected
- the foreign decision does not breach CAR public policy

In practice, it is easy to obtain an enforcement order.

## ARBITRATION

#### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

The CAR is a Member State of OHADA (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires* - Organisation for the Harmonisation of Business Law in Africa). The OHADA Treaty was first signed on 17 October 1993. Under the OHADA Treaty, the Council of Ministers adopt "uniform acts" that are directly applicable and enforceable in each of the Member States. Arbitration in the OHADA Member States has been governed by the Uniform Act on Arbitration within the Framework of the OHADA Treaty, which was adopted on 11 March 1999 and came into force 11 June 1999 (the Uniform Act).

The Uniform Act is not based on the UNCITRAL Model Law. It was drafted separately but nevertheless complies with the fundamental principles of international commercial arbitration and the essential characteristics of the UNCITRAL Model Law.

The Uniform Act applies to both national and international arbitration and governs all arbitration proceedings sitting in a Member State.

Prior to the adoption of the Uniform Act, there was no law governing arbitration in the CAR. Moreover, CAR law has no provisions relating to arbitration when arbitration takes place in a State which is not a Member State.

One of the most important characteristics of OHADA arbitration is the Common Court of Justice and Arbitration (*Cour commune de justice et d'arbitrage*) (CCJA), which acts as both a permanent arbitral tribunal and the supreme court of arbitration for all OHADA Member States.

#### 15. WHAT ARE THE MAIN NATIONAL ARBITRATION INSTITUTIONS?

The main arbitration institution in the CAR does not exist at national level: it is the CCJA, which was created by the OHADA Treaty and is based in Abidjan, in Côte d'Ivoire. The CCJA, which also has a judicial function, acts as an arbitration centre and administers proceedings governed by the CCJA Rules of Arbitration. The CCJA is different from other arbitration centres in that it is not a private institution but was created and organised by OHADA.

For the CCJA Rules to be applicable, article 21 of the OHADA Treaty stipulates that all or part of the contract must be performed within the territory of one or more Member States or that at least one of the parties must be domiciled or habitually resident in a Member State. According to commentators, it should also be possible to go to arbitration under the CCJA Rules even if these conditions are not met, if the parties have provided for this possibility in their arbitration agreement.

In practice, the inclusion of arbitration clauses in contracts entered into by CAR companies, as well as certain public institutions is more and more frequent.

An arbitration centre was created in June of 2012 following a decision made by the *Chambre de commerce de l'industrie des mines et de l'artisanat* (Chamber of commerce for the mining and craft industries).

**16. ARE THERE ANY RESTRICTIONS ON WHO MAY REPRESENT THE PARTIES TO AN ARBITRATION?**

The Uniform Act does not set any restrictions on persons who can represent parties in an arbitration matter. They are entitled but not required to instruct a lawyer (article 20 of the Uniform Act).

The parties may also be assisted by a foreign lawyer.

**17. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?**

Article 3 of the Uniform Act states that the arbitration agreement must be made in writing or by any other means which provides proof of the existence of the clause. No particular format is required. The Uniform Act also provides that contracts can refer to an arbitration agreement contained in a different document.

**18. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?**

Article 13 of the Uniform Act provides that national courts must decline jurisdiction where there is a valid arbitration agreement and where the arbitral tribunal has not yet been constituted, save where the arbitration agreement is "manifestly void". The court cannot decline jurisdiction at its own discretion.

If the composition of the arbitral tribunal has already been decided, the national court must decline jurisdiction at the request of one of the parties.

In practice, the CAR courts tend to decline jurisdiction when the parties have included an arbitration clause in their contract.

Parties governed by an arbitration agreement have the option of referring a matter to a national court to obtain interim or conservatory measures that do not require a review of the case on the merits, in circumstances that have been recognised as urgent and where reasons have been given, or where the measure must be performed in a State that is not party to OHADA.

National courts can also intervene in very limited circumstances with a view to assisting the arbitration process (see questions 22 and 23 below).

When the seat of the arbitration is located outside the OHADA zone, it is also possible to file a motion before the CAR judge in order to enforce interim measures against the CAR party.

**19. IF THE ARBITRATION AGREEMENT AND ANY RELEVANT RULES ARE SILENT, HOW MANY ARBITRATORS WILL BE APPOINTED, AND WHO IS THE APPOINTING AUTHORITY?**

The Uniform Act does not stipulate a specific number of arbitrators if the arbitration agreement is silent on this point. It does provide that an arbitral tribunal must have a sole arbitrator or three arbitrators.

If the parties do not appoint one or more arbitrators, they will be

appointed by a court with jurisdiction in the State in which the arbitral tribunal sits.

**20. WHAT RIGHTS ARE THERE TO CHALLENGE THE APPOINTMENT OF AN ARBITRATOR?**

Article 7 of the Uniform Act sets the rules on challenging an arbitrator. An arbitrator must notify the parties of "any circumstance about him/herself" for which they may be challenged. Any disputes will be settled by the State court with the jurisdiction, save where the parties have provided for a different procedure for challenging arbitrators. Decisions cannot be appealed.

Arbitrators may only be challenged for reasons that come to light after their appointment.

**21. DOES THE DOMESTIC LAW CONTAIN SUBSTANTIVE REQUIREMENTS FOR THE PROCEDURE TO BE FOLLOWED?**

The Uniform Act requires parties to receive equal treatment and to have every opportunity to exercise their rights (article 9); arbitrators may not base their decisions on reasons considered at their own discretion without first allowing the parties to submit observations (article 14).

Article 18 of the Uniform Act provides that the deliberations must be kept secret.

The Uniform Act also provides that the duration of the arbitration may not exceed six months from the date upon which the last arbitrator accepts the terms, save where extended by agreement of the parties.

**22. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED INSIDE THE JURISDICTION?**

In principle, where there is an arbitration agreement, the national courts cannot intervene in a dispute until the award has been made.

Nevertheless, parties may consult the court with jurisdiction in the CAR in the following circumstances;

- to resolve difficulties encountered with composing the arbitral tribunal, to appoint the sole arbitrator or the third arbitrator (articles 5 and 8)
- to rule on challenges against arbitrators where the parties have not provided for a different procedure (article 7)
- to extend the deadline for the conclusion of the arbitration where there is no agreement between the parties to do so, at the request of a party or the arbitral tribunal (article 12)
- to order interim or protective measures in cases of emergency (with reasons given) or when the measure would be performed in a non-OHADA State, provided the measures do not require a review of the case on the merits (article 13)
- to assist the arbitral tribunal, at its request, with the production of evidence (article 14)

**23. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?**

In principle, national courts cannot intervene in an arbitral tribunal sitting outside their jurisdiction where there is an arbitration agreement, as indicated above. In addition, all measures relating to

the composition of the arbitral tribunal and conducting the proceedings fall under the jurisdiction of the courts of the country in which the arbitral tribunal sits.

However, it is possible for national courts other than the competent court of the country in which the arbitration is seated to intervene to order conservatory or interim relief under the conditions defined above in question 18 (article 13).

#### **24. DO ARBITRATORS HAVE POWERS TO GRANT INTERIM OR CONSERVATORY RELIEF?**

Although this matter is not dealt with directly in the Uniform Act, legal commentators generally agree that it is possible for arbitrators to order interim or protective measures, save where the parties have agreed otherwise.

In practice, arbitral tribunals have ordered protective measures in the CAR.

#### **25. WHEN AND IN WHAT FORM MUST THE AWARD BE DELIVERED?**

Unless otherwise agreed by the parties, arbitration awards must be made within six months from the date on which all of the arbitrators have accepted the terms. This term can be extended by agreement between the parties or by order of the court with jurisdiction of the State concerned at the request of a party or the arbitral tribunal (article 12).

Parties can set special requirements for awards. Failing this, awards are made on a majority vote, where the tribunal counts three arbitrators, and must be reasoned. They must be signed by at least two of the three arbitrators.

#### **26. CAN A SUCCESSFUL PARTY RECOVER ITS COSTS?**

The Uniform Act contains no provisions on this.

Where arbitration is conducted under the aegis of the CCJA, the arbitrator is empowered to award costs.

#### **27. ON WHAT GROUNDS CAN AN AWARD FROM AN ARBITRATION SEATED IN THE JURISDICTION BE APPEALED TO THE COURT?**

The only remedy against an arbitration award is an application to set aside the award brought before the court with jurisdiction in the Member State in which it was made, within one month from the date of notification of an enforceable award (articles 25 and 27).

The circumstances in which an application to set aside can be brought are as follows (article 26):

- the arbitral tribunal ruled without an arbitration agreement or with respect to an invalid or expired agreement
- the arbitral tribunal was not properly composed
- the arbitral tribunal did not rule in compliance with the terms of arbitration
- there was no due process
- the arbitral tribunal breached a public policy rule of the OHADA Member States
- there are no reasons given for the award

Bringing an application to set aside an arbitration award postpones enforcement, unless the tribunal ordered provisional enforcement. The decision can only be appealed to the CCJA (articles 25 and 28).

This is the only remedy available to parties before a national court. The other remedies, namely third party challenge and the application for a revision of the award, must be submitted to the arbitral tribunal (article 25).

#### **28. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?**

There are no provisions allowing an appeal to the local courts.

#### **29. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF: (I) AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION AND (II) DOMESTIC AWARDS?**

To enforce awards made within an OHADA Member State, the Uniform Act requires parties to obtain the recognition of the award from the competent court in that Member State (article 30), which, in the CAR, is the presiding judge of the *tribunal de grande instance*.

This requires the production of the original arbitration award, together with the arbitration agreement or copies of these documents meeting the necessary authentication conditions and, where necessary, a sworn translation into French (article 31).

Decisions refusing to recognise an arbitration award can be appealed to the CCJA. However, decisions granting recognition cannot be appealed (article 32).

Awards made in a different OHADA Member State are recognised in other Member States under the conditions set forth in any applicable international agreements or, failing this, under the conditions stated in the Uniform Act.

The CAR is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which facilitates the recognition of foreign arbitration awards, in particular awards made outside of OHADA territory.

## **ALTERNATIVE DISPUTE RESOLUTION**

#### **30. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?**

The courts may intervene to assist the parties to reach a settlement. Parties may, either by themselves or at the initiative of the court, reach a settlement at any time during the proceedings (articles 399 and 400, Code of Civil Procedure).

## **REFORMS**

#### **31. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?**

Not that we are aware of.

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# CHAD



## INTRODUCTION

The legal system of Chad comprises both civil and customary law. The legal system is based on the Constitution of 31 March 1996, amended by Constitutional Law No 08/PR/2005 of 15 July 2005, and on Law No 011/PR/2013 relating to the organisation of the legal and court system, and to a lesser extent Law No 012/PR/2013 relating to the organisation and functioning of administrative courts. Chad is a member of CEMAC and OHADA and the Supreme Court has ultimate jurisdiction for matters which do not fall within the scope of these inter-governmental organisations.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

The legal profession is governed by Law No 033/PR/96 of 5 November 1996. In order to practise as a lawyer in Chad, one must be registered with the Chad Bar Association (*Ordre des avocats*), and:

- have Chadian nationality (subject to any reciprocity agreement)
- be over 18 years of age
- be in possession of their civil rights
- have a law degree
- have completed an internship

The profession is organised by the *Conseil de l'Ordre*, which ensures compliance with the rules governing the profession and takes any necessary administrative and disciplinary measures. Lawyers (*avocats*) admitted to the Bar (*Barreau*) may appear before any court. They may practise either individually or in a practice structure.

Lawyers admitted to the Bar of a State with which Chad has a legal co-operation agreement, and all States with which it has a reciprocity agreement, may appear before the Chadian courts. They must inform the Justice Minister, the Public Prosecutor, the relevant Chair of the Bar Association (*Bâtonnier*) and counsel for the other party.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The Chadian court system is organised as a three-tier pyramid:

- the first instance courts:
  - *Justices de paix* can be found in all districts of the town of Ndjameña and in any sub-prefecture where there is no *tribunal de première instance*. They hear civil matters at first and final instance for claims of less than or equal to XAF 100,000, and appeals for claims of less than or equal to XAF 500,000
  - *Tribunaux de première instance*: Law No 011/PR/2013 provides in its article 32 that the *tribunaux de première instance* hear all civil and administrative cases for which competence is not otherwise assigned, because of their nature or amount of the claim, to another jurisdiction. Also, Law No 012/PR/2013 on the organisation and functioning of administrative courts creates administrative chambers within the *tribunaux de première instance* (article 1) which are competent to rule on common administrative disputes (article 12)

There are also first instance special courts (Employment and Social Security Courts and Commercial Courts)

- Courts of Appeal (N'djamena, Moundou, Abéché Sarh, Mongo, Moussoro, Faya and Amdjarass (Decree No 1010/PR/P//MJDH/2014 of 4 September 2014)
- Supreme Court (*Cour suprême*)

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

Time limits vary depending on the type of action and the parties involved:

- the ordinary limitation period for bringing an action for damages in a contractual matter is 30 years
- the limitation period between traders, and between traders and non-traders, is five years
- the ordinary limitation period for bringing an action for damages in a non-contractual matter is three years

Special limitation periods apply for certain types of action, for example, for possessory actions the time limit is one year, and actions concerning real estate are time-barred after 10 or 20 years.

The parties may adjust the limitation periods by contract, provided that this is not less than one year or more than 10 years. Traders may also add clauses which suspend or interrupt the limitation period.

The limitation period may be interrupted in the case of death, an underage party, an adult with a guardian, by a condition precedent, or by the term or maturity of a receivable. The limitation period is suspended when a claim is brought or an action for recognition of a foreign judgment is filed.

#### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

In principle, a lawyer cannot disclose professional secrets. However, there are no provisions concerning the type of communication which is legally privileged.

Lawyers are subject to professional ethical rules which govern the consequences of legal privilege.

A violation of the confidentiality duty may expose a lawyer to disciplinary sanctions and civil and criminal liability.

A client may release his/her lawyer from his/her confidentiality duty.

#### 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

Civil actions are filed with the court:

- by *requête* filed by the claimant or his/her representative with the court registrar
- by summons to appear (*exploit de citation*), giving details of the court and the date of the hearing

In practice, it is the application to commence proceedings (*requête introductive d'instance*) which is used. The period between the date of service of the summons to appear and the date on which the defendant is to appear, must be at least eight days if the defendant lives in the district of the prefecture but outside of the sub-prefecture district. The period is one month if the defendant is in another part of the country, in France or in a neighbouring African country, two months if the defendant lives in another African State, and three months in all other cases.

These time limits do not apply for urgent proceedings. Conciliation is mandatory for all actions started by a *requête*. If conciliation fails, the petitioner must make an advance payment of XAF 10,000 for the case to be filed. The registrar summons the parties to a hearing.

#### 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

In civil and commercial matters, evidence can be produced in writing, by witness statements and under oath. Witnesses may be called by the parties, the registrar or at the initiative of the court.

There are no provisions which allow a party to ask the court to produce evidence. In criminal matters, evidence produced by *serment judiciaire* (a form of proof whereby a fact asserted under oath is assumed to be true) is prohibited.

There is no equivalent to the English law concept of "disclosure" in Chadian law. In practice, evidence can be communicated to the other party up until the end of the hearing, but not during pleadings. New evidence may be produced on appeal.

The court may order the appointment of an expert, either on its own initiative or at the request of the parties.

#### 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

The parties do not control the procedure. Once the proceedings have commenced, the timetable is set at the discretion of the court and in practice depends on various factors, such as the complexity of the case, the degree of urgency and the caseload of the court. Nevertheless, the parties may end the proceedings at any time by mutual agreement. Civil or commercial cases which are not overly complicated last for between nine and 15 months.

#### 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

There are emergency procedures in Chad which protect the interests of the parties whilst waiting for a decision on the merits of the case:

- *référé* proceedings allow one of the parties to obtain an interim decision, without prejudice to the decision on the merits of the case. The request is made to the presiding judge of the court at a hearing organised for this purpose
- *ex parte* orders (*ordonnances sur requête*) allow for all measures needed to protect the rights and interests of the parties when the circumstances mean that an adversarial procedure is not appropriate. The *ordonnance sur requête* is immediately enforceable
- interim attachment order (*saisie conservatoire*) allows for the seizure of the debtor's goods and prevents the debtor from disposing of them to the detriment of the creditor. The creditor needs to meet two conditions: a well-founded claim, and show the existence of circumstances which could threaten collection of the debt

#### 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

Enforcement measures available under Chadian law are those provided for in the OHADA Uniform Act Organising Simplified Recovery Procedures and Measures of Execution. The principal measures are:

- seizure for sale (*saisie-vente*): "any creditor in possession of a writ of execution showing a debt due for immediate payment may proceed to the seizure and sale of the tangible property belonging to his debtor in order to be paid from the sale price"
- seizure award of debts (*saisie-attribution de créances*): "any creditor in possession of a writ of execution showing a debt due for immediate payment may [procure the seizure] in the hands of a third party [of] the debt owed by his debtor in the form of a sum of money"
- penalty payment (*astreinte*): creditors who obtain an injunction from a court ordering their debtors to accomplish a particular task or to cease and desist may ask the court to combine the injunction with a penalty for non-compliance, payable by day/week/month
- real property foreclosure (*saisie immobilière*): this enforcement mechanism is applied as a last resort when the seizure of personal property or of debts was unfruitful or insufficient. The insufficiency must be authenticated by a bailiff (*huissier de justice*), and only then may the creditor initiate a *saisie immobilière*

Depending on the debtor's circumstances and the creditor's needs, the court may decide to postpone or stagger the payment of the amount due for a period of no more than one year (grace period), save for maintenance payments (*dette d'aliments*) or debts pertaining to negotiable instruments (*dettes cambiaries*).

#### 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

The unsuccessful party pays the costs. However, if the court's decision is not clearly in favour of just one party, part of the costs may be shared by the parties.

The reimbursement of lawyers' fees is not included in costs. Each party bears its own lawyers' fees, with no possibility of recovery.

Subject to international agreements, any party may ask a foreign claimant to provide a guarantee for the payment of any damages which may be awarded, in addition to a payment into court to cover procedural costs.

#### 11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

Parties have two months to appeal first instance judgments from the date the judgment is handed down (following a hearing of all parties), or from the deadline for objections (if handed down by default). Appeals must be filed by way of a notice of appeal received and acknowledged by the registrar for the court that issued the decision.

It is not possible to make new claims on appeal, save for damages or where the new claim is an argument in defence against the main claim. If filed in due time, appeals suspend the enforcement of the judgment, save where the court has ordered immediate enforcement.

After the appellate stage, it is possible to apply to the Supreme Court within one month of the date on which the appellate decision was issued. Supreme Court proceedings consider the law and not the facts of the case and do not suspend the enforcement of the lower court's decision. If the appeal to the Supreme Court is successful, the decision is overturned and the case is remanded to a new Court of Appeal or a different seating of the original Court of Appeal for a second appellate judgment. In principle, the remand Court of Appeal is not required to abide by the Supreme Court's decision. In practice, however, the Court of Appeal follows the Supreme Court's decision.

#### 12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

Proceedings can be brought against the Government or public authorities before the *Tribunal de premiere instance*. These proceedings are valid in all cases, whether civil, administrative or criminal. State-owned companies do not have jurisdictional immunity but do have immunity from enforcement measures.

In terms of foreign entities, any jurisdictional immunity rights that can be applied derive from international agreements on diplomatic or consular relationships or from headquarters agreements between such foreign entities and the State of Chad, if they provide for such rights.

#### 13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

To obtain an *exequatur*, a request must be sent to the presiding judge of the Ndjamena *Tribunal de premiere instance*. The request must meet the following criteria:

- the court issuing the decision had jurisdiction to do so
- the decision implemented the law applicable to the dispute under the rules for conflicts of law in the State where enforcement is being requested
- the decision is final, binding and enforceable under the laws of the country where it was handed down
- the parties were served due notice of the legal proceedings, entered an appearance in court or were found in default
- the decision is not contrary to public policy rules in Chad and does not conflict with any *res judicata* judicial decision issued in Chad

After verification, the chief registrar attaches the enforcement order to the decision. This process takes between three and five days.

### ARBITRATION

#### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

Chad is a Member State of OHADA (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires* - Organisation for the Harmonisation of Business Law in Africa). The OHADA Treaty was first signed on 17 October 1993. Under the OHADA Treaty, the Council of Ministers of Justice and Finance adopt "uniform acts" that are directly applicable and enforceable in each of the Member States. Arbitration in OHADA Member States is governed by the Uniform Act on Arbitration within the Framework of the OHADA Treaty, which was adopted on 11 March 1999 and came into force 90 days afterwards (the Uniform Act).

The Uniform Act is not based on the UNCITRAL Model Law. It was drafted separately but nevertheless adopts the fundamental principles of international commercial arbitration and key features of the UNCITRAL Model Law.

The Uniform Act applies to both national and international arbitration and governs all arbitration proceedings with a seat in a Member State.

Prior to the adoption of the Uniform Act, there was no specific arbitration law and only a few provisions of the Chad Civil Procedure Code governed domestic arbitrations. These provisions were repealed and replaced with the Uniform Act.

One of the most important characteristics of OHADA arbitration is the Common Court of Justice and Arbitration (*Cour commune de justice et d'arbitrage*) (the CCJA), which acts as both a permanent arbitral tribunal and the supreme court of arbitration for all OHADA Member States.



## 15. WHAT ARE THE MAIN NATIONAL ARBITRATION INSTITUTIONS?

The main arbitration institution in Chad is not a national institution – it is the CCJA, which was created by the OHADA Treaty and is based in Abidjan, in Côte d'Ivoire. The CCJA, which also has a judicial function, acts as an arbitration centre and administers proceedings governed by the CCJA Rules of Arbitration. The CCJA is different from other arbitration centres as it is not a private institution but was created and organised by OHADA.

For the CCJA Rules to be applicable, article 21 of the OHADA Treaty provides that all or part of the contract in question must be performed within the territory of one or more Member States or that at least one of the parties must be domiciled or habitually resident in a Member State. According to legal commentators, it should also be possible for the parties to refer a dispute to arbitration under the CCJA Rules even if these conditions are not met. However, this possibility must have been provided for in their arbitration agreement.

In Chad, many commercial distribution agreements contain arbitration clauses referring to institutional CCJA arbitration.

## 16. ARE THERE ANY RESTRICTIONS ON WHO MAY REPRESENT THE PARTIES TO AN ARBITRATION?

The Uniform Act does not set any restrictions on persons who can represent parties in an arbitration. They are entitled, but not required to, instruct a lawyer (article 20 of the Uniform Act).

## 17. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

Article 3 of the Uniform Act states that the arbitration agreement must be made in writing or by any other means which provides proof of the existence of the clause. No particular format is required. The Uniform Act also provides that contracts can refer to an arbitration agreement contained in a different document.

## 18. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?

Article 13 of the Uniform Act provides that national courts must decline jurisdiction where there is an arbitration agreement and where the arbitral tribunal has not yet been composed, save where the arbitration agreement is "manifestly void". Courts cannot decline jurisdiction at their own discretion.

If the arbitral tribunal has already been composed, the national court must decline jurisdiction at the request of one of the parties.

Parties governed by an arbitration agreement do have the option of consulting a national court to obtain interim or conservatory measures that do not require a review of the case on the merits, in circumstances that have been recognised as urgent and where reasons have been given, or where the measure must be performed in a State that is not part of OHADA.

National courts can also intervene in very limited circumstances with a view to assisting the arbitration process (see questions 21 and 23 below).

If the seat of arbitration is outside OHADA, one of the parties can also apply to the courts of Chad to obtain interim or conservatory relief vis-a-vis a Chadian party.

## 19. IF THE ARBITRATION AGREEMENT AND ANY RELEVANT RULES ARE SILENT, HOW MANY ARBITRATORS WILL BE APPOINTED, AND WHO IS THE APPOINTING AUTHORITY?

The Uniform Act does not stipulate a specific number of arbitrators if the arbitration agreement is silent on this point. However, it does provide that an arbitral tribunal must have a sole arbitrator or three arbitrators.

If the parties do not appoint one or more arbitrators, the task falls to the competent court of the Member State that is the seat of arbitration.

There are no other applicable provisions on this issue under the laws of Chad.

## 20. WHAT RIGHTS ARE THERE TO CHALLENGE THE APPOINTMENT OF AN ARBITRATOR?

Article 7 of the Uniform Act sets the rules on challenging an arbitrator. An arbitrator must notify the parties of "any circumstance about himself/herself" for which they may be challenged. Any disputes will be settled by the presiding judge of the Chadian Supreme Court, save where the parties have provided for a different procedure for challenging arbitrators. Decisions are not subject to appeal.

Arbitrators may only be challenged for reasons that come to light after their appointment. The laws of Chad do not contain any further information on this subject.

## 21. DOES THE DOMESTIC LAW CONTAIN SUBSTANTIVE REQUIREMENTS FOR THE PROCEDURE TO BE FOLLOWED?

The Uniform Act requires parties to receive equal treatment and to have every opportunity to exercise their rights (article 9); arbitrators may not base their decisions on reasons considered at their own discretion without first allowing the parties to submit observations (article 14).

Article 18 of the Uniform Act provides that the deliberations must be kept secret.

The Uniform Act also provides that the duration of the arbitration may not exceed six months from the date upon which the last arbitrator accepts the terms, save where extended by agreement of the parties or by consulting the appropriate judge in Chad, the presiding judge of the *Tribunal de premiere instance* of the seat of arbitration.

## 22. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED INSIDE THE JURISDICTION?

In principle, where there is an arbitration agreement, the national courts cannot intervene in a dispute until the award has been issued.

Nevertheless, parties may consult the competent court in Chad in the following circumstances:

- to resolve difficulties encountered while constituting the arbitral tribunal, to appoint the sole arbitrator or the third arbitrator (articles 5 and 8)
- to rule on challenges against arbitrators where the parties have not provided for a different procedure (article 7)

- to extend the deadline for the conclusion of the arbitration where there is no agreement between the parties to do so, at the request of a party or the arbitral tribunal (article 12)
- to order interim or protective measures recognised as urgent and where reasons have been given, or when the measure would be performed in a non-OHADA State, provided this does not require a review of the case on the merits (article 13)
- to assist the arbitral tribunal, at its request, with the collection of evidence (article 14)

### 23. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?

As indicated above (question 22), national courts cannot in principle intervene in an arbitration seated outside their jurisdiction where there is an arbitration agreement. In addition, all measures relating to the composition of the arbitral tribunal and conducting the proceedings fall under the jurisdiction of the courts of the country in which the arbitration is seated.

However, it is possible for national courts other than the competent court of the Member State in which the arbitration is seated to intervene by ordering conservatory or interim relief under the conditions defined above in question 18 (article 13).<sup>1</sup>

### 24. DO ARBITRATORS HAVE POWERS TO GRANT INTERIM OR CONSERVATORY RELIEF?

Although this matter is not dealt with directly in the Uniform Act, legal commentators generally agree that it is possible for arbitrators to order interim or conservatory relief, save where the parties have agreed otherwise.

### 25. WHEN AND IN WHAT FORM MUST THE AWARD BE DELIVERED?

Save as agreed otherwise by the parties, arbitral awards must be issued within six months from the date on which all of the arbitrators have accepted their appointment. This term can be extended by agreement between the parties or by the presiding judge of the arbitration chamber of the *Tribunal d'instance*, at the request of a party or the arbitral tribunal (article 12).

Parties can set special requirements for awards. Failing this, awards are issued by majority, where the tribunal comprises three arbitrators, and must be reasoned. They must be signed by at least two of the three arbitrators.

### 26. CAN A SUCCESSFUL PARTY RECOVER ITS COSTS?

The Uniform Act does not contain any provisions on this.

Where arbitration is conducted under the aegis of the CCJA, the arbitrator is explicitly empowered to award costs.

In practice, the unsuccessful party bears the costs which include arbitration fees, procedures, and, to a certain extent, lawyers' fees. The issue is resolved by the arbitral tribunal in its awards.

### 27. ON WHAT GROUNDS CAN AN AWARD FROM AN ARBITRATION SEATED IN THE JURISDICTION BE APPEALED TO THE COURT?

The only remedy against an arbitral award is an application to set aside that award, brought before the competent court in the Member State in which it was issued, within one month from the date of notification of an enforceable award (articles 25 and 27).

The circumstances in which an application to set aside can be brought are as follows (article 26):

- the arbitral tribunal ruled without an arbitration agreement or with respect to an invalid or expired agreement
- the arbitral tribunal was not properly constituted
- the arbitral tribunal did not rule in compliance with the terms of the arbitration
- due process was not met
- the arbitral tribunal breached a public policy rule of the OHADA Member States
- there are no reasons given for the award

Bringing an application to set aside an arbitral award postpones enforcement, unless the tribunal ordered provisional enforcement. The decision can only be appealed to the CCJA (articles 25 and 28).

This is the only remedy available to parties before a national court. The other remedies, namely third party challenge and the application for a revision of the award, must be submitted to the arbitral tribunal (article 25).

### 28. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

No.

### 29. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF: (I) AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION AND (II) DOMESTIC AWARDS?

To enforce awards issued within an OHADA Member State, the Uniform Act requires parties to obtain the recognition of the award from the competent court in that Member State (article 30). In Chad, this is the presiding judge of the N'Djamena *Tribunal de premiere instance*.

This requires producing the original arbitral award, together with the arbitration agreement or copies of these documents meeting the necessary authentication conditions and, where necessary, a sworn translation into French (article 31).

Decisions refusing to recognise an arbitral award can be appealed to the CCJA, but decisions granting recognition are not subject to appeal (article 32).

Awards issued in a different OHADA Member State are recognised in other Member States under the conditions set out in the applicable international agreements or, failing this, under the conditions stated in the Uniform Act.

Chad is not a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which facilitates the recognition and enforcement of foreign arbitral awards. Regarding awards issued outside OHADA territory, enforcement is on exactly the same terms as for the enforcement of foreign judgments (see question 13).

### 30. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

Yes, if they meet the criteria for recognition of foreign judgments.

## ALTERNATIVE DISPUTE RESOLUTION

### 31. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

The president of the court can invite claimants acting *sur requête* to provide any and all necessary clarifications or additional information. If the claim is pursued, the president of the court attempts conciliation between the parties (article 60 of Order No 67-018).

An initial conciliation phase is mandatory in civil matters brought before the *juge de paix*. If the judge is successful in facilitating conciliation, an enforceable settlement agreement will be drawn up and signed by the judge and the parties (article 48 of Law No 004/PR/98 of 28 May 1998 on judicial organisation).

## REFORMS

### 32. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

A new civil procedure code is currently being drafted and will reform the conciliation procedure, which will aim to prompt conciliation. Provisions relating to mediation are expected as well.

Moreover, a new criminal code and criminal procedure code are currently being reviewed for a possible adoption by the national assembly.

As regards arbitration, the reform will provide for the establishment of an arbitration and mediation centre as part of the Chamber of Commerce, Industry, Mines and Agriculture of N'Djamena.

## FOOTNOTE:

1. This article is the only one to refer to a "jurisdiction" rather than the "competent court in the Member State". It also refers to interim or protective measures to be performed in a non-OHADA State.

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# COMOROS



## INTRODUCTION

The Comoros is a civil law country. Its court structure is derived from the Constitution of 23 December 2001, amended by the referendum of 17 May 2009, and its implementing decrees and laws. The Comoros is a member of OHADA and the provisions apply directly to national business law.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

The legal profession is governed by the law of 23 June 2008 regulating the legal profession in the Union of the Comoros. To practise law in the Comoros, potential lawyers must be registered with the Comoros Bar Association (*Ordre des avocats*) and meet certain requirements, including:

- holding the Certificate of Aptitude for the Profession of Lawyer (*Certificat d'aptitude à la profession d'avocat*) (CAPA)
- having Comorian nationality or being registered in a Member State of OHADA or a State granting reciprocity in such matters to Comorian nationals

The profession is organised by the Bar Association (*Conseil de l'Ordre*), which ensures that members abide by the rules of professional conduct and applies any necessary disciplinary measures. Lawyers registered with the Bar (*Barreau*) can appear before any court. They can practise either individually or as part of a legal practice.

Foreign lawyers registered with the Bar of a Member State of OHADA or a State granting reciprocity to Comorian nationals can plead before Comorian courts provided they elect domicile in the Union of the Comoros at the offices of a lawyer practising within the jurisdiction of the court, and they inform the Bar Association, the opposing party and the Prosecutor General. All other lawyers must be expressly authorised to appear by decision of the Chairman of the Bar Association or the *Conseil de l'Ordre*.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The Comorian court system forms a three-tiered pyramid:

- the first instance courts (present on each island) which have jurisdiction in the first instance in all matters, subject to jurisdiction granted by law to other courts

There are specialist first instance courts, such as the Labour Court and the Commercial Court. There are also Cadi Courts (Muslim justice) with jurisdiction regarding personal status (marriage, divorce and inheritance). They are headed by a Cadi assisted by a registrar

- three Courts of Appeal (present on each island) which rule on appeals filed against decisions handed down by the first level courts
- the Supreme Court rules on appeals to set aside filed against rulings and judgments handed down by the court of last instance

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

Limitation periods vary depending on the type of action and the parties involved:

- the general limitation period for bringing an action for damages in a contractual or criminal claim is 30 years
- between business people and in matters of commercial sales, the limitation period is subject to OHADA rules

Specific limitation periods apply to certain types of action. For example, all actions disputing legal costs and fees are limited to two years after the client's payment.

### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

Communications between lawyers and clients are confidential. However, the law does not specify what types of communication are covered by the duty of confidentiality.

Clients can release their lawyers from their duty of confidentiality.

### 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

Civil proceedings are filed:

- by joint petition, where the parties submit their respective claims to the court
- by declaration to the registry of the court
- by summons, where the claimant calls the defendant to appear before the competent court

There is no particular timeframe within which defendants must submit their arguments. This timeframe is at the discretion of the judge (presiding over the hearing).

In employment disputes, parties must always undertake preliminary conciliation. Should the conciliation procedure fail, the judge refers the case for litigation.

## 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

In civil proceedings, all forms of evidence are permitted. In practice, there is no pre-trial hearing. The evidence is submitted to the court at the same time as the claims and pleadings. A party citing an exhibit is required to send it to every other party to the proceedings. Exhibits must be communicated simultaneously. The judge may order a party to produce evidence, subject to a penalty payment if necessary, upon the request of the other party. The judge has the power to order, upon his/her own initiative, all legally accepted investigative measures.

In principle, after the pleadings and when the case is submitted for deliberation, it is not possible to submit new evidence. In practice, however, the judge may authorise the parties to submit post-hearing evidence, often accompanied by exhibits, provided the other party can respond to the post-hearing submissions via further post-hearing submissions or request the closure of the deliberations and the re-opening of the debates.

## 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

The parties do not control the procedure. Once the proceedings have commenced, the timetable is set at the discretion of the court and in practice depends on various factors, such as the complexity of the case, the degree of urgency and the court's caseload. Nevertheless, the parties may end the proceedings at any time by mutual agreement.

In practice, the duration of proceedings at first instance and at appeal is one and a half years. However, one of the major problems of the Comorian judges is the writing of legal decisions. Thus, after the deliberation it is possible to wait more than six months before obtaining the written decision.

Furthermore, proceedings are often delayed by adjournments between hearings. In the first instance and at appeal, it is common for seven hearings to take place, at a rate of one hearing per month.

## 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

There are three interim proceedings in the Comoros to protect parties' interests pending a judgment on the merits:

- *référé* proceedings are held in the presence of all parties. In all urgent cases, the presiding judge of the Magistrates' Court may order all measures that lack a serious challenge or that justify the existence of a dispute. He/she may still, even in the presence of a serious challenge, order the interim or restitution remedies required either to stop a manifestly unlawful act or prevent imminent harm. In cases where the existence of the obligation cannot seriously be contested, a provision may be granted to the creditor or enforcement of the obligation ordered even if it is a specific performance obligation. In practice, it is rare for the presiding judge to grant provisions
- *ex parte* applications (*ordonnances sur requête*): the presiding judge of the party on petition and in the absence of the other party, where the circumstances at issue require that they are not

ordered in the presence of all parties. *Ex parte* orders are thus immediately enforceable but the other party may contest this measure before the judge

- conservatory measures are governed by the OHADA rules. The debtor may refer to the *référé* judge to apply for release of the assets seized. To do this, the claim must simply appear founded in principle

## 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

Judgments are only enforceable to the extent that, being no longer subject to appeal with suspensive effect, they are *res judicata*, save where immediate enforcement is provided by law or has been ordered. Unsuccessful parties can apply for a grace period.

The enforcement measures available under Comorian law are those provided for in the OHADA Uniform Act Organising Simplified Recovery Procedures and Measures of Execution. The principal measures are:

- seizure and sale (*saisie-vente*): "any creditor in possession of a writ of execution showing a debt due for immediate payment may proceed to the seizure and sale of personal property belonging to his debtor in order to be paid from the sale price"
- attachment order (*saisie-attribution de créances*): "any creditor in possession of a writ of execution showing a debt due for immediate payment may procure the seizure in the hands of a third party of the debt owed by his debtor in the form of a sum of money." In practice, this is a seizure of bank accounts
- penalty payment (*astreinte*): creditors who obtain an injunction from a court ordering their debtors to accomplish a particular task or to cease and desist may ask the court to team the injunction with a penalty for non-compliance, payable by day/week/month or per breach. The *référé* judge often resorts to the penalty payment in matters of cessation of works or return of payment. In practice, penalty payments are rarely paid
- real property foreclosure (*saisie immobilière*): this enforcement mechanism is applied as a last resort when the seizure of personal property or of debts was unfruitful or insufficient. The insufficiency must be authenticated by a bailiff (*huissier de justice*); only then may the creditor initiate a *saisie immobilière*

The judge may not grant grace periods to the party convicted.

## 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

The unsuccessful party bears the court costs, save where the court decides to order a different party to bear all or part of them. In principle, the unsuccessful party bears the expenses but rarely the legal costs of the other party. This is known as the obligation to plead. Legal fees are evaluated at the court's discretion. The costs of the fees paid by the client are generally far higher than those granted by the court.

Every claimant, whether Comorian or foreign, is bound to pay a certain sum to be deposited with the Supreme Court's clerk at the time of filing the petition, otherwise it will not be registered. If the appeal is rejected, the sum goes to the Treasury. The claimant in appeal to the Supreme Court is further required, subject to dismissal, to deposit a sufficient sum to guarantee payment of the stamp duty and registration fees calculated on a fixed basis (article 36 of the Constitutional Law on the Supreme Court of 27 June 2005).

### 11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

An appeal is based on law and no permission is required. It is filed by a declaration of appeal with the Registry of the Magistrates' Court after serving of the decision of first instance.

Parties have one month in contentious matters and 15 days in non-contentious matters to appeal. New claims are inadmissible on appeal, unless they pertain to compensation or the new claim is the defence against the principal action. The appeal filed within the required period suspends enforcement of the judgment, unless provisional execution has been ordered by the first judge.

After an appeal decision, it is possible to appeal to the Supreme Court to have final and unappealable court decisions reviewed by the Supreme Court. As the Supreme Court of the Comoros was only established in 2012, it has handed down very few decisions.

The Supreme Court can only order a judgment on issues of law and not fact. An appeal to the Supreme Court does not suspend enforcement of the judgment. If the appeal to the Supreme Court is successful, the case is remanded to a new court for a second judgment. In principle, the remanding court is not required to abide by the Supreme Court's decision, but in practice, this is the case.

### 12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

Proceedings can be brought before the State in the civil chamber (in the case of illegal expropriation) or in the administrative chamber. The State and local authorities do not benefit from jurisdictional immunity.

In terms of foreign entities, any jurisdictional immunity rights that can be applied derive from international agreements on diplomatic or consular relationships.

### 13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

In the Comoros, the Code of Civil Procedure does not provide for an enforcement procedure. However, in practice, the judge observes the following conditions:

- the decision is not contrary to public policy rules in the Comoros and does not infringe a final and binding Comorian legal decision
- the parties were served, represented or found in default with due process of law

In practice, enforcement is very rarely admitted. The judge will usually overturn the foreign judgment at the time of handing down the enforcement order.

## ARBITRATION

### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

The Comoros is a member of OHADA (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires* - Organisation for the Harmonisation of Business Law in Africa). The OHADA Treaty

was first signed on 17 October 1993. Under the OHADA Treaty, the Council of Ministers of Justice and Finance adopt "uniform acts" that are directly applicable and enforceable in each of the Member States. Arbitration in the OHADA Member States is governed by the Uniform Act on Arbitration within the Framework of the OHADA Treaty, which was adopted on 11 March 1999 and came into force 90 days afterwards (the Uniform Act).

The Uniform Act is not based on the UNCITRAL Model Law. It was drafted separately, but is nevertheless consistent with the fundamental principles of international commercial arbitration and the main features of the UNCITRAL Model Law.

The Uniform Act applies to both national and international arbitration and governs all arbitration proceedings with a seat in a Member State.

One of the most important characteristics of OHADA arbitration is the Common Court of Justice and Arbitration (*Cour Commune de justice et d'arbitrage*) (the CCJA), which acts as both a permanent arbitration institution and a supreme court of arbitration for OHADA Member States.

### 15. WHAT ARE THE MAIN NATIONAL ARBITRATION INSTITUTIONS?

Since December 2011, the main arbitration institution in the Comoros has been the Court of Arbitration of the Comoros at the seat of the *Union des chambres de commerce d'industrie et d'Agriculture des Comores* (UCCIA). The Court of Arbitration of the Comoros is the result of a joint initiative of UCCIA and the *Organisation patronale des Comores* (OPACO).

At the supranational level, the CCJA, which was created by the OHADA Treaty and is based in Abidjan, in Côte d'Ivoire, can also hear arbitration matters. The CCJA acts as an arbitration centre and administers proceedings governed by the CCJA Rules of Arbitration. The CCJA is different from other arbitration centres as it is not a private institution but was created and organised by OHADA.

In practice, few contracts include clauses referring to CCJA arbitration.

To the best of our knowledge, the Court of Arbitration of the Comoros has not dealt with any case. Usually this court will deal with commercial cases. The professional judges composing the traditional courts do not view this court of arbitration very favourably.

### 16. ARE THERE ANY RESTRICTIONS ON WHO MAY REPRESENT THE PARTIES TO AN ARBITRATION?

The Uniform Act does not set any restrictions on persons who can represent parties in an arbitration. They are entitled but not required to instruct counsel (article 20 of the Uniform Act).

Parties may be assisted by a foreign lawyer; there is no rule restricting this freedom.

### 17. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

Article 3 of the Uniform Act states that the arbitration agreement must be made in writing or by any other means of which evidence can be produced. No particular format is required. The Uniform Act also provides that parties can rely on an arbitration agreement contained in a different document.

**18. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?**

Article 13 of the Uniform Act provides that national courts must decline jurisdiction where there is an arbitration agreement and where the arbitral tribunal has not yet been composed, save where the arbitration agreement is "manifestly void". Courts cannot decline jurisdiction at their own discretion.

If the arbitral tribunal has already been composed, the national court must decline jurisdiction at the request of a party.

Parties governed by an arbitration agreement do have the option to appear before a national court to obtain interim or conservatory measures that do not require a review of the case on the merits, in circumstances that have been "recognised and reasoned" as urgent or where the measure must be performed in a State that is not part of OHADA.

National courts can also intervene in very limited circumstances with a view to assisting the arbitration process (see questions 22 and 23 below).

**19. IF THE ARBITRATION AGREEMENT AND ANY RELEVANT RULES ARE SILENT, HOW MANY ARBITRATORS WILL BE APPOINTED, AND WHO IS THE APPOINTING AUTHORITY?**

The Uniform Act does not stipulate a specific number of arbitrators if the arbitration agreement is silent on this point. It does provide that an arbitral tribunal must have a sole arbitrator or three arbitrators.

If the parties are unable to appoint one or more arbitrators, the task falls to the competent court in the Member State in which the seat of arbitration is located.

**20. WHAT RIGHTS ARE THERE TO CHALLENGE THE APPOINTMENT OF AN ARBITRATOR?**

Article 7 of the Uniform Act sets the rules for challenging an arbitrator. Arbitrators must notify the parties of "*any circumstance about him/herself*" for which they may be challenged. Any disputes will be settled by the competent court of the Member State, save where the parties have provided for a different procedure for challenging arbitrators. Decisions are not subject to appeal.

Arbitrators may only be challenged on grounds that come to light after their appointment.

**21. DOES THE DOMESTIC LAW CONTAIN SUBSTANTIVE REQUIREMENTS FOR THE PROCEDURE TO BE FOLLOWED?**

The Uniform Act requires parties to receive equal treatment and to have an opportunity to exercise their rights and stipulates that arbitrators may not base their decisions at their own discretion without first allowing parties to submit observations.

Article 18 of the Uniform Act provides that the deliberations must be kept secret.

The Uniform Act also provides that the duration of the arbitration may not exceed six months from the date upon which the last arbitrator accepts the terms, save where extended by agreement of the parties or by petitioning the competent court.

**22. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED INSIDE THE JURISDICTION?**

In principle, where there is an arbitration agreement, the national courts cannot intervene in a dispute until the award has been issued.

Nevertheless, parties may petition the competent court in the Comoros in the following circumstances:

- to resolve difficulties encountered with composing the arbitral tribunal, to appoint the sole arbitrator or the third arbitrator (articles 5 and 8)
- to rule on challenges against arbitrators where the parties have not provided for a different procedure (article 7)
- to extend the deadline for the conclusion of the arbitration where there is no agreement between the parties to do so, at the request of a party or the arbitral tribunal (article 12)
- to order interim or protective measures when urgently necessary (recognised and reasoned circumstances) or when the measures would be performed in a non-OHADA State, provided the measures do not require a review of the case on the merits (article 13)
- to assist the arbitral tribunal, at its request, with the collection of evidence (article 14)

**23. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?**

In principle, national courts cannot intervene in an arbitration seated outside their jurisdiction where there is an arbitration agreement, as indicated above (question 22). In addition, all measures relating to the composition of the arbitral tribunal and conducting the proceedings fall under the jurisdiction of the courts of the country in which the arbitration is seated.

However, it is possible for national courts other than the competent court of the Member State in which the arbitration is seated to intervene to order conservatory or interim measures under the conditions defined above in question 18 (article 13<sup>1</sup>).

**24. DO ARBITRATORS HAVE POWERS TO GRANT INTERIM OR CONSERVATORY RELIEF?**

Although not expressly described in the Uniform Act, it is generally agreed by legal authors that this option is available to arbitrators, save as agreed otherwise by the parties.<sup>2</sup>

**25. WHEN AND IN WHAT FORM MUST THE AWARD BE DELIVERED?**

Save as agreed otherwise by the parties, arbitral awards must be issued within six months from the date on which all of the arbitrators have accepted their arbitrating functions. This term can be extended by agreement between the parties or by an order of the competent court of the Member State at the request of a party or the arbitral tribunal.

Parties can set special requirements for awards. Failing this, awards are issued by majority, where the tribunal comprises three arbitrators, and must lay down the grounds for such awards. They must be signed by at least two of the three arbitrators.

**26. CAN A SUCCESSFUL PARTY RECOVER ITS COSTS?**

The Uniform Act contains no provisions on this point.

Where arbitration is conducted under the aegis of the CCJA, the arbitrator is empowered to award costs.

### 27. ON WHAT GROUNDS CAN AN AWARD FROM AN ARBITRATION SEATED IN THE JURISDICTION BE APPEALED TO THE COURT?

The only remedy against an arbitral award is an application to set aside that award brought before the competent court in the Member State in which it was issued, within one month from the date of service of the award once rendered enforceable (articles 25 and 27).

The circumstances in which an application to set aside can be brought are as follows (article 26):

- the arbitral tribunal ruled without an arbitration agreement or with respect to an invalid or expired agreement
- the arbitral tribunal was not properly composed
- the arbitral tribunal did not rule in compliance with the terms of arbitration
- due process was not met
- the arbitral tribunal breached a public policy rule of the OHADA Member States
- there are no reasons for the award

Bringing an application to set aside an arbitral award suspends enforcement, unless the tribunal ordered immediate enforcement. The decision can only be appealed to the CCJA.

This is the only remedy available to parties before a national court. The other remedies, third party opposition and the application for a review of the award, must be submitted to the arbitral tribunal.

### 28. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

No. See question 27 above.

### 29. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF: (I) AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION AND (II) DOMESTIC AWARDS?

To enforce awards issued within an OHADA Member State, the Uniform Act requires parties to obtain the recognition of the award from the competent court in that Member State.

This requires producing the original arbitral award, together with the arbitration agreement or copies of these documents meeting the necessary authentication conditions and, where necessary, a sworn translation into French.

Decisions refusing to recognise an arbitral award can be appealed to the CCJA but decisions granting recognition are not subject to appeal.

The Comoros is now a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which facilitates recognition and enforcement of foreign arbitral awards. It ratified the Convention without reservations on 28 April 2015, and the Convention entered into force in the Comoros on 27 July 2015.<sup>3</sup>

### 30. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

It is likely that adhesion by Comoros to the New York Convention will facilitate the enforcement and recognition of foreign awards in Comoros.

## ALTERNATIVE DISPUTE RESOLUTION

### 31. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

In the Comoros, it is within the judge's remit to conciliate the parties. The parties therefore have the option of conciliation, on their own initiative or on the initiation of the judge. Extracts of the report recording the conciliation may be issued. They are valid as instruments permitting enforcement.

In employment disputes, parties must always undertake preliminary conciliation. Should the conciliation procedure fail, the judge refers the case for litigation.

## REFORMS

### 32. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

To the best of our knowledge, there are currently no plans to make any significant reforms of civil or commercial procedure in the near future.

## FOOTNOTES:

1. This article is the only one that refers to "jurisdiction" rather than the "competent judge in the Member State". It furthermore refers to the interim or conservatory measures to be performed in a non-OHADA State.
2. This results from a comparative reading of article 13, which limits the intervention of the national court in cases of recognised urgency (in domestic matters).
3. [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html)

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# CÔTE D'IVOIRE



## INTRODUCTION

Côte d'Ivoire has a civil law-based legal system founded on the Constitution of 23 July 2000, duly ratified/approved treaties and agreements, and other relevant laws and regulations. Côte d'Ivoire is also a member of ECOWAS, UEMOA and OHADA.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

The legal profession is governed by UEMOA Regulation 05/CM/UEMOA relating to the harmonisation of the rules governing the legal profession within the UEMOA zone, as well as the provisions of Law n°81/588 of 27 July 1981, which are consistent with the relevant provisions of the UEMOA Regulations.

To practise law in Côte d'Ivoire, potential lawyers must be registered with the Côte d'Ivoire Bar Association (*Ordre des avocats*) as a lawyer or pupil. Persons satisfying the following cumulative requirements are eligible to register as pupils:

- be at least 21 years of age
- hold a master's degree recognised by the African and Madagascar Council for Superior Education (CAMES) or any diploma recognised as its equivalent
- hold the Certificate of Aptitude for the Profession of Lawyer (*Certificat d'aptitude a la profession d'Avocat*) (the CAPA) recognised within the UEMOA zone. However, resigned judges having practiced for 10 years in their jurisdiction, as well as tenured law professors, are allowed to waive the CAPA requirement
- have good moral standing
- be a citizen of a Member State of UEOMA

Persons satisfying the following cumulative requirements are eligible to register as lawyers:

- be at least 24 years of age
- hold citizenship of a UEMOA Member State
- hold a training certificate
- have good moral standing
- be of good financial standing, having not been declared insolvent or bankrupt

The profession is organised by the *Conseil de l'Ordre des avocats* which ensures that members abide by the rules governing the profession and applies any necessary disciplinary measures. Lawyers (*avocats*) registered with the Bar (*Barreau*) can appear before any court and assist their clients. They can practise either individually or as part of a legal practice structure.

Lawyers from a UEOMA Member State may freely establish themselves in Côte d'Ivoire if they meet the requirements listed above to register as lawyers.

Foreign lawyers can plead before the Côte d'Ivoire courts on an occasional basis provided that Côte d'Ivoire lawyers have reciprocal rights in the foreign lawyer's home country and that they notify the Chairman of the Bar Association (*bâtonnier*) of their presence and of the case in which they wish to represent their client.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The court system in Côte d'Ivoire forms a three-tiered pyramid:

- the first instance courts:
  - the first instance courts have jurisdiction over all claims for which jurisdiction is not explicitly reserved to another court. In all cases, these courts have jurisdiction over all matters exceeding CFA 500,000 or unquantified amounts (and in civil and commercial law matters, they are also the court of final appeal for all claims not exceeding CFA 500,000)
  - the commercial courts have jurisdiction over the following cases:
    - disputes relating to undertakings and transactions between merchants within the meaning of the OHADA Uniform Act relating to general commercial law
    - disputes between partners of a company
    - disputes between any persons relating to commercial matters
    - bankruptcy and debt proceedings
    - disputes relating to acts taken by merchants during commercial transactions, notwithstanding the civil nature of the acts

Commercial courts rule at first instance in all cases where the amount in dispute exceeds CFA 1 billion, or is unquantified. These courts also rule in first and last instance on all cases where the amount in dispute does not exceed CFA 1 billion

- Labour courts also exist, as specialised chambers within first instance courts

- Three Courts of Appeal (*Cours d'appel*), which hear appeals of judgments issued in the first instance
- The Court of Cassation (*la Cour de cassation*) which, although provided for by the Constitution, is not yet functional. Its functions are now exercised by the Supreme Court which has final jurisdiction on appeals in all matters where an application of the provisions of the OHADA Uniform Act is not required. In matters where such an application is required, the Common Court of Justice and Arbitration has final jurisdiction

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

Limitation periods vary depending on the type of action and the parties involved:

- the ordinary limitation period for bringing an action for damages in contract is:
  - 30 years for actions to recover personal property or real property
  - 10 years for establishing good faith and just title of property
- the ordinary limitation period for bringing a non-contractual action for damages is 30 years
- the limitation period applicable to commercial actions is five years, and two years in matters involving commercial sales
- specific limitation periods apply to certain types of actions. For example, the limitation period for actions by domestics hired for the year is one year and for actions by physicians regarding examinations, operations and medicaments, two years

Limitation periods fall within public policy, and are thus mandatory. The party benefiting from a period of limitation may waive enforcement. The limitation periods are primarily suspended by the issuance of a summons commencing legal proceedings or by a court order for payment or sequestration.

### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

Communications between lawyers and clients are confidential.

### 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

Civil proceedings are filed before the court:

- by summons where the claimant calls the defendant to appear before the competent court
- by written or oral petition filed at the registry of the competent court, for actions concerning personal property or movable assets, of which the pecuniary interest does not exceed CFA 500,000
- by voluntary appearance of the parties before the judge, and by joint petition, with the parties submitting their respective claims to the judge, along with the points on which they disagree, and their respective evidence

Except by consent of the parties or shortening of the time limit by the judge, the time limit between the issue date of the notice or summons to appear in court and the hearing date is fixed to a minimum of eight days. The time is increased to 15 days if the

party is domiciled in an area adjoining the jurisdiction and two months for parties domiciled outside Côte d'Ivoire.

These limits do not apply to urgent matters such as interim proceedings, where the judge will set the timeframe.

The Labour Code obliges the presiding judge of the court to propose conciliation in labour disputes. In the event of full conciliation, an excerpt from the conciliation report, signed by the clerk and issued to the parties, is deemed to be an enforceable ruling. If conciliation fails, the presiding judge refers the matter to a public hearing.

### 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

In the context of civil proceedings, written proof is admitted. In general, this means all forms of documents.

Evidence may be exhibited in the context of proceedings conducted in good faith and notified at the same time as the formal pleadings. It may happen, however, that a defendant refuses to exhibit evidence in his/her possession, even if such evidence could contribute to establishing the truth.

There is no equivalent to the common law concept of "disclosure" under Côte d'Ivoire law, and, in principle, no one may be required to give evidence against him/herself. However, the law acknowledges a claim requiring a party who refuses to exhibit evidence in its possession to disclose the evidence.

On appeal, it is always possible to exhibit new evidence, but the latter must not constitute a new claim. In appeals to the Court of Cassation on points of law, the court may not in principle hear new evidence. But by exercising its discretion regarding notification, the Court of Cassation may in practice hear new evidence disclosed on appeal.

In the case of expert assessments, appointed experts are selected in principle from a national list prepared by the Keeper of the Seals (*garde des Sceaux*). Exceptionally, the judge may, by reasoned decision, select an expert not included on that list. The party seeking the appointment of an expert witness must pay the costs in advance. The expert will file their report at the Registry with the documents supplied. They must inform the parties accordingly within 24 hours by registered letter.

### 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

The parties do not control the procedure before regular courts. Once the proceedings have commenced, the timetable is set at the discretion of the court, and in practice depends on various factors, such as the complexity of the case, the degree of urgency and the court's caseload. Nevertheless, the parties may end the proceedings at any time by mutual agreement.

Before the commercial courts, the law requires that decisions be made within three months from the beginning of the case. This period may exceptionally be extended for one month by order of the President of the tribunal.

## 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

Interim proceedings can be brought in Côte d'Ivoire to protect parties' interests pending a judgment on the merits:

- *référé* proceedings allow a party to obtain an interim ruling urgently, without affecting the court's decision on the merits of the case. The claim is reviewed at a hearing held by the presiding judge of the court. A *référé* judgment is possible in all urgent situations. For example, penalty payments, confiscation and reparation orders may be the subject of a *référé* judgment. The *référé* judgment is pronounced after proceedings in the presence of all parties
- *ex parte* order (*ordonnances sur requête*) are issued by the presiding judge of the court in the absence of a party to protect the rights and interests of the other party, where the circumstances require this. *Ex parte* orders are thus immediately enforceable
- Preventative attachment confiscates the debtor's movable assets and prevents the debtor from disposing of them to the prejudice of the creditor. The presiding judge of the court with jurisdiction for the debtor's residence, referred on a petition, orders preventative attachment when there are circumstances which could jeopardise recovery of the debt, when the debtor has an instrument permitting enforcement and when the debt appears founded in principle

## 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

Enforcement under Côte d'Ivoire law is possible only if the order for enforcement is affixed to the judgment. The enforcement measures available under Côte d'Ivoire law are those provided for in the OHADA Uniform Act Organising Simplified Recovery Procedures and Measures of Execution, and include:

- seizure and sale (*saisie-vente*): "any creditor in possession of a writ of execution showing a debt due for immediate payment may proceed to the seizure and sale of the tangible property belonging to his debtor in order to be paid from the sale price"
- attachment order (*saisie-attribution de créances*): "any creditor in possession of a writ of execution showing a debt due for immediate payment may [procure the seizure] in the hands of a third party [of] the debt owed by his debtor in the form of a sum of money"
- penalty payment (*astreinte*): creditors who obtain an injunction from a court ordering their debtors to accomplish a particular task or to cease and desist may ask the court to team the injunction with a penalty for non-compliance, payable by day/week/month
- real property foreclosure (*saisie immobilière*): this enforcement mechanism is applied as a last resort when the seizure of personal property or of debts was unfruitful or insufficient. The insufficiency must be authenticated by a bailiff (*huissier de justice*); only then may the creditor initiate a *saisie immobilière*

The enforcement judge may grant a period of grace. Any debtor may request an extension, granted at the judge's sole discretion, in the event of personal, family or financial difficulties. The judge will consider the applicant's good faith.

## 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

In principle, the unsuccessful party bears the court costs,<sup>1</sup> save where the court rationally decides to order a different party to bear all or part of them.

Unless a contrary diplomatic convention applies, foreign claimants, or their representatives or agents, if requested to do so by the adverse party, must deposit sufficient funds to cover the court costs when filing the writ at the Registry, unless they are in a position to show that the value of their immovable property in Côte d'Ivoire is sufficient to cover the amounts they may ultimately be ordered to pay.

## 11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

### ◦ appeals of judgments:

- the parties may appeal judgments issued in first instance by lower courts (please refer to question 2 above, including for the different jurisdictional levels applying in commercial disputes)
- judgments issued by the Labour Courts may be appealed when the amount in controversy exceeds the amount 10 times the monthly minimum wage

### ◦ appeals of interim orders:

- interim orders may always be appealed within 15 days after notification of the issuance of the order

### ◦ interim enforcement notwithstanding pending appeals:

- a judgment is enforceable notwithstanding appeal when coupled with a provisional enforcement action. Provisional enforcement is of right and must be ordered *ex officio* by the court if it is presented with an uncontested genuine deed, or a private confession, or a recognised promise.

Provisional enforcement may be ordered upon application by the parties for all or part of the rulings in each of the following cases:

- if it is a dispute between travellers and hotel owners or carrier
- if it is a judgment appointing an escrow agent or ordering child support
- if there is an escrow judgment awarding a provision on damages
- in all other cases of extreme emergency

### ◦ available remedies following appeal:

- all judgments of the courts of appeal may be challenged by means of an appeal either to the Common Court of Justice and Arbitration (CCJA) (when the case requires the application of a provision of the Uniform Act) or to the Supreme Court of Côte d'Ivoire in all cases

## 12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

In respect of administrative litigation or litigation not falling within the jurisdiction of specialised courts, the first instance courts and related entities are competent. In these matters, all domestic legal entities of public law, State companies and majority public companies can be subject to jurisdiction before these courts. However, for the enforcement of the judgment issued against them, the OHADA Uniform Act relating to enforcement

proceedings prohibits any enforcement measure from being directly implemented. Public entities or legal persons will therefore assert their immunity from execution when an enforcement measure is directed against them.

In respect of foreign entities, any jurisdictional immunity rights that can be applied derive from international agreements on diplomatic or consular relationships.

### 13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

Contentious and non-contentious court decisions by a foreign court may only be enforced or published in the territory of Côte d'Ivoire once they have been declared enforceable following enforcement proceedings, subject to the special provisions provided for in international conventions.

In Côte d'Ivoire, enforcement of a foreign decision may only occur if the following conditions are met:

- the judgment was pronounced by a competent court in the country concerned
- the judgment is final, binding and enforceable under the laws of that country
- the defendant has duly appealed before a court which pronounced a judgment and has been given the chance to defend him/herself
- the dispute adjudicated by the foreign court does not, according to Côte d'Ivoire law, fall within the exclusive competence of the Côte d'Ivoire courts
- there is no conflict between the foreign judgment and a judgment pronounced by an Côte d'Ivoire court in the same proceedings, on the same subject matter and between the same parties which is deemed final and binding
- the decision is not contrary to public policy rules in Côte d'Ivoire

In addition, judgments pronounced in a foreign country may not be deemed final and binding unless, reciprocally, judgments pronounced in Côte d'Ivoire may be deemed final and binding in that country.

In practice, there is no particular difficulty in judgments being deemed final and binding once said conditions are fulfilled.

## ARBITRATION

### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

Côte d'Ivoire is a Member State of OHADA (*Organisation pour l'Harmonisation du Droit des Affaires en Afrique* - Organisation for the Harmonisation of Business Law in Africa). The OHADA Treaty was first signed on 17 October 1993. Under the OHADA Treaty, the Council of Ministers of Justice and Finance adopt "uniform acts" which are directly applicable in each of the Member States. Since 11 June 1999, arbitration in OHADA Member States has been governed by the Uniform Act on Arbitration within the Framework of the OHADA Treaty, which was adopted on 11 March 1999 and came into force 90 days afterwards (the Uniform Act). The Uniform Act is not based on the UNCITRAL Model Law. It was drafted separately but nevertheless complies with the fundamental principles of international commercial arbitration and

the essential characteristics of the UNCITRAL Model Law.

The Uniform Act applies to both national and international arbitration and governs all arbitration proceedings with a seat in an OHADA Member State.

For arbitrations not governed by the Uniform Act, certain provisions set out in Law No 93-671 dated 9 August 1993 relating to arbitration survive the entry into force of the Uniform Act (ie the *exequatur procedure*).

One of the most important characteristics of OHADA arbitration is the Common Court of Justice and Arbitration (*Cour commune de justice et d'arbitrage*) (the CCJA), which acts as both a permanent arbitral tribunal and the supreme court of arbitration for all OHADA Member States.

### 15. WHAT ARE THE MAIN ARBITRATION INSTITUTIONS?

The main arbitration institution in Côte d'Ivoire is the Arbitration Court of Côte d'Ivoire (*Cour d'arbitrage de Côte d'Ivoire*) (the CACI), which was established in 1997. The CACI is located in Abidjan and is an independent branch of the Chamber of Commerce and Industry. The CACI has its own rules of arbitration for commercial disputes where the arbitration agreement concluded by the contracting parties provides for CACI jurisdiction.

At the supranational level, the CCJA, which was created by the OHADA Treaty, can also hear arbitration matters. Like the CACI, it is based in Abidjan. The CCJA, which also has a judicial function, acts as an arbitration centre and administers proceedings governed by the CCJA Rules of Arbitration. The CCJA is different from other arbitration centres as it is not a private institution but was created and organised by OHADA.

For the CCJA Rules to be applicable, article 21 of the OHADA Treaty stipulates that all or part of the contract in question must be performed within the territory of one or more Member States or that at least one of the parties must be domiciled or habitually resident in a Member State. According to legal commentators, it should also be possible to go to arbitration under the CCJA Rules even if these conditions are not met if the parties have provided for this possibility in their arbitration agreement.

Unlike the CACI, the CCJA acts as an arbitration centre, supporting judge (*judge d'appui*), enforcement judge and appeal jurisdiction for arbitral awards. In addition, it has the authority to enforce awards throughout the OHADA area.

### 16. ARE THERE ANY RESTRICTIONS ON WHO MAY REPRESENT THE PARTIES TO AN ARBITRATION?

The Uniform Act does not set any restrictions on persons who can represent parties in arbitration. They are entitled but not required to instruct a lawyer (article 20 of the Uniform Act).

### 17. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

Article 3 of the Uniform Act states that the arbitration agreement must be made in writing, or by any other means permitting it to be evidenced. No particular format is required. The Uniform Act also provides that agreements can refer to an arbitration agreement contained in a different document.

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Article 13 of the Uniform Act provides that national courts must decline jurisdiction where there is a valid arbitration agreement and where the arbitral tribunal has not yet been composed, save where the arbitration agreement is “manifestly void”. The court cannot decline jurisdiction at its own discretion.

If the arbitral tribunal has already been composed, the national court must decline jurisdiction at the request of a party.

Parties governed by an arbitration agreement have the option of consulting a national court to obtain interim or protective measures that do not require a review of the case on the merits, in circumstances that have been “recognised and reasoned” as urgent or where the measure must be performed in a State that is not part of OHADA.

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The Uniform Act does not stipulate a specific number of arbitrators if the arbitration agreement is silent on this point. It does provide that an arbitral tribunal must have a sole arbitrator or three arbitrators.

If the parties are unable to appoint the arbitrator(s), the task falls to the competent court in the Member State of the seat of the arbitration. In Côte d'Ivoire, this is the presiding judge of the Court of First Instance.

**20. WHAT RIGHTS ARE THERE TO CHALLENGE THE APPOINTMENT OF AN ARBITRATOR?**

Article 7 of the Uniform Act sets the rules on challenging an arbitrator. Arbitrators must notify the parties of “any circumstance about him/herself” for which they may be challenged. Any disputes will be settled by the competent court of the Member State, save where the parties have provided for a different procedure for challenging arbitrators. Decisions are not subject to appeal.

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In principle, where there is an arbitration agreement, the national courts cannot intervene in a dispute until the award has been issued.

Nevertheless, parties may consult the competent court in Côte d'Ivoire in the following circumstances:

- to resolve difficulties encountered with composing the arbitral tribunal, to appoint the sole arbitrator or the third arbitrator (articles 5 and 8)
- to rule on challenges against arbitrators where the parties have not provided for a different procedure (article 7)
- to extend the arbitration term where there is no agreement between the parties, at the request of a party or the arbitral tribunal (article 12)
- to order interim or protective measures when urgently necessary (recognised and reasoned circumstances) or when the measure would be performed in a non-OHADA State, where the measures do not require a review of the case on the merits (article 13)
- to assist the arbitral tribunal, at its request, with the administration of proof (article 14)

**23. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?**

As noted above (question 22), in principle, the national courts cannot intervene in a dispute where there is an arbitration agreement, in addition, all measures relating to the composition of the arbitral tribunal and the organisation of the proceedings fall within the remit of the court of the seat of arbitration.

However, it is possible for a court other than the competent court within whose territory the arbitration is taking place to order protective or interim measures under the conditions described in question 18 above (article 13).<sup>2</sup>

**24. DO ARBITRATORS HAVE POWERS TO GRANT INTERIM OR CONSERVATORY RELIEF?**

Although this matter is not dealt with directly in the Uniform Act, legal commentators generally agree that it is possible for arbitrators to order interim or protective measures, save where the parties have agreed otherwise.<sup>3</sup>

The CACI Rules of Arbitration allow interim or protective measures to be ordered prior to the composition of the arbitral tribunal. Interim proceedings can also be brought before the arbitral tribunal to defend rights that cannot be left without protection or to intervene in urgent or high-risk situations. In these cases, the CACI Secretary General will appoint the arbitrator, who must rule within 72 hours from the first hearing.

## 25. WHEN AND IN WHAT FORM MUST THE AWARD BE DELIVERED?

Save as agreed otherwise by the parties, arbitral awards must be issued within six months from the date on which all of the arbitrators have accepted the terms. This term can be extended by agreement between the parties or by order of the competent court in the Member State at the request of a party or the arbitral tribunal (article 12).

Parties can set special requirements for awards. Failing this, awards are issued by majority, where the tribunal comprises three arbitrators, and must be reasoned. They must be signed by at least two of the three arbitrators.

Where the arbitration is governed by the CACI Rules of Arbitration, the award must be issued within the time period set in the report drawn up under the arbitration procedure.

## 26. CAN A SUCCESSFUL PARTY RECOVER ITS COSTS?

The Uniform Act contains no provisions on this.

Where arbitration is conducted under the aegis of the CCJA, the arbitrator is empowered to award costs.

## 27. ON WHAT GROUNDS CAN AN AWARD FROM AN ARBITRATION SEATED IN THE JURISDICTION BE APPEALED TO THE COURT?

The only remedy against an arbitral award is an application to set aside that award brought before the competent court in the Member State in which it was issued, within one month from the service of the award once rendered enforceable (articles 25 and 27).

The circumstances in which an application to set aside can be brought are as follows (article 26):

- the arbitral tribunal ruled without an arbitration agreement or with respect to an invalid or expired agreement
- the arbitral tribunal was not properly composed
- the arbitral tribunal did not rule in compliance with the terms of arbitration
- due process was not adhered to
- the arbitral tribunal breached a public policy rule of the OHADA Member States
- there are no reasons for the award

Bringing an application to set aside an arbitral award suspends enforcement, unless the tribunal ordered immediate enforcement. The decision can only be appealed to the CCJA (articles 25 and 28).

This is the only remedy available to parties before a national court. The other remedies, namely third party opposition and the application for a revision of the award, must be submitted to the arbitral tribunal (article 25).

## 28. CAN A FOREIGN ARBITRATION AWARD BE APPEALED TO THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

An arbitral award issued abroad may not be appealed before a local court.

## 29. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF: (I) AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION AND (II) DOMESTIC AWARDS?

To enforce awards issued within an OHADA Member State, the Uniform Act requires parties to obtain the recognition of the award from the competent court in that Member State (article 30). In Côte d'Ivoire, that is the President of the higher court (*tribunal de première instance*).

This involves producing the original arbitral award, together with the arbitration agreement or copies of these documents meeting the necessary authentication conditions and, as applicable, a sworn translation into French (article 31).

Decisions refusing to recognise an arbitral award can be appealed to the CCJA. However, decisions granting recognition cannot be appealed (article 32).

Awards issued in a different OHADA Member State are recognised in other Member States under the conditions set out in any applicable international agreements or, failing this, under the conditions stated in the Uniform Act.<sup>4</sup>

Côte d'Ivoire is party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which facilitates the recognition of foreign arbitral awards between Contracting States. Awards issued in other territories are enforced by applying to the court for *exequatur*.

## 30. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

These can be enforced in Côte d'Ivoire as soon as they obtain *exequatur*.

## ALTERNATIVE DISPUTE RESOLUTION

### 31. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

All proceedings are exempt from preliminary conciliation, save where the law provides otherwise (article 133 of *Code de procédure civile commerciale et administrative* (Code of civil, commercial and administrative procedure) (the CPCCA)). The parties may nevertheless reconcile, on their own or on the judge's initiative, throughout the proceedings (article 134 of the CPCCA).

The Labour Code obliges the presiding judge of the court to propose conciliation in labour disputes. In the event of full conciliation, an excerpt from the conciliation report, signed by the clerk and issued to the parties, is deemed to be an enforceable ruling. If conciliation fails, the presiding judge refers the matter to a public hearing.

## REFORMS

### 32. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

To the best of our knowledge, there are no plans to make any significant reforms of civil or commercial procedure in the near future.

## FOOTNOTES:

1. In civil law countries, recoverable legal costs do not necessarily include lawyers' fees.
2. This article is the only one to refer to a "jurisdiction" rather than the "competent court in the Member State". It also refers to interim or protective measures to be performed in a non-OHADA State.
3. This derives from a reverse reading of article 13, which limits the intervention of national courts to urgent circumstances (for internal matters).
4. Article 34 of the Uniform Act does not mention foreign awards directly. However, legal writers agree that it does apply to foreign awards. It could be advisable to verify this point with a local practitioner.

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# DEMOCRATIC REPUBLIC OF CONGO



## INTRODUCTION

The Democratic Republic of Congo is a civil law jurisdiction. The justice system principally derives from the Constitution of 18 February 2006, as amended by Law No 11-022 of 20 January 2011, and from legislation predating the 2006 Constitution on the administration of justice. This remains in force in the absence of implementing legislation for the 2006 Constitution. The Constitution is at the apex of the hierarchy of laws.

Apart from the Constitution and the various legal texts preceding it, the Democratic Republic of Congo is also governed by:

- Organic Law No 13/011 B of 11 April 2013 relating to the organisation, functioning and legal skills of the judiciary
- Organic law No 13/010 relating to proceedings before the Court of Cassation
- Organic Law No 13/026 relating to the organisation and functioning of the Constitutional Court

The Democratic Republic of Congo is a member of OHADA (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires*). This membership has resulted in the introduction of new rules in some areas in the Democratic Republic of Congo's justice system.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

The legal profession is governed by Legislative Order No 79-028 of 28 September 1979 on the organisation of the Bar, of the defence attorneys' association, and of the association of State legal representatives, and by a resolution of the National Council of the Lawyers' Association, CNO/8/87 of 19 August 1987, on internal regulations of the system of Bars of the Democratic Republic of Congo.

To practise as a lawyer in the Democratic Republic of Congo and have the title of lawyer, the candidate must be entered on the Roll of the Association, or on a list of pupil advocates, and meet certain legal conditions, in particular:

- they must be of Congolese nationality. Foreigners may become lawyers in the Democratic Republic of Congo on conditions of reciprocity, or under international conventions
- they must hold a doctorate or an undergraduate degree in law, or an equivalent diploma awarded by a foreign university, which must establish that they know Congolese law
- they must not have been convicted for actions infringing good faith, or the integrity of accepted principles of morality, unless they have been pardoned or rehabilitated in respect of such convictions
- they must not have been the perpetrator of offences of the types indicated above where these have resulted in disciplinary or administrative sanctions, removal from office, or withdrawal of licence or authorisation, unless expressly authorised by the office of the Prosecutor-General
- they must prove their good conduct record by producing a certificate of good conduct issued by the administrative authorities of their place of residence of the past five years

To be entered on the Roll of the Association, the candidate must also hold a Certificate of Professional Aptitude.

The legal profession is organised by the National Council of the Lawyers' Association, which ensures that each Bar adheres to the rules governing the profession, and takes any necessary disciplinary action. Lawyers entered on the Bar Roll may appear before any court, apart from the Supreme Court of Justice which, in the area of appeals and judicial review, is reserved exclusively for lawyers attached to that court.

Lawyers may exercise their profession individually or as a group, in the form of an association, or as the associate of another lawyer or group of lawyers.

Foreign lawyers are authorised to exercise the profession of lawyer in the Democratic Republic of Congo, subject to compliance with the following prior obligations:

- requesting additional registration with one of the Bars of the Democratic Republic of Congo, if such exercise is permanent
- choosing a law firm within the jurisdiction of the Court of Appeal of Lubumbashi for all acts that may from time to time be carried out in that jurisdiction
- presenting him/herself to the political/administrative authorities and public institutions, accompanied by a lawyer or lawyers of Congolese nationality, as part of his/her professional duties



## 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The court system in the Democratic Republic of Congo consists of the following.

- the first instance courts:
  - the Magistrates' Courts (*tribunaux de paix*), which deal with any dispute to do with family law, inheritance law, gifts and collective or individual land disputes governed by custom. They also handle the execution of deeds
  - the District Courts (*tribunaux de grande instance*), which handle all disputes that do not come within the jurisdiction of the Magistrates' Courts. When a case is brought before the District Courts concerning the jurisdiction of the Magistrates' Courts, they rule on the merits as a court of last resort, if the defending party registers his/her express consent through the court registrar
- the higher courts:
  - the District Courts (*tribunaux de grande instance*), which handle appeals against judgments handed down by the Magistrates' Courts. They also handle the execution of judicial decisions, and enforce decisions of foreign jurisdictions and enforceable deeds drawn up by the authorities of another country
  - the Courts of Appeal (*Cours d'appel*) are found in the jurisdiction of each province, and handle appeals against judgments handed down at first instance by the District Courts, the Labour Tribunals and the Commercial Courts. The Courts of Appeal, moreover, deal at first instance with applications for annulment on grounds of breach of the law, made against administrative decisions
- the following specialist courts, which are an integral part of the judiciary:
  - the Commercial Courts: they hear all disputes relating to contracts and transactions between merchants, disputes between partners, disputes between all persons relating to commercial transactions including disputes relating to trade companies, businesses, stock market operations, to dual actions if the defendant is a merchant, complex litigation including ones where there are several defendants, one of whom is either the depositor or the executor of a negotiable instrument (cheque, bill of exchange or promissory note), disputes relating to debt agreements, bankruptcies, unfair competition, and offences relating to economic and trade legislation
  - the Labour Tribunals: they have jurisdiction over individual disputes occurring between an employee and his employer or in the course of an employment contract, collective agreements or legislation and the regulation of labour and social welfare, collective labour disputes (conflicts between one or more employers, on the one hand, and a number of members of their staff on the other, concerning the working conditions when they are likely to jeopardise the smooth running of the company or social peace)
  - the Juvenile Courts: they have sole jurisdiction over matters involving a child (persons under 18) having breached the law. They also have jurisdictions over matters relating to identity, capacity, filiation, adoption and kinship as provided by law. The appeal chambers of these courts hear judgments rendered in the first instance courts of juvenile courts
- the Judicial Committee of the Supreme Court of Justice rules on appeals relating to the final judgments and rulings of all courts. It thus substitutes itself for the Supreme Court until the latter is fully functional
- the Common Court of Justice and Arbitration (Community jurisdiction of OHADA) rules on appeals of the final decisions and judgments of the commercial courts.

## 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

Limitation periods vary depending on the type of action and the parties involved:

- the ordinary limitation period for bringing an action for damages in a contractual situation is 30 years
- the limitation period applicable to commercial actions is five years, although there are some shorter limitation periods

Specific limitation periods apply to certain types of actions. For example, arrears in maintenance payments, house rentals and in general everything payable annually, or at shorter regular time intervals, have a time limit of five years. Actions brought for payment of salary are time-barred one year from the date the salary becomes payable, and other lawsuits arising from an employment contract are time-barred three years after the occurrence of the act from which the lawsuit arises.

Parties may not waive or alter time limits through private agreements.

The causes for interruption of the limitation period are "natural" (an interruption of fact) or "civil". A summons, notice or order sent to the party one wishes to sue is a case of civil interruption. The period of limitation is also interrupted by recognition that the debtor or owner has rights to the thing he is being sued for.

Time limits do not run in respect of a debt that depends on a condition until that condition is fulfilled, for example, in reference to a debt due by a fixed date until that day arrives.

## 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

Lawyers are forbidden from disclosing secrets entrusted to them by virtue of their profession, or from taking advantage themselves of such privilege in any way.

Breaching professional confidentiality is punishable by law. The law does, however, waive the ban on disclosing professional secrets when the discloser of the secret is called to give witness evidence in court, and when a provision in law obliges the lawyer to disclose this secret.

For example, the Law No 04/016 of 19 July 2004 on combating money laundering and the financing of terrorism states that lawyers may be asked to waive their professional confidentiality obligations in certain cases without this making them criminally liable.

The lawyer's professional confidentiality obligation is a matter of strict public policy. It is therefore not possible for a client to remove such obligation from his/her lawyer. The facts covered by professional confidentiality are all those which, in general, the lawyer learns in the course of exercising his/her profession, including from third parties. Anything said confidentially in the lawyer's offices, letters from the client to his/her counsel, facts learned during the investigative stage, and even facts accidentally learned by the lawyer while acting professionally are therefore confidential.

## 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

Civil proceedings are brought before the court by means of a summons, in which the plaintiff orders his/her opponent to appear before the judge competent to handle the matter. The summons is drawn up by the court registrar, although in practice counsel for the plaintiff drafts it and hands it to the court registrar who merely serves it on the concerned party. The parties may also always appear voluntarily before the judge.

The deadline given in the summons is eight full days between the date of summons and appearance in court, plus one day for each hundred kilometres of distance between the court and the opponent's place of residence. The deadline given in a summons in the case of persons not domiciled or residing in the Democratic Republic of Congo is three months.

In urgent cases, the president of the competent court may, by means of an order issued on application, authorise a summons with a shorter period of notice.

If, after appearing, the defendant fails to appear again or fails to make representations, the plaintiff may pursue the proceedings after notice has been sent to the defendant. After 15 clear days the plaintiff may demand that a ruling is given on his/her claim; the ruling is then deemed to have been held in the presence of the accused.

The parties must present written conclusions, and these are communicated amongst themselves or their attorneys, either directly or through the court registrar, with the documents they expect to use, at least three days before the hearing of the case.

### Conciliation

There are also compulsory conciliation procedures prior to court action brought before the lower courts. In labour law, for example, individual and collective disputes are not admissible before the Labour Court unless they have been submitted beforehand to a conciliation and/or mediation procedure. Likewise, in commercial cases, the OHADA Uniform Act Organising Simplified Recovery Procedures and Measures of Execution provides that the court before which the objection to an order to pay is brought must proceed to attempt conciliation. If this is successful, the president of the court draws up a memorandum of conciliation signed by the parties, and the delivery of this has the enforcement formula attached to it. If the attempt at conciliation fails, the court will immediately rule on the claim for recovery by means of a decision that will have the effect of a decision taken in the presence of the other party (*décision contradictoire*).

## 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

Evidence is submitted to the court at the same time as the claims and conclusions, and before debate is closed. The judge on the merits may take any steps he/she deems necessary to ensure that the matter undergoes full investigation. He/she lays down deadlines as deemed necessary for the carrying out of each of the measures he/she orders.

Under the Civil Procedure Code, evidence may be admitted either in writing or in the form of documentation, or as witness testimony, or as presumptive evidence, by admission or oath. The

Civil Procedure Code admits evidence in the form of expert testimony, visits to the sites, and the personal appearance of the parties and questioning of them. Witnesses are heard separately, in the presence of the parties if they appear. The judge conducts the questioning procedure.

### Documents

The party using a document as evidence in proceedings is obliged to submit it to every other party to proceedings. If the party fails to submit such evidence, the injured party may raise the delaying objection of failure to communicate documents, the aim of which is to ensure that the documents used by the opposing party as the basis of its claim or its defence are communicated to the party that raised the objection.

In Congolese law, there is no "disclosure" procedure. On the other hand, there is a procedure for enforced production of a piece of evidence (an *ad exhibendum* motion). Thus, if there are serious, specific, and corroborative reasons to presume that one party or a third party holds a document containing the proof of a pertinent fact, the judge may order this document to be lodged in the file for proceedings, even against the party such document could harm. The judge may draw inferences if a party refuses to produce the document.

The request to communicate documents, when made for the first time at appeal, cannot be deemed as a new request; such demand is merely the use of a new method that may be proposed under any circumstances in the courts dealing with the merits, or even in ones replaced *ex officio* by the Court of Appeal, if they consider this necessary or useful.

### Experts

If an expert report is required, it is ordered through a ruling that names the experts and the precise mission entrusted to them, and gives them a deadline by which they must lodge their report. Only one expert is appointed, unless the judge deems it necessary to appoint three. The parties may bring an expert with them to the hearing.

An expert who fails to carry out his/her task may be sentenced by the court that appointed him/her to pay all the costs unreasonably incurred, and even to pay damages. If the judges do not find sufficient clarification in the report, they may order a new expert report.

## 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

In civil cases, it is the parties who control the procedure, and the judge is a passive participant. Notwithstanding this, the parties must comply with public policy provisions in the area of calculating periods of notice, in particular the periods of notice for summonses and communicating documents. It is the parties who settle the case file to be submitted to the court, and suggest the dates for hearings. The speed of the procedure depends, however, on various factors, for example, the subject of the dispute, the amount involved, or indeed the workload of the judge. The parties are free to end the proceedings by mutual agreement.

The deadline provided in law for rendering a judgment, following deliberations, is 30 days for civil cases, 15 days for labour cases, 10 days for criminal matters and eight days for commercial cases. However, in practice, this depends on the diligence of the parties.

In general, judgments are delivered considerably later than the deadline provided in law.

## 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTEREST SPENDING JUDGMENT?

*Référé* proceedings, which allow one party to obtain an interim decision without prejudice to the decision on the merits of the case, do not exist in the Democratic Republic of Congo.

## 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

The available enforcement measures are laid down in the OHADA Uniform Act Organising Simplified Recovery Procedures and Measures of Execution, and include:

- seizure and sale (*saisie-vente*); impounding and seizure of movable property under a prior claim (*saisie-appréhension et la saisie-revendication des biens meubles corporels*); sequestration of partnership rights and transferable securities (*saisie des droits d'associés et des valeurs mobilières*)
- attachment order (*saisie-attribution de créances*)
- attachment of earnings (*saisie et cession des rémunérations*)
- seizure of immovable property (*saisie immobilière*)

Apart from maintenance debts and exchange debts, the judge may grant grace periods to the party he/she sentences, taking into account the situation of the debtor and the needs of the creditor. The judge may order postponement of payment of the amounts owing, up to a limit of one year.

## 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

The unsuccessful party bears the court costs. These costs cover all expenses itemised by the court for the duration of proceedings. In practice, courts tend to be restrained in terms of the amounts they cover, and the real expenses of a case are rarely covered in full.

Lawyers' fees are not assessed by the judge. In principle, they are freely agreed between the lawyer and his/her client, according to a tariff of fees fixed by the National Council of the Lawyers' Association. Fees and expenses owing to lawyers may be recovered via an enforcement order drawn up by the lawyer, stamped, and with the enforcement formula attached by the President of the Court of Appeal.

There are no particular provisions in law applicable to foreign claimants as regards court fees, since in civil cases foreign nationals have the same rights as nationals.

## 11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

Decisions of the lower courts may be appealed when one of the parties considers he/she has been unfairly treated, and that it is in his/her interests to challenge the findings of the first judge. Appeal, like every remedy, is a right guaranteed by law to every citizen.

Parties have 30 days to appeal first instance judgments. Notwithstanding this, in commercial cases the period given is eight days. These deadlines run, for judgments given after due hearing of the parties, from the day of the application, and for judgments by default, from the day when an objection is no longer admissible.

Appeals are lodged either by way of a declaration received and authenticated by the registrar of the Court of Appeal, or by registered letter sent by post to the registrar of the court. No new claim may be made on appeal, unless it is a demand for compensation, or the new claim is a defence against the main claim.

Within the deadline fixed for lodging an appeal, the appellant party must provide the registrar with all the evidence required in order to summons the party in question to the Court of Appeal. The summonsed party may cross-appeal, even if he/she accepted the judgment without objection.

Appeal suspends enforcement of the judgment, save where the court has ordered immediate enforcement. If immediate enforcement has been ordered by the judgment being appealed when it should not have been, the appellant party may, at the hearing, obtain a prohibition against enforcement, with a summons at short notice.

Appeals have devolving effect, meaning that the court dealing with the appeal only deals with the part of the judgment to which the appeal refers.

After a decision on appeal, it is possible to go to the Court of Cassation with the intention of requesting the judicial committee of the Supreme Court of Justice to annul the final decisions of lower courts, or the Common Court of Justice and Arbitration, as the court of last resort. The Supreme Court can only order a judgment on issues of law and not on the facts. It examines whether the judgments and orders referred to it violate law or custom. Appeal to the Court of Cassation does not have suspensive effect. If the appeal to the Supreme Court is successful, the case is remanded to a new court for a second judgment.

## 12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

In civil cases, proceedings can be brought against the Government or public authorities. However, the property of the State is in the public domain and cannot be seized.

State-owned companies do not have jurisdictional immunity and proceedings can be brought against them in the same way as against ordinary legal entities.

## 13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

The judgments of foreign courts and writs received by non-national court registrars have no enforceability until their execution has been ordered. The decisions of foreign courts are given executive force in the Democratic Republic of Congo by the higher courts (*tribunaux de grande instance*):

- if they do not contain anything contrary to public policy and order in the Democratic Republic of Congo
- provided, according to the laws of the country where the decisions were handed down, they have the force of *res judicata*

- provided, according to the same laws, the copies produced of the judgment fulfil the necessary conditions of authenticity
- provided the rights of defence were upheld
- provided the foreign court is the sole competent court on grounds of the defendant's nationality

Enforcement (*exequatur*) is granted whatever the value of the dispute by the President of the District Court in the place where enforcement is being sought. The President must take care to determine that the decision complies with the stipulations indicated above.

Foreign judgments subject to *exequatur* and rendered enforceable in the Democratic Republic of Congo are enforcement orders. These judgments, delivered abroad, without an international convention, only have executive force through the *exequatur* procedure, which must be conducted before the District or other higher court.

In practice, this procedure does not present serious problems.

## ARBITRATION

### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

The Democratic Republic of Congo is a Member State of OHADA (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires* – Organisation for the Harmonisation of Business Law in Africa). The OHADA Treaty was first signed on 17 October 1993. Under the OHADA Treaty, the Council of Ministers of Justice and Finance adopt "uniform acts" that are directly applicable and enforceable in each of the Member States. Arbitration in the OHADA Member States is governed by the Uniform Act on Arbitration within the Framework of the OHADA Treaty, which was adopted on 11 March 1999 and came into force in the Member States on 11 June 1999 (the Uniform Act). The Uniform Act is not based on the UNCITRAL Model Law. It was drafted separately, but is nevertheless consistent with the fundamental principles of international commercial arbitration and main features of the UNCITRAL Model Law.

The Uniform Act applies to both national and international arbitration and governs all arbitration proceedings with a seat in a Member State of OHADA.

One of the most important characteristics of OHADA arbitration is the Common Court of Justice and Arbitration (*Cour Commune de justice et d'arbitrage*) (the CCJA), which acts as both a permanent arbitration institution and a supreme court of arbitration for OHADA Member States.

Prior to the adoption of the Uniform Act, arbitration law was governed by the decree of 7 March 1960, namely articles 159 to 194 of the Civil Procedure Code (*Code de procédure civile*). This has now been replaced, in respect of the above-mentioned provisions, by the Uniform Act of 17 October 1993 on arbitration, in the context of the OHADA Treaty, and also by Law No 004-2002 of 21 February 2002 on the Investment Code.

### 15. WHAT ARE THE MAIN NATIONAL ARBITRATION INSTITUTIONS?

There are two national arbitration institutions in the Democratic Republic of Congo: the Centre for Arbitration of the Congo and the National Centre for Arbitration, Conciliation and Mediation. They are mostly concerned with commercial disputes.

The Centre for Arbitration of the Congo (the CAC), created in 2003, is an institutional centre organised as a non-profit association under Law No 004-2001 of 20 July 2001, which states the general conditions applicable to non-profit associations and public benefit organisations. The main aim of the CAC is to promote the practice of arbitration and mediation as legal techniques for the peaceful settlement of disputes. As a secondary function, the CAC hopes to reduce systematic recourse to the courts and higher courts in relation to specific types of dispute by proposing an effective solution to the parties.

The National Centre for Arbitration, Conciliation and Mediation (the CENACOM), an initiative of the Congo Business Federation (the CBF), was created in December 2004, in the form of a public benefit organisation, pursuant to the law mentioned above. Its aim is to promote the use of alternative methods of settling commercial disputes, specifically arbitration and mediation. To this end, CENACOM publishes an approved list of arbitrators and mediators, and creates rules to govern arbitration and mediation. CENACOM is not designed to rule on the merits of disputes. This competence is reserved solely for the arbitral tribunal formed at the wish of the parties, and in accordance with the rules of arbitration or mediation.

The main arbitration institution in the Democratic Republic of Congo is not, however, to be found at national level. It is the Common Court of Justice and Arbitration (the CCJA), created by the OHADA Treaty, and located in Abidjan, Côte d'Ivoire. This court, which also has a judicial function, fulfils the role of a centre for arbitration and administers procedures governed by the CCJA Rules of Arbitration. It may be distinguished from a classical centre for arbitration in the sense that it is not a private institution, rather an institution created and organised by OHADA. In order to have recourse to the CCJA as a centre for arbitration, article 21 of the OHADA Treaty states that the contract must be executed either partially or wholly within one or more Member States, or that one of the parties must have his/her domicile or habitual place of residence in a Member State. According to legal authors, it should also be possible to have recourse to arbitration conducted by the CCJA if these conditions are not fulfilled, but if the parties have expressed their wish to this effect in their arbitration agreement.

### 16. ARE THERE ANY RESTRICTIONS ON WHO MAY REPRESENT THE PARTIES TO AN ARBITRATION?

The Uniform Act does not set any restrictions on persons who can represent parties in a case of arbitration. They are entitled but not required to instruct counsel (article 20 of the Uniform Act).

The parties may use the services of a foreign lawyer according to the rules described under question 1.

### 17. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

Article 3 of the Uniform Act states that the arbitration agreement must be made in writing or by any other means of which evidence

can be produced. No particular format is required. The Uniform Act also provides that contracts may contain an arbitration clause by reference, contained in a different document.

The Civil Procedure Code does not consider written form to be a requirement for the validity of the arbitral clause. Before the Uniform Act, written form was only envisaged as a method of proof in respect of domestic arbitration. The rule was not applied to international arbitration, where the existence of the arbitration agreement can be proved by any method.

### **18. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?**

National courts must decline jurisdiction where there is an arbitration agreement, save where the arbitration agreement is "manifestly void". Courts cannot decline jurisdiction at their own discretion.

If the arbitral tribunal has already been composed, the national court must decline jurisdiction at the request of a party.

Case law prior to the Uniform Act states that, as soon as they are created, arbitration clauses are binding on the courts, and that therefore they have to decline jurisdiction and send the parties to arbitration.

It is, however, possible, if there is an arbitration agreement, to appear before a national court to obtain interim or conservatory measures that do not require a review of the case on the merits, in circumstances that have been "recognised and reasoned" as urgent or where the measure must be performed in a State that is not part of OHADA.

National courts can also intervene in very limited circumstances, solely with a view to assisting the arbitration process (see questions 22 and 23 below).

When the seat of arbitration is outside OHADA, one of the parties may, in accordance with the Civil Procedure Code, and until the arbitral tribunal is formed, ask the Congolese judge with jurisdiction to order interim measures in urgent cases. Congolese law therefore allows, by way of exception, interim or conservatory measures to be ordered by the higher court or the Commercial Court, as the case may be, that has jurisdiction because of the arbitration, notwithstanding agreement to the contrary by the parties, on grounds that the arbitral proceedings have not yet commenced and the matter is urgent. The notion of urgency is left to the discretion of the national court that is dealing with the case.

### **19. IF THE ARBITRATION AGREEMENT AND ANY RELEVANT RULES ARE SILENT, HOW MANY ARBITRATORS WILL BE APPOINTED, AND WHO IS THE APPOINTING AUTHORITY?**

The Uniform Act does not stipulate a specific number of arbitrators if the arbitration agreement is silent on this point. It does provide that an arbitral tribunal must have a sole arbitrator or three arbitrators.

If there is no definition in the arbitral agreement on the appointment of arbitrators, arbitration is entrusted to one or three arbitrators appointed by the President of the court having jurisdiction. In the Democratic Republic of Congo, jurisdiction is

given either to the higher court or to the Commercial Court, depending on whether the dispute is civil or commercial in nature, unless the parties appoint another court.

Each time it is necessary for a court to appoint arbitrators, the request is sent to the President of the court in question. The decision of the presiding judge is not subject to appeal.

Settlement of the matter by arbitration in the CAC assumes that, if the parties have not established the number of arbitrators by mutual agreement, the CAC will appoint a sole arbitrator, unless the dispute, in its opinion, justifies appointing three, and in the latter case the parties have a period of 30 days in which to appoint the arbitrators.

The arbitration rules of CENACOM indicate that the decision taken by the parties on the number of arbitrators is subject to the approval of CENACOM's management committee, or its President. The latter may also, in certain cases (disagreement between the parties, refusal of approval, failure of the parties to appoint arbitrators) determine the number of arbitrators, either *ex officio* or at the request of the parties.

### **20. WHAT RIGHTS ARE THERE TO CHALLENGE THE APPOINTMENT OF AN ARBITRATOR?**

Article 7 of the Uniform Act contains rules for challenging an arbitrator. Arbitrators must notify the parties of "*any circumstance about him/herself*" for which they may be challenged. Any disputes will be settled by the competent court of the Member State of the seat of the arbitration, save where the parties have provided for a different procedure for challenging arbitrators. For institutional arbitration by the CAC or CENACOM, they have their own rules on challenges to arbitrators.

Arbitrators may only be challenged on grounds that come to light after their appointment.

This decision is not subject to appeal.

### **21. DOES THE DOMESTIC LAW CONTAIN SUBSTANTIVE REQUIREMENTS FOR THE PROCEDURE TO BE FOLLOWED?**

The Uniform Act requires parties to receive equal treatment and to have every opportunity to exercise their rights (article 9); arbitrators may not base their decision on their own findings without first allowing parties to submit observations (article 14).

Article 18 of the Uniform Act provides that deliberations of the arbitrators must be kept secret.

The Uniform Act also provides that the duration of the arbitration may not exceed six months from the date on which the last arbitrator accepts the terms, save where extended by agreement of the parties or by petitioning the competent court (article 12). In the Democratic Republic of Congo this is the higher court (*tribunal de grande instance*) or the Commercial Court to which the case has been referred, or at the request (in the case of commercial arbitration) of the party initiating the proceedings. The court's decision on an extension is not subject to appeal.

The parties appear in person, either through their representatives, who bring documents to proceedings, or through special powers of proxy approved by the arbitrators. The documents and defences communicated beforehand are submitted to the arbitrators

without any formality, within the deadline they fix. If one of the parties fails to submit them within this deadline, the arbitrators will record this and rule solely on the basis of the documents received.

The arbitrators rule in accordance with the rules of law, unless the arbitration agreement gives them powers to rule as good and equitable men (*amiabes compositeurs*). When there are several arbitrators, the arbitral decision must be rendered by a majority of votes. It is signed by the arbitrators.

## 22. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED INSIDE THE JURISDICTION?

The existence of an arbitration agreement in principle rules out any intervention on the part of the national courts in arbitral proceedings, until an award has been issued.

Nevertheless, parties may petition the competent court in the Democratic Republic of Congo in the following circumstances under the Uniform Act:

- to resolve difficulties encountered with composing the arbitral tribunal, to appoint the sole arbitrator or the third arbitrator (articles 5 and 8)
- to rule on challenges against arbitrators, where the parties have not provided for a different procedure (article 7)
- to extend the deadline for conclusion of the arbitration, where there is no agreement between the parties to do so, at the request of a party or the arbitral tribunal (article 12)
- to order interim or protective measures when urgently necessary (recognised circumstances giving grounds), or when the measure would be performed in a non-OHADA State, provided these measures do not require a review of the case on the merits (article 13)
- to assist the arbitral tribunal, at its request, with the collection of evidence (article 14)

## 23. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?

Within OHADA, as indicated above (question 22), an intervention by the national court is in principle ruled out in the presence of an arbitral agreement. Moreover, any measures concerning the formation of the arbitral tribunal and the conduct of proceedings are the responsibility of the competent court in the country within which the seat of arbitration is located. However, the intervention of a national court apart from the competent court in the country within which the seat of arbitration is located is possible, for the purpose of taking protective or interim measures, under the conditions set out above under question 18 (article 131).

The rules of local law in force prior to the Uniform Act (namely the Code of Civil Procedure) should be applicable in connection with arbitration where the seat of arbitration is outside OHADA. The national court may theoretically intervene:

- in the event of a failure by one party to inform the other party, within eight full days, plus extra time limits for distance, of the name of the arbitrator (this appointment is made by the President of the competent higher court (*tribunal de grande instance*)). The same occurs in case of disagreement between the parties on the choice of arbitrator or arbitrators (article 161)

- at the request of the parties, to take protective measures in cases of urgency (article 163)
- in the event of one party refusing to sign the compromise agreement, or in case of disagreement about its wording (article 164)
- in the event of a challenge of an arbitrator (article 172) in the event of suspension of the compromise agreement owing to the death or incapacity of one of the parties. The competent judge will decide when this suspension ends (article 174)
- if a witness refuses to appear, to take an oath, to give a testimony or sign his/her testimony. He/she is heard by an assigned judge, at the request of one of the parties submitted to the President of the competent court (article 176)
- if an incident occurs which the arbitrators cannot know of. The arbitrators will allow the parties to pursue the case before the competent court, and the deadline for the arbitration is suspended until the day on which the arbitrators are notified that the incident has acquired force of *res judicata* (article 177)

## 24. DO ARBITRATORS HAVE POWERS TO GRANT INTERIM OR CONSERVATORY RELIEF?

Although this matter is not dealt with directly in the Uniform Act, legal writers generally agree that it is possible for arbitrators to order interim or conservatory relief, save where the parties have agreed otherwise.<sup>2</sup>

## 25. WHEN AND IN WHAT FORM MUST THE AWARD BE DELIVERED?

Save as agreed otherwise by the parties, arbitral awards must be issued within six months from the date on which all of the arbitrators have accepted their arbitrating functions. This term can be extended by agreement between the parties or by order of the higher court (*tribunal de grande instance*) or Commercial Court, at the request of a party or the arbitral tribunal (article 12).

Parties can set special requirements for awards. Failing this, awards are issued by majority, where the tribunal comprises three arbitrators, and must state the grounds for the award. They must be signed by at least two of the three arbitrators.

## 26. CAN A SUCCESSFUL PARTY RECOVER ITS COSTS?

The Uniform Act contains no provisions on this point.

Where arbitration is conducted under the aegis of the CCJA, the arbitrator is empowered to award costs. However, nothing prohibits the parties from inserting into the arbitration clause or agreement a provision to the effect that the successful party should be entitled to this reimbursement.

## 27. ON WHAT GROUNDS CAN AN AWARD FROM AN ARBITRATION SEATED IN THE JURISDICTION BE APPEALED TO THE COURT?

The only remedy against an arbitral award is an application to set aside that award, brought before the competent court in the Member State in which it was issued, within one month as from the date of service of the award once rendered enforceable (articles 25 and 27).

The circumstances in which an application to set aside can be brought are limited to the following (article 26):

- the arbitral tribunal ruled without an arbitration agreement or with respect to an invalid or expired agreement
- the arbitral tribunal was not properly composed
- the arbitral tribunal did not rule in compliance with the terms of arbitration
- due process was not adhered to
- the arbitral tribunal breached a public policy rule of the OHADA Member States
- there are no reasons for the award

Bringing an application to set aside an arbitral award suspends enforcement, unless the tribunal ordered immediate enforcement. The decision can only be appealed to the CCJA (articles 25 and 28).

This is the only remedy available to parties before a national court. The other remedies are third party opposition and the application for a review of the award, which must be submitted to the arbitral tribunal (article 25).

## 28. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

The Uniform Act is silent on the possibility of appealing an arbitral award issued abroad before local courts. However, if the parties have agreed on this possibility, this could potentially be allowed.

The appeal would then be brought before the Appeal Court in the jurisdiction where the higher court (*tribunal de grande instance*) or Commercial Court chosen by the parties is located, or if the parties fail to agree, by the higher court (*tribunal de grande instance*) or Commercial Court chosen by the party initiating the appeal.

The deadline for lodging an appeal is one month starting from the date the arbitral award rendered enforceable is notified.

The parties may also agree to organise an appeal before another arbitral tribunal. The latter has the legal power to deal with arbitral awards rendered in ordinary law, and decisions given by good and equitable men (*amiables compositeurs*). When this applies, it is the parties that state the deadlines for the appeal and, failing this, they are bound by those deadlines given in ordinary law.

## 29. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF: (I) AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION AND (II) DOMESTIC AWARDS?

The Democratic Republic of Congo is a signatory to the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). However, Law No. 13/023 of 26 June 2013, which authorised the accession of the Democratic Republic of Congo to the Convention, makes the following reservations:

- arbitral awards issued before the accession of the Democratic Republic of Congo to the New York Convention cannot be enforced under this international legal instrument
- arbitral awards meant to be enforced in the national courts must focus solely on matters considered as commercial by national legislation

- arbitral awards issued in States which have not ratified or adhered to the New York Convention are not eligible for enforcement in the Democratic Republic of Congo
- the New York Convention does not apply to disputes bearing on real property located in the designated State or on a right derived from this property

For the enforcement of arbitral awards issued abroad, any interested party is obliged to comply with the procedure set forth in the domestic statutory rules for the recognition of an arbitral award. These require (in accordance with Article 120 of Law No 13/011-B of 11 April 2013 bearing on the organisation, functioning and jurisdiction of the judiciary), that there be an *exequatur* of the award prior to its enforcement. One must also comply with the following conditions:

- the party seeking enforcement must submit:
  - a duly certified original copy of the arbitral award and proof of service
  - an authenticated original copy of the arbitration clause or agreement signed by the parties
  - a certified translation of the award and of the arbitration clause if they are not drafted in French
  - proof of payment of the procedural fees as required by Congolese law
- the arbitration clause or agreement should comply with the law of the country to which the parties subjected it or, in the absence of any indication by the parties, with the law where the award was issued
- the procedure for the appointment of arbitrators and of the arbitral court must comply with the law of the country where the arbitration occurred
- the defence rights of the party against whom the award is enforced must be complied with in the arbitration proceedings
- the award should be final
- the award should not pertain to a dispute which cannot be subject to arbitration pursuant to Congolese law
- the award should not violate Congolese public policy

To enforce awards issued within an OHADA Member State, the Uniform Act requires parties to obtain recognition of the award from the competent court in that Member State. In the Democratic Republic of Congo, this means the President of the higher court (*tribunal de grande instance*), who proceeds by means of an order attached to the original of the request from the party initiating the enforcement proceedings.

This involves producing the original arbitral award, together with the arbitration agreement or copies of these documents meeting the necessary authentication conditions and, where necessary, a sworn translation into French (article 31).

Decisions refusing to recognise an arbitral award can be appealed to the CCJA but decisions granting recognition of enforcement are not subject to appeal (article 32).

Awards issued in a different OHADA Member State are recognised in other Member States under the conditions set out in the applicable international agreements or, otherwise, under the same conditions as those stated in the Uniform Act.<sup>3</sup>

The enforcement procedure is not one of due process. The judge will not grant enforcement to a court decision which, in his/her opinion, is void, although nor will he/she systematically verify the procedure, since no debate takes place in court.

The order granting or dismissing enforcement can be appealed. The latter has suspensory effect. The appeal is formed by means of a petition addressed to the First President of the Court of Appeal in the jurisdiction of the higher court (*tribunal de grande instance*) declared competent. The appeal must be sought within 15 days, starting from the day the enforcement order is notified, and the procedure is adversarial.

Arbitral awards on appeal are only enforceable if they have obtained an enforcement order granted by the President of the higher court (*tribunal de grande instance*) chosen by the parties.

The arbitral award cannot be the subject of a challenge or an appeal in cassation, even if the parties have agreed otherwise.

### 30. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

Following the accession of the Democratic Republic of Congo to the New York Convention, we confirm that arbitral awards issued abroad are now easily enforceable (subject to the requirements set out in question 29 above).

## ALTERNATIVE DISPUTE RESOLUTION

### 31. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

When a case is referred to a tribunal, the parties may have recourse to an alternative dispute resolution procedure. This is the case when the parties to a dispute agree to an out-of-court agreement which will resolve the dispute. For example, this may take the form of a settlement agreement, and the parties are then obligated to inform the tribunal hearing the case of the existence of this settlement in order to obtain the dismissal of the case.

However, this is only possible in civil and commercial matters.

See question 5 above regarding compulsory conciliation processes in actions before the lower courts.

## REFORMS

### 32. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

To the best of our knowledge, there are currently no plans to make any significant reforms of civil or commercial procedure in the near future.

## ENDNOTES:

1. This article is the only one to refer to a "jurisdiction" instead of "the competent court in the Member State". It also provides for interim of protective measures that must be implemented in a country that is not an OHJADA Member State.
2. This is clear, in particular, from a reading *a contrario* of article 13, which limits intervention of the national court to recognised cases of urgency (in domestic cases).
3. Article 34 of the Uniform Act does not expressly refer to foreign awards. Nevertheless, legal authors agree that it does apply to foreign awards. It may be advisable to verify this point with local counsel.

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# DJIBOUTI



## INTRODUCTION

Djibouti has a civil law system which is based on the Constitution of 4 September 1992 (the highest legal authority), the Djibouti Civil Procedure Code, and on various laws which establish the judicial system.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

The profession of lawyer (*avocat*) is governed by the Law of 25 January 1987. There are certain pre-requisites to be satisfied by anyone wishing to practise law, including:

- having Djiboutian nationality
- obtaining a master's degree (*maîtrise*) in law (there is no *certificat d'aptitude a la profession d'avocat* (CAPA))

Lawyers are all members of a single Bar, administered by a Bar Association (*Conseil de l'Ordre*) and presided over by a Bar President (*Bâtonnier*). The *Conseil de l'Ordre* ensures that practitioners abide by the rules of professional conduct and it carries out any appropriate disciplinary actions.

Lawyers registered with the Djibouti Bar can make submissions, represent clients and plead before any court, or other adjudicative or disciplinary bodies, and assist or represent others before public authorities.

Foreign lawyers may plead before the courts in Djibouti if authorised to do so by the Minister of Justice (a lack of response within three days counts as *de facto* authorisation).

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The courts of ordinary law are structured as a three-tier pyramid:

- the *Tribunal de première instance* (Court of First Instance) issues final judgments for cases involving DJF 200,000 or less. The only permanent district is Djibouti City
- the Court of Appeal
- the Supreme Court

There are also courts with specific subject matter jurisdiction: traditional courts for purely local disputes, the *Tribunal administratif*

(Administrative Court), the *Tribunaux de statut personnel* (Personal Status Courts) and the *Cour criminelle* (Criminal Court).

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

Time limits vary depending on the type of claim:

- the statute of limitations for civil matters under ordinary law is 30 years
- the statute of limitations for commercial matters under ordinary law was 10 years. It is now five years for obligations arising after 1 August 2012
- specific time limits apply to certain types of actions (one year for land-based or maritime transport, or for employment contracts; two years for commercial sales to individuals or other merchants)

There is no provision for contractually adjusting time limits, but doing so would seem to be contrary to the public policy underpinning statutory time limits. At most, case law may accept adjustments between merchants that do not have the effect of depriving creditors of their ability to take effective action, or adjustments made after the obligation was created and while the statutory time limit is in effect.

Events that suspend time limits from running are debtor acknowledgment of his/her debt, filing for legal proceedings, and enforcement instruments.

### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

Lawyers have an obligation to maintain confidentiality. All written and oral communications between lawyers are confidential unless they bear the reference "non-confidential" ("*non confidentielle*") or "I hereby state the present may be treated as public" ("*je donne à la présente un caractère public*"). When an agreement between parties has taken concrete form in correspondence between lawyers, it can be submitted in court, potentially under the supervision of the Bar President. According to the most recent case law, confidentiality also applies to conversations between a lawyer and client, but not to letters written by the lawyer to an opposing party.

Lawyers who infringe rules of confidentiality are subject to criminal penalties (one year's imprisonment and a fine of DJF 200,000) save where they involve disclosure of abuse or deprivations affecting a minor or vulnerable person to judicial authorities.

Clients can release their lawyers from their duty of confidentiality.

## 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

Civil and commercial actions are brought in the *Tribunal de première instance*:

- by way of a writ served by a bailiff to the opposing party at least five days before the hearing if the party resides in Djibouti City, 20 days before the hearing if the party resides anywhere else in Djibouti, two months before if the party resides in Europe or in a State that borders Djibouti, and three months before if the party resides in any other place.

For urgent interlocutory hearings, claimants can submit a petition to have an urgent summons served without observing the above intervals, even on the very same day as the petition.

This authorisation is granted in an order from the presiding judge of the *Tribunal de première instance* (*ex parte*) and must be stated at the top of the urgent summons.

- through an *ex parte* petition submitted to the presiding judge of the *Tribunal de première instance*. The claimant submits the petition together with exhibits and a draft order; the judge may sign the order or dismiss it without summoning the opposing party. The order must always be served on the opposing party by bailiff
- in certain specific matters, applications may be made to the *Tribunal* by way of statements (*mémoires*) (commercial rent increases) or technical submissions (*incident de saisie immobilière*) (procedural pleas in real property seizures) that are filed with the court clerk's office

In cases brought through a complaint, claimants submit their exhibits to the court and the opposing party at the initial hearing, and the parties exchange submissions and other exhibits before the court (there is no case management judge).

There are no strict deadlines, but if a party fails to make submissions despite several adjournments specifically for that purpose, the judge may either strike the matter off the docket (for claimant default) or rule on the case as it stands.

The mandatory conciliation procedure has been abolished (except in employment matters, presided over by the Work Inspector).

## 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

In civil cases, an obligation must be fully or partially substantiated by a written document (notarised document, private instrument, IOU, correspondence, etc). For commercial cases and disputes between merchants, all types of evidence are admissible and may be based on written or oral testimony, presumptions, ledgers, correspondence, invoices, etc.

Evidence in all types of cases may also be obtained through admissions, presumptions – whether legal or otherwise – and by statement under oath (*déclaration de serment*) from the other party. The court may also order expert review.

There is no process through which a party may ask the judge to order the other party to produce one or more pieces of evidence, or any obligation equivalent to "disclosure" in the UK. However, the parties must present all the exhibits referred to in their written submissions, and the judge will draw all appropriate inferences from any party's refusal to present the court with any piece of evidence requested by the other party.

Exhibits are presented at the time submissions are filed; new pieces of evidence may be added to the case file until the hearing of oral arguments (provided they are first communicated to the opposing party and subject to that party's option of seeking a postponement for time to reply to new evidence).

## 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

The parties may request extensions as many times as they intend to file new submissions, but the court has sole discretion on the number of extensions and their length.

In practice, the length of the process depends on several factors such as the complexity of the case, the degree of urgency, and the procedural motions raised by the opposing party. Decisions in urgent interlocutory petitions (*référé*) may be obtained between one day and one month after applying to the court, depending on how urgent the matter is.

For an ordinary case, proceedings last an average of one year in the first instance, one year on appeal, and from one to three years before the Supreme Court.

The parties may put an end to proceedings at any stage if they reach a settlement.

## 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

There are several types of interim remedy under the laws of Djibouti:

- protective measures: in urgent circumstances where the collection of a debt is in jeopardy, the presiding judge of the *Tribunal de première instance* may authorise any creditor with a demonstrated claim that appears to be justified in principle to make an interim attachment (*saisie conservatoire*) or to register an interim charge over the debtor's business (*nantissement*) or its real property (*hypothèque*).

Creditors present their petitions together with proof of their claim to obtain an order from the presiding judge of the *Tribunal de première instance* (on an *ex parte* basis). They then have the interim measure implemented and lastly, have the order served on the debtor together with a writ on the merits and for validation of the arrest.

- garnishment (*saisie-arrêt*): any creditor may request an authorisation from the court to have sums or property belonging to a debtor in the hands of a third party garnished to secure a definite claim.

If the creditor holds an enforceable instrument (judgment, notarised deed), the garnishment can be implemented directly

through a bailiff, and the debtor/third party served process for validation of the garnishment.

If the creditor does not hold an enforceable instrument, a petition must be presented to the presiding judge of the *Tribunal de première instance* and an authorising order obtained (on an *ex parte* basis). Then the creditor must serve the order to the debtor together with a writ on the merits and for validation of the arrest.

- urgent petitions: in all urgent matters or where interim decisions regarding problems with enforcing an enforceable title or judgment are needed, the claimant can have the other party summonsed before the interlocutory judge without conforming to the usual time frame for a summons, on a date other than the ordinary hearing dates of the *Tribunal de première instance*

Judges in urgent interlocutory hearings (*référés*) can order an expert review, bar certain manifestly unlawful acts subject to a daily penalty, evict a tenant, order a sequestration, appoint a provisional or special receiver for a company, etc. *Référés* orders are immediately enforceable.

## 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

The primary enforcement measures are:

- seizure and sale (*saisie-exécution*): creditors holding an enforceable title may have a bailiff seize the debtor's movable property 48 hours after a simple order to pay and, eight days later, have the seized property sold at auction (after a notice has been published in the local newspaper)
- penalty payment (*astreinte*): creditors may obtain an injunction from a court (including in an interim petition if the right at issue cannot be seriously contested, or on an *ex parte* basis) ordering their debtors to give or pay a sum to the opposing party, or to perform a certain act paired with a penalty for non-compliance payable by day/month for any delay in executing the decision. The court can grant debtors grace periods for paying sums due in light of their financial circumstances. Enforcement procedures may be stayed for a maximum of one year

## 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

In principle, the court orders the unsuccessful party to pay the costs, including bailiff's fees, expert's fees and fees for the registration of judgments, totalling 2% of the sums awarded. The court cannot order the unsuccessful party to pay the other party's legal fees, only damages for abuse of process and unrecoverable costs, if that party has abused its right to take legal action.

Foreign claimants may be ordered to pay a *judicatum solvi* (security for legal costs) amount into court to secure payment of any damages that may be awarded against them if the Djiboutian defendant so requests in *limine litis* (at the start of the proceedings). The amount is set by the court and may be sizeable in practice.

Some foreign parties are released from this guarantee under international agreements (France, Ethiopia, the Arab League). It is recommended that a clause be included in any international contracts to exclude this *judicatum solvi* amounts for foreign parties to proceedings.

## 11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

The deadline for appealing a civil or commercial judgment is two months from the judgment if it is handed down after a hearing of all parties, or two months from service of the judgment if it is only deemed to be handed down after a full hearing (*réputé contradictoire*) or handed down by default. All first instance judgments may be appealed unless the court's ruling is final. Appeals are brought by way of a summons to a Court of Appeal hearing scheduled by the court's clerk.

In an appeal, the appellate court will re-hear the entire case on the facts and on points of law. New claims not submitted to a first instance judge are inadmissible, but new grounds and evidence can be used. Appellate decisions may be enforced immediately, appeals to the Supreme Court notwithstanding.

Appeals to the Supreme Court may be made within 15 days of the date of the appellate decision (if handed down after a hearing in the presence of all parties (*arrêt contradictoire*)) or 15 days from service of the appellate decision if the defendant did not appear before the court (*arrêt réputé contradictoire* or *arrêt par défaut*).

The Supreme Court rules solely on points of law. If a judgment is overturned, the court must remand the case to a new composition of the appellate court.

## 12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

Claims may be brought against the State, public bodies, or State-owned companies before the *Tribunal administratif*.

The State, public bodies and State-owned companies enjoy immunity from enforcement.

Foreign State entities may rely on immunity (from court jurisdiction or enforcement) under international agreements, or pursuant to international standard practices. These entities may validly waive the immunity under international business contracts.

## 13. WHAT PROCEDURES EXIST FOR THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

Administrative or court decisions handed down abroad in civil, commercial, employment and administrative matters are only enforceable in Djibouti if they meet the following conditions:

- the decision was issued by a body that has jurisdiction according to the relevant law for conflicts of jurisdiction that applies in the State where the decision has standing
- the decision applies the law applicable to the dispute according to the relevant rules on conflicts of law governing the State where the decision has standing
- the parties were duly summonsed, represented, or found to have failed to enter an appearance
- the decision does not contain any provisions that are contrary to the relevant State's public policy

- the decision is *res judicata* and enforceable under the laws of the State where it was handed down
- there is no *lis pendens* situation before a court in the requisite State where the matter was first referred, or an enforceable decision in the requisite State

With the exception of issues on personal status, declarations of enforceability (*exequatur*) must be issued from the Djibouti court handed down pursuant to an ordinary summons.

In practice, it takes a long time to obtain a judgment of enforceability, given the possibility of appeals to the Court of Appeal and to the Supreme Court considering the variety of motions that can be raised by defendants (eg a request for a *judicatum solvi* provision).

## ARBITRATION

### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

The laws covering arbitration are from three different sources:

- The International Code of Arbitration (*Code de l'Arbitrage International*), Law 79/AN/84/1e L of 13 February 1984, which only governs arbitration "involving international commercial interests".

This Code is still in effect (it was incorporated into the new Djibouti Commercial Code promulgated in Law 134/AN/11/6e L of 1 August 2012) but has never been implemented in practice because the institutions referred to in the Code have not been established (the Arbitration Appeals Commission (*Commission des Recours Arbitraux*) and the International Centre for Arbitration Services (*Centre International des Services Arbitraux*))

- articles 1003 to 1028 of the Djibouti Civil Procedure Code (corresponding to the same provisions from the former French Civil Procedure Code) which apply to all types of arbitration
- articles L2311-1 to L2316-4 of the New Djibouti Commercial Code of 1 August 2012 which apply to any arbitration "between merchants" (domestic or international) when the seat of arbitration is in the Republic of Djibouti

This new law resolves the disadvantages of the 1984 International Code of Arbitration since there is no reference to a *Commission des Recours Arbitraux*, which is replaced with the presiding judge of the Djibouti *Tribunal de première instance* ruling as an interlocutory judge.

### 15. WHAT ARE THE MAIN NATIONAL ARBITRATION INSTITUTIONS?

There are no arbitration institutions at the national level. The parties appoint *ad hoc* arbitrators (eg the President of the Port Authority and *Zones Franches*, the President of the Chamber of Commerce, the President of the Bar Association (*Bâtonnier de l'Ordre des Avocats*), etc).

### 16. ARE THERE ANY RESTRICTIONS ON WHO MAY REPRESENT THE PARTIES TO AN ARBITRATION?

There are no restrictions on who may represent the parties in an arbitration. Lawyers do not need to present a written instruction, but other representatives must do so.

### 17. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

For civil arbitrations, if the arbitration agreement is not in writing (minutes (*procès-verbal*) notarised or private instrument) or does not refer to the subject of the dispute and does not mention the names of the arbitrators, it may be invalid (articles 1005-1006 of the Djibouti Civil Procedure Code).

For commercial arbitrations, the agreement may be made in writing or by any other means that are subject to proof, in particular a reference to a document that stipulates arbitration.

### 18. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?

State courts will decline jurisdiction where the dispute before them is covered by a valid arbitration agreement between the parties, even if the seat of arbitration is not within the territorial jurisdiction of the Djibouti courts. Supreme Court case law is well established along these lines, but occasionally the *Tribunaux de première instance* and courts of appeal refuse to implement arbitration agreements if they are not signed by all parties (eg bills of lading).

### 19. IF THE ARBITRATION AGREEMENT AND ANY RELEVANT RULES ARE SILENT, HOW MANY ARBITRATORS WILL BE APPOINTED, AND WHO IS THE APPOINTING AUTHORITY?

The arbitral tribunal is made up of either a single arbitrator or three arbitrators. If not otherwise specified in the arbitration agreement, the third arbitrator or the single arbitrator is appointed by the presiding judge of the *Tribunal de première instance* ruling as an interlocutory judge.

### 20. WHAT RIGHTS ARE THERE TO CHALLENGE THE APPOINTMENT OF AN ARBITRATOR?

Challenges must be raised immediately or may be deemed waived provided a party knowingly refrains from doing so. Justifications for a challenge are the same as those which apply to judges and experts - relations by blood or marriage, disputes between the arbitrator and a party, relationship between an arbitrator and a party, the arbitrator has given counsel or advice on the dispute, taking meals with the arbitrator since the dispute began, gifts to the arbitrator, enmity, assault, insults, threats.

The challenge must be entered with the presiding judge of the *Tribunal de première instance* ruling as an interlocutory judge.

### 21. DOES THE DOMESTIC LAW CONTAIN SUBSTANTIVE REQUIREMENTS FOR THE PROCEDURE TO BE FOLLOWED?

The general principles of a civil law trial must be followed: compliance with the adversarial principle (*contradictoire*); equal treatment to the parties; and inability of the arbitrator to cite grounds *sua sponte* (of his/ her own accord) without first inviting the parties to submit observations.

The parties can determine the rules for the proceeding between themselves or submit to a procedural law of their choosing. If they cannot choose, the arbitral tribunal may determine its own rules as long as the above general principles are satisfied.

## 22. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED INSIDE THE JURISDICTION?

The presiding judge of the *Tribunal de première instance* can issue an interlocutory ruling on the composition of the arbitral tribunal, challenges to arbitrators, inability, death, resignation or removal of an arbitrator, and to interpret and revise mistakes or omissions in arbitral awards.

## 23. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?

Interim and protective measures remain under the jurisdiction of the courts, even if there is an arbitration agreement (the interlocutory judge for urgent measures such as expert appointments, the presiding judge of the *Tribunal de première instance* for interim attachments (*saisie arrêt, saisie conservatoire, nantissement* or *hypothèque conservatoire*)).

Arbitrators may seek the assistance of the courts, on their own motion or upon petition from a party, if such assistance is necessary for the production of evidence.

## 24. DO ARBITRATORS HAVE POWERS TO GRANT INTERIM OR CONSERVATORY RELIEF?

Arbitrators may seek the assistance of the courts, on their own motion or upon petition from a party, if such assistance is necessary for the production of evidence.

## 25. WHEN AND IN WHAT FORM MUST THE AWARD BE DELIVERED?

The parties can set the period in which the arbitral award will be issued, in the arbitration agreement. Otherwise, in commercial matters the mission of the arbitrators cannot exceed six months, from the date the last arbitrator accepts his/her mission. In civil matters, the settlement is valid only for three months after the date of the settlement. The arbitral award must be issued in writing, dated, well-founded and signed. The parties can agree on other format requirements.

## 26. CAN A SUCCESSFUL PARTY RECOVER ITS COSTS?

Save where the arbitration agreement so provides, the successful party cannot recover the cost of its legal fees; only damages for abuse of rights and unrecoverable costs may be awarded.

## 27. ON WHAT GROUNDS CAN AN AWARD FROM AN ARBITRATION SEATED IN THE JURISDICTION BE APPEALED TO THE COURT?

Arbitration awards handed down in commercial cases in Djibouti cannot be challenged before the trial judge (*juge de première instance*) by a defaulting party (*opposition*), nor lodged with an appeal to the Court of Appeal or the Supreme Court for invalidation. Applications to set aside can be submitted to the Supreme Court in the following cases only:

- there is no arbitration agreement or the agreement is invalid
- improper arbitrator appointments
- failure of the arbitrators to observe their terms of reference

- violation of the adversarial (*contradictoire*) principle or rights of defence
- awards that conflict with international public policy
- reasons for the arbitration award are not provided (article L2315-2 of the Djibouti Commercial Code)

In civil cases, arbitral awards cannot be challenged before the trial judge (*juge de première instance*) by a defaulting party (*opposition*), but they can be appealed unless the parties have waived this right. Applications for invalidation are submitted to the *Tribunal de première instance* or the Court of Appeal in the same cases as above.

For commercial arbitrations, applications for invalidation must be presented within two months of service of the award to the parties (article L2315-3 of the Djibouti Commercial Code).

The application suspends the enforceability of the arbitration award unless immediate enforcement has been ordered (article L2315-4 of the Djibouti Commercial Code).

If the application for invalidation is dismissed, the arbitral award is automatically confirmed as valid and enforceable.

## 28. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

An arbitration award from abroad cannot be appealed before a court in Djibouti, but an application for invalidation can be submitted to the appropriate court (for example, the *Tribunal administratif* if the dispute involves the State or a public body, or the civil and commercial chamber of the *Tribunal de première instance* for a trade dispute). An application for invalidation may be based on one of the six grounds listed in question 27. They may also be submitted as counterclaims to an application for an enforceability (*exequatur*) decision covering a foreign award.

## 29. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF: (I) AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION AND (II) DOMESTIC AWARDS?

The Republic of Djibouti is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which facilitates the enforcement of foreign arbitral awards.

Foreign awards must be submitted to the *Tribunal de première instance* for an enforceability (*exequatur*) decision (which can be appealed all the way to the Supreme Court).

The courts of Djibouti do not review the substance of the dispute, only the points listed above in question 27.

For awards handed down in Djibouti, the enforceability decision is issued by the presiding judge of the *Tribunal de première instance* ruling on an *ex parte* petition, provided that:

- the original arbitration agreement and award (or certified copies) are produced
- the award does not manifestly conflict with a rule of international public policy in the Republic of Djibouti

The order that grants the award status as an enforceable decision, or denies such status, may be appealed to the presiding judge of the Court of Appeal within two months of service of such decision. The only grounds for appeal are:

- there is no arbitration agreement or the agreement is invalid
- improper arbitrator appointments
- violation of the adversarial (*contradictoire*) principle or rights of defence
- conflicts with international public policy

An appeal to the Supreme Court for violations of the law may also be brought against the Court of Appeal judge's decision.

### 30. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

In practice, the enforcement of foreign arbitration awards against a Djiboutian party is long and fraught with difficulty:

- a Djiboutian defendant may seek a *judicatum solvi* guarantee from foreign claimants as a preliminary motion (articles 166-167 of the Djibouti Civil Procedure Code) unless said defendant had waived such right in the contract or arbitration agreement
- the *exequatur* proceedings may be drawn out (*première instance*, appeal, Supreme Court, Court of Appeal after remand) but enforceability decisions have actually been handed down in the past

## ALTERNATIVE DISPUTE RESOLUTION

### 31. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

If the agreement between the parties provides for mandatory alternative dispute resolution prior to proceedings, they must comply with those contractual provisions. Otherwise, no alternative dispute resolution methods are mandatory (except in employment matters, where a conciliation attempt before the Work Inspector is mandatory).

## REFORMS

### 32. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

There is currently discussion regarding a potential reshaping of the Djiboutian Civil Code and the Djiboutian Code of Civil Procedure, but this should not come into force until 2017.

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# EGYPT



## INTRODUCTION

Egypt is a civil law jurisdiction based on the French Civil Code. Sources of Egyptian law include the Constitution, legislation, custom and practice. The Constitution provides the salient legal principles that Parliament should observe while passing any legislation. The legislation (which takes the form of codes) provides the detailed legal text by which citizens should abide.

The main code in Egypt is the Egyptian Civil Code, which governs the daily transactions between individuals. This code is supported by specialised codes (eg the Commercial Code, the Companies' Code, etc).

The Penal Code deals with criminal actions.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

Advocates can practise in Egypt either as sole practitioners or through a partnership with other advocates. Lawyers in Egypt are called advocates; there is no split profession. A licensed advocate has rights of audience before the courts, although there are specific requirements as to experience at each level of the court structure. Advocates also draft and notarise agreements and advise clients.

Pursuant to the requirements of the Egyptian Bar Association, only Egyptian nationals with a law degree from an Egyptian university or a recognised foreign university can practise law in Egypt. Overseas lawyers are prohibited from practising law in Egypt (whether Egyptian law or any other) unless reciprocal treatment is offered to Egyptian lawyers in the country in which the overseas lawyer is recognised to practise, and the specific permission of the Minister of Justice is obtained.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The main courts in Egypt for hearing civil and criminal cases are divided as follows:

- Courts of First Instance have jurisdiction to hear cases where the disputed amount is more than EGP 40,000 (otherwise they are heard in District Courts)
- the Court of Appeal
- the Court of Cassation (the highest court in Egypt from which there is no appeal)

In addition, a Supreme Constitutional Court governs disputes relating to the constitutionality of laws and regulations.

Furthermore, specialised courts exist, including Family Courts, Military Courts, Economic Courts and the Council of State as the administrative judicial court.

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

The time limits for bringing civil claims are stated in the Civil Code. These generally vary, based on the subject matter, from one year to 15 years.

The general limitation according to article 374 of the Civil Code is that a right expires after 15 years from the date on which such right arose. This is subject to the following exceptions:

- the right to sums recurring periodically such as rent, interest, periodical payments, salaries, wages and pensions expire after five years, even if the debt is admitted by the debtor. However, debt sums recurring periodically in respect of bad faith debtors expire after 15 years (article 375 of the Civil Code)
- claims for the fees of physicians, pharmacists, lawyers, engineers, experts, trustees in bankruptcy, brokers, professors or teachers expire after five years, provided that such fees are due as remuneration for work conducted within the scope of their professions or in payment of expenses incurred by them (article 376 of the Civil Code)
- claims relating to taxes and dues owing to the State expire after five years from the end of the year in which they fell due (article 91 of the Income Tax Law)
- the right to annul a contract expires three years from the date on which a party becomes entitled to annul such contract (article 140 of the Civil Code)

- the right of a purchaser to request a reduction in the price/the excess paid, or cancellation of contract in respect of deficient sold items expires one year from the date of actual delivery of the item sold (article 434 of the Civil Code)
- breach of warranty claims expire one year from the date of delivery of the sold item, even if the purchaser discovers the defect after the expiration of this period, unless the seller agrees to be bound by the warranty for a longer period (article 452 of the Civil Code)
- claims related to an administrative decision issued by the Government expire 60 days from the date of the decision

#### **4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?**

Yes. According to article 79 of the Egyptian Bar Association Law, communications between a lawyer and his or her client are privileged unless the lawyer is requested by the client to reveal them in court in order to defend their interests. Article 66 of the Egyptian Evidence Law further states that attorney/client privileged information is confidential and must not be disclosed even after retirement.

The lawyer may be requested to disclose the information as appropriate if the information indicates commission of a felony or misdemeanour by the client (article 65 of the Egyptian Bar Association Law and article 66 of the Egyptian Evidence Law).

The above-mentioned provisions of the Egyptian Bar Association apply also to in-house counsel.

#### **5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?**

The claimant files their claim (which comprises a memorandum of claim) with the relevant court, and the court bailiff must deliver a copy of the claim to the defendant and inform him or her of the time and date of the hearing. Once served, the defendant must submit a memorandum with a defence at least three days prior to the first hearing (article 65 of the Civil and Commercial Procedures Law).

If the defendant does not attend the first hearing because he or she was not duly notified of the claim in time, the court will postpone the hearing until the defendant has been notified (article 84 of the Civil and Commercial Procedures Law). In practice lawyers sometimes avoid receiving the notice so as to postpone the hearing as this gives them more time to prepare for the hearing. Usually, when the defendant attends the first hearing he or she requests a postponement so as to review the case files and fully prepare his or her defence.

#### **6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?**

In practice, there is no pre-trial exchange of evidence in Egypt. Although the Civil and Commercial Procedures Law allows for the parties to provide their evidence when filing the claim or defence, it is more usual for it to be delayed until the trial where parties present both the oral and documentary evidence on which they rely. There is no requirement for a party to provide evidence which may assist the counterparty's case.

Pursuant to article 87 of the Egyptian Evidence Law witnesses are cross-examined.

Article 135 of the Egyptian Evidence Law provides for the court appointment of up to three experts (if necessary). Upon the appointment of the expert(s), the expert's report/findings may be viewed as part of the trial and be adduced as evidence.

#### **7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?**

The procedural timetable is enshrined in the Civil and Commercial Procedures Law and does not afford much flexibility to the parties.

However, there are various tactics the parties can use deliberately to slow down the litigation. In some cases lawyers may challenge the authenticity of documents, or demand the recusal of the court.

The court process is usually slow and complex. The courts may take three to five years to issue a final judgment. This will depend on the nature of the case and the sophistication of the judge. The promulgation of the Economic Courts in 2008 has reduced the period that courts may take in reviewing cases to determine their jurisdiction.

#### **8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?**

The following interim measures may be available: a preservation order to prevent the parties' interests being destroyed, damaged or lost; protective seizure of a counterparty's assets; appointing a legal guardian over the subject matter of the dispute pending final judgment. In practice, either party may request such remedy through filing a claim with a specialist judge. A hearing will be held, where both parties present their cases and a final judgment is rendered.

#### **9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?**

Separate proceedings must be filed to enforce a judgment. The enforcement methods provided for by the Civil and Commercial Procedures Law include seizure of property (movable and immovable) and/or cash. Applications for a charging order and/or the appointment of a receiver are made through a petition submitted to a specialist judge.

In practice, enforcing a court judgment is not an easy process. It can be a very lengthy and bureaucratic process which, in some cases, might take more time than the time involved in obtaining judgment.

#### **10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?**

In practice, costs lie where they fall irrespective of the outcome of the case. The judge may ask the losing party to pay some costs to the court (for example, the judicial fees); however, the court does not usually order the losing party to pay the winning party any costs.

Foreign claimants are not required to provide security for costs.



**11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?**

The right of appeal is a legislative right based on any one of the following grounds:

- the court did not have jurisdiction to hear the dispute
- the judgment is void
- procedural irregularities

Articles 227 and 252 of the Civil and Commercial Procedures Law, provides that the appeal must be filed within 40 days (for appeals against decisions of the Court of First Instance) or 60 days (for appeals from the Court of Appeal to the Court of Cassation). It is not open for the parties to present new evidence on appeal before the Court of Cassation (article 233 of the Civil and Commercial Procedures Law). In general, enforcement of the decision of the Court of First Instance is suspended until the appeal is decided by the Court of Appeal, although suspension of enforcement is not automatic on appeal from the Court of Appeal to the Court of Cassation.

**12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?**

There is no explicit legislation in relation to State sovereign immunity. Egyptian State entities do not enjoy sovereign immunity from civil proceedings. Any party has the right to bring legal action against State entities and has the right to enforce any final judicial verdict issued by a competent Egyptian court or arbitration panel against Egyptian State entities.

As a general principle, the assets of the Egyptian Government are divided into public assets and private assets. Public assets are any fixtures or movables owned by the Government or public entities and allotted for public interest, such as water or electricity utilities. Public assets are immune from seizure/attachment orders. Private assets are assets owned by the Government but not allotted for public interest. Private assets of the Government can, in theory, be seized or be the subject of an attachment order. However, in practice, court officials generally refuse to take enforcement procedures against government assets.

**13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?**

Egyptian courts will not recognise a judgment of a foreign court unless there is a reciprocal recognition of judgments between the two countries. Egypt has treaties for reciprocal recognition of awards with Italy and some Arab countries (it is a signatory to the Arab League Convention on the Enforcement of Judgments and Arbitral Awards (dating from 1952), which only applies where the Riyadh Convention does not). Egypt is not a signatory to the Riyadh Convention. There are no treaties with the UK, USA or Japan, for example.

## ARBITRATION

**14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?**

The Egyptian Arbitration Law No 27 of 1994 (the Arbitration Law) is based on the UNCITRAL Model Law. It applies to both domestic and international arbitrations. There are no key modifications except that the UNCITRAL Model Law has given more attention to the power of the arbitral tribunal to grant interim measures and preliminary orders, while in the Arbitration Law many of these details are not included. The UNCITRAL Model Law provides that the arbitrator has the power to grant interim measures unless otherwise agreed; however, the Egyptian legislature required that parties must explicitly agree this in advance in order to empower the arbitrator to grant such remedies.

Other differences include a definition of commercial arbitration in article 2 and a definition of international arbitration in article 3. Article 9 provides that the court having original jurisdiction over the dispute has jurisdiction to review arbitral matters referred to it by the arbitrators save in cases of international commercial arbitration (whether conducted in Egypt or abroad) in which case, unless agreed otherwise, the jurisdiction lies with the Cairo Court of Appeal.

**15. WHAT ARE THE MAIN NATIONAL ARBITRATION INSTITUTIONS?**

The main arbitration institution in Egypt is the Cairo Regional Centre for International Commercial Arbitration (CRCICA).

**16. ARE THERE ANY RESTRICTIONS ON WHO MAY REPRESENT THE PARTIES TO AN ARBITRATION?**

Although Egyptian law does not allow overseas-qualified lawyers to work in Egypt unless there is reciprocal treatment for Egyptian lawyers in the country where the overseas lawyer is registered to practise, in practice foreign lawyers handle a number of international arbitration cases which are heard in Egypt, in particular before the CRCICA.

**17. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?**

The arbitration agreement must be concluded in writing, otherwise it will be void. An arbitration agreement is deemed to be in writing if it is incorporated in a document that is mutually signed by both parties or written correspondences between them whether in letters, cables or any other means of written communication evidencing their agreement on referring matters to arbitration (article 12 of the Arbitration Law). The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement, provided that such reference is such as to make that clause an integral part of the contract (article 10 of the Arbitration Law). Arbitration clauses in administrative contracts with public bodies require the approval of the competent minister or whoever possesses his or her powers as to public juridical persons. Delegation of powers is prohibited in this respect (article 1 of the Arbitration Law).

In order that the arbitration agreement becomes valid, all the conditions required to enter into any contract must be fulfilled, such as a valid consent, object (subject matter) and cause (meaning that the obligation must have been assumed for a reason which is neither illegal nor contrary to public policy or morality).

**18. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?**

Article 13 of the Arbitration Law states that a court seized with a dispute in respect of which an arbitral agreement exists must rule the case non-admissible if the respondent invokes a plea of non-admissibility before raising any request of defence in the case (article 13(1) of the Arbitration Law). This means that the courts will not be able to review a dispute where the parties have agreed to recourse to arbitration provided that one of the parties has challenged the jurisdiction of the court prior to raising any other request of defence. If neither party requested the normal court to cease reviewing the dispute, the court will then have the power to review the dispute (and neither party can challenge the judgment of the court on the basis of lack of jurisdiction due to the existence of the arbitration agreement).

The approach does not differ whether the seat of arbitration is within Egypt, or not.

**19. IF THE ARBITRATION AGREEMENT AND ANY RELEVANT RULES ARE SILENT, HOW MANY ARBITRATORS WILL BE APPOINTED, AND WHO IS THE APPOINTING AUTHORITY?**

According to the Arbitration Law, if the parties do not agree on the number of arbitrators, the arbitral tribunal will comprise three arbitrators (article 15(1) of the Arbitration Law). One arbitrator shall be selected by each party and the third shall be selected by the two arbitrators appointed by the parties (article 17(1)(b) of the Arbitration Law). If the third arbitrator is not selected within 30 days from the date of appointment of the other arbitrators, this appointment will be made, upon request of one of the parties, by:

- the Cairo Court of Appeal (in case of an international commercial arbitration) or
- by the Egyptian court which would have had jurisdiction over the case if there was no arbitration agreement (in the case of a domestic arbitration)

If the parties have agreed that there will be a sole arbitrator, the arbitrator shall be selected by the Cairo Court of Appeal in the case of an international arbitration and the court which would have had jurisdiction if there was no arbitration agreement (in the case of domestic arbitration) (article 17(1)(a) of the Arbitration Law).

**20. WHAT RIGHTS ARE THERE TO CHALLENGE THE APPOINTMENT OF AN ARBITRATOR?**

The parties are entitled to challenge the appointment of an arbitrator only if there is serious doubt about the arbitrator's impartiality or independence. However, an arbitrator may not be challenged by the party who appointed him except for reasons which became known to the latter party after the appointment was made (article 18 of the Arbitration Law).

A challenge to the appointment of an arbitrator must be made in writing to the arbitral tribunal within 15 days from the date the

concerned party was aware of the composition of the arbitration panel and the appointment of the arbitrator, or from the date the challenging party became aware of the reasons justifying such challenge. If, within 15 days from submitting the challenge, the arbitrator in question does not step aside, the challenge will be referred to the Cairo Court of Appeal in the case of international arbitration (or the court which would have had jurisdiction over the dispute in the case of domestic arbitration) to decide (article 19(1) of the Arbitration Law).

It is worth noting that an arbitrator cannot be challenged by the same party twice in the same arbitration: in other words, if the challenge is rejected, it cannot be brought again in the same arbitration (article 19(2) of the Arbitration Law).

**21. DOES THE DOMESTIC LAW CONTAIN SUBSTANTIVE REQUIREMENTS FOR THE PROCEDURE TO BE FOLLOWED?**

The parties are free to agree on the procedural rules or to apply institutional rules to govern the arbitration whether in Egypt or abroad (article 25 of the Arbitration Law). However, the Arbitration Law provides certain mandatory general procedural principles which must be followed in all cases to ensure fair and equal treatment of the parties. These principles are:

- the parties should be on an equal footing and have an equal and full opportunity to submit their cases (article 26 of the Arbitration Law)
- the claimant shall serve a written statement of claim and the respondent shall serve a written statement of defence to the claim within the period agreed between the parties or specified by the arbitral tribunal (article 30 of the Arbitration Law)
- copies of documents submitted to the tribunal by either party must be sent to the other party, and similarly copies of expert reports and any document submitted to the tribunal must be sent to both parties (article 31 of the Arbitration Law)
- the parties must be notified of the dates of hearings and meetings sufficiently in advance of the scheduled date (article 33(2) of the Arbitration Law)

**22. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED INSIDE THE JURISDICTION?**

The court can intervene during the arbitration process, upon the request of the tribunal, to impose penalties on witnesses who fail to attend or give their testimony (article 37 of the Arbitration Law). In the event that the arbitral tribunal fails to render an award in an international arbitration within the timeframe agreed upon by the parties, the Cairo Court of Appeal can intervene, upon the request of either party, to extend the arbitration, or terminate the arbitration (article 45(2) of the Arbitration Law). The court which would have had jurisdiction but for the arbitration agreement has the same powers in case of a domestic arbitration. If the arbitration is brought to an end without an award being made, the parties are entitled to bring proceedings before the court having jurisdiction (article 45(2) of the Arbitration Law). Upon the request of one of the parties, the court may order the taking of interim or conservatory measures, whether before the commencement or during the arbitration proceedings (article 14 of the Arbitration Law). Upon the request of one of the parties, the court can intervene to nominate the arbitrators if the parties fail to agree (article 17 of the Arbitration Law).

### 23. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?

The court may intervene in arbitrations seated outside the jurisdiction, where such dispute is subject to the rules of the Egyptian Arbitration Law, on the same grounds as it can intervene in arbitrations seated in Egypt. With the exception of international commercial arbitrations, the court which would have had jurisdiction, but for the arbitration agreement, will be the competent court. As for international commercial arbitrations (as defined in article 3 of the Arbitration Law), the competent court will be the Cairo Court of Appeal, whether the seat of arbitration is inside or outside Egypt.

### 24. DO ARBITRATORS HAVE POWERS TO GRANT INTERIM OR CONSERVATORY RELIEF?

Under the Arbitration Law, interim and conservatory relief may not be granted by the arbitral tribunal unless that power is expressly stated in the arbitration agreement, or the parties apply institutional rules which allow the arbitral tribunal to grant such relief. In order to grant this relief the following conditions must be fulfilled:

- parties must agree explicitly to grant the tribunal this power (article 24 of the Arbitration Law)
- the arbitration procedure must have been started
- one of the parties to the dispute must request the order to grant interim relief from the tribunal
- the relief must be provisional or conservatory relief
- the relief must be related to the nature of the dispute
- general requirements for issuing an interim order must exist. These requirements are: the possibility of the existence of a right, the existence of the case of urgency and that the interim order must not affect the subject matter of the case

### 25. WHEN AND IN WHAT FORM MUST THE AWARD BE DELIVERED?

The award must be delivered within the timeframe agreed upon by the parties or designated by the relevant institutional rules. In the absence of such agreement or institutional rules, an award must be made within 18 months of the date of commencement of the arbitral proceedings.

According to article 43 of the Arbitration Law, an award must be in writing and signed by the arbitrators and it must include the following:

- the reasons for the award (unless the parties agree otherwise)
- the names and addresses of the parties
- the names, addresses, nationalities and capacities of the arbitrators
- a summary of the parties' claims and statements
- the date and place where the award was issued

For the purpose of enforcement, a party in whose favour the award has been rendered must deposit the original award, or a copy in the language in which it was issued or an authenticated Arabic translation thereof if the award has been issued in a foreign language, with the clerk of the court which would have had jurisdiction over the dispute (article 47 of the Arbitration Law).

### 26. CAN A SUCCESSFUL PARTY RECOVER ITS COSTS?

The arbitral tribunal may award costs to the successful party at its discretion.

### 27. ON WHAT GROUNDS CAN AN AWARD FROM AN ARBITRATION SEATED IN THE JURISDICTION BE APPEALED TO THE COURT?

The Arbitration Law states that arbitral awards made in accordance with its provisions are final and not subject to appeal for any reason. However, article 53 of the Arbitration Law allows the competent Egyptian court (the Cairo Court of Appeal in the case of international arbitration) to declare the invalidity of arbitral awards in any of the following circumstances:

- the arbitration agreement does not exist or is void
- lack of capacity of one of the parties at the time of entering into the arbitration agreement
- failure to notify any of the parties properly of the proceedings, or inability of the defendant to issue a defence because he or she was not properly notified of the arbitral proceedings or for any reason beyond its control
- the arbitral tribunal fails to apply the law designated by the parties
- the invalid appointment of the arbitrators (contrary to the law of the agreement between the parties)
- the award falls outside the terms of submission to arbitration; however, in this case nullity does not extend to the part of the award which is within the scope of the arbitration agreement
- the award violates Egyptian public policy

The above reasons are the only grounds for the invalidation of the arbitral award as a matter of Egyptian law.

### 28. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

Foreign arbitration awards cannot be appealed in the local courts.

### 29. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF: (I) AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION AND (II) DOMESTIC AWARDS?

For awards rendered in arbitrations seated outside of the jurisdiction, Egypt is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Therefore, a valid arbitral award is enforceable without retrial of the merits if it fulfils the conditions of the New York Convention and the Arbitration Law. The conditions set out in article 58 of the Arbitration Law are:

- the arbitral award does not contradict a judgment previously made by the Egyptian courts on the subject in dispute
- it does not contravene Egyptian public policy
- it was properly notified to the party against whom it was made

For enforcement of a foreign or domestic arbitral award, first, the party in whose favour the arbitral award has been rendered must deposit at the secretariat of the competent court (or of the Cairo Court of Appeal in the case of international arbitration) the original award, or a copy or an official Arabic translation if it was rendered

in a foreign language. Then, an application for execution of the award (*exequatur*) must be submitted to the Cairo Court of Appeal. The application must be accompanied by the original award or a signed copy thereof (plus an Arabic translation authenticated by the competent authority), a copy of the arbitration agreement and a copy of the report attesting the deposit of the award at the secretariat of the court.

Generally, the role of the Cairo Court of Appeal is only to order the execution of the arbitral award and this is usually done without delay. However, if any party claims the invalidity of an arbitral award due to any of the above-mentioned reasons, the Cairo Court of Appeal may suspend the enforcement of the award until it reviews the grounds. This analysis applies to both domestic and foreign awards.

Under Decree 8310/2008 (as amended by Decree 9739/2011), the Ministry of Justice's Arbitration Technical Office scrutinises awards prior to their review by the courts. The reviewing role of the Technical Office is preserved despite the latest amendments, which are intended to facilitate the process of enforcement of arbitral awards, although we understand that in practice the role is becoming more limited. The amendment also affirmed the authority of the competent court to issue an enforcement order after having ascertained that the arbitral award conforms to the conditions stipulated in article 58 of the Arbitration Law, which are based on the UNCITRAL Model Law. This will make enforcement easier. Even though the amendment did not completely erase the obstacle of the Technical Office's review, it eliminated the substantive restriction on arbitrating certain matters, it reduced the discretion and binding effect of the Technical Office's decision to only providing its opinion, it eliminated the waiting period for depositing an award, and reaffirmed the complete authority of the court to decide the enforcement of the arbitration award.

### **30. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?**

Yes, in accordance with the procedures detailed above.

## **ALTERNATIVE DISPUTE RESOLUTION**

### **31. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?**

There is no requirement under Egyptian law for the parties to consider ADR or mediation, although the parties may agree to submit to this by way of contract.

## **REFORMS**

### **32. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?**

We are not aware of any future plans for reform.

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# EQUATORIAL GUINEEA



## INTRODUCTION

Equatorial Guinea has a civil law legal system. The court system is based on the 1991 Constitution and its implementing laws and regulations.

Equatorial Guinea is a member of CEMAC and OHADA. Its Supreme Court (*Cour suprême*) has final jurisdiction over all matters not governed by the laws introduced by these inter-governmental organisations.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

The legal profession is governed by the *Statut général du métier d'avocat en Guinée Equatoriale* (EGAGE).

To practise law in Equatorial Guinea, potential lawyers must be registered with the Bar Association (*Ordre des avocats*) and meet certain conditions, including:

- have Equatorial Guinean nationality
- be of age
- hold a bachelor's degree (*licence*) or a doctorate in law or an equivalent foreign qualification accepted in Equatorial Guinea
- have no past criminal convictions preventing them from practising as a lawyer
- be free from all restrictions or other impediments preventing them from practising as a lawyer

The profession is organised by the Bar (*Barreau*), which ensures that members abide by the ethical rules governing the profession and takes any necessary disciplinary measures. Lawyers (*avocats*) registered with the Bar can appear before any court and can practise individually or as part of a law firm.

Foreign lawyers can appear before the courts in Equatorial Guinea where this is allowed under the rules of the relevant Bar.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The court system forms a three-tiered pyramid:

- the first instance courts:
  - the *Tribunaux de première instance*, present in all municipal capitals, have jurisdiction to hear civil cases not allocated by law to other courts and hear appeals against decisions issued by the *tribunaux de paix*
  - the *Tribunaux traditionnels*, sitting in all municipal capitals, have jurisdiction to hear civil disputes relating to the annulment and dissolution of marriage, custody of children and inheritance. They apply the customary law of each ethnic group involved in the case but cannot issue judgments that do not comply with the laws of Equatorial Guinea
  - the *Tribunaux de paix*, sitting in all municipalities, have jurisdiction to hear financial claims and complaints where the amount in dispute does not exceed XAF 300,000 and offer civil conciliation and mediation proceedings

There are also a number of specialist first instance courts such as the *Tribunaux de vigilance pénitentiaire*, the *Magistratures de travail*, the *Tribunaux de la famille et de la tutelle des mineurs* and the *Tribunaux d'instruction*

- the *Cours provinciales*, present in all provincial capitals, hear appeals against all first instance decisions that are subject to appeal
- the *Cour suprême de justice* is located in Malabo, the capital

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

Limitation periods vary depending on the type of action and the parties involved.

The ordinary limitation period for bringing an action for damages in contract is four years.

### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

According to the *Statut général du métier d'avocat en Guinée Equatoriale*, all communications between lawyers and their clients must be kept confidential.

Lawyers who fail to meet their obligations are liable under civil and criminal laws and ethical rules.

To the best of our knowledge, there is no specific rule on the issue of whether clients can lift confidentiality obligations.

## 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

All parties bringing civil actions before the courts must first undertake conciliation proceedings before the relevant municipal court.

The amount in dispute must be specified at the time civil proceedings are commenced.

## 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

Court testimony, public and official documents, private documents, correspondence and commercial documents are all admitted as evidence. Testimony is an admitted mode of proof when made in writing and on oath, these two conditions being cumulative.

The preparatory stage of the proceedings is divided in two stages:

- an initial phase of 20 days (non-transferrable), during which the parties produce their evidence
- a second phase of 30 days (non-transferrable), during which the parties examine each other's evidence (in the presence of all parties)

The court may, exceptionally, allow a preparatory phase of four months when evidence is located abroad.

The court can also order the production of evidence to a party or to a third party, on its own initiative or at the request of a party, in particular in cases of fiscal audits in the petroleum industry. The law provides that books and registers held by the taxpayer must be available on any requisition.

## 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

The parties do not control the procedure. Once the proceedings have commenced, the timetable is set at the discretion of the court and in practice this depends on various factors, such as the level of complexity of the case, the degree of urgency and the caseload of the court.

## 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

It is possible to bring interim proceedings to protect parties' interests pending a judgment on the merits. The protective/conservatory attachment or sequestration (*saisie conservatoire*) proceedings involve the seizure of the movable or immovable assets of a defaulting party (payment, appearance, etc) at the request of the opposing party. However, if the default is justified by force majeure, the court may lift the *saisie conservatoire*.

## 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

The enforcement measures available in Equatorial Guinea are those provided for in the OHADA Uniform Act Organising Simplified Recovery Procedures and Measures of Execution. The principal measures are:

- seizure for sale (*saisie-vente*): "any creditor in possession of a writ of execution showing a debt due for immediate payment may [...] proceed to the seizure and sale of the tangible property belonging to his debtor [...] in order to be paid from the sale price"

- seizure-award of debts (*saisie-attribution de créances*): "any creditor in possession of a writ of execution showing a debt due for immediate payment may [procure the seizure] in the hands of a third party [of] the debt owed by his debtor in the form of a sum of money"
- penalty payment (*astreinte*): creditors who obtain an injunction from a court ordering their debtors to complete a particular task or to cease and *desist* may ask the court to combine the injunction with a penalty for non-compliance, payable by day/week/month
- real property foreclosure (*saisie immobilière*): this enforcement mechanism is applied as a last resort when the seizure of personal property or of debts was unfruitful or insufficient. The insufficiency must be authenticated by a bailiff (*huissier de justice*); only then may the creditor initiate a *saisie immobilière*

The court may grant grace periods to the unsuccessful party, save for maintenance payments (*dette d'aliments*) or debts pertaining to negotiable instruments (*dettes cambiaires*).

## 10. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

The right to appeal is automatic. In the first instance, the timeframe for appealing is six days from the third day after the date of the court's decision.

It is possible to produce new evidence on appeal. Parties disputing the evidence must do so in writing within three days. However, in so far as the *Cour suprême de justice* rules on the law alone, no additional evidence may be produced at this stage of a case. Judgments issued by the *Cours provinciales* (courts of appeal) suspend the enforcement of the lower court's decision. It is possible to consult the *Cour suprême de justice* to reverse final appellate decisions. The *Cour suprême de justice* rules on the law alone and not on the facts. The enforcement of the appellate decision is not suspended pending the consultation of the *Cour suprême de justice*. Decisions issued by the *Cour suprême de justice* are directly enforceable with no possibility of remand.

## 11. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

In terms of foreign entities, any jurisdictional immunity rights that can be applied derive from international agreements on diplomatic or consular relationships.

## 12. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

Law No 5/2009 of 18 May 2009 reforming Law No 10/1984 on judicial authority provides that applications for the enforcement of foreign judgments must be submitted to the *Cour suprême de justice*.

## ARBITRATION

### 13. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

Equatorial Guinea is a Member State of OHADA (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires* – Organisation for the Harmonisation of Business Law in Africa). The OHADA Treaty

was first signed on 17 October 1993. Under the OHADA Treaty, the Council of Ministers of Justice and Finance adopt "uniform acts" that are directly applicable and enforceable in each of the Member States. Arbitration in the OHADA Member States is governed by the Uniform Act on Arbitration within the Framework of the OHADA Treaty, which was adopted on 11 March 1999 and came into force 90 days afterwards (the Uniform Act).

The Uniform Act is not based on the UNCITRAL Model Law. It was drafted separately but is nevertheless aligned with the fundamental principles of international commercial arbitration and key features of the UNCITRAL Model Law.

The Uniform Act applies to both national and international arbitration and governs all arbitration proceedings with a seat in a Member State.

For all matters not governed by the Uniform Act, the applicable law in Equatorial Guinea is the Law introducing the Civil Procedure Code (*Code de procédure civile*) adopted by Royal Decree of 3 February 1881 (Title VIII). This law now only applies in the alternative, where the Uniform Act does not.

One of the most important characteristics of OHADA arbitration is the Common Court of Justice and Arbitration (*Cour commune de justice et d'arbitrage*) (the CCJA), which acts as both a permanent arbitral tribunal and the supreme court of arbitration for all OHADA Member States.

#### **14. WHAT ARE THE MAIN NATIONAL ARBITRATION INSTITUTIONS?**

There is no national arbitration institution in Equatorial Guinea. At the supranational level, the CCJA, which was created by the OHADA Treaty and is based in Abidjan, in Côte d'Ivoire, can also hear arbitration matters. The CCJA, which is also a supreme court, acts as an arbitration centre and administers proceedings governed by the CCJA Rules of Arbitration. The CCJA is different from other arbitration centres as it is not a private institution but was created and organised by OHADA.

To apply to the CCJA as an arbitration centre, article 21 of the OHADA Treaty stipulates that all or part of the contract in question must be performed within the territory of one or more Member States, or that at least one of the parties must be domiciled or usually reside in a Member State. According to legal authors, it should also be possible to go to arbitration under the CCJA Rules even if these conditions are not met, if the parties have provided for this possibility in their arbitration agreement.

#### **15. ARE THERE ANY RESTRICTIONS ON WHO MAY REPRESENT THE PARTIES TO AN ARBITRATION?**

The Uniform Act does not set any restrictions on persons who can represent parties in an arbitration. They are entitled but not required to instruct a lawyer (article 20 of the Uniform Act).

In Equatorial Guinea, parties to an arbitration may be assisted by a foreign lawyer under the same conditions as parties to litigation (see question 1).

#### **16. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?**

Article 3 of the Uniform Act states that the arbitration agreement must be made in writing or by any other means in which evidence

can be provided. No particular format is required. The Uniform Act also provides that contracts can refer to an arbitration agreement contained in a different document.

In practice, local courts apply a narrow interpretation to these conditions. For example, an arbitration clause will only be valid where made in writing.

#### **17. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?**

Article 13 of the Uniform Act provides that national courts must decline jurisdiction where there is an arbitration agreement and where the arbitral tribunal has not yet been composed, save where the arbitration agreement is "manifestly void". Courts cannot decline jurisdiction at their own discretion.

If the composition of the arbitral tribunal has already been decided, the national court must decline jurisdiction at the request of a party.

There is no case law based on article 13 of the Uniform Act.

Parties governed by an arbitration agreement do have the option of consulting a national court to obtain interim or conservatory measures that do not require a review of the case on the merits, in circumstances that have been "recognised and reasoned" as urgent or where the measure must be performed in a State that is not part of OHADA.

National courts can also intervene in very limited circumstances with a view to assisting the arbitration process (see questions 21 and 22 below).

There are no local laws providing for the situation whereby parties can consult a court in Equatorial Guinea to obtain conservatory or interim relief against a national of that country.

#### **18. IF THE ARBITRATION AGREEMENT AND ANY RELEVANT RULES ARE SILENT, HOW MANY ARBITRATORS WILL BE APPOINTED, AND WHO IS THE APPOINTING AUTHORITY?**

The Uniform Act does not stipulate a specific number of arbitrators if the arbitration agreement is silent on this point. It does provide that an arbitral tribunal must have a sole arbitrator or three arbitrators.

If the parties are unable to appoint one or more arbitrators, the task falls to the competent court of the Member State in which the arbitration is seated.

Pursuant to the Equatorial Guinean Civil Procedure Code, if the parties cannot agree on the appointment of the arbitrators, the arbitration will not go ahead. Local law provides for a maximum of five arbitrators. The number of arbitrators must always be odd and, in the event of a sole arbitrator, he/she must have been appointed with the consent of both parties.

#### **19. WHAT RIGHTS ARE THERE TO CHALLENGE THE APPOINTMENT OF AN ARBITRATOR?**

Article 7 of the Uniform Act sets the rules on challenging an arbitrator. Arbitrators must notify the parties of "any circumstance about him/herself" for which they may be challenged. Any disputes

will be settled by the competent court of the Member State, which in Equatorial Guinea is the judge of the *Tribunal de première instance*, save where the parties have provided for a different procedure for challenging arbitrators. Decisions are not subject to appeal.

Arbitrators may only be challenged for reasons that come to light after their appointment.

There is no case law in Equatorial Guinea on challenging arbitrators. The Civil Procedure Code allows the arbitrator to be challenged, particularly where he/she is related to or is an acquaintance of a party.

## 20. DOES THE DOMESTIC LAW CONTAIN SUBSTANTIVE REQUIREMENTS FOR THE PROCEDURE TO BE FOLLOWED?

The Uniform Act requires parties to receive equal treatment and to have every opportunity to exercise their rights (article 9). Arbitrators may not base their decisions on reasons considered at their own discretion without first allowing parties to submit observations (article 14).

Article 18 of the Uniform Act provides that the deliberations must be kept secret.

The Uniform Act also provides that the duration of the arbitration may not exceed six months from the date upon which the last arbitrator accepts the terms, save where extended by agreement of the parties or by consulting the competent court (article 12).

The Civil Procedure Code allows parties to seek damages from arbitrators who have not fulfilled their obligations.

## 21. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED INSIDE THE JURISDICTION?

In principle, where there is an arbitration agreement, the national courts cannot intervene in a dispute until the award has been issued.

Nevertheless, parties may consult the competent court in Equatorial Guinea in the following circumstances:

- to resolve difficulties encountered with composing the arbitral tribunal, to appoint the sole arbitrator or the third arbitrator (articles 5 and 8)
- to rule on challenges against arbitrators where the parties have not provided for a different procedure (article 7)
- to extend the deadline for the conclusion of the arbitration where there is no agreement between the parties to do so, at the request of a party or the arbitral tribunal (article 12)
- to order interim or protective measures when urgently necessary (recognised and reasoned circumstances) or when the measure would be performed in a non-OHADA State, provided the measures do not require a review of the case on the merits (article 13)
- to assist the arbitral tribunal, at its request, with the collection of evidence (article 14)

## 22. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?

As indicated above (question 21), national courts cannot, in principle, intervene in an arbitration seated outside their jurisdiction where there is an arbitration agreement. In addition, all measures relating to the composition of the arbitral tribunal and conducting the proceedings fall under the jurisdiction of the courts of the country in which the arbitration is seated.

However, it is possible for national courts other than the competent court of the Member State in which the arbitration is seated to intervene to order conservatory or interim relief under the conditions defined above in question 17 (article 13).

## 23. DO ARBITRATORS HAVE POWERS TO GRANT INTERIM OR CONSERVATORY RELIEF?

Although this matter is not dealt with directly in the Uniform Act, legal commentators generally agree that it is possible for arbitrators to order interim or conservatory relief, save where the parties have agreed otherwise.

## 24. WHEN AND IN WHAT FORM MUST THE AWARD BE DELIVERED?

Save as agreed otherwise by the parties, arbitral awards must be issued within six months from the date on which all of the arbitrators have accepted the terms. This term can be extended by agreement between the parties or by order of the competent court of the Member State at the request of a party or the arbitral tribunal (article 12). Equatorial Guinean law did not determine the competent judge in this hypothesis.

Parties can set special requirements for awards. Failing this, awards are issued by majority, where the tribunal counts three arbitrators, and must be reasoned. They must be signed by at least two of the three arbitrators.

Where local law is substituted for OHADA law, arbitral awards are issued by absolute majority before a notary (*notaire*).

## 25. CAN A SUCCESSFUL PARTY RECOVER ITS COSTS?

The Uniform Act contains no provisions on this.

Where arbitration is conducted under the aegis of the CCJA, the arbitrator is empowered to award costs.

## 26. ON WHAT GROUNDS CAN AN AWARD FROM AN ARBITRATION SEATED IN THE JURISDICTION BE APPEALED TO THE COURT?

The only remedy against an arbitral award is an application to set aside that award brought before the competent court in the Member State in which it was issued, within one month as from the date of service of the award (articles 25 and 27).

The circumstances in which an application to set aside can be brought are as follows (article 26):

- the arbitral tribunal ruled without an arbitration agreement or with respect to an invalid or expired agreement
- the arbitral tribunal was not properly composed
- the arbitral tribunal did not rule in compliance with the terms of arbitration



- due process was not met
- the arbitral tribunal breached a public policy rule of the OHADA Member States
- there are no reasons for the award

Bringing an application to set aside an arbitral award suspends enforcement, unless the tribunal ordered immediate enforcement. The decision can only be appealed to the CCJA (articles 25 and 28).

This is the only remedy available to parties before a national court. The other remedies, namely third party opposition and the application for a revision of the award, must be submitted to the arbitral tribunal (article 25).

## 27. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

Local law makes no provisions in this respect. It is not possible to appeal a foreign arbitration award.

## 28. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF: (I) AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION AND (II) DOMESTIC AWARDS?

To enforce awards issued within an OHADA Member State, the Uniform Act requires parties to obtain the recognition of the award from the competent court in that Member State (article 30). In Equatorial Guinea, the competent court is always the Supreme Court (*Cour suprême de justice*) (article 955).

This involves producing the original arbitral award, together with the arbitration agreement or copies of these documents meeting the necessary authentication conditions and, where necessary, a sworn translation into French (article 31).

Decisions refusing to recognise an arbitral award can be appealed to the CCJA but decisions granting recognition are not subject to appeal (article 32).

Awards issued in a different OHADA Member State are recognised in other Member States under the conditions set out in the applicable international agreements or, failing this, under the conditions stated in the Uniform Act.

Equatorial Guinea is not party to the New York Convention on the Enforcement and Recognition of Foreign Arbitral Awards (the New York Convention), which facilitates the recognition of foreign arbitral awards. To obtain the enforcement of a foreign arbitration award issued outside OHADA territory, a request must be made in writing to the *Cour de cassation*, save where there is an agreement expressly allocating jurisdiction to a different court. The court will hear the defendant and the state prosecutor (*procureur*) within nine days and then declare the award enforceable or unenforceable in the country, with no option to appeal.

## 29. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

Foreign awards will only be enforced in Equatorial Guinea where permitted by a treaty. If there is no treaty with the country in which the arbitration was seated, enforcement will be conditional on the existence of reciprocal agreement in that other country.

## ALTERNATIVE DISPUTE RESOLUTION

### 30. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

All parties bringing civil actions brought before the courts must first undertake conciliation proceedings before the relevant municipal court. The *tribunaux de paix* offers civil conciliation and mediation services.

## REFORMS

### 31. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

To the best of our knowledge, there are no plans to make any significant reforms of civil or commercial procedure in the near future.

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**Updated by Herbert Smith Freehills Paris for this second edition (2016)\***

\* Herbert Smith Freehills is not licensed to practice in Equatorial Guinea

# ERITREA



## INTRODUCTION

Eritrea has a mixed legal system comprising substantive laws based on the civil system and procedural laws based on the common law.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

Lawyers in Eritrea act as solicitors and barristers; there is no split profession. One must fulfil the requirements provided for in Proclamation No 88/96 in order to practise as a lawyer in Eritrea, namely:

- be formally admitted as an advocate on the Register and have a valid practising certificate and licence (article 3)
- be at least 21 years old and a permanent resident or citizen of Eritrea (article 4)
- have served for at least two years in a legal capacity in a Government ministry, authority, agency, department, commission, office or regional division or sub-division of the State, local authority or university or in a private organisation (article 4)
- be of good character and have no convictions for offences involving moral turpitude, dishonesty or treason (article 4)

In addition to the above, to practise in the High Court, one must:

- hold a law degree from a recognised university or organisation approved by the Legal Committee of the Ministry of Justice (the Legal Committee)
- have passed such examination as may be prescribed by the Legal Committee

The Legal Committee may opt to exempt the lawyer in question from the above requirements on account of his/her previous experience as a judge, registrar or prosecutor of the High Court or a higher court (article 5).

To practise in other courts, one must:

- hold a diploma or certificate in law from a recognised university or institution approved by the Legal Committee
- have passed such examination as may be prescribed by the Legal Committee

Again, the Legal Committee, in its judgment, may opt to exempt the lawyer from the requirements prescribed above on account of

his/her previous experience as a judge, registrar or prosecutor; provided that he/she does not act as an advocate in courts higher than his/her previous level of experience (article 5).

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

A new Civil Procedure Code 2015 was published by the Government on 15 May 2015, which includes a restructuring of the civil court system in Eritrea. However, the new Code (which does not have a published commencement date) has not yet been implemented in practice and it is difficult to predict when this will occur.

As it currently stands, the Civil Procedure Code 1965 (as amended post-independence) governs the civil court system in Eritrea. The civil courts comprise Communal Courts, Zonal Courts and the High Court.

The High Court enjoys original jurisdiction, and appellate jurisdiction in relation to cases originating in the Communal and Zonal Courts. It also has a division serving as the final appellate court.

Cases which originate in the Communal Court level can be appealed to the High Court, if the decision is varied by a Zonal Court. A case that originates in the Zonal Court level can be appealed to the final appellate court division of the High Court. Communal Courts have original jurisdiction only.

The above courts also have criminal jurisdiction.

Three judges sit in the Communal Court, one in the Zonal Court, three in the High Court, and three or five in the final appellate court.

Traditional courts play a major role in rural areas, where village elders determine property and family disputes under customary law or in the case of people of Islamic faith, Sharia law.

Under the structure set out in the (as yet not operational) Civil Procedure Code 2015, the civil courts comprise Community Courts, Regional Courts, the High Court and a new Supreme Court as follows:

- the Community Court has jurisdiction to try all suits not regarding irremovable property where the amount does not exceed ERN 100,000 and regarding immovable property where the amount involved does not exceed ERN 150,000
- the Regional Court has jurisdiction to try all suits not regarding immovable property between ERN 100,001 and 500,000 and regarding immovable property where the amount involved is between ERN 150,001 and 1 million

- the High Court has jurisdiction regarding immovable property where the amount exceeds ERN 1 million and in all other cases, where the amount involved exceeds ERN 500,000. The High Court has exclusive jurisdiction to try certain suits such as those relating to the formation, dissolution and liquidation of companies, insurance policies and trademarks, patents and copyright
- a first appeal can be made from the decision of a Community Court to the Regional Court in whose territorial jurisdiction such Community Court lies. Appeals can be made from the Regional Court to the High Court and from the High Court to the Supreme Court

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

Time limits depend on the type of claim. By way of example, claims based on contract must be brought within 10 years of the accrual of the cause of action. Claims based on tort must be brought within two years from when the victim suffered damage. Where the damage arises from the commission of a criminal offence in respect of which the Penal Code prescribes a longer period of limitation, the latter period applies to the action for damages.

### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

Yes. Communications between a lawyer and his client are privileged in accordance with article 30 (7) of Advocates Proclamation No 88/96. Under this provision, subject to authorised disclosure under the law and subject to the consent of the client, a lawyer must maintain professional attorney-client confidentiality of information, even after the expiry of his or her retainer.

Breach of confidentiality by a lawyer may entail:

- criminal responsibility which is chargeable in accordance with the Penal and Criminal Procedure Codes
- suspension or revocation of their practising licence in accordance with Advocates Proclamation No 88/96

### 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

To commence a suit, the claimant is required to prepare his/her statement of claim in accordance with the provisions of the Civil Procedure Code 1965.

The claimant must then submit it to the registrar of the court who will verify the technical sufficiency of the statement of claim, and open a file and give it a file number before transferring the case to a division of the court.

The court will also examine the legal sufficiency of the statement of claim before issuing a summons to the defendant requiring him/her to appear in court, on a date set by the judge, with his/her statement of defence (which may include preliminary objections). At the appointed date, if the defendant produces a statement of defence, the first thing the court will do is examine the technical and legal sufficiency of the statement of defence.

### 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

The parties must produce to both the other side and the court, at the first hearing, all the documentary evidence of every description in their possession or power on which they intend to rely.

Subject to certain exceptions, documents may be produced at a later stage in the suit.

### 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

The court controls the procedure and the timetable. The Civil Procedure Code 1965 provides: "*the period of time for the doing of anything which need or may be done in relation to proceedings in court shall, if not fixed by law, be fixed by the court having regard to all the circumstances of the case*".

The time frames from issue to trial vary widely (from months to years). They depend on the caseload of the court and the nature of the case.

### 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

The court may, amongst other things, order:

- a temporary injunction to restrain the repetition or continuance of a breach of contract or other act prejudicial to the plaintiff
- arrest before judgment
- attachment before judgment
- interlocutory orders for an interim sale, detention and inspection
- the appointment of receivers
- affixing of seals and making of inventories

### 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

The Civil Procedure Code 1965, depending on the nature of the decree or decision, provides for various means of enforcement.

A decree for payment of money may be executed by the attachment and sale of the judgment debtor's property.

A decree for any specific movable property or any part of it may be executed by its seizure and delivery to the decree holder or to such person as the decree holder may appoint to receive delivery on his/her behalf.

Where the party against whom a decree for the specific performance of a contract or for an injunction has been passed has had an opportunity to comply with the decree and has wilfully failed to do so, the decree may be executed by the attachment and sale of his/her property. The court may, out of the proceeds, award to the decree holder such compensation as it thinks fit.

Where a decree is for the execution of a document or for the endorsement of a negotiable instrument and the judgment debtor neglects or refuses to obey the decree, the decree holder may prepare a draft of the document or endorsement in accordance

with the terms of the decree. He/she should deliver the same to the court, and in the absence of any objections, the court may cause the document to be registered and may make such order as it thinks fit as to the payment of the expenses of the registration.

Where a decree is for the delivery of any immovable property, possession shall be delivered to the decree holder, or to such person as he/she may appoint to receive delivery on his/her behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.

#### **10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?**

Unless otherwise expressly provided, the costs of and incidental to proceedings are at the discretion of the court. The court has full power to decide by whom or out of what property and to what extent such costs are to be paid and to give all necessary directions to this effect. Foreign claimants may be required to provide security for costs whenever it appears to the court that a sole plaintiff is, or if there is more than one plaintiff, that all the plaintiffs are residing out of Eritrea and that that such plaintiff(s) do not possess sufficient immovable property within the country other than the property in the suit.

The (as yet not operational) Civil Procedure Code 2015 includes provision for the defendant to apply for an order that the claimant give security for all costs incurred and likely to be incurred at any stage of the suit.

#### **11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?**

The plaintiff or the defendant may appeal against any final judgment of a civil court except:

- where an appeal lies from a judgment or order but remedy under the Civil Procedure Code 1965 is available in the court which gave such judgment or made such order unless such remedy has been exhausted
- in a decision or order on any interlocutory matters, notwithstanding that any such decision or order may be raised as a ground of appeal when an appeal is made against the final judgment

If a first instance court's decision is varied by the first appellate court, there may be an appeal to the second appellate court.

The Civil Procedure Code 1965 provides for the stay of proceedings pending an appeal where:

- the president of the court which gave the decision or which has the power to hear the appeal has the power to order a stay of enforcement for a limited time
- an application is made for a stay of enforcement of an appealable decision before the expiration of the time allowed for appealing it. The court which rendered the decision has the power to stay the enforcement of the decision
- pending appeal, the appellate court has the power to grant a stay of execution of the decision

#### **12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?**

There are no express provisions addressing the issue of immunity of domestic and/or foreign State entities in civil proceedings.

#### **13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?**

Foreign judgments may be recognised and enforced, provided that:

- the execution of Eritrean judgments is allowed in the country where the judgment was rendered (principle of reciprocity)
- the judgment was given by a court duly established and constituted
- the judgment debtor was given the opportunity to appear and present his/her defence
- the judgment to be executed is final and enforceable and
- execution is not contrary to public order or morals

### **ARBITRATION**

#### **14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?**

The arbitration law is not based on the UNCITRAL Model Law. The provisions of arbitration law are provided in the Transitional Civil Code of Eritrea 2/1991 (Civil Code 1991) and the Civil Procedure Code 1965.

(Alongside the publication of the proposed Civil Procedure Code in May 2015, a new Civil Code was also published, including consolidating the arbitration laws, but it similarly has not been implemented to date.)

#### **15. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?**

There should be an arbitral submission. The Civil Code 1991 defines the term as "*the contract whereby the parties to a dispute (existing or future) entrust its solution to a third party, the arbitrator, who undertakes to settle the dispute in accordance with the principles of law.*"

Accordingly, an arbitral submission is governed by the basic principles of contract law and must fulfil the conditions of contract set out in the Civil Code.

#### **16. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?**

Yes. Courts should stay litigation if there is a valid arbitration clause covering the dispute. Where a suit is instituted in a court where there is a valid arbitration clause, the other party is entitled to raise a preliminary objection under the provisions of the Civil Procedure Code 1965.

The courts will normally not hear a dispute where parties have agreed to have their disputes resolved by way of arbitration. This applies whether or not the arbitration is to be heard inside or outside of Eritrea.

**17. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?**

There is no clear provision on this point. I have no experience of interim relief being sought in such circumstances and do not think the court would intervene in a foreign-seated arbitration.

**18. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?**

I am not aware of any case of such nature. However, I do not consider that an Eritrean court would entertain an appeal of a foreign arbitration award.

**19. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION?**

Eritrea is not a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

I am not aware of any case in which a foreign arbitral award has been enforced in Eritrea. I believe a foreign award would be enforced in the same way as a foreign judgment (see question 13 above).

**20. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?**

Please see question 19 above.

## ALTERNATIVE DISPUTE RESOLUTION

**21. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?**

There is no such requirement under the laws of Eritrea.

## REFORMS

**22. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?**

As noted above, although the Civil Procedure Code 2015 and Civil Code 2015 were published in May 2015, it is not clear when the provisions will come into force.

A new Commercial Code is also in the process of being drafted but this has not yet been published or any likely timing announced.

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# ETHIOPIA



## INTRODUCTION

Ethiopia is a federal State composed of nine regional states. The Ethiopian legal system is a hybrid system comprising both the Anglo-Saxon common law and the Roman-based civil law system. Procedural law is based on Indian civil procedure.

The majority of its laws, as in most civil law jurisdictions, are codified. The codified laws include the Civil Code, the Civil Procedure Code, the Criminal Code, the Criminal Procedure Code, the Commercial Code, and the Maritime Code.

In addition to these laws, the legal system is based on the Constitution, which came into force on 21 August 1995, customary laws and Islamic law.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

There is no split profession; lawyers may act as solicitors and barristers.

To practise as a lawyer in Ethiopia, one must obtain a practising licence in accordance with the provisions of the Federal Courts Advocates' Licensing and Registration Proclamation No 199/2000.

Three types of practising licence are issued by the Ministry of Justice: a federal first instance court advocacy licence; a federal courts advocacy licence; and a federal court special advocacy licence.

A federal first instance court licence is an entry level licence that enables lawyers to practise in the Federal First Instance Courts provided that the applicant:

- is an Ethiopian citizen
- has a diploma in law from a legally recognised educational institution, knows the basic laws of Ethiopia and has a minimum

of five years' relevant experience; or has a degree in law, knows the basic laws of Ethiopia and has a minimum of two years relevant experience

- demonstrates conduct suitable for assisting in the proper administration of justice
- has passed the advocacy entrance examination set for the licence applied for
- has not been convicted and sentenced of any offence of improper conduct
- provides a document showing that he/she has a professional indemnity insurance policy

A federal courts advocacy licence is a mid-level licence which is granted if the applicant satisfies the above criteria and has a minimum of five years' relevant experience.

The Ministry of Justice is yet to publish a directive relating to the registration and licensing of law firms, the issuance of a special advocacy licence and the type and quality of services to be rendered through the licence. However, the intention is that it will be awarded to Ethiopian nationals who defend the general interests and rights of society on a *pro bono* basis. Regional states have also adopted their own advocacy license to practice in regional courts.

A practising licence is normally not issued to a person who has another permanent employment (eg an in-house counsel).

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

Articles 78 to 84 of the Constitution deal with the structure and powers of the courts at the federal and state levels.

At the federal level, the court system is comprised of:

- Federal Supreme Court
- Federal High Courts
- Federal First Instance Courts

At the state level, the court system is comprised of:

- State Supreme Court
- State High Courts (Zonal Courts)
- State First Instance Courts (Woreda Courts)

Article 78(2) of the Constitution vests the supreme federal judicial authority in the Federal Supreme Court, which is split into civil, criminal and labour divisions.

Federal High Courts and Federal First-Instance Courts have jurisdiction over:

- cases arising under the Constitution, federal laws and international treaties
- parties specified in federal laws
- places specified in the Constitution or in federal laws

In civil cases, the Federal Courts have jurisdiction over cases to which a federal Government organ is party, suits between persons permanently residing in different regional states, cases to which a foreign national is a party, suits relating to patent, literary and artistic ownership rights, suits regarding insurance and applications for *habeas corpus*. The State Courts hear all other civil cases.

The Constitution also allows for Religious and Customary Courts. In addition, although not provided for under the Constitution, courts known as Social Courts, of historic origin or having been legislated by the states' Governments, have been set up in a number of states.

Religious Courts, whose establishment is based on the provisions of article 34(5) of the Constitution, deal with personal and family law matters. These include the Sharia Courts, which have jurisdiction in family and succession matters where the parties have expressly consented to the adjudication under Islamic law.

Customary Courts established in accordance with the provisions of article 78(5) of the Constitution are allowed to exist and perform traditional tribal administration of justice.

Social and Municipal Courts are established at the community level in rural and urban areas to deal with public health and municipal administration issues.

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

The general limitation for civil actions based on contract is 10 years from the date the cause of action arose (article 1845 of the Ethiopian Civil Code).

Proceedings in tort must be instituted within two years of the tort, or damage (in case of latent damage occurring).

Employment claims generally must be brought within one year, claims for wages, overtime and other payments within six months and claims for reinstatement following unlawful termination within three months.

A claim for enforcement of a judgment must be brought within 10 years.

#### Land disputes

The law on limitation in respect of land disputes is complex and depends on a number of circumstances, including the location of the land as against the applicable law and how it was acquired.

There is no private ownership of land in Ethiopia and land tenure is based on leaseholds granted by regional Governments and

chartered municipalities. As a result, the period of limitation varies from one region to the other depending on the law in force in the specific region.

Under the Urban Land Lease Holding Proclamation No 721/2011, parties aggrieved by an order issued by the authorities in charge of urban land in their possession are required to submit their grievances within 15 days from the date the order has been passed.

Claims arising from land "ownership" inherited from a family member must be brought within 15 years.

### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

Yes. Communications between a lawyer and his/her client are privileged under article 10 of the Federal Court Advocates' Code of Conduct Council of Ministers Regulations No 57/1999. Under this provision, the lawyer has a professional obligation to keep secret the personal or organisational information of his or her client or any other information he or she obtains in the course of his/her professional service. The lawyer may not, without the consent of the client, reveal such information.

The obligation of professional confidentiality of the lawyer may subsist after termination of his/her contract with the client.

The lawyer is permitted to disclose confidential information obtained in the course of his/her professional duties, in accordance with article 11, where he/she reasonably believes:

- the information he/she obtained from the client is necessary for the task he/she is undertaking
- he/she must defend him/herself or claim his/her interests in a dispute with the client
- a dispute has arisen concerning his/her power of representation or
- he/she performs his/her obligations as expressly provided otherwise by law

Breach of confidentiality obligations by a lawyer may result in suspension or revocation of his or her practising licence in accordance with article 15 of the Federal Courts Advocates' Licensing and Registration Proclamation No 199/2000.

Criminal sanction is also provided under criminal law for breaches of professional secrecy and the aggrieved party may initiate criminal proceedings against the violator.

### 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

To commence a suit, the plaintiff/claimant/applicant is required to prepare his/her statement of claim in accordance with the provisions of articles 80 and 222 of the Civil Procedure Code (CPC).

He/she will then submit to the Registrar of the court his/her statement of claim who will check the same, open a file and provide it to the judge.

The judge will issue a summons, together with a copy of the statement of claim, to the defendant requiring the defendant to appear in court, on a date set by the judge, with his/her statement of defence prepared in accordance with article 234 of the CPC.

The above process, from the time the plaintiff lodges the plaint to the time the summons is issued on the defendant, takes about 20 to 30 days and the plaintiff is expected to serve the summons at least 10 days prior to the date appointed for submission of the statement of defence at the office of the court Registrar (article 94 and following of the CPC).

In the statement of defence, the defendant must raise preliminary objection(s) to the statement of claim, if any, and respond to any substantive issues in the statement of claim. Thereafter, the court will make a decision on the preliminary objection(s) raised by the defendant.

Under article 244 of the CPC, preliminary objections may be raised where:

- the court has no jurisdiction
- the subject matter of the suit is *res judicata*
- the suit is pending in another court
- the other party is not qualified to act in the proceedings
- prior permission to sue has not been obtained, when this is required by law
- the suit is barred by limitation
- the claim is to be settled by arbitration or has previously been made the subject of a compromise or scheme of arrangement

The court will decide any objection taken under article 244 of the CPC after hearing the opposing party and ordering the production of such evidence as may be necessary for the decision to be made.

Where the court is satisfied that the objection is well-founded, it shall, in the case of *res judicata* or limitation objections, dismiss the suit and, in other cases, strike out the suit and/or make such other order as it thinks fit.

Where matters proceed, the court adjourns for a period of about one month and issues summons requiring witnesses to appear and for documents from third parties to be brought before it on the appointed date (article 111 and following of CPC).

On the appointed date, witnesses will be examined, cross-examined and re-examined, if necessary, by the court. Then the court will again adjourn the case for at least a month. If the court finds that there needs to be further investigation or presentation of additional evidence it will ask for it. Otherwise it will give judgment giving its findings on the substantive issues in dispute according to the law, evidence presented, issues framed and the testimony of witnesses, if any (article 257 and following of CPC).

## 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE AND HOW IS EVIDENCE PRESENTED AT TRIAL?

In Ethiopia, procedural laws are inspired by Indian civil procedure, so there is no discovery at the pre-trial stage. However, there is discovery in a limited sense once the plaintiff has initiated proceedings. In this regard, the CPC grants authority to the court, either on its own motion or on the application of any of the parties, to send for records held by the courts, or in the hands of third parties, provided they are relevant.

For the court to grant such an order, an application for the production of records must show that the record is material to the suit in which the application is made and that the applicant cannot without unreasonable delay or expense obtain a duly authenticated copy of the record, or that the production of the original is necessary for the purposes of justice. The record to be used in evidence must be admissible in the suit (article 145 of the CPC).

## 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

It is difficult for the parties to control matters, as courts in Ethiopia invariably adjourn cases in order to try other cases that, in their discretion, require speedy trial. This is attributable to the fact that courts have backlogs and too many cases but too few judges. Consequently, the timeframes provided above normally vary depending on the number of cases pending in court. As a result cases mostly take between one and five years to be concluded.

## 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

Under the laws of Ethiopia, a party may seek an order for:

- a temporary injunction to restrain the repetition or continuance of a breach
- arrest before judgment, which may entail the grant of security to guarantee appearance in court by the defendant
- attachment before judgment
- interlocutory orders for interim sale, detention and inspection
- the appointment of receivers
- the affixing of seals and making of inventories

The facts must support the grant of such orders and procedural laws must be complied with.

## 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

The CPC provides for various enforcement mechanisms:

- a decree for payment of money may be executed by the attachment and sale of the judgment debtor's property (article 394 of the CPC)
- a decree for any specific movable property or any share therein may be executed by seizure and delivery to the decree-holder (article 399 of the CPC)
- where the party subject to a decree for specific performance or an injunction has wilfully failed to comply, the decree may be executed by the attachment and sale of his or her property and the court may, out of the proceeds, award to the decree-holder such compensation as it thinks fit (article 400 of the CPC)
- where a decree for the execution of a document or for the endorsement of a negotiable instrument is not honoured, the decree-holder may prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the court (article 401 of the CPC)
- where a decree is for the delivery of immovable property, possession is conferred on the decree-holder, and if necessary, those bound by the decree removed from the property (article 402 of the CPC)



### 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

Courts in Ethiopia have the power to order costs in line with the provisions of article 465 of the CPC (which grants the courts full power to decide by whom and to what extent such costs are to be paid). The court also has the power to tax bills of costs and grant compensatory costs in the case of vexatious litigation (article 465 of the CPC).

Foreign claimants may be required to provide security for costs whenever it appears to the court that the plaintiff is resident outside Ethiopia and does not possess sufficient immovable property within Ethiopia other than the property in the suit (article 200(2) of the CPC).

### 11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

A party has the right to appeal from a final judgment of the First Instance Court to the High Court, and thereafter to the Federal Supreme Court and finally to the Federal Supreme Court in Cassation, which is a sub-division of the Federal Supreme Court. The Court of Cassation hears cases on matters of law only in relation to cases from both the Federal and Regional courts. It is the ultimate guardian of the rights embodied in the Constitution.

Article 332 of the CPC provides that an appeal shall not operate as a stay of proceedings under a decree or order appealed from, but the Appellate Court may, for sufficient cause, order a stay of execution (article 333 of the CPC). In addition, the President of the court which passed the decree or made the order is also permitted to grant a stay of execution for a period not exceeding 15 days (article 334 of the CPC).

### 12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

There are no express provisions under the laws of Ethiopia that address the issue of immunity of domestic and/or foreign State entities in civil proceedings.

The facts must support the grant of such orders and procedural laws must be complied with.

However, article 2137 of the Civil Code provides that, "... *no action for liability based on an offence committed by Him may be brought against His Majesty the Emperor of Ethiopia.*" This law was passed in the 1960s when Ethiopia was an Empire under the reign of Emperor Haile Selassie. Article 2137 has largely remained unamended, notwithstanding that some of its provisions have become obsolete.

In principle, and in line with international practice, domestic and/or foreign State entities do not enjoy immunity of their assets or legal persons when engaged in commercial acts. Nevertheless, most parties dealing with domestic and/or foreign State entities normally negotiate an express provision waiving any immunity that the State entity may be entitled to under the contract.

### 13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

Foreign judgments, in accordance with the provisions of article 458 of the CPC, will be recognised and enforced, without retrial, provided that:

- the execution of Ethiopian judgments is allowed in the country where the judgment was rendered (reciprocity)
- the judgment to be executed was given by a court or arbitral tribunal that was duly established and constituted
- the judgment debtor was given the opportunity to appear and present his defence
- the judgment is final and enforceable
- the execution is not contrary to public order or morals

## ARBITRATION

### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

No. There are scattered provisions in different legislative instruments, namely under the Civil Code of Ethiopia (articles 3325-3346 and the Civil Procedure Code of the Empire of Ethiopia (articles 315-319 and 456-461).

However, many of the provisions are similar to UNCITRAL Model Law.

### 15. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

The Civil Code and the Civil Procedure Code use the term "arbitral submission" to mean an arbitration agreement (contract) where parties to a dispute entrust its solution to a third party, the arbitrator, who undertakes to settle the dispute in accordance with the principles of law agreed by the parties to apply to their relationship.

Consequently, an arbitration agreement is governed by the basic principles of contract law and must fulfil the conditions set out under the Civil Code of Ethiopia, which are that:

- the parties have expressed their intent to be bound
- the object of the contract, ie the obligations created thereunder, are defined, lawful, possible to perform and not immoral
- parties have given their consent free from any defect (such as duress, mistake, fraud or unconscionability)
- the contract meets formality requirements set by the law, eg that the agreement must be in writing and attested by at least two witnesses

In addition, the arbitration agreement must comply with the provisions of article 3326(2) of the Civil Code, in that it must have been drawn up in the form required by law for disposing, without consideration, of the right to which it relates.

The parties can refer: (a) existing disputes; or (b) disputes which may arise out of the contract in the future.

Parties are further required to fulfil the requirement of arbitrability, in that the subject matter that is in dispute must be capable of settlement by arbitration. For instance, disputes arising under an administrative contract cannot be settled by arbitration.

**16. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?**

Yes. Courts in Ethiopia will uphold provisions of a contract with an arbitration clause on the basis of the principle enshrined under the Civil Code where contracts lawfully formed shall be binding on the parties as though they were law.

The courts will normally not entertain a dispute where parties have agreed to have their disputes settled by way of arbitration, if a suit is instituted in court where there is a valid arbitration clause which covers the dispute the other party is entitled to raise a preliminary objection in accordance with the provisions of the Civil Procedure Code.

The approach will not change if the seat of arbitration is inside or outside Ethiopia.

**17. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?**

In principle, in Ethiopia, arbitration proceedings enjoy freedom from court intervention and arbitrators generally have the power to decide their jurisdiction, and to grant orders in relation to attendance of witnesses and preservation of assets or evidence.

Nonetheless, parties to arbitration have the right to apply for court assistance whenever appropriate.

Parties to an arbitration agreement may approach the courts, *inter alia*, seeking interim relief enjoining a pending arbitral proceeding.

There have been instances where the Ethiopian Federal Supreme Court accepted a party's application to restrain an international arbitration proceeding pending court decision on a preliminary objection to the jurisdiction of the arbitrators.

The application was brought based on article 3342(3) of the Civil Code which allows an appeal against an application for disqualification turned down by the arbitrators. Though there is no express legal authority, within the pertinent provisions of the Civil Code and CPC, for courts to suspend the arbitration until they finally give a decision on the pending application for disqualification, Ethiopian courts have practically done so with the help of the CPC's provisions on temporary injunctions and stay of proceedings.

The ICC Arbitral Tribunal in *Salini Costruttori SpA v The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority* was ordered by the Federal Supreme Court to suspend the arbitration pending judicial decision on the qualification/jurisdiction of the arbitrators. The tribunal declined to do so.

The above position illustrates the fact that the Ethiopian courts will accept a supervisory jurisdiction over international arbitration proceedings and may therefore intervene in arbitrations seated outside Ethiopia if approached by either party with an interest in the matter.

In exercising their supervisory role, the Ethiopian courts can intervene in arbitrations seated outside Ethiopia and thus entertain: (i) challenges to arbitral awards; and (ii) applications for enforcement of the same.

**18. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?**

Whilst there is no distinction made between a domestic and foreign arbitral award under Ethiopian law, there is very little jurisprudence on appeals against foreign arbitration awards.

Under article 351 of the CPC, no appeal shall lie from an award except where:

- the award is inconsistent, uncertain or ambiguous or is on its face wrong in law or fact
- the arbitrator omitted to decide matters referred to him or her
- irregularities have occurred in the proceedings, in particular where the arbitrator:
  - failed to inform the parties or one of them of the time or place of the hearing, or to comply with the terms of the submission regarding admissibility of evidence
  - refused to bear the evidence of material witnesses or took evidence in the absence of the parties or one of them
- the arbitrator has been guilty of misconduct, in particular where:
  - they heard one of the parties and not the other
  - they were unduly influenced by one party, whether by bribes or otherwise
  - they acquired an interest in the subject-matter of dispute referred to them

However, article 351 of the CPC applies to arbitrations seated in Ethiopia only and not foreign arbitrations unless parties have agreed that the laws of Ethiopia will apply to both the procedural and substantive matters of their disputes.

In most instances, parties do not agree that Ethiopia will be the seat of the arbitration and therefore on very few occasions will Ethiopian law be the procedural and substantive law. Generally, the local courts in Ethiopia have no jurisdiction to entertain appeals arising from a foreign arbitration award.

Enforcement of a foreign award can be resisted on the above grounds, and more particularly in accordance with the provisions of the Ethiopia Civil Procedure Code of 1965, where:

- there is no reciprocity between Ethiopia and the country where the award was made as provided for in the Ethiopian Civil Procedure Code
- the award has been made following an invalid arbitration agreement
- the parties did not have equal rights in appointing the arbitrators (unless the parties have expressly agreed to a process for appointing the tribunal which led to unequal rights) and/or a party has not been summoned to attend the proceedings
- the arbitration tribunal was not regularly constituted

- the award relates to matters which, under the provisions of Ethiopian law, cannot be submitted to arbitration or are contrary to public order or morals and
- the subject-matter of the award cannot be settled by arbitration under the laws of Ethiopia

### 19. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION?

Under the laws of Ethiopia, foreign arbitral awards will be recognised and enforced in Ethiopia where an application for the execution of such a foreign arbitral award has been presented to the relevant division of the High Court accompanied by a certified copy of the foreign arbitral award to be executed, and a certificate signed by the President or Registrar of the arbitral tribunal that rendered the award to the effect that such an award is final and enforceable.

The High Court will not review the merits of the case. It will, during an *exequatur* proceeding, merely establish whether the arbitral tribunal which rendered the arbitral award had jurisdiction to do so, and whether the defendant/respondent was given a chance to defend himself/herself. Where it finds that this is the case, it will enforce the award against the defendant in Ethiopia.

The courts with jurisdiction to hear such cases are the Federal High Courts and the Federal Supreme Court of Ethiopia in event of an appeal.

Generally, the time taken would be about seven months from the time the first application is made and the court decides on any appeal made by the losing party, but in practice it may take a minimum of one year as it would depend on the number of cases already pending in court, which in most cases is many.

### 20. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

Ethiopia is not a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

While the law governing enforcement and recognition of foreign judgments and arbitral awards is, in our view, fair and comparable to the provisions of the New York Convention, there has not been enough case law on enforcement of foreign judgments and foreign arbitral awards in Ethiopia to date to test these provisions.

From the few cases decided, the trend established is not positive. For instance, in the case of *Paulos Papassinus* filed in the Federal High Court of Ethiopia, Civil Case No 1623/1980 involving enforcement of a foreign arbitral award following an international arbitration, the interpretation on the requirement of reciprocity was very restrictive while in *Addis Ababa Water and Sewerage Authority v Salini Costruttori SpA* Federal Supreme Court of Ethiopia Civil Appeal Case No 06298, there was a general bias against foreign/international arbitration, especially due to the fact that the case had been brought against a State entity.

These are cases decided many years ago which may not necessarily give the correct current position on the Ethiopian courts' perception of recognition and enforcement of foreign judgments and foreign arbitral awards. The problem is that there are no current cases where the court has been asked to enforce a foreign arbitral award, although the laws in force seem to be in line with the established international norms.

## ALTERNATIVE DISPUTE RESOLUTION

### 21. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

Presently, there is no requirement for the parties to submit to any alternative dispute resolution before or during proceedings under the laws of Ethiopia.

## REFORMS

### 22. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

None that we are aware of, particularly insofar as the provisions of the Civil Procedure Code and Civil Code on arbitration and court proceedings are concerned.

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# GABON



## INTRODUCTION

The laws of Gabon are based on the civil law tradition. The judicial system is derived from the Constitution of 26 March 1991 and Law 9/94 of 17 September 1994 as well as on Order n°15/PR/015 of 11 August 2015 bearing on the organisation and operation of the legal system. Gabon is also a member of CEMAC and OHADA.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

The legal profession is governed by Law No 013/2014 of 7 January 2015 and by the Internal Bar Regulations (*Règlement Intérieur du Barreau*) of 19 June 2015. To practise law in Gabon, potential lawyers must be registered with the Gabon Bar Association (*Ordre des avocats*) and meet certain conditions, including:

- having Gabonese nationality for at least the past 10 years (or have acquired Gabon nationality (through naturalisation, marriage or adoption) at least 10 years prior to the date of application)
- be at least 21 years old
- holding a master's degree (*maîtrise*) in law, a bachelor's degree (*licence*) in law or a foreign legal diploma recognised as equivalent
- being of good moral character
- not having been sentenced for offences other than reckless offences
- holding the Certificate of Aptitude to the Legal profession (*Certificat d'aptitude à la profession d'avocat*)
- having completed a preparatory internship of a one-year duration alongside an attorney who has been registered with the Bar Association for at least five years, is up to date in their Bar membership fees, has not been suspended for at least three years, and has sufficient means to enable the intern to receive clients while complying with confidentiality obligations
- being sponsored by a law firm

The profession is organised by the *Conseil de l'Ordre*, which ensures that members abide by the rules governing the profession and applies any necessary disciplinary action. Lawyers (*avocats*)

registered with the Bar (*Barreau*) can appear before any court and can practise individually or in a practice structure.

No distinction is made between lawyers giving advice (solicitors) or appearing in court (barristers).

Provided that Gabonese lawyers have reciprocal rights in their home countries, foreign lawyers can plead before the Gabonese courts if they inform the President of the Bar (*Bâtonnier*) in advance of their appearance and the case in which they wish to represent their client, that they appear alongside an attorney registered with the Gabon Bar, and have a fee agreement with the Gabonese attorney. Foreign lawyers registered with a foreign Bar may be listed as an associate of a Gabonese lawyer on the *Tableau de l'Ordre*, pursuant to a decision from the *Conseil de l'Ordre*.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The Gabonese court system includes:

- the *tribunaux de première instance* (Courts of First Instance). The Courts of First Instance have jurisdiction over all matters whose jurisdiction is not expressly and exclusively attributed to another court. They are organised into Chambers:
  - the Civil Chamber has jurisdiction over civil matters
  - the Criminal Chamber has jurisdiction over common law offenses and misdemeanours
  - Commercial courts have jurisdiction over commercial matters
  - the Employment Chamber (also referred to as the Labour Tribunal) is the first instance forum for all disputes arising out of the performance of an employment contract
- the Courts of Appeal (Libreville, Franceville, Port-Gentil, Oyem, and Mouila)
- the *Cour de cassation* (Supreme Court)
- Special Courts, including:
  - the Special Court for Economic and Financial Crime. This court has special jurisdiction for the investigation and prosecution of economic and financial crimes such as corruption, extortion, influence peddling, money laundering and the trafficking of ivory, raw materials or pharmaceuticals. It also has jurisdiction in respect of acts of terrorism, offences relating to automated data processing systems, criminal conspiracy or murder committed for purposes of monitoring or removal of organs, trafficking or human trafficking.
  - the Special Court of Appeal has jurisdiction on appeals of decisions relating to investigations or trials led by the Special Court for Economic and Financial Crime.

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

Limitation periods vary depending on the type of action and the parties involved:

- the ordinary limitation period for bringing an action is 30 years
- the limitation period applicable to commercial actions is five years
- specific limitation periods apply to certain types of actions:
  - salary claims (five years)
  - claims over commercial sales (two years)
  - action for rescission (*action réhibitoire*) (one year)
  - actions to rescind a gift (*revocation donation*) (one year)
  - annulment of a marriage (one year)
  - acknowledgement of parenthood (*contestation de filiation légitime*) (three months)

The limitation period can be modified by contract in commercial matters only. However, the limitation period cannot be reduced to less than one year or extended to more than 10 years. The main interruptions to the limitation periods come from the filing of legal actions or acknowledgement of parenthood (*actes de reconnaissance*). Other causes for interruption may always be agreed upon by the parties.

### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

Exchanges between lawyers and their clients are confidential. Lawyers may be held liable for failures to maintain confidentiality. Disciplinary penalties may apply, without prejudice to claims for any infringements pursuant to criminal law.

Clients cannot release their lawyers from this obligation.

### 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

Civil proceedings are brought before the court:

- in a petition submitted to the registrar for the appropriate court
- through the voluntary appearance of the parties before the court
- in a joint petition by which the parties submit their respective claims to the judge, the points of disagreement and the arguments of each side

All civil, commercial and employment claims are submitted by way of a petition. Orders are then issued on the petitions authorising the party to have a summons served setting the court, place, time and date. A copy of the petition and authorising order is provided to the bailiff, who then handles service of the summons.

The period for entering an appearance is at least 15 days from the summons. The deadlines for appearing, challenging, and appealing to the Court of Appeal or Supreme Court are increased by one month for parties domiciled outside the court's territorial jurisdiction, and by two months in all other cases.

These deadlines do not apply to interlocutory proceedings, where the timeframes are left to the judge's discretion.

Defendants must comply with the deadlines set by the judge in charge of the preliminary phase (*la mise en état*) for presenting arguments in their defence.

There is no mandatory prior mediation procedure except in cases involving payment orders or in labour disputes.

### 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

As a general rule, the types of evidence allowed under ordinary law may be presented (notarised instruments, witness testimony, private instruments, confessions, etc).

There is no obligation equivalent to "disclosure" under UK law.

The party relying on a piece of evidence is obliged to communicate it to any other party to the proceedings. Communication must be spontaneous. A party can ask the judge to issue a preliminary ruling ordering another party to produce evidence.

Evidence is submitted to the court together with the parties' claims. New evidence is allowed until the trial phase has been closed. New evidence can also be submitted in an appeal to the Court of Appeal or the Supreme Court.

Courts may order an expert review if there are legitimate reasons to preserve or establish proof of certain facts that may be key to the dispute, either before or during the trial, if there is not sufficient evidence in the case file. The expert review must be proportional to the dispute - the simplest and least costly solution. Other parties must be given the chance to challenge the expert evidence. The expert's conclusions or observations are not binding on the court.

### 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

The parties do not control the procedure. Once the proceedings have commenced, the timetable is set at the discretion of the court and in practice depends on various factors, such as the complexity of the case, the degree of urgency and the caseload of the court.

The average length is one year for proceedings on the merits and six months for ordinary interlocutory petitions. The average length of interlocutory proceedings is at the discretion of the judge receiving the petition.

The average length for appellate proceedings is one year, or eight months in employment matters. Supreme Court appeals take from two to four years.

### 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

There are urgent procedures in Gabon for parties to protect their interests while a decision on the merits is pending:

- interlocutory proceedings (*référé*) are a means by which a party can obtain interim measures in urgent circumstances without prejudice to the final ruling on the merits. An interlocutory

petition is submitted at a specific hearing before the presiding judge of the court. The proceeding must offer all parties an opportunity to respond. Interlocutory proceedings can be used to prevent imminent harm, to put an end to a clearly unlawful disturbance, to grant a provision to a creditor where the debt cannot seriously be questioned, or where there is a difficulty with executing a court decision or other enforceable title if no application has been made to the enforcement judge

- *ex parte* orders (*ordonnances sur requête*) are issued by the presiding judge to prescribe any measures necessary to preserve the parties' rights and interests where circumstances demand that the decision be taken without the input of the other party. An *ex parte* order is immediately enforceable
- interim attachment orders (*saisie conservatoire*) make the debtor's affected movable property unavailable, and prevents the debtor from being able to dispose of it to the detriment of a creditor. The party seeking the attachment must demonstrate that a debt exists in principle. Requests for interim attachment are submitted to the registrar. Unless otherwise provided by law, an order must be issued authorising the attachment. The order expires within three months. The court must receive an application for enforceable title within the months following the interim attachment

## 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

Judgments are only enforceable once they can no longer be appealed and become final, unless provisional enforcement is automatic or has been ordered in the specific case. Those subject to the judgment may, however, be granted a grace period.

The enforcement measures provided under Gabonese law are those provided for in the OHADA Uniform Act Organising Simplified Recovery Procedures and Measures of Execution and include:

- seizure for sale (*saisie vente*): "any creditor in possession of a writ of execution showing a debt due for immediate payment may [...] proceed to the seizure and sale of the tangible property belonging to his debtor [...] in order to be paid from the sale price"
- seizure-award of debts (*saisie-attribution de créances*): "any creditor in possession of a writ of execution showing a debt due for immediate payment may [procure the seizure] in the hands of a third party [of] the debt owed by his debtor in the form of a sum of money"
- penalty payment (*astreinte*): creditors who obtain an injunction from a court ordering their debtors to complete a particular task or to cease and desist may ask the court to combine the injunction with a penalty for non-compliance, payable by day/week/month
- real property foreclosure (*saisie immobilière*): this enforcement mechanism is applied as a last resort when the seizure of personal property or of debts was unfruitful or insufficient. The insufficiency must be authenticated by a bailiff (*huissier de justice*), only then may the creditor initiate a *saisie immobilière*

The court may grant grace periods to the unsuccessful party, save for maintenance payments (*dette d'aliments*) or debts pertaining to negotiable instruments (*etettes cambiales*).

## 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

The unsuccessful party bears the costs unless the court issues a reasoned decision charging such costs to another party either in whole or in part. The unsuccessful party only bears the cost of legal fees if reimbursement of such fees was specifically requested from the court. Legal fees are assessed at the judge's discretion, and the discrepancy with the fees actually borne in practice is considerable.

Deposits of the amount necessary to cover legal costs<sup>1</sup> are requested of all parties who wish to bring civil proceedings before the courts of Gabon. Subject to international agreements and conventions, foreign claimants or participating parties must provide a guarantee for payment of the costs as well as any damages they may be ordered to pay, if the defendant so requests, before making any other procedural motions. The judgment ordering the guarantee also sets the amount.

## 11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

Parties have one month to appeal first instance judgments. For litigation, appeals must be filed by way of a written or verbal notice received and recorded by the registrar for the original ruling or the registrar for the Court of Appeal. It is not possible to make new claims on appeal, save for damages or where the new claim is an argument in defence against the main claim. If filed in due time, appeals suspend the enforcement of the judgment, save where the court has ordered provisional enforcement.

After a decision has been handed down on appeal, a further appeal to the Supreme Court is possible. The Supreme Court only judges points of law, not facts. In principle, Supreme Court appeals do not suspend enforcement. If the appeal is successful, the case is remanded to a new court of appeal or to the same court of appeal comprising other judges for a new decision. In principle, the court of remand adheres to the Supreme Court decision.

## 12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

Legal action can be brought against the State and public authorities. State-owned companies do not have any immunity from jurisdiction.

Any immunity allowed to foreign State entities derives from international agreements on diplomatic and consular relations, particularly from headquarters agreements between such foreign entities and the State of Gabon.

## 13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

In Gabon, judgments handed down by foreign courts must be the subject of a recognition (*exequatur*) decision from the *tribunal de première instance* with jurisdiction over the place where it is to be enforced. The judgments must meet the following criteria:

- the foreign court that handed down the judgment had jurisdiction pursuant to its laws (and the courts of Gabon did not)

- due procedure was followed and the defendant was able to present arguments in its defence
- the dispute was settled appropriately in light of the facts at issue and the interpretation of applicable legal rules
- no Gabonese decision has been handed down in respect of the same facts and the dispute has not been submitted to any court in Gabon
- the decision is not contrary to Gabonese public policy

The courts of Gabon will not recognise or enforce any decision from a foreign judicial body if the decision conflicts with one that has already been decided in Gabon (whether rendered by a Gabonese or a foreign court).

The court cannot revise the foreign judgment. However, it can find that only certain items of the decision are enforceable, and reduce the amount of any fine or damages.

## ARBITRATION

### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

Gabon is a Member State of OHADA (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires* – Organisation for the Harmonisation of Business Law in Africa). The OHADA Treaty was first signed on 17 October 1993. Under the OHADA Treaty, the Council of Ministers of Justice and Finance adopt "uniform acts" that are directly applicable and enforceable in each of the Member States. Arbitration in the OHADA Member States is governed by the Uniform Act on Arbitration within the Framework of the OHADA Treaty, which was adopted on 11 March 1999 and came into force 90 days afterwards (the Uniform Act),

The Uniform Act is not based on the UNCITRAL Model Law. It was drafted separately but is nevertheless aligned with the fundamental principles of international commercial arbitration and key features of the UNCITRAL Model Law.

The Uniform Act applies to both national and international arbitration and governs all arbitration proceedings with a seat in a Member State.

Prior to the adoption of the Uniform Act, arbitration law was governed by articles 972 to 993 of the Gabonese Civil Procedure Code.

The Uniform Act has now replaced all existing domestic law on the subject, save any non-contrary provisions.

One of the most important characteristics of OHADA arbitration is the Common Court of Justice and Arbitration (*Cour commune de justice et d'arbitrage*) (the CCJA), which acts as both a permanent arbitral tribunal and the supreme court of arbitration for all OHADA Member States.

### 15. WHAT ARE THE MAIN NATIONAL ARBITRATION INSTITUTIONS?

The main arbitration institution in Gabon does not exist at national level: it is the CCJA, which was created by the OHADA Treaty and is based in Abidjan, in Côte d'Ivoire. The CCJA, which also has a judicial function, acts as an arbitration centre and administers proceedings governed by the CCJA Rules of Arbitration. The CCJA

is different from other arbitration centres in that it is not a private institution but was created and organised by OHADA.

For the CCJA Rules to be applicable, article 21 of the OHADA Treaty stipulates that all or part of the contract in question must be performed within the territory of one or more Member States or that at least one of the parties must be domiciled or habitually resident in a Member State. According to commentators, it should also be possible to go to arbitration under the CCJA Rules even if these conditions are not met if the parties have provided for this possibility in their arbitration agreement.

### 16. ARE THERE ANY RESTRICTIONS ON WHO MAY REPRESENT THE PARTIES TO AN ARBITRATION?

The Uniform Act does not set any restrictions on persons who can represent parties in an arbitration. They are entitled but not required to instruct a lawyer (article 20 of the Uniform Act).

### 17. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

Article 3 of the Uniform Act states that the arbitration agreement must be made in writing or by any other means of which evidence can be provided. No particular format is required. The Uniform Act also provides that contracts can refer to an arbitration agreement contained in a different document.

### 18. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?

Article 13 of the Uniform Act provides that national courts must decline jurisdiction where there is an arbitration agreement and where the arbitral tribunal has not yet been constituted, save where the arbitration agreement is "manifestly void". Courts cannot decline jurisdiction at their own discretion.

If the arbitral tribunal has already been composed, the national court must decline jurisdiction at the request of one of the parties.

In practice, the courts tend to decline jurisdiction if all the conditions of article 13 apply.

Parties governed by an arbitration agreement do have the option of consulting a national court to obtain interim or conservatory measures that do not require a review of the case on the merits, in circumstances that have been recognised as urgent and where reasons have been given, or where the measure must be performed in a State that is not part of OHADA.

National courts can also intervene in very limited circumstances with a view to assisting the arbitration process (see questions 22 and 23 below).

There is also nothing to prevent a party from applying to the Gabonese courts where the seat of arbitration is outside OHADA and interim measures are necessary vis-à-vis a Gabonese party.

### 19. IF THE ARBITRATION AGREEMENT AND ANY RELEVANT RULES ARE SILENT, HOW MANY ARBITRATORS WILL BE APPOINTED, AND WHO IS THE APPOINTING AUTHORITY?

The Uniform Act does not stipulate a specific number of arbitrators if the arbitration agreement is silent on this point. It

does provide that an arbitral tribunal must have a sole arbitrator or three arbitrators.

If the parties do not appoint one or more arbitrators, the task falls to the competent court in the Member State of the seat of arbitration. In Gabon, this is the Commercial Chamber of the *tribunal de première instance*.

## 20. WHAT RIGHTS ARE THERE TO CHALLENGE THE APPOINTMENT OF AN ARBITRATOR?

Article 7 of the Uniform Act sets the rules on challenging an arbitrator. An arbitrator must notify the parties of "any circumstance about him/herself" for which they may be challenged. Any disputes will be settled by the *tribunal de première instance*, save where the parties have provided for a different procedure for challenging arbitrators. Decisions are not subject to appeal.

Arbitrators may only be challenged for reasons that come to light after their appointment.

## 21. DOES THE DOMESTIC LAW CONTAIN SUBSTANTIVE REQUIREMENTS FOR THE PROCEDURE TO BE FOLLOWED?

The Uniform Act requires parties to receive equal treatment and to have every opportunity to exercise their rights (article 9); arbitrators may not base their decisions on reasons considered at their own discretion without first allowing the parties to submit observations (article 14).

Article 18 of the Uniform Act provides that the deliberations must be kept secret.

The Uniform Act also provides that the duration of the arbitration may not exceed six months from the date upon which the last arbitrator accepts the terms, save where extended by agreement of the parties or by consulting the *tribunal de première instance*, which has jurisdiction (article 12).

## 22. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED INSIDE THE JURISDICTION?

In principle, where there is an arbitration agreement, the national courts cannot intervene in a dispute until the award has been issued.

Nevertheless, parties may consult the competent court in Gabon in the following circumstances:

- to resolve difficulties encountered with composing the arbitral tribunal, to appoint the sole arbitrator or the third arbitrator (articles 5 and 8)
- to rule on challenges against arbitrators where the parties have not provided for a different procedure (article 7)
- to extend the deadline for the conclusion of the arbitration where there is no agreement between the parties to do so, at the request of a party or the arbitral tribunal (article 12)
- to order interim or protective measures in cases of emergency (with reasons given), or when the measure would be performed in a non-OHADA State, provided the measures do not require a review of the case on the merits (article 13)
- to assist the arbitral tribunal, at its request, with the production of evidence (article 14)

Where the arbitration is not governed by the Uniform Act, the presiding judge of the *tribunal de première instance* appoints the president of the arbitral tribunal.

## 23. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?

In principle, national courts cannot intervene in an arbitration seated outside their jurisdiction where there is an arbitration agreement, as indicated above. In addition, all measures relating to the composition of the arbitral tribunal and conducting the proceedings fall under the jurisdiction of the courts of the country in which the arbitration is seated.

However, it is possible for national courts other than the competent court of the Member State in which the arbitration is seated to intervene to order conservatory or interim relief under the conditions described above in question 18 (article 13).

## 24. DO ARBITRATORS HAVE POWERS TO GRANT INTERIM OR CONSERVATORY RELIEF?

Although this matter is not dealt with directly in the Uniform Act, legal commentators generally agree that it is possible for arbitrators to order interim or conservatory relief, save where the parties have agreed otherwise.

## 25. WHEN AND IN WHAT FORM MUST THE AWARD BE DELIVERED?

Save as agreed otherwise by the parties, arbitral awards must be issued within six months from the date on which all of the arbitrators have accepted the terms. This term can be extended by agreement between the parties or by order of the competent court of the Member State, the *tribunal de première instance*, at the request of a party or the arbitral tribunal (article 12).

Parties can set special requirements for awards. Failing this, awards are issued by majority, where the tribunal counts three arbitrators, and must be reasoned. They must be signed by at least two of the three arbitrators.

If the Uniform Act does not apply, the Gabonese Civil Procedure Code provides that unless a timeframe is set in the arbitration agreement, the arbitrators' assignment lasts no more than three months from the date of appointment.

## 26. CAN THE SUCCESSFUL PARTY RECOVER ITS COSTS?

The Uniform Act does not contain any provisions on this, but the Gabonese Civil Procedure Code does. Please see question 10 above.

Where arbitration is conducted under the aegis of the CCJA, the arbitrator is empowered to award costs.

## 27. ON WHAT GROUNDS CAN AN AWARD FROM AN ARBITRATION SEATED IN THE JURISDICTION BE APPEALED TO THE COURT?

The only remedy against an arbitral award is an application to set aside that award brought before the competent court in the Member State in which it was issued, within one month from the date of service of the award once rendered enforceable (articles 25 and 27).



The circumstances in which an application to set aside can be brought are as follows (article 26):

- the arbitral tribunal rules without an arbitration agreement or with respect to an invalid or expired agreement
- the arbitral tribunal was not properly composed
- the arbitral tribunal did not rule in compliance with the terms of arbitration
- due process was not met
- the arbitral tribunal breached a public policy rule of the OHADA Member States
- there are no reasons given for the award

Bringing an application to set aside an arbitral award postpones enforcement, unless the tribunal ordered provisional enforcement. The decision can only be appealed to the CCJA (articles 25 and 28).

This is the only remedy available to parties before a national court. The other remedies, namely third party challenge and the application for a revision of the award, must be submitted to the arbitral tribunal (article 25).

## 28. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

The Gabonese Civil Procedure Code (article 989) provides that arbitral awards are to be appealed to the Court of Appeal. The provision makes no distinction between arbitral awards handed down in Gabon or abroad. In relation to awards handed down in Gabon and other Member States, the Uniform Act applies (see question 27 above). In relation to other foreign awards, article 989 may apply. The rule of ordinary law that the entire case is submitted on appeal, in fact and in law, would apply.

## 29. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF: (I) AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION AND (II) DOMESTIC AWARDS?

To enforce awards issued within an OHADA Member State, the Uniform Act requires parties to obtain the recognition of the award from the competent court in that Member State (article 30), namely, the *Tribunal de première instance*.

This requires the production of the original arbitral award, together with the arbitration agreement or copies of these documents meeting the necessary authentication conditions and, where necessary, a sworn translation into French (article 31).

Decisions refusing to recognise an arbitral award can be appealed to the CCJA but decisions granting recognition are not subject to appeal (article 32).

Awards issued in a different OHADA Member State are recognised in other Member States under the conditions set forth in the applicable international agreements or, failing this, under the conditions stated in the Uniform Act.

Gabon is party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which facilitates the recognition and enforcement of foreign arbitral awards and applies to awards handed down outside OHADA Member States.

## 30. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

In practice, yes.

## ALTERNATIVE DISPUTE RESOLUTION

### 31. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

Proceedings are not subject to any mandatory prior conciliation unless the law provides otherwise (article 425 of the Civil Procedure Code). For example, cases involving payment orders or labour disputes are subject to a mandatory mediation procedure.

Beyond this, parties may engage in mediation or conciliation either of their own accord or as ordered by the court at any point in the proceedings (articles 425 and 426 of the Civil Procedure Code).

## REFORMS

### 32. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

The principles and rules governing the organisation and the functioning of the judiciary were significantly amended by a Government Decree issued on 11 August 2015 during the parliamentary intercession. This Decree replaces the 7/94 Act of 16 September 1994 on the organisation of justice and repeals all other previous provisions. It should be ratified by Parliament at the next session. An organic law establishing the organisation, composition and functioning of the courts is also expected.

## FOOTNOTE:

1. In civil law countries, recoverable legal costs do not necessarily include lawyers' fees.

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# GAMBIA



## INTRODUCTION

The Gambia implements a tripartite legal system based on English common law, Sharia (Islamic) law, and customary law. The 1997 Constitution recognises statutory enactments, decrees passed by the Armed Forces Provisional Ruling Council (during the transition from military rule from 22 July 1994 to the coming into force of the Constitution), common law and principles of equity, customary law as it concerns the communities to which it applies, and Sharia law on matters of marriage, divorce and inheritance among people of Islamic faith.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

The legal profession comprises legal practitioners enrolled to practise law by the General Legal Council established under the Legal Practitioners Act (Cap. 7:01), and the common law judges who preside in the High Court, Court of Appeal, Supreme Court, Court Martial and the Magistrates' Courts. In its wider sense the legal profession could be regarded as including the Cadis trained in Islamic law, who preside over the Cadi Courts, and Sharia practitioners (persons qualified in Sharia law permitted to represent litigants before the Cadi Court).

The legal profession is fused, such that there is no distinction between barristers and solicitors. Persons trained as barristers and solicitors anywhere in the Commonwealth may be enrolled to practise as legal practitioners if they meet the requirements specified in the Legal Practitioners Act and fulfil the conditions prescribed by the General Legal Council established under that Act. These include being a citizen of the Gambia (or non-citizen who has been resident for a period of not less than 15 years), having a law degree and a professional qualification which permits the applicant to practise law anywhere in the Commonwealth, having no criminal record, and character references from two current members of the Bar.

By section 33 of the District Tribunals Act, lawyers have no rights of audience before District Tribunals. The rationale for this may be because common law based rules of evidence or rules of civil

procedure do not include customary law. Only lawyers who are qualified in Sharia law may appear before the Cadi Courts.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The judicature comprises the superior courts of record, the subordinate courts, and the Cadi Courts.

The superior courts comprise:

- the Supreme Court
- the Gambia Court of Appeal
- the High Court and Special Criminal Court

The subordinate courts comprise:

- Magistrates' Courts
- Children's Courts
- District Tribunals
- Industrial Tribunals
- Rent Tribunals
- Traffic Offences Courts
- Anti-littering Court

Sharia courts comprise:

- Cadi Court
- Cadi Appeal Panel

Appeals lie from the subordinate courts to the High Court, from the High Court to the Gambia Court of Appeal and from the Gambia Court of Appeal to the Supreme Court as a final Court of Appeal. The High Court also has supervisory jurisdiction over subordinate courts and administrative tribunals and may issue orders and prerogative writs in the nature of *certiorari*, *mandamus*, prohibition and *habeas corpus* for the purpose of enforcing its supervisory jurisdiction.

The Supreme Court has original jurisdiction in matters relating to the interpretation and enforcement of the Constitution (other than fundamental human rights provisions in respect of which the High Court has original jurisdiction), election of the President of the Republic and matters relating to privilege claimed by the State regarding the production of any government document on grounds of security or public interest.

Appeals lie from the Cadi Court to the Cadi Appeal Panel as a final court in matters in which the Cadi Courts have jurisdiction.

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

The Limitation Act (Cap. 8:01) prescribes limitation periods for instituting civil claims. The Labour Act (Cap. 56:01) also prescribes time limits for claims under that Act. The following periods generally apply, subject to other conditions prescribed under the Limitation Act:

- 12 years applies to most property claims (including claims to recover land or money secured under a mortgage, foreclosure actions, and claims in relation to the estates of deceased persons)
- six years applies to actions in tort and contract, as well as sums recoverable under statute, recovery of rent, mortgage interest, trust property, and enforcement of judgments/arbitral awards
- three years applies to personal injury (Including death) claims
- two years applies to claims arising under the Labour Act, breach of contract of employment, or claims for recovery of contribution in respect of any damage

Time does not run in the case of fraud, concealment or mistake until discovery. Time does not run during a disability.

### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

Yes. Sections 172 and 175 of the Evidence Act 1994 (Cap. 6:06) specifically provide that communications between a lawyer and his/her client, including documents and advice, are privileged from disclosure. Excluded from this privilege are communications in furtherance of an illegal purpose and information regarding the commission of a crime or fraud.

Further, no one can be compelled by any court to disclose confidential information between himself/herself and an instructed lawyer unless he/she offers himself/herself as a witness. In such circumstances he/she may be compelled to disclose confidential information to the extent necessary to explain evidence given by him/her but not others.

### 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

The High Court subordinate courts and Cadi Court have original jurisdiction.

A majority of all claims are handled by the High Court. Civil proceedings in the High Court are commenced by one of the following methods:

- writ of summons: this is the most common method for the majority of civil claims. The writ of summons is filed with a statement of claim, witness statements, and all the evidence on which the plaintiff relies in a bundle and served on the defendant. The defendant has 30 days to file a statement of defence, witness statements and evidence on which he/she relies in answer to the claim. Time may only be extended for 14 days and, exceptionally, a further 14 days. Subsequent pleadings in the form of a reply or rejoinder may be filed at the discretion of the court. Once pleadings are closed, the case is set down for pre-trial conference.

At the pre-trial conference the court rules on all preliminary objections relevant to jurisdiction, interlocutory applications, discovery, objections to evidence, the possibility of out-of-court settlement and costs to be applied, and sets a timeframe to trial.

The case is thereafter set down for trial. At trial, witness statements are adopted as evidence-in-chief. Witnesses on either side are made available for cross-examination. At the end of the trial briefs are filed and the case is adjourned for judgment.

- originating summons procedure is adopted for non-contentious legal matters
- petitions for matrimonial matters, company proceedings and election matters

### 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

As stated above, all evidence must be submitted with the originating process. Physical evidence must be submitted at the pre-trial conference. Documentary evidence is presented in the form of statements exhibited to an affidavit. All other evidence must be listed and presented during the pre-trial conference. Objections to evidence are taken at the pre-trial conference. All evidence deemed admissible is adopted at trial by the witness. Expert evidence is treated no differently, and has to be exchanged and experts made available for cross-examination.

### 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

Parties are required to agree on a timeframe to trial, including the taking of any step required by the rules or the court at the pre-trial conference in proceedings begun by writ. Otherwise, generally, the time for doing anything under the rules is agreed by the parties and the court and must be convenient to the court. If parties cannot agree, timeframes may be imposed by the court.

Following the introduction of this procedure for the majority of civil cases commenced by writ, the process has been expedited and civil cases can be disposed of from six to nine months in the case of contentious matters with complex and meritorious defences.

### 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

Interim remedies in the form of injunctions to detain property in dispute or to prevent its waste, damage or alienation may be granted. An order similar to a *mareva* injunction may also be granted for the interim attachment of property if the plaintiff can show that the defendant is about to sell his/her assets with a view to evading judgment.

### 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

The following orders are available:

- writ of attachment (*fieri facias* or *fi.fa*), which authorises the sheriff to seize and sell movable or immovable assets of the judgment debtor. After judgment is entered, the judgment creditor may apply for a writ of *fi.fa* by filing a *praecipe*. The writ is issued by the judge and directed at the sheriff to levy execution against the judgment debtor's property. Execution is levied on movables by taking them into the custody of the

sheriff or by attachment on site (if the asset cannot be easily moved eg plant and heavy machinery). Immovable property is attached by pasting notice on the site and service on the *fi.fa* debtor. Attached property may not be sold, in the case of movable property, until at least seven days after public notice of the sale, and in the case of immovable property, until at least two months after such public notice. Public notice is by advertisement in a prominent newspaper of general circulation and/or radio advertisement

- writ of possession for the repossession of immovable property and delivering the same to the judgment creditor
- seizure and delivery up of movable property
- writ of sequestration against the property of an absconding judgment debtor against whom an order of arrest has been issued and who cannot be found, or has been taken and detained in custody without obeying the judgment of the court
- garnishee orders attaching money belonging to the judgment debtor in the hands of a third party
- charging orders against a judgment debtor's stocks or shares in a public company, money held in trust for a judgment debtor, money in court or in the hand of the official receiver appointed by court, land or interest in land of a judgment debtor, share or interest of the judgment debtor in a partnership
- committal

#### **10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?**

Yes, the court has the power to make costs orders. In rare cases the court may make an order for the taxation of costs in which case a bill of costs must be submitted to the registrar of the court.

A foreign litigant may be required to provide security for costs on the application of the defendant. Such an application is made by motion supported by affidavit.

#### **11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?**

Parties have a constitutional right of appeal from the subordinate court to the High Court within 30 days, from the High Court to the Court of Appeal within 90 days, and from the Court of Appeal to the Supreme Court within 42 days. An extension of time may be granted on limited grounds.

The grounds of appeal must specify an error of law or misdirection, or be based on mixed fact and law. Appeals based on factual errors alone are restricted.

A stay of execution may be granted to an unsuccessful defendant if he/she can show special circumstances. These include the possibility of the destruction or irreversible alteration of the *res*, irreparable loss, the judgment creditor not being able to repay the judgment sum should the appeal succeed, closure of the judgment debtor's business, etc. Each case is decided on its merits. The court must impose conditions for the stay, which may include the deposit of the judgment sum into court.

An injunction may be granted to an unsuccessful plaintiff whose case has been dismissed pending appeal (instead of a stay of execution), on the premise that the dismissal of an action is not

executory and a stay is not appropriate. It is granted for the purpose of maintaining the *status quo* and preserving the *res* pending appeal.

#### **12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?**

State entities have no immunity unless they are international organisations granted immunity under the Diplomatic Privileges (International Organisations) Act (Cap. 25:01). The Government may be sued just as any other litigant, although there are limitations with respect to enforcement, as execution cannot be levied on government assets. The Government is expected to settle any judgment upon service of a demand on the Accountant General. An application can be brought for contempt proceedings if the Accountant General fails to pay. In practice the Government usually pays.

Foreign State entities have immunity under the Vienna Convention, which has been given effect in domestic law by the Diplomatic Privileges (Commonwealth and Foreign Missions) Act (Cap. 25:02).

#### **13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?**

A foreign judgment of the High Court of the United Kingdom may be registered in the High Court and enforced by the court under the Reciprocal Enforcement of Judgments Act (Cap. 8:05) as if it were its own decision. Foreign judgments from specified countries may also be enforced under the Foreign Judgments (Reciprocal Enforcement) Act (Cap. 8:06). Where no reciprocal arrangements exist between the Gambia and the originating jurisdiction, the judgment may be enforced by action on the judgment using the writ of summons procedure. This is a common law relief which is based on the judgment itself conferring a right of action.

### **ARBITRATION**

#### **14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?**

Arbitration is governed by the Alternative Dispute Resolution Act of 2005 (the Act) which is generally based on the UNCITRAL Model Law, with some provisions adapted from the UNCITRAL Rules. Section 55 of the Act provides that notwithstanding the provisions of the Act, parties to an international commercial agreement may agree that disputes shall be referred to arbitration in accordance with the UNCITRAL Model Law (which are set out in Schedule 1 to the Act) or any other international arbitration rules acceptable to the parties.

While the Gambia is not a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), the Act specifically applies the New York Convention to the enforcement of international commercial arbitral awards on a strictly reciprocal basis.

The Act contains additional grounds on which an award can be set aside which go beyond those found in the UNCITRAL Model Law. Under section 49 of the Act, an application to set aside an award can be made on the grounds that the award was "*induced or affected by fraud, corruption or gross irregularity*" or on the grounds that a breach of the rules of natural justice occurred during the proceedings or in connection with the making of the award. All of these grounds render the award in conflict with public policy.

## 15. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

Under section 11 of the Act, it must be in writing and:

- in the form of an arbitration clause in a contract
- in the form of a separate agreement or
- inferred in an exchange of points of claim or defence in which the existence of an arbitration agreement is alleged by one party and not denied by the other

## 16. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?

Yes, under section 12 of the Act, if a party so requests no later than the submission of its first statement on the substance of the dispute. The court may refuse the application if it finds that the arbitration agreement is null and void, inoperative, or incapable of being performed, or there is not in fact any dispute between the parties with regard to the matters agreed to be referred. This also applies if the seat of the arbitration is outside of the jurisdiction.

## 17. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?

The law does not make provision for interference in arbitrations seated outside the jurisdiction. The jurisdiction of the local court would be limited to matters of enforcement of the arbitral award in the local jurisdiction.

Section 13 provides that a party to an arbitration agreement may, before or during the arbitral proceedings, request from a court an interim measure of protection and the court may grant the measure if it deems it necessary or desirable. For these purposes, the court has the same powers as it has for the purposes of proceedings before it, namely to make an order:

- for the preservation, interim custody or sale of goods which are the subject matter of the dispute
- securing the amount in dispute
- appointing a receiver
- to ensure that an award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by the other party (interim injunction)

Section 31(1) of the Act provides that an arbitral tribunal can order interim measures of protection on request by a party or on its own motion or may require any party to provide security. By virtue of section 31(2), any arbitral order irrespective of country is automatically recognised as binding and will have the same effect as an order made under section 31(1) above.

## 18. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

No. Recourse to a court against a domestic or foreign arbitration award can only be made by an application to set aside the award on specified grounds within 60 days of the making of the award, or if the grounds for setting aside are founded on fraud, corruption or gross irregularity, within 60 days of the discovery of the fraud or corruption.

These grounds are set out in section 49(2) and (4) of the Act. If the parties initially agreed in writing to be bound by the UNICITRAL Model Law, article 34(2) of the UNICITRAL Model Law would apply instead.

## 19. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION?

An arbitral award, irrespective of the country in which it was made is recognised as binding and, on application in writing to the High Court, must be enforced by entry as a judgment in terms of the award, or by action. This takes between two and six months.

Although the Gambia is not a signatory to the New York Convention, it has domesticated all of the provisions of the New York Convention, which are set out in Schedule 2 of the Act. These domesticated provisions will apply to any award made in any New York Convention Contracting State, provided that:

- the Contracting State has reciprocal legislation recognising the enforcement of arbitral awards made in the Gambia in accordance with the provisions of the New York Convention and
- the difference arises out of a legal relationship that is contractual. Although article 11 of the New York Convention refers to "a legal relationship, whether contractual or not", the Act refers to a contractual relationship only

## 20. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

Yes. That includes awards made against the Government - even prior to the new law, such awards were, upon registration in the High Court, honoured by the Government.

## ALTERNATIVE DISPUTE RESOLUTION

### 21. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

The Alternative Dispute Resolution Act 2005 provides for court-facilitated ADR. The court may refer any matter or part of any matter to ADR (arbitration, conciliation and mediation are provided for in the Act). Parties may also agree to have their matter referred to ADR at any time before judgment is given.

## REFORMS

### 22. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

No - we are not aware of any proposed reforms for the time being.

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# GHANA



## INTRODUCTION

The Ghanaian legal system is based on the Constitution (which came into force on 7 January 1993), statutes passed by Parliament, subsidiary legislation made under the power conferred by either the Constitution (Constitutional Instruments) or statute (Legislative Instruments), English common law, doctrines of equity, and rules of customary law.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

Lawyers in Ghana practise as both barristers and solicitors; there is no split profession. Lawyers provide legal services directly to clients and conduct proceedings in the courts. All lawyers have rights of audience before all trial courts and tribunals in Ghana.

Qualifying as a lawyer in Ghana typically involves three stages of training, namely:

- the academic stage
- the professional education stage
- the pupillage stage

The academic stage involves obtaining a recognised degree in Law. The professional education stage involves completing two years of professional training at the Ghana School of Law. To be admitted to the Ghana School of Law, an applicant must first obtain an LLB qualification from a Ghanaian university. Thereafter, the applicant must sit a competitive entrance examination, and if successful, the applicant is then invited to attend an interview conducted by the General Legal Council. Applicants with an LLB qualification from a non-Ghanaian university must complete a three-month course in Ghanaian legal systems and pass the requisite examination before being admitted onto the two-year professional programme. At the end of the programme, qualifying students are awarded a Qualifying Certificate in Law and are admitted onto the Roll of Lawyers. The pupillage stage involves the completion of a six-month pupillage spent in an authorised pupillage training organisation, usually an established law firm.

Foreign lawyers are permitted to practise in Ghana provided that they have:

- the required qualifications from their home jurisdiction
- a letter of good-standing from their home Bar
- enrolled on and completed the Post Call Law Course at the Ghana School of Law and passed the required examinations, which includes examinations in various disciplines including civil and criminal procedure, evidence, interpretation of deeds and statutes, family law, constitutional and customary law of Ghana

The General Legal Council is the statutory body regulating the profession and deals with complaints against lawyers.

There have recently been several reforms in legal education in Ghana. With effect from October 2015, candidates at the professional stage are required to complete one year of professional training at the Ghana School of Law and then six months internship before being called to the Ghana Bar (following which they would do their pupillage). This new system runs side by side with the old system until the end of June 2016 when the old system will be phased out.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

Courts in Ghana are divided into the superior courts and the lower courts. The superior courts consist of the:

- Supreme Court
- Court of Appeal
- High Court and Regional Tribunals

The lower courts consist of the:

- Circuit Courts
- Districts Courts
- Juvenile Courts

Circuit and District Courts are vested with original jurisdiction in both criminal and civil proceedings. Civil claims with a value not exceeding GHS 20,000 (approximately USD 5,000) must be initiated in the District Court, and GHS 50,000 (approximately USD 12,500) in the Circuit Court. With respect to the superior courts, the High Court is vested with original jurisdiction in criminal and civil matters. The Regional Tribunals only have criminal jurisdiction, limited to offences involving serious economic fraud against the State. It has concurrent jurisdiction with the High Court in such matters.

Within the High Court, there are also specialised divisions, namely the General Jurisdiction, Criminal, Probate and Administration, Divorce and Matrimonial, Commercial, Finance, Land, Industrial/Labour, and Human Rights Divisions. The High Court has supervisory jurisdiction over the lower courts.

Criminal appeals from the Circuit, District, and Juvenile Courts are heard by the High Court. Civil appeals from the Circuit Court are heard by the Court of Appeal. Appeals from the High Court and Regional Tribunals are heard by the Court of Appeal. Appeals from decisions of the Court of Appeal are heard by the Supreme Court, which is the final appellate court, and its decisions are binding on all the lower courts. The Supreme Court is also vested with supervisory jurisdiction over the superior courts and has original jurisdiction in matters relating to the enforcement or interpretation of the Constitution.

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

Statutory limitation periods apply to civil actions, and vary depending on the cause of action.

The limitation period is 12 years for an action:

- on an instrument under seal, other than for the recovery of arrears of an annuity charged on movable property, or a principal sum of money or arrears of interest in respect of a sum of money secured by a mortgage or any other charge
- to enforce an award, where the arbitration agreement is under seal
- to recover a sum of money due to a registered company by a member of the company under the company's regulations
- to recover tax due and payable to the commissioner of the Internal Revenue Service, or duty due and payable to the Controller of Customs and Excise
- on an enforceable judgment
- to recover the proceeds of the sale of land

The limitation period is six years for an action:

- founded on contract or torts other than negligence, nuisance or breach of duty
- to enforce a recognisance to enforce an award, where the arbitration is under an enactment other than the Arbitration Act
- to recover a sum of money recoverable by virtue of an enactment
- to recover seamen's wages which are not enforceable *in rem*
- for an account in respect of a matter which arose more than six years before the commencement of the action
- for arrears of interest in respect of a debt

The limitation period is three years for an action:

- claiming damages for negligence, nuisance or breach of duty
- for damages for the benefit of the dependants of a deceased person

The limitation period is two years for an action:

- claiming damages for defamation, including libel and slander

- to recover a contribution against one or more concurrent wrongdoers
- to recover a penalty or forfeiture, or a sum of money by way of penalty or forfeiture, recoverable under an enactment

Limitation periods are suspended during periods of disability.

### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

Communications between a lawyer and his or her client are privileged and therefore protected from disclosure to a court, tribunal or opposing parties. This privilege includes communications between: (a) the client or a representative of the client and the lawyer or a representative of the lawyer; (b) the lawyer and a representative of the lawyer; and (c) the lawyer or a representative of the lawyer and a lawyer representing another person in a matter of common interest with the client or a representative of the lawyer (section 100(2) Evidence Act 1975). Privilege can be claimed by the client, the client's guardian or committee, the personal representative of a deceased client, or the successor in interest of a client who was an artificial person, the person who was the client's lawyer at the time of the communication, or the representative of the lawyer.

There are exceptions to lawyer-client privilege and these are:

- if, apart from the communication, sufficient evidence has been introduced to support a finding of fact that the services of the lawyer were sought or obtained to enable or aid a person to commit or plan to commit a crime or intentional tort
- a communication relevant to an issue between parties who claim an interest in property through the same deceased client of the lawyer
- a communication relevant to an issue of breach of duty by a lawyer to a client of the lawyer, or a client to the lawyer of the client, a communication relevant to the formalities of the execution of a written document by a client, where the lawyer or a representative of the lawyer is an attesting witness to its execution
- a communication relevant to a matter of common interest between two or more clients, if the communication was made by any of them to a lawyer sought by them in common, when offered in a proceeding between any of the clients. In such circumstances privilege is held by the clients.

### 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

Generally, civil proceedings are commenced by filing a writ of summons (writ). It must be accompanied by a statement of claim (claim). A defendant who is served with the writ and claim has to file a notice of appearance to the writ within eight days and a statement of defence (defence) in answer to the claim within 14 days. The plaintiff has seven days after the service of the defence to file a reply. Within 14 days of the close of pleadings, there must be automatic and mutual discovery of relevant documents.

Application for directions must be filed within one month after pleadings have closed. At the direction stage, the issues for trial are set down and the mode of trial is determined. The Ghanaian civil procedure rules were amended in March 2015 to include a

requirement for parties to file witness statements, and therefore at the directions stage, the court sets timelines for the parties to file their witness statements. The court may also set a date(s) for a case management conference and/or for pre-trial review. Once the witness statements are filed, the parties attend the case management conference and/or a pre-trial review where the judge gives further directions on the management of the case. If a trial date has not been fixed by the judge, the registrar issues a notice to the parties specifying a date on which the matter will be tried.

Within the Commercial Division of the High Court, there is mandatory judicial mediation after the close of pleadings (see question 31 below).

Although all civil proceedings are required to be commenced by the filing of writs, the law recognises two other specialised originating processes, namely originating notices of motion and petitions, which are used where a statute specifically provides for commencing actions by those processes.

## 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

As noted above, parties are required within 14 days of the close of pleadings to undertake automatic and mutual discovery, ie the exchange of lists of documents between them without the necessity of appearing before the court. A party's list must set out all documents which are or have been in his/her possession, custody or relating to any matter in question between them in the action. The list of documents must include a notice of inspection stating a time and venue for the other party to inspect the documents. However, the practice has been that photocopies of the relevant documents are attached to the list with a verifying affidavit. If a party fails to undertake automatic discovery, the other party may apply to the court for an order for discovery.

The previous procedure in the Ghanaian courts was for witnesses to give oral evidence at trial. However, due to the new requirement for parties to file witness statements setting out the oral evidence which they wish to rely on at trial, witnesses are no longer required to give evidence orally. A witness is now only required to tender his/her witness statement at trial, which is treated by the court as the witness' evidence-in-chief. The other party can, however, cross-examine the witness based on the witness statement tendered. Subject to the court's discretion, re-examination is directed to the clarification or explanation of matters referred to in cross-examination.

Judges are allowed to question witnesses directly. A witness cannot be recalled without the leave of the court.

On any application in any cause or matter, evidence may be given by affidavit. The court may, on the application of any party, order the attendance for cross-examination of the person making the affidavit and where, after an order has been made, the person in question does not attend, that person's affidavit must not be used as evidence without leave of the court.

The court or any other party may also call an expert witness. The matters to be submitted to the expert are usually agreed between the parties and the court, or set down by the court where they cannot agree. The expert submits a written report to the court and the parties on the matters referred to him, and he may be cross-examined by any party in the suit.

## 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

The courts manage their case lists, and judges have considerable powers with respect to scheduling of cases, control over the issues on which evidence is permitted and the way in which evidence is introduced.

The timetable is guided by the Civil Procedure Rules. Before or during the trial, the material disputes between parties may be settled in court and reduced to "issues for trial". The Civil Procedure Rules allow for interlocutory applications between the issue of a writ and the trial, which often delays matters. In many instances cases that go to full trial take as long as a year or more from issue of the writ. This may be significantly longer if there are interlocutory applications which are then appealed – see question 11 below.

## 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

The court may, at any time, preserve a party's interest in a case upon that party's application for the relevant interim remedy pending trial and judgment. The available interim remedies include an order for interlocutory injunction and the detention, custody or preservation of any property which is the subject matter of the suit and is within the court's jurisdiction. An application for an interlocutory injunction may be made before or after trial irrespective of whether the claim for an injunction is included in the writ.

The court may, rather than grant the application for an injunction, order an early trial to finally determine the matters in issue.

## 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

A judgment for the payment of money may be enforced by:

- writs of *fieri facias* (*fi.fa.*)
- garnishee orders
- charging orders
- appointment of receivers
- writs of sequestration
- insolvency proceedings against an individual
- winding up proceedings against a debtor company

A judgment for the possession of immovable property may be enforced by:

- writ of possession
- committal
- writ of sequestration

A judgment for the delivery of goods or payment of the assessed value may be enforced by:

- writ of delivery to recover goods or their assessed value
- writ of specific delivery with leave of the court
- writ of sequestration



A judgment ordering a person to do or abstain from doing an act may be enforced (subject to personal service of the judgment/order on the person in default) by:

- writ of sequestration against the property of the person with leave of the court
- writ of sequestration against the property of the directors or other officers, if the person involved is a corporate body
- committal against the person or director or other officer of the corporate body, as the case may be

In practice, it is fairly easy to enforce judgments where the judgment debtor has unencumbered assets and bank accounts that may be proceeded against. However, it is very difficult to enforce judgments where the judgment debtor has no such available assets or where the judgment creditor has no information with respect to available assets and bank accounts. The most common enforcement methods, particularly with respect to money judgments, are *fi.fa.* and garnishee orders.

#### **10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?**

The court has the discretion to award costs of and incidental to proceedings and to determine by whom and to what extent the costs are to be paid. The parties or their lawyers may briefly address the court on the question of costs before any such award is made.

The court takes into consideration a wide number of factors, including the expenses incurred by the party, the court fees paid, the length and complexity of the proceedings, the conduct of the parties before and during the proceedings, and any previous orders as to costs made in the proceedings, before making any award for costs.

A plaintiff, whether foreign or Ghanaian, who is ordinarily resident outside Ghana may, on the defendant's application, be required to provide security for the defendant's costs. Thus a foreign claimant ordinarily resident outside Ghana may be required to provide security for costs whereas a foreign claimant ordinary resident in Ghana will not be so required. However, where a plaintiff who is ordinarily resident outside Ghana has assets in Ghana the court is unlikely to make the order for security for costs.

#### **11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?**

In Ghana, the right to appeal is constitutionally guaranteed and there is a general right of appeal against a decision of a court of first instance. Grounds of appeal vary, and range from the omnibus ground, that "the judgment is against the weight of the evidence", to specific grounds of appeal that the party will set out in the notice of appeal. Permission to appeal (leave) is required only under specific circumstances.

Where the first appeal is made to the High Court, for example, from a District Court, a subsequent appeal (second appeal) is heard by the Court of Appeal, and is made as of right. Permission is, however, required from the Court of Appeal for any third appeal to the Supreme Court. Usually, permission to appeal is granted where the Court of Appeal is satisfied that the case involves a substantial question of law or it is in the public interest to grant

permission to appeal, or that the appeal has a real chance of success.

Where the first appeal is to the Court of Appeal itself, for example, from a High Court or Circuit Court, the second appeal lies as of right to the Supreme Court, and no permission is required.

If dissatisfied with the decision of the Supreme Court, a party may ask for the court to review its decision. The power of the Supreme Court to review its decision is, however, limited to where a party claims that there are exceptional circumstances which have resulted in a miscarriage of justice, or that there are new and important matters or evidence which, after the exercise of due diligence, were not within the applicant's knowledge or could not have been produced by him during the trial or hearing of the case.

Generally, an appeal does not operate as a stay of the decision of the lower court unless the lower court or the appellate court stays the execution of the judgment.

#### **12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?**

Generally, domestic State entities do not have immunity from civil proceedings. However, one may not sue the State for anything done or omitted to be done by a person while discharging or purporting to discharge responsibilities of a judicial nature vested in that person.

There are statutory provisions expressly granting both civil and criminal immunity to foreign diplomats (foreign diplomatic agents). However, there is no express stipulation to the effect that foreign State entities have immunity from civil proceedings.

However, it is a general rule of international law (applicable in Ghana) that a State (or foreign State entity for that matter) is immune from the jurisdiction of another State unless the foreign State has waived its immunity either explicitly or by implication. Thus where a foreign State entity enters into a contract in Ghana, or agrees to submit to the jurisdiction of the Ghanaian courts in a contract, it would be deemed to have waived such immunity and may be sued in Ghana.

#### **13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?**

In Ghana, enforcement of foreign judgments is governed by statute. Judgments of the court of a foreign country are enforced on the basis of reciprocity. The relevant countries and courts are listed by legislative instrument (being Brazil, France, Italy, the United Kingdom, Spain, Israel, Lebanon, Japan, Senegal and the United Arab Republic). The judgment should be from a superior court (not sitting in its appellate capacity).

The judgment is enforceable if it is final and conclusive between the parties. A foreign judgment is final and conclusive although an appeal may be pending against it or it may still be subject to appeal in a court of that foreign country).

The judgment of the foreign court must also be registered within six years after the date of the judgment or where there has been an appeal, after the last judgment given in those proceedings. A foreign judgment will not be registered if at the date of the application, it has been wholly satisfied, or it could not be enforced by execution in the foreign country.

Where the judgment of a foreign court is not enforceable on the basis of reciprocity, fresh proceedings may be instituted in Ghana and the foreign judgment relied upon in evidence.

## ARBITRATION

### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

Arbitration is governed by the Alternative Dispute Resolution Act, 2010 (Act 798) (ADRA) which largely reflects the UNCITRAL Model Law. Provisions under the ADRA relating to the competence of the arbitral tribunal to rule on its own jurisdiction, the powers of the arbitral tribunal to order interim measures, the autonomy of the parties to agree on rules of procedure and the grounds for setting aside an award, amongst others, are based on the UNCITRAL Model Law. There are no key modifications to the UNCITRAL Model Law under the ADRA, although the terms are more comprehensive than the UNCITRAL Model Law. Certain provisions reflect those in the English Arbitration Act 1996.

### 15. WHAT ARE THE MAIN NATIONAL ARBITRATION INSTITUTIONS?

Ghana has an Alternative Dispute Resolution Centre which serves as the main national arbitration institute. There are, however, private arbitration bodies such as the Ghana Arbitration Centre. There are also the arbitration bodies operating within registered associations such as the Association of Certified Mediators and Arbitrators (GHACMA).

### 16. ARE THERE ANY RESTRICTIONS ON WHO MAY REPRESENT THE PARTIES TO ARBITRATION?

Unless otherwise agreed by the parties, a party may be represented by counsel or any other person chosen by the party.

### 17. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

There must be a written agreement by the parties to submit present or future disputes to arbitration. There is persuasive authority to the effect that if there is a document providing that any disputes should be referred to arbitration which the parties have accepted or have confirmed, even if orally, then that document will be deemed as a valid arbitration agreement. Under the High Court Rules, parties to pending court action may also apply to the court to refer the matter to arbitration.

### 18. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?

The Ghanaian courts will stay proceedings and refer a matter to arbitration if there is a valid arbitration agreement covering the dispute before the court. The seat of the arbitration has no impact on the court's decision to stay proceedings.

### 19. IF THE ARBITRATION AGREEMENT AND ANY RELEVANT RULES ARE SILENT, HOW MANY ARBITRATORS WILL BE APPOINTED, AND WHO IS THE APPOINTING AUTHORITY?

Parties are at liberty to determine the number of arbitrators, except that the number must be an odd number. Where there is

no agreement as to the number of arbitrators to be appointed, the tribunal will consist of three arbitrators. In an arbitration which requires the appointment of three arbitrators, each party appoints one arbitrator and the two appointed arbitrators appoint the third arbitrator who shall be the chairperson.

Where a party fails to appoint an arbitrator within 14 days of receiving a request to do so from the other party, or the two appointed arbitrators fail to agree on the third arbitrator within 14 days of the date of their appointment, the appointment is made by the appointing authority upon a request by a party. The appointing authority is any person or authority in whom parties to an arbitration agreement vest power to take any action for or on behalf of the parties, in relation to the arbitration. If there is no appointing authority designated by the parties, the parties may agree on an appointment or either party may apply to the court to make an appointment.

### 20. WHAT RIGHTS ARE THERE TO CHALLENGE THE APPOINTMENT OF AN ARBITRATOR?

An arbitrator's appointment may be challenged only if: (a) existing circumstances give rise to reasonable cause to doubt the arbitrator's independence or impartiality; or (b) the arbitrator does not possess the pre-requisite qualification(s) agreed between the parties.

The parties to arbitration are at liberty to agree on the procedure for challenging the appointment of an arbitrator, except as otherwise provided in the arbitration agreement. Where the parties have not agreed on a procedure for challenging the appointment of an arbitrator, the party who wishes to make the challenge must submit a written statement of the reasons for the challenge to the arbitrator and any other arbitrators within 15 days of: (a) becoming aware of the constitution of the arbitral tribunal; or (b) becoming aware of the circumstances that justify the challenge of the appointment of an arbitrator. However, a party may not challenge an arbitrator appointed by that party or in whose appointment that party participated, except for reasons which the party becomes aware of subsequent to the appointment.

The challenge will be decided by the arbitral tribunal or, in the case of a sole arbitrator appointed by an appointing authority, the appointing authority. Where the arbitrator is appointed by a party, the party challenging the arbitrator may apply to the High Court for the determination of the challenge. The same method of instigating the challenge applies regardless of whether the arbitration is institutional or *ad hoc*.

### 21. DOES THE DOMESTIC LAW CONTAIN SUBSTANTIVE REQUIREMENTS FOR THE PROCEDURE TO BE FOLLOWED?

The ADRA allows the parties and arbitrators to determine the procedure and rules that will apply to the arbitration. However, if the arbitration is referred to the Alternative Dispute Resolution Centre, the rules of the Centre set out under the Second Schedule of the ADRA will apply.

### 22. ON WHAT GROUND CAN THE COURT INTERVENE IN ARBITRATIONS SEATED INSIDE THE JURISDICTION?

The court's role under the ADRA is mainly facilitative, and in some instances complementary, to the arbitrator's role of ensuring effective and efficient determination of the dispute.

However, the court's jurisdiction may be invoked by the parties and in a limited instance by the arbitrator.

In relation to interim relief, the court is empowered to make orders:

- for the taking of evidence of witnesses
- for the preservation of evidence
- in respect of the determination of any question or issue affecting any property right which is the subject of the proceedings or in respect of which any question in the proceedings arise
- for the inspection, photographing, preservation, custody or detention of property
- for the taking of samples from or the observation of an experiment conducted upon, a property; and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration
- for the sale of any goods which are the subject of the proceedings
- for the granting of an interim injunction or the appointment of a receiver

The court also has the power to:

- determine a challenge to the appointment of a sole arbitrator
- remove an arbitrator
- make a determination regarding the entitlement to fees/expenses and/or liability of an arbitrator who has resigned
- make a determination regarding the fees payable to an arbitrator

Regarding the conduct of the arbitral proceedings, the court is empowered to:

- make a determination regarding the arbitrator's jurisdiction
- hear a challenge by a party who is subject to arbitration proceedings of which he had not been notified
- appoint a receiver
- determine a preliminary question of law where it is satisfied that the question substantially affects the rights of the other party

In relation to the arbitral award, the court has the power to:

- order the tribunal to deliver the award and determine the fees or expenses payable to the tribunal if the award has been withheld pending payment
- enforce or set aside arbitral awards, both domestic and foreign

### **23. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?**

The provisions of the ADRA regulate arbitral proceedings held in Ghana. The provisions on foreign arbitrations under the ADRA refer to foreign arbitral awards and their enforcement in Ghana. It is doubtful whether the courts in Ghana have the jurisdiction to intervene in foreign arbitral proceedings as the above provisions apply to arbitrations within Ghana only (there is no equivalent in the ADRA to section 2(3) of the English Arbitration Act 1996).

### **24. DO ARBITRATORS HAVE POWERS TO GRANT INTERIM OR CONSERVATORY RELIEF?**

Arbitrators have the same power as the High Court to grant interim relief. Arbitrators are also empowered to make interim awards except where the parties have stipulated otherwise in the arbitration agreement.

### **25. WHEN AND IN WHAT FORM MUST THE AWARD BE DELIVERED?**

The ADRA does not stipulate the time within which an award should be made by the arbitrators.

An award must be in writing, signed by the arbitrators and should state the date and place where the award was made, and unless otherwise agreed between the parties, the arbitrators' reasons for making the award. Where there are three or more arbitrators, any award or decision of the tribunal must be made by a majority of the arbitrators.

### **26. CAN A SUCCESSFUL PARTY RECOVER ITS COSTS?**

Unless the parties expressly provide otherwise in their arbitration agreement, or the arbitrator makes a decision on costs in the award against the party, all the expenses of the arbitration will be paid equally by the parties. Furthermore, under the rules of the Alternative Dispute Resolution Centre set out under the Second Schedule of the ADRA, the arbitral tribunal must fix the costs of the arbitration in its award. The term "costs" for this purpose means:

- the fees of the arbitrators and umpire
- the travel and other expenses incurred by the arbitrators
- the costs of expert advice and of other assistance required by the arbitral tribunal
- the travel and other expenses of witnesses to the extent that those expenses were approved by the arbitral tribunal
- the costs for legal representation and assistance of the successful party if these costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of these costs is reasonable and
- any fees and expenses of the Alternative Dispute Resolution Centre

### **27. ON WHAT GROUND CAN AN AWARD FROM AN ARBITRATION SEATED IN THE JURISDICTION BE APPEALED TO THE COURT?**

Arbitral awards are deemed to be final and binding on all parties and any persons claiming through or under them. The ADRA does not provide for appeals from arbitral awards. However, parties may apply to the High Court to set aside an arbitral award on any of the following grounds:

- a party to the arbitration was under some disability or incapacity
- the law applicable to the arbitration agreement was not valid
- the applicant was not given notice of the appointment of the arbitrator or of the proceedings or was unable to present its case
- the award dealt with a dispute not within the scope of the arbitration agreement or outside the agreement, except that the court will not set aside any part of the award that falls within the agreement

- there has been a failure to conform to the agreed procedure by the parties and/or
- the arbitrator had an interest in the subject matter of arbitration, which he failed to disclose

## 28. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

There are no provisions in the ADRA for filing an appeal against a foreign arbitral award. The Act, however, provides that such an award will not be registered in Ghana for the purposes of enforcement where:

- the award has been annulled in the country in which it was made
- the party against whom the award is invoked was not given sufficient notice to enable the party to present its case
- a party, lacking legal capacity, was not properly represented
- the award does not deal with the issues submitted to arbitration and/or
- the award contains a decision beyond the scope of the matters submitted for arbitration

## 29. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF: (I) AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION AND (II) DOMESTIC AWARDS?

Both domestic and foreign awards may be enforced, by leave of the High Court, in the same manner as a judgment or order of the court.

Ghana is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). A foreign award made in a country which is a party to the New York Convention can be enforced in Ghana by obtaining the leave of the High Court. Before leave is granted by the High Court, it must be satisfied that:

- the award was made by a competent authority under the laws of the country in which the award was made (a duly authenticated original must be produced) and
- there is no appeal pending against the award in any court under the law applicable to the arbitration

At common law, an action may be brought to enforce a foreign arbitral award. An award made either in a country which has a reciprocal agreement with Ghana, or under any international convention on arbitration to which Ghana is a party and which has been ratified by Parliament, may be enforced by the enforcement procedure provided for in that agreement or convention.

## 30. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

Foreign awards are readily enforceable as long as the award complies with the requirements for the enforcement of foreign arbitral awards discussed under question 29 above. In practice, however, a foreign award will only be readily recognised if made in a country which is a party to the New York Convention.

## ALTERNATIVE DISPUTE RESOLUTION

### 31. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

Parties to arbitration are not required by law to consider or submit to ADR before or during proceedings, unless an agreement requires that of the parties. For example, a dispute resolution clause in an agreement might require the parties to engage in pre-arbitration ADR. Parties to arbitration can submit to other ADR processes during the arbitral proceedings. Under the ADRA, the arbitrator may, with the agreement of the parties, use mediation or other procedures at any time during the arbitral proceeding to settle the dispute. If the parties settle during the proceedings, the arbitral proceedings are terminated and the settlement is recorded in the form of an arbitral award on agreed terms.

With respect to litigation commenced by writs in the Commercial Division of the High Court, there is a mandatory 30-day pre-trial mediation by a judge, when pleadings close. Only where the mediation fails will the judge set down the issues for trial by another judge.

## REFORMS

### 32. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

We are not aware of any significant procedural reforms in the near future. The current rules of the High Court only came into effect on 3 January 2005, and thereafter portions were amended in December 2014, with the amendments coming into force on 15 March 2015. These rules apply to both the High Court and the Circuit Court. New rules governing the Magistrate/District Courts have just been enacted. We are also aware that the Rules of Court Committee has been reviewing the Court of Appeal and Supreme Court Rules but it is difficult to determine whether any amendment to these Rules will actually be made.

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# GUINEA



## INTRODUCTION

Guinea is a civil law country. The court system is based on the Constitution of 19 April 2010 and the laws and regulations adopted by the Government. Guinea is a member of ECOWAS and OHADA. Its Supreme Court (*Cour Suprême*) has final jurisdiction over all matters not governed by the laws introduced by these inter-governmental organisations.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

To practise law in Guinea, potential lawyers must be registered with the Guinean Bar Association (*Ordre des avocats*) and meet certain conditions, including:

- having Guinean nationality or that of a country affording reciprocal rights to Guinean lawyers
- holding the Certificate of Aptitude for the Profession of Lawyer (*Certificat d'aptitude à la profession d'avocat*) (CAPA)

The profession is organised by the *Conseil de l'Ordre*, which ensures that members abide by the rules governing the profession and applies any necessary disciplinary action. Lawyers (*avocats*) registered with the Bar (*Barreau*) can appear before any court and can practise individually or as part of a law firm.

Provided that Guinean lawyers have reciprocal rights in their home countries, foreign lawyers can plead before the Guinean courts on an occasional basis, subject to notifying the Chairman of the Bar Association (*Bâtonnier*) of the case in which they wish to represent their client.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The court system forms a three-tiered pyramid:

- the first instance courts:
  - the *juges de paix*, who have ordinary jurisdiction over all civil and commercial matters where the amount in dispute is less than GNF 50 million

- the *Tribunal de première instance*, which has jurisdiction in all matters where jurisdiction has not been expressly and exclusively allocated to a different forum

There are other first instance courts such as the Children's Court (*tribunal pour enfants*), the Industrial Tribunal (*tribunal de travail*) for the Conakry special zone, the State Security Court (*cour de sûreté de l'Etat*), the High Court of Justice (*haute cour de justice*), the Police Court (*tribunal de simple police*) and the Military Tribunal (*tribunal militaire*).

- the two Courts of Appeal (*cours d'appel*) located in Conakry and Kankan
- the Supreme Court (*Cour suprême*)

Since the institution of the Constitutional Court by Law L/2011/06/CNT dated 4 October, 2011, the Supreme Court no longer has jurisdiction in constitutional matters. This Law has not yet been published in the Official Gazette of the Republic of Guinea. However, the new Constitutional Court has already started its activities, in particular, by validating the results of the 2015 presidential elections in Guinea. Also, the members of the Constitutional Court have been appointed by a Presidential Decree dated 30 March 2015. The Constitutional Court deals with matters pertaining to constitution, referendums, elections, freedoms and fundamental rights.

Nevertheless, the Supreme Court is still the highest court in Guinea and keeps its jurisdiction in civil, commercial, criminal, social and administrative matters.

A Court of Auditors (*Cour des comptes*) is also being established in accordance with the Guinean Constitution. Consequently, the Audit Chamber of the Supreme Court will be abolished.

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

Limitation periods vary depending on the type of action and the parties involved:

- the ordinary limitation period for bringing a civil action is 30 years
- obligations arising out of a transaction between businesses or a business and an individual are time-barred after five years if no shorter limitation period is stipulated
- specific limitation periods apply to certain types of actions: for example, three years for the back payment of maintenance, two years for commercial companies and for goods sold to individuals, one year for actions brought by paid workers and employees for the payment of their salaries and six months for actions between hotel owners

In insurance matters, the parties can make agreements as to the applicable limitation period, ie whether to extend or reduce it. Limitation periods can be suspended.

#### **4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?**

All communications between lawyers and their clients are confidential. This applies in all circumstances (from advising clients to defending them in court) and to all materials (paper, fax, electronic, etc).

Clients cannot lift this confidentiality obligation save where strictly necessary for their defence and in the following cases:

- implication in criminal proceedings
- professional liability dispute
- fee disputes

Non-compliance with the confidentiality obligation is an offence and a breach of the ethical rules applicable to lawyers.

#### **5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?**

Civil proceedings are filed:

- by way of a summons, in which the claimant invites the defendant to appear before the competent court
- by way of a petition to the registry of the competent court, in personal or property-related cases where the amount in dispute is less than GNF 100,000

The parties must appear before the court within eight days if the defendant is domiciled within the jurisdiction of the court, 15 days if he/she is domiciled in a neighbouring *préfecture* and one month for all other areas of Guinea. If the defendant is located outside Guinea, the timeframes are extended to two months for parties domiciled in Africa and Europe, and three months for any other continent. Where the proceedings are urgent, parties must appear at a specific time.

Deadlines for filing submissions and disclosing evidence are set by the court.

Courts to which an opposition to a petition is referred must attempt conciliation proceedings. Where the conciliation succeeds, the presiding judge will issue a conciliation agreement to be signed by the parties. One counterpart of the agreement will be marked as final and binding. Where the conciliation attempt fails, the court will immediately rule on the petition for recovery of the debt, even in the absence of the debtor who filed the opposition, and its decision will have the effect of a decision after trial.

#### **6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?**

The only means of evidence admissible in Guinea are written evidence, witness statements, presumptions, confession and testimony given under oath. The types of evidence allowed do not depend on the court.

There is no equivalent in Guinea of the English law concept of "disclosure".

If a party holds evidence, the court may, at the request of the other party (with supporting arguments), order the first party to produce the evidence, subject to financial penalties for non-compliance. At the request of a party, it may also request or order the disclosure of all documents held by third parties if there is no legitimate reason for their non-disclosure (subject to financial penalties for non-compliance where applicable).

Evidence is produced to the court at the same time as the parties' submissions. The procedural judge (*juge chargé de la mise en état*) can take all necessary measures to fully investigate the matter and will set the deadlines for the completion of those measures. Parties referring to an item of evidence must disclose it to all other parties to the proceedings of their own volition. Failing this, the other party can file a plea for invalidity based on the failure to disclose submissions or evidence, or ask the court to order such disclosure.

On appeal, parties are not required to produce again evidence already disclosed before the lower court. However, they are entitled to request the disclosure of evidence and it is possible to produce new evidence on appeal and before the Supreme Court.

The court may only order an expert investigation if the consultations or reports provided are insufficient to make a decision. The judge has sole discretion over such matters.

#### **7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?**

The parties do not control the procedure. Once the proceedings have commenced, the timetable is set at the discretion of the court and in practice depends on various factors, such as the complexity of the case, the degree of urgency and the caseload of the court. Nevertheless, the parties may end the proceedings at any time by mutual agreement.

On average, first instance proceedings run for three to four months. For proceedings including an appeal to the Supreme Court, the average length is a maximum of two years.

#### **8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?**

Emergency proceedings are available in Guinea to protect parties' interests pending a judgment on the merits:

- *référé* proceedings enable parties to obtain an interim decision in urgent circumstances without affecting the court's ultimate decision on the merits of the case. Claims are reviewed at a hearing held by the presiding judge of the court. Proceedings are held in the presence of all parties. The presiding judge of the *Tribunal de première instance* or the *juge de paix* can order conservatory or remedial measures to prevent imminent damage or put an end to a clearly unlawful situation
- *ex parte* applications (*ordonnances sur requête*) are issued by the presiding judge of the court to protect the rights and interests of the parties and in the absence of the other party, due to the circumstances at issue. Applications are immediately enforceable

- protective/conservatory attachment or sequestration (*saisie conservatoire*), under which a debtor's movable assets (cited by the order) are frozen, thus preventing the debtor from disposing of them to the detriment of the creditor. This type of measure may only be ordered where circumstances show that it will be difficult for the creditor to collect the debt. Parties must apply to the presiding judge of the competent court in the domicile or place of residence of the debtor

In all urgent circumstances, the presiding judge of the *Tribunal de première instance* or the *juge de paix* can order interim measures where no serious opposition is presented by the other party.

## 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

Judgments are binding when they are no longer subject to an appeal suspending enforcement. At this point they become *res judicata*, unless immediate enforcement is automatic or has already been ordered. Enforcement is therefore only possible once the judgment is marked as final and binding.

The enforcement measures available under Guinean law are those provided for in the OHADA Uniform Act Organising Simplified Recovery Procedures and Measures of Execution. The principal measures are:

- seizure for sale (*saisie-vente*): "any creditor in possession of a writ of execution showing a debt due for immediate payment may [...] proceed to the seizure and sale of the tangible property belonging to his debtor [...] in order to be paid from the sale price"
- seizure-award of debts (*saisie-attribution de créances*): "any creditor in possession of a writ of execution showing a debt due for immediate payment may [procure the seizure] in the hands of a third party [of] the debt owed by his debtor in the form of a sum of money"
- penalty payment (*astreinte*): creditors who obtain an injunction from a court ordering their debtors to accomplish a particular task or to cease and desist may ask the court to team the injunction with a penalty for non-compliance, payable by day/week/month
- real property foreclosure (*saisie immobilière*): this enforcement mechanism is applied as a last resort when the seizure of personal property or of debts was unfruitful or insufficient. The insufficiency must be authenticated by a bailiff (*huissier de justice*), only then may the creditor initiate a *saisie immobilière*.

The courts can grant grace periods to unsuccessful parties.

## 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

The unsuccessful party bears the costs, save where the court decides (with reasons) to order a different party to bear all or part of them.

Costs are limited to court costs. In practice, it is rare that the judge will assess legal fees. He/she will simply award a fixed amount depending on the parties' claims. However, the party receiving a fixed amount of court costs may ask the court to re-assess the amount when the costs are liquidated, in order to take into account the actual amount of legal fees paid. This assessment will be made with the assistance of a court bailiff (*huissier de justice*).

Security for costs is only necessary in criminal cases in which the victim joins the proceedings as a civil party (*plainte avec constitution de partie civile*). This applies to claimants of all nationalities.

## 11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

The right to appeal is automatic. Parties have 10 days to appeal first instance judgments from the date of issue of the judgment, where given in the presence of all parties, or 10 days from the date of notification where the judgment is handed down by default. In the latter case, the court can give defendants extra time to file an appeal under certain conditions.

Appeals are filed by summons or by way of a petition addressed to the court registrar. It is not possible to make new claims on appeal, save for damages or where the new claim is an argument in defence against the main claim. If filed in due time, appeals suspend the enforcement of the judgment, save where the court has ordered immediate enforcement.

Cases are reviewed in full by the Court of Appeal, which will issue a new decision on the facts and legal issues of the matter. The appellant should only refer to the points of the judgment that it is expressly or implicitly disputing (or points reliant on those points).

After the appellate stage, it is possible to apply to the judicial chamber of the Supreme Court to reverse a final decision handed down on appeal. Supreme Court proceedings consider the law and not the facts of the case and do not suspend the enforcement of the lower court's decision (save where the Supreme Court orders the suspension of the decision). If the appeal to the Supreme Court is successful, the case is remanded to a new panel of appellate judges for a second judgment.

In principle, the new panel of judges is not required to abide by the Supreme Court's decision. This is the case in practice. In addition, the remand court of appeal must follow the Supreme Court on the relevant point of law where a second decision is overturned on the same grounds as the first.

## 12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

Proceedings can be brought against the Government or public authorities before the administrative chamber of the Supreme Court. State-owned companies do not have jurisdictional immunity.

In terms of foreign entities, any jurisdictional immunity rights that can be applied derive from international agreements on diplomatic or consular relationships.

## 13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

In Guinea, foreign judgments are automatically deemed final and binding if they meet the following conditions:

- the decision is final and binding and enforceable under the laws of that country
- the decision is not contrary to public policy rules in Guinea

- the decision is not contrary to a final and binding decision from a Guinean court

Enforcement decisions are made by the presiding judge of the Court of Appeal of the place in which the judgment is to be enforced, regardless of the amount in dispute. The presiding judge will simply verify that the judgment meets the above conditions. If the conditions are met, it is straightforward to obtain the enforcement of a decision in Guinea.

## ARBITRATION

### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

Guinea (Conakry) is a Member State of OHADA (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires* - Organisation for the Harmonisation of Business Law in Africa). The OHADA Treaty was first signed on 17 October 1993. Under the OHADA Treaty, the Council of Ministers of Justice and Finance adopt uniform acts that are directly applicable and enforceable in each of the Member States. Arbitration in the OHADA Member States is governed by the Uniform Act on Arbitration within the Framework of the OHADA Treaty, which was adopted on 11 March 1999 and came into force 90 days afterwards (the Uniform Act).

The Uniform Act is not based on the UNCITRAL Model Law. It was drafted separately but is nevertheless aligned with the fundamental principles of international commercial arbitration and key features of the UNCITRAL Model Law.

The Uniform Act applies to both national and international arbitration and governs all arbitration proceedings with a seat in a Member State.

Prior to the adoption of the Uniform Act, arbitration law was governed by the rules set forth in the Guinean Civil, Economic and Administrative Procedure Code (*Code de procédure civile, économique et administrative*).

One of the most important characteristics of OHADA arbitration is the Common Court of Justice and Arbitration (*Cour commune de justice et d'arbitrage*) (the CCJA), which acts as both a permanent arbitral tribunal and the supreme court of arbitration for all OHADA Member States.

### 15. WHAT ARE THE MAIN NATIONAL ARBITRATION INSTITUTIONS?

The main arbitration institution in Guinea is the *Chambre d'arbitrage de la Guinée*, which is located in Conakry.

At the supranational level, the CCJA, which was created by the OHADA Treaty and is based in Abidjan, in Côte d'Ivoire, can also hear arbitration matters. The CCJA, which is also a supreme court, acts as an arbitration centre and administers proceedings governed by the CCJA Rules of Arbitration. The CCJA is different from other arbitration centres as it is not a private institution but was created and organised by OHADA. To apply to the CCJA as an arbitration centre, article 21 of the OHADA Treaty stipulates that all or part of the contract in question must be performed within the territory of one or more Member States, or that at least one of the parties must be domiciled or usually reside in a Member State. According to legal authors, it should also be possible to go to arbitration under the CCJA Rules even if these conditions are

not met, if the parties have provided for this possibility in their arbitration agreement.

Many contracts contain arbitration clauses providing for CCJA arbitration.

### 16. ARE THERE ANY RESTRICTIONS ON WHO MAY REPRESENT THE PARTIES TO AN ARBITRATION?

The Uniform Act does not set any restrictions on persons who can represent parties in an arbitration. They are entitled but not required to instruct a lawyer (article 20 of the Uniform Act).

The only restriction on foreign lawyers in terms of representing clients in an arbitration is reciprocal rights: the laws applicable in the foreign lawyer's home country must allow Guinean lawyers to represent clients.

### 17. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

Article 3 of the Uniform Act states that the arbitration agreement must be made in writing or by any other means of which evidence can be provided. No particular format is required. The Uniform Act also provides that contracts can refer to an arbitration agreement contained in a different document.

In practice, Guinean courts tend to apply a narrow interpretation to this condition.

### 18. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?

Article 13 of the Uniform Act provides that national courts must decline jurisdiction where there is an arbitration agreement and where the arbitral tribunal has not yet been constituted, save where the arbitration agreement is "manifestly void". Courts cannot decline jurisdiction at their own discretion.

If the composition of the arbitral tribunal has already been decided, the national court must decline jurisdiction at the request of a party.

In practice, Guinean courts do decline jurisdiction where these conditions are met.

Parties governed by an arbitration agreement do have the option of consulting a national court to obtain interim or conservatory measures that do not require a review of the case on the merits, in circumstances that have been "recognised and reasoned" as urgent or where the measure must be performed in a State that is not part of OHADA.

National courts can also intervene in very limited circumstances with a view to assisting the arbitration process (see questions 22 and 23 below).

However, where the seat of arbitration is outside the OHADA area, Guinean courts will decline jurisdiction in favour of the arbitrator designated by the parties.



### 19. IF THE ARBITRATION AGREEMENT AND ANY RELEVANT RULES ARE SILENT, HOW MANY ARBITRATORS WILL BE APPOINTED AND WHO IS THE APPOINTING AUTHORITY?

The Uniform Act does not stipulate a specific number of arbitrators if the arbitration agreement is silent on this point. It does provide that an arbitral tribunal must have a sole arbitrator or three arbitrators.

If the parties are unable to appoint one or more arbitrators, the task falls to the competent court of the Member State in which the arbitration is seated, which, in the case of Guinea, is the *Tribunal de première instance* in Conakry.

### 20. WHAT RIGHTS ARE THERE TO CHALLENGE THE APPOINTMENT OF AN ARBITRATOR?

Article 7 of the Uniform Act states the rules on challenging an arbitrator. Arbitrators must notify the parties of "any circumstance about him/herself" for which they may be challenged. Any disputes will be settled by the court with jurisdiction over the seat of arbitration, save where the parties have provided for a different procedure for challenging arbitrators. Decisions are not subject to appeal.

Arbitrators may only be challenged for reasons that come to light after their appointment.

### 21. DOES THE DOMESTIC LAW CONTAIN SUBSTANTIVE REQUIREMENTS FOR THE PROCEDURE TO BE FOLLOWED?

The Uniform Act requires parties to receive equal treatment and to have every opportunity to exercise their rights (article 9); arbitrators may not base their decisions on reasons considered at their own discretion without first allowing parties to submit observations (article 14).

Article 18 of the Uniform Act provides that the deliberations must be kept secret.

The Uniform Act also provides that the duration of the arbitration may not exceed six months from the date upon which the last arbitrator accepts the terms, save where extended by agreement of the parties or by consulting the court with jurisdiction over the seat of arbitration.

### 22. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED INSIDE THE JURISDICTION?

In principle, where there is an arbitration agreement, the national courts cannot intervene in a dispute until the award has been issued.

Nevertheless, parties may consult the competent court in Guinea in the following circumstances:

- to resolve difficulties encountered with composing the arbitral tribunal, to appoint the sole arbitrator or the third arbitrator (articles 5 and 8)
- to rule on challenges against arbitrators where the parties have not provided for a different procedure (article 7)
- to extend the deadline for the conclusion of the arbitration where there is no agreement between the parties to do so, at the request of a party or the arbitral tribunal (article 12)

- to order interim or protective measures when urgently necessary (recognised and reasoned circumstances) or when the measure would be performed in a non-OHADA State, provided the measures do not require a review of the case on the merits (article 13)
- to assist the arbitral tribunal, at its request, with the collection of evidence (article 14)

### 23. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?

As indicated above (question 22), national courts cannot in principle intervene in an arbitration seated outside their jurisdiction where there is an arbitration agreement. In addition, all measures relating to the composition of the arbitral tribunal and conducting the proceedings fall under the jurisdiction of the courts of the country in which the arbitration is seated.

However, it is possible for national courts other than the competent court of the Member State in which the arbitration is seated to intervene to order conservatory or interim relief under the conditions defined above in question 18 (article 13').

### 24. DO ARBITRATORS HAVE POWERS TO GRANT INTERIM OR CONSERVATORY RELIEF?

Although this matter is not dealt with directly in the Uniform Act, legal commentators generally agree that it is possible for arbitrators to order interim or protective measures, save where the parties have agreed otherwise.<sup>2</sup>

### 25. WHEN AND IN WHAT FORM MUST THE AWARD BE DELIVERED?

Save as agreed otherwise by the parties, arbitral awards must be issued within six months from the date on which all of the arbitrators have accepted the terms. This term can be extended by agreement between the parties or by order of a court at the request of a party or the arbitral tribunal (article 12).

Parties can set special requirements for awards. Failing this, awards are issued by majority, where the tribunal counts three arbitrators, and must be reasoned. They must be signed by at least two of the three arbitrators.

### 26. CAN A SUCCESSFUL PARTY RECOVER ITS COSTS?

The Uniform Act contains no provisions on this.

Where arbitration is conducted under the aegis of the CCJA, the arbitrator is empowered to award costs.

### 27. ON WHAT GROUNDS CAN AN AWARD FROM AN ARBITRATION SEATED IN THE JURISDICTION BE APPEALED TO THE COURT?

The only remedy against an arbitral award is an application to set aside that award brought before the competent court in the Member State in which it was issued, within one month from the date of service of the award once rendered enforceable (articles 25 and 27).

The circumstances in which an application to set aside can be brought are as follows (article 26):

- the arbitral tribunal ruled without an arbitration agreement or with respect to an invalid or expired agreement
- the arbitral tribunal was not properly composed
- the arbitral tribunal did not rule in compliance with the terms of arbitration
- due process was not met
- the arbitral tribunal breached a public policy rule of the OHADA Member States
- there are no reasons for the award

Bringing an application to set aside an arbitral award postpones enforcement, unless the tribunal ordered immediate enforcement. The decision can only be appealed to the CCJA (article 25).

This is the only remedy available to parties before a national court. The other remedies, namely third party opposition and the application for a revision of the award, must be submitted to the arbitral tribunal (article 25).

#### **28. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?**

An arbitral award issued abroad may not be appealed before a local court.

#### **29. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF: (I) AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION AND (II) DOMESTIC AWARDS?**

To enforce awards issued within an OHADA Member State, the Uniform Act requires parties to obtain the recognition of the award from the competent court in that Member State (article 30). Enforcement applications are made to the Court of Appeal in Guinea.

This requires producing the original arbitral award, together with the arbitration agreement or copies of these documents meeting the necessary authentication conditions and, where necessary, a sworn translation into French (article 31).

Decisions refusing to recognise an arbitral award can be appealed to the CCJA but decisions granting recognition are not subject to appeal (article 32).

Awards issued in a different OHADA Member State are recognised in other Member States under the conditions set forth in the applicable international agreements or, failing this, under the conditions stated in the Uniform Act.<sup>3</sup>

#### **FOOTNOTES:**

1. This article is the only one to refer to a "jurisdiction" rather than the "competent court in the Member State". It also refers to interim or protective measures to be performed in a non-OHADA State.
2. This derives from a reverse reading of article 13, which limits the intervention of national courts to urgent circumstances (for internal matters).
3. Article 34 of the Uniform Act does not expressly refer to foreign awards. However, legal authors concur that it does apply to foreign awards. It would be advisable to clarify this point with local counsel.

Guinea is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which facilitates the recognition of foreign arbitral awards, including where the arbitration is seated outside the OHADA area.

#### **30. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?**

These can be enforced in Guinea as soon as they obtain *exequatur*.

### **ALTERNATIVE DISPUTE RESOLUTION**

#### **31. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?**

Parties are not required to undertake preliminary conciliation proceedings in Guinea, save where the law provides otherwise (articles 443 and 444 of the Guinean Civil, Economic and Administrative Procedure Code). As stated above in question 5, certain courts must attempt conciliation in disputed matters.

The parties may also undertake conciliation of their own volition or on the initiative of the court at any stage of the proceedings (article 445 of the Guinean Civil, Economic and Administrative Procedure Code).

### **REFORMS**

#### **32. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?**

To the best of our knowledge, there are no plans to make any significant reforms of civil or commercial procedure in the near future.

However, please note that the Guinean Criminal and Criminal Procedure Codes are currently under review.

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# GUINEA-BISSAU



## INTRODUCTION

The Guinea-Bissau legal framework is based on the Constitution which came into force on 16 May 1984, and the Civil Code, which derives from Portuguese law. Since the independence of Guinea-Bissau on 24 September 1973, Portuguese law has remained in effect, except to the extent it is inconsistent with the Constitution or subsequent legislation. Due to its Portuguese roots, the Guinea-Bissau legal system is based on neo-Roman law as reflected in the Napoleonic Codes of the early 19th century and modified by later German thinking.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

Lawyers in Guinea-Bissau practise as both barristers and solicitors, providing legal services directly to their clients and conducting proceedings in court. There is no split profession.

To be a member of the Bar Association, an individual must be a Guinea-Bissau citizen and:

- hold a degree in law
- be in full enjoyment of his/her civil rights
- not have any criminal convictions or have behaved dishonourably

A foreign national may only become a member of the Bar Association and practise as a lawyer if he or she satisfies the three requirements above and if, in similar circumstances, a Guinea-Bissau Lawyer could also practise in the foreign country concerned.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

There are lower courts and superior courts. The lower courts comprise the Judiciary District Courts, which are divided according to their speciality in matters of civil, criminal, labour or administrative proceedings.

The superior courts comprise:

- the Constitutional Court
- the Supreme Court
- the Court of Appeal

The Court of Appeal hears appeals:

- from the Judiciary District Courts
- concerning proceedings for damages against judges and prosecutors relating to the performance of their duties
- concerning conflicts of jurisdiction between courts (including divisions of the same court)
- concerning the review of judgments by foreign courts or by foreign arbitrators

The Supreme Court hears appeals which are within its competence, including:

- appeals from the Court of Appeal and District Courts
- proceedings for damages against judges of the Supreme and Appeal Courts and against prosecutors relating to the performance of their duties
- conflicts of jurisdiction between courts

The Constitutional Court has exclusive jurisdiction in matters relating to the enforcement or interpretation of the Constitution.

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

According to the Guinea-Bissau Civil Code the general limitation period is 20 years (this applies to contract and tort claims). However, certain actions are barred after a period of five years, such as claims relating to rents or commercial interest. Parties can agree time limits contractually between themselves.

### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

Yes. There is an obligation of confidence between a lawyer and his client. This obligation ceases when it is necessary to disclose communications to defend the rights, interests or dignity of the client or the lawyer.

## 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

Civil proceedings begin with the filing of the writ of summons by the plaintiff.

The defendant may respond within 20 days from the date of the summons. The pleadings should set out the facts and legal bases upon which the parties rely for their claim or defence. In certain cases there may be a right of rebuttal or second reply.

## 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

The documents a party intends to rely on must be submitted either with the writ of summons or the statement of defence.

If they are not submitted with the pleadings, the documents can be submitted up until the close of trial (with the court's permission, which is never withheld). However, the party will be fined unless it can prove that it could not have submitted the evidence with the pleadings.

As for witnesses, the common procedure is that they give oral evidence at trial, not written witness statements. Such evidence, together with any documents tendered, is recorded as evidence-in-chief. The other party can cross-examine the witness. Subject to the court's discretion, re-examination may be directed on matters referred to in cross-examination. Judges are allowed to question witnesses directly. A witness cannot be recalled without the leave of the court.

As for experts, the court's permission is required to adduce such evidence. Expert reports are submitted to the court. Experts are not cross-examined.

## 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

Procedural rules govern certain steps to be taken by the parties. However, the judge has ultimate power to control the timetable, so it cannot be predicted with certainty.

Deadlines exist for the filing of documents and where these are not complied with, penalties including admission of facts or, sometimes discontinuance/dismissal of the claim apply. It is difficult to estimate the average length of a commercial case; this depends on the complexity of the issues and process. However, the time from issue to trial is never less than one to two years.

## 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

Several types of interim remedies may be applied for, namely specified temporary injunctions and unspecified provisional remedies.

Specified temporary injunctions include provisional alimony, restitution, temporary possession (including temporary refund of the asset) and suspension of corporate resolutions. Unspecified provisional remedies include orders to perform certain acts, a summons ordering the defendant to refrain from certain conduct, or the delivery of movable or immovable assets which are the subject of the action.

## 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

To enforce decisions taken in proceedings, a party must commence further proceedings called executive proceedings.

The main methods of enforcing judgments are:

- execution orders (to pay a sum of money by selling the debtor's assets)
- delivery up of assets
- provision of information on the whereabouts of assets

## 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

The court has discretion to award costs of and incidental to proceedings and the power to determine by whom and to what extent those costs are to be paid. The parties or their lawyers may briefly address the court on the question of costs before any such award is made and when the parties are notified of the costs, they can file a complaint.

The court takes into consideration a wide number of factors, including the expenses (including court fees) incurred by the parties or their lawyers, the length and complexity of the proceedings, the conduct of the parties before and during the proceedings, and any previous orders as to costs made in the proceedings.

Foreign claimants are not required to provide security for costs.

## 11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

The right to appeal is constitutionally guaranteed and there is a general right of appeal against a decision of a court of first instance. The Civil Procedure Code also provides for appeals, namely ordinary and extraordinary appeals:

- ordinary appeals – consist of first appeals, review appeals, interlocutory appeals and full court appeals
- extraordinary appeals – consist of further appeals

Generally, an appeal does not operate as a stay of the decision of the lower court unless it is expressly provided for in the Civil Procedure Code.

## 12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

Domestic and foreign States do not have immunity from civil proceedings.

Some domestic State entities are subject to the jurisdiction of the administrative courts, as opposed to civilian courts.

## 13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

The Guinea-Bissau Civil Procedure Code states that foreign final court judgments and arbitral awards are enforceable in Guinea-Bissau subject to "foreign decision recognition".

To establish "foreign decision recognition" it is required that:

- there must be no doubt as to the authenticity of the decision
- the decision must be final and unappealable under the law of the country in which it was made
- the decision must be recognised under Guinea-Bissau conflicts rules and must not be contrary to Guinea-Bissau public policy
- the defences of *lis pendens* or *res judicata* must be unavailable
- the defendant must have been duly served unless Guinea-Bissau Law has dispensed with service of process or judgment in default was obtained

## ARBITRATION

### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

Guinea-Bissau is the only Portuguese-speaking Member State of OHADA (*Organisation pour l'Harmonisation du Droit des Affaires en Afrique* – Organisation for the Harmonisation of Business Law in Africa). The OHADA Treaty was first signed on 17 October 1993. Under the OHADA Treaty, the Council of Ministers of Justice and Finance adopts "uniform acts" which are directly applicable in each of the Member States. Since 11 June 1999, arbitration in OHADA Member States has been governed by the Uniform Act on Arbitration within the Framework of the OHADA Treaty, which was adopted on 11 March 1999 (the Uniform Act) and came into force 90 days later. The Uniform Act complies with the fundamental principles of international commercial arbitration and follows the essential characteristics of the UNCITRAL Model Law.

The Uniform Act applies to both national and international arbitration and governs all arbitration proceedings with a seat in a Member State (arising after its entering into force), superseding the existing national laws. The provisions of the national laws which do not conflict with the Uniform Act should be taken into consideration, but only on very subsidiary terms (eg the conditions for realisation of institutional domestic arbitrations).

Guinea-Bissau has a voluntary national arbitration law, which is Law No 19/2010 (the Arbitration Law) and it is based on the UNCITRAL Model Law.

In general terms, the national Arbitration Law provides that the procedure should be based on the principles of fair and equal treatment, adversarial process, and hearing of the parties (article 11).

The parties can determine the procedure they wish to apply to the dispute, respecting the national principles that govern public order. The parties can also agree that the tribunal will rule according to equity (article 20, paragraph 3) although such choice will mean that they have waived the possibility to file an appeal. Generally, an arbitral decision cannot be appealed, but there are some circumstances in which it can be (see questions 27 and 28 below).

Regarding the production of evidence, the Arbitration Law foresees that all kinds of evidence that are legally admitted may also be admitted in arbitration (article 16). The Law also anticipates the use of a specific model clause arbitration agreement.

The Arbitration Law provides a specific chapter for international arbitration (articles 43 and 44) which is broadly defined as one which puts at stake "interests of international trade". The Arbitration Law specifically determines that, providing the parties have so agreed, in the cases of international arbitration, the tribunal may decide the dispute according to the concept of "amiable composition" weighing the balance of the interests at stake (article 45). Notwithstanding the above, the truth is that the national Arbitration Law has a secondary role, considering that most arbitration procedures will be governed by the Uniform Act.

### 15. WHAT ARE THE MAIN NATIONAL ARBITRATION INSTITUTIONS?

Arbitration in Guinea-Bissau is still at an early stage and, therefore, no arbitration centre has been established to date.

At the supranational level, the Common Court of Justice and Arbitration (CCJA), based in Abidjan, in Côte d'Ivoire, which was created by the OHADA Treaty can also serve as an arbitration institution where the Uniform Act applies. The CCJA is both a judicial court and an arbitration institution covering all the OHADA States. The CCJA acts as an arbitration centre and administers proceedings governed by the CCJA Rules of Arbitration. Title IV of the Treaty provides a framework for CCJA arbitration and the CCJA Arbitration Rules provide the detail. The CCJA is different from other arbitration centres as it is not a private institution. For the CCJA Arbitration Rules to apply, the dispute must be contractual, one of the parties must have its domicile or usual residence in an OHADA Member State or the contract must have been executed in, or is to be fully or partially performed in, an OHADA Member State (article 2.2 of the CCJA Arbitration Rules).

### 16. ARE THERE ANY RESTRICTIONS ON WHO MAY REPRESENT THE PARTIES TO AN ARBITRATION?

Under Bar Association rules the parties to a Guinea Bissau seated arbitration must be represented by lawyers, (although the lawyer does not need to be a member of the Bar Association). There are no express provisions in this regard in respect of arbitrations seated outside Guinea-Bissau.

### 17. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

Under article 3 of the Uniform Act, the arbitration agreement must be in writing, or by any other means permitting it to be evidenced. The Uniform Act also provides that agreements may refer to an arbitration agreement contained in a different document.

Article 4 of the Uniform Act also provides that the arbitration agreement is independent of the main contract (principle of separability). Its validity is not affected by the nullity of the contract and it is assessed according to the intention of both parties. The parties can always mutually agree to resort to an arbitration agreement, even when a hearing has already been initiated before another court.

Under article 4 of the Arbitration Law, there must be a written agreement by the parties to submit present or future disputes to arbitration. The agreement must set out the scope of the disputes to be determined by arbitration and how the arbitrators are to be appointed.

The arbitration agreement must contain:

- the name, occupation, marital status and domicile of the parties to the agreement
- the matter which will be the subject of arbitration - for example, all future disputes arising under the agreement
- the seat of the arbitration

It may also contain:

- place or places where the arbitration hearings will take place
- authorisation for the arbitrator or arbitrators to adopt equitable principles to decide the dispute
- the deadline for the delivery and presentation of the award
- an indication of the national law or corporate rules applicable to the substance of the disputes when the parties have agreed this
- a statement of responsibility for the payment of fees and expenses and fixing the fees of the arbitrator or arbitrators

#### **18. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?**

Article 13 of the Uniform Act provides that national courts must decline jurisdiction, at the request of one of the parties, where there is a valid arbitration agreement. If the dispute has not yet been submitted to an arbitral tribunal, the court should also declare itself incompetent, except if the arbitration agreement is "clearly null".

Also, article 23 of the OHADA Treaty states that any national court of a Contracting State hearing a case wherein the parties have agreed that the matter should be resolved by arbitration must hold itself as lacking jurisdiction to hear the case and, if necessary, refer the matter to arbitration proceedings.

The Arbitration Law also embodies the principle of "*Kompetenz-Kompetenz*" in article 13, which states that the tribunal should decide its own competence.

#### **19. IF THE ARBITRATION AGREEMENT AND ANY RELEVANT RULES ARE SILENT, HOW MANY ARBITRATORS WILL BE APPOINTED, AND WHO IS THE APPOINTING AUTHORITY?**

The Uniform Act does not stipulate a specific number of arbitrators if the arbitration agreement is silent on this point. It does provide that an arbitral tribunal must have a sole arbitrator or three arbitrators (article 5). If the parties are unable to appoint the arbitrator(s), the task falls to the competent court in the Member State of the seat of the arbitration.

#### **20. WHAT RIGHTS ARE THERE TO CHALLENGE THE APPOINTMENT OF AN ARBITRATOR?**

Article 7 of the Uniform Act sets out the rules for challenging the appointment of an arbitrator. It states that the arbitrator who accepts this function shall communicate his/her acceptance to the parties by any means in writing and, if the arbitrator knows of any circumstance about which he/she may be challenged, he/she must disclose it to the parties and may only accept this function with the unanimous agreement in writing of the parties.

In case of dispute and if the parties have not determined the procedure for challenging an arbitrator, the competent judge in the Member State must rule on the challenge. This decision is subject to any appeal. Any reasons for challenging an arbitrator must be disclosed without delay by the party who intends to challenge the arbitrator. Challenges to an arbitrator may only raise issues which became known after his/her appointment.

#### **21. DOES THE DOMESTIC LAW CONTAIN SUBSTANTIVE REQUIREMENTS FOR THE PROCEDURE TO BE FOLLOWED?**

Yes. Under article 12, n 2, the request for arbitration must contain:

- the full names, qualities, corporate and addresses of the parties indicating their domicile of choice for procedural purposes
- the arbitration agreement signed between the parties, as well as documents (contractual or not) which clearly establish the nature of the agreement
- a summary of the claims and their legal grounds
- all relevant information concerning the number and choice of arbitrators

The applicant must indicate whether or not the arbitration agreement covers:

- the seat of arbitration
- the language of the arbitration
- the law applicable to the arbitration agreement, the arbitration process and the claim

The applicant must serve the request for arbitration (with all attachments) on the respondent(s) to the claim and the relevant arbitral institution.

The date of receipt of the demand by an authorised body empowered to conduct the arbitration is the start date of the arbitration proceedings.

If the parties do not establish an arbitration procedure, the tribunal may conduct the process as it deems appropriate, unless the parties wish to submit to a centre of institutionalised arbitration.

In any case, there are some principles that should be followed, such as:

- the parties should be treated equally
- the defendant must have been duly served
- the principle of adversarial process should be observed in all phases of the process
- the parties should be heard, either by oral or written statement, before the award is issued

#### **22. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED INSIDE THE JURISDICTION?**

The Uniform Act provides that the national courts may provide assistance in several matters such as: the appointment of arbitrators (articles 5 and 8) and its challenge procedure (article 7); the grant of interim measures/preliminary orders as long as they do not require an examination of the substance of the claim (article 13); the production of evidence (article 14); the

annulment of awards (article 25); disputes relating to provisional enforcement (article 28); and awards of *exequatur* (article 30).

### 23. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?

At the request of the parties, the Guinea-Bissau national courts can support an arbitration with a seat outside Guinea-Bissau, for example, by granting an injunction or an interim measure for the preservation of documents or assets. These measures must be of an urgent nature.

### 24. DO ARBITRATORS HAVE POWERS TO GRANT INTERIM OR CONSERVATORY RELIEF?

The Uniform Act does not provide for any specific interim measures. Nevertheless, the arbitrators can adopt interim measures that are available under the procedural law that governs the arbitration. These measures will be enforced by the national courts.

The courts in OHADA countries may order interim measures, as can the arbitral tribunal. The difference is that the courts have the authority to order interim measures that are immediately enforceable. On the other hand, an award ordering an interim measure needs to be granted *exequatur* in order to be become enforceable.

### 25. WHEN AND IN WHAT FORM MUST THE AWARD BE DELIVERED?

Under the Uniform Act, save as agreed otherwise by the parties, arbitral awards must be issued within six months from the date on which all of the arbitrators have accepted the terms. This period can be extended by agreement between the parties or by order of the national courts of the Member State at the request of a party or the arbitral tribunal (article 12).

Parties may set special requirements for awards in the agreement. Failing this, awards are issued by majority, where the tribunal comprises three arbitrators (article 19).

The award must contain:

- the full name of the arbitrator or arbitrators
- the date of the award
- the seat of the arbitration tribunal
- the full names and company names of the parties, as well as their residence or registered office
- where necessary, the full names of the advocates or any person having represented or assisted the parties
- the statement of the respective claims of the parties, their arguments as well as the stages of the procedure
- the reasons on which the award was based

The award must be signed by at least two of the three arbitrators. However, where a minority of them refuses to sign the award, mention shall be made of such refusal and the award has the same effect as if it had been signed by all the arbitrators.

For arbitrations seated in Guinea-Bissau, the Arbitration Law provides that the original award is deposited in the court registry

of the court of the place of the arbitration as soon as the arbitral award is notified to the parties (article 36).

### 26. CAN A SUCCESSFUL PARTY RECOVER ITS COSTS?

Article 39, n 1 of the Arbitration Law states that the final award of the arbitration should determine which party should pay the costs of the arbitration or what proportion of costs will be shared between the parties.

### 27. ON WHAT GROUNDS CAN AN AWARD FROM AN ARBITRATION SEATED IN THE JURISDICTION BE APPEALED TO THE COURT?

Under the Uniform Act, the main remedy against an arbitral award is an application to set aside that award brought before the competent court in the Member State in which it was issued (recourse for nullity). This should be done within one month from the service of the award (articles 25 and 27).

The circumstances in which an application to set aside may be brought are as follows (article 26):

- the arbitral tribunal ruled without an arbitration agreement or with respect to an invalid or expired agreement
- the arbitral tribunal was not properly constituted or the arbitrator was not properly appointed
- the arbitral tribunal did not rule in compliance with the terms of the arbitration
- the principle of adversarial process was not met
- the arbitral tribunal breached a public policy rule of the OHADA Member States
- no grounds were given for the award

Bringing an application to set aside an arbitral award postpones enforcement, unless the tribunal has ordered immediate enforcement.

The decision of the Member State court on set aside may be appealed to the CCJA (articles 25 and 28).

Where an award is set aside (or declared null), a party may initiate another arbitration in accordance with the Uniform Act (article 29).

Setting aside (or recourse for nullity) is the only remedy available to the parties before a national court. However, a party may apply to the arbitral tribunal for revision of the award if it discovers a fact capable of having a decisive influence on the outcome and which, before the making of the award, was unknown to both the tribunal and the party applying for revision. In addition, an award may be subject to opposition before the tribunal by any third party who had not been called if the award damages its rights (article 25).

### 28. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

If the dispute is subject to the OHADA Treaty, the regime above will apply.

The Arbitration Law states in article 44 that if the arbitration is international (in the sense of article 43), the arbitral award cannot

be subject to an appeal, except if the parties have agreed on such possibility and on the procedure to be followed.

The Arbitration Law states that an arbitral award that is not under the Uniform Act must be duly recognised by the Supreme Court.

### **29. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF: (I) AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION AND (II) DOMESTIC AWARDS?**

Awards issued in different OHADA Member States will be recognised as binding within the Member States under the conditions provided by applicable international agreements, and, failing such, under the conditions provided by the Uniform Act.

To enforce awards issued within an OHADA Member State, the Uniform Act requires parties to obtain the recognition of the award from the competent court in that Member State (article 30).

Article 31 states that the existence of the award is established by the production of the original award accompanied by the arbitration agreement or copies of such documents satisfying the conditions required for their authenticity. Where the documents are not written in French the relevant party must produce a certified translation by an official registered translator.

Nevertheless, the recognition by *exequatur* will be refused where the award is manifestly contrary to the Member State or international public policy.

The decisions refusing to recognise an arbitral award can be appealed to the CCJA. However, decisions granting recognition cannot be appealed (article 32).

The Arbitration Law provides, at article 35, that foreign arbitral awards that were not made under the Uniform Act are subject to foreign decision recognition by the Supreme Court (see question 13 above).

Under Guinea-Bissau civil procedural law, foreign and domestic arbitration awards have the same force as an award of the District Court. Therefore, the same procedures apply as for court judgments enforcement (see question 9 above).

If the seat of the arbitration is Portugal, the rules of the Treaty on legal cooperation between Portugal and Guinea-Bissau 1989 would apply. This Treaty contains several rules on matters such as conditions of access to each Member's courts of law, co-operation in civil matters, recognition and enforcement of decisions, as well as other matters (such as co-operation in issues of criminal law, extradition, social security, etc).

The Treaty does not render decisions automatically enforceable in the territory of each State, but makes the recognition and enforcement procedures clearer and easier for the parties. The Treaty is clearly applicable to arbitral awards (article 14, n 2).

### **30. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?**

Guinea-Bissau is not party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Guinea-Bissau has signed the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States (the ICSID

Convention) in 1991. However, it has never ratified it, and so the Convention is not in force.

The Uniform Act has made the procedures clearer and more accessible to countries within the scope of OHADA, which facilitates many of the procedures. However, the local contingencies, the relative lack of experience of judges in international arbitration and the difficulties faced by the local judicial systems still constitute significant obstacles to the enforcement of awards.

## **ALTERNATIVE DISPUTE RESOLUTION**

### **31. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?**

In both situations there is no legal requirement to submit to any alternative dispute resolution before or during proceedings, unless the parties enter into an express agreement.

## **REFORMS**

### **32. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?**

The Government programme foresees the reform of the Civil Procedure Code as one of its main measures in the justice area. However, it is unlikely that this will be realised in the near future.

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# KENYA



## INTRODUCTION

Kenya's legal system is based on the Constitution which was adopted upon Kenya's independence from British colonial rule in 1963. On 27 August 2010, a new Constitution was promulgated which introduced a new legal landscape, including the devolution of powers. A notable change to the judicial structure was the introduction of a Supreme Court as well as the mandatory vetting of all judicial officers.

Kenya's legal system is based on common law and the doctrine of precedent in the interpretation and creation of legal principles. The Kenyan Law of Contract Act provides that the common law of England relating to contract (as modified by the doctrines of equity and specified UK legislation) applies in Kenya. As a matter of practice, decisions of English superior courts are treated by the Kenyan courts as persuasive authority.

Laws in Kenya are codified, however, the Constitution recognises customary law in so far as it does not conflict with the Constitution.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

There is a unified profession and advocates act as both barristers and solicitors. Advocates may choose an area of specialism, although a majority of advocates are general practitioners.

The legal profession in Kenya is regulated by legislation – specifically the Advocates Act, the Council of Legal Education Act, the Law Society of Kenya Act, the Oaths and Statutory Declarations Act, and the Notaries Public Act.

In order to qualify as a lawyer in Kenya one must obtain a Bachelor of Laws degree from a recognised university either locally or overseas. To become an advocate of the High Court, candidates study and are examined for a post graduate diploma in law at the Kenya School of Law (KSL), which is regulated by the Council of Legal Education Act of Kenya. KSL offers a one year taught programme and requires the lawyer to undertake pupillage for a minimum of six months covering contentious and non-contentious areas of law. After successful completion of the course at KSL the candidate petitions the Chief Justice of the High Court of Kenya to

be admitted to the Roll of Advocates as stipulated in the Advocates Act.

Through the Law Society of Kenya ([www.lsk.co.ke](http://www.lsk.co.ke)) members of the public can check the status of legal practitioners to confirm that they are eligible to practise. The discipline and conduct of advocates is regulated by the Advocates Complaints Commission and the Advocates Disciplinary Tribunal, both of which are established by the Advocates Act.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The court system is regulated by the following laws:

- the Constitution of Kenya
- the Supreme Court Act
- the Judicature Act
- the Environment and Land Court Act
- the Employment and Labour Relations Act
- the Appellate Jurisdiction Act
- the Magistrates' Courts Act
- the Kadhis' Court Act

The Constitution establishes the Supreme Court, which is the highest court. It has jurisdiction over presidential election petitions, hears appeals from the Court of Appeal and can give advisory opinions with respect to any matter touching on a county government. The Court of Appeal determines appeals from the High Court, the Employment and Labour Relations Court, Kadhis' Court and Environment and Land Court. The High Court has unlimited original jurisdiction in criminal and civil matters, constitutional challenges and also exercises appellate jurisdiction on appeals from lower courts and tribunals. The Magistrates' Courts and Kadhis' Courts are subordinate courts. There are also numerous statutory tribunals that are constituted under legislation.

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

The Limitation of Actions Act prescribes the periods of limitation for court actions and arbitrations:

- actions concerning land must be brought within 12 years of the accrual of the cause of action
- actions founded on contract, seeking account or to enforce an award, and claims seeking equitable relief must be brought within six years of the accrual of the cause of action

- actions founded on tort must be brought within three years of the accrual of the cause of action

The Kenyan Employment Act prescribes a limitation period for employment claims of three years after the cause of action accrues.

It is notable, however, that the 2010 Constitution introduced brand new fundamental rights and freedoms and that there is no limitation of action for claims to enforce the same.

#### **4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?**

Communications between an advocate and his/her client (or an agent on the client's behalf) are privileged unless waived by the client. The Evidence Act provides that an advocate must not disclose any such communication (oral or documentary) without the consent of his/her client. The privilege continues even after the engagement of the advocate ceases.

Privilege does not, however, extend to communications made in furtherance of illegal acts, crimes or fraud observed by the advocate in the course of his/her engagement.

#### **5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?**

The Civil Procedure Act and Rules prescribe the procedure for initiation and conduct of civil proceedings.

Proceedings are generally commenced by the filing of a plaint (statement of claim), which must be accompanied by a statement verifying the averments in the plaint (verifying affidavit).

A list of witnesses together with a list of documents to be relied upon should also be filed by the claimant/plaintiff. Each witness (unless he/she is an expert witness) is required to file a written witness statement.

These documents must be filed at the court registry and once a court summons is obtained, they must be served on the defendant who will be required to enter an appearance in court within 10 days of receiving the summons or such other longer period set out in the summons and lodge a statement of defence within 14 days of entering appearance.

The statement of defence must attach any list of witnesses together with witness statements and a list of documents relied upon, if any. Ten days after the close of pleadings the parties are expected to fill out a pre-trial questionnaire and have the matter set down within 30 days for a case conference to establish the issues and attempt settlement. If this fails, then a trial conference is scheduled to plan the timetable for the hearing and the manner in which the case will be conducted.

The Civil Procedure Rules were amended in 2010 to facilitate disclosure before trial and narrow the issues for determination through pre-trial conferences. It should now ideally take about two years to conclude a matter (previously it would take five years or more).

In most proceedings, there are invariably interim applications that may alter the course of proceedings (for example,

applications to amend pleadings, for further and better particulars, disclosure applications, injunction applications, applications for security for costs etc). These are generally disposed of via written submissions.

#### **6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?**

Parties to litigation are expected to file their witness statements and serve these on the opposing party when they file the plaint or statement of defence. In addition, they are expected to file and present the list and bundle of documents they wish to rely on at the hearing.

In the event that there is a requirement for the production of additional documents, parties are at liberty to file and serve on the opposing side a notice seeking the production of specified documents. If the pleadings of either side are unsatisfactory, the other party may seek further and better particulars to enable it to respond.

At trial, the plaintiff opens his case and presents witnesses, followed by the defendant. The parties, through their lawyers, cross-examine the other side's witnesses and the parties conclude with oral or written submissions. Experts need not file witness statements; instead they attend court and give their evidence in chief. Like any other witness they are cross-examined on their testimony. There may be written agreement by the advocates to adduce expert evidence by consent.

A written judgment should be handed down within 60 days. Since the new Constitution was promulgated, the judiciary has had new appointments to the Supreme Court, Court of Appeal and High Courts. There has been great improvement in the conduct of cases and the delivery of judgments has been timely. In the past, this was not the case.

#### **7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?**

The parties to litigation can regulate the procedure to a certain extent. If, for instance, they agree on the issues for determination, they can request that the court makes a determination only on the agreed issues. The court, at a pre-trial hearing, assesses how long a hearing will take to conclude (usually a day or two, but this depends on the complexity of the case and the number of witnesses) and will issue directions in this respect. It is only at the hearing that the court really takes charge of the process since the preliminaries, such as agreement on issues and disclosure, are mainly dealt with by the parties. A fair estimation would be six to eight months for issue, compliance with pre-trial procedures and the setting down of the case for hearing (subject, of course to the court's diary).

#### **8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?**

Kenyan courts can issue injunctive relief to deserving parties with a view to preventing the destruction, removal, disposal, wasting away or alienation of any property that is the subject of the litigation.

The courts can also restrain a party from committing breach of contract or injury of any kind whether compensation is sought or not.

Where there is apprehension by the plaintiff that the defendant will flee the jurisdiction or attempt to frustrate the possible entitlement of the plaintiff, the courts may order arrest or attachment before judgment is obtained.

### 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

Where judgment is delivered, the judgment debtor may be ordered to pay the money into court, or to the decree holder. If payment is not forthcoming the decree holder may apply to the court for assistance either:

- for the specific delivery of property
- attachment and sale of property or sale without attachment
- arrest and detention of any person or
- appointment of receiver

The ease of enforcement is dependent on locating the defendant's assets. Obtaining orders from the court to execute after judgment is transparent and procedural.

### 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

In Kenya, costs are usually awarded to the successful party. The courts tend to award the successful party the costs of the suit unless the party's conduct during the trial militates against this or the parties agree that each shall bear its own costs.

The courts may order security for costs. There is greater likelihood that the court will grant the order where the plaintiff is not resident in Kenya or does not have sufficient assets in the jurisdiction.

### 11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

A party may appeal in the first instance from the Magistrates' Court to the High Court or from the High Court to the Court of Appeal on issues of fact and law. In cases where the decision in the Court of Appeal involved the interpretation of the provisions of the Constitution, a further appeal can lie as a matter of right to the Supreme Court. In all other cases, an appeal will only be allowed to the Supreme Court upon certification that the appeal is on a matter of general public importance.

The appeal does not of itself operate as a stay of execution. However, the court appealed from/to may grant a stay of execution pending the hearing of the appeal. The court can also impose conditions for grant of stay.

### 12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

The Privileges and Immunities Act sets out the immunities that can be granted to persons. The Act seeks to enforce the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, and also indicates which organisations are entitled to privileges and immunities such as the United Nations.

Otherwise, all persons are subject to the jurisdiction of the courts.

### 13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

The Foreign Judgments (Reciprocal Enforcement) Act prescribes the manner in which judgments given outside Kenya can be enforced.

An application must be presented to the High Court within six years of the judgment. The application must be accompanied by:

- a certificate from the original court
- if the judgment is not in English, a translation

The countries Kenya presently has reciprocal arrangements with are Australia, Malawi, Seychelles, Tanzania, Uganda, Zambia, Rwanda and the United Kingdom.

It is likely that the High Court would hear applications to enforce judgments from other countries and make determinations on a case-by-case basis in the interests of justice.

## ARBITRATION

### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

Arbitration in Kenya is under the Arbitration Act 1995, which is based on the UNCITRAL Model Law. There are no key modifications that have been made to the UNCITRAL Model Law.

### 15. WHAT ARE THE MAIN NATIONAL ARBITRATION INSTITUTIONS?

The Chartered Institute of Arbitrators in Kenya is an active arbitration body and was founded in 1984. It is a branch of the Chartered Institute of Arbitrators formed in 1915 with its headquarters in London. It is the entity that in practice regulates arbitrations and trains arbitrators in Kenya. Its website is [www.ciarbkenya.org](http://www.ciarbkenya.org).

The Nairobi Centre for International Arbitration was created by legislation which came into effect on 25 January 2015. The Centre is expected to be the overarching body with respect to both international and domestic arbitration in Kenya. The website is [www.ncia.or.ke](http://www.ncia.or.ke).

### 16. ARE THERE ANY RESTRICTIONS ON WHO MAY REPRESENT THE PARTIES TO AN ARBITRATION?

There are no restrictions as to representation in arbitration proceedings, but ordinarily it is lawyers who represent parties at these proceedings, although other professionals such as engineers and architects also represent parties, especially in construction disputes.

### 17. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

For an arbitration agreement to be enforceable in Kenya it needs to be in writing and in a document signed by the parties. It can be evidenced by an exchange of emails, letters and other forms of communication that provide proof of agreement. The Arbitration Act goes as far as indicating that where there is a statement of claim in which the existence of an agreement is alleged by a party and not denied by the other, that would constitute an arbitration agreement. Lastly, a clause in a contract referring to a document that contains an arbitration clause shall constitute an arbitration

agreement if the contract is in writing and the reference is made to make the arbitration clause part of the contract.

**18. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?**

An arbitration agreement will be upheld to the exclusion of the courts in Kenya. The Arbitration Act is explicit that where an arbitration agreement is in existence and expected to govern a dispute, the court will stay proceedings and refer the parties to arbitration as long as the party seeking such stay and referral has not submitted to the jurisdiction of the courts by filing a defence and taking steps in the proceedings.

However, the proceedings will not be stayed if it is shown that: (a) the arbitration agreement is void and inoperative; or (b) there is not in fact a dispute with regard to the matters submitted to arbitration.

This provision will apply whether the seat of arbitration is in Kenya or not.

**19. IF THE ARBITRATION AGREEMENT AND ANY RELEVANT RULES ARE SILENT, HOW MANY ARBITRATORS WILL BE APPOINTED, AND WHO IS THE APPOINTING AUTHORITY?**

The parties are free to determine the number of arbitrators. If they do not, there will be one arbitrator. Where the parties indicate that they would like two arbitrators, unless they indicate the contrary, it will be presumed that they intended that the two arbitrators appoint a third arbitrator.

If the agreement is silent on the appointing authority, the parties can apply to the High Court for the appointment.

**20. WHAT RIGHTS ARE THERE TO CHALLENGE THE APPOINTMENT OF AN ARBITRATOR?**

Any party can challenge the appointment of an arbitrator if justifiable doubts exist as to his impartiality and independence or if he does not possess the qualifications that the parties have agreed to or if he is physically or mentally incapable of conducting the proceedings, or there are justifiable doubts as to his capacity.

In order to have an arbitrator removed, the parties may agree on the procedure but if they fail to, within 15 days of becoming aware of the composition of the tribunal or after becoming aware of the circumstances warranting a challenge, a party is expected to write a statement setting out the reasons for the challenge. The arbitrator may withdraw or determine the matter of his challenge.

If the challenge is unsuccessful, the party may within 30 days apply to the High Court to determine the matter.

The arbitrator will be entitled to address the court, should they wish to. The court may also hear the other party to the arbitration. The decision of the court on the matter is final and cannot be appealed.

**21. DOES THE DOMESTIC LAW CONTAIN SUBSTANTIVE REQUIREMENTS FOR THE PROCEDURE TO BE FOLLOWED?**

The procedural requirements included in the Arbitration Act are

along the lines of UNCITRAL Model. The parties therefore have latitude to adopt the rules of institutions that they choose to regulate the procedure.

**22. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATION SEATED INSIDE THE JURISDICTION?**

If the agreement is silent on the appointing authority, the parties can apply to the High Court for the appointment.

In appropriate cases, the High Court can also make interim conservatory orders pending the commencement of arbitration proceedings.

Challenges to arbitral awards can be presented by an aggrieved party to the High Court, which can uphold or quash the same.

**23. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?**

The courts will intervene in arbitrations only to the extent that the Act allows regarding:

- granting interim measures before or during the arbitral proceedings
- the appointment/challenge of an arbitrator, where parties disagree
- the determination of a point of Kenyan law
- the determination of apportionment of monies deposited in court
- applications to recognise and enforce the award

**24. DO ARBITRATORS HAVE POWERS TO GRANT INTERIM OR CONSERVATORY RELIEF?**

Yes.

**25. WHEN AND IN WHAT FORM MUST THE AWARD BE DELIVERED?**

The award must be in writing and signed by the arbitrator(s). Reasons must be provided unless the parties have otherwise agreed.

In order to be valid the award must indicate the seat of arbitration and should be delivered to each of the parties.

Where the arbitral tribunal consists of more than one arbitrator, the decision of the tribunal can be made by a majority.

**26. CAN A SUCCESSFUL PARTY RECOVER ITS COSTS?**

The arbitrator is expected to make a finding with regard to costs. The Arbitration Act does not give guidance on this, however, most arbitrators are guided by the concept that costs are usually awarded to the successful party and will indicate the same in the award. In the absence of a finding by the arbitrator, each party will bear its costs.

The award may be withheld from a party who has not paid his share of the fees due, but such party may deposit money in court and apply to the High Court for the apportionment of the money. The arbitrator can also determine the matter of interest and

decide whether to apply simple or compound interest.

## 27. ON WHAT GROUNDS CAN AN AWARD FROM AN ARBITRATION SEATED IN THE JURISDICTION BE APPEALED TO THE COURT?

For domestic awards, the Arbitration Act provides that there is no recourse, save where the parties have expressly agreed in advance on a right of appeal on a point of law. If such is the case, the parties can appeal to the High Court. They can also appeal to the Court of Appeal on a point of law subject to agreement or if the Court of Appeal certifies that there is a matter of general public importance.

On a separate note, arbitral awards, both foreign and domestic, can be set aside if one or more of the following grounds is established:

- a party was under some incapacity
- the agreement is not valid under the law to which the parties have subjected it
- the party was not given notice of the appointment of an arbitrator or was otherwise unable to present his case
- the award deals with a dispute not contemplated by the reference
- the composition of the arbitral tribunal was not in accordance with the agreement
- the making of the award was induced by fraud, bribery, undue influence or corruption

The High Court can also set aside an award if the subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya or if the award is in conflict with public policy.

## 28. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

A foreign award cannot be appealed in the Kenyan courts. However, a foreign award may be set aside by the Kenyan courts on the same grounds as domestic awards, as set out in question 27 above.

## 29. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF: (I) AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION AND (II) DOMESTIC AWARDS?

Awards (foreign or domestic) are enforced by applying to the High Court for recognition. The grounds for opposing recognition are the same as for setting aside an award (as set out in question 27 above). Once an award is recognised it is enforced as a decree of the High Court would be (see question 9 above).

Kenya is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Awards made in other Contracting States to the New York Convention will be enforced as an order of the High Court on application by a party. The original sealed award or a certified (and, if necessary, translated) copy must be attached to the application. There must be no pending applications to set aside the award in the courts of the seat of the arbitration. Enforcement of a foreign award may only be resisted on the same grounds as for setting aside.

For domestic awards the same procedure applies as for court judgments (see question 9 above).

## 30. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

Foreign awards can be converted into High Court judgments via a formal application for recognition.

## ALTERNATIVE DISPUTE RESOLUTION

### 31. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

The new Constitution expressly promotes ADR, including arbitration. The courts therefore encourage parties to seek amicable resolution outside of the court system. The Civil Procedure Rules allow for any litigating party to apply to have a matter referred to arbitration. Court-assisted dispute resolution exists under the Civil Procedure Rules and the court may at any time before judgment allow parties to refer a dispute to arbitration. In 2012 there was an amendment to the Civil Procedure Act that introduced court annexed mediation. The Mediation Accreditation Committee has been constituted under the Civil Procedure Rules and is presently working towards the implementation of court mandated mediation in appropriate cases.

In practice, at the case management conferences, the judges establish whether the parties have attempted resolution of their dispute before proceeding to trial.

## REFORMS

### 32. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

The Constitution of Kenya 2010 required the enactment of many laws that continue to be passed by the Kenyan Parliament. A significant number have already been passed in the five years and more will continue to be passed to streamline the court process, improve access to justice and to promote ADR, amongst other laudable aims.

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# LESOTHO



## INTRODUCTION

Lesotho's legal system is the product of the interaction between Roman Dutch civil law and customary law. It comprises a variety of sources, including the Constitution, legislation, judicial precedent, customary law, and authoritative texts. Decisions from South African courts are persuasive, and the courts refer to them in formulating their decisions. Decisions from similar jurisdictions may also be cited for their persuasive value.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

Legal practitioners are either advocates or attorneys. An advocate is a specialist in litigation and is not allowed to deal directly with clients. An attorney is entitled to appear in court in the same way as an advocate but can also deal directly with clients. Attorneys can also be admitted as notaries and conveyancers, entitling them to draw notarial documents and the like. An attorney is required to pass practical examinations, including bookkeeping, and is required to maintain a trust account, which is audited annually.

Only registered legal practitioners may practise in the courts of Lesotho.

A legal practitioner is required to hold a four or five year law degree from the National University of Lesotho. Articles of clerkship are not a pre-requisite, although some legal practitioners do undergo articles for a period of two years and more.

Certain foreign lawyers can be admitted to practise as legal practitioners in Lesotho based on their admission in their home country but, in order to obtain a practising certificate, they must be part of an office manned full-time by an attorney in Lesotho.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The court structure in Lesotho is a three-tier system as follows:

- the Court of Appeal
- the High Court
- subordinate courts

The High Court acts in a number of capacities, including as a Commercial Court, a Constitutional Court, an Electoral Court, a Land Tribunal, and a Revenue Appeals Tribunal.

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

Generally, a common law limitation period of 30 years applies.

However, there is also a Prescription Act, which lays down time limits in respect of specific contractual causes of action.

In respect of claims for goods sold and delivered, money lent and advanced, rent, admission of debt, money due upon an arbitration award, the purchase price of immovable property, and claims based on cheques/promissory notes and the like, the claim must be brought within eight years.

In the case of claims for the fees of legal practitioners, land surveyors, persons practising in any branch of the medical profession, bakers, butchers, tailors, dressmakers, shoemakers, merchant clerks or the wages of a servant, the claim must be brought within three years of the cause of action arising.

There is no statutory limitation period in respect of torts (*delicts*).

### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

Legal professional privilege applies in Lesotho. However, it is limited to communications between the legal practitioner and his/her client in contemplation of litigation, either pending or envisaged.

There have recently been significant statutory inroads into legal professional privilege in an effort to combat corruption and money laundering. As such, the scope of privilege is now limited.

### 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

Civil proceedings are commenced by the issue of a summons or the issue of a notice of application together with affidavits in support of the relief being claimed.

In an action instituted by the issue of a summons, pleadings are filed and signed by a legal practitioner or the party. Once pleadings have closed and pre-trial issues have been resolved, the case will go to trial and witnesses will be called to

lead evidence in support of or in defence of the parties. The court will thereafter consider the evidence which has been led and rule in favour of one party.

In the case of an application, this is commenced by the issue of a notice of application attaching affidavits by the parties and their witnesses. Once answering and replying affidavits have been filed, the parties will apply for a date for the hearing of the matter. At this hearing the court will not ordinarily hear evidence but will decide the case on the evidence that has been presented by way of affidavit. The legal representatives for the parties will argue the case based upon the facts as set out in the affidavits and the law to be applied.

#### **6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?**

In actions commenced by a summons, the parties must:

- produce all relevant documentary evidence
- give notice as well as a summary of expert evidence which they intend to lead at the hearing
- provide witness statements from those they intend to call at the hearing
- give notice of any photographs, plans, etc, which they intend to produce and rely upon at the hearing

The hearing then proceeds on the basis of the calling of witnesses to give sworn testimony as to the facts.

In the case of applications, all the evidence is contained in affidavits, with the result that there is no pre-trial exchange of evidence, other than the exchange of affidavits.

#### **7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?**

The parties are in a position to control the procedure and the timetable to some extent. This is through deploying the court rules which have been promulgated in respect of each court and which set out the procedure and the time limits for each step to be taken in order to bring the case to a hearing.

Pleadings are usually finalised within two months and pre-trial issues resolved within a further two months. A date for the hearing is then allocated, which could be as much as one year ahead.

Postponements of hearings are quite usual, which tend to extend the process substantially as another year has to pass before the matter can again be heard.

#### **8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?**

Interim remedies are available to the parties pending judgment. However, they will not be available in all instances. In most cases, they will relate to the preservation of an asset, such as a motor vehicle, where it can be shown that the asset will deteriorate in value if interim relief is not granted.

#### **9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?**

The enforcement of procedures and time limits enables the court

to compel the other side to comply.

As for enforcements of judgments already granted, the court process issued is executed by deputy sheriffs (in the case of the High Court) and messengers of court (in the case of the subordinate courts).

#### **10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?**

A court is fully empowered to order costs, which are in its discretion.

Foreign claimants are usually required to provide security for costs in litigation.

#### **11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?**

There is a right to appeal against a final judgment. However, further appeals are restricted, usually to questions of law.

An appeal does not usually lie in an interlocutory application.

Enforcement of a court's judgment is not suspended pending the appeal but a party can apply for such suspension. This will usually be granted if there are reasonable grounds shown or the party provides security for the capital amount.

#### **12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?**

There is no general immunity from civil proceedings in respect of domestic State entities. However, a party is prohibited from attaching property of the Government of Lesotho in execution of a judgment against it.

Foreign State entities can claim immunity if the claim is not based on a commercial contract entered into by that foreign State.

#### **13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?**

Foreign judgments may be recognised either by applying to the High Court to register the foreign judgment as an order of the High Court under local legislation, or by issuing a summons based on the foreign judgment which will entitle the claimant to apply for summary judgment. If it is then shown that the defendant has no *bona fide* defence to the claim, judgment will be granted and execution can follow.

### **ARBITRATION**

#### **14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?**

Arbitrations in Lesotho are conducted in accordance with the Arbitration Act of 1980 (the Arbitration Act). This is not based on the UNCITRAL Model Law.

The relevant provisions of the Arbitration Act are that arbitration agreements must be in writing, they must provide for reference to

arbitration of any existing or future dispute and the dispute must relate to a matter specified in the agreement. Matters which cannot be referred to arbitration are matrimonial matters or matters relating to status.

If a party to an arbitration agreement applies to the court for resolution of a dispute covered by the arbitration agreement, the other party may apply for the stay of the proceedings. The court will have discretion as to whether or not to order a stay and the test is that there must be sufficient reason for the court to hear the matter and not for the dispute to be decided by arbitration.

The procedure for arbitration in terms of the Arbitration Act is that the aggrieved party will serve a written notice upon the other party requiring the appointment of an arbitrator (in accordance with any procedure agreed between the parties in their arbitration agreement). Once the arbitrator is appointed, the basic procedure for the arbitration will be agreed upon between the parties and the tribunal. The award must be made within six months of the appointment of the arbitrator, and must be in writing and signed and delivered in open court. Unless the arbitration agreement provides otherwise, the award will be final and not subject to appeal.

There are also provisions in the Arbitration Act regarding how an award is to be enforced.

#### **15. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?**

As stated above, the agreement must be in writing, it must provide for reference to arbitration of any existing or future dispute, and the dispute must relate to a matter specified in the agreement. There is no requirement that the arbitrator be named or designated in the agreement itself.

#### **16. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?**

A court has the power to stay litigation if there is a valid arbitration clause covering the dispute.

As to the question of whether a Lesotho court would grant a stay of litigation where the parties have agreed that their disputes should be settled by arbitration and the seat of the arbitration is in a foreign country, a Lesotho court has discretion as to whether or not to stay such proceedings. In most cases, the court would give effect to the party's agreement that their disputes be settled by way of arbitration, as well as where that arbitration should take place.

#### **17. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?**

We do not believe that the Arbitration Act provides any powers to a court to intervene in an arbitration seated outside the jurisdiction.

#### **18. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?**

The Arbitration Act makes no provision in relation to an appeal from an arbitration award. Indeed, the Act provides that, unless the arbitration agreement contains a provision otherwise, there

will be no appeal from an arbitration award wherever it is decided.

#### **19. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION?**

The Arbitration Act provides for the enforcement of awards in arbitrations, it does not distinguish between domestic or international arbitrations or those seated within or outside Lesotho.

The procedure would be for the party in whose favour the award is made to apply to the High Court for an order recognising the award and making it an order of the court. Once that order is granted, the award would be enforced in the same way as other orders of court made in the High Court's jurisdiction.

Lesotho is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). The Lesotho courts are, therefore, obliged to enforce foreign arbitral awards in accordance with the terms of the New York Convention.

#### **20. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?**

As we have indicated above, foreign awards can be made an order of court through an application procedure.

Once the award has been made an order of court, it will be enforced in the same way as any other order of court.

### **ALTERNATIVE DISPUTE RESOLUTION**

#### **21. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?**

The Court-Annexed Mediation (CAM) Programme was introduced into Lesotho's judicial system through the Mediation Rules of May 2011. CAM was officially launched in June 2011 and became operational in August 2011. Under CAM, parties to litigation are required to consider mediation and in most High Court cases reference to mediation is obligatory. To date, however, it is unclear whether or not such references have expedited litigation or brought about early settlement.

There is no requirement on arbitrating parties to attempt ADR unless they have contractually agreed to do so.

### **REFORMS**

#### **22. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?**

There is some discussion about the Arbitration Act being repealed but we have seen no evidence of this as yet.



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# LIBERIA



## INTRODUCTION

Liberia is sometimes referred to as Africa's oldest democracy, and was founded in 1822 by the USA.

The legal system is dual, comprising statutory law based on Anglo-American common law for the modern sector and customary law based on unwritten customary practices for the indigenous population. The primary sources of law in Liberia are the Constitution of 1984 (which is the supreme law), legislation, statutes, customary law and court precedents.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

There is no split profession. To be admitted as an attorney-at-law, one must be a citizen of Liberia, and a graduate of a recognised law school. After five years of practice, an attorney-at-law must apply to sit an examination for admission to the Supreme Court as a counsellor-at-law. Upon passing, he/she is admitted as a "counsellor-at-law", and is qualified to practise before the Supreme Court.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The judiciary is headed by the Supreme Court with subordinate courts. In keeping with the dual legal system, all courts are empowered under article 65 of chapter VII of the Liberian Constitution to apply both statutory and customary laws in accordance with the standards enacted by the legislature. The Supreme Court of Liberia has five justices, one chief justice and four associate justices.

Except for Montserrado County, each of the political sub-divisions referred to as counties has one Circuit Court (Court of Records) and several subordinate courts (Magistrates' Courts and Justices of the Peace Courts). Montserrado County has six Circuit Courts and five specialised courts.

The six Circuit Courts are:

- the Sixth Judicial Circuit-Civil Law Court
- the Criminal Courts A-E

The specialised courts are:

- the Debt Court
- the Labour Court
- the Juvenile Court
- the Tax Court
- the Commercial Court

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

Real property:

- no time limit for claims against persons disqualified to own property
- to recover real property – 20 years
- to recover damages for injuries to real property – three years

Written contracts:

- for debt or damages for breach of contract based upon written instrument – seven years
- on bond or note secured by mortgage – seven years
- upon a deed or other instrument establishing a trust – seven years
- to establish a will – one year after the death of the testator

Personal injury:

- injuries to the person – three years
- medical malpractice not involving fraud – three years
- medical malpractices involving fraud – two years
- injuries to reputation – one year
- injuries to domestic relations – one year

Breach of oral contract:

- three years

Personal property:

- to recover chattels – three years
- injury to personal property – three years

Action by or on behalf of a corporation's agent, director or officer:

- against a present or former director – three years

Fraud, mistake, or fraudulent concealment:

- based upon fraud or mistake – two years
- action to impose constructive trust – two years
- for fraudulent concealment – two years
- to annul marriage on ground of fraud – one year

#### **4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?**

The Code of Moral and Professional Ethics, promulgated in 1999 and revised in 2009, relative to the duties of a lawyer to his/her client, provides that information provided to a lawyer by the client is protected. The client may waive privilege.

#### **5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?**

Civil actions are commenced by the filing of a complaint accompanied by a written direction to docket the case for the next term of court. The rule is that civil actions filed during one term of court will not be heard until the succeeding term.

Once a complaint is filed, the defendant has up to 10 days to file a responsive pleading and the plaintiff has up to 10 days to file a reply.

#### **6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?**

The documents that a party relies upon to prove his/her case must be attached to their pleadings.

During trial, witnesses must testify in person.

Expert evidence may be considered during trial with or without the permission of the court. Where the expert works for the Government or a private institution, he may be *subpoenaed* to appear and testify as an expert witness. On the other hand, if an expert is an independent person, a *subpoena* may not be required to secure his appearance provided there is an agreement between the expert witness and the party seeking to adduce the expert's evidence.

#### **7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?**

Parties are required to hold pre-trial conferences to narrow the issues. During the pre-trial conference, parties are required to raise objections they may have against any evidence. If this is done, the trial is usually quicker.

On average, civil actions can be litigated before the civil law court within three to six months and where an appeal is taken to the Supreme Court, at least another six months. It is therefore possible to conclude a civil action from the Circuit Court to the Supreme Court within 12 months.

#### **8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?**

Different interim remedies are available depending on the action. In an action for ejectment, especially if the matter concerns the construction or development of real property, the plaintiff may apply for a preliminary injunction to stay further construction on the property pending the adjudication of the case. The petitioner will be required to file a bond to indemnify the other party. Although the other party may file a corresponding bond to vacate the injunctive order, each party will be indemnified as a means of protecting their interests.

In matters involving the payment and collection of rental income, either party may file for the sequestration of the rent (a common law principle), and have the same kept in escrow pending the final determination of the case. The party that prevails takes the money from the escrow account.

In debt actions, the plaintiff may consider an action of debt by attachment, by which the court places a lien over properties owned by the defendant as a guarantee that the defendant will appear to satisfy the judgment, or, alternatively, the court may proceed against the attached properties.

#### **9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?**

Court judgments may be enforced by execution (chapter 44, section 39.39 of the Civil Procedure Law), a deferred payment plan (chapter 44, section 44.22 of the Civil Procedure Law), receivership (chapter 44, section 44.72 of the Civil Procedure Law), contempt proceedings (chapter 44, section 44.73 of the Civil Procedure Law) or imprisonment (chapter 44, section 44.71(2) of the Civil Procedure Law).

#### **10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?**

Costs are governed by chapter 4 of the Civil Procedure Law. The general rule is that the party in whose favour a judgment is entered is entitled to costs in the action unless otherwise provided by statute or rule or unless the court determines that to allow costs would not be equitable in all the circumstances. The exception to this rule is that costs should not be imposed against or in favour of the Republic of Liberia, the officer sued or suing in their official capacity, its agencies or any agency wholly owned by the Government.

There is no provision under Liberian law making special requirements for foreign plaintiffs to provide security for costs.

#### **11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?**

A right of appeal is guaranteed by the Constitution of Liberia from the rulings of all courts except the Supreme Court. Once an appeal is announced in any court, the appeal will serve as a stay on the enforcement of the judgment pending the review of the judgment either by the Circuit Court (appeal from Justices of the Peace and Magistrates' Courts to the Circuit Courts) or by the Supreme Court (appeal from the Circuit Courts). There is no further appeal

from the ruling of the Supreme Court except that the Supreme Court may grant a motion for re-argument when a party believes that the Supreme Court made palpable mistakes or inadvertently overlooked some points of law that would have given a different result if taken into consideration.

## 12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

There is no direct immunity for domestic entities from civil actions. However, the Government of Liberia or the State cannot be sued for anything done or omitted to be done by government officials while discharging their duties. This covers the three branches of the Government of Liberia, namely the legislature, the executive and the judiciary.

Immunities are also provided for diplomatic missions accredited near the capital. However, in any event where a diplomat is charged with the commission of an offence which is an exception to the rule, the summons will be served through the Foreign Ministry.

## 13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

The enforcement of foreign judgment begins with the filing of a petition for enforcement before a competent court of jurisdiction. For example, if a civil judgment is sought to be enforced, the petition for enforcement must be filed in the civil law court. If the judgment originates from a debt court, the enforcement must be filed before a debt court, etc. For details of enforcement procedures, see chapter 25 of the Civil Procedure Code.

## ARBITRATION

### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

The arbitration law of Liberia is statutory and contained in chapter 64 of the Civil Procedure Law, Title 1 of the Liberian Code of Laws Revised (1 LCLR) (the Arbitration Law). There is no direct reference to the UNCITRAL Model Law in the Arbitration Law. Prior to the enactment of the Arbitration Law in Liberia, the Liberian Supreme Court held that arbitration clauses were invalid as they sought to oust the jurisdiction of the court when the jurisdiction of the courts could not be ousted by prior private agreements of individuals (*Grant v The Foreign Mission Board of the National Baptist Convention, USA* [1949] LRSC 20; 10 LLR 209 (1949)). This position has been reversed since the legislature enacted the 1956 Code and the current 1973 Civil Procedure Law, as Title 1 of the Revised Code, both of which expressly provide for arbitration and judicial enforcement of arbitration awards and state these to be legal and valid procedures for dispute resolution by private parties (*Chicri Bros v Isuzu Motors* [2000] LRSC 13; 40 LLR 128 (2000)).

### 15. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

The formal requirement for an enforceable arbitration agreement under the Arbitration Law is that the agreement must be in writing. Section 64.1 of the Arbitration Law provides that: "*a written agreement to submit to arbitration any controversy existing at the time of the making of the agreement or any controversy thereafter arising is*

*valid, enforceable without regard to the justiciable character of the controversy, and irrevocable except upon such grounds as exist for the revocation of any contract*".

### 16. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?

Parties may apply to the court under paragraphs 1 and 2 of section 64.2 of the Arbitration Law for an order to compel or stay arbitration proceedings respectively. A party applying for an order to direct the parties to arbitrate (as opposed to litigate) under paragraph 1 must show: (i) the existence of a written agreement to arbitrate as described in section 64.1 of the Arbitration Law (above); (ii) that the applicant is party to such agreement; (iii) the referability of the dispute to arbitration; and (iv) that another party to the agreement has refused to arbitrate the dispute.

Section 64.2 paragraph 4 of the Arbitration Law (stay of action or proceedings involving an issue referable to arbitration) provides that: "*any action or proceeding involving an issue referable to arbitration shall be stayed if an order for arbitration or application therefor has been made under paragraphs one and two of this section or, if the issue is severable, the stay may be only with respect thereto. Where the application is made in such action, or proceeding, the order for arbitration shall include such stay*".

Whether or not the seat of the arbitration is inside or outside Liberia makes no difference; the Arbitration Law does not distinguish between national and international arbitration. For example, in *Chicri Bros v Isuzu Motors* the Supreme Court upheld an arbitration clause in a contract governed by Japanese law providing for ICC arbitration seated in Tokyo. Proceedings commenced in the Liberian courts were dismissed without prejudice to the appellant's right to have the dispute settled by arbitration. Once the matter is referred to arbitration, courts will stay further proceedings.

### 17. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?

There is no specific section in the Arbitration Law on action or the court's intervention in arbitration proceedings inside or outside Liberia. Nor is there an equivalent to section 2(3) of the English Arbitration Act 1996. The court's jurisdiction under the Arbitration Law is set out in section 64.16 which provides that: "*the making of an agreement described in section 64.1 [above] providing for arbitration in this Republic confers jurisdiction on the court to enforce the agreement under this chapter and to enter judgment on an award thereunder*".

The court can intervene in arbitrations seated outside the jurisdiction in terms of appeal (see question 18 below).

### 18. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

There are appeal provisions under the Arbitration Law. That is, if any of the parties to arbitration proceedings, including foreign arbitrations seated outside Liberia, make an application to the court, the court will hear such an application and make a determination.

For example, a party to arbitration proceedings may file a motion before the court to confirm an arbitration award (section 64.10 of the Arbitration Law) or to vacate an award (section 64.11 of the Arbitration Law) (see further the answer to question 19 below).

Grounds for vacating an award under section 64.11 include:

- i. procurement of the award by corruption, fraud, or other undue means
- ii. arbitrator partiality (except where the award was procured by confession, corruption or misconduct)
- iii. where the arbitrator/agency or person making the award exceeded his/her powers or rendered an award contrary to public policy or
- iv. where the arbitrators refused to postpone the hearing upon sufficient cause being shown or refused to hear evidence material to the dispute, or otherwise conducted the hearing contrary to the provisions in the Arbitration Law concerning the hearing, or oaths, witnesses, *subpoenas* and depositions

Upon vacating an award the court will order a re-hearing and determination of all or any of the issues by the tribunal, except where the award was vacated upon the ground that the dispute was not referable to arbitration. If the award was vacated due to arbitrator partiality, corruption or misconduct, the rehearing will be before new arbitrators appointed in accordance with the Arbitration Law.

Grounds for modification or correction of an award by the court under 64.12 include where: (i) there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing, or property referred to in the award; (ii) the arbitrators issued an award upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; and (iii) the award is imperfect as a matter of form not affecting the merits of the controversy.

A judgment entered pursuant to the provisions of the Arbitration Law can be appealed.

### 19. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION?

Liberia is a signatory of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). The New York Convention was ratified by Liberia on 16 September 2005 and entered into force on 15 December 2005. Once a foreign award meets the criteria set out under the enforcement of a foreign judgment, it will be enforced under Liberian law.

Parties must file a motion before the court to confirm an award under section 64.10 of the Arbitration Law. Upon the confirmation of an award, judgment should be entered under section 64.13 of the Arbitration Law. Such judgment has the same force and effect as, and is subject to all the provisions of law relating to, a judgment in a civil action, and may be enforced as any other such judgment.

Upon entry of the judgment, the parties must file: (i) the agreement to arbitrate, or a copy thereof, together with each written extension of the time within which to make the award; (ii) if the award was by confession, the statement containing authorisation to make the award as verified by the oath of the

parties; (iii) a copy of the award; (iv) a copy of the order(s) confirming, modifying, or correcting the award and the papers upon which they were based; and (v) a copy of the judgment.

When a foreign party makes a successful claim in an arbitration proceeding against a party with assets in Liberia and the award is confirmed by the court, the party will be under a duty to satisfy the judgment or award. If the party fails to satisfy the award, the court may order execution. By this, the assets of the Liberian party may be exposed to public auction or judicial sale to satisfy the award.

### 20. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

Since Liberia is a party to the New York Convention and the local law provides a clear procedure for enforcement, provided a foreign award meets the criteria set out under the enforcement of a foreign judgment, enforcement should be quite straightforward.

## ALTERNATIVE DISPUTE RESOLUTION

### 21. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

To a large extent, arbitration proceedings are synonymous with alternative dispute resolution under the law. In other words, arbitration proceedings are an alternative to actual courtroom litigation. Where possible resolution is determined during arbitration hearings by the parties, the court will normally endorse that to support the arbitration proceedings, especially if it is achieved through the consensus of the parties.

## REFORMS

### 22. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

The current arbitration statute in Liberia was enacted in 1973. There has not been any amendment since then. However, the law is evolving and one cannot therefore rule out future reform to make the law simpler and more effective.

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# LIBYA



## INTRODUCTION

The Libyan legal system is influenced by the civil law legal system in France and Italy as well as Islamic law.

It finds its source in the Interim Constitutional Declaration issued by the Transitional National Council. The Interim Constitutional Declaration has repealed and replaced all instruments and laws of a constitutional nature. All other legislation in force before the proclamation of the Interim Constitutional Declaration remains in force as long as it does not contravene the provisions of the Interim Constitutional Declaration.

Article 1 of the Libyan Civil Code identifies the main sources of law as legislative provisions, principles of Islamic law, custom, and principles of natural law and rules of equity.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

The practice of law is regulated by Law No 10/1990 on the regulation of the profession of lawyers. In order to practise as a lawyer in Libya, a candidate must satisfy certain conditions, notably:

- have Libyan nationality (subject to judicial agreements)
- be over 21 years of age
- hold a law degree from a college, university or law school in Libya (Faculty of Law degree) or abroad and
- hold a certificate of capacity to practise law

The profession is organised by the Libyan Bar Association, which ensures that the rules governing the profession are observed and is legally empowered to maintain a registry of lawyers and to take appropriate disciplinary actions against lawyers who violate the regulations of the profession.

Practising lawyers registered with the Libyan Bar Association may appear before any court of their rank or lower. They may practise independently or as part of a firm practice.

In Libya there is no distinction between transactional lawyers (solicitors) and litigators (barristers).

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The Libyan court system is divided into three levels:

- the courts of first instance:
  - Summary Courts for minor cases. Summary Courts are located in most small towns, and consist of a single judge who hears cases involving misdemeanours (disputes involving amounts up to LYD 250)
  - Courts of First Instance: they hear appeals from Summary Courts and have original jurisdiction over all matters involving amounts of more than LYD 250
- three Courts of Appeal (located in Tripoli, Benghazi and Sabha), which hear appeals lodged against decisions handed down by the Courts of First Instance. They consist of a panel of three judges, ruling on majority, and who hear civil, criminal and commercial cases. They also apply Sharia law to personal or religious matters which were previously handled by the Courts of First Instance
- the Supreme Court (located in Tripoli), which rules only on legal issues at stake in the cases brought before it and not on the facts. It is composed of five chambers (civil and commercial chamber, criminal chamber, administrative chamber, constitutional chamber, and Sharia law or personal status matters chamber). It has no annulment power over the decision of the lower courts, but may interpret constitutional law matters. All justices of the Supreme Court are appointed by the Supreme Council of Judicial Bodies.

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

The time limit for bringing a contractual civil claim is, as a matter of general principle, 15 years from the beginning of the obligation.

The time limit for bringing a claim under tort law is three years.

However, other time limits may apply in relation to specific matters or in relation to commercial law matters. In claims emanating from commercial relations and transactions, the time limits for bringing legal actions are generally much shorter.

Depending on the nature and origin of the commitment or right, it could be said that time limits range from between three to five years.

#### **4. ARE COMMUNICATION BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?**

Lawyers are under an absolute duty not to disclose any information they have acquired regarding their clients as a result of practising their profession. This commitment extends beyond the termination of their retainer, and is not restricted by the type of information or communication. It includes all documents and affects both lawyers providing advice and those appearing in court. Lawyers may not be released from their duty of confidentiality. Further, lawyers may not act as witnesses in a dispute assigned to them or on which they have consulted unless acting upon prior written permission from the client.

A lawyer who commits a breach of confidentiality will be subject to disciplinary measures and sanctions.

#### **5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?**

Proceedings are brought about by filing a writ with the court clerk, signed and dated by the claimant or the claimant's representative or lawyer, with one copy provided to the other party (or parties). The court clerk will enter the initial hearing date on the copies of the petition instituting proceedings, which will be provided to the claimant for service on the defendants.

The time frame for scheduling the first court hearing is a minimum of eight days from the service of the petition if the defendant is domiciled in Libya.

If the defendant is domiciled abroad, the timeframe will be extended to:

- 30 days if the defendant is domiciled in a country bordering the Mediterranean Sea
- 60 days if the defendant is domiciled in Europe and
- 150 days if the defendant is domiciled in a country other than those listed above

The *ad hoc* judge (or summary judge) may, by an order, set aside this time limit depending on the facility of transportation and circumstances of urgency.

The defendant must submit all defences, claims (requests) and supporting documents before the second session of the case hearing.

#### **6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?**

Evidence is submitted to the court with the claims and submissions. There are no time frames for producing evidence but it may only be presented in the first instance and before the Court of Appeal. The other party must be able to reply to any such evidence presented. No new evidence may be presented in the case of an appeal to the Supreme Court. Written evidence must be provided to the court before and during the proceedings. This applies to a first instance court as well as courts of appeal.

Witness testimony is permitted upon request of the other party and with court approval during the proceedings before both the court of first instance and courts of appeal.

There is no specific provision requiring a party to disclose evidence in his/her possession. However, one party may request the other party to submit any beneficial written evidence in the proceedings in the latter's possession in each of the following cases:

- if the law permits the request of submission or delivering of such written evidence
- if the written evidence is shared between him/her and his/her opponent and
- if his/her opponent invoked such written evidence at any stage of the proceedings

The court may also authorise the introduction of a third party and oblige him/her to submit a document in his/her possession. The court may also ask administrative bodies to submit in writing any information and documents they may have if deemed necessary for the conduct of the case, provided that such action will not prejudice the public interest.

As a rule, Libyan law does not allow the principle of self-implication ie forcing a party to produce evidence against oneself. However, if the court, upon request from a litigant, decides to "order" the other party to provide a document as in the cases specified above, then that party has to abide by the court order or face a penalty, to be determined by the judge.

The court is also entitled to order, either of its own volition or upon the request of a litigant, the appointment of one or three experts chosen from among those admitted by the court.

#### **7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?**

The parties have no control over the procedure or the timetable insofar as the court selects the hearing dates. Parties can only seek extensions of time, which are subject to the court's sole discretion.

It is not possible to specify the average duration of proceedings before the various courts in Libya. The length and pace of the proceedings depends on various factors relating to the subject matter of the dispute, the amount at stake, and the workload of the judge presiding over the case.

The parties may agree on terminating proceedings. In such case, the parties may request the court's approval. Once approved, this would be deemed an execution writ, which would have the characteristics of a full judgment.

#### **8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?**

The judges have power to freeze a party's assets pending judgment where there is *prima facie* evidence of a good arguable case against the owner of the assets and a credible risk that they may be dissipated to defeat a judgment. Where appropriate, the court may also grant injunctions or make other prohibiting or mandatory orders in order to preserve the *status quo* until the trial takes its course. Interim orders may also be made (if appropriate, without notice to the defendant(s)) permitting a party to trace the

flow of funds through financial institutions, or to enter a defendant's premises to search for and seize evidence. The courts also have jurisdiction to order that a defendant or a debtor under a judgment be prohibited from leaving Libya.

## 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

A declaratory judgment or a judgment creating a new legal relationship does not need enforcement. Only judgments making mandatory or prohibiting orders need enforcement.

Enforcement measures available under Libyan law include, but are not limited to:

- an auction sale of assets to satisfy the judgment
- issuance of an order for an examination of the debtor (or a corporate debtor's directors) to disclose all assets (the failure of which will result in criminal sanctions)

Libyan law does not give the judge authority to issue a notice to the person against whom a judgment is rendered to comply with the execution of the judgment, but the law gives the Court of Appeal the right to stop the enforcement of a first instance judgment governed by expedited implementation.

The law also gives the Supreme Court the power to stop the execution of a judgment of the Court of Appeal filed with it if it deems it likely to set aside the judgment.

However, bearing this in mind, for judgments of a prohibiting effect or other mandatory orders, there is little practical means of enforcement in the instance of non-compliance. The only means of enforcement is through sanctions. There is no contempt of court in Libya in case of non-compliance with a judgment. So the court indirectly compels the judgment debtor by way of a monetary penalty. For example, the court can impose a penalty payment from the judgment debtor to the judgment creditor for each day that a judgment order is not honoured.

Libyan law contains no provisions on imposing a deadline to comply with a judgment.

## 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

The unsuccessful party bears the costs. This would include filing fees, lawyers' fees, expert's fees, etc. No security for costs can be ordered. Litigants must attach a list of expenses in the case file. The successful party can, therefore, in theory, recover its legal costs. In practice, courts tend to be restrictive on the amounts recovered, which rarely cover the actual costs. These costs are calculated on the basis of the actual "paid" fees. However, when it comes to the fees of lawyers, which may be of substantial amounts, the court assesses them on an average, not on the fees actually paid. This usually results in much lower fees ordered by the court.

## 11. ON WHAT GROUND CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

Judgments may be appealed within 30 days from the date on which the judgment is served on the unsuccessful party before the

Court of First Instance (for decisions handed down by a Summary Court) or the Court of Appeal (for decisions handed down by a Court of First Instance).

The appeal suspends enforcement of the decision. Excluding those decisions that automatically benefit from immediate enforcement and notwithstanding appeals or applications to annul, the court must order immediate enforcement, when requested to do so, in all cases involving an official instrument, an acknowledged obligation, or a previous decision against a party by way of a *res judicata* decision.

Parties may also appeal to the Supreme Court within 60 days from the day on which the Court of Appeal's decision is served on the unsuccessful party. The Supreme Court rules on legal issues, not on facts, and may decide to allow an appeal (in which case it quashes the appealed decision and invites the parties to revert to the lower court), or to dismiss it.

## 12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

Libyan State entities are not entitled to claim immunity from civil proceedings save within the scope of administrative acts, which may be submitted to the administrative courts (administrative proceedings). If the acts are purely civil in nature, they may be submitted to the ordinary courts. However, assets of administrative bodies cannot be seized for enforcement purposes.

Foreign State entities may only claim immunity under diplomatic immunity rules applicable to the diplomats of foreign States and subject to the principle of reciprocity.

## 13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

It is possible to enforce a foreign judgment in Libya by leave of the Court of First Instance of the place of enforcement of the judgment. However, these courts will not give leave to enforce the judgment unless:

- it was made by a competent court in the relevant jurisdiction
- the judgment is enforceable under the law of which the judgment was rendered and it has become final
- the parties have been duly represented and
- the decision is not contrary to Libyan public policy

A foreign judgment will be enforced in Libya under the same conditions applied by the courts of the country in which the judgment was given when enforcing Libyan judgments. Normally, foreign judgments are easily enforced in Libya if the required conditions apply.

## ARBITRATION

### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

There is no specific arbitration law in Libya (except the new Law No 4/2010 relating to mediation and arbitration before the Summary Courts which deal with minor cases). Arbitration is governed by articles 739-777 of the Code of Commercial and Civil Procedure of 1953, which preceded the UNCITRAL Model Law



and hence is not based on it. Libya is not a party to any international arbitration convention.

### **15. WHAT ARE THE MAIN NATIONAL ARBITRATION INSTITUTIONS?**

Libya has no established arbitration institution. However, the District of Benghazi Chamber of Commerce, Trade, Industry and Agriculture has established an organisation of conciliation and arbitration.

### **16. ARE THERE ANY RESTRICTIONS ON WHO MAY REPRESENT THE PARTIES TO ARBITRATION?**

The parties may either appear in person, or be represented by someone with a power of attorney. The parties may be represented by a local or foreign lawyer.

### **17. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?**

The arbitration agreement must be in writing and must specify the nature of the dispute, the arbitration procedure, the rules governing appointment of arbitrators, and whether the arbitral tribunal may determine disputes regarding the termination of the agreement.

The parties may include such provision in their agreement. If the agreement is not valid, the arbitration provision remains applicable.

### **18. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?**

If a dispute that has already been submitted for arbitration under an arbitration agreement is subsequently brought before a court, the latter must, if requested to do so by the defendant before a ruling has been made on the merits, hold the proceedings to be inadmissible until the completion of the arbitration or the termination of the arbitration agreement.

If the request for arbitration has not been submitted, the court must also declare the proceedings to be inadmissible (at the request of the defendant) unless the arbitration agreement is manifestly invalid.

According to article 761 of the Code of Commercial and Civil Procedure of 1953, these rules would apply if the seat of arbitration is in Libya. The parties may also agree to select a foreign seated arbitration but, in this case, the arbitral award will be dealt with as a foreign judgment (see question 13 above).

### **19. IF THE ARBITRATION AGREEMENT AND ANY RELEVANT RULES ARE SILENT, HOW MANY ARBITRATORS WILL BE APPOINTED, AND WHO IS THE APPOINTING AUTHORITY?**

The arbitral tribunal can be composed of a sole arbitrator or several arbitrators, but in the latter case the number of arbitrators must be odd.

In arbitrations conducted under the Arbitration Rules of the Benghazi Chamber of Commerce, the choice is between one or three arbitrators.

If the parties fail to appoint the arbitrators, they will then refer the matter to the court for resolution. There are no default rules under Libyan law.

In international arbitrations, if the parties fail to appoint the arbitrators and have selected an institutional arbitration, they will refer the matter to the secretariat of the institution selected.

### **20. WHAT RIGHTS ARE THERE TO CHALLENGE THE APPOINTMENT OF AN ARBITRATOR?**

An arbitrator may be challenged:

- if he/she does not possess the necessary qualifications required by the parties
- if one of the reasons for challenging an arbitrator as set out in the rules of arbitration adopted by the parties is met and
- if the prevailing circumstances raise legitimate doubts over the independence of an arbitrator, particularly due to the presence of direct or indirect economic or family ties with a party

A party may only challenge the arbitrator that it has appointed or to whose appointment it contributed for reasons it became aware of after the appointment.

The arbitral tribunal and the other party must be informed of the reason for the challenge at the earliest opportunity. In the event of a dispute, and if the parties or the rules of arbitration make no provision for the procedure to be followed, the relevant court will issue an order at the request of any party. This order is not subject to appeal.

### **21. DOES THE DOMESTIC LAW CONTAIN SUBSTANTIVE REQUIREMENTS FOR THE PROCEDURE TO BE FOLLOWED?**

The parties may, in general, regulate the procedure to be followed by the arbitrators, in the submission or any other agreement before commencement of arbitration. They may refer in their agreement to the rules of an arbitral institution, such as the International Chamber of Commerce.

In the absence of such a reference, the arbitrators may, together with the parties, establish the rules of procedure to be followed.

If neither the parties nor the arbitrators have determined the rules of procedure, then the rules applicable to the ordinary courts as stated by the Code of Commercial and Civil Procedure must be followed.

### **22. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED INSIDE THE JURISDICTION?**

Courts can intervene during arbitration only in specific cases, for example when matters outside the jurisdiction of the arbitrators have been brought before them, or in case of criminal incident requiring the intervention of the courts. In such matters, the arbitration proceedings should be suspended to allow the competent court to deal with the case.

Other than intervention of the court once the arbitral award is rendered (ie for enforcement purposes), the court can intervene upon a request by the parties to the arbitration

agreement and only in the circumstances specified by the law, which are as follows:

- if a litigant fails to appoint his arbitrator within 20 days of the announcement, the other party may ask the court which has jurisdiction to appoint the arbitrator (article 746 paragraph 2)
- an arbitrator must be appointed in writing unless appointed by the court (article 747)
- the court may issue an injunction imposing compensation on the arbitrators if they have been challenged without a legitimate reason (article 748)
- arbitrators may only be removed by mutual consent or a court ruling at the request of one of the litigants
- if no ruling by the arbitrators is made within the time limit specified in the arbitration agreement or, failing that, within three months (article 752). Absent a ruling within the determined time limit, the dispute will be referred to the court or the court could be requested to appoint other arbitrators

Arbitrators may refer to the President of the court in the following circumstances:

- to rule on witnesses for failure to appear
- to order rogatory
- regarding deposit of rulings of arbitrators with the competent court (article 762) (see question 24 below)
- where no arbitrators' award shall be affected except by order of the judge (article 763)
- the court may correct any typo or material mistakes in arbitrators' rulings (article 764)
- the court has competence in cases of appeals of awards and petitions to reconsider (article 767, paragraph 3)
- in cases of requests of repeal of the award

### **23. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?**

With regard to foreign awards, intervention of the court is limited to issuing an injunction regarding enforcement.

### **24. DO ARBITRATORS HAVE POWERS TO GRANT INTERIM OR CONSERVATORY RELIEF?**

Arbitrators have no power to order an interim or conservatory measure. The parties cannot agree to give the arbitrator such authority but they may request the competent court to order such measures without prejudice to the substance of the dispute.

### **25. WHEN AND IN WHAT FORM MUST THE AWARD BE DELIVERED?**

All arbitral awards must be deposited in their original form with the competent court, which is the court that would have jurisdiction to hear the dispute if it were to be filed at court. Filing is undertaken by one of the arbitrators within five days of the date of the decision. The Registrar of the court must notify the parties that the award has been filed.

If the registration or deposit does not take place within the time limit, the award can be subject to annulment.

### **26. CAN A SUCCESSFUL PARTY RECOVER ITS COSTS?**

The unsuccessful party will bear the costs. In practice, the arbitrators determine the amounts to be recovered.

### **27. ON WHAT GROUNDS CAN AN AWARD FROM AN ARBITRATION SEATED IN THE JURISDICTION BE APPEALED TO THE COURT?**

An arbitral award with a seat in Libya, whether its parties are Libyan or foreigners, may be appealed according to the same rules governing appeals from courts' decisions. There are certain cases where the right to appeal of an award from the arbitral tribunal is curtailed. These are:

- if the arbitrator(s) has been authorised to conciliate the matter
- if the award has been made by an arbitrator in the context of an appeal before an arbitral tribunal
- if the parties have expressly waived the right of appeal
- if the award falls within the final competence of the court which would otherwise have competence over the dispute

Arbitration awards are subject to appeal on the merits as well as on points of law, similar to the appeals of court judgments.

Article 769 stipulates a number of instances where a final award could be repealed/set aside by the court which would otherwise be competent to decide the case. These instances comprise the following occurrences:

- the award is issued without any arbitration agreement or is based on a defective agreement
- the arbitrators' appointment was irregular, due to lack of capacity of the arbitrator, the plaintiff or the defendant
- the arbitrators did not respect the arbitration agreement
- the award did not comply with the procedural requirements
- the award is issued after the agreed deadline
- the non-observance by the arbitrators of the rules of procedure agreed by the parties

### **28. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? AND IF SO, ON WHAT GROUNDS?**

An arbitration award rendered by a foreign arbitral tribunal is regarded as a judgment of a foreign court and is therefore treated accordingly in Libya.

Arbitral awards with a seat outside Libya can only be executed by a Libyan court order, but not appealed.

### **29. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF: (I) AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION AND (II) DOMESTIC AWARDS?**

According to article 408 of the Civil and Commercial Procedure Code a foreign arbitral award can be enforced in Libya on the condition that it is final and can be executed in the country where it has been rendered. Further, it is subject to the general rules regarding execution of foreign judgments in Libya. These are

mentioned in article 407 of the Code and can be summarised as follows:

- the judgment or award has been issued by a competent judicial authority according to the law of the country where it was issued and it has been recognised as having the power of an adjudicated matter
- the parties have been ordered to appear and were duly represented
- the judgment or arbitral order does not contradict a judgment or order issued by the Libyan courts
- the judgment or arbitral order does not contravene public policy in Libya

It is worth mentioning that, according to article 409, the court in Libya is under an obligation to decide the request for execution expeditiously.

The order for execution is issued by a summary matters judge of the first instance court in which execution is sought.

A domestic arbitral award cannot be enforced until an order for enforcement (*exequatur*) has been granted upon the request of the interested party. Such an order is to be issued by the court which would have had jurisdiction over the dispute.

The judge must verify the award, the existence of the arbitration agreement and the absence of impediments to enforcement. He/she then places the order for enforcement at the bottom of the original award.

### 30. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

Foreign awards are not readily enforceable in Libya. As mentioned above, the winning party or his/her representative normally has to apply to the *ad hoc* judge before the competent court for an order of execution of the award in Libya. The court is, however, required to issue the order in an expeditious manner should all required conditions apply.

## ALTERNATIVE DISPUTE RESOLUTION

### 31. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING THE PROCEEDINGS?

The Court of First Instance may act as conciliator at any time during the proceedings if it chooses to do so and if the parties agree. Moreover, Law No 4/2010 relating to mediation and arbitration concerning disputes falling under the jurisdiction of the Summary Courts requires the said courts to offer mediation before proceeding to arbitration.

## REFORMS

### 32. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

To the best of our knowledge, there are currently no plans to introduce any reforms of civil and commercial procedure in the near future.

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# MADAGASCAR



## INTRODUCTION

Madagascar gained independence in 1960, having been previously colonised by France. The Malagasy legal system is based traditionally on Roman civil law. Individual rights and fundamental liberties are guaranteed by the Constitution but their exercise is organised by laws, which are passed by Parliament.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

Lawyers in Madagascar are generally called barristers. Barristers deal with clients, draft statements of case and appear in court. As such, there is no split profession.

To become a barrister, one must be at least 21 years old, be a Malagasy citizen and hold a Master's degree in law or an equivalent degree (ie four years' post-secondary study or more).

Candidates must first take part in and pass the entrance examination at the Institute for Professional Training for Barristers (IFPA). This is then followed by one year's training at IFPA (ie 360 hours of training courses in addition to internships in law practices, courts or companies).

The Bar student must sit and pass the final IFPA examination, which is evidenced by the issuance of the CAPA certificate.

After swearing in as a barrister, the applicant is admitted to the internship list. The training period is three years. Trainee barristers must work for barristers who have been registered on the Bar Association Roll (*Tableau de l'Ordre*). At the trainee barrister's request, the training period may be extended up to five years.

At the end of the internship, the trainee barrister applies for registration on the Bar Association Roll, and can thereafter train other trainee barristers.

Foreign barristers cannot generally register at the Bar of Madagascar. Exceptionally, reciprocal rules may apply between two jurisdictions, provided for in a bilateral agreement. For example, pursuant to the judicial co-operation agreement between France and Madagascar, a French barrister is authorised to ensure the defence of a French citizen before the Malagasy Criminal Court; similarly, a Malagasy barrister is allowed to represent a Malagasy citizen before the French Assizes Court.

Notaries are public officers whose function is to authenticate documents (sales of immovable property, wills, etc), and issue true copies. They may also act as counsel, and practise as members of a profession.

Legal advisers provide expertise in various fields (business law, tax law, company law, contract law, intellectual property, etc). They draw up deeds and draft contracts, and assist their clients in specialist areas. One qualifies as a legal adviser by completing a Master's (or higher degree) in law. They can give legal advice but cannot appear in court.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The court system in civil matters is pyramidal.

At the bottom are the Courts of First Instance, of which the Commercial and Labour Courts form part, located throughout the country.

Above these are the Courts of Appeal which hear appeals against judgments of all civil Courts of First Instance, without distinction. They are located in the major cities of the country.

The Court of Cassation, also called the Supreme Court, is at the apex. It is a triptych comprising the State Council for actions in administrative law involving the Malagasy State, the Court of General Auditors, whose function is to judge the accounts of public accountants, and the Supreme Court. The Supreme Court is located in Antananarivo.

It should be noted that the Supreme Court of Appeal is not a third level jurisdiction; it decides only points of law or law enforcement, and does not rule on the facts.

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

At common law, a civil obligation is time-barred after 30 years.

However, shorter limitations exist in both civil and commercial matters, as follows:

- five years for commercial matters
- five years for rent and interests
- one year for accommodation and pension costs, the price of current supplies and materials
- six months for salaries and professional fees

The Code of Civil Procedure provides that judgments may be executed within 30 years from the date on which they were delivered.

#### **4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?**

Exchanges between a barrister and his/her client are protected by law with regards to both the court and opposing parties. All correspondence from a barrister to his/her client is protected by professional confidence. As such, documents are confidential and would systematically be excluded from proceedings in the event that one party seeks to adduce them.

If a barrister is suspected of facilitating his/her client's unlawful acts or of complicity, a search of his/her office may be permitted, but only in the presence of the President of the Bar.

#### **5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?**

A classic civil lawsuit begins with the service of a summons by a bailiff acting on behalf of the party that has initiated the judicial action. The summons must include the object and the grounds of the claim and, as the case may be, the quantum of the claim. It should also state the claimant's civil status details, his/her address and his/her barrister's name, indicate the court in which the claim has been lodged, and the date and time of the court appearance. It must specify the documents on which the action is based.

The summons is then put on the case schedule of the relevant court that will try the case, where it is thereafter allocated to the appropriate division.

As the regular civil procedure is a written one, the defendant's barrister (or barristers if there are more than one defendant) must formally inform the court that he/she has been instructed by the defendant, by submitting a signed appointment letter which mentions the name of the defendant he/she is assisting or representing. Preliminary procedures are then initiated, and the claims and arguments are communicated in the form of statements of case or submissions, under the control of the judge in charge at the preliminary trial stage. The parties must exchange the documents which they intend to share with the court.

The judge in charge at the preliminary trial stage refers the case to hearings, which are generally at three to four week intervals. The judge may, for example, order one party to take an action which is necessary or useful to the case or to its resolution. These are measures of judicial administration which cannot be appealed against.

When the case is ready for hearing, the judge issues a closing judgment, which has the effect of bringing to an end the preliminary trial stage. A hearing date is then set for the barristers of both parties to present their arguments before the court. Cross-examination is not part of the practice in civil cases under Malagasy law. At the close of pleadings, the barristers submit to the court all the documents that have been communicated to one another. The court delivers its judgment on a date which is announced at the end of the pleadings.

#### **6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?**

The civil case is governed by open debate involving both parties. This means that it is mandatory that all arguments and all documents are exchanged between the parties prior to the end of the preliminary trial stage.

The parties also have the opportunity, subject to the court's discretion, to request the summoning of a witness who does not wish to testify voluntarily, or the production of a document held by a third party.

Various investigative measures may be ordered when the judge does not have sufficient technical elements to rule. For example, the judge may order an expert report commissioned by a technician registered on a list approved by the court. The party making the request must advance funds towards the cost of the expert, which will ultimately be borne by the losing party.

Voluntary witnesses may make oral depositions or written statements and the judge may order the personal appearance of the parties.

The guiding principle is that the responsibility rests on the litigants to request from the court the investigative measures they wish to be implemented. Indeed, the basic rule in civil matters is that each party bears the burden of proving the existence of the facts that it alleges.

#### **7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?**

For a classic civil case, as described in question 5 above, the timeframe, between the date of summons and judgment, can range from four to 18 months, depending on the barristers' input and the complexity of the case.

When a barrister takes dilatory measures, it is up to the other party to seek an injunction from the judge in charge at the preliminary trial stage. If the injunction is not complied with, the judge may close the case.

The civil procedure provides measures allowing a party to rapidly obtain immediately enforceable judgments. Indeed, the law confers on the President of the court the power to grant, in summary proceedings, a provisional sum of money when there is an emergency and in the absence of a serious defence.

If the judge sitting in summary proceedings deems that there is a serious defence, he/she may dismiss the claim without prejudice to the merits of the case, which is then resolved according to the common law procedure described above.

Finally there is a procedure for the "injunction to pay", which is applicable to cases for the recovery of small civil or commercial debts (bad cheques or bills of exchange, for example), that allows the creditor to obtain an enforcement order by correspondence by sending all documentary evidence to the court.

## 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

If the recovery of a debt is endangered, the following may be ordered pending judgment:

- a garnishee order, which blocks, by and in possession of a third party, sums of money and movable assets belonging to the debtor. Authorisation of the court by way of *ex parte* petition is required
- a protective attachment, which is a remedy open to any creditor of a sum of money. As with the garnishee order, authorisation obtained by way of *ex parte* petition is also required
- a forced judicial mortgage, which allows a creditor to take security over an immovable property belonging to the debtor with a view to selling it through public auction
- the party who is a creditor prior to judgment may also be authorised to take a pledge over the debtor's business, which guarantees that the creditor will be paid in priority

## 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

A creditor, having a writ of execution, may collect his debt on all the movable and immovable property belonging to the debtor, by way of a garnishee order, seizing order, forced sale of business assets, seizure of immovable property as well as through judicial winding up of traders or civil and commercial companies.

## 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

Courts order the payment of the following, by the losing party:

- costs, including court costs, as well as expert fees, as the case may be
- in case of an appeal deemed dilatory or abusive, the appellant is sentenced to a civil fine

Subject to international agreements, any foreign claimant is required, if the defendant so requests, to provide security to pay the damages which he could be ordered to pay. Under article 12 of the Code of Civil Procedure, a judgment ordering a foreign claimant to provide such security is not automatic and is at the court's discretion.

## 11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

The right to use an ordinary recourse (appeal) or extraordinary recourse (Supreme Court appeal) is not subject to any limitation.

Except for judgments that are enforceable by right (summary orders, orders relating to the refusal of out of court settlements, wage claims), the appeal has the effect of putting a stay on the judgment until the Court of Appeal gives a new ruling. A judgment delivered by a first instance court which is under appeal, is therefore not enforceable.

However, the court may decide to rule that its judgment is partially or entirely enforceable on a provisional basis, whether or not conditioned by the provision of security. That may be, because, for

example, the debt is long-standing or due to the precarious situation of the parties. In such a case, even if an appeal is commenced, the judgment is immediately enforceable within the stated limits.

On the other hand, an appeal court judgment is enforceable even if it is the subject of an appeal to the Supreme Court.

## 12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

Foreign Governments (through their embassies, diplomatic missions and diplomats) benefit from immunity against civil suits.

As regards civil litigation against the Malagasy Government, this can be brought before the Administrative Courts.

## 13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

Subject to bilateral international agreements, a judgment delivered by a foreign court may be made enforceable in Madagascar by the procedure called *exequatur* before the civil court or the judge acting in summary proceedings, provided that the foreign judgment is not contrary to either public order or morality.

For example, the agreement between France and Madagascar provides that a judgment delivered by the courts of one country has by right *res judicata* status in the other country, provided that the judgment emanates from a competent court according to the rules on conflicts of competence accepted by the country in whose territory it must be executed.

## ARBITRATION

### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

Arbitration law has been introduced into the Malagasy Code of Civil Procedure by two laws: Law No 98-019 of 2 December 1998 (the 1998 Arbitration Law) and Law No 2001-022 of 9 April 2003 (the 2003 Arbitration Law). Prior to the promulgation of these two laws, no provision governed the rules or procedure for arbitration.

The 2003 Arbitration Law, incorporated into the Code of Civil Procedure, draws on some aspects of the UNCITRAL Model Law (namely regarding the arrangements for the appointment of arbitrators, and the overall structure of the procedure). However, the Malagasy arbitration law is much less detailed than the UNCITRAL Model Law.

The arbitration procedure, according to the Malagasy Law, varies depending on whether the arbitration procedure is national (domestic) or an international arbitration.

According to article 452.1 of the 2003 Arbitration Law, an arbitration is "international" in any one of the following cases:

- if the parties to an arbitration agreement are, at the time such agreement was entered into, established in different States
- if one of the following places is situated outside of the State in which the parties have their establishment:
  - the place (seat) of arbitration, if the same is specified in or determined under the arbitration agreement, or

- any place where a substantial part of the parties' contractual obligations are to be performed or the place with which the object of the dispute has the closest connection
- if the parties have expressly agreed that the subject of the arbitration agreement relates to more than one country
- in a general manner, if the arbitration involves international trade, namely when cross-border transfers of funds, interests or capital services take place between the parties

The "establishment" of a party to an arbitration is determined as follows:

- if one party has more than one establishment, the establishment to be taken into consideration is the one which has the closest link to the arbitration agreement
- if one of the parties does not have any establishment, its habitual residence shall be considered as its establishment
- if one party is a subsidiary of a foreign company, its establishment is, unless provided otherwise, the head office of the parent company

In the absence of any definition for domestic arbitration, it can be considered that an arbitration which does not fall within any one of the first four cases listed above would be a domestic arbitration.

The Centre for Arbitration and Mediation of Madagascar (CAMM) was created in 2000 as an independent arbitration organisation with a separate legal personality. The CAMM organises and supervises arbitration and mediation procedures for domestic and international disputes according to its rules.

The CAMM has entered into several agreements for co-operation and mutual assistance with similar foreign organisations. However, although, legally speaking, the CAMM does exist as an organisation, it has not been functioning on an operational level for the past five or six years and, on this basis, has not been selected by parties choosing arbitration.

#### **15. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?**

The Malagasy Code of Civil Procedure specifies the conditions of validity which need to be met in order for an arbitration agreement or clause to be binding.

With regard to the substantive conditions, the arbitration agreement must not contravene the Malagasy laws prohibiting the settlement of certain disputes by way of arbitration. Under Malagasy law, it is not possible to arbitrate disputes on public law issues, on matters relating to nationality or personal status, and on issues relating to the State, local governments and public institutions. The arbitration agreement must also not contravene any international agreements signed by Madagascar which contain provisions affecting the application of arbitration to a certain type of dispute or disputes between entities of Madagascar and entities of other signatory States.

Aside from these restrictions, certain form-related requirements must be observed: the arbitration clause must be included in writing in the main agreement or in a document, signed by both parties and referred to in the main agreement. Furthermore, the clause must identify the arbitrator(s) or specify the procedure for their appointment. Finally, the arbitrator must be a natural person.

#### **16. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?**

With regards to domestic arbitration, the 2003 Arbitration Law specifies that when a dispute is referred to a court of law while an arbitration agreement or clause exists and binds the parties involved in the litigation, the court must declare itself incompetent to rule on the matter. Indeed, when the parties have agreed to settle their present or future dispute by arbitration through an arbitration clause or agreement, the will of the parties shall be followed as such clause is contractually binding upon the parties. Thus, the parties must compulsorily settle their dispute through arbitration.

However, the law states that the existence of an arbitration clause or agreement does not preclude either party from seeking provisional or protective measures from the court's presiding judge when such measures do not involve an examination of the substantive dispute. An illegal disorder or an imminent harm must, however, be proved before such measures are granted.

In the case of international arbitration, the law stipulates that a common law court to which a dispute is referred relating to a matter which is subject to an arbitration agreement or clause must refer the parties to arbitration if either of them so requests in its first substantive submissions. However, if the arbitration agreement proves to be void, inoperative or incapable of being performed, the dispute will then be submitted to and judged by the common law court. The law, however, specifies that these arbitration rules apply only if the place of arbitration is located on the Malagasy territory or if the provisions of the 2003 Arbitration Law relating to international arbitration have been chosen by the parties or by the arbitration tribunal. The law remains silent in respect of other situations.

In relation to arbitration agreements to which the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) applies in relation to Madagascar, the court is obliged to refer parties to arbitration in accordance with Madagascar's obligations under the New York Convention.

#### **17. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?**

When the place of arbitration is located in a country other than Madagascar, the Malagasy courts may intervene for one reason only: when a legal question, such as the interpretation of a point of Malagasy law or relating to the application of a legal provision, arises and the Malagasy courts are competent to respond.

The Malagasy courts may grant interim or injunctive relief in support of a foreign-seated arbitration only in the situation described in response to question 16.

#### **18. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?**

This depends on whether the arbitration is internal, foreign or an international arbitration (as defined in question 14 above).

The arbitration will be considered internal when all the elements (applicable law, place of arbitration, location of the parties) are in Madagascar. On the other hand, it will be considered as foreign when the same elements all relate to a country other than Madagascar.

In the light of such definitions, "foreign arbitration" is understood to include international arbitrations as defined in the Malagasy law and arbitrations which do not meet the definition of international arbitration but which are seated outside Madagascar. As such:

- international arbitral awards are not appealable. The only possible recourse is action before the Court of Appeal of Antananarivo, to declare the award null and void
- no direct legal or regulatory provision governs foreign-seated arbitral awards which do not meet the definition of an "international arbitration". However, by analogy, it is possible to argue that if a local or international award is not appealable in Madagascar, the same would be the case for a foreign-seated award
- in either case, such an action would not be permissible in respect of an award to which the New York Convention applies in relation to Madagascar (see question 19 below)

### 19. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION?

Madagascar is a party to the New York Convention. It will apply the New York Convention to all awards made in the territory of another Contracting State, provided that the dispute arose out of a legal relationship which is considered "commercial" under Malagasy law.

Arbitrations that may take place outside Madagascar concern both foreign and international arbitrations as defined in Malagasy law.

As was previously stated, there is no provision of Malagasy law directly governing foreign arbitration awards.

There is, however, a reference to the procedure enabling the application of the award in international arbitration, in this context, the Malagasy law states that the arbitration award, irrespective of the country where it was delivered, is recognised as binding and, upon written request made before the Court of Appeal of Antananarivo, may be enforced. In order to do this, either party must produce the authenticated original or a certified copy of the award, as well as of the arbitration agreement.

In the case of a foreign arbitration award which does not constitute an international arbitration award, one would need to refer to the various agreements established between Madagascar and other countries in order to establish what the appropriate procedure is, insofar as Malagasy law is silent on the matter, in the absence of an agreement with the foreign country, a request will need to be filed before the Malagasy courts.

### 20. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

The enforcement of foreign arbitration awards in Madagascar would be relatively easy if the award is a foreign award for the purposes of the New York Convention (ie it was made in the territory of another Contracting State and relates to a dispute arising out of a commercial legal relationship).

However, for those foreign awards which are not foreign awards for the purposes of the New York Convention, the ability to enforce a foreign award will depend on the will to co-operate between Madagascar and the country in which the award was delivered and whether there are any other reciprocal enforcement arrangements in place.

## ALTERNATIVE DISPUTE RESOLUTION

### 21. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

Alternative dispute resolution is certainly encouraged to prevent parties from being forced to endure a lengthy and costly procedure and to permit conciliation.

Hence, before or during the procedure, parties to litigation or arbitration may, by way of a transactional agreement, decide to put an end to the dispute between them. However, this is only an option proposed to the parties and not an obligation which could be imposed on them.

The Centre for Arbitration and Mediation of Madagascar has its own institutional rules for mediation. It has not been operational for several years, however, so has not been used to facilitate mediations.

## REFORMS

### 22. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

We have no information regarding any proposed reforms.

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# MALAWI



## INTRODUCTION

The Malawian legal system is based on the Constitution of 18 May 1994, subsidiary legislation, Acts of Parliament (in particular the Legal Education and Legal Practitioners Act (Cap 3:04)), and English rules of common law and equity which have been adopted as part of Malawi law.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

Lawyers in Malawi practise as both barristers and solicitors; there is no split profession. Lawyers provide legal services directly to clients and conduct proceedings in the courts. All lawyers have rights of audience before all trial courts except in the Industrial Relations Court where leave of the court must first be sought. Such leave is almost always granted.

To practise as a lawyer in Malawi one must first obtain a law degree from Chancellor College of the University of Malawi. The graduate can apply to the Chief Justice for admission to the Malawi Bar. Admission is usually conditional and invariably one of the conditions is that the lawyer should practise for at least the first year under the supervision of an experienced lawyer admitted to the Malawi Bar.

Persons who qualify as lawyers other than through the University of Malawi are required to pass a Malawi Law Examination administered by the Council of Legal Education.

The Chief Justice is empowered to admit to practise any person who, in the opinion of the Chief Justice, has sufficient legal knowledge and qualifications, is of good character, has come to Malawi for the purpose of appearing in such cause or causes, and has paid the prescribed fee.

A licence to practise as a legal practitioner is renewable annually. Every legal practitioner who has a valid licence to practise must become a member of the Malawi Law Society, which has powers, amongst others, to make rules dealing with standards of professional conduct with which every legal practitioner must comply.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The judiciary consists of the High Court and its subordinate courts. Appeals from the High Court lie to the Supreme Court of Appeal. Courts subordinate to the High Court include Magistrates' Courts, which generally have jurisdiction to deal with, try and determine civil matters where the amount in dispute does not exceed MWK 2 million and criminal matters in respect of offences whose maximum sentence does not exceed 14 years. Appeals from Magistrates' Courts lie to the High Court.

Malawi also has an Industrial Relations Court, subordinate to the High Court and with registries in various districts, with jurisdiction to hear labour disputes. Appeals from the Industrial Relations Court lie to the High Court.

The High Court, which has original jurisdiction in both civil and criminal matters, has a Commercial Division, which deals with commercial matters. The High Court also sits as a Constitutional Court in constitutional matters.

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

The Limitation Act (Cap 6:02) provides limitation periods for bringing civil claims.

A 12-year limitation period applies to:

- actions brought upon a judgment
- actions to recover land
- actions to recover any principal sum of money secured by a mortgage or other charge on property, whether real or personal, or to recover proceeds of the sale of land
- foreclosure actions in respect of mortgaged personal property
- actions in respect of any claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a will or on intestacy

A six-year limitation period applies to:

- actions founded on contract or other torts
- actions to enforce a recognisance
- actions to enforce an award
- most actions to recover sums recoverable by virtue of written law
- actions for an account

- actions to recover arrears of interest payable in respect of any sum secured by a mortgage or other charge or payable in respect of proceeds of sale of land or to recover damages in respect of such arrears
- actions for damages in respect of such arrears

A three-year limitation period applies to actions for damages for negligence, nuisance or breach of duty where the damages claimed by the plaintiff consist of or include damages in respect of personal injury to any person.

There is no limitation period in respect of actions brought by a beneficiary under a trust: in respect of any fraud or fraudulent breach of trust to which the trustee was a party or proxy or to recover from the trustee trust property or proceeds in the possession of the trustee, or previously received by the trustee and converted to his use.

#### **4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?**

English law rules of privilege apply in Malawi. As such, although the existence of some classes of documents must be disclosed, they are privileged from production and inspection by the other side.

Privileged documents, including letters and other communications passing between a party, or their predecessor in title, and their lawyer(s), are privileged from production, provided they are, and are sworn to be, confidential, and written to, or by, the lawyer in their professional capacity, and for the purpose of obtaining or giving legal advice or assistance for the client.

A document is accorded privilege from disclosure to the court or opposing parties on the ground of legal professional privilege if the dominant purpose for which it was prepared was that of submitting it to a legal adviser for advice and/or use in litigation.

Such privilege can be waived by the client and is subject to disclosure required by law.

#### **5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?**

Generally, civil proceedings in the High Court are commenced by filing one of the following:

- writ of summons
- originating summons
- petition
- originating motion

##### **Writ of summons**

The following proceedings are generally commenced by writ:

- proceedings in which a claim is made by the plaintiff in respect of any tort, other than trespass to land
- proceedings in which a claim made by the plaintiff is based on an allegation of fraud
- proceedings in which a claim is made by the plaintiff for damages for breach of a duty, death or personal injury or damage to any property

- proceedings in which a claim is made by the plaintiff for damages for breach of promise of marriage
- proceedings in which a claim is made by the plaintiff in respect of the infringement of a patent

If a defendant intends to contest the proceedings, he/she must file a notice of intention to defend the matter within 14 days and a defence 14 days thereafter. Failure to adhere to prescribed time limits mean default judgment may be entered. The plaintiff may file a reply within 14 days of service of the defence. The matter is then usually referred to mandatory mediation, which must be concluded within 90-120 days. If no settlement is reached, the matter is referred back to court. Some matters are by law exempted from mediation such as those:

- involving the determination of constitutional issues
- concerning the liberty of an individual
- commenced under the small claims procedure rules
- for judicial review
- relating to injunctions, summary possession of land, expedited originating motion and any other matters where the trial is expedited
- where the court makes an order on a party's application requesting the court to exempt the action from the rules
- where the court in its discretion so orders

##### **Originating summons**

Commencing an action by way of originating summons applies to the following type of proceedings:

- cases in which the sole or principal question at issue is one of construction of an Act or of any instrument made under an Act, or of any deed, will, contract or other document or some other question of law or
- cases in which there is unlikely to be any substantial dispute as to fact

A defendant who intends to contest these proceedings has 14 days from the date of service of the originating summons to enter an appearance. The plaintiff then has 14 days to file and serve affidavit evidence in support of the summons. The defendant must file and serve affidavit evidence in opposition within 28 days of service of the plaintiff's affidavit evidence. The plaintiff may file an affidavit in reply within 14 days of service of the defendant's affidavit.

##### **Petition and originating motion**

Some actions are commenced by petition, the most common examples being actions for divorce, judicial separation, bankruptcy and winding-up proceedings. There is no general form regulating the drafting of petitions, this will either be prescribed by specific Acts or have been shaped by accepted practice.

A good example of cases which are commenced by originating motion include judicial review under order 53 of Rules of the Supreme Court.

Generally, the procedure for actions commenced through petitions and originating motions is governed by specific rules or Acts pertaining to the subject matter in issue. The procedure will therefore vary depending on the specific provision(s) under which the action has been commenced.

Most civil actions can be commenced in the Magistrates' Court as long as the value in dispute does not exceed MWK 2 million. However, the Magistrates' Court does not have jurisdiction to hear:

- certain land ownership disputes
- claims for the cancellation or rectification of instruments
- most guardianship or custody disputes
- disputes over the validity or dissolution of any marriage other than where customary law is in question
- relating to the title to any right, duty or office
- seeking any declaratory decree or injunction

Actions in the Magistrates' Courts are generally commenced by way of default summons. The defendant has eight days within which to file an affidavit of defence if they intend to contest the proceedings. They may indicate through the affidavit of defence that they intend to file a defence within seven days from the date of filing the affidavit of defence or they may include their grounds of defence in the affidavit itself.

If the defendant fails to file the affidavit of defence, a default judgment may be entered against them. If they file the affidavit of defence, the matter is referred to mandatory mediation if mediation is applicable.

## 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

This depends on whether the person from whom evidence is sought is a party to the action.

Generally, discovery must be given of any documents relating to any matter in question between the parties in the action. It is not restricted to documents which would be admissible in evidence at trial. Discovery must be given of documents in a party's possession, custody or power. This covers documents physically held by a party, and also documents which the party can call for in the capacity in which they are being sued. Privileged documents must be disclosed on discovery, but need not be made available for inspection by the other side. The list of documents which the parties to proceedings are obliged to exchange must contain a statement of the time and place at which the documents listed can be inspected.

As a general rule, discovery of documents cannot be obtained against third parties, nor is it proper to join a third party as a party merely for the purpose of discovery. If documents or information in the possession of a third party are required, it is ordinarily necessary to call them as a witness at the hearing or trial.

Written witness statements and expert reports are exchanged pre-trial.

At trial, documentary evidence may be admitted directly by the maker or be exhibited to affidavits. Witnesses give oral evidence and the other party can cross-examine the witness. Re-examination is limited to an explanation of the matters referred to in cross-examination. Reluctant witnesses may be summoned to court under *subpoena*. This applies to all types of claim (writ, summons, petition/originating motion, Magistrates' Court claims).

## 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

The trial court is responsible for managing its case list. Judges/presiding judicial officers have control over the issues on which evidence is admitted and the way in which evidence is to be put before the court.

The procedure may vary from one court to the other as follows:

- Supreme Court of Appeal – a matter may only be set down when the record of the court below is ready. Once the record is ready, parties to the appeal are required to file skeleton arguments within the stipulated timeframe after which the registrar will grant a date of hearing of the matter
- High Court of Malawi (General Division) – the timetable is governed by Rules of the High Court and Rules of the Supreme Court. The issues to be determined at trial are defined by the pleadings. The court has inherent powers on its own motion to dismiss a matter for want of prosecution. A defendant may also apply to dismiss a matter if the plaintiff is not complying with the timeframe in prosecuting a matter. The onus is on the plaintiff to file and serve a bundle of pleadings and a trial bundle before a matter is set down for trial. The time taken to conclude a matter depends mainly on whether there are interlocutory applications, and the availability of a judge to preside over the trial. On average, matters are concluded within two to three years
- High Court of Malawi (Commercial Division) – the practice is governed by Commercial Court Rules (2007), Rules of the High Court and Rules of the Supreme Court. Interlocutory applications are generally attended to by judges and not the registrar as is the case in the High Court General Division. Issues for determination at a trial are defined by pleadings and are narrowed at a scheduling conference. In most cases, matters are concluded within 12 to 18 months
- Industrial Relations Court – interlocutory applications are heard by the registrar or the chairperson/deputy chairperson. The court has its own rules which are very flexible. The challenge in this court is the lack of judicial officers. It is difficult to obtain an early hearing date due to a backlog of outstanding cases. On average, matters are concluded within three to five years
- Magistrates' Courts – the procedure is governed by Subordinate Court Rules. All interlocutory applications are presided over by the magistrate. On average, matters are concluded within 12 to 15 months

## 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

The law allows a party at any time to apply for an interim remedy pending judgment. The available interim remedies include an order for interlocutory injunction, detention, custody or preservation of any property which is the subject matter of the suit and is within the court's jurisdiction. An application for an interlocutory or interim injunction may be made before or after trial. Such orders are granted at the discretion of the court where the interests of justice require. For example, orders for an interim injunction are granted subject to the applicant establishing that they have an arguable case and that damages would not be an adequate remedy. The applicant must also undertake to pay damages to the respondent if it turns out later that the order was wrongly granted.

## 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

A judgment for the payment of money may be enforced by:

- writ of *fieri facias* (*fi.fa*)
- garnishee proceedings
- charging orders
- appointment of receiver (order 61)
- an order for committal
- writ of sequestration
- insolvency proceedings against the individual or winding up proceedings against a debtor company

A judgment for possession of immovable property can be enforced by:

- writ of possession
- committal
- writ of sequestration

A judgment for the delivery of goods may be enforced by:

- writ of delivery to recover goods or their assessed value
- order of committal
- writ of sequestration

A judgment ordering a person to do or abstain from doing an act may be enforced (subject to personal service of the judgment/order on the person in default) by:

- writ of sequestration against the property of the person with leave of the court
- writ of sequestration against the property of the directors or other officers, if the person involved is a corporate body
- committal against the person or director or other officer of the corporate body, as the case may be

In practice, the mechanisms for enforcement of a judgment in Malawi are effective. For example, there is a Sheriff's department which works under the court and it is therefore easy to enforce writs of *fi.fa* and any of the enforcement modes which require the services of the Sheriff.

A plaintiff can also easily apply to court for a committal order where the defendant is in contempt of court.

## 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

The court has discretion to award costs of and incidental to proceedings and full power to determine by whom, and to what extent, costs are to be paid. Generally, costs follow the event. This means the successful party is entitled to its costs.

The court takes into consideration a wide number of factors, including the expenses incurred by the party or its lawyer, the court fees paid by that party or the lawyer, the length and complexity of the proceedings, the conduct of the parties before and during the proceedings, and any previous orders as to cost made in the proceedings.

A claimant who is ordinarily resident outside Malawi may, on the defendant's application, be required to provide security for the defendant's costs. A nominal claimant (a claimant who is suing for the benefit of some other person) may also be required to provide security for costs if there is reason to believe that he will be unable to pay costs. Further, a plaintiff whose address is not stated or is not correctly stated in the originating process or who has changed their address during the course of the proceedings with a view to evading consequences of litigation may also be ordered to provide security for costs. However, where a plaintiff who is ordinarily resident outside Malawi has assets in Malawi the court is unlikely to make an order for security for costs.

## 11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

The right to appeal is constitutionally guaranteed and there is a general right of appeal against a decision of a court of first instance. In some cases, leave to appeal is required (eg in relation to a judgment given by the High Court in its appellate capacity, an order of the High Court or any judge thereof made with the consent of the parties, an order as to costs only, or an order made in chambers by a judge of the High Court).

An appeal from the Industrial Relations Court to the High Court may be on a point of law or jurisdiction only. An appeal from a Magistrates' Court to the High Court may lie on point of fact and/or law. No leave is required to appeal from the Magistrates' Court to the High Court save for cases where the judgment/order appealed against was made *ex parte*, or by consent, or relates to costs only.

An appeal from the High Court to the Supreme Court of Appeal may lie on a point of fact and/or law. When dissatisfied with the decision of the Supreme Court of Appeal, a party may ask the Supreme Court to review its decision. The power of the Supreme Court to review its decision is, however, limited to where a party claims that there are exceptional circumstances which have resulted in a miscarriage of justice, or there is new and important evidence which was not within the applicant's knowledge or could not be produced by them during the trial.

Generally, an appeal does not operate as a stay of the decision of the lower court unless the court stays the execution of the judgment. In order for a court to grant an order staying execution of judgment pending appeal, the applicant must establish that the chances of success on appeal are high and that unless execution of judgment is stayed, the appeal will be rendered nugatory.

## 12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

The Malawi Government and its entities do not have immunity from civil proceedings.

The Immunities and Privileges Act expressly grants immunity to foreign States. A foreign State includes the Sovereign or other Head of that State in his or her public capacity, the Government of that State and any department of that Government. However, there are exceptions to the general immunity granted to foreign States. These exceptions include: proceedings in which the foreign State has submitted to the jurisdiction of the Malawian courts; proceedings relating to commercial transactions; contracts of employment; personal injuries, damage to property, ownership,

possession and use of property; intellectual property and use of a trade or business name in Malawi; its membership of a corporate body, an unincorporated body or a partnership; proceedings against ships used for commercial purposes; and liability for any customs and excise duty.

A foreign State entity (ie a separate entity distinct from the executive organs of the Government of a State and capable of suing or being sued) is immune from the jurisdiction of the Malawian courts if, and only if, the proceedings relate to anything done by it in the exercise of sovereign authority and the circumstances are such that a State would have been so immune.

### **13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?**

By statute, Malawi recognises judgments of the Zimbabwean and Zambian courts. The party in whose favour the judgment is given must register the Zimbabwean/Zambian judgment in Malawi. Upon registration, the judgment has the same force and effect in all respects as a judgment of the Malawi court in which it is registered.

Further, under the British and Commonwealth Judgments Act of 1922, judgments of superior British and Commonwealth courts may be registered in the High Court at any time within 12 months after the date of the judgment or such longer period as may be allowed by the High Court.

Upon registration, these judgments would have the same effect as if they had originally been given in the court in which they were registered.

In relation to judgments issued in other jurisdictions, the plaintiff can commence an action in Malawi based on the judgment. The plaintiff must adduce evidence before the court to prove that the judgment was issued in the relevant jurisdiction. If the court is satisfied, it will issue its own judgment, based on the foreign judgment, which can then be enforced in Malawi.

## **ARBITRATION**

### **14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NOT, WHAT FORM DOES THE ARBITRATION LAW TAKE?**

Arbitration in Malawi is not based on the UNCITRAL Model Law. It is governed by the Arbitration Act, Cap 6.03 of the Laws of Malawi (the Arbitration Act).

The Protocol on Arbitration Clauses signed on behalf of the United Kingdom at a meeting of the Assembly of the League of Nations held on 24 September 1923 and the Convention on the Execution of Foreign Arbitral Awards signed in Geneva on behalf of the United Kingdom on 26 September 1927 have been incorporated into the Arbitration Act.

The Arbitration Act also provides that where it is agreed in a contract that arbitration shall be under the Arbitration Act 1950 of the United Kingdom, or any Act which that Act replaced, the English Arbitration Act will replace the whole of the Malawi Arbitration Act in those proceedings.

### **15. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?**

Under the Arbitration Act, an arbitration agreement must be a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not. There is no specific requirement that the agreement must be signed by both the parties in order to be valid. However, as with all agreements, a signed document is the best way to demonstrate the assent of both parties to enter into the agreement.

There is no requirement under the Arbitration Act to specify the seat of arbitration. Where a seat is not specified, it is likely that a court will find that the seat of arbitration is Malawi.

There is no requirement to specify the number of arbitrators. Where this is not specified, the arbitration agreement will be deemed to include a provision that reference shall be to a single arbitrator.

### **16. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?**

Courts will normally stay litigation on application of one of the parties to the agreement if there is a valid arbitration clause covering the dispute, regardless of where the seat of arbitration is. Any party to the arbitration may, before delivery of any pleadings or the taking of any other steps in the proceedings commenced in court, apply to the court to stay the proceedings. The court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and the applicant still remains ready and willing to do all things necessary in the proper conduct of the arbitration, may make an order staying the proceedings.

What amounts to "sufficient reason" is generally left to the court's discretion. A stay may be refused where one of the matters at issue raises a serious constitutional question or if it can be shown that there is good ground for apprehending that the arbitrator will not act fairly in the matter. The Arbitration Act provides that the court may decline to stay proceedings if it is satisfied that the agreement or arbitration has become inoperative or cannot proceed or there is no actual dispute between the parties.

### **17. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?**

The courts will not normally intervene in arbitrations seated outside the jurisdiction. Generally, however, where, after a dispute has arisen, any party applies for leave to revoke the authority of an arbitrator designated in the agreement on the ground that the arbitrator is not or may not be impartial, or where a dispute arises which involves the question whether any such party has been guilty of fraud, the court may order that the agreement cease to have effect or may revoke the authority of an appointed arbitrator.

The Arbitration Act provides that, for the purpose of and in relation to a reference, courts will have the same power of making orders in respect of (among others) the preservation, interim custody or sale of any goods which are the subject matter of the reference and interim injunctions. While this provision does not specifically refer to foreign-seated arbitrations, in our view, a party to a foreign-seated arbitration can apply to the courts for such relief.

### 18. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN LOCAL COURTS? IF SO, ON WHAT GROUNDS?

Unless a contrary intention is expressed in an arbitration agreement, every arbitration agreement is deemed to contain a provision that the award to be made by the arbitrator or umpire shall be final and binding on the parties. The court may only set aside an award where the arbitrator is deemed not to be impartial or where there is an allegation of fraud.

The Arbitration Act provides that in all cases of reference to arbitration the court may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrator or umpire.

### 19. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION?

Malawi is not party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

Under the Arbitration Act, certain foreign awards are enforceable such as:

- those made pursuant to an arbitration agreement to which the Protocol on Arbitration Clauses signed on behalf of the United Kingdom at a meeting of the Assembly of the League of Nations on 24 of September 1923 applies, such as awards made in the United Kingdom, Germany, France and India among others. Under the Protocol, each of the contracting States undertakes to recognise the validity of such agreements between contracting parties subject to the jurisdiction of the different contracting States
- those made in such territories and between persons as the Minister of Justice and Constitutional Affairs, being satisfied that reciprocal provisions have been made, may by notice published in the Gazette declare to be parties to the Convention on the Execution of Foreign Arbitral Awards signed in Geneva on behalf of the United Kingdom on 26 of September 1927. However, as far as we are aware, the Minister has not yet published such notice in the Gazette

In order for any foreign award to be enforceable, it must:

- be pursuant to an arbitration agreement which is valid under the law by which it is governed
- be made by the tribunal provided for in the agreement or constituted in a manner agreed upon by the parties
- be made in conformity with the law governing the arbitration procedure
- become final in the country in which it was made
- be in respect of a matter which may lawfully be referred to arbitration under the law of Malawi and the enforcement thereof must not be contrary to the public policy or the laws of Malawi

A foreign award will not be enforceable if the court is satisfied that:

- the award has been annulled in the country in which it was made
- the party against whom it sought to enforce the award was not given sufficient notice of the arbitration proceedings to enable it to present its case, or was under some legal incapacity and was not properly represented

- the award does not deal with all the questions referred or contains decisions beyond the scope of the arbitration agreement. If the award does not deal with all the questions referred, the court may either postpone the enforcement of the award or order its enforcement subject to the giving of such security by the person seeking to enforce it

The Arbitration Act also allows for the enforcement of foreign awards other than those made pursuant to the Protocol and Convention referred to above and awards where the seat of arbitration is in a non-reciprocating State. Such awards must comply with the above requirements. There is no practical difference in the enforcement procedure.

Foreign awards are enforceable either by action or by leave of the court in the same manner as a judgment or order to the same effect. Where leave is given by the court, judgment may be entered in the same terms as the award. The time taken to enforce such an award cannot be ascertained with precision. Where an action is commenced to enforce a foreign award, if enforcement is not resisted by the defendant, it should take approximately four to six weeks to enforce.

### 20. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

Foreign awards will be enforceable by the courts if they comply with the requirements laid out in the Arbitration Act as stated in question 19 above. However, recognition or enforcement of a foreign arbitral award may be resisted on the basis that: the arbitrator lacked jurisdiction; the award was obtained by fraud; its recognition or enforcement would be contrary to public policy; or it was obtained in proceedings which contravene the rules of natural justice.

## ALTERNATIVE DISPUTE RESOLUTION

### 21. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

In respect of arbitration, there is no statutory requirement for parties to submit to alternative dispute resolution. Parties will only be required to go through mediation before proceeding to arbitration if an agreement entered into between them requires them to do so.

With respect to litigation, subject to certain exceptions (see question 5 above), all cases commenced in the High Court of Malawi or any subordinate court must, where the defendant indicates an intention to defend, first go to mediation.

The assistant registrar of the High Court maintains a list of mediators and a list of experts. The mandatory mediation is conducted by a person chosen by the agreement of the parties from the list of mediators maintained by the assistant registrar or, if the parties consent, a person who is not named on the list.

If the matter is not settled during mediation, the action will proceed in the court in which it was commenced. There have been no statistics compiled on the success rate of mediations. Mandatory mediation is still a relatively new concept in Malawi and it appears that the success rate so far is not very high. Mediations conducted by judges of the Commercial Court (in commercial matters) appear to have a much higher success rate than other mediations.

## REFORMS

### 22. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

No.

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# MALI



## INTRODUCTION

Mali is a civil law country. The legal system is based on the Constitution of 25 February 1992 and its implementing laws and decrees. Mali is also a member of OHADA, UEMOA and CEDEAO. The Supreme Court has ultimate jurisdiction for matters which do not fall within the scope of these inter-governmental organisations.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

The legal profession is governed by Law No 94-014 of 13 October 1994, which created and organised the legal profession in Mali.

In order to practise as a lawyer in Mali, the person must satisfy certain conditions, and in particular:

- have Malian nationality (subject to any reciprocity agreement)
- have the Certificate of Aptitude for the Profession of Lawyer (*Certificat d'aptitude à la profession d'avocat*) (CAPA) and
- hold a Completion of Training Certificate (*certificat de fin de stage*) or have a doctorate (after approval by the Mali Bar Council)

The profession is organised by the Bar Council, which ensures compliance with the rules governing the profession and takes any necessary disciplinary measures. Lawyers admitted to the Bar may appear before any court, draft and sign procedural instruments and enforce court decisions. They may practise either individually or in a practice structure.

There is no distinction between solicitor (*avocat conseil*) and barrister (*avocat plaidant*).

Foreign lawyers, after opting for residence in Mali, must be expressly authorised to plead. This authorisation is given for a specific case by the Chair of the Bar Council or by the Bar Council if the Chair represents a party in the case.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The Malian court system is organised as a three-tier pyramid:

- the first instance courts:

- the TGI, or *Tribunaux de Grande Instance* (formerly TPI, or *Tribunaux de Première Instance*) have first and final instance jurisdiction in civil, commercial and customary cases where the sums involved are (less than or equal to CFA 50,000, and first instance jurisdiction for disputes relating to individuals and matters concerning sums higher than CFA 100,000
- *Justices de Paix* with extended jurisdiction (JPCE)
- special courts, such as the commercial court, employment courts or administrative courts
- the Appeal Courts (Bamako, Kayes and Mopti)
- the Supreme Court

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

Time limits vary depending on the type of action and the parties involved:

- the ordinary limitation period for bringing an action for damages in a contractual or non-contractual matter is 20 years, unless otherwise provided
- the limitation period between merchants is five years

Special limitation periods apply for certain types of actions. For example, actions relating to commercial sales are time-barred after two years.

Time limits are matters of public policy and cannot be adjusted by contract. In principle, the time limit is suspended in the case of a prosecution or in an act of recognition.

### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

Communications between a lawyer and a client are confidential. Any breach of this obligation may give rise to liability on the part of the lawyer. The client may release the lawyer from this obligation.

### 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

Civil actions are filed with the court:

- by written petition (*requête écrite*), dated and signed by the claimant
- by oral petition (*requête verbale*), which is exceptional
- by summons



The lawyer decides on the procedure.

The parties are summonsed to appear at the initiative of the court with jurisdiction. The period between the date of service of the summons to appear and the date on which the defendant is to appear must be at least eight days if the defendant lives in the place where the court sits, 15 days if the defendant lives within the jurisdiction of the court, 30 days if outside of the court's jurisdiction but in national territory, two months if the defendant lives in Africa, and three months if he/she lives outside Africa. In summary proceedings, the law simply requires that the parties be summonsed to appear within a reasonable period of time.

For the presentation of arguments in defence, the defendant may be bound by a time limit fixed by the court.

Conciliation exists for divorce matters or orders to pay. Apart from these cases, there is no mandatory mediation or conciliation procedure. The Code of Civil, Commercial and Social Procedure (CPCCS) gives the court the authority to attempt to reconcile the parties, at any time during the proceedings. The court may therefore, in agreement with the parties, appoint a mediator to hear them in order to try to reach an amicable settlement.

## 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

Evidence can be produced by all usual means (authenticated document, private agreement, confession, witness testimony, etc). If a party has evidence in its possession, the court may, at the request of the other party, order it to be produced.

There is no equivalent of "disclosure" in Malian law.

Evidence must be communicated to the other party at the same time as written submissions.

## 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

The parties do not control the procedure. Once the proceedings have commenced, the timetable is set at the discretion of the court and in practice depends on various factors, such as the complexity of the case, the degree of urgency and the caseload of the court. Nevertheless, the parties may end the proceedings at any time by mutual agreement.

*Référé* proceedings last for an average of two to three weeks, and proceedings on the merits of the case for one to two months. Supreme Court proceedings last longer.

## 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

There are interim proceedings in Mali which protect the interests of the parties whilst waiting for a decision on the merits of the case:

- *référé* allows one of the parties to obtain an interim decision, without prejudice to the decision on the merits of the case. The request is made to the presiding judge of the court at a hearing organised for this purpose. Grounds include matters of emergency or difficulties encountered with the enforcement of court decisions

- *ordonnances sur requête*, which allow for all measures needed to protect the rights and interests of the parties when the circumstances mean that an adversarial procedure is not appropriate. The *ordonnance sur requête* is immediately enforceable
- *saisie conservatoire*, which allows for the seizure of the debtor's goods and prevents the debtor from disposing of them to the detriment of the creditor. The creditor needs to prove its claim and show that the circumstances could threaten collection of the debt. The petition is filed with the court with jurisdiction as the debtor's place of residence

## 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

Decisions only become enforceable when, once they can no longer be suspended by an appeal, they become final, unless provisional enforcement is automatic or has been ordered. The debtor may, however, benefit from a grace period. Only decisions bearing an order of enforcement may be enforced.

Enforcement measures available under Malian law are those provided for in the OHADA Uniform Act Organising Simplified Recovery Procedures and Measures of Execution. The principal measures are as follows:

- seizure for sale (*saisie-vente*): "any creditor in possession of a writ of execution showing a debt due for immediate payment may proceed to the seizure and sale of the tangible property belonging to his debtor in order to be paid from the sale price"
- seizure-award of debts (*saisie-attribution de créances*): "any creditor in possession of a writ of execution showing a debt due for immediate payment may [procure the seizure] in the hands of a third party [of] the debt owed by his debtor in the form of a sum of money"
- penalty payment (*astreinte*): creditors who obtain an injunction from a court ordering their debtors to complete a particular task or to cease and desist may ask the court to team the injunction with a penalty for non-compliance, payable by day/week/month
- real property foreclosure (*saisie immobilière*): this enforcement mechanism is applied as a last resort when the seizure of personal property or of debts was unfruitful or insufficient. The insufficiency must be authenticated by a bailiff (*huissier de justice*): only then may the creditor initiate a *saisie immobilière*

In addition, enforcement against the person (*contrainte par corps*) is provided for by the CPCCS, but not by the Uniform Act.

## 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

In principle, the unsuccessful party pays the costs (which comprise court fees, bailiff fees but not lawyer costs). The claimant must make a payment to the court, which is intended to cover various procedural and registration costs. Failing this the case will not be listed. The payment includes a lump sum amount and a sum subject to a proportional and declining tax, depending on the amount concerned.<sup>1</sup>

Main claimants or foreign parties must, at the request of the defendant, provide security to cover costs and any damages they may be ordered to pay.

**11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?**

Parties have one month to appeal against a first instance decision. This period starts from the date of notification of the decision, if it is adversarial, or from the date where opposition is no longer admissible in the case of a default decision. Appeals are made by way of a statement sent by the party, by registered mail or telegram, to the registrar of the court which handed down the decision. An appeal made in time suspends enforcement, unless the court has ordered provisional enforcement.

An appellate decision can be appealed to the Supreme Court. An appeal to the Supreme Court reviews issues of law and not of fact. The appeal to the Supreme Court does not suspend enforcement. If the appeal is successful, the case is remanded to a new appeal court for re-hearing. The Supreme Court can also quash a decision without remanding the case. In principle, the Supreme Court decision is not binding on the appeal court. In practice, however, the appeal court frequently follows the Supreme Court decision.

**12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?**

Proceedings can be brought against the Government or public authorities before the judicial or administrative courts, depending on the type of action. These entities do, however, benefit from immunity from enforcement. State-owned companies do not, in principle, benefit from immunity.

In terms of foreign entities, any jurisdictional immunity rights that can be applied derive from international agreements on diplomatic or consular relationships.

**13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?**

In Mali, decisions made by foreign courts are automatically enforceable if they meet the following conditions:

- the decision has been made by a court with jurisdiction
- the foreign decision applies the law which governs the dispute
- the dispute in question does not, according to Malian law, fall within the exclusive jurisdiction of the Malian courts
- the decision is final and may be enforced in the foreign country and
- the foreign decision does not infringe a final decision made by a Malian court

An enforcement order is only granted if an enforcement order would be granted in the foreign country for decisions made by the Malian courts. In practice, it is easy to obtain an enforcement order, provided that proof is provided that the decision is final and that it is not contrary to Malian public policy.

## ARBITRATION

**14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?**

Mali is a Member State of OHADA (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires* - Organisation for the Harmonisation of Business Law in Africa). The OHADA Treaty was first signed on 17 October 1993. Under the OHADA Treaty, the Council of Ministers adopt "uniform acts" that are directly applicable and enforceable in each of the Member States. Arbitration in the OHADA Member States has been governed by the Uniform Act on Arbitration within the framework of the OHADA Treaty, which was adopted on 11 March 1999 and came into force 11 June 1999 (the Uniform Act).

The Uniform Act is not based on the UNCITRAL Model Law. It was drafted separately but nevertheless complies with the fundamental principles of international commercial arbitration and the essential characteristics of the UNCITRAL Model Law.

The Uniform Act applies to both national and international arbitration and governs all arbitration proceedings sitting in a Member State.

One of the most important characteristics of OHADA arbitration is the Common Court of Justice and Arbitration (the CCJA) (*Cour Commune de justice et d'arbitrage*), which acts as both a permanent arbitral tribunal and the supreme court of arbitration for all OHADA Member States.

Prior to the adoption of the Uniform Act, arbitration was governed by articles 879 to 942 of the Decree of 28 June 1994 enacting the former Code of Civil, Commercial and Social Procedure (*Code de procédure civile, commerciale et sociale*), repealed by Decree No 99-254/P-RM of 15 September 1999, itself amended by Decree No 220/P-RM of 11 May 2009 to which article 753 refers, concerning arbitration rules set down by the Uniform Act.

**15. WHAT ARE THE MAIN NATIONAL ARBITRATION INSTITUTIONS?**

The main arbitration institution in Mali is the *Centre de conciliation et d'arbitrage du Mali* (the CECAM-COM).

Created on 29 July 2004 under the aegis of the Mali Chamber of Commerce (CCIM), the CECAM administers arbitration and conciliation procedures and is involved in the training of economic operators, arbitrators, in-house lawyers, judges and judicial officials. It is an administrative body. It does not itself make any decisions, but organises and administers conciliation and arbitration procedures through its Secretariat. Its task is to ensure compliance with the regulation, the adversarial principle and confidentiality.

It has already made a contribution to the settlement of several disputes by ensuring that administrative costs are affordable for users.

At the supranational level, the CCJA, which was created by the OHADA Treaty and is based in Abidjan, in Cote d'Ivoire, can also hear arbitration matters. The CCJA, which is also a supreme court, acts as an arbitration centre and administers proceedings governed by the CCJA Rules of Arbitration. The CCJA is different from other arbitration centres as it is not a private institution but was created and organised by OHADA.

For the CCJA Rules to be applicable, article 21 of the OHADA Treaty stipulates that all or part of the contract must be performed within the territory of one or more Member States, or that at least one of the parties must be domiciled or usually reside in a Member State. According to legal authors, it should also be possible to go to arbitration under the CCJA Rules even if these conditions are not met, if the parties have provided for this possibility in their arbitration agreement.

#### **16. ARE THERE ANY RESTRICTIONS ON WHO MAY REPRESENT THE PARTIES TO AN ARBITRATION?**

The Uniform Act does not set any restrictions on persons who can represent parties in an arbitration matter. They are entitled, but not required, to instruct a lawyer (article 20 of the Uniform Act).

There is nothing in Malian law which limits this freedom.

#### **17. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?**

Article 3 of the Uniform Act states that the arbitration agreement must be made in writing or by any other means which provides proof of the existence of the clause. No particular format is required. The Uniform Act also provides that contracts can refer to an arbitration agreement contained in a different document.

#### **18. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?**

Article 13 of the Uniform Act provides that national courts must decline jurisdiction where there is a valid arbitration agreement and where the composition of the arbitral tribunal has yet to be decided, save where the arbitration agreement is "manifestly void". The court cannot decline jurisdiction at its own discretion.

If the composition of the arbitral tribunal has already been decided, the national court must decline jurisdiction at the request of a party.

According to Malian case law, the Malian courts decline jurisdiction if there is an arbitration clause.

Parties governed by an arbitration agreement have the option of referring a matter to a national court to obtain interim or conservatory measures that do not require a review of the case on the merits, in circumstances that have been "recognised and reasoned" as urgent or where the measure must be performed in a State that is not party to OHADA.

National courts can also intervene in very limited circumstances with a view to assisting the arbitration process (see questions 22 and 23 below).

#### **19. IF THE ARBITRATION AGREEMENT AND ANY RELEVANT RULES ARE SILENT, HOW MANY ARBITRATORS WILL BE APPOINTED, AND WHO IS THE APPOINTING AUTHORITY?**

The Uniform Act does not provide for a specific number of arbitrators if the arbitration agreement is silent on this point. It does provide that an arbitral tribunal must have a sole arbitrator or three arbitrators.

If the parties are unable to appoint one or more arbitrators, they will be appointed by a court with jurisdiction in the State in which the arbitral tribunal sits.

Before the Uniform Act came into force, national law gave jurisdiction to the presiding judge of the *Tribunal de première instance*. While awaiting the harmonisation of Malian law in this respect, this court should continue to have jurisdiction.

#### **20. WHAT RIGHTS ARE THERE TO CHALLENGE THE APPOINTMENT OF AN ARBITRATOR?**

Article 7 of the Uniform Act sets the rules on challenging an arbitrator. Arbitrators must notify the parties of "any circumstance about him/herself" for which they may be challenged. Any disputes will be settled by the presiding judge of the *Tribunal de première instance*, as was the case before the Uniform Act came into force, save where the parties have provided for a different procedure for challenging arbitrators. Decisions cannot be appealed.

Arbitrators may only be challenged for reasons that come to light after their appointment.

#### **21. DOES THE DOMESTIC LAW CONTAIN SUBSTANTIVE REQUIREMENTS FOR THE PROCEDURE TO BE FOLLOWED?**

The Uniform Act requires parties to receive equal treatment and to have an opportunity to exercise their rights (article 9); arbitrators may not base their decisions on reasons considered at their own discretion without first allowing parties to submit observations (article 14).

Article 18 of the Uniform Act provides that the deliberations must be kept secret.

The Uniform Act also provides that the duration of the arbitration may not exceed six months from the date upon which the last arbitrator accepts the terms, save where extended by agreement of the parties or where an extension is granted by the court with jurisdiction. This concerns the presiding judge of the court named in the arbitration agreement or, failing this, the court in whose jurisdiction the arbitration agreement provides that arbitration will take place. If there is nothing in the agreement, the court with jurisdiction is that with jurisdiction in the place of residence of the defendant(s) or, if the defendant does not live in Mali, the court with jurisdiction in the place of residence of the claimant.

#### **22. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED INSIDE THE JURISDICTION?**

In principle, where there is an arbitration agreement, the national courts cannot intervene in a dispute until the award has been made.

Nevertheless, parties may consult the court with jurisdiction in Mali in the following circumstances:

- to resolve difficulties encountered with composing the arbitral tribunal, to appoint the sole arbitrator or the third arbitrator (articles 5 and 8)
- to rule on challenges against arbitrators where the parties have not provided for a different procedure (article 7)
- to extend the deadline for the conclusion of the arbitration where there is no agreement between the parties to do so, at the request of a party or the arbitral tribunal (article 12)

- to order interim or protective measures when urgently necessary (recognised and reasoned circumstances) or when the measure would be performed in a non-OHADA State, provided the measures do not require a review of the case on the merits (article 13)
- to assist the arbitral tribunal, at its request, with the collection of evidence (article 14)

### 23. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?

In principle, national courts cannot intervene in an arbitration sitting outside their jurisdiction where there is an arbitration agreement, as indicated above. In addition, all measures relating to the composition of the arbitral tribunal and conducting the proceedings fall under the jurisdiction of the courts of the country in which the arbitral tribunal sits.

However, it is possible for national courts other than the competent court of the country in which the arbitration is seated to intervene to order conservatory or interim relief under the conditions defined above in question 18 (article 13).

### 24. DO ARBITRATORS HAVE POWERS TO GRANT INTERIM OR CONSERVATORY RELIEF?

Although this matter is not dealt with directly in the Uniform Act, legal writers generally agree that it is possible for arbitrators to order interim or protective measures, save where the parties have agreed otherwise.

### 25. WHEN AND IN WHAT FORM MUST THE AWARD BE DELIVERED?

Unless otherwise agreed by the parties, arbitration awards must be made within six months from the date on which all of the arbitrators have accepted the terms. This term can be extended by agreement between the parties, or by the State court with jurisdiction following a request made by a party or by the arbitral tribunal. According to previous legislation, this court is the *Tribunal de première instance* (article 12).

Parties can set special requirements for awards. Failing this, awards are made on a majority vote, where the tribunal comprises three arbitrators, and must be reasoned. They must be signed by at least two of the three arbitrators.

### 26. CAN A SUCCESSFUL PARTY RECOVER ITS COSTS?

The Uniform Act contains no provisions on this.

Where arbitration is conducted under the aegis of the CCJA, the arbitrator is empowered to award costs.

### 27. ON WHAT GROUNDS CAN AN AWARD FROM AN ARBITRATION SEATED IN THE JURISDICTION BE APPEALED TO THE COURT?

The only remedy against an arbitration award is an application to set aside the award brought before the court with jurisdiction in the Member State in which it was made, within one month from the date of notification of an enforceable award (articles 25 and 27).

The circumstances in which an application to set aside can be brought are as follows (article 26):

- the arbitral tribunal ruled without an arbitration agreement or with respect to an invalid or expired agreement
- the arbitral tribunal was not properly composed
- the arbitral tribunal did not rule in compliance with the terms of arbitration
- there was no due process
- the arbitral tribunal breached a public policy rule of the OHADA Member States
- there are no reasons for the award

Bringing an application to set aside an arbitration award postpones enforcement, unless the arbitral tribunal ordered immediate enforcement. The decision can only be appealed to the CCJA (articles 25 and 28).

This is the only remedy available to parties before a national court. The other remedies, namely third party opposition and the application for a revision of the award, must be submitted to the arbitral tribunal (article 25).

### 28. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

No (see question 27 above).

### 29. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF: (I) AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION AND (II) DOMESTIC AWARDS?

To enforce awards made within an OHADA Member State, the Uniform Act requires the parties to obtain the recognition of the award from the competent court in that Member State (article 30).

For CECAM awards, jurisdiction is given to the presiding judge of the *Tribunal de première instance* in whose jurisdiction the award was made, and to the CCJA President for CCJA arbitration.

For foreign awards, jurisdiction is also given to the presiding judge of the *Tribunal de première instance* for the place of performance, in accordance with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which facilitates the recognition of foreign arbitration awards, to which Mali is a party.

The enforcement procedure requires the production of the original arbitration award, together with the arbitration agreement or copies of those documents meeting the necessary authentication conditions and, where necessary, a sworn translation into French (article 31).

Decisions refusing to recognise an arbitration award can be appealed to the CCJA. However, decisions granting recognition cannot be appealed (article 32).

Awards issued in a different OHADA Member State are recognised in other Member States under the terms set forth in the applicable international agreements or, failing this, under the conditions stated in the Uniform Act. For awards made by a State which is outside of OHADA territory, an enforcement order will only be made if the conditions set down by the Code of Civil Procedure are met:

- the award is made by a court with jurisdiction according to the laws of the country in which it is made, or by a lawfully composed arbitral tribunal
- the award is final and can be enforced in the country in which it was made
- the parties were properly summonsed to appear, were represented or declared in default
- the dispute dealt with by the foreign court does not, according to Malian law, fall within the exclusive jurisdiction of the Malian courts
- there is no conflict between the foreign court decision or arbitration award and another final decision made by a Malian court concerning the same dispute, the same purpose and the same parties and
- the decision does not go against Malian public policy

Apart from the above-mentioned conditions, an enforcement order will only be made for decisions made in a foreign country if an enforcement order would be made in that country for decisions made in Mali.

### 30. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

Once an enforcement order has been obtained, the foreign award will be performed in the same way as other enforceable decisions made by national or community courts.

## ALTERNATIVE DISPUTE RESOLUTION

### 31. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

Conciliation exists for divorce matters or orders to pay. Apart from these cases, there is no mandatory mediation or conciliation procedure. The Code of Civil, Commercial and Social Procedure (CPCCS) gives the court the authority to attempt to reconcile the parties, at any time during the proceedings. The court may therefore, in agreement with the parties, appoint a mediator to hear them in order to try to reach an amicable settlement.

## REFORMS

### 32. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

To the best of our knowledge, there are no plans to make any significant reforms of civil or commercial procedure in the near future.

## FOOTNOTE:

1. In civil law countries, legal costs do not necessarily include lawyers' fees.

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# MAURITANIA



## INTRODUCTION

The Mauritanian legal system is based on the Constitution of 12 July 1991, which was amended by the Constitution of 12 July 2006, adopted by referendum, and the Constitution of 20 March 2012, and on the laws and regulations passed by the Government.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

The legal profession is governed by Law No 95-24 of 19 July 1995, supplemented by Laws No 2005/0076 of 20 January 2005 and No 2007/029 of 9 April 2007.

To practise law in Mauritania, prospective lawyers must meet certain requirements, including:

- having Mauritanian nationality and being in full possession of their civil and civic rights
- being at least 24 years of age
- holding a Masters level degree in law or Sharia law or an equivalent qualification
- holding the Certificate of Aptitude for the Profession of Advocate (*Certificat d'Aptitude à la Profession d'Avocat*) (CAPA)
- completing a three-year internship at a law firm, save for magistrates who have worked for at least 10 years, tenured university professors and Mauritanian nationals who have practised law in a foreign country for at least five years, not including internships

The profession is organised by the *Conseil de l'Ordre*, headed by the *Bâtonnier*, who ensures that members abide by the rules governing the profession and applies any necessary disciplinary measures.

Lawyers (*avocats*) registered with the Bar (*Barreau*) can appear before any court and such registration is mandatory at the appellate and Supreme Court (*Cour suprême*) levels. They can practise individually or as part of a law firm structure.

Provided that Mauritanian lawyers have reciprocal rights under mutual legal assistance treaties, foreign lawyers can appear before the Mauritanian courts. They must first notify the *Bâtonnier*, the opposing party's counsel and, if the case is

criminal, the representative from the Public Prosecutor's office (*Ministère public*) and must provide an address for service at the offices of a local lawyer.

A plan to overhaul the laws governing the Bar is being prepared and could be enacted in 2016.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The court system forms a three-tiered pyramid:

- the first instance courts:
  - the *tribunaux de Moughataa* at county level have unlimited jurisdiction to hear personal status cases and disputes between individuals rather than businesses
  - the *tribunaux de Wilaya* at province level have special jurisdiction over that allocated to the Moughataa courts to hear all cases defined by the Procedure Code (*Code de procédure*) (disputes relating to insurance, immovable property subject to a title of ownership, etc)
  - there are other specialised courts at first instance level, such as the *Tribunal de commerce* (Commercial Court) and the *Tribunal de travail* (Industrial Tribunal) (located in Nouakchott and Nouadhibou) and a *Cour criminelle* (Criminal Court) in all province capitals
- four courts of appeal (in Nouakchott, Nouadhibou, Kiffa and Aleg)
- the *Cour suprême* (Supreme Court) (in Nouakchott)

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

Limitation periods vary depending on the type of action and the parties involved:

- the ordinary limitation period for bringing an action for damages in contract is 15 years
- commercial claims arising between traders, or traders and non-traders are subject to a five-year limitation period
- the time limit for bringing a non-contractual action for damages is three years
- specific limitation periods apply to certain types of case; for example, actions brought by doctors and other healthcare professionals are subject to a two-year limitation period and third-party claims are subject to a one-year limitation period

It is not possible to waive or reduce time limits in advance. However, it is possible to waive the right to rely on a time limit

once it has run out. Parties can also agree by contract to extend limitation periods, with a maximum limit set by law of 15 years.

The main reasons for interrupting a limitation period are legal action, the declaration of a claim in insolvency proceedings brought against the debtor and any action taken by a debtor to acknowledge a debt.

#### **4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?**

All communications between lawyers and clients are confidential.

Lawyers found to have breached this confidentiality duty may face disciplinary action, criminal prosecution or an action for damages depending on the scale of the loss incurred due to the breach.

The law organising the legal profession does not provide that clients can release their lawyers from this confidentiality duty.

#### **5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?**

Civil proceedings are filed:

- by a written petition issued by the claimant or his/her lawyer
- by an appearance in court and a statement recorded by the court registrar (*greffier*)

The petition must be served on the defendant at least 15 days prior to the hearing if located in the area over which the court has jurisdiction or another region of Mauritania, and at least three months in advance if the defendant is located outside Mauritania.

The petition and the claimant's arguments must be served on the defendant at least 15 days prior to the hearing.

Defendants have no time limits within which to file their submissions in defence.

There are no time limits for urgent matters (*référé*). The judge may set a time limit on a case-by-case basis.

#### **6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?**

Evidence can be presented in any form.

There are no time limits for disclosing evidence, but it must be produced in the first instance and before the Court of Appeal.

Parties have the right to examine and challenge all evidence produced and can apply to the court for an order against the other party to produce evidence mentioned in its submissions but not disclosed. There is no equivalent of the English law "disclosure" system in Mauritania.

New evidence is not admissible on appeal or before the Supreme Court insofar as new claims are not admissible on appeal and appeals to the Supreme Court are limited to legal arguments.

In terms of expert investigations, the procedure applicable in Mauritania is still relatively undeveloped. The expert is obliged to

inform the parties of the opinion subject to his/her expertise and to produce any supporting documentation. However, there are no provisions under Mauritanian law guaranteeing the exchange of evidence between the parties or debate between or even the presence of parties during the preparation of the expert's report.

#### **7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?**

The parties do not control the procedure. Once the proceedings have commenced, the timetable is set at the discretion of the court and in practice this depends on various factors, such as the level of complexity of the case, the degree of urgency and the caseload of the court. Nevertheless, the parties may end the proceedings at any time by mutual agreement.

First instance proceedings can run for six to 18 months, depending on the complexity of the case and provided the parties are co-operative and do not use undue delaying tactics.

The average length of proceedings before the Court of Appeal and the Supreme Court is identical. But due to the low level of trust in the judicial system – where the Minister of Justice may appeal in all matters "in the interest of the law" – in practice proceedings may often be suspended indefinitely. However, it bears noting that since the end of 2013, the situation seems to have improved and that no appeal "in the interest of the law" has been lodged since that time. The two ministers in charge of the chancellery have declared a desire to put an end to this type of appellate proceeding altogether.

#### **8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?**

There are two types of urgent procedure that can be brought to protect the parties' interests pending a judgment on the merits:

- *référé* proceedings, which allow a party to obtain an interim decision without affecting the judgment on the merits. *Référé* orders for measures sought to protect a party's rights and interests are requested by petition to the presiding judge of the court in the absence of the other party, to the extent the circumstances so require. It is also possible to obtain a *référé* order on difficulties pertaining to an enforcement order or judgment. The order is then immediately enforceable
- injunctions to pay debts arising out of a contract, bill of exchange, promissory note, endorsement or guarantee or the acceptance of a debt transfer or acknowledgment of an uncontested debt

#### **9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?**

The principal means of enforcement permissible under Mauritanian law are as follows:

- protective/conservatory attachment or sequestration (*saisie conservatoire*), under which a debtor's movable assets (cited by the order) are frozen, thus preventing the debtor from disposing of them to the detriment of the creditor
- garnishment (*saisie-arrêt* or *opposition*), under which the creditor can seize or challenge the transfer of all funds and personal effects owed to the debtor by a third party
- seizure and sale (*saisie-exécution*), under which the creditor can seize the debtor's assets

The law allows the appellate courts to grant debtors a grace period through a stay of immediate enforcement (*sursis à exécution provisoire*) where there is imminent threat or where the arguments on which the appeal is based seem well-founded and justified.

However, the Supreme Court will only order a stay of immediate enforcement in exchange for security in an amount equal to the award even where there is an imminent threat or where the debtor's arguments seem well-founded and justified.

#### **10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?**

In principle, the losing party bears the procedural costs (known as *dépens*). These include all justified expenses except for lawyers' fees. In Mauritania, lawyers' fees or expenses are borne by the instructing parties.

In practice, the courts tend to limit the costs they order and they rarely correspond to the actual costs incurred.

The court may ask the claimant to deposit an amount of money with the court registry as security for the court costs. In practice, the courts do not use this option, even in cases brought by foreigners.

#### **11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?**

The right to appeal is automatic for all parties and leave is not required. All first instance judgments can be appealed within one month: (i) of the date of notification to the unsuccessful party if it was issued following adversarial proceedings; or (ii) of the date of service if it is considered to have been issued following an adversarial debate; or (iii) from the date of opposition if it was issued by default. It is not possible to make new claims on appeal, save for damages or where the new claim is an argument in defence against the main claim.

If filed in time, appeals suspend the enforcement of the judgment, save where the court has ordered immediate enforcement, which is possible where the appeal is based on a notarised or uncontested document.

Cases are reviewed in full by the Court of Appeal and a new decision issued where the appeal is not limited to certain parts of the lower court's judgment, if the appellant is seeking the reversal of the judgment, and where the subject matter of the case is not divisible.

A further appeal to the Supreme Court can be made within two months of the date of the appellate decision, for judgments handed down after a hearing of all parties. In all other cases, the date of notification of the decision is the start date for the time limit. The Supreme Court only rules on issues of law.

#### **12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?**

Mauritanian State entities cannot claim immunity from civil proceedings. Civil matters must be submitted to the judicial courts. However, State assets cannot be seized to enforce a judgment.

Foreign State entities can potentially claim immunity from jurisdiction and enforcement where this is provided for under an international agreement or customary under international practices. They can also waive the right to immunity in an international business agreement.

#### **13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?**

It is possible to obtain the enforcement of a foreign judgment in Mauritania issued by the courts of a country having a judicial agreement with Mauritania by applying to the court having jurisdiction over the area where the defendant is domiciled or where enforcement is to take place. However, the court will only grant enforcement under the following conditions:

- the decision is not contrary to Mauritanian public policy or accepted standards of behaviour
- the decision was issued by a competent judicial authority in the country in question and is enforceable under the laws of that country
- the parties were duly called to appear before the court and had the opportunity to be heard
- the foreign judgment does not contradict another judgment issued by a Mauritanian court

In practice, in 2011 and 2012 and after a significant legal battle, our firm was able to obtain the enforcement of a judgment issued by the Paris *Tribunal de Commerce*, based on a decision issued by the Supreme Court. This case is now settled case law and it provides guidance on the criteria that applies for the *exequatur* of any foreign judgment issued by jurisdictions tied to Mauritania via judicial convention.

### **ARBITRATION**

#### **14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?**

Law No 2000-06 of 18 January 2000 introducing the Mauritanian Arbitration Code (*Code de l'arbitrage*) applies to domestic and international arbitration and is based on the UNCITRAL Model Law.

However, institutional and *ad hoc* arbitration are both virtually non-existent in Mauritania due to the lack of modern rules on the subject. This is partly due to the common practice of influencing court decisions, which means that parties do not go to arbitration.

The following responses are therefore theoretical, in that the rules described below are not applied in practice for the time being.

In April 2015 a joint decree of the Justice and Trade Ministers was signed during an official ceremony approving, pursuant to the Arbitration Code and Decree 2009/182 of 7 June 2009, the establishment of permanent institutions of arbitration and mediation, and for an international centre for mediation and arbitration in Mauritania to be installed at the Chamber of Commerce and Industry and Agriculture of Mauritania. To this date, this remains a theoretical creation and the Chamber of Commerce is planning on launching a major awareness campaign to publicise the centre, as well as its usefulness and potential contribution to the business community.



## 15. WHAT ARE THE MAIN NATIONAL ARBITRATION INSTITUTIONS?

Apart from the *Centre de médiation et d'arbitrage* mentioned above, it is possible for other mediation and arbitration institutions to be founded pursuant to the following legislation:

- Law No 2000-06 of 18 January 2000 introducing the Arbitration Code
- Decree No 2009.182 of 7 June 2009 on the establishment of a permanent arbitration and mediation institution
- Decree No 2009.206 of 24 September 2009 on the establishment of permanent arbitration and mediation institutions

However, no other arbitration institutions have been established to date based on this legislation.

## 16. ARE THERE ANY RESTRICTIONS ON WHO MAY REPRESENT THE PARTIES TO AN ARBITRATION?

The law does not provide for any restrictions and, insofar as there is no arbitration in practice, we can conclude that there should be no such restrictions.

## 17. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

The arbitration agreement must be in writing, either a notarised instrument or a private instrument. It is possible for an agreement to be recorded in the minutes further to a declaration made before an arbitral tribunal.

An arbitration clause may also be inserted into an agreement, contract or memorandum of understanding and may be recorded in a separate instrument. The Mauritanian courts will recognise each of these possibilities.

Under Mauritanian law, the arbitration clause is a separate agreement and is detachable from the rest of the contract in which it is contained. It will therefore survive any dispute pertaining to the validity of the contract

## 18. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?

The Mauritanian courts will decline jurisdiction if there is a valid arbitration clause, regardless of the location of the seat of arbitration.

If a dispute that has already gone to arbitration under an arbitration agreement was subsequently to be brought before a national court, the court must declare the proceedings to be inadmissible, at the request of the parties and prior to issuing a decision on the merits, pending completion of the arbitration or expiry of the arbitration agreement. This is the case for domestic and international arbitration.

If the arbitral tribunal has yet to be consulted, the national court must also decline jurisdiction (at the request of a party), save where the arbitration agreement is manifestly void (in domestic arbitration) or unenforceable (in international arbitration).

## 19. IF THE ARBITRATION AGREEMENT AND ANY RELEVANT RULES ARE SILENT, HOW MANY ARBITRATORS WILL BE APPOINTED, AND WHO IS THE APPOINTING AUTHORITY?

In a domestic arbitration, if there are multiple arbitrators, the number must be odd. If the parties appoint an even number of arbitrators, an additional arbitrator must be appointed to complete the tribunal, selected by mutual agreement between the parties or, failing this, the arbitrators they have already appointed. In the event of a disagreement, the presiding judge of a first instance court (*Wilaya*) for the area in which the arbitration is seated will make the appointment.

In an international arbitration, the parties can choose the number of arbitrators, provided that it is odd. If they cannot agree on the number, the default number of arbitrators is three.

## 20. WHAT RIGHTS ARE THERE TO CHALLENGE THE APPOINTMENT OF AN ARBITRATOR?

Arbitrators must be individuals, of age and in full possession of all their civil rights. They must be independent and impartial with respect to the parties.

If the arbitration agreement appoints a legal entity, that entity must appoint the arbitral tribunal.

Judges or public officials may act as arbitrators on the condition that they do not neglect their official duties and obtain authorisation from the competent authority prior to accepting the role.

Arbitrators may only be challenged where there are legitimate reasons to doubt their impartiality or independence or because they do not have the qualifications required by the parties.

Parties may only dismiss the arbitrators they have appointed or in whose appointment they participated and only for reasons that came to light post-appointment.

Applications to dismiss an arbitrator for lack of independence or impartiality are heard by the *Wilaya* court (provincial level) for the area in which the arbitration is seated, which will review the application in accordance with the Arbitration Code.

Arbitrators may also be dismissed on the same grounds as judges.

However, due to the fact that arbitration is a newly approved and very recent development in Mauritania, this system is entirely theoretical and thus impossible to assess.

## 21. DOES THE DOMESTIC LAW CONTAIN SUBSTANTIVE REQUIREMENTS FOR THE PROCEDURE TO BE FOLLOWED?

Mauritanian law merely states that arbitrations may be *ad hoc* (ie the tribunal sets the procedure to be followed) or institutional.

However, due to the fact that arbitration is a newly approved and very recent development in Mauritania, this system is, as of yet, still impossible to properly assess.

## 22. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED INSIDE THE JURISDICTION?

Courts can intervene:

- in the appointment of arbitrators
- to dismiss arbitrators or with respect to related problems
- if conservatory measures are ordered by an arbitral tribunal

Insofar as there is no specific documentation and, in practice, there are no instances where the courts intervened in an arbitration in Mauritania, it is impossible to assess this situation any further.

## 23. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?

See question 22 above.

## 24. DO ARBITRATORS HAVE POWERS TO GRANT INTERIM OR CONSERVATORY RELIEF?

In international arbitration, save as provided otherwise by the parties, the arbitral tribunal can order any interim or conservatory measures it sees fit, at the request of a party.

If the other party fails to comply with the order, the arbitral tribunal can ask assistance from the senior presiding judge (*premier président*) of the competent Court of Appeal.

In both cases, the arbitral tribunal or judge can order the payment of interim damages to a party as compensation for the expense caused by the measure.

## 25. WHEN AND IN WHAT FORM MUST THE AWARD BE DELIVERED?

If the parties do not agree on a time frame, the arbitrators will have six months to make their decision from the date on which the last arbitrator accepted the terms of appointment. The parties may agree to extend this period at the request of a party or the arbitral tribunal.

The award must be delivered in writing and signed by the arbitrators.

In international arbitration, the award must state the grounds for the decision save if the parties have agreed otherwise. In addition, the award must state the date and the seat of arbitration.

## 26. CAN A SUCCESSFUL PARTY RECOVER ITS COSTS?

It is possible for the successful party to recover its costs, at the discretion of the *ad hoc* or institutional arbitral tribunal. It is not possible to be more precise given the lack of actual arbitration proceedings in Mauritania as organised and governed by the Arbitration Code.

## 27. ON WHAT GROUNDS CAN AN AWARD FROM AN ARBITRATION SEATED IN THE JURISDICTION BE APPEALED TO THE COURT?

In domestic arbitration, awards can be appealed where the parties have not expressly waived the right to appeal in the arbitration agreement and where the arbitrators are not basing their decisions on equity and fairness (*amiable compositeurs*).

An award that has already been appealed cannot be set aside. In addition, if the court of appeal confirms the award, it must then order its enforcement. If the court of appeal overturns the award, it must then rule on the merits.

If the parties waive the right to appeal, an application to set aside can be brought in the following circumstances:

- if the award was issued without an arbitration agreement or under an invalid or expired agreement
- if the tribunal was not validly formed or the sole arbitrator not duly appointed
- if the arbitrator ruled outside the remit of the terms of appointment
- if the arbitrator breached a public policy rule
- if the fundamental rules of due process relating to defence rights were breached

In international arbitrations seated in Mauritania, it is only possible to file an application to set aside the award. This is possible in the following circumstances:

- when a party does not have legal capacity
- where the arbitration agreement is null under the law selected by the parties or applicable law under the rules of private international law
- where the claimant was not duly informed of the appointment of the arbitrators or the arbitral procedure or where it was not possible for the claimant to assert its rights for a different reason
- where the award concerns a dispute not covered by the arbitration agreement or matters not within the scope of the arbitration agreement
- if the court considers the award to be contrary to public policy

## 28. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

The national courts can intervene in arbitration proceedings seated outside Mauritania on matters of jurisdiction and to obtain enforcement.

Any party can appear before national courts (Court of Appeal) to appeal against an arbitral award on the grounds that the arbitral tribunal lacks jurisdiction.

Other than in these cases, foreign arbitral awards cannot be appealed in Mauritania but can only be subject to proceedings applicable to recognition and enforcement.

## 29. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF: (I) AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION AND (II) DOMESTIC AWARDS?

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) has been in force in Mauritania since 30 April 1997. In international arbitration, it is possible to obtain the enforcement of a foreign award in Mauritania by applying in writing to the presiding judge of the relevant provincial (Wilaya) court.

The judge will only grant enforcement if:

- the parties to the arbitration agreement had the necessary legal capacity to enter into a contract or if the arbitration agreement is valid under the law selected by the parties or applicable law under the rules of private international law
- the unsuccessful party had been duly informed about the appointment of the arbitrator(s) or the arbitration procedure or had been in a position to assert its rights
- the award pertains to matters/disputes covered by the arbitration agreement
- the arbitral tribunal was validly constituted in compliance with the arbitration agreement
- the award is enforceable under the laws in force at the place of delivery and is final and binding
- the decision is not contrary to Mauritanian public policy

In domestic arbitration, awards can only be enforced by the presiding judge of the Wilaya Court, or Regional Court, having jurisdiction over the area in which the award was issued. The following must be provided to obtain enforcement:

- an original, authenticated counterpart or certified copy of the award
- an original counterpart or certified copy of the arbitration agreement
- an official translation of both documents into Arabic

### 30. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

The provisions of the Arbitration Code on the enforcement of foreign awards, the New York Convention and recent case law from the joint session on the enforcement of foreign judgments should in theory make it easier to enforce foreign awards in Mauritania. However, in practice, this is often not the case.

In any case, the Arbitration Code does not allow the Mauritanian courts to revise arbitral awards. We have never come across a case involving such practices.

The recent approval for the International Center for Mediation and Arbitration and of the partnership with the Chamber of Commerce of Mauritania should support the development of arbitration and facilitate the enforcement of arbitral awards.

## ALTERNATIVE DISPUTE RESOLUTION

### 31. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

If the parties are not required by law to submit to mediation or any other dispute resolution procedure before or during litigation, the presiding judge of the court may attempt to conciliate the parties through mediation.

There is no legislation on conciliation but there is nothing to prevent judges from using it.

## REFORMS

### 32. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

Other than the aforementioned arbitration reforms, several procedural reforms are currently being contemplated by the current Justice Minister, including a plan to overhaul the laws governing the Bar, which could be enacted as early as 2016.

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# MAURITIUS



## INTRODUCTION

The Mauritian legal system is a fusion of English and French law. Private law is based on the French *Code Napoleon* and public and administrative laws are drawn from English common law.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

The legal profession is divided into three branches: attorneys, barristers and public notaries. Attorneys act as instructing lawyers and are involved in the procedural aspects of litigation. Barristers specialise in advocacy and consultancy work, while public notaries deal mainly with the drawing up of title deeds, conveyances and succession documents. Foreign lawyers and international law firms may also be registered in Mauritius following recent amendments to the Law Practitioners Act 1984.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The judicial system in Mauritius consists of two parts: the Supreme Court and the subordinate courts. The Supreme Court is the highest judicial authority and the principal court of civil and criminal jurisdiction.

The Supreme Court has various divisions consisting of:

- Bankruptcy/Commercial Division
- Family Division
- Court of First Instance in civil and criminal matters
- Court of Civil Appeal and the Court of Criminal Appeal
- Court of Appeal

The subordinate courts consist of:

- Court of Rodrigues
- District Courts
- Intermediate Court
- Industrial Court

Civil and criminal appeals from the subordinate courts are heard by the Supreme Court (applying its appellate jurisdiction). Appeals from the decisions of the Supreme Court sitting in its original jurisdiction are heard by either the Court of Civil Appeal or the Court of Criminal Appeal. A right of final appeal against such judgments of the Supreme Court lies to the Judicial Committee of the Privy Council in England.

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

There are statutory limitations for bringing civil claims. These limitations vary, depending on the cause of action.

The general rule is that, if the claim relates to the exercise of a personal right, the time limit is 10 years. If the claim relates to exercising a right over property, the time limit is 30 years.

### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

Confidential communications between a lawyer and a client are privileged and protected from disclosure provided that the purpose of the communication is to give or receive legal advice. The communication must directly relate to the performance by the lawyer of his professional duty as a legal advisor to the client. As such, communications relating to general business or commercial advice are not privileged and are not protected from disclosure. The privilege is that of the client and it may be waived by the client. A breach of a client's confidentiality by a lawyer is a serious offence punishable by both a custodial sentence and a fine.

### 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

Generally, civil proceedings before the Supreme Court of Mauritius exercising its original jurisdiction are initiated by way of plaint with summons. An action may also be initiated by way of motion supported by affidavit, provided that the action is either one of a prerogative order or the circumstances require urgency or it is so prescribed in the Supreme Court Rules.

The plaint with summons is lodged in the Registry of the Supreme Court and served upon the defendant not later than 14 days prior to a returnable date and time specified in the summons. Service on the defendant may be effected either by registered post with a request for notice of delivery or by an usher. The plaint with

summons is returnable before the Master and Registrar, who has jurisdiction to deal with all formal matters prior to the hearing of the case. The powers vested in his/her office are:

- to conduct and hear all formal matters (except those which relate to criminal cases) pending before the Supreme Court, including the power to hold pre-trial conferences, and the power to give such orders or directions for the just, expeditious and economical disposal of proceedings
- to tax costs, the conduct and management of judicial sales, probate of wills and incidental matters
- any other matters that may be referred to him/her by the Chief Justice of Mauritius

The pleadings filed before the Master and Registrar comprise the demand of particulars, answer to particulars, plea and the counterclaim.

The pleadings are also exchanged between the parties and the case is placed on the list of cases awaiting trial.

## 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

Pre-trial exchange of particulars is dealt with before the Master and Registrar of the Supreme Court.

### Disclosure/discovery of documents

If the Master and Registrar is, whether in his/her own judgement or after hearing the parties, of the opinion that disclosure of documents is required, he/she may direct a party to apply to a judge in chambers for an order requiring production of documents. Note that an order for disclosure may also call for the examination under oath of those persons providing documents. Where such an order is made, the person named in the order will be required to appear on a specified date in front of a judge. This examination will be recorded.

Disclosure and discovery may also, though not common, extend to an order in the nature of a search warrant for specific documents. A search warrant would be produced by police officers. It would usually involve the seizure of the documents and any other items or documents specified in the warrant.

### Evidence

Evidence is usually presented in oral form, unless prescribed otherwise by Mauritian laws, and includes testimony upon oath or solemn affirmation given *viva voce* or by affidavit in writing and unsworn personal answers of parties to trials. Evidence adduced in court is restricted to the evidence relating to the facts that have been asserted in the pleadings.

### Witnesses

A party to any case may apply to the Master for witnesses to be summoned and for witnesses to produce books, deeds, papers or writings in their possession or control. A party must serve on the other party, a list of witnesses that he or she wishes to examine.

### Expert evidence

Expert evidence may be required on technical aspects in certain matters. In such cases, a judge will make appropriate orders for an expert to be appointed. For instance, in relation to a matter before

a mediation judge (see question 21 below), the latter may appoint an expert whose advice must be given in an independent and fair manner and whose costs are borne equally by all parties. Parties may also be requested to appoint experts, in which case they may either each appoint an expert of their choice, or find common ground to appoint a single expert.

Where a single party deems it necessary to retain the services of an expert, an application must be made to the judge in chambers who will then set out the scope of the expertise required.

The Court of Appeal (sitting in its original jurisdiction) may, if it thinks it necessary or expedient in the interests of justice, appoint any person with special expert knowledge to act as assessor, in any case where it appears to it that such special knowledge is required for the proper determination of the case.

### Mediation

Parties in a civil case can apply to the Chief Justice to refer the matter before the Supreme Court to mediation, setting out reasons for such application. If so referred, a mediation judge is appointed to facilitate the mediation and enable parties to reach an agreement. The parties cannot be forced to participate but may face cost sanctions if they do not. Mediation is subject to the Supreme Court (Mediation) Rules 2010 (see further question 21 below).

## 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

Parties may not usually derogate from timeframes which have been set by the court, unless they can provide satisfactory explanation. If parties disrupt the flow of proceedings, it is likely that they will face cost sanctions.

From plaint to trial the average timeframe may be six to 12 months. However, this time frame may vary depending on various factors such as:

- availability of the court
- the type of application (eg urgent applications like injunctions are usually dealt with in a more expeditious manner)
- complexity of the case
- the number of parties involved
- procedural issues
- any incidental applications (eg counterclaims, joinders, interim arguments, etc)

An unsuccessful referral to mediation may also delay the process. That said, the court tries to expedite matters as far as practicable.

## 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

Available interim remedies include an order for an interim injunction. These must be applied for by the party pending a judgment from the court.

In any cause or matter relating to the inspection of property, the court may, on the application of either party or on its own motion, make an order for inspection by the court, the jury, the parties, or witnesses of any movable or immovable property, the inspection

of which may be material to the proper determination of the questions in dispute. The court may also give such directions as regards inspection as it sees fit.

As a matter of practice, an interim order is made pursuant to an application being lodged by a party and it must show good cause for such an order to be made. Amongst the various factors relevant to the issue of interim orders, the urgency attributed to the particular circumstances will be a determining factor.

## 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

In essence, court orders direct the execution or enforcement of a judgment rendered by a judge. The mode of enforcement depends on the case and the urgency of the matter. The main means of enforcement are:

- where a judgment debtor has defaulted on a payment order, warrants of execution against the goods and chattels of that party may be made
- insolvency proceedings against a debtor company
- attachment orders and orders for recovery of assets
- the payment of fines

It is difficult to paint a generic picture of the ease and practicality of enforcement procedures. This will largely depend on the urgency that may be attributed to the circumstances requiring enforcement. For example, some cases may require the judge to expedite the issue of an order directing payment of a judgment debt (for instance, if it is anticipated that a debtor will dispose of assets). In such a situation, the judge must be presented with sufficient evidence to satisfy himself that the matter at hand is urgent and that immediate payment of the debt is required.

## 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

Any court has discretion to award costs of and incidental to proceedings and full power to determine by whom and to what extent the costs are to be paid.

In practice, the court takes into account an array of factors such as the court fees paid, the length and complexity of the proceedings, and the conduct of the parties before and during the proceedings.

A plaintiff may, on the defendant's application in any cause or matter, be required by the court to furnish security for costs in all cases in which security may be required under the *Code Napoleon*, or where the plaintiff is known to be insolvent.

Foreign claimants are also required to furnish security for costs, in any matter other than a commercial matter, pursuant to article 21 of the *Code Civile*.

## 11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

A person may appeal a decision of the subordinate courts to the Supreme Court (in its appellate jurisdiction). Or, a person may appeal a decision of the Supreme Court (where the Supreme Court

was sitting in its original jurisdiction) to the Court of Civil Appeal and the Court of Criminal Appeal.

A person may, in relation to any order, decision or judgment of a judge sitting in chambers in any matter in which an appeal lies, appeal that order, decision or judgment to the Supreme Court. The appeal must be lodged in the Registry and notice of appeal served on the other party or parties to the case within 21 days from the date of the order, decision or judgment.

Any person wishing to lodge an appeal to the Court of Civil Appeal and the Court of Criminal Appeal must serve notice of appeal on the other party to the case and lodge the appeal in the Registry within 21 days from the date of the judgment or order appealed from. An appeal usually involves a fee payable to court.

Leave for appeal is required in certain circumstances. For example, leave of the court is required before lodging a case to the Judicial Committee of the Privy Council in England and, should leave be refused, the appellant may seek special leave directly from the Judicial Committee of the Privy Council.

## 12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

Generally, State entities do not have immunity from proceedings. One may not, however, sue the State for anything done or omitted by a State entity in the performance of its State functions. For instance, the Director of Public Prosecutions has immunity from civil suits in relation to his or her decisions to prosecute and the State is not vicariously liable for that decision to prosecute.

The Diplomatic Relations Act, which is based on the Vienna Convention on Diplomatic Relations, provides foreign diplomats with immunity from criminal and civil proceedings in Mauritius. However, there are some instances where that immunity is waived, such as in actions relating to:

- private property
- succession in which the foreign diplomat is involved and
- any professional or commercial activity exercised by the diplomat outside his official functions

## 13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

A final judgment of a foreign court may be enforced by the courts in Mauritius, without re-examination of the merits of the case, through *exequatur* proceedings in accordance with article 546 of the *Code Civile*.

An application under the provisions of article 546 is made by way of motion and affidavit. Once it is lodged in the Supreme Court, the procedure will be the same as a normal civil claim.

Additionally, a final judgment of a foreign court may also be enforceable in Mauritius if the foreign court is situated in a country to which the Reciprocal Enforcement of Judgments Act 1923 applies. As a general rule, this Act only applies to judgments rendered by superior courts in the United Kingdom.

## ARBITRATION

### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

Arbitration is governed by the International Arbitration Act 2008 (International Arbitration Act), which is based on the UNCITRAL Model Law on Arbitration. No key modifications have been made to the UNCITRAL Model Law. Mauritius is a signatory to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). It has also signed a Host Country Agreement with the Permanent Court of Arbitration (PCA), under which it has delegated administrative functions under the International Arbitration Act to the PCA (which also has a physical presence in the country).

In 2011 the London Court of International Arbitration (LCIA) established the LCIA Mauritius International Arbitration Centre (LCIA-MIAC). The LCIA-MIAC adopted new arbitration and mediation rules on 1 October 2012, which the parties may agree in their arbitration agreement should apply to their arbitration. The LCIA-MIAC Secretariat is the body which administers arbitrations under the LCIA-MIAC Rules and the LCIA Court is the final authority for proper application of the LCIA-MIAC Rules.

### 15. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

Under the International Arbitration Act, an arbitration agreement must be in writing to be enforceable. It can be either in the form of an arbitration clause in a contract or other legal instrument or in the form of a separate agreement.

There is no requirement in the International Arbitration Act for an arbitration agreement to be signed to be enforceable, but it must otherwise be in writing. It shall be in writing where its contents are recorded in any form, whether or not the arbitration agreement or the contract has been concluded orally, by conduct, or by other means.

An arbitration agreement can be concluded by an electronic communication which is accessible and usable for subsequent reference. In addition it can also be contained in an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

### 16. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?

Under the International Arbitration Act, where an action is brought before any court and a party contends that the action is the subject of an arbitration agreement, that court shall automatically transfer the action to the Supreme Court, provided that the request is not later than the submission of the first statement on the substance of the dispute.

The Supreme Court must on such a transfer refer the parties to arbitration unless a party shows, on a *prima facie* basis, that there is a very strong probability that the arbitration agreement may be null and void, inoperative or incapable of being performed, in which case the Supreme Court must itself proceed to determine whether the arbitration agreement is null and void, inoperative or

incapable of being performed. Where the Supreme Court finds in favour of the latter, it transfers the matter back to the court that made the transfer. The process is expedited in as much as the referral to arbitration will be done as soon as there has been transfer unless the Supreme Court finds that the arbitration agreement is null and void.

The above-mentioned approach will also apply to arbitrations with a juridical seat outside Mauritius.

### 17. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?

The International Arbitration Act only applies to arbitrations seated in Mauritius and the courts are not empowered to intervene in arbitrations seated outside Mauritius, with the exception of companies holding a Global Business Licence (GBL). In the case of a GBL company, it is mandatory for the seat of the arbitration to be in Mauritius where the dispute concerns the constitution of the company or relates to the company.

The Supreme Court in Mauritius can issue interim measures in relation to arbitration proceedings seated outside Mauritius. It has the same powers as a judge in chambers has in relation to court proceedings in Mauritius, and it must exercise that power in accordance with the applicable court procedure, in consideration of the specific features of international arbitration.

### 18. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

An arbitral award may be set aside by the Supreme Court only where:

- there is proof that a party to the arbitration agreement was under some incapacity or the agreement is not valid under the law to which it is subject to or failing any indication thereon, under Mauritian law
- it was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings
- the award deals with a dispute not contemplated by the scope of the arbitration or
- the composition of the arbitral tribunal or the procedure was not in accordance with the agreement of the parties

The award may also be generally challenged before the court on the basis that the subject matter of the dispute is not capable of settlement by arbitration under Mauritian law, the award conflicts with public policy, the making of the award was induced or affected by fraud or corruption or there is a breach of the rules of natural justice. An application for setting aside may not be made after three months have elapsed from the date the party making the application has received the award.

### 19. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION?

Foreign arbitral awards may be enforced in Mauritius under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 2001 (the 2001 Act). This Act implements in the internal law of Mauritius the New York Convention. When Mauritius ratified the New York Convention in 1996, it declared

that it would apply the New York Convention only to awards made in other Contracting States. In addition, the recently introduced Supreme Court (International Arbitration Claims) Rules 2013 set out the procedure to be followed when an award has to be enforced in Mauritius. The Rules apply to any application arising under the 2001 Act.

Further, the Reciprocal Enforcement of Judgments Act 1923 (the 1923 Act) defines "judgment" as including "*an award in proceedings on an arbitration if the award has, under the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place*". As the 1923 Act only applies to judgments rendered by superior courts in the United Kingdom, this means that enforcement in Mauritius under the 1923 Act is only available for awards made in United Kingdom-seated arbitrations which have become enforceable as if they were a judgment of a United Kingdom court.

The process for the enforcement of a foreign arbitral award would be by way of an *inter-partes* application before the court and generally the length of time will depend on whether the application is resisted or not. It may take between three to six months depending on the availability of dates for the court and for the parties.

## 20. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

In practice, the Mauritian courts will generally enforce foreign awards if the requirements of the 2001 Act are met and the procedures provided by the Supreme Court (International Arbitration Claims) Rules 2013 are followed (see question 19 above).

## ALTERNATIVE DISPUTE RESOLUTION

### 21. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

In 2011 the Supreme Court adopted the Supreme Court (Mediation) Rules 2010 (the Rules). The Rules appoint several judges of the Supreme Court as mediation judges, to assist parties in settling their disputes. The Rules apply to civil suits and actions pending before the Supreme Court and suits that the Chief Justice deems appropriate to refer to mediation. Additionally, a party to a civil action may also apply to the Chief Justice for the matter to be referred to mediation.

The primary purpose of mediation under the Rules is for the parties to dispose of civil suits and actions by common agreement. There is no obligation for parties to civil suits and actions to participate in a mediation process. However, it is in the party's interest to participate to avoid adverse cost consequences.

There is no requirement for parties to arbitration to engage in ADR.

## REFORMS

### 22. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

No, we do not anticipate any significant procedural reforms in the near future.

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# MOROCCO



## INTRODUCTION

Morocco's legal system is based on the Constitution of 1 July 2011 and its laws and implementing regulations.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

The profession of lawyer (*avocat*) is governed by Law No 1-93-162 of 10 September 1993 enacted by Dahir of the Moroccan King relating to the organisation of the legal profession, as amended by Law No 28-08 of 20 October 2008 enacted by Dahir No 1-8-101.

In order to practise as a lawyer in Morocco, a candidate must satisfy certain conditions, notably:

- have Moroccan nationality (subject to judicial agreements)
- be over 21 years of age
- hold a law degree (*licence en droit*) or any other equivalent foreign qualification
- have successfully passed the Bar examination
- be registered with the Moroccan Bar

The profession is organised by the Bar Association (*Conseil de l'Ordre*), which ensures that the rules governing the profession are observed and pursues any related disciplinary actions.

Lawyers registered with the Moroccan Bar may appear before any court and give legal opinions. They may practise independently or with a firm.

There is no distinction between solicitors (*avocat conseil*) and barristers (*avocat plaidant*).

Foreign lawyers may appear before Moroccan courts for a specific case, either under an international agreement between Morocco and the country of origin, or with the prior approval of the Minister of Justice (*Ministre de la Justice*) having jurisdiction over the relevant court.

However, it is not permitted for a lawyer registered with a foreign Bar to be simultaneously registered with the Moroccan Bar. Removal from the foreign Bar should be completed before claiming registration before the Moroccan Bar.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The Moroccan court system comprises ordinary and specialised courts.

The ordinary courts are divided into three levels:

- the Courts of First Instance:
  - the Proximity Courts (*jurisdictions de proximité*) for minor cases and
  - the Courts of First Instance (*Tribunaux de première instance*) which hear all matters except those for which Municipal and District Courts are competent, and which hear appeals against the decisions of the Municipal and District Courts
- the Courts of Appeal (*Cours d'appel*) which hear appeals against decisions from the Court of First Instance
- the Court of Cassation (*Cour de cassation*), which is the highest court, ruling only on the legal issues at stake in the case and not on the facts

There are also specialist courts such as Administrative Courts, Commercial Courts, Administrative Courts of Appeal and Commercial Courts of Appeal.

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

The time limit for bringing a civil claim is, as a matter of general principle, 15 years from the beginning of the obligation. However, shorter time limits may exist in relation to specific matters or in relation to commercial law or tort claims:

- the time limit for commercial claims and/or tort claims is reduced to five years
- claims based on letters of exchange or cheques should be filed within three years
- insurance and/or lease claims should be filed within two years
- product liability claims concerning defective and hidden aspects should be filed within 30 days or one year depending on the nature of defects and aspects

The parties can neither waive a time limit, nor extend it beyond 15 years.

#### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

All lawyers are required to comply with the principle of confidentiality.

This is a public order rule which should be strictly observed for both advice and litigation.

Communications between lawyers are also confidential, unless they reach an agreement through their communications or one of the lawyers authorises the other to disclose a communication.

A breach of the principle of confidentiality is subject to disciplinary measures and compensation in case of substantial damage.

#### 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

Proceedings are brought before the Courts of First Instance either by a writ signed by the claimant or its representative or by a declaration from the claimant in person where minutes are taken by a court-appointed clerk. In most cases, the proceedings are brought by virtue of a writ signed by a lawyer. A copy is served on the defendant by a bailiff.

The time frame for scheduling the first court hearing is a minimum of five days from the service of the petition if the defendant is domiciled in the place where the Court of First Instance has its seat or in a bordering locality, or 15 days if the defendant is domiciled elsewhere in Morocco.

If the defendant is domiciled abroad, this timeframe is extended to:

- two months if the defendant is domiciled in Algeria, Tunisia or in Europe
- three months if the defendant is domiciled in another African country, in Asia or in America and
- four months if the defendant is domiciled in Oceania

In an emergency procedure (*procédure en référé*), there is no minimum legal time frame.

In respect of hearings, postponements are generally of three to four weeks.

There are no mandatory "mediation or conciliation" procedures which should be followed, except for divorce procedures.

#### 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

##### Documents

Evidence is submitted to the court with the writ and submissions. There are no time frames for producing evidence, but it may only be presented at first instance and before the Court of Appeal and the other party must be able to reply to such evidence presented. No new evidence may be presented in the case of an appeal to the Supreme Court.

Evidence must be in writing such as contracts, invoices, acknowledgments of debts, bills of delivery, written statements of witnesses, etc.

There exists no equivalent to the English law obligation of "disclosure" and the judge has no power to force the production of evidence by a party.

##### Experts

If a court issues a preliminary judgment ordering expert evidence, the nominated expert must invite the parties to attend a meeting with their lawyers in order to present his/her technical arguments, for example accounting, balance sheets and books. Such a procedure is contradictory. A report is made and filed by the expert and the parties can reply and present arguments for or against the report in submissions filed before the court.

#### 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

The parties have no control over the procedure or the timetable insofar as the court selects the hearing dates. Parties can only seek extensions of time, which are subject to the court's sole discretion. The speed of the proceedings depends on various factors relating to the subject matter of the dispute and the workload of the judge presiding over the case.

The average time taken to obtain a judicial decision is six to nine months.

#### 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

Judges have power to freeze a party's assets pending judgment where there is *prima facie* evidence of a good arguable case against the owner of the assets and a credible risk that they may be dissipated to defeat a judgment.

Where appropriate, the court may also, upon demand of the claimant, grant injunctions or make other prohibitory or mandatory orders in order to preserve the *status quo* until the trial.

Interim orders may also be made (if appropriate, without notice to the defendant(s)) permitting a party to trace the flow of funds through financial institutions, or to enter a defendant's premises to search for and seize evidence.

The courts also have jurisdiction to order that, in criminal cases, a defendant or a debtor under a judgment be prohibited from leaving Morocco.

#### 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

A declaratory judgment or a judgment creating a new legal relationship does not need enforcement. Only judgments making mandatory or prohibitory orders require enforcement.

Decisions only become enforceable when, once they can no longer be suspended by an appeal, they become final, unless provisional enforcement is automatic or has been ordered. The judge cannot suspend the execution of the judgment.

Enforcement measures available under Moroccan law include, but are not limited to:

- an auction sale of assets to satisfy the judgment

- issuing an order for an examination of the debtor (or a corporate debtor's directors) to disclose all assets (the failure of which will result in criminal sanctions)

A judicial decision can be enforced within 30 years of its issuance.

For judgments making prohibitory or other mandatory orders, there are few practical means of enforcement in the case of non-compliance. The only means of enforcement is through sanctions. There is no contempt of court in Morocco, so the court indirectly compels the judgment debtor by way of a monetary penalty. For example, the court can impose a penalty payment from the judgment debtor to the judgment creditor for each day that a judgment order is not honoured.

#### 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

The unsuccessful party bears judicial costs (fees paid to the court upon the filing of a claim, bailiff costs, expert costs, appeal costs, etc) and tax.

However, each party covers its own lawyer fees.

No security for costs can be ordered.

#### 11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

Judgments and orders may be appealed within 30 days from the date on which the judgment is served on the unsuccessful party before the Court of First Instance or the Court of Appeal (for decisions handed down by a Court of First Instance). This time frame may be reduced to 15 days for interim orders and for the judgments rendered by the Commercial Courts or extended to 90 days for parties not residing in Morocco.

The appeal in principle suspends the enforcement of the decision. Excluding those decisions that automatically benefit from immediate enforcement and notwithstanding appeals or applications to annul, the court must order immediate enforcement, when requested to do so, in all cases involving an official instrument, an acknowledged obligation, or a previous decision against a party by way of a *res judicata* decision.

Parties may also appeal to the Supreme Court within 30 days of the notification of the appeal decision. The Supreme Court rules on legal issues, not on the facts, and may decide to allow an appeal (known as a *pourvoi*) (in which case it quashes the appealed decision and invites the parties to revert to the lower court) or to dismiss it.

#### 12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

Moroccan State entities are not entitled to immunity from proceedings or from the enforcement of a decision save within the scope of administrative acts ordered by the King of Morocco, or of matters regarding Government relations with Parliament or with foreign States. Other administrative acts may be submitted to the Moroccan Administrative Courts. If the acts are purely civil in nature, they may be submitted to the ordinary courts. However, assets of administrative bodies cannot be seized for enforcement purposes.

Foreign State entities may only claim immunity under diplomatic immunity rules applicable to diplomats of foreign States, subject to the principle of reciprocity.

#### 13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

It is possible to enforce a foreign judgment in Morocco by leave of the local Court of First Instance, at the place of residence of the defendant or, where applicable, the place of enforcement. However, this court will not give leave to enforce the judgment unless:

- it was made by a competent court in the relevant jurisdiction
- the judgment is enforceable under the law in which the judgment was rendered and is final
- the parties have been properly represented and duly notified and
- the decision is not contrary to Moroccan public policy

The justification on grounds of public policy is more political than economic.

*Exequatur* is ordered when the conditions mentioned above are fulfilled.

### ARBITRATION

#### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

The governing law on arbitration is Law No 08-05 enacted by Dahir No 1-07-169 of 30 November 2007. This law repealed and replaced chapter VIII of title V of the Moroccan Code of Civil Procedure relating to arbitration and is extensively based on the UNCITRAL Model Law of 1985, as amended in 2006. Arbitration is generally accepted and used in Morocco.

#### 15. WHAT ARE THE MAIN NATIONAL ARBITRATION INSTITUTIONS?

Morocco has four main arbitral institutions:

- the *Cour marocaine d'arbitrage près CCI Casablanca*
- the Maritime Arbitration Chamber of Morocco
- the Rabat International Mediation and Arbitration Centre
- the *Cour atlantique d'arbitrage international*

#### 16. ARE THERE ANY RESTRICTIONS ON WHO MAY REPRESENT THE PARTIES TO AN ARBITRATION?

There is no restriction as regards international arbitration outside Morocco.

In domestic arbitration, parties are not entitled to instruct a foreign counsel, as the counsel should have his/her residency within the relevant Court of Appeal in Morocco.

#### 17. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

The arbitration agreement must be in writing, and either be a notarised (*acte authentique*) or privately signed (*sous seing privé*) document, or be contained in the minutes to a declaration made to the arbitral tribunal.

Morocco recognises the principle of autonomy of the arbitration clause, ie the arbitration clause remains valid even if the validity of the contract, where such clause is included, is challenged.

**18. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?**

If a dispute that has already been submitted for arbitration under an arbitration agreement is subsequently brought before a court, the latter must, if requested to do so by the defendant before a ruling has been made on the merits, hold the proceedings to be inadmissible until the completion of the arbitration or the termination of the arbitration agreement.

If the request for arbitration has not been submitted, the court must also declare the proceedings to be inadmissible (at the request of the defendant) unless the arbitration agreement is manifestly invalid.

**19. IF THE ARBITRATION AGREEMENT AND ANY RELEVANT RULES ARE SILENT, HOW MANY ARBITRATORS WILL BE APPOINTED, AND WHO IS THE APPOINTING AUTHORITY?**

In domestic arbitration, if no agreement has been made between the parties regarding the number of arbitrators, three arbitrators will be appointed: one by each party and the third by the first two arbitrators. If one of the parties fails to appoint an arbitrator within 15 days of receiving notice to do so from the other party, or if the two arbitrators appointed by the parties cannot agree on the third within 15 days of the appointment of the second arbitrator, the presiding judge of the local court with jurisdiction will make the appointment at the request of one of the parties.

In international arbitration, in the event of difficulties in the appointment of the arbitral tribunal, and unless provided otherwise in the arbitration agreement or the applicable arbitration rules, either of the parties may:

- if the seat of arbitration is in Morocco, apply to the presiding judge of the court that will in the future need to declare the award enforceable
- if the seat of arbitration is abroad, under Moroccan civil procedure rules, apply to the presiding judge of the Commercial Court in Rabat

**20. WHAT RIGHTS ARE THERE TO CHALLENGE THE APPOINTMENT OF AN ARBITRATOR?**

Arbitrators may be dismissed with unanimous consent from all the parties or challenged by one of the parties for a reason that occurs or that is discovered after his/her appointment and that falls under one of the following categories:

- the arbitrator has definitively been convicted of a dishonourable or dishonest act, or an act contrary to acceptable standards of behaviour or that deprives him/her of the capacity to operate a commercial activity or any of his/her civil rights
- the arbitrator or his/her spouse, parent or child has a direct or indirect personal interest in the dispute
- the arbitrator or his/her spouse is related to or associated with one of the parties (up to and including first cousins)

- proceedings are pending or have been completed in the last two years between one of the parties and the arbitrator or his/her spouse, parent or child
- the arbitrator is the creditor or debtor of one of the parties
- the arbitrator has previously made submissions or observations or given a witness statement on the dispute
- the arbitrator has acted as the legal representative of one of the parties
- the arbitrator or his/her spouse, parent or child must answer to one of the parties or his/her spouse, parent or child or vice versa
- the arbitrator and one of the parties are commonly known to be friends or enemies

**21. DOES THE DOMESTIC LAW CONTAIN SUBSTANTIVE REQUIREMENTS FOR THE PROCEDURE TO BE FOLLOWED?**

The domestic law provides that the arbitral tribunal establishes the procedural rules for the arbitration that it deems appropriate and is not bound to follow the rules established by the courts, unless the parties have stipulated otherwise in the arbitration agreement.

**22. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED INSIDE THE JURISDICTION?**

The court can intervene in the processes of appointing arbitrators and challenges thereto and in relation to conservatory measures ordered either by an arbitral tribunal or requested by a party directly.

**23. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?**

Please see question 22 above.

**24. DO ARBITRATORS HAVE POWERS TO GRANT INTERIM OR CONSERVATORY RELIEF?**

Unless the parties have agreed otherwise, the arbitral tribunal may order any interim or conservatory measures that it deems necessary at the request of a party and within the scope of its instructions.

If the party in question fails to comply, the arbitral tribunal may request assistance from the relevant court. The court will then apply its own law.

The arbitral tribunal or the court may order the requesting party to provide appropriate securities in return for granting interim or conservatory measures.

The arbitral tribunal may grant provisional or protective measures such as seizure of movable assets (company assets, tangible property, shares), seizure of immovable assets, and garnishment (bank accounts, including those in the hands of a third party).

The law allows the arbitral tribunal to take such measures except if agreed otherwise by the parties.

## 25. WHEN AND IN WHAT FORM MUST THE AWARD BE DELIVERED?

If the arbitration agreement or the applicable arbitration rules do not set a time frame for handing down the award, the arbitrators will have six months to make a decision from the date on which the last arbitrator accepts his/her appointment.

The award must be handed down in writing, signed by the arbitrator(s) and must include a brief summary of the parties' claims and arguments. It must provide reasons for the decision and include the following information:

- the name, nationality, and address of the arbitrators
- the date
- the seat of arbitration
- the name of the parties and their addresses and the company name of any legal entities and the address of their registered offices and if applicable, the name of the lawyers or persons who represented or assisted the parties
- the arbitration's fees and expenses and how they should be shared between the parties

## 26. CAN A SUCCESSFUL PARTY RECOVER ITS COSTS?

The unsuccessful party will bear the costs. In practice, the amounts recovered will depend on the arbitrators' decision.

## 27. ON WHAT GROUNDS CAN AN AWARD FROM AN ARBITRATION SEATED IN THE JURISDICTION BE APPEALED TO THE COURT?

In domestic arbitration, arbitral awards may be appealed by way of an application for annulment which may be brought by the parties to the arbitration or by third parties (who deem the award to be harmful or potentially harmful to their interests) on the following grounds:

- the arbitral tribunal has ruled without an arbitration agreement or under a void agreement, or after the expiry of the time period provided under the arbitration agreement
- the arbitral tribunal was irregularly constituted or the sole arbitrator irregularly appointed
- the arbitral tribunal has ruled without complying with the mission which had been granted
- the arbitral award does not give reasons (except if the parties agreed this)
- when the rights of the defence have not been respected
- recognition or enforcement is contrary to international or national public policy
- the arbitral award was not rendered in accordance with the agreement of parties on procedural formalities or on the law applicable to the dispute

In international arbitration matters, applications to set aside awards handed down in Morocco may be brought under the same grounds save for the fourth and the seventh grounds.

## 28. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

A foreign arbitration award could be subject to setting aside proceedings provided that the award was rendered in Morocco and the arbitration was subject to Moroccan civil procedure rules.

## 29. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF: (I) AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION AND (II) DOMESTIC AWARDS

In international arbitration, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) has been in force in Morocco since 7 June 1959. Morocco was the second signatory country of the Convention. It is possible to enforce a foreign arbitral award in Morocco by leave of the Moroccan courts. However, the courts will not grant leave to enforce the award unless:

- it was made by a competent court in the relevant jurisdiction
- the award is enforceable under the law in which judgment was rendered
- the parties have been properly represented
- the decision is not contrary to Moroccan public policy

In domestic arbitration, the enforcement of an arbitral award may only be undertaken by way of an *exequatur* order (order for enforcement) from the presiding judge of the court under whose jurisdiction the award was handed down. For this purpose, an official copy of the award together with a copy of the arbitration agreement and a translation, if applicable, into Arabic must be registered with the court clerk within seven days of the award being handed down.

## 30. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

The courts will not review arbitral awards except for in the circumstances mentioned in question 29 above.

## ALTERNATIVE DISPUTE RESOLUTION

### 31. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

Mediation is used in parallel to arbitration and litigation. In a bid to prevent or to resolve disputes, the parties may agree to appoint a mediator to facilitate the conclusion of a settlement (articles 327-55 of the Code of Civil Procedure). However, parties are generally not required by law to consider or submit to alternative dispute resolution before or during proceedings. Mandatory "mediation or conciliation" procedures should be followed in divorce cases though.

## REFORMS

### 32. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

There are plans to introduce procedural reforms in the near future, which are currently before Parliament. These include reforms pertaining to civil and commercial proceedings.

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# MOZAMBIQUE



## INTRODUCTION

Mozambique's legal system is based on the Constitutions of 1975, 1990 and 2004, and codified laws, some of which are still influenced by the Portuguese colonial legal system.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

Lawyers provide legal services directly to clients and perform advocacy in all courts, including Appeal and Supreme Courts. There is no split profession.

To become a lawyer, one must have a law degree and undertake two stages of pupillage. The first stage involves eight months of technical, professional and ethics training. The second stage involves eight months of practical training, including directly participating in trials.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The judiciary consists of the superior courts and the lower courts.

The superior courts consist of the:

- Supreme Court
- Appeal Regional Courts

The lower courts consist of the:

- District Court of 1st class
- District Court of 2nd class
- Courts of the Province

Judicial court jurisdictional thresholds are based on amounts calculated by reference to the Public Administration minimum wage. For the year of 2015, the minimum Public Administration wage was fixed at MZN 3,152, as per Decree 2/2015, dated 8 May 2015.

Both the District Court of 1st class and 2nd class are vested with original jurisdiction in both criminal and civil proceedings. The District Court of 1st class hears in the first instance family law matters, legal proceedings related to minors, civil matters not exceeding 100 times the minimum wage (that is, currently up to

MZN 315,200) and criminal matters punishable with imprisonment not exceeding 12 years. The District Court of 2nd class hears civil cases where the sum in dispute is not more than 50 times the minimum wage (currently up to MZN 157,600) and criminal matters punishable with imprisonment not exceeding eight years. The same courts have in the second instance competence to hear appeals from final judgments rendered by any community court.

Provincial courts rule on claims not specifically assigned to another court. In civil proceedings these tribunals hear cases where sums in dispute are in excess of 100 times the minimum wage (currently above MZN 315,200). In the second instance these courts hear appeals from final judgments rendered by district courts, rule on conflicts of jurisdiction between districts courts, and appeals of final judgments rendered by arbitral courts. These courts also hear labour and criminal matters as there are no specialist courts for these sorts of matters.

The Appeal Regional Courts hear appeals from the lower courts and also rule on claims against judges/senior government officials of the lower courts, and conflict issues concerning the lower courts.

Apart from these courts there are also Community Courts, which are non-judicial independent institutionalised bodies for non-judicial conflict resolution. They judge in a non-legal, informal way according to good sense and fairness, favouring oral communication and addressing the social and cultural values existing in Mozambican society, with respect for the Constitution.

The civil justice system is adversarial and the judge's role is passive. There are no jury trials in civil cases. Civil cases are heard by a single judge, together with two to four assessors called elected judges. It is the judge's role to decide the case and the opinion of the assessors is not binding on the judge.

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

Variable statutory limitation periods apply, depending on the cause of action, and can be 20 years (eg civil debts), five years (eg lease rents due), two years (eg legal fees owed to lawyers) or six months (eg accommodation debts).

### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

Yes. As per the rules of the Law Society of Mozambique and the Civil Procedure Code, lawyers owe duties of professional secrecy

and can refuse to testify as witnesses in court. Exceptions include waiver by the client, or where prior authorisation is given by the Law Society of Mozambique.

#### **5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?**

Generally, civil proceedings are commenced by the applicant submitting a written application to the court. The defendant is notified and must respond within 20 days of being notified. Thereafter, the judge decides the facts that must be proved at a court hearing. Provided the parties do not object to the judge's finding in this regard, the judge sets a hearing date.

The Civil Procedure Rules allow a plaintiff who can show that there is no answer to his or her case to obtain judgment summarily. The plaintiff must show that the defendant is unable to set up a *bonafide* defence or raise an issue against the claim which ought to be tried. This procedure is called "*saneador-sentença*".

#### **6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?**

All documentary evidence is presented with the application. A list of witnesses is also presented with the application. The defendant, in response, also presents all documentary evidence and a list of witnesses.

Exceptionally, further documentary evidence may be submitted after the written phase has ended.

#### **7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?**

Trial judges have considerable power to manage cases, including controlling the issues on which evidence may be admitted and the way in which evidence is to be put before the court. In many instances cases that go to full trial take two or three years from issue of the writ of summons. Judges are not penalised if they fail to meet deadlines.

#### **8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?**

Before, during or after judgment the judge can, upon application of one of the parties, order:

- sequestration of assets at the request of either party
- seizure of goods such that one of the parties is prevented from moving them out of the jurisdiction

#### **9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?**

Where a final court judgment has been handed down it can be enforced through a further executive court procedure. For instance, if the court ordered the defendant to pay a sum and the defendant does not pay voluntarily, the executive court procedure will start with seizing assets of the defendant.

#### **10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?**

The court has discretion to award costs of and incidental to proceedings and full power to determine by whom, and to what extent, costs are to be paid. The parties or their lawyers may briefly address the court on the question of costs before any such award is made. Initial court costs are paid up front, at the time of submission of an application and at the time of submission of the response. The consequences of a failure to pay the court costs include the exclusion of the application/response.

#### **11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?**

The parties may, in general, appeal decisions that amount to more than 50, 25 and 10 times the minimum wage in the Courts of the Province and District Courts of 1st and 2nd classes respectively. The appeal is limited to points of law and/or fact. Depending on the type of appeal, it may act to suspend the final first instance court decision.

#### **12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?**

Generally, domestic State entities do not have immunity from civil proceedings.

All citizens are subject to the rules in force in Mozambique. However, there are exemptions; for example, civil proceedings in respect of ambassadors, consuls and foreign officials are governed by embassies, not by the courts.

#### **13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?**

As a rule, foreign judgments do not have legal weight in Mozambique until they are confirmed by the local judicial system. This is through a judicial procedure submitted to the Supreme Court to confirm and revise the foreign judgment.

### **ARBITRATION**

#### **14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NOT, WHAT FORM DOES THE ARBITRATION LAW TAKE?**

The primary domestic source of law relating to arbitration in Mozambique is the Law on Arbitration, Conciliation and Mediation dated 8 July 1999 (the Arbitral Law, Law 11/99). This law is for the most part based on the UNCITRAL Model Law. The parties are free to determine the rules of the procedure, provided said determination is in written form. Notwithstanding, Mozambique is not an official UNCITRAL Model Law jurisdiction as per the UNCITRAL website.

The Arbitral Law consists of a number of legal rules related to domestic and international arbitration. In article 52, the concept of "International Commercial Arbitration" is introduced. This definition mirrors the definition in the UNCITRAL Model Law. An arbitration is of an international nature when it involves international trade interests and in particular: (i) when the parties have, at the time they conclude their agreement, businesses



domiciled in different countries; or (ii) either the place of arbitration, or any place where a substantial part of the obligations resulting from the commercial relationship are to be performed, or the place with which the subject-matter of the dispute is deemed to be most closely connected, is outside the place in which the parties have their place of business; or (iii) the parties have expressly stipulated that the subject-matter of the arbitration agreement has connections with more than one country.

The general provisions of the Arbitral Law apply to international commercial arbitration, save where there is a special provision in the Arbitral Law. In particular, in relation to international commercial arbitration, the Arbitral Law provides that the tribunal will rule on the dispute in accordance with the substantive law chosen by the parties (excluding the conflict of laws rules) (article 54).

Save for the provisions in article 12(2) (relating to a stay of proceedings for a matter which is subject to an arbitration agreement) and article 12(4) (relating to interim measures of protection sought before or during an arbitration), the Arbitral Law only applies to arbitrations that take place within Mozambican territory (article 68).

#### **15. WHAT ARE THE MAIN NATIONAL ARBITRATION INSTITUTIONS?**

Mozambique has one arbitration institute, the Mozambique Arbitration Centre (CACM). There are no private arbitration bodies. However, the law leaves open the possibility of creating conflict and mediation centres as private enterprises, although none have, to date, been established.

#### **16. ARE THERE ANY RESTRICTIONS ON WHO MAY REPRESENT THE PARTIES TO AN ARBITRATION?**

The Arbitral Law does not restrict who may represent a party in arbitral proceedings – article 30 provides that the parties may designate a person or persons to represent or assist them before the tribunal.

#### **17. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?**

In Mozambique, under the Arbitral Law, there must be a written agreement signed by the parties to submit present or future disputes to arbitration. An arbitration agreement is considered to be in writing if it is documented in a written instrument signed by the parties or contained in correspondence between the parties. A reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided the clause referred to is in writing and the reference is such as to make that clause an integral part of the contract.

The written agreement may appoint the arbitrators or establish the criteria for appointment.

#### **18. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?**

An agreement to arbitrate implies a waiver by the parties to initiate court action on the matters or disputes submitted to arbitration. As a result, unless the Mozambican court finds that the agreement is null and void or incapable of being performed, the arbitration clause will be respected and the Mozambican court

will stay litigation brought in breach of the clause, providing that a party so requests no later than when submitting his/her first statement on the substance of the dispute. This is the position even if the seat of arbitration is not in Mozambique.

#### **19. IF THE ARBITRATION AGREEMENT AND ANY RELEVANT RULES ARE SILENT, HOW MANY ARBITRATORS WILL BE APPOINTED, AND WHO IS THE APPOINTING AUTHORITY?**

Under article 16 of the Arbitral Law, the arbitral panel should comprise three arbitrators, one appointed by each party and the third, who will be the chair of the tribunal, appointed by the chosen arbitrators.

Where parties are unable to agree on the appointment of an arbitrator, or the appointment mechanism that they agreed has failed, the appointment will fall to the competent State court at the request of the parties.

#### **20. WHAT RIGHTS ARE THERE TO CHALLENGE THE APPOINTMENT OF AN ARBITRATOR?**

Article 21 provides that an arbitrator may only be challenged if circumstances exist that raise justifiable doubt as to his/her impartiality or independence or if he/she does not possess the qualifications on which the parties agreed. A party may only challenge an arbitrator in whose appointment he has participated for a reason which was discovered after that appointment. Article 22 provides an ethical code for arbitrators, which gives a number of requirements for a person to take up an appointment and prescribes a number of duties which an arbitrator must follow in determining the reference. These include ensuring the right of each of the parties to a fair hearing and preventing any kind of delaying tactics.

The procedure for challenging an arbitrator is provided in article 23 of the Arbitral Law.

#### **21. DOES THE DOMESTIC LAW CONTAIN SUBSTANTIVE REQUIREMENTS FOR THE PROCEDURE TO BE FOLLOWED?**

Article 27 of Arbitral Law provides that, subject to the provisions of the Arbitral Law, the parties are free to agree on the rules of procedure to be followed (including adopting any institutional rules) as well as the place of arbitration. In the absence of agreement, the tribunal is to determine the procedure, including the power to determine the admissibility, relevance and weight of any evidence. Article 28 of the Arbitral Law provides for statements of claim and defence, and article 29 provides for the tribunal to determine (subject to any agreement by the parties) whether there should be a hearing. It also states that all statements, documents and information supplied to the tribunal by one party should be supplied to the other party.

#### **22. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED INSIDE THE JURISDICTION?**

The court can intervene during the arbitration, to award interim remedies in support of the arbitration proceedings (eg freezing injunctions and orders for preservation of evidence) and to rule on the challenge to an arbitrator, unless the parties have expressly excluded the intervention of the judicial court in the arbitration agreement. The tribunal or a party with the authorisation of the tribunal can request assistance from the judicial court in taking evidence (article 32(2)).

### 23. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?

If, in their agreement, the parties have agreed to the intervention of the judicial court for interim measures, the Mozambican courts can intervene if there is a connection with the Mozambique territory, or if other criteria given in the Civil Procedure Code for the Mozambican courts to intervene are fulfilled. Whilst the Arbitral Law generally does not apply to arbitrations seated outside Mozambique, article 12(4) (which provides that seeking interim measures from a judicial court before or during the arbitration, as well as the granting of such measures, is not incompatible with an arbitration agreement) applies whether or not the seat is in Mozambique, provided the parties have so agreed.

### 24. DO ARBITRATORS HAVE POWERS TO GRANT INTERIM OR CONSERVATORY RELIEF?

Under article 33 of the Arbitral Law, arbitrators are empowered to grant interim measures, except where the parties have otherwise stipulated in the agreement.

However, with the exception of articles 12(2) and 12(4), the Arbitral Law does not govern arbitrations with a foreign seat. If the seat of arbitration is outside Mozambique, an order for interim measures made by a tribunal will be considered as a foreign decision and will thus be subject to confirmation (and possibly revision) by the Mozambican courts before it is enforced in Mozambique.

### 25. WHEN AND IN WHAT FORM MUST THE AWARD BE DELIVERED?

The parties may stipulate the deadline for drawing up the award. In the absence of this, six months is provided for under article 35 of the Arbitral Law.

Under article 39 the award must be made in writing and it must identify the parties, refer to the arbitration agreement and the subject-matter of the dispute, identify the arbitrators and the place of the arbitration and state the location and date on which it was made. It must be signed and state the reasons on which it is based unless the parties have agreed that no reasons are to be given.

The parties will be notified of the arbitral award by registered mail or by other means constituting a written record.

### 26. CAN A SUCCESSFUL PARTY RECOVER ITS COSTS?

Unless otherwise provided by the parties in their arbitration agreement, the tribunal has discretion to make an award on the costs of the arbitration (including the parties' legal fees).

### 27. ON WHAT GROUNDS CAN AN AWARD FROM AN ARBITRATION SEATED IN THE JURISDICTION BE APPEALED TO THE COURT?

Arbitral awards are deemed to be final and binding on all parties. The Arbitral Law, however, allows parties to apply for the award to be declared null and void under article 44 if:

- the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any such indication under Mozambican law
- a party was not duly informed of the appointment of an arbitrator or of the arbitration or it was impossible for that party to enforce his rights for any other reason

- the composition of the tribunal or the procedures are not in accordance with the parties' agreement, unless the agreement was in conflict with a provision of the Arbitral Law from which the parties cannot derogate, or failing such agreement, are not in accordance with the Arbitral Law
- the award proffered is on matters not arbitrable under Mozambican laws (for instance, divorce cannot be decided in arbitration)
- the award proffered is on matters legally subject to mandatory law
- the award proffered is in violation of Mozambique public policy
- the award deals with a dispute not referred to in the arbitration agreement or not contemplated in the submission to arbitration or contains decisions on matters beyond the scope of the agreement
- a party to the arbitration agreement is legally incapacitated

### 28. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

A foreign award itself cannot be appealed on the merits in the Mozambican courts.

Mozambique is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). At the time of signature, Mozambique reserved the right to apply the New York Convention on the basis of reciprocity in respect of awards issued outside the Mozambican territory (article 2 of Resolution No 22/98, dated 2 June 1998).

Foreign arbitration awards (awards issued in arbitrations seated outside Mozambique) are subject to a confirmation and revision judicial procedure, in which the award can be refused or accepted by the court. If a foreign arbitration award is refused, based on the requirements for revision and confirmation of foreign awards and court sentences set out in the Civil Procedure Code, such refusal can be appealed.

### 29. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF: (I) AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION AND (II) DOMESTIC AWARDS?

Arbitral awards are treated as national judgments, provided the seat of arbitration is in Mozambique (article 68 of the Arbitral Law). Domestic awards (Mozambique-seated awards) are therefore binding on all individuals and public and private institutions. Enforcement is achieved through judicial proceedings to execute the award. Such enforcement does not amount to reviewing the decision on the merits.

Foreign awards (issued in arbitrations seated outside Mozambique) are not enforced automatically and may require a judicial procedure to review them on the merits and confirm them by the Mozambican courts (see question 28 above), unless a treaty has been signed between Mozambique and the other State. Although Mozambique is a party to the New York Convention, at the time of signature Mozambique reserved the right to apply the New York Convention on the basis of reciprocity.

### 30. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

It is difficult to say, since court decisions have not been published regularly. On the basis of the published decisions it appears that foreign awards are readily enforceable in practice.

## ALTERNATIVE DISPUTE RESOLUTION

### 31. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

Mediation and conciliation exist in Mozambique but are not widespread. Parties to litigation and arbitration are not required to consider or submit to alternative dispute resolution before or during proceedings.

Articles 60–66 of the Arbitral Law provide for an express framework for the resolution of disputes through mediation and/or conciliation but this relies on the mutual agreement of the parties to attempt these procedures before or during litigation or arbitration. Confidentiality is preserved under the Arbitral Law such that evidence adduced in mediation or conciliation cannot later be admitted in evidence before a court or arbitral tribunal. Any written settlement reached pursuant to mediation or conciliation has the force of an arbitral award pursuant to the Arbitral Law.

In the context of litigation, there is a degree of judicial encouragement to settle disputes. Under the Civil Procedure Code, the judge sets a preliminary hearing to attempt to reach agreement between the parties, but if this is not successful, the judicial case will continue.

## REFORMS

### 32. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

The last reforms under Mozambican civil law were made in April 2009.

It is difficult to determine whether and when further amendments will be introduced.

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# NAMIBIA



## INTRODUCTION

Namibian law comprises uncodified Roman Dutch common law, which forms the main body of the civil law, and also various principles and institutions derived from English law, predominantly in the areas of corporate and mercantile law.

In addition, Namibian law is supplemented by parliamentary legislation (both of pre-and post-independence origin), subordinate legislation, as well as customary law of the indigenous people of Namibia.

Under the Namibian Constitution, the laws introduced to the territory of South West Africa (prior to independence on 21 March 1990) remain in force until repealed by Parliament or ruled unconstitutional.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

The distinction between advocates (barristers) and attorneys (solicitors) was abolished by the Legal Practitioners Act 1995, and Namibia now has a unified profession such that all legal practitioners have rights of audience in all the courts of Namibia. However, in practice, the distinction between advocates and attorneys is still maintained. Advocates tend to practise as High Court litigation specialists, and will, in terms of the rules of their Bar Council, only act for clients on the instructions of instructing attorneys.

The legal profession is regulated by the Legal Practitioners Act 1995, and a person may be admitted to practise as a legal practitioner if he or she:

- is a fit and proper person to be admitted
- is duly qualified
- is a Namibian citizen, or has been lawfully admitted to Namibia as a permanent resident and is ordinarily resident in Namibia, or holds an employment permit if he or she is in service of the State

A person is duly qualified if he or she:

- holds a degree in law from the University of Namibia or an equivalent qualification from another university/comparable educational institution outside Namibia as prescribed by the Minister of Justice
- has satisfactorily completed practical legal training (at least six months) and
- has passed the Legal Practitioners Qualifying Examination (LPQE) with the Justice Training Centre

The Legal Practitioners Act 1995 provides that, magistrates, prosecutors and other specified persons, who have been in the service of the State for five years or more, are duly qualified.

The Legal Practitioners Act 1995 establishes the Law Society of Namibia, of which every enrolled legal practitioner is a member. The purpose of the Law Society is to maintain and enhance the standards of conduct and integrity of all members of the legal profession.

A disciplinary committee also established under the Legal Practitioners Act 1995 is responsible for maintaining the professional and ethical conduct of legal practitioners.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

Under the Namibian Constitution the judiciary comprises:

- the Supreme Court
- the High Court
- the lower courts

The Supreme Court hears and adjudicates on appeals from the High Court, including appeals involving the interpretation of the Namibian Constitution. The Supreme Court may act as a court of first instance in matters referred to it by the Attorney General.

The High Court comprises an Admiralty Court, a Labour Court, a special Tax Court and a Water Court. It has jurisdiction to hear all civil disputes, including cases which involve the interpretation of the Namibian Constitution. The High Court has jurisdiction to hear appeals or to review proceedings from the lower courts.

Magistrates' Courts have clearly defined jurisdiction by reference to geographic area, persons, causes of action and claim amounts. They have no jurisdiction to hear matrimonial cases, mental incapacity matters, insolvency proceedings, matters involving the validity or interpretation of wills and, generally, causes of action with claim amounts in excess of NAD 25,000.

There are no jury trials in civil litigation, and in the High Court, civil cases are heard by a single judge. Some statutes provide for the possibility of a High Court judge sitting with assessors. Most importantly, the Income Tax Act 1981 requires the appointment of an accountant and a representative of the commercial community as assessors. Any matter of law, and any question as to whether a matter for decision is a matter of fact or law will, however, be decided by the judge alone.

The civil justice system is adversarial. Through the introduction of a comprehensive case management system in 2014, the judge's role during the trial is now an active one.

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

Under the Prescription Act 1969, the limitation periods are:

- 30 years (debts secured by mortgage, judgment debts, debts in respect of any taxation imposed or levied by law, debts owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances)
- 15 years (debts owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor)
- six years (debts arising from bills of exchange or other negotiable instrument or from a notarial contract)
- three years (all other cases)

In addition to the Prescription Act 1969, there are other specific statutes of limitation. They commonly relate to civil claims against the Government, such as against the Namibian Police, and usually time bar claims earlier than under the Prescription Act 1969.

### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

Yes. The rules of privilege are based on common law principles. Privilege can be waived by the client (there is no requirement for the waiver to be in writing). Limited exclusions to privilege exist, notably in the case of money laundering, where a lawyer's duty of disclosure overrides privilege.

### 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

There are two basic forms of civil litigation in the Namibian courts: the action procedure and the application procedure.

#### Action procedure

The action procedure, which is commenced by way of summons, consists of the following phases and components, all of which take place within the case planning and case management procedures:

- exchange of pleadings, in which the essential facts of the parties' cases are set out without evidence
- pre-trial procedure (including discovery)
- trial hearing

The exchange of pleadings involves the filing by the plaintiff of the summons with particulars of claim, to which the defendant pleads.

Due to the fact that the action procedure is not actively managed, there are no fixed timeframes, but the process is as follows:

- immediately following a notice of intention to defend, a managing judge is appointed, who calls for a case planning hearing
- upon the case planning hearing, an order is made by the judge as to the dates for filing any summary judgment applications, exceptions, pleadings (plea and replication) counter-applications, etc, and the matter is postponed to a status hearing
- at the status hearing, the parties report on the progress and, if the pleadings have been exchanged and all aspects of the previous order have been complied with, the judge gives a case management date
- at the case management date, the parties must file case management reports, detailing the facts in dispute and witnesses. Again, the matter is postponed to a status hearing
- at the status hearing, the parties report on the progress and, if the case management has been completed, the judge postpones the matter to a pre-trial hearing
- at the pre-trial hearing, the parties file a report and an order is made in respect of the witnesses to be called, the days required for the hearing, dates for requesting trial particulars, discovery and the proposed hearing date or dates. Again, the matter is postponed to a status hearing
- at the status hearing, and if the pre-trial steps have been completed, the judge allocates a trial date

It must be noted that, within the case management, the parties may agree to court-connected mediation, or the managing judge may *mero-motu* refer the matter to court-connected mediation.

#### Application procedure

The application procedure is suitable where there are no disputes of fact. The applicant serves on the respondent a notice of motion (setting out the relief claimed) supported by an affidavit and documentary evidence. The respondent files an opposing affidavit, to which the applicant usually files a reply affidavit. Further affidavits may be allowed in appropriate circumstances, following which the matter is set down for hearing and argument. Urgent applications may be brought under appropriate circumstances.

The time limits under the Rules of Court are as follows:

- the respondent has 10 days following service of the notice of motion and the founding affidavit to file notice of his or her intention to oppose the application
- the respondent has 14 days to file his or her opposing affidavit
- the applicant may file a replying affidavit within 14 days
- if the respondent brings a counter-application, the applicant has 10 days to file an opposing affidavit, and the respondent 14 days to file an opposing affidavit in the counter-application

(The reference to "days" here is a reference to court days).

When an application is ready for hearing, it will be enrolled in accordance with the practice directives of the High Court and in accordance with the case management procedure.

## 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

### Action procedure

The High Court Rules contain extensive provisions on the discovery, inspection and production of documents after the close of pleadings but before trial. Each party is obliged to disclose under oath all documents relating to any matter in question in the action which have been in possession or control of such party. Save with the leave of the High Court, documents not disclosed may not be used for any purpose at trial by the party who failed to disclose them. Specific disclosure applications may be made.

The High Court Rules also provide for inspections *in loco*, and the filing of witness statements and affidavits (including expert statements and summaries) prior to trial, as well as for the *subpoena* of witnesses (with or without documents) to appear at trial. Furthermore, on application of a party, the High Court may take evidence on commission where this is convenient or necessary for the purposes of justice.

In trial, evidence is given orally, with documents on which evidence is given being handed up as exhibits. Ordinarily, the plaintiff bears the burden of proof, in which case the plaintiff is first required to present evidence-in-chief. Witnesses may be cross-examined by the opponent. Following cross-examination, re-examination may be conducted on issues that came up under cross-examination. Judges may directly question a witness, and witnesses may not be recalled without the leave of the High Court.

There is a right to adduce expert evidence; the court's permission is not required. An expert notice must be filed, followed by an expert summary (this is part of the discovery procedure). The expert gives oral evidence at trial and is cross-examined. Experts are regarded as party witnesses and as such do not owe duties to the court.

### Application procedure

Evidence is given by affidavit, and litigants are required to deliver their affidavits together with any relevant documents. If an application cannot properly be decided on affidavit, the court may dismiss the application or make such order as it deems fit to ensure a just and expeditious decision. More specifically, the court may direct that oral evidence be heard on specific issues with a view to resolving disputes of fact. To that end the court may order any deponent to appear personally or grant leave to them or any other person to be subpoenaed to appear and be examined and cross-examined as a witness.

Expert evidence is not admitted in application proceedings as there are no disputed facts. In principle, expert evidence could be put in an affidavit but this is not seen in practice.

The High Court Rules provide that the discovery provisions (relating to the action procedure) also apply to the application procedure.

## 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

With the introduction of a comprehensive case management system, and in conjunction with the courts, the parties have a large amount of control over the timetable.

In our experience, in action proceedings the process to reach trial is approximately six to eight months. In applications, the time to reach a hearing is approximately four to six months. Delays do occur in cases where judgment is reserved for lengthy periods of time.

## 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

The High Court may at any time, on application of a party, grant interlocutory or interim interdicts, such as to preserve assets or a certain *status quo* pending the final determination of the matter.

## 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

Under the High Court Act 1990, the Deputy-Sheriff is required to execute all sentences, decrees, judgments, writs, summonses, rules, orders, warrants, commands and processes of the High Court directed to the Sheriff.

Usually, judgments or orders of the High Court are enforced by a writ of execution, which is a document issued by the Registrar directing the Deputy-Sheriff to take so much of the debtor's movable or immovable property as will realise by public sale the amount of the judgment and the costs incurred in satisfying the same. However, writs may also be issued for other purposes, such as ejectment.

Where an order of the High Court is one *ad factum praestandum* (such as to do some act where the issuing of a writ of execution is not allowed or possible), the court order must be served on the judgment debtor, and if the judgment debtor fails to comply with the order, proceedings for contempt of court must be initiated.

Other commonly seen methods of execution include garnishee orders, emoluments, attachment orders and sequestration or liquidation proceedings.

Garnishee and attachment orders are more commonly seen in the Magistrates' Courts.

Enforcement is quite straightforward in practice.

## 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

The High Court has the power to award costs. Generally, a successful litigant is entitled to costs. However, the High Court has complete discretion whether or not to award costs, or even to deprive a successful litigant of costs. Costs orders are employed to discourage or punish inappropriate conduct by litigants, such as litigants making excessive demands, causing unnecessary litigation and failing to limit or curtail proceedings and costs. Costs may be awarded on different scales.

The determination of costs is subject to taxation, which involves a procedure before the taxing master to determine, with reference to relevant tariffs published in the Government Gazette, the reasonableness of the costs incurred by the litigant entitled to costs.

Although the purpose of an award of costs is to indemnify a successful litigant for the expenses incurred in having been required to initiate or defend a legal action, the taxation procedure and the prescribed tariffs will usually not result in a complete or even a substantive indemnity for the actual costs incurred by litigants.

A so-called *peregrinus* plaintiff (being, in general terms, a plaintiff not resident in Namibia) who initiates proceedings in the High Court, is required, as a general rule, to give security for costs to the defendant. This is so unless such plaintiff has within the jurisdiction of the High Court immovable property with a sufficient margin unburdened to satisfy any costs which may arise. The plaintiff may contest the amount of security, in which case the Registrar must finally determine such amount. Where the plaintiff contests liability to give security, or where the plaintiff fails to provide security, the defendant may apply to the court for such security to be given and that the proceedings be stayed until such order is complied with.

### **11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?**

The Namibian Constitution does not contain an express right of appeal, but in relation to the High Court of Namibia, there are three avenues of appeal:

- appeal as of right: where the High Court sits as a court of first instance, an appeal against a (final) order lies as of right to the Supreme Court
- appeal by leave of the High Court: under the High Court Act 1990, interlocutory orders and cost orders may only be appealed with the leave of the High Court
- appeal by leave of the Supreme Court: where the High Court denies the leave to appeal, the Supreme Court Act 1990 allows a litigant to petition the Supreme Court

In relation to the lower courts, the Magistrates' Courts Act 1944 establishes a right of appeal in respect of final orders.

Generally, the grounds of appeal must relate to an error of fact or law committed by the judge.

In terms of the Supreme Court Act 1990, there is no appeal from or review of any judgment or order made by the Supreme Court.

Under the High Court Rules, an appeal automatically suspends the operation and execution of the order in question pending the decision of the Appeal Court unless the court that gave the order otherwise directs on the application of a party. Under the Magistrates' Courts Act 1944, where an appeal has been lodged, the court may direct either that the judgment be executed or that execution be suspended pending the decision of the appeal or application.

### **12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?**

Generally, neither the Government nor domestic State entities may claim immunity from civil proceedings in Namibia.

However, there are various provisions found in the laws of Namibia providing for immunity from proceedings. Under the Namibian Constitution, the President is immune from civil proceedings save where such proceedings concern an act done in his or her official capacity as President. After a President has vacated office, no court can entertain any action against him or her in any civil proceedings in respect of any act done in his or her official capacity as President. Furthermore, various statutes provide that no compensation is payable by the Government or relevant public

officials in respect of acts done by such public officials in good faith pursuant to such statutes.

Under the Proclamation AG 16 of 1989, no execution, attachment or like process may be issued against any property of which the ownership vests in the Government.

There are no laws specifically regulating or granting immunity of foreign States or State entities outside the diplomatic context. However, under the Namibian Constitution, the general rules of public international law and international agreements form part of the law of Namibia. Therefore, to the extent that public international law may distinguish between sovereign acts (for which immunity can be claimed) and commercial acts (for which no immunity can be claimed), foreign States and State entities should not be able to claim immunity in relation to causes of action relating to commercial (ie non-sovereign) acts or activities.

The Diplomatic Privileges Act 1951 provides for the immunity from the civil jurisdiction of the Namibian courts of Heads of State, diplomatic agents, special envoys and organisations or institutions specially recognised by the Minister of Foreign Affairs for the purposes of such immunity. However, such immunity does not apply in respect of any liability incurred for any tax levied on income or in connection with any transaction entered into in a private and personal capacity, for the purposes of trade or in the exercise of any profession or calling.

### **13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?**

#### **Enforcement of Foreign Civil Judgments Act 1994**

The Enforcement of Foreign Civil Judgments Act 1994 provides for judgments of designated countries to be registered and enforced in Namibia. The Republic of South Africa is the only designated country under that law. A "judgment" is defined to be any final judgment or order for the payment of money in civil proceedings by any court in a designated country, which is enforceable by execution in the designated country in which it was given. It does not include any judgment or order on appeal, or for the payment of any tax or charge of a like nature or of any fine or other penalty.

The registration of a judgment may be set aside on various listed grounds, for example, if the Namibian court is satisfied that:

- such judgment was registered in contravention of the Enforcement of Foreign Civil Judgments Act 1994
- the court of the designated country concerned had no jurisdiction in the circumstances of the case
- the judgment debtor did not receive notice of the proceedings in which the judgment was granted, as prescribed by the law of the designated country, or, if no such notice is prescribed, he or she did not receive reasonable notice of the proceedings to enable him or her to defend them, and did not appear
- the judgment was obtained by fraud
- the enforcement of the judgment would be contrary to public policy in Namibia
- the certified copy of the judgment was lodged at the request of a person other than the judgment creditor
- the matter in dispute in the proceedings had, prior to the date of the judgment, been the subject of a final judgment by a court of competent jurisdiction in civil proceedings before such court

- the judgment has been set aside by a court of competent jurisdiction
- the judgment has lapsed under either the laws of Namibia or of the designated country concerned
- the judgment has been wholly satisfied
- judgment has been partly satisfied, to the extent to which it has been so satisfied
- the judgment is a judgment or order which in terms of any law may not be recognised or enforced in Namibia

### Enforcement at common law

A final judgment obtained against a debtor in a foreign court in respect of any sum of money payable would generally also be enforceable at common law by an action in the High Court without re-examination of the merits of the issues determined by the proceedings in the foreign court, provided that:

- the foreign court granting the judgment had jurisdiction in the matter
- the process whereby the action was instituted was properly served upon the defendant in the action
- the judgment was not fraudulently obtained
- the judgment is final and conclusive
- the judgment is older than a year
- the judgment is not contrary to the public policy of Namibia or rules of natural justice
- the judgment does not involve the enforcement of a penal or revenue law of a foreign country

An action must be instituted *de novo* in the High Court of Namibia based on the foreign judgment obtained in the foreign jurisdiction.

Foreign judgments may only be enforced by way of execution if an order based on the foreign judgment is made by a competent Namibian court, and the recognition and enforcement lies in the final discretion of the respective competent Namibian courts. Enforcement may also be limited by other legal principles (such as the non-recognition of punitive or exemplary damages) and laws of general application (such as the Prescription Act 1969 and the Conventional Penalties Act 1962).

## ARBITRATION

### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

Arbitration is not well developed in Namibia.

Generally, arbitration in Namibia is governed by the Arbitration Act 1965 (the Arbitration Act). It is not based on the UNCITRAL Model Law.

There is legal authority to the effect that the enactment of the Arbitration Act did not result in the repeal of the common law on arbitration. Where persons agree to submit a dispute to arbitration in any manner other than as provided by the Arbitration Act, their arbitration will not fall under the Arbitration Act, but will be valid at common law (for example, any agreement which does not constitute a "written agreement" under the Arbitration Act, such as an oral agreement). In that case none of the provisions of the

Arbitration Act will apply to the arbitration agreement in question. At common law (and under the Arbitration Act), it is not possible to submit criminal matters or cases relating to freedom, status or matrimonial and spiritual causes to arbitration. It is, however, possible to submit a civil action relating to damages or personal property that arises from a crime.

The common law does not prescribe the number of arbitrators required, and a sole arbitrator is possible. Arbitrator(s) are appointed by submission of the parties, which is an agreement by the disputants promising that they will abide by his or her decision. There remains doubt whether an agreement to submit disputes to the arbitration of unidentified persons is enforceable at common law.

In terms of enforcement, an arbitration award is also enforced by converting it into an order of a competent court (the High Court of Namibia) and then enforcing that order in the manner provided by the rules of such court. The procedure is to apply for relief by way of application (motion proceedings), as there would ordinarily be no factual disputes which would prevent the application procedure.

The Labour Act 2007 requires the resolution of labour disputes through mediation and arbitration, principally by government mediators and arbitrators, but parties to a labour dispute may agree on private arbitration.

### 15. WHAT ARE THE MAIN NATIONAL ARBITRATION INSTITUTIONS?

Namibia does not have any national arbitration institutions. One private arbitration foundation was established some years ago but it failed to establish itself as a viable alternative forum for dispute resolution.

### 16. ARE THERE ANY RESTRICTIONS ON WHO MAY REPRESENT THE PARTIES TO AN ARBITRATION?

The Arbitration Act contains no provisions in relation to the representation of parties at the arbitration proceedings. There appear to be no restrictions on the representation of the parties, but this could be governed by the arbitration agreement.

### 17. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

The Arbitration Act requires a written agreement providing for the reference to arbitration of any existing dispute or future dispute relating to a matter specified in the agreement. The arbitration agreement need not name or designate the arbitrator, and assumes a reference to a single arbitrator, unless the agreement states otherwise. There is no express requirement that the agreement be signed by the parties. Therefore, in accordance with principles of Namibian law, a "written agreement" could well be constituted by an exchange of correspondence.

### 18. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?

Even though the Arbitration Act provides that an arbitration agreement is not capable of being terminated except by consent of all the parties, the court may refuse to stay litigation. The Arbitration Act provides that where a party to an arbitration agreement commences legal proceedings in any court against the



other party to the arbitration agreement in relation to the matter agreed to be referred to arbitration, any party may apply to the court for a stay of such proceedings. If the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration, the court may make an order staying such proceedings on terms and conditions it may consider just.

Furthermore, the High Court may, at any time on the application of any party to an arbitration agreement, if "good cause" is shown:

- set aside the arbitration agreement
- order that the particular dispute referred to in the arbitration agreement not be referred to arbitration
- order that the arbitration agreement cease to have effect with reference to any dispute referred

South African case law dealing with the meaning of "good cause", which would be persuasive authority in Namibia, suggests that arbitration agreements will be set aside where the arbitrator had no powers to investigate the alleged fraudulent or criminal conduct of third parties raised in a counterclaim by one of the litigants.

The term "good cause", in other areas of litigation, is rather wide and normally confers a discretion on the courts. However, in the context of arbitration, "good cause" would amount to compelling reasons, such as contractual grounds or public policy grounds, as the above case illustrates. The courts are not likely to set aside an arbitration agreement.

The seat of the arbitration should make no difference on the question as to what "good cause" is and to whether the courts will stay litigation.

#### **19. IF THE ARBITRATION AGREEMENT AND ANY RELEVANT RULES ARE SILENT, HOW MANY ARBITRATORS WILL BE APPOINTED, AND WHO IS THE APPOINTING AUTHORITY?**

The Arbitration Act provides that unless a contrary intention is expressed in the arbitration agreement, the reference shall be to a single arbitrator. The Arbitration Act contains further detailed provisions on the appointment of arbitrators where arbitrators become incapable of acting, or where the arbitration agreement provides for an even number of, or two or three arbitrators, or where a dispute arises. In such cases the High Court of Namibia has the power to appoint arbitrators and umpires on application of the parties.

#### **20. WHAT RIGHTS ARE THERE TO CHALLENGE THE APPOINTMENT OF AN ARBITRATOR?**

The Arbitration Act provides that the appointment of an arbitrator, unless a contrary intention is expressed in the arbitration agreement, must not be capable of being terminated except by consent of all the parties to the reference.

The High Court may, however, at any time on the application of any party to the reference, and on good cause being shown, set aside the appointment of an arbitrator or remove him or her from office. "Good cause" includes failure on the part of the arbitrator to use all reasonable dispatch in entering on and proceeding with the reference and making an award, or in the case where two arbitrators are unable to agree, in giving notice of that fact to the parties. The Arbitration Act does not deal in terms with challenges to appointments on the grounds of partiality or bias. There are no court cases in Namibia dealing with this, but there is very little arbitration in Namibia.

In a South African case (which is not binding precedent in Namibia, but persuasive authority, because it is based on the same statute) the court noted:

*"When it comes to an application for the removal of an arbitrator on "good cause shown" as intended in s 13(2)(a) of the Act, the court should bear in mind the purpose of private arbitration, viz the cost-effective and fast solution of disputes, particularly in cases in which the arbitration agreement demands speed over procedural precision. The question to be answered is whether, viewed holistically, the proceedings would be considered substantially fair by a reasonable person. A petitioner who seeks the removal of an arbitrator on the ground of perception of bias must show that a reasonable, objectively informed person would apprehend bias on the part of the arbitrator. In this context there exists a double requirement of reasonableness: both the applicant and the apprehension itself must be reasonable."*

#### **21. DOES THE DOMESTIC LAW CONTAIN SUBSTANTIVE REQUIREMENTS FOR THE PROCEDURE TO BE FOLLOWED?**

The Arbitration Act does not contain any material substantive requirements for the procedure to be followed. There are, however, residual provisions relating to the notification of the commencement of proceedings and the service of notices. Awards should be made within four months of the reference to the arbitrator.

#### **22. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED INSIDE THE JURISDICTION?**

In respect of any reference under an arbitration agreement, the High Court retains the power to make orders in respect of:

- security for costs
- discovery of documents and interrogatories
- examination of any witnesses before a commissioner in Namibia or abroad
- giving of evidence by affidavit
- inspection or interim custody or the preservation or the sale of goods or property
- interim interdict or similar relief
- securing the amount in dispute in the reference
- substituted service of notices or summonses
- appointment of a receiver

#### **23. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?**

The courts cannot intervene, as such, as Namibian laws have no extraterritorial application. The Arbitration Act does not refer to the seat of arbitration and, as long as there is a valid submission to arbitration under the Arbitration Act, the court should be able to make the orders listed above in question 22 in support of a foreign seated arbitration.

#### **24. DO ARBITRATORS HAVE POWERS TO GRANT INTERIM OR CONSERVATORY RELIEF?**

Unless the arbitration agreement provides otherwise, an arbitration tribunal may make an interim award at any time within the period allowed for making an award. Interim awards can be enforced in the Namibian courts in the same way as final awards.

## 25. WHEN AND IN WHAT FORM MUST THE AWARD BE DELIVERED?

Under the Arbitration Act, an arbitration award must be made within four months of the arbitrator entering the reference or the date on which such arbitrator was called to act, whichever is earlier.

The award is required to be in writing and must be signed by all the members of the arbitral tribunal, but the refusal by a minority to sign it will not invalidate the arbitral award. The award must be delivered by the tribunal with their parties or representatives being present or having been summoned to appear.

## 26. CAN A SUCCESSFUL PARTY RECOVER ITS COSTS?

Unless the arbitration agreement provides otherwise, the award of costs will be at the discretion of the arbitral tribunal, which may give directions as to the scale on which costs are to be taxed, and may direct by whom and in what manner costs or any part of them should be paid. However, by section 35(6) of the Arbitration Act, any provision contained in an arbitration agreement referring to future disputes and requiring that any party pay his or her own costs will be void.

Where the award contains no order as to costs, any party to the reference may, within 14 days of the publication of the award, make an application to the arbitral tribunal for a costs order.

## 27. ON WHAT GROUNDS CAN AN AWARD FROM AN ARBITRATION SEATED IN THE JURISDICTION BE APPEALED TO THE COURT?

Under the Arbitration Act, and unless the arbitration agreement provides otherwise, an arbitral award is final and not subject to appeal, and the parties to the reference must abide by and comply with the award in accordance with its terms.

However, the Arbitration Act allows for an award to be set aside on application to the High Court where:

- any member of the arbitration tribunal has misconducted him or herself in relation to their duties as arbitrator
- the arbitral tribunal has committed any gross irregularity in the conduct of the arbitral proceeding or has exceeded its powers
- an award has been improperly obtained. There is no case law interpreting this term

The application must be made within six weeks after publication of the award (except for cases of corruption, where such application must be made within six weeks of discovery of the corruption and in any case not later than three years after the award was published).

## 28. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

That is not clear, but in our opinion it cannot. The issue is one of enforcement, rather than appeal. A person seeking to enforce a foreign arbitral award must ask the High Court of Namibia for an enforcement order (as set out in question 29 below). In that context, the defendant could raise objections relating to the manner in which the award was obtained, but we doubt that a Namibian court would sit in judgment where a decision on the merits has been made by the arbitrator.

## 29. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF: (I) AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION AND (II) DOMESTIC AWARDS?

Under the Arbitration Act an award may, on application (motion proceedings) to a court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of court. The award may then be enforced in the same manner as any judgment or order to the same effect.

Namibia is not a Contracting State to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). It is not clear whether Namibia should nonetheless be bound by the New York Convention on account of the Republic of South Africa acceding thereto in 1976 (at which point Namibia was under direct rule by South Africa). In any case, Namibia has not translated the New York Convention into municipal law. As such, there exists no statute law providing for the enforcement of foreign arbitration awards in Namibia.

South African case law prior to Namibian independence, which would constitute precedent in Namibia, suggests that a foreign arbitral award would be enforced against defendants in Namibia, but this point has, to date, not been settled or decided in the Namibian courts.

## 30. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

There is no case law on this, but arbitration is not widely used in Namibia outside of the labour law context. As such it is unlikely that there are many (if any) matters pending before the High Court relating to the enforcement of foreign arbitral awards.

## ALTERNATIVE DISPUTE RESOLUTION

### 31. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

Yes. As noted in question 5 above, a court may of its own initiative refer litigants to court-connected mediation as part of the case management process

Also, under the Labour Act 2007, parties to a labour dispute are required to attend compulsory conciliation before they proceed to arbitration.

## REFORMS

### 32. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

We are not aware of any further proposals for major procedural reforms in the foreseeable future.

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# NIGER



## INTRODUCTION

Niger is a civil law jurisdiction. Its court system is derived from the Constitution of the Seventh Republic of 25 November 2011. Niger is a member of OHADA, ECOWAS and UEMOA. Its Supreme Court (*Cour de Cassation*) has final jurisdiction over appeals not governed by the laws promulgated by these inter-governmental bodies.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

The legal profession is governed by the provisions of Regulation No. 05/CM/UEMOA of 24 September 2014, which entered into force on 1 January 2015, and Law n°2004-42 of 8 June 2004 regarding the regulation of the legal profession (for the provisions not governed by Regulation No.05). To practise law in Niger, potential lawyers must:

- be a citizen of one of the member states of UEMOA
- be at least 24 years of age
- hold a *certificat de fin du stage*
- be of established good moral character (article 30 of Regulation n°05)

The profession is organised by the *Conseil de l'Ordre*, which ensures that members abide by the rules governing the profession and applies any necessary disciplinary measures.

Lawyers can practise either individually or as part of a practice structure.

Lawyers who are nationals of any State granting reciprocity can appear before the courts of Niger in one or more cases, provided that:

- they are practising at a law firm in Niger
- the chairman of the Bar and the opposing counsel are informed
- the presiding judge and the Attorney General referred are informed (article 42 of Regulation n°05)

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The Nigerien court system consists of the following:

- the First Instance courts:
  - the Magistrates' Courts (*Tribunaux d'Instance*), which have jurisdiction over all civil and commercial matters where the amount in principal does not exceed CFA 1 million
  - the *Tribunaux de Grande Instance* which have jurisdiction in civil matters for all cases that do not fall within the jurisdiction of the Magistrates' Courts and the specialist courts (being the Labour Courts, Commercial Courts, Rural Property Courts, Administrative Courts, Juvenile Courts, and Military Courts)
- two Courts of Appeal
- the Supreme Court (*Cour de cassation*)
- the State Council

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

Limitation periods vary depending on the type of action and the parties involved (article 14 of the Code of Civil Procedure (Civil Code)):

- the ordinary limitation period for bringing an action is 30 years (article 2262 of the Civil Code)
- between merchants, the limitation period is five years, unless a shorter period is stipulated

Specific limitation periods apply to certain types of actions:

- matters concerning commercial sales: two years (article 301 of the OHADA Uniform Act)
- actions in warranty against the architects and contractors: 10 years (article 2270 of the Civil Code)
- actions filed by teachers of science and arts, for the courses they provide on a monthly basis: six months (article 2271 of the Civil Code)
- actions against bailiffs for fees payable for the acts they notify and the commissions they execute: one year (article 2272 of the Civil Code)
- actions against hoteliers and caterers: six months (article 2271 of the Civil Code)
- actions against labourers and employees for payment of their days, supplies and wages: six months (article 2271 of the Civil Code)

- actions by doctors, surgeons, dental surgeons, midwives and pharmacists: two years (article 2272 of the Civil Code)

Limitation periods are governed by public policy rules unless another law is applicable (articles 2220 and 2223 of the Civil Code).

#### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

Communications between lawyers and clients are confidential (article 44 of Regulation n°05). The types of communications protected are correspondence between lawyers and correspondence and consultations between a client and his/her lawyer. Lawyers found to have breached their confidentiality obligations face disciplinary and/or criminal action. Clients cannot release their lawyers from their confidentiality obligations.

#### 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

Civil proceedings are filed either by summons or by joint petition (except in specific cases where the law allows proceedings to be commenced by petition filed by one of the parties, or through the voluntary appearance of the parties before the judge) (article 98 of the Civil Code).

The summons is an act of a bailiff through which the claimant calls the defendant to appear before the judge. It contains the subject of the claim and a statement of the arguments in fact and in law. Interlocutory proceedings are instigated by means of summons, which may be ordinary or urgent.

The joint petition is the common act through which the parties submit their respective claims to the judge (article 432 of the Code of Civil Procedure).

The time limit for the defendant to appear before *the Tribunal de Grande Instance* is eight clear days. A pre-trial review procedure was introduced through the new Code of Civil Procedure (articles 454 to 458).

There are also mediation or conciliation proceedings which can be instigated on the initiative of the judge in all disputes in which the rights in question are within the control of the parties.

#### 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

The summons must indicate the documentary evidence (exhibits) on which the claim is based. The party relying on the exhibit is required to send it to any other party to the proceedings. Exhibits must be communicated simultaneously. A party may ask the judge to order such communication (article 149 of the Civil Code). In appeal cases, further communication of exhibits already submitted in the first instance is not required. Any party may nevertheless request this. It is possible to communicate new exhibits on appeal and before the *Cour de Cassation*.

The judge may, either upon his/her own initiative or on the request of the parties, where a technical question arises, order an expert report with the sole purpose of examining technical questions (articles 266 to 300 of the Civil Code).

#### 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

The parties do not control the procedure. Once the proceedings have commenced, the timetable is set at the discretion of the court and in practice depends on various factors, such as the level of complexity of the case, the degree of urgency and the court's caseload.

Nevertheless, the parties may end the proceedings at any time by mutual agreement.

In general, the average duration of proceedings is six months for each level of jurisdiction.

#### 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

Interim proceedings can be brought in Niger to protect parties' interests pending a judgment on the merits:

- *référé* proceedings are held in the presence of all parties. In all urgent cases, the presiding judge of the court may order all measures that lack a serious challenge or that justify the existence of a dispute. He/she may still, even in the presence of a serious challenge, order interim or restoration remedies required either to stop an unlawful situation or prevent imminent harm (articles 459 to 465 of the Civil Code)
- *ex parte* applications (*ordonnances sur requête*) make it possible to obtain any measure to protect the rights and interests of a party and in the absence of the other party, when the circumstances require. *Ex parte* orders are thus immediately enforceable (articles 466 to 468 of the Civil Code)
- conservatory measures enable any person whose debt seems founded in principle to seek (by petition permission) to exercise an interim remedy over all tangible or intangible assets of its debtor, without prior order, if it can demonstrate that there are circumstances threatening its recovery (article 54 *et seq.* of the OHADA Uniform Act)

#### 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

The principal enforcement measures deployed are the seizure and sale (*saisie vente*), attachment order (*saisie attribution*), and real estate attachment (*saisie immobilière*). These are all provided for in the Uniform Act Organising Simplified Recovery Procedures and Measures of Execution. In addition, under local law, engrossed orders (*titres grossoyés*) exist. These are valid as direct formal requests from the police force for the purpose of enforcement.

#### 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

The unsuccessful party bears the court costs. However, the successful party is not entitled to recover its legal fees.

In all matters, foreign claimants are required to pay a deposit to cover any damages that may be awarded against them, unless they own real estate in Niger of a sufficient value to cover payment. However, bilateral or multilateral co-operation agreements between States limit the scope of this article (article 16 of the Civil Code).

### 11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

Parties have one month to appeal from the date of delivery of the judgment, if issued in the presence of all parties, and one month from the date of notification if issued by default. Parties have 15 days in non-contentious matters, from the date the decision is issued (article 520 of the Code of Civil Procedure).

Appeals may be filed in all matters, even non-contentious, against first instance judgments unless stipulated otherwise.

New claims are inadmissible on appeal. The appeal is suspensive in the following cases only:

- in personal status matters
- in incidental claims
- in real property registration matters, or when the purchase or the transfer of the property has been duly noted through the means provided by law
- when a legal provision so states
- when the amount of the award exceeds CFA 25 million

If the appeal to the *Cour de Cassation* is successful, the case is remanded to the same but differently constituted lower court for a second judgment. In principle, the remand court is not required to abide by the *Cour de Cassation's* decision, but in practice this is the case.

### 12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

Proceedings can be brought against the State, but the State benefits from immunity regarding execution.

In terms of foreign entities, any jurisdictional immunities that can be applied derive from international agreements on diplomatic or consular relationships. These immunities also benefit certain international institutions.

### 13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

In Niger, contentious and non-contentious judgments handed down by foreign courts are enforceable if: they are final, binding and enforceable, the national court is no longer seized, and the judgment can no longer be challenged.

Enforcement decisions are made by the presiding judge of *Tribunal de Grande Instance* of the place in which the judgment is to be enforced, regardless of the amount in dispute. The court will simply verify that the judgment meets the above conditions.

## ARBITRATION

### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

Niger is a Member State of OHADA (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires* - Organisation for the Harmonisation of Business Law in Africa). The OHADA Treaty

was signed on 17 October 1993. Under the OHADA Treaty, the Council of Ministers of Justice and Finance adopt "uniform acts" that are directly applicable and enforceable in each of the Member States. Arbitration in the OHADA Member States is governed by the Uniform Act on Arbitration within the Framework of the OHADA Treaty, which was adopted on 11 March 1999 and came into force on 11 June 1999 (the Uniform Act).

The Uniform Act is not based on the UNCITRAL Model Law. It was drafted separately, but is nevertheless consistent with the fundamental principles of international commercial arbitration and main features of the UNCITRAL Model Law.

The Uniform Act applies to both national and international arbitration and governs all arbitration proceedings with a seat in a Member State. One of the most important characteristics of OHADA arbitration is the Common Court of Justice and Arbitration (*Cour commune de justice et d'arbitrage*) (the CCJA), which acts as both a permanent arbitration institution and a supreme court of arbitration for OHADA Member States.

### 15. WHAT ARE THE MAIN NATIONAL ARBITRATION INSTITUTIONS?

There is no official arbitration institution in Niger. The main arbitration institution in Niger is therefore not at national level. It is the CCJA, which was created by the OHADA Treaty and is based in Abidjan, in Côte d'Ivoire. The CCJA, which also has a judicial function, acts as an arbitration centre and administers proceedings governed by the CCJA Rules of Arbitration. The CCJA is different from other arbitration centres as it is not a private institution, but was created and organised by OHADA.

For the CCJA Rules to be applicable, article 21 of the OHADA Treaty stipulates that all or part of the contract in question must be performed within the territory of one or more Member States or that at least one of the parties must be domiciled or habitually resident in a Member State. According to legal commentators, it should also be possible to go to arbitration under the CCJA Rules even if these conditions are not met, if the parties have provided for this possibility in their arbitration agreement.

### 16. ARE THERE ANY RESTRICTIONS ON WHO MAY REPRESENT THE PARTIES TO AN ARBITRATION?

The Uniform Act does not set any restrictions on persons who can represent parties in arbitration. They are entitled but not required to instruct counsel (article 20 of the Uniform Act).

There is no other restriction in Niger with regard to the people that can represent the parties to arbitration, except of course in the case of conflict of interest.

### 17. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

Article 3 of the Uniform Act states that the arbitration agreement must be made in writing or by any other means which proves of the existence of the clause. No particular format is required. The Uniform Act also provides that contracts can rely on an arbitration agreement contained in a different document.

Local judges interpret these conditions strictly and there is no other condition of format set out in the local legislation.

**18. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?**

Article 13 of the Uniform Act provides that national courts must decline jurisdiction where there is an arbitration agreement and where the arbitral tribunal has not yet been composed, save where the arbitration agreement is "manifestly void". Courts cannot decline jurisdiction at their own discretion.

The location of the seat of the court has no influence over this issue and the national court must decline jurisdiction.

If the arbitral tribunal has already been composed, the national court must decline jurisdiction at the request of one of the parties. Parties governed by an arbitration agreement do have the option to appear before a national court to obtain interim or conservatory measures that do not require a review of the case on the merits, in circumstances that have been recognised as urgent and where reasons have been given, or where the measure must be performed in a State that is not part of OHADA.

National courts can also intervene in very limited circumstances with a view to assisting the arbitration process (see questions 22 and 23 below).

**19. IF THE ARBITRATION AGREEMENT AND ANY RELEVANT RULES ARE SILENT, HOW MANY ARBITRATORS WILL BE APPOINTED, AND WHO IS THE APPOINTING AUTHORITY?**

The Uniform Act does not stipulate a specific number of arbitrators if the arbitration agreement is silent on this point. It does provide that an arbitral tribunal must have a sole arbitrator or three arbitrators. If the parties do not appoint one or more arbitrators, the task falls on to the competent court in the Member State in which the seat of arbitration is located.

The competent court in Niger is the *Tribunal de Grande Instance*, which also has jurisdiction to remedy any faults of the arbitration clause.

**20. WHAT RIGHTS ARE THERE TO CHALLENGE THE APPOINTMENT OF AN ARBITRATOR?**

Article 7 of the Uniform Act sets the rules for challenging an arbitrator. An arbitrator must notify the parties of "any circumstance about him/herself" for which they may be challenged. Any disputes will be settled by the competent court of the Member State, save where the parties have provided for a different procedure for challenging arbitrators.

The competent court for challenging an arbitrator should be the same as that which assists with the composition of the arbitral tribunal, namely the *Tribunal de Grande Instance*. Decisions are not subject to appeal.

Arbitrators may only be challenged on grounds that come to light after their appointment.

**21. DOES THE DOMESTIC LAW CONTAIN SUBSTANTIVE REQUIREMENTS FOR THE PROCEDURE TO BE FOLLOWED?**

The Uniform Act requires parties to receive equal treatment and to have an opportunity to exercise their rights (article 9); arbitrators

may not base their decisions at their own discretion without first allowing the parties to submit observations (article 14).

Article 18 of the Uniform Act provides that the deliberations must be kept secret.

The Uniform Act also provides that the duration of the arbitration must not exceed six months from the date upon which the last arbitrator accepts the terms, save where extended by agreement of the parties or by petitioning the competent court.

The local law contains no imperative provisions other than those applicable pursuant to the Uniform Act.

**22. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED INSIDE THE JURISDICTION?**

In principle, where there is an arbitration agreement, the national courts cannot intervene in a dispute until the award has been issued.

Nevertheless, parties may petition the competent court in Niger in the following circumstances:

- to resolve difficulties encountered with constituting the arbitral tribunal, to appoint the sole arbitrator or the third arbitrator (articles 5 and 8)
- to rule on challenges against arbitrators where the parties have not provided for a different procedure (article 7)
- to extend the deadline for the conclusion of the arbitration where there is no agreement between the parties to do so, at the request of a party or the arbitral tribunal (article 12)
- to order interim or protective measures recognised as urgent and where reasons have been given or when the measure would be performed in a non-OHADA State, provided the measures do not require a review of the case on the merits (article 13)
- to assist the arbitral tribunal, at its request, with the collection of evidence (article 14)

**23. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?**

In principle, national courts cannot intervene in an arbitration seated outside their jurisdiction where there is an arbitration agreement, as indicated above (question 22). In addition, all measures relating to the composition of the arbitral tribunal and conduct of the proceedings fall under the jurisdiction of the courts of the country in which the arbitration is seated.

However, it is possible for national courts other than the competent court of the Member State in which the arbitration is seated to intervene to order conservatory or interim measures under the conditions defined above in question 18 (article 13).

**24. DO ARBITRATORS HAVE POWERS TO GRANT INTERIM OR CONSERVATORY RELIEF?**

Although this matter is not dealt with directly in the Uniform Act, legal commentators generally accept that it is possible for arbitrators to order interim or conservatory relief, save where the parties have agreed otherwise.

## 25. WHEN AND IN WHAT FORM MUST THE AWARD BE DELIVERED?

Save as agreed otherwise by the parties, arbitral awards must be issued within six months from the date on which all of the arbitrators have accepted their arbitrating functions. This term can be extended by agreement between the parties or by order of the competent court of the Member State, which is the *Tribunal de Grande Instance*, at the request of a party or the arbitral tribunal (article 12).

Parties can set special requirements for awards. Failing this, awards are issued by majority, where the tribunal is comprised of three arbitrators, and grounds must be set out for such awards. They must be signed by at least two of the three arbitrators.

## 26. CAN A SUCCESSFUL PARTY RECOVER ITS COSTS?

The Uniform Act contains no provisions on this point, and nor did the local law prior to the Uniform Act.

Where arbitration is conducted under the aegis of the CCJA, the arbitrator is empowered to award costs.

## 27. ON WHAT GROUNDS CAN AN AWARD FROM AN ARBITRATION SEATED INSIDE THE JURISDICTION BE APPEALED TO THE COURT?

The only remedy against an arbitral award is an application to set aside that award brought before the competent court in the Member State in which it was issued, within one month from the date of notification of an enforceable award (articles 25 and 27).

The circumstances in which an application to set aside can be brought are as follows (article 26):

- the arbitral tribunal ruled without an arbitration agreement or with respect to an invalid or expired agreement
- the arbitral tribunal was not properly constituted
- the arbitral tribunal did not rule in compliance with the terms of arbitration
- due process was not met
- the arbitral tribunal breached a public policy rule of the OHADA Member States
- there are no reasons for the award

Bringing an application to set aside an arbitral award suspends enforcement, unless the tribunal ordered provisional enforcement. The decision can only be appealed to the CCJA (articles 25 and 28).

This is the only remedy available to parties before a national court. The other remedies, third party challenge and the application for a review of the award, must be submitted to the arbitral tribunal (article 25).

## 28. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

The arbitral award is not open to opposition or appeal.

It may be the subject of an application to set aside, which must be brought before the competent judge in the State party (article 25). No provision is provided in local law to this end.

## 29. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF: (I) AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION AND (II) DOMESTIC AWARDS?

To enforce awards issued within an OHADA Member State, the Uniform Act requires parties to obtain the recognition of the award from the competent court in that Member State; in Niger this is the presiding judge of the *Tribunal de Grande Instance* (article 30).

This requires producing the original arbitral award, together with the arbitration agreement or copies of these documents meeting the necessary authentication conditions and, where necessary, a sworn translation into French (article 31).

Decisions refusing to recognise an arbitral award can be appealed to the CCJA, but decisions granting recognition are not subject to appeal (article 32).

Awards issued in a different OHADA Member State are recognised in other Member States under the conditions set out in the applicable international agreements or, otherwise, under the conditions stated in the Uniform Act.

Niger is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which facilitates recognition and enforcement of foreign arbitral awards.

## 30. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

In practice, foreign awards are readily enforceable in Niger through application of the New York Convention.

## ALTERNATIVE DISPUTE RESOLUTION

### 31. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

Alternative dispute resolution is not compulsory in Niger but mediation or conciliation proceedings may be instigated by the judge in litigation proceedings.

## REFORMS

### 32. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

No – a new Code of Civil Procedure was recently adopted, enacted and published in the Republic of Niger's official journal, special edition of 13 July 2015.



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# NIGERIA



## INTRODUCTION

The Nigerian legal system is twofold, based on: (i) English common law, founded on ecclesiastical principles and the doctrine of precedent; and (ii) indigenous laws, Sharia (Islamic) law and local legislation.

Three categories of English law are recognised as direct sources of Nigerian law: common law, principles of equity and statutes of general application in force in England on 1 January 1900.

The indigenous legal system applies customary law (including Sharia law) in resolving disputes, including through customary arbitration. Customary law is a system of law that reflects the culture, customs, values and habits of the ethnic groups whose activities it regulates. Customary law is particularly dominant in the area of personal and family relations such as marriage, divorce, guardianship and custody of children and succession. It is largely unwritten, but owes its authority to the fact that the custom has been established from ancient days. In the states in the southern part of the country, Islamic law, where it exists, is integrated and has always been treated as an aspect of customary law.

Since 1956, Islamic law has been administered in the northern states as a separate and distinct system. It only applies in relation to Muslim personal law. Sharia law, unlike ethnic customary law, is written. Its principles are clearly defined and articulated.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

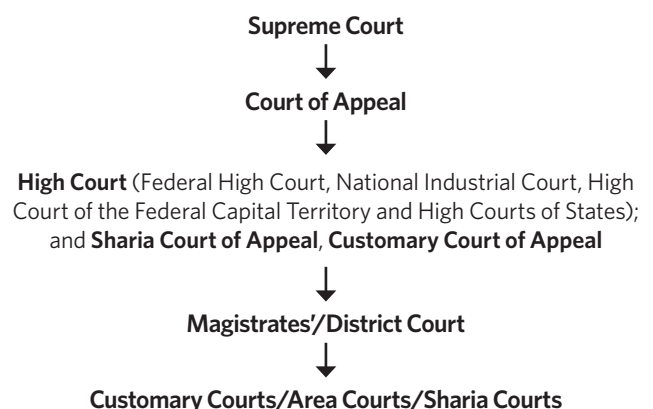
The legal profession is founded on and remains largely similar to that of England and Wales. However, the major distinguishing feature is that the Nigerian legal profession is fused, so upon acquiring professional qualifications, a lawyer is licensed to practise as a barrister and solicitor of the Supreme Court of Nigeria.

To become a barrister and solicitor of the Supreme Court of Nigeria, a person must first obtain a degree in law from either a Nigerian university or a university of a common law country. A graduate in law from a Nigerian university is expected to enrol on a one-year compulsory course at the Nigerian Law School, and to take the Nigerian Bar Examinations (Bar Part II). Law graduates from other common law countries must pass the Bar Part I examinations and subsequently the one-year compulsory Bar Part II examinations. Successful candidates are called to the Nigerian Bar and enrolled at the Nigerian Supreme Court.

The practice of conferring on successful barristers the status of King's or Queen's Counsel was followed in Nigeria until the 1970s when it was restyled as the conferment of the status of Senior Advocate of Nigeria. Such conferment, as is the case in England and Wales, is also known in Nigeria as promotion to the inner Bar from the outer Bar.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The Nigerian courts are structured as follows:



Notwithstanding the federal status of Nigeria, the federal and state court systems are not parallel. Each state has its own legal system only to a very limited extent. All appeals from the High Courts, whether state or federal, are made to the Court of Appeal and subsequently to the Supreme Court, both of which are Federal Courts.

The Sharia Courts, Area Courts and Customary Courts are inferior courts and are presided over by lay judges. In Sharia matters only, appeals are available to the Sharia Court of Appeal, which is presided over by the *Grand Kadi* or *Kadi* who is expected to have a specialist knowledge of Islamic law and practice. Sharia appeal judges, like common law judges, are appointed by the legislature on the recommendation of the National Judicial Council.

Judicial proceedings in Nigeria may be initiated in either of the lower courts (as long as the claim falls within the court's jurisdiction) or in the High Court of a state, the Federal High Court or the National Industrial Court (for labour disputes). The jurisdiction of any of these courts over any given claim depends on the nature of the claim and the parties to the action.

The Sharia Court of Appeal hears appeals from the Area Courts and Sharia Courts, whilst the Customary Court of Appeal hears appeals from the Customary Courts. Appeals from the Magistrates' Courts are heard in the High Court, and the National Industrial Court hears appeals from Industrial Arbitration Panels. The Court of Appeal hears appeals from the High Court, the Sharia Court of Appeal, the Customary Court of Appeal and, to a limited extent, the National Industrial Court. The Supreme Court is the final court of appeal. In special, limited circumstances, the Supreme Court and the Court of Appeal become courts of first instance.

The judicial system is adversarial in nature, and although it is provided for in some Nigerian legislation (especially legislation enacted prior to 1960) Nigeria no longer operates a jury system. Jury trials were prevalent particularly in criminal cases until the early 1970s, after which they were disposed of. The judge at first instance sits as an impartial umpire and parties have full control over the presentation of their respective cases (subject to compliance with procedural and evidential laws and rules). It is the duty of the judge to resolve questions of fact and thereafter apply the law to the resolved facts in his or her judgment.

### 3. WHAT ARE THE LIMITS FOR BRINGING CIVIL CLAIMS?

There are no monetary limits on bringing civil claims before superior courts of record in Nigeria.

In Lagos, by section 8 of the Limitation Law of Lagos, the limitation period for actions for the recovery of land by a state authority is 20 years, and by an individual, 12 years. The limitation period for a claim under seal (by deed) is 12 years from the date the cause of action accrued. Actions in contract and tort may not be brought after the expiration of six years from the date the cause of action accrued. The tort of negligence resulting in personal injury has a limitation period of three years.

Limitation may be prescribed in certain cases by specific statutes governing specialised areas such as maritime or aviation claims.

Most states in Nigeria have their own limitation laws but these are generally the same as those above.

### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

The Nigerian Evidence Act confers privilege on communications between counsel and client and this privilege is highly respected. The privilege covers communications between the solicitor and his/her client for the purpose of his/her employment including documents and advice rendered. The obligation not to disclose such information continues even after the employment between the solicitor and client has ceased. The client does not waive this privilege if he/she volunteers evidence during proceedings nor is it waived if any party calls the legal practitioner as a witness. The privilege is only waived if the client questions the legal practitioner during judicial proceedings about the privileged communication. The client cannot be compelled to disclose privileged communications unless he/she offers himself/herself as a witness in proceedings in which case he/she may be compelled to disclose any such communication as may appear to the court necessary to explain any evidence which he/she has given, but no other.

Legal privilege does not apply to communications between a solicitor and client made in furtherance of any illegal purpose.

### 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

The rules governing civil proceedings are not uniform across Nigeria. Every State High Court in Nigeria, Federal High Court and the National Industrial Court has its own civil procedure rules. Most states used the Lagos State Rules as a guide in drafting their rules. For present purposes, we focus on the Lagos State High Court Rules 2012 which are the operative rules of the court (HCLR).

#### Magistrates' Court claims

Civil proceedings are commenced in the Magistrates' Court by the lodgement of a plaint form at the court registry, which is subsequently served on the defendant. The claim must be within the monetary limits of the Magistrates' Court. In Lagos State, the current monetary limit for civil claims is NGN 10 million and for criminal matters NGN 1 million. These figures are significantly high due to the status of Lagos as Nigeria's commercial capital. The monetary limits are much lower in other states. The Magistrates' Courts are essentially courts of summary jurisdiction for effective disposal of relatively smaller claims.

#### High Court claims

In the High Court, civil actions are usually commenced by a writ of summons, originating summons, originating motion or petition. A writ of summons is the general method of commencing any civil action and therefore the most common. It can be used for any type of civil claim. An originating summons is used where there is no substantial dispute as to facts and the dispute is essentially one of law, such as the interpretation of a will, contractual document or statute. Proof in such matters is only by affidavit evidence, but if the affidavits evince conflicting facts, the court may convert the originating summons into an action commenced by a writ of summons and order pleadings so that the parties can call oral evidence to prove their respective positions. An originating motion is used where a statute specifically prescribes it as the appropriate method to commence the action, such as an action to set aside an arbitral award in the High Court.

For actions commenced by writ of summons, full details of the claim may be endorsed on the writ, or in a separate document called the “statement of claim” (order 16 of the High Court of Lagos State (Civil Procedure Rules) 2012 (HCLSCP 2012)). High Courts in Lagos and Abuja have adopted the “frontloading” system, requiring all civil proceedings commenced by writ of summons to be accompanied by the statement of claim, list of witnesses to be called at trial, written statements on oath, and copies of every document to be relied on at trial. Civil claims commenced by originating summons or originating motion are accompanied by an affidavit setting out the facts relied upon, all the exhibits to be relied on, and a written address in support of the application. These documents together are called the “originating processes”, and are subsequently served on the defendant, in accordance with the court’s rules (see generally order 3 of HCLSCP 2012).

A defendant who wishes to defend the claim is required to file a memorandum of appearance within the time specified in the originating process (usually 42 days from the time he/she is served, in Lagos State), a statement of defence (in answer to the statement of claim), supported by copies of documentary evidence, a list of witnesses and the witnesses’ written statement on oath.

### **Federal High Court claims**

In the Federal High Court, the rules on commencement of actions are similar to those of the Lagos High Courts. However, in the Federal High Court, a defendant who wishes to challenge the jurisdiction of the court must do so within 21 days of the service of the originating processes, otherwise his/her application will not be heard by the court until after trial. A defendant may also, in his/her defence, include a “counter-claim”. Further, the defendant in the Federal High Court has 30 days to enter an appearance and file a defence to the claim.

Where the claimant wishes to address any issues raised in the statement of defence, or a counter-claim, he/she may do so by way of a reply.

Pleadings are closed seven days after the service of the statement of defence or reply (if one is filed). In the Lagos High Court, within 14 days of the close of pleadings, the claimant must apply for the issuance of a case management conference notice. The conference must be completed within three months to afford the court and the parties time to consider matters to facilitate the speedy disposal of the action. It is not uncommon for a matter to be settled at the pre-trial conference stage (order 25 of the HCLR 2012).

Under order 11 of the Lagos High Court Rules, a claimant may apply for summary judgment where he believes sincerely that the defendant has no defence to the claim. In such a case, the originating processes are accompanied with an application for summary judgment. The affidavit in support of the application must state the grounds for the belief that there is no defence to the claim. The defendant is expected to file his/her statement of defence, witness deposition, documents to be relied upon and a counter affidavit to the application for summary judgment. The judge will hear the application expeditiously and if the application is successful, the claimant will be given judgment on the merits. If the application fails, the matter will proceed to a full hearing as the defendant will have established a defence to the claim.

## **6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?**

The rules encourage a great deal of pre-trial formalities which include the exchange of documents, interrogatories and the settlement of issues. The essence of the rules in this regard is to ease the entire trial process.

At the pre-trial stage, the claimant or the defendant may serve an application for the discovery on oath of any evidence that may be in the possession of the opposite party that would help the case of either the claimant or the defendant. This usually forms part of the agenda at the case management conference. Discovery may also be made by either party delivering to the other party documents that are in his/her possession (see generally order 26 HCLSCP 2012).

A party may also, in its pleadings, give the other party or parties a “notice to produce” a document that such a party wishes to rely on to prove its case.

As has already been stated, the parties are expected to file their witness statements on oath at the commencement stage of the proceedings. Consequently, at trial, witnesses are cross-examined, with the option of re-examination open to the party who called the witness. It is not uncommon for the judge to ask the witnesses questions during the trial.

Where a party engages an expert to prepare a report on its behalf on a specific aspect of the dispute prior to the commencement of the action, it must file the expert report together with the witness statement of such expert as part of his/her originating processes. If, however, the decision to call an expert witness is taken after the commencement of proceedings, the party must apply to court for leave to call an additional witness and the witness statement of the proposed expert is annexed to this application. In the event, however, that the expert is to be subpoenaed by a party, a witness statement is not required.

At trial the evidence of an expert is admitted like that of any other witness. Cross-examination is permitted. The expert may either produce a report or give his or her entire evidence orally.

## **7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?**

As stated in the preamble to the HCLR 2012, the objective of the rules is to foster the quick and effective dispensation of justice. Under order 25 HCLSCP 2012, the judge is responsible for managing the case. Parties are, however, encouraged to co-operate with the judge to work within the timetable. The rules also provide time periods within which to file and serve court processes. Adjournments by either side contribute to delay. Cases which go to trial can take anything from 18 months to three years, though a longer period can occur where any of the parties file an interlocutory appeal in the course of trial.

## **8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES’ INTEREST PENDING JUDGMENT?**

The court may, on its own or by application of a party, make orders with regard to disputed property pending judgment. Such orders depend largely on the nature of the property in dispute. Orders include preservation or interim custody of the subject matter of a

disputed contract, an order for the sale of perishable goods, an order for the preservation or inspection of property which is the subject of an action, or the appointment of a receiver in the case of debt recovery (see generally order 38 HCLS 2012).

Interim injunctions are available if the plaintiff establishes a case of real urgency showing that the *res* could be destroyed within a period of less than seven days. Judges are prepared to grant such applications on condition that the claimant provides a cross-undertaking in damages. Such injunctions, when granted, do not last more than seven days in Lagos State, and can be renewed for a further seven days but no more. In the Federal High Court, such interim orders could lapse by effluxion of time if: (a) the party affected by the order applies to have the order set aside and the court fails to hear the application within 14 days of it being filed; or (b) the court hears the application in time but fails to deliver a ruling within 14 days of the hearing of the application. The essence of these rules is to ensure that an interim injunction obtained without a hearing *inter partes* is not permitted to remain extant for long. In actual practice, the courts seldom grant interim relief on an *ex parte* basis.

## 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

Enforcement methods in relation to money judgments include:

- execution by a writ of *fiери facias*
- garnishee proceedings
- judgment summons

Enforcement of money judgments is not difficult if the judgment debtor has assets within the jurisdiction to satisfy the judgment debt. The most effective method of enforcing a money judgment is by garnishee proceedings, a procedure that permits the court to attach money belonging to the judgment debtor in any bank or financial institution in Nigeria. Once granted, the garnishee order is difficult to reverse and banks usually comply, provided there is money in the judgment debtor's accounts.

For the enforcement of judgments other than money judgments:

- the court may stay further proceedings until an interlocutory order is complied with
- if a judgment debtor has refused to execute a deed/instrument, a judgment creditor may prepare the deed/instrument in accordance with the terms of the judgment, and apply to the court for the deed/ instrument to be endorsed by the registrar of the court
- enforcement of a judgment for the delivery of goods may be achieved by way of a writ of delivery
- a judgment to cause a person to do or to refrain from doing an act may be enforced by an order for an injunction
- a non-monetary judgment may also be enforced by a writ of sequestration, although this is not very common

## 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

In Nigeria, costs follow the event, and the court has wide discretion to award and fix the amount of costs payable by the losing party. This discretion must, however, be exercised judicially and judiciously (see *Gabari v Ilori* [2002] 14 NWLR (Part 786) 103). Costs may not

be awarded against a losing party if it lost the case purely on technical grounds rather than on the facts, or counsel diligently prosecuted the case with commendable industry. The quantum of costs usually awarded at the end of hearing is very small compared to the actual cost incurred by the winning party.

An interesting provision introduced by order 49(2) HCLR 2012 is that where an offer of settlement made in the course of case management or ADR is rejected by a party and that party eventually succeeds at trial but is awarded sums not in excess of the offer of settlement made earlier, the winning party must pay the costs of the losing party from the time of the offer of settlement up to judgment. This provision is designed to encourage claimants to accept offers of settlement prior to trial.

By order 49(4) HCLR 2012 a foreign claimant (a claimant ordinarily outside the jurisdiction) may be ordered to give security for costs even if they are temporarily resident within the jurisdiction. The practice is that the resident defendant would apply to the court for such security, and it is within the court's discretion to make such an order.

## 11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

Appeals lie as of right or by leave of the court. Section 241(1) of the Constitution of the Federal Republic of Nigeria 1999 (the Constitution) provides circumstances where appeals lie as of right from the High Court to the Court of Appeal, and section 233(2) of the Constitution provides circumstances where appeals lie as of right to the Supreme Court.

Sections 242(2) and 241(2)(c) of the Constitution provide for circumstances where appeals lie to the Court of Appeal from the High Court by leave. Similarly, section 233(3) of the Constitution provides that appeals which are not listed under section 233(2) of the Constitution will be by leave.

The general rule is that an appeal does not act as a stay of execution of the judgment of the court below. Consequently, an appellant would, depending on the stage of the proceedings in the court below, need to apply to the court for an interim order pending appeal. These orders include a stay of execution, injunction, and an order for the stay of proceedings.

## 12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

The Constitution confers immunity on the President, Vice-President, Governor and Deputy Governor of a state within Nigeria from civil proceedings during their period in office. The jurisprudence of the Nigerian Courts supports absolute immunity enjoyed by States in respect of commercial transactions and non-commercial transactions, the latter only being the subject of sovereign immunity. It was held in *Trendtex Trading v Central Bank of Nigeria* [1977] QB 529 by the English Court of Appeal that for an organ of State to successfully establish that it enjoys sovereign immunity it must either: (i) show that it exists only as a department of State and has no separate juristic existence; or (ii) having a separate existence, the organisation is expressly declared by the local law to be a department of State; or (iii) that the legislation establishing the entity intended it to be part of the State so as to claim immunity.

This authority, though not binding on the Nigerian courts, remains persuasive and some High Court judges have made obiter statements in their judgments in support of this position.

### 13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

The Foreign Judgments (Reciprocal Enforcement) Act 1961 makes it possible to enforce foreign judgments in Nigeria which accord reciprocal treatment to judgments given in Nigeria. This is usually done by application by the judgment creditor for the registration of the judgment in a superior court in Nigeria with jurisdiction over the dispute. See generally sections 3 and 4 of the Foreign Judgments (Reciprocal Enforcement) Act 1961. Upon registration the judgment becomes a judgment of the Nigerian court and can be enforced by the Nigerian court using any of the enforcement procedures.

The application for registration must be brought within six years and the judgment must be a final judgment with no further right of appeal.

A court in Nigeria will refuse to register a foreign judgment of a reciprocating country where:

- it is not one of the types of judgment the Act allows for registration in Nigeria
- the courts of the country had no jurisdiction in the circumstances of the case
- the judgment debtor had not received prior notice of the proceedings in sufficient time to enable him/her to defend the proceedings and thus did not appear
- the judgment was obtained by fraud
- the enforcement of the proceedings would be contrary to public policy in Nigeria
- the rights under the judgment are not vested in the person by whom the registration was made

For judgments obtained from the United Kingdom, the Reciprocal Enforcement of Judgments Act 1958 permits the registration of such judgment if the application is brought within one year.

## ARBITRATION

### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

The Nigerian Arbitration and Conciliation Act (ACA) 1988 is based on the UNCITRAL Model Law and the ACA 1988 incorporates the UNCITRAL Arbitration Rules in the First Schedule to the Act.

One key modification is that under section 7 of the ACA, in the event that one party defaults or two arbitrators are unable to agree on a third arbitrator or a third party or an institution chosen by the parties as appointing authority fails to act in the appointment of arbitrators, the parties must approach a Nigerian High Court to appoint arbitrators.

Another key modification is in respect of the setting aside of an arbitral award. Sections 29 and 30 of the ACA recognise that an arbitral award can be set aside on grounds of excess of authority by the arbitrators or misconduct of the arbitrators or if the award

has been improperly procured. The terms "misconduct" and "improper procurement" are not defined by the ACA but judicial definitions offered by the appellate courts have shown that misconduct is particularly of wide import. The word misconduct covers a wide variety of acts of impropriety on the part of the arbitrators which are recognised by the courts as capable of rendering the arbitral proceedings void. So the court would usually refer to instances of misconduct or adopt identified grounds which constitute misconduct under the common law as grounds for setting aside an award.

The ACA also draws a distinction between domestic and international commercial arbitration. Part I of the ACA applies to all arbitrations; Part III contains additional provisions relating to international commercial arbitrations and conciliation. The definition of whether an arbitration is "international" is included in section 57 of the ACA. The parties are able to agree that any dispute arising from a commercial transaction shall be treated as an "international arbitration" notwithstanding the nature of the contract, or the place of business of the parties. An arbitration which is not an international commercial arbitration is a domestic arbitration.

It is also of note that in Lagos State, there is an arbitration law which came into force in 2009 which is applicable to all arbitrations with Lagos as its seat unless the parties otherwise agree. The Lagos Arbitration Law 2009 is also based on the UNCITRAL Model Law but is designed to amend the provisions of the federal arbitration law and make them more modern. The Lagos Arbitration Law retains a number of key provisions in the federal ACA such as appointment of arbitrators, stay of proceedings brought in defiance of an arbitration agreement, enforcement of arbitral awards and setting aside of awards. However, it amends some of these provisions and introduces a number of other provisions.

One key area is that, unlike the federal ACA, the Lagos Arbitration Law does not distinguish between local and international arbitration. Another key area is that the Lagos Court of Arbitration has replaced the conventional courts under the Lagos Arbitration Law. Further, the Lagos Arbitration Law confers powers on the court to grant interim relief in aid of arbitration.

### 15. WHAT ARE THE MAIN NATIONAL ARBITRATION INSTITUTIONS?

There are various national arbitration institutions in Nigeria, including the Chartered Institute of Arbitrators (UK) Nigeria Branch, the Chartered Institute of Arbitrators Nigeria, Construction Arbitrators of Nigeria and the Maritime Arbitrators of Nigeria. There is also the Lagos Centre for International Commercial Arbitration (LCICA) but this arbitration body is of limited scope and application.

In 2009, Lagos State established a Court of Arbitration, which was formally launched on 9 November 2012 during the Kuramo Conference held in Lagos. The Lagos Court of Arbitration is a private sector institution independent of regulation, direction or control by any branch of Government. It consists of the General Meeting, Board of Directors and a Secretariat, all of which are regulated by the enabling law, the Lagos Court of Arbitration Law 2009.

Each of the above bodies has members who play key roles in international commercial arbitration. In some cases, the members are nominated as arbitrators over specialised disputes. In other

cases, the President of any of the bodies may be designated as appointing authority by the parties and usually exercises such powers satisfactorily.

## 16. ARE THERE ANY RESTRICTIONS ON WHO MAY REPRESENT THE PARTIES TO AN ARBITRATION?

Under the ACA, there is no restriction on who may represent the parties in arbitration proceedings. Article 4 of the Arbitration Rules found in the First Schedule to the ACA provides that:

*"The parties may be represented or assisted by legal practitioners of their choice. The names and addresses of such legal practitioners must be communicated in writing to the other party; such communication must specify whether the appointment is being made for purposes of representation or assistance".*

The Nigerian courts have not interpreted article 4 but in at least one recent domestic arbitration the tribunal interpreted "legal practitioner" as restricting representation to persons qualified to practise in Nigeria (the same restriction applies to representation of parties in Nigerian litigation). However, it is doubtful whether the tribunal's interpretation will have effect on future tribunals given it is the decision of a single tribunal in a domestic arbitration which has not been tested on appeal – and that foreign counsel do represent parties in arbitrations regularly in Nigeria, albeit that this is in the capacity of co-counsel and does not extend to acting as advocate.

The Lagos Arbitration Law does not contain any specific provision on legal representation.

## 17. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

Under section 1(1) of the ACA every arbitration agreement must be in writing; that is, it must be contained either in a document signed by the parties, or in an exchange of letters, telex, telegrams or other means of communication which provide a record of the arbitration agreement, or in an exchange of points of claim and of defence in which the existence of an arbitration agreement is alleged by one party and denied by another.

Section 3 of the Lagos Arbitration Law also specifies that an arbitration agreement must be in writing, but adds: "*writing includes data that provides a record of the Arbitration Agreement or is otherwise accessible so as to be useable for subsequent reference*". Data as used in that definition is also defined in the section to include "*information generated, sent, received or stored by electronic, optical or similar means such as but not limited to Electronic Data Interchange (EDI), electronic mail, telegram, telex or telecopy*".

## 18. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?

Nigerian courts will stay litigation proceedings in favour of arbitration under the ACA if the court is satisfied that:

- there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement and
- the applicant was at the time when the action was commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration (section 5(2) ACA)

An application for a stay of proceedings must bring the existence of the arbitration clause to the notice of the court before the party takes any steps in the proceedings. See *Obembe v Wemabod Estates Ltd* [1977] 5 SC 129.

The courts are ready and willing to order a stay of proceedings irrespective of the seat of the arbitration. The major concern for the court is that there must be a valid and binding arbitration agreement between the parties covering the dispute. The courts also require that a party requesting a stay must satisfactorily show its readiness and willingness to do all that is necessary for the conduct of the arbitration. These steps include taking steps to constitute the arbitration panel after giving a notice of arbitration. See the case of *M.V. Panormos Bay v. Olam (Nig.) Plc* (2004) 5 NWLR (Pt. 865) p 1.

The Lagos Arbitration Law provisions for stay of proceedings are similar to those of the ACA but add that "*where a Court makes an order of stay of proceedings under subsection (1) of this Section, the Court may, for the purpose of preserving the rights of parties, make such interim or supplementary orders as may be necessary*" (section 6(3)).

## 19. IF THE ARBITRATION AGREEMENT AND ANY RELEVANT RULES ARE SILENT, HOW MANY ARBITRATORS WILL BE APPOINTED, AND WHO IS THE APPOINTING AUTHORITY?

If an arbitration agreement is silent, the number of arbitrators under the ACA is three and under section 7(3) of the Lagos Arbitration Law, a sole arbitrator will be appointed where the agreement is silent as to the number of arbitrators.

Under the ACA, each party will appoint one arbitrator and both arbitrators will appoint the third, who will be the chair of the tribunal. However, if one of the parties, upon receipt of a request to appoint an arbitrator, fails to do so within 30 days, or if the two arbitrators fail to appoint a third arbitrator within 30 days of the appointment of the second arbitrator, or an appointing authority agreed by the parties fail to act, the appointment is made by the court on application of either one of the parties (section 7 ACA).

Under the Lagos Arbitration Law, the court with the power of appointment in the event of failure of the appointing procedure agreed by the parties or a deadlock shall be the Lagos Court of Arbitration.

## 20. WHAT RIGHTS ARE THERE TO CHALLENGE THE APPOINTMENT OF AN ARBITRATOR?

Either of the parties to an arbitration agreement may challenge the appointment of an arbitrator:

- if circumstances exist that give rise to justifiable doubts as to his/her impartiality or independence or
- if he/she does not possess the qualifications agreed by parties (see generally sections 8 and 45(3) of the ACA)

The procedure to challenge an arbitrator should be determined by the parties. However, if this is not the case, a party who intends to challenge must within 15 days of becoming aware of the constitution of the arbitral tribunal or becoming aware that there are justifiable doubts as to the independence or impartiality of the arbitrator, send to the arbitral tribunal a written statement of the reasons for his/her challenge. Unless the challenged arbitrator withdraws or the other party agrees to the challenge, the arbitral tribunal decides on the

challenge. This decision can be challenged on appeal to the High Court. The procedure is the same under the Lagos Arbitration Law.

## **21. DOES THE DOMESTIC LAW CONTAIN SUBSTANTIVE REQUIREMENTS FOR THE PROCEDURE TO BE FOLLOWED?**

The ACA provides the procedure the parties to an arbitration agreement are to follow in sections 14 - 28. The procedure is not mandatory as parties may agree on a different set of rules. This procedure is subject to section 24(2) of the ACA 1988 which gives the presiding arbitrator, on the authority of the parties, power to decide questions relating to the procedure to be followed at the arbitral proceedings. The ACA also includes the requirement for the arbitral tribunal to conduct the arbitration in the manner it considers appropriate, provided that the parties are treated equally, and each party is given a full opportunity to present its case. The tribunal may decide to conduct the proceedings by way of an oral hearing. Alternatively, the tribunal may determine the matter on the basis of documents and other materials. If the latter is chosen, the rules contain substantive requirements for the procedure to be followed.

Section 31 of the Lagos Arbitration Law, however, provides that except as otherwise agreed by the parties, the arbitral proceedings shall be conducted in accordance with the procedure contained in the Arbitration Rules of the Lagos Court of Arbitration (the Rules) in force from time to time. Where the Rules are silent, the arbitral tribunal is permitted to conduct the arbitration in any manner it considers appropriate so as to ensure a fair hearing.

## **22. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED INSIDE THE JURISDICTION?**

The general rule is that the court must not intervene during arbitration (section 34 of the ACA, section 59 of Lagos Arbitration Law) except as permitted under those enactments. The limited instances in which the court can intervene include the appointment of arbitrators, to compel the attendance of a witness, to bring a prisoner to examination, and to set aside an award in certain circumstances upon an application by either party.

It should be noted that in the case of *Statoil (Nigeria) Ltd & Anor v Federal Inland Revenue Service & Anor* (2014) LPELR - 231444(CA), the Court of Appeal Abuja Division held that a third party non-signatory to the arbitration agreement had the right to intervene in an ongoing arbitration with a view to stopping the continuation of the process, where the third party was of the opinion that his interest was likely to be affected by the outcome of the arbitration proceedings. However, this decision was determined solely on the basis of public policy regarding the Federal Inland Revenue Service's statutory functions (that is, the conflict between the arbitral agreement and the Nigerian Constitution and tax legislation), in line with previous case law suggesting that taxation matters are not arbitrable. It has not been tested on appeal and is doubtful as laying down any general proposition of law outside the taxation context.

There is no specific statutory provision that permits the courts to grant an injunction in aid of arbitration. Parties who require an interim injunction must apply to the arbitral tribunal itself in accordance with article 26 of the Rules. If the tribunal has not been constituted, however, the court could be persuaded in very urgent situations to grant interim injunctions preserving the *res pending* arbitration. Under section 21 of the Lagos Arbitration Law, the

court is empowered to grant interim reliefs in aid of arbitration.

Where an application is made to the High Court for an injunction in aid of arbitration, the court could be persuaded to grant the injunction under its general powers in section 18 of the High Court Law to grant injunctions to preserve the subject matter of litigation. Instances where the courts have exercised the power under section 18 are rare and are mostly unreported decisions of the High Courts which were never challenged on appeal.

An injunction granted by the tribunal may be enforced by application to the court to aid enforcement but there is no clear authority as to whether or not the court will grant such orders, except perhaps if they are issued in the form of a partial final award. Section 29 of the Lagos Arbitration Law specifically empowers the High Court of Lagos State to recognise and enforce interim measures issued by an arbitral tribunal. In doing so, the court may require appropriate security to be furnished by the party seeking to enforce the interim measure.

## **23. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?**

Nigerian courts cannot intervene in arbitrations with a seat outside the jurisdiction, except to grant a stay of the substantive matter before it in favour of arbitration. Nigerian courts are very willing to support arbitration and recent appellate decisions have leaned towards encouraging arbitration. Whether or not a stay of proceedings commenced contrary to an arbitration agreement will be granted, however, depends on the facts and circumstances of each case. The general rule is that a stay will be granted once the applicant can satisfy the court that there is a valid arbitration clause; that it has not taken steps in the proceedings so as to disentitle it from obtaining a stay; that it is willing and able to take part in the arbitration; and that there is no feature in the case (such as an allegation of crime) which makes the matter unsuitable for arbitration.

It is possible to obtain an anti-suit injunction restraining foreign proceedings from taking place in breach of an exclusive jurisdiction clause in favour of the Nigerian courts. However, it is unclear whether the courts will grant injunctive relief in support of a foreign arbitration, including, for example, to ensure the preservation of assets or evidence within Nigeria. There is no authority for such a proposition.

The jurisdiction of the Lagos Court of Arbitration is only exercised in respect of arbitrations with Lagos as their seat.

## **24. DO ARBITRATORS HAVE POWERS TO GRANT INTERIM OR CONSERVATORY RELIEF?**

By article 26 of the Rules, at the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

It is at the discretion of the arbitral tribunal to require security for costs for interim measures. Such interim measures could be enforced through the court, if necessary. As stated earlier, it is possible to enforce such orders if they are rendered in the form of a partial final award.



Under the Lagos Arbitration Law, an arbitral tribunal is empowered to grant interim relief, which may be enforced through the High Court.

## 25. WHEN AND IN WHAT FORM MUST THE AWARD BE DELIVERED?

Section 26 of the ACA covers the form and content of the award. The award must be in writing and signed by the arbitrator(s). In addition, the award must state the reasons upon which it is based, unless the parties agree otherwise, the date it was made, and the place of the arbitration as agreed or determined (see generally section 26 of the ACA). The award must be rendered in the language of the arbitration, usually English.

If the parties to the arbitration agreement settle the dispute during the arbitral proceedings, the tribunal can, if requested by the parties and not challenged by the tribunal, make the settlement in the form of an arbitral award on agreed terms. Consequently, the arbitral award can be made during and after the arbitration proceedings (section 25 of the ACA).

The Lagos Arbitration Law contains similar provisions.

## 26. CAN A SUCCESSFUL PARTY RECOVER ITS COSTS?

Under article 40 of the Arbitration Rules, the costs of the arbitration are usually born by the unsuccessful party. Notwithstanding, the arbitral tribunal has a discretion and may apportion such costs between the parties if it determines to be reasonable.

## 27. ON WHAT GROUNDS CAN AN AWARD FROM AN ARBITRATION SEATED IN THE JURISDICTION BE APPEALED TO THE COURT?

A party cannot "appeal" an arbitral award. A party can only apply to have the award recognised and enforced or set aside as the case may be. An aggrieved party can have the award set aside by applying to the court to set aside the award within three months of the date of the award.

The court will set aside an arbitral award if the aggrieved party to the award can furnish the court with evidence of misconduct on the part of the arbitrator(s) (section 30); can demonstrate that there exist error(s) of law on the face of the award (see *Baker Marine (Nig) Ltd v Chevron (Nig) Ltd* [2000] 12 NWLR (Pt 681) 404-405); or can satisfy the provisions of the ACA for setting aside an arbitral award in section 29. Section 29 provides that an award may be set aside if it contains decisions on matters which are beyond the scope of the submission to arbitration. Please note that the common law rule which permits errors of law on the face of an award as a ground for setting aside an award remains applicable in Nigeria, as there is yet no statutory exclusion of this ground.

Section 53 of the Lagos Arbitration Law contains similar provisions for setting aside an award.

## 28. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

There is no provision for "appeal" to the local court from a foreign arbitral award.

However, an application can be made to the court for recognition of an award made in a foreign jurisdiction. Upon such application, the adverse party may resist recognition.

## 29. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF: (I) AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION AND (II) DOMESTIC AWARDS?

Nigeria is a party to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

Foreign arbitral awards are recognised in Nigeria only if the foreign country is a party to the New York Convention (as set out in the second schedule to the ACA), and the contracting country has reciprocal legislation recognising the enforcement of arbitral awards made in Nigeria (see section 54 of the ACA).

The procedure for recognition of a foreign award is the same as for domestic awards. The party seeking to enforce the award must furnish the court with a duly authenticated original award or a certified copy; the original arbitration agreement or a certified copy thereof and a translation of the award into English language if the award was delivered in a different language.

A party to a domestic arbitral award can apply to the court in writing, under section 31 of the ACA, to have the award recognised and enforced. Any party who wishes to rely on the award must supply the authenticated original award or certified copy of it, and the original arbitration agreement. Where the court recognises the award, a party may, by the leave of court, enforce it in the same manner as a judgment or order to the same effect.

## 30. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

Yes. Foreign awards from reciprocating New York Convention territories are readily enforceable provided they contain an enforceable element such as the payment of a sum of money. If the award is merely declaratory in nature, the successful party can bring an action in court using the award as a cause of action.

## ALTERNATIVE DISPUTE RESOLUTION

### 31. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

In matters pending before Nigeria's High Courts, particularly the Lagos High Court, at the case management conference stage, parties are required to consider alternative means of settling the issues between them and where they are desirous of doing so, the court may refer them to an appropriate ADR centre. Under order 3(11) of the HCLR 2012, it is now mandatory to attempt ADR in cases commenced after 31 December 2012. The provision states: "all originating processes shall upon acceptance for filing by the Registry be screened for suitability for ADR and referred to the Lagos Multi Door Court House or other appropriate ADR institutions or practitioners in accordance with the Practice Directions that shall from time to time be issued by the Chief Judge of Lagos State".

There is no requirement to consider or submit to ADR in arbitration.

## REFORMS

### 32. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

After Lagos State pioneered the enactment of the “frontloading” system in its High Court of Lagos State (Civil Procedure) Rules 2004, other states of Nigeria have reviewed their own Civil Procedure Rules; notable amongst these is Kaduna State, which included the frontloading system in its Kaduna State High Court (Civil Procedure) Rules of 2007. Rivers State, Imo State and a few other states have all adopted the frontloading system initiated by Lagos State.

Another reform worthy of note is the “fast-track” procedure, by which the High Courts in Lagos will accord a certain level of urgency in the hearing of monetary claims above NGN 100 million.

Lagos State has recently given more impetus to the provisions of its rules which encourage the parties to pursue alternative dispute resolution mechanisms such as arbitration and mediation.

The Federal High Court amended both its substantive rules in 2009 and the Admiralty Jurisdiction Rules in 2011.

There is a new government in Nigeria and its expected that there will be justice sector reforms proposed soon.

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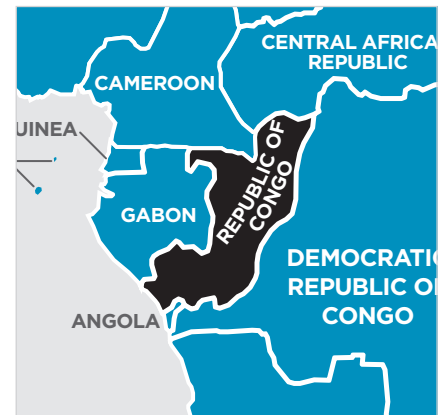
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# REPUBLIC OF CONGO



## INTRODUCTION

The Republic of Congo is a civil law country. The legal system is based on the Constitution of 25 October 2015 and Law No. 022-92 of 20 August 1992 relating to the organisation of judicial power in the Republic of Congo, supplemented and amended by Law No 19-99 of 15 August 1999.

The Republic of Congo is also a member of CEMAC and OHADA. The Supreme Court has ultimate jurisdiction for matters that do not fall within the scope of these inter-governmental organisations.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

The legal profession is governed by Law No 026-92 of 20 August 1992 relating to the organisation of the legal profession. In order to practise as a lawyer in the Republic of Congo, the person must be admitted to the Congo Bar Council and meet certain conditions:

- have Congolese nationality (subject to any reciprocity agreement)
- have a master's degree in law or equivalent legal diploma and a diploma from the *Ecole Nationale d'Administration et de Magistrature*

The profession is organised by the Bar Council, which ensures compliance with the rules governing the profession and takes any necessary disciplinary measures. Lawyers admitted to the Bar may appear before any court, except for the Supreme Court. They may practise either individually or in a practice structure.

There is no distinction between solicitor (*avocat conseil*) and barrister (*avocat plaidant*).

Foreign lawyers may only plead in the Republic of Congo to the extent that their country of origin has signed a reciprocity agreement allowing Congolese lawyers likewise to plead in such country.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The Republic of Congo court system is organised as a three-tier pyramid:

- the first instance courts:
  - the *tribunaux d'instance*, which hear all personal actions and actions relating to personal and real property, where the sums concerned are no more than CFA 1 million in capital and CFA 300,000 in income, rental and leasing
  - the *tribunaux de grande instance*, which hear at first instance all civil matters which cannot be dealt with by the *tribunaux d'instance*
  - other special courts (commercial courts, employment courts, administrative courts etc)
- four Appeal Courts
- the Supreme Court

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

Time limits vary depending on the type of action and the parties involved:

- the ordinary limitation period for bringing an action for damages in contractual matters is 30 years
- the ordinary limitation period for bringing an action for damages in non-contractual matters is 10 years
- the limitation period for claims between merchants is five years

Special limitation periods apply for certain types of actions; for example, actions relating to commercial sales are time-barred after two years, real estate after 10 years, claims for wages after one year and actions for debt recovery after three years.

Time limits are matters of public policy and cannot be adjusted by contract. Time limits are suspended when a summons is served, an action is brought, or by court order.

### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

Lawyers are strictly bound by an obligation of confidentiality, both when giving advice and defending a client.

Any breach of this obligation may incur civil liability.

Congolese law does not expressly prohibit a client from releasing its lawyers from this obligation.

## 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

Civil actions are started in the courts by written petition (*requête*), summons (*assignation*), or even by an oral statement made to the registrar (especially in family matters).

The period for appearance is 30 days if the defendant lives in the Republic of Congo and three months if the defendant is not domiciled or resident in the Republic of Congo. These time periods do not apply in the case of emergency procedures (such as summary applications) where the court, in principle, deliberates for a period of eight days.

The defendant must file its written submissions in defence on the day of the hearing (except for criminal law matters) and, the court receives them during the hearing.

There are mandatory conciliation procedures, in particular for opposition to orders to pay, and in divorce and employment disputes.

## 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

In civil matters and for all courts, evidence can be produced in writing, by witness testimony, affidavits, bailiff reports etc.

There is no equivalent of "disclosure" in Congolese law.

A party can request the court to order the other party to produce evidence.

The request to appoint an expert may be made by the parties or automatically by the court. The court appoints an expert for a specific mission, with a deadline for filing the report. Evidence must be communicated to the other party as and when the report conclusions are finalised.

At first instance, new evidence may be produced, provided that the case has not been adjourned for deliberation. New evidence can be produced on appeal. However, no new claims can be made. At the Supreme Court level, new exhibits may be produced if it can be proved that they were not available at the time of the first appeal.

## 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

The parties do not control the procedure. Once the proceedings have commenced, the timetable is set at the discretion of the court and, in practice, this depends on various factors, such as the complexity of the case, the degree of urgency and the caseload of the court. Nevertheless, the parties may end the proceedings at any time by mutual agreement.

The average length of proceedings is at least six months for first instance courts and appeal courts, and one year for the Supreme Court. Given the factors described above, these periods may, however, be much longer.

## 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

There are emergency procedures in the Republic of Congo which protect the interests of the parties whilst waiting for a decision on the merits of the case:

- *ordonnance sur requête*: the courts may order any protection or investigation measures and, more generally, all emergency measures which do not prejudice third party rights
- *référé*: in all emergency circumstances where speed is essential, or where there are serious difficulties in enforcing a decision or other enforcement order. This proceeding does not involve any ruling on the merits of the case
- *saisie-conservatoire*: under the same conditions as the *référé* before the first instance or motions judge (in civil matters, the presiding judge of the *Tribunal d'instance* or *grande instance*; in commercial matters, the presiding judge of the *Tribunal de commerce*)

## 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

Enforcement measures available under Congolese law are those provided for in the OHADA Uniform Act Organising Simplified Recovery Procedures and Measures of Execution. The principal measures are as follows:

- seizure for sale (*saisie-vente*): "any creditor in possession of a writ of execution showing a debt due for immediate payment may proceed to the seizure and sale of the tangible property belonging to his debtor in order to be paid from the sale price"
- seizure-award of debts (*saisie-attribution de créances*): "any creditor in possession of a writ of execution showing a debt due for immediate payment may [procure the seizure] in the hands of a third party [of] the debt owed by his debtor in the form of a sum of money"
- penalty payment (*astreinte*): creditors who obtain an injunction from a court ordering their debtors to accomplish a particular task or to cease and desist may ask the court to team the injunction with a penalty for non-compliance, payable by day/week/month
- real property foreclosure (*saisie immobilière*): this enforcement mechanism is applied as a last resort when the seizure of personal property or of debts was unfruitful or insufficient. The insufficiency must be authenticated by a bailiff (*huissier de justice*), and only then may the creditor initiate a *saisie immobilière*

The court may grant a period of grace to the unsuccessful party, if this is requested.

## 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

The court routinely orders the parties to pay costs. It should be noted that both parties may be bound to bear legal fees if their case is rejected.

Costs cover lawyers' and bailiffs' fees, and all other fees incurred in the proceedings.

Lawyers' fees are estimated by the court during the costs hearing. Fees ordered to be reimbursed are in practice close to actual fees incurred.

Foreign claimants may be obliged to provide guarantees for the payment of court costs. A *judicatum solvi* guarantee may be required for nationals of countries that do not have a legal co-operation agreement with the Republic of Congo.

### 11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

There is a right to appeal. Parties have one month to appeal against a first instance decision. This period starts from the date of the decision, if it is adversarial, or from the date of notification if by default. The appeal is made by the unsuccessful party by letter or oral statement transcribed into a register held by the registrar. No new claim can be made on appeal, except in the case of a claim for damages or where the new claim is an argument in defence against the main claim. An appeal from a first instance decision suspends the enforcement of the decision, unless the first court has ordered immediate enforcement or if it concerns the enforcement of an order.

The appeal has a devolutionary effect. The first court is divested of responsibility in favour of the appeal court, which can re-hear the case.

An appeal to the Supreme Court considers points of law and not of fact. The appeal to the Supreme Court does not suspend enforcement. If the appeal is successful, the case is remanded to a new appeal court for re-hearing. In principle, the Supreme Court decision is not binding on the appeal court. In practice, however, the appeal court frequently follows the Supreme Court decision.

### 12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

Proceedings can be brought against the Government or public authorities before the judicial or administrative courts. They do, however, benefit from immunity from enforcement.

State-owned companies do not benefit from immunity.

In terms of foreign entities, any jurisdictional immunity rights that can be applied derive from international agreements on diplomatic or consular relationships.

### 13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

In order to enforce foreign decisions, a request must be made to the enforcement judge and the decision in question must be final.

The court with jurisdiction to grant an enforcement order is the *Tribunal de grande instance*.

Law No 05/75 of 12 March 1975 relating to the ratification of the legal co-operation agreement between Congo and France provides as follows:

- the decision must have been made by a court with jurisdiction, in accordance with the conflict of law rules of the State in question
- according to the law of the State in which it was made, the decision must no longer be open to appeal
- the parties must have been properly summonsed to appear, were represented or declared in default
- the decision must not be contrary to public policy in the State in which it is enforced

- there must not have been any decision made in the Republic of Congo concerning the same parties, the same grounds and concerning the same facts and purpose
- there must not have been any decision made or pending in a State which satisfies the necessary recognition conditions in the Republic of Congo concerning the same parties

The same conditions must be met even if the decision was made in a State which has not entered into a legal co-operation agreement with the Republic of Congo.

In practice, it is easy to obtain enforcement of a foreign decision in the Republic of Congo.

## ARBITRATION

### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

The Republic of Congo is a Member State of OHADA (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires* — Organisation for the Harmonisation of Business Law in Africa). The OHADA Treaty was first signed on 17 October 1993. Under the OHADA Treaty, the Council of Ministers adopted "uniform acts" that are directly applicable and enforceable in each of the Member States. Arbitration in OHADA Member States is governed by the Uniform Act on Arbitration within the Framework of the OHADA Treaty, which was adopted on 11 March 1999 and came into force on 11 June 1999 (the Uniform Act).

The Uniform Act is not based on the UNCITRAL Model Law. It was drafted separately, but nevertheless adopts the fundamental principles of international commercial arbitration and the essential characteristics of the Model Law.

The Uniform Act applies to both national and international arbitration and governs all arbitration proceedings seated in a Member State.

Prior to the adoption of the Uniform Act, arbitration law was governed by the provisions of the French Civil Code relating to arbitration and whose pre-independence (15 August 1960) provisions were applicable in the Republic of Congo.

One of the most important characteristics of OHADA arbitration is the Common Court of Justice and Arbitration (the CCJA) (*Cour commune de justice et d'arbitrage*) which acts as both a permanent arbitration tribunal and the supreme court of arbitration for all OHADA Member States.

### 15. WHAT ARE THE MAIN NATIONAL ARBITRATION INSTITUTIONS?

The Republic of Congo has created a permanent arbitration centre, the "*Centre de Médiation et d'Arbitrage auprès des Chambres Consulaires du Congo*" (CEMACO), whose mission is to organise and administer conciliation and arbitration procedures in disputes governed by an arbitration clause, an arbitration agreement or a mediation or conciliation agreement.

CEMACO's role is to promote alternative dispute resolution methods and to improve the business environment. This institution was inaugurated in the Republic of Congo (Pointe Noire) in November 2015.

At the supranational level, the CCJA, which was created by the OHADA Treaty and is based in Abidjan, in Côte d'Ivoire, can also hear arbitration matters. The CCJA, which is also a supreme court, acts as an arbitration centre and administers proceedings governed by the CCJA Rules of Arbitration. The CCJA is different from other arbitration centres as it is not a private institution but was created and organised by OHADA.

For the CCJA Rules to be applicable, article 21 of the OHADA Treaty stipulates that all or part of the contract must be performed within the territory of one or more Member States, or that at least one of the parties must be domiciled or usually reside in a Member State. According to legal authors, it should also be possible for the parties to refer a dispute to arbitration under the CCJA Rules even if these conditions are not met, if they have provided for this possibility in their arbitration agreement.

#### **16. ARE THERE ANY RESTRICTIONS ON WHO MAY REPRESENT THE PARTIES TO AN ARBITRATION?**

The Uniform Act does not set any restrictions on persons who can represent parties in an arbitration matter. They are entitled but not required to instruct a lawyer (article 20 of the Uniform Act).

There are no particular restrictions on parties being represented by foreign lawyers, provided that they comply with local rules.

#### **17. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?**

Article 3 of the Uniform Act, states that the arbitration agreement must be made in writing or by any other means which provides proof of the existence of the clause. No particular format is required. The Uniform Act also provides that contracts can refer to an arbitration agreement contained in a different document.

In practice, the court will above all seek to identify the intention of the parties, without necessarily referring to a State law.

#### **18. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?**

Article 13 of the Uniform Act provides that national courts must decline jurisdiction where there is a valid arbitration agreement and where the arbitral tribunal has not yet been composed, save where the arbitration agreement is "manifestly void". The court cannot decline jurisdiction at its own discretion.

If the arbitral tribunal has already been composed, the national court must decline jurisdiction at the request of a party.

This rule also applies when arbitration takes place in a State that is not an OHADA Member State.

Parties governed by an arbitration agreement have the option of referring a matter to a national court to obtain interim or conservatory measures that do not require a review of the case on the merits, in circumstances that have been "recognised and reasoned" as urgent or where the measure must be performed in a State that is not party to OHADA.

When arbitration takes place in an OHADA Member State, national courts can also intervene in very limited circumstances with a view to assisting the arbitration process (See questions 21 and 22 below).

If arbitration takes place in a State that is not an OHADA Member State, it is possible to refer the matter to the Congolese courts if the arbitration award is to be performed in the Republic of Congo and if there is an interest in doing so.

#### **19. IF THE ARBITRATION AGREEMENT AND ANY RELEVANT RULES ARE SILENT, HOW MANY ARBITRATORS WILL BE APPOINTED, AND WHO IS THE APPOINTING AUTHORITY?**

The Uniform Act does not stipulate a specific number of arbitrators if the arbitration agreement is silent on this point. However, it does provide that an arbitral tribunal must have either a sole arbitrator or three arbitrators.

If the parties are unable to appoint one or more arbitrators, they will be appointed by the presiding judge of the *Tribunal de grande instance* in civil matters and by the presiding judge of the *Tribunal de commerce* in commercial matters.

Both the CEMAC Regulation and the Uniform Act provide that the dispute should be settled by one or three arbitrators.

#### **20. WHAT RIGHTS ARE THERE TO CHALLENGE THE APPOINTMENT OF AN ARBITRATOR?**

Article 7 of the Uniform Act, as well as article 12 of CEMACO's arbitration rules, set out the rules on challenging an arbitrator.

Pursuant to the Uniform Act, arbitrators must notify the parties of "any circumstance about him/herself" for which they may be challenged. Any disputes will be settled by the presiding judge of the *Tribunal de première instance*, as was the case before the Uniform Act came into force, save where the parties have provided for a different procedure for challenging arbitrators. Decisions cannot be appealed.

Arbitrators may only be challenged for reasons that come to light after their appointment.

Article 12.3 of the CEMACO arbitration rules specifies that the party seeking recusal must, under penalty of waiving its right to do so, submit its motion seeking recusal either within 15 days of its receipt of the appointment or confirmation of the arbitrator by the Centre, or within 15 days of the date on which that party was informed of the facts and circumstances that it alleges in support of his challenge, if this date is later than the date of receipt of such notification.

#### **21. DOES THE DOMESTIC LAW CONTAIN SUBSTANTIVE REQUIREMENTS FOR THE PROCEDURE TO BE FOLLOWED?**

The Uniform Act requires parties to receive equal treatment and to have every opportunity to exercise their rights (article 9); arbitrators may not base their decisions on reasons considered at their own discretion without first allowing parties to submit observations (article 14).

Article 18 of the Uniform Act provides that the deliberations must be kept secret.

The Uniform Act also provides that the duration of the arbitration may not exceed six months from the date upon which the last arbitrator accepts the terms, save where extended by agreement of the parties or where an extension is granted by the presiding judge of the *Tribunal de grande instance* in civil matters or the

presiding judge of the *Tribunal de commerce* in commercial matters (article 12).

There are no other mandatory provisions under national law relating to arbitration.

## 22. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED INSIDE THE JURISDICTION?

In principle, where there is an arbitration agreement, the national courts cannot intervene in a dispute until the award has been made.

Nevertheless, parties may consult the court with jurisdiction in the Republic of Congo in the following circumstances:

- to resolve difficulties encountered with composing the arbitral tribunal, to appoint the sole arbitrator or the third arbitrator (articles 5 and 8)
- to rule on challenges against arbitrators where the parties have not provided for a different procedure (article 7)
- to extend the deadline for the conclusion of the arbitration where there is no agreement between the parties to do so, at the request of a party or the arbitral tribunal (article 12)
- to order interim or protective measures when urgently necessary ("recognised and reasoned" circumstances) or when the measure would be performed in a non-OHADA State, provided the measures do not require a review of the case on the merits (article 13)
- to provide assistance with the administration of evidence, at the request of the arbitral tribunal (article 14)

## 23. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?

In principle, national courts cannot intervene in an arbitral tribunal seated outside their jurisdiction where there is an arbitration agreement, as indicated above. In addition, all measures relating to the composition of the arbitral tribunal and conduct of the proceedings fall under the jurisdiction of the courts of the country in which the arbitral tribunal is seated.

However, it is possible for national courts other than the competent court of the country in which the arbitration is seated to intervene to order conservatory or interim relief under the conditions defined above in question 18 (article 13').

## 24. DO ARBITRATORS HAVE POWERS TO GRANT INTERIM OR CONSERVATORY RELIEF?

Although this matter is not dealt with directly in the Uniform Act, legal authors generally agree that it is possible for arbitrators to order interim or protective measures, save where the parties have agreed otherwise.

## 25. WHEN AND IN WHAT FORM MUST THE AWARD BE DELIVERED?

Unless otherwise agreed by the parties, arbitration awards must be made within six months of the date on which all of the arbitrators have accepted their appointment. This term can be extended by agreement between the parties or by the *Tribunal de grande instance* for civil matters, and the *Tribunal de commerce* in commercial matters, following a request made by a party or by the arbitral tribunal (article 12).

Parties can set special requirements for awards. Failing this, awards are made on a majority vote, and must be reasoned. They must be signed by at least two of the three arbitrators.

## 26. CAN A SUCCESSFUL PARTY RECOVER ITS COSTS?

The Uniform Act contains no provisions on this.

Where arbitration is conducted under the aegis of the CCJA, the arbitrator is empowered to award costs.

## 27. ON WHAT GROUNDS CAN AN AWARD FROM AN ARBITRATION SEATED IN THE JURISDICTION BE APPEALED TO THE COURT?

The only remedy against an arbitration award is an application to set aside the award brought before the presiding judge of the *Tribunal de grande instance* (in the Member State in which it was made), within one month from the date of notification of an enforceable award (articles 25 and 27).

The circumstances in which an application to set aside can be brought are as follows (article 26):

- the arbitral tribunal ruled without an arbitration agreement or with respect to an invalid or expired agreement
- the arbitral tribunal was not properly composed
- the arbitral tribunal did not rule in compliance with the terms of arbitration
- there was no due process
- the arbitral tribunal breached a public policy rule of the OHADA Member States
- there are no reasons for the award

Bringing an application to set aside an arbitration award postpones enforcement, unless the arbitral tribunal ordered immediate enforcement. The decision can only be appealed to the CCJA (articles 25 and 28).

This is the only remedy available to parties before a national court. The other remedies, namely third party opposition and the application for a revision of the award, must be submitted to the arbitral tribunal (article 25).

## 28. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

A foreign arbitration award cannot be appealed to a local court.

## 29. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF: (I) AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION AND (II) DOMESTIC AWARDS?

An arbitration award is final immediately on being made and must therefore be performed in good faith by the parties, once it has been notified. If it is not performed, then an enforcement order must be obtained.

To enforce awards made within an OHADA Member State, the Uniform Act requires the parties to obtain the recognition of the award from the competent court in that Member State (article 30). In the Republic of Congo, this is the presiding judge of the *Tribunal de grande instance*.

The enforcement procedure requires the production of the original arbitration award, together with the arbitration agreement or copies of these documents meeting the necessary authentication conditions and, where necessary, a sworn translation into French (article 31).

Decisions refusing to recognise an arbitration award can be appealed to the CCJA. However, decisions granting recognition cannot be appealed (article 32).

Awards rendered in an OHADA Member State are recognised in other OHADA Member States under the conditions set down by any applicable international agreements or, failing this, under the conditions set down by the Uniform Act.<sup>2</sup> The Republic of Congo is not a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

For a foreign arbitral award to be recognised and enforced, it is necessary to produce:

- the foreign decision
- documents supporting the initial claims
- the recognition request (*exequatur*)

It should also be noted that in such a claim any appellate proceedings do not have the effect of suspending enforcement of the award except when the appeal is premised upon an enforcement defence.

### 30. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

Once an enforcement order has been obtained, the foreign award will be treated in the same way as a local decision, following the same rules for enforcement.

In practice, judges readily grant *exequatur* when the above-mentioned requirements are met.

## ALTERNATIVE DISPUTE RESOLUTION

### 31. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

There are mandatory conciliation procedures, in particular for opposition to orders to pay, and in divorce and employment disputes.

## REFORMS

### 32. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

To the best of our knowledge, there are no plans to make any significant reforms of civil or commercial procedure in the near future.

## FOOTNOTES:

1. This is the only article that refers to "*une jurisdiction*" instead of "*juge compétent dans l'Etat-partie*." Moreover, it concerns interim or protective measures to be performed in a State that is not an OHADA Member State.
2. Article 34 of the Uniform Act does not expressly refer to foreign awards. However, legal authors agree that it does apply to foreign awards. It would, however, be better to check this with a local expert.

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# RWANDA



## INTRODUCTION

The Rwandan legal system is based on the civil law system of its former coloniser, Belgium. In an attempt to integrate into the Eastern African community, it is gradually moving towards a common law system. Sources of law include the 2003 Constitution, statutes of Parliament, subsidiary legislation, organic rules of law, equity and customary law.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

Lawyers in Rwanda practise as both barristers and solicitors. Lawyers provide legal services directly to clients and conduct proceedings in the courts. Lawyers have rights of audience before all trial courts and tribunals in Rwanda.

To become a lawyer, one must complete academic and professional training. The academic stage involves obtaining a degree in law. The professional stage involves undertaking two years' professional training at a law firm under the supervision of a lawyer with at least five years' experience. At the end of the programme, and after passing an exam, qualifying trainees are awarded a qualifying certificate and are admitted to the Roll of Lawyers.

In addition, in 2013 Law No 83/2013 of 11/09/2013 was introduced, establishing the Bar Association in Rwanda and regulating its organisation and functioning. It introduced a requirement that, in order to practice as an advocate, a candidate must have a recognised certificate from the Institute of Legal Practice and Development or its equivalence.

Foreign lawyers are permitted to practise in Rwanda provided that they have:

- the required qualifications from their home jurisdiction
- a letter of good-standing from their home Bar
- a letter of approval from the president of the Kigali Bar Association

In addition, the new law regulating the Bar Association (Law No 83/2013 of 11/09/2013) stipulates that advocates from foreign Bar Associations may be allowed to practice as an advocate in Rwanda where their national legislation provides for reciprocity in this regard or in accordance with international agreements to which Rwanda is a party.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The judiciary consists of the superior courts and the lower courts. The superior courts consist of:

- the Supreme Court
- the High Court (including specialist courts such as the Commercial Court)

The lower courts consist of the:

- Intermediate Courts and Commercial Intermediate Court (12 courts nationwide)
- Primary Courts (*Tribunal de base*) (60 courts nationwide)

The Primary and Intermediate Courts are vested with original jurisdiction in both criminal and civil proceedings. Claims not exceeding RWF 5 million must be initiated in the Primary Courts. Those in excess of that amount are heard by the Intermediate Court. Appeals from the Primary Courts are heard in the Intermediate Courts.

The High Court is vested with original jurisdiction in both criminal and civil matters as well as the enforcement of foreign judgments. Appeals from the lower (Intermediate) courts are heard by the High Court, which has supervisory jurisdiction over all lower courts.

Appeals from decisions of the High Court are heard by the Supreme Court, which is the final court of appeal, and its decisions are binding on all lower courts.

The Supreme Court also has exclusive original jurisdiction in matters relating to the enforcement or interpretation of the Constitution.

There are no jury trials in Rwanda. The justice system is adversarial and the judge's role is passive rather than inquisitorial, except in criminal cases.

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

There are statutory limitation periods for bringing civil claims. The limitation periods vary depending on the cause of action:

- 30 years for civil actions (for example, tort, contract, damages to property, divorce, probate)
- five years to recover debts in commercial matters, personal injury resulting from accidents, tax
- two years for labour actions

### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

Yes. A lawyer cannot disclose to a court or tribunal and/or any other parties the information he or she receives from a client. The client can waive privilege in writing, and the lawyer may disclose privileged information if required by law.

### 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

Generally, civil proceedings are commenced by paying a fee and filing a writ of summons accompanied by a statement of claim. This is done online through the Electronic Filing System (EFS). The defendant must file a notice of appearance in response to the writ and file a defence.

The judge will decide the date of the hearing and the judge must deliver his or her decision within one month (in urgent matters, 24 hours after pleadings have closed). Appeals must normally be submitted within 30 days (or 15 days for urgent matters).

### 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

The parties should disclose to one another in their pleadings all relevant documents. The list must include a notice of inspection stating a time and venue for the other party to inspect the documents. However, in practice, photocopies are attached to the list with an affidavit verifying the list. If a party fails to fulfil his or her obligation to make automatic discovery, the other party may apply to the court to make an appropriate order. It is usual, at the first court hearing, for the judge to determine the procedure for disclosure.

Witnesses usually give oral evidence at trial. The evidence given for or on behalf of a party during trial, together with any documents tendered, is recorded as evidence-in-chief. The other party can cross-examine the witness. Subject to the court's discretion, re-examination may be directed. Judges are allowed to question witnesses directly. A witness cannot be recalled without leave of the court. Evidence may be given by affidavit with the court's consent and the court may order the attendance for cross-examination of the person making the affidavit. If an order has been made and the person in question does not attend, that person's affidavit may not be used as evidence without leave of the court.

In some cases, the judge may appoint an expert and the expert's report will be sent to the parties to provide comments before the final hearing.

### 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIME TABLE? HOW QUICK IS THE PROCESS?

Each trial court is responsible for managing its case list. Judges have considerable powers in this respect, including control over the issues on which evidence is permitted and the way in which evidence is to be put before the court.

The timetable is guided by the Civil Procedure Rules. Before or during the trial, the material disputes between the parties may be settled in court or agreed as "issues for trial". The Civil Procedure Rules also allow for interim applications, which can delay the process. In many instances cases take at least one year from issue of the writ of summons to trial.

However, commercial matters can be resolved within three to six months where parties manage the case well and reduce the issues in dispute by agreement.

### 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

The court may, at any time, preserve a party's interest pending judgment upon that party's application for the relevant interim remedy. The available interim remedies include an order for interlocutory or interim injunction, detention, custody or preservation of any property that is the subject matter of the suit and is within the court's jurisdiction. An application for an interlocutory or interim injunction may be made before or after trial, irrespective of whether the claim for injunction is included in the writ of summons.

The court may, rather than grant an injunction, order an early trial to finally determine the matters in issue. It is quite easy to obtain interim remedies as judges understand that the defendant may take measures that will have a negative impact on the execution of their decision. The court must be satisfied, however, that negative consequences will flow should an interim remedy not be granted.

### 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

The principal mode of enforcement is through a professional court bailiff or local authority (which has the same powers as a court bailiff). The police, District and Rwanda National Resources Authority (for land issues and the Rwanda Revenue Authority (for tax issues) may also enforce judgments, depending on the context.

### 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

The court has the discretion to award costs of and incidental to proceedings and full power to determine by whom and to what extent those costs are to be paid. The parties or their lawyers may briefly address the court on the question of costs before any such award is made.

The court takes into consideration a wide number of factors, including the expenses incurred by the parties or their lawyers, the court fees paid, the length and complexity of the proceedings, the conduct of the parties before and during the proceedings, and any previous orders as to costs made in the proceedings, before making any award for costs.

A plaintiff who is ordinarily resident outside Rwanda may, on the defendant's application, be required to provide security for the

defendant's costs. This is not limited to foreign claimants but extends to claimants not ordinarily resident in Rwanda. However, where a plaintiff who is ordinarily resident outside Rwanda has assets in Rwanda the court is unlikely to make an order for security for costs.

**11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?**

In Rwanda, the right to appeal is constitutionally guaranteed and there is a general right of appeal against a decision of a court of first instance. Permission to appeal (leave to appeal) is required only in specific circumstances.

Where a first appeal is made against a decision of the Primary Court, an appeal lies to the Intermediate Court. A second appeal is possible to the High Court. Permission is, however, required for any appeal to the Supreme Court. Usually, permission to appeal is granted only where the Supreme Court is satisfied that the case involves a substantial question of law or it is in the public interest to grant permission to appeal, or that the appeal has a real chance of success.

Where the first appeal is to the High Court itself, a second appeal lies as of right to the Supreme Court, and no permission is needed. If dissatisfied with the decision of the Supreme Court, a party may ask the Supreme Court to review its decision. The power of the Supreme Court to review its decision is, however, limited to where a party claims that there are exceptional circumstances which have resulted in a miscarriage of justice, or that there has been discovery of new and important evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him during the trial or hearing of the case.

Generally, an appeal does not operate as a stay of the decision of the lower court unless the court specifically stays the execution of the judgment. There is no enforcement until the decision on appeal becomes final and binding, except when the judge of the lower court has decided so after a request of one of the parties.

**12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?**

Generally, domestic State entities do not have immunity from civil proceedings. However, one may not sue the State for anything done or omitted to be done by a person while discharging or purporting to discharge responsibilities of a judicial nature vested in that person.

There are statutory provisions expressly granting both civil and criminal immunity to foreign diplomats (foreign diplomatic agents).

There is no express stipulation to the effect that foreign State entities have immunity from civil proceedings. However, it is a general rule of international law (applicable in Rwanda) that a State (or foreign State entity) is immune from the jurisdiction of another State unless the foreign State has waived its immunity either explicitly or by implication. Where a foreign State entity enters into a contract in Rwanda, or agrees to submit to the jurisdiction of the Rwandan courts in a contract, it would be deemed to have waived such immunity and may be sued in Rwanda.

**13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?**

In Rwanda enforcement of foreign judgments is governed by statute. Judgments of the court of a foreign country are enforced even without reciprocity.

A foreign judgment is enforceable if it is final and conclusive between the parties. The judgment must be submitted to the High Court in Rwanda for approval before being executed in Rwanda. It must first be registered and registration will be denied if, at the date of the application, it has been wholly satisfied or if it could not be enforced by execution in the foreign country. Decisions regarding enforcement of foreign judgments can be made by the Rwandan courts in as little as one month.

**ARBITRATION**

**14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?**

Arbitration is governed by the Arbitration Act 2008 (Law No 005/2008 of 14 February 2008 on arbitration and conciliation in commercial matters) (the Arbitration Act), which is based on the UNCITRAL Model Law. The Kigali International Arbitration Centre (KIAC) was opened in 2012 and, whilst it is intended to deal with international disputes, primarily it deals with domestic disputes at the moment. The KIAC Rules are principally based on an amalgamation of the ICC, LCIA and SIAC Rules.

**15. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?**

Under article 9 of the Arbitration Act, there must be a written agreement by the parties to submit present or future disputes to arbitration. If there is a document in which the parties have accepted or confirmed, even if orally, that any disputes should be referred to arbitration then that document will be deemed a valid arbitration agreement.

Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

The parties in a pending court action may also apply to the court to refer the matter to arbitration.

**16. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?**

In Rwanda, the court will refuse to continue litigation if it is satisfied that the arbitration agreement is valid. Under article 10 of the Arbitration Act, an ordinary court before which an action regarding an arbitration agreement is seized shall submit it to the arbitration if a party so requests before submitting his or her statements on the substance of the dispute, unless it finds that the agreement is null and void, inoperative or incapable of being performed.

However, when a party alleges that the arbitration agreement has been procured by fraud the court may order that the agreement has no effect. Furthermore, the courts will refuse to stay litigation if the matter in dispute involves questions of national security or if the subject-matter of the dispute is not capable of being settled by arbitration under Rwandan law. Arbitration is not possible for some matters (eg divorce, or marital status (article 51, 2 of the Arbitration Act)).

The approach is the same even if the seat of the arbitration is outside the jurisdiction.

In relation to the recognition and enforcement of foreign arbitral awards, if a party to the foreign arbitration commences court proceedings, the other party may, after service of the writ of summons but before a date is fixed for a hearing, apply to the court to stay the said proceedings. If the agreement is null and void, inoperative or incapable of being performed, the courts will stay the proceedings.

#### **17. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?**

The court's role is mainly facilitative and in some instances complementary to the arbitrator's role of ensuring effective and efficient determination of the dispute. Interim measures may be granted by the court in accordance with article 11 of the Arbitration Act. One of the parties to arbitration may apply to the court, before or during arbitral proceedings, for an interim measure, which the court may grant. Such a measure must not be contrary to the arbitration agreement.

#### **18. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?**

Domestic and foreign arbitral awards are deemed to be final and binding on all parties.

Article 47 of the Arbitration Act provides that an arbitral award may be set aside by the court of competent jurisdiction only if:

- a party to the arbitration agreement referred to in article 9 was under some incapacity
- the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereof, under Rwandan Law
- the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his or her case
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such an agreement is in conflict with provisions of the Rwandan Law from which the parties cannot derogate, or failing such agreement, was not in accordance with the Rwandan Law

- the court finds that the subject-matter of the dispute is not capable of settlement by arbitration under Rwandan Law
- the award is in conflict with the public security of the Republic of Rwanda

#### **19. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION?**

Both domestic and foreign awards may be enforced by decision of the High Court, in the same manner as a judgment or order of the court.

There is no need for reciprocity and this rule applies even to arbitrations seated outside Rwanda.

Rwanda is a party to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Thus, enforcement of a foreign award may only be resisted on the grounds laid down in the New York Convention.

Enforcement usually takes approximately one month.

#### **20. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?**

Yes.

### **ALTERNATIVE DISPUTE RESOLUTION**

#### **21. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?**

Parties to arbitration are not required by law to consider or submit to ADR before or during proceedings, unless the agreement requires that of the parties.

With respect to commercial litigation, if the parties wish to mediate, the judge may grant a stay to allow the parties to attempt mediation.

In labour cases, there is a requirement to mediate with a district inspector of labour before taking the matter to the courts. Only where the mediation fails are the parties allowed to refer their case to the tribunal.

### **REFORMS**

#### **22. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?**

The Rules of the Commercial Court are being reviewed and a Court of Appeal between the High Courts and the Supreme Court may be introduced but a decision has been postponed for the time being.

There are also proposals to amend aspects of the High Court Rules to provide for an updated court structure.

More judges have recently been appointed to the Supreme Court with a view to achieving improvements in the speed and efficiency of the Supreme Court process by 2016.

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# SÃO TOMÉ AND PRÍNCIPE



## INTRODUCTION

The São Toméan legal framework is based on the Constitution of 1990 and on the Civil Code, which is derived from Portuguese law.

The courts are independent of political power and have a pyramid structure, with the Supreme Court at the apex.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

Lawyers in São Tomé and Príncipe practise as both barristers and solicitors, providing legal services directly to their clients and conducting proceedings in court; there is no split profession.

To be a lawyer and a member of the Bar Association, an individual must:

- be a São Toméan citizen
- hold a degree in law
- be in full enjoyment of his/her civil rights
- not have been convicted of a crime, or have behaved dishonourably

A foreign national cannot be a member of the Bar Association and practise as a legal professional in São Tomé and Príncipe, unless he/she has permanent residence in São Tomé and Príncipe and their country also recognises the same possibility for São Toméan citizens.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

Pursuant to Law No 7/2010, the courts are split between the First Instance Court and the Supreme Court of Justice.

The First Instance Courts are divided by region (Água Grande District, Mé-Zochi, Cantagalo e Caué Districts, Lembá District, and Príncipe Island). The First Instance Court has general competence to hear civil, criminal and labour claims. There are also specialist courts (eg the Constitutional Court, the Account Court and the Tax Court).

The Supreme Court of Justice is divided in two sections: one for civil, labour, administrative and tax matters, and the other for criminal matters. It hears:

- appeals from the First Instance Court
- appeals against members of Parliament, judges, prosecutors and administrative bodies
- appeals concerning conflicts of jurisdiction between courts (including divisions of the same court)
- appeals concerning review of judgments given by foreign courts or by foreign arbitrators

Five judges sit in the second level of the Supreme Court of Justice, and rule on:

- jurisprudence under the civil procedure law
- criminal and civil law decisions of the Supreme Court

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

According to the São Toméan Civil Code the general limitation period is 20 years.

### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

Yes. There is an obligation of confidence between a lawyer and his/her client under the Bar Association Law.

This obligation only ceases if it becomes necessary to disclose such communications to defend the rights, interests or dignity of the client or the lawyer.

### 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

Civil proceedings begin with the filing of the writ of summons by the plaintiff. The defendant may file a statement of defence within 20 days of the date of the summons. In certain cases, depending on the value of the claim, there may be a right of reply, rebuttal and/or second reply.

The pleadings should set out the facts and law upon which the parties rely.

## 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

The documents a party intends to rely on must be submitted either with the writ of summons or the statement of defence.

If they are not submitted with the pleadings, the documents can be submitted up until the close of the trial with the court's permission, which in practice is never withheld. However, a party will be fined unless it can prove that it could not have submitted the documents earlier.

With regard to witnesses, the common procedure is that a witness gives oral evidence at trial. The evidence given for or on behalf of a party during trial, together with any documents tendered, is recorded as evidence-in-chief. The other party can cross-examine the witness. Subject to the court's discretion, re-examination is directed to the explanation of matters referred to in cross-examination. Judges are allowed to question witnesses directly. A witness cannot be recalled without the leave of the court.

Expert evidence may be submitted with the court's permission in the form of a written report. Experts are not cross-examined at trial.

## 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

Procedural rules govern certain steps (for example the São Toméan Civil Procedure Code contains deadlines for presenting the plaintiff's writ, the defendant's answer or the plaintiff's reply). However, the judge has ultimate power to control the timetable.

Where procedural deadlines are not complied with, penalties include admission of facts or, sometimes, discontinuance/dismissal of the claim.

Litigation can be a drawn out process, taking one to two years from issue to trial.

## 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

The court may, at any time, preserve a party's interests upon that party's application, pending judgment.

Several types of interim remedy can be applied for, namely specified temporary injunctions and unspecified provisional remedies.

Specified temporary injunctions include provisional alimony, restitution, temporary possession (temporary refund of the asset), and suspension of corporate resolutions.

Unspecified provisional remedies include orders to perform or refrain from certain acts, or the delivery of movable or immovable assets which are the subject of the action.

In practice, the courts take a considerable time to decide such applications and consequently the effectiveness of the remedy can be lost.

## 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

To enforce judgments, separate proceedings, called executive proceedings, must be commenced.

Within executive proceedings, the following main methods of enforcement exist:

- an order to pay a sum of money by selling the debtor's assets
- delivery up of assets
- provision of a particular fact and information on the whereabouts of assets

## 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

The court has the discretion to award costs of and incidental to proceedings and the power to determine by whom and to what extent costs are to be paid.

The parties or their lawyers may briefly address the court on the question of costs before any award is made and when the parties are notified of the costs, they can file a complaint.

The court takes into consideration a wide number of factors, including the expenses incurred by the parties or their lawyers, the court fees paid, the length and complexity of the proceedings, the conduct of the parties before and during the proceedings, and any previous orders as to costs made in the proceedings before making any award for costs.

Foreign claimants are not required to provide security for costs.

## 11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

The right to appeal is constitutionally guaranteed and there is a general right of appeal against a decision of a court of first instance.

The Civil Code also provides for appeals, namely ordinary and extraordinary appeals:

- ordinary appeals consist of first appeals, review appeals, interlocutory appeals and full court appeals
- extraordinary appeals consist of further appeals and third-party proceedings

Generally, an appeal does not operate as a stay of the decision of the lower court unless it is expressly provided for in the Civil Code.

## 12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

Domestic and foreign States do not have immunity from civil proceedings.

Some domestic State entities are not judged in civilian courts but in the administrative courts, which have special jurisdiction.

### 13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

The São Toméan Civil Code states that foreign final court judgments and arbitration awards are enforceable in São Tomé and Príncipe after formal foreign decision recognition.

To establish "foreign decision recognition":

- there must be no doubt as to the authenticity of the decision
- the decision must be final and unappealable under the law of the country in which it was made
- the decision must be recognised under São Toméan conflicts rules and must not be contrary to São Toméan public policy
- the defences of *lis pendens* or *res judicata* must be unavailable
- the defendant must have been duly served unless São Toméan law has dispensed with service of process or judgment in default was obtained

## ARBITRATION

### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

The Arbitration Law which governs domestic and international arbitrations is Law 9/06 of 2 November (the Arbitration Law). It is not based on the UNCITRAL Model Law, but rather largely based on the old Portuguese arbitration law (Law 31/1986 of 29 August).

In general terms, the Arbitration Law provides that the procedure should rest on the principles of fair and equal treatment, adversarial process, and hearing of the parties (article 16). The parties can determine the procedure they wish to apply to their dispute including any institutional rules (article 15). The parties can also agree that the tribunal will rule according to equity (article 22).

The most innovative feature of the Arbitration Law is the fact that it makes specific provision for domestic (or "internal") arbitration and institutional arbitration (having created the Arbitration Centre of São Tomé and Príncipe), and also for international arbitration.

Similar to the old Portuguese Arbitration Law, the Arbitration Law specifically distinguishes "internal arbitration" from "international arbitration" and provides for each in specific parts. An "international arbitration" (articles 30 to 33) is broadly defined as one which puts at stake "interests of international trade". The Arbitration Law specifically determines that, providing the parties have so agreed, in the case of international arbitration, the tribunal may decide the dispute according to the concept of "amiable composition", weighing the balance of the interests at stake (article 33).

The law also embodies the principle of "*Kompetenz-Kompetenz*" in article 21, which states that the tribunal should decide its own competence.

Article 21, n 2 institutes the "principle of separability", providing that the invalidity of the contract does not necessarily result in the invalidity of the arbitration agreement.

In relation to the production of evidence, the Arbitration Law provides that all kinds of evidence that are legally admitted by the general civil procedure law in São Tomé and Príncipe, may be admitted in arbitration (article 18, n 1).

The national courts can provide assistance in several matters such as the appointment of arbitrators (article 12, n 1, 2 and 3), determination of the precise scope of the dispute if the parties do not reach agreement (article 12, n 4), gathering of evidence (article 18, n 2), deposit of the award (article 24, n 2), annulment (article 26) and enforcement (article 28).

Arbitration practice in São Tomé and Príncipe is still at an early stage. The country signed the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention) in 1999 but it was only ratified in June 2013. Also, the country has only signed one bilateral investment treaty – with Portugal (which adopted the principles of the General Agreement on Tariffs and Trade (GATT), national treatment and most favoured nation status).

Nevertheless, São Tomé and Príncipe has recently become the 148th country to accede to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which entered into force on the island on 18 February 2013. This may very well constitute a signal on the path of acceptance, recognition and development of international arbitration as a valid and more widely accepted dispute resolution mechanism.

### 15. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

Under the São Toméan Civil Procedure Code and the Arbitration Law, there must be a written agreement by the parties to submit present or future disputes to arbitration. In the arbitration agreement, the scope of disputes which are to be referred to and resolved by arbitration must be established (articles 1 and 2 of the Arbitration Law).

Article 2, n 2 defines an agreement in "writing" as including one which is part of a document signed by the parties, or an agreement made in an exchange of letters, telex, fax or other means of telecommunications, either if such documents directly contain the agreement to arbitrate, or if they refer to any document where there is an agreement to arbitrate.

The arbitration agreement must accurately define the scope of the disputes covered, and should also clearly demonstrate the will and the agreement of the parties to refer the dispute to arbitration. The agreement can include the number of arbitrators who will decide the dispute.

The Arbitration Law also states that disputes directly related to inalienable rights are not arbitrable (article 1, n 1).

Certain disputes must be exclusively submitted to a judicial court or to "legal/mandatory" arbitration. Such disputes must be resolved by arbitration because the law demands it, rather than because the parties have contractually agreed to it (article 1, n 1).

### 16. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?

According to the law, the courts will stay litigation if there is a valid arbitration clause signed by both parties, whether or not the arbitration is seated inside or outside São Tomé and Príncipe. Under article 2, n 5, by entering into an arbitration agreement, the parties waive their rights to apply to the judicial courts, except as provided in the Arbitration Law.



### 17. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?

The local courts can, depending on the specific case, issue interim measures of protection (eg injunctions or other interim orders, for example to preserve assets or evidence within São Tomé and Príncipe) in support of an arbitration seated outside the jurisdiction.

### 18. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

If the arbitral award is "international" (in the sense of article 30), the rule is that it will not be subject to an appeal in the local courts unless the parties have previously agreed on such possibility, and also, if they have settled the specific terms for the appeal regime (article 32).

Regarding domestic arbitration, a party can request the annulment of an award on the basis of the following (article 26):

- the dispute cannot be solved by arbitration under São Toméan law
- the decision was rendered by a tribunal without jurisdiction or irregularly constituted (although a party who has knowledge of such irregularity should duly raise this matter during the arbitration procedure)
- there has been a breach of the main principles referred in São Toméan arbitration law (mentioned in article 16) and this influenced decisively the resolution of the dispute
- the decision is not reasoned, or does not contain the number of signatures of at least the majority of the arbitrators and the dissenting opinions duly identified
- the arbitral tribunal decided on matters that it should not have or the tribunal did not decide upon matters which it should have decided upon

Nevertheless, as discussed below, São Tomé and Príncipe is now a party to the New York Convention and therefore, must recognise and enforce foreign arbitral awards in accordance with the terms of the New York Convention.

### 19. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION?

São Tomé and Príncipe has recently become a party to the New York Convention, regarding the enforcement of arbitral awards.

The New York Convention entered into force in São Tomé and Príncipe on 18 February 2013. There is no implementing legislation to date and the New York Convention will apply directly in São Tomé and Príncipe in respect of all foreign arbitral awards.

### 20. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

With the New York Convention entering into force, it is expected that the courts will enforce awards rendered in other Contracting States. The main constraints regarding this procedure will be the weak judicial system, and the general lack of experience of judges regarding international arbitration matters, which may cause delays in the process.

## ALTERNATIVE DISPUTE RESOLUTION

### 21. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

In both situations there is no legal requirement to submit to any alternative dispute resolution before or during proceedings, unless the parties enter into an express agreement.

## REFORMS

### 22. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

The Government programme foresees the reform of the Civil Procedure Code, Criminal Code and Commercial Code. The most important reform proposed by the Government concerns the judiciary system, to permit judges of other Portuguese speaking countries to evaluate the decisions taken by São Toméan judges in criminal or civil processes.

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# SENEGAL



## INTRODUCTION

Senegal is a civil law country. The legal system is based on the 2001 Constitution. Senegal is also a member of OHADA, UEMOA and CEDEAO. The Supreme Court has ultimate jurisdiction for matters which do not fall within the scope of these inter-governmental organisations.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

The legal profession is governed by Law No 2009-25 of 8 July 2009, as amended by Regulation No 05/CM/UEMOA of 25 September 2014 relating to the harmonisation of the rules governing the legal profession within the West African Economic and Monetary (WAEMU) zone, which is in force from 1 January 2015. Further, a new Law No 2014-26 of 3 November 2014 replaces Law No 84-19 of 2 February fixing the organisation of the judiciary.

In order to practise as a lawyer in Senegal, the person must satisfy certain conditions, and in particular:

- have Senegalese nationality or be a national of a State with which Senegal has a reciprocity agreement and
- have a certificate of training (*certificat de stage*) and have passed an examination in Senegalese law

The profession is organised by the Bar Council, which ensures compliance with the rules governing the profession and takes any necessary disciplinary measures. Lawyers admitted to the Bar may appear before any court. They may practise either individually or in a practice structure.

If there are reciprocity agreements between Bars, foreign lawyers who have at least five years' experience may apply to be admitted to the Senegal Bar, in order to practise in compliance with the Bar Council's internal regulations.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The Senegal civil court system is organised as a three-tier pyramid:

- the first instance courts:
  - the *tribunaux d'instance* have, in principle, first instance jurisdiction to hear all *in personam* claims, regardless of the sums involved in the

dispute. They have jurisdiction over both civil and commercial matters involving personal or movable property, up to a value of CFA 300,000 and, in matters subject to appeal, up to a value of CFA 2 million. They also have jurisdiction in the first instance over actions based in contract relating to commercial or residential leases. The courts also have jurisdiction to interpret and assess the legality of decisions issued by the administrative authorities when the outcome of the dispute hinges on this legality assessment

- the *tribunaux de grande instance* have jurisdiction for all matters not within the jurisdiction of the *tribunaux d'instance*. Decisions of these courts may be appealed to the Supreme Court. The *tribunaux de grande instance* also include labour courts, which have jurisdiction to hear employment disputes between an employer and an employee and/or relating to the validity or to the performance of an employment contract
- the six appeal courts (*cours d'appel*) which hear appeals against first instance decisions
- the Supreme Court (*Cour suprême*) hears appeals to set aside final decisions made by all courts, in matters other than those covered by OHADA, WAEMU or CEDEAO law

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

Limitation periods vary depending on the type of action and the parties involved:

- the ordinary limitation period for bringing an action for damages in a contractual situation is 10 years, and five years for periodic debt obligations (for example, rent payments)
- the ordinary limitation period for bringing an action for damages in a non-contractual situation is three years
- for matters concerning sales, the limitation period between merchants is two years
- special limitation periods apply for certain types of action:
  - salaries and pension costs provided to non-merchants: one year
  - actions based on insurance contracts: two years
  - nullity suits: two years
  - actions concerning payable instruments: six months from the date when the debtor reimbursed the cheque or from the day it was cashed
  - an action by a cheque-holder against the drawee: three years from the expiry of the time limit stated in article 40 of the Penal Code (according to the time limits in force in the place of issue (in Senegal and within the WAEMU zone, this varies from 20 days minimum to 70 days maximum))

The debtor cannot waive the limitation period in advance.

The limitation period will be tolled by an admission by the debtor (whether tacit or not), a payment order, performance, or the service of a summons.

#### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

Letters, information, conversations and documents exchanged between a lawyer and a client are legally privileged.

The tax authorities and the police cannot enter and search a lawyer's office without a warrant and without the presence of the Chair of the Bar Council, who must have been notified in advance and who may be represented by a member of the Bar Council.

Letters between a lawyer and the client cannot be disclosed or published by the lawyer.

In theory, the client cannot release the lawyer from this obligation.

#### 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

Civil proceedings are filed:

- by way of a summons filed with the registrar by the claimant or his/her lawyer. A summons is served when a matter is initiated by a party, either on the merits or in summary proceedings
- by a petition addressed to the presiding judge of the court with jurisdiction. A petition is filed when the law provides that the judge should rule by issuing an order

The timeframe for the first hearing is a minimum of five days from the date of the summons or petition, if the defendant lives in Senegal. It is extended to a maximum of four months if the defendant is domiciled abroad.

There is a mandatory conciliation procedure before the *tribunal départemental* in divorce matters. There is mandatory mediation/conciliation before the employment inspector in employment matters. The mediator, regardless of the sector, hears the complaints made by both parties at the same time. The mediator then suggests a solution, after as many hearings as may be required by the parties. If no solution is reached, the mediator records this in a report, a copy of which is given to the parties who may then take action before the courts to obtain a first instance decision.

#### 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

There is no equivalent to the common law concept of disclosure.

Evidence is produced in written documents (by private agreement, by public agreement, or before a notary), confession and witness testimony.

The court may be asked to order a third party to produce documents, if necessary under threat of a penalty.

New evidence may be produced on appeal at the appellate court level.

However, the Supreme Court only deliberates on points of law and not of fact, and new evidence may therefore not be introduced at that level as a matter of principle.

When warranted by the facts of the case, the court may appoint an expert at the request of a party and/or of its own initiative. The appointment may be challenged in limited cases. If an expert is properly appointed, he/she has a limited time and a limited scope in order to fulfil his/her mission. The expert is required to file his/her report within the time limits under penalty of not having his/her fees paid. The expert's report is not binding but is, rather, a technical opinion.

#### 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

The parties do not control the procedure. Once the proceedings have commenced, the timetable is set at the discretion of the court and in practice depends on various factors, such as the complexity of the case, the degree of urgency and the caseload of the court. Nevertheless, the parties may end the proceedings at any time by mutual agreement.

The length of proceedings varies. A case brought before the Dakar Employment Tribunal on first instance would at best take nine months. With no particular intervention, a criminal trial would take around two to three years in Dakar.

#### 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

There are three emergency procedures in Senegal which allow for the parties' interests to be protected:

- *référé* – the *référé* is an adversarial procedure which takes place in cases of emergency, or when an interim decision is needed concerning problems encountered with the enforcement of an order or decision
- *ordonnance sur requête* – the presiding judge may, on petition, take any necessary steps in order to protect the rights and interests of the parties, where circumstances do not demand an adversarial hearing. The order is immediately enforceable.
- protective/conservatory attachment or sequestration (*saisie conservatoire*) – the debt must be due and payable and there must be a risk of non-recovery

#### 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

The enforcement measures available under Senegalese law are those provided for in the OHADA Uniform Act Organising Simplified Recovery Procedures and Measures of Execution (Uniform Act). The principal measures are as follows:

- seizure for sale (*saisie-vente*): "any creditor in possession of a writ of execution showing a debt due for immediate payment may [...] proceed to the seizure and sale of the tangible property belonging to his debtor [...] in order to be paid from the sale price"
- seizure-award of debts (*saisie-attribution de créances*): "any creditor in possession of a writ of execution showing a debt due for immediate payment may [procure the seizure] in the hands of a third party [of] the debt owed by his debtor in the form of a sum of money"

- penalty payment (*astreinte*): creditors who obtain an injunction from a court ordering their debtors to complete a particular task or to cease and desist may ask the court to team the injunction with a penalty for non-compliance, payable by day/week/month
- real property foreclosure (*saisie immobilière*): this enforcement mechanism is applied as a last resort when the seizure of personal property or of debts was unfruitful or insufficient. The insufficiency must be authenticated by a bailiff (*huissier de justice*), only then may the creditor initiate a *saisie immobilière*

The court may grant a period of grace if a party requests this.

#### 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

The Code of Civil Procedure provides that "*the unsuccessful party bears the costs*".

Costs include procedural costs, State fees, court fees, bailiff fees and lawyer fees. Any Senegalese or foreign claimant must, when filing the complaint, pay a sum to the court's registrar which is sufficient to cover the payment of State fees and fixed rate registration duties. If demanded by the defendant before filing any defence on the merits of the case, foreign claimants must provide a personal guarantee to secure the payment of fees and any damages they may be ordered to pay.

#### 11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

There are no restrictions on an appeal where one of the parties is not entirely satisfied by the first instance decision. The right of appeal is automatic, provided it is made in time, although it must be neither dilatory nor abusive.

Appeals are made by way of a petition addressed to the court registrar. Parties have two months to appeal against first instance decisions. This period starts on the day on which the decision is handed down if it is adversarial, or the date of notification in the case of a default judgment.

It is not possible to raise new claims on appeal, except in the case of a claim for damages or where the new claim is an argument in defence against the main claim. An appeal suspends the enforcement of the decision, unless the court has ordered immediate enforcement.

A decision on appeal can be appealed to the Supreme Court. An appeal to the Supreme Court considers points of law and not of fact and does not suspend the enforcement of the lower court's decision. If the appeal to the Supreme Court is successful, the case is remanded to a new court of appeal for re-hearing. In principle, the Supreme Court's decision is not binding on the appeal court, but in practice the latter will follow the Supreme Court's decision.

#### 12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

Proceedings can be brought against the Government or public authorities before the Senegalese courts. State-owned companies or mixed economy companies do not have jurisdictional immunity.

In terms of foreign entities, any jurisdictional immunity rights that can be applied derive from international agreements on diplomatic or consular relationships.

#### 13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

In Senegal, decisions made by foreign courts are enforceable if they meet the following conditions:

- the decision has been made by a court with jurisdiction under Senegalese law
- according to Senegalese conflict of law rules, the foreign court has applied the law governing the dispute
- the decision is final and enforceable in the country concerned
- the parties were properly summoned, represented or declared in default
- the decision does not breach Senegalese public policy and does not go against a Senegalese court decision which is *res judicata*

The enforcement order is made by the presiding judge of the *tribunal régional* with jurisdiction for the place of performance. The presiding judge must limit him/herself to checking that the decision complies with the above-mentioned conditions.

If these conditions are satisfied, then the enforcement order is easily obtained in practice.

### ARBITRATION

#### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

Senegal is a Member State of OHADA (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires* – Organisation for the Harmonisation of Business Law in Africa). The OHADA Treaty was first signed on 17 October 1993. Under the OHADA Treaty, the Council of Ministers adopt "uniform acts" that are directly applicable and enforceable in each of the Member States. Arbitration in the OHADA Member States has been governed by the Uniform Act on Arbitration within the Framework of the OHADA Treaty, which was adopted on 11 March 1999 and came into force 11 June 1999 (the Uniform Act).

The Uniform Act is not based on the UNCITRAL Model Law. It was drafted separately, but nevertheless complies with the fundamental principles of international commercial arbitration and the essential characteristics of the UNCITRAL Model Law.

The Uniform Act applies to both national and international arbitration and governs all arbitration proceedings sitting in a Member State.

Prior to the adoption of the Uniform Act, arbitration law was governed by the Code of Civil Procedure. Provisions, which were similar or contrary to the OHADA Uniform Act, have been repealed.

One of the most important characteristics of OHADA arbitration is the Common Court of Justice and Arbitration (*Cour Commune de justice et d'arbitrage*) (the CCJA), which acts as both a permanent arbitral tribunal and the supreme court of arbitration for all OHADA Member States.

## 15. WHAT ARE THE MAIN NATIONAL ARBITRATION INSTITUTIONS?

The main national arbitration institution in Senegal is the *Chambre de Commerce, d'Industrie et d'Agriculture* (CCIAD), which sits in Dakar.

The Dakar CCIAD *Centre de médiation et d'arbitrage* has existed for some 15 years. It specialises in disputes between commercial companies.

At the supranational level, the CCJA, which was created by the OHADA Treaty and is based in Abidjan, in Côte d'Ivoire, can also hear arbitration matters. The CCJA, which is also a supreme court, acts as an arbitration centre and administers proceedings governed by the CCJA Rules of Arbitration. The CCJA is different from other arbitration centres as it is not a private institution but was created and organised by OHADA.

For the CCJA Rules to be applicable, article 21 of the OHADA Treaty provides, that all or part of the contract must be performed within the territory of one or more Member States or that at least one of the parties must be domiciled or primarily reside in a Member State. According to legal authors, it should also be possible to go to arbitration under the CCJA Rules even if these conditions are not met, if the parties have provided for this possibility in their arbitration agreement.

## 16. ARE THERE ANY RESTRICTIONS ON WHO MAY REPRESENT THE PARTIES TO AN ARBITRATION?

The Uniform Act does not set any restrictions on persons who can represent parties in an arbitration matter. They are entitled but not required to instruct a counsel (article 20 of the Uniform Act).

Restrictions applicable with regard to representation before the Senegalese courts (see question 5) do not apply to arbitration, unless otherwise provided in the arbitration rules.

## 17. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

Article 3 of the Uniform Act states that the arbitration agreement must be made in writing or by any other means which provides proof of the existence of the clause. No particular format is required. The Uniform Act also provides that contracts can refer to an arbitration agreement contained in a different document.

Local courts tend to apply a narrow interpretation.

## 18. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?

Article 13 of the Uniform Act provides that national courts must decline jurisdiction where there is a valid arbitration agreement and where the arbitral tribunal has not yet been composed, save where the arbitration agreement is "*manifestly void*". The court cannot decline jurisdiction at its own discretion.

If the arbitral tribunal has already been composed, the national court must decline jurisdiction at the request of a party. In practice, the Senegalese courts tend to decline jurisdiction if there is an arbitration clause.

Parties governed by an arbitration agreement have the option of referring a matter to a national court to obtain interim or conservatory measures that do not require a review of the case on the merits, in circumstances that have been "*recognised and reasoned*" as urgent or where the measure must be performed in a State that is not party to OHADA.

National courts can also intervene in very limited circumstances with a view to assisting the arbitration process (see questions 21 and 22 below).

## 19. IF THE ARBITRATION AGREEMENT AND ANY RELEVANT RULES ARE SILENT, HOW MANY ARBITRATORS WILL BE APPOINTED, AND WHO IS THE APPOINTING AUTHORITY?

The Uniform Act does not provide a specific number of arbitrators if the arbitration agreement is silent on this point. It does provide that an arbitral tribunal must have a sole arbitrator or three arbitrators.

If the parties are unable to appoint one or more arbitrators, they will be appointed by a court with jurisdiction in the State in which the arbitral tribunal sits.

The court with jurisdiction is the *tribunal régional*.

## 20. WHAT RIGHTS ARE THERE TO CHALLENGE THE APPOINTMENT OF AN ARBITRATOR?

Article 7 of the Uniform Act sets the rules on challenging an arbitrator. Arbitrators must notify the parties of "*any circumstance about him/herself*" for which they may be challenged. Any disputes will be settled by the State court having jurisdiction, save where the parties have provided for a different procedure for challenging arbitrators. The court with jurisdiction is the *tribunal régional*. Decisions cannot be appealed.

Arbitrators may only be challenged for reasons that come to light after their appointment.

## 21. DOES THE DOMESTIC LAW CONTAIN SUBSTANTIVE REQUIREMENTS FOR THE PROCEDURE TO BE FOLLOWED?

The Uniform Act requires parties to receive equal treatment and to have an opportunity to exercise their rights (article 9); arbitrators may not base their decisions at their own discretion without first allowing parties to submit observations (article 14).

Article 18 of the Uniform Act provides that the deliberations must be kept secret.

The Uniform Act also provides that the duration of the arbitration may not exceed six months from the date upon which the last arbitrator accepts its arbitrating functions, save where extended by agreement of the parties or by consulting the court with jurisdiction.

## 22. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED INSIDE THE JURISDICTION?

In principle, where there is an arbitration agreement, the national courts cannot intervene in a dispute until the award has been issued.

Nevertheless, parties may consult the court with jurisdiction in Senegal in the following circumstances:

- to resolve difficulties encountered with composing the arbitral tribunal, to appoint the sole arbitrator or the third arbitrator (articles 5 and 8)
- to rule on challenges against arbitrators where the parties have not provided for a different procedure (article 7)
- to extend the deadline for the conclusion of the arbitration where there is no agreement between the parties to do so, at the request of a party or the arbitral tribunal (article 12)
- to order interim or protective measures when urgently necessary (recognised and reasoned circumstances) or when the measure would be performed in a non-OHADA State, provided the measures do not require a review of the case on the merits (article 13)
- to assist the arbitral tribunal, if requested, with the collection of evidence (article 14)

### 23. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?

In principle, national courts cannot intervene in an arbitral tribunal sitting outside their jurisdiction where there is an arbitration agreement, as indicated above. In addition, all measures relating to the composition of the arbitral tribunal and conducting the proceedings fall under the jurisdiction of the courts of the country in which the arbitral tribunal sits.

However, it is possible for national courts other than the competent court of the country in which the arbitration is seated to intervene to order conservatory or interim relief under the conditions defined above in question 18 (article 13).

### 24. DO ARBITRATORS HAVE POWERS TO GRANT INTERIM OR CONSERVATORY RELIEF?

Although this matter is not dealt with directly in the Uniform Act, legal writers generally agree that it is possible for arbitrators to order interim or protective measures, save where the parties have agreed otherwise.

### 25. WHEN AND IN WHAT FORM MUST THE AWARD BE DELIVERED?

Unless otherwise agreed by the parties, arbitration awards must be made within six months from the date on which all of the arbitrators have accepted the terms. This term can be extended by agreement between the parties or by order of the court with jurisdiction of the State concerned which in Senegal is the *tribunal régional*, at the request of a party or the arbitral tribunal (article 12).

Parties can set special requirements for awards. Failing this, awards are made on a majority vote, where the tribunal counts three arbitrators, and must be reasoned. They must be signed by at least two of the three arbitrators.

### 26. CAN A SUCCESSFUL PARTY RECOVER ITS COSTS?

Neither the Uniform Act nor local law contains any provisions on this.

Where arbitration is conducted under the aegis of the CCJA, the arbitrator is empowered to award costs.

### 27. ON WHAT GROUNDS CAN AN AWARD FROM AN ARBITRATION SEATED IN THE JURISDICTION BE APPEALED TO THE COURT?

The only remedy against an arbitration award is an application to set aside the award brought before the court with jurisdiction in the Member State in which it was issued, within one month from the date of notification of an enforceable award (articles 25).

The circumstances in which an application to set aside can be brought are as follows (article 26):

- the arbitral tribunal ruled without an arbitration agreement or with respect to an invalid or expired agreement
- the arbitral tribunal was not properly composed
- the arbitral tribunal did not rule in compliance with the terms of arbitration
- there was no due process
- the arbitral tribunal breached a public policy rule of the OHADA Member States
- there are no reasons for the award

Bringing an application to set aside an arbitration award suspends enforcement, unless the tribunal ordered immediate enforcement. The decision can only be appealed to the CCJA (articles 25 and 28).

This is the only remedy available to parties before a national court. The other remedies, namely third party opposition and the application for a revision of the award, must be submitted to the arbitral tribunal (article 25).

### 28. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

No. Please see question 27 above.

### 29. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF: (I) AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION AND (II) DOMESTIC AWARDS?

To enforce awards issued within an OHADA Member State, the Uniform Act requires parties to obtain the recognition of the award from the competent court in that Member State (article 30). In Senegal, the court with jurisdiction is the *tribunal régional* with jurisdiction over the place of residence of the debtor or defendant against whom the award is made, or its registered office.

This requires the production of the original arbitration award, together with the arbitration agreement or copies of these documents meeting the necessary authentication conditions and, where necessary, a sworn translation into French (article 31).

Decisions refusing to recognise an arbitration award can be appealed to the CCJA. However, decisions granting recognition cannot be appealed (article 32).

Awards issued in a different OHADA Member State are recognised in other Member States under the conditions set forth in any applicable international agreements or, failing this, under the conditions stated in the Uniform Act.<sup>1</sup>

Senegal is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which facilitates the recognition of foreign arbitration

awards. Regarding awards made outside of OHADA territory, the Code of Civil Procedure (articles 787 *et seq*) provides that the request for recognition is made by way of a summons, to which the claimant attaches an original copy of the award and a certificate showing that there is no appeal.

The enforcement procedure in commercial matters is adversarial, in that the summons is served on the relevant person by a bailiff of the *tribunal régional* having jurisdiction over the place of residence of this person.

The following must be produced (article 792 of the Code of Civil Procedure):

- an authenticated copy of the decision, which meets the conditions set down relating to its authenticity
- the original of the record of service of the decision or any other similar instrument
- a statement from the registrar noting that there is no opposition against the decision or appeal
- as need be, a copy of the summons to appear served on a defaulting party

### 30. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

If all documents are produced, and if the award is not contrary to Senegalese public policy provisions, then enforcement is easy to obtain.

## ALTERNATIVE DISPUTE RESOLUTION

### 31. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

As stated in question 5 above, there is a mandatory conciliation procedure before the *tribunal départemental* in divorce matters, and a mandatory mediation/conciliation before the employment inspector in employment matters.

Even if the parties are not obliged to submit to conciliation or to any other dispute resolution method, either before or after the procedure, the presiding judge of the *tribunal départemental* may attempt to reconcile the parties before litigation.

The Dakar CCIAD *Centre de médiation et d'arbitrage* was set up 15 years ago to facilitate mediation between commercial companies.

## REFORMS

### 32. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

To our knowledge, taking into account the recent legislative reforms described in questions 1 and 2 above, there are no significant procedural reforms planned for the near future.

## FOOTNOTE:

1. Article 34 of the Uniform Act does not expressly refer to foreign awards. However, legal authors agree that it does apply to foreign awards. It would, however, be better to check this with a local expert.

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# SEYCHELLES



## INTRODUCTION

The Seychelles, having been under successive French and British colonial administrations, has a mixed legal system. The basic private law is of French origin and consists of a civil and a commercial code. Legislation relating to the more modern aspects of commerce, such as corporations and bills of exchange, as well as offshore business and international financial services (which have grown into one of the main pillars of the country's economy), is mostly common law-inspired. The criminal and public laws are also based on the common law, as is much of the adjectival law.

The Seychelles was granted independence by Britain and became a republic in 1976. Its present Constitution, which came into force in 1993, contains an entrenched bill of rights and provides for a separation of powers between the executive, legislative and judicial branches of state. The Government is headed by an executive president who, like the legislature, is elected every five years by universal suffrage.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

The Seychelles has no split profession. Lawyers are known as attorneys and have rights of audience in all courts and tribunals.

To be admitted as an attorney, a candidate must have passed the Seychelles Bar final examination or the Bar or other law professional examination of a Commonwealth country or been admitted to practise law in a Commonwealth jurisdiction. But before admission to the Seychelles Bar, the candidate must serve two years' pupillage in the Seychelles.

Lawyers practising in a Commonwealth jurisdiction may be granted *ad hoc* rights of audience in the Seychelles courts for a period not exceeding six months. Typically, such *ad hoc* rights of audience are granted to litigation lawyers who are experts in their area of practice. Attorneys and foreign lawyers admitted on an *ad hoc* basis are subject to the regulatory control of the Supreme Court.

Most attorneys are members of the Bar Association of the Seychelles and thus are also subject to its regulatory control.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The Seychelles has a three-tier court system:

- the Magistrate Courts, with jurisdiction to try civil disputes relating to amounts not exceeding SCR 350,000 and minor criminal matters
- the Supreme Court, with original jurisdiction in criminal, civil (including admiralty) and constitutional matters and appellate and supervisory jurisdiction over the Magistrate Courts, tribunals and adjudicatory authorities
- the Court of Appeal, which is the apex court, with appellate jurisdiction over the Supreme Court

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

Actions for the enforcement of immovable property rights must be brought within 20 years where the claimant's title is evidenced by deed and 10 years where the claimant's title is not evidenced by deed.

Contractual and delictual (tortious) claims must be brought within five years of the cause of action arising. Actions in delict against the Government and public officers are time-barred after six months.

Actions to review the legality or constitutionality of the acts of the Government and other State entities are subject to a time limit of three months.

### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

Attorney-client communications are privileged and protected and may only be disclosed in the public interest (eg to prevent the commission of a crime or to comply with the attorney's reporting obligations under the Anti-Money Laundering Act).

### 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

Most proceedings are commenced by filing a plaint with summons at the Registry of the court. On the first appearance in court, a defendant is usually granted around 14 days to file its statement of defence to the plaint. Where the statement of defence includes a



counterclaim, the plaintiff would also be granted around 14 days to file its answer to it. When the pleadings are closed, a date is set for the hearing of the case.

Other forms of originating processes are provided by certain legislation, eg writ of summons in admiralty and bills of exchange claims, and petitions in company, matrimonial matters and generally in claims determined by way of summary proceedings.

## 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

Each party to a plaint is required to file in court and serve on the other party a list of all the documentary evidence relied upon. In commercial cases (ie cases listed for hearing in the commercial division of the Supreme Court) a party is also required to file in court and serve on the other party copies of all the documentary evidence listed in its pleadings.

A party may apply to the court for an order for discovery, where the opposing party fails to disclose relevant documents.

The parties and their witnesses, including expert witnesses, may give oral evidence at trial and produce any documentary evidence listed in their pleadings and are liable to cross-examination. Witnesses may be re-examined on matters arising in cross-examination. A witness may be recalled with leave of the court.

## 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

The court sets dates for hearing of cases in consultation with the parties at the close of the pleadings. Generally, hearings commence within 12 months of the filing of the case and complete within 12 months. Judgment is delivered within about three months of completion of the hearing.

Generally, summary proceedings (where evidence is adduced by way of affidavit, although the deponent may be cross-examined with leave of the court) are normally completed and judgment delivered within six months.

## 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

The following conservatory remedies are available:

- provisional seizure of movable property
- provisional attachment of funds in the hands of third parties
- interim and interlocutory injunctions
- warrant of arrest (in admiralty claims)
- inhibition (preventing the registration of any dealing in registered immovable property)

## 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

Judgments of the courts may be enforced by:

- attachment proceedings
- seizure and judicial sale of property (both movable and immovable)

- writ of possession (in respect of both movable and immovable property)
- contempt of court proceedings to penalise non-compliance with an order of specific performance or other order of the court
- insolvency proceedings against judgment debtors

## 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

The court is empowered to award costs of proceedings to such of the parties and in such amount as it considers appropriate.

A party to a case (plaintiff or defendant) who is a non-resident may, on the application of the other party, be required to furnish security for costs of the proceedings.

## 11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

There is a right of appeal against a final judgment of the Magistrate or the Supreme Court (whether exercising its original or appellate jurisdiction) in respect of both findings of law and fact.

An appeal from any interlocutory judgment of the Supreme Court or final judgment of the Supreme Court where the subject matter of the appeal has a monetary value less than SCR 10,000 is subject to leave of the Supreme Court. If leave is refused by the Supreme Court it may be granted by the Court of Appeal.

On the application of an appellant, the execution of a judgment may be stayed pending appeal on such terms as the court may decide (including the provision of security).

## 12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

Generally, Seychelles State entities do not have immunity from civil proceedings in the Seychelles. However, the State may not be sued for any act or omission of a judicial officer whilst discharging a judicial function lawfully vested in him or her, except where a person has suffered imprisonment as a result of a serious miscarriage of justice.

A foreign State (including any State entity) is immune from the jurisdiction of the Seychelles courts, unless it has waived its immunity by submitting to the jurisdiction. However, jurisprudence suggests that the Seychelles courts would not uphold a claim of State immunity where the dispute arises from a commercial transaction or other non-sovereign activity.

## 13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

Judgments of superior courts of the Commonwealth (defined as territories where the Queen of the United Kingdom is recognised as the head) are enforceable in the Seychelles under the Foreign Judgments (Reciprocal Enforcement) Act. The judgments are required to be registered as judgments of the Seychelles Supreme Court in accordance with the Act before becoming executory.

Other foreign judgments may be enforced under the Seychelles Code of Civil Procedure. The foreign judgment creditor is required to file a plaint in the Seychelles Supreme Court for a declaration

that the judgment is executory in the Seychelles.

In either case, the foreign judgment must satisfy these basic requirements:

- the judgment is capable of execution in the country where it was delivered
- the rights of the defendant to a fair hearing have been respected in the foreign court proceedings
- the foreign court has applied the proper law, in accordance with the Seychelles rules of private international law
- the judgment is not contrary to any rule of public policy applicable in the Seychelles
- there was no fraud

## ARBITRATION

### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

The Seychelles arbitration law, set out in the Commercial Code, is not based on the UNCITRAL Model Law. It is based on the text of the Uniform Law on Arbitration proposed by the European Convention on Arbitration 1967, with certain modifications. It includes elements of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

In particular, it provides for the recognition and enforcement of foreign arbitral awards under the New York Convention on the basis of reciprocity. However, the Seychelles is not a party to the New York Convention.

### 15. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

The Commercial Code requires that there be an instrument in writing signed by the parties or other document binding on the parties showing their intention to have recourse to arbitration.

### 16. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?

The court will stay proceedings if it is seized of a dispute in respect of which there is a valid arbitration agreement (whether or not the arbitration is seated in or outside the Seychelles).

### 17. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?

The Seychelles court may not intervene in arbitration proceedings seated outside the Seychelles, except on application of a party to grant conservatory or other interim relief.

### 18. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

No appeal lies against a foreign arbitral award in the Seychelles court, but to the extent that a foreign arbitral award under the New York Convention could be enforced in the Seychelles (on the grounds of reciprocity), the award may be set aside by the

Supreme Court on grounds identical to those set out in article V of the New York Convention.

### 19. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION?

As stated above, the Seychelles is not a party to the New York Convention and does not recognise foreign arbitral awards under the Convention, except on the basis of reciprocity. A foreign arbitral award recognised on that basis may be registered in the Supreme Court with leave of the court, and it may then be enforced in the same manner as a judgment or order of that court. However, there is no settled list of reciprocating States and so enforcement of foreign awards on the basis of reciprocity is impracticable and seldom sought in the Seychelles.

As an alternative, a foreign arbitral award may be enforceable in the Seychelles under the Foreign Judgments (Reciprocal Enforcement) Act if it is first registered as a judgment of a superior court of the Commonwealth (see 13 above).

### 20. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

In practice foreign arbitral awards are not readily enforceable in the Seychelles (see question 19 above). There is growing recognition amongst the Seychelles Bar and the judiciary of the need for the Seychelles to accede to the New York Convention.

## ALTERNATIVE DISPUTE RESOLUTION

### 21. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

The Supreme Court (Mediation) Rules 2013 have established a court-annexed mediation system. A judge of the Supreme Court, seized of a civil dispute may, on his/her own motion or at the request of a party, refer the dispute to mediation. The mediator may be a judge of the Supreme Court or other person authorised under the Rules to act as a mediator.

## REFORMS

### 22. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

No significant procedural reform is anticipated.

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# SIERRA LEONE



## INTRODUCTION

The Sierra Leone legal system is based on the Constitution of 1991 as well as English common law and English legislation.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

Sierra Leone has no split profession. Upon satisfactory completion of the required pupillage, the name of a pupil barrister is entered in the Roll of Court as a legal practitioner and a certificate of enrolment is issued entitling him/her to practise both as a barrister and solicitor in all courts of Sierra Leone except the Local Courts (see below).

To become a lawyer in Sierra Leone one must:

- attain an honours degree in law from either (i) one of a number of specified universities in Sierra Leone or (ii) an approved institute of the Commonwealth/country with a legal system similar to that of Sierra Leone
- complete a one-year course at the Sierra Leone Law School and be called to the Bar/awarded a Certificate of Qualification in Law to practise as a legal practitioner
- serve a period of pupillage of not less than 12 months with a legal practitioner of at least 10 years' standing in Sierra Leone

Foreign lawyers are permitted to register to practise law in Sierra Leone provided they satisfy the Council of Legal Education that:

- they have been admitted and enrolled as legal practitioners in any Commonwealth country approved by the Council
- they have practised law in that country for a period of at least five years
- they are fit and proper to be granted such right
- they are a citizen of a Commonwealth country which has similar legal provisions granting equivalent rights to citizens of Sierra Leone

However, foreign lawyers may only work as legal practitioners in either the judicial and legal service or in the services of the State but not as private practitioners.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The court system in Sierra Leone comprises two levels, the superior courts and the lower courts. The superior courts are:

- the Supreme Court
- the Court of Appeal
- the High Court (Commercial and Admiralty Division (ie Fast Track Commercial Court), Land and Property Division, Family and Probate Division and General Civil Division)

The lower courts are:

- the Magistrates' Court, including the Juvenile Court and Coroners Court
- the District and Traditional Court (ie Local Courts)

The Local Courts are within the formal legal system but are not under the jurisdiction of the judiciary. Instead, the Local Court is controlled by the Ministry of Local Government.

The Magistrates' Courts are courts of summary jurisdiction and are established in several districts in Sierra Leone. Their jurisdiction is limited to those districts. They hear both criminal and civil disputes (excluding defamation, divorce, and breach of promise of marriage cases).

The High Court is a court of original jurisdiction both in civil and criminal matters. It is also a court of supervisory jurisdiction over all lower courts.

The High Court has an appellate jurisdiction and it hears appeals from the Magistrates' Courts and in its local division from the District Appeal Court (ie from the Local Courts). It also has jurisdiction to determine matters relating to industrial and labour disputes and administrative complaints.

The Court of Appeal only deals with matters on appeal in both civil and criminal cases from the High Court.

The Supreme Court is a court of original jurisdiction in all matters relating to the enforcement or interpretation of the Constitution and other legislation. The Supreme Court is also the final court of appeal and has supervisory jurisdiction over all courts in Sierra Leone and over any adjudicating authority.

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

The time limits for bringing civil claims are provided for by statute and limitation periods vary depending on the cause of action.

A limitation period of 12 years applies to actions:

- upon a specialty
- upon any judgment from the date on which the judgment became enforceable
- to redeem mortgaged land or non-foreclosure of mortgaged personal property
- to recover principal amounts secured by a mortgage or other charge on property
- to recover proceeds of the sale of land
- relating to the personal estate of a deceased person, or to any share or interest in such estate

A limitation period of six years applies to actions:

- founded on simple contract or tort
- to enforce recognisance
- to enforce an award where the submission is not by an instrument under seal
- to recover any sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of penalty
- to recover seamen's wages
- in respect of further successive conversions or wrongful detention and extinction of title in chattels
- to recover arrears of rent or damages
- to recover arrears of interest, in respect of any legacy, judgment or mortgage
- to recover trust property or breach of trust

A limitation period of three years applies to actions claiming damages for negligence, nuisance or breach of duty.

A limitation period of two years applies to actions arising out of any penalty or forfeiture.

A limitation period of one year applies to actions against public authorities.

Extensions of the limitation period are available in cases where the person to whom the right of action accrued is under a disability.

#### **4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?**

Like nearly all civil law jurisdictions based on English jurisprudence and the common law, communications between a client and a lawyer are privileged. For such communications to qualify as privileged the communications must have been confidential in nature and must have been made in the course of a lawyer/client relationship or with a view to establishing such a relationship. Therefore, giving or obtaining legal advice is privileged whether or not litigation is contemplated. This simply means neither the lawyer nor his/her client can be compelled by any court or tribunal to divulge the nature and/or content of such privileged communications.

Further, section 39(1) of the Legal Practitioner Code of Conduct Rules 2010 states "A Legal Practitioner employed as Counsel shall not communicate to any third person information which has been entrusted

to him in confidence or use such information to his Client's detriment or to his own or another Client's advantage".

If a client admits guilt in respect of criminal charges to his/her lawyer the lawyer should not proceed with the defence but should advise his/her client to plead guilty in court. If the client refuses to plead guilty, the lawyer is still not entitled to breach the client's confidentiality. The only choice open to the lawyer is to withdraw his representation.

#### **5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?**

Civil proceedings may be initiated by writ of summons, originating summons, originating motion or petition.

Generally civil proceedings are begun by a writ of summons filed together with a statement of claim, at the High Court Registry or a District Registry. Service of the writ is then effected and an affidavit of service filed. Once served, the defendant has 14 days to enter an appearance and 10 days within which to file a defence. Thereafter, the plaintiff has 10 days to file a reply if need be.

Within 14 days of the close of pleadings there is mutual exchange of documents on which the parties rely and/or ordered discovery by the court. Within one month of the close of pleadings an application for directions is filed (summons for directions). Admissions and agreements, issues for trial, the mode of trial and trial date are all discussed and fixed.

#### **6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?**

After the close of pleadings, the parties undertake discovery by exchanging lists of documents. Each party's list is served on the other within 14 days of the close of pleadings to allow time for the inspection of the documents disclosed. Either party is at liberty to serve a notice on the other requiring it to verify its list by affidavit.

At the summons for directions stage, the court usually directs the parties to serve on each other, within 14 weeks or so, written statements of oral evidence which each party intends to use as evidence in court (witness statements or affidavits). If there is no written statement the name of the intended witness should be provided to the other party. Where the witness whose written statement has been served is not called to testify, no other party can put the statement in evidence at trial. However, the court may direct that the statement served or part of it be put as evidence-in-chief of the witness or the evidence.

Evidence may also be presented by depositions. Depositions are ordered by the court to be made under oath before a judge, or an officer, or examiner of the court or some other person.

Cross-examinations of a witness giving oral testimony or a deponent to an affidavit or a person making a deposition ordered by the court can be made by the other party. The other party at their discretion may re-examine a witness or deponent mostly for clarity purposes on questions asked under cross-examination.

Experts are treated like any other witness. An expert can make a deposition and will be called to give oral evidence in court. They will be subject to cross-examination once they give evidence.

## 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

The procedure and timetable is guided by the High Court Rules/ Civil Procedure Rules (as set out in question 5 above). After the close of pleadings, the action is set down for trial and a date fixed by the court. These processes are out of the control of the parties.

The speed of the process depends on the approach of the parties and the trial judge. For instance, interim applications or delays in responding to documents filed may slow down the process considerably. Also, each judge manages his or her own case list and, because there are a limited number of judges available, cases are almost always adjourned up to five to six times.

Therefore, civil proceedings in Sierra Leone can be a very slow process. The length of time between the issuance of a writ of summons and the start of trial can be up to three months, and the length of time from trial to final judgment may be one year or more. However, the process is much faster in the Fast Track Commercial Court.

## 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

A court may grant interim remedies before or during trial to preserve certain interests or the *status quo* pending trial. Interim remedies available to preserve a party's interests include: injunction; detention, custody or preservation of property which is the subject matter of the action; and/or sale of property.

An application for an interim order may be granted conditionally or unconditionally, and such an application may be made before or after trial.

Where an application is made to the court for an interim order and it appears to the court that the matter in dispute can be better dealt with by an early trial, the court may make such an order. Further, when an application for an interim order is made, the court, before making such order, will require that the applicant gives an undertaking as to damages to the person opposing the application.

Interim remedies are regularly granted in practice.

There is also provision in the High Court Rules for a party to apply for a stay of execution, to preserve the *status quo* even after a judgment has been delivered

## 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

A judgment for the payment of money may be enforced by one or more of the following:

- writ of *feri facias* (ie *fi. fa*)
- garnishee proceedings
- appointment of a receiver
- charging orders (eg charge on land, stock etc)
- writ of sequestration
- attachment of debts
- bankruptcy notice
- an order of committal

A judgment for the payment of money into court may be enforced by one or more of the following:

- appointment of a receiver
- an order of committal
- writ of sequestration

A judgment of possession of immovable property may be enforced by:

- writ of possession
- committal
- writ of sequestration

A judgment for the delivery of goods may be enforced by:

- writ of delivery
- committal
- writ of sequestration

A judgment to do or abstain from doing any act may be enforced by:

- writ of sequestration against the property of that person
- writ of sequestration (if it is a corporate body) against the property of any director or other officer of the body
- committal

Enforcement orders are made routinely in practice. The most popular form of enforcement is *feri facias*.

## 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

The court does have broad discretion to award costs of and incidental to proceedings. Usually costs follow the event.

The court will consider all the facts of the case, the result and the conduct of the parties. A party may be entitled to costs without an order from the court where the claim is a liquidated demand.

Foreign claimants may be required to provide security on an application to the court made by the defendant. This order is usually granted in situations where the claimant is ordinarily resident outside of the jurisdiction, or is suing for the benefit of some other person, or where the claimant has changed his address during the course of the proceedings. The security to be given will be at the discretion of the court.

## 11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

The most common grounds of appeal in Sierra Leone are:

- a misdirection as to the law
- a misdirection as to the facts
- an error in law
- jurisdictional issues
- an incorrect judgment in light of the weight of the evidence

The grounds of appeal must be set out concisely according to the cause of action.

An appeal may lie as of right from a final judgment, decree or order of the court. The time limit within which such an appeal must be brought is 28 days after the date of judgment (exceptionally an extension of a further 28 days will be granted).

In relation to interlocutory judgments, an appeal requires leave of the court. Where an appeal lies by leave only, the appellant must apply in the court below or to the Court of Appeal within 14 days from the date of the decision. Exceptionally an extension of time of 14 days will be granted.

An appeal in itself does not operate as a stay of execution. The appellant may, however, apply to the Court of Appeal (or to the Supreme Court) for an order of a stay of execution of the judgment and an order for a stay of proceedings in the court below pending the hearing and determination of the appeal by either the Court of Appeal or the Supreme Court.

## **12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?**

The Constitution of Sierra Leone provides for civil actions to be brought against government ministers, government officials and domestic State entities. By the enactment of the State Proceedings Act, at least three months' notice must be given to the office of the Attorney General of the intention to commence such an action. It is only after the expiration of three months' notice and in the absence of any action taken by the office of the Attorney General (during the tenure of the notice) that the claimant can proceed to issue a writ of summons to commence the action.

Since it has been made possible for civil actions to be brought against State officials and domestic entities there is no longer any claim for immunity from civil proceedings available to such persons/institutions, apart from the usual constitutional, presidential immunities and parliamentary privileges and immunities.

The only foreign State entities which can claim immunity from civil proceedings are those that have been accorded diplomatic status and immunities from civil proceedings. Sierra Leone, like any other country, recognises the diplomatic privileges and immunities internationally accorded to all foreign embassies, diplomats and diplomatic premises but there are no automatic immunities for other foreign State entities that operate within the jurisdiction of Sierra Leone. Any immunity from civil proceedings enjoyed by a foreign entity can be waived by the foreign State in certain instances.

## **13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?**

The Sierra Leone courts will recognise a foreign judgment that emanates from a jurisdiction that shares a bi-lateral reciprocal enforcement treaty with Sierra Leone. The procedure is governed by the Reciprocal Enforcement of Judgments Act, Cap 21 and the Sierra Leone High Court Rules.

Provided there is a bilateral reciprocity treaty between the Government of the State in which the original judgment was given and the Sierra Leone Government, a foreign judgment will be recognised through an *ex parte* application (supported by evidence) made by originating summons to the High Court for

leave to have the foreign judgment registered in the High Court of Sierra Leone. In granting leave for the foreign judgment to be registered, the court will state the time limit within which the judgment creditor is entitled to apply to set aside the registration of the judgment the execution of the judgment by the judgment creditor within the jurisdiction of Sierra Leone by way of a writ of execution, if the judgment debtor fails to apply by summons to set aside the registered foreign judgment within the timeframe given.

## **ARBITRATION**

### **14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?**

The arbitration law is not based on the UNCITRAL Model Law. The law governing arbitration in Sierra Leone is the Arbitration Act, Cap 25 of the Laws of Sierra Leone 1960 (the Arbitration Act), which is based on the old English position under the Arbitration Act 1950.

It obviously pre-dates both the UNCITRAL Arbitration Rules 1976 and the UNCITRAL Arbitration Rules 2010, and bears little similarity to them. The Arbitration Act is far less detailed than the UNCITRAL Model Law.

### **15. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?**

In order for an arbitration agreement to be enforceable, there must be an express term in the contract that any disputes arising out of the contract should be finally settled through arbitration. A "submission" according to section 2 of the Arbitration Act, Cap 25, means "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not". The agreement needs to be signed by the parties.

### **16. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?**

Under section 5 of the Arbitration Act, the High Court of Sierra Leone will stay proceedings where there is a valid arbitration submission/clause providing for arbitration with a seat in Sierra Leone, provided it is satisfied that there is no sufficient reason why the matter should not be referred to arbitration, and that the party applying for the stay was and remains ready and willing to do all acts necessary for settlement of the matter through arbitration.

There is a policy in Sierra Leone that welcomes arbitration as a means of dispute resolution and the courts are generally supportive of arbitration. However, in practice the High Court may only order a stay of such proceedings in domestic cases where the arbitration clause contained in the contract does not expressly or by implication oust the jurisdiction of the High Court of Sierra Leone in relation to matters which relate directly to Sierra Leone. As described in further detail below, the High Court treats domestic arbitration like a court of first instance. The arbitral tribunal is not empowered to determine its own jurisdiction.

Where a party applies for a stay of proceedings in reliance on an arbitration clause providing for arbitration with a seat outside Sierra Leone, the High Court of Sierra Leone would not grant a stay of proceedings if the clause would oust the jurisdiction that the High Court would otherwise have over the dispute in relation to

matters which relate directly to Sierra Leone. Whether the High Court would have jurisdiction is assessed on a case-by-case basis depending on the facts before the judge.

### 17. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?

Although this is not provided in the Arbitration Act, the court may intervene in arbitrations seated outside the jurisdiction where the law governing the substantive obligations of the parties under the contract is the law of Sierra Leone.

The Arbitration Act does not provide for the High Court to grant interim or conservatory relief in support of a foreign-seated arbitration.

The court can also intervene to set aside awards where the arbitrator has conducted himself incorrectly or the award has been improperly procured, for example, where the tribunal exceeded its jurisdiction, where the award was manifestly partial or where the tribunal disregarded a fundamental rule of justice.

### 18. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN LOCAL COURTS? IF SO, ON WHAT GROUNDS?

The registration of foreign arbitral awards can be appealed in the High Court of Sierra Leone only after the award or judgment has been duly registered in the High Court Registry pursuant to the provisions of the Foreign Judgments (Reciprocal Enforcement) Act and order 45 of the High Court Rules 2007.

An appeal can be filed against a foreign arbitration award, and the appellant can then apply to the judge to set aside the registration or enforcement of the award, as the case may be, or suspend the execution of the award.

Pursuant to the provisions of section 12 of the Arbitration Act, the court can set aside an award on the grounds of misconduct of an arbitrator or where the award is improperly procured. There have been cases where the High Court has overturned a domestic arbitration award on its merits as if it were a decision of the lower courts. This is not provided in the Arbitration Act but this is what is done in practice.

### 19. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF AWARDS RENDERED IN ARBITRATION SEATED OUTSIDE OF THE JURISDICTION?

Sierra Leone is not a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

Awards or judgments in arbitration seated outside Sierra Leone can be enforced pursuant to the provisions of order 45 of the High Court Rules 2007 (Reciprocal Enforcement of Judgment). The party seeking to enforce the award should first seek leave of the court to register the foreign award as a judgment and once duly registered, it must be treated as a judgment of the High Court of Sierra Leone and be enforced by a writ of execution.

The High Court might refuse to register a foreign award in circumstances where:

- the award was procured by fraud
- the respondent to the arbitration did not receive notice of the arbitration in sufficient time for them to appear to defend the claim
- enforcement would be contrary to public policy in Sierra Leone

Alternatively, awards can be enforced if a judgment is obtained in that foreign country based on the award. The judgment can subsequently be registered in the High Court of Sierra Leone pursuant to the provisions of the High Court Rules 2007 as stated above.

### 20. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

The Sierra Leone judicial system has made provision for the expeditious enforcement of foreign awards like any awards made by a Sierra Leone court. This is clearly provided for in the High Court Rules of 2007.

## ALTERNATIVE DISPUTE RESOLUTION

### 21. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

No, parties are not required to consider or attempt ADR. However, the judicial process has always encouraged alternative dispute resolution during litigation. At any stage of a legal action, parties can enter into consent judgments ie the parties reach an agreement in settlement of part or all of a claim in writing, and the same is submitted to the court which enters it as a judgment of the court.

In addition to the above, with the establishment of the Fast Track Commercial Court, a more formal judicial alternative dispute resolution mechanism was introduced into the judicial system of the court. Rule 5(2) states as follows:

*"The pre-trial judge shall within fifteen days from the date the claim is assigned to him or her, invite the parties to settle the issues for trial or effect settlement of the claim".*

This stage is now firmly regarded as the Alternative Dispute Resolution stage (ADR) and it can result in the settlement of a matter without recourse to full trial.

## REFORMS

### 22. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

Since the reform of the Sierra Leone High Court Rules in 2007 to replace the old rules of the 1960s, it is very unlikely that there will be any procedural reforms in civil proceedings in the near future.

The Sierra Leone Law Reform Commission has been working on replacing the Arbitration Act since 2004/2005. It has not yet progressed into law.

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# SOMALIA



## INTRODUCTION

Somalia is a melange of jurisdictions, each with its own legal history, prevailing legal norms and overarching set of traditional dispute resolution mechanisms. There are three major jurisdictions within the area that used to be known as the former Democratic Republic of Somalia (which is shown as Somalia on most maps). At independence, Somalia had four distinct legal traditions: English common law, Italian law, Islamic Sharia law, and Somali Xeer (customary law). The challenge after 1960 was to integrate these diverse legal systems. During the 1960s, a uniform Penal Code, a Code of Criminal Court Procedures, and a standardised judicial organisation were introduced.

Ever since the fall of the Siad Barre regime in 1991, which left Somalia without a centralised Government, Somalia has suffered chronic underdevelopment compounded by decades of lawlessness and communal violence. Today, the country is much less integrated, with a number of regions declaring either sovereignty or autonomy from the Federal Republic of Somalia.

In the North East is the de facto State of Somaliland which has, since 1991, pursued a course completely divergent from the remainder of the Somali region. Somaliland has its own Constitution, President, Parliament, Supreme Court, and governance system. Somaliland does give credence to legislation and treaties that were in force upon its self-declared separation from the remainder of the Somali region in 1991. Following 1991, any action by the Government in Mogadishu is not viewed as authoritative in Somaliland.

In the North West of the former country is the semi-autonomous State of Puntland. Puntland has never stated that it intends to separate from Mogadishu and pursue its own course independent of the rest of the Somali region. It has, however, maintained that it

will require some level of independence in its own affairs. Puntland has its own President, Parliament, and Supreme Court. Its Parliament has passed numerous laws and it has recently passed its Constitution.

The remainder of the Somali region is a conglomeration of regions that have, at times, declared themselves semi-autonomous States in the vein of Puntland. However, none of these States has developed extensive governance systems on a par with Puntland and most continue to have some level of dependence on the Government in Mogadishu.

Recently, Somalia has experienced promising social and political stability with the establishment of the Federal Government of Somalia (FGS) on 20 August 2012, following the end of the interim mandate of the Transitional Federal Government (TFG). The successful political transition has given rise to intensified post-conflict reconstruction efforts, including developments in the rule of law.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

The Somali region has a fused legal profession where lawyers are known as advocates and have rights of audience in all courts and tribunals.

Persons with a degree in law from a recognised university may, after serving as a law apprentice for a period of six months and after passing an examination conducted by the Bar Council, be enrolled as advocates or solicitors on the Ordinary Roll of Advocates and Solicitors, maintained by the Supreme Court.

In particular cases, the President of the Supreme Court and the President of the Court of Appeal may, by a decree not subject to appeal, authorise the appearance of foreign advocates, under the supervision of local advocates, provided their names are entered in the Roll of their respective countries.

Somaliland lawyers have rights of audience throughout Somaliland; lawyers from other regions have rights of audience in the other Somali regions. Currently, there are no formal mechanisms for allowing non-Somaliland lawyers rights of audience in Somaliland courts and vice versa. However, the lack of formal mechanisms allowing for such activity does not stop such practices.



Currently, in Somaliland the requirements for obtaining a practising certificate are being debated. It is likely that the other Somali regions will also debate this question in the coming years. In Somaliland lawyers are admitted to practise based on either a law degree or extensive experience before courts.

There is a Somali Bar Association located in Mogadishu. Its members also include practitioners in the Interim Galmudug Administration, Interim Southwest Administration and the Interim Jubba Administration, as well as some practitioners in the Puntland Regional Government. The Bar registers its members and regulates compliance with ethics standards. It is not currently effective for security reasons, however, it is the recognised Bar in the region, and recognised by the Somali Federal Parliament.

## 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

All the Somali regions have a four-tier court system. In order of precedence from lowest to highest:

- District Courts have original jurisdiction to try civil disputes relating to amounts not exceeding SOS 3 million, family disputes, inheritance (in accordance with Sharia), criminal matters for which the minimum punishment is less than three years imprisonment, and cases which have no monetary value
- Regional Courts have jurisdiction in cases above SOS 3 million, criminal cases for which the minimum punishment is more than three years' imprisonment, enforcement of employment cases, and original jurisdiction over all remaining matters that are not constitutional or administrative in nature
- Courts of Appeal maintain appeal supervision over the lower courts and deal with the recognition of foreign judgments and the administrative power of the region's courts
- Supreme Court, with original jurisdiction in constitutional and administrative cases, acts as the final appellate court, although it can review its own cases in full bench. The Court also has original jurisdiction over corporate dissolution cases and approval of election results. The Supreme Court also acts as the Constitutional Court (or High Court of Justice) and carries duties conferred on it by articles 99 and 102 of the 1960 Constitution. The previous Constitutions of Somalia are applicable in so far as they are not in conflict with the August 2012 Provisional Constitution

There is also a clan system underpinning the formal court system. This operates informally but is particularly active in the field of ADR (see question 21 below).

## 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

In Somali law (articles 371-385 of Somali Civil Code, Law No. 19 of 27 July 1974 (Somali Civil Code)) there is a limitation period of 15, five, three, and one year depending on the cause of action. For example, actions for unpaid accounts of recognised professions are subject to a limitation period of three years. The limitation period for costs of any arrears of *per diem* accounts is one year. Actions to enforce immovable property rights must be brought within 15 years. Contractual and tort claims must be brought within three years from the date when the cause of action arose.

Actions to review the legality or constitutionality of the acts of Government have no definite limitation period.

## 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

These are not clearly protected under Somali law at this time.

## 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

Proceedings begin by filing a complaint along with a summons with the clerk of the court. On the first appearance in court, the defendant is granted time, usually about 15 days, to file its response. Where the response includes a counterclaim, the plaintiff is also granted about 14 days to file an answer. When the pleadings are closed, the parties and the court collaboratively establish the date for the beginning of the trial.

## 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

Each party to a complaint is required to file in court and serve on the other party a list of all documentary evidence relied upon. In commercial cases, a party is also required to file in court and serve on the other party copies of all documentary evidence listed in its pleadings. Currently the discovery rules and other documentary evidence rules for authentication are nascent.

The parties and their witnesses may give oral evidence at trial and be cross-examined/re-examined on points arising in cross-examination. They may also produce any documentary evidence listed in their pleadings. Witness testimony is routinely disallowed where there is some modicum of bias on the part of the witness, which presents lawyers with a difficulty in civil cases.

Expert testimony is permissible and has been used more prevalently in recent years given the need for Somali legal expertise in Somalia's emerging legal regime (for example, regarding the purchase and sale of real estate).

## 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

The court sets dates for hearing cases in consultation with the parties at the close of the pleadings. Generally, hearings commence within a few weeks of the filing of the case. Judgment is usually delivered within a further few days after the hearing has been completed.

## 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

The following conservatory remedies are available:

- provisional seizure of movable property
- provisional attachment of funds in the hands of third parties
- interim and interlocutory injunctions

## 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

Judgments of the courts may be enforced by:

- attachment proceedings
- seizure and judicial sale of property (both movable and immovable)

- writ of possession (in respect of both movable and immovable property)
- contempt of court proceedings to penalise non-compliance with an order of specific performance or other order of the court
- insolvency proceedings against individual judgment debtors and corporate debtors

**10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?**

The court may award costs of proceedings to any of the parties and in any amount the court considers appropriate. Any party to a case, on the application of the other party, may be required to furnish security for costs of the proceedings. Security for litigation costs is routine in civil cases.

**11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?**

The appellant is required to write a letter of appeal, pointing out the legal and factual defects of the judgment or any evidence unlawfully excluded from the lower court. An appeal must be brought within 30 days of the judgment rendered by the lower court. Any party who voluntarily confesses/admits before the lower court in either a civil or criminal case has no right to appeal for any adverse judgment based on those admissions/confessions.

**12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?**

Generally, Somali State entities do not have immunity from civil proceedings in Somali courts. However, the State(s) may not be sued for any act or omission of a judicial officer whilst discharging a judicial function lawfully vested in him or her, except where a person has suffered imprisonment as a result of a serious miscarriage of justice.

Theoretically, a foreign State (including any State entity) is immune from the jurisdiction of Somali courts, unless it has waived its immunity by submitting to the jurisdiction of the Somali court. In practice, foreign entities are routinely sued in Somali courts.

**13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?**

In order to enforce a foreign judgment in Somalia, one must first show:

- that the foreign court respected the main principles of its legal system
- the full participation of the parties in the proceeding or proved absence of one or more of the parties in accordance with the law
- that the judgment rendered by the foreign court was enforceable
- that the judgment rendered by the foreign court does not contradict the principles of the Somali Civil Code or other prevailing laws
- that the matter is not currently also in dispute before a Somali judge

## ARBITRATION

**14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?**

No. There is currently no formal arbitration law.

**15. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?**

Arbitrators (also called referees) are mutually appointed by the parties through agreement. If the parties cannot agree on an arbitrator, they make submissions before the Regional Court, after which the judge will make a binding determination on the arbitrator, having taken note that the parties are unable to agree (article 321, Somali Civil Code). The appointed arbitrator must be a legally competent Somali citizen (article 323, Somali Civil Code).

**16. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?**

If the parties have unanimously agreed to submit a dispute to arbitration, Somali law requires a stay of court proceedings. No one is allowed to have recourse to the court before the arbitration has taken place (article 317, Somali Civil Code).

**17. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?**

Under the Civil Procedure Code, on application of a party, the court may grant conservatory or other interim relief in support of an arbitration seated outside the jurisdiction. This routinely happens within the domestic context as the courts and traditional dispute resolution mechanisms usually operate simultaneously.

**18. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?**

There is no appeal process regarding foreign arbitration awards.

**19. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION?**

If a form of ADR (including arbitration) is successful, the parties may register the agreement or award with the Regional Court within 10 days from its issuance (if it is in written form and meets other formality requirements) in order to have the court support its enforcement.

Courts have, at times, enforced foreign arbitration awards. Usually, courts require foreign arbitration awards to have been registered as judgments within the foreign jurisdiction where the arbitration took place. This allows the courts to enforce the foreign judgments under the Somali Civil Code. The case must be between two foreigners or a Somali national (not currently residing in the country) and a foreigner. The courts do not enforce foreign awards between two Somali nationals.

**20. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?**

Somalia (and Somaliland) is not a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Foreign awards are rarely enforced in the Somali courts. Mostly this is due to the current incapacity of the Somali judiciary and the lack of foreign individuals working here. There simply isn't the flow of money and interests across borders that require the development of such norms.

## ALTERNATIVE DISPUTE RESOLUTION

### 21. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

It is customary practice in both the Regional Court and Appeal Court that the judge will inquire whether the parties want to participate in alternative dispute resolution (called out-of-court settlements or extra-judicial conciliation). If so, the judge will consent to an adjournment of the proceeding to resolve the dispute.

In practice, most cases go through some form of ADR administered by the clan networks either at the request of the parties or the judge. The clan system is commonly known as the informal judicial system. The parties may submit their case to ADR, which should stay the litigation pending the outcome of the ADR.

For such extra-judicial conciliations or settlements to be effective and enforceable they must be registered at the District Court of the place which the conciliation has occurred (article 333, Somali Civil Code).

## REFORMS

### 22. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

There are a number of developments in Somali law that are contingent on the implementation of the relatively new constitutional amendments in the 2012 Provisional Constitution. Somalia is in the process of developing a Federal judicial system that is integrated across Somalia. The effectiveness of these reforms will depend on political dialogue and negotiation between the Somali Federal Government and the various autonomous regions.

Further, the Somali Bar Association is in discussion with Federal authorities to expand its regulatory scope and jurisdiction across Somalia. We expect to see an increase in membership in the Somali Bar across Federal Member States.

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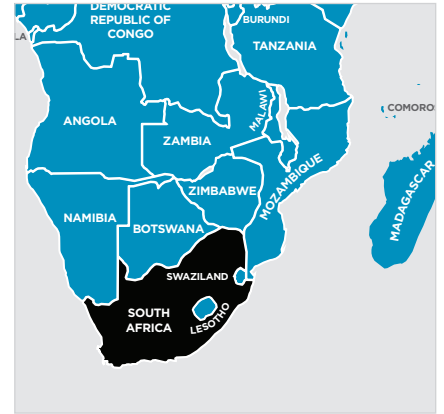
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# SOUTH AFRICA



## INTRODUCTION

South Africa is a mixed common law jurisdiction, in which substantive law is primarily derived from Roman-Dutch law but influenced by English law, while procedural law is primarily based on English law, all subject to a supreme Constitution with a justiciable Bill of Rights.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

Inherited from the English system, South Africa has a split profession, in which attorneys (solicitors) take instructions from individual clients, provide advice and generally manage the administrative aspects of dispute resolution, while advocates (barristers) receive briefs from attorneys to appear in court and give specialist strategic and substantive advice. Without briefing an advocate, attorneys may appear in the lower courts and, since 1995, may apply for the right to appear in the superior courts, although this right is not commonly exercised.

The Legal Practice Act of 2014, which is gradually being brought into force, introduces several significant reforms to the regulation of the legal profession (such as allowing an advocate to accept briefs directly from clients without referral from an attorney, subject to certain conditions), but the essential structure of the split profession remains unchanged.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The South African judiciary is broadly divided into superior courts (presided over by judges who are appointed by the President on the recommendation of the Judicial Service Commission) and lower courts (presided over by magistrates who are appointed by the Minister of Justice on the advice of the Magistrates' Commission).

The superior courts are:

- the Constitutional Court, which is the highest court of appeal in all matters, with exclusive jurisdiction in particular constitutional matters
- the Supreme Court of Appeal, which may hear appeals from any division of the High Court

- the High Court, which is divided into provincial and local divisions with delineated territorial jurisdiction and
- Statutory Courts with similar status to the High Court (including Tax Court, Electoral Court, Land Claims Court, Labour Court, Labour Appeal Court and Competition Appeal Court)

The lower courts (better known as Magistrates' Courts) are divided into:

- Regional Courts, which hear mainly criminal matters but also certain civil matters
- District Courts, which hear lesser criminal and civil matters and
- Statutory Courts and Tribunals with similar status to District Courts (including Equality Courts, Community Courts, Customary Courts, Consumer Courts and Tribunals, Military Courts, Rental Housing Tribunals, Workers' Compensation Tribunals, etc)

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

The Prescription Act of 1969 imposes the following time limits:

- 30 years for any debt secured by mortgage bond, any judgment debt, any tax debt, and any debt owed to the State in respect of any share of the profits or royalties from mining
- 15 years for any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State
- six years for any debt arising from a notarial contract, a bill of exchange or other negotiable instrument
- three years in respect of any other debt

The applicable time limit begins to run from the date on which the debt becomes due, provided that it will not be deemed to become due until the creditor becomes aware (or, by exercising reasonable care, could have become aware) of the debtor's identity and the facts from which the debt arises.

### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

Yes, in the same way as under English law.

## 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

There are two main types of civil proceedings:

- action proceedings (in trial court) are appropriate for matters involving material disputes of fact, which cannot be resolved without oral evidence. These proceedings are commenced by the plaintiff issuing a summons and particulars of claim, making the essential allegations necessary to establish its cause of action, without reference to supporting evidence. The defendant must file a notice of intention to defend, followed by a plea, making the essential allegations necessary to establish its defence, to which the plaintiff may file a replication. After full discovery of documents, interrogatories and a pre-trial conference, dates are allocated for a trial, where each party presents and challenges documentary evidence and witnesses, followed by legal argument
- application proceedings (in motion court) are appropriate for matters involving no material disputes of fact (or such limited disputes as can be resolved without oral evidence). Such proceedings are instituted by the applicant issuing a notice of motion and founding affidavit setting out the grounds for the relief sought and presenting all of the supporting evidence. The respondent must file a notice of intention to oppose, followed by an answering affidavit setting out the grounds for opposing the relief sought and presenting all of the supporting evidence, to which the applicant may file a replying affidavit. There is no trial and there are no further opportunities to present or challenge evidence. Legal argument is made on the basis of the facts set out in the affidavits

## 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

In action proceedings, after filing their pleadings, the parties must make full discovery of anything in their possession that is potentially relevant to the disputed issues (and is not legally privileged). In order to narrow the disputed issues, the parties typically exchange requests for further particulars, interrogatories and requests for admissions of certain facts (such as the authenticity of documents). The parties are required to agree on a trial bundle, containing all discovered evidence on which the parties intend to rely. The parties exchange witness lists, but not witness statements. Witnesses are examined, cross-examined and re-examined in open court, and may also be questioned by the judge, who must assess the credibility of each witness and the probative value of their evidence.

## 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

There are detailed rules of procedure for both action and application proceedings in the High Court and in the Magistrates' Courts, as well as more detailed practice manuals and directives issued for the busier divisions (ie the High Court divisions seated in Pretoria, Johannesburg and Cape Town, as well the Johannesburg Magistrate's Court).

Each set of rules does afford the parties a limited degree of control over the timetable, as deadlines for filings and discovery may be extended or shortened by agreement. However, in the absence of demonstrable urgency, the parties cannot expedite the dates for hearing or trial, which are dictated by typically congested court rolls.

Depending on the complexity of the matter and the conduct of the parties, action proceedings in the busier divisions of the High Court typically take between 18 and 36 months (but can take as long as six years in some cases). For example, in the divisions seated in Pretoria and Johannesburg, once the parties have completed all applicable pre-trial processes, the next available trial date is typically at least a year later.

Application proceedings are naturally more expeditious. Depending on the complexity of the matter and the conduct of the parties, opposed applications proceedings in the busier divisions of the High Court typically take between three and 12 months, although matters of extreme urgency can be disposed of in a single day.

## 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

A party may seek an interim interdict (injunction) ordering a counterparty to do or refrain from doing something, pending final determination of the dispute. A party may also seek provisional attachment of certain property or preservation of certain evidence, as well as security for costs.

## 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

In the case of a judgment for the payment of money, the creditor may have the debtor's movable or immovable property attached and auctioned to satisfy the debt (although, in the case of immovable property, a special writ must be obtained from a judge who must be satisfied that the debtor will not be rendered homeless). The creditor may also obtain a garnishee or emolument attachment order, which directs a third party (eg the debtor's employer or bank) to pay a portion of the debtor's funds to the judgment creditor instead. If these measures fail, the creditor may apply for the liquidation or sequestration of the debtor.

In the case of a judgment ordering conduct other than the payment of money, the defaulting party may ultimately be declared in contempt of court and committed to prison pending compliance with the order. (The Constitutional Court has declared that this enforcement method cannot be used in respect of judgments for the payment of money.)

## 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

All South African courts have the power to order costs, which typically follow the result unless there are exceptional circumstances justifying a departure from this default position (improper conduct by a party or its representatives may warrant awarding punitive costs against the unsuccessful party, or depriving the successful party of the right to recover its costs from the unsuccessful party).

Foreign claimants may be required to provide security for the defendant's costs, if the defendant so demands in good faith. Such security may take the form of a bank guarantee or an escrow deposit.

**11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?**

There is an automatic right to appeal against a Magistrates' Court judgment to the relevant division of the High Court within prescribed time limits, on the grounds that the judgment was substantively wrong. A Magistrates' Court judgment may also be taken on judicial review to the relevant division of the High Court on the grounds of a procedural irregularity.

There is no automatic right to appeal against civil judgments of the High Court. Leave to appeal must be sought from the judge(s) who delivered the judgment in question. If that is refused, special leave must be sought from the President of the Supreme Court of Appeal. The Constitutional Court may hear appeals against judgments of the Supreme Court of Appeal (and, in exceptional cases, directly against judgments of the High Court) in matters raising constitutional issues or an arguable point of law of general public importance.

The operation and execution of a judgment is suspended pending an appeal, or an application for leave to appeal, unless the court orders otherwise in exceptional circumstances. The party seeking such an order must prove on a balance of probabilities that he or she will suffer irreparable harm if the order is not granted and that the other party will not suffer irreparable harm if it is.

**12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?**

South African organs of State do not enjoy immunity from the institution of proceedings in the South African courts, nor from the execution of judgments by South African courts. Certain formalities and extended timetables are, however, prescribed by the Legal Proceedings against Certain Organs of State Act of 2002.

Consistent with international law, the Foreign States Immunities Act of 1981 provides that a foreign State is immune from the jurisdiction of the South African courts, except in respect of its commercial transactions; employment contracts; personal injuries; damage to property; ownership, possession and use of property; intellectual property; certain consumer taxes; admiralty proceedings; and any proceedings in respect of which it has expressly waived its immunity.

**13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?**

South Africa has not signed the Hague Convention of 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. This matter is thus governed by the common law and, in theory, by the Enforcement of Foreign Civil Judgments Act of 1988.

Under the common law, a foreign judgment is not directly enforceable, but founds a cause of action and will be enforced by South African courts as long as:

- the court that issued it had jurisdiction to entertain the case
- it is final and conclusive in its effect and has not become superannuated
- its recognition and enforcement would not be contrary to South African public policy
- it was not obtained by fraudulent means
- it does not involve the enforcement of a penal or revenue law of the foreign State and
- its enforcement of the judgment is not precluded by the provisions of the Protection of Business Act of 1978 (which pertains narrowly to judgments about minerals and other raw materials)

A party seeking to enforce a foreign judgment in South Africa must thus institute an application for a judgment by a domestic court, alleging in the founding affidavit that the above requirements have been met. The application may be opposed by the judgment debtor.

The Enforcement of Foreign Civil Judgments Act of 1988 aimed to simplify enforcement of foreign judgments, providing that judgments by the courts of designated foreign states will be enforceable in South Africa upon registration of a certified copy in a magistrate's court with jurisdiction over the areas where the judgment debtor resides, works, conducts business or owns immoveable property. However, only one state (Namibia) has been designated under this Act, so its application is limited.

## ARBITRATION

**14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?**

Currently, all arbitrations conducted within South Africa are governed by the Arbitration Act of 1965, which precedes and has not been brought into conformity with the 1985 UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006). The Act does not distinguish between domestic and international disputes.

The Minister of Justice published a draft International Arbitration Bill in April 2016, which is likely to be passed by Parliament and signed into law by the President during 2017. In its current form, the draft Bill will make the UNCITRAL Model Law applicable to international commercial disputes, while domestic disputes will continue to be governed by the Arbitration Act of 1965.

**15. WHAT ARE THE MAIN NATIONAL ARBITRATION INSTITUTIONS?**

The Arbitration Foundation of Southern Africa (AFSA), founded in 1996, is a full-service mediation and arbitration centre, which maintains a panel of arbitrators and its own rules of procedure.

Africa ADR, established under the auspices AFSA in 2009, is a full-service administrative authority for cross-border disputes in the Southern African region.

The Association of Arbitrators, founded in 1979, maintains a panel of arbitrators and a set of rules based on the 2010 UNCITRAL Arbitration Rules.

In August 2015, AFSA, Africa ADR and the Association of Arbitrators concluded an agreement with the Shanghai International Arbitration Centre to establish the China-Africa Joint Arbitration Centre, based in both Johannesburg and Shanghai, which was launched in November 2015.

**16. ARE THERE ANY RESTRICTIONS ON WHO MAY REPRESENT THE PARTIES TO AN ARBITRATION?**

The Arbitration Act imposes no such restrictions, nor does the Legal Practice Act of 2014.

**17. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?**

The agreement must be in writing and must specify the matters that may be referred to arbitration.

**18. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?**

The courts will stay legal proceedings in respect of any dispute subject to an arbitration agreement, as long as the defendant or respondent applies for such a stay before delivering any pleading, and the court is satisfied that there is "no sufficient reason" why the dispute should not be referred to arbitration in accordance with the agreement. The courts may even extend the agreed deadline for instituting arbitration proceedings if "undue hardship" would otherwise be caused. The approach is the same regardless of whether the arbitration is seated inside or outside South Africa.

**19. IF THE ARBITRATION AGREEMENT AND ANY RELEVANT RULES ARE SILENT, HOW MANY ARBITRATORS WILL BE APPOINTED, AND WHO IS THE APPOINTING AUTHORITY?**

There will be a single arbitrator, appointed by the parties jointly or, if they are unable to agree on an arbitrator, by the relevant division of the High Court.

**20. WHAT RIGHTS ARE THERE TO CHALLENGE THE APPOINTMENT OF AN ARBITRATOR?**

Under the Arbitration Act, a party may apply to court on "good cause" for an order setting aside or terminating the appointment of an arbitrator. The expression "good cause" has not been judicially tested, and the Arbitration Act states only that it "includes failure on the part of the arbitrator... to use all reasonable dispatch in entering on and proceeding with the reference and making an award or, in a case where two arbitrators are unable to agree, in giving notice of that fact to the parties". Likely examples of good cause would include reasonable apprehension of bias, which is the test for recusal of a judge.

**21. DOES THE DOMESTIC LAW CONTAIN SUBSTANTIVE REQUIREMENTS FOR THE PROCEDURE TO BE FOLLOWED?**

The Arbitration Act affords the parties considerable freedom to determine the procedure, subject to the basic requirement that each party must be afforded written notice of the time and place of the proceedings, and the opportunity to be heard at such proceedings.

**22. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED INSIDE THE JURISDICTION?**

In addition to the power to set aside or terminate an arbitrator's appointment (see question 20), the High Court may issue an interdict (injunction) precluding an arbitral tribunal from exceeding its jurisdiction, or make a declaratory order invalidating the arbitration agreement.

The Arbitration Act also vests the High Court with widely framed (but rarely exercised) powers, "on good cause shown", to set aside an arbitration agreement, order that a particular dispute referred to in the agreement shall not be referred to arbitration, or order that the agreement shall cease to have effect with reference to any dispute referred to arbitration.

The High Court is, however, also empowered (and typically more inclined) to support the arbitration process, by ordering: security for costs; discovery of documents and interrogatories; examination of witnesses; giving of evidence by affidavit; inspection, interim custody, preservation or sale of goods or property; interim interdicts (injunctions) or similar relief; securing amounts in dispute; substituted service of notices or summonses; and appointment of a receiver (trustee).

At any time before a final award is made, the arbitrator(s) or any or all of the parties, may approach the court for an opinion on a question of law, which will be final and binding on the arbitrator(s) and the parties.

**23. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?**

South African courts cannot exercise extraterritorial jurisdiction. Thus, the power to issue interdicts (injunctions), to terminate or set aside arbitrators' appointments or to deliver binding opinions on questions of law cannot be invoked in respect of disputes seated outside South Africa. The power to pronounce on the validity of an arbitration agreement may, however, be invoked, if the court enjoys jurisdiction on other grounds (such as the domicile of the parties or the place of conclusion of the contract). The High Court may also exercise its supportive powers (see question 22 above) in respect of persons or property located within its territorial jurisdiction.

**24. DO ARBITRATORS HAVE POWERS TO GRANT INTERIM OR CONSERVATORY RELIEF?**

The Arbitration Act in general terms provides that an arbitral tribunal may make an interim award (unless the arbitration agreement provides otherwise), but does not confer any specific powers on an arbitral tribunal, leaving it to the parties to do so in the arbitration agreement (including the supportive powers that may be exercised by the courts (see question 22 above)).

**25. WHEN AND IN WHAT FORM MUST THE AWARD BE DELIVERED?**

Under the Arbitration Act, the award must be written and signed by the arbitrator(s), and delivered to the parties within four months after the arbitrator(s) took up appointment or within a longer period stipulated in the arbitration agreement, an extension signed by the parties, or a court order.

**26. CAN A SUCCESSFUL PARTY RECOVER ITS COSTS?**

Unless the arbitration agreement provides otherwise, the arbitral tribunal has the discretion to make an appropriate costs award (including an award of punitive costs).

**27. ON WHAT GROUNDS CAN AN AWARD FROM AN ARBITRATION SEATED IN THE JURISDICTION BE APPEALED TO THE COURT?**

Unless the arbitration agreement provides otherwise, an arbitral award is final and cannot be taken on appeal. An award may,

however, be judicially reviewed and set aside by the High Court on the grounds of arbitrator misconduct, gross procedural irregularity, exceeding jurisdiction, or other impropriety in obtaining the award.

### **28. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?**

A foreign arbitration award cannot be appealed in the local courts.

### **29. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF: (I) AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION AND (II) DOMESTIC AWARDS?**

South Africa is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Under the Recognition and Enforcement of Foreign Arbitral Awards Act of 1977 (which incorporates, imperfectly, the New York Convention), a foreign arbitral award may be made an order of the High Court upon application with the original or certified copies of the arbitration agreement and the arbitral award (as well as authenticated sworn translations of these if they are not in English or another official language of South Africa). If the amount awarded is expressed in a foreign currency, the High Court order will state the equivalent amount in South African Rand on the basis of the exchange rate prevailing at the date of the original award.

The High Court may refuse to recognise or enforce a foreign arbitral award on the grounds as provided for in the New York Convention, that is if:

- the subject matter of the dispute is not arbitrable in South Africa (the only such matters are divorce and other matters of legal status)
- enforcement of the award concerned would be contrary to South African public policy
- the arbitration agreement was concluded by parties lacking contractual capacity under the law applicable to them, or was otherwise invalid under the law to which the parties have subjected it or the law of the country in which the award was made
- a party did not receive proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise not able to present its case
- the award deals with a dispute, or contains decisions on matters, falling beyond the scope of the reference to arbitration
- the arbitral tribunal was constituted or the proceedings were conducted in contravention of the arbitration agreement or the law of the country in which the arbitration took place
- the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made

Under the Arbitration Act, a domestic arbitral award may be made an order of the High Court, upon application by any of the parties after giving notice to the others, and will thereafter be enforceable in the same way as a High Court order (see question 9 above).

### **30. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?**

Foreign awards are readily enforceable in practice, under the procedures set out above.

## **ALTERNATIVE DISPUTE RESOLUTION**

### **31. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?**

Under the Labour Relations Act of 1995, the Labour Court cannot be approached to settle disputes between employers and employees (except for interim relief and other exceptional circumstances), until the parties have exhausted the alternative dispute resolution processes of the Commission for Conciliation, Mediation and Arbitration (a statutory body established exclusively for labour disputes) and in some instances the relevant sectoral bargaining council.

Since December 2014, the Department of Justice has rolled out Rules of Voluntary Court-Annexed Mediation as a pilot project in several Magistrates' Courts, and has been training presiding officers and practitioners to implement them and to encourage litigants to consider mediation.

## **REFORMS**

### **32. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?**

As noted above, the Minister of Justice published a draft International Arbitration Bill in April 2016, which is likely to be passed by Parliament and signed into law by the President during 2017. In its current form, the draft Bill fully incorporates the 1985 UNCITRAL Model Law (as amended in 2006) as well as the New York Convention.

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# SOUTH SUDAN



## INTRODUCTION

The South Sudan legal system is based on the transitional Constitution of the Republic of South Sudan, which came into force on 9 July 2011. In addition, the courts also observe customs, traditions and the will of the people. The legal system is based on English common law.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

Since the secession of South Sudan from Sudan in 2011, there is some uncertainty as to the structure of the legal profession. Prior to the secession, South Sudan's legal profession was merged with Sudan's legal profession.

Lawyers in South Sudan practise as advocates, solicitors, barristers and legal consultants; there is no split profession. To qualify as a lawyer in South Sudan, students must first obtain a law degree from a recognised institution of higher learning, and then undertake a pupillage with a commissioner for oaths or an advocate who has practised law for more than five years. The trainee is then recommended to the South Sudan Bar Association for licensing and entered into the Roll of Advocates.

South Sudan's legal structure does not permit foreign lawyers to practise in South Sudan or appear before its courts. However, foreign lawyers can engage in consultancy or in-house work with South Sudanese law firms.

The South Sudan Bar Association is the regulatory body of the profession.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The Transitional Constitution of South Sudan mandates the establishment of the judiciary of South Sudan as an independent decentralised institution. The judiciary is independent of the executive and legislature, with its budget charged on government reserves and consolidated funds, thereby affording it necessary financial independence.

Judicial power in South Sudan is derived from the people and will be exercised by the courts in accordance with their customs,

values, norms and aspirations and in conformity with the Constitution and the law. The judiciary of South Sudan is structured as follows:

- the Supreme Court of South Sudan is the court of final judicial instance in respect of any civil litigation under South Sudan or State law, including statutory and customary law
- the Court of Appeal has jurisdiction to hear and determine the following matters:
  - appeals against judgments and orders of the High Court
  - appeals against administrative decisions made by administrative authorities
  - any other matters assigned to its jurisdiction by the Constitution or any other law
- the High Court has jurisdiction to try original suits without limit as to value or subject matter, except as otherwise provided by law. Under sections 20 and 21 of the Civil Procedure Act 2007, certain matters fall under the exclusive jurisdiction of the High Court and may not be heard by the County Court. Examples of these are:
  - suits concerning companies, trademarks, business names, bankruptcy and settlement between creditors
  - suits concerning matters of personal law in respect of foreigners
  - reviews of administrative decisions
- the County Courts: a County Court of the First Grade judge has jurisdiction to try other suits without limit as to value and also determines appeals against judgments and orders of Payam Courts, and other appeals as may be expressly provided by any other law. A County Court of the Second Grade judge has original jurisdiction to try suits of value not exceeding SSP 1,000
- the Payam Courts have original jurisdiction to try suits with a value not exceeding SSP 500 subject to any limitation which may be contained in its warrant of establishment

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

The law on the limitation of actions has not yet been published. Together with the law on arbitration (see below), this law is considered a priority that must be passed as soon as possible by the Parliament of South Sudan.

#### **4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?**

No advocate is allowed, unless with his/her client's express consent, to disclose any communication made to him/her in the course of and for the purpose of his/her employment, by or on behalf of his/her client, or to state the contents or condition of any document with which he/she has become acquainted in the course of and for the purpose of his/her professional employment.

This privilege is limited and does not protect from disclosure any communication made in furtherance of any illegal purpose, or any fact observed in the course of employment showing that any crime or fraud has been committed since the commencement of the employment.

#### **5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?**

Commencement of a civil law suit begins when the plaintiff files a plaint with the court. A suit is deemed to be instituted on the date of payment of the court fee or, if the plaintiff is exempted from payment of fees, on the date on which the plaint was allowed by the court (section 33 of the Civil Procedure Act 2007). By section 73, the defendant must file a defence and there may be a right of reply (section 82).

Court fees should be paid within seven days from the date on which payment is ordered otherwise the court should dismiss the plaint.

#### **6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?**

A procedure permitting pre-trial exchange of evidence does not exist in South Sudan. The court obtains statements and evidence from the plaintiff and the defendant, but neither party is automatically entitled to see the other party's statements and evidence. In practice, the parties can request permission from the court to review, and take notes. Such a request will usually be granted by the court, although photocopies of such statements and evidence may not usually be taken. There are instances where discovery of documents between adversaries may be allowed, if one party has applied to the court to direct the other party to make discovery of documents in his/her possession (Rules Schedule, rule 5(6) of the Civil Procedure Act 2007); or by order of the court under its inherent power if it deems it necessary for the disposal of the suit or to cut costs (section 328 of the Civil Procedure Act 2007).

The primary source of evidence is oral testimony from individuals (whom the court has accepted as witnesses) with direct knowledge of the matters in dispute. Cross-examination of witnesses is permitted. Expert witnesses may be called to comment upon technical matters, and written evidence in the South Sudanese language may be submitted directly to the court.

#### **7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?**

Parties have very little control over the timetable, especially after filing the plaint/claim. However, they may reconcile certain issues between themselves thereafter. The court will set the hearing date and may rule on the exchange of statements, witnesses and expert reports.

#### **8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?**

Interim injunctions, interim declarations, orders for detention, custody, preservation or inspection of relevant property are all possible, as well as orders for the payment of income until a claim is decided. The court may also make an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be the subject of an application for an injunction. The urgency of the matter is usually evidenced in an affidavit (sections 155 and 156 of the Civil Procedure Act 2007).

#### **9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?**

The following mechanisms exist:

- delivery of any property specifically decreed
- attachment of any property specifically decreed
- arrest and detention in prison of the judgment debtor pending execution of the decree
- appointing a receiver
- in such other manner as the nature of the relief granted may require

Attachment orders are the most commonly seen method of enforcement. In practice, enforcement against powerful people like army generals or senior executives in government is challenging as they may use their positions of power to overcome enforcement.

#### **10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?**

The court has powers to order costs and, where a decree is for the payment of money and interest has been claimed in the plaint, the court may order interest to be paid on the principal sum. Foreign claimants are treated like domestic claimants for the purposes of costs.

Claimants do not usually provide security unless they become counter-defendants or judgment debtors. The law does not differentiate between locals and foreigners.

#### **11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?**

An appeal is a universal right; leave of appeal is only required if a ground not set out in the memorandum of appeal is advanced (section 191 of the Civil Procedure Act 2007).

The Court of Appeal makes its decision based on the record of the case established by the trial court or agency. It does not receive additional evidence or hear witnesses. The Court of Appeal may also review the factual findings of the trial court, but typically will only overturn a decision on factual grounds if the findings were "clearly erroneous". A right of final appeal exists from the Court of Appeal to the Supreme Court and from the County Court to the High Court.

## 12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

Since South Sudan seceded from Sudan, this question has not been clarified by the courts. However, under international practice, the protection is recognised. Immunity can extend to legal proceedings against the foreign State itself, its organs and enterprises, and its agents. In this case immunity is generally considered to be a procedural bar. If it wishes, the defendant foreign State may waive its right to immunity and the case will then proceed.

Where foreign State entities are plaintiffs or claimants, they are generally treated like other litigants.

## 13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

A foreign judgment, decree or order may not be executed by a court in South Sudan unless:

- the judgment, decree or order is made by a competent judicial tribunal in accordance with the rules of international law relating to jurisdiction that are applicable in the country where the judgment or order was made and which became final in accordance with that law
- the parties to the suit were duly summoned and duly represented
- the decree or order does not conflict with a prior decree or order made by the courts of South Sudan
- the decree or order has not been obtained by fraud
- the decree or order does not contain a claim founded on a breach of any law in force in South Sudan

## ARBITRATION

### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

In South Sudan, the law on arbitration is based on common law principles. Being a very young country, it is yet to accede to, adopt or ratify most international principles such as those based on the UNCITRAL Model Law. There is as yet no independent law on arbitration, although the Civil Procedure Act 2007 has committed a whole chapter to arbitration.

At any time before judgment is pronounced, the interested parties in a suit may agree that any matter in issue between them will be referred to arbitration and apply in writing to the court for an order of reference. The chapter includes provisions on the contents of the reference, the appointment of arbitrators, the court's powers in relation to the summoning of witnesses and grounds for setting aside an award and staying proceedings where there is an arbitration agreement.

The same provisions of the Civil Procedure Act 2007 on arbitration are applicable insofar as is practicable to the arbitration of disputes under a prior agreement between the parties, where such disputes have not been raised before the court.

Where a matter has been referred to arbitration without the intervention of the court, a person interested in the award may apply to any court having jurisdiction over the subject matter of the award for the award to be filed in court.

### Juba Centre for Arbitration

In 2013 a group of South Sudanese lawyers proposed and established the Juba Centre for Arbitration (JCA) which has since been registered by the Ministry of Justice as an arbitration centre. The Centre has developed Rules of Arbitration, Mediation and Conciliation and has now opened chambers to handle arbitration matters. The Centre recently (2015) had the first dispute referred to it upon the parties' application to court. It has also developed a training programme for local lawyers in arbitration, mediation and conciliation.

### 15. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

Persons may agree in writing that any dispute between them should be referred to arbitration. In such a case, any of the parties to the agreement may apply to the court having jurisdiction in the matter to which the agreement relates, to file the agreement at court. Filing the agreement with the court is mandatory under sections 137 and 138 of the Civil Procedure Act 2007.

Where no sufficient cause preventing the agreement from being filed is shown, the court must order the agreement to be filed and will make an order of reference to the arbitrator(s) appointed in accordance with the provisions of the agreement or, if there is no such provision and the parties cannot agree, the court will appoint the arbitrators. The arbitrators appointed will depend on the subject matter of the arbitration. For example, if the matter is a business dispute, the court may appoint accountants and if the dispute concerns insurance, it may appoint insurance experts.

### 16. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?

The Civil Procedure Act 2007 provides that where any party to an arbitration agreement initiates any suit against a party to the agreement in respect of any matter agreed to be referred, any other party to such suit may, at the earliest possible opportunity and before the hearing has started, apply to the court to stay the suit.

If the court is satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement, and that the applicant was, at the time when the suit was instituted and still remains, ready and willing to do all things necessary in the proper conduct of the arbitration, it may make an order staying the suit.

### 17. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?

The court may intervene and remit the award or any matter referred to arbitration for reconsideration by arbitrators upon such terms as it deems appropriate, where it is satisfied that any of the following circumstances apply:

- where the award has left undetermined any of the matters referred to arbitration, or where it determines a matter not referred to arbitration, unless such matter can be separated without affecting the determination of the matters referred
- where the award is so indefinite as to be incapable of execution
- where the award clearly contravenes the law

An award remitted for one of the above reasons will become void if the arbitrators fail to reconsider it within the time fixed by the court.

Further, the parties may apply to have an award set aside on one of the following grounds:

- corruption or misconduct by one or more of the arbitrators
- either party is guilty of fraudulent concealment of any matter which he/she ought to have disclosed, or wilfully misled or deceived the arbitrators
- the award was made after the issue of an order by the court superseding the arbitration and proceeding with the suit
- the award was made after the expiration of the period allowed by the court (section 147 of the Civil Procedure Act 2007), or is otherwise invalid

#### **18. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?**

No, a foreign arbitration award cannot be appealed in the local courts, as the local courts do not have jurisdiction to consider the award. Any appeal must be in accordance with the agreement of the parties.

#### **19. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION?**

South Sudan is not a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Where an award is issued by an international arbitral tribunal, the enforcement of the arbitral award depends on: the validity of the award; whether the award is in writing signed by the members of the panel; and whether reasons upon which the award was based are included. The validity of the award may be affected by corruption or misconduct of one of the arbitrators, either party having been guilty of fraudulent concealment of any matter he/she ought to have disclosed, or the award having been made after the expiration of the period allowed by the court or being otherwise invalid (section 147 of the CPA 2007).

A party wishing to enforce a foreign-seated award in South Sudan would first need to get the award recognised in the courts of the seat of the arbitration. The courts of South Sudan are competent to enforce awards in arbitration seated outside of the jurisdiction if the parties submit to such jurisdiction expressly or impliedly by agreement in writing (sections 137 and 138 of the Civil Procedure Act 2007), and the local court does not of its own motion declare itself incompetent for lack of jurisdiction.

#### **20. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?**

Not unless the award has been recognised in the courts of the seat.

### **ALTERNATIVE DISPUTE RESOLUTION**

#### **21. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?**

Since South Sudan seceded from the Sudan, much has been anticipated in relation to alternative dispute resolution. Traditional conflict resolution based on customary law plays a considerable

part in dispute and conflict resolution in South Sudan, particularly in the areas of family law and crime. Offences such as adultery, slander and defamation are compensated traditionally, eg by paying the aggrieved party in livestock or by simply giving an apology. On the other hand, crimes as serious as murder could be settled through payment of *dia* or replacement of a human victim by another human being from the aggressor. See also question 14 above regarding the new Juba Centre for Arbitration, which is also proposed to provide mediation and conciliation services.

### **REFORMS**

#### **22. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?**

Much is being done to ensure basic structures are in place, such as the clear division of the executive, legislature and judiciary. In efforts to have a clear legal framework, hopes for procedural reforms and the development of alternative dispute resolution mechanisms will be a priority, including reform of the law of arbitration.

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# SUDAN



## INTRODUCTION

The Republic of Sudan is an Arab State in North Africa occupied historically by Britain and Egypt. It gained independence in 1956 and has suffered successive wars and civil wars in recent times.

The Sudanese legal system is based on a complex mosaic of laws composed of English common law, civil law and Sharia law.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

Lawyers in Sudan act as both solicitors and barristers; there is no split profession. Qualified lawyers may appear before all courts, with the exception of the Constitutional Court, which is restricted to senior lawyers only.

To qualify as a lawyer, one must obtain a degree in law, pass the Bar examination and spend one year training in an office of a senior advocate who has at least 10 years' experience as a practising lawyer. All qualified Sudanese lawyers are members of the Bar Association.

A foreign lawyer may be granted a licence to practise in Sudan on an *ad hoc* basis in association with a local lawyer.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

There are three types of court: civil (including specialist courts for commercial, labour and land disputes), criminal, and personal law (Sharia).

The general structure is as follows:

- the High Court has jurisdiction to overturn decisions of the Court of Appeal
- the Court of Appeal has jurisdiction to overturn decisions of the General and District Court of First Instance and to hear objections against administrative decisions
- the District Court has jurisdiction to hear matters that are urgent or of a simple nature
- the General Court has jurisdiction to hear matters without limit as to value or subject matter

- Town Benches have jurisdiction to determine petty cases which the District Court may determine summarily
- the Constitutional Court is separate from the judiciary and is empowered to review the constitutionality of all laws adopted by the legislature and to decide on cases where persons allege that their rights have been violated in contravention of the guarantees provided for in the constitution

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

The law does not provide general time limits for bringing civil claims except for the following:

- actions for compensation for a harmful act may be brought no more than 15 years from the date of the harmful act (if the claimant did not have knowledge), but no more than five years from the date when the claimant had knowledge of the harmful act
- 15 years for an action for usufruct (the right to enjoy advantages on a neighbour's land, eg a water pipeline from the neighbour's land to your land) or a right of use/right of dwelling
- 10 years for an action for the possession of movable or immovable property
- 10 years for an action on an easement
- one year for an action for rescission or reduction of price from the date of delivery
- one year for an action founded on an employment contract (this does not apply to actions brought under the Labour Act)
- six months from the date of delivery for an action claiming a defective warranty
- 30 days for an action for pre-emption after notice of the registration of sale and six months from the date of registration

### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

Yes. Both the Advocacy Act 1983 amendment 2014 and the Evidence Act 1994 provide that such communications are privileged. As such, lawyers are not allowed to disclose information or facts obtained through representation of a client unless the client agrees otherwise. This privilege applies even where the lawyer is called upon as a witness before court (unless the evidence concerns the client's intention to commit a crime in the future). The client may waive privilege by giving consent in writing.

## 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

Generally, civil proceedings are commenced by filing a brief and clear plaint (statement of claim). If the judge authorises the plaint, the court issues a summons submitted with the statement of claim to the defendant to appear and file his/her statement of defence on a specified date. Then a date is fixed for the plaintiff to file his/her reply. After the pleadings are finalised the judge decides the issues (facts and law) and determines who must prove what. Thereafter a date is fixed for the hearing.

## 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

The law does not provide for any pre-trial exchange of evidence.

Evidence is exchanged before the court. The plaint (statement of claim) and defence must include a list of all the documentary evidence the plaintiff/defendant wishes to rely on as well as the names of the witnesses. In addition, the court has the discretion, either on its own initiative or on an application from a party, to require any of the parties to produce a specific document or all the documents the party might rely on in the proceedings. At the hearing the judge hears witnesses (under examination, cross-examination and re-examination) and each party reviews documents. The parties may submit closing written submissions.

## 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

The parties or their lawyers liaise with the judge to fix a date suitable to all. In the case of disagreement the judge imposes a date suitable to the court. The typical timetable consists of a weekly court session for exchange of memos and a monthly court session to hear witnesses. The average time for a case to be determined by a court of first instance is at least one year.

## 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

The court may at any time grant provisional remedies including:

- the attachment of property (movable or immovable)
- prohibition of activity
- an order for security
- an order not to leave Sudan
- appointment of a receiver
- control of bank accounts
- furnishing of security
- injunction against the waste, damage or alienation of property in dispute or
- any other order that it sees fit to protect the plaintiff without causing serious damage to the defendant

## 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

The following are the main methods of enforcing court judgments:

- delivery up of property

- attachment and sale of any property by public auction
- changing the register of any immovable property from the name of the defendant to the name of the plaintiff
- appointment of a receiver
- detaining the defendant in prison until full satisfaction of judgment (this has been subject to serious criticism and is the subject of attacks by lawyers and human rights activists)
- such other methods as the nature of relief granted may require

## 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

The court has power to order costs, including court fees, advocates' fees, costs of experts, witnesses and expenses. The court, in making a final judgment will, of its own motion, determine the payment of the costs of the suit.

Foreign claimants are not required to provide security for costs.

## 11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

Decrees and orders of Town Benches are appealed to District Courts. Decrees and orders of District and General Courts are appealed to the Court of Appeal (three judges).

In the Court of Appeal the grounds for appeal are open, ie dispute over facts, incorrect application of the law and evaluation of evidence.

Court of Appeal decisions may be appealed to the High Court (three judges). Such appeals are restricted to points of law only.

Judgments of the High Court may be revised in limited cases, mainly if there is contravention of Sharia law (five judges). At least one of the judges must have been on the judicial panel which issued the High Court judgment.

An appeal should be submitted within 15 days of the date of the judgment.

Usually, the courts, upon the appealing party's request, suspend execution of a judgment for a reasonable period to enable the appellant to obtain a stay from the court hearing the appeal, if the effect of execution would not be able to be rectified following a successful appeal.

## 12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

There is no immunity for domestic entities. However, no suit may be instituted against any organ of the State or a public servant in exercise of their duties unless the plaintiff gives notice in writing to the Attorney General's office and waits two months until issuing a claim.

According to the Immunities and Privileges Act, immunity from civil proceedings may be granted to diplomatic entities and diplomatic agents and international organisations by virtue of bilateral agreements, reciprocity, or international agreements where Sudan is a party.

### 13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

A foreign decree or order may not be executed unless it satisfies the following conditions:

- it is made by a competent judicial tribunal in accordance with the rules of international law relating to jurisdiction which are applicable in the country where the judgment or order was made and which became final in accordance with that law
- the parties to the suit were duly summoned and duly represented
- the decree or order does not conflict with a prior decree or order made by the Sudanese courts
- the decree or order is not contrary to public order or morality
- the decree or order has not been obtained by fraud
- the decree or order does not contain a claim founded on a breach of any Sudanese law
- the decree has been issued in a country which allows for the enforcement of judgments of the Sudanese courts

## ARBITRATION

### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

No. The Arbitration Law is not based on the UNCITRAL Model Law.

A new Arbitration Law was enacted in 2016 by a presidential decree, amending the prior Arbitration Law enacted in 2005 as an Act of Parliament. It is derived from different sources, including the old Sudanese Arbitration Rules which were part of the Civil Procedure Act.

### 15. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

Under the Arbitration Law, there must be a written agreement by the parties to submit present or future disputes to arbitration. Any letters, notes or email messages between the parties are considered written. The agreement does not need to be signed. The agreement does not have to specify the seat or the number of arbitrators. The default position is that the number of arbitrators will be three. Each party will select an arbitrator and the two co-arbitrators will select the chair of the tribunal. To the extent it has not been agreed by the parties, the tribunal will determine the seat.

Notwithstanding that there is no arbitration agreement, after a dispute has arisen and if there is already a pending action in court, the parties may apply by agreement to the court to request an order that the matter is referred to arbitration.

### 16. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?

The court will dismiss litigation of any dispute that is subject to a valid arbitration agreement upon the defendant's request, before or with submitting his/her written statement of defence. If the defendant does not dispute the jurisdiction of the courts before or with submitting the statement of defence he/she will be considered to have waived their right to arbitrate the dispute. This

approach does not differ if the seat of the arbitration is inside or outside of the jurisdiction.

### 17. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?

The Arbitration Law provides that either party may request the court (or the tribunal) to grant interim remedies in support of arbitrations seated outside the jurisdiction upon the request of one of the parties or the tribunal.

### 18. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

Foreign arbitrations awards cannot be appealed in the local courts.

### 19. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION?

Sudan is not a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). A foreign arbitration award may not be enforced unless it satisfies the following conditions:

- the award is made by an arbitration centre or institution or tribunal in accordance with the laws applicable in the country where the award was made and the award has become final in accordance with that law
- the parties to the arbitration were aware of the existence of the arbitration, were notified in accordance with any contractual notice provisions or served in accordance with the local law governing the arbitration and had an opportunity to be heard
- the award does not conflict with a prior decision of the courts of Sudan or other awards from arbitration centres
- the award is not contrary to public order or morality in Sudan
- the award has been issued in a country which enforces judgments of Sudanese courts and awards from arbitration centres on the basis of reciprocal treatment or an international agreement to which Sudan is a party

### 20. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

They are subject to the above-mentioned rules.

Awards are enforced by submitting a petition to the court attaching a copy of the authenticated award. After certain conditions are satisfied the court will order:

- delivery of any decreed property
- attachment and sale of any property
- arrest and detention of the judgment debtor
- appointment of a receiver
- any other relief as the nature of the relief granted in the award may require

It is impossible to determine how long it will take to enforce an award, as it depends on the award and whether enforcement is resisted by the party against whom it is being enforced.

The Sudanese courts will not review awards on their merits.

## ALTERNATIVE DISPUTE RESOLUTION

### 21. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

No. Parties to litigation or arbitration are not required by law to consider or submit to alternative dispute resolution before or during proceedings. However, where there is an arbitration the parties may all agree to go to conciliation first with the same arbitrators. If no agreement is achieved then the formal arbitration is followed.

In litigation the judge may ask the parties to sit together and try to reach settlement. This relies on the parties' willingness to attempt this. There are no costs sanctions if they fail to attempt to reach settlement in this way.

## REFORMS

### 22. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

Yes, there are likely to be some procedural reforms introducing electronic filing in the near future.

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# SWAZILAND



## INTRODUCTION

Swaziland's legal system is a dual legal system consisting of the Roman Dutch common law as well as Swazi law and custom. The Roman Dutch common law has evolved over the years and has been amended by statutes. Swazi law and custom is still applicable to the extent that it is not in conflict with the rules of natural justice and statute law. It applies mainly among indigenous Swazis.

Swaziland's first Constitution in 1968 was later amended by the 1973 Decree which subsisted until a new Constitution came into effect in February 2006. The Constitution does not specifically provide for the abrogation of the 1973 Decree, but asserts its own supremacy and further provides that any law that is inconsistent with the Constitution is null and void.

The Constitution is supplemented by legislation enacted by Parliament and the King in Council. Such legislation is made under the power conferred by the Constitution, the rules of Roman Dutch common law, Swazi law and custom, and doctrines of equity.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

In principle, every litigant is entitled to appear personally before a court to plead a cause or to raise a defence. However, because the conduct of litigation is so specialised, litigants normally instruct lawyers to conduct litigation on their behalf in the superior courts (being the High Court and the Supreme Court of Appeal). The exception is the yet to be established Claims Court and Swazi Nation Courts, where legal representation is prohibited.

Lawyers in Swaziland provide legal services directly to clients and conduct proceedings in court. They have rights of audience before all trial courts and tribunals. There is no split profession.

To be admitted and enrolled as a lawyer in Swaziland, an applicant must be at least 21, be a citizen of Swaziland or ordinarily resident there, and be a proper person to be so admitted.

In addition to the above, the candidate must be suitably qualified. Training as a lawyer in Swaziland involves an academic stage and a pupillage stage.

The academic stage involves obtaining an LLB degree or Bachelor's degree from a recognised university (being universities in Botswana, England, Ireland, Lesotho, Swaziland, Zimbabwe, Scotland, South Africa and Namibia) (section 6(c) of the Practitioners Act 1964). The degree holder must then undertake articles of clerkship at a recognised law firm for a period of one year. He/she then qualifies to sit Bar examinations within six months of serving articles of clerkship.

Foreign qualified lawyers are permitted to practise in Swaziland provided that:

- they have an LLB degree from their home jurisdiction
- they have passed their Bar examination and have a certificate confirming the same
- they have petitioned the High Court to be admitted as an attorney and have all qualifications from the foreign jurisdiction attached to their petition

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

Pursuant to article 139 of the Constitution, the judiciary consists of the Superior and Subordinate courts.

Subordinate Courts include:

- Swazi Nation Courts (these are courts where only minor disputes between Swazi nationals are heard eg theft of chickens in the village. Lawyers are prohibited from appearing in such courts)
- Magistrates' Courts (Magistrate Court Act No 66 of 1938) where both civil and criminal matters below the threshold of SZL 30,000 are heard
- Industrial Court (section 151(1)(b) of the Constitution of Swaziland confers on the Industrial Court exclusive jurisdiction in relation to employment matters)

Superior Courts consist of:

- the Supreme Court/Court of Appeal (Court of Appeal Act No 7 of 1954)
- High Court (High Court Act No 20 of 1954)

The High Court has original jurisdiction, inherent jurisdiction and appellate jurisdiction. It hears matters where more than SZL 30,000 is in dispute, as well as matters appearing on Schedule 5 to the Criminal Procedure Evidence Act 1938. In the High Court, after judgment has been granted, a person may apply to appeal. In civil matters an appeal can be made only on issues relating to law and not fact.

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

Generally, there are no time limits for bringing civil claims, although there is a common law prescription period of 33 and a half years.

In relation to claims against the Government, section 2 of the Limitation of Legal Proceedings Against the Government Act 1972 requires that a written demand be lodged within 90 days of the alleged debt arising. Following this, a claim must be brought within two years of the alleged debt arising.

With labour matters, the Conciliation Mediation and Arbitration Commission (CMAC) offers quicker dispute resolution mechanisms and is considered by many before proceeding to the Industrial Court. A dispute or claim before CMAC should be brought within 18 months. If it is unresolved, a certificate will be issued, and a claim should be brought within three years.

### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

Communications between a lawyer and a client are privileged in Swaziland under the rules of ethics governing the legal profession.

### 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

Civil proceedings are commenced either by application proceedings or action proceedings. Application proceedings should be used where there is no dispute of fact.

#### Application proceedings

Application proceedings are commenced by notice of motion and are sometimes also called motion proceedings. No oral evidence is heard, and witnesses are not called to give *viva voce* evidence. Three documents are exchanged. These are:

- founding affidavit
- answering affidavit
- replying/confirmatory affidavit

Section 6 of the High Court Rules 1969 details the procedure to be followed when commencing civil proceedings. The applicant must appoint an address at which he/she will accept service. The applicant must propose a day, not less than five days after service on the respondent, where the latter is required to notify the applicant in writing whether he/she intends to oppose the application. If unopposed, the application is set down for hearing not less than seven days after service on the respondent of the notice.

If the respondent opposes, he/she should appoint an address within five kilometres of the office of the Registrar at which he/she

will accept notice and service of all documents. Within 14 days of service of the notice of motion he/she should deliver an answering affidavit with any other relevant documents. Within seven days of service on him/her the applicant may deliver a replying affidavit.

If no answering affidavit is delivered the applicant may within four days apply to the Registrar to allocate a date for the hearing of the application. If an answering affidavit is delivered the applicant may apply for such allocation within four days of the delivery of his/her replying affidavit. The judge determines the matter on the papers in application proceedings.

Under this procedure, the courts may also hear urgent applications under Rule 6(25) of the High Court Rules, which allows the normal rules of procedure to be dispensed with. The applicant is prohibited from creating his own urgency; for example by waiting too long to act so that the ordinary rules can no longer be applied.

#### Action proceedings

Action proceedings are commenced by way of summons. These may be in the form of simple summons, combined summons, and provisional summons. There is a necessity for oral evidence *viva voce* (section 17 of the High Court Rules). In the Magistrates' Court a party has three days to respond to the summons, whereas in the High Court he/she has 10 days. A notice to defend must be served within seven days in the Magistrates' Court and 21 days in the High Court. A trial is held in action proceedings.

Prior to the trial stage, a plaintiff may obtain default judgment if the defendant has not timeously filed a notice of intention to defend or a plea, as the case may be. If the plaintiff fails to timeously file his/her declaration, the defendant may apply to the court to grant absolution from the instance.

### 6. WHAT IS THE EXTENT OF THE PRE-TRIAL EXCHANGE OF EVIDENCE AND HOW IS EVIDENCE PRESENTED AT TRIAL?

Under section 37 of the High Court Rules, at a pre-trial exchange of evidence conference, the parties gather with the object of reaching agreement as to possible ways of curtailing the duration of any trial. They may discuss:

- obtaining admissions of fact and documents
- discovery of documents which need not necessarily be relevant documents but also documents of any nature which the parties seek to rely on
- holding an inspection of all relevant documents
- exchange between parties of expert reports
- providing plans, diagrams, photographs, models
- consolidation of trials
- quantum of damages
- preparation of a trial bundle

Any list of documents will most likely include a notice of inspection stating a time and venue for the other party to inspect the documents. Copies of the relevant documents may be attached to the list with an affidavit verifying the list. If a party fails to fulfil his/her obligation to make automatic discovery, the other party may apply to the court to make an order for discovery.

On any application in any cause or matter, evidence may be given by affidavit. The court may in civil proceedings order the attendance for cross-examination of the person making the affidavit where a dispute over facts has arisen. The person's affidavit is not used in court as evidence without leave of the court.

#### **7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?**

Each court manages its own case list. A court roll is issued by each court under each judge. The parties apply to the Registrar for an allocation date for trial. On average a civil action can take up to three years because of the backlog of cases in Swaziland.

#### **8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?**

The court may preserve a party's interests pending judgment through an order for an interlocutory or interim injunction, or preservation of any property which is the subject matter of the suit.

An application for an interlocutory or interim injunction may be made at any time irrespective of whether the claim for an injunction is included in the summons issued. The court may order an early trial to finally determine the matters in dispute.

In practice, an order is usually issued to prevent the parties from dealing with the property in question pending the finalisation of the matter and the handing down of judgment.

#### **9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?**

A judgment for the payment of money may be enforced by:

- garnishee proceedings
- charging orders
- writ of execution
- insolvency proceedings against the individual or winding up proceedings against a debtor company

A judgment for the delivery of goods or payment of the assessed value may be enforced by:

- writ of delivery to recover goods or their assessed value
- writ of specific delivery with leave of the court
- writ of execution

A judgment ordering a person to do or abstain from doing an act may be enforced (subject to personal service of the judgment/order on the person in default) by:

- writ of execution against the property of the person with leave of the court
- writ of execution against the property of the directors or other officers, if the person involved is a corporate body
- committal against the person or director or other officer of the corporate body, as the case may be

#### **10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?**

The court has a wide discretion when awarding costs and may award costs of and incidental to proceedings. It has full power to determine by whom and to what extent the costs are to be paid. The court considers what costs order would be correct and equitable in the circumstances.

The court takes into consideration a wide number of factors, including the expenses incurred by the parties, the court fees paid by the parties, the length and complexity of the proceedings, the conduct of the parties before and during the proceedings, and any previous orders as to costs made in the proceedings before making any award for costs.

The High Court Rules do not distinguish between costs that have to be provided by local claimants and foreign claimants. Any respondent may apply for costs and justify the amount requested. Foreign claimants may therefore be required to provide security for costs. The court will determine this using its discretion.

#### **11. ON WHAT GROUNDS CAN THE PARTIES APPEAL AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?**

In Swaziland, the right to appeal is constitutionally guaranteed (under section 147 of the Constitution of Swaziland) and there is a general right of appeal against a decision of a court of first instance. Permission to appeal (leave to appeal) is required only under specific circumstances (for example leave of the High Court is required in relation to appeals from lower courts). In civil matters, an appeal may only be made on issues relating to law, not fact.

Usually, permission to appeal is granted where the Court of Appeal is satisfied that the case involves a substantial question of law, or it is in the public interest to grant permission to appeal, or that the appeal has a real chance of success.

When dissatisfied with the decision of the Supreme Court, a party may apply for a review of the matter. The power of the Supreme Court to review its decision is limited to exceptional circumstances which have resulted in a miscarriage of justice, or if there has been discovery of new and important evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him/her during the trial or hearing of the case.

Generally, an appeal does not operate as a stay of the decision of the lower court unless the court stays the execution of the judgment.

#### **12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?**

Generally, domestic State entities do not have immunity from civil proceedings. One may, however, not sue the State for anything done or omitted to be done by a person while discharging or purporting to discharge responsibilities of a judicial nature vested in that person. The Diplomatic Privileges Act, 18, 1968 cites the Vienna Convention on Diplomatic Relations.

There are other statutory provisions expressly granting both civil and criminal immunity to foreign diplomats (foreign diplomatic agents). However, there is no express stipulation to the effect that foreign State entities have immunity from civil proceedings.

However, it is a general rule of international law that a State is immune from the jurisdiction of another State unless the foreign State has waived its immunity either explicitly or by implication.

### 13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

Enforcement of foreign judgments in Swaziland is governed by the Reciprocal Enforcement of Judgments Act 1922. This only refers to three countries (England, Ireland and Scotland). The judgment should be one given by a superior court and should not have been heard by the superior court on appeal from a court which is not a superior court. Enforcement may be possible in respect of judgments from other Commonwealth countries, although there is no statutory basis for this.

Where the judgment of a foreign court is not enforceable on the basis of reciprocity, fresh proceedings may be instituted in Swaziland and the foreign judgment relied upon in evidence.

## ARBITRATION

### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

The main arbitration process in Swaziland is one between an employer and an employee which is governed by the Industrial Relations Act 2000, as amended (the IRA). The Conciliation, Mediation and Arbitration Commission (CMAC) is the most accessible arbitration commission in Swaziland established by section 62 of the IRA.

Although not prevalent in Swaziland, private parties can contractually agree to resolve their conflicts by way of arbitration (including contracts of sale, lease agreements, etc). Such arbitrations are governed by the Arbitration Act, No 24 of 1904 (the Arbitration Act). The Arbitration Act is not based on the UNCITRAL Model Law.

With commercial arbitration in Swaziland, usually a letter is first written by a party to the President of the Law Society of Swaziland requesting him/her to appoint an independent arbitrator to hear and determine the dispute between the parties. The letter must set out in detail and chronologically the circumstances and events which have unfolded since the contract was concluded and which have led to the dispute. Over the years, it has been common practice, where the dispute is of a legal nature, for the Law Society of Swaziland to endorse an attorney or advocate of the High Court of Swaziland to act as arbitrator. If it is a matter primarily of an accounting or financial nature, an independent chartered accountant is chosen and his appointment is endorsed by the President of the Swaziland Institute of Accountants. This procedure is not provided in the Arbitration Act, but it is what happens in practice.

There are a number of cases on arbitration in Swaziland; two recent authorities based on the Arbitration Act are *Swazi Mtn Limited v Swaziland Posts and Telecommunications and Another Case No 19/ 2011* and *A G Thomas (Pty) Limited v Salgaocar Swaziland (Pty) Limited Case No 1499/ 2012*.

In the former case, the court application was withdrawn so that the parties could resolve their outstanding disputes by arbitration pursuant to the joint venture agreement.

In the latter case, the parties concluded a transport agreement which was to last for five years. This contract was allegedly cancelled by one party without any reason. The court upheld the parties' arbitration clause, there being no good reason under section 6.2 of the Arbitration Act as to why the dispute concerning cancellation of the transport agreement could not be determined by arbitration in accordance with the transport agreement.

### 15. WHAT ARE THE MAIN NATIONAL ARBITRATION INSTITUTIONS?

Swaziland has one public arbitration institution. This is the above-mentioned CMAC. There are attorneys who deal with arbitration matters in Swaziland. The Law Society welcomes suggestions from the parties regarding who they would like to have as their arbitrator if the Law Society route has been agreed upon by the parties. If not, the parties reserve the right to appoint an arbitrator or arbitrators in accordance with the Arbitration Act. The appointed tribunal then handles the matter.

Parties in Swaziland usually agree to use the Rules for the Conduct of Arbitrations of the Association of Arbitrators in South Africa.

### 16. ARE THERE ANY RESTRICTIONS ON WHO MAY REPRESENT THE PARTIES TO ARBITRATION?

There are none.

### 17. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

In the private context under the Arbitration Act, "submission" means a written agreement to submit present or future disputes to arbitration (section 2 of the Arbitration Act). There is no requirement to name the arbitrator in a submission. The submission must be an irrevocable agreement to arbitrate disputes, except by leave of the High Court or by consent of all the parties. A submission has the same effect as if it had been an order of the High Court or by consent of all the parties (section 3 of the Arbitration Act).

### 18. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?

Sections 6(1) and (2) of the Arbitration Act govern this and state:

*"If any party to a submission (meaning an agreement) or any person claiming through or under him commences any legal proceedings in any Court against any other party to the submission or any person claiming through or under him in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings apply to such Court to stay proceedings. In Swaziland the court will refuse to stay litigation if it is satisfied that the arbitration agreement is inoperative or incapable of being performed.*

*Such Court or a judge may, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, make an order staying the proceedings."*

See also question 14 above regarding recent Swazi case law where the courts have upheld the parties' arbitration clause.

Sections 6(1) and (2) do not differentiate between the seat of the arbitration.

**19. IF THE ARBITRATION AGREEMENT AND ANY RELEVANT RULES ARE SILENT, HOW MANY ARBITRATORS WILL BE APPOINTED, AND WHO IS THE APPOINTING AUTHORITY?**

Under section 4 of the Arbitration Act, unless a contrary intention is expressed in the submission, the submission is deemed to include the provisions of the Schedule to the Act. The Schedule provides that: "*If no other mode of reference is provided, the reference shall be to a single arbitrator*". Section 8 of the Arbitration Act provides default procedures for the appointment of arbitrators.

**20. WHAT RIGHTS ARE THERE TO CHALLENGE THE APPOINTMENT OF AN ARBITRATOR?**

Section 10 of the Arbitration Act provides that: "*every arbitrator shall be and continue throughout the reference to be disinterested with reference to the matters referred*". An arbitrator can be required to make a sworn declaration that he/she has no (direct or indirect) interest in the matters referred or in the parties to the reference and knows of nothing disqualifying him/her from being impartial and disinterested in the discharge of his/her duties. The right to challenge an appointment can be exercised only by an application to the court (section 11 of the Arbitration Act).

Where the arbitrator is appointed by the court, then the order appointing him/her, being the ruling of the High Court, is subject to the normal review and appeal jurisdictions of the courts.

**21. DOES THE DOMESTIC LAW CONTAIN SUBSTANTIVE REQUIREMENTS FOR THE PROCEDURE TO BE FOLLOWED?**

Where the arbitration agreement is silent on procedure, and unless the contrary intention is expressed, certain procedural steps laid down in the Schedule to section 4 to the Arbitration Act are deemed to be included in the submission agreement. For example, the arbitrator can decide whether to examine witnesses under oath, whether oral evidence must be recorded, and the costs shall be within the discretion of the arbitrators. The arbitrator further regulates all aspects not expressly provided for in the agreement.

**22. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED INSIDE THE JURISDICTION?**

In addition to the court interventions described in questions 18 and 20 above, a party may seek the court's intervention on other grounds, although this is very rare. This would be a civil procedure in court proceedings. Approaching the court for relief is entirely dependent on the aggrieved party, who may decide to refer the matter to the court before an award is issued. He/she may apply to the arbitrator to refer the matter to the court for a legal determination. The court can grant any relief it deems fit to parties within its jurisdiction.

If for any reason the arbitrator commits an act of misconduct, the court may set aside an award issued by the arbitrator (section 16 of the Arbitration Act).

**23. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?**

The court must have the authority to hear the matter and this requires the presence of some jurisdictional connecting factor (nexus) between the court and the parties or the cause of action. The link may be in the form of domicile or residence, commission of the act that now has to be arbitrated upon, breach of contract or even the location of property where such property is the subject of the dispute. If the link is present, the court can intervene in an arbitration seated outside the jurisdiction.

The intervention by the court would take the form of normal court proceedings.

**24. DO ARBITRATORS HAVE POWERS TO GRANT INTERIM OR CONSERVATORY RELIEF?**

Yes. The Arbitration Act does not deal with this expressly but section 4, number 14 states that where the majority of the arbitrators cannot agree on any matter of procedure or an interlocutory question, they may refer it to the umpire to decide. In our view this would include the power to grant interim relief.

**25. WHEN AND IN WHAT FORM MUST THE AWARD BE DELIVERED?**

Unless otherwise agreed by the parties, the arbitrators must make their award within three months of entering on the reference or having been called on to act by notice in writing from any party (whichever is earlier) or on or before any later day to which the arbitrators may in writing extend the time for making the award, provided that such further period does not exceed four months (provision 4 of the Schedule to the Arbitration Act). According to section 17 of the Arbitration Act, an award which has been made an order of court may be enforced in the same manner as a judgment or order to the same effect.

**26. CAN A SUCCESSFUL PARTY RECOVER ITS COSTS?**

Unless the parties expressly provide otherwise in their arbitration agreement, the agreement is deemed to include a provision that the costs of the reference and award are at the discretion of the arbitrator or umpire, who may direct to whom and by whom, and in what manner, costs are to be paid.

A provision in an agreement that the parties will pay the respective costs of the reference or award or a part of the costs is void, unless the dispute in question preceded the agreement.

Where the arbitrator fails to make an award with respect to the costs of the reference, a party may apply within one month of the publication of the award or a further time (as extended by the High Court) to the arbitrator, for an order for the payment of costs. Upon hearing the application, the arbitrator should amend the award by adding to it appropriate directions for the payment of the costs of the reference.

**27. ON WHAT GROUNDS CAN AN AWARD FROM AN ARBITRATION SEATED IN THE JURISDICTION BE APPEALED TO THE COURT?**

Arbitral awards are deemed to be final and binding on all parties. The Industrial Relations Act, however, allows parties to apply to the High Court to set aside awards where there is a certificate of an unresolved dispute.

## 28. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

Notwithstanding that arbitral awards are deemed to be final and binding, an award can be appealed in the local courts if one of the parties to the arbitration is domiciled in the local courts' jurisdiction or the dispute arose in the local courts' jurisdiction but a different place was chosen by the parties for the arbitration. An appeal can therefore be lodged in the local courts provided there is as a link between the court and the parties or one of the parties is present in the jurisdiction. This is governed by the laws of civil procedure.

## 29. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF: (I) AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION AND (II) DOMESTIC AWARDS?

Swaziland is not a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Both domestic and foreign awards may be enforced, by leave of the High Court, in the same manner as a judgment or order of the court.

A foreign award will, however, only be recognised if made in a country declared as a reciprocating State by the Head of State through a legislative instrument, currently the Arbitration (Foreign Awards) Instrument. A foreign award made in a country listed in the instrument can be enforced in Swaziland by obtaining the leave of the High Court. Where the seat of the arbitration is in a non-reciprocating State, the successful party may seek to enforce the award in Swaziland by instituting a fresh action and relying on the award as evidence.

## 30. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

This is very rare in Swaziland, but through leave of the court, foreign awards may in theory be enforced.

## ALTERNATIVE DISPUTE RESOLUTION

### 31. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

Parties to arbitration and litigation are not required by law to consider or submit to ADR before or during proceedings, unless the agreement requires that of the parties. This goes for both cases heard by CMAC and other cases of a private nature (contracts).

## REFORMS

### 32. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

Yes, a number of significant procedural reforms in civil procedure are likely.

These include the revision of the Rules of the High Court and Supreme Court. A panel of senior judges and practitioners has been appointed to consider and review the Rules, with a report expected in August 2016.

The establishment of a Small Claims Court in Swaziland is also in the pipeline as a reform we are eagerly awaiting. This forum will be a good alternative to litigating in the subordinate courts. It will

extend access to justice in cases of small claims relating to consumer matters, neighbourhood disputes and other minor disputes that are not worth the cost of litigating in a higher court.

There is also an ongoing process to introduce the reporting of all Superior Court judgments, due to be completed by September 2017.

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# TANZANIA



## INTRODUCTION

The United Republic of Tanzania gained independence from the United Kingdom in 1961. The legal system in Tanzania is based on the common law and, pursuant to the Judicature and Application of Laws Act 1961, English law up to 1920 applies automatically in Tanzania. English court decisions are highly persuasive and a registered English High Court judgment would, subject to the provisions of the Foreign Judgments (Reciprocal Enforcement) Act, be enforceable in Tanzania as if it were a decision of the High Court of Tanzania.

Unlike the unwritten British constitutional system, the primary source of law in Tanzania is the 1977 Constitution (as amended most recently in 2010). Secondary sources of law are statutes and case laws. Customary law and Sharia (Islamic) law also apply.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

The legal profession is regulated by the Advocates Act 1955, the Advocates Remuneration Act 1931, the Law School Act No 18 of 2007, and the Tanganyika Law Society Act 1955.

Lawyers must complete and pass a four-year LLB degree course and then enrol with the Law School of Tanzania on a seven-month law practice course. On completion, qualifying lawyers are called to the Bar and admitted to the Roll. Lawyers admitted to the Roll are called advocates and may also practise as notaries public. There is no split profession in Tanzania; advocates act as lawyers and barristers. It is common for an advocate to handle a corporate matter and then take the brief in relation to any disputes arising from it.

Practising certificates are only valid for one year ending on 31 December. Advocates must obtain a renewal by February of the next year, failing which they are technically disqualified from practising. A client's case would be dismissed if handled by an advocate with no practising certificate.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The Court system is made up of the following:

- the Court of Appeal of Tanzania – this is the highest court in Tanzania
- the High Court of Tanzania which includes specialised Divisions such as the High Court (Commercial Division) commonly known as the Commercial Court, High Court (Labour Division) also known as the Labour Court and the High Court (Land Division) which is also known as the Land Court
- the High Court of Zanzibar which handles cases in Zanzibar
- the Resident Magistrates' Court
- the District Magistrates' Court
- primary courts where no advocates have rights of audience

#### Tribunals

Tribunals are established judicial bodies which are set up under Ministries to hear certain disputes. Some Tribunals have original jurisdiction over specific matters as if they were the High Court of Tanzania. In particular, the Tax Revenue Appeals Tribunal has sole jurisdiction in all appeals arising from decision of the Tax Revenue Appeals Board (the Board) on disputes on which original jurisdiction is conferred on the Board. It exercises general powers of supervision over the Board in the exercise of its powers. In that respect, it may call for and inspect the records of any proceedings before the Board and may revise any decision. The Tax Revenue Appeals Board has sole original jurisdiction in all proceedings of a civil nature in respect of disputes arising from revenue laws administered by the Tanzania Revenue Authority. Appeals from such Tribunals lie to the Court of Appeal.

These specialised judicial bodies are not limited to those that have a concurrent jurisdiction with the High Court. There are other established judicial bodies which are on a lower rank to the High Court, including:

- the District Land and Housing Tribunal (commonly known as the Land Tribunal) which deals with land related disputes whose value are below TZS 50,000, and from which appeals lie to the High Court (Land Division)
- the Fair Competition Tribunal (FCT), which handles competition issues under the Fair Competition Act including utilities disputes concerning water, energy and fair competition issues

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

This is regulated by the Limitation Act 1971 (CAP 89 R E 2002) and depends on the nature of the claim.

Limitation periods from one to 60 years apply.

Suits by or on behalf of the Government are subject to a limitation period of 60 years.

Suits founded on a judgment are subject to a limitation period of 12 years.

Suits in respect of a claim to movable property of a deceased person whether under will or intestacy are subject to a limitation period of 12 years.

A six-year limitation period applies to actions:

- founded on contract
- to enforce a recognisance or award
- claiming equitable relief for which no period of limitation is prescribed by law
- for an account or to recover arrears
- by beneficiaries to recover trust property or claim breach of trust

A three-year limitation period applies to actions founded on tort.

### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

Communications between a client and his/her lawyer are protected unless waived by the client or the advocate is required by law to disclose pursuant to:

- the Prevention of Terrorism Act, No 21 of 2002
- the Anti-Money Laundering Act, No 12 of 2006
- the Anti-Money Laundering (Amendment) Act of 2012, which removed any protection of lawyer/client communications in respect of requests from all regulatory authorities, for example the Financial Intelligence Unit, the Bank of Tanzania, the Capital Markets and Securities Authority, the Tanzania Insurance Regulatory Authority, the Gaming Board and the Energy and Water Utilities Regulatory Authority

The 2012 amendments erode substantially the protection of lawyer/client communication in Tanzania.

### 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

The Civil Procedure Code governs the conduct of proceedings. A typical procedure would include the following steps:

- the plaintiff commences proceedings by filing a plaint attached to which must be appended all documents the plaintiff intends to rely on
- the defendant must file his/her defence within 21 days from the date of receipt of the summons and the plaint. The defence must attach all documents he/she intends to rely on. The documents must be filed at the appropriate registry

- the court sets a mention date at which the court and the lawyers agree the date for the plaintiff to file a reply and a date for the first pre-trial conference
- at the first pre-trial conference, the court satisfies itself that the pleadings are complete

#### First pre-trial conference

The lawyers must disclose how many witnesses they intend to call, whether they intend to file any interlocutory applications, such as preliminary objections, which must be settled first before the matter moves to mediation and trial. The lawyers also agree on the speed track for the case and the court makes a scheduling order. There are four speed tracks namely:

- speed track 1: 9 months
- speed track 2: 12 months
- speed track 3: 14 months
- speed track 4: 24 months

#### Mediation

After the first pre-trial conference, the file is returned to the judge or magistrate in charge to assign it to a mediator. Mediation is court-administered and has proved very effective especially for commercial cases.

If mediation fails then the court returns the file to the judge in charge for a trial judge to be assigned the case. The mediator is precluded from handling the trial.

#### Trial

The matter moves to a trial magistrate or judge and a final pre-trial conference is held to determine the issues.

Witnesses appear without written witness statements unless a witness is unable to appear.

When both the plaintiff and the defence have submitted their evidence and their witnesses have been heard, the court determines the dates for written submission first by the plaintiff and then by the defendant. The plaintiff has the right to submit a reply submission. If the plaintiff raises new issues in his/her reply the court may give the defendant the right to a rejoinder. Sometimes the court may decide that these submissions should be oral only.

The court sets the date for judgment. A judgment should be delivered within the speed track period agreed upon.

### 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

None unless there is a discovery application. The evidence to be adduced has to be reflected in the plaint and annexures/statement of defence and annexures but parties may apply for discovery or for permission to file additional documents. The party applying must disclose these at the first pre-trial conference.

The trial starts with examination-in-chief by the plaintiff's lawyer, and witnesses tender evidence which becomes part of the court record. The plaintiff's lawyer examines the witness-in-chief after which the witness is cross-examined by the lawyer for the defendant. After cross-examination, the



plaintiff's lawyer may re-examine/redirect the witness. The same will apply to each plaintiff witness until all the plaintiff's witnesses have been heard.

The same procedure applies in relation to the defendant's case.

Closing submissions are then made (either written or oral) by the lawyer.

On the judgment date, the judge may deliver a written judgment or an oral judgment to be followed by the issuance of a written judgment. If the party against whom the decision has been made wishes to appeal, then the lawyer representing such party must notify the court of this intention and write a letter requesting a copy of the judgment, decree and transcript of the proceedings for the purposes of the appeal.

Most notices of appeal to the Court of Appeal must be filed either within 14 days or 30 days from the date the judgment was delivered. In most cases the court does not provide the necessary documents in time (sometimes this can take months). Any such delay by the court extends the period set for filing the notice by the number of days the necessary documents are not made available to the requesting party.

#### **7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?**

In practice, the parties are not really able to control the timetable. Timings are reflected in the speed track agreed upon but often these are not adhered to, mainly due to interlocutory applications or adjournments. Lawyers seem to be more disciplined where the Court of Appeal is concerned.

It is therefore, very difficult to predict how long a commercial case will take, as many factors may influence this. If the case is in the Commercial Court, then the average time is one to two years from issue to trial.

#### **8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?**

A party may apply for an injunction to prevent the other party from selling, disposing, destroying, removing, or alienating any property or asset which is the subject of the case.

#### **9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?**

A judgment creditor must apply for an execution, attachment or garnishee order for money in the defendant's accounts. The application for an attachment order must include a list of the defendant's properties giving details of title numbers and location. Once an attachment or garnishee order is granted then the court appoints a court broker to auction the property or to garnishee the account.

#### **10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?**

Yes the courts have power to order costs. Usually costs follow the event and the party who wins is awarded their costs. However, the court may decide that each party should bear its own costs.

The courts may order security for costs. There is greater likelihood that the court will grant the order where the plaintiff is not resident in Tanzania.

#### **11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?**

A party may appeal in the first instance from the Magistrates' Court to the High Court or from the High Court to the Court of Appeal on issues of fact and/or law. Appeals against decisions of the High Court rejecting challenges to arbitration awards require leave to appeal to the Court of Appeal to be first obtained from the High Court.

The appeal does not of itself operate as a stay of execution; however, the court appealed from may grant a stay of execution pending the hearing of the appeal or the court appealed to may grant a stay.

The court may grant a stay where one party appeals and the judgment decree holder attempts to execute the judgment. The court must be satisfied that it is just to do so or that execution would make the appeal meaningless or where execution would result in the judgment debtor suffering irreparable loss.

#### **12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?**

##### **Domestic civil proceedings**

With respect to domestic civil proceedings, the Government has no immunity. Proceedings against the Government must be in accordance with the provisions of the Government Proceedings Act CAP 5 R E 2002 of the Laws of Tanzania (the Act). Civil proceedings against the Government may only be instituted in the High Court of Tanzania provided 90 days' notice of an intention to sue has been submitted to the Government Minister, department or officer concerned specifying the basis of the claim against the Government. A copy must also be sent to the Attorney General. The Government is subject to all proceedings as if it were a private person of full age and capacity. Any claim arising may be enforced against the Government in accordance within the provisions of the Act. However, no proceedings lie against the Government by virtue of the Act in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him or any responsibilities which he has in connection with the execution of judicial process.

Section 16(3) of the Act prohibits the Tanzanian courts from issuing execution or attachment orders to enforce payments by the Government of any money or costs referred to in the Act and no person would be individually liable under any order for such.

Furthermore, all Government assets that are held on deposit or managed by the Central Bank are immune from enforcement proceedings (including attachment) issued by any court (section 67(1) of the Bank of Tanzania Act No 4 of 2006). In light of this, enforcement of judgments against the Government is limited.

### Agencies of Government or parastatals

There is no immunity from civil proceedings against State agencies or parastatals but proceedings against some key agencies or parastatals such as the Tanzania Port Authority (TPA), the Tanzania Telecommunications Company Limited (TTCL), the Tanzania Revenue Authority (TRA) and local Government authorities are immune from execution or attachment. It is important when instituting civil proceedings against any State agency or parastatal to review the law establishing such agency or parastatal to find out: (a) if there is any requirement to serve a notice of intention to sue and; (b) if there is immunity against execution (in practice there is always a provision requiring payment of the claim but not through attachment). For instance, the assets and properties of local government authorities are immune from execution or attachment, but the law obliges the Minister responsible to raise rates from rate payers and pay if a claim is not paid within three months from the date of receipt of the claim.

### Foreign State entities

The Diplomatic and Consular Immunities and Privileges Act R E 2002 CAP 356 sets out the immunities and privileges a sending State, its diplomatic envoy, and other diplomatic staff are entitled to. Section 4 of the Act, *inter alia*, incorporates the provisions of the Vienna Convention on Diplomatic Relations signed on 18 April 1961, into Tanzanian law, to the extent specified in the First Schedule to the Act and in particular articles 1, 11 and 22-41 of the Convention. State entities of sending States are not included.

## 13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

Enforcement of foreign judgments is regulated by the Reciprocal Enforcement of Foreign Judgments Act (CAP 8 R E 2002). The procedure depends on whether the country from which the judgment is delivered is listed in the Act. These are: Botswana, Lesotho, Mauritius, Australia (New South Wales), Zambia, the Seychelles, Somalia, Zimbabwe, Swaziland, the United Kingdom and Sri Lanka.

An application must be made to the High Court to register the judgment. It is not clear (as is the case for the registration of arbitral awards) whether the receipt of the foreign judgment by the Registrar of the High Court would constitute registration. The application should include the original judgment and, if the judgment is not in English, an official translation.

The court will register the judgment if the judgment:

- is final (notwithstanding that an appeal may be pending against it or it is subject to an appeal in the original court)
- is a money judgment which is neither a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or any other penalty
- is given after the coming into operation of the order directing the Reciprocal Enforcement of Foreign Judgments Act to extend to that foreign country
- is not time barred (the time limit is six years from the date the judgment was delivered)
- is not wholly satisfied
- is not capable of execution in the country of origin and
- does not offend public policy

Registration gives a foreign judgment, for the purposes of execution, the same force and effect as if it had been originally given and delivered by the High Court of Tanzania.

Judgment creditors from countries not on the list must institute a fresh suit against the judgment debtor in a Tanzanian court that has jurisdiction using the judgment as evidence. There is no guarantee that the Tanzanian courts will accept the foreign judgment as evidence.

The Judgment Extension Act No 13 of 1921 (CAP 7) extends the execution of decrees and warrants of civil courts of neighbouring countries. Where a decree has been obtained or entered in the High Court of Kenya, the High Court of Uganda, the High Court of Malawi, the High Court of Zanzibar or in any court subordinate to any of those courts for any debt, damage or costs and where it is desired that the decree be executed upon the person or property of a defendant in mainland Tanzania, the decree may be transferred to the High Court of Tanzania or to any courts subordinate to those for execution. The provisions of the Civil Procedure Code (CAP 33 R E 2002) for the transfer of execution of a decree apply in the same manner as if the decree had been obtained or entered in one court and were transferred for execution to another within the jurisdiction of the High Court. After transfer, all proceedings are conducted as if the decree had been a decree originally obtained in the High Court or a subordinate court, and all reasonable costs and charges with regard to the transfer and execution of the decree will be recovered in like manner as if they were part of the original judgment.

## ARBITRATION

### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

The Arbitration Act (CAP 15 of 1932) R E 2002 is one of the oldest pieces of legislation in Tanzania. It has not been amended since 1971. Thus, it does not reflect the UNCITRAL Model Law. It needs to be amended to take into account developments in the law of arbitration. The Arbitration Act applies only to disputes which, but for the submission to arbitration, the High Court would be competent to try (section 3). The Arbitration Rules of 1957 were made under the Arbitration Act and contain further provisions governing arbitration. Provisions relating to court-mandated arbitration proceedings are found in the Civil Procedure Code.

### 15. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

A submission is defined in the Arbitration Act as a written agreement to submit present or future disputes to arbitration (whether an arbitrator is named therein or not) (section 2). Unless otherwise agreed by the parties, a submission to arbitration is irrevocable except by leave of the court (section 4). Unless the parties agree otherwise, the provisions in Schedule 1 to the Arbitration Act are deemed to be incorporated into the arbitration agreement.

### 16. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?

The courts will stay litigation if there is a valid arbitration clause covering the dispute. Under section 6 of the Arbitration Act, where a party commences legal proceedings in respect of a matter

agreed to be referred to arbitration, a party to the legal proceedings may, at any time after appearance and before filing a written statement or taking any other steps in the proceedings, apply to the court to stay the proceedings. The court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and the applicant is ready and willing to do all things necessary for the proper conduct of the arbitration, may make an order staying the proceedings. Section 6 applies where the matter to be submitted to arbitration would, but for the arbitration agreement, be within the competence of the High Court to try (section 3).

Tanzania is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). In relation to an arbitration agreement which provides for a foreign-seated arbitration where the seat is in a New York Convention Contracting State, the Tanzanian court is obliged under the New York Convention to stay proceedings and refer parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

#### **17. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?**

Under Tanzanian law there is no provision for the courts to intervene in foreign seated arbitrations. There is nothing in the Arbitration Act which expressly allows interim measures by the court in support of a foreign seated arbitration. However, it is likely that the court would grant an order under its inherent jurisdiction to preserve the subject matter of arbitration. The court can compel a witness to appear before a tribunal (section 13). In this case the court will not have intervened but assisted the arbitrators. In 2008/09 the Commercial Court in Tanzania granted an injunction, using its inherent power, to prevent a party to an international arbitration from selling the assets that were the subject matter of the arbitration when it became clear that the shareholders of the party were not resident in Tanzania and did not have any other assets outside Tanzania.

Under section 11, the arbitrators can refer a question of Tanzanian law for decision by the courts during the reference.

#### **18. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?**

As noted in question 16 above, Tanzania is a party to the New York Convention. A foreign award which has been made in a New York Convention Contracting State cannot be appealed but enforcement can be challenged on the grounds laid down in the New York Convention.

A foreign award which has not been made in a New York Convention Contracting State can be challenged in the High Court of Tanzania on the grounds of misconduct of the arbitrator or that the arbitration or the award was improperly obtained (section 16).

#### **19. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION?**

The arbitrators must first notify the parties that they have issued an award and send a copy to each of the parties. One of the parties may ask that the award be filed with the Registrar of the High Court of Tanzania (section 12). The arbitrators may file the original or a certified copy of the award by couriering it to the Registrar of

the High Court of Tanzania. Alternatively, they may cause the award to be filed on their behalf such as by an instructing lawyer or one of the counsels of the parties, or to file it in person. Evidence on the reference, the minutes of their proceedings and a copy of each notice given to the parties, must also be filed with the award.

The Court of Appeal of Tanzania decided in 1997 that the receipt of the award by the Registrar would constitute the filing of the award (such that there would be no need for the parties to file an application for the filing of the award). From the date the award is received by the Registrar of the High Court the award may be either challenged under section 16 (to the extent that it is not an award made in a New York Convention Contracting State), or enforced.

After the opportunity (if any) for challenging the award has passed, or a challenge has been unsuccessful, the foreign award becomes a decree enforceable in Tanzania as if it were a decree issued by the High Court of Tanzania.

Enforcement of a foreign award where the arbitration is seated in a New York Convention Contracting State can be resisted only on the grounds set out in the New York Convention.

#### **20. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?**

Yes but it may be a protracted process even in relation to New York Convention awards due to the process for accessing the Court of Appeal from a decision of the High Court granting or rejecting a challenge.

In the case of foreign awards to which the New York Convention does not apply, delay is usually caused by interlocutory applications and the fact that there is no automatic right of appeal under the Appellate Jurisdiction Act (CAP 141 R E 2002) if a party challenging an award is aggrieved by a decision of the High Court. A process for application for leave to appeal must be commenced followed by an application or stay of execution. All these processes delay the determination of the challenge and appeal. The court system is slow, especially at the Court of Appeal level, so a matter may take several years before a final decision is made by the Court of Appeal.

### **ALTERNATIVE DISPUTE RESOLUTION**

#### **21. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?**

Please see question 5 above in relation to court-annexed mediation. There is no requirement for arbitrating parties to consider or submit to ADR before or during proceedings.

### **REFORMS**

#### **22. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?**

The Government plans to introduce a new Arbitration Act. The courts and the Tanganyika Law Society have been demanding revisions for some time and it is likely that a new law will be passed in the next year or so.

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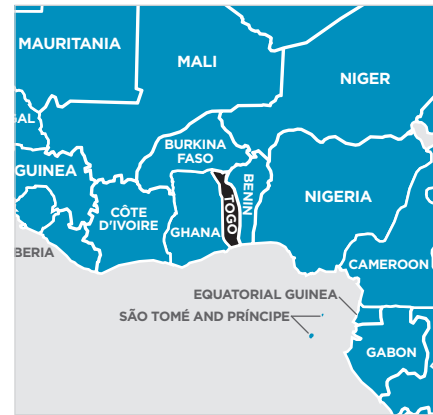
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# TOGO



## INTRODUCTION

The Republic of Togo is a civil law country. The 1992 Constitution, as revised by Law No 202-029 of 31 December 2002, stands at the apex of all statutory provisions. The court structure is set out in the Constitution and enacted laws and decrees. The Republic of Togo is a member of OHADA, UEMOA and ECOWAS. Its Supreme Court (*Cour suprême*) has final jurisdiction over matters not governed by the laws introduced by these inter-governmental bodies.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

The legal profession is governed by Decree No 80-37 of 7 March 1980, implementing Order No 80-11 of 9 January 1980, Law No 88-7 of 27 May 1988 modifying articles 3 and 9 of Order No 80-11, Regulation No 10/2006/CM/UEMOA of 25 July 2006 relating to the free circulation and the establishment of Union attorneys within the UEMOA zone, and Regulation No 05/CM/UEMOA relating to the harmonisation of the rules governing the legal profession within the UEMOA zone.

To practise law in Togo, potential lawyers must be registered with the Togo Bar Association (*Ordre des avocats*) and meet certain requirements, including:

- having Togolese nationality and being at least 21 years old
- hold a master's degree recognised by the African and Madagascar Council for Superior Education (CAMES) or any diploma recognised as its equivalent
- having completed a course resulting in the award of the Certificate of Aptitude for the Profession of Lawyer (*Certificat d'aptitude à la profession d'avocat*) (CAPA) recognised within the UEMOA zone
- having performed a three-year training contract as evidenced by the acquisition of a training certificate

The profession is organised by the *Conseil de l'Ordre*, which ensures that members abide by the rules governing the profession and applies any necessary disciplinary measures. Lawyers

(*avocats*) registered with the Bar (*Barreau*) can appear before any court. They can practise either individually or as part of a legal practice structure.

Lawyers from a UEMOA Member State may freely establish themselves in Togo if they meet the requirements listed above to register as lawyers.

Foreign lawyers registered with the Bar of a foreign country that has concluded a judicial cooperation convention with Togo may request registration with the Togolese Bar.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The Togolese court system (excluding the criminal courts) forms a three-tiered pyramid:

- the First Instance Courts, which are structured as follows:
  - the *tribunaux de première instance*, which have jurisdiction over civil, commercial and public law matters, regardless of the amount in dispute
  - the commercial chambers (*chambres de commerce*), which are specialised chambers of the *tribunaux de première instance*, and which have jurisdiction over all disputes between merchants
- two Courts of Appeal (*Cours d'appel*), which hear appeals of decisions from the *tribunaux de première instance*
- the Supreme Court (*Cour suprême*), which hears appeals against orders or judgments pronounced as final decisions by the courts. Togo being a member state of OHADA, UEMOA and ECOWAS, the Supreme Court's final jurisdiction is limited to cases not falling under the jurisdiction of these inter-governmental organisations

There are also specialised courts, such as the Employment Tribunals, which have jurisdiction over individual disputes arising, for example, during the performance of an employment contract, between employers and employees.

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

Limitation periods vary depending on the type of action and the parties involved:

- the ordinary limitation period for bringing an action in a civil matter is 30 years

- the limitation period applicable to disputes arising between merchants, or between merchants and non-merchants, is five years, unless a shorter period applies in more specific cases
- Special limitation periods apply to certain types of actions, including, in commercial matters:
  - civil actions against company executives for torts committed by them individually or collectively in the exercise of their functions are prescribed three years from the date the tort is committed, or, if it was concealed, from the date of discovery of the tort
  - derivative suits (seeking of damages for the prejudice suffered by a company due to a tort committed by its directors in the exercise of their functions) are also prescribed after three years starting from the commission of the damaging act, or, if it was concealed, from the date of its discovery
  - derivative suits against executors are prescribed after three years

The parties may not conclude agreements on limitation periods, except in commercial matters where the law grants them greater freedom: the period of limitation may be shortened or extended by agreement of the parties.

A summons, an order or a seizure, served on a party for purposes of interrupting the statute of limitations, effectively interrupts the limitation period.

#### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

Communications between lawyers and clients are strictly confidential. A breach of the confidentiality obligation by an attorney may result in disciplinary sanctions.

A client may not waive an attorney's confidentiality obligation.

#### 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

Civil proceedings are filed:

- by written petition, filed by the claimant or its lawyer at the court Registry, stating the party's full identity, the capacity in which they are acting, the identity, residence and profession of the opposing party or parties, a brief statement of claim and the grounds relied on
- by oral petition. The parties may jointly seize the judge of their dispute. Once the dispute has arisen, they may, regarding the same subject-matter, and under the same conditions, vest power in the judge to pronounce a decision as *amiable compositeur*. This will be subject to appeal unless the parties have renounced any appeal

Once summonsed, the defendant must appear either in person or be represented. The time limit for the hearing date is one week if the defendant is domiciled in a prefecture adjoining the jurisdiction seized. It is extended to two weeks if the party is domiciled in a prefecture not adjoining the jurisdiction seized, to one month for parties domiciled outside Togo in a country with regular scheduled airline flights to Togo, and to two months for parties domiciled in a country with no direct scheduled flights to Togo.

For urgent proceedings eg interim measures, the court may reduce the deadlines.

#### 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

It is for each party to prove the facts necessary to support his or her claim(s). Documentary evidence, testimonial evidence and confessions are allowed. Before commercial courts, evidence can be submitted by any means. The party making reference to an exhibit undertakes to provide it to any party to the proceeding. Communication must be spontaneous. If communication does not occur, an application may be made to the judge for him to order production, or face monetary sanctions. Compliance with the adversarial principle implies that each party has the right to respond to evidence produced by the opposing party.

A party may similarly request the judge to order third parties to disclose evidence, provided there is no impediment to doing so.

The parties may submit evidence to the court until all hearings are completed. They may also introduce new arguments, new exhibits and new evidence in appellate proceedings (apart from Supreme Court proceedings, where no new evidence can be produced). However, they cannot raise new claims on appeal.

The judge has the power to order *ex officio* all legally permissible investigative measures and the parties are obliged to provide assistance in the investigative measures ordered by the judge. The judge may also, if the point at issue requires technical knowledge with which he or she is unfamiliar, appoint one or more experts, on the proposal of the parties or *ex officio*. The scope of the expert's testimony should be specified, and limited to his or her specialty. It must also be legally neutral. The judge must specify a time within which the expert should fulfil his or her mission.

#### 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

The parties do not control the procedure. Once the proceedings have commenced, the timetable is set at the discretion of the court and in practice depends on various factors, such as the level of complexity of the case, the degree of urgency and the court's caseload. Nevertheless, the parties may end the proceedings at any time by mutual agreement.

The average length of a commercial proceeding is six months. Civil proceedings can last between six months to a year, or even more.

#### 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

Interim proceedings can be brought in Togo to protect parties' interests pending a judgment on the merits:

- *référé* proceedings allow a party to obtain an interim ruling urgently, without affecting the court's decision on the merits of the case. The claim is reviewed at a hearing held by the presiding judge of the court. All claims that are not seriously disputed may be the subject of interim orders
- *ex parte* orders (*ordonnances sur requête*) can be issued by the presiding judge of the court in the absence of a party to protect the rights and interests of the other party where the issues at stake require this. *Ex parte* orders are thus immediately enforceable
- conservatory measures (*saisie conservatoire*) ordered by the presiding judge of the court to confiscate the debtor's movables

and preventing the debtor disposing of them to the detriment of the creditor. For permission to conduct a conservatory seizure, one must provide proof of a grounded claim as well as circumstances that are likely to threaten recovery. These two conditions are cumulative. In practice, it is easy to obtain the permission of the presiding judge; but it is sometimes difficult to prove the circumstances likely to threaten recovery of the debt. The creditor may pursue a conservatory seizure without prior approval of the presiding judge when he avails him/herself of a writ of execution.

In practice it is easy to obtain these types of orders.

## 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

Judgments are only enforceable to the extent that, being no longer subject to appeal with suspending effect, they are *res judicata*, except where immediate enforcement is provided for by law or has been ordered. Unsuccessful parties can apply for a grace period. Enforcement is possible only if the judgment is endorsed as enforceable.

The enforcement measures available under Togolese law are those provided for in the OHADA Uniform Act Organising Simplified Recovery Procedures and Measures of Execution and include:

- seizure and sale (*saisie-vente*): "any creditor in possession of a writ of execution showing a debt due for immediate payment may proceed to the seizure and sale of the tangible property belonging to his debtor in order to be paid from the sale price"
- attachment order (*saisie-attribution de créances*): "any creditor in possession of a writ of execution showing a debt due for immediate payment may [procure the seizure] in the hands of a third party [of] the debt owed by his debtor in the form of a sum of money"
- penalty payment (*astreinte*): creditors who obtain an injunction from a court ordering their debtors to accomplish a particular task or to cease and desist may ask the court to combine the injunction with a penalty for non-compliance, payable by day/week/month
- real property foreclosure (*saisie immobilière*): this enforcement mechanism is applied as a last resort when the seizure of personal property or of debts was unfruitful or insufficient. The insufficiency must be authenticated by a bailiff (*huissier de justice*), only then may the creditor initiate a *saisie immobilière*

The judge may grant a period of grace to the unsuccessful party if necessary.

## 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

The courts may order payment of a proportion of the court costs. The unsuccessful party bears the legal costs (excluding lawyers' fees). The court costs include expenses, pleadings, and expert's costs. Expenses include court fees, fees due to counsel and to officially appointed members of the legal profession, witness charges and the remuneration of technicians.

The lawyers' fees are taxed according to a scale established by the appropriate professional body.

The deposit of a sum of money necessary to cover the payment of court fees is required of all plaintiffs, whether foreign or domestic.

In all cases, foreign claimants must deposit sufficient funds to cover the court costs when filing the writ at the Registry, unless they are in a position to show that the value of their immovable property in Togo is sufficient to cover the amounts they may ultimately be ordered to pay.

## 11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

Parties have one month to appeal first instance judgments. The deadline is calculated from the day the judgment is pronounced for *inter partes* proceedings or from the day a challenge can be filed if by default. Appeals must be filed by way of a summons or a petition addressed to the appeal court registrar.

It is not possible to make new claims on appeal, save for damages or where the new claim is an argument in defence against the main claim. Appeals suspend the enforcement of the judgment, save where the first court has ordered immediate enforcement.

Appellate judgments and judgments not subject to appeal before the Court of Appeal can be reviewed by the Supreme Court. The Supreme Court can only deliver a judgment on issues of law and not fact. Appeal to the Supreme Court has no suspensive effect. If the appeal to the Supreme Court is successful, the case is remanded to the appeal court (composed differently) for a second judgment. In principle, the remand court is not required to abide by the Supreme Court's decision, but in practice this is the case.

## 12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

Proceedings can be brought against the Government or public authorities before the administrative law courts. However, they enjoy immunity from execution. Debts that are due and payable by the State, public authorities and State companies may only be offset with due and payable debts of the creditors, subject to reciprocity.

With regard to foreign entities, any jurisdictional immunity rights that can be applied derive from international agreements on diplomatic or consular relationships.

## 13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

Enforcement is obtained on the basis of international conventions between Togo and the country where the judgment was issued. Togo has thus signed bilateral and regional conventions which set out the procedure to follow for the enforcement of a foreign judgment.

Moreover, in OHADA matters, the judgments of the CCJA are enforced on the territories of each of the Member States under the same conditions as national legal decisions. The enforcement order is issued, without any further control other than the verification of the authenticity of the decision by the national authority appointed by the Togolese Government.

In practice it is relatively easy to obtain enforcement if the required conditions are met.

## ARBITRATION

### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

Togo is a Member State of OHADA (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires* - Organisation for the Harmonisation of Business Law in Africa). The OHADA Treaty was first signed on 17 October 1993. Under the OHADA Treaty, the Council of Ministers of Justice and Finance adopt "uniform acts" that are directly applicable and enforceable in each of the Member States. Arbitration in the OHADA Member States is governed by the Uniform Act on Arbitration within the Framework of the OHADA Treaty, which was adopted on 11 March 1999 and came into force 90 days later (the Uniform Act). The Uniform Act is not based on the UNCITRAL Model Law. It was drafted separately but is nevertheless consistent with the fundamental principles of international commercial arbitration and main features of the UNCITRAL Model Law.

The Uniform Act applies to both national and international arbitration and governs all arbitration proceedings with a seat in a Member State.

Prior to the adoption of the Uniform Act, arbitration law was governed by articles 275 to 290 of the Code of Civil Procedure. These rules are now only applicable provided they are not contrary to the Uniform Act.

One of the most important characteristics of OHADA arbitration is the Common Court of Justice and Arbitration (*Cour Commune de justice et d'arbitrage*) (CCJA), which acts as both a permanent arbitration institution and a supreme court of arbitration for OHADA Member States.

### 15. WHAT ARE THE MAIN NATIONAL ARBITRATION INSTITUTIONS?

The main arbitration institution in Togo is the *Centre d'arbitrage et de médiation et de conciliation of Togo* (CATO) sitting in Lomé. CATO offers merchants a mediation-conciliation and arbitration framework for the settlement of civil and commercial contractual disputes. CATO is an administrative centre which monitors, organises and supervises, in accordance with its regulations, conciliations and arbitrations conducted under its aegis.

At the supranational level, the CCJA, which was created by the OHADA Treaty and is based in Abidjan, in Côte d'Ivoire, can also hear arbitration matters. The CCJA, which is also a supreme court, acts as an arbitration centre and administers proceedings governed by the CCJA Rules of Arbitration. The CCJA is different from other arbitration centres as it is not a private institution but was created and organised by OHADA.

In practice, many contracts have arbitration clauses referencing the CCJA.

### 16. ARE THERE ANY RESTRICTIONS ON WHO MAY REPRESENT THE PARTIES TO AN ARBITRATION?

The Uniform Act does not set any restrictions on persons who can represent parties in an arbitration. They are entitled but not required to instruct counsel. Assistance may be provided by foreign lawyers.

### 17. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

Article 3 of the Uniform Act states that the arbitration agreement must be made in writing or by any other means of which evidence can be produced. No particular format is required. The Uniform Act also provides that contracts may contain an arbitration agreement by reference, contained in a different document. This indicates that proof may be in written or oral form.

In practice, Togolese Courts interpret this form requirement in a very strict manner. There are no other provisions on this issue in local law.

### 18. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?

Article 13 of the Uniform Act provides that national courts must decline jurisdiction where there is an arbitration agreement and where the arbitral tribunal has not yet been composed, save where the arbitration agreement is "manifestly void". Courts cannot decline jurisdiction at their own discretion.

In principle, the location of the seat of arbitration has no effect on this issue.

If the arbitral tribunal has already been composed, the national court must decline jurisdiction at the request of a party.

Pursuant to article 13 of the Uniform Act, the Togolese courts may order interim or conservatory measures that do not require a review of the case on the merits, for which only the arbitral court has jurisdiction, either where they are "recognised and reasoned" as urgent or where the measure must be performed in a State that is not part of OHADA.

National courts can also intervene in very limited circumstances with a view to assisting the arbitration process (see questions 21 and 22 below).

When the seat of arbitration is located outside OHADA, either party may refer to the Togolese judge for escrow or interim measures against the Togolese party. The court shall order the measures if the request is justified and grounded.

### 19. IF THE ARBITRATION AGREEMENT AND ANY RELEVANT RULES ARE SILENT, HOW MANY ARBITRATORS WILL BE APPOINTED, AND WHO IS THE APPOINTING AUTHORITY?

The Uniform Act does not indicate the exact number of arbitrators in the event this is not specified in the arbitration agreement. However, it provides that the arbitral tribunal shall consist of either a single arbitrator or three arbitrators.

In Togo, if the parties fail to appoint one or more arbitrators, the presiding judge of the court seized by a party may appoint the arbitrator(s).

Local law does not provide for a specific number of arbitrators if the arbitration agreement fails to specify this.



## 20. WHAT RIGHTS ARE THERE TO CHALLENGE THE APPOINTMENT OF AN ARBITRATOR?

Article 7 of the Uniform Act sets the rules for challenging an arbitrator. Arbitrators must notify the parties of “*any circumstance about him/herself*” for which they may be challenged. Any disputes will be settled by the competent court of the Member State, save where the parties have provided for a different procedure for challenging arbitrators. In Togo, the judge is the President of the Court of First Instance.

Decisions are not subject to appeal.

Arbitrators may only be challenged for grounds that come to light after their appointment.

## 21. DOES THE DOMESTIC LAW CONTAIN SUBSTANTIVE REQUIREMENTS FOR THE PROCEDURE TO BE FOLLOWED?

The Uniform Act requires parties to receive equal treatment and to have an opportunity to exercise their rights (article 9); arbitrators may not base their decisions at their own discretion without first allowing parties to submit observations (article 14).

Article 18 of the Uniform Act provides that the deliberations must be kept secret.

The Uniform Act also provides that the duration of the arbitration may not exceed six months from the date upon which the last arbitrator accepts the terms, except where extended by agreement of the parties or by petitioning the competent court (article 12). In Togo, the judge competent to extend the arbitration deadline must be the same as may be called on to collaborate in constituting the arbitral tribunal.

Furthermore, the arbitrator’s duties may only be entrusted to an individual who has full enjoyment of his or her civil rights, and who must remain independent and impartial vis-à-vis the parties.

The arbitral tribunal shall observe and enforce the adversarial principle. Consequently, it may only consider, in its decision, the arguments, explanations or documents invoked by the parties if they were raised in an adversarial debate.

The arbitral tribunal should issue its decision within 45 days. The award, in the absence of an agreement between the parties, should be issued by majority vote when the court is composed of three arbitrators. The award should be signed by the arbitrator(s). In case of refusal by a minority to sign the award, this should be mentioned.

A motion for the interpretation of an award or for material error or omissions that would affect an arbitration award must be made within 30 days of notification of the award.

## 22. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED INSIDE THE JURISDICTION?

Local law makes no provision on such matters. The Uniform Act applies.

According to the latter, in principle, an arbitration agreement excludes all intervention by the country’s courts during arbitration, pending pronouncement of the judgment.

Nevertheless, parties may petition the competent court in Togo in the following circumstances:

- to resolve difficulties encountered with constituting the arbitral tribunal, to appoint the sole arbitrator or the third arbitrator (articles 5 and 8)
- to rule on challenges against arbitrators where the parties have not provided for a different procedure (article 7)
- to extend the deadline for the conclusion of the arbitration where there is no agreement between the parties to do so, at the request of a party or the arbitral tribunal (article 12)
- to order interim or protective measures when urgently necessary (recognised and reasoned circumstances), provided the measures do not require a review of the case on the merits (article 13)
- to assist the arbitral tribunal, at its request, with the collection of evidence (article 14)
- to interpret the award or fix errors or material omissions affecting the award if the arbitral tribunal cannot meet again

## 23. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?

In principle, national courts cannot intervene where there is an arbitration agreement. In addition, all measures relating to the composition of the arbitral tribunal and conducting the proceedings fall under the jurisdiction of the courts of the country in which the arbitration is seated.

However, it is possible for national courts other than the competent court of the Member State in which the arbitration is seated to intervene to order conservatory or interim measures in accordance with the procedure set out in question 18 (article 13).

## 24. DO ARBITRATORS HAVE POWERS TO GRANT INTERIM OR CONSERVATORY RELIEF?

Although this matter is not dealt with directly in the Uniform Act, legal authors generally agree that it is possible for arbitrators to order interim or conservatory relief, save where the parties have agreed otherwise.

## 25. WHEN AND IN WHAT FORM MUST THE AWARD BE DELIVERED?

Except as agreed otherwise by the parties, arbitral awards must be issued within six months from the date on which all of the arbitrators accepted their arbitrating functions. This term can be extended by agreement between the parties, or by order of the competent court of the Member State or, in Togo, the presiding judge of the Court of First Instance.

The Parties may provide for special formal requirements regarding the award. Otherwise, it must be issued by a majority vote when the court is composed of three arbitrators and it must be grounded. It must be signed by at least two of the three arbitrators. In case of refusal by a minority to sign the award, this should be mentioned.

There are other conditions provided by Togolese law but these are contrary to those of the Uniform Act and cannot therefore be enforced under article 10 of the OHADA Treaty.

## 26. CAN A SUCCESSFUL PARTY RECOVER ITS COSTS?

The Uniform Act makes no provisions in this regard.

## 27. ON WHAT GROUNDS CAN AN AWARD FROM AN ARBITRATION SEATED IN THE JURISDICTION BE APPEALED TO THE COURT?

In application of the Uniform Act, the only remedy against an arbitral award is an application to set aside that award brought before the competent court in the Member State in which it was issued, within one month from the date of service of the award rendered enforceable (articles 25 and 27).

The circumstances in which an application to set aside can be brought are as follows (article 26):

- the arbitral tribunal ruled without an arbitration agreement or with respect to an invalid or expired agreement
- the arbitral tribunal was not properly composed
- the arbitral tribunal did not rule in compliance with the terms of arbitration
- due process was not followed
- the arbitral tribunal breached a public policy rule of the OHADA Member States
- there are no reasons for the award

Bringing an application to set aside an arbitral award suspends enforcement, unless the tribunal ordered immediate enforcement. The decision can only be appealed to the CCJA (articles 25 and 28).

This is the only remedy available to parties before a national court. The other remedies are third party opposition and the application for a review of the award, which must be submitted to the arbitral tribunal (article 25).

## 28. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

Before the Uniform Act, unless the parties agreed otherwise, arbitration decisions could be appealed before ordinary State courts (article 289 of the Civil Procedure Code). Under the aegis of the Uniform Act, the award may only be subject to an action for annulment (as described above). It cannot be opposed, appealed, nor taken to the Supreme Court. There are, however, no specific provisions relating to potential remedies against an award made abroad.

## 29. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF: (I) AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION AND (II) DOMESTIC AWARDS?

To enforce awards issued within an OHADA Member State, the Uniform Act requires parties to obtain the recognition of the award from the competent court in that Member State (article 30). In Togo, the competent judge is the President of the appeal court with jurisdiction.

This requires producing the original arbitral award, together with the arbitration agreement or copies of these documents meeting the necessary authentication conditions and, where necessary, a sworn translation into French (article 31).

Decisions refusing to recognise an arbitral award can be appealed to the CCJA but decisions granting recognition are not subject to appeal (article 32).

Awards issued in a different OHADA Member State, or outside the OHADA zone as set out in the regulations derived from the Uniform Act, are recognised in other Member States under the conditions set out in the applicable international agreements or, otherwise, under the conditions stated in the Uniform Act. Togo is not a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

The procedure for the recognition of awards is not adversarial. The judge exercises control over the evidence submitted pursuant to article 31 of the Uniform Act. His or her decision authorising enforcement is not subject to appeal. A refusal to enforce may only be appealed before the CCJA. Finally, an action for annulment suspends the proceeding unless provisional execution is ordered by the arbitral tribunal.

## 30. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

In practice, foreign awards are readily enforceable in Togo, except if the unsuccessful party makes use of delaying tactics.

## ALTERNATIVE DISPUTE RESOLUTION

### 31. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

All applications are exempt from preliminary conciliation unless the law provides otherwise. Nevertheless, the court may, in any event, seek to achieve conciliation between the parties.

## REFORMS

### 32. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

A draft law revising the judiciary in Togo is being considered by the deputies. If adopted, the draft would considerably reform the judiciary in Togo.

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# TUNISIA



## INTRODUCTION

Tunisia's legal system is based on the Constitution of 27 January 2014 and its laws and implementing regulations.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

The profession of lawyer (*avocat*) is governed by Decree-Law No 2011-79 relating to the organisation of the legal profession.

In order to qualify to practise as a lawyer in Tunisia, a candidate must satisfy certain conditions and notably:

- have Tunisian nationality for at least five years and be domiciled in Tunisia
- be between 23 and 40 years of age
- hold a certificate of capacity to practise law delivered by the High Institute of the Profession of Avocat (or a law PhD)
- be registered with the Tunisian Bar

The profession is organised by the Bar Association (*Conseil de l'Ordre*), which ensures that the rules governing the profession are observed and takes any related disciplinary action.

Lawyers registered with the Tunisian Bar may appear before any court and give legal opinions. They may practise independently or with a firm (*société professionnelle d'avocat*).

There is no distinction between *avocat conseil* (solicitors) and *avocat plaidant* (barristers).

In general, foreign lawyers cannot appear before the Tunisian courts (due to the nationality requirement to practise as a lawyer in Tunisia). However, there are certain bilateral conventions as well as conventions entered into between the Tunisian Bar and foreign Bars which authorise (under certain strict conditions) lawyers of the signatory country to appear before Tunisian courts.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The Tunisian court system comprises judicial and administrative courts.

The judicial courts are divided into three levels:

- the Courts of First Instance:
  - the District Courts (*Tribunaux cantonaux*) which hear all minor cases
  - the Courts of First Instance (*Tribunaux de première instance*) which hear everything except cases for which District Courts are competent, and hear appeals against the decisions of the District Courts
- the Courts of Appeal (*Cours d'appel*) hear appeals lodged against decisions handed down in the first instance by the Courts of First Instance
- the Supreme Court (*Cour de cassation*) which is the highest court, ruling only on the legal issues at stake in the case and not on the facts

The administrative courts are the *Tribunal administratif* and the *Cour des comptes*.

There are also specialist courts (for example, Labour Tribunals).

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

The time limit for bringing a civil claim is, as a matter of general principle, 15 years from the beginning of the obligation. However, shorter time limits may exist in relation to specific matters or in relation to commercial law.

The time limit for claims under tort law is three years from the moment where the aggrieved party had knowledge of the damage and of the person accountable for it. In any case, the time limit cannot exceed 15 years from the occurrence of the damage.

However, there are shorter time limits, such as:

- claims in respect of a rent - five years
- claims in respect of a bill of exchange - one or three years, as the case may be
- claims between merchants - one year
- claims regarding abusive dismissal before the court competent for labour issues - one year

The parties are not entitled contractually to waive time limits and cannot extend them beyond 15 years.

#### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

Communications between a lawyer and his/her client are confidential.

A lawyer is required to comply with the principle of professional confidentiality. A lawyer is not allowed to disclose the secrets confided to him/her by his/her client or which he/she has knowledge of during the exercise of his/her profession.

Certain laws and regulations permit the lawyer to disclose confidential information (law against terrorism or money laundering, etc).

The breach of this confidentiality obligation can result in civil and criminal sanctions.

#### 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

Civil matters are brought before the Court of First Instance by way of a writ submitted by the claimant's lawyer. A copy is served on the defendant by a bailiff-notary (*huissier-notaire*) and will include copies of any exhibits.

The timeframe for scheduling the court hearing is a minimum of 21 days from the service of the petition if the defendant is domiciled in Tunisia, or 60 days if the defendant is domiciled abroad or if the case involves the State or public entities.

The timeframe for scheduling a court hearing in an emergency procedure is a minimum of three days.

In practice, the defendant can submit his/her written defence (via his/her lawyer) up until the day of the hearing, when the case is still at the stage of exchange of written arguments. However, the defendant is required to comply with the minimum time limit of three days before the hearing for the exchange of the written defence when the case has entered the stage of oral arguments.

Conciliation is mandatory before the District Courts and Labour Tribunals. Conciliation is also mandatory in family matters (divorce, etc).

#### 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

Parties are entitled to submit ordinary evidence (written evidence, witnesses, etc). Evidence is submitted to the court together with the submissions. There are no time frames for producing evidence but it may only be presented at first instance and before the Court of Appeal, and the other party must be able to reply to such evidence presented. No new evidence may be presented in the case of an appeal to the Supreme Court.

A party may request the judge to order the other party to submit one or more pieces of evidence by requesting a preparatory judgment from the tribunal.

A decision appointing one or more experts must indicate the expert's mission and operations to be completed, the amount of money to be advanced to the expert, and the time limit for filing

the expert report at the Registry. This time limit cannot exceed three months and may be extended only once provided the extension: (i) does not exceed three months; and (ii) is granted by a formal decision.

#### 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

The parties have no control over the procedure or the timetable insofar as the court selects the hearing dates. Parties can only seek an extension of time, which is at the court's sole discretion.

The speed of the proceedings depends on various factors such as the subject matter of the dispute, the amount at stake, and the workload of the judge presiding over the case.

In practice, a civil claim before the Court of First Instance in Tunis takes an average of six months to one year. For cases requiring judicial expertise, the time frame can extend to two years in the first instance.

The parties can enter into settlement agreements in order to terminate litigation proceedings at any time.

#### 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

The judges have the power to freeze a party's assets pending judgment where there is *prima facie* evidence of a good arguable case against the owner of the assets and a credible risk that they may be dissipated to defeat a judgment. Where appropriate, the court may also grant injunctions or make other prohibiting or mandatory orders in order to preserve the *status quo* until the trial. Interim orders may also be made (if appropriate, without notice to the defendant(s)) permitting a party to trace the flow of funds through financial institutions, or to enter a defendant's premises to search for and seize evidence. The courts also have jurisdiction to prohibit a defendant or a debtor under a judgment from leaving Tunisia.

#### 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

A declaratory judgment or a judgment creating a new legal relationship does not require enforcement. Only judgments making mandatory or prohibiting orders require enforcement.

Enforcement measures available under Tunisian law include, but are not limited to:

- an auction sale of assets to satisfy the judgment
- issuance of an order for an examination of the debtor (or a corporate debtor's directors) to disclose all assets (the failure of which will result in criminal sanctions)
- confiscation of bank accounts and other portfolios managed by third parties
- confiscation of salaries and pensions
- confiscation of movables and their sale at auction
- confiscation of immovables and their sale at auction

The procedure for enforcement will depend on the type of assets against which the judgment is to be enforced.

For prohibiting or other mandatory orders, there are little practical means of enforcement in case of non-compliance. The only means of enforcement is through sanctions. There is no concept of contempt of court in Tunisia, so the court indirectly compels the judgment debtor by way of a monetary penalty. For example, the court can impose a penalty payment from the judgment debtor to the judgment creditor for each day that a judgment order is not honoured.

A judge cannot suspend the execution of a judgment, but in case of enforcement measures the bailiff-notary must grant the judgment debtor a period of 20 days to execute the judgment.

#### 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

The unsuccessful party bears the costs unless the court decides to divide them between the parties. No security for costs can be ordered. The winning party can, therefore, in theory, recover its legal costs. In practice, courts tend to be restrictive on the amounts recovered, which rarely cover the actual costs.

The expenses generally cover the registration fees, the bailiff fees, and other expenses of this nature. Regarding the lawyer's fees, the amounts granted by the tribunal are far less than the actual fees incurred.

#### 11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

Judgments and orders may be appealed within 20 days from the date on which the judgment is served on the unsuccessful party before the Court of First Instance (for decisions handed down by a District Court) or the Court of Appeal (for decisions handed down by a Court of First Instance).

The appeal suspends the enforcement of the decision. Excluding those decisions that automatically benefit from immediate enforcement, and notwithstanding appeals or applications to annul, the court must order immediate enforcement – when requested to do so – in all cases involving an official instrument, an acknowledged obligation or a previous decision against a party by way of a *res judicata* decision.

Parties may also appeal to the Supreme Court, within 20 days from the day on which the appeal court's decision is served on the unsuccessful party. The Supreme Court rules on legal issues, not on the facts, and may decide to allow an appeal (in which case it quashes the appealed decision and invites the parties to revert to a new Court of Appeal) or to dismiss it.

#### 12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

Tunisian State entities are not entitled to claim immunity from civil proceedings, save within the scope of administrative acts, which may be submitted to the administrative courts (administrative proceedings). If the acts are purely civil in nature, they may be submitted to the judicial courts. However, assets of administrative bodies cannot be seized for enforcement purpose.

Foreign State entities may only claim immunity under diplomatic immunity rules applicable to the diplomats of foreign States and subject to the principle of reciprocity.

#### 13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

It is possible to enforce a foreign judgment in Tunisia by leave of the Court of First Instance (also called *exequatur*) at the place of residence of the defendant or, where applicable, the place of enforcement. If the defendant does not have an address in Tunisia, the action will be brought before the Court of First Instance in Tunis. However, this court will not give leave to enforce the judgment unless:

- it was made by a competent court in the relevant jurisdiction
- the judgment is enforceable under the law in which judgment was rendered and final
- the parties have been properly represented
- the decision is not contrary to Tunisian public policy

The "public policy" exception is understood in this context as the public policy of Tunisian international private law, which refers to the fundamental choices of the Tunisian legal system.

In practice, *exequatur* is easy to obtain for commercial matters, especially regarding decisions of tribunals of countries with French legal ties. *Exequatur* is more difficult to obtain regarding issues of personal status and family law.

### ARBITRATION

#### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

Yes. Law No 93-42 of 26 April 1993 enacting the Arbitration Code (*Code de l'arbitrage*) is extensively based on the UNCITRAL Model Law.

The Tunisian Arbitration Code governs the organisation of domestic and international arbitration proceedings in Tunisia.

#### 15. WHAT ARE THE MAIN NATIONAL ARBITRATION INSTITUTIONS?

The Centre for Conciliation and Arbitration of Tunis (*Centre de conciliation et d'arbitrage de Tunis*).

#### 16. ARE THERE ANY RESTRICTIONS ON WHO MAY REPRESENT THE PARTIES TO AN ARBITRATION?

There are no restrictions on who may represent the parties to an arbitration.

#### 17. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

The arbitration agreement must be in writing, and either be a notarised (*acte authentique*) or privately signed (*sous seing privé*) document, or be contained in the minutes to a declaration made to the arbitral tribunal.

Under Tunisian law, an arbitration clause is autonomous from the rest of the contract in which it is inserted. As a result, the arbitration clause would not be affected if the whole contract is deemed invalid.

**18. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?**

If a dispute that has already been submitted for arbitration under an arbitration agreement is subsequently brought before a court, the latter must, if requested to do so by the defendant before a ruling has been made on the merits, hold the proceedings to be inadmissible until the completion of the arbitration or the termination of the arbitration agreement.

If the request for arbitration has not been submitted, the court must also declare the proceedings to be inadmissible (at the request of the defendant) unless the arbitration agreement is manifestly invalid.

**19. IF THE ARBITRATION AGREEMENT AND ANY RELEVANT RULES ARE SILENT, HOW MANY ARBITRATORS WILL BE APPOINTED, AND WHO IS THE APPOINTING AUTHORITY?**

In domestic arbitrations, the tribunal comprises a single arbitrator or an odd number of arbitrators.

If the number of arbitrators appointed by the parties is even, a further arbitrator must be appointed to complete the tribunal and will act as president of the arbitral tribunal. This arbitrator will be selected by agreement between the parties, by the arbitrators who have already been appointed or, in the event of a disagreement, by the presiding judge of a court of first instance.

In international arbitrations, the parties are free to choose the number of arbitrators, although their number must be odd. If no agreement is made as to the number of arbitrators, the default number is three arbitrators.

**20. WHAT RIGHTS ARE THERE TO CHALLENGE THE APPOINTMENT OF AN ARBITRATOR?**

An arbitrator may only be challenged for reasons that raise legitimate doubts as to his/her impartiality or independence or if he/she does not possess the relevant qualifications required by the parties.

A party may only challenge the arbitrator that it has appointed or to whose appointment it contributed, for reasons of which it became aware after the appointment.

**21. DOES THE DOMESTIC LAW CONTAIN SUBSTANTIVE REQUIREMENTS FOR THE PROCEDURE TO BE FOLLOWED?**

The domestic law indicates that, provided they remain within the limits set down by the law, the parties may select the procedure to be followed by the arbitral tribunal.

If the parties do not select the procedure, the arbitral tribunal may undertake the arbitration as it deems fit, provided that it remains within the limits set down by the law. The powers enjoyed by an arbitral tribunal include assessing the admissibility, relevance, effectiveness and importance of any exhibits produced by the parties.

**22. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED INSIDE THE JURISDICTION?**

The court can intervene in the processes of appointing arbitrators and challenges thereto and in relation to conservatory measures ordered by an arbitral tribunal.

**23. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?**

Please see question 22 above.

**24. DO ARBITRATORS HAVE POWERS TO GRANT INTERIM OR CONSERVATORY RELIEF?**

Unless the parties have agreed otherwise, the arbitral tribunal may order any interim or conservatory measures it deems necessary, at the request of a party.

If the party in question does not comply, the arbitral tribunal may request assistance from the first presiding judge of the Tunis Court of Appeal.

In either case, the arbitral tribunal or the judge may request an advance from either of the parties on the costs incurred by the measure.

Tunisian case law does not provide clear examples of interim or conservatory measures that can be granted by arbitrators. It seems that in most cases, the intervention of the First President of the Court of Appeal is necessary to implement the measures which may be granted by arbitral tribunals.

**25. WHEN AND IN WHAT FORM MUST THE AWARD BE DELIVERED?**

If the parties do not stipulate a time frame for the issuance of the award, this time frame will be six months from the date on which the last arbitrator is appointed.

The award must be handed down in writing, be signed by the arbitrator(s) and include a brief summary of the parties' claims. It must provide reasons for the decision and notably include the following information:

- the first and last names of the arbitrators
- the date
- the seat of arbitration
- the first and last names of the parties and their addresses and the company name of any legal entities and the address of their registered offices
- if applicable, the first and last names of the lawyers or persons who represented or assisted the parties

**26. CAN A SUCCESSFUL PARTY RECOVER ITS COSTS?**

The unsuccessful party will bear the costs (expenses and lawyers' fees) unless the arbitral tribunal decides to divide them between the parties if they have each lost some of their claims. In practice, the amounts recovered will depend on the arbitrators' decision.

## 27. ON WHAT GROUNDS CAN AN AWARD FROM AN ARBITRATION SEATED IN THE JURISDICTION BE APPEALED TO THE COURT?

Appeals may only be lodged against domestic arbitral awards and the only form of appeal possible against an international arbitration is the application for annulment, under limited grounds. The plaintiff will have to evidence that:

- a party to the arbitration agreement does not have the capacity or the said convention is not valid under the law governing the arbitration agreement or under the rules of international private law
- the plaintiff has not been informed of the appointment of an arbitrator or of the arbitration proceedings or is not capable of asserting his rights
- the award relates to a dispute that is not provided for in the arbitration agreement or it ruled on issues not provided in the arbitration agreement
- the composition of the arbitral tribunal or the proceedings did not comply with the provisions of the arbitration clause, the regulations, the applicable law or the rules of the arbitration code
- the court deems that the award is against public policy according to international private law

Furthermore, a setting aside proceeding may only be lodged if the arbitrators' ruling is not *ex aequo et bono* ("right and good") and if the arbitration agreement expressly provides that an appeal may be brought. An award that has been appealed may not then be annulled. If the court of appeal confirms the award, it will then order enforcement; if it overturns the award, it will rule on the merits of the case itself.

## 28. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

A foreign arbitration award with a seat in Tunisia can be appealed in the form of setting aside proceedings as described above in question 27.

## 29. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF: (I) AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION AND (II) DOMESTIC AWARDS?

In domestic arbitrations, the mandatory enforcement of arbitral awards may only be undertaken by way of an *exequatur* order from the presiding judge of the Court of First Instance or District Court within the jurisdiction of which it falls. However, if the arbitration concerns a dispute pending before a Court of Appeal at the time of the conclusion of the arbitration agreement, then only the presiding judge of that court has the authority to order the enforcement of the award.

In international arbitration, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) has been in force in Tunisia since 1967.

It is possible to enforce a foreign arbitral award in Tunisia following a request in writing addressed to the Tunis Court of Appeal.

*Exequatur* of foreign awards may be refused if the plaintiff presents new evidence establishing one of the following elements:

- a party to the arbitration agreement does not have the capacity or the arbitration agreement is not valid under the law governing it or under the rules of international private law
- the plaintiff has not been informed of the appointment of an arbitrator or of the arbitration proceeding or is not capable of asserting his/her rights
- the award relates to a dispute that is not provided for in the arbitration convention or ruled on issues not provided in the agreement
- the composition of the arbitral tribunal or the proceeding did not comply with the provisions of the arbitration clause, the regulations, the applicable law or the rules of the arbitration code
- the award was suspended or cancelled by a court of the concerned foreign country
- the court deems that the award conflicts the public policy according to international private law

## 30. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

Yes. Annulment of awards and/or refusal of *exequatur* are generally strictly construed by the Court of Appeal of Tunis.

## ALTERNATIVE DISPUTE RESOLUTION

### 31. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

Conciliation is mandatory before the District Courts and Labour Tribunals and in family matters (divorce, etc).

## REFORMS

### 32. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

To the best of our knowledge, there are currently no plans to introduce any reforms of civil and commercial procedure in the near future.

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# UGANDA



## INTRODUCTION

The Ugandan legal system is based on the Constitution of 8 October 1995, legislation, rules of common law, doctrines of equity, and customary law. The official languages are English and Swahili.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

In Uganda, there is no split profession; lawyers practise as both barristers and solicitors. Lawyers have rights of audience before all trial courts and tribunals, save that newly enrolled advocates are limited to Magistrates' Courts for their first eight months in practice.

Training as a lawyer typically involves two stages:

- obtaining a Bachelor of Laws degree from an accredited Ugandan university
- undertaking a nine-month course at the Law Development Centre, including a three-month clerkship/pupillage with the courts, a law firm or an accredited institution. Students are awarded a Diploma in Legal Practice upon successful completion of the course and are eligible to be entered onto the Roll of Advocates provided they have no criminal record for crimes involving moral turpitude and are not an undischarged bankrupt

Foreign lawyers are permitted to practise in Uganda upon being issued with the requisite Practising Certificate by the Registrar of the Courts of Judicature.

The Uganda Law Council is the statutory body regulating the profession and it deals with complaints against lawyers.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The judiciary consists of the superior courts and the lower courts. The superior courts are courts of record and consist of the:

- Supreme Court
- Court of Appeal
- High Court

The lower courts consist of:

- Chief Magistrates' Courts
- Grade I Magistrates' Courts
- Grade II Magistrates' Courts
- the Family and Children's Courts

The High Court is divided into various divisions (ie the Civil Division, Criminal Division, Commercial Division, Land Division, Family Division, War Crimes Division and the Anti-Corruption Division). It is also decentralised and operates various circuit courts in geographical areas in the country.

The High Court is vested with original and unlimited jurisdiction in both criminal and civil proceedings. Claims with a value exceeding UGX 50 million must be initiated in the High Court. Any claim less than UGX 50 million should be initiated in the Chief Magistrates' Courts.

The Court of Appeal has jurisdiction to handle appeals from the High Court and has original jurisdiction in matters relating to the interpretation of the Constitution. This court is headed by the Deputy Chief Justice.

The Supreme Court is the final appellate court in Uganda and is headed by the Chief Justice.

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

The Limitation Act Cap 80 of the Laws of Uganda, Revised, 2000 sets out limitation periods for bringing civil claims. These vary depending on the cause of action.

The limitation period is 12 years for actions:

- to recover land
- for foreclosure in respect of mortgaged personal property, and recovery of any principal sum of money secured by a mortgage or other charge over property

The limitation period is six years for actions:

- founded on tort or contract
- to enforce an award
- to recover any sum other than a sum by way of penalty or forfeiture



The six-year limitation period is reduced to three years in cases of damage in respect of personal injuries to any person arising out of negligence, nuisance or breach of duty.

The limitation period is extended in cases of latent damage, fraudulent concealment, disability, acknowledgement and part payment.

The limitation periods equally apply to private citizens as well as the Government of Uganda, save that they do not apply to proceedings for recovery of taxes or duties or interest thereon, criminal proceedings or any rights to mines and minerals vested in Government. The Act also applies to arbitrations as it does to actions in court.

The provisions of the Act, however, do not apply to any action or arbitration for which a period of limitation is prescribed by any other enactment, or to any action or arbitration to which the Government is a party for which, if it were between private persons, a period of limitation would be prescribed by any other enactment.

#### **4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?**

Communications between a lawyer and his client are privileged and cannot be disclosed to the court or opposing parties. A party is at liberty to waive its right to confidentiality.

#### **5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?**

Generally, civil proceedings are commenced by "notice of intention to sue" (a party risks losing its entitlement to costs if no letter before action is issued). If the dispute cannot be settled, a plaint is filed. It is mandatory for a plaint to include a summary of the evidence, list of documents and list of witnesses. This can, however, be altered at the scheduling conference.

Upon filing the plaint, the court issues a summons to file a written statement of defence and this, together with the plaint, is served upon the defendant within 21 days from the date of issuance of the summons. The defendant has 15 days to file its written statement of defence in ordinary suits and 10 days to file an application for leave to appear and defend the suit in summary suits. The plaintiff has seven days after service of the defence to file a reply. After closure of pleadings, the matter is fixed for a scheduling conference at which the agreed and disputed facts are settled, the issues for trial are identified, the number of witnesses to be called by either side are indicated, and relevant documents are agreed on and exchanged. A trial bundle is prepared and the matter is set down for hearing. Save for criminal matters, it is mandatory after closure of the pleadings to refer matters in the High Court to court-annexed mediation.

#### **6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?**

Under the Civil Procedure Rules a list of documents must accompany the plaint and, in practice, photocopies of documents listed are attached to the plaint.

The opposing party can apply for discovery in the event that a particular document relevant to the dispute is not included in the list of documents accompanying the plaint.

The law provides for oral evidence at trial. The evidence given for or on behalf of a party during trial, together with any documents tendered, is recorded as evidence-in-chief. The other party can cross-examine witnesses. Re-examination is also by right. Judges are allowed to question witnesses directly. A witness cannot be recalled without the leave of the court.

Expert evidence is adduced in the same manner as any other evidence and experts are cross-examined. A party is at liberty to call on another expert to rebut expert evidence. Permission of the court is not required to adduce expert evidence.

On application for temporary relief or discovery, evidence may be supported by affidavit. The court may, on the application of any party, order the attendance for cross-examination of the person making the affidavit. If, after an order has been made, the person in question does not attend, that person's affidavit may not be used as evidence without leave of the court.

Although not provided for by law, (ie in the Evidence Act and the Civil Procedure Rules) the courts have recently adopted the use of witness statements.

#### **7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?**

Each trial court is responsible for managing its case list. Judges, therefore, have considerable powers in this respect, including control over the issues on which evidence is permitted and the way in which evidence is put before the court.

Before trial, the material disputes between parties may be agreed by the parties and reduced to writing in a "joint scheduling memorandum", or this may be done in court. Thus, the parties may shorten the trial by agreeing the issues to be tried, or may delay the trial by forcing this to be decided under the supervision of the court.

The period from filing a plaint to judgment may take 12-24 months and the conduct and proactiveness of the parties is critical in the speedy disposal of an action.

#### **8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?**

The court may, at any time, preserve a party's interest upon that party's application for the relevant interim remedy pending judgment. Available interim remedies include an order for a temporary or interim injunction, and detention, custody or preservation of any property that is the subject matter of the suit and is within the court's jurisdiction. An application for an interlocutory or interim injunction may be made before or during the trial.

#### **9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?**

A judgment for the payment of money may be enforced by:

- attachment of the judgment debtor's assets
- garnishee proceedings

- committal to civil prison of a judgment debtor
- bankruptcy proceedings against the individual or winding-up proceedings against a debtor company

A judgment of possession of immovable property may be enforced by:

- cancellation of registration of proprietorship of land or interest in land
- eviction orders
- committal

A judgment for the delivery of goods or payment of the assessed value may be enforced by orders for delivery up of goods or their assessed value.

In the past, enforcement was straightforward. However, the position is now different, as orders of enforcement issued by the court are sanctioned by the Police and Resident District Commissioners (RDCs) prior to enforcement actually taking place. In effect the Police and RDCs can decide whether or not an enforcement order should be carried out.

#### **10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?**

The court has the discretion to award costs of and incidental to proceedings as well as full power to determine by whom and to what extent costs are to be paid. The successful party to an action files its bill of costs and this is taxed by the registrar of the court in the presence of both parties.

The court takes into consideration a number of factors, including the value and complexity of the dispute, the number of court attendances, the expenses incurred by the party or its lawyer, the court fees paid by the party or its lawyer, the conduct of the parties before and during proceedings, and any previous orders as to costs made in the proceedings.

A plaintiff who is ordinarily resident outside the East African community countries may, on the defendant's application, be required to provide security for the defendant's costs. The court is, however, unlikely to make such orders if the plaintiff has assets within its jurisdiction.

#### **11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?**

Appeals are creatures of statute and, if a statute does not provide for appeal, one cannot be made. Appeals from court judgments lie as of right under the Civil Procedure Act. Appeals from rulings (on interlocutory applications) are strictly with leave of the court. Appeals are allowed based on errors of law and/or errors of fact by the trial court.

There are three appellate courts in Uganda: the High Court (from decisions of the Magistrates' Courts), the Court of Appeal (from decisions of the High Court) and the final appellate court, the Supreme Court.

Third appeals (ie from decisions of the Magistrates Courts) can only be made with leave of the Court of Appeal. Leave to file a

third appeal will be granted where the Court of Appeal is satisfied that the case involves a substantial question of law or where it is in the public interest to grant permission to appeal, or where the appeal has a real chance of success.

When dissatisfied with the decision of the Supreme Court, a party may ask for the Supreme Court to review its decision. The power of the Supreme Court to review its decision is, however, limited to exceptional circumstances that have resulted in a miscarriage of justice, or discovery of new and important matters or evidence which, after the exercise of due diligence, were not within the applicant's knowledge or could not be produced by the applicant during the trial or hearing of the case.

Appeals do not operate as a stay of execution of the decision of the lower court and orders for a stay of execution must be applied for.

#### **12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?**

As a general rule of international law, a State (or foreign State entity for that matter) is immune from the jurisdiction of another State unless the foreign State has waived its immunity either explicitly or by implication.

Under the Diplomatic Privileges Act, the President can, by statutory instrument, make regulations to extend any or all the immunities conferred on diplomatic agents to prescribed organisations. Many foreign State entities have been granted diplomatic immunity pursuant to this Act.

However, where a foreign State entity contractually agrees to submit to the jurisdiction of the Ugandan courts, it would be deemed to have waived such immunity and may be sued in Uganda.

Domestic State entities have corporate personality and can sue or be sued in their names. They do not have immunity from civil proceedings.

#### **13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?**

Three statutes provide for recognition and enforcement of foreign judgments. These are:

- The Reciprocal Enforcement of Judgments Act Cap 21 of the Laws of Uganda (2000): this Act makes provision for the enforcement in Uganda of judgments made in Commonwealth countries and the Republic of Ireland. Pursuant to this Act, a judgment creditor may apply to the High Court in Uganda within 12 months of the date of judgment or such longer period as may be allowed by the court to have the judgment registered. Where the judgment of a foreign court is not enforceable on the basis of reciprocity, fresh proceedings may be instituted in Uganda and the foreign judgment relied upon in evidence
- The Foreign Judgments (Reciprocal Enforcement) Act Cap 9 of the Laws of Uganda (2000): this makes provision for the enforcement of judgments given in foreign countries that accord reciprocal treatment to judgments given in Uganda for facilitating the enforcement in foreign countries of judgments given in Uganda and for matters incidental thereto. Under this Act, a judgment creditor may, within six years of obtaining a judgment from a foreign court, apply to the High Court. The

High Court must, subject to confirmation that the judgment is yet to be satisfied or was incapable of performance by execution in the country of the original court, order its registration

- The Judgments Extensions Act Cap 12 of the Laws of Uganda (2000): this Act makes provision for the execution by the Ugandan courts of decrees and warrants made and granted by courts in Kenya, Malawi and Tanzania

## ARBITRATION

### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

Arbitration in Uganda is governed by the Arbitration & Conciliation Act of 2004 Cap 4 of the Laws of Uganda (2000) (the Act) which applies to domestic and international arbitration (save where otherwise provided in the Act). The Act is based on the UNCITRAL Model Law 1985 with some modifications.

The Act makes specific provision for applications to the court for interim measures (section 6).

The default number of arbitrators is one (section 10).

Under the Act, in addition to the grounds set out in the UNCITRAL Model Law, an award may be set aside by the court if it was procured by corruption, fraud, or undue means or there was evidence of partiality or corruption in one or more of the arbitrators, or if the award is not in accordance with the Act. The parties have one month (rather than three months under the UNCITRAL Model Law) from the date on which they receive the award to seek to have it set aside (section 34).

The Act makes provision for the parties to agree that questions of law arising in domestic arbitrations may be determined by the court (section 38).

Part IV of the Act provides for enforcement of ICSID Convention Awards and Part V of the Act provides for conciliation.

Schedule 2 sets out a number of standard forms which may be used (with variations where necessary) which, if used, may not be questioned. These are a submission agreement, an agreement for appointment of an arbitrator, an agreement for extending the time for making an award, an application for making a submission to the court on a question of law under section 38 and a standard form of award.

Section 67 of the Act establishes the Centre for Arbitration and Dispute Resolution whose function *inter alia* is to perform the functions specified in the UNCITRAL Arbitration Rules of 1976 and to act as an appointing authority in accordance with various provisions of the Act.

Schedule 1 of the Act contains rules made by the Centre determining the court procedure to be followed for recognition and enforcement of awards, the filing of applications for setting aside awards, applications for stays of proceedings under section 5 of the Act and applications for the appointment of or challenge to arbitrators.

### 15. WHAT ARE THE MAIN NATIONAL ARBITRATION INSTITUTIONS?

The Centre for Arbitration and Dispute Resolution is the main national arbitration institution. Most of the arbitrations in Uganda are, however, conducted outside the auspices of this institution. Most arbitrations are conducted on an *ad hoc* basis with a seat in Uganda and most arbitrations involving large claims adopt the UNCITRAL Arbitration Rules.

### 16. ARE THERE ANY RESTRICTIONS ON WHO MAY REPRESENT THE PARTIES TO AN ARBITRATION?

The Act does not stipulate any restrictions on who may represent parties to an arbitration. However, under the Advocates Act, persons who are not holders of practising certificates are not permitted to appear before the Ugandan courts to represent parties to disputes. Although there is no judicial pronouncement on this and we are not aware of any anecdotal evidence of this interpretation, it may be argued that this extends to appearances before arbitration tribunals. The Advocates Act also empowers the Law Council, subject to issuance by the Chief Justice of a special practising certificate, to admit legal practitioners of any country to practise as advocates on specific cases or matters. The use of the word "matter" may be interpreted to include arbitrations.

### 17. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

The only requirement prescribed by the Act is the requirement for an arbitration agreement to be in writing (section 3 of the Act). The Act further provides that an agreement is in writing if it is contained in a document signed by both parties or in an exchange of letters, a telex, telegram or other means of communication which provides a record of the agreement. The grounds on which the enforceability of an arbitration agreement can be challenged are derived from common law.

### 18. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?

The Act makes it mandatory for courts, upon application by a party, to stay litigation proceedings if the contract on which the court action is based contains an arbitration clause (section 5 of the Act). The courts' powers extend to referring matters to arbitration to which the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) applies (section 40 of the Act).

The courts may decline to stay litigation if they are satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed. In addition the courts may decline to refer the matter to arbitration if the dispute between the parties is not covered by the arbitration agreement. A stay of litigation will be granted regardless of whether or not the arbitration is inside or outside jurisdiction.

### **19. IF THE ARBITRATION AGREEMENT AND ANY RELEVANT RULES ARE SILENT, HOW MANY ARBITRATORS WILL BE APPOINTED, AND WHO IS THE APPOINTING AUTHORITY?**

The Act empowers parties to an arbitration agreement to agree on the number of arbitrators, failing which the Act provides for the appointment of a sole arbitrator (section 10 of the Act).

### **20. WHAT RIGHTS ARE THERE TO CHALLENGE THE APPOINTMENT OF AN ARBITRATOR?**

The Act permits parties to challenge the appointment of an arbitrator only if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality and independence or if the arbitrator does not possess qualifications agreed to by the parties (section 12 of the Act).

Section 13 of the Act permits parties to agree on the procedure for challenging the appointment of an arbitrator. It provides that, if no agreement is arrived at, a party must, within 15 days of becoming aware of the composition of "the appointing authority" (although this is widely understood to be a mistake and the Act should refer here to the "tribunal"), after becoming aware of any circumstances that form a basis for challenging the appointment of an arbitrator, send a written statement of the reasons to the appointing authority. Unless the arbitrator who is being challenged withdraws from office or the other party agrees to the challenge, the appointing authority is by law required to decide on the challenge within 30 days from receipt of the statement.

### **21. DOES THE DOMESTIC LAW CONTAIN SUBSTANTIVE REQUIREMENTS FOR THE PROCEDURE TO BE FOLLOWED?**

Subject to the Act, the parties are free to agree on the procedure to be followed by rules of the arbitral tribunal in the conduct of the proceedings. In the absence of an agreement, the arbitral tribunal, may, subject to the Act, conduct the arbitration in the manner it considers appropriate, including the power to determine the admissibility, relevance, materiality and weight of any evidence. The Act does, however, state that every witness giving evidence and every person appearing before the arbitral tribunal shall have at least the same privileges and immunities as witnesses and advocates in proceedings before a court (section 19 of the Act).

The parties may agree on the place in which the arbitration will take place and, if not, the tribunal will determine the place (section 20 of the Act).

Within the time period agreed by the parties or determined by the tribunal, the parties must file statements of case in accordance with the Act (unless the parties have agreed as to the particulars of these statements) (section 23 of the Act).

### **22. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED INSIDE THE JURISDICTION?**

Section 9 of the Act provides that, except as provided by the Act, no court may intervene in matters governed by the Act. The court can issue interim measures of protection, eg injunctions or other interim orders pending the conclusion of the arbitration (section 6 of the Act). However, the court's jurisdiction in this instance must be invoked by the parties.

Under section 38, where parties have agreed, an application may be made to a court to determine any question of law arising during

the arbitration or an appeal may be made to the court on any question of law arising out of the award. The court may determine the question of law, confirm, vary or set aside the award, or remit the matter to the tribunal. Whilst the definition of arbitration in section 2 of the Act includes all arbitrations, section 38 is expressed to apply to questions of law arising in domestic arbitration. The Act does not define "domestic" arbitration and we are not aware of any case in which the court has defined "domestic arbitration". Our view is that domestic arbitrations are those administered by domestic institutions or seated in Uganda, regardless of the nationality or residence of the parties.

The arbitral tribunal, or a party with the approval of the arbitral tribunal, may also request from the court assistance in taking evidence, and the court may execute the request within its competence and according to its rules on taking evidence (section 27 of the Act).

### **23. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?**

With the exception of section 38, the sections described above apply whether or not the arbitration is seated outside the jurisdiction.

### **24. DO ARBITRATORS HAVE POWERS TO GRANT INTERIM OR CONSERVATORY RELIEF?**

Unless otherwise agreed by the parties, arbitrators may on the application of a party take such interim orders of protection as the arbitrator may consider necessary in respect of the subject matter of the dispute, and the arbitrator may require any party to provide appropriate security in connection with such measure (section 17 of the Act). Section 17 of the Act actually refers to the "appointing authority" ordering a party to take interim measures. This is understood to be an erroneous reference and that section 17 is intended to refer to the tribunal's powers.

### **25. WHEN AND IN WHAT FORM MUST THE AWARD BE DELIVERED?**

The Act provides for a period of two months from entering on the reference, or from having been called upon to act by one of the parties or at a later date which the arbitrators have determined. It is a requirement for the award to be in writing and signed by the arbitrator(s). Unless otherwise agreed by the parties, the award must state the reasons upon which it is based and be signed by the arbitrator. In the case of more than one arbitrator, the signatures of the majority is sufficient but the reason for any omitted signature must be stated. Parties can also agree to a settlement prior to the issuance of the award.

### **26. CAN A SUCCESSFUL PARTY RECOVER ITS COSTS?**

Unless otherwise agreed, the arbitral tribunal has the mandate to determine and apportion the costs and expenses of an arbitration (being legal and other expenses of the parties, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration) in the award. In the absence of an award or additional award determining and apportioning the costs and expenses, each party is responsible for its expenses and for an equal share of the fees and expenses of the tribunal. These costs are recoverable by a successful party.

## 27. ON WHAT GROUNDS CAN AN AWARD FROM AN ARBITRATION SEATED IN THE JURISDICTION BE APPEALED TO THE COURT?

In relation to domestic arbitral awards, appeals can lie on question of law and only in instances indicated in section 38 which provides that:

"Questions of law arising in domestic arbitration

- 1) Where in the case of arbitration, the parties have agreed that –
  - (a) an application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or
  - (b) an appeal by any party may be made to a court on any question of law arising out of the award,

the application or appeal, as the case may be, may be made to the Court.
- 2) On an application or appeal being made to it under subsection (1), the Court may, as appropriate –
  - (a) determine the question of law arising;
  - (b) confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for reconsideration or, where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration.
- 3) Notwithstanding sections 9 and 34, an appeal shall lie to the Court of Appeal against a decision of the court under subsection (2) if –
  - (a) the parties have so agreed that an appeal shall lie; and
  - (b) the Court grants leave to appeal, or where the court fails to grant leave, the Court of Appeal grants special leave to appeal, and on such appeal the Court of Appeal may exercise any of the powers which the court could have exercised under subsection (2)".

This was considered by the Court of Appeal in the case of *Babcon Uganda Limited V Mbale Resort Hotel Limited* [Court of Appeal Civil Appeal 87 of 2011] (judgment handed down on 23 June 2015) in which the Court held:

"Section 9 of the ACA satisfied the foregoing standard. It is very clear in ousting courts general jurisdiction. It bars the courts from intervening beyond the limited or special jurisdiction permitted under the ACA. This in my view, must extend to an appeal to this Court as this would be tantamount to intervention by the Court of Appeal in a proceeding under the ACA. Such intervention is barred unless is it authorised by the ACA and it is not so authorised."

The Court of Appeal went on to hold that "No right of appeal to the Court of Appeal exists under the ACA beyond what is provided under Section 38 (3) of the ACA".

## 28. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

Arbitral awards are deemed to be final and binding on all parties regardless of whether they are foreign or local awards. There is no provision for appeal on the merits. The High Court can set aside awards on the following grounds:

- a party to the arbitration agreement was under some incapacity

- the arbitration agreement is not valid under the law to which the parties have subjected it or, if there is no indication of that law, the law of Uganda
- the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was unable to present his or her case
- the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration; except that, if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award that contains decisions on matters not referred to arbitration may be set aside
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of the Act from which the parties cannot derogate, or in the absence of an agreement, was not in accordance with the Act
- the arbitral award was procured by corruption, fraud or undue means, or there was evident partiality or corruption in one or more of the arbitrators or
- the arbitral award is not in accordance with the Act

The court can also set aside the award under section 34 of the Act if it finds that:

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

An application for setting aside an award under section 34 of the Act must be made within one month of receiving the award.

## 29. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF: (I) AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION AND (II) DOMESTIC AWARDS?

The Act provides for the enforcement of awards (whether from arbitrations seated within or outside Uganda) by application to the High Court for enforcement of such award (sections 35 and 36 of the Act). The award is construed as a decree of the court and the ordinary means of execution apply. There are no grounds listed in the Act for refusing enforcement of an award and, when the time for making an application to set aside has expired or an application has been made and has been refused, an award will be enforced by the court in the same manner as a decree of the court.

Uganda is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and Part III of the Act deals with enforcing New York Convention awards (awards made in pursuance of an arbitration agreement in the territory of a State other than Uganda which is a party to the New York Convention). New York Convention awards which would be enforceable under the Act are treated as binding for all purposes on the persons between whom they are made and can be relied upon by those persons by way of defence, set off or otherwise in legal proceedings in Uganda (section 41). New York Convention awards must be recognised and enforced in accordance with section 35. The grounds for refusal of recognition and enforcement in Article V of the New York Convention are not replicated in the Act but can nonetheless be relied upon by a party

to resist recognition and enforcement of a New York Convention award.

### **30. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?**

The Act provides for the enforcement of foreign awards by application to the High Court. Ordinary means of execution apply (see question 9 above). An arbitral award issued in a New York Convention Contracting State would be quicker and easier to enforce as all that is required for it to be registered by the High Court is a duly authenticated original award or a duly certified copy and the original or duly certified copy of the arbitration agreement. By way of comparison, registration of a judgment of an English court could be challenged in the Ugandan courts on grounds set out in the Reciprocal Enforcement of Judgments Act, Chapter 21 of the Laws of Uganda. These grounds include the original court having acted without jurisdiction, service of process not having been effected, the existence of a pending appeal. This would have the effect of delaying its enforcement.

## **ALTERNATIVE DISPUTE RESOLUTION**

### **31. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?**

Parties to arbitration are not required by law to consider or submit to ADR before or during proceedings, unless an agreement requires this.

In relation to litigation, in all matters filed in the High Court (all divisions of the High Court save for the Criminal Division) it is mandatory after closure of the pleadings to refer matters to court-annexed mediation. This is conducted by registrars of the court, court-accredited mediators, usually advocates, and upon request of the parties, by judges. The mediation period lasts 21 days but may, with the consent of the parties, be extended. It is only where the mediation fails that the trial judge will set down the issues for trial. A judge who conducts a mediation cannot try the dispute.

## **REFORMS**

### **32. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?**

The Civil Procedure Rules are presently being reviewed. Some of the areas being considered are admissibility of witness statements, skeleton arguments, preparation of trial bundles, verification of affidavits, discovery and inspection of documents, time within which to file written statements of defence, amendments of pleadings, etc.

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# ZAMBIA



## INTRODUCTION

The Zambian legal system is a dual system in which statutory law operates side by side with the tribe specific customary law. The following are the sources of law:

- the Constitution of Zambia dated 1991 (as amended by the Constitution of Zambia (Amendment) Act No 2 of 2016)
- Acts of Parliament
- common law
- doctrines of equity
- English legislation in force on 17 August 1911 and subsequent English legislation applicable to Zambia pursuant to the British Acts (Extension) Act
- customary law

The application of common law, doctrines of equity, and statutes of England is subject to the Constitution of Zambia and other written laws.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

In Zambia there is no split profession and lawyers practise as both barristers and solicitors.

To qualify as a legal practitioner a person must hold a degree in law from either a public university accredited by the Council of the Zambia Institute of Advanced Legal Education, an approved private university registered under the University Act, or an approved university outside Zambia operating under the common law. In addition, the person must attend a one-year course of post-graduate study required by the Council of the Zambia Institute of Advanced Legal Education, be duly certified as having fulfilled the requirements by the director of the Institute and must pass the Legal Practitioners Qualifying Examination.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

Following changes introduced in early 2016, the structure of the court system is as follows (although the Constitutional Court and Court of Appeal are not currently operational, as at 20 May 2016):

- Supreme Court and Constitutional Court, which rank equally
- Court of Appeal
- High Court
- Subordinate Courts
- Small Claims Court
- Local Courts

The Local Courts have jurisdiction in respect of civil claims, within the territorial limits set out in their court warrant. In relation to criminal matters the Local Courts have jurisdiction to the extent prescribed for the grade of court to which they belong. The Local Courts are not courts of record and they administer the tribe specific customary laws of disputing parties.

The Subordinate Courts are courts of record with original and appellate jurisdictions in both civil and criminal proceedings within the relevant territorial jurisdictions applicable. Any civil claim with a value not exceeding ZMW 30,000 must be initiated in the Subordinate Court. Subordinate Courts can hear and determine any action for recovery of land with a maximum value of ZMW 30,000 or rent of up to ZMW 6,000. Appeals from the Subordinate Court lie to the High Court.

The High Court is a superior court and has original and unlimited jurisdiction throughout Zambia for both civil claims and criminal jurisdiction. Specifically, the High Court can hear and determine civil claims with a value in excess of ZMW 30,000 and criminal proceedings for offences specifically stated under the law to be tried by the High Court. The High Court also has prescribed appellate and supervisory jurisdiction, and prescribed jurisdiction to review decisions. The High Court has registries located in Lusaka, Kabwe, Livingstone, Kitwe and Ndola. Within the High Court at Lusaka there exists a specialised fast track court known as the Commercial Court.

The Court of Appeal has jurisdiction to hear appeals from the High Court and other courts, except for matters under the exclusive jurisdiction of the Constitutional Court. There is also jurisdiction to hear appeals as may be prescribed from quasi-judicial bodies (except a local government elections tribunal). An appeal from a decision of the Court of Appeal shall be made to the Supreme Court with leave of the Court of Appeal. As noted above, the Court of Appeal is not currently operational.

The Constitutional Court has original and final jurisdiction to hear matters relating to interpretation of the Constitution; violation or contravention of the Constitution; the President, Vice-President or an election of a President; appeals relating to election of Members of Parliament and councillors and whether or not a matter falls within the jurisdiction of the Constitutional Court. Where a question relating to the Constitution arises in a court, the person presiding in that court shall refer the question to the Constitutional Court. Furthermore, a person who alleges that an Act of Parliament or statutory instrument, an action, measure or decision taken under any law or an act, omission, measure or decision by a person or an authority contravenes the Constitution, such person may petition the Constitutional Court for redress. A decision of the Constitutional Court is not appealable to the Supreme Court. As noted above, the Constitutional Court is not currently operational.

The Supreme Court has appellate jurisdiction for both civil and criminal appeals from the Court of Appeal and jurisdiction conferred on it by other laws. The Supreme Court is bound by its decisions, except in the interest of justice and development of jurisprudence. The Supreme Court ordinarily sits every second week of every month. Each successive sitting is in a different town, being Kabwe, Ndola and Lusaka.

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

The time limits for bringing civil claims in Zambia are primarily determined by the Statute of Limitations Act of 1939 of the United Kingdom and the Law Reform (Limitation of Actions) Act, Chapter 72 of the Laws of Zambia. In addition, the Supreme Court has held that various other statutes have specific limitation provisions.

Generally the applicable limits are as follows:

- 30 years in respect of an action for recovery of land by the State
- 12 years in respect of:
  - recovery of land by another person
  - recovery of money secured by mortgage
  - foreclosure in respect of mortgaged personal property
  - action on a contract under seal
  - action to recover any share or interest in the estate of a deceased person
  - enforcement of a judgment
- six years in respect of:
  - actions founded on simple contract or tort
  - recovery of a sum recoverable by virtue of a statute
  - recovery of arrears of interest on a judgment debt
  - subsequent conversion of title/wrong detention
  - recovery of trust property and breach of trust. However, there is no limitation period in relation to an action by a beneficiary under a trust if it is an action: (i) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; and (ii) in relation to recovering from a trustee the trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted for his own use
  - recovery of rent arrears or arrears of interest in respect of any gift to someone in a will

- recovery by tenant of rent paid on account to landlord
- action to enforce a recognisance
- action for an account in respect of any matter
- action to recover any sum recoverable by virtue of any enactment other than a penalty or forfeiture or sum by way of penalty or forfeiture
- three years (pursuant to the Limitation Act as read with the Law Reform (Limitation of Actions) Act) in respect of an action for damages for personal injury for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or a provision made by or under a statute or independently of any contract or any such provision)
- two years in respect of an action to recover any penalty or forfeiture, or sum by way of penalty or forfeiture, recoverable by virtue of any enactment

The above limitations can be postponed in the case of a fraud or mistake. Section 26 of the Limitation Act provides that where a period of limitation has been prescribed and the action is based on: (i) fraud of the defendant or his agent; or (ii) the right of action is concealed by such a person; or (iii) the action is for relief from the consequences of a mistake; the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.

### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

Communications between a lawyer and client whether made for the purposes of obtaining legal advice or with reference to on-going litigation or whilst litigation is in contemplation are privileged based on common law principles (English Law (Extent of Application) Act, Chapter 11 of the Laws of Zambia). In addition rule 35(2) of the Legal Practitioners Practice Rules (2002) obliges every legal practitioner to keep the affairs of each client confidential, a duty which extends to both current and former clients. Rule 32(4) (e) of the Legal Practitioners Practice Rules also restricts the disclosure of all or any information communicated to a legal practitioner in his capacity as legal practitioner unless permitted by law or court order. This duty continues even after the lawyer-client relationship has ended and extends to a legal practitioner's partners, associates and assistants.

### 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

Civil proceedings are commenced through various means depending on the claim. These include:

- writ of summons accompanied by a statement of claim
- originating summons accompanied by a supporting affidavit
- originating notice of motion accompanied by affidavit
- petition
- appeal

The typical procedure following the commencement of an action begun by writ of summons (which is the most common mode of commencement) is that the defendant served with the originating process must enter an appearance and respond to the claim within a specified time (which ranges between 14 and 42 days depending



on the location of the defendant's place of residence or business). Once a response to the claim has been filed at court and served on the claimant, both parties will file at court any relevant documents and the court will issue a hearing date. The trial judge may refer the case to mediation before trial (see question 21 below). After trial, both parties will file their closing arguments at court and a judgment will be issued by the court.

In the event of the defendant failing to enter an appearance, the claimant may enter default judgment while in other instances the claimant will be required to proceed to trial without the defendant's appearance. Examples of such instances are defamation or probate suits.

In an action commenced by originating summons, the respondent must enter an appearance and oppose the claim raised by the applicant by filing an opposing affidavit. The applicant may then file an affidavit in reply. Unless the presiding judge directs otherwise, he or she will summon the parties for a hearing and subsequently proceed to determine the matter. Actions where the facts of the matter are not in dispute are suitable to be begun by originating summons.

The procedure of commencing an action by an originating notice of motion is rare and dependent on the particular legislation under which the action is commenced. The most common pieces of legislation that still provide for this are the Rent Act, Chapter 206 of the Laws of Zambia (Rent Act), the Landlord and Tenant (Business Premises) Act Chapter 193 of the Laws of Zambia (Landlord and Tenant (Business Premises) Act). Under the Rent Act and the Landlord and Tenant (Business Premises) Act, after the applicant files the originating notice of motion and affidavit verifying statements, a respondent may file an affidavit in opposition, but there would be no default judgment granted if a respondent neglected to do so. The originating notice of motion served on the respondent will state a period when the notice of motion will be heard by the court and there must be 14 clear days between service of the originating notice of motion on the respondent and the date of hearing. On the hearing date, the judge will try the matter and subsequently make a determination.

Actions begun by petition include matrimonial causes, winding up proceedings, challenging of presidential and parliamentary election results and actions to enforce fundamental rights and freedoms protected under the Zambian constitution. The procedure to be followed is largely dependent on the particular legislation under which the action has been commenced but generally, after the petitioner files their petition, it is served on the respondent. A date and time is fixed for the hearing and determination of the petition.

Lastly, appeals from decisions of tribunals or ministers under various pieces of legislation are commenced by filing a notice of appeal with grounds of appeal, generally within 30 days of the decision complained of. A record of appeal is also filed and the court fixes a date for hearing of the appeal.

## 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

Parties must disclose documents in their possession, power or control that are relevant to the dispute. Parties prepare lists of documents and inspection and discovery takes place by exchange of lists. Sometimes parties may agree on a venue and time to facilitate inspection. Where necessary, a party may apply for a

further and better list of documents. When inspection and discovery are concluded, a bundle of documents is prepared and filed into court.

Presentation of evidence at trial is by:

- oral testimony for and on behalf of a party whilst referring to relevant documents in the bundle of documents. The witness first gives his evidence as evidence-in-chief. This is followed by cross-examination and finally re-examination if desirable. On the Commercial List, witness statements are prepared and exchanged by parties in advance of trial. If the witness is called at trial, their statement is admitted into evidence as evidence-in-chief and oral testimony proceeds from cross examination by the opposite party
- affidavit in some actions. However, the court may on the application of a party order the attendance of such person who made the affidavit for the purposes of cross-examination

Where expert evidence is necessary, an application for leave from the court to rely on expert evidence is required. The court will also give directions on the way in which expert evidence should be adduced.

The expert witness will give oral evidence at trial unless the court considers that there are special circumstances which make it necessary to have the substance of the expert evidence disclosed beforehand in the form of a written report served on all parties.

## 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

The extent to which parties are able to control the procedure is dependent on the procedural rules applicable and the relevant latitude granted to the parties in respect of these rules. The timetable is largely controlled by the court.

It is difficult to say how long a commercial claim typically takes as this will depend on the nature and complexity of the claim, the evidence to be adduced in support of the claim, the number of witnesses to be called by the parties and whether the parties lodge any interlocutory applications. However, the rules of the Commercial Court are structured in such a way as to deter parties from wasting time unnecessarily and occasioning unnecessary adjournments. As a broad estimate, the time period from issue to trial is likely to be 8-24 months.

## 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

The interim remedies available are:

- order for interim/interlocutory injunction
- order for stay of proceedings
- order for security for costs
- order for sale of perishable goods
- order for detention and inspection of property relating to the dispute
- order for attachment of property

Such orders are readily made in practice, subject to satisfying the court that the requisite criteria exist and that any preliminary steps

which the applicant ought to have taken prior to making a formal application to court have been taken.

## 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

The following methods are available:

- writ of *fi.fa* to enforce a judgment or order for the payment of money. The writ is executed on the judgment debtor's personal property by way of distress and sale. Property such as personal clothing, tools of the trade and beddings cannot be executed upon
- writ of *elegit*, by which a judgment creditor seizes possession of a portion of the land or goods of the judgment debtor (except work animals) and holds it until the debt is satisfied out of the rents and profits issuing from the property
- writ of possession to enforce a judgment or order for the giving of possession of land
- garnishee proceedings, used when a judgment creditor wishes to access money owed to the judgment debtor by a third party
- charging orders, whereby a judgment creditor obtains an order from court imposing on specified property of the debtor a charge securing the payment of any money due or to become due under the judgment or order
- order for attachment of earnings from the judgment debtor's employment

Enforcement in practice is fairly straightforward, provided the relevant enforcement law and procedures are complied with. The most popular method of enforcement is by way of writ of *fi.fa*, under which the sheriff is instructed to seize and sell the judgment debtor's chattels.

## 10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

Yes, the court has power to award and apportion costs in any manner deemed just. However, the court will not order the successful party in a suit to pay to the unsuccessful party the entire costs of the suit. In the absence of any express direction by the court, the general position is that costs will follow the event.

The court may on its own motion or on the application of any defendant, if it sees fit, require a foreign claimant to give security for costs to the satisfaction of the court, by deposit or otherwise, or to give further or better security.

Where security for costs is required, the court may order all proceedings to be stayed until the security is provided.

## 11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

Parties have an automatic right of appeal to the Supreme Court against judgments of the High Court.

The Subordinate Court Act recognises the right of appeal to the High Court from any judgment, order or decision of a Subordinate Court whether interlocutory or final, while the Supreme Court Act recognises a right of appeal in any civil cause or matter from any

judgment of the High Court. Parties can appeal on points of law or fact. However, the Supreme Court rarely interferes with findings of fact established by the lower court unless it can be shown that the evidence adduced before it was overwhelmingly contrary to the court's findings.

An appeal from an interlocutory order cannot be made without leave to appeal (except injunctions for which there is an automatic right of appeal).

An appeal does not operate as a stay and, as such, the extent to which enforcement is suspended pending appeal is dependent upon the steps taken by the aggrieved party to seek a stay of enforcement/execution of a judgment pending the appeal.

## 12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

As a general rule domestic entities do not have immunity from civil proceedings unless expressly provided by law.

However, a number of statutes such as the Sheriffs Act and the Diplomatic Immunities and Privileges Act (amongst others) afford domestic and foreign entities immunity from certain civil proceedings in relation to certain acts.

The State enjoys immunity under the State Proceedings Act. In particular, no execution or attachment or similar process may be issued out of any court for enforcing payment by the State of any money or costs. Furthermore, the court may not grant an injunction or make an order for specific performance against the State, but may in lieu make a declaratory order as to the rights of the parties. Also, in proceedings against the State for the recovery of land or other property, the court may not make an order for the recovery of the land or the delivery of the property, but may make an order declaring that the plaintiff is entitled as against the State to the land or property or to its possession.

## 13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

The procedure for recognition and enforcement of foreign judgments in Zambia is set out in the Foreign Judgments (Reciprocal Enforcement) Act, chapter 76 of the laws of Zambia (the Act).

A judgment creditor in receipt of a judgment to which the Act applies may apply to the High Court at any time within six years of the date of the judgment, to have the judgment registered in the High Court. A notice in writing of the registration of the judgment will be served on the judgment debtor, indicating among other things, the full particulars of the judgment registered and the order for registration, the name and address of the judgment creditor or his solicitor, the right of the judgment debtor to apply to have the registration set aside and applicable time frames.

However, it is not clear which countries have reciprocal enforcement of foreign judgments in Zambia, so in practice arbitration is preferred for foreign law disputes.

## ARBITRATION

### 14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

The UNCITRAL Model Law forms part of Arbitration Act No 19 of 2000 which governs arbitration in Zambia (the Arbitration Act). As such, arbitration in Zambia is based on both the Arbitration Act and the UNCITRAL Model Law, save where expressly modified. Key modifications to the UNCITRAL Model Law are as follows:

- section 3 of the Arbitration Act modifies article 1 of the UNCITRAL Model Law to the extent that the Arbitration Act applies to every arbitration agreement and is not restricted to international commercial arbitrations. However, section 6 of the Arbitration Act places a limit on matters which are subject to arbitration and excludes, for instance, criminal proceedings and matrimonial causes
- while article 7 of the UNCITRAL Model Law requires an arbitration agreement to be in writing, section 2 of the Arbitration Act modifies this by dispensing with the need for a written agreement
- section 2 of the Arbitration Act, which modifies article 2 of the UNCITRAL Model Law, contains more definitions and defines, for example, an arbitral institution, arbitral proceedings and an award
- section 10 of the Arbitration Act, which modifies article 8 of the UNCITRAL Model Law, empowers the court to stay proceedings brought in a matter which is the subject of an arbitration agreement at any stage of the proceedings upon application by a party to those proceedings. Under the UNCITRAL Model Law, a request to stay proceedings can only be made before or at the time that a party is submitting a statement on the substance of the dispute
- section 12 (1) of the Arbitration Act modifies article 11 (1) of the UNCITRAL Model Law to the extent that it states that no person shall be precluded from acting as an arbitrator based on his nationality, gender, colour or creed

### 15. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

The Arbitration Act does not set out the formal requirements of an arbitration agreement but it stipulates that an arbitration agreement is an agreement by parties, whether in writing or not, to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. The Arbitration Act goes on to recognise that an arbitration agreement may be in the form of an arbitration clause in a contract or a separate agreement.

One of the ways in which an arbitration agreement is identified to be in writing is if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another; and the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and reference is such as to make that clause part of the contract.

In certain instances, an arbitration agreement is deemed to exist. For example, where a written law provides for a matter to be

determined by arbitration, the provision in the written law is deemed to be an arbitration agreement and a person by or against whom a claim subject to arbitration in pursuance of that provision may be made, or has been made, shall be deemed to be a party to that arbitration agreement. It is worth noting that any dispute arising as a consequence of an investment under the Zambia Development Agency Act No 6 of 2006 is to be settled through arbitration.

### 16. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?

Under the Arbitration Act, where the dispute concerns a matter which is subject to a valid arbitration agreement the court has power to stay proceedings either on its own motion or on the application by a party to the proceedings, unless the arbitration clause is incapable of being performed.

The Arbitration Act makes no reference to the place of the arbitration and as such it can reasonably be inferred that there would be no difference whether the seat of arbitration is inside or outside Zambia.

### 17. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?

The Arbitration Act does not state any grounds on which a court would intervene in arbitrations outside the jurisdiction. However, there is no restriction under the Arbitration Act on parties, or the tribunal, applying to the Zambian courts for interim relief in support of a foreign-seated arbitration. The following are specifically available:

- an order for the preservation, interim custody, sale or inspection of any goods which are the subject matter of the dispute
- an order securing the amount in dispute or the costs and expenses of the arbitral proceedings
- an interim injunction or other interim order
- any other order to ensure that an award which may be made in the arbitral proceedings is not rendered ineffectual

### 18. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

There can be no appeal in Zambia against an arbitral award (either foreign or domestic) as the only exclusive recourse against an arbitral award is an application to have the award set aside. This is the case in respect of both foreign awards and domestic awards. The grounds on which an arbitral award (foreign or domestic) may be set aside by the court are as follows:

- a party to the arbitration agreement was under some incapacity or the agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the laws of Zambia
- the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case
- the award deals with a dispute not contemplated by, or not falling within the terms of the arbitration agreement, provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the

award which contains decision on matters not submitted to arbitration may be set aside

- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the Arbitration Act or the law of the country where the arbitration took place
- the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made
- the subject-matter of the dispute is not capable of settlement by arbitration under the law of Zambia. Generally, criminal matters, matrimonial causes, the determination of paternity or maternity, or matters affecting the interests of a minor or an individual under a legal incapacity are not capable of settlement by arbitration
- the award is in conflict with public policy
- the making of the award was induced or effected by fraud, corruption or misrepresentation

#### **19. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION?**

Zambia is a Contracting Party to the New York Convention of the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Section 18 of the Arbitration Act allows for the recognition and enforcement of foreign arbitral awards irrespective of the country in which the award was made, even if the country is not a party to the New York Convention. A party seeking to enforce the award must make an application to the High Court for the registration of the award. Once an order granting leave to register the award has been issued, the applicant is required to:

- file a notice of the registration of the award at court
- serve the notice upon the respondent and
- within three days, endorse on the notice the date on which service was effected. Once the specified period within which an application may be made to set the registration aside has lapsed, the applicant may proceed to execute the award

By virtue of section 18 of the Arbitration Act, there need not be a reciprocity agreement with the country where the arbitration award was made in order for it to be recognised and enforced, subject to the grounds for refusal of recognition and enforcement under the Arbitration Act. The procedure for recognition and enforcement of such awards is as set out above.

It is worthy of note that the procedure available for enforcement of arbitral awards is the same, regardless of whether the award is foreign or not.

#### **20. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?**

Foreign awards are enforceable in practice, provided that enforcement of the award cannot be refused by law in accordance with the New York Convention, and the enforcement procedure is compliant with that set out in the Arbitration Act.

## **ALTERNATIVE DISPUTE RESOLUTION**

### **21. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?**

In respect of arbitration, there is no requirement for parties to consider or submit to alternative dispute resolution before or during the arbitral proceedings.

In the case of litigation it is possible for parties to be referred to mediation. The High Court Act provides that, except in cases involving constitutional issues, the liberty of an individual, an injunction or where the trial judge considers the case to be unsuitable for referral, every action may, upon being set down for trial, be referred by the trial judge for mediation. However, where mediation fails the judge proceeds to fix a hearing date.

There is no public record of cases settled through mediation. However, we estimate that 10-20% of cases referred to mediation result in a settlement.

## **REFORMS**

### **22. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?**

We do not expect any significant procedural reforms in the near future.

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# ZIMBABWE



## INTRODUCTION

The Zimbabwean legal system is based on the Constitution dated 1979 as amended, which is supreme and overrides all other laws.

Roman Dutch common law applies in relation to issues not provided for in the Constitution. English law applies in the commercial law context to the extent it is not inconsistent with any other applicable law. Zimbabwe also recognises and applies domestic and international customary law principles.

## LITIGATION

### 1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

In Zimbabwe, legal practitioners practise as both lawyers and advocates, under a fused profession. As such, legal practitioners provide legal services directly to clients and conduct proceedings in the courts. All legal practitioners have rights of audience before all domestic trial courts. (A legal practitioner must, however, be separately registered as a notary public or a conveyancer before they can engage in those practices.)

However, in practice there exists a *de facto* divided profession, as there are lawyers who practice as advocates and voluntarily regulate themselves in the same way as advocates/barristers in a divided system.

To be registered as a legal practitioner in Zimbabwe an applicant must complete an LLB (Honours) Degree and then apply for registration to the High Court. LLB graduates from non-Zimbabwean universities must sit conversion examinations. If the High Court is satisfied that the applicant meets the requirements to be a legal practitioner, ie he/she:

- has completed all formalities prescribed
- possesses the necessary qualifications
- is normally resident in Zimbabwe or a reciprocating country or has been granted a residential exemption certificate
- is at least 21 years of age
- is not an unrehabilitated insolvent and

- is a fit and proper person to be so registered

it will approve the application. The applicant is then registered as a legal practitioner and applies to be a member of the Law Society of Zimbabwe.

The Law Society of Zimbabwe is the statutory body regulating the profession (under section 51 of the Legal Practitioners Act (Chapter 27:07)) and deals with complaints against lawyers.

### 2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The Zimbabwean courts system is derived from section 162 of the Constitution of Zimbabwe Amendment (No.20) Act 2013 (the New Constitution). The courts are independent and subject only to the Constitution and the law, which they must apply impartially, expeditiously and without fear, favour or prejudice.

Zimbabwean courts fall into two broad categories – criminal courts and civil courts. Criminal courts and civil courts comprise the Magistrates' Court, the High Court, the Supreme Court and the Constitutional Court.

There are several specialist courts, namely the Labour Court, Administrative Court, Income Tax Appeals Court, Small Claims Court, and local courts applying customary law.

The Magistrates' Court is created by the Magistrates Court Act (Chapter 7:10). Unlike the other ordinary courts this court is a creature of statute in the sense that it can only exercise those powers and duties that are provided by its establishing Act. It has jurisdiction to apply both customary law and general law in its determination of civil cases.

In general the Magistrates' Court only has jurisdiction in civil cases where:

- the amount claimed does not exceed the prescribed limit, which currently stands at USD 10,000<sup>1</sup> as amended by statutory instrument 163 of 2012, gazetted in October 2012
- the defendant resides, carries on business or is employed within the province where the court is situated or where the case arose wholly within the province

The High Court has jurisdiction over all persons and over all matters within Zimbabwe. It has inherent jurisdiction, unless prohibited by law. The High Court may hear matters even where the Magistrates' Court has jurisdiction. However, the High Court can refuse to hear a matter where it is prohibited from entertaining it by statute. The High Court has no monetary limit on claims.

The High Court also has jurisdiction to hear certain appeals, as well as inherent review powers. The High Court may set aside the decision of an inferior court where the decision making process of such court was flawed.

The Supreme Court is an appellate court with jurisdiction to hear civil appeals only where a right of appeal is provided for by statute. It is the final court of appeal for Zimbabwe except in matters over which the Constitutional Court has jurisdiction.

The Constitutional Court is a superior court of record and makes the final decision on whether or not an Act of Parliament or conduct of the President or Parliament is constitutional. The Constitutional Court must confirm any order of constitutional invalidity made by another court before that order has any force.

### 3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

The Prescription Act (Chapter 8:11) sets out the relevant time periods within which a party must bring a claim to the court. Prescription is interrupted by an acknowledgment of liability by the debtor or by the service of process on the debtor. If the creditor does not successfully prosecute his/her claim to finality, prescription will begin to run again. The statutory period for bringing a civil claim is dependent on the claim.

The limitation periods for debt claims as provided in the Prescription Act are:

- 30 years in the case of:
  - a debt secured by mortgage bond
  - a judgment debt
  - a debt in respect of taxation imposed or levied by or under any enactment
  - a debt owed to the State in respect of any tax, royalty, tribute, share of the profits or other similar charge or consideration payable in connection with the exploitation of or the right to win minerals or other substances
- 15 years in the case of a debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor
- six years in the case of:
  - a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract
  - other debts owed to the State

Except where any enactment provides otherwise, a limitation period of three years applies to all other debts.

The general limitation period for non-debt claims is 30 years.

In addition, the following specific Acts of Parliament have specific time limits for bringing claims:

- Customs and Excise Act (Chapter 23:02): section 196 provides that any claims against the State, the Director of Customs or any customs officer must be made within eight months after the date on which the cause of action arose
- Police Act (Chapter 11:10): section 71 provides that claims against the police must be made within eight months after the date on which the cause of action arose and notice must be

given as provided in terms of section 6 of the State Liabilities Act (Chapter 8:14)

- Road Traffic Act (Chapter 13:11): section 25(1)ii provides that a claim against an insurer for damages for bodily injury arising out of a road accident prescribes two years from the date on which the claim arose

### 4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS/HER CLIENT PRIVILEGED (IE PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

Under section 8 of the Civil Evidence Act (Chapter 8:01), disclosure of confidential communications between a client (or his/her employee/agent) and the client's legal practitioner (or his/her employee/agent) are prohibited where the confidential communication was made for the purpose of enabling the client to obtain, or the legal practitioner to give the client, any legal advice. Since legal practitioner and client privilege is enshrined in an enactment and not common law, it may not be waived by law. However, the client is free to waive privilege.

### 5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

In Zimbabwe there are two main ways in which civil procedures are commenced:

- application/motion
- action

In an application procedure, the court is approached by means of a notice of motion. The party who files or brings the application to the court is known as the applicant, and the other party is known as the respondent. Legislation may prescribe application (motion) proceedings, but the procedure may also be used where there is no real dispute over any fundamental question of fact.

In an action procedure, the court is approached by means of summons and there is a clear distinction between the pleadings and trial stage. An action procedure is governed by rules of court. The party who files or brings the action is known as the plaintiff whilst the other party is known as the defendant.

Most civil claims are prefaced by a letter of demand, where the plaintiff makes a claim from the defendant and further warns the defendant that if such claim is not settled within a set number of days the plaintiff will institute civil proceedings. A letter of demand is not a legal requirement except where parties have agreed on a demand as a condition precedent to instituting a civil action.

The summons in a civil action can only be served on the other party by a Sheriff/Messenger of Court as the case may be. A defendant who wishes to defend the matter should enter an appearance within 10 days. In the Magistrates' Court the time limit is less, being seven days. It must be in the form of a written statement filed with the court. Where the defendant does not wish to defend the matter, he/she must consent to judgment. Where the defendant fails to enter an appearance to defend, the plaintiff may obtain default judgment. Where the plaintiff is of the view that the defendant does not have a *bona fide* defence, the plaintiff may apply for summary judgment.

After entering an appearance to defend, the defendant may request that the plaintiff provide further particulars to enable him/her to defend the claim. The defendant is then required to file a plea (usually within five days), which should include any counterclaim. The plaintiff may require the defendant to file further particulars.

The plaintiff replies to the defendant's plea with a replication (reply). This is necessary where the defendant makes certain allegations in the plea that require a response.

The documents from summons to the replication are called pleadings. They are deemed closed if the parties make it clear that they disagree with regard to the facts and look to trial for resolution of the dispute.

The Chief Justice of Zimbabwe may by way of practice directions vary the above procedures in conformity with the rules of court. The latest practice direction regulating the conduct of civil proceedings is Practice Direction 3 of 2014.

## 6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

After the close of pleadings, the parties undertake discovery, whereby either party is required to specify the documents it wishes to rely on as evidence at trial. Any item not produced may not be used at trial.

At the pre-trial conference, held after discovery, both parties appear before the judge/magistrate. The parties define the issues and attempt to reach agreement on issues such as the length of trial, as well as the number of witnesses and evidence to be produced. The parties may also try to settle the matter without going to trial.

At trial, evidence is produced in the following manner. The lawyer for the plaintiff calls witnesses. Examination-in-chief is conducted by the plaintiff's lawyer. The witness is then cross-examined by the defendant's lawyer. Where necessary, there is re-examination conducted by the plaintiff's lawyer.

Expert evidence may be adduced during trial. The court will hear any objections from the party against whom it is being adduced before accepting the evidence. If need be the expert concerned may be called to give oral evidence on his/her written findings.

At the close of the plaintiff's case, the defendant may apply for absolution from the instance, a type of judgment to the effect that the plaintiff has failed to prove its case sufficiently and there is no case to answer.

If absolution from the instance is either not applied for or is declined, the defendant will then open its case and the procedure for examination of witnesses is repeated in the same way. Thereafter, closing submissions are filed by both the plaintiff and defendant and the court gives judgment. The court may give judgment *extempore*.

## 7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

The procedure is controlled by the rules of the respective courts, namely the Magistrates Court (Civil) Rules 1980 and High Court Rules 1971.

The timetable, however, is determined by the plaintiff. The plaintiff initiates the process and for that reason determines its speed. However, where there are unnecessary delays caused by the plaintiff, the defendant can apply for dismissal of the case.

The duration of a commercial case in Zimbabwe will depend on the complexity of the issues to be determined. The average time of completion is approximately one and a half years. Practice Direction 3 of 2014 issued by the Chief Justice of Zimbabwe now has the effect of placing mandatory timeframes for conduct of certain aspects of civil procedure. For example, where deficiencies in the conduct of the case render it liable to be struck out, the Practice Direction provides a mandatory period of 30 days for such defects to be rectified failing which the matter is deemed to have been abandoned and dismissed.

## 8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

Principal remedies are interdicts (injunctions). Interdicts can either be prohibitory or mandatory.

These remedies are used when other remedies are either not available or where delay using other remedies could cause irreparable harm. These remedies may be interim or final.

An interim interdict, which is sometimes called an interlocutory or temporary interdict or interdict *pendent lite*, is usually used to preserve or restore the parties' *status quo* pending judgment.

The requirements to obtain an interdict are:

- a clear right
- an injury actually committed or reasonably apprehended and
- the absence of similar or adequate protection by any other ordinary remedy (*Setlogelo v Setlogelo* [1914] AD 221 at 227)

If these requirements are proven, in most cases a temporary interdict will be granted. However, if there is no clear right, the courts will consider whether:

- the right that forms the subject matter of the main action which the applicant seeks to protect is *prima facie* established, even though open to some doubt
- there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he/she ultimately succeeds in establishing the right
- the balance of convenience favours the granting of interim relief
- the applicant has no other satisfactory remedy (*Setlogelo v Setlogelo* [1914] AD 221 at 227)

## 9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

There are several means of enforcement of judgments, namely:

- execution of property: a warrant/writ of execution issued against immovable and movable property. The court may only attach immovable property where there is insufficient movable property. The courts cannot attach property that is necessary for the judgment debtor to sustain life and work
- garnishee order: a garnishee order is made against the judgment debtor's salary and requires the employer to pay a portion of the debtor's salary to the judgment creditor until the full judgment

debt has been paid. The amount deducted from the salary must leave a sufficient amount for the judgment debtor to sustain him/herself and his/her dependents

- civil imprisonment: a debtor may be imprisoned to compel him/her to settle the debt. Civil imprisonment can only be ordered where it has been proved that the debtor has sufficient funds to pay and has wilfully failed to do so. The maximum period is three months. If the debtor pays before the period is over he/she is released. If the debtor does not pay, and is released after three months, he/she cannot be re-imprisoned. However, other methods of enforcement can be used
- contempt of court: civil contempt of court proceedings are designed to compel the debtor to comply with the judgment. The judgment creditor applies to the court to have the defaulting judgment debtor found guilty of contempt of court. It must be shown that the order was not complied with and non-compliance was wilful. The defaulting judgment debtor will be imprisoned for contempt of court. In most cases however, imprisonment is suspended pending performance

The difference between contempt of court imprisonment and civil imprisonment is that the former carries no limit to the term of imprisonment and the defaulting party can remain imprisoned or be imprisoned repeatedly until the debt is paid.

In practice, judgments are enforceable through the Deputy Sheriff/Messenger of Court depending on the court which has entered the judgment.

#### **10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?**

The courts have the power to award *inter partes* or solicitor/client costs. They also have the power to award no costs. Costs usually follow the event.

Foreign claimants are required to provide security for costs where they do not have immovable property in the country. This is, however, not automatic and the counterparty will have to apply to the court for security for costs.

#### **11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?**

If a party is dissatisfied with a court judgment they may appeal to a higher court.

There is no automatic right to appeal, since appeal is only available where permitted by statute. It is not necessary to apply for leave to appeal in all instances, for example where a final judgment has been given. Where the matter has reached the Supreme Court, there can be no further appeal.

With regards to the enforcement of judgments pending appeal, it is only the court granting the order appealed against that has the power to give leave to allow its judgment to be carried into effect pending the decision of the appeal.

The common law rule of suspending execution of judgment pending appeal is founded upon the avoidance of irreparable damage to the intending appellant. The court must decide

whether it is possible to restore the *status quo* if the appeal were upheld. In instances where the judgment is a money judgment the courts usually, but not invariably, grant leave to execute subject to security *de restituendo*. However, in the case of non-money judgments, the court must decide what would be just and equitable in all the circumstances.

#### **12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?**

Immunity from civil proceedings is not afforded to domestic State entities. Regarding foreign State entities, immunity is limited and only provided to those with diplomatic immunity (under the Privileges and Immunities Act). The High Court case of *Sibanda and Another v International Committee of the Red Cross (ICRC)* [2002] WZHHC 54 confirmed that the immunity granted by the Privileges and Immunities Act is in respect of both suit and legal process.

#### **13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?**

Under the High Court Rules, rule 293, a chamber application must be made in order to register a foreign judgment. Rule 294 requires that the chamber application be verified by an affidavit and exhibit the judgment or a verified or certified or otherwise duly authenticated copy, and state that to the best information and belief of the deponent the judgment has not been satisfied. The affidavit must also give the full name, title, trade or business and usual or last known place of abode or business of the judgment creditor and judgment debtor respectively.

Upon registration of the judgment, pursuant to rule 296, a notice in writing of the registration of the judgment must be served on the judgment debtor within a reasonable time after the registration.

Rule 297 states that the notice must contain full particulars of the judgment registered and of the order for registration. The notice must also state the details of the judgment creditor or his/her attorney. The notice must state that the defendant is entitled, if he has grounds, to apply to set aside the registration and must also state the number of days for applying to set aside the registration limited by the order giving leave to register.

Once the foreign judgment is registered, it will be enforceable as if it were entered in Zimbabwe.

### **ARBITRATION**

#### **14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?**

Yes. Legislation incorporating the provisions of the UNCITRAL Model Law into Zimbabwean law was enacted in the form of the Arbitration Act (Chapter 7:15). Modifications appear as follows:

- article 9 gives power to the High Court of Zimbabwe to grant interim relief before or during arbitration proceedings. An application for interim relief may be made on an *ex parte* basis. Urgency is the main pre-condition in such an application, as well as the absence of any other remedy and the possibility of irreparable harm
- article 10 provides that the number of arbitrators failing determination by the parties may be one in Zimbabwe. This is always the default quorum for arbitration proceedings



- article 11 gives the High Court of Zimbabwe the power to appoint an arbitrator upon the request of a party
- article 15 provides for what may be done where there has been a change or replacement of an arbitrator or arbitral tribunal. In particular, where there has been a change or replacement of an arbitrator, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced
- article 17 gives powers to an arbitral tribunal to grant interim measures. These measures may be enforced by the High Court upon a request for *executor* assistance by the arbitrator concerned
- articles 19 and 24 provide for additional rules of procedure. These are enforced by the arbitrator presiding who determines the rules of procedure for the parties to follow
- article 25 provides additional rules on default of a party to participate in proceedings. The arbitrator enforces these rules through making an award dismissing the claim of either party or giving directions, with or without conditions, for the speedy determination of the claim
- article 27 provides additional rules for court assistance in taking evidence
- article 31 provides additional mandatory rules on the form and content of an award. In particular, the article provides that: (1) the award must be made in writing and must be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal suffices, provided that the reason for any omitted signature is stated; (2) the award must state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30; (3) the award must state its date and the place of arbitration as determined in accordance with article 20(1) (the award is deemed to have been made at that place); and (4) after the award is made, a copy signed by the arbitrators in accordance with article 31(1) must be delivered to each party
- article 34 provides additional grounds for the setting aside of an arbitral award

### 15. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

The arbitration agreement must be both:

- in writing
- signed by both parties

The agreement may be in one document or in a series of documents (including in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another). The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract, and the agreement must provide an unequivocal reference to arbitration.

### 16. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?

The courts will stay litigation upon the request of a party if there is a valid arbitration clause covering the dispute. This approach does not differ if the seat of the arbitration is inside or outside the jurisdiction.

### 17. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?

The High Court may not intervene of its own accord but only upon the application of a party in which case the High Court will first decide on whether or not it has jurisdiction to determine on the subject matter of the arbitration. The decision on whether or not the court has jurisdiction will depend on whether the subject matter of the arbitration is within the jurisdiction, the attitude of the parties (whether there is a submission to the jurisdiction of the High Court by the parties either expressly or tacitly), and the common law principles governing the inherent jurisdiction of the court.

The courts are able to grant interim relief in support of a foreign-seated arbitration under article 9 of the Arbitration Act.

### 18. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

A foreign arbitration award may only be appealed in the courts of original jurisdiction, namely the courts of the seat of the arbitration. It may only be set aside in Zimbabwe on public policy grounds as set out in article 34 of the UNCITRAL Model Law, read in conjunction with the Arbitration Act (Chapter 7:15). As such, a foreign arbitration award cannot be appealed on the merits in Zimbabwe.

On public policy grounds, the award may be set aside if:

- a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication on that question, under the law of Zimbabwe
- the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his/her case
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the UNCITRAL Model Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with the UNCITRAL Model Law
- the High Court finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law of Zimbabwe; or the award is in conflict with the public policy of Zimbabwe (including, but not limited to, where the making of the award

was induced or effected by fraud or corruption); or a breach of the rules of natural justice occurred in connection with the making of the award

The High Court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

### 19. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION?

Zimbabwe is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and the New York Convention is incorporated into the Arbitration Act.

Enforcement of awards, irrespective of the country in which such awards are made, is provided in article 35 of the UNCITRAL Model Law as read in conjunction with the Arbitration Act (Chapter 7:15). The procedure is as follows:

- the party relying on the award must supply the duly authenticated original award or a duly certified copy
- if the award is in a language that is not English a duly certified translation into English must be provided
- an application for registration of the award in writing must be made to the High Court of Zimbabwe. Upon the application being granted it becomes and has the effect of a judgment of the High Court

### 20. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

Yes, they are readily enforceable and ordinarily the process should not take more than one month, unless the enforcement is opposed. In cases where the enforcement is opposed the process will take approximately one year.

## ALTERNATIVE DISPUTE RESOLUTION

### 21. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

The courts may recommend alternative dispute resolution to the parties but they cannot be compelled to attempt it unless there is a legally enforceable agreement to that effect. The High Court of Zimbabwe in its Practice Direction provides for mandatory pre-trial conferences, which parties must hold before proceeding to trial. Such pre-trial conferences are designed to accommodate alternative dispute resolution and curtail the continuation of litigation.

There is no requirement for parties to arbitration to attempt ADR.

## REFORMS

### 22. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

Yes. A number of changes in the legal system have taken place since 2013. The Constitution of Zimbabwe Amendment (No.20) 2013 (the New Constitution) repealed the Lancaster House Constitution on which the Zimbabwe legal system had been based. Under the new constitution, Zimbabwe now has a separate Constitutional Court. Changes will likely take place in several Acts of Parliament which now need to be aligned to the new Constitution. The process is ongoing and will likely take several years.

There has also been an inclination by the Judicial Service Commission of Zimbabwe to make procedural changes to speed up resolution of disputes in the various courts and some of the changes have already taken place through case monitoring systems which have been put in place in the High Court and Magistrates' Court.

There also appear to be a shift by the Government in its economic policy which may result in more changes in the Zimbabwean legal system. The need to improve the conditions for doing business in the jurisdiction by the Government may see significant procedural reforms particularly to investment related legislation aimed at attracting investment and reducing bureaucracy.

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### FOOTNOTE:

1. Zimbabwe is using a multiple currency system with the United States Dollar being the base currency.

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