

GUIDE TO ARBITRATION PLACES (GAP)

KENYA

CHAPTER PREPARED BY

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JURISDICTION INDICATIVE TRAFFIC LIGHTS

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There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline any and all responsibility.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

The popularity of arbitration is increasing among Kenyan parties. The confidential nature of arbitration proceedings and the option to choose the procedure are just two reasons for the uptick. That said, users of arbitration in Kenya face certain challenges common across the globe: difficulty of obtaining interim relief, length of proceedings, costs of prosecuting the dispute plus those of the tribunal and centre, and ability of recalcitrant parties to frustrate the arbitral process through delay tactics. Although parties are free to choose any arbitral rules, the Nairobi Centre for International Arbitration (**NCIA**) and Chartered Institute of Arbitration, Kenya Chapter (the **CIArb Kenya Rules**) are commonly selected. The legislation governing arbitration is the Kenya Arbitration Act of 1995 (**KAA**).¹

The broader context is that despite a drop in foreign direct investment prior to 2019, Kenya has improved its investment climate in recent years, according to the UN Conference on Trade and Development. As a result, the country is predicted to continue attracting foreign investment over the medium term. A key factor will be Kenya's ability to overcome perennial challenges of lack of transparency and corruption. Here too domestic and international organizations are hopeful.

Key places of arbitration in the jurisdiction?	Nairobi.
Civil law / Common law environment? (if mixed or other, specify)	Kenya has a Common Law system. The Supreme Court is the highest court in Kenya and its decisions are binding on the Court of Appeal, the High Court, the Magistrate's Courts as well as other specialised courts and tribunals.
Confidentiality of arbitrations?	There is no statutory provision requiring confidentiality of proceedings and awards found in the KAA or any other relevant legislation. However, parties can choose to apply the confidentiality provisions of the NCIA or the CIArb Kenya Rules. Further, confidentiality is generally regarded by users as a fundamental feature of arbitration. Accordingly, the common practice among parties is to include a confidentiality clause in arbitration agreements.
Requirement to retain (local) counsel?	None. There is no such restriction under the KAA.
Ability to present party employee witness testimony?	Yes. There are no express or implied statutory restrictions on employee witness testimony. Section 20(1) of the KAA provides that the parties are free to agree on the procedure to be adopted by the tribunal in the conduct of the proceedings. Sections 20(2) and 20(3) further provide that failing such an agreement, the tribunal may conduct the arbitration in the manner it considers appropriate including having powers to determine evidentiary issues.
Ability to hold meetings and/or hearings outside of the seat and/or remotely?	The parties are free to agree on the location of any hearing or meeting (Section 21(3) of the KAA).

¹ <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%204%20of%201995>

Availability of interest as a remedy?	Yes. Unless otherwise agreed by the parties, the tribunal may award interest whether simple or compound. (See Section 32(C) of the KAA).
Ability to claim for reasonable costs incurred for the arbitration?	Yes. Under the KAA, unless otherwise agreed by the parties, the arbitral tribunal shall determine the costs and expenses of arbitration and allocate the same as it deems appropriate. (Section 32B (1)).
Restrictions regarding contingency fee arrangements and/or third-party funding?	There are restrictions against contingency fee arrangements (Section 46(c) of the Advocates Act (Chapter 16, Laws of Kenya). There are no statutory restrictions against third-party funding. However, it is worth noting that Section 46(a) of the Advocates Act prohibits an agreement allowing an advocate to purchase any part of the client’s interest in a suit.
Party to the New York Convention?	Yes. Kenya ratified the New York Convention in February 1989, with a reciprocity reservation.
Party to the ICSID Convention?	Yes. ²
Compatibility with the Delos Rules?	Yes.
Default time-limitation period for civil actions (including contractual)?	As per Section 4 of the Limitations of Actions Act, 6 years for contractual claims and 3 years for tortious claims except for actions for libel or slander, which must be brought within 12 months. ³ For contractual and tortious claims, limitation periods run from the date of cause of action.
Other key points to note?	ϕ
World Bank, Enforcing Contracts: Doing Business score for 2020, if available?	58.3 ⁴ . Kenya jumped 15 places to 56 in 2020, up from 71 in 2019.
World Justice Project, Rule of Law Index: Civil Justice score for 2020, if available?	0.47. Kenya is ranked 91 out of 140 globally in a competitive ranking on adherence to Rule of Law. ⁵

² <https://icsid.worldbank.org/about/member-states/database-of-member-states>

³ http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/LimitationofActionsAct_Cap22.pdf

⁴ <https://archive.doingbusiness.org/en/data/doing-business-score?topic=enforcing-contracts>

⁵ <https://worldjusticeproject.org/rule-of-law-index/global/2022/Civil-Justice/>

ARBITRATION PRACTITIONER SUMMARY

The legislative framework of the arbitration regime is based on: (i) the Constitution of Kenya 2010; (ii) the Arbitration Act of 1995 as amended in 2017 (**KAA**); and (iii) the Nairobi Centre for International Arbitration Act 2013. The regime is further shaped by court decisions on the relevant legislation.

Private users of arbitration rely on the following domestic institutions to administer disputes:

- The Nairobi Centre for International Arbitration (**NCIA**)
- The Chartered Institute of Arbitrators (**Clarb**)

Additionally, the rules of the following bodies are popular among users: London Court of Arbitration (**LCIA**), the International Chamber of Commerce (**ICC**), and the United Nations Commission on International Trade Law (**UNCITRAL**).

Investors suing state agencies also rely on the International Centre for Settlement of Investment Disputes (**ICSID**) to administer disputes.

Date of arbitration law?	1995 (last amended 2017).
UNCITRAL Model Law? If so, any key changes thereto? 2006 version?	<ul style="list-style-type: none"> • The Arbitration Act 1995 (as amended in 2017) is largely based on the UNCITRAL Model Law. Recent updates include: • Section 16(A) and (B) on withdrawal and immunity of an arbitrator. • Section 19(A) on equal treatment of parties. • Section 32(A), (B) and (C) on the effect of awards, costs and expenses, and interest. • Section 38 to include the effect of bankruptcy on agreements to settle differences by arbitration.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	It is not a specialised court but it is the designated division of the Commercial & Tax Division of the High Court of Kenya. ⁶
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes. Section 7 of the KAA provides for interim relief and the High Court may issue both <i>inter partes</i> and <i>ex parte</i> orders.
Courts' attitude towards the competence-competence principle?	Kenyan courts have applied the principle of competence-competence as provided for in Section 17 of the KAA.
May an arbitral tribunal render a ruling on jurisdiction (or other issues) with reasons to follow in a subsequent award?	No. Section 32(6) of the KAA provides that a tribunal may issue a partial award with regard to some of the issues that are to be determined. It also states that the provisions regarding the requirements of an award under the KAA would be applicable towards a partial award.

⁶ <https://sifocc.org/countries/kenya/>

	<p>Rule 29(12) of the NCIA Rules also states that the tribunal may make separate awards on different issues at different times which shall have the same status and effect as any other award made by the tribunal.</p> <p>A ruling on jurisdiction would constitute a partial award. Therefore, the reasons would need to be provided pursuant to the requirement under Section 32(1) of the KAA, unless parties agree that no reasons should be provided or if the award is a settlement award.</p>
<p>Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?</p>	<p>An additional ground includes the making of an award that was induced or affected by fraud, bribery, undue influence, or corruption. (Section 35(2)(vi) of the KAA)</p>
<p>Do annulment proceedings typically suspend enforcement proceedings?</p>	<p>No, there is no automatic suspension of enforcement proceedings upon filing of an application seeking to set aside or suspend an arbitral award. However, based on Section 37 (2) of the KAA, the High Court may adjourn its decision on the recognition or enforcement of an arbitral award until the determination of an application to set aside if it deems it appropriate (see <i>Blue Shield Insurance Co. Limited V Samuel Kamau Muhindi [2009] eKLR</i>) and may also on the application of the party, claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security.</p>
<p>Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>The High Court has the power to refuse the recognition and enforcement of a foreign arbitral award where a party provides proof that the award was set aside by a court of the state in which, or under the law of which, that arbitral award was made (see Section 37(1)(a)(vi) of the KAA.</p>
<p>If an arbitral tribunal were to order a hearing to be conducted remotely (in whole or in part) despite a party's objection, would such an order affect the recognition or enforceability of an ensuing award in the jurisdiction?</p>	<p>No.</p> <p>Although the KAA does not expressly reference remote hearings, Section 21 grants the tribunal discretion on where to hold hearings, which implies that a remote hearing would not form an adequate ground to affect the recognition or enforceability of an award. Similarly, under Rule 46 of the CIArb Rules and Rule 22(5), the tribunal may direct the parties to have hearings be conducted remotely (in whole or in part).</p> <p>Under Section 37 of the KAA, the High Court may refuse to recognise and enforce an arbitral award where, among other circumstances, a party proves that it was unable to present its case before the tribunal.</p> <p>We are yet to come across a case where a party challenged an award on the basis that it was unable to present its case because the proceedings were conducted virtually.</p> <p>Rule 90(m) of the CIArb Rules states that the tribunal's power to order for a remote hearing can be done as long as sufficient safeguards are in place to ensure that parties are given equal treatment and no party is disadvantaged.</p>

	We consider it unlikely that a party could successfully resist enforcement on this basis as a due process concern.
Key points to note in relation to arbitration with and enforcement of awards against public bodies at the jurisdiction?	Section 41 of the KAA states that <i>"This Act shall bind the Government."</i>
Is the validity of blockchain-based evidence recognised?	Section 20(2) of the Arbitration Act empowers the arbitral tribunal to determine the admissibility, relevance, materiality and weight of any evidence and to determine at what point an argument or submission in respect of any matter has been fairly and adequately put or made. Although we have not yet seen this in practice, it could be inferred that a tribunal may admit blockchain based evidence in its discretion.
Where an arbitration agreement and/or award is recorded on a blockchain, is it recognised as valid?	The KAA does not expressly address the use of blockchain technology. However, an arbitration agreement recorded on a blockchain technology may be deemed valid as the requirement that an arbitration agreement be in writing is met by an electronic communication, provided it does not conflict with any mandatory applicable provisions. (Section (4)(3)(b) of the KAA). There is no precedent on the use of blockchain.
Would a court consider a blockchain arbitration agreement and/or award as originals for the purposes of recognition and enforcement?	Section 7 of the New York Convention of 1958 (NY Convention) specifies that an agreement is considered in writing if it is communicated via <i>"electronic means."</i> Section 4 (3) (b) of the KAA recognises an agreement as written if it is contained in <i>"an exchange of letters, telex, telegram, facsimile, electronic mail, or other means of telecommunications which provide a record of the agreement;"</i> The term <i>"electronic means"</i> is not defined in the Act. In addition, Section 36(3) of the KAA requires that the applicant provide the court with the original or duly certified copy of the arbitral award, as well as the original or duly certified copy of the arbitration agreement and any translations. But as we do not have specific experience of such use of a blockchain, it is not yet clear how the courts might deal with this point.
Other key points to note?	The courts have a limited scope to interfere with an arbitral award or proceeding in terms of an appeal process.

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model law? 1985 or 2006 version?

Arbitration in Kenya is governed, for the most part, by the Arbitration Act, No. 4 of 1995 and its subsequent amendments (the **Kenyan Arbitration Act** or the **KAA**) and court decisions on the relevant legislation.⁷

While the KAA was initially based on the 1985 version of the UNCITRAL Model Law on International Commercial Arbitration (the **UNCITRAL Model Law**), it was subsequently amended to reflect developments in the practice of domestic and international arbitration in Kenya.

Significantly, the Kenyan courts have held that the KAA is self-sufficient in that questions of arbitration procedure and awards fall within its scope and thus other domestic legislation need not be consulted on such topics.⁸

1.1.1 If yes, what key modifications if any have been made to it?

The scope of the 2010 amendments included: composition of the tribunal (KAA, Sections 11 and 12), withdrawal and immunity of arbitrators (KAA, Sections 16A and 16B), and the powers of a tribunal to order interim relief and also security for costs (KAA, Section 18). The 2017 amendment introduced the effect of bankruptcy on agreements to settle differences by arbitration (KAA, Section 38).

1.2 When was the arbitration law last revised?

2017.

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

The courts have applied the three-stage test established in the English case *Sulamerica CIA Nacional de Seguros SA & others v Enesa Engenharia SA and others* [2012] EWCA Civ 638 in determining which law governs the arbitration agreement. This being an enquiry as to whether: (i) the parties have made an express choice of law; (ii) an implied choice of law; (iii) determining the law with the closest and most real connection to the agreement (see *Thomas & Piron Grands Lacs Limited v Whitefield Investment Limited* [2017] eKLR and *Kundan Singh Construction Limited v Tanzania National Roads Agency*). We are yet to come across a case applying the recent UK Supreme Court decision *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb*.

2.2 In the absence of an express designation of a 'seat' in the arbitration agreement, how do the courts deal with references therein to a 'venue' or 'place' of arbitration?

Section 21(2) of the KAA provides that in the absence of an express designation, the tribunal shall determine the "place of arbitration" based on the "circumstances of the case and convenience of the parties."

SubSection (3) of the same provision provides that, absent party agreement, the tribunal may "meet at any location it considers appropriate"

Rule 88 of the CIArb Rules provides that notwithstanding Sections 21 and 23 of the KAA, the tribunal shall have the power to decide the juridical seat of arbitration as well as the location of any hearing or meeting.

⁷ The other two legislative sources are the: (i) Constitution of Kenya 2010; and (ii) Nairobi Centre for International Arbitration Act 2013.

⁸ *Victoria Furnitures Limited v Zadock Furniture Systems Limited* [2019] eKLR, (<http://kenyalaw.org/caselaw/cases/view/190168>).

Under rule 18 of the NCIA Rules, unless parties agree otherwise, the seat of arbitration is Nairobi. The tribunal may determine a more appropriate seat where necessary, upon providing all the parties with an opportunity to make written comments on the appropriate seat and considering all the circumstances of the claim. Rule 18(4) of the NCIA Rules also provides that the tribunal may hold meetings and hearings at any geographical location, with the consent of all the parties to the arbitration.

2.3 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Yes. Section 171(a) of the KAA states that an arbitration clause that forms part of a contract will be treated as an agreement independent of the other terms of the contract.

2.4 What are formal requirements (if any) for an enforceable arbitration agreement?

The agreement must be in writing. (KAA, Section 4(2)) It may be in the form of an arbitration clause in a contract or in the form of a separate agreement (KAA, Section 4(1)).

The reference in a contract to a document containing an arbitration clause shall constitute an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract as per KAA, Section 4(4).

2.5 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

The combination of Sections 3(6), 4, and 5 of the KAA establish that an agreement to arbitration binds only the parties to the arbitration agreement. Further, the High Court when considering its powers to issue interim orders under Section 7 of the KAA have held that only parties to an arbitration agreement may seek and be bound by interim orders issued by the Court.

The exceptions to this privity of contract principle are limited to:

- On the death of a party, the agreement is enforceable by or against the personal representative of the deceased as per Section 8 of the KAA.
- The trustee in bankruptcy adopts the agreement and the agreement terms are enforceable by or against the trustee as per Section 38 of the KAA.

2.6 Are there restrictions to arbitrability? In the affirmative:

There are no restrictions in the KAA. However, it is generally accepted that some subject matters are not capable of being resolved by arbitration (see *Nedermar Technology BV Ltd v Kenya Anti-Corruption Commission & another* [2006] eKLR).

Although the KAA is silent on whether matters of family law are arbitrable it can be implied from the case of *TSJ v SHSR* [2019] eKLR the judges held that nothing in the Children's Act or the Marriage Act precludes arbitration from being used as a means to resolve disputes relating to children and marriage, particularly where parties voluntarily submit to arbitration.

2.6.1 Do these restrictions relate to specific domains (such as anti-trust, employment law etc.)?

Yes. Matters concerning national security, criminal matters, bribery and corruption, fraud (in some circumstances see *Gerick Kenya Limited v Honda Motorcycle Kenya Limited* [2019] eKLR) are not arbitrable. There is limited jurisprudence on this but generally, disputes falling within the following categories: competition, and intellectual property are not considered arbitrable (see *Gerick Kenya Limited v Honda Motorcycle Kenya Limited* [2019] eKLR).

2.6.2 Do these restrictions relate to specific persons (i.e., State entities, consumers etc.)?

No.

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

3.1.1 If the place of the arbitration is inside of the jurisdiction?

Yes, Section 6 of the KAA allows a party to apply for a stay before the courts where there is a valid arbitration agreement covering the dispute. The courts will not stay litigation where it finds that:

- The arbitration agreement is null and void, inoperative or incapable of being performed; or
- There is no dispute in respect of the matters agreed to be referred to arbitration.

3.1.2 If the place of the arbitration is outside of the jurisdiction?

Under Section 6 of the KAA, the courts may also stay proceedings filed before it where the matter is subject to an arbitration agreement even though the place of arbitration chosen by the parties in the matter is outside of Kenya. In this regard, the Courts do not distinguish between arbitrations seated within and outside of Kenya.

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

Under Section 18(1) of the KAA, the tribunal may order a party to take such interim measure of protection as considered necessary in respect of the subject matter, and Section 10 prohibits intervention by the courts in matters governed by the KAA. However, there is no specific provision in the KAA which gives powers to arbitrators to issue an anti-suit injunction.

There is limited jurisdiction in Kenya on this issue and we have not come across any case by the Court deliberating the exercise of such powers by the tribunal.

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to anti-suit injunctions/anti-arbitration injunctions or orders, but not only)

We are yet to come across a case where the Kenyan courts have issued an anti-suit injunction. However, under Section 6 of the KAA, the Court may stay proceedings instituted in the local courts where there is a valid arbitration agreement. It is also worth noting that under Section 7 of the KAA, the Court may issue an interim measure of protection to a party before or during arbitral proceedings. We are yet to see whether such measures extend to anti-suit injunctions.

4. The conduct of the proceedings

4.1 Can parties retain foreign counsel or be self-represented?

Yes. Section 25(5) of the KAA allows the parties to be self-represented or represented by a person of their choice. However, most parties prefer to retain advocates who are qualified to practice in Kenya where the seat is in Kenya and where the governing law of the contract is Kenyan law.

4.2 How strictly do courts control arbitrators' independence and impartiality? For example, does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

Under Sections 13 and 14 of the Arbitration Act, the High Court may make a determination on an arbitrator's decision rejecting a challenge to his appointment. The Court will allow the challenge where a party has demonstrated that circumstances exist as to give rise to justifiable doubts as to the arbitrator's impartiality and independence.

According to the High Court, this is a stringent and objective test that is intended to weed out frivolous allegations. The Court must find that the circumstances of actual bias or prejudice exist and are not merely believed to exist and that those circumstances are justifiable (see *West Park Limited v Villa Care Limited & another* [2020] eKLR).

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?

The Court may appoint an arbitrator pursuant to Section 12 of the KAA upon the application of a party where the defaulting party:

- Indicates that they are unwilling to appoint an arbitrator;
- Fails to do so within the time provided in the arbitration agreement; or
- Fails to do so within 14 days, where the arbitration agreement does not limit the time within which an arbitrator must be appointed by a party.

4.4 Do courts have the power to issue interim measures in connection with arbitrations? If so, are they willing to consider *ex parte* requests?

Yes, Section 7 of the KAA allows interim measures in connection with arbitrations; a party is not prohibited from filing its application for interim measures *ex parte*.

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

Yes, Part IV of the KAA covers the conduct of the arbitration.

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

There is no statutory provision requiring confidentiality of proceedings and awards in the Arbitration Act 1995 of Kenya (the **KAA**).

However, where the parties have chosen to apply the Nairobi Centre for International Arbitration (the **NCIA Rules**) or the arbitration rules of the Chartered Institute of Arbitration, Kenya Chapter (the **CIArb Rules**) then they will be bound by confidentiality provisions. Rule 134 of the CIArb Rules provides that the proceedings of the arbitration are to be kept confidential and private unless otherwise determined by the parties. Similar provisions are found in Rule 34 of the CIArb Rules. Rule 34(1) provides that the parties shall undertake to keep confidential all awards in the arbitration, all matters in the proceedings and documents produced for the purposes of arbitration. Rule 34(2) provides that the deliberations of the tribunal are confidential to its members and Rule 34(3) provides that the Nairobi Centre for International Arbitration (the **NCIA**) shall not publish an award or any part of an award without the prior written consent of the parties and the tribunal.

Further, where it is chosen by the parties, confidentiality is regarded as a fundamental feature of arbitration and is strictly enforced. The common practice among parties is to include a confidentiality clause in the arbitration agreement.

4.5.2 Does it regulate the length of arbitration proceedings?

Sections 24 and 25 of the KAA (concerning the timetable for the statements of claim, defence, hearings and written representations) imply that the tribunal can regulate the length of proceedings insofar as the written submission and hearings are concerned. Section 20 of the KAA (Determination of rules of procedure) further allows the tribunal to rule on points of procedure, which could be inferred to cover length of proceedings.

4.5.3 Does it regulate the place where hearings and/or meetings may be held, and can hearings and/or meetings be held remotely, even if a party objects?

Section 21 of the KAA regulates the place of arbitration. Express regulation of remote hearings is not provided, though it can be inferred from the tribunal's powers under Section 25 (hearings and written representations).

Rule 88 of the CIArb Rules provides that notwithstanding Sections 21 and 23 of the KAA, the tribunal shall have the power to decide the location of any hearing or meeting. Rule 45 of the CIArb Rules allows the tribunal to direct a meeting or hearing to be held remotely either on its own motion or upon application by any party.

Rule 18(4) of the NCIA Rules also provides that the tribunal may hold meetings and hearings at any geographical location, with the consent of all the parties to the arbitration.

For proceedings under the NCIA or CIArb, where a party objects, the tribunal would have the discretion to determine the type of hearing that may be conducted, having regard to the representations of the parties and the circumstances of the proceedings. This is primarily on the basis that a tribunal has the jurisdiction to determine the conduct of the arbitral proceedings.

4.5.4 Does it allow for arbitrators to issue interim measures? In the affirmative, under what conditions?

Yes, under Section 18 of the KAA, the tribunal may issue interim measures of protection that *"the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute, with or without an ancillary order requiring provision of appropriate security in connection with such a measure."*

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence? For example, are there any restrictions to the presentation of testimony by a party employee?

Section 20 of the KAA regulates the tribunal's right to determine the admissibility, relevance, materiality and weight of evidence. Sections 23(4), 24(2), and 25 further refer to forms of evidence that may be submitted to the tribunal. Section 27 covers expert evidence. Section 28 allows the tribunal to request the High Court's assistance in taking evidence. There are no restrictions to the presentation of testimony by a party employee.

4.5.6 Does it make it mandatory to hold a hearing?

No. However, under Section 25(2) of the KAA a party may opt to have a hearing.

4.5.7 Does it prescribe principles governing the awarding of interest?

Under Section 32(C) of the KAA, the tribunal has discretion in principles governing the award of interest.

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

The tribunal has discretion to allocate arbitration costs under Section 32B of the KAA.

4.6 Liability

4.6.1 Do arbitrators benefit from immunity from civil liability?

Yes, under Section 16B of the KAA arbitrators enjoy immunity from civil liability for anything done or omitted to be done in good faith in the course of discharging their duties.

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

There is no *per se* rule relating to potential criminal liability in the above scenario.

5. The award

5.1 Can parties waive the requirement for an award to provide reasons?

The parties can waive the requirement under Section 32(3)(a).

5.2 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

There are no mandatory requirements to the rendering of a valid award which are atypical and applicable in Kenya.

5.3 Is it possible to appeal an award (as opposed to seeking its annulment)? If yes, what are the grounds for appeal?

There is limited scope for appeal of an arbitral award. In respect of domestic arbitrations, a party has a right to appeal before the High Court on any question of law arising out of the arbitral award provided the parties have so agreed (see Section 39(1)(b) of the KAA). On appeal, the High Court shall determine the question of law and thereafter confirm vary or set aside the arbitral award or remit the matter to the tribunal for re-consideration. A further appeal of the High Court decision to the Court of Appeal may be made only if they had agreed prior to the delivery of the award or if the Court of Appeal grants leave to appeal. In respect of international arbitrations, there is no statutory right to appeal, and the only available recourse is setting aside procedures. (Section 35 of the KAA).

5.4 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

A party seeking to have a local or foreign award recognised and enforced is required to make an application to the High Court and file with the High Court the original or duly certified copy of the award and arbitration agreement. An application seeking the recognition and enforcement of an award must be filed before the lapse of 6 years after the issuance of the award, pursuant to Section 4(c) of the Limitation of Actions Act.

The Arbitration Rules 1997 (subsidiary legislation)⁹ promulgated under the KAA provides that if no application to set aside an arbitral award has been made in accordance with the KAA, the party filing the award may apply *ex parte* for leave to enforce the award as a decree. However, a party seeking recognition and enforcement may file their application for recognition before the 3-month timeline and await this period to elapse before the hearing and determination of the application (see *Britam General Insurance Company Limited & another v Infama Insurance Agency Limited & another (Civil Case E 174 of 2019 & 118 of 2021 (Consolidated)) [2021] KEHC 352 (KLR)*).

⁹ <http://kenyalaw.org:8181/exist/kenyalex/sublegview.xql?subleg=No.%204%20of%201995->

5.5 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

No.

5.6 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

No. However, there is limited jurisprudence on this in Kenya.

5.7 Are foreign awards readily enforceable in practice?

Yes. Kenya ratified the New York Convention, with a reciprocity reservation, on 10 February 1989. Section 36 of the KAA provides that an international arbitration award shall be recognised as binding and enforceable in accordance with the provisions of the New York Convention. However, in practice, a foreign award will be enforced the way a domestic arbitral award is enforced, pursuant to the requirements of Section 36 of the KAA.

6. Funding arrangements

6.1 Are there laws or regulations relating to, or restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction? If so, what is the practical and/or legal impact of such laws, regulations or restrictions?

There are restrictions against contingency fee arrangements (Section 46(c) of the Advocates Act (Chapter 16, Laws of Kenya). There are no substantive laws providing for third party funding or statutory restrictions against third-party funding. However, it is worth noting that Section 46(a) of the Advocates Act prohibits an agreement allowing an advocate to purchase any part of the client's interest in a suit.

7. Arbitration and technology

7.1 Is the validity of blockchain-based evidence recognised?

We do not have specific experience of such use of a blockchain as this is a relatively untested field.

7.2 Where an arbitration agreement and/or award is recorded on a blockchain, is it recognised as valid?

That said, we do not have specific experience of such use of a blockchain.

7.3 Would a court consider a blockchain arbitration agreement and/or award as originals for the purposes of recognition and enforcement?

That said, we do not have specific experience of such use of a blockchain.

7.4 Would a court consider an award that has been electronically signed (by inserting the image of a signature) or more securely digitally signed (by using encrypted electronic keys authenticated by a third-party certificate) as an original for the purposes of recognition and enforcement?

There is no requirement for an award to bear an arbitrator's actual signature as opposed to an electronic signature for purposes of recognition and enforcement under the KAA. There are no specific regulations that have been passed concerning the presentation of arbitral awards filed electronically.

In addition, following the commencement of the COVID-19 pandemic, parties are required to file and serve their documents electronically and on a dedicated e-filing platform provided by the Judiciary. As such, parties have been using electronic signatures to sign their respective pleadings, with judges and arbitrators also using such signatures for their respective rulings, judgements, and awards.

However, we have not come across any case law where recognition and enforcement has been denied on the basis that the award was signed using an electronic signature.

8. Is there likely to be any significant reform of the arbitration law in the near future?

Yes. The National ADR Policy which was formulated by the NCIA and other stakeholders and which seeks to promote the use of ADR in Kenya is pending approval by cabinet. Further, there is an [Alternative Dispute Resolution Bill, 2021](#) currently being reviewed by the Parliament; it is not yet known when the Bill will be passed into law.

9. Compatibility of the Delos Rules with local arbitration law

Yes, broadly speaking, but there are areas of incompatibility. For instance, Article 10 of the Delos Rules allows DELOS, at the request of a party, to consolidate multiple arbitrations into a single arbitration. There is no equivalent provision under KAA, which means that the default position is that all parties must consent to consolidation.

10. Further Reading

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ARBITRATION INFRASTRUCTURE AT THE JURISDICTION

Leading national, regional and international arbitral institutions based out of the jurisdiction, <i>i.e.</i> , with offices and a case team?	Nairobi Centre of International Arbitration (NCIA) and Chartered Institute of Arbitrators (CiArb).
Main arbitration hearing facilities for in-person hearings?	Nairobi Centre of International Arbitration (NCIA) or Chartered Institute of Arbitrators Kenya Branch offices. There are also several office workspaces in Nairobi which may be hired for hearings.
Main reprographics facilities in reasonable proximity to the above main arbitration providers with offices in the jurisdiction?	Such services may be provided by the NCIA, CiArb or the parties will separately organise for the same.
Leading local providers of court reporting services, and regional or international providers with offices in the jurisdiction?	There are individuals and transcription companies who may be contracted to offer transcription and reporting services in Kenya.
Leading local interpreters for simultaneous interpretation between English and the local language, if it is not English?	Parties may engage local interpreters where required but this is not common as most arbitration proceedings will be conducted in English.
Other leading arbitral bodies with offices in the jurisdiction?	Chartered Institute of Arbitrators Kenya Branch International Chamber of Commerce Kenya