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Africa's seventh largest economy, Kenya is home to a well-developed legal disputes sector with a healthy future and since the introduction of the country's new constitution, arbitration has also been gaining ground.

Kenya has a well-established legal infrastructure, based on common law principles, with established provision for dispute resolution in support of a local economy built on agriculture and the service sector. Outside of the High Court, Kenya's superior court of first instance, the use of arbitration is on the verge of a major leap with the introduction of the country's new 2010 constitution, which inserted a requirement for mandatory arbitration prior to the pre-trial process.

"There is an appetite for alternative disputes work in Kenya," says **Evans Monari**, a dispute resolution partner with Kenyan firm **Coulson Harney Advocates**, part of the Africa group of South African firm **Bowman Gilfillan**. He tells *CDR* that although the full effect has not yet been felt, growth in the market is imminent: "Laws and regulations are being put in place. It is working now, but is about to kick off, and judges do already informally ask if there has been an attempt at alternative dispute resolution (ADR)."

His colleague **Anthony Njogu** agrees: "Our courts are trying to make formal rules that operationalise this, but in terms of the concept that ADR is something that is beneficial and actually gets you to dispute resolution in a much more efficient manner, that is fully understood." He adds: "We are one of the very few countries where it is in the constitution."

Cosima Wetende, a partner with **Kaplan & Stratton Advocates** in Nairobi, says the market is currently very steady: "A lot of contracts have arbitration clauses which are obviously enforceable, and so there is quite a bit of arbitration going on."

Arbitration is already established in certain sectors, says Monari because it allows cases to be heard by specialists in a relatively short period of time: “There is arbitration where parties feel that judges do not have enough expertise to handle the matter, or where they want the dispute at hand to be resolved within a particular period of time because our courts tend to be slow and are sometimes very unpredictable.”

Indeed, there has been a surge in construction in the Nairobi area, notes Njogu, fuelling this work.

Government-related disputes involving Kenya’s relatively small mining sector, energy and insurance, as well as commercial corporations “that want to resolve their problems and get on with business” figure strongly in the use of arbitration, says Monari.

COMPETING WITH LITIGATION

“We have been driven to this by the state of our courts,” says Njogu. “People actually look for methods that will work and get you quicker results.”

“Through the 1990s our judicial system got a very bad name, we were in perpetual backlog and the integrity of certain members of the judiciary was highly questioned.”

Reform of the judiciary in the early 2000s followed, but public confidence in the system remained low, contributing to the rise of arbitration. The World Bank’s 2015 *Doing Business* report marked Kenya down as 137 out of 189 for contract enforcement.

“People had a lot more confidence in a system where you are able to pick who is determining your decisions. You believe more in your arbitrator and his ability to get you to a just solution quickly.”

Njogu points out that the Kenyan judicial system does a poor job of matching judges’ skills to their jobs, leading to a lack of specialists.

“Expertise is not particularly well used in the judiciary. You take someone who is an excellent commercial litigator, and you put them in the criminal court or transfer him to the farthest corner of Kenya where they will deal with the smallest infractions. You are not actually leveraging their knowledge and expertise.”

“People will go [to litigation] if you need an injunction which an arbitrator will not be able to give you or enforce in any quick manner, you go there because you have to. If you are more concerned about getting to a resolution of a commercial dispute, for that the preference will always be to go to ADR.”

The courts are perceived as cheaper though, explains Njogu: “In litigation [you] do not pay the judge anything up front, but you need to pay the arbitrator out of your pocket before anything happens and keep topping it up.”

This creates the perception that “you will get hit with a very large bill for arbitration, something that many people are trying to get around”.

For now, as Wetende observes, the choice is currently between the speed of arbitration and the expense of the arbitrator's fee. "There are some cases that go to arbitration and are dealt with pretty quickly, you get in and get out, so you do not have to wait for the backlog of cases, but then there is the expense component, because the arbitrator's fee would probably be on an hourly rate and so the client ends up with this extra cost."

As is the case in many other countries, the increased use of arbitration has been beneficial to the courts, reducing the workload, but the backlog remains. "Within the arbitration system we do not have backlogs, people agree and they get the arbitration done as quickly as they can," says Monari.

The reality, Njogu adds, is that arbitration is much quicker, but it needs to tackle the perception that it is not and show that the up-front payment provides value for money.

Although most big ticket arbitration involving international parties heads abroad to bodies like the ICC or LCIA, local arbitration is primarily handled through the **Chartered Institute of Arbitrators**, Kenya branch, which progressed from being a subsidiary of the UK institute in the 1990s, to a branch in its own right.

Njogu agrees: "It is the body which has positioned itself as being able to run arbitrations, and most arbitration clauses will have the chairman of the institute as the default appointing authority."

There are some smaller institutions offering arbitration and mediation, but not on the scale of the Chartered Institute. Nonetheless, Wetende says a bigger pool of domestic arbitrators is needed: "Arbitration is very involving, you cannot run 15 arbitrations as an individual at the same time, something will suffer. So we would like to build capacity to have a larger pool of arbitrators in all industries, who are competent, so dispute resolution can grow even larger."

BUILDING THE FUTURE

The establishment of Kenya as a regional arbitration hub is very much an ambition of the government. The Nairobi Centre for International Arbitration Act 2012 provides for the establishment of a local institution to rival destinations such as Mauritius for attracting international arbitrations from around the region, and being a force for education about arbitration.

Njogu says: "They have a board of directors, they have an acting registrar, what they do not have are physical premises and they have not really started operations as such." Late last year, the Law Society of Kenya decided to get in on the act, announcing plans for a KES 800 million (GBP 5 million) international arbitration centre in Nairobi. This received a mixed response, with some dissent within the Law Society's own ranks. A series of law suits were launched by members unhappy with their money being spent in this way. The main case made by objectors led to a stay of proceedings, a ruling appealed by the Law Society at the Court of Appeal, with diverse other objections having been dismissed by the courts.

However, Monari dismisses those efforts as the complaints of a politically-motivated faction, unfamiliar with arbitration, and is confident that the centre will eventually be constructed.

“The people opposing the arbitration centre have never gone through an arbitration process. These are lawyers whose interest was to capture power in the Law Society of Kenya,” he says. “It was nothing to do with whether the centre should be established or not, but it will be established, it is a matter of time.”

Njogu elaborates: “The concept of having a well set-up place where there is infrastructure, where you can actually do your arbitrations, I do not think anybody is against that. The problem is how you effect it.”

Meanwhile, Njogu looks forward to “a gradual upswing” in the use of arbitration as the economy picks up from its recent downturn, and Wetende agrees, foreseeing “normal growth”, rather than a spike, as society’s need for dispute resolution gradually increases.

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