# Alternative dispute resolution in Kenya

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**Sean Omondi and George King of Bowman Gilfillan Africa Group's Coulson Harney office in Nairobi, set out the key alternative dispute resolution mechanisms available in Kenya.**

The main alternative dispute resolution (ADR) methods available in Kenya are negotiation, conciliation, mediation and arbitration.

There is no mandatory requirement for parties to commercial litigation to submit to ADR proceedings.

However, in terms of the Civil Procedure Act, the courts may, either on the application of the parties or on its own motion, refer a commercial dispute to ADR mechanisms.

In ADR proceedings parties generally agree that each party will bear their own costs and expenses and the parties will share the costs of any third party involved in facilitating the resolution of the dispute (example, conciliator or mediator).

In arbitration, the costs of arbitration may be agreed upon by the parties, fixed by the arbitrator as part of the arbitral award in the absence of an agreement; or shared, with each party bearing its own legal and other expenses and the parties equally sharing the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration. ADR proceedings are confidential.

The Kenyan **Chartered Institute of Arbitrators** and the **Dispute Resolution Centre and Mediation Training Institute** are currently the main bodies that offer ADR in Kenya.

Parties are not obliged to use these bodies. They are free to state in their agreements how the ADR proceedings will be carried out and which body will oversee the proceedings. The parties are also free to choose individual qualified arbitrators.

## ARBITRATION

The duration of arbitration proceedings in Kenya varies depending on the complexity of the subject matter, the efficiency and enthusiasm of the parties, the respective schedules of the parties and the arbitrator and his/ her efficiency.

Arbitration proceedings in Kenya generally take between six months and three years.

A court can intervene in arbitration proceedings but the level and instances of intervention are limited.

Under the Arbitration Act the instances in which a court may intervene in arbitration proceedings include:

- determination of the enforceability of arbitration agreements;
- granting interim measures of protection;
- setting aside the appointment of an arbitrator;
- appointing an arbitrator where none has been appointed;
- assisting in taking of evidence;
- removing an arbitrator;setting aside of arbitral awards;
- enforcement of arbitral awards; and
- hearing and determining appeals, where a right of appeal from the decision of an arbitral tribunal lies to the court.

An arbitrator has power to grant interim relief and measures of protection as he may consider necessary.

There is no mandatory requirement to disclose any documents. Parties disclose documents that are relevant to their cases. The disclosure and exchange of documents and other information is agreed upon by the parties and the arbitrator during the preliminary arbitration scheduling meetings.

Certain documents are privileged. Communications between a lawyer and his/ her client are strictly privileged.

Medical records must also not be disclosed without the consent of the patient concerned unless disclosure is required by law.

It is also common practice by opposing parties to enter into negotiations in an effort to settle pending matters without fear of prejudicing their clients' claims. Any document and/or statement made with the intent of settling a dispute is not admissible in court proceedings. In practice such documents are marked 'without prejudice'.

Documents emanating from the official status of a person are also privilege. Such privilege includes the privilege of judges and magistrates and public officers in connection with official information.

In arbitration proceedings, evidence may be presented in any manner agreed by the parties. In the absence of an agreement, the arbitral tribunal is entitled to decide whether to hold an oral hearing for the presentation of evidence or require that the proceedings shall be conducted on the basis of documents.

The oral hearing and the presentation of oral evidence at the hearing usually follows the same format used in courts.

## AWARDS

An arbitration award may be enforced in the same manner as a decree or order issued by the High Court only if its enforcement is permitted by the High Court.

The arbitration award sought to be enforced must first be filed in court and an application for enforcement filed. Once the High Court grants the application for enforcement, the arbitration award becomes enforceable as a judgment of the High Court and the methods of execution discussed above become available.

It is possible to appeal an award given in a domestic arbitration if the parties have expressly agreed that an appeal may be made to a court. Where no right of appeal has been expressly reserved by the parties in the arbitration agreement, the arbitration award can only be challenged through an application for setting aside.

The High Court will set aside an arbitral award if the party making the application provides proof that:

- a party to the arbitration agreement was under some incapacity;
- the arbitration agreement is invalid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya;
- the party making the application was not given proper notice of the appointment of an arbitrator or the arbitral proceedings or was otherwise unable to present its case;
- the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to the arbitration, or contains decisions on matters beyond the scope of the reference to arbitration;
- the composition of the tribunal or the conduct of the arbitral proceedings did not accord with the agreement of the parties or the act; or
- the making of the award was induced or affected by fraud, bribery, undue influence or corruption.

Additionally, the High Court will set aside an arbitral award if it finds that the subject matter of the dispute is incapable of settlement by arbitration under the laws of Kenya or the award conflicts with the public policy of Kenya.

Foreign judgments and arbitral awards cannot be enforced by way of arbitration proceedings.

There is no rule that requires foreign claimants to provide security for costs. If the parties to an arbitration do not expressly restrict an arbitrator's power to order security for costs, an arbitrator may on the application of a party order a claimant to provide security for costs.

## REFORM

There are no proposed reforms to the court system or the ADR system. The Kenyan judiciary has proposed plans for reform of the Kenyan judiciary by the introduction of various measures including the use of automation systems within the courts. The process of judicial reforms is on-going.

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