Introduction

This is the first edition of our Guide to Dispute Resolution in Africa. It is intended to provide a concise overview of issues relating to litigation and arbitration in certain key African jurisdictions.

There is always a risk that cross-border business activities will result in a dispute that gives rise to litigation or arbitration in a jurisdiction that at least one party is not familiar with. This guide provides an overview of the differences in dispute resolution proceedings in various African countries.

It covers nine African jurisdictions including the countries in which Bowmans has offices. The answers deal with the law and rules of the relevant jurisdiction.

It has been prepared as a collaboration among lawyers from our offices and best friend firms in various African jurisdictions.

Adam Anderson
Head of Litigation

Our Firm

We help our clients overcome legal complexity and unlock opportunity in Africa.

We have an enviable track record of providing legal services to the highest professional standards in Africa. We work for clients across numerous African jurisdictions on corporate, finance, competition, taxation, employment, technology and dispute resolution matters.

With eight offices in six African countries and over 400 specialist lawyers, we draw on our unique knowledge of the business and socio-political environment to advise clients on a wide range of legal issues.

Everywhere we work, we offer clients a service that uniquely blends expertise in the law, knowledge of the local market, and an understanding of their businesses. Our aim is to assist clients to achieve their objectives as smoothly and efficiently as possible while minimising the legal and regulatory risks.

Our clients include domestic and foreign corporates, multinationals, funds and financial institutions, across almost all sectors of the economy, as well as state-owned enterprises and governments.

Our expertise is frequently recognised by independent research organisations. Most recently, we won three IFLR Africa Awards (2021) including National Firm of the Year for South Africa and for Zambia. At the 2021 Africa Legal Awards, we won five practice awards, more than any other law firm. In the 2020 Dealmakers East Africa Awards we ranked first for number of M&A transactions among which was the East Africa Deal of the Year. In 2020, Mergermarket identified us as the number one legal adviser in Africa by number of completed deals.
Our Presence in Africa

Recognising the size and enormous diversity of Africa, our approach to providing legal services across the continent is intended to offer on-the-ground advice in the countries that matter for our clients. Our presence in Africa is always evolving to meet the changes that are shaping the future of this vast continent.

Currently, we have our own offices in six African countries: Kenya (Nairobi), Mauritius (Moka), South Africa (Cape Town, Durban, Johannesburg), Tanzania (Dar es Salaam), Uganda (Kampala) and Zambia (Lusaka).

We work closely with our Bowmans Alliance firms in Ethiopia (Aman Assefa & Associates Law Office) and Nigeria (Udo Udoma & Belo-Osagie). These are two of the leading corporate and commercial law firms in their jurisdictions.

We have special relationships with competent practitioners in Malawi and Mozambique. We also have a non-exclusive co-operation agreement with French international law firm Gide Loyrette Nouel that provides our clients access to assistance in francophone west and north Africa and Gide. The arrangement provides complementary access for Gide’s clients and lawyers to markets in central, southern and eastern Africa.

We ensure that, whenever our clients need legal advice in other parts of Africa, we can assist them by tapping into our comprehensive database of contacts of the best firms and practitioners across the continent.

On the global front, Bowmans has long-standing and excellent relationships with a range of international law firms with whom we often work on Africa-focused client mandates. We are also a member firm of Lex Mundi, a global association of more than 160 independent law firms in all the major centres across the globe. Lex Mundi gives us the ability to connect our clients with the best law firms in each of the countries represented.

Our Litigation Practice

Our Litigation Practice specialises in commercial disputes and has extensive knowledge of disputes in the following areas of law:

- Banking
- Business rescue
- Commercial
- Contract
- Constitutional
- Construction
- Corporate
- Corporate recovery
- Forensic and white collar crime
- Insolvency
- Insurance
- Medico-legal
- Regulatory
- Risk assessment
- Property
- Tax

We are able to offer a broad scope of legal services to support our dispute resolution and arbitration lawyers in proceedings across Africa.
1. What is the structure of the legal profession?

The Botswana legal system comprises a split bar of attorneys (akin to UK solicitors) and advocates (akin to UK barristers). Our system evolved from the model used in South Africa, but over time it has crystallised into a practice of no local advocates being extant. Attorneys have right of appearance to the highest court in the land and do so appear regularly.

South African admitted advocates may be admitted on an ad hoc basis to appear in Botswana courts and they do so appear, in particular in matters which are seen to be of a certain magnitude.

2. What methods of dispute resolution are available to settle commercial disputes?

The High Court of Botswana is the primary forum for adjudicating large commercial disputes. Disputes with commercial values lower than the threshold of BWP 40 thousand are dealt with in the Magistrates’ Courts.

Botswana has recently seen the inception of the Small Claims Court, which is open to natural persons with disputes not in excess of BWP 10 thousand. The proceedings in these courts are mostly adversarial.

Alternative dispute mechanisms in the way of arbitration, adjudication and mediation are also available in Botswana.

3. Are there any restrictions on the role of foreign lawyers in litigation proceedings?

Foreign attorneys are not able to conduct cases in Botswana, unless they are enrolled to practise in accordance with the Legal Practitioners’ Act. However, foreign advocates in litigation proceedings may apply to the court by petition in writing to be admitted and enrolled.

4. What is the time period within which a civil claim must be brought?

The Prescriptions Act details the time periods within which civil claims can be rendered unenforceable by lapse of time. This Act stipulates the following prescription periods:

- one year for claims for defamation;
- three years for claims founded on oral contracts, claims for remuneration due in connection with services rendered and rentals due upon contract;
- six years for claims founded on written contracts; and
- 30 years for claims founded on mortgage bonds.

5. What is the legal fee structure?

Where there is no fixed rate for services, the High Court Rules (Rules) provide a tariff for time taken.

Rates may vary depending on the agreement made between the client and attorney. What is important to note is that there is a disparity between costs claimable on a party-and-party scale as provided for in the Rules, and the commercial reality of attorney and own client fees, which often are well in excess of the statutory rate. This dictates that litigants’ recoveries of fees are between 50% and 60% of their actual expenditure in taxation.

6. Is it possible for litigation to be funded by a third party? Can lawyers claim contingency fees?

It is possible for litigation to be funded by a third party, though the Rules only envisage the cost implications parties before court stand to incur. Third party funding is therefore an issue of contract between the third party and the litigant.

Botswana does not have the necessary legal framework for contingency fees.
THE COURT SYSTEM

1. What is the structure of the court system?

The superior court in Botswana is the Court of Appeal, followed by the High Court, which stands superior to the Magistrates’ Court. The High Court is a court of first instance, though it hears appeals from lower courts (example the Magistrates’ Court) and tribunals (example the Land Tribunal) as well as reviews of the decisions of the same.

Matters that require specialised knowledge are relegated to special tribunals, for example, the Workman’s Compensation Commissioner, Income Tax Appeals Committee and the Industrial Court.

Botswana has a dual system of law, a Customary Court system co-exists with the Common Law system. Customary Courts deal with all tribal matters and have their own hierarchy, though appeals lie with the Magistrates’ Court, the High Court and the Court of Appeal.

2. Are certain types of disputes allocated to a particular court?

Yes. Matters that require specialised knowledge are relegated to special tribunals, for example, the Workman’s Compensation Commissioner, Income Tax Appeals Committee and the Industrial Court.

3. Are lower courts bound by the decisions of higher courts?

Yes.

4. What are the different types of civil proceedings in court available to enforce a claim?

There are two types of civil proceedings available to enforce a claim:

- **action proceedings**: commence with the service of a writ of summons, following further exchanges of documents until the matter comes to trial, where oral evidence is heard by the court. In trial action the parties are called ‘plaintiff’ and ‘defendant’.

- **motion proceedings**: commence with the service of a notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief. In instances of motion proceedings the matter does not go for trial and oral evidence is not heard. The potential of material disputes of fact that cannot be resolved on paper, without reference to oral evidence, is the primary factor that determines the choice of whether to proceed in action or on motion.

5. Are court proceedings and court documents confidential?

No. Court proceedings are not confidential as they are held in public, unless the presiding judge has reason to hold the proceedings in camera.

Court documents in respect of finalised litigious matters are public record. However, court documents in respect of ongoing proceedings are only available to the parties with personal interest in the litigation, which determination is within the complete authority of the registrar.

6. Are there any pre-trial proceedings prescribed by the rules of court?

Yes, in Botswana there has been a departure from the traditional structure of Rules in Roman-Dutch jurisdictions with the introduction of the judicial case management of litigation.

Judicial case management is a system in which judges direct conduct of litigation. There is a series of pre-trial processes involving several meetings between parties and their counsel, with Status Hearings before court at which appropriate directions are handed down for future conduct of matters.

The judicial case management system has serious implications as failure to participate in these proceedings can result in adverse orders. In addition, once the High Court hands down a final pre-trial order, which is the penultimate hearing to the actual trial of a matter, such order cannot be unless a party is able to prove manifest injustice.

7. What is the role of a judge in civil proceedings?

Judges in Botswana play many roles. They have all the traditional duties accorded to judicial officers, in that they interpret the law, assess evidence presented and control how hearings and trials unfold.

Judges remain above the fray of litigation, and provide an independent and impartial assessment of the facts and how the law applies to facts in issue.

Judges in Botswana are the primary drivers of litigation, making the judiciary managers of all aspects of pre-trial processes.

8. What documents are parties required to disclose?

A party is obliged to make a full and prompt disclosure of all documents currently or previously in its possession or in the possession of an agent, that are relevant to the issues of the case except for privileged documents.

9. Are any documents regarded as privileged?

Communications and documentation exchanged as between a lawyer and a client are privileged.

10. How is evidence presented?

In trial proceedings, evidence is presented through the testimony of witnesses, unless a Summary of Evidence delivered in the pre-trial process has been admitted by a party. In motion proceedings, parties present their evidence in the affidavits filed with the court.

11. Are interim remedies available to a party before or during civil court proceedings?

Yes. It is open to a party to secure interim remedies through appropriate interlocutory applications before and/or during civil proceedings.

12. How is a court order enforced?

A court order is generally enforced through the deputy sheriff in the event that a party refuses to abide by the order. Contempt proceedings are also available to litigants in appropriate circumstances where a recalcitrant party leaves the counterparty no choice but to seek the High Court’s intervention.

13. What is the estimated duration of court proceedings?

The duration of court proceedings cannot be estimated. Duration is based on several factors: the efficiency, diary and availability of the presiding judge and the counterparty, as well as the complexity of the case.

14. Does a court have the power to award costs?

Yes. Costs usually follow the event of judgment in Botswana, save in exceptional cases where the court makes no order as to costs.

15. Are foreign claimants required to provide security for costs?

Foreign litigants are not required to provide security for costs, though the Rules allow an incola desiring to demand security for costs to pursue the same.

16. Is it possible to recover legal fees?

Yes. In the absence of a suitable tender for costs, a party that has been awarded costs by the court can recover legal fees by preparing and taking a Bill of Costs.

17. On what grounds can parties appeal or review an order granted by a court?

A party who is not satisfied with the final decision of a court of first instance may appeal against such decision to a higher court. On the other hand, a party not satisfied with the decision-making process used to arrive at a conclusion, may in appropriate circumstances seek to have such decision reviewed.
18. Do procedures exist for the recognition and enforcement of foreign judgments or arbitral awards?

Yes. The enforcement of foreign judgments in Botswana is provided for under the Judgments (International Enforcement) Act. Where a party has obtained a final and conclusive judgment in their home jurisdiction, such judgment is enforceable in Botswana provided that its country of origin has been recognised by the President of Botswana in a published order as a country whose foreign judgments may be enforced by our courts once duly registered. In order to effect enforcement an application must be brought in our High Court to have the foreign judgment made an order of our court.

ALTERNATIVE DISPUTE RESOLUTION

1. What are the main alternative dispute resolution methods available to resolve disputes?

Arbitration, mediation, and adjudication.

2. Are parties to commercial litigation required to submit to alternative dispute resolution proceedings?

Unless bound by a contract containing a clause requiring parties to the contract to submit themselves to alternative dispute resolution, parties to commercial litigation are not required to submit to alternative dispute resolution proceedings.

3. How costs are dealt with in alternative dispute resolution proceedings?

In the absence of specific agreements to the contrary, costs in alternative dispute resolution proceedings usually follow the event.

4. Are alternative dispute resolution proceedings confidential?

Yes. Unless parties otherwise agree, the proceedings and any awards published therein are confidential to the extent that disclosure may be required in order to protect or pursue a legal right or to enforce or challenge an award in any legal proceedings.

5. What are the main bodies that offer and conduct alternative dispute resolution proceedings? Are parties obliged to use these bodies for alternative dispute resolution proceedings?

The Botswana Institute of Arbitrators is one of the main bodies that offers and conducts alternative dispute resolution proceedings; although parties are not obligated to use this or other bodies unless they have agreed to do so by contract.

ARBITRATION

1. What is the estimated duration of arbitration proceedings?

The duration of arbitration proceedings cannot be estimated, as duration is based on several factors: the efficiency, diary and availability of the arbitrator and the counterparty, as well as the complexity of the case.

2. Can a court intervene in arbitration proceedings?

Yes. In appropriate circumstances, it is open to a party to arbitration proceedings to seek injunctive relief from a court. In addition, the court may at any time, upon motion, remove an arbitrator against whom a ground for recusal is found to exist, or who has misconducted the proceedings in connection with an arbitration.

3. Does an arbitrator have the power to grant interim relief?

The arbitrator’s power to grant interim relief depends on the rules agreed by the parties that determine conduct of the arbitration proceedings.

4. What documents are parties required to disclose?

Despite the agreed rules, parties are generally required to disclose all documents that are not privileged that shall assist in determination of the matter in dispute.

5. Are any documents regarded as privileged?

Exchanges as between attorney and client are privileged.

6. How is evidence presented?

Generally, any documents delivered with parties’ submissions are admitted into evidence without the necessity for their identification or verification by any witness, although any party will be entitled to lead evidence on origin, accuracy, meaning and relevance of the same. Any party may apply to the arbitrator, or the arbitrator may at his/ her own instance direct the parties to discover documents and other material relating to any matter in question in the arbitration, which is in the possession and control of such party.

7. How is an arbitration award enforced?

An award on a submission may, by leave of the High Court, be enforced in the same manner as a judgment or order to the same effect, and where leave is given, judgment may be entered in terms of the award.

8. Is it possible to appeal an arbitration award?

Yes. However, the parties must in a signed written agreement provide that the award shall be subject to appeal. The absence of such agreement shall mean that an award cannot be appealed.

9. Can foreign judgments or arbitral awards be recognised and enforced by way of arbitration proceedings?

Yes, the Recognition and Enforcement of Foreign Arbitral Awards Act regulates the recognition and enforcement of arbitral awards in Botswana. In addition, a foreign award may be enforced in terms of the Judgments (International Enforcement) Act.

A foreign award can be recognised and enforced in Botswana, provided that the country in which the award was made is a designated country by the President after being satisfied that, ‘substantial reciprocity of treatment’ is extended to the judgements of the High Court of Botswana in that country, and that the award has been registered with the High Court.

10. Are foreign claimants required to provide security for costs?

Unless parties agree to the contrary, generally the arbitrator may on application of a defendant in convention or in reconvention, order a claimant in convention or in reconvention to provide appropriate security for costs (including additional security) and may in fact stay the arbitration proceedings pending compliance with such order.

REFORM

1. Is there likely to be any future reform of the court system or alternative dispute resolution system?

Reform in the court system or alternative dispute resolution system is not likely. The Legislature will pass instruments that amend aspects of the Rules and the Arbitration Act, but the substance of the system is likely to remain unchanged in the near future.
Democratic Republic of Congo

DISPUTE RESOLUTION

1. What is the structure of the legal profession?

Lawyers are called ‘Avocats’ in the Democratic Republic of Congo (DRC). They have the right to assist and represent their clients and also plead on their behalf before the courts of the country. Furthermore, Avocats are entitled to act outside DRC’s courts. For example, they can provide legal advice to their clients.

Judicial defenders (défenseurs judiciaires) are court officers who can assist and represent parties as well as plead on their behalf before Peace Tribunals and County Courts (TGI). Avocats or civil servants can represent the State. The latter are called ‘mandataires de l’Etat’.

2. What methods of dispute resolution are available to settle commercial disputes?

Commercial Tribunals can settle commercial disputes in DRC. Conciliation-mediation and arbitration are also available to settle commercial disputes.

3. Are there any restrictions on the role of foreign lawyers in litigation proceedings?

In principle, only Congolese Avocats are allowed to intervene in litigation proceedings in DRC. However, foreign lawyers can also intervene in the two following cases:

• an international convention entered into between their country of origin and DRC allows them to act as Avocats in DRC; and

• in reciprocation for Congolese Avocats: being allowed to intervene in litigation proceedings abroad (example if Congolese Avocats are allowed to intervene in litigation proceedings in France, French lawyers will be authorised to intervene in litigation proceedings happening in DRC).

4. What is the time period within which a civil claim must be brought?

In principle, a civil claim must be brought within a period of 30 years. In some specific cases, this time period is shorter (example a worker wishing to recover his/ her salary must bring a claim within a period of one year).

5. What is the legal fee structure?

Once an Avocat agrees to handle a case, his/ her client has to pay him/ her a retaining fee (provision), which cannot be less than 20% of the amount of the Avocat’s fees.

For extra-judicial interventions there is a minimum as well as a maximum amount of money that must be paid to the Avocats. Thus, the legal fees can vary on a case-by-case basis, as long as they are within the abovementioned range. Extra-judicial interventions include, inter alia, consultations, conciliations and drafting wills.

Avocats are paid in the same way when it comes to judicial interventions (example pleading on behalf of their clients before the courts). However, there is a slight difference because from time to time, their legal fees can be increased by a percentage of a certain amount of money (example in case of review of a judgment handed down by a Peace Tribunal, an Avocat will receive a percentage of the amount of money awarded to his/ her client). Furthermore, if a case involves recovering money, Avocats will be paid with a percentage of the amount of the recovered money.

An Avocat and his/ her client can also enter into a subscription contract, which contains a minimum as well as a maximum amount of money that must be paid, on a monthly basis, to the Avocat. The said amount of money varies on a case-by-case basis (depending on whether the client is an individual or a company), but it must be within the range of the abovementioned minimal and maximal monthly legal fees.

Contingency fees are forbidden in DRC.
6. Is it possible for litigation to be funded by a third party? Can lawyers claim contingency fees?

Yes. Litigation can be funded by a third party. Avocats cannot claim contingency fees.

THE COURT SYSTEM

1. What is the structure of the court system?

The court system in DRC has the following structure:

- at the bottom of the court system are Peace Tribunals, Military Tribunals, County Courts (commonly referred to as TGI), Commercial Tribunals and Labour Tribunals;
- the second degree of the court system in DRC is made up of Courts of Appeal and Military Courts. There can be one or more Courts of Appeal in each province and in Kinshasa. Decisions rendered by County Courts, Commercial Tribunals and Labour Tribunals can be contested before the Courts of Appeal; and
- the highest courts in DRC are the Military High Court and the Court of Cassation. The Court of Cassation is located in the capital of DRC. It has jurisdiction over the entire territory of the country. Civil and Military Tribunals and courts are under the control of the Court of Cassation.

2. Are certain types of disputes allocated to a particular court?

Yes. For example, Commercial Tribunals have jurisdiction over the following matters (this is not an exhaustive list):

- disputes between merchants relating to their commitments and transactions;
- disputes between individuals relating to acts of merchant;
- disputes between shareholders; and
- insolvency matters.

3. Are lower courts bound by the decisions of higher courts?

Yes. Lower courts are bound by the decisions of higher courts.

4. What are the different types of civil proceedings in court available to enforce a claim?

There are two types of civil proceedings in court to enforce a claim. A party can ask for a judgment on the merits or, in case of an emergency, ask for a summary judgment also called ‘procédure de référé’.

5. Are court proceedings and court documents confidential?

In principle, court proceedings are held in public. However, if such proceedings are deemed to be dangerous, confidential proceedings will take place. Court documents are always confidential.

6. Are there any pre-trial proceedings prescribed by the rules of court?

No.

7. What is the role of a judge in civil proceedings?

The role of a judge in civil proceedings is to settle disputes between the parties generally, and specifically to settle disputes

- arising from wedding, divorce, death, or difficulty relating to a child’s education;
- relating to ownership issues, debts not recovered, and breach of a contract; and
- arising from labour relationships.

8. What documents are parties required to disclose?

Parties are required to disclose all documents currently or previously in their possession, that are relevant to the case. A party is required to make a spontaneous disclosure of the documents required. If a party fails to comply with a request for disclosure, the applicant may apply to court to compel disclosure. The court may order a penalty.

9. Are any documents regarded as privileged?

The civil procedure code does not provide a list of documents regarded as privileged, but in practice, the communications between an Avocat and his/her client are strictly privileged. An in-house Avocat’s legal advice to his/her company would be regarded as privileged. Documents prepared in contemplation of, or in preparation for, litigation are also privileged.

10. How is evidence presented?

Evidence can be presented in writing or orally. However, for civil matters, evidence must be in writing. It is worth noting, though, that the judge could order an inquiry measure, if required, for the disclosure of evidence.

11. Are interim remedies available to a party before or during civil court proceedings?

Yes. Interim remedies such as a protective seizure of assets and freezing of bank accounts are available to a party before or during civil court proceedings. Protective seizure is also used in case of emergency or if the enforcement of the claim may be endangered or imperilled. Furthermore, the aim of interim remedies is to prevent

- the risk of the defendant dissipating monetary assets; or
- the destruction of evidence.

The party seeking interim remedies must lodge a formal request with the court president.

12. How is a court order enforced?

A court order always mentions that the judgment is enforced and implemented by the bailiff with the assistance of the police force if required.

13. What is the estimated duration of court proceedings?

The estimated duration of court proceedings varies on a case-by-case basis.

14. Does a court have the power to award costs?

Yes. The judgment rendered by the tribunal contains damages asked by the claimant. However, before the inscription of the case at the court, the claimant must deposit a sufficient fund to pay the court costs. A judgment contains fees and costs (which represent court costs). It is worth noting that the losing party must pay the fees and costs of the proceedings.

15. Are foreign claimants required to provide security for costs?

Yes. Foreign claimants are required to provide security for costs, unless otherwise provided by a treaty.

16. Is it possible to recover legal fees?

Yes. The fee that is recoverable will be set out in the judgment.

17. On what grounds can parties appeal or review an order granted by a court?

In principle, if the Claimant or the defendant is not satisfied with the judgment rendered by the court of first instance, each one can lodge an appeal against the judgment. If one of the parties is not satisfied with the Court of Appeal’s decision, each one is entitled to contest the said decision before the Supreme Court.

18. Do procedures exist for the recognition and enforcement of foreign judgments or arbitral awards?

It is necessary to request an exequatur of a foreign judgment or a foreign arbitral award, in order for foreign judgments to be enforceable in DRC.

ALTERNATIVE DISPUTE RESOLUTION

1. What are the main alternative dispute resolution methods available to resolve disputes?

The following types of alternative dispute resolution are available in DRC:

- Mediation/ Conciliation: this mechanism consists of amicably seeking a solution to a dispute with the assistance of a conciliator/ mediator chosen by the parties who acts as a neutral third party. The solution brought by the mediator/ conciliator is not binding on the parties. The proceeding ends by the signing of an agreement between the parties providing the solution of the dispute or by the drafting of a non-conciliation minutes (procès-verbal de non-conciliation).
• Arbitration: this is a private process for the resolution of a dispute, in which parties choose one third party or more (ie arbitrator/s) to help them examine and solve their dispute. Arbitration provisions are inserted in contracts by way of an arbitration clause (clause compromissoire) or a separate agreement (convention d’arbitrage) concluded between the parties. The said dispute ends upon the pronunciation of a decision (ie arbitral award) by the arbitrator. That decision is binding on the parties.

Arbitration and conciliation-mediation are voluntary proceedings, which offer to the parties the opportunity to settle their dispute without going through court as these mechanisms are quick, effective and cost-efficient.

2. Are parties to commercial litigation required to submit to alternative dispute resolution proceedings?

No. Parties are not required to submit to alternative dispute resolution proceedings because it depends on the will of the parties.

3. How are costs dealt with in alternative dispute resolution proceedings?

Costs include honorary fees of the arbitrator/ conciliator/ mediator and administrative fees of the Centre National d'Arbitrage, de Conciliation et de Médiation (CENACOM). These costs are determined upon submission of the dossier at CENACOM. Additional costs may be involved during the proceeding such as honorary fees of experts appointed by the arbitrator/ conciliator/ mediator. In practice, these costs depend on the amount at stake in the dispute and the complexity of the case.

4. Are alternative dispute resolution proceedings confidential?

Alternative dispute resolution proceedings are confidential.

5. What are the main bodies that offer and conduct alternative dispute resolution proceedings? Are parties obliged to use these bodies for alternative dispute resolution proceedings?

CENACOM is the main body that offers and conducts alternative dispute resolution in DRC. Parties are not obliged to use CENACOM for alternative resolution proceedings.

**ARBITRATION**

1. What is the estimated duration of arbitration proceedings?

The duration of arbitration proceedings varies on a case-by-case basis but takes less time than court proceedings. The arbitrator’s authority is fixed in the arbitration agreement and cannot exceed six months from the date of the appointment of the last arbitrator. However, the period can be extended either by parties’ consent or upon one party’s request.

2. Can a court intervene in arbitration proceedings?

A court will declare its incompetence to settle a dispute in arbitration proceedings. It can only intervene in arbitration proceedings by virtue of a party’s request to obtain an interim relief or protective measure in case of motivated and justified emergency. This is on the condition that these measures do not involve examination of the merits of the dispute, as only the arbitral tribunal is competent to do this.

The arbitral tribunal is also entitled to request the assistance of the local judge in the event that such assistance is required for the management of evidences.

3. Does an arbitrator have the power to grant interim relief?

No. Only the court has the power to grant interim relief.

4. What documents are parties required to disclose?

The arbitral tribunal can request from the parties, explanations, argumentation and evidences it deems necessary for the settlement of the dispute. The documentation includes, inter alia statements and expert reports.

5. Are any documents regarded as privileged?

No. There are no documents regarded as privileged. All documents that the arbitral tribunal may rely on in order to render a decision must be communicated.

6. How is evidence presented?

Parties are free to agree on the procedure to be followed by the arbitral tribunal. Failing such agreement, the arbitral tribunal may conduct the arbitration as it considers appropriate. The arbitral tribunal has the power to determine the admissibility, relevance and the significance of any evidence presented.

The claimant, in support of his/ her request, shall state the evidence, the matters in dispute and findings. The defendant must submit his/ her defence in respect of these matters.

7. How is an arbitration award enforced?

An arbitration award is enforced by virtue of an exequatur granted by the president of the competent court in DRC.

8. Is it possible to appeal an arbitration award?

No. An arbitration award is not subject to an appeal. However, it is subject only to an action for cancellation. The action for cancellation is admissible only:

• if the arbitral tribunal was irregularly constituted;
• if the arbitral tribunal ruled without complying with the mission entrusted to it;
• if the adversarial principle has not been respected; and
• in the event of breach of the international public order.

The action for cancellation is open from the issuance of the arbitral award and remains valid within one month upon the affixation of the exequatur to the arbitral award.

9. Can foreign judgments or arbitral awards be recognised and enforced by way of arbitration proceedings?

No. Foreign judgements and arbitration awards can be recognised and enforced only by virtue of an exequatur granted by the president of the competent court in DRC.

10. Are foreign claimants required to provide security for costs?

It depends on the clause of payment inserted by the parties in the arbitration agreement.

**REFORM**

1. Is there likely to be any future reform of the court system or alternative dispute resolution system?

No.
**Guinea**

**DISPUTE RESOLUTION**

1. **What is the structure of the legal profession?**

   In Guinea, attorneys called ‘Avocats’ (similar to barristers) are the only legal practitioners entitled to plead before Guinean courts. Avocats can accept work directly from the public. There is also a mandatory nomination of Avocats called ‘commission d’office’ in specific cases such as in a criminal case involving a defendant that is destitute.

2. **What methods of dispute resolution are available to settle commercial disputes?**

   Tribunals of first instance can settle commercial disputes. They have jurisdiction over commercial matters. Conciliation, mediation and arbitration are also available to settle commercial disputes.

3. **Are there any restrictions on the role of foreign lawyers in litigation proceedings?**

   Yes. Avocats called to the (Guinean) bar are the only ones allowed to practice as Avocats in Guinea. As a consequence, in principle, foreign lawyers do not have the right to intervene in litigation proceedings in Guinea.

   However, foreign lawyers may intervene in litigation proceedings in Guinea if an international convention entered into between their country of origin and Guinea allows it.

4. **What is the time period within which a civil claim must be brought?**

   In principle, a claim must be brought within 30 years. However, this period varies depending on the nature of the person involved (for example, workers must bring their claims relating to the payment of their salaries within one year).

5. **What is the legal fee structure?**

   The Avocat’s fees are negotiated between the Avocat and his/her client. Avocats generally charge their client on a rate per day basis or on a rate per hour basis. They may also charge a fixed amount for a file.

   Contingency fees are forbidden in Guinea.

6. **Is it possible for litigation to be funded by a third party? Can lawyers claim contingency fees?**

   Litigation can be funded by a third party. Avocats are not allowed to claim contingency fees.

**THE COURT SYSTEM**

1. **What is the structure of the court system?**

   At the bottom of the Guinean court system structure are the tribunals of first instance. They have jurisdiction over civil, administrative, commercial, social and criminal matters. The second degree of the Guinean court system is made up of Courts of Appeal. Decisions rendered by the tribunals of first instance can be brought before the Courts of Appeal and the highest court in Guinea is called the Supreme Court.

   Apart from the above courts, Guinea’s court system also has specialised courts, notably the Court of Auditors and the Military Tribunal.

2. **Are certain types of disputes allocated to a particular court?**

   Yes. For example, commercial sections of the tribunals of first instance have jurisdiction over commercial disputes. Military disputes are allocated to the Military Tribunal.
3. Are lower courts bound by the decisions of higher courts?

Yes.

4. What are the different types of civil proceedings in court available to enforce a claim?

There are two types of civil proceedings in court to enforce a claim. A party can ask for a judgment on the merits or ask for a summary judgment also known in French as ‘ordonnance de référé’.

5. Are court proceedings and court documents confidential?

In principle, court proceedings are held in public unless otherwise provided by law. The judge may decide that the court proceedings should be confidential in circumstances where, if the court proceedings were held in public, it would violate private life and if something may trouble the serenity of justice.

Court documents are confidential. However, if a party to litigation uses a document to bolster its claim, the said party must communicate the document to the other party/parties.

6. Are there any pre-trial proceedings prescribed by the rules of court?

No.

7. What is the role of a judge in civil proceedings?

The roles of a judge in civil proceedings are settling:

- disputes between the parties;
- family disputes arising from wedding, divorce, death, or difficulty relating to a child’s education;
- disputes relating to ownership issues, debts not recovered, and breach of a contract; and
- disputes arising from labour relationships.

8. What documents are parties required to disclose?

Parties are required to disclose all documents currently or previously in their possession that are relevant to the case. A party is required to make a spontaneous disclosure of the documents required. If a party fails to comply with a request for disclosure, the applicant may apply to court to compel disclosure. The court may order a penalty payment.

9. Are any documents regarded as privileged?

The Guinean law does not provide a list of documents regarded as privileged, but in practice, the communications between an Avocat and his/her client are strictly privileged. An in-house Avocat’s legal advice to his/her company is regarded as privileged. Documents prepared in contemplation of or in preparation for litigation are also privileged.

10. How is evidence presented?

Evidence can be presented in writing or orally. However, for civil matters, evidence must be in writing. Please note that the judge could order a necessary measure of inquiry for the disclosure of evidence.

11. Are interim remedies available to a party before or during civil court proceedings?

Yes. Interim remedies, such as a protective seizure of assets and freezing of bank accounts, are available to a party before or during civil court proceedings. Protective seizure is also used in case of emergency or if the enforcement of the claim may be endangered or imperilled.

The aim of interim remedies is to prevent the risk of the defendant dissipating monetary assets or the destruction of evidence.

The party seeking the interim remedies must lodge a formal request with the court president.

12. How is a court order enforced?

A court order always mentions that the judgment is enforced and implemented by the bailiff with the assistance of the police force if required.

Enforcement of judgments may not be made before 6:00 am and after 12:00 noon, during Sundays, official holidays or non-working days.

13. What is the estimated duration of court proceedings?

The estimated duration of court proceedings varies on a case-by-case basis.

14. Does a court have the power to award costs?

Yes. The judgment rendered by the tribunal contains damages asked by the claimant. However, before the inscription of the case, the claimant must deposit sufficient funds to pay the court costs.

A judgment contains fees and costs (which represent court costs). Costs include:

- fees and taxes received by the court’s clerk or the tax agent;
- compensation for technicians (for example expert, translator);
- disbursements; and
- fees of the public and ministerial officials. The unsuccessful party must pay the fees and costs of the proceedings.

15. Are foreign claimants required to provide security for costs?

Yes. Foreign claimants are required to provide security for costs, except if a treaty provides otherwise.

16. Is it possible to recover legal fees?

Yes, legal fees are recoverable from the unsuccessful party and are stipulated in the judgment.

17. On what grounds can parties appeal or review an order granted by a court?

In principle, if the claimant or the defendant is not satisfied with the judgment rendered by the court of first instance, each one can lodge an appeal against the judgment. If one of the parties is not satisfied with the Court of Appeal’s decision, each one will be entitled to contest the said decision before the Supreme Court.

18. Do procedures exist for the recognition and enforcement of foreign judgments or arbitral awards?

It is necessary to request an exequatur of a foreign judgment or a foreign arbitral award in order for foreign judgments to be enforceable in Guinea.

**ALTERNATIVE DISPUTE RESOLUTION**

1. What are the main alternative dispute resolution methods available to resolve disputes?

The following types of alternative dispute resolution are available in Guinea: conciliation, mediation and arbitration. However, arbitration is the most used in Guinea.

Arbitration is a private process for the resolution of a dispute, in which parties choose one third party or more (ie arbitrators) to help them examine and solve their dispute. Arbitration provisions are inserted in contracts by way of an arbitration clause (clauses compromissaire) or a separate agreement (compromis) concluded between the parties. The said dispute ends upon the pronouncement of a decision by the arbitrators. That decision is binding between the parties.

Arbitration provides an opportunity for parties to settle their dispute without going through court as this mechanism is quick, flexible, confidential and cost-efficient.
2. Are parties to commercial litigation required to submit to alternative dispute resolution proceedings?

No. Parties are not required to submit to alternative dispute resolution proceedings because it depends on the will of the parties.

3. How are costs dealt with in alternative dispute resolution proceedings?

In practice, the parties pay for their own costs. However, the arbitrator can also decide to allocate the payment of the fees between the parties or only to one party.

4. Are alternative dispute resolution proceedings confidential?

Alternative dispute resolution proceedings are confidential.

5. What are the main bodies that offer and conduct alternative dispute resolution proceedings? Are parties obliged to use these bodies for alternative dispute resolution proceedings?

The Chambre d’Arbitrage de Guinée (CAG) is the main body that offers and conducts alternative dispute resolution in Guinea Conakry. Parties are not obliged to use CAG for alternative dispute resolution proceedings.

**ARBITRATION**

1. What is the estimated duration of arbitration proceedings?

The duration of arbitration proceedings varies on a case-by-case basis but takes less time than court proceedings. However, it is worth noting that the arbitrator’s mission is fixed in the arbitration agreement. It cannot exceed six months from the date of the appointment of the last arbitrator. However, the period can be extended either by parties’ consent or upon one party’s request.

2. Can a court intervene in arbitration proceedings?

A court will declare its incompetence to settle a dispute in arbitration proceedings. It can only intervene in arbitration proceedings by virtue of a party’s request to obtain an interim relief or protective measure in case of motivated and justified emergency. This is on the condition that these measures do not involve examination of the merits of the dispute, as only the Arbitral Tribunal is competent to do this.

The arbitral tribunal is also entitled to request the assistance of the local judge in the event that such assistance is required for the management of evidences.

3. Does an arbitrator have the power to grant interim relief?

No. Only the court has the power to grant interim relief.

4. What documents are parties required to disclose?

The arbitral tribunal can request from the parties, explanations, argumentation and evidences it deems necessary for the settlement of the dispute. The documentation includes inter alia statements and expert reports.

5. Are any documents regarded as privileged?

No. There are no documents regarded as privileged. All documents that the arbitral tribunal may rely on in order to render a decision must be communicated.

6. How is evidence presented?

Parties are free to agree on the procedure to be followed by the arbitral tribunal. Failing such agreement, the arbitral tribunal may conduct the arbitration as it considers appropriate. The arbitral tribunal has the power to determine the admissibility, relevance and the significance of any evidence presented.

The claimant, in support of his/ her request, shall state the evidence, the matters in dispute and findings. The defendant must submit his/ her defence in respect of these matters.

7. How is an arbitration award enforced?

An arbitration award is enforced by virtue of an exequatur granted by the competent Court of Appeal in Guinea. The arbitral award has res judicata in Guinean territory if it satisfies the following conditions:

- the decision is enforceable; and
- the decision is not contrary to public policy in Guinea.

8. Is it possible to appeal an arbitration award?

No. An arbitration award is not subject to an appeal. However, it is subject only to an action for cancellation. The action for cancellation is admissible only:

- if the arbitral tribunal has ruled without an arbitration agreement or under a void or expired agreement;
- if the arbitral tribunal was irregularly constituted;
- if the arbitral tribunal ruled without complying with the mission entrusted to it;
- if the adversarial principle has not been respected; and
- in the event of breach of the international public order.

The action for cancellation is open from the issuance of the arbitral award and remains valid within one month upon the affixation of the exequatur to the arbitral award.

9. Can foreign judgments or arbitral awards be recognised and enforced by way of arbitration proceedings?

No. Foreign judgements and arbitration awards can be recognised and enforced only by virtue of an exequatur granted by the competent Court of Appeal in Guinea.

10. Are foreign claimants required to provide security for costs?

It depends on the clause of payment inserted by the parties in the arbitration agreement.

**REFORM**

1. Is there likely to be any future reform of the court system or alternative dispute resolution system?

No.
1. What is the structure of the legal profession?

The legal profession in Kenya is fused. An advocate is entitled to carry out any legal work and appear in any court without limitation (except where a minimum number of years of post-qualification experience is expressly required).

2. What methods of dispute resolution are available to settle commercial disputes?

Litigation is the primary method of settling commercial disputes in Kenya. Other methods in order of priority are (1) negotiation; (2) arbitration; (3) mediation; and (4) conciliation.

3. Are there any restrictions on the role of foreign lawyers in litigation proceedings?

Foreign lawyers are not permitted to represent parties and conduct litigation proceedings in Kenya unless they have first qualified to practice as advocates in Kenya and have obtained practising certificates.

However, the Attorney-General may, in his/ her absolute discretion, permit a foreign practitioner to practice as an advocate in Kenya if such person:

- is entitled to appear before the superior courts of a Commonwealth country;
- has come or intends to come to Kenya for the purpose of appearing, acting or advising in a specified suit or matter;
- has been so instructed by the Attorney-General or an advocate; and
- is not disqualified or suspended from acting as an advocate.

A foreign lawyer permitted to practice as an advocate:

- cannot practice until he/ she has paid a prescribed admission fee to the registrar of the High Court;
- is not entitled to practice unless he/ she is instructed by, and if appearing in court appears with, an advocate or an officer entitled to act as an advocate; and
- is not entitled to sign or file any pleadings in court.

4. What is the time period within which a civil claim must be brought?

The Limitation of Actions Act sets the following time periods (from the date on which the cause of action accrued) within which civil claims must be brought:

- three years for an action founded on tort;
- six years for an action based on contract;
- 12 months for actions founded on libel and slander; and
- 12 years for actions for the recovery of land.

In terms of the Employment Act, 2007, an action arising out of an employment contract or the Act itself must be instituted within three years after the act, neglect or default complained. Alternatively, in the case of continuing injury or damage, action must be instituted within 12 months after the cessation thereof.

5. What is the legal fee structure?

The Advocates Remuneration Order contains schedules that prescribe the minimum fees chargeable by an advocate for different types of work. Where advocates and clients do not expressly agree on a different basis for fees, the Advocates Remuneration Order applies.
Advocates and their clients are at liberty to agree on the fee chargeable for legal work carried out. However, the fee charged by an advocate must not be lower than that fixed in the Advocates’ Remuneration Order (as revised and amended from time to time).

6. Is it possible for litigation to be funded by a third party? Can lawyers claim contingency fees?

In Kenya, funding of litigation (ie champerty) and contingency fee arrangements are not lawful.

THE COURT SYSTEM

1. What is the structure of the court system?

The Kenyan court system is divided into superior courts and subordinate courts.

The superior courts comprise the Supreme Court, the Court of Appeal, the High Court, the Employment and Labour Relations Court and the Environmental and Land Court.

The Supreme Court is the highest court in Kenya. The Court of Appeal is the second highest court. The High Court, the Employment and Labour Relations Court and the Environmental and Land Court have the same status and they are the third highest courts in Kenya.

The subordinate courts comprise the Magistrates’ Courts, the Kadhis’ Courts, the Courts Martial and all other courts and tribunals established by any Act of Parliament.

2. Are certain types of disputes allocated to a particular court?

Yes, certain disputes are allocated to specific courts. For example:

• disputes relating to elections to the office of President can only be heard and determined by the Supreme Court;
• appeals from the High Court (where a right of appeal exists or leave to appeal has been granted) can only be heard and determined by the Court of Appeal;
• disputes arising out of an employment contract or an employment relationship can only be heard and determined by the Employment and Labour Relations Court;
• the High Court has supervisory jurisdiction over subordinate courts or any person or body performing quasi-judicial functions (but not over any superior court);
• the jurisdiction of Magistrates’ Courts is limited to specific subject matter values. The maximum pecuniary jurisdiction of certain magistrates and the courts that they preside over is as set out below:
  • chief magistrate – KES 7 million;
  • senior principal magistrate – KES 5 million;
  • principal magistrate – KES 4 million;
  • senior resident magistrate – KES 3 million; and
  • resident magistrate – KES 2 million.

3. Are lower courts bound by the decisions of higher courts?

Yes.

4. What are the different types of civil proceedings in court available to enforce a claim?

• Bankruptcy causes: these are civil proceedings that relate to bankrupt persons and their estates.
• Constitutional petitions: these are civil proceedings that relate to the infringement or threatened infringement of constitutional rights protected under the Constitution of Kenya, 2010.
• Divorce causes: these are civil proceedings that relate to dissolution of marriages, the rights of divorcing or divorced persons as against each other and the division of matrimonial property.
• Industrial/ employment and labour relations causes: these are civil proceedings that relate to the rights and obligations of parties to employment contracts and persons who are deemed to have rights and obligations under Kenyan labour law.
• Interpleader proceedings: these are proceedings commenced by persons holding property that is being claimed by two or more people with interests that are adverse to each other.
• Judicial review cases: these are civil proceedings through which the actions and decisions of subordinate courts and tribunals, administrative bodies and quasi-judicial tribunals may be challenged with a view to getting the High Court to exercise its supervisory jurisdiction. The administrative bodies involved are usually government departments, administrative tribunals and other public bodies set up under Acts of Parliament to carry out specific mandates.
• Ordinary civil cases: these are civil proceedings usually relating to claims under contract or tort. Such proceedings are commonly instituted by way of plaint (or originating summonses in some cases).
• Succession causes: these are civil proceedings that relate to the administration of the estates of deceased persons and the resolution of claims and disputes relating to the estates of deceased persons.
• Winding up causes: these are civil proceedings that relate to the winding up and liquidation of companies incorporated under the Companies Act.

5. Are court proceedings and court documents confidential?

All proceedings in the court are open to the public except in respect of divorce matters and matters where children are involved, where the court may direct that proceedings should be held in camera.

Court documents are public documents and they are invariably available to the public.

6. Are there any pre-trial proceedings prescribed by the rules of court?

Yes, there are pre-trial proceedings prescribed under the Civil Procedure Rules, 2010 (Civil Procedure Rules). These are modified from time to time through practice directions issued by the Chief Justice.

The current pre-trial proceedings in the High Court include the following:
• filing of pre-trial questionnaires;
• case conferences: these are convened within 30 days after the close of pleadings to determine the pertinent issues;

7. What is the role of a judge in civil proceedings?

Court proceedings in Kenya are adversarial in nature. The judge is required to be neutral in the contest unfolding before him/her. The role of the judge is to ensure the trial proceeds according to the procedural rules of trial or due process of law and that evidence entered is done so according to established rules and guidelines. Once the parties have finalised presenting their cases, the judge issues a judgment or an order based on the law and the evidence adduced.

8. What documents are parties required to disclose?

The Civil Procedure Rules require parties to furnish their evidence in advance before the commencement of the trial. These provisions are couched in mandatory terms. A party in a suit is obliged to make a full and prompt disclosure of all documents currently or previously in its possession that are relevant to the issues raised in the case (except legally privileged documents as discussed below).

During a case conference, the court is entitled to consider the parties’ compliance with the requirements on disclosure.

9. Are any documents regarded as privileged?

Certain documents are privileged. Communications between a lawyer and his/her client are strictly privileged. However, there is an exception when it comes to matters of illegal acts.

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 client’s claim. 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, public officers in connection with official information.

10. How is evidence presented?

In Kenyan courts, evidence is predominantly presented through the oral evidence (viva-voce evidence) of witnesses. Documentary evidence may also be produced by witnesses. Witnesses are usually subjected to cross-examination.

However, in interlocutory proceedings evidence is mainly presented to the court by way of affidavits.

11. Are interim remedies available to a party before or during civil court proceedings?

Yes, interim remedies are available to a party before and during civil court proceedings. Such interim remedies include:

- injunctions;
- arrest and/or attachment before judgment;
- appointment of receivers;
- order for a commission; and
- security for costs.

Of the above, injunctions are the most common interlocutory remedies sought by litigants in Kenya.

An interlocutory/ interim/ temporary injunction is limited so as to apply only pending the hearing and determination of the main suit. The injunction is commonly granted as and when it is brought to the court’s attention that the subject matter in question is in imminent danger of destruction or disposal so as to protect the plaintiff’s interest in it.

Such applications may be made and granted ex parte if they are found by the court to be of an urgent nature.

For a party to be entitled to an interlocutory/ interim/ temporary injunction, he or she must satisfy three conditions, that:

- it is a prima facie case with a high probability of success;
- there is irreparable injury that cannot be compensated with damages; and
- the balance of convenience favours the party making an application for interim relief.

12. How is a court order enforced?

The enforcement of court orders and judgments in Kenya is governed the Civil Procedure Rules. A party in whose favour a judgment has been given (ie the decree holder) will be required to extract a decree from the court in order to ensure it is enforced.

The court may on the application of the decree holder, order the execution of an order by:

- delivery of any property decreed against;
- attachment and sale, or sale without attachment;
- attachment of debts;
- arrest and detention in prison of any person;
- appointing a receiver; or
- in such other manner as the nature of the relief may require.

13. What is the estimated duration of court proceedings?

In Kenya, the estimated average duration of court proceedings is three to five years. However, a case could take a shorter or longer period as the factors involved are numerous.

The Civil Procedure Rules have attempted to classify cases in three categories based on the likelihood duration of proceedings (and in one case, based on the value of the subject matter) as follows:

- Small claims: refers to a simple claim, involving not more than two parties and whose monetary value does not exceed KES 49,999. Such claims will likely be concluded within 100 days after the pre-trial directions are given;
- Fast track: refers to a case with undisputed facts and legal issues; relatively few parties; and would likely be concluded within 180 days after the pretrial directions are given; and
- Multi-track: refers to a case with complex facts and legal issues or several parties and which would likely be concluded within 240 days.

The durations referred to above are, in practice, not usually achievable.

14. Does a court have the power to award costs?

Yes, the court has power to award costs at its discretion.

As a general rule, costs will follow the event, meaning that the successful party will be awarded costs. However, the court may, for good reason, refuse to award costs or limit the amount of costs recoverable by the successful party.

15. Are foreign claimants required to provide security for costs?

There is no absolute rule that requires foreign claimants to provide security for costs. However, the court has discretion to order security for costs in appropriate cases where a plaintiff resides outside Kenya or where the defendant does not have sufficient immovable property within Kenya. The purpose of this rule is to provide protection to the defendant where it appears very likely that he/ she will have difficulty realising the costs incurred in litigation.

16. Is it possible to recover legal fees?

Legal fees are only recoverable to the extent of the amount of costs awarded by the court. The recoverable amount is almost always a small fraction of the legal fees actually incurred. If costs are awarded by the court, the amount of costs recoverable by the party to whom the award has been given is usually determined through a process called taxation.

17. On what grounds can parties appeal or review an order granted by a court?

Any person who is aggrieved by an order granted by a court may apply for a review of that order on the following grounds:

- where there is a mistake or error apparent on the face of the record;
- where there has been discovery of a new and important matter or evidence (such a matter or evidence must be one which, after the exercise of due diligence, was not within the person’s knowledge or could not be produced by him/ her at the time when the order was made); and/or
- where there is a sufficient reason.

18. Do procedures exist for the recognition and enforcement of foreign judgments or arbitral awards?

Yes, there are procedures for recognition and enforcement of foreign judgments and arbitral awards.

- Enforcement of foreign judgments: the enforcement of foreign judgments in Kenya is governed by the Foreign Judgments (Reciprocal Enforcement) Act (Foreign Judgments Act).

Under this Act, judgments for a definite sum (reciprocal enforcement) will be recognised and enforced by the High Court of Kenya without re-trial or examination of the merits of the case provided that:

- the applicable decision has been registered to such proceedings have been by way of appeal against the applicable decision, within six years of the date of the applicable decision or where there have been proceedings by way of appeal against the applicable decision, within six years of the date of last judgment or award in the proceedings;
- the court is satisfied that papers relating to such proceedings have been properly served.

Any person who is aggrieved by an order granted by a court may appeal against the order as long as the law expressly permits this. Where the law does not expressly permit the filing of an appeal against such an order, an appeal can only be filed if the court has granted leave to appeal.

Any person who is aggrieved by an order granted by a court may apply for a review of that order on the following grounds:

- where there is a mistake or error apparent on the face of the record;
- where there has been discovery of a new and important matter or evidence (such a matter or evidence must be one which, after the exercise of due diligence, was not within the person’s knowledge or could not be produced by him/ her at the time when the order was made); and/or
- where there is a sufficient reason.
• the court is satisfied that the defendant received notice of such proceedings in sufficient time to enable the defendant to defend the proceedings;
• the applicable decision is not contrary to the public policy of Kenya;
• the applicable decision does not relate to the recovery of any penalty or penalty interest (albeit that amounts may be recoverable to the extent that they do not relate to any penalty or penalty interest); and
• the applicable decision was not obtained by fraud.

The Foreign Judgments Act, however, does not apply to judgments of courts or arbitral awards obtained in any states which have not entered into reciprocal enforcement agreements with Kenya.

• Enforcement of foreign arbitral awards: a foreign arbitral award made in a country that is a contracting state to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards is enforceable in Kenya.

The enforcement process involves filing the arbitral award in the High Court of Kenya and filing an ex parte application under the Arbitration Act for its enforcement.

ALTERNATIVE DISPUTE RESOLUTION

1. What are the main alternative dispute resolution methods available to resolve disputes?

The main alternative dispute resolution methods available in Kenya are:

• Negotiation: this is an informal process and one of the most fundamental methods of conflict resolution, offering parties maximum control over the process. It offers a mutually acceptable solution without the help of a third party and the main focus of negotiations is the common interests of the parties rather than their relative power or position.

2. Are parties to commercial litigation required to submit to alternative dispute resolution proceedings?

There is no mandatory requirement for parties to commercial litigation to submit to alternative dispute resolution 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 alternative dispute resolution mechanisms.

3. How are costs dealt with in alternative dispute resolution proceedings?

In alternative dispute resolution 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 proceedings, 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.

4. Are alternative dispute resolution proceedings confidential?

Yes, alternative dispute resolution proceedings are confidential.

5. What are the main bodies that offer and conduct alternative dispute resolution proceedings? Are parties obliged to use these bodies for alternative dispute resolution proceedings?

The Chartered Institute of Arbitrators, Dispute Resolution Centre and Mediation Training Institute are currently the main bodies that offer alternative dispute resolution in Kenya. Parties are not obliged to use these bodies. They are free to state in their agreements how the alternative dispute resolution proceedings will be carried out and which body will oversee the proceedings. The parties are also free to choose individual qualified arbitrators.

ARBITRATION

1. What is the estimated duration of arbitration proceedings?

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.

2. Can a court intervene in arbitration proceedings?

Yes, 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.

3. Does an arbitrator have the power to grant interim relief?

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

4. What documents are parties required to disclose?

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.

5. Are any documents regarded as privileged?

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 privileged. Such privilege includes the privilege of judges and magistrates and public officers in connection with official information.

6. How is evidence presented?

In arbitration proceedings, evidence may be presented in any manner agreed by the parties. In the absence of an agreement, the arbitral

• the court is satisfied that the defendant received notice of such proceedings in sufficient time to enable the defendant to defend the proceedings;
• the applicable decision is not contrary to the public policy of Kenya;
• the applicable decision does not relate to the recovery of any penalty or penalty interest (albeit that amounts may be recoverable to the extent that they do not relate to any penalty or penalty interest); and
• the applicable decision was not obtained by fraud.

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• 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.

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• 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.

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

4. What documents are parties required to disclose?

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.

5. Are any documents regarded as privileged?

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 privileged. Such privilege includes the privilege of judges and magistrates and public officers in connection with official information.

6. How is evidence presented?

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.

**7. How is an arbitration award enforced?**

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.

**8. Is it possible to appeal an arbitration award?**

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 furnishes 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.

**9. Can foreign judgments or arbitral awards be recognised and enforced by way of arbitration proceedings?**

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

**10. Are foreign claimants required to provide security for costs?**

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**

1. **Is there likely to be any future reform of the court system or alternative dispute resolution system?**

There are no proposed reforms to the court system or the alternative dispute resolution 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.
DISPUTE RESOLUTION

1. What is the structure of the legal profession?

In Madagascar, attorneys called ‘Avocats’ (similar to barristers), are the only legal practitioners entitled to plead before Malagasy courts. Avocats can accept work directly from the public. There is also a mandatory nomination of Avocats called ‘commission d’office’ in specific cases such as in a criminal case involving a defendant that is destitute.

2. What methods of dispute resolution are available to settle commercial disputes?

Commercial courts have jurisdiction over commercial disputes. Commercial disputes can also be settled by arbitration. There are two types of arbitration in Madagascar – local arbitration and international arbitration.

3. Are there any restrictions on the role of foreign lawyers in litigation proceedings?

Only French Avocats are entitled to conduct cases in the Malagasy courts. This is as a result of a cooperation agreement between Madagascar and France.

4. What is the time period within which a civil claim must be brought?

All civil claims must be brought within a period of 30 years.

5. What is the legal fee structure?

Avocat’s fees are negotiated between the Avocat and his/her client.

Avocats generally charge their clients on a rate per day basis or on a rate per hour basis. They may also charge a fixed amount for a file.

Avocats may also charge their clients for each step of the proceedings (for example, a fixed fee for the first instance proceedings, another fixed fee for handling an appeal if any and a fixed fee for the proceedings before the Court of Cassation if any).

6. Is it possible for litigation to be funded by a third party? Can lawyers claim contingency fees?

Litigation can be funded by a third party. Contingency fees are forbidden in Madagascar.

THE COURT SYSTEM

1. What is the structure of the court system?

The Malagasy court system has the following structure:

• at the bottom of the court system are 39 courts of first instance. Among these, there are Commercial Courts and Labour Courts. There are courts of first instance in major areas including Ambatondrazaka, Antsirabe, Antananarivo and Toamasina;

• the second degree of the Malagasy court system is the Court of Appeal. An appeal can be lodged against a decision of any of the courts of first instance. There are six Courts of Appeal in Madagascar which are based in Antananarivo, Diego, Fianarantsoa, Majunga, Tamatave and Tulear; and

• the Court of Cassation is the highest court in Madagascar. It controls the legality of the decisions handed down by the Courts of Appeal and the courts of first instance. It has jurisdiction over the entire territory of Madagascar.
2. Are certain types of disputes allocated to a particular court?

Yes. For example, Commercial Courts have jurisdiction over the following disputes:

- disputes that are the result of an act of merchant;
- disputes involving shareholders in a commercial company;
- insolvency cases; and
- hybrid acts if the said acts have a commercial nature from the defendant’s perspective.

3. Are lower courts bound by the decisions of higher courts?

Decisions rendered by higher courts are binding on the lower courts.

4. What are the different types of civil proceedings in court available to enforce a claim?

There are two types of civil proceedings in court to enforce a claim. A party can ask for a judgment on the merits or, in case of an emergency, ask for a summary judgment also called ‘procédure de référé’.

5. Are court proceedings and court documents confidential?

In principle, court proceedings are held in public. However, if such proceedings are deemed to be dangerous, confidential proceedings will take place. Court documents are always confidential.

6. Are there any pre-trial proceedings prescribed by the rules of court?

No.

7. What is the role of a judge in civil proceedings?

The roles of a judge in civil proceedings are settling:

- litigation between the parties;
- family litigations arising from the wedding, divorce, death, or difficulty relating to a child’s education;
- litigation relating to ownership issues, debts not recovered, and breach of a contract; and
- litigation arising from labour relationships.

8. What documents are parties required to disclose?

Parties are required to disclose all documents currently or previously in their possession, that are relevant to the case. A party is required to make a disclosure within three working days if the communications period is not provided by a judgment.

9. Are any documents regarded as privileged?

Yes, communications between an Avocat and his/ her client are strictly privileged. An in-house Avocat’s legal advice to his/ her company would be regarded as privileged. Documents prepared in contemplation of or in preparation for litigation are also privileged.

10. How is evidence presented?

Evidence can be presented in writing or orally. However, for civil matters, evidence must be in writing.

11. Are interim remedies available to a party before or during civil court proceedings?

Yes, interim remedies such as a protective seizure of assets and freezing accounts, are available to a party before or during civil court proceedings. The aim of interim remedies is to prevent the risk of the defendant dissipating monetary assets or the destruction of evidence.

The party seeking interim remedies must lodge a formal request with the court president.

12. How is a court order enforced?

A court order is enforced and implemented by the bailiff with the assistance of the police force if required.

13. What is the estimated duration of court proceedings?

The estimated duration of court proceedings varies on a case-by-case basis. Typically, the duration of court proceedings is:

- 12 months if the case is in the court of first instance;
- 24 months if the case is in an Appeal Court; and
- four to five years if the case is in a Court of Cassation.

14. Does a court have the power to award costs?

Yes, if the judgment includes damages asked by the claimant. It also contains fees and costs (which represent court costs). The losing party must pay the fees and costs.

15. Are foreign claimants required to provide security for costs?

Yes, if a Malagasy defender requests that the foreign claimants provide security for costs. The security for costs is called ‘cautio judicatum solvi’.

16. Is it possible to recover legal fees?

Yes. The losing party must pay all court costs.

17. On what grounds can parties appeal or review an order granted by a court?

In principle, if the claimant or the defendant is not satisfied with the judgment rendered by the court of first instance, each one can lodge an appeal against the judgment. If one of the parties is not satisfied with the Court of Appeal’s decision, each one is entitled to contest the said decision before the Court of Cassation.

18. Do procedures exist for the recognition and enforcement of foreign judgments or arbitral awards?

For the foreign judgment or arbitral award to be enforceable in Madagascar it is necessary to request an exequatur of a foreign judgment or a foreign arbitral award. The party requesting such an exequatur must make an application at the Appeal Court of Antananarivo.

ALTERNATIVE DISPUTE RESOLUTION

1. What are the main alternative dispute resolution methods available to resolve disputes?

The following types of alternative dispute resolution are available in Madagascar:

- Conciliation: this consists of parties to a dispute amicably seeking a solution to the dispute with the assistance of a conciliator, who is chosen by the parties and acts as a neutral third party. The main duties of a conciliator include hearing the arguments of the parties and suggesting a solution to them. The parties may or may not follow the suggested solution or may amend it.
- Transaction: this is an agreement, which intends to end or prevent a current/ future dispute relating to a breach of a contract. The transaction must be in written form. The existence of the transaction means that the dispute ends and there is no need to bring the case to court.
- Mediation: this is a dispute resolution process through which a third party (a mediator) chosen by the parties helps the parties to find an agreed solution.
- Arbitration: this is a private process for the resolution of a dispute. A dispute is submitted to one or more arbitrators, which are chosen by the parties to render a binding decision on the dispute (ie the arbitral award). Arbitration provisions are inserted in contracts by way of arbitration clauses (clause compromissoire) or separate agreements (compromis) concluded between the parties.

Conciliation and transaction are the most used methods of amicably settling disputes. The processes are flexible, allowing parties to define the time, structure and content of the conciliation proceedings. The also do not involve any costs.

Mediation and arbitration proceedings are mainly used if the dispute involves an international transaction. They are quicker than court proceedings.
2. Are parties to commercial litigation required to submit to alternative dispute resolution proceedings?

No. Parties are not required to submit to alternative dispute resolution proceedings because it depends on the will of the parties.

3. How are costs dealt with in alternative dispute resolution proceedings?

In practice, parties pay for their own costs and of the dispute and the complexity of the case. The fees regarding mediation and arbitration proceedings depend on the quantum of Antananarivo.

3. Does an arbitrator have the power to grant interim relief?

Yes. The arbitrator, appointed by the parties to settle the dispute, has the power at the request of a party to grant an interim measure. The arbitrator will require a party to provide the appropriate fees for this.

4. What documents are parties required to disclose?

All documents required by the arbitral tribunal must be disclosed. All statements, documents, any expert report or information that a party provides to the arbitral tribunal shall be disclosed and communicated to the other party.

5. Are any documents regarded as privileged?

No. There are no documents regarded as privileged. All documents that the arbitral tribunal may rely on to render a decision must be communicated.

6. How is evidence presented?

Parties are free to agree on the procedure to be followed by the arbitral tribunal. Failing such agreement, the arbitral tribunal may conduct the arbitration as it considers appropriate. The arbitral tribunal has the power to determine the admissibility, relevance and significance of any evidence presented.

The claimant, in support of his/her request, shall state the evidence, the matters in dispute and findings. The defendant must submit his/her defence in respect of these matters.

Unless otherwise agreed by the parties, the arbitral tribunal shall determine whether the proceedings must contain oral hearings for presentation of evidence or for oral argument. In this regard, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings.

7. How is an arbitration award enforced?

An arbitration award is enforced by virtue of an exequatur granted by the Appeal Court of Antananarivo.

8. Is it possible to appeal an arbitration award?

No, an arbitration is not subject to an appeal. It is subject only to an action for a cancellation at the Appeal Court of Antananarivo. An arbitration award can only be cancelled when the applicant for the cancellation proves that:

- one of the parties was under some incapacity or the arbitral agreement is not valid under the law chosen by the parties or, in the absence of choice of applicable law, under private international law rules;
- one of the parties was not duly informed of the appointment of an arbitrator or of the arbitral proceedings or he/she was not able to assert his/her rights;
- the arbitral award deals with a dispute not provided by the arbitral agreement or not falling in the provisions of the arbitration clause or it contains decisions which are beyond the scope of the provision of the agreement or the arbitration clause.

9. Can foreign judgments or arbitral awards be recognised and enforced by way of arbitration proceedings?

No. Foreign judgements and arbitration awards can be recognised and enforced only by virtue of an exequatur granted by the Appeal Court of Antananarivo.

10. Are foreign claimants required to provide security for costs?

Whether or not a foreign claimant will be required to pay security for costs depends on the clause of payment included by the parties in the arbitration agreement.

REFORM

1. Is there likely to be any future reform of the court system or alternative dispute resolution system?

No.
1. What is the structure of the legal profession?

The South African legal profession is similar to the English legal profession in that there is a split bar and legal practitioners practice as either attorneys (solicitors) or advocates (barristers). Advocates are briefed by attorneys and cannot accept instructions directly from the public. Generally, advocates appear and argue matters in court although an attorney may apply for a right of appearance to be heard in court.

The Legal Practice Act was recently enacted and aims to provide a legislative framework for the transformation and restructuring of the legal profession. The intention of this legislation is for attorneys and advocates to be regulated by one professional body.

2. What methods of dispute resolution are available to settle commercial disputes?

Commercial disputes are generally settled in the High Court of South Africa. The High Court has jurisdiction to hear disputes with a claim value of more than ZAR 400 000 and the Magistrates Courts have jurisdiction to hear disputes with a claim value lower than ZAR 400 000.

Dispute resolution proceedings in court are typically adversarial. In commercial disputes, a party is required to prove its claim on a balance of probabilities in order for a court to find in its favour.

Alternative dispute resolution is fast becoming a more common method of resolving commercial disputes in South Africa. Alternative dispute resolution methods are used outside, or in addition to, formal court proceedings and are perceived to be beneficial in that proceedings are confidential, expedited and cost effective. Parties are also able to appoint the mediator or arbitrator. Mediation and arbitration are the most common forms of alternative dispute resolution.

3. Are there any restrictions on the role of foreign lawyers in litigation proceedings?

Foreign lawyers are prohibited from appearing on behalf of parties in litigation proceedings.

4. What is the time period within which a civil claim must be brought?

In South African law, the limitation on the time period within which a claim may be instituted is determined by the Prescription Act. The limitation is known as extinctive prescription and a right to enforce a claim is extinguished by operation of law after the lapse of a prescribed time period. The periods of prescription are:

- 30 years for any debt secured by a mortgage bond; judgment debt; any debt in respect of any taxation imposed or levied by or under any law; any debt owed to the State in respect of any share of royalties, profits or similar consideration payable in respect of the right to mine minerals or other substances;
- 15 years for any debt owed to the State and which arose out of an advance loan of money, sale or lease of land by the State to the debtor (unless a longer prescription period is applicable in regard to this debt);
- six years for any debt arising out of bills of exchange or other negotiable instruments such as cheques; and any debt arising from notarial contracts (unless a longer prescription period is applicable); and
- three years for any debt not mentioned above or specifically mentioned in other legislation.
Prescription is calculated from the date on which the debt became due. A debt is due when the cause of action is complete. This means that:

- the creditor must be able to claim payment immediately; and
- the debtor does not have a defence to the creditor’s claim for immediate payment.

The cause of action must be complete at the time summons is issued. The running of prescription is interrupted by the valid issue and service of a summons or other court process.

5. What is the legal fee structure?

The fee charged by attorneys and advocates is based on a rate per day or per hour. Although the High Court and Magistrates’ Court each have a set tariff of fees, the rates are generally determined by the attorney or advocate.

There is a long standing practice in which attorneys guarantee payment of an advocate’s fee even though an advocate is briefed on behalf of a client.

6. Is it possible for litigation to be funded by a third party? Can lawyers claim contingency fees?

Litigation is typically funded by the parties themselves, however third party funding is becoming more frequent.

Third party funders are at risk as a third party funder may be joined, against its will, to proceedings in order to allow a successful opposing party to obtain costs directly from the funder.

Contingency fees can be arranged provided that the strict requirements imposed by the Law Society and the Contingency Fees Act relating to contingency fees are met. In terms of these rules, a legal practitioner is entitled to charge double his/her normal fee or 25% of the amount awarded in favour of his/her client (whichever is lower).

A contingency fee arrangement that does not comply with the requirements relating to contingency fees is invalid and unenforceable.

THE COURT SYSTEM

1. What is the structure of the court system?

There is a hierarchy of courts in South Africa – the Constitutional Court, Supreme Court of Appeal, High Courts and Magistrates’ Courts. Local and international litigation is typically heard in the High Courts.

Disputes that are of a monetary value greater than ZAR 400,000 are heard in the appropriate division of the High Court concerned. The High Courts are seated in various major commercial centres such as Cape Town, Durban, Johannesburg and Pretoria.

The court where the action or application is instituted is required to have jurisdiction over the matter in order to hear it. This is established when the cause of action arose in the area of the specific seat of court and/or the defendant resides or is domiciled within the area of that seat of court.

Decisions of a Magistrates’ Court can be taken on review or appeal to the High Court. A decision by the High Court can be taken on appeal before a full bench of the same court or the Supreme Court of Appeal and, in limited instances, the Constitutional Court.

The Supreme Court of Appeal sits in Bloemfontein and is the highest appellate court for commercial disputes which do not raise constitutional issues and which are not deemed to raise points of law which are of general public importance by the Constitutional Court.

2. Are certain types of disputes allocated to a particular court?

Apart from the prescribed monetary limits for matters, certain types of disputes are allocated to particular specialised courts and tribunals as a result of the nature of the dispute.

Although not formally separate divisions of the High Court, the following courts and tribunals (not an exhaustive list) hear some specific disputes:

- **Admiralty Court:** each provincial and local division of the High Court has jurisdiction to adjudicate on any maritime claim, irrespective of the:
  - place where the claim arose;
  - place of registration of the ship concerned; or
  - residence, domicile or nationality of the owner of the ship.
- **Labour Court:** this court has exclusive jurisdiction in respect of all matters in terms of the Labour Relations Act or any other law relevant to the Labour Court.
- **Land Claims Court:** this court has exclusive jurisdiction to determine, inter alia, a right to restitution of any land in accordance with the Restitution of Land Rights Act, title to such land and issues of compensation in respect of appropriation of land.
- **Equality Court:** this court hears complaints of unfair discrimination.
- **Special Income Tax Court:** this court hears appeals by persons dissatisfied with the decisions made by the commissioner for the South African Revenue Services.
- **The Commissioner of Patents:** the Commissioner of Patents is a High Court judge who has been designated to hear patent disputes under the Patents Act.
- **The Copyright Tribunal:** the commissioner of Patents also hears copyright licensing disputes by the Copyright Tribunal.
- **The Competition Tribunal:** this tribunal deals with competition law issues.
- **The Companies Tribunal:** this is a newly established body under the Companies Act. Its functions include adjudicating in relation to any application that may be made to it in terms of the Companies Act and serving as a forum for the voluntary resolutions of disputes.
- **The National Consumer Tribunal:** the National Consumer Tribunal is an adjudicative body established in terms of the National Credit Act.

3. Are lower courts bound by the decisions of higher courts?

Yes. South Africa has what is called the doctrine of precedent. In terms of this doctrine, the lower courts are bound by the decisions of the higher courts. The Magistrates’ Courts are bound by the decisions of all the higher courts. All courts are bound by the decisions of the Supreme Court of Appeal, being the highest court for commercial matters, and the decisions of the Constitutional Court, being the highest court in South Africa.

4. What are the different types of civil proceedings in court available to enforce a claim?

Proceedings usually begin with a letter of demand setting out the claimant’s claim and providing a date by which the other party is to adhere to such claim. If the other party does not comply with this demand, the claimant may start civil proceedings either by:

- **Bringing an action:** this procedure is used in matters involving a factual dispute. It involves both the plaintiff and the defendant making submissions to court, producing evidence (by way of exchange of relevant documents and involving witnesses giving oral evidence) and culminates in a trial. The action is begun when a summons with particulars of claim (essentially a statement of the claimant’s claim) has been issued out of the court and served on the defendant.
- **Launching an application:** this procedure is generally quicker, but can only be used where there is no factual dispute (ie in matters involving only the application of the relevant law). There is no oral evidence to the court, all the documentary evidence on which a party wants to rely must be annexed to the affidavits it submits to the court. This process is started once the following documents have been issued out of the court and served on the respondent:
  - a notice of motion setting out the relief that the applicant seeks; and
  - an accompanying witness statement, in the form of an affidavit.

5. Are court proceedings and court documents confidential?

Court proceedings are open to the public. However the courts have the discretion to order that proceedings be confidential. Confidential court proceedings happen only in limited circumstances, where the presiding officer
consider it to be in the interests of the proper administration of justice (that is, a public hearing would materially hamper or make impractical the administration of justice). This discretion is rarely exercised and, in practice, parties should expect cases to be heard in public. The exception to this is in matters in which the court seeks to protect the identity of a minor.

6. Are there any pre-trial proceedings prescribed by the rules of court?

The court rules provide for various pre-trial proceedings and time limits for the completion of each stage of the proceedings. The parties may grant each other extensions within which to fulfil these obligations. If the parties cannot agree an extension of time to comply, any of the rules, an interim application can be brought by either of the parties to request that the court grants such extension of time (bearing in mind that the court has discretion in this regard and is not required to allow any extensions). The main requirements are as follows:

- Exchange of discovered documents: each party is required to prepare, on affidavit, a schedule of all documents which it has in hand or under its control which are relevant to the issues in dispute (whether the document benefits the party or is adverse to the party, if it is relevant it must be disclosed). The parties then call for and exchange the documents listed in their respective discovery affidavits. The documents are then compiled into a bundle for purposes of trial.
- Application for a trial date: after close of pleadings (that is when all parties have submitted their respective pleadings), any party can apply for a trial date to be allocated by the registrar. On receipt of the date from the registrar, any party can serve a notice of set-down on the other(s) formally confirming the date of the trial.
- Request for further particulars: the parties’ pleadings often require clarification in respect of certain facts and legal arguments in order to allow the other party to properly prepare for trial. Prior to the trial the parties therefore exchange requests for further particulars and their responses to such requests. The exchange of these documents is intended to assist the parties to understand each other’s pleaded issues and to curtail issues to be raised at the hearing.
- Pre-trial meeting: once the parties have exchanged documentation and are in a position to have a meaningful discussion on the hearing of the matter and possible settlement, and at least six weeks before the hearing of the matter, the parties must hold a pre-trial conference, at which they must discuss certain issues with the aim of curtailing the issues to be dealt with at the hearing. These issues are dealt with in the Uniform Rules of Court and include, among others:
  - the possibility of settlement; admissions made by each party (i.e. agreed facts); the onus or duty to begin at the hearing of the matter (the general principle is a party that makes an assertion has the duty to prove that assertion, and a corresponding duty to begin proceedings).
  - Expert witness statements: some disputes may require the evidence of an expert in regards to an issue of a specific specialised nature. In such event, the parties are required to submit expert witness statements within 30 days of the trial.

If, at any stage, a party does not comply with the High Court Rules timeously or at all, the aggrieved party may apply to the relevant court for an order compelling the other party to comply, failing which that party’s claim or defence may be dismissed at the discretion of the court.

7. What is the role of a judge in civil proceedings?

The adversarial procedure prevails in South Africa, although it does have some inquisitorial traits. The parties are the fact finders and the judge does not, save in exceptional circumstances, play an active role in the proceedings.

The judge may, however, and in fact does more often than not, play an inquisitorial role by seeking clarification from the parties’ legal representative arguing the matter or its witnesses testifying so as to better understand the parties’ cases.

8. What documents are parties required to disclose?

A party is obliged to make a full and prompt disclosure of all documents currently or previously in its possession or under its control or in the possession of an agent, that are relevant to the issues in dispute (except legally privileged documents). If a party fails to comply with a request for disclosure, the applicant may apply to the court to compel disclosure, failing which the court may strike out the defence, dismiss the claim or grant the applicant further relief within its discretion.

9. Are any documents regarded as privileged?

Certain categories of documents are deemed to be privileged information which is not required to be disclosed to another party. These include, inter alia, communications between a lawyer and his/her client and an in-house lawyer’s legal advice to his/her company (although the law is not settled on the latter).

The general principle in South African law is that any document prepared in contemplation of or in preparation for litigation is privileged and does not have to be disclosed. A document is not privileged merely because it is written and delivered on the basis that it is confidential. There are other instances, other than claiming privilege, where documents do not have to be disclosed. These include medical records which may not be disclosed without the consent of the patient concerned, unless disclosure is required by law. Where the consent to disclose medical records cannot be obtained, a subpoena must be issued and a court order must be obtained for the disclosure of the records.

It is common practice for parties to enter into negotiations in an effort to settle pending matters and the parties should be able to do so without the fear of prejudicing their claims. Any document and/or statement made with the bona fide intent of settling a dispute is not admissible in court proceedings. It is practice that such documents are marked ‘without prejudice’ although failure to do so does not render the documents admissible. In this regard, substance takes precedence over form.

10. How is evidence presented?

Witnesses of fact and expert witnesses invariably give oral evidence and are subject to cross examination in trial proceedings. However, in application proceedings no oral evidence is given and evidence is placed before the High Court by way of statements, in affidavit form.

11. Are interim remedies available to a party before or during civil court proceedings?

- Summary judgment: after the defendant has served a notice of intention to defend, a claimant can apply for summary judgment if its claim is one of the following:
  - based on a liquid document (such as a cheque or acknowledgment of debt);
  - for a liquidated amount of money (that is, an amount capable of objective determination);
  - for the delivery of specified movable property; or
  - for sequestration (the eviction of a tenant from a property).

To obtain summary judgment, the claimant must satisfy the High Court that the defendant:
  - does not have a bona fide defence to the action; and
  - entered a notice of intention to defend solely for the purpose of delay.
The High Court views summary judgment as a harsh remedy and is generally reluctant to grant it unless the plaintiff has clearly shown the above requirements.

- **Provisional sentence summonses:** when suing on a liquid document, a provisional sentence summonses may be issued. This compels the defendant to appear before court to admit or deny liability in relation to the liquid document.

If the court is satisfied that the defendant is liable in relation to the liquid document, the defendant:

- will be ordered to pay the amount set out in the liquid document; and
- is not permitted to defend the summons until payment has been made.

- **Application to strike out:** there is no procedure through which the defendant can apply to have the claimant’s claim struck out in itself. However, the defendant can, in certain circumstances, file an exception, through which it can both
  - object to a defect in the pleading of the claim; and
  - request the plaintiff to amend the claim’s wording to remove this defect (for example, where the summons does not disclose a cause of action).

If the plaintiff does not comply with the defendant’s request, the defendant can apply to the High Court for an order compelling the plaintiff to perform or refrain from performing a certain act, the plaintiff instructs the sheriff to serve the court order on the defendant, at which point the defendant must perform or refrain from performing the act.

13. **What is the estimated duration of court proceedings?**

Depending on which court a plaintiff institutes proceedings in, as some courts have less capacity than others, the estimated duration of trial proceedings is between 18 and 36 months from the date of issuing of the summons to the date of the hearing. In respect of application proceedings, the estimated duration is between three and nine months.

14. **Does a court have the power to award costs?**

The court has the power to award costs and has a wide discretion in relation to cost orders. The usual order is that the unsuccessful party is liable to pay the successful party’s costs, but only that part of the successful party’s costs prescribed by the tariff (task-based tariffs that determine the amount recoverable from the unsuccessful party). The tariffs are out of line with costs actually incurred on a ‘lawyer and client’ basis, so the successful party pays a substantial part of its own costs. In practice, the successful party rarely recovers more than 30% of actual costs incurred.

15. **Are foreign claimants required to provide security for costs?**

If the claimant is foreign, a defendant resident in South Africa can apply to the court compelling the foreign claimant to file security for costs. The registrar determines the amount of security, taking into account the tariff-based costs that are likely to be expended in the litigation. Generally, security for costs is furnished in the form of a bank guarantee.

16. **Is it possible to recover legal fees?**

Yes, it is possible to recover legal fees. Once the legal fees have been taxed they can be recovered in the same manner that court orders are enforced.

17. **On what grounds can parties appeal or review an order granted by a court?**

- **Appeal:** a party can appeal an order of the court on the basis that the order is incorrect on the facts or the law. There is no automatic right of appeal in civil disputes in the High Court. A dissatisfied party can appeal a first instance judgment, but must have applied for, and been granted, leave to appeal by the High Court. If such a party is not granted leave to appeal, it can petition the Supreme Court of Appeal or, if applicable, the Constitutional Court to grant it leave to appeal. The same also applies with regards to appealing a judgment of the Supreme Court of Appeal to the Constitutional Court.
- **Review:** a review can be bought on the basis of an irregularity or illegality in the proceedings. A review is concerned with the method at which a legal result was obtained

18. **Do procedures exist for the recognition and enforcement of foreign judgments or arbitral awards?**

- **Enforcement of foreign judgments:** in most instances, a claimant wishing to enforce a foreign judgment in South Africa must apply to a local court for an order recognising the judgment. Following this, the claimant can obtain a writ of execution and enforce the judgment.

South African courts will enforce a foreign judgment without re-examining the merits of the decision as long as the judgment satisfies certain requirements which include that the:

- judgment is final and conclusive;
- foreign court must have had international jurisdiction or competence to decide the case; and
- recognition and enforcement of the judgment must not be against public policy.

The enforcement of certain judgments will require the consent of the Minister of Trade and Industry whose consent is rarely withheld.

Foreign judgments from certain countries can be enforced by registering the judgment with a local court in terms of the Enforcement of Foreign Civil Judgments Act. Unfortunately, the only country that this act applies to at present is Namibia.

- **Enforcement of foreign arbitral awards:** South Africa is party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). The Recognition and Enforcement of Foreign Arbitral Awards Act gives effect to the provisions of the New York Convention within South Africa. In terms of this Act, any foreign arbitral award may be made an order by a South African court without a re-examination of the merits. The grounds upon which such an application may be refused by a court include that:
  - it would not be permissible for the subject-matter of the award to be submitted to arbitration in South Africa (for example, the liquidation/ bankruptcy) of an entity or sequestration of any person);
  - the enforcement of the award would be contrary to public policy in South Africa; or
  - the arbitration or award was invalid in some respect.
ALTERNATIVE DISPUTE RESOLUTION

1. What are the main alternative dispute resolution methods available to resolve disputes?

The main alternative dispute resolution methods available to resolve disputes are arbitration and mediation, as well as hybrid forms combining these processes including arb-med (arbitration followed by mediation).

Mediation is a flexible and confidential consensus-based process facilitated by a neutral third party in which the parties remain in ultimate control of the decision whether to settle and on what terms. The mediation styles employed by a mediator will vary depending on the nature of the dispute and the requirements of the parties. The primary style is a facilitative one – where the mediator manages a negotiation process that is designed to assist the parties find an agreed outcome. The mediator avoids giving advice or making recommendations on the substance of the dispute. In an evaluative mediation the mediator may give advice or recommendations to the parties on the appropriate outcome as well as evaluating the strengths and weaknesses of parties’ positions.

Arbitration run in the South Africa context will be recognised by foreign parties. It is an adjudication process under an agreement between the parties to a dispute. The dispute is referred for final determination to an independent and impartial tribunal appointed by or on behalf of the parties. The Arbitration Act regulates arbitration particularly in situations where the parties to an arbitration have not recorded all the terms of the arbitration in writing. The Act is however fairly outdated and does not provide sufficient guidance for parties to rely solely on the Act to run an arbitration in practical terms. Parties should instead draft their own arbitration agreements incorporating procedural rules such as the UNCITRAL Arbitration Rules.

2. Are parties to commercial litigation required to submit to alternative dispute resolution proceedings?

South Africa has not yet enacted legislation compelling parties to submit to alternative dispute resolution proceedings. It is however common practice for commercial parties to include alternative dispute resolution provisions in their contractual arrangements. The courts will generally compel the use of alternative dispute resolution where the parties have agreed contractually to submit to alternative dispute resolution.

3. How are costs dealt with in alternative dispute resolution proceedings?

Costs are determined in terms of the alternative dispute resolution agreement concluded between the parties. It is common for parties to agree to pay their own costs and share the mediator’s fees equally in mediation while arbitration agreements generally provide that costs are dealt with in the same way as costs in High Court litigation (ie the unsuccessful party is ordered to pay the other party’s costs on a party and party basis).

4. Are alternative dispute resolution proceedings confidential?

As the confidentiality of mediation is not governed by statute, it is vital that parties include confidentiality provisions in their mediation agreements. While documents produced or admissions made during mediation proceedings are usually privileged as they form part of a settlement process, in addition to agreeing the confidential nature of the mediation itself, parties should consider including a contractual provision agreeing that the mediator cannot be called as a witness in subsequent litigation.

Unless the parties agree otherwise, the arbitration is confidential in terms of the common law and statute unless the arbitral award is made an order of the High Court under the Arbitration Act which results in the award being a matter of public record.

5. What are the main bodies that offer and conduct alternative dispute resolution proceedings? Are parties obliged to use these bodies for alternative dispute resolution proceedings?

- Association of Arbitrators (Southern Africa): has an extensive panel of arbitrators all of whom have qualified as Fellows of the Association. The Association can be relied on to appoint an appropriate arbitrator. The Association of Arbitrators does however not administer arbitrations and parties are not required to pay any agency administration fees.
- Tokiso Dispute Settlement: offers arbitration, mediation and facilitation services. In addition to its panel including mediators and arbitrators in all provinces of South Africa, there are also panelists in Australia, Canada, Mozambique and the UK. All of Tokiso’s mediators are CEDR and DISAC accredited.
- Arbitration Foundation of Southern Africa (AFSA): offers arbitration, mediation and a fully administered dispute resolution service with costs based on the quantum of the dispute. AFSA maintains panels of experts and offers disputants a choice of rules depending on the size and complexity of the matter. The Alternative Dispute Resolution Association of South Africa is a wholly owned subsidiary of AFSA.

ARBITRATION

1. What is the estimated duration of arbitration proceedings?

In general, arbitration proceedings are more expeditious than proceedings through the courts. Importantly, the duration of arbitrations may vary depending upon the rules which govern the process. Such rules are agreed between the parties and include, for example, the rules of a local arbitral body or the Uniform Rules of Court (which regulate High Court proceedings). Some local arbitral rules make provision for expedited arbitration procedures which can serve to limit the duration of proceedings. Having said this, parties often select the Uniform Rules of Court as the applicable rules which determine the procedures and processes for the proceedings.

As with litigation through the courts, arbitration proceedings will vary in duration depending on various factors, most notably whether any interlocutory proceedings are brought during the course of the arbitration (ie applications regarding secondary issues which need to be determined such as procedural matters).

In light of the fact that the parties have some control in agreeing timelines (for example, hearing dates), arbitrations are generally more expeditious than proceedings through the courts.

Litigants in arbitration proceedings could expect proceedings to become finalised within a period of 12 to 18 months although the process could be longer or shorter.

2. Can a court intervene in arbitration proceedings?

Our courts do not accept a complete ouster of their jurisdiction and retain the power to make findings in respect of matters which fall within their jurisdiction. Having said this, South African courts respect arbitration agreements and will only intervene in extremely rare instances. Courts have been at pains not to intervene in disputes where the parties have agreed that they must be dealt with by arbitration.

In terms of the Arbitration Act, the court retains its power over certain matters including:

- applications for security for costs;
- the examination of any witness before a commissioner in the Republic or abroad and the issue of a commission or a request for such examination;
- an interim interdict or similar relief; and
- securing the amount in dispute in the reference.
If a party wishes to avoid an arbitration clause it may, in terms of the Arbitration Act, make an application to court for an order:

• setting aside the arbitration agreement;
• that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or
• that the arbitration agreement shall cease to have effect with reference to any dispute referred.

3. Does an arbitrator have the power to grant interim relief?

An arbitrator does not have power to grant interim relief. For example, where a party seeks an order for an interdict (or injunction), a court will be required to make such an order.

In terms of the Arbitration Act, unless the arbitration agreement provides otherwise an arbitrator may make an interim award (for example, during interlocutory proceedings). Similarly, the Uniform Rules of Court, which are usually adopted by the parties, gives the arbitrator the power to make interim awards.

4. What documents are parties required to disclose?

The rules regarding the discovery of documents in arbitration proceedings will be as agreed by the parties as the Arbitration Act does not set out a discovery process. In South Africa, it is common for the parties to agree that the Uniform Rules of Court will govern the arbitration process. In terms of these rules, parties are required to make discovery of all documents relevant to the matter (whether potentially supportive or harmful to their respective cases) and which are in their possession or under their control. Legally privileged documents are, however, not discoverable.

5. Are any documents regarded as privileged?

Yes, communications between clients and their attorneys or documents created for the purpose of obtaining legal advice or in contemplation of litigation are privileged and are not discoverable.

6. How is evidence presented?

Generally speaking, the rules agreed by the parties that govern the arbitration proceedings will dictate how evidence is to be presented. Some processes are less formal than others. For example, parties may not be required to follow the formal rules of evidence as would be required in court proceedings.

Where the Uniform Rules of Court (and various local arbitral rules) are adopted, evidence will be presented in the same manner as in court. In this regard, the plaintiff bears the onus of proof and the duty to begin. Witnesses will be called by the parties who will give evidence under oath. A witness will first provide evidence in chief (direct) and then be subjected to cross-examination by the opposing party’s legal representatives. The witness will then have an opportunity for re-examination (re-direct) by his/ her or her legal representatives.

In arbitrations, much like court cases, the arbitrator may pose questions or seek clarity from a witness. Expert evidence is typically presented in a report prior to the hearing. The expert usually then confirms the contents of his/ her report at the hearing before he/ she is cross-examined. The arbitrator does not have the power to appoint his/ her or her own expert for assistance.

After all of the evidence is presented, each party will present legal argument to the arbitrator who will then decide the matter on a balance of probabilities.

7. How is an arbitration award enforced?

In terms of the Arbitration Act, any party may apply to a court of competent jurisdiction to have the arbitration award made an order of court. The court will not consider the merits of the case and the applicant only has to prove that the dispute was submitted to arbitration in terms of an arbitration agreement, that the arbitrator was duly appointed and that there was a valid award in terms of the reference.

The Arbitration Act provides that an award which has been made an order of court may be enforced in the same manner as any judgment or order to the same effect.

8. Is it possible to appeal an arbitration award?

The Arbitration Act provides that an award will be final and not subject to appeal unless otherwise agreed by the parties.

In South Africa the majority of arbitration proceedings do not include a mechanism for appeals.

In terms of the Arbitration Act, an aggrieved party may apply to court to set aside the arbitration award. This is known as an application for review. Review proceedings are distinguishable from appeal proceedings. Under review proceedings, a court will not revisit the merits of the matter to determine whether the arbitrator came to the correct decision whether in law or in fact. Review proceedings are limited and may only be brought where the aggrieved party contends, for example, that:

• the arbitrator was biased;
• the arbitrator committed a gross irregularity;
• the arbitrator exceeded his/ her powers when he/ she made the award; or
• an award has been improperly obtained.

9. Can foreign judgments or arbitral awards be recognised and enforced by way of arbitration proceedings?

Foreign judgments or arbitral awards may not be enforced by way of arbitration proceedings. However, these judgments or awards may be enforced by South African courts.

10. Are foreign claimants required to provide security for costs?

If the claimant is foreign, a defendant who is resident in South Africa can apply to the court for an order compelling the foreign claimant to provide security for costs. The court retains its power to make any such order in terms of the Arbitration Act.

REFORM

1. Is there likely to be any future reform of the court system or alternative dispute resolution system?

As a result of the recognition that the Arbitration Act does not adequately cater for developments in international arbitration, the international Arbitration Bill was approved by cabinet in 2016 and is awaiting assent by the President.

When passed, the International Arbitration Act will align South African International Arbitration law with international best practice.
Tanzania

**DISPUTE RESOLUTION**

1. **What is the structure of the legal profession?**

   The legal profession in Tanzania is divided into the Bench and the Bar.

   Lawyers in the Bench are judicial officers serving as judges of the Court of Appeal or the High Court. Magistrates serve as Resident Magistrates, District Magistrates or Primary Court Magistrates and registrars.

   Lawyers within the Bar are further classified as those in private practice and those serving in the Attorney General’s office.

2. **What methods of dispute resolution are available to settle commercial disputes?**

   The main dispute resolution methods used to settle large commercial disputes in Tanzania are litigation and arbitration. Other methods include mediation, negotiation and reconciliation.

   Litigation is governed by the Civil Procedure Code Act, the High Court (Commercial Division) Procedure Rules and the Evidence Act.

   These laws provide for the court procedures including preparation of statements, evidence, trial and appeal. The system is broadly adversarial. The applicable standard of proof in commercial cases is on the balance of probabilities. The principle statute governing arbitration is the Arbitration Act.

3. **Are there any restrictions on the role of foreign lawyers in litigation proceedings?**

   Generally foreign lawyers do not have a right to appear in court unless they are admitted as advocates under the Advocates Act. A foreign lawyer may obtain a temporary permit from the Chief Justice to appear in court for a specific matter.

4. **What is the time period within which a civil claim must be brought?**

   The limitation periods are governed by the Law of Limitation Act. Limitation periods vary depending on the type of claim, for example, a claim to enforce a judgment must be made within 12 years. The prescribed period to file a claim for breach of contract is six years, while claims based on tort must be filed within three years.

5. **What is the legal fee structure?**

   Advocates generally charge their clients based on hourly rates or enter into fixed fee arrangements. If an advocate enters into a fixed fee agreement, the fee is generally fixed by law at 3% of the subject matter but can be higher depending on the complexity of the matter.

6. **Is it possible for litigation to be funded by a third party? Can lawyers claim contingency fees?**

   Parties pay their own legal costs. Depending on the outcome of the litigation, a portion of the costs may be recovered from the unsuccessful party. Third party funding is not prohibited by law. Contingency fee agreements are not allowed in Tanzania.

**THE COURT SYSTEM**

1. **What is the structure of the court system?**

   The court system in Tanzania is structured into three tiers namely: the Court of Appeal, the High Court (including specialised divisions - Commercial Division, Land Division and Labour Division) and the Magistrates’ Courts.

   The Magistrates’ Courts are established and governed by the Magistrates’ Courts Act and they are further divided into three categories: Resident Magistrates’ Courts, District Magistrates’ Courts and Primary Courts.
There are also tribunals and boards which are vested with exclusive jurisdiction over specific matters. Examples include the Tax Appeals Board and the Fair Competition Tribunal.

2. Are certain types of disputes allocated to a particular court?

In Tanzania, allocation of disputes to a particular court depends on three major factors, namely: subject matter; territorial jurisdiction; and pecuniary jurisdiction.

Certain disputes have their own resolution mechanisms. For example, all employment disputes are resolved through the Commission for Mediation and Arbitration and the High Court (Labour Division).

3. Are lower courts bound by the decisions of higher courts?

Yes, all lower courts are bound by the decisions of the higher courts. The High Court and the Court of Appeal are regarded as courts of record and judges of these courts are not regarded as courts of the higher courts. The Higher Court and the Court of Appeal are regarded as courts of record. The court of appeal is final appeal court.

4. What are the different types of civil proceedings in court available to enforce a claim?

Most civil proceedings are initiated by filing of a plaint. Other available options include seeking enforcement of a claim by way of a summary suit, making an application for attachment before judgement and applying for deposit of security for costs before the hearing of a matter.

5. Are court proceedings and court documents confidential?

Proceedings are generally public, and judgments are pronounced in open court. Court documents are also generally considered to be public documents. Parties must disclose information requested by the court, including confidential documents. The court may, however, determine that documents can be withheld if they contain commercial secrets or for public interest reasons.

6. Are there any pre-trial proceedings prescribed by the rules of court?

Pre-trial proceedings are governed by certain orders of the Civil Procedure Code. Pre-trial proceedings include the first scheduling and settlement conference which is attended by the parties or their recognised agents or advocates. The purpose of the first pre-trial conference is to:

- ascertain the timing of the case; and
- attempt to resolve the case through negotiation, mediation, arbitration or such other procedures not involved in a trial.

This is then followed by a court supervised mediation where the parties, with the assistance of the court, make an attempt to resolve the matter amicably failing which the matter is referred for final pre-trial conference prior to commencement of trial.

7. What is the role of a judge in civil proceedings?

The Tanzanian civil system is an adversarial system whereby cases are contests between opposing sides. The judge remains above the fray, providing an independent and impartial assessment of the facts and how the law applies to those facts.

8. What documents are parties required to disclose?

At the first hearing parties must produce all the documents that they intend to rely on and which have not already been filed in court. Parties are also required to provide documents which the court has ordered to be produced.

9. Are any documents regarded as privileged?

Generally documents are regarded as public information. However, in certain circumstances, documents are regarded as privileged for instance, professional client-attorney communication or government communication (where such information is in the opinion of the Minister of Justice prejudicial to the public interest either by reason of the content thereof or on grounds of public policy).

10. How is evidence presented?

Evidence may be presented orally and in some cases in writing. For instance in the Commercial Division of the High Court. Witnesses are required to file written witness statements and this evidence is followed by oral cross examination. Where documents are relied upon, original documents must be produced. In certain circumstances the court may allow a witness to produce a copy or a certified copy made from the original copy of the document.

11. Are interim remedies available to a party before or during civil court proceedings?

Yes. The law allows any party in civil proceedings to seek interim injunctions under specific circumstances, for instance where:

- the assets in dispute are in danger of being dissipated or may suffer loss of value by reason of their continued use by a defendant, or may be wrongly sold in execution of a decree; or
- where the defendant threatens, or intends to remove or dispose of, its property with a view to defraud its creditors.

In such circumstances, the court may grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, loss in value, removal or disposition of the property as the court thinks fit, until the disposal of the claim or until further orders.

12. How is a court order enforced?

A party wishing to enforce a court order or judgment must apply to the court which issued the decree for execution of the order. The application must state the type of court assistance required. This can include, for example:

- delivery of specific property;
- attachment and sale, or sale without attachment, of any property;
- arrest and detention in prison of any person; or
- appointment of a receiver.

13. What is the estimated duration of court proceedings?

The Civil Procedure Code Act provides for specific time frames under which cases shall be determined. This law provides for four types of speed tracks ranging from 10 to 24 months from commencement of the case.

In spite of this provision in the law, the courts suffer a huge back-log in disposal of cases inevitably leading to delays in completion of court proceedings.

In terms of Commercial Court Rules, commercial cases instituted in the Commercial Division of the High Court must be completed within a period of 12 months. Matters in the commercial court tend to be completed in reasonably shorter time.

14. Does a court have the power to award costs?

Yes. The law permits parties to be awarded costs and in most cases, costs are awarded to the successful party.

15. Are foreign claimants required to provide security for costs?

Yes. Foreign claimants who do not have any known immovable assets in Tanzania are required to deposit security for costs.

16. Is it possible to recover legal fees?

Yes. Where a party is awarded costs, such costs would usually include any legal fees paid by the party.

17. On what grounds can parties appeal or review an order granted by a court?

An appeal can be brought on a point of law or fact. The appellant must submit a memorandum of appeal clearly stating its grounds of objections to the decree appealed.
A party that is aggrieved by an order from which an appeal is not allowed may apply for review of such order or decree. Generally the grounds for review include:

- the existence of new and important matters or evidence which, after the exercise of due diligence, were not within the knowledge of the aggrieved party or could not be produced at the time when the decree was passed or order made;
- the existence of a mistake or apparent error on the face of record; or
- where there is any other sufficient reason desires to obtain a review.

18. Do procedures exist for the recognition and enforcement of foreign judgments or arbitral awards?

Yes. The Reciprocal Enforcement of Foreign Judgment Act provides for the enforcement of foreign judgments. The main jurisdictions whose judgments can be enforced in Tanzania include Botswana, Lesotho, Mauritius, New South Wales, Seychelles, Somalia, Sri Lanka, the Kingdom of Swaziland, the United Kingdom, Zambia and Zimbabwe.

### ALTERNATIVE DISPUTE RESOLUTION

1. What are the main alternative dispute resolution methods available to resolve disputes?

The alternative dispute resolution mechanisms available in Tanzania include negotiation, mediation, reconciliation, and arbitration.

2. Are parties to commercial litigation required to submit to alternative dispute resolution proceedings?

Yes. The High Court (Commercial Division) Procedure Rules require parties to submit to court supervised alternative dispute resolution in the form of mediation prior to commencement of trial.

3. How are costs dealt with in alternative dispute resolution proceedings?

The award of costs is usually the discretion of the mediator. In most cases, parties bear their own costs. The issue of costs could also be addressed as one the terms of settlement where parties reach an amicable resolution.

4. Are alternative dispute resolution proceedings confidential?

Yes. Proceedings of the mediation session remain confidential and do not form part of the court records. In most cases, these proceedings are discarded where mediation fails and parties proceed to full trial.

5. What are the main bodies that offer and conduct alternative dispute resolution proceedings? Are parties obliged to use these bodies for alternative dispute resolution proceedings?

Alternative dispute resolution in commercial litigation is conducted by the court. Parties are also free to refer disputes to any other local or international forums (other than courts of law). Examples of local alternative dispute resolution forums include arbitration bodies such as the Tanzania Institute of Arbitrators and the National Construction Council.

### ARBITRATION

1. What is the estimated duration of arbitration proceedings?

In most cases parties agree on the timing for arbitration proceedings in which case they have control of various aspects of the process such as the duration. There are no hard and fast rules on this and parties are free to agree on reasonable timelines based on several factors including the availability of the parties involved.

2. Can a court intervene in arbitration proceedings?

Yes. The law permits parties to seek interim relief pending determination of arbitration proceedings.

3. Does an arbitrator have the power to grant interim relief?

Yes. The law permits arbitrators to grant interim relief.

4. What documents are parties required to disclose?

Parties are required to disclose all documents that may be relevant to determine the dispute.

5. Are any documents regarded as privileged?

Yes. Arbitration proceedings including documents submitted during such proceedings are regarded as privileged.

6. How is evidence presented?

Evidence may be presented orally or in writing. In the case of the latter, parties are required to file witness statements.

7. How is an arbitration award enforced?

An arbitral award must first be registered with the High Court after which it becomes enforceable as if it were a decree of the court.

8. Is it possible to appeal an arbitration award?

Generally an arbitration award is not appealable unless the agreement between the parties provides for an appeal procedure. However a party may ask the court to set aside an arbitration award on certain grounds including where an award is obtained by fraud or where there is misconduct on the part of the arbitrator.

9. Can foreign judgments or arbitral awards be recognised and enforced by way of arbitration proceedings?

Foreign judgements or arbitral awards can only be enforced if they are judgements issued by specific courts of countries with which Tanzania has an arrangement for reciprocal enforcement of judgements.

Arbitral awards can be recognised and enforced in Tanzania. In both these instances, the foreign judgment and arbitral award must be registered by the High Court of Tanzania for it to be enforceable.

10. Are foreign claimants required to provide security for costs?

No. The law does not provide for any requirement for foreign claimants in arbitration proceedings to provide for security for costs.

### REFORM

1. Is there likely to be any future reform of the court system or alternative dispute resolution system?

In an effort to bring more efficiency to the administration of justice the government is expected to revamp the performance of Primary Courts. This exercise has started with the recruitment of magistrates which now involves stipulated minimum qualifications that must be met in order to be appointed as a magistrate in the Primary Court.
DISPUTE RESOLUTION

1. What is the structure of the legal profession?

Togolese lawyers are called Avocats. They have a monopoly when it comes to representing and assisting parties as well as pleading for the benefit of these parties before the Togolese courts. Togolese Avocats are also entitled to represent a party before the Togolese public administration.

2. What methods of dispute resolution are available to settle commercial disputes?

Tribunals of first instance (sitting in commercial matters) can settle commercial disputes. Parties to a commercial dispute can also rely on conciliation mediation and arbitration to settle their dispute.

3. Are there any restrictions on the role of foreign lawyers in litigation proceedings?

Yes. Avocats called to the Togolese bar are the only ones allowed to practice as Avocats in Togo. As a consequence, in principle, foreign lawyers do not have the right to intervene in litigation proceedings in Togo. However, foreign lawyers may intervene in litigation proceedings in Togo if an international convention entered into between their country of origin and Togo allows it.

4. What is the time period within which a civil claim must be brought?

Although exceptions do exist, a civil claim must generally be brought within 30 years.

5. What is the legal fee structure?

In general, in case of a judicial intervention, Togolese Avocats are paid on a fixed fee basis, increased by a percentage of the quantum of the dispute. This amount represents the amount of the claim brought before a court. This method of calculation is valid when an Avocat acts before a court of first instance and before the Court of Appeal. However, there is an hourly rate for Avocats pleading before the Supreme Court. Avocats are also paid on a fixed fee basis (without the percentage of the amount at stake) for specific cases, example when an Avocat is involved in summary proceedings (référé).

For extra-judicial interventions, Avocat’s fees are freely negotiated between him/ her and his/ her client (for example, fees relating to a simple consultation).

6. Is it possible for litigation to be funded by a third party? Can lawyers claim contingency fees?

Yes. A third party can fund litigation. However, Avocats cannot claim contingency fees.

THE COURT SYSTEM

1. What is the structure of the court system?

The Togolese court system is structured as follows:

- at the bottom of the court system are the tribunals of first instance which sit in commercial, civil or criminal matters;
- the second level of the Togolese court system is made up of Courts of Appeal which sit in civil, commercial, social, and criminal matters etc.; and
- the highest court in Togo is the Supreme Court. It has jurisdiction over all judicial and administrative matters. This is due to the fact that the Supreme Court has two chambers – a judicial chamber and an administrative chamber.

2. Are certain types of disputes allocated to a particular court?

Yes. For example, commercial disputes are allocated to tribunals of first instance sitting in commercial matters. Labour Tribunals have jurisdiction over labour disputes.
3. Are lower courts bound by the decisions of higher courts?

Yes. Lower courts are bound by the decisions of higher courts.

4. What are the different types of civil proceedings in court available to enforce a claim?

There are two types of civil proceedings in court to enforce a claim. A party can ask for a judgment on the merits of its case or, in an emergency, ask for a summary judgment also known as ‘référé’.

5. Are court proceedings and court documents confidential?

In principle, court proceedings are held in public. However, the tribunal can order proceedings to be held in camera (huis clos) in the following cases:

- if the court proceedings were held in public, it would violate private life;
- if a party asks for the proceedings to be held in camera;
- if something troubles the serenity of justice; and
- if all the parties ask for the proceedings to be held in camera.

Court documents are confidential. However, if a party to litigation uses a document to support its claim, the said party must communicate the document to the other party.

6. Are there any pre-trial proceedings prescribed by the rules of court?

No.

7. What is the role of a judge in civil proceedings?

The role of a judge in civil proceedings is to attempt to settle disputes between parties.

8. What documents are parties required to disclose?

Parties are required to disclose all documents currently or previously in their possession, that are relevant to the case. A party is required to make a spontaneous disclosure of the documents required. If a party fails to comply with a request for disclosure, the applicant may apply to court to compel disclosure. The court may order a penalty.

9. Are any documents regarded as privileged?

The Togolese law does not provide a list of documents that are regarded as privileged but, in practice, the communications between an Avocat and his/her client are strictly privileged. An inhouse Avocat’s legal advice to his/her company would be regarded as privileged. Documents prepared in contemplation of, or in preparation for, litigation are also privileged.

10. How is evidence presented?

Evidence can be presented in writing or orally. However, for civil matters, evidence must be in writing. It is worth noting that the judge could order an inquiry measure, if required, for the disclosure of evidence.

11. Are interim remedies available to a party before or during civil court proceedings?

Yes, interim remedies such as a protective seizure of assets and freezing accounts are available to a party before or during civil court proceedings. Protective seizure is also used in case of emergency or if the enforcement of the claim may be endangered or imperilled.

12. How is a court order enforced?

A court order is always enforced and implemented by the bailiff with the assistance of the police force if required.

13. What is the estimated duration of court proceedings?

The estimated duration of court proceedings varies on a case-by-case basis.

14. Does a court have the power to award costs?

Yes. The judgment rendered by the tribunal contains damages asked by the claimant. However, before the inscriptions of the case at the court, the claimant must deposit sufficient funds to pay the court costs. The judgment contains fees and costs which represent court costs. The losing party must pay the fees and costs.

15. Are foreign claimants required to provide security for costs?

Yes. Foreign claimants are required to provide security for costs, unless otherwise provided by a treaty.

16. Is it possible to recover legal fees?

Yes. A successful litigant is entitled to recover costs which will be set out in the judgement.

17. On what grounds can parties appeal or review an order granted by a court?

In principle, if the claimant or the defendant is not satisfied with the judgment rendered by the court of first instance, each can lodge an appeal. If one of the parties is not satisfied with the Court of Appeal’s decision, each is entitled to contest the said decision before the Supreme Court.

18. Do procedures exist for the recognition and enforcement of foreign judgments or arbitral awards?

It is necessary to request an exequatur of a foreign judgment or a foreign arbitral award, in order for a foreign judgment to be enforceable in Togo.

ALTERNATIVE DISPUTE RESOLUTION

1. What are the main alternative dispute resolution methods available to resolve disputes?

The following types of alternative dispute resolution are available in Togo:

Conciliation-mediation: this mechanism attempts to resolve a dispute amicably with the assistance of a conciliator. The conciliator is chosen by the parties and acts as a neutral third party. The proceeding ends by the signing of an agreement (protocole d’accord) between the parties providing the solution of the dispute or by the drafting of a non-conciliation minute (procès-verbal de non-conciliation).

Arbitration: this is a private process for the resolution of a dispute, in which parties choose one or more third parties (‘s arbitrate/s) to help them resolve their dispute. Arbitration provisions are inserted in contracts by way of arbitration clauses (clause compromissoire) or a separate agreement (compromis) concluded between the parties. In arbitration proceedings, the dispute is determined by the arbitrator and the arbitrator’s decision is binding on the parties.

Arbitration and conciliation-mediation are voluntary proceedings which offer to the parties the opportunity to settle their dispute without going through courts as these mechanisms are quick, impartial, effective, confidential and cost-efficient.

2. Are parties to commercial litigation required to submit to alternative dispute resolution proceedings?

No. Parties are not required to submit to alternative dispute resolution proceedings because it depends on the will of the parties.

3. How are costs dealt with in alternative dispute resolution proceedings?

In practice, the parties pay for their own costs. However, the arbitrator or the conciliator can also decide to allocate the payment of the fees between the parties.
4. Are alternative dispute resolution proceedings confidential?

Yes.

5. What are the main bodies that offer and conduct alternative dispute resolution proceedings? Are parties obliged to use these bodies for alternative dispute resolution proceedings?

The Cour d’Arbitrage de Médiation et de Conciliation du Togo (CATO) is the main body that offers and conducts alternative dispute resolution in Togo. Parties are not obliged to use CATO for alternative resolution proceedings.

**ARBITION**

1. What is the estimated duration of arbitration proceedings?

The duration of arbitration proceedings varies on a case-by-case basis but takes less time than court proceedings.

The arbitrator’s authority is determined in the arbitration agreement. It shall not exceed six months from the date of the appointment of the last arbitrator. However, the period can be extended either by parties’ consent or upon one party’s request.

2. Can a court intervene in arbitration proceedings?

The court can only intervene in arbitration proceedings by virtue of a party’s request to obtain interim relief or a protective measure in case of motivated and justified emergency, on the condition that these measures do not involve examination of the merits of the dispute, in which only the arbitral tribunal is competent. The arbitral tribunal is also entitled to request the assistance of the local judge in the event that such assistance is required for the management of evidences.

3. Does an arbitrator have the power to grant interim relief?

No. Only the court has the power to grant interim relief.

4. What documents are parties required to disclose?

The arbitral tribunal can request the explanations, arguments and evidence it deems necessary from the parties for the settlement of the dispute. The documentation includes inter alia statements and expert reports.

5. Are any documents regarded as privileged?

No. There are no documents regarded as privileged. All documents that the arbitral tribunal may rely on in order to render a decision must be communicated.

6. How is evidence presented?

Parties are free to agree on the procedure to be followed by the arbitral tribunal. Failing such agreement, the arbitral tribunal may conduct the arbitration as it considers appropriate. The arbitral tribunal has the power to determine the admissibility, relevance and the significance of any evidence presented.

The claimant, in support of his/ her request, shall state the evidence, the matters in dispute and findings. The defendant must submit his/ her defence in respect of these matters.

7. How is an arbitration award enforced?

An arbitration award is enforced by virtue of an exequatur granted by the competent court in Togo.

8. Is it possible to appeal an arbitration award?

No. An arbitration award is not subject to an appeal. However, an arbitration award may subject to an action for a cancellation. The action for a cancellation is admissible only:

- if the arbitral tribunal has ruled without an arbitration agreement or under a void or expired agreement;
- if the arbitral tribunal was irregularly constituted;
- if the arbitral tribunal ruled without complying with the mission entrusted to it;
- if the adversarial principle was not respected; and/or
- in the event of breach of the international public order.

The action for cancellation is open from the issuance of the arbitral award and remains valid for one month after the affixation of the exequatur to the arbitral award.

9. Can foreign judgments or arbitral awards be recognised and enforced by way of arbitration proceedings?

No. Foreign judgement and arbitration awards can only be recognised and enforced by virtue of an exequatur granted by the competent court in Togo.

10. Are foreign claimants required to provide security for costs?

Whether or not a foreign claimant will be required to provide security for costs depends on the clause of payment inserted by the parties in the arbitration agreement.

**REFORM**

1. Is there likely to be any future reform of the court system or alternative dispute resolution system?

No.
DISPUTE RESOLUTION

1. What is the structure of the legal profession?

The legal profession in Uganda is not fused. The role of an advocate differs from that of a lawyer. An advocate is an enrolled lawyer to the bar and can address court whereas a lawyer does not have a right of audience before the court.

2. What methods of dispute resolution are available to settle commercial disputes?

Commercial disputes can be settled by negotiation, mediation, conciliation or arbitration. If all of the above fail, parties may resort to litigation which is adversarial in nature.

3. Are there any restrictions on the role of foreign lawyers in litigation proceedings?

Foreign lawyers currently require authorisation to temporarily participate in litigation proceedings in Uganda. Those in active practice can obtain a special certificate to practice within the jurisdiction. Under the Advocates Act, a foreign lawyer is required to obtain a 'special practising certificate' which admits the lawyer to practice in Ugandan courts for the purpose of any legal matter.

4. What is the time period within which a civil claim must be brought?

The Limitation Act provides different periods for different claims. Land matters must be brought within 12 years; a claim based on contract or tort must be brought within six years; and a claim based on nuisance or negligence must be brought within three years.

5. What is the legal fee structure?

The legal fee structure for contentious and noncontentious matters is provided for under the Advocates’ Remuneration and Taxation of Costs Act. There is a sliding scale and fees are calculated according to percentage of value of the subject matter. For higher courts, namely the Court of Appeal and Supreme Court, the Judicature Court of Appeal Rules and the Judicature Supreme Court Rules apply. Complexity, novelty of issues involved and amount of research are also considered when charging a fee.

6. Is it possible for litigation to be funded by a third party? Can lawyers claim contingency fees?

In terms of the common law in Uganda, it is illegal for litigation to be funded by a third party. Advocates are prohibited from entering into contingency fee agreements. An advocate shall not enter into any agreement for the sharing of a proportion of the proceeds of a judgement whether by way of percentage or otherwise either as part of or the entire amount of his/her professional fees or in consideration of advancing to a client funds for disbursements.

THE COURT SYSTEM

1. What is the structure of the court system?

According to the Constitution of the Republic of Uganda and the Judicature Act, the court structure from the highest in hierarchy is:

- the Supreme Court;
- the Court of Appeal;
- the High Court; and
- the Magistrates’ Courts

The Magistrates’ Courts structure according to the Magistrates Courts’ Act from the highest in hierarchy is as follows:

- Chief Magistrates’ Courts;
- Magistrate Grade I Courts; and
- Magistrates’ Grade II Courts.

2. Are certain types of disputes allocated to a particular court?
Magistrates’ Courts adjudicate all types of disputes indiscriminately unless expressly barred by statute, for example Magistrates’ Courts do not have jurisdiction in employment matters.

Employment matters are exclusively handled by the Industrial Court. Tax matters are handled by the Tax Appeals Tribunal.

The High Court has jurisdiction in all matters. However, administratively, matters are handled by specially set up divisions of the High Court for Land, Criminal, Civil, Family, War Crimes and Execution Divisions. This applies in Kampala (the capital city of Uganda). Outside Kampala, High Court circuits handle all matters indiscriminately. Matters of constitutional interpretation are handled by the Court of Appeal exclusively.

3. Are lower courts bound by the decisions of higher courts?
Yes. The doctrine of precedent (stare decisis) is salient in the jurisprudence of Ugandan courts.

4. What are the different types of civil proceedings in court available to enforce a claim?
A claim can be instituted by ordinary plaint; notice of motion; chamber summons; originations summons; or petition to enforce a claim.

5. Are court proceedings and court documents confidential?
Court proceedings are public hearings and court documents are available to the public unless the court makes a specific order to the contrary. An order that trial be held in camera can be made in certain cases.

6. Are there any pre-trial proceedings prescribed by the rules of court?
Yes. The rules of court prescribe discovery applications and interrogatories as and when applicable. In terms of the Civil Procedure Rules, before a trial can commence parties are required to participate in a scheduling conference to determine the issues of contention, agreed issues and disputed issues.

7. What is the role of a judge in civil proceedings?
The judge conciliates the parties, guides them on the procedural aspects of presentation of their respective cases and finally adjudicates on the case on its legal merits.

8. What documents are parties required to disclose?
Documents that are relevant and admissible are required to be disclosed by the parties. These include but are not limited to documents of title, agreements, receipts and the like.

9. Are any documents regarded as privileged?
Yes. Certain documents that are classified and part of government records are privileged documents. The court, upon application by a party, can however admit the privileged documents if it do so would be in the public interest or for other sufficient cause.

10. How is evidence presented?
Evidence is presented by oral and documentary proof of the parties involved. Oral proof is by examination in chief, cross examination and re-examination of witnesses on a stand in court. Documentary proof is done through tendering of authenticated documents during a hearing.

11. Are interim remedies available to a party before or during civil court proceedings?
Interim remedies are available mainly before civil court proceeding to preserve the status quo during the hearing of the suit.

12. How is a court order enforced?
A court order is enforced through execution proceedings, by arrest and detention of the judgement debtor or by attachment or sale of the judgement debtor’s property. Garnishee proceedings (attachment of accounts) can also be taken out against the judgement debtor.

13. What is the estimated duration of court proceedings?
The duration of court proceedings is dependent on various factors and the specific circumstances of a particular case. Administratively, a fast trial is one that is concluded in one calendar year.

14. Does a court have the power to award costs?
Yes. Courts can award costs to the successful party. Generally, costs follow the event.

15. Are foreign claimants required to provide security for costs?
If a foreign claimant has no assets or property within the jurisdiction, the court normally requires the claimant to furnish security for costs.

16. Is it possible to recover legal fees?
Legal fees are recoverable in the bill of costs as is the instruction fee. This is normally the first item on the itemised bill of costs which is subjected to taxation proceedings at the end of the trial.

17. On what grounds can parties appeal or review an order granted by a court?
There is no such thing as an inherent right of appeal. An appeal is a creature of statute. The grounds for review are also provided in statute such as discovery of new and important evidence (which was not within the applicant’s knowledge and could therefore not be produced by him/ her), some mistake or error apparent on the face of the record or any other sufficient reasons analogous to the foregoing.

18. Do procedures exist for the recognition and enforcement of foreign judgments or arbitral awards?
Yes. The Foreign Judgements (Reciprocal Enforcement) Act stipulates the procedure for the recognition and enforcement of a foreign judgment. The relevant procedure will depend on whether the foreign judgement was granted within or outside the commonwealth.

The Arbitration and Conciliation Act provides the same procedure for the recognition and enforcement of foreign arbitral awards.

19. Are procedures exist for the recognition and enforcement of foreign arbitral awards?
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The Arbitration and Conciliation Act provides the same procedure for the recognition and enforcement of foreign arbitral awards.

ALTERNATIVE DISPUTE RESOLUTION

1. What are the main alternative dispute resolution methods available to resolve disputes?
The main alternative dispute resolution methods available are negotiation, mediation, conciliation or arbitration.

2. Are parties to commercial litigation required to submit to alternative dispute resolution proceedings?
Yes. There are High Court Commercial Court Mediation Rules that require all parties in commercial disputes to submit to alternative dispute resolution proceedings before trial can commence.

3. How are costs dealt with in alternative dispute resolution proceedings?
Each party is responsible for paying their own costs during mediation proceedings.

4. Are alternative dispute resolution proceedings confidential?
Yes.

5. What are the main bodies that offer and conduct alternative dispute resolution proceedings?
Various bodies exist including:
- Uganda Mediation Chambers which is a private mediation body; and
- Centre for Arbitration & Dispute Resolution which is a statutory body vested with the mandate to accredit arbitrators.
Before any trial can commence, it is mandatory that parties use these bodies in an attempt to resolve the dispute amicably.

**ARBITRATION**

1. **What is the estimated duration of arbitration proceedings?**

   The duration of an arbitration will depend on the specific circumstances of the case. A rough estimate is six months.

2. **Can a court intervene in arbitration proceedings?**

   In terms of the Arbitration and Conciliation Act, no court can intervene in arbitration proceedings.

3. **Does an arbitrator have the power to grant interim relief?**

   The party has to apply to the High Court before or during arbitration proceedings to get interim relief.

4. **What documents are parties required to disclose?**

   Relevant documents to the transaction in issue should be disclosed in arbitration.

5. **Are any documents regarded as privileged?**

   The nature of arbitration proceedings in Uganda is that these proceedings are alternative dispute resolution mechanisms. Arbitration proceedings are not as adversarial as litigation in the courts. Consequently, the hard and fast rules of civil procedure and law of evidence are relaxed during arbitration proceedings.

   The more information that a party elects to disclose, the greater the chances are of the arbitration succeeding. Privilege between an advocate and client could be waived to foster mutual trust and good faith despite the fact that this type of privilege is still a valid principle under the Ugandan law of evidence.

6. **How is evidence presented?**

   Evidence can be presented either orally or in written form.

7. **How is an arbitration award enforced?**

   An arbitration award can be enforced in the same manner as a decree of court.

8. **Is it possible to appeal an arbitration award?**

   Yes, if parties agree, an appeal can be made to the High Court on a question of law.

9. **Can foreign judgments or arbitrals be recognised and enforced by way of arbitration proceedings?**

   No. Foreign judgements and arbitration awards can only be recognised and enforced by way of court proceedings.

10. **Are foreign claimants required to provide security for costs?**

    The practice is that foreign claimants without assets or property in Uganda are to provide security for costs.

**REFORM**

1. **Is there likely to be any future reform of the court system or alternative dispute resolution system?**

   There is no reform to the court system or alternative dispute resolution in the immediate future.

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**Key Contacts**

- **JAMES MCKINNELL**
  Partner
  Cape Town, South Africa
  T: +27 21 480 7820
  E: james.mckinnell@bowmanslaw.com

- **FREDERICK J. MPANGA**
  Partner
  Kampala, Uganda
  T: +256 41 425 4540
  E: frederick.mpanga@bowmanslaw.com

- **WILBERT KAPINGA**
  Managing Partner
  Dar es Salaam, Tanzania
  T: +255 76 998 8640
  E: wilbert.kapinga@bowmanslaw.com

- **KABWELA CHISAKA**
  Partner
  Johannesburg, South Africa
  T: +27 11 669 9697
  E: kabwela.chisaka@bowmanslaw.com

- **ADAM ANDERSON**
  Partner
  Johannesburg, South Africa
  T: +27 11 669 9000
  E: adam.anderson@bowmanslaw.com

- **ASHLEIGH GRAHAM**
  Partner
  Johannesburg, South Africa
  T: +27 11 669 9561
  E: ashleigh.graham@bowmanslaw.com

- **TORI HERHOLDT**
  Partner
  Johannesburg, South Africa
  T: +27 11 669 9489
  E: tori.herholdt@bowmanslaw.com

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To view profiles of our lawyers, please visit www.bowmanslaw.com
Cape Town, South Africa
T: +27 21 480 7800
E: info-cpt@bowmanslaw.com

Dar es Salaam, Tanzania
T: +255 76 898 8640
E: info-tz@bowmanslaw.com

Durban, South Africa
T: +27 31 109 1150
E: info-dbn@bowmanslaw.com

Johannesburg, South Africa
T: +27 11 669 9000
E: info-jhb@bowmanslaw.com

Kampala, Uganda
T: +256 41 425 4540
E: info-ug@bowmanslaw.com

Lusaka, Zambia
T: +260 96 227 5329
E: info-zb@bowmanslaw.com

Moka, Mauritius
T: +230 460 5959
E: info-ma@bowmanslaw.com

Nairobi, Kenya
T: +254 20 289 9000
E: info-ke@bowmanslaw.com

Follow us on Twitter:
@Bowmans_Law

www.bowmanslaw.com

Alliance Firms:

Aman Assefa & Associates Law Office, Addis Ababa, Ethiopia
T: +251 11 470 2868
E: info@aaclo.com

Udo Udoma & Belo-Osagie, Lagos, Nigeria
T: +234 1 2774920-2, +234 1 2719811-3
E: uubo@uubo.org