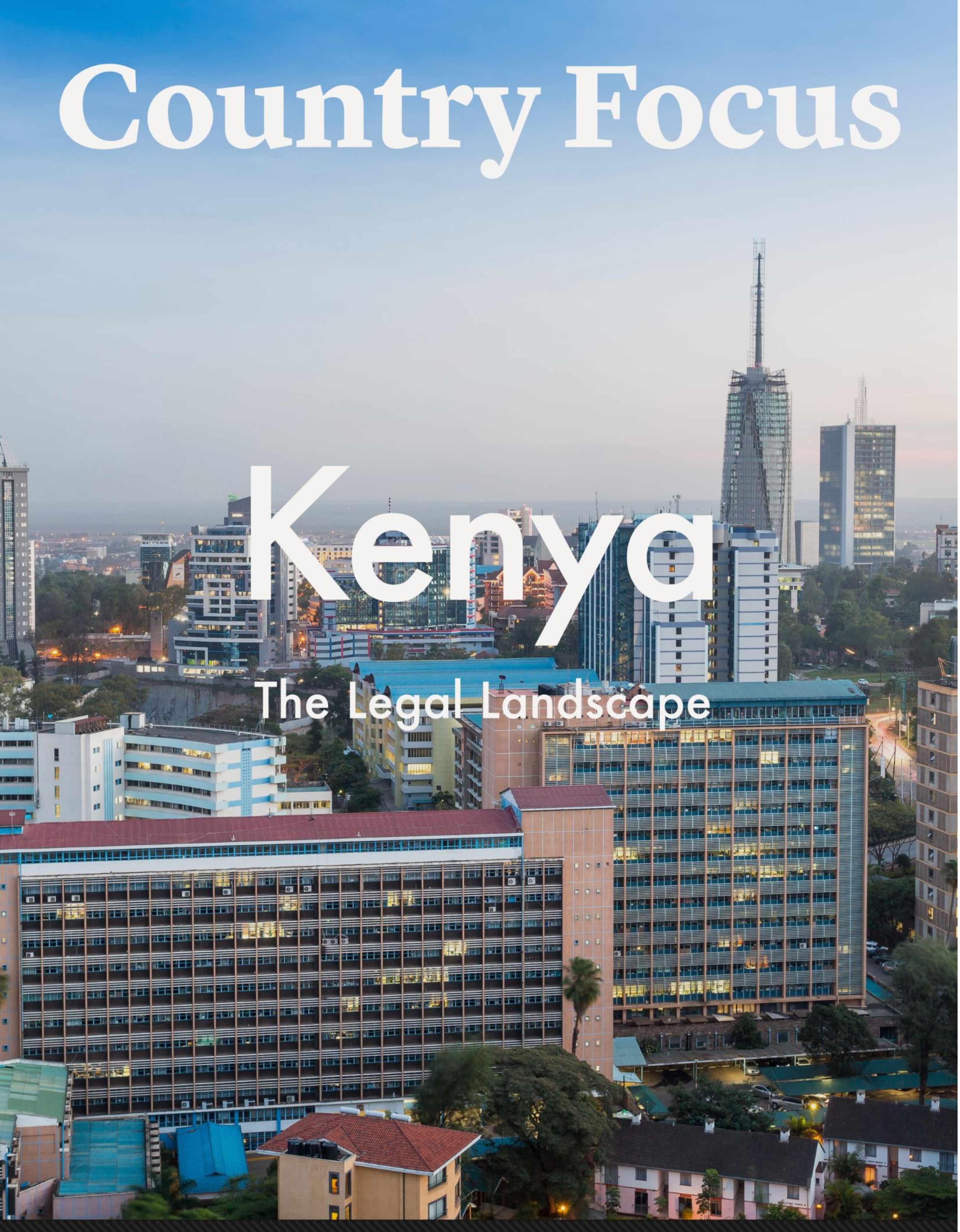
Country Focus

Kenya

The Legal Landscape



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MMAN Advocates

GETTING THE DEAL THROUGH

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Cover: iStock.com/Jacek_Sopotnicki

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Kenya: The Legal Landscape

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This new *Getting The Deal Through* initiative is designed to offer in-house legal departments, as well as private practice lawyers with an international clientele, a concise 'helicopter view' of the legal environments in which they do business, or where they may be considering investment.

The Legal Landscape addresses the key factors that underpin civil and common law legal frameworks, policy, regulation and enforcement, taxation, organisational behaviour and investor strategies.

Getting the Deal Through has canvassed general counsel at more than 100 multinational corporations and financial institutions to focus on the first points of legal reference that in-house counsel need to know when assessing unfamiliar jurisdictions where they may seek opportunities or be exposed to risk. The following questions and answers cover the essential areas of consideration in their 'first step' analysis.

We would like to thank the team at MMAN Advocates – one of Kenya's leading law firms, for their analysis of the country's legal landscape.

GETTING THE DEAL THROUGH

London
September 20

Kenya: The Legal Landscape

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MMAN Advocates

Country overview

1 Give an overview of the country's economy, its structure and main characteristics, and prevailing government economic policy, particularly as regards foreign investment.

Kenya is the most dominant economy in East Africa with strong growth prospects supported by an emerging urban middle class and an increasing appetite for quality goods and services. Kenya, contributes more than 40 per cent of the region's GDP with numerous multinational companies having their regional and continent-wide headquarters in the country. By the Ernst & Young Africa Attractiveness Index 2017, Kenya ranked second in Africa after Morocco and South Africa, one step lower than its rating in 2017..

In a bid to make Kenya an economic hub there have been legislative and institutional reforms such as the enactment of the Special Economic Zones Act and the Companies Act aimed at improving the ease of doing business to encourage more freight direct investment.

The top investment opportunities in Kenya are in the renewable energy, infrastructure, ICT, technology, tourism, agriculture and fisheries, manufacturing, construction, tourism and trade (both local and international) sectors.

Legal overview

2 Describe the legal framework and legal culture in your jurisdiction as regards business and commerce.

Kenya's legal system is largely based on English common law and comprises private and public law. The primary sources of law in Kenya are the 2010 Constitution (which is the supreme law binding on all persons and state organs), statutes and case law.

Kenya has a devolved two-tier system of government comprising a national government and 47 semi-autonomous county governments. It has a bicameral national legislature comprising the National Assembly and the Senate, and unicameral county assemblies.

The principles of autonomy and separation of powers are enshrined in the Constitution. Sovereign power is delegated to the three arms of government – executive, judiciary and legislature – and is exercised at national and county level.

Elaborate legislative, regulatory and institutional structures have been developed that govern business and commercial practices in Kenya. With increased civic awareness – and a more efficient judiciary – there has been an upsurge of formal dispute resolution through litigation and other alternative dispute resolution mechanisms. For large commercial disputes, there is an option for arbitration – whether or not the contract subject matter of the dispute has an arbitration clause. This is now frequently used both by the courts and litigants in order to obtain faster resolution of disputes and expert determination in complex cases.

Kenya's legal framework is business-friendly, and with its main principles being based on English law, it is familiar to foreign investors.

3 What are the main sources of civil and administrative law applicable to companies?

The main sources of civil and administrative law applicable to companies are:

(a) the Constitution, 2010;

(b) subject to (a), all other written laws, the main ones being:

- (i) the Companies Act (No. 17 of 2015);
- (ii) the Insolvency Act (No. 18 of 2015;
- (iii) the Law of Contract Act (CAP 23);
- (iv) the Competition Act (No. 12 of 2010);
- (v) the Employment Act (No. 11 of 2007);
- (vi) the Income Tax Act (CAP 470);
- (vii) the Registration of Business Services Act;
- (viii) the Tax Procedures Act (No. 29 of 2015);
- (ix) the Value Added Tax (No. 35 of 2013);
- (x) the Transfer of Businesses Act (CAP 500); and

(c) to the extent that (a) and (b) do not extend or apply, Kenyan case law, common law and principles of equity and statutes of general application in force in England on 12 August 1897.

Dispute resolution

4 How does the court system operate with regards to large commercial disputes?

All commercial disputes whose subject matter value exceeds 20 million Kenyan shillings are heard and determined by the Commercial and Admiralty Division of the High Court of Kenya – a specialised division of the High Court created in Nairobi and Mombasa – and before the High Court of Kenya in all other stations where it sits. Once a case is filed it goes through a mandatory screening for mediation, and if it qualifies it is referred to mediation. The mediation process should be undertaken and finalised within 60 days from the date of referral. If the process fails, the case goes through the normal litigation process.

Parties usually file all the documents they intend to rely on during the hearing, such as witness statements and expert reports, within the time allowed in law, following which the case is set for a Case Management Conference, whose purpose is to confirm whether or not the case is ready for hearing and, if not, to set time limits for compliance. This avoids adjournments once a hearing date is scheduled. The hearing then proceeds normally and a judgment is subsequently delivered (by law, it should be delivered within 42 days of filing of final submissions by the parties).

5 What legal recourse do consumers typically have against businesses?

The Parliament of Kenya passed the Consumer Protection Act to protect consumers against businesses and their excesses. Consumer protection is also provided for under the Kenyan Constitution. The range and breadth of rights of consumers are wide and far reaching.

Under the Consumer Protection Act, consumers have recourse to claim damages, compensation, injunctions, orders of cancellation of agreements, repossession, declaration of unfair practices and so on. Although we have a law that provides for class proceedings under section 4 of the Consumer Protection Act, it is rarely utilised in Kenya. We do not have a 'plaintiff's bar' in Kenya.

6 How significant is arbitration as a method of dispute resolution?

The Constitution of Kenya provides, under article 159, that alternative dispute resolution should guide the courts as a dispute resolution method. Indeed, the Parliament of Kenya passed the Nairobi Centre for

International Arbitration Act in a bid to promote Nairobi as a regional and international centre for dispute resolution. Most commercial agreements have a dispute resolution clause that emphasises on conciliation and arbitration. Arbitration is viewed as a way to unclog the congested court system. It is also viewed as confidential and faster and appeals to parties that may require specialists to arbitrate on their disputes.

The Chartered Institute of Arbitrators Kenya Branch is very vibrant and has a growing membership. Arbitration is also promoted by professional bodies such as the Law Society of Kenya and the Architectural Association of Kenya.

Lastly, the Civil Procedure Rules, as used within the court system, have specifically provided for arbitration as an alternative dispute resolution process, and the court can either *suo moto* or, on application of parties, refer a matter to arbitration.

7 What other methods of dispute resolution are commonly used?

Other commonly used methods of dispute resolution include court annexed mediation, adjudication (which is ordinarily used in construction disputes) reconciliation and conciliation. Traditional systems of dispute resolution are also used but rarely.

In 2016, the Government passed the Small Claims Act to provide for a somewhat informal system within the court system to resolve disputes whose pecuniary value did not exceed KES 200,000.00. Although the law was passed, it is yet to be operationalized by the Government.

8 How easy is it to have foreign court judgments and foreign arbitral awards recognised and enforced in your jurisdiction?

Foreign judgments and foreign awards are recognised and enforced in Kenya under the Foreign Judgments (Reciprocal Enforcement) Act. The definition of 'designated court' under the Act is what limits the foreign judgments that can be enforced in Kenya. A designated court is defined as:

- a superior court of a reciprocating country that is a Commonwealth country;
- a superior court of any other reciprocating country that is specified in an order made under section 13 of the Act, as designated by the relevant Minister from time to time; and
- a subordinate court of a reciprocating country that is specified in an order made under section 13.

Currently, the 'reciprocating countries' are: Australia, Malawi, Seychelles, Tanzania, Uganda, Zambia, the United Kingdom and Rwanda.

The process involves filing an application at the High Court of Kenya (within six years from the date of judgment) for registration of the judgment in Kenya. The motion should be accompanied by affidavits and certificates issued by the court originating the judgment. The Kenyan Court can only decline to register the judgment if it has been wholly satisfied or if it could not be enforced by execution in the country of the original court. The application can, however, be resisted on grounds of lack of jurisdiction, fraud or misrepresentation.

In cases where a party seeks to enforce a judgment obtained from a country which is not designated as a 'reciprocating country' under the Act, the judgment can also be recognised although the procedure is somewhat different – a party has to file an ordinary suit seeking enforcement of the foreign judgment and will accompany the suit with a motion for summary judgment [in view of the judgment already entered in the other jurisdiction].

The above procedure applies to arbitral awards with the caveat that the local process of recognising an award through the local courts must be complied with before that adopted court judgment is then sought to be recognised in Kenya.

Foreign investment and trade

9 Outline any relevant treaty organisations, economic or monetary unions, or free trade agreements.

Exports from Kenya enjoy preferential access to world markets under a number of special access and duty reduction programmes. Kenya is signatory to various agreements aimed at enhancing trade among member states, including:

Common Market for Eastern and Southern Africa (COMESA)

COMESA is a free-trade area aimed at allowing free trade between member countries. Presently, exports and imports within member countries enjoy preferential tariff rates.

African Free Trade Zone

This is a free-trade zone allowing free trade between member countries.

Africa Continental Free Trade Agreement (AfCFTA)

This 44-state agreement establishes a single African market with free movement of capital. It was signed in March 2018 and will become operational after ratification by at least 22-member states.

East African Community (EAC)

This is a multilateral agreement between Kenya, Uganda, Tanzania, Rwanda, Burundi and South Sudan, providing partner states with a unique framework for regional cooperation and integration.

ACP/Cotonou Partnership Agreement

Exports from Kenya entering the European Union are entitled to duty reductions and freedom from all quota restrictions. Trade preferences include duty-free entry of all industrial products, as well as a wide range of agricultural products.

African Growth and Opportunity Act (AGOA)

With the enactment of AGOA by the US, Kenya qualifies for duty-free access to the US market. Kenyan products that qualify for export under AGOA include textiles, apparels and handicrafts products.

Bilateral agreements

Kenya is signatory to a number of bilateral trade agreements with several countries. As at 17th June 2019, Kenya had entered into bilateral agreements with the following countries:

- Argentina;
- Bangladesh;
- Bulgaria;
- China;
- Comoros;
- Congo (DRC);
- Djibouti;
- Egypt;
- Hungary;
- India;
- Iraq;
- Lesotho;
- Liberia;
- Netherlands;
- Nigeria;
- Pakistan;
- Poland;
- Romania;
- Russia;
- Rwanda;
- Somalia;
- South Korea;
- Swaziland;
- Tanzania;
- Thailand;
- Zambia; and
- Zimbabwe.

10 Are foreign exchange or currency controls in place?

There are no foreign exchange or currency controls in Kenya. However, the Central Bank of Kenya Act provides that every payment made (i) in Kenya to or for the credit of a person outside Kenya; (ii) outside Kenya to or for the credit of a person in Kenya; or (iii) in Kenya (other than a payment for a current transaction) between a resident and anon resident must be effected through an authorised bank. Central Bank approval is required for one to use an alternative channel.

11 Are there restrictions on foreign investment?

General

There are generally no restrictions on foreign investments and ordinarily a company registered in Kenya can be 100 per cent foreign owned. There are, however, a few industry-specific restrictions often limiting the percentage of foreign ownership of businesses in Kenya. The restrictions are in the land, mining, financial institutions, capital markets, engineering, health and communications industries.

Land

Foreigners and local companies with foreign shareholding can only hold land on the basis of leasehold tenure for a term not exceeding 99 years.

Dealings in agricultural land in Kenya are controlled under the Land Control Act.

Land within a zone of 25 km from the inland boundary of Kenya, any land within the first and second row from the high water mark from the Indian ocean and any other land declared as controlled land under any law or statute cannot be transferred to a non-Kenyan citizen or body corporate with non-Kenyan citizen shareholders without the consent of the cabinet secretary.

12 Are there grants, incentives or tax reliefs for foreign investors or businesses?

Investors in Kenya are entitled to certain tax incentives. These are:

Export Processing Zone (EPZ)

EPZ's enjoy an array of benefits, including, among others:

- Exemption from corporation tax for a period of 10 years and a lower rate of 25 per cent for a period of 10 year subsequent thereafter;
- Value Added Tax exemption on all inputs except motor vehicles;
- a 10-year tax holiday on dividend remittance;
- 100 per cent investment deduction on capital expenditures for 20 years;
- stamp duty exemptions; and
- work permits for senior expatriate staff.

Special Economic Zones (SEZ)

SEZ's enjoy certain benefits, including, among others:

- corporation tax at a rate of 10 per cent for the first 10 years of incorporation and 15 per cent for the subsequent 10 years;
- exemption from stamp duty on the execution of any instrument relating to the business activities of SEZ enterprises, developers and operators;
- work permits for up to 20 per cent of their full-time employees – additional work permits may be obtained for specialised sectors, on recommendation of the Authority;
- exemption from the requirement to obtain various licences and certificates prior to operation; and
- right to repatriate profits and capital and full protection against expropriation.
- exemption from income tax on dividends paid to non-residents

Motor vehicle assembling companies

Local motor vehicle assembling companies pay corporation tax at a rate of 15 per cent for the first five years of operation, which may be extended for a further five years if the company achieves a local content equivalent to 50 per cent of the value of the vehicle.

Capital allowances and investment deductions

Capital allowances and investment deductions of up to 150 per cent are allowed in respect of capital expenditure on machinery and industrial buildings.

These exemptions, incentives and reliefs will change on enactment of the Income Tax Bill, 2018.

Exemption on Value Added Tax (VAT)

There is an exemption on VAT on goods imported or purchased for direct and explicit use in specified industries, such as construction of tourism facilities, construction of specialised hospitals and industrial parks. However, approval must be obtained from the relevant cabinet secretary.

13 What are the main taxes that apply to cross-border or foreign owned business and investors?

Kenya has a source-based tax regime meaning that tax is charged on an income that accrues in or is derived from Kenya.

If a company or an investor operates as a subsidiary, they will be subject to resident corporation tax rate of 30 per cent of their taxable profit. If they operate as a branch or a permanent establishment, they will be subject to a non-resident corporation tax rate of 37.5 per cent.

Kenya also operates a withholding tax regime, which requires certain payments to be subject to withholding tax on the gross amount before being remitted to the recipient. The withholding tax rate will vary from 3 per cent to 30 per cent depending on the nature of payment and the residence of the person receiving the payment.

Changes are however anticipated on the enactment of the Income Tax Bill, 2019.

Regulation

14 Which industry sectors are regulated or controlled by the government?

The main regulated industry sectors are agriculture, banking, insurance, information and communications, energy, tourism, aviation and mining.

15 Who are the key industry regulators, and what are their powers?

Key industry regulators include:

- the Central Bank of Kenya, which regulates the banking, microfinance and payment systems sector;
- the Insurance Regulatory Authority, which regulates the insurance sector;
- the Communications Authority, which regulates the information, e-commerce and communications sector;
- the Capital Markets Authority, which is responsible for regulation of the capital markets;
- The Retirement Benefits Authority, which regulates the retirement benefits industry;
- the Kenya Civil Aviation Authority, which controls and regulates the civil aviation sector.
- the Ministry of Petroleum and Mining, which oversees the petroleum and mineral sector; and

  the Agriculture and Food Authority, which regulates the agricultural sector.

  Each authority is established by a separate statute which empowers the authority to license participants in the sector, develop and manage the sector and publish and enforce rules and regulations governing the sector.

16 What are the other main enforcement authorities relevant to businesses?

The main enforcement authorities in Kenya are: the Capital Markets Authority; the Competition Authority of Kenya; the Kenya Revenue Authority; the Ethics and Anti-Corruption Commission; the Communications Authority of Kenya; the Anti-Counterfeit Agency; the Financial Reporting Centre; the Asset Recovery Agency; and the Kenya Bureau of Standards.

17 On which areas have regulators particularly focused their recent enforcement activities?

The Competition Authority has greatly increased its monitoring of restrictive trade practices such as price-fixing within certain industries, including instituting enforcement action. In the past three years, the Kenya Revenue Authority has implemented major reforms in its tax collection systems, migrating to an online system for the filing of tax returns and tax payments, linking the system with other activities such as land transactions so as to widen the base of registered taxpayers and ensure the collection of transaction based taxes such as capital gains tax, as well as passing legislation increasing penalties for noncompliance. The Ethics and Anti-Corruption Commission has a larger mandate as a result of the enactment of a Bribery Act in 2017 which, although yet to be fully operationalised, has now criminalised bribery activity within the private sector and made it an offence to give a bribe, in addition to receiving a bribe. The implementation of the Proceeds of Crime and Anti-Money Laundering Act with the assistance of the Financial Reporting Centre has intensified the reporting requirements for cash transactions in the banking system, with the Central Bank of Kenya implementing rules requiring detailed written disclosures for any cash deposit or withdrawal exceeding US$10,000.

Compliance

18 What are the principal bribery, corruption and money laundering concerns for businesses?

Bribery, corruption and money laundering are offences under the laws of Kenya. These offences are particularly captured under the prevailing legislative and regulatory framework set out in:

- Anti-Corruption and Economic Crimes Act (No. 3 of 2003);
- Bribery Act, 2016;
- Leadership and Integrity Act (No. 19 of 2012);
- Public Officers Ethics Act (No.4 of 2003);
- Public Procurement and Asset Disposal Act (No. 33 of 2015);
- Public Procurement and Disposal Regulations, 2006

- Proceeds of Crime and Anti-Money Laundering Act (No. 9 of 2009); and
- Penal Code (Cap 63).

The forgoing legislation provide for:

- criminalisation, prevention, investigation and punishment of active, passive, or attempted money laundering, bribery, corruption, economic crimes, bid rigging, abuse of office and other related offences involving public officials, individuals and or business entities;
- identification, tracing, freezing, seizing and confiscation of the proceeds of crime; and
- protection of whistle-blowers and witnesses from recriminations.

Businesses operating in the Kenyan arena therefore must conduct themselves within the ambit of the forgoing legislation.

Moreover, the law requires:

- businesses to put in place mechanisms to identify, prevent and report suspected and actual risks to the respective government authorities;
- businesses to conduct due diligence on transactions and customers they engage with;
- that certain businesses, e.g all financial institutions and professions like accounting, register with the Financial Reporting Centre and to report any fraudulent, money laundering or corrupt activities.

Public institutions are also required to act with integrity, transparency and accountability in all their dealings. It should be noted that the respective legislative provisions have extraterritorial application to govern conduct perpetrated outside Kenya.

19 What are the main data protection and privacy risks for businesses?

As businesses frequently interact with their own or other persons' information, the key data protection and privacy issues revolve around unlawful access and misuse of data and information. The Constitution enshrines the right to privacy by prohibiting:

- the seizure of personal property;
- the unnecessary requirement or disclosure of information relating to a person's family or private affairs: and
- the infringement of privacy of a person's communication.

Data protection and privacy issues in Kenya are dealt with under various professional codes of ethics, court judgments, and in sector specific legislation in such areas as banking, insurance and information technology. However, Kenya is yet to adopt specific legislation on data protection although a bill is pending in parliament.

In 2018 Kenya enacted the Computer and Cyber Crimes Act which criminalises unlawful access and misuse of unlawfully obtained information stored in information technology systems. Moreover, in the Data Protection Bill, 2018, the country is considering providing owners of data extensive rights to control how personal data can be processed, applied or consumed by users. Further, any person serving or dealing with information of persons in Europe must comply with the EU General Data Protection Regulation.

20 What are the main anti-fraud and financial statements duties?

The anti-fraud duties relating to business entities are contained in the Companies Act 2015; the Proceeds of Crime and Anti-Money Laundering Act (No. 9 of 2009); the Penal Code (Cap 63); the Bribery Act 2016; and the Anti-Corruption and Economic Crimes Act (No. 3 of 2003). These laws provide for the identification, prevention, investigation and penalties in respect of fraudulent transactions by public and private entities. Reporting institutions, such as banking institutions, fund managers and insurance providers, are mainly obligated to:

- put measures in place to combat money laundering and fraud;
- register with the Financial Reporting Centre (Centre);
- submit specified reports, such as suspicious transactions, to the Centre.

Additionally, non-reporting institutions such as construction firms are prohibited from engaging in fraudulent conduct.

In relation to financial statements, business entities are required to:

- prepare financial statements for each financial year;
- keep proper accounting records;
- keep the accounting records at the business' registered office;
- ensure the records are open to inspection by its officers and members;
- preserve the accounting records for no less than seven years;
- ensure the financial statements give a true and fair view of the assets, liabilities and profit or loss of the business; and

ensure the financial statements comply with the prescribed financial accounting standards.

21 What are the main competition rules companies must comply with?

Companies in Kenya are governed by the Competition Act No. 12 of 2010 as amended by the Competition (Amendment) Act No. 49 of 2016 together with all rules and subsidiary legislation created thereunder. The Competition Act regulates merger control, abuse of dominance, restrictive trade practices and prohibited transactions impacting competition negatively. Kenya, being a member of COMESA, is also subject to COMESA competition regulations and their operation shall become subject to the East Africa Community competition rules and regulations once they come into force. Additionally, there are sector specific legislation that govern ownership and control as well as offering and pricing of products and services in restricted sectors such as banking, insurance, tele-communication and investment in listed securities.

22 Outline the corporate governance regime.

The corporate governance regime in Kenya is based on the global principles of corporate governance which aim at promoting transparency, accountability, effective leadership and integrity. These principles are enshrined under the Constitution, 2010.

In relation to private companies, the corporate governance regime is found in the Companies Act 2015. The Institute of Certified Secretaries has also developed a code of governance for private organisations developed to provide guidance to such entities.

Where companies are listed on a securities exchange in Kenya, the Capital Markets Act (Cap 485A) and the Code of Corporate Governance Practices for Issuers of Securities to the Public 2015 (the 'Code') apply. The Code applies to all entities which have received approvals from the Capital Markets Authority to issue securities to the public whether those issuers have been listed or not.

For state corporations, the key instrument is the Code of Governance for State Corporations, promulgated through Executive Order Number 7 of 2015 (the "Mwongozo Code"). Additionally, where such state corporation is listed, the corporate governance regime for listed companies will apply.

23 Can business entities incur criminal liability? What are the sanctions for businesses, related companies and their directors and officers for wrongdoing and compliance breaches?

Under the Kenyan law business entities can incur criminal liability. Some of the legislation imposing such criminal liability include the Companies Act 2015, Insolvency Act, 2015, the Competition Act (No. 12 of 2010), the Penal Code (Cap 63), and the Bribery Act 2016. Such criminal liability attaches vicariously through conduct of their officer in the course of their lawful work or with respect to conduct sanctioned by the business entity.

Criminal liability is imposed on the business entity and each director and officer of the business entity who is in default. Upon conviction, the business entity may be liable to a fine while such of its officers who are in default may be liable to a fine or to imprisonment or to both a fine and imprisonment.

Business operations

24 What types of business entity are most commonly used by foreign investors and why? What are the main requirements for their establishment and operation?

The main type of business entity used by foreign investors is the limited liability company.

A limited liability company is established under the Companies Act. Incorporation is carried out online through the online government portal known as eCitizen which is the official digital payments platform that enables individuals and businesses access and pay for government services online. There is no minimum share capital, local shareholder or local director requirement for the incorporation of a company in Kenya; however, certain regulated sectors prescribe a minimum local shareholding or maximum shareholding by a single shareholder, such as in the banking, insurance, aviation and communication sectors. A company must have at least one natural person as a director and one shareholder. The Companies Act prescribes certain reporting requirements, such as the filing of annual returns, notification of changes to share capital and directorships and registration of certain securities. Upon incorporation, the eCitizen system automatically registers the company as a tax payer with the Kenya Revenue Authority, as well as with the National Social Security Fund and the National Hospital Insurance Fund for the payment of social security and healthcare insurance for the company's employees.

A foreign company may also be registered in Kenya under the provisions of the Companies Act. The reporting requirements for a local branch of a foreign company are less; however, a branch will not qualify to be licenced in sectors that require activities be carried out by a locally incorporated company.

A limited liability partnership is also a form of business entity available under Kenyan law, although less commonly used.

25 Describe the M&A market and the merger control regime. How easy is it to complete deals in your jurisdiction?

Kenya is the regional leader in the East African M&A market. It is the preferred entry point for companies wishing to expand in the region due to its strategic geographical location, well-established private sector, relatively developed infrastructure and robust human capital. This is expected to remain the case over the medium term. Kenya's rise in the World Bank's Ease of Doing Business rankings is also notable, jumping 19 positions from 2017 to 2018 to position 61 globally. Significant M&A activity in Kenya has been seen in recent years in the financial services and ICT sector.

The merger control regime is set out in the Competition Act and has extra territorial application to conduct outside Kenya by a body corporate carrying on business within Kenya. The Act requires that all mergers are notified to the Competition Authority prior to their completion, failing which there are severe financial and criminal penalties. There are prescribed thresholds (relating to matters such as the entities' turnover and assets) that determine whether the merger is eligible to apply for exclusion by the Authority from the requirement for merger approval. Where merger approval is required, a detailed review of the implications of the merger on competition in the sector will be carried out by the Competition Authority, based on the submission of financial, sector and other information by the merging parties. The Competition Act prescribes timelines within which the Authority must make decisions on a merger application, and the Authority has been efficient in decision-making, ensuring that it does not unduly delay determination of merger applications. By virtue of Kenya's membership in COMESA, any merger transaction with a regional dimension may (subject to meeting certain asset or turnover thresholds) also require a separate merger approval by the COMESA Competition Commission. The East African Community Competition Act 2006 intended to regulate merger activity in the EAC is yet to be fully operationalised.

26 Outline the corporate insolvency regime. Is bankruptcy protection available for corporates?

The corporate insolvency regime under the Insolvency Act 2015 incorporates administration, receivership and liquidation within its ambit. Of note is its introduction of administration into the insolvency regime, affording corporates in distress the ability to seek the protection of an administration order during the implementation of a strategy for the company's rescue or asset realisation.

Employment

27 How easy is it to enter into and terminate employment contracts?

Any individual who is at least 16 years old can enter into an oral or written employment contract. A contract for employment for a period more than three (3) months must be in writing.

Termination of an employment contract must be fair and in accordance with the law. Casual employment, that is for 24 hours, can be terminated without notice while permanent contracts consisting of monthly payments, can be terminated by either party giving a 28 - day notice in writing. This requirement can be waived, and payment in lieu of notice can be made. The notice given must be in writing.

Termination of an employment contract by an employer as a result of an employee's gross misconduct under circumstances set out in the Act will entitle the employer to terminate the contract without notice or due notice. This is known as summary dismissal and a hearing must be conducted in the manner set out in the Act. The Court of Appeal recently held that although the cause of termination is not wrongful, fair procedure must be followed, otherwise the employer may be liable to pay damages to the terminated employee as was the case in *The Standard Group v Jenny Luesby [2018] eKLR.*

In the event of termination on the ground of redundancy, the employer must follow certain conditions, such as providing one month's notice or one month's wages in lieu of notice and notification to the trade union that the employee belongs to, among others. Failure to follow this procedure is detrimental to the employer as was the case in Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others [2018] eKLR.

The courts have recently gone further to acknowledge that the disciplinary hearing held before an employee is terminated should be objectively constituted. Further, the employee should be given the agenda of the meeting and the charges against them prior to the meeting. The satisfaction of these requirements prove that the employer has met the mandatory procedural fairness as envisioned under the Act. The leading case on this subject currently is Jacqueline Arkle v Five Forty Aviation Limited [2018] eKLR.

Recently, courts have acknowledged constructive dismissal one of the grounds for wrongful and unfair termination. This arises where an employee resigns in response to a fundamental breach of the contract by the employer. While the doctrine is not yet part of Kenyan statute law, it is rooted in Article 41 of the Constitution which guarantees the right to fair labour practices. The leading case on the subject currently is Coca-Cola East Central Africa Limited V. Maria Kagai Ligaga (2015) eKLR.

28 What are the key rights of local employees?

The key rights of local employees are:

- proper working hours;
- non-discrimination;
- fair remuneration;
- reasonable working conditions;
- annual leave;
- maternity and paternity leave;
- sick leave;
- housing;
- water and food at place of employment;
- medical attention;
- form, join or participate in trade union activities; and
- go on strike.

29 What are the main restrictions on engaging foreign employees?

Employers who want to engage foreign employees to work in Kenya must apply for the appropriate work permit from the Department of Immigration Services. Work permits are organised into categories which are granted depending upon the type of work the expatriate will undertake in Kenya. The application must be accompanied by a letter from the employer indicating that they were unable to fill the vacancy from the local labour market and that there are programmes in place to produce trained citizens in that field.

On approval of the application, the employer or, if the employer is not present in Kenya, an agent on his or her behalf is required to pay an amount as security to the government or obtain a security bond.

In the case of a foreign employee ceasing to work for the employer specified in the work permit for any reason, such employer shall report in writing to the Director of Immigration Services within fifteen (15) days that the holder of a permit has ceased to engage in the employment. Any employer who fails to do so commits an offence.

The Cabinet Secretary in charge of matters relating to citizenship is also empowered to make an order in writing, directing that any person whose presence in Kenya is unlawful to be removed from and remain out of Kenya either indefinitely or for such period as may be specified in the order.

30 What are the other key employment law factors that foreign

Employers who employ one or more employees are required to remit their contributions and those of the employees to National Social Security Fund. Both an employer and an employee can make private pension arrangements with registered schemes.

Every employer is required to obtain an insurance policy with an insurer approved by the Minister of Labour in respect of any liability that may be incurred under the Work Injury Benefits Act to any employee.

Disputes between an employer and employee may be resolved by the labour officer, but it is always subject to final determination by the Employment and Labour Relations Court.

To register workplace premises an employer must apply to the Directorate of Occupational Safety and Health to determine the safety and suitability for use of the workplace.

Foreign investors who intend to invest in Kenya are to apply to the Investment Authority for an investment certificate at a fee and are also to prove that the investment will be beneficial to Kenya in ways such as creating employment for Kenyan citizens.

Employers must provide written contracts of employment for employment over three months stating particulars in accordance with labour laws. Employment relations are further strengthened by constitutional rights, statutory rights, collective agreements, extension orders for collective agreements, and individual labour contracts.

The minimum rates of remuneration or conditions of employment for different industries is established in a wages order published by the Wages Council and is an invariable term of employment to any employee it applies to.

The Finance Act 2018 introduced the requirement for a 1.5% mandatory levy on the gross salary of employees entailing a maximum deduction of Kenya Shillings Two Thousand Five Hundred (Kshs. 2,500.00) for employees earning a salary of Kenya Shillings One Hundred and Sixty-Six Thousand (Kshs. 166,000.00) and higher. It also requires an employer to pay a similar amount for each employee to the National Housing Development Fund thereby raising the maximum contribution per employee to Kenya Shillings Five Thousand (Kshs. 5,000.00). This requirement is to be effective from 1st March 2019, however due to numerous court cases being instituted by various stakeholder regarding the status of the housing fund, its implementation has been put on hold.

The introduction of market conduct regulations in the retirement benefits sector vide The Retirement Benefits (Good Governance Practices) Guidelines 2018. The purpose is to ensure that good governance is maintained among employers, trustees and service providers in the sector and to improve service delivery to members who are the consumers of retirement benefits products and services. It has also prescribed the format of several documents that schemes must now have. These provisions are then supplemented with best international practices on good governance of schemes.

Intellectual property

31 Describe the intellectual property environment. How effective is enforcement and what are the key current issues?

Kenya has put in place legislation to protect Intellectual Property Rights (IPRs). IPRs such as patents, trademarks, industrial designs and copyright are protected. Kenya has complied with international obligations with respect to IPRs through domestication of international conventions.

Intellectual property in Kenya faces both institutional and legislative challenges- the institutional challenges include; inadequate qualified personnel responsible for matters related to IP, lack of adequate training facilities on I.P and inadequate funds for running of IP institutions. Legislative challenges are that- most of the I.P laws are outdated and cannot keep up with the latest development in I.P issues. Insufficiency of the enacted laws to comprehensively deal with the whole corpus of I.P in Kenya.

Kenya's legislative framework and enforcement can improve by increasing the public awareness of IP, coordinating and sharing information among the enforcement institutions, and ensuring cooperation between private and public authorities in combating counterfeiting and piracy.

Legal reform and policy

32 What are the key issues in legal reform, government policy and the economy?

Kenya adopted a new Constitution in 2010 and embarked on a devolution agenda to, inter alia, improve service delivery at the local level, remove limitations to economic growth, improve equality within national borders and increase poverty reduction efforts. However, the challenges experienced by the national government and counties in transforming the regulatory landscape have been a lack of creation, coordination and streamlining of new rules, structures and systems across the two tiers of government, and the building of national and local capacity. As a result, there is disparity in the ease of doing business from county to county.

In a bid to offer as many government services under one roof, the government opened over 38 Huduma Centres in over 33 counties. The Government has also implemented electronic systems in various State Departments and other state-owned institutions, including national tax systems, immigration information system, legal information system, the integrated financial management system and education system. Most of these systems are to be found in the National Treasury, Kenya Revenue Authority, State Departments and Immigration Office. These systems provide partial electronic services to citizens and businesses through Government portals. Kenyan Citizens and Foreign Residents can now apply for Government to Citizen (G2C) services and pay via mobile money, debit Cards and eCitizen agents. With the eCitizen portal you can now have access to various government departments for quick and easy services. This has made business transactions in Kenya easier. Shortfalls in collection of taxes and revenue and large infrastructural projects by the state have influenced government policy through the introduction and

More recently in June 2019, the government, through the draft 2019/2020 budget, proposed the increase of Capital Gains Tax from 5% 12.5%. The government also targeted the betting industry by proposing the introduction of 10% excise duty on every amount staked. Through these measures the government hopes to increase its fill the ever-increasing budget deficit.

33 Are there any significant legal developments ongoing or pending? What are their effects on the business environment?

New laws have been passed, such as on public private participation, compliance with environmental impact assessment laws, competition laws, IP, and a new Companies Act, which take into account current business practices realties and technology.

Key technology-based developments include the implementation of electronic systems is in the lands registry. The Ministry of Lands in 2017 embarked on a digitization exercise of the 57 land registries across the country which have been keeping manual records since 1895. This exercise, despite facing numerous challenges such as lack of a proper legal framework, is ongoing and is aimed at improving the delivery of services through electronic land transactions.

The Movable Property Security Rights Act which was passed in 2017 is also a key development that promotes consistency and certainty in secured financing relating to movable assets. In the securities trading industry, the regulations on short selling and borrowing of listed securities which were introduced in 2018 have been welcomed by industry players and are seen as a key reform to increase the market liquidity and increase market capitalization.

Other favourable laws include insolvency laws, and those relating to special economic zones, and a Business Registration Service Act aimed at making business entry as smooth as possible.

There has been a recent shift on extractive resources including oil and gas minerals moving Kenya from a market-seeking to a resource seeking country. More recent and pending laws to improve Kenya's investment landscape include laws on petroleum, energy, food and agriculture, ICT and privatisation. All these laws have improved or will greatly improve the ease of doing business in Kenya.

There is an increased stakeholder collaboration in development of ICT laws and Policy. The Government is making strides using legal instruments to limit certain actions and activities earlier not regulated. This includes the Computer and Cyber Crimes Bill, 2017 which was passed into law. Pending legislations include: Copyright Amendment Bill 2017, The Cyber Security and Protection Bill, 2016 and the Data Protection Bill.

Kenya's legislative and regulatory reforms have been impressive, and progress has been made to improve the investment climate. Tax administration has been modernised with an online filing and payment system (M-Pesa) and Huduma Centres.

However, the introduction and increase in taxes by the government has not been met well as expected. Economists warn that the increased taxes and levies will likely hurt creation of new job opportunities and slow down economic growth.

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MMAN Advocates is a leading corporate law firm in Kenya that aims to provide innovative and meaningful legal solutions to its clients. With a growing team of over 20 lawyers, MMAN offers expert legal advice and support services to businesses, corporate entities, banks and financial institutions, governments, multinationals, diplomatic missions and private clients.

MMAN has significant expertise in the banking and finance, aviation law, infrastructure projects, corporate and commercial law, real estate and property management (including capital markets, private equity, mergers and acquisition and privatisations), employment and pensions, intellectual property and litigation and arbitration areas of law.

The firm has years of experience in delivering legal services in the different practice areas and industry sectors, adopting a personal approach with direct partner involvement to service delivery aimed at understanding the clients' needs and far exceeding their expectations.

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The firm has consistently been ranked by international ranking firms such as *Chambers Global*, *ILFR1000* and *The Legal 500* as one of the leading commercial law firms in Kenya.

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