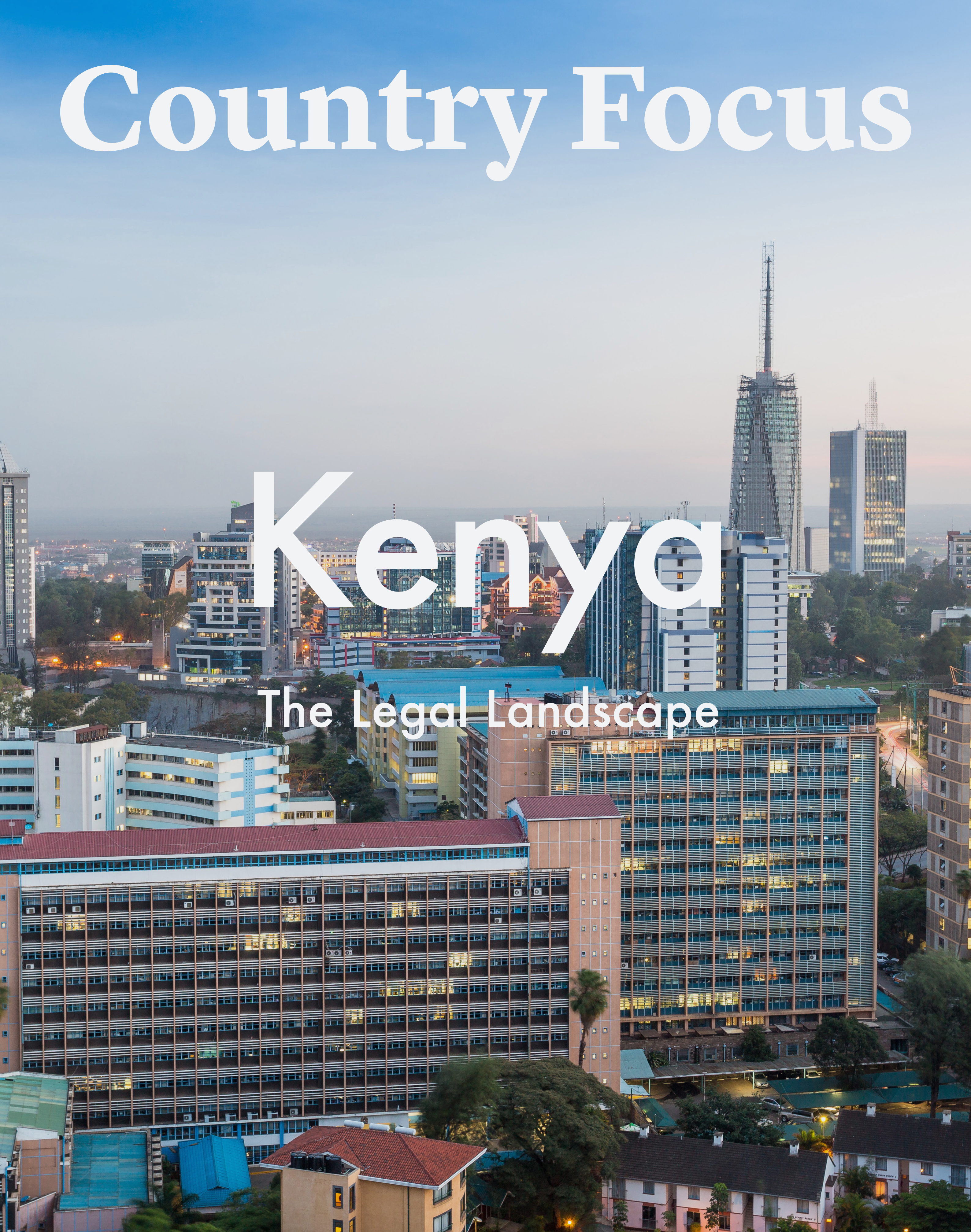
Country Focus

Kenya

The Legal Landscape



In association with
MMAN Advocates

GETTING THE DEAL THROUGH

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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

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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 high-value goods and services. It is the largest economy in the East African Community, contributing to more than 40 per cent of the region's GDP with a large volume of multinational companies having their regional and continent-wide headquarters in the country. By the Ernst & Young Africa Attractiveness Index released in 2016, Kenya ranked fourth on the continent after South Africa, Morocco and Egypt.

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 government has also consistently invested in infrastructure, including the construction of the standard gauge railway.

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 through supervision, sanctions and the penalisation of prohibited conduct. With increased civic awareness – and a more efficient judiciary – there has been an upsurge of formal dispute resolution through litigation and other available alternative dispute resolution mechanisms. Moreover, certain foreign judgments and arbitral awards are recognised.

Kenya's legal framework is business-friendly, and with its main principals being largely based on English law it is familiar to foreign investors. This has certainly played a part in leading the country to become the regional economic hub.

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

The main sources of civil and administrative law for companies are:

- the Constitution, 2010;
- the Civil Procedure Act (CAP 21) and Code;
- the Companies Act (No. 17 of 2015);
- the Competition Act (No. 12 of 2010);
- the Employment Act (No. 11 of 2007);
- the Income Tax Act (CAP 470);
- the Industrial Property Act (No. 3 of 2001);
- the Insolvency Act (No. 18 of 2015;
- the Law of Contract Act (CAP 23);
- the Limitation of Actions Act (CAP 22);
- the Prevention of Fraud (Investments) Act (No. 1 of 1977);
- the Registration of Business Names Act (CAP 499);
- the Registration of Business Services Act;
- the Tax Procedures Act (No. 29 of 2015);
- the Transfer of Businesses Act (CAP 500);
- the Value Added Tax (No. 35 of 2013); and
- 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 will 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 in the normal manner 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. Consumers can file a constitutional petition seeking the declaration of a breach of constitutional rights and seek any other appropriate remedy such as damages, injunctions, judicial review orders and orders for compensation.

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.

Access to justice is a constitutional right and has improved markedly over the years, particularly with the passing of the 2010 Constitution. The judiciary has expanded the court infrastructure system exponentially and the Parliament of Kenya recently passed the Legal Aid Act, the primary aim of which is to establish a legal and institutional framework to promote access to justice. Cost, ignorance and poverty, however, remain constant stumbling blocks in achieving the ultimate goal of access to justice.

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 emphasise on conciliation and arbitration. Arbitration is viewed as a way to unclog the congested court system, which lacks the capacity to efficiently and speedily adjudicate on commercial disputes. 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 Arbitration Kenya Branch is very vibrant and has a growing membership. Arbitration is also actively 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.

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 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 is to be accompanied by certain affidavits and certificates issued by the court originating the judgment. The Kenyan Court can only decline to register the judgment if the judgment 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.

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.

East African Community

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 a signatory to a number of bilateral trade agreements with several countries around the world. As at 27 July 2017, 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 non-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 may 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:
- 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;
- 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:
- 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;
- 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.

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.

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 before the exemption is enjoyed.

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

Kenya has a source-based tax regime which essentially means 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, on the other hand, 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 that certain payments should 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.

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?

The 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 Kenya Civil Aviation Authority, which regulates the civil aviation sector.
- the Ministry of Energy and Petroleum, which regulates the energy and petroleum sector;
- the Ministry of Mining, which oversees the mineral sector;
- the Agriculture and Food Authority, which regulates the agricultural sector; and
- the Tourism Regulatory Authority, which regulates the tourism sector.

Each authority is established by a separate statute that sets out the specific powers of the authority. These generally empower 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 non-compliance. The Ethics and Anti-Corruption Commission has a larger mandate as a result of the publication 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. The Constitution establishes the Ethics and Anti-Corruption Commission to ensure compliance with and the enforcement of laws on bribery, corruption, money laundering and related matters. It also allows for the ratification of related international legislation.

Businesses in Kenya are inherently exposed to bribery, corruption and money laundering concerns. They are required to conduct themselves within the ambit of 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 Disposal Act 2005;
- Public Procurement and Asset Disposal Act (No. 33 of 2015);
- Proceeds of Crime and Anti-Money Laundering Act (No. 9 of 2009); and
- Penal Code (Cap 63);

that 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;
- identification, tracing, freezing, seizing and confiscation of the proceeds of crime; and
- protection of whistle-blowers and witnesses from recriminations.

Further, businesses are required to put in place mechanisms to identify, prevent and report suspected and actual risks to the respective government authorities. 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, data protection and privacy issues are a key concern to businesses in Kenya. The Constitution enshrines the right to privacy by prohibiting, among others:

- 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 by various legislative instruments governing varied matters such as banking, insurance and information technology. However, Kenya is yet to adopt specific legislation on data protection although a bill is pending. The draft law contemplates operationalising the right to privacy principles set out in the Constitution, among them:

- the necessity of collecting information;
- a data subjects' right to access information about them; and
- the imposition of a duty to ensure information is accurate, updated and complete.

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

In the context of a company, the Companies Act requires the directors of a company to:

- prepare financial statements for each financial year;
- keep proper accounting records;
- keep the accounting records at the company's registered office;
- ensure the records are open to inspection by its officers;
- 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 company; and
- ensure the financial statements comply with the prescribed financial accounting standards.

Failure by the directors or company to adhere to the duties on financial statements under the Companies Act 2015 is an offence which, upon conviction, may lead to a fine, imprisonment or both in the case of a natural person.

The main anti-fraud duties 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 acts provide for identification, prevention, investigation and penalties in respect to fraudulent transactions by public and private entities.

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. Additionally, there is sector-specific legislation that governs restricted sectors such as banking, insurance, telecommunications, air services and investment in the stock market.

22 Outline the corporate governance regime.

Kenya has developed certain codes to promote good governance through transparency, effective leadership and integrity as enshrined in the Constitution, namely:

- the Capital Markets Authority has established the Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015. Some of the provisions of the Code have been incorporated in Capital Markets (Securities) (Public Offers, Listing and Disclosures) (Amendment) Regulations, as mandatory for companies that issue securities, whether listed or not;
- all boards of state corporations are required to implement the provisions of the Mwongozo, the Code of Governance for State Corporations, developed through Executive Order Number 7 of 2015; and
- the Institute of Certified Public Secretaries of Kenya has developed a code of governance for private organisations.

Additionally, quoted companies are required under the Companies Act to develop corporate governance principles that are appropriate for the nature and scope of their businesses.

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?

The Companies Act 2015 creates a number of criminal offences, most of which are designed to punish misconduct by companies, or directors or officers, while some address the misconduct of shareholders and third parties, where applicable. The offences are spread across a wide range of provisions, some of which are restricted to substantive matters while others are administrative in nature.

Many of the Companies Act's provisions on criminal offences impose liability on the company and each officer of the company who is in default. Upon conviction for contravention of such provisions, the company and the respective officers in default may be liable to a fine, while the officer may as well be imprisoned for a prescribed term.

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 industries 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 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 branch of a foreign company are less; however, there is a different tax rate applied to a foreign company, and a branch will not qualify to be licenced in industries that require activities be carried out by a locally incorporated company.

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 further in the region due to its strategic geographical location, well-established private sector, favourable government incentives, relatively developed infrastructure and robust human capital. This is expected to remain the case over the medium term. Significant M&A activity in Kenya has been seen over the years in the financial services and telecommunications sector.

The merger control regime is set out in the Competition Act. 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) that determine whether the merger is eligible 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 extremely effective in decision-making, ensuring that it does not unduly delay the completion of merger transactions. By virtue of Kenya's membership in COMESA, any merger transaction with a regional dimension may also require a separate merger approval by the COMESA Competition Commission.

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. A recent development is the introduction of administration, affording corporates in distress the protection of an administration order.

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. Contracts that run for three months and more must be in writing and signed by the employee.

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.

For permanent contracts that consist of monthly payments, the contract 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.

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.

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.

28 What are the key rights of local employees?

The key rights of local employees are:
- proper working hours;
- non-discrimination;
- remuneration;
- annual leave;
- maternity and paternity leave;
- sick leave;
- housing;
- water and food at place of employment;
- medical attention; and
- trade union activities.

29 What are the main restrictions on engaging foreign employees?

Employers who want to engage foreign employees to work in Kenya must apply for a Class D permit from the Department of Immigration Services. 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.

30 What are the other key employment law factors that foreign counsel, investors and businesses should be aware of?

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.

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.

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) in line with the Western philosophy of property ownership. 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 numerous issues and most, if not all, stem from the lack of a comprehensive national IP policy guiding the enforcement of IP law. Some of the emerging issues are the low level of awareness of IP and the rights arising under it in society, as well as the increase in piracy and counterfeit goods in Kenya.

Kenya's legislative framework and enforcement can improve by increasing the public awareness of IP, coordinating and sharing information among the numerous 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. Nevertheless, to allow more entrepreneurs to benefit from them, more public awareness, close cooperation and a clear division of labour between the centres and the various government agencies is critical.

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. 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.

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.

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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.

MMAN's knowledge of East Africa makes it the perfect legal partner for the region. The firm also provides cross-jurisdictional legal services through its membership in international legal networks TerraLex and Eversheds Africa Law Institute (EALI).

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.

Authors

Suzanne Muthaura

Suzanne is the managing partner at MMAN Advocates. She has over 18 years' experience in commercial and corporate law practice, with particular expertise in asset finance, equipment leasing, capital markets, corporate advice, commercial contracts, infrastructure projects, mergers and acquisitions and private equity. She has acted as lead counsel to both local and international clients in numerous transactions over the years.

For several years, Suzanne has been ranked by internationally recognised rating firm *Chambers Global*, as one of Kenya's leading commercial lawyers, and in 2015 she was recognised as one of the world's leading practitioners in aviation finance by *Who's Who Legal*.

Suzanne holds an LLM in corporate and commercial law from the London School of Economics, and an LLB degree from the University of Warwick.

Waringa Njonjo

Waringa Njonjo is a partner at MMAN Advocates and works in the firm's corporate and commercial department. She is qualified in two jurisdictions, being a barrister-at Law for England and Wales and an advocate of the High Court of Kenya. Waringa holds a bachelor of economics and social studies in law and political studies from the University of Wales, Aberystwyth, and a postgraduate diploma from the Kenya School of Law.

Waringa has a strong background in commercial and corporate law, including capital market transactions, corporate finance, corporate advice, commercial contracts, energy projects, mergers and acquisitions and private equity. She has been ranked for several years by internationally recognised rating firm *Chambers Global* as one of Kenya's leading commercial lawyers, and a 'rising star' in financial and corporate law by *IFLR1000*.

Waringa is a member of the Law Society of Kenya, the Honourable Society of the Middle Temple, England and a member of the board of Pharm Access.

Carole Ayugi

Carole Ayugi is a partner at MMAN Advocates and has over 14 years' experience in the commercial and corporate field with a focus on corporate governance, intellectual property, real estate development and construction, trusts, employment and pensions.

She is an advocate of the High Court of Kenya, a certified public secretary, a member of the Law Society of Kenya, a member of the Chartered Institute of Arbitrators Kenya Branch, an accredited mediator, an accredited court-annexed mediator in the Mediation Accreditation Committee of the Judiciary of Kenya, a member of the Institute of Directors (Kenya) and a director at Countryside Dairy Limited.

She holds an LLB (Hons) degree from the University of Nairobi and a postgraduate diploma from the Kenya School of Law. Carole has been rated by *Chambers Global* as an 'up and coming' lawyer.