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INTERNATIONAL ARBITRATION

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FOREWORD

International arbitration, offering a flexible and neutral platform for dispute resolution, is increasing in prominence as a method of resolving cross-border commercial disputes in Africa. This trend is set to continue as investments increase amid continuing concerns about the quality of local judiciaries.

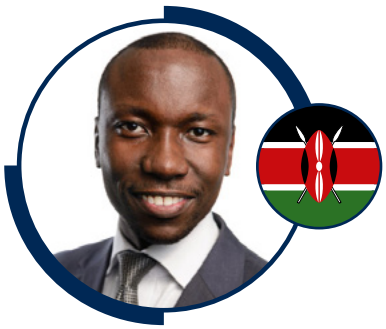
This guide provides an overview of the unique legal frameworks and regional institutions shaping the arbitration landscape within the five African countries in which Bowmans is located. It is designed to provide a quick introduction and an understanding of the advantages and disadvantages of international arbitration in each jurisdiction.

For further information, please contact one of the key contacts listed per section.

Cecil Kuyo and Clement Mkiva
Team Leads: International Arbitration

The information in this guide is correct as at 30 September 2023, and does not substitute for detailed legal advice.

KENYA



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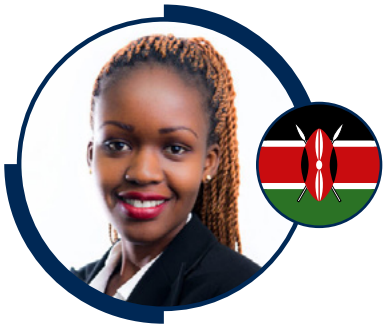

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OVERVIEW

The Arbitration Act 4 of 1995 (as amended in 2009) (**Arbitration Act**) governs both domestic and international arbitration as well as the enforcement of arbitral awards in Kenya.

The Arbitration Act incorporates the UNCITRAL Model Law of International Commercial Arbitration 1985 (**UNCITRAL Model Law**) as well as the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (**New York Convention**).

ADVANTAGES

- The Constitution of Kenya encourages the use of alternative dispute resolution mechanisms in the settlement of disputes.
- Kenyan courts have consistently considered alternative dispute resolution processes to be complementary to the judicial process and are obligated to promote them.
- Kenyan courts will generally only intervene in arbitration in the limited circumstances provided for under the Arbitration Act.
- Kenya has an arbitral institution known as the Nairobi Centre of International Arbitration (**NCIA**) which was established in 2013 by an Act of Parliament to promote international commercial arbitration and other alternative forms of dispute resolution.
- It is becoming increasingly common for national government contracts to provide for arbitration under the auspices of the NCIA.

DISADVANTAGES

- Arbitration practice in Kenya has been criticised for being overly expensive, particularly in terms of counsel fees and arbitrator charges.
- The challenges parties seek to avoid in court litigation are slowly creeping into arbitration proceedings. For example, there has been an increase in delaying tactics as well as the use of strict procedures typically applicable in court. This increases the cost and time taken to resolve disputes detracting from the benefits of arbitration.
- The Arbitration Act gives parties a considerable amount of control of the arbitration proceedings, which is increasingly being abused.
- There has also been reluctance by tribunals to issue sanctions for non-compliant parties.
- It is becoming apparent that there is an arbitration skills gap. Many arbitral awards are being challenged in court through setting aside proceedings as a result of parties' dissatisfaction with the quality of the awards.

DISTINCTIVE FEATURES

The Arbitration Act makes provision for the withdrawal of an arbitrator from the arbitral proceedings as well as for the immunity of an arbitrator. It also empowers an arbitrator to do all things necessary for the proper and expeditious conduct of the arbitral proceedings.

MAURITIUS

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OVERVIEW

As part of its goal to establish Mauritius as a safe, neutral and modern place for business and investment, including dispute resolution, the Government has made several reforms to create an international 'régime' for international arbitration. This has been done in such a way that the approach is unhindered, in as much as is possible, by domestic rules and policy considerations.

The International Arbitration Act 2008, which is based on the UNCITRAL Model Law, governs arbitration in Mauritius. In 2013, the Government also amended the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 2001, which gives the New York Convention force of law. It also adopted the Supreme Court (International Arbitration Claims) Rules 2013, which provide the procedure and rules for the enforcement of claims in Mauritius.

ADVANTAGES

- The Mauritian legal system uniquely blends French civil and UK common law, which lends itself to jurists being highly qualified in both systems.
- Well-established arbitration institutions, such as the Mediation and Arbitration Center (**MARC**) and the Mauritius International Arbitration Center (**MIAC**), provide state-of-the-art arbitration facilities.
- Under the 2008 Act, the vast majority of functions in arbitration proceedings that would traditionally necessitate court assistance (e.g. the appointment of arbitrators) have been entrusted to the Permanent Court of Arbitration in The Hague (**PCA**).

DISADVANTAGES

- The process of recognition and enforcement of awards through the Supreme Court is not always efficient, particularly if the losing party resists the enforcement of the award.

DISTINCTIVE FEATURES

A unique feature of international arbitration law in Mauritius is the automatic right of appeal to the Privy Council for final decisions of the Supreme Court on a challenge of an award or for a decision under the 2001 Act.

SOUTH AFRICA

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OVERVIEW

In December 2017, South Africa enacted the International Arbitration Act (**IA Act**), which incorporates the UNCITRAL Model Law with amendments as adopted in 2006, and the New York Convention, into domestic law, even though the latter already formed part of South African law. International arbitration in South Africa is now regulated by a single statute, based on international best practices.

ADVANTAGES

- South African courts are pro-arbitration. They consistently exalt the benefits of arbitration and respect the parties' choice to arbitrate.
- The main local arbitration institutions have rules that meet best practices and are amongst the best on the African continent.
- The rules of procedure, including the law of evidence, are largely based on English law. Accordingly, procedural rules are similar to those found in other common law jurisdictions.
- In comparison to more established seats, which have similar arbitral laws and the same quality of lawyers, South African legal services are more economical.

DISADVANTAGES

- The process of recognition and enforcement of awards through the courts is not always as efficient as it could be, particularly if the losing party resists enforcement or seeks to set aside an award.

DISTINCTIVE FEATURES

South African law is sophisticated, and its application is complemented by a modern legal system and an independent judiciary. South Africa is regularly chosen as the preferred seat for arbitration of sub-Saharan African disputes and is increasingly being chosen as the seat for arbitrations without an African link.

TANZANIA

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OVERVIEW

The new Arbitration Act [CAP 15 RE 2020] (**Arbitration Act**) became effective from 18 January 2021. Combined with the Arbitration (Rules of Procedure) Regulations 2021, the Arbitration Act established a comprehensive mechanism for the regulation of arbitral proceedings and the accreditation of arbitrators. It brought Tanzania in line with international best practice, based on the UK Arbitration Act of 1996.

ADVANTAGES

- The Arbitration Act explicitly stipulates that an arbitral award is deemed final and binding upon the parties involved, even extending to those who claim rights through it. Consequently, national courts have cultivated a jurisprudential stance designed to foster the resolution of disputes outside of the courtroom. They have also generally exhibited reluctance to intervene in the enforcement of arbitral awards, provided that they conform to the provisions outlined in the Arbitration Act.
- Owing to the fact that the procedural rules are predominantly rooted in English law, the arbitration process boasts a familiar and accessible framework for all parties involved.

DISADVANTAGES

- The legal framework surrounding the Arbitration Act is still developing. One noteworthy aspect of this emerging jurisprudence is the requirement that domestic arbitration proceedings must be conducted under the auspices of an arbitrator who holds accreditation in accordance with the Reconciliation, Negotiation, Mediation, and Arbitration (Practitioners Accreditation) Regulations of 2021. Any arbitral award issued by an arbitrator lacking this accreditation is rendered void.

DISTINCTIVE FEATURES

Previously, the Natural Wealth and Resources (Permanent Sovereignty) Act of 2017 explicitly barred any proceedings in foreign courts or tribunals pertaining to matters involving the natural resources of Tanzania. Instead, such disputes were mandated to be adjudicated within Tanzania, exclusively through bodies that were 'established' in Tanzania, such as the Tanzanian Institute of Arbitrators.

However, the Arbitration Act has since been amended to remove the term 'established'. Consequently, it now allows for the arbitration of such disputes through foreign arbitral bodies, such as the London Court of International Arbitration (**LCIA**), provided that the arbitration takes place within Tanzania and is conducted in accordance with Tanzanian laws.

ZAMBIA

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OVERVIEW

The Arbitration Act of 2000 governs arbitration in Zambia. The Act adopts the UNCITRAL Model Law in its entirety as a schedule to the Act, which applies in Zambia to the extent that it is not inconsistent with the Arbitration Act.

There are also Rules [Arbitration (Court Proceedings) Rules 2001] that regulate the procedure for the court's intervention in arbitration proceedings. The Rules provide the procedure for the registration and enforcement of foreign arbitration awards as well as the procedure for challenging the enforcement of foreign awards.

An effort is underway to update the Arbitration Act to reflect recent changes in arbitration. The Law Association of Zambia, in collaboration with the Chartered Institute of Arbitrators, Zambia Branch, opened the Lusaka International Arbitration Centre (**LIAC**) in early 2023. LIAC has yet to be operationalised. It has no regulations or employees, but it is projected to be operational by early 2024.

ADVANTAGES

- The courts in Zambia are arbitration-friendly, and the Supreme Court has delivered landmark pro-arbitration decisions that have set the tone for the rest of the courts.
- Zambia is a signatory to the New York Convention, which is domesticated through the Arbitration Act. Therefore, foreign arbitral awards are enforced in the same manner as domestic awards.
- The enforcement procedure is *ex parte* and straightforward.

DISADVANTAGES

- The Arbitration Act is relatively old and does not address new arbitration concerns. It was passed in 2000 and is based on the 1985 version of the UNCITRAL Model Law. The most common difficulty with this is that modern concerns like third-party funding and the ever-changing idea of conflict of interest are not addressed in the arbitration registration.

DISTINCTIVE FEATURES

A distinctive feature of arbitration law in Zambia is that it allows members of the judiciary (judges) to sit as arbitrators. The debate on whether to exclude judges from sitting as arbitrators is ongoing. The proponents of the idea intend to include a specific provision in the new Arbitration Act.

OUR INTERNATIONAL ARBITRATION EXPERTISE

'maintains excellent standing for its ADR practice, with notable experience in arbitrations across Africa'
- Chambers and Partners, 2022

We provide cost-effective and practical advice at every stage of the arbitration process.

We have expertise across various business sectors and experience in arbitrating under the rules of all major arbitral institutions including UNCITRAL rules.

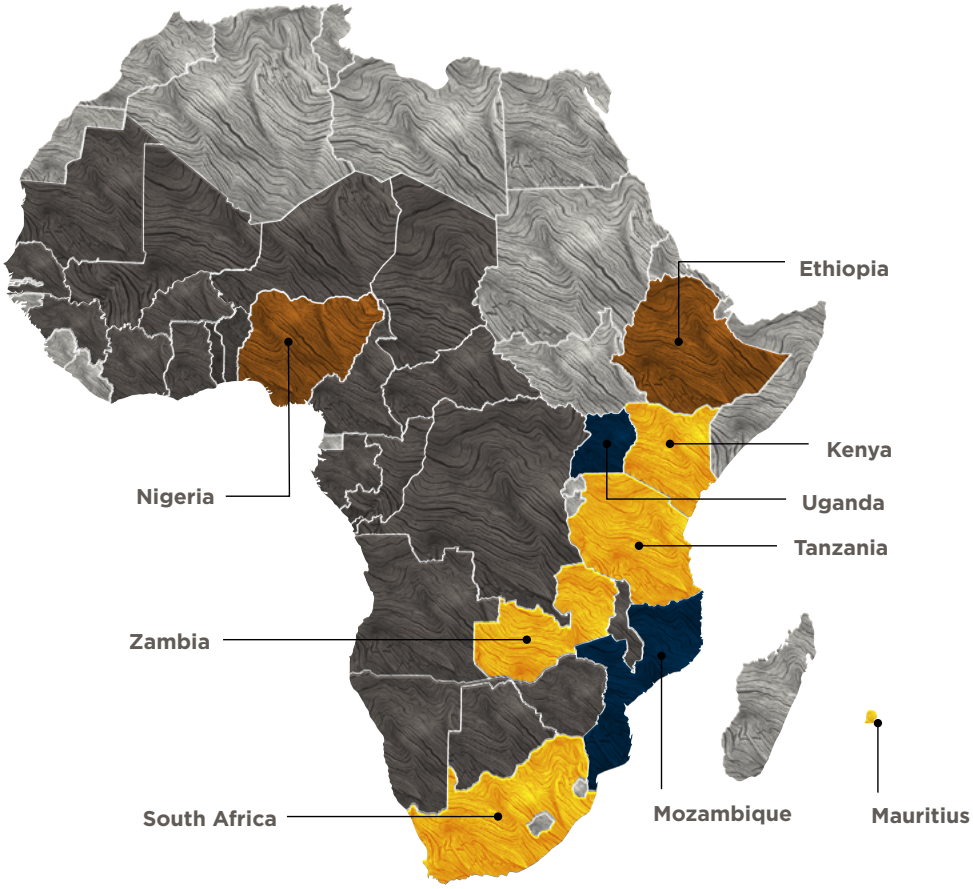
We act for clients in both treaty-based arbitrations and international commercial arbitrations. We also regularly conduct ad hoc arbitrations.

Our experience ranges from investment protection arbitrations to arbitrations concerning joint ventures and transactions as well as commercial disputes.

We are members of regional arbitration associations (such as the China Africa Joint Arbitration Centre; Kenya's Chartered Institute of Arbitrators and Dispute Resolution Centre; and the Arbitration Foundation of South Africa).

We have a broad international client base including multinational organisations and non-government entities, governments, state-owned entities and financial institutions.

OUR PRESENCE IN AFRICA



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Our advice uniquely blends expertise in the law, knowledge of local markets and an understanding of our clients' businesses.

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