

A YEAR IN REVIEW

LOOKING BACK AT THE LEGISLATIVE DEVELOPMENTS OF 2019

The year 2019 witnessed a phenomenal growth and expansion in the commercial landscape in Kenya. These rapid and dramatic changes were fuelled in no small measure by the increasing foreign investment, especially in the infrastructural and energy sectors of the economy. The major player in these zones was by far Chinese capital, with a sprinkling contribution from the EU. The prospect of others entering the theatre may be seen from the recent agreement signed by the USA and Kenya, on the heels of the recent visit by HE the President of the Republic to the USA.

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The legislative year 2019 has been a busy one, clearly aimed at laying the ground for this invigorated business climate. Parliament in all considered and passed into law 30 pieces of legislation some of which receive attention in this letter. Poised for similar treatment are a vast array of Bills, intended to augment the commercial ecosystem for faster growth, despite the uncertainty which may be seen from the remaining two years before the next general election. If passed, the laws may have a significant effect on the corporate/commercial field.



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ANTI-TRUST & COMPETITION

Since its inception, the Competition Authority of Kenya has consistently made strides to increase its regulatory capacity as well as refine the Competition Act to capture different forms of competition and anti-trust behaviour.

In 2019 an amendment to the Act was proposed that enhanced abuse of buyer power provisions in the Act by providing examples of abuse of buyer power. It also stipulated that certain terms must be included in a buyer / supplier contract. Specifically, the terms of payment, the date of payment, the interest rate payable on late payment, the conditions for termination and variation of the contract with reasonable notice, and the mechanism for dispute resolution. The Bill passed Parliament on 3 December and following presidential assent came into force on 31 December 2019.

We encourage clients to conduct a legal audit of existing contracts to ensure compliance with the new requirements.



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BANKING & FINANCE

Following the imposition of a cap on lending interest rates (of no more than 4% above the CBR) and a minimum interest rate earned on deposits (of at least 70% of the CBR) in 2016 the banking sector has been reluctant to offer credit to borrowers.

Under pressure the government in 2018 abolished the minimum interest rate earned on deposits but retained the lending cap. Then in March 2019 the High Court ruled that the lending cap was void due to the wording of the section being ambiguous and imprecise. The High Court however suspended its judgment for 12 months to allow the National Assembly to amend the deficiencies in the provision.

A Bill was therefore introduced (the Banking (Amendment) Bill, 2019) to address the issues raised by the High Court judgement. The Bill was however overtaken by events when the Finance Act, 2019 came into force which abolished the section imposing the cap. Banks were now poised to release credit into the market.

However, another amendment was proposed by the legislature in 2019 (under the Law of Contract Amendment Bill) whose effect would once again restrict the credit. The amendment intends to require lenders to first 'realise' the principal debtor's security before proceeding against a guarantor.

The intention is to create a legal obligation for a creditor to first seek recourse from the principal debtor before pursuing the guarantor. However, the clause does not make apparent what steps would be considered to be sufficient to satisfy the requirement of 'realising' a debt.

From our reading of Hansard, the National Assembly saw the amendment as a mechanism of lifting the inordinate burden of being a personal guarantor where the creditor does not attempt to pursue the debtor. Parliament did not consider the implications on corporate lending (there are no proposed exemptions under Bill). The Bill was passed in September however, the President has refused to assent to the Bill citing its negative impact on the finance sector and returned the Bill back to the National Assembly in January this year.

CORPORATE GOVERNANCE

Strong governance is the cornerstone for all thriving economies. In 2019 several bills were introduced that seek to strengthen Kenya's governance regime: first the Institute of Directors of Kenya Bill, 2019 seeks to regulate the conduct of directors, second the Anti-Corruption and Economic Crimes (Amendment) Bill, 2019 proposes a life time ban for those convicted of corruption from holding a position in public office. It also proposes that on conviction a person will also be held personally liable for any pecuniary loss suffered. Third, the Ethics and Anti-Corruption Commission circulated a draft Conflict of Interest Bill, 2019 for public comment. The Conflict of Interest Bill seeks to codify the instances where conflict of interest may arise for a public official and the steps they need to take to resolve / declare that conflict. Finally, the Lifestyle Audit Bill, 2019 seeks to provide a legal framework for conducting lifestyle audits of public officers.



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CORPORATE & M&A

A surprising development in the corporate space came through the Statute Law (Miscellaneous Amendments) Act, No. 12 (in force from 23 July 2019).

Generally the purpose of Statute Law Miscellaneous Amendments) Act is to capture administrative / non-consequential changes to acts. However, in this instance the Act amended a significant provision in the Companies Act, 2015 regarding the threshold for forced takeovers (that is the sanctioned legal process for squeezing out minority shareholders – a squeeze out). It decreased the squeeze out threshold from requiring the acquirer to already hold 90% of the company's shares down to 50% ownership.

In addition, towards the end of 2019, the Business Laws (Amendment) Bill, 2019 was introduced in the National Assembly. The purpose of the Bill is to amend various statutes with the aim of further facilitating the ease of doing business in Kenya. If successfully implemented, this could boost Kenya's global ranking in the World Bank's ease of Doing Business Guide. However, this progress may be countered by the recent amendment to the Companies Act (lowering the threshold for a forced sale of shares) as the matrix the World Bank uses to determine a country's ranking considers the protection of minority rights.



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DATA PROTECTION

Up until 25 November 2019 Kenya did not have a cohesive piece of legislation to deal with data protection. With the enactment of the Data Protection Act (the DP Act) the conduct and activities of persons who collect, process or utilise individuals' personal data is now regulated. The DP Act regulates the conduct of both the person (or entity) who decides that certain personal data needs to be collected (data controllers) and those persons who process the personal data (data processors) on behalf of the data controller. An example of this would be a market research company (the data processor) undertaking a customer satisfaction survey on behalf of a bank (the data controller).

The DP Act also sets up a new regulator, the Data Commissioner to deal with data protection regulation and enforcement of the Act. At present, the Data Commissioner has not been appointed. However, with the right political goodwill, the post may be created in 2020. The role of the Data Commissioner will be pivotal as they are tasked under the DP Act to set up a register of data controllers and processors and state the registration thresholds a processor / controller will have to satisfy to be required to register. Once the regulator is established, we foresee that the need for a desensitisation campaign of the public and businesses as the consequences of this Act are far reaching.



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EMPLOYMENT

Over the last two years, three Employment Amendment Bill bills have been published each proposing noteworthy changes to the Act. In 2017 a Bill proposed increasing maternity leave from 3 months to 6 months. This Bill has since stalled. Then in March 2019 a new Bill was put to Parliament seeking to provide for 3 months adoption leave (the same duration as maternity leave).

Then in April 2019 the Kenya Law Reform Commission (KLRC) and the State Department for Labour published a draft Bill for public consultation. This Bill proposed a wide range of changes. Most importantly it suggests a mechanism of transferring employees from one entity to another in an M&A transaction. This draft Bill is yet to be introduced in parliament.

In addition the recently enacted Data Protection Act also places new obligation on employers regarding how employers obtain, use and save employee personal data.

ENERGY & PETROLEUM

On 28 March 2019 a new Energy Act came into force. The ambitious Act consolidates Kenya's energy laws and overhauls some of the public entities in Kenya's energy space and sets up a new licensing regime. In particular: i) the Energy and Petroleum Regulatory Authority (EPRA) replaces the Energy Regulatory Commission (ERC). The EPRA takes over the ERC's regulatory role over Kenya's electricity, petroleum and renewable energy sectors. In addition, the new authority's mandate now includes upstream petroleum and coal; ii) the Rural Electrification and Renewable Energy Corporation replaced the Rural Electrification Authority that oversaw the provision of electricity to rural areas; and iii) the Nuclear Power and Energy Agency replaced the Kenya Nuclear Electricity Board which was responsible for Kenya's nuclear energy sector.

As these new authorities settle into their roles, we expect to see policy development in 2020 that will shape Kenya's energy industry for years to come.



INSURANCE

The Insurance (Amendment) Act, 2019 contains four main changes:

- it introduces definitions for index based insurance and micro insurance;
- it requires that all insurance premiums be paid directly to insurers and not to intermediaries;
- it details the acts that will be considered insurance fraud and the penalty payable; and
- it gives the Commissioner of Insurance the extraterritorial ability to fine a company if its subsidiary or another company which is in the same group of companies has breached a directive from the Commissioner.

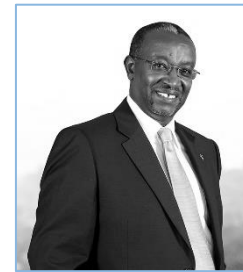
The final amendment is perhaps the most critical for insurance groups due to the extraterritorial ability the Commissioner now has. It will be interesting to see if the Commissioner does use this new found power.



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INTELLECTUAL PROPERTY

Kenyan IP law has experienced two fundamental developments in the past year. First the Copyright (Amendment) Act, 2019 (which was first introduced in Parliament in 2017) brings Kenya's legislation in line with the provision of the Marrakesh Treaty, ISP Liability and Resale Royalty Right. It creates an obligation on ISP providers once notified to take down material due to the unlawful nature of the cached material. The second development was a precedent setting Court of Appeal decision on the statutory concept of 'incidental inclusion'. The case, successfully argued by our Partner Peter Gachuhi, set legal precedence on the statutory concept of 'incidental inclusion' of copyrighted material in an advert. The decision will provide guidance and clarity in Kenya's fast growing entertainment and media industry (valued at USD 1.7 billion in 2017) where copyright issues are critical to the creators of content. For more details of the judgement click [here](#).



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LAND

Over the last two of years, the Ministry of Lands has been steadily putting in place infrastructure to enable the digitization of land records and land transaction processes. The object is to make the buying and selling land more efficient and to reduce the risk of lost records.

Therefore, it was a legislative triumph when the Land (Electronic Land Transactions) Regulations, 2019 came into effect. To bolster its policy objectives, the Ministry of Lands also issued a notice that stopped the presenting of manual documents at the registry and promoted automation. However, in a case of three steps forward two steps back, Parliament in December 2019 revoked the regulations following reported interventions from the Law Society of Kenya who took issue that the regulations permitted non-qualified practitioners to prepare land transaction documents. Under the Advocates Act only advocates can prepare these type of documents. We expect that the Ministry of Land will readdress this issue since digitisation of its processes is a core policy.

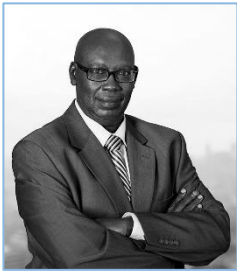


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RETIREMENT BENEFITS



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2019 was marked by a tussle between the Retirement Benefits Authority (RBA) and the legislature in determining when pensioners could access their pension pots. The RBA's core mission is to proactively promote savings for retirement and to achieve 30% pension coverage. At present, 80% percent of Kenya's labour force have no savings for retirement.

At the beginning of the year the legal position was that on termination of employment an employee was entitled to access the entirety of their contribution into the pension fund and 50% of the employer's contribution plus any income accrued. The RBA then introduced regulations barring employees from accessing the employer's portion of contributions and the investment income gained from the joint contributions until they had attained retirement age.

However, the legislator revoked the legislation during its parliamentary session in November arguing (as reported by the dailies) that they had not been consulted. The corresponding legal notice revoking the regulations is yet to be published in the Kenya gazette.



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TAX

The Finance Act, 2019 took a business progressive outlook and sought to redress some concerns raised within the business community. First an amendment was passed that permitted the Commissioner to exempt certain persons or a class of persons from the requirement of needing a tax payer personal identification number (PIN) in certain circumstances. This provision will be useful to foreign start-ups who have found it a challenge establish their business due to the need for a PIN. For example, PINs are required when opening a bank account in Kenya.

The second change was to provide a capital gains tax exemptions for transactions where the transfer of property is as a result of a corporate restructuring. This amendment will be especially beneficial to group companies undertaking a restructuring.



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TELECOMMUNICATIONS

There were two Bills in 2019 that sought to amend the Kenya Information and Communication Act.

The first Bill seeks to allow telecommunication licensees to engage in other businesses on condition that these businesses are run under separate legal entities and that the relevant licensing for the type of business sought are obtained.

The second Bill seeks to regulate the use of social media by introducing licensing requirements for social media platforms. It also creates obligations for social media users including the registration of bloggers.



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