GAMBIA

INTRODUCTION

The Gambia implements a tripartite legal system based on English common law, Sharia (Islamic) law, and customary law. The 1997 Constitution recognises statutory enactments, decrees passed by the Armed Forces Provisional Ruling Council (during the transition from military rule from 22 July 1994 to the coming into force of the Constitution), common law and principles of equity, customary law as it concerns the communities to which it applies, and Sharia law on matters of marriage, divorce and inheritance among people of Islamic faith.

LITIGATION

1. WHAT IS THE STRUCTURE OF THE LEGAL PROFESSION?

The legal profession comprises legal practitioners enrolled to practise law by the General Legal Council established under the Legal Practitioners Act (Cap. 7:01), and the common law judges who preside in the High Court, Court of Appeal, Supreme Court, Court Martial and the Magistrates' Courts. In its wider sense the legal profession could be regarded as including the Cadis trained in Islamic law, who preside over the Cadi Courts, and Sharia practitioners (persons qualified in Sharia law permitted to represent litigants before the Cadi Court).

The legal profession is fused, such that there is no distinction between barristers and solicitors. Persons trained as barristers and solicitors anywhere in the Commonwealth may be enrolled to practise as legal practitioners if they meet the requirements specified in the Legal Practitioners Act and fulfil the conditions prescribed by the General Legal Council established under that Act. These include being a citizen of the Gambia (or non-citizen who has been resident for a period of not less than 15 years), having a law degree and a professional qualification which permits the applicant to practise law anywhere in the Commonwealth, having no criminal record, and character references from two current members of the Bar.

By section 33 of the District Tribunals Act, lawyers have no rights of audience before District Tribunals. The rationale for this may be because common law based rules of evidence or rules of civil procedure do not include customary law. Only lawyers who are qualified in Sharia law may appear before the Cadi Courts.

2. WHAT IS THE STRUCTURE OF THE COURT SYSTEM?

The judicature comprises the superior courts of record, the subordinate courts, and the Cadi Courts.

The superior courts comprise:

- the Supreme Court
- the Gambia Court of Appeal
- the High Court and Special Criminal Court

The subordinate courts comprise:

- Magistrates' Courts
- Children's Courts
- District Tribunals
- Industrial Tribunals
- Rent Tribunals
- Traffic Offences Courts
- Anti-littering Court

Sharia courts comprise:

- Cadi Court
- Cadi Appeal Panel

Appeals lie from the subordinate courts to the High Court, from the High Court to the Gambia Court of Appeal and from the Gambia Court of Appeal to the Supreme Court as a final Court of Appeal. The High Court also has supervisory jurisdiction over subordinate courts and administrative tribunals and may issue orders and prerogative writs in the nature of *certiorari*, *mandamus*, prohibition and *habeas corpus* for the purpose of enforcing its supervisory jurisdiction.

The Supreme Court has original jurisdiction in matters relating to the interpretation and enforcement of the Constitution (other than fundamental human rights provisions in respect of which the High Court has original jurisdiction), election of the President of the Republic and matters relating to privilege claimed by the State regarding the production of any government document on grounds of security or public interest.

Appeals lie from the Cadi court to the Cadi Appeal Panel as a final court in matters in which the Cadi Courts have jurisdiction.

3. WHAT ARE THE TIME LIMITS FOR BRINGING CIVIL CLAIMS?

The Limitation Act (Cap. 8:01) prescribes limitation periods for instituting civil claims. The Labour Act (Cap 56:01) also prescribes time limits for claims under that Act. The following periods generally apply, subject to other conditions prescribed under the Act:

- 12 years applies to most property claims (including claims to recover land or money secured under a mortgage, foreclosure actions, and claims in relation to the estates of deceased persons)
- six years applies to actions in tort and contract, as well as sums recoverable under statute, recovery of rent, mortgage interest, trust property, and enforcement of judgments/arbitral awards
- three years applies to personal injury (including death) claims
- two years applies to claims arising under the Labour Act, breach of contract of employment, or claims for recovery of contribution in respect of any damage

Time does not run in the case of fraud, concealment or mistake until discovery. Time does not run during a disability.

4. ARE COMMUNICATIONS BETWEEN A LAWYER AND HIS CLIENT PRIVILEGED (IE, PROTECTED FROM DISCLOSURE TO A COURT/TRIBUNAL AND OPPOSING PARTIES)?

Yes. Sections 172 and 175 of the Evidence Act 1994 (Cap. 6:06) specifically provide that communications between a lawyer and his/her client, including documents and advice, are privileged from disclosure. Excluded from this privilege are communications in furtherance of an illegal purpose and information regarding the commission of a crime or fraud.

Further, no one can be compelled by any court to disclose confidential information between himself/herself and a lawyer instructed unless he/she offers himself/herself as a witness. In such circumstances he/she may be compelled to disclose confidential information to the extent necessary to explain evidence given by him/her but not others.

5. HOW ARE CIVIL PROCEEDINGS COMMENCED, AND WHAT IS THE TYPICAL PROCEDURE WHICH IS THEN FOLLOWED?

The High Court, subordinate courts and Cadi Court have original jurisdiction.

A majority of all claims are handled by the High Court. Civil proceedings in the High Court are commenced by one of the following methods:

- writ of summons: this is the most common method for the majority of civil claims. The writ of summons is filed with a statement of claim, witness statements, and all the evidence on which the plaintiff relies in a bundle and served on the defendant. The defendant has 30 days to file a statement of defence, witness statements and evidence on which he/she relies in answer to the claim. Time may only be extended for 14 days and, exceptionally, a further 14 days. Subsequent pleadings in the form of a reply or rejoinder may be filed at the discretion of the court. Once pleadings are closed, the case is set down for pre-trial conference.

  At pre-trial conference the court rules on all preliminary objections relevant to jurisdiction, interlocutory applications, discovery, objections to evidence, the possibility of out-of-court settlement, costs to be applied, and sets a time frame to trial.

  The case is thereafter set down for trial. At trial, witness statements are adopted as evidence-in-chief. Witnesses on either side are made available for cross-examination. At the end of the trial briefs are filed and the case is adjourned for judgment.
- originating summons procedure is adopted for non-contentious legal disputes
- petitions for matrimonial matters, company proceedings and election matters

6. WHAT IS THE EXTENT OF PRE-TRIAL EXCHANGE OF EVIDENCE, AND HOW IS EVIDENCE PRESENTED AT TRIAL?

As stated above, all evidence must be submitted with the originating process. Physical evidence must be submitted at the pre-trial conference. Documentary evidence is presented in the form of statements exhibited to an affidavit. All other evidence must be listed and presented during the pre-trial conference. Objections to evidence are taken at the pre-trial conference. All evidence deemed admissible is adopted at trial by the witness. Expert evidence is treated no differently, and has to be exchanged and experts made available for cross-examination.

7. TO WHAT EXTENT ARE THE PARTIES ABLE TO CONTROL THE PROCEDURE AND THE TIMETABLE? HOW QUICK IS THE PROCESS?

Parties are required to agree on a time frame to trial, including the taking of any step required by the rules or the court at the pre-trial conference in proceedings begun by writ. Otherwise, generally, time for doing anything under the rules is agreed by the parties and the court and must be convenient to the court. If parties cannot agree, time frames may be imposed by the court.

Following the introduction of this procedure for the majority of civil cases commenced by writ, the process has been expedited and civil cases can be disposed of from six to nine months in the case of contentious matters with complex and meritorious defences.

8. WHAT INTERIM REMEDIES ARE AVAILABLE TO PRESERVE THE PARTIES' INTERESTS PENDING JUDGMENT?

Interim remedies in the form of injunctions to detain property in dispute or to prevent its waste, damage or alienation may be granted. An order similar to a *mareva* injunction may also be granted for the interim attachment of property if the plaintiff can show that the defendant is about to sell his/her assets with a view to evading judgment.

9. WHAT MEANS OF ENFORCEMENT ARE AVAILABLE?

The following orders are available:

- writ of attachment (*fieri facias* or *fi.fa*), which authorises the sheriff to seize and sell movable or immovable assets of the judgment debtor. After judgment is entered, the judgment creditor may apply for a writ of *fi.fa* by filing a *praecipe*. The writ is issued by the judge, directed at the sheriff to levy execution against the judgment debtor's property. Execution is levied on movables by taking them into the custody of the sheriff or by attachment on site (if the asset cannot be easily moved eg, plant and heavy machinery). Immovable property is attached by pasting on site and service on the *fi.fa.* debtor. Attached property may not be sold, in the case of movable property, until at least seven days after public notice of the sale, and in the case of immovable property, until at least two months after such public notice. Public notice is by advertisement in a prominent newspaper of general circulation and/or radio advertisement
- writ of possession for the repossession of immovable property and delivering the same to the judgment creditor
- seizure and delivery up of movable property

- writ of sequestration against the property of an absconding judgment debtor against whom an order of arrest has been issued and who cannot be found, or has been taken and detained in custody without obeying the judgment of the court
- garnishee orders attaching money belonging to the judgment debtor in the hands of a third party
- charging orders against a judgment debtor's stocks or shares in a public company, money held in trust for a judgment debtor, money in court or in the hand of the official receiver appointed by court, land or interest in land of a judgment debtor, share or interest of the judgment debtor in a partnership
- committal

10. DOES THE COURT HAVE POWER TO ORDER COSTS? ARE FOREIGN CLAIMANTS REQUIRED TO PROVIDE SECURITY FOR COSTS?

Yes, the court has the power to make costs orders. In rare cases the court may make an order for the taxation of costs in which case a bill of costs must be submitted to the registrar of the court.

A foreign litigant may be required to provide security for costs on the application of the defendant. Such an application is made by motion supported by affidavit.

11. ON WHAT GROUNDS CAN THE PARTIES APPEAL, AND WHAT RESTRICTIONS APPLY? IS THERE A RIGHT OF FURTHER APPEAL? TO WHAT EXTENT IS ENFORCEMENT SUSPENDED PENDING AN APPEAL?

Parties have a constitutional right of appeal from the subordinate court to the High Court within 30 days, from the High Court to the Court of Appeal within 90 days, and from the Court of Appeal to the Supreme Court within 42 days. An extension of time may be granted on limited grounds.

The grounds of appeal must specify the error of law or misdirection, or be based on mixed fact and law. Appeals based on factual errors alone are restricted.

A stay of execution may be granted to an unsuccessful defendant if he/she can show special circumstances. These include the possibility of the destruction or irreversible alteration of the *res*, irreparable loss, the judgment creditor not being able to repay the judgment sum should the appeal succeed, closure of the judgment debtor's business, etc. Each case is decided on its merits. The court must impose conditions for the stay, which may include the deposit of the judgment sum into court.

An injunction may be granted to an unsuccessful plaintiff whose case has been dismissed pending appeal instead of a stay of execution, on the premise that the dismissal of an action is not executory and a stay is not appropriate. It is granted for the purpose of maintaining the *status quo* and preserving the *res* pending appeal.

12. TO WHAT EXTENT CAN DOMESTIC AND/OR FOREIGN STATE ENTITIES CLAIM IMMUNITY FROM CIVIL PROCEEDINGS?

State entities have no immunity unless they are international organisations granted immunity under the Diplomatic Privileges (International Organisations) Act Cap. 25:01. The Government may be sued just as any other litigant, although there are limitations with respect to enforcement, as execution cannot be levied on government assets. The Government is expected to settle any judgment upon service of a demand on the Accountant General. An application can be brought for contempt proceedings if the Accountant General fails to pay. In practice the Government usually pays.

Foreign State entities have immunity under the Vienna Convention, which has been given effect in domestic law by the Diplomatic Privileges (Commonwealth and Foreign Missions) Act Cap. 25:02.

13. WHAT PROCEDURES EXIST FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS?

A foreign judgment of the High Court of the United Kingdom may be registered in the High Court and enforced by the court under the Reciprocal Enforcement of Judgments Act Cap. 8:05 as if it were its own decision. Foreign judgments from specified countries may be enforced under the Foreign Judgments (Reciprocal Enforcement) Act (Cap. 8:06). Where no reciprocal arrangements exist between the Gambia and the originating jurisdiction, the judgment may be enforced by action on the judgment using the writ of summons procedure. This is a common law relief which is based on the judgment itself conferring a right of action.

ARBITRATION

14. IS THE ARBITRATION LAW BASED ON THE UNCITRAL MODEL LAW? IF YES, ARE THERE ANY KEY MODIFICATIONS? IF NO, WHAT FORM DOES THE ARBITRATION LAW TAKE?

Arbitration is governed by the Alternative Dispute Resolution Act of 2005 (the Act) which is generally based on the UNCITRAL Model Law, with some provisions adapted from the UNCITRAL Rules. Section 55 of the Act provides that notwithstanding the provisions of the Act, parties to an international commercial agreement may agree that disputes shall be referred to arbitration in accordance with the UNICITRAL Model Law (which are set out in Schedule 1 to the Act) or any other international arbitration rules acceptable to the parties.

It also specifically applies the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) to the enforcement of international commercial arbitral awards on a strictly reciprocal basis.

The Act contains additional grounds on which an award can be set aside which go beyond those found in the UNICITRAL Model Law. Under section 49 of the Act, an application to set aside an award can be made on the ground that the award was "*induced or affected by fraud, corruption or gross irregularity*" or on the grounds that a breach of the rules of natural justice occurred during the proceedings or in connection with the making of the award. All of these grounds render the award in conflict with public policy.

15. WHAT ARE THE FORMAL REQUIREMENTS FOR AN ENFORCEABLE ARBITRATION AGREEMENT?

Under section 11 of the Act, it must be in writing and:

- in the form of an arbitration clause in a contract
- in the form of a separate agreement
- inferred in an exchange of points of claim or defence in which the existence of an arbitration agreement is alleged by one party and not denied by the other

16. WILL THE COURTS STAY LITIGATION IF THERE IS A VALID ARBITRATION CLAUSE COVERING THE DISPUTE? DOES THE APPROACH DIFFER IN THIS REGARD IF THE SEAT OF THE ARBITRATION IS INSIDE OR OUTSIDE OF THE JURISDICTION?

Yes, under section 12 of the Act, if a party so requests no later than the submission of its first statement on the substance of the dispute. The court may refuse the application if it finds that the arbitration agreement is null and void, inoperative, or incapable of being performed, or there is not in fact any dispute between the parties with regard to the matters

agreed to be referred. This also applies if the seat of the arbitration is outside of the jurisdiction.

17. ON WHAT GROUNDS CAN THE COURT INTERVENE IN ARBITRATIONS SEATED OUTSIDE THE JURISDICTION?

The law does not make provision for interference in arbitrations seated outside the jurisdiction. The jurisdiction of the local court would be limited to matters of enforcement of the arbitral award in the local jurisdiction.

Section 13 provides that a party to an arbitration agreement may, before or during the arbitral proceedings, request from a court an interim measure of protection and the court may grant the measure if its deems it necessary or desirable. For these purposes, the court has the same powers as it has for the purposes of proceedings before it, namely to make an order:

- for the preservation, interim custody or sale of goods which are the subject matter of the dispute
- securing the amount in dispute
- appointing a receiver
- to ensure that an award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by the other party (interim injunction)

Section 31(1) of the Act provides that an arbitral tribunal can order interim measures of protection on request by a party or on its own motion or may require any party to provide security. By virtue of section 31(2), any arbitral order irrespective of country is automatically recognised as binding and will have the same effect as an order made under section 31(1) above.

18. CAN A FOREIGN ARBITRATION AWARD BE APPEALED IN THE LOCAL COURTS? IF SO, ON WHAT GROUNDS?

No. Recourse to a court against a domestic or foreign arbitration award can only be made by an application to set aside the award on specified grounds within 60 days of the making of the award, or if the grounds for setting aside are founded on fraud, corruption or gross irregularity, within 60 days of the discovery of the fraud or corruption.

These grounds are set out in section 49(2) and (4) of the Act. If the parties initially agreed in writing to be bound by the UNICITRAL Model Law, Article 34(2) of the UNICITRAL Model Law would apply instead.

19. WHAT PROCEDURES EXIST FOR ENFORCEMENT OF AWARDS RENDERED IN ARBITRATIONS SEATED OUTSIDE OF THE JURISDICTION?

An arbitral award, irrespective of the country in which it was made is recognised as binding and, on application in writing to the High Court, must be enforced by entry as a judgment in terms of the award, or by action. This takes between two and six months.

The Gambia is not a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). However, the Gambia has domesticated all of the provisions of the New York Convention, which are set out in Schedule 2 of the Act. These domesticated provisions will apply to any award made in any New York Convention Contracting State, provided that:

- the Contracting State has reciprocal legislation recognising the enforcement of arbitral awards made in the Gambia in accordance with the provisions of the New York Convention and
- the difference arises out of a legal relationship that is contractual. Although Article 11 of the New York Convention refers to "*a legal relationship, whether contractual or not*", the Act refers to a contractual relationship only

20. ARE FOREIGN AWARDS READILY ENFORCEABLE IN PRACTICE?

Yes. An award made against the Government, even prior to the new law, was, upon registration in the High Court, honoured by the Government.

ALTERNATIVE DISPUTE RESOLUTION

21. ARE THE PARTIES TO LITIGATION OR ARBITRATION REQUIRED TO CONSIDER OR SUBMIT TO ANY ALTERNATIVE DISPUTE RESOLUTION BEFORE OR DURING PROCEEDINGS?

The ADR Act 2005 provides for court-facilitated ADR. The court may refer any matter or part of any matter to ADR (arbitration, conciliation and mediation are provided for in the Act). Parties may also agree to have their matter referred to ADR at any time before judgment is given.

REFORMS

22. ARE THERE LIKELY TO BE ANY SIGNIFICANT PROCEDURAL REFORMS IN THE NEAR FUTURE?

No. The Act was enacted in 2005 and became fully operational in 2008. We are not aware of any proposed reforms for the time being.

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