ANANT BHATT LLP
CERTIFIED PUBLIC ACCOUNTANTS
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ANALYSIS OF THE NEWLY ENACTED BUSINESS LAWS (AMENDMENTS) ACT, 2020

BUSINESS LAWS (AMENDMENTS) ACT UPDATE:

Anant Bhatt LLP has prepared a brief analysis for clients and external parties on the now enacted Business Laws (Amendments) Act, 2020 by the Government of Kenya.

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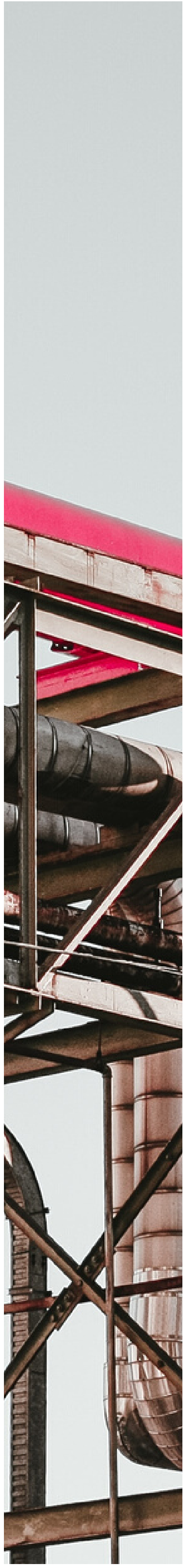
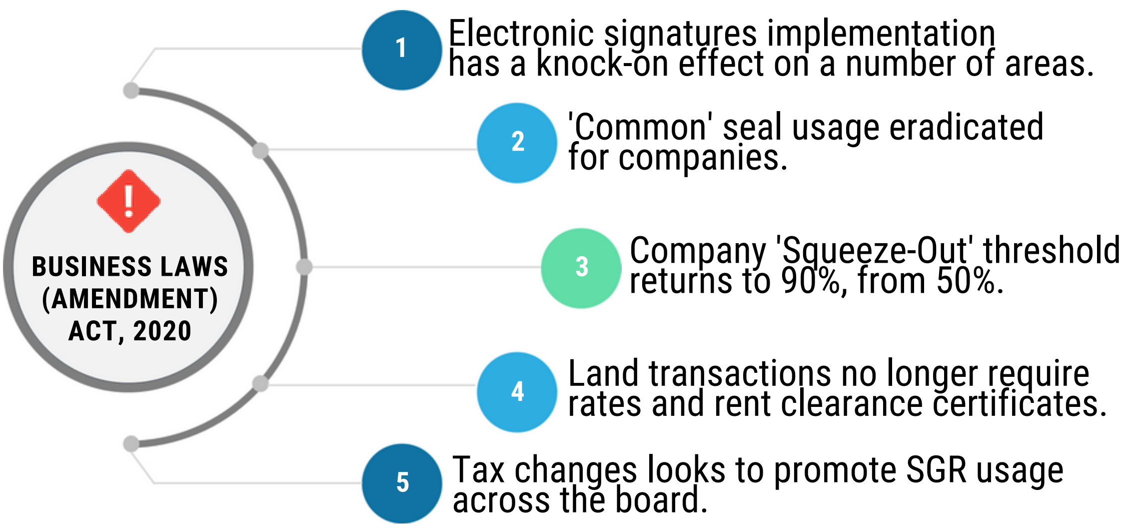


INTRODUCING THE BUSINESS LAWS (AMENDMENTS) ACT, 2020

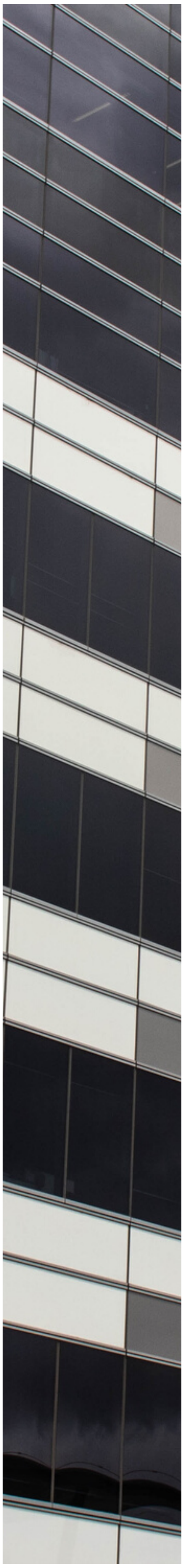
On Wednesday 18th March 2020, the President of Kenya H.E. Uhuru Kenyatta was presented with 'The Business (Amendment) Bill, 2019', by the Speaker of the National Assembly: Justin Muturi, and Speaker of the Kenyan Senate: Ken Lusaka. The Bill was subsequently signed and assented into law.
The now 'Business (Amendments) Act, 2020' aims to boost the Kenyan economy through improved ease of doing business. The Act within its 43 clauses, has amended 16 existing laws. These are namely:

- The Law of Contract Act (Cap. 23)
- The Industrial Training Act (Cap. 237)
- The Registration of Documents Act (Cap. 285)
- The Survey Act (Cap. 299)
- The Income Tax Act (Cap. 470)
- The Stamp Duty Act (Cap. 480)
- The Kenya Information and Communication Act (No. 2 of 1998)
- The Occupational Safety and Health Act (No. 15 of 2007)
- The National Construction Authority Act (No. 41 of 2011)
- The Land Registration Act (No. 3 of 2012)
- The Public Finance Management Act (No. 18 of 2012)
- The Companies Act (No. 17 of 2015)
- The Business Registration Service Act (No.17 of 2015)
- The Insolvency Act (No. 18 of 2015)
- The Excise Duty Act (No. 23 of 2015)
- The Miscellaneous Fees and Levies Act (No. 29 of 2016)

MAPPING OUT THE MAJOR IMPACTS ON BUSINESS CONDUCT



2 ELECTRONIC SIGNATURES & ITS CRITICAL BUSINESS IMPACTS



DEFINING AN 'ELECTRONIC SIGNATURE'

The Kenya Information and Communication Act No. 2 of 1998 ("The KICA") has previously mentioned the existence and acceptable usage of electronic signatures by the public of Kenya. However, the "proper implications" of them was not previously tied in with other Acts in Kenya.

The KICA defines an *electronic signature* as : "Data in electronic form, affixed to or logically associated with other electronic data, which may be used to identify the signatory in relation to the data message and indicate the signatory's approval of the information contained in the data message".

The KICA defines an *advanced electronic signature* as : "an electronic signature which meets all the following requirements
(a) Is uniquely linked to the signatory;
(b) Is capable of identifying the signatory;
(c) It is created using means that the signatory can maintain under his sole control; and
(d) It is linked to the data to which it relates in such a manner that any subsequent change to the data is detectable

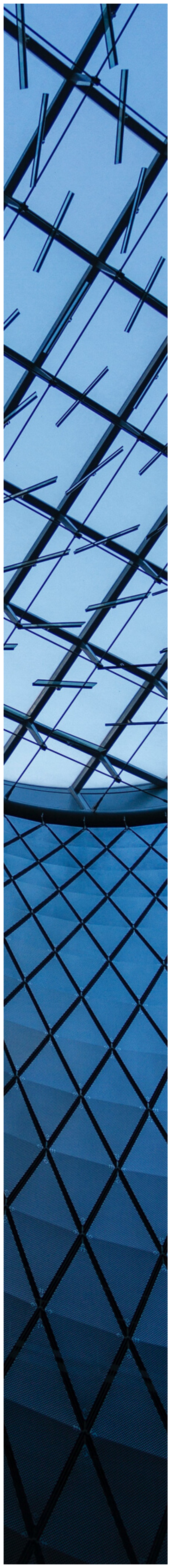
IMPACT ON THE LAW OF CONTRACT ACT

The new Act has now been changed to mean that 'advanced electronic signatures' can be used as part of a legal contract, not just the previously accepted 'physical' signatures. This change is pivotal in a fast changing economy.

Not only will this move help individuals and businesses to save on courier and stationary costs, but also aid in speeding up deals cross-border. However, all citizens should be vigilant of the increased risk of forgeries as a consequence. Additional measures to verify identity should be adopted by all when dealing with individuals not met in person. Internal and external auditors alike should possibly make an effort to implement additional internal controls to aid in adequate verification of signatories.

IMPACT ON THE REGISTRATION OF DOCUMENTS ACT ("THE RDA")

Similarly, the new Act has now been changed to mean that 'advanced electronic signatures' in addition to "wet-ink" can be used in all documents presented to the 'Registrar of Documents', as was the lawful norm.



In addition to this, The Act now allows the Principal and Coast registries to keep all records of the 'Registrar of Documents' in an electronic form, while simultaneously also allowing all individuals to transact deals electronically.

A move towards electronically managed registries is quite an effective way to speed up the rate of work at registries, and monumentally reduces the risk of losing paper documents through mishandling, or in a fire. However, all registries should ideally also actively take steps such as adequately encrypting password protected computers, and regularly updating database firewalls, to reduce the risk of hackers attempting to steal confidential information.

IMPACT ON THE STAMP DUTY ACT

The Act has expanded its scope to now include 'electronically' marked documents to be also defined as a "stamp". Previously only adhesive marked stamps or franking of documents were accepted within documents. Furthermore, the Act also allows the Cabinet Secretary of the National Treasury to make regulatory changes with the use of 'electronic' stamps.

IMPACT ON THE LAND REGISTRATION ACT ("THE LRA")

The Land Registration Act from now will also accept the use of 'advanced electronic signatures' and electronic seals in all documents. In addition to this, the defined scope of "instruments" within the LRA has been extended to also include electronically created documents. Lastly, the LRA now allows both parties in a contract doing business to electronically approve documents.

IMPACT ON THE SURVEY ACT

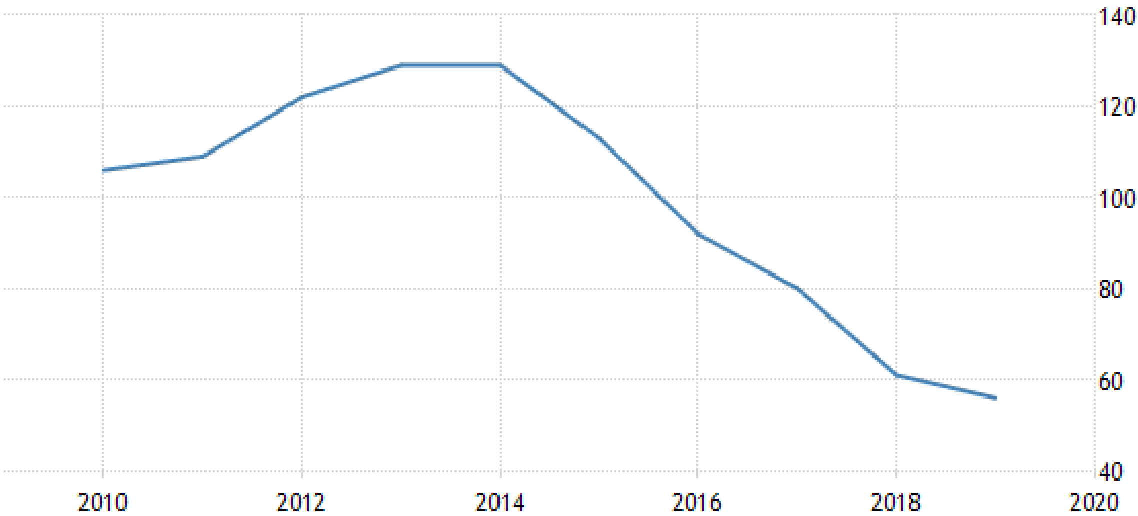
As is the scope of this Act, The Survey Act will also incorporate the usage of 'electronic signatures' and 'electronic seals' within all documents. Additionally, surveyors in Kenya can now submit plans online, and also be able to receive a decision on their application online, in addition to in-person.
This is a major move in Kenyans way of doing business. The turnaround time of deals can drastically improve as the wait time for authenticating documents such as deed plans and PDPs were slowing down the economy.
Furthermore, the time for verifying all records will also improve.

Having said this, it is again, with all electronic machine usage, critical that the steps to protect data of users is regularly audited, and relevantly updated across the board. Blockchain technology has shown great potential, and has already begun to root itself in Kenya: The Blockchain Association of Kenya was setup in October 2017 under the Societies Act Cap 12 Laws of Kenya.

IMPACT ON THE KENYA INFORMATION AND COMMUNICATION ACT

The KICA is an Act that mainly governs the application for licenses and enforcement by the Communications Commission of Kenya. The new Business (Amendments) Act, 2020 changes Section 83B (1) by deleting (c), which was specifically prohibiting the usage of electronic signatures to approve documents of 'Title'.

Similar to the other Acts, the enhanced scope of electronic signature usage is a critical move for improving the ease of doing business in Kenya. Recently Kenya has been actively trying to improve its global standing:



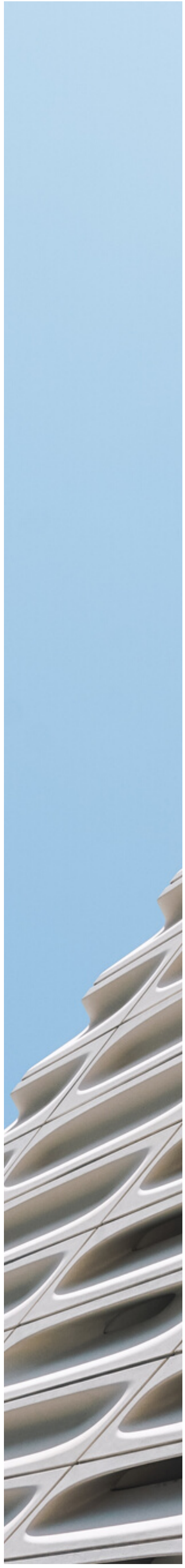
KENYA I Ease of Doing Business Rankings (2010-2019), World Bank

The ease of doing business index ranks countries against each other based on how the regulatory environment is conducive to business operation and stronger protections of property rights. Economies with a high rank (1 to 20) have simpler and more friendly regulations for businesses.

Kenya is ranked 56 among 190 economies in the ease of doing business, according to the latest World Bank annual ratings. The rank of Kenya improved to 56 in 2019 from 61 in 2018.

3 CHANGES TO THE COMPANIES, LAND REGISTRATION & INSOLVENCY ACTS

CHANGES IN THE COMPANIES ACT



1. *Need for using 'Common Seal' removed for all companies*

   The Act has amended section 35 to mean that the previously existing requirement stating all company *contracts* should have a company seal is removed. Additionally, section 37 was amended to mean that company *documents* no longer require a 'company seal'. This is a good move from the government, as businesses face fewer costs.

2. *Changes in who can sign on behalf of a company*

   The Act has been amended to mean that a company director in the presence of an attesting witness, or 2 authorized signatories may sign documents on behalf of the company. Previously, only a company director in the presence of an attesting witness could sign company documents.

3. *Company 'Squeeze-Out' threshold returns to 90% shareholding, from 50%*

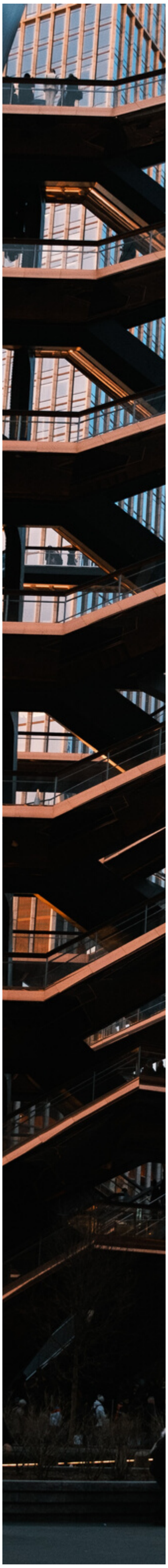
   The Statute Law (Miscellaneous Amendments) Act No. 12 of 2019, which was brought into law on 23rd July 2019 had made a number of significant changes to The Companies Act, 2015. Within Kenya, up until 23/7/2019 minority shareholders of a company could only be 'squeezed-out' of a company if they owned < 10%, as they could not effectively have major decision-making powers. The law stated that if an offer wherein 90% of the shares were sold, those who owned < 10% could be 'squeezed-out' of the company on the same terms.

   After The Statute Law (Miscellaneous Amendments) Act No. 12 of 2019 came into effect, this "< 10%" law changed to "< 50%". Understandably it created an upheaval within all M&A transactions, and risked the rights of all shareholders with less than 50% shareholdings.

   The Business Laws (Amendments) Act, 2020 changes The Companies Act, 2015 to mean that the "< 50%" law returns back to "< 10%". This is a critical move in protecting shareholder rights, that was adopted into the Kenyan law framework from the UK Company Act.

4. *The share warrants issued during the time period of the older companies act (The Companies Act, Cap 486) is now invalid*

   A "Share Warrant" is a document issued by the company, stating that its bearer is entitled to the shares or stock specified therein. Share warrants



are negotiable instruments. A mere delivery transfers the ownership of the shares. Coupons are attached to each warrant, bearing the dates on which the dividend will be paid by the company as it cannot know who the shareholder or who is entitled to the dividends. The person who produces the appropriate coupon can receive payment of the dividend.

The Business Laws (Amendment) Act, 2020 implies by deleting paragraph 21 of Schedule 6 of The Companies Act, 2015 that share warrants issued while the previous act: The Companies Act, Cap 486 was in governance, can no longer to be deemed to be enforceable, including the liabilities one may have incurred as a result of their issue.

CHANGES IN THE LAND REGISTRATION ACT

1. *Rates and rent clearance certificates requirement scrapped from land transactions*

   The Land Registration Act, No.3 of 2012 under sections 38 and 39 required all parties transacting in any transferal of interest, vesting any land or registering any lease of land, to get a hold of a certificate for rent and rates beforehand. The Act now removes this requirement for all parties, making the process of land registration to be that much easier.

   Although the process has become easier, the rent and rates certificates are still important documents that prove compliance with the law; and thus would be a good idea to always obtain them before any deals are signed.

2. *Additional step in the claim of indemnity*

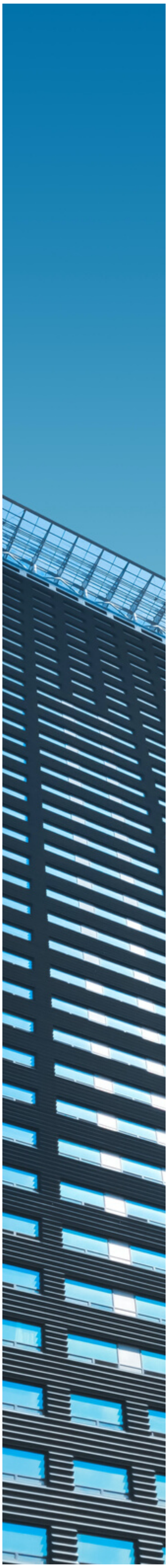
   The Land Registration Act, No.3 of 2012 under section 81 allowed all persons who suffered damage as a result of rectification of the Land Register, or if they suffered any error in a copy of or extract from the Land Register. Before the Business Laws (Amendment) Act, 2020 came into effect, a person filing for indemnity had to :

   - Apply to the courts directly for indemnity.

   Now however, there is an additional step in the process. Persons filing must:

   - Apply to the Chief Land Register, after which he or she will assess the issue.
   - The assessment outcome can be appealed in court if the persons applying feel the need to do so.

CHANGES IN THE INSOLVENCY ACT



In recent times, the financial sector has adapted itself to incorporate the practice of company restructuring. The process involves restoring distressed or insolvent companies back to solvency through a reorganization of the assets and liabilities of debtors in financial difficulty. Kenya brought into effect the Insolvency Act with the aim of restoring distressed companies back to normalcy through 2 effectively proven routes:

- Administration
- Company Voluntary Arrangements (CVAs)

However, recently the government sought the need for a number of changes after a series of high profile cases including Nakumatt, Uchumi, Deacons, KQ and ARM Cement, whose collective debt went in excess of $2 Billion. The new Act brings changes in:

1. *Mandatory information sharing with business creditors*

   The Act now specifies that all insolvency practitioners must share information with company creditors within the time span of 5 working days. This step is crucial in curbing debtor frustration, as transparency between all parties improve.

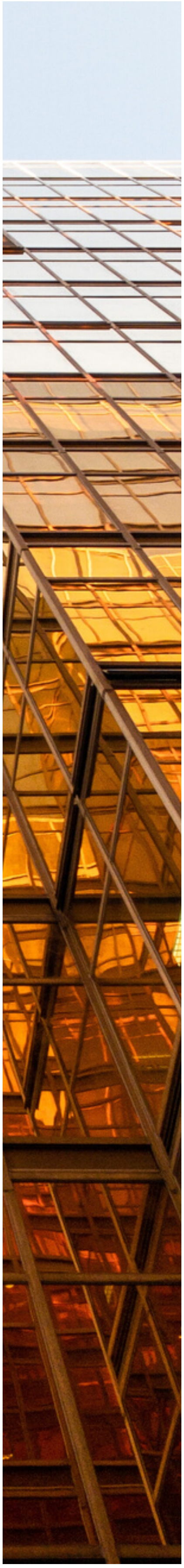
2. *Changes in Moratoriums*

   If a company is undergoing administration, The Insolvency Act instructs management and directors that certain transactions can only be completed with a moratorium (approval from an insolvency practitioner, or with a court order). The Business Laws (Amendments) Act has been changed to mean that the court will further assess the following issues before lifting a moratorium:

   - If the secured asset being taken from a business is required in the reorganization process to define the business as a going concern.
   - If the claim of a secured creditor is exceeding the value of the secured asset.
   - If relief is required for adequate preservation of the asset.
   - If the secured creditor is sufficiently able protect themselves, should the value of the secured asset continue to deteriorate.
   - If the protection of a secured asset is reasonably feesable, or is proving to be overburdening.

   The Act further explains that a moratorium can be lifted for no more that 28 days.

4 CHANGES TO THE NCAA, OSHA AND OTHER TAX REGULATIONS



CHANGES TO NATIONAL CONSTRUCTION AUTHORITY ACT

In Kenya, The National Construction Authority Act, No.41 of 2011 (The NCCA Act) gives introduction to the National Construction Authority (NCA). The main purpose of the NCA is to be a framework for quality assurance within the construction industry in Kenya. The Business Laws (Amendments) Act, 2020 by amending sections 5 and 23 of the NCCA, has taken steps to empower the NCA by giving fundamental rights to enforce the 'Building Code'.

Although the County governments are those charged with approving plans, and issuing the building certificates, the NCA will now be the authority that oversees and assesses quality control compliance. NCA investigation officers have the authority to penalize those charged with governance a maximum fine of Ksh 1 million, or 3 years in prison, or both.

The effect of the amendment is quite positive, as investor confidence will improve within the construction industry.

CHANGES TO THE INDUSTRIAL TRAINING ACT (ITA)

The Act specifies that any penalties arising from the non-payment of training fees will be payable annually, as opposed to monthly.

CHANGES TO THE OCCUPATIONAL SAFETY AND HEALTH ACT (OSHA)

The OSHA requires all businesses in Kenya to register their premises as workplaces. However the Business Laws (Amendment) Act, 2020 gives new businesses with less than 100 employees time up for to 12 months to comply with the requirements. This is a great move for those businesses who already feel overwhelmed by the impacts of the ongoing COVID-19 pandemic.

INCENTIVES TO THE USE OF THE STANDARD GAUGE RAILWAY (SGR)

The Act is providing a 150% investment deduction for the capital expenditure faced by businesses in construction of bulk and storage facilities at a minimum cost of Ksh 5 Billion and handling facilities with a minimum capacity of 100,000 metric tonnes in relation to the SGR, from the year of first use of the facility. In addition to this, products that are taxable but are procured locally or have been imported for the construction of bulk storage in support of the SGR, will be exempted from tax. Lastly, imported glass bottles will incur 25% excise duty tax.

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