

THE EAST AFRICAN COURT OF JUSTICE'S ARBITRAL JURISDICTION OVER COMMERCIAL CONTRACT DISPUTES *

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1. Introduction

The East African region has made significant strides in furthering its regional integration agenda. This can be seen, for example, through its level of intra-regional trade of 23%, which is quite higher than the average of 12% on the African continent. It is estimated that intra-East African Community (EAC) trade grew from 2 billion US dollars in 2005 to 6 billion US dollars in 2014, representing a 300% increase in the value of trade. This was highlighted by the 16th Summit of Heads of State of the East African Community, held on 20 February 2015, in Nairobi, Kenya.¹

The said Summit considered progress on a number of issues of strategic importance in taking forward the region's integration agenda. It is worth noting that among other issues addressed were those relating to the legal and institutional framework of the EAC – particularly the extended jurisdiction of the East African Court of Justice (EACJ).

It should be recalled that EACJ is established by Article 9 (1) (e) of the Treaty for the Establishment of the East African Community ("The Treaty"). As the judicial organ of the grouping, it is responsible for ensuring "the adherence to law in the interpretation and application of and compliance with the Treaty". According to Article 27(1) of Treaty, "the Court shall initially have jurisdiction over interpretation and application of the Treaty."

In compliance with Article 27(2) of the EAC Treaty, the Heads of State adopted and signed a Protocol to extend EACJ's jurisdiction to cover trade and investment matters, as well as issues associated with the implementation of the Protocol on the Establishment of the East African Monetary Union.

Also of importance, as far as the EACJ's jurisdiction is concerned, are the provisions of Article 32 of the Treaty allowing the Court to constitute itself into an arbitral tribunal. Although this article provides for three instances whereby the Court's arbitral jurisdiction may be invoked, this Paper will only focus on the Court's arbitral jurisdiction over commercial contract disputes given the expected increase of cross-border disputes that might be triggered by an increase in cross-border trade as East African integration pursues its journey.

This Paper proceeds as follows; Section 2 will shed light on the Court's overall jurisdiction. Section 3 delves into arbitrating commercial contracts disputes. Section 4 examines key provisions of the EACJ Arbitration Rules. The article ends with concluding remarks to chart the way forward in order to make

¹ See William. Mwanza, The East African Court's jurisdiction over investments matters and what it means for Community's legal instruments, March 2015, <http://www.tralac.org/discussions/article/7126-the-eac-court-s-jurisdiction-over-investment-matters-and-what-it-means-for-the-community-s-legal-instruments.html#ad>.

the Court's arbitral jurisdiction an enabling tool of strengthening the rule of law **and creating a conducive environment for economic growth in the region.**

2. Overview of the EACJ's Jurisdiction

The major function of EACJ is to adjudicate and determine disputes arising under the EAC Treaty. The Court therefore, plays a crucial role in the process towards integration of East African Community. This role can be effectively realized through the Court's effective and efficient execution of its mandate as an arbiter in dispute resolution, thereby contributing to confidence building in the region.

The Treaty in Articles 27, 28, 29, 30, 31 and 32 prescribes the jurisdiction of the Court as follows:-

- (1) *Initial jurisdiction over the interpretation and application of the Treaty; plus other original, appellate human rights and other jurisdiction as may subsequently be determined by Council of Ministers, by Protocol to be concluded by the Partner States;*
- (2) *References by the Partner States or the Secretary General, over the failure by a Partner State or Community /Institution to fulfill a Treaty obligation; or for infringement of the Treaty; or illegality of an act, regulation, decision or action;*
- (3) *Reference by legal or Natural persons (resident in Partner State) over the legality of any Act, regulation, directive decision or action of a Partner State or Community Institution – except for acts, regulations, etc that are “reserved” to an institution of a Partner State;*
- (4) *Jurisdiction to hear and determine disputes between the Community and its employees that arise out of the terms and conditions of employment of the employees of the Community or the application and interpretation of the staff rules and regulations and terms and conditions of service of the Community.*
- (5) *jurisdiction to hear and determine any matter:*
 - (a) *arising from an arbitration clause contained in a contract or agreement which confers such jurisdiction to which the Community or any of its institutions is a party; or*
 - (b) *arising from a dispute between the Partner States regarding this Treaty if the dispute is submitted to it under a special agreement between the Partner States concerned; or*
 - (c) ***arising from an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court.”***

3. Arbitrating commercial contract disputes

3.1. Scope

As mentioned above, the Court has the jurisdiction to hear and determine any matter arising from an arbitration clause contained in a **commercial² contract or agreement** in which the parties have conferred jurisdiction on the Court.

Commercial contract disputes may arise in many sectors, including: banking, finance, insurance, real estate, construction, technology, defense, pharmaceuticals, telecommunications, retail, government contracts and health care. Thus, commercial disputes include, franchise disputes, unfair business practices, misrepresentation or fraud, intellectual property disputes such brand disputes as or patent disputes breach of contract, product liability and consumer disputes, etc.

As one representative of the Kenya Private Sector Alliance pointed out, cross-border trade in goods and services has triggered a spike in commercial disputes across the East African region. He also stated that mega-infrastructure projects such as roads, ports, railways, oil, gas and minerals related projects could trigger disputes involving various stakeholders (i.e. communities, investors, governments, etc.).³ It thus is essential to establish a strong legal and dispute resolution framework to deal adequately with any dispute that may arise in these sectors.

When a commercial dispute arises between companies, there is need to resolve it as simply and efficiently as possible so that they can get back to business. For this to be achievable in the East African region, there is need to assure the business community of a legal system that is predictable and reliable thus providing the necessary certainty that there is a clearly established mechanism of dispute resolution,⁴ thus easing the enforcement of cross-border business contracts.

In this regard, it is noteworthy that arbitration is now largely seen as the preferred dispute resolution mechanism for cross-border disputes among multinational players.⁵ The EACJ's arbitral jurisdiction seen in this context appears to be an invaluable mechanism/tool at the disposal of the business community within the region to settle any dispute arising from their cross-border business.

² UNCITRAL considers that the term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road. See UNCITRAL Model Law on International Commercial Arbitration, 1985, p. 1, http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf

³ TRALAC, Special courts expected in East Africa to arbitrate commercial disputes, <http://www.tralac.org/news/article/6342-special-courts-expected-in-east-africa-to-arbitrate-commercial-disputes.html>

⁴ See Francis Kariuki, Challenges facing the Recognition and Enforcement of International Arbitral Awards within the East African Community, p. 5, <http://www.kmco.co.ke/attachments/article/163/Paper%20on%20Recognition%20and%20Enforcement%20of%20Foreign%20Arbitral%20%20Awards.pdf>,

⁵ According to the 2015 International Arbitration Survey by Queen Mary University of London and White Case (p.2), 90% of respondents indicate that international arbitration in their preferred dispute resolution mechanism. The whole report can be accessed at: <http://www.arbitration.qmul.ac.uk/docs/164761.pdf>

3.2. Attributes of the EACJ Arbitration

EACJ arbitration as a method of resolving cross-border commercial disputes in the East African region has all the attributes/characteristics of an international arbitration. In fact, the EACJ Rules of Arbitration are designed to make EACJ arbitration efficient, cost-effective, flexible, confidential, neutral, binding and expeditious. Moreover, the award rendered pursuant to EACJ arbitration is final and binding on parties.

Confidentiality: EACJ arbitral proceedings are not public. They are held privately. The confidential nature of the proceedings prevents the award or deliberation being published in the press without approval of the parties.

Flexibility: as a consensual process, EACJ arbitration is flexible. Parties and arbitrators are free to adopt flexible procedures and rules which suit everybody. Rules 1 (2) (b) thus provides that “the parties to any arbitration may agree in writing to modify or waive the application of these Rules.” Another part of the flexibility attribute is that a party may appear in person or send a lawyer or representative or, indeed, anyone that he/she chooses (Rule 4).

Finality : Subject to provisions of the Rules of Arbitration providing for the interpretation of the award, the correction of the award and the additional award and review of the Award, the arbitral award shall be final (Rule 36, (1)).

The panel or the sole arbitrator is appointed from among the Court’s judges who are all certified arbitrators. In addition, Rule 37(1) states that “There shall be no fees payable to the arbitrators.”

Neutrality: Possibility to set up a neutral arbitral tribunal, to choose a neutral place of arbitration

There is no pre-enforcement judicial review and arbitral awards are enforced in accordance with the enforcement procedures of the country in which enforcement is sought (Rule 36 (3)).

4. Key provisions of the EACJ Rules of Arbitration

Arbitration is a dispute resolution process whereby a private and neutral personal (arbitrator) is chosen to arbitrate a disagreement between the disputants.

In order to operationalize the jurisdiction conferred upon it by Article 32 of the Treaty, the Court has developed the Rules of Arbitration that govern its arbitration proceedings. The main parts of these rules provide for the composition and process of the arbitral tribunal, the conduct of proceedings, the decision making, the arbitral award, the finality and enforceability of award and rules on issues.

4.1. Composition of the Arbitral Tribunal

According to Rule 8 on the appointment of arbitrators, the appointing authority (i.e. the President or in his/her absence the Vice President of the Court) appoints, from among the Judges of the Court a Panel to constitute the Tribunal to conduct the arbitral proceedings, unless the parties have agreed on a Sole Arbitrator who, in the like manner, is appointed from among the Judges of the Court.

Rule 8(2) states that the Chairman of the Tribunal is appointed by the appointing authority from among the Judges constituting the Tribunal.

In making the appointment, the appointing authority shall have due regard to the necessity to secure the appointment of independent and impartial arbitrators (Rule 8(3)).

In a recent arbitration case, the arbitral tribunal was composed of 2 Judges from the Appellate Division (one being the Chairman) and a Judge from the First Instance Division.

4.2. Conduct of Arbitral Proceedings

For smooth arbitration proceedings, it is essential to make sure that, impartial and independent arbitrators who understand their role and the rules they are bound by in dispensing justice fairly and equally are appointed.

Rule 16 provides thus that a prospective arbitrator shall disclose to the appointing authority any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, once appointed, shall disclose such circumstances to the parties unless they have already been duly informed of these circumstances.

An arbitrator may be challenged on the grounds that circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality or independence (Rule 17).

A challenged arbitrator is allowed to withdraw from the proceedings. The decision on the challenge of an arbitrator, if parties do not agree to the challenge and the challenged arbitrator does not withdraw, is made by the appointing authority.

In the conduct of arbitral proceedings, the powers conferred upon the Tribunal include the power to decide on an objection that it has no jurisdiction, including any objection concerning the existence or validity of the arbitral agreement (*Rule of Competence-Competence- Rule 23(2)*), the power to determine the admissibility, relevance, materiality and weight of any evidence. It is also one attribute of natural justice that parties be treated with equality and each party be given full opportunity of presenting its case.

4.3. Arbitral Awards

The Rules determine both formal and substantive requirements that an arbitral award should meet. This is due to the fact that an arbitral award is a documentary instrument that has legal effect. All these requirements are provided for in Rule 30.

In this regard, an arbitral award shall be made in writing and shall be final and binding on the parties.

It also has to state the reasons upon which the award is based, unless the parties agree that no reasons are to be given, or the award is an award on the agreed terms (i.e. consent award).

In addition, an arbitral award shall be signed by the arbitrator(s) and the signed award shall be communicated to parties by the Tribunal.

The Rules also provide that an award shall contain the date when and the place where the award was made or is deemed to have been made. Where there are three or more arbitrators and one or more arbitrators fail to sign, the award shall state the reasons for the absence of the signature(s).

Finally, the award may be made public, including through law reporting, only with the consent of all parties.

4.4. Post-Award Remedies

Under Rule 30 (1), an award is final and binding. It is not subject to any remedy except those provided in the Rules.

The arbitral jurisdiction of the EACJ being a creature of the Treaty, an award rendered in accordance with Article 32 of the Treaty is not subject to any review by national courts. But, the EACJ Arbitration Rules adopted by the Court in exercising the powers conferred upon it by Article 42 of the Treaty provide for a number of remedies and procedures that are administered by the original tribunal that rendered the award or the appointing authority (i.e. the President or in his/her absence, the Vice-President of the Court).

It is in this regard that the Rules provide for the interpretation of the award (Rule 33), the correction of the award (Rule 34) and the additional award and review of the award (Rule 35).

A remedy which is generally recognized to challenge an award and which is missing in the EACJ Arbitration Rules is the annulment of the award, which would provide limited emergency relief for situations in which the basic legitimacy of the arbitration process is called into question.⁶ The ongoing review of the EACJ Rules of Arbitration should consider including provisions on the grounds for annulment of awards rendered by an EACJ arbitral tribunal.

4.5. Enforcement of award

As mentioned above, the award is final and binding on the parties and is not subject to any pre-judicial review by national courts of Partner States.

The parties, by submitting to arbitration under Article 32 of the Treaty, shall be deemed to have undertaken to implement the resulting award without delay.

⁶ See for a comparison, Article 52(1) of the ICSID Convention which lists grounds for annulment of an award, UNCTAD, Dispute Settlement, International Centre for Settlement of investment Disputes – Post-Award Remedies and Procedures, http://unctad.org/en/docs/edmmisc232add7_en.pdf

Enforcement of arbitral awards shall be in accordance with the enforcement procedures of the country in which enforcement is sought [Rule 36(3)].

4.6. Costs in EACJ Arbitral Proceedings

As one scholar pointed out, *“the arbitration process invariably involves costs and expenses and the questions of who bears the costs, how much is payable and when costs are to be awarded are very delicate questions. The costs of arbitration , also called costs of the award include: the arbitrator’s fees, costs of hiring the venue of arbitration, costs of providing transcripts of the proceedings (where these have been contracted), legal fees of advocates employed to advice on legal issues and experts’ fees, disbursements and other allowances.”*⁷

One salient feature of the EACJ arbitral proceedings is that no fees are payable to the arbitrators (Rule 37(1)) who, as mentioned above, are appointed among the Judges of the Court.

The costs of arbitration and other allowances, as well as matters pertaining to security for costs are dealt with in Rules 37 and 38.

5. Conclusion

Increased cross-border trade and investment in the region creates odds for more commercial disputes to arise. In the East African region, various stakeholders have been calling for efficient mechanisms in order to implement key Community legal instruments, in particular the EAC Common Market Protocol so as to improve movement of goods, services, capital and people across the region.

On the other hand, mega-infrastructure projects such as roads, ports, railways, oil, gas and minerals related projects could trigger disputes involving various stakeholders (i.e. communities, investors, governments, etc.).⁸ It thus is essential to establish a strong legal and dispute resolution framework to deal adequately with any dispute that may arise in these sectors

In this regard, calls for efficient and effective mechanisms aimed at ensuring legal certainty in cross-border commercial transactions and for an effective legal framework to resolve potential cross-border commercial contracts disputes have been made.

It is posited that EACJ arbitral jurisdiction stands to be an invaluable mechanism in improving contract enforcement in the East African region by promoting an alternative avenue for businesses to resolve commercial disputes quickly and cost effectively. But as we all know, the crux of any arbitration is an agreement between the parties to arbitrate a dispute. An arbitration agreement usually takes the form

⁷ See Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya*, 2012, p. 161.

⁸ TRALAC, *Special courts expected in East Africa to arbitrate commercial disputes*, <http://www.tralac.org/news/article/6342-special-courts-expected-in-east-africa-to-arbitrate-commercial-disputes.html>

of a clause in an underlying contract between the disputing parties. That is why Partner States, when concluding international contracts or agreements, should include an arbitration clause giving competence to EACJ as an arbitral tribunal to deal with any dispute that may arise from these contracts or agreements. Likewise, lawyers are encouraged to advise their clients, especially those who are doing business across the region, to include an arbitration clause giving competence to EACJ, seating as an arbitral tribunal, to deal with any dispute that may arise from their commercial contracts.

All in all, the arbitral jurisdiction of the Court has to be seen within the overarching role that the Treaty has conferred up it to uphold the rule of law and thus, contribute to the improvement of the East African region's investment climate –ensuring that contract enforcement becomes an important contributor to the region's economic prosperity.

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