

**AN ANALYSIS OF ARTICLE 32(C) OF THE EAC TREATY: THE EFFICACY OF
ARBITRATION IN BOLSTERING THE EAC INTEGRATION AGENDA**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School

By:

Faith Wanjiru Gathoni

094593

Prepared under the supervision of

Dr. Francis Kariuki

April 2020

Word Count: 15,898

DECLARATION

I, FAITH WANJIRU GATHONI, do hereby declare that this research is my original work. To the best of my knowledge and belief, it has not been previously submitted, in its entirety or in part, to any other university for a degree or diploma. Other works cited or referenced are accordingly acknowledged.

Signature

Date

This proposal has been submitted for examination with my approval as University Supervisor

Signature

Francis Kariuki

TABLE OF CONTENTS

DEDICATION	V
ACKNOWLEDGMENTS.....	VI
ABSTRACT.....	VII
LIST OF CASE LAW	VIII
LIST OF LEGAL INSTRUMENTS	IX
LIST OF ABBREVIATIONS	X
CHAPTER ONE:.....	1
1.0 BACKGROUND	1
1.1 STATEMENT OF THE PROBLEM.....	4
1.2 STATEMENT OF OBJECTIVES	5
1.3 RESEARCH QUESTIONS	5
1.4 HYPOTHESES	5
1.5 JUSTIFICATION OF THE STUDY	6
1.6 THEORETICAL FRAMEWORK.....	6
1.7 LITERATURE REVIEW	7
1.8 RESEARCH DESIGN AND METHODOLOGY.....	11
1.8.1 INSTRUMENTS OF DATA COLLECTION	11
1.8.2 ASSUMPTIONS.....	12
1.8.3 LIMITATIONS	12
1.8.4 CHAPTER BREAKDOWN	12
1.8.5 DURATION OF THE STUDY.....	13
CHAPTER TWO:	2
2.0 INTRODUCTION.....	2
2.1 PARTY AUTONOMY	3
2.2 APPOINTMENT OF ARBITRATORS	4
2.3 THE PROCEDURAL RULES AND ADMINISTRATION SERVICES OF THE EACJ.....	6
2.4 POWERS OF AN ARBITRAL TRIBUNAL.....	8
2.5 PURSUIT OF NEUTRALITY AND IMPARTIALITY.....	10
2.6 CONFIDENTIALITY	12
2.7 COSTS OF ARBITRATION	13
2.8 INTEREST.....	13
2.9 AMALGAMATING CIVIL AND COMMON LAW TRADITIONS	15

2.10 FINALITY AND THE ENFORCEMENT OF AWARDS	16
2.11 CONCLUSION	17
CHAPTER THREE:.....	2
3.0 INTRODUCTION	2
3.1 CURTAILMENT OF PARTY AUTONOMY	2
3.2 SELECTION OF LANGUAGE ISSUES	4
3.3 THE LIMITED SCOPE OF EACJ POWERS TO AWARD INTERIM MEASURES	6
3.4 CONSIDERATIONS IN THE AWARD OF INTEREST	7
3.5 ISSUES OF ENFORCEMENT MECHANISMS	8
3.6 LACK OF AWARENESS OF THE EXISTENCE OF THE EACJ	12
3.7 CONCLUSION	13
CHAPTER FOUR:.....	2
4.0 INTRODUCTION	2
4.1 THE ECONOMIC MOTIVATIONS FOR SEEKING INTEGRATION	3
4.2 ECONOMIC INTEGRATION GOALS AND ACHIEVEMENTS OF THE EAC	4
4.3 THE PLACE OF ARBITRATION IN THE AUGMENTATION OF REGIONAL INTEGRATION	6
4.4 CONCLUSION	11
CHAPTER FIVE:	2
5.0 INTRODUCTION	2
5.1 FINDINGS	2
5.2 RECOMMENDATIONS	4
5.3 CONCLUSION	6
REFERENCES.....	7

DEDICATION

To God for His everlasting love and to my mother – a true inspiration.

ACKNOWLEDGMENTS

I would like to express my sincere gratitude to all those who helped me during the research and writing of this study.

I chiefly give thanks to the Almighty God for helping me complete this dissertation. I have seen his guiding hand in everything that I have done. I honour and praise him for his everlasting love and support.

I am extremely grateful for the immense assistance of Dr. Francis Kariuki. His expertise, guidance and constructive critique of this work has been invaluable. This research would not have been possible without his help.

I am also grateful to my mother for her support through my four years of law school and the dissertation writing process. She has been the unwavering rock I have leaned on.

ABSTRACT

The EAC has committed itself to the economic integration of the Community. The achievement of economic integration naturally results in the rise of commercial disputes given the increase in cross-border commercial engagement. Arbitration is regarded as the preferred mode of disputes settlement for the private sector. The EACJ boasts of an arbitration mechanism under Article 32(c) of the EAC Treaty. However, this mechanism remains underutilised with only one arbitration case having been heard by the Court. Therefore, this research assesses the Arbitration Rules of the Court with a view to determining whether or not they are desirable for private sector disputants. Furthermore, it examines the role which arbitration can play in augmenting the EAC economic integration agenda.

This research employs a qualitative method of data analysis using both primary and secondary sources and inductive reasoning. It reveals that the Arbitration Rules of the Court as they are formulated are not desirable for private sector disputants because they are marred by numerous weaknesses. Furthermore, the research concludes that arbitration can play a key role in ensuring private sector participation in cross-border trade thereby strengthening the economic integration agenda of the EAC.

LIST OF CASE LAW

1. *Ashville Investment v. Elmer Contractors* (1988), Queens Bench, United Kingdom.
2. *Charles M Willie and Co. (Shipping) Ltd v. Ocean Laser Shipping Ltd*, (1999), Queens Bench Division (Commercial Court) of the United Kingdom.
3. *Kersa Holdings v. Infancourtage*, (1996) Cour Superieure de Justice of Luxembourg.
4. *Christ for All Nations v Apollo Insurance Company Ltd* [2002] 2 EA 336 (CCK).
5. *McCullough & Company v. Ministry of Post, Telegraph and Telephone* (1986), Iran-US Claims Tribunal, the Hague.
6. *Spalding v. Mason*, (1896), The Supreme Court of the United States.
7. *Curtis v. Innerarity*, (1848), The Supreme Court of the United States.
8. *Nayebare Alice v. East Africa Law Society*, (2012), East African Court of Justice in Arusha.

LIST OF LEGAL INSTRUMENTS

1. *Convention on the Recognition and Enforcement of Foreign Awards*, 10 June 1958, 330.4739.
2. *East African Community, East African Community Development Strategy 2011/12-2015/16*, 2011, 14.
3. *East African Court of Justice Rules of Arbitration*, 2012.
4. *East African IRC Repository, East African Community Development Strategy 2016/17-2020/21*.
5. *Kenya Arbitration Act* (Act No. 4 of 1995).
6. *Tanzania Arbitration Act* (Chapter 15, 1931).
7. *Treaty for the Establishment of the East African Community*, 30th November 1999.
8. *UNCITRAL Model Law on International Commercial Arbitration*, 2006, 330.4739.
9. *UNCITRAL Notes on Organizing Arbitral Proceedings, UNCITRAL Commission on International Trade Law* (2016) *UNCITRAL Yearbook*, vol. XXVII.
10. *Protocol for the Establishment of the East African Community Customs Union*, 2004.
11. *Protocol for the Establishment of the East African Community Common Market*, 2009.
12. *UNIDROIT Principles of International Commercial Contracts*, May 2016.

LIST OF ABBREVIATIONS

1. EAC East African Community
2. EACJ East African Court of Justice
3. EEC European Economic Community
4. ICC International Chamber of Commerce
5. ICSID International Centre for Settlement of
Investment Disputes
6. OHADA Organisation for the Harmonisation of
Business Law in Africa
7. TWAIL Third World Approaches to International
Law
8. UNCITRAL United Nations Commission on
International Trade Law
9. UNIDROIT International Institute for the Unification of
Private Law
10. USD United States Dollars

CHAPTER ONE: INTRODUCTION

1.0 BACKGROUND

In 1967, Kenya, Uganda and Tanganyika entered into the Treaty for East African Cooperation and thereafter established a Common Market. However, the inequality of benefits gained by each country *inter alia* caused its collapse in 1977.¹ From the ashes of the East African Cooperation arose the East African Community.²

The Treaty for the Establishment of the East African Community (EAC Treaty) establishes the East African Community³ (EAC) which aims at *inter alia* legal and economic integration intended to bolster the economic expansion of the Community.⁴ The Community is predicated on mutual trust and the peaceful settlement of disputes.⁵ In achieving its objectives, the Community is to be guided by, amongst other things, market co-operation.⁶

A system of dispute resolution to settle conflicts such as inequitable gains, contractual frustrations and commercial breakdowns must be adopted by the Community in view of these objectives. Arbitration is the favoured means of resolving commercial disputes.⁷ Commercial disputes are usually submitted to arbitration as oppose to litigation in the pursuit of, *inter alia*, future business relations and/or cost effective and speedy resolutions.⁸ A chief advantage of commercial arbitration is its transboundary application with little interference by the Judiciary.⁹ Thus, trade relations between parties' origination from different States are more easily resolved through this system of dispute resolution.¹⁰

¹ Gastorn K and Masinde W, 'The EAC Common Market' in Ugirashebuja E, Ruhangisa J, Ottervanger T and Cuyvers A (eds) *East African Community Law Book: Institutional, Substantive and Comparative EU Aspects*, Brill – Nijhoff, 2017, 287.

² Gastorn and Masinde, 'The EAC Common Market' 288.

³ Article 2, *Treaty for the Establishment of the East African Community*, 30th November 1999.

⁴ Article 5(3)(b), *Treaty for the Establishment of the East African Community*.

⁵ Article 6(a) and (c), *Treaty for the Establishment of the East African Community*.

⁶ Article 7(1)(a), *Treaty for the Establishment of the East African Community*.

⁷ Muigua K, 'Arbitration institutions in East Africa' in Onyema E (eds) *The Transformation of Arbitration in Africa: The Role of Arbitral Institutions*, Kluwer Law International B.V. the Netherlands, 2016, 76.

⁸ Alter K and Hooghe L, 'Regional dispute settlement systems' in Tanja A, Brozel and Risse (eds), *Oxford Handbook of Comparative Regionalism*, Oxford University Press, United States, 2016, 546.

⁹ Muigua K, 'Promoting International Commercial Arbitration in Africa' East African International Arbitration Conference, Fairmont the Norfolk, Nairobi, 28-29 July 2014, 2.

¹⁰ Muigua K, 'Promoting International Commercial Arbitration in Africa,' 3.

Therefore, integration must be complimented by systems of protection aimed at addressing and effectively resolving disputes which inevitably occur as a result of active engagement in cross-border trade.¹¹ For instance, companies that operate in the different jurisdictions within the EAC may encounter circumstances such as *force majeure*, hardship, alterations in exchange rates and documentation errors. So as to safeguard the potential gains of economic integration, the Community must ensure the proper operation of its systems of dispute resolution which meet the needs of the commercial sector.¹² Arbitration offers one such means.

The East African Court of Justice (EACJ) is established by Article 9 of the EAC Treaty. Article 32(c) grants the Court the mandate to adjudicate commercial disputes. The United Nations Model Law on International Commercial Arbitration (UNCITRAL Model Law)¹³ defines commercial relationships as including but not being limited to:

“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 cooperation; carriage of goods or passengers by air, sea, rail or road.”¹⁴

Moreover, according to Article 1(3) of the Model Law, international arbitrations occur where:

“(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

¹¹ Axline W, ‘Underdevelopment, dependence, and integration: the politics of regionalism in the third world’ 31 *International Organisation* 1, 1977, 100.

¹² Axline W, ‘Underdevelopment, dependence, and integration: the politics of regionalism in the third world,’ 104.

¹³ Kariuki F, ‘Challenges Facing the Recognition and Enforcement Of International Arbitral Awards Within the East African Community’, *Commercial Private International Law in East and Southern Africa*, Johannesburg, 15 September 2015, 8.

¹⁴ Article 1(1), *UNCITRAL Model Law on International Commercial Arbitration*, 2006, 330.4739, 1.

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.”¹⁵

Similarly, Alter and Hooghe define an international dispute as being a “disagreement between two parties originating from more than one country”.¹⁶

Despite the fact that the EACJ became operative in 2001, only one arbitration matter has been heard under its arbitration mechanism.¹⁷ Conflicts have tended to be submitted for arbitration in international (western) fora.¹⁸ However, if the EAC is to develop at the rate so envisioned; if it is to achieve integration supported by systemic socio-economic and legal structures alongside the international *modus operandi*, it must be committed to the development of effective systems of dispute settlement within the East African region.¹⁹

Nevertheless, it should be noted that there does exist a number of arbitration institutions within the various EAC Member States. However, there is no uniform legal regime or tradition within them.²⁰ Arbitration in Kenya finds its basis in the Arbitration Act founded on the UNCITRAL Model Law.²¹ The dominant arbitration institutions within the country are: the Nairobi Centre for International Arbitration, the Chartered Institute of Arbitrators and the Centre for Alternative Dispute Resolution. Arbitration in Tanzania is guided by the Tanzania Arbitration Act.²² Having been passed before the enactment of the Model Law, it was not enacted as per its principles. The main arbitration institutions in Tanzania are the Tanzania Institute of Arbitrators and the National Construction Council.

The Arbitration and Conciliation Act²³ is the primary Act used within Uganda. It is modelled on the Model Law. The primary arbitration institution in Uganda is the Centre of Arbitration Dispute Resolution. Similarly, Rwanda’s Arbitration and Conciliation law is also modelled on

¹⁵ Article 1(3), *UNCITRAL Model Law on International Commercial Arbitration*.

¹⁶ Alter and Hooghe, ‘Regional dispute settlement systems,’ 539.

¹⁷ *Nayebare Alice v. East Africa Law Society* (2012), East African Court of Justice in Arusha.

¹⁸ Sempasa S, ‘Obstacles to international commercial arbitration in African countries’ 41 *The International and Comparative Law Quarterly* 2, 1992, 389.

¹⁹ Sempasa S, ‘Obstacles to international commercial arbitration in African countries,’ 394.

²⁰ Kariuki F, ‘Challenges facing the recognition and enforcement of international arbitral awards within the East African community,’ 2.

²¹ *Arbitration Act* (Act No 4 of 1995).

²² *Arbitration Act* (Chapter 15, 1931).

²³ *Arbitration and Conciliation Act* (Chapter 4, 2000).

the Model Law with the Kigali International Arbitration Centre being the main arbitration institution. Although the Burundi Centre for Arbitration and Mediation stands as Burundi's main arbitration centre, there are no comprehensive laws on the same.²⁴ Lastly, due to the political situation in South Sudan, there has been little or no development of its arbitration laws.²⁵

Due to the diversity of arbitration laws in the EAC Partner States, arbitration under the EACJ proves to be of particular advantage on the following grounds: firstly, all Member States have already acceded to the jurisdiction of the EACJ. Secondly, due to the transnational nature of commercial engagement, a regional, delocalised Court is a particularly desirable forum to resolve disputes arising between private parties.

Trade, being international, transcends national boundaries and class lines. This necessitates the growth of a system of dispute resolution which likewise transcends national boundaries and the limited scope of national judicial jurisdiction.²⁶ The imperative of developing uniform rules of arbitration for intra-regional conflicts cannot be over-emphasised. This will encourage the maturity of wider markets and augment economic affiliations.²⁷

This study assesses the benefits which can be derived from the existence and use of an effective, delocalised regional arbitration institution in augmenting the economic integration agenda of Burundi, Rwanda, Uganda, Tanzania, Kenya and now, South Sudan. The process of regional integration is a creation of the law²⁸ and requires the law to uphold and maintain it.

1.1 STATEMENT OF THE PROBLEM

The EACJ, being the organ to which the Community has conferred the mandate of dispute resolution, offers a forum through which international commercial arbitration may be undertaken. However, the forum is underutilised. This research seeks to analyse the potential gains that can be derived from the utilisation of arbitration under Article 32(c) of the EAC Treaty in commercial disputes. With the augmentation of the integration process aimed at by

²⁴ Muigua, 'Arbitration institutions in East Africa,' 76.

²⁵ Muigua, 'Arbitration institutions in East Africa,' 76.

²⁶ Sempasa S, 'Obstacles to international commercial arbitration in African countries,' 389.

²⁷ Sempasa S, 'Obstacles to international commercial arbitration in African countries,' 412.

²⁸ Fagbayibo B, 'Exploring legal imperatives of regional integration in Africa' 45 *The Comparative and International Law Journal of Southern Africa* 1, 2012, 65.

the EAC, the question of whether there can be effective, efficient and timely resolution of disputes on African soil using African arbitrators becomes a necessary point of interrogation.

1.2 STATEMENT OF OBJECTIVES

The research purposes to evaluate the reasons why the arbitration jurisdiction of the EACJ continues to be underutilised and the role which arbitration can play in augmenting the EAC integration agenda.

In order to undertake such an inquiry, this research shall:

1. Determine why the EACJ Article 32(c) arbitration jurisdiction is underutilised;
2. Determine whether commercial arbitration under the EACJ provides a desirable means of dispute resolution; and
3. Examine the role which arbitration can play in the achievement of the successful and stable integration scheme of the EAC.

1.3 RESEARCH QUESTIONS

1. Why is the EACJ arbitration jurisdiction underutilised?
2. Does commercial arbitration under the EACJ provide a desirable means of dispute resolution?
3. How can commercial arbitration under the EACJ be used to augment the EAC integration agenda?

1.4 HYPOTHESES

1. The EACJ arbitration jurisdiction is underutilised because the EACJ Arbitration Rules are undesirable to contracting parties.
2. Arbitration can be used to augment the integration agenda of the EAC because it encourages cross-border business engagement between private parties.

1.5 JUSTIFICATION OF THE STUDY

The EAC aims at and has so far committed itself to achieving the economic integration of the Community. Economic integration necessitates the active engagement of the private sector. However, in order to ensure private-sector participation, a dispute settlement system that meets the needs of the private sector must be in place. Arbitration is an encouraged mode of commercial dispute resolution.

Commercial disputes arising in the East African region have tended to be submitted for resolution in international fora under western models of arbitration notwithstanding the fact that the EACJ boasts of an arbitration jurisdiction. This necessitates an inquiry into why parties are not opting for regional arbitration, whether the EACJ arbitration mechanism is a desirable alternative to arbitration in western fora and whether submission to arbitration to resolve commercial disputes can fuel the augmentation and stabilisation of the integration schemes so far aimed at by the EAC.

1.6 THEORETICAL FRAMEWORK

This research adopts the Third World Approach to International Law (TWAIL) as the lens through which arbitration on the African continent will be viewed. According to Makau Mutua, TWAIL scholarship attempts to develop an alternative legal and normative approach to international law better suited to the Third World.²⁹

This approach is appropriate for this research because the study seeks to assess, and theorises that indeed, arbitration within East Africa arising from East-African commercial disputes is a better alternative to the international arbitration of regional disputes. In this way, arbitration in East Africa will be developed within a context best suited to it. As espoused by the second wave of TWAIL scholars, African thinkers must be cognisant of the inapplicability of international laws' self-professed universalism to specific relativistic and cultural contexts.³⁰

The principles of universality and relativity of international commercial arbitration are at odds with one another. The context within which disputes arise locally differ from international

²⁹ Mutua M, 'What is TWAIL?' 94 *Proceedings of the Annual Meeting (American Society of International Law)*, 2000, 31.

³⁰ Eslava L and Pahuja S, 'Beyond the (post)colonial: TWAIL and the everyday life of international law' 45 *Law and Politics in Africa, Asia and Latin America* 2, 2012, 209.

disputes for example in the levels of development, local business practices and the context of business engagements. Local arbitrators are thus best suited to not only understanding the material facts and legitimacy of the disputes within the East African context, they are also best suited to resolving them. The EAC must be cautioned from treating as universal practices which are western in origin, thought and experience.³¹

The African voice should not be denied.³² This will enable East Africa to promote its own scholarship, jurisprudence and the development of its instruments of international law such as arbitral institutions.³³

International arbitration today, based in western institutions and governed by western arbitrators, is almost singularly grounded on the intellectual, historical and cultural experiences of one region of the world, thus privileging western knowledge and participation.³⁴ It is for this reason that this research undertakes to adopt a third world lens in analysing the viability and desirability of arbitration under Article 32(c) of the EAC Treaty given that business conditions, the terms of engagement and trade and the level of development within East Africa are dissimilar to western experiences. Moreover, the third world lens is best suited to assessing whether arbitration can be used to augment the integration agenda of a third world region.

1.7 LITERATURE REVIEW

Arbitration is predicated on party autonomy, privacy, confidentiality and the resultant final and binding award.³⁵ It is praised for its transnational applicability.³⁶ Because of its growing popularity, countries have begun to promote themselves and their arbitration centres as viable seats for international arbitration.³⁷ The EAC has failed to do the same. Its arbitration case load continues in obscurity. However, no research has been done to explain why the EAC's arbitration mechanism is so underutilised. The EAC should be advised against insisting only

³¹ Riegner M, 'How universal are international law and development? Engaging with postcolonial and Third World scholarship from the perspective of its Other' 45 *Law and Politics in Africa, Asia and Latin America* 2, 2012, 235; Mutua M, 'What is TWAIL?', 37.

³² Gathii J, 'Rejoinder: twailing international law' 98 *Michigan Law Review* 6, 2000, 2067.

³³ Mutua M, 'What is TWAIL?', 32.

³⁴ Mutua M, 'What is TWAIL?', 32.

³⁵ Tsietsi T, 'International commercial arbitration: case study of the experience of African States in the International Centre for Settlement of Investment Disputes,' 47 *The International Lawyer* 2, 2013, 249.

³⁶ Muigua, 'Arbitration institutions in East Africa,' 76.

³⁷ Ostrove M, Sanderson B and Veronelli A, 'Developments in African arbitration' *Global Arbitration Review*, 2018, 33 - <https://globalarbitrationreview.com/chapter/1139890/developments-in-african-arbitration> on 4 May 2019; Sempasa S, 'Obstacles to international commercial arbitration in African countries,' 405.

on formalistic means through which to resolve disputes contrary to the international trajectory.³⁸ The Court has enacted extensive rules of arbitration in pursuit of Article 32 and in fulfilment of its Article 42(1)³⁹ mandate.

Therefore, this research aims to assess whether the cause of the underutilisation is indeed the EACJ's failure to promote its arbitration mechanism as a viable means of dispute resolution, or whether it is as a result of the undesirability of the rules under which such an arbitration would operate.

East Africa should take charge of the creation of its own legal systems. While paraphrasing Judge Yusuf, the International Court of Justice president, it has been noted that there is a need to 'decolonise' African-related arbitration proceedings. The existing state of affairs hinders the growth of arbitration in Africa.⁴⁰ This has led Kariuki Muigua to opine that notwithstanding the presence of knowledgeable, skilled and experienced African arbitrators, parties tend to assign non-African arbitrators to govern their arbitration proceedings.⁴¹

Therefore, Judge Yusuf has called for the "repatriation of arbitration" due to the rate at which African arbitration proceedings are "exported to international centres".⁴² However, in order for commercial arbitration to be a viable, desirable and effective process within the region, Ostrove, Sanderson and Veronelli advise that: firstly, regional arbitration must be modernised. Secondly, the judges and lawyers must possess a deeper knowledge of arbitration.⁴³ This necessitates an examination of the *modus operandi* of arbitration under the EACJ mechanism. The repatriation of African-related arbitrations would not be beneficial to parties nor to the development of legal systems if the systems themselves are not effectively constructed.

As such, this research will assess whether the EACJ commercial arbitration mechanism is desirable to private parties and whether the rules constructed thereunder conform to the fundamental precepts of arbitration. Although the EACJ should be encouraged to develop

³⁸ Sempasa S, 'Obstacles to international commercial arbitration in African countries,' 405.

³⁹ "The Court shall make rules of the Court which shall, subject to the provisions of this Treaty, regulate the detailed conduct of the business of the Court."

⁴⁰ Ostrove M, Sanderson B and Veronelli A, 'Developments in African arbitration' *Global Arbitration Review*, 2018, 33 - <https://globalarbitrationreview.com/chapter/1139890/developments-in-african-arbitration> on 4 May 2019.

⁴¹ Muigua, 'Arbitration institutions in East Africa,' 89.

⁴² Ostrove M, Sanderson B and Veronelli A, 'Developments in African arbitration' *Global Arbitration Review*, 2018, 33 - <https://globalarbitrationreview.com/chapter/1139890/developments-in-african-arbitration> on 4 May 2019.

⁴³ Ostrove M, Sanderson B and Veronelli A, 'Developments in African arbitration' *Global Arbitration Review*, 2018, 33 - <https://globalarbitrationreview.com/chapter/1139890/developments-in-african-arbitration> on 17 August 2019.

arbitration within its own relativistic context as advocated for by TWAIL scholarship, there are core tenets of arbitration that must exist within any rules and under any institution in order to bolster their legitimacy and likelihood of acceptance by arbitrating parties.

Both commercial and investment arbitration cases involving African parties have significantly increased in recent years given that there is an inevitable corollary between increased commercial activity and increased commercial related disputes.⁴⁴ Thus, Muigua has posited that the EACJ arbitration mechanism may be underutilisation because the EAC integration process is still ongoing.⁴⁵ However, the integration process has been on-going for more than a decade now and the court itself has been operational since 2004. Therefore, a more pertinent question is whether commercial arbitration can aid in augmenting the integration agenda so far achieved and thus whether it is a useful tool which the EAC can employ to further its aims.

The Community has committed itself to developing economic relations between the member States which, if fulfilled, will lead to an increase in commercial activity and likewise, an increase in commercial disputes. As per Article 5 of the Treaty, the Partner States have resolved to establish a Customs Union, a Common Market and a Monetary Union. Thus, the Community purposes to bolster commercial relations between the Partner States. The EAC further aims to ensure the sustainable economic expansion of the region.⁴⁶

The objectives of the Community are well represented in the medium-term development strategies that guide its activities. The second development strategy of 2001-2005 saw the establishment of the Customs Union⁴⁷. During the period between 2006-2010 (the third development strategy), the Common Market was established.⁴⁸ The fourth development strategy (2012-2016) focused on implementing the Common Market and launching the Monetary Union.⁴⁹ In the period between 2016-2020, the EAC will centre its focus on international competitiveness, economic development, the expansion of its financial markets, technological advancement, innovation and improved productivity and distribution. This is to

⁴⁴ Ostrove M, Sanderson B and Veronelli A, 'Developments in African arbitration' *Global Arbitration Review*, 2018, 33 - <https://globalarbitrationreview.com/chapter/1139890/developments-in-african-arbitration> on 17 August 2019.

⁴⁵ Muigua, 'Arbitration institutions in East Africa,' 88.

⁴⁶ Article 5(2), *Treaty for the Establishment of the East African Community*.

⁴⁷ East African Community, *East African Community Development Strategy 2011/12-2015/16*, 2011, 14.

⁴⁸ East African Community, *East African Community Development Strategy 2011/12-2015/16*, 14.

⁴⁹ East African Community, *East African Community Development Strategy 2011/12-2015/16*, 15.

be achieved within an environment that endorses high job creation and the maturation of the labour market.⁵⁰

Under the EAC Vision 2050, the EAC aims at achieving macro-economic stability in a conducive business environment. This is with a view to ensuring the growth of private sector investment so as to fuel economic growth rates of 10 percent per annum.⁵¹

Furthermore, the EACs vision and mission is to, *inter alia* “augment economic integration”.⁵² The fourth development agenda states that the purpose of the EAC integration agenda is the attainment of economic growth.⁵³ The Treaty mandates that the EAC work towards achieving sustainable growth and development, strengthen and consolidate cooperation and economic ties and enhance and strengthen partnerships with the private sector.⁵⁴ Therefore, increased economic activity is central to the integration agenda. The need for a viable commercial dispute resolution mechanism is thus a pertinent question in view of these goals.

In order for arbitration to gain a hold within the region the impetus to develop international arbitration within East Africa must stem from the region itself.⁵⁵ The statistics demonstrate that African arbitrators and counsel are not represented in international arbitration tribunals even where the disputes involve Africa-connected disputes. This is because parties to international arbitration statistically opt for western fora, western arbitrators and western lawyers.⁵⁶ In instances where African arbitrators are represented on Tribunals, the President of the Tribunal is almost invariably a non-African citizen.⁵⁷

According to the International Centre for Settlement of Investment Disputes (ICSID) 2018 Caseload statistics, 15% of the disputes submitted to ICSID were from Sub-Saharan Africa.⁵⁸ As per the geographical distribution of new cases registered in the financial year 2018, cases submitted from Sub-Saharan Africa accounted for 19% of the case load with one case involving

⁵⁰ East African IRC Repository, *East African Community Development Strategy 2016/17-2020/21*, 15.

⁵¹ East African IRC Repository, *East African Community Development Strategy 2016/17-2020/21*, 53.

⁵² East African Community, *East African Community Development Strategy 2011/12-2015/16*, 13.

⁵³ East African Community, *East African Community Development Strategy 2011/12-2015/16*, 16.

⁵⁴ Article 5(3), *Treaty for the Establishment of the East African Community*.

⁵⁵ Sempasa S, ‘Obstacles to international commercial arbitration in African countries,’ 397-398.

⁵⁶ Tsietsi T, ‘International commercial arbitration: case study of the experience of African States in the International Centre for Settlement of Investment Disputes,’ 262.

⁵⁷ Tsietsi T, ‘International commercial arbitration: case study of the experience of African States in the International Centre for Settlement of Investment Disputes,’ 262.

⁵⁸ International Centre for Settlement of Investment Disputes, *ICSID Caseload Statics Issue 2018-2*, 2018, 11.

Tanzania and another involving Rwanda.⁵⁹ Participation of Sub-Saharan African States increased from 4% in the 2017 financial year to 19% by the 2018 financial year.⁶⁰

The ICC caseload statistics tell a similar story. The 2017 statistics report saw a 40% increase of parties from Sub-Saharan Africa – accounting for 6.6% of the ICC caseload⁶¹ with Kenya, Burundi and Tanzania all having cases within the ICC.⁶² There was a total of 153 cases involving Sub-Saharan African parties and a grand total of 208 cases involving African parties in general just within 2017.⁶³ Of the 150 cases involving State and State-owned parties, 32 came from Sub-Saharan Africa.⁶⁴ This is simply to quote Sub-Saharan representation in but two international arbitration centres. Conversely, only one arbitration case has been heard by the EACJ since its inauguration.⁶⁵ Therefore, it is clear that the EACJ arbitration mechanism is underutilised in favour of western fora. Judge Yusuf's words about the need to repatriate African-related disputes back to Africa thus ring true. Accordingly, this research seeks to determine why the EACJ arbitration mechanism is underutilised.

In order to ensure that the flow of trade is not unduly disrupted, international disputes should be promptly resolved⁶⁶ in a context best suited for their resolution. There has, however, been no research done into the desirability of the EACJ arbitration mechanism nor the possible use of arbitration in augmenting the economic integration of the region. This research therefore aims to fill that gap in the existing discourse.

1.8 RESEARCH DESIGN AND METHODOLOGY

1.8.1 INSTRUMENTS OF DATA COLLECTION

This research employs a qualitative approach to collecting data, utilising both primary and secondary sources of information. Therefore, this research principally adopts an inductive method where the data is used to evaluate the hypothesis. This research consists entirely of

⁵⁹ International Centre for Settlement of Investment Disputes, *ICSID Caseload Statics Issue 2018-2*, 2018, 26-27.

⁶⁰ International Centre for Settlement of Investment Disputes, *ICSID Annual Report*, 2018, 28-29.

⁶¹ Quarterly e-journal of the International Chamber of Commerce, *ICC Dispute Resolution Bulletin*, 2018, 52.

⁶² Burundi acted as Claimant in one case and as Respondent in another; Kenya acted as Claimant in 2 cases and as Respondent in 4 others; Tanzania acted as Claimant in one case and as Respondent in two others.

⁶³ Quarterly e-journal of the International Chamber of Commerce, *ICC Dispute Resolution Bulletin*, 2018, 53.

⁶⁴ Quarterly e-journal of the International Chamber of Commerce, *ICC Dispute Resolution Bulletin*, 2018, 56.

⁶⁵ *Nayebare Alice v. East Africa Law Society*, (2012), East African Court of Justice in Arusha.

⁶⁶ McLaughlin J, 'Arbitration and developing countries' 13 *The International Lawyer* 2, 1979, 212.

desktop research. The data was collected through an intensive study of the EAC laws and instruments relating to arbitration and integration as well as scholarly works on the subject. Other sources include: case law, Acts of parliament of the various EAC States, International Conventions and reports.

1.8.2 ASSUMPTIONS

This research assumes that the EAC will remain committed to the integration scheme envisioned under the EAC Treaty and other such instruments. The EAC has so far demonstrated a commitment to the integration scheme and did in fact admit a new member (South Sudan) to its ranks in 2016. Moreover, since the first case was instituted in 2005, the number of cases brought to the EACJ under its judicial mechanism have steadily increased.

1.8.3 LIMITATIONS

The foremost limitation to this study was time. For example, the researcher was unable to conduct research into the visibility of the EACJ and the general knowledge held by the EAC population about the role, mandate and jurisdiction of the Court. The time frame allotted to this research curtailed the researcher's ability to determine whether the phenomena so far observed will remain unchanged even with the progressive realisation of the EAC integration agenda. Thus, the research represents a snapshot of variables dependent on the conditions which occurred during this time. Nevertheless, a majority of the research centred around the assessment of the Arbitration Rules of the Court as they are today. Moreover, it also assessed the role of arbitration in augmenting the economic integration of the EAC generally and under the objectives already committed to by the Partner States.

1.8.4 CHAPTER BREAKDOWN

Chapter One: Introduction to the study

This Chapter presents the research proposal for the study. It contains the background, statement of the problem, statement of objectives, hypothesis, research questions, justification, theoretical framework, literature review and the research design and methodology.

Chapter Two: Analysis of Commercial Arbitration under the EACJ

Chapter Two presents an analysis of the system of commercial arbitration under the Rules of Arbitration of Court and identifies the major weaknesses of those Rules.

Chapter Three: Reasons why the EACJ arbitration jurisdiction is underutilised

Chapter Three of the study considers why the EACJ commercial arbitration jurisdiction remains underutilised by undertaking a systematic assessment of the weaknesses of the EAC Arbitration Rules.

Chapter Four: Examination of the role which commercial arbitration in the EACJ can play in the achievement of the integration scheme of the EAC

Chapter Four analyses whether effective commercial arbitration can aid in the achievement of the integration agenda of the EAC given its aim towards increased socio-economic activity within the region.

Chapter Five: Conclusion and Recommendations

The final Chapter represents a summary of the findings. It thereafter presents the recommendations derived therefrom. The Chapter finally concludes the research by considering the research objectives and research questions and whether the hypotheses of the study was proven.

1.8.5 DURATION OF THE STUDY

This study was conducted between May 2019 – November 2019.

CHAPTER TWO: ANALYSIS OF THE EACJ ARBITRATION RULES

2.0 INTRODUCTION

As mandated by Article 42(1) of the Treaty, the EACJ enacted the East African Court of Justice Arbitration Rules¹ which apply to all arbitrations brought under Article 32 of the Treaty.² Article 32(c) of the EAC Treaty and Rule 23(c) of the Arbitration Rules grant the EACJ jurisdiction over commercial arbitration disputes. They stipulate that the Court may arbitrate disputes “arising from an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court.”³ TWAIL scholarship dictates that international law should be constructed to suite the relativistic context of the Third World.⁴ However, as they are constructed, the EACJ arbitration Rules do not take cognisance of the local circumstance and are thus generically formulated, nor do they conform to some of the fundamental precepts of arbitration.

Given that it is international, arbitration amalgamates different legal traditions into a system that allows for the neutral determination of international commercial disputes.⁵ According to Margaret Moses, a leading scholar in this field, the defining characteristics of arbitration are: 1) the consent of the parties to take their dispute to arbitration; 2) non-governmental adjudicators given that arbitrators are generally private citizens; and 3) a final and binding award.⁶ Moses states that the advantages of arbitration are the ease of enforcement mainly through the New York Convention; confidentiality of the proceedings and the resulting award;

¹ *East African Court of Justice Rules of Arbitration*, 2012.

² Rule 7(1), *East African Court of Justice Rules of Arbitration*.

³ Regrettably, save for defining arbitration as being “any proceedings instituted under Article 32 of the Treaty”, neither the EACJ Arbitration Rules nor the EAC Treaty define what constitutes a ‘commercial contract or agreement’ for the purposes of arbitration under the EACJ.

⁴ Eslava L and Pahuja S, ‘Beyond the (post)colonial: TWAIL and the everyday life of international law’ 45 *Law and Politics in Africa, Asia and Latin America* 2, 2012, 209.

⁵ Strong S, ‘Research in international commercial arbitration: special skills, special sources’, 20 *The American Review of International Arbitration* 2, 2009, 156.

⁶ Moses M, *The principles and practice of international commercial arbitration*, 3ed, Cambridge University Press, United Kingdom, 2017, 2.

party autonomy; lower requirements for discovery; and comparatively less costs than litigation.⁷ Parties opt for arbitration on the promise of neutrality and impartiality.⁸

This Chapter undertakes an analysis of the contents of the EACJ Arbitration Rules in light of these fundamental precepts of international arbitration. There are inherent tenets of arbitration which attract private disputants. Although the manifestations of these tenets may differ between jurisdictions, the essential qualities differ slightly among the myriad of arbitration rules and institutional arrangements.⁹ Therefore, in this Chapter, the essential qualities of arbitration as manifested in the EACJ Arbitration Rules will be examined using a TWAIL lens.

2.1 PARTY AUTONOMY

Having been accepted as the cornerstone of international commercial arbitration, party autonomy is one of the considerable benefits of this mode of dispute resolution.¹⁰ Party autonomy is the principle that disputants have the liberty to construct the manner in which their dispute is to be resolved, subject only to public interest considerations.¹¹

Party autonomy, being integral to private international law, can be found in almost all international arbitration conventions¹² including the ICSID Convention, Regulations and Rules, the European Convention on International Arbitration, the UNCITRAL Model Law and the International Chamber of Commerce Rules.

Procedural flexibility is usually harnessed by institutions to cater for the party's interests. This flexibility manifests itself in, for example, the parties being able to designate the number of arbitrators to compose the Tribunal, the procedure for their appointment, the place of arbitration, the law applicable to the dispute and the powers of the arbitral Tribunal.¹³

⁷ Moses, *The principles and practice of international commercial arbitration*, 3-4.

⁸ Onyema E, 'The jurisdictional tensions between domestic Courts and arbitral Tribunals' in Menaker A (eds) *International Arbitration and the Rules of Law: Contribution and Conformity* 1ed Kluwer Law International, The Netherlands, 2017, 493.

⁹ Straus D, 'The growing consensus on international commercial arbitration' 68 *The American Journal of International Law* 4, 1974, 711.

¹⁰ Tweeddale A and Tweeddale K, *Arbitration of commercial disputes: international and English law and practice*, 1ed, Oxford University Press, New York, 2005, 259.

¹¹ Rajveer A, 'Parties' autonomy in international commercial arbitration', 9 *International Journal of Science & Engineering Research* 10, 2018, 1204.

¹² Anglade L, 'The use of transnational rules of law in international arbitration' 38 *Irish Jurist, New Series* 1, 2003, 94-95.

¹³ Matli W, 'Justice in the global economy: from litigation to arbitration', 55 *International Organisation* 4, 2001, 925.

The EACJ Rules are decorated by provisions that uphold this principle. In recognition of the parties right of choice, both Article 32(c) of the Treaty and Rule 23(c) of the Arbitration Rules designate that the Court shall only have jurisdiction to arbitrate those disputes which the parties have expressly conferred jurisdiction to it in their commercial contract or agreement. Under Rule 1(1), the Rules only apply where the parties agree that they should do so. Moreover, the parties may modify or waive their application. Where the Rules conflict with the applicable law, the applicable law will prevail.¹⁴ The Tribunal is obligated to resolve the dispute as per the law designated by the parties.¹⁵ Only where expressly authorised by the parties to do so may the Tribunal determine “the substance of the dispute according to considerations of justice and fairness without being bound by the rules of law”.¹⁶ Additionally, the arbitration is to be conducted at a place determined by the disputants.¹⁷ Only where the parties fail to agree may the Tribunal select the place of arbitration.¹⁸

Nevertheless, Rule 8 stands as a significant bar to party autonomy if parties are to select the Arbitration Rules of the EACJ in their entirety. The appointing authority¹⁹ may only appoint members of the Tribunal, or the sole Arbitrator from amongst the Judges of the Court.²⁰ This stifling of party autonomy is further discussed below and elaborated on in Chapter Three.

2.2 APPOINTMENT OF ARBITRATORS

The principle of party autonomy mandates that the parties may select the arbitral Tribunal or choose the process by which the Tribunal is to be appointed.²¹ The principle dictates that parties should be “free to agree on the number of arbitrators, how they will be appointed and who they will be”.²² Only upon the failure to appoint arbitrators or a default in specifying the procedure

¹⁴ Rule 1(2)(c), *East African Court of Justice Rules of Arbitration*.

¹⁵ Rule 11(1), *East African Court of Justice Rules of Arbitration*.

¹⁶ Rule 11(1), *East African Court of Justice Rules of Arbitration*.

¹⁷ Rule 21 (1), *East African Court of Justice Rules of Arbitration*.

¹⁸ Rule 21 (1), *East African Court of Justice Rules of Arbitration*.

¹⁹ Under Article 1(4) *East African Court of Justice Rules of Arbitration*, 2012, the appointing authority is the President or Vice President of the Court ‘as the person appointing an arbitrator in accordance with Rules 8 and 18’.

²⁰ Rule 8(1), *East African Court of Justice Rules of Arbitration*.

²¹ Tweeddale and Tweeddale, *Arbitration of commercial disputes: international and English law and practice*, 36.

²² Greenberg, Kee and Weeramantry, *International commercial arbitration: an Asia-pacific perspective*, 246.

by which the Tribunal is to be appointed may the institution have the power to determine the constitution of the arbitration Tribunal.²³

Generally, a Tribunal is comprised of a three-person bench with each party selecting one arbitrator and the chairman being appointed by the two appointed arbitrators, an arbitration Tribunal or the parties themselves.²⁴ The institutional rules selected by the parties should only provide a *default* processes for the selection of arbitrators where the parties fail to agree.²⁵ The applicable arbitration rules represent a contingency plan that prevent the constitution process from being frustrated by the parties failure of choice or lack of agreement.²⁶

In *Ashville Investment v. Elmer Contractors*, it was stated that a “non-statutory arbitrator derives his jurisdiction from the agreement of the parties at whose instance he is appointed. He has such jurisdiction as they agree to give him and none that they do not.”²⁷ The appointment of a competent Tribunal with which the parties are satisfied is paramount.²⁸ This has led Margaret Moses to note that “because arbitration is a private dispute resolution process lacking some of the safeguards of a national legal system, the quality of the Tribunal has a significant impact on maintaining parties confidence in the arbitration as a system that works.”²⁹

This principle is so central to international commercial arbitration that Article V(1)(d) of the New York Convention declares that one of the grounds upon which the recognition and enforcement of an award may be refused is where “the composition of the arbitral authority... was not in accordance with the agreement of the parties”.

The main limitations to the exercise of party autonomy should be the failure to agree on the arbitrators and mandatory due process rules such as public policy considerations, natural justice requirements, impartiality, neutrality, conflict of interest principles and non-derogable provisions of the *lex arbitri* laws.³⁰

²³ Greenberg, Kee and Weeramantry, *International commercial arbitration: an Asia-pacific perspective*, 246.

²⁴ Tweeddale and Tweeddale, *Arbitration of commercial disputes: international and English law and practice*, 36.

²⁵ Tweeddale and Tweeddale, *Arbitration of commercial disputes: international and English law and practice*, 142.

²⁶ Greenberg, Kee and Weeramantry, *International commercial arbitration: an Asia-pacific perspective*, 246.

²⁷ *Ashville Investment v. Elmer Contractors* (1988), Queens Bench, United Kingdom.

²⁸ Tweeddale and Tweeddale, *Arbitration of commercial disputes: international and English law and practice*, 140.

²⁹ Moses, *The principles and practice of international commercial arbitration*, 127.

³⁰ Greenberg, Kee and Weeramantry, *International commercial arbitration: an Asia-pacific perspective*, 304; Tweeddale and Tweeddale, *Arbitration of commercial disputes: international and English law and practice*, 260.

Unfortunately, the EACJ Rules severely limit the party's ability to determine the composition of the Tribunal. In fact, a Tribunal is defined strictly as being "the Court when exercising its arbitral jurisdiction under Article 32 of the Treaty."³¹ Similarly, an arbitrator is defined as being "a judge or judges of the Court appointed to constitute" the Tribunal.³² Moreover, Rule 8 reads that arbitrators are to be appointed "from among the judges of the Court" and the "Chairman of the Tribunal" is to be appointed from the "judges constituting the Tribunal." Therefore, the Rules proffer a very limited definition of who may constitute a Tribunal in EACJ arbitration matters and thus hinder the parties right to appoint skilled, experienced and knowledgeable experts to constitute their Tribunal. The very purpose of TWAIL scholarship is the emphasis on the need to develop laws and legal systems that suit the local condition of the Third World. This condition, however, cannot be satisfied where those placed in charge of the development of these systems are not possessed of subject-specific knowledge and expertise.

Moreover, Moses has contended that "arbitrators [should be] private citizens... [who] do not belong to any governmental hierarchy [as] compared with judges". This is because "unlike judges, arbitrators tend to be very thoughtful of the parties" themselves rather than with public interest and public policy concerns.³³ Conversely, the EACJ Rules conflate the role of judges with the role of arbitrators. This is likely to have a negative impression on the public's perception of the neutrality and impartiality of the judges. Additionally, the judges are unlikely to have subject-specific expertise in all arbitration matters that may be brought for determination.

2.3 THE PROCEDURAL RULES AND ADMINISTRATION SERVICES OF THE EACJ

Rules of arbitration confer upon a Tribunal the discretion to determine points of procedure which the parties have not implicitly or explicitly considered.³⁴ Institutional arbitration should be buttressed by an effective, efficient and properly constituted set of rules administered by a recognised institution.³⁵ According to Drohozal, institutions offer three main services to disputants: firstly, the institution furnishes the parties with standardised procedural rules that govern the arbitration process. Secondly, the institution serves as the appointing authority

³¹ Rule 1(4), *East African Court of Justice Rules of Arbitration*.

³² Rule 1(4), *East African Court of Justice Rules of Arbitration*.

³³ Moses, *The principles and practice of international commercial arbitration*, 2.

³⁴ Strong S, 'Research in international commercial arbitration: special skills, special sources,' 139.

³⁵ Straus D, 'The growing consensus on international commercial arbitration,' 712.

where disputants are not in common accord on the appointment of arbitrators. Lastly, the institution provides administration services in support of the arbitration process.³⁶

The proper administration of arbitration requires of institutional rules that they make provisions for such things as “the arrangement of meetings, transcripts, or interpreters; the filing of papers; filing of vacancies created by the death or disability of an arbitrator” and such other matters as are related to the proper conduct of hearings.³⁷

The standard procedural rules of arbitration under the EACJ are espoused in Part 1 of the Rules. These include, *inter alia*, how arbitrations are to be initiated,³⁸ how the answer to the request for arbitration and counterclaims are to be commenced³⁹ and the general effect of arbitration agreements.⁴⁰

The administrative services offered by the administering body include but are not limited to facilitation of the mode of submitting documents,⁴¹ hosting of the preliminary conference at which the document defining the Terms of Reference is drawn up,⁴² and creating the provisional timetable to guide the conduct of the arbitration.⁴³

Arbitration, being commercial, is geared towards resolving disputes that arise within a given industry. Therefore, it is not uncommon to find institutional rules which direct that its arbitrators apply ‘usages of trade’ or ‘trade customs’ in resolving the disputes.⁴⁴ Likewise, an EACJ Tribunal is required to take into account the applicable usages of trade when deciding a dispute.⁴⁵

³⁶ Drohozal C, ‘Commercial norms, commercial codes, and international commercial arbitration’, 33 *Vanderbilt Journal of Transitional Law* 79, 2000, 99-100.

³⁷ Straus D, ‘The growing consensus on international commercial arbitration,’ 712.

³⁸ Rule 3, *East African Court of Justice Rules of Arbitration*.

³⁹ Rule 5, *East African Court of Justice Rules of Arbitration*.

⁴⁰ Rule 7, *East African Court of Justice Rules of Arbitration*.

⁴¹ Rule 10, *East African Court of Justice Rules of Arbitration*.

⁴² Rule 12(1), *East African Court of Justice Rules of Arbitration*.

⁴³ Rule 12(7), *East African Court of Justice Rules of Arbitration*.

⁴⁴ Drohozal C, ‘Commercial norms, commercial codes, and international commercial arbitration’, 111-117.

⁴⁵ Rule 11(4), *East African Court of Justice Rules of Arbitration*.

2.4 POWERS OF AN ARBITRAL TRIBUNAL

It is generally recognised that arbitrators have three kinds of powers: express powers, implied powers and inherent powers.⁴⁶ Express power is the authority granted to them by arbitration agreements, other agreement by the parties or the laws and Rules governing the arbitration proceedings.⁴⁷ Conversely, implied powers result from the Tribunals duty to ensure the proper conduct and functioning of the arbitration.⁴⁸ For example, the Tribunal is expected to conduct the arbitration efficiently.⁴⁹ Lastly, inherent powers “derive from the Tribunals adjudicatory function and are needed by the arbitrator to preserve the integrity of the arbitral process.”⁵⁰ For example, the requirement that the arbitrations be fair and untainted necessities that the Tribunal possess the power to ensure the arbitration is not disrupted by such things as delays or corruption.⁵¹

As with all arbitrations, the jurisdiction of an EACJ Tribunal stems from the arbitration agreement.⁵² The principle of *Kompetenz-Kompetenz*⁵³ dictates that an a Tribunal may determine questions regarding its jurisdiction to hear and determine a dispute.⁵⁴ This principle is justified by party autonomy. By agreeing to arbitrate, parties likewise elect that the arbitrators have the power to determine all relevant questions put to it including matters pertaining to its jurisdiction.⁵⁵ This principle is reflected in Rule 23(2) which provides that “the Tribunal shall have the power to decide on an objection that it has no jurisdiction, including any objection concerning the existence or validity of the arbitration agreement.” Its determination shall be final.⁵⁶

The objection as to the jurisdiction of the Tribunal must “be raised not later than in the Statement of Defence or, with respect to a counterclaim, in the reply to the counterclaim.”⁵⁷ Moreover, where parties contend that the EACJ Tribunal has exceeded its jurisdiction, such

⁴⁶ Tweeddale and Tweeddale, *Arbitration of commercial disputes: international and English law and practice*, 286; Moses, *The principles and practice of international commercial arbitration*, 158.

⁴⁷ Tweeddale and Tweeddale, *Arbitration of commercial disputes: international and English law and practice*, 286; Moses, *The principles and practice of international commercial arbitration*, 158.

⁴⁸ Moses, *The principles and practice of international commercial arbitration*, 158.

⁴⁹ Moses, *The principles and practice of international commercial arbitration*, 158.

⁵⁰ Moses, *The principles and practice of international commercial arbitration*, 158.

⁵¹ Moses, *The principles and practice of international commercial arbitration*, 158.

⁵² Rule 23(1)(c), *East African Court of Justice Rules of Arbitration*.

⁵³ Sometimes referred to as Competence-Competence.

⁵⁴ Moses, *The principles and practice of international commercial arbitration*, 96.

⁵⁵ Tweeddale and Tweeddale, *Arbitration of commercial disputes: international and English law and practice*, 289; Moses, *The principles and practice of international commercial arbitration*, 96.

⁵⁶ Rule 23(2), *East African Court of Justice Rules of Arbitration*.

⁵⁷ Rule 23(3), *East African Court of Justice Rules of Arbitration*.

objection must be raised “as soon as the matter alleged to be beyond the scope of its jurisdiction” arises.⁵⁸

Where it determines that it has no jurisdiction, the Tribunal is to issue an order terminating the arbitral proceedings.⁵⁹ Rule 31 further elucidates the powers of the Tribunal to terminate arbitral proceedings.

The Tribunal is empowered to conduct the arbitration as it deems fit where the parties have not agreed to waive or modify the Rules.⁶⁰ Moreover, the Tribunal has the power to determine the “admissibility, relevance, materiality and weight of any evidence.”⁶¹ Furthermore, Rule 27 mandates that the “Tribunal may, on its own motion or upon application by a party, request the assistance of any Court or Tribunal to take the evidence of a witness and transmit it to the Tribunal.”

Additionally, the Tribunal has the power to “order any party to provide security for the costs of any other party by way of deposit or bank guarantee or in such other manner as the Tribunal deems fit.”⁶² Where such an order is not complied with, “the Tribunal may disregard a claim or counterclaim by the non-complying party, and it may proceed to determine a claim or counterclaim by a complying party.”⁶³

Furthermore, an EACJ Tribunal has the power to grant interim measures.⁶⁴ However, such powers are very limited in their scope. An interim measure is temporary relief granted by an arbitral Tribunal to a requesting party.⁶⁵ They are conservatory measures intended to protect a party’s ability to obtain a final award.⁶⁶

Under Chapter IV A, Article 17(2) of the UNCITRAL Model Law:

“An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral Tribunal orders a party to:

⁵⁸ Rule 23(4), *East African Court of Justice Rules of Arbitration*.

⁵⁹ Rule 31(1)(a), *East African Court of Justice Rules of Arbitration*.

⁶⁰ Rule 20(1) and (2), *East African Court of Justice Rules of Arbitration*.

⁶¹ Rule 27, *East African Court of Justice Rules of Arbitration*.

⁶² Rule 38, *East African Court of Justice Rules of Arbitration*.

⁶³ Rule 38, *East African Court of Justice Rules of Arbitration*.

⁶⁴ Rule 14, *East African Court of Justice Rules of Arbitration*.

⁶⁵ Chapter IV A, Article 17(2), UNCITRAL Model Law; Moses, *The principles and practice of international commercial arbitration*, 111.

⁶⁶ Moses, *The principles and practice of international commercial arbitration*, 112.

- (a) Maintain or restore the status quo pending determination of the dispute;*
- (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;*
- (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or*
- (d) Preserve evidence that may be relevant and material to the resolution of the dispute.”⁶⁷*

Conversely, Rule 14 of the EACJ Rules grants an EACJ Tribunal the power to award interim measures only:

“in respect of the subject matter of the dispute, including measures for the conservation of the goods forming the subject matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.”

Therefore, the powers of an EACJ Tribunal to grant interim awards solely with regards to the subject matter of the dispute are severely limited given the broad range of issues which are likely to arise within international commercial arbitrations especially where those issues arise as a result of the integration process and Community law.

2.5 PURSUIT OF NEUTRALITY AND IMPARTIALITY

In selecting the seat of arbitration, greatest heed is generally paid by the parties to the neutrality of the forum.⁶⁸ This is in an attempt to ‘delocalise’ international contracts.⁶⁹ The delocalisation of international arbitration is manifested in a number of ways. For example, being international, the parties often originate from different countries, the members of the Tribunal will likely be from more than one State and the place of arbitration is often within a neutral country. Furthermore, the enforcement of the award will likely be in one or more jurisdictions in which only one of the parties has business assets which may or may not be the same jurisdiction as the seat of arbitration.⁷⁰

⁶⁷ Chapter IV A, Article 17(2), UNCITRAL Model Law.

⁶⁸ Hrnčíříková M, ‘The meaning of soft law in international commercial arbitration’, 16 *ICLR* 1, 2016, 102.

⁶⁹ Anglade L, ‘The use of transnational rules of law in international arbitration,’ 101.

⁷⁰ Anglade L, ‘The use of transnational rules of law in international arbitration,’ 101.

The EAC as it stands today is a revival of the Community which existed between 1967 – 1977 with a renewed commitment to *inter alia* promoting private sector engagement.⁷¹ Kenya stands as the economic hegemony of East Africa.⁷² Therefore, a neutral system of dispute resolution, buttressed by robust rules and characterised by equality of arms is necessary to settle disputes that are likely to arise between the business community with the augmentation of the integration agenda.

The principle of neutrality and impartiality is well entrenched in Rule 8(3) of the EACJ Arbitration Rules. This Rule mandates that when appointing Arbitrators, due regard is to be had “to the necessity to secure the appointment of independent and impartial arbitrators.” Furthermore, a prospective Arbitrator is mandated to “disclose to the appointing authority any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence.”⁷³ Lastly, parties are entitled to challenge an Arbitrator where they are of the opinion that there exist justifiable doubts as to their impartiality or independence.⁷⁴ Nevertheless, as has been discussed above and will be further examined in Chapter Three, there exist considerable doubts as to whether the judges of the Court will be perceived as neutral given that they are decision-makers who exist within a governmental hierarchy.

It is recognised that the conduct of arbitration should adhere to what Straus terms as the “common sense considerations of fairness and equality”⁷⁵ which necessarily arise out of the pursuit of neutrality and impartiality.

Efficiency is a fundamental element of fairness because “justice too long delayed becomes justice denied.”⁷⁶ Thus, under Rule 24(a) of the Rules, in establishing the facts of any case the Tribunal must “proceed within the shortest time possible.” Moreover, a natural consequence of the pursuit of fairness is the requirement of due process.⁷⁷ This comprises the right to be heard, the right to an unbiased trial and equality of arms between the parties.⁷⁸

⁷¹ Alter K, Gathii J and Helfer L, ‘Backlash against international Courts in west, east and southern Africa: causes and consequences’ 27 *The European Journal of International Law* 2, 2016, 300.

⁷² Alter K, Gathii J and Helfer L, ‘Backlash against international courts in west, east and southern Africa: causes and consequences,’ 317.

⁷³ Rule 16, *East African Court of Justice Rules of Arbitration*.

⁷⁴ Rule 17, *East African Court of Justice Rules of Arbitration*.

⁷⁵ Straus D, ‘The growing consensus on international commercial arbitration,’ 711.

⁷⁶ Park W, ‘The procedural soft law of international arbitration: non-governmental instruments’ in Mistelis L and Lew J (eds) *Pervasive Problems in International Arbitration*, 1ed, Kluwer Law International, London, 2006, 144.

⁷⁷ Park, ‘The procedural soft law of international arbitration: non-governmental instruments,’ 145-146.

⁷⁸ Park, ‘The procedural soft law of international arbitration: non-governmental instruments,’ 145.

The Rules expressly direct that the parties be treated equally.⁷⁹ In the pursuit of this aim, both parties must be accorded full opportunity to present their case.⁸⁰ Likewise, the parties are entitled to be present at each hearing⁸¹ and the Tribunal is required to inform both disputants of the date, time and place of the hearing with adequate advance notice.⁸²

Moreover, Rule 4 entitles the parties to representation or assistance by any person of their choice. Once the Tribunal has read the written submissions of the parties, they shall then hear the parties.⁸³ All decisions rendered by the Tribunal must be by a majority.⁸⁴

Under the EACJ model, in the event that a sole Arbitrator is replaced, a fresh hearing will be required, and hearings previously held will be repeated. Likewise, if an Arbitrator is replaced, previous hearings may be repeated unless the parties otherwise agree.⁸⁵ The Rules do not address the cost implications of fresh hearings or delays.

Under Rule 26(2), all copies of an expert's report should be given to each party who will then be given the opportunity to present their opinion on the report. If a party so requests, the expert must allow such party to examine all documents, goods and other property which the expert used in preparing their report.⁸⁶ If an expert participates in a hearing, each party has the right to put questions to them.⁸⁷

2.6 CONFIDENTIALITY

A central component of arbitration is confidentiality.⁸⁸ Parties are interested in the confidentiality of their proceedings in the interest of, *inter alia*, the safeguarding of future business relations, aversion for setting judicial precedent, protection of private corporate

⁷⁹ Rule 20(3), *East African Court of Justice Rules of Arbitration*.

⁸⁰ Rule 20(3), *East African Court of Justice Rules of Arbitration*.

⁸¹ Rule 24(d), *East African Court of Justice Rules of Arbitration*.

⁸² Rule 25(1), *East African Court of Justice Rules of Arbitration*.

⁸³ Rule 24(b), *East African Court of Justice Rules of Arbitration*.

⁸⁴ Rule 28 and Rule 32, *East African Court of Justice Rules of Arbitration*.

⁸⁵ Rule 19(1), *East African Court of Justice Rules of Arbitration*.

⁸⁶ Rule 26(3), *East African Court of Justice Rules of Arbitration*.

⁸⁷ Rule 26(4), *East African Court of Justice Rules of Arbitration*.

⁸⁸ Poorooye A and Feehily R, 'Confidentiality and transparency in international commercial arbitration: finding the right balance', 22 *Harvard Negotiation Law Review* 275, 2017, 277.

information and safeguarding of the proceedings and information therein disclosed from the public eye, competitors and the media.⁸⁹

Under Rule 24(d) of the EACJ Arbitration Rules, no person who is not involved may be admitted to the proceedings. Moreover, the Tribunal is required to “take such measures as it deems fit for protecting trade secrets and confidential information of any person involved in the proceedings.”⁹⁰ Hearings are to “be held in camera unless the parties agree otherwise”.⁹¹ Any award rendered by the Tribunal may only be made public with the consent of all of the parties.⁹²

2.7 COSTS OF ARBITRATION

According to Drohozal, commercial arbitration should be recognised as a highly competitive industry the manifestation of which is the construction of rules which appeal to parties above an alternate set of rules in a competing institution.⁹³ It is thus not uncommon to find that arbitral institutions offer arbitration services at competitive prices.⁹⁴ The costs associated with an arbitration generally include the fees paid to arbitrators, administrative expenses, fees and expenses for experts, cost of legal representation and advances on costs.⁹⁵ Under Rule 37, no fees are payable to the arbitrators. Additionally, the Tribunal is mandated to keep its expenses at a reasonable amount.⁹⁶

2.8 INTEREST

John Gotanda defines interest as “a sum paid or payable as compensation for the temporary withholding of money.”⁹⁷ Therefore, it compensates an aggrieved party for the loss of the

⁸⁹ Poorooye A and Feehily R, ‘Confidentiality and transparency in international commercial arbitration: finding the right balance,’ 278.

⁹⁰ Rule 24(f), *East African Court of Justice Rules of Arbitration*.

⁹¹ Rule 25(4), *East African Court of Justice Rules of Arbitration*.

⁹² Rule 30(4), *East African Court of Justice Rules of Arbitration*.

⁹³ Drohozal C, ‘Commercial norms, commercial codes, and international commercial arbitration’, 93.

⁹⁴ Drohozal C, ‘Commercial norms, commercial codes, and international commercial arbitration’, 98.

⁹⁵ Drohozal C, ‘Commercial norms, commercial codes, and international commercial arbitration’, 93.

⁹⁶ Rule 37(7), *East African Court of Justice Rules of Arbitration*.

⁹⁷ Gotanda J, ‘Awarding interest in international arbitration’, 90 *American Journal of International Law* 40, 1996, 41; Branson D and Wallace R, ‘Awarding interest in international commercial arbitration: establishing a uniform approach’ 28 *Virginia Journal of International Law* 4, 1988.

ability to use moneys owned to him by a Respondent.⁹⁸ The sum owed is usually recoverable without the duty to prove actual loss under the presumption that the money would have been invested elsewhere by the Claimant while it was under the control of the Respondent.⁹⁹

The Rules make no reference to the award of interest. In acceding to the EACJ Rules of Arbitration, it is imperative that the parties are fully cognizant of the full breadth of powers held by an EACJ Tribunal. As such, parties have a legitimate interest in knowing whether or not the Tribunal has the power to award interest. There is, however, no universally agreed upon approach to the award of interest.¹⁰⁰ Nevertheless, it is founded on the principle of full compensation.¹⁰¹

Thus, Article 7.4.2 of the International Institute for the Unification of Private Law (UNIDROIT) Principles provides that “the aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance... Such harm includes both any loss which [the applicant] suffered and any gain of which [the applicant] was deprived.”¹⁰²

The rationale for the award of interest was first espoused in *Spalding v. Mason*¹⁰³ quoting *Curtis v. Innerarity*¹⁰⁴ as follows:

“It is a dictate of natural justice, and the law of every civilized country, that a man is bound in equity, not only to perform his engagements, but also to repair all the damages that accrue naturally from their breach. . . . Everyone who contracts to pay money on a certain day knows that, if he fails to fulfil his contract, he must pay the established rate of interest as damages for his non-performance. Hence it may correctly be said that such is the implied contract of the parties.”

In international commercial arbitration, there are two predominant forms of interest granted by arbitrators: pre-award interest and post-award interest.¹⁰⁵ The former, also known as compensatory interest, forms part of the award.¹⁰⁶ This form of compensation is predicated on

⁹⁸ Gotanda J, ‘Awarding interest in international arbitration,’ 41.

⁹⁹ Gotanda J, ‘Awarding interest in international arbitration,’ 41.

¹⁰⁰ Stephen-Chu G and Kelly J, ‘Awards of interest in international arbitration: achieving coherence through purpose,’ 7 *Indian Journal of Arbitration Law* 1, 2018, 33.

¹⁰¹ Gotanda J, ‘A study of interest’ Villanova University Charles Widger School of Law, Working Paper Series, 2007, 4 – <http://digitalcommons.law.villanova.edu/wps/art83> on 2nd November 2019.

¹⁰² *UNIDROIT Principles of International Commercial Contracts*, May 2016.

¹⁰³ (1896), The Supreme Court of the United States.

¹⁰⁴ (1848), The Supreme Court of the United States.

¹⁰⁵ Stephen-Chu G and Kelly J, ‘Awards of interest in international arbitration: achieving coherence through purpose,’ 10.

¹⁰⁶ Gotanda J, ‘A study of interest,’ 4.

the assumption that the aggrieved party would have derived some beneficial use of or avoided some consequential loss had he not been deprived of the principle sum.¹⁰⁷

As such, the Comment to Article 7.4.10 of the UNIDROIT Principles observes that “it is not the practice of businesspersons to leave their money idle.” It further acknowledges that:

“the aggrieved party’s assets are diminished as from the occurrence of the harm whereas the nonperforming party, for as long as the damages are not paid, continues to enjoy the benefit of the interest on the sum which it will have to pay. It is only natural that this gain passes to the aggrieved party.”

Interest on the award constitutes post-award interest.¹⁰⁸ Its primary function is to provoke the award debtor to quickly settle the award.¹⁰⁹ Upon the granting of an award, the Claimant becomes the Respondent’s creditor.¹¹⁰

Therefore, the award of interest is not an insignificant issue. It goes to the heart of fully compensating an aggrieved party for harm occasioned or loss suffered as a result of the defendants’ actions. As such, in properly resolving the issues placed before it and in seeking to dispense justice by placing a wronged party in the position in which he would have been had the loss not been occasioned nor the harm suffered, the EACJ should have regard to the importance of awarding compensatory interest. Moreover, the award of post-award interest would have the effect of motivating subjects of EACJ arbitral awards to expeditiously settle awards against them.

2.9 AMALGAMATING CIVIL AND COMMON LAW TRADITIONS

Arbitration is argued to be the only dispute resolution mechanism which amalgamates civil and common law traditions of dispute resolution.¹¹¹ When disputants and their lawyers hail from different legal traditions, it is important that an institution have pre-established procedural standards for the absence thereof could be detrimental to the efficient, effective and fair conduct

¹⁰⁷ Stephen-Chu G and Kelly J, ‘Awards of interest in international arbitration: achieving coherence through purpose,’ 12.

¹⁰⁸ Gotanda J, ‘A study of interest,’ 5.

¹⁰⁹ Stephen-Chu G and Kelly J, ‘Awards of interest in international arbitration: achieving coherence through purpose,’ 13.

¹¹⁰ Maniatis M, Dorobantu F and Nunez F, ‘A framework for interest awards in international arbitration’, 41 *Fordham International Law Journal* 4, 2018, 839.

¹¹¹ Strong S, ‘Research in international commercial arbitration: special skills, special sources,’ 156.

of any proceedings.¹¹² Kenya, Tanzania and Uganda operate under a common law tradition while Burundi and Rwanda are governed by a civil law tradition. By selecting an arbitration institution, both parties accede to the application of its rules. This mitigates the complications that can be created from a lack of cross-cultural baselines.¹¹³

It is therefore unfortunate that the Rules provide that the language of an arbitration under the EACJ Rules may only be English.¹¹⁴ This is despite the fact that the official language in both Burundi and Rwanda is French. Moreover, Swahili is widely spoken in Tanzania, Kenya, Rwanda and Uganda. This stands as a bar to contracting parties who are better versed in a language other than English. Furthermore, it fails to develop international arbitration in East Africa under operational principles best suited to it as mandated by TWAIL. The specific problems arising out of language considerations in international arbitrations will be discussed in the succeeding Chapter.

2.10 FINALITY AND THE ENFORCEMENT OF AWARDS

One attraction of arbitration is the relatively easier process for enforcing awards. There exist legal frameworks fostering arbitral-award enforcement within many jurisdictions of the world.¹¹⁵ Parties are thus advised to consider how their awards will be enforced even at the beginning of the arbitral process.¹¹⁶

A final award refers to the ultimate determination made by the Tribunal that “resolves all the remaining disputes between the parties.” It terminates the mandate of the Tribunal and renders it *functus officio*¹¹⁷ subject only to the review, rectification or interpretation of the award.¹¹⁸

As with most arbitration institutions, the awards rendered by an EACJ Tribunal “shall be made in writing and shall be final and binding on the parties.”¹¹⁹ Nevertheless, parties are entitled to request the Tribunal review its award within 30 days of its delivery on the following grounds:

- a) “a party to the arbitration agreement was under some incapacity;

¹¹² Park, ‘The procedural soft law of international arbitration: non-governmental instruments,’ 150.

¹¹³ Park, ‘The procedural soft law of international arbitration: non-governmental instruments,’ 150.

¹¹⁴ Rule 22(1), *East African Court of Justice Rules of Arbitration*.

¹¹⁵ Drohozal C, ‘Commercial norms, commercial codes, and international commercial arbitration,’ 94-95.

¹¹⁶ Strong S, ‘Research in international commercial arbitration: special skills, special sources,’ 131.

¹¹⁷ Without further jurisdiction.

¹¹⁸ Moses, *The principles and practice of international commercial arbitration*, 202-203.

¹¹⁹ Rule 30(1) and 36(2), *East African Court of Justice Rules of Arbitration*.

- b) *the arbitration agreement is not valid under the law to which the parties have subjected it or under the law of the State where the agreement was made;*
- c) *the party making the application was not given notice of the arbitral proceedings;*
- d) *a new and important matter or evidence discovered after the award was rendered, which could not with the exercise of due diligence, be produced in the arbitral proceedings;*
- e) *there is an error apparent on the face of the record which has occasioned injustice;*
- f) *the award was obtained through fraud or corruption; or*
- g) *the award deals with a dispute not contemplated in the terms of the submission to arbitration.”*

Unless the parties direct otherwise or the award is given on agreed terms as per Rule 29(3), an award must state the grounds upon which it is based.¹²⁰ If the parties so wish, they may petition the Tribunal to interpret the award within 30 days of its rendering.¹²¹ Significantly, the Rules instruct that “by submitting the dispute to arbitration under Article 32 of the Treaty, the parties shall be deemed to have undertaken to implement the resulting award without delay.”¹²²

According to Rule 36(3), “the enforcement of arbitral awards shall be in accordance with the enforcement procedures of the country in which enforcement is sought.” As will be examined in Chapter Three of this study, the enforcement procedures herein referred to are unsatisfactory within the East African context.

2.11 CONCLUSION

The Arbitration Rules of the EACJ somewhat conform to the international standard and precepts of arbitration. There exists a set of standardised rules which buttress the principles of neutrality, impartiality, fairness, equity and confidentiality. Given that no fees are payable to the Tribunal, the cost of arbitration under the EACJ is affordable.

¹²⁰ Rule 30(2), *East African Court of Justice Rules of Arbitration*.

¹²¹ Rule 33(1), *East African Court of Justice Rules of Arbitration*.

¹²² Rule 36(2) and 30(1), *East African Court of Justice Rules of Arbitration*.

Nevertheless, the Rules are marred by inherent weaknesses the most significant of which is the curtailment of the parties right to appoint arbitrators of their choosing. Moreover, the limited powers of awarding interim measures, the lack of clarity as to whether awards of interest may be made, the conducting of arbitrations in a language that does not cater for or take into consideration some of the EAC Partner States and the lack of a harmonised enforcement mechanism blight the EACJ Arbitration Rules. The following Chapter will analyse these weaknesses.

CHAPTER THREE:
A MULTITUDE OF ACHILLES HEELS: WEAKNESSES OF THE EACJ
ARBITRATION RULES

3.0 INTRODUCTION

The EACJ arbitration mechanism is freckled with a myriad of limitations which weaken arbitration under its mechanism. The Rules significantly hamper party autonomy even though party autonomy is ordinarily a prerequisite for arbitration. In addition, the Rules underplay the importance of language considerations in arbitration by providing that EACJ arbitrations may only be conducted in English. Furthermore, the powers of an EACJ arbitral Tribunal to award interim measures are severely limited despite the fact that interim awards aid in preserving the efficacy of the final award.

Additionally, the EACJ Arbitration Rules are silent on the issue of interest on awards despite the important role which interest on awards plays in the full compensation of an aggrieved party. Furthermore, the enforcement mechanism for EACJ arbitral awards is marred by an excess of diversity in the enforcement laws of the Contracting States. Lastly, the EACJ arbitration mechanism may be underutilised due to its lack of visibility amongst the general East-African population.

3.1 CURTAILMENT OF PARTY AUTONOMY

Given that arbitration is predicated on party autonomy, it is natural that the identity of the arbitrators or the mode of their selection be the choice of the parties¹ subject only to legal requirements.

The parties right to select arbitrators is supposed to be a defining advantage of arbitration.² Arbitration under the EACJ Model, where parties are only entitled to select EACJ judges as arbitrators makes arbitration akin to litigation and distorts the advantages which distinguish the two.

¹ Greenberg, Kee and Weeramantry, *International commercial arbitration: an Asia-pacific perspective*, 1.

² Rajveer A, 'Parties' autonomy in international commercial arbitration,' 1208.

This principle allows parties to avoid courtroom proceedings with adjudicators who belong to a governmental hierarchy³ under a pre-determined structure.⁴ Under the EACJ model, not only must the parties select EACJ judges to be the arbitrators, they must also submit to the pre-determined language of the forum. Ruhangisa has thus concluded that it is unlikely that:

*“stakeholders would be assured that judges sitting as arbitrators will behave differently from the way they behave while presiding over matters in Court rooms, bearing in mind the fact that arbitration is a specialised discipline of dispute settlement.”*⁵

Even the very appointment of EACJ judges has been called into question. Article 24(1) of the Treaty deals with the appointment of judges to the Court. Save for providing that they be:

“of proven integrity, impartiality and independence and [that they] fulfil the conditions required in their own countries for the holding of such high judicial office, or [that they be] jurists of recognised competence”,

no oversight institution has been formed to vet the judges in order to ensure their competence or that they are of the stipulate integrity, impartiality and independence.⁶ Nevertheless, that discussion is beyond the ambit of this study.

The very basis of arbitration is undermined where parties are not at liberty to exert their autonomy to determine the structure of the proceedings.⁷ Arbitrators are often preferred over judges because they possess subject-specific knowledge or experience in the subject matter of the dispute.⁸ The determination of the constitution of the arbitral Tribunal and the language of the proceedings is integral to the exercise of autonomy and flexibility. Mandatory rules are usually procedural (such as due process requirements) or substantive (regarding laws)⁹ but do not typically regard such aspects of the arbitral proceedings as are highlighted above. Therefore, the EACJ Arbitration rules present a glaring curtailment of party autonomy.

³ Moses, *The principles and practice of international commercial arbitration*, 2.

⁴ Rampall Y and Feehily R, ‘The sanctity of party autonomy and the powers of arbitrators to determine the applicable law: the quest for arbitral equilibrium,’ 354.

⁵ Ruhangisa J, ‘Judicial protection under EAC law: direct actions’ in Ugirashebuja E, Ruhangisa J, Ottervanger T and Cuyvers A (eds) *East African Community Law: Institutional, Substantive and Comparative EU Aspects*, 1ed, Brill, Netherlands, 2017, 249.

⁶ Luocho LO, ‘Legitimacy of the East African Community,’ 53 *Journal of African Law* 2, 2009, 204.

⁷ Rampall Y and Feehily R, ‘The sanctity of party autonomy and the powers of arbitrators to determine the applicable law: the quest for arbitral equilibrium,’ 354.

⁸ Braden J, ‘Sound rules and administration in arbitration,’ 196.

⁹ Rampall Y and Feehily R, ‘The sanctity of party autonomy and the powers of arbitrators to determine the applicable law: the quest for arbitral equilibrium,’ 378.

3.2 SELECTION OF LANGUAGE ISSUES

If the disputants themselves have not agreed on the language of an arbitration, arbitration rules generally grant the Tribunal the power to select the language of the arbitration.¹⁰ Naturally, this raises the issue of translation of documents and oral testimony as well as the costs therein associated.¹¹ The Tribunal is at liberty to decide who will bear the cost of translation or whether such costs are to form part of the costs in the arbitration award.¹²

Justifiably, the UNCITRAL Notes on Organising Arbitral Proceedings provides that:

*“The parties may agree on the language or languages in which the arbitral proceedings will be conducted. Such agreement ensures that the parties have the capacity to communicate in the language or languages of the arbitral proceedings.”*¹³

Unfortunately, the EACJ Arbitration Rules provide that an arbitration under its forum must be conducted in English.¹⁴ Language considerations have a direct impact on 1) party equality; 2) the constitution of the Tribunal; and 3) interaction with national Courts.¹⁵

Firstly, Tribunals are mandated to uphold due process in their conduct of arbitral proceedings. Due process mandates that the proceedings be conducted with procedural fairness,¹⁶ equality of parties and by ensuring the right to be heard.¹⁷ Article V of the New York Convention lays out the instances in which the recognition and enforcement of an arbitral award may be refused. The instances therein listed largely stem from violations of due process rights.¹⁸ Language considerations have a legitimate impact on the equal treatment of parties as well as on their

¹⁰ Tweeddale and Tweeddale, *Arbitration of commercial disputes: international and English law and practice*, 269.

¹¹ Tweeddale and Tweeddale, *Arbitration of commercial disputes: international and English law and practice*, 170.

¹² Tweeddale and Tweeddale, *Arbitration of commercial disputes: international and English law and practice*, 170.

¹³ Para 20, *UNCITRAL Notes on Organizing Arbitral Proceedings*, *UNCITRAL Commission on International Trade Law* (2016) *UNCITRAL Yearbook*, vol. XXVII.

¹⁴ Rule 22(1), *East African Court of Justice Rules of Arbitration*.

¹⁵ Simoes F, ‘The language of international arbitration’, 35 *Conflict Resolution Quarterly* 1, 2017, 89.

¹⁶ Procedural fairness “includes proper notice to know what an individual is facing, notice of how the trial or hearing will proceed, as well as timeliness and cost efficient proceedings for a decision to be made”; Tung S, ‘The importance of languages in international arbitration and how they impact parties’ due process rights’ 10 *Contemporary Asia Arbitration Journal* 1, 2017, 120.

¹⁷ Tung S, ‘The importance of languages in international arbitration and how they impact parties’ due process rights,’ 120.

¹⁸ Tung S, ‘The importance of languages in international arbitration and how they impact parties’ due process rights,’ 121.

right to be heard.¹⁹ Therefore, it is of fundamental importance that parties be able to present their case and defend their rights in a language of their choosing.²⁰

Secondly, arbitrators must be able to meet the linguistic requirements of a given arbitration. When selecting arbitrators, language proficiency is often taken into consideration.²¹ Nevertheless, as has been discussed above, the party's choice in the selection of arbitrators under the EACJ Arbitration Rules is severely limited.

Lastly, where parties turn to national Courts, they are bound by the official language of those Courts. Language challenges naturally arise where the language of the arbitration is not the same as that of national Courts.²² Therefore, Article IV(2) of the New York Convention stipulates that where the official language of the country where enforcement is sought differs from the original language of the arbitration award, such award is to be translated into the language of the enforcement jurisdiction and "[t]he translation shall be certified by an official or sworn translator or by a diplomatic or consular agent." Therefore, considerations of translation arise whether or not the EACJ arbitration Rules provide for the language of the arbitration or such determination is left to the choice of the parties.

It is often assumed that English should function as the *lingua franca* of international arbitration.²³ Given that international commercial arbitrations are transcultural in nature, language issues should not be underestimated.²⁴ The selection of the language of the arbitration is an exercise of party autonomy and this linguistic flexibility is a decisive advantage of arbitration over litigation.²⁵

Moreover, the selection of English as the language of arbitration gives room for the use of legal English, a technical language full of legal jargon. The myriad of issues which may arise through the legal interpretation of ordinary English words such as consideration, acceptance, contribution, frustration, mistake, offer or duty of care is further aggravated by the fact that EACJ arbitrators are judges by profession.²⁶

¹⁹ Tung S, 'The importance of languages in international arbitration and how they impact parties' due process rights,' 126.

²⁰ Simoes F, 'The language of international arbitration,' 93.

²¹ Simoes F, 'The language of international arbitration,' 94.

²² Simoes F, 'The language of international arbitration,' 95.

²³ Wilske S, 'Linguistic and language issues in international arbitration – problems, pitfalls and paranoia,' 9 *Contemporary Asia Arbitration Journal* 2, 2016, 160.

²⁴ Wilske S, 'Linguistic and language issues in international arbitration – problems, pitfalls and paranoia,' 161.

²⁵ Harpole S, 'Language in arbitration procedure: a practical approach for international commercial arbitration,' 9 *Contemporary Asia Arbitration Journal* 2, 2016, 274.

²⁶ Simoes F, 'The language of international arbitration,' 96.

It is important that arbitration under the EACJ be accommodative. The business actors operating in the EAC range from large businesses with a presence in more than one State to smaller entities who may or may not have access to legal or financial business support services.²⁷

3.3 THE LIMITED SCOPE OF EACJ POWERS TO AWARD INTERIM MEASURES

Rule 14 of the EACJ Arbitration Rules grant an EACJ arbitral Tribunal very limited scope to award interim measures. This is despite the fact that a Tribunal may be presented with a very broad range of issues necessitating the grant of an interim award so as to not render the final award meaningless.

To justify the grant of interim measures, the aggrieved party must demonstrate to the Tribunal that they are likely to suffer harm if the measures are not granted.²⁸ Interim measures which, for example, prevent the destruction of property and evidence aid in preserving the sanctity of arbitration.²⁹ Therefore, interim measures have become a *sine qua non* to the efficacy of arbitration proceedings and the final award therefrom rendered.³⁰ The rise of globalised trade has also witnessed the rise in the importance of and rate of application for interim measures in order to secure the rights of the parties.³¹

Although there is minimal consensus on the scope of interim awards in international commercial arbitration, the following commonalities have been observed: the requesting party must demonstrate conditions of urgency; the requesting party must show that there exists the risk of serious harm; and the award of interim measures may only bind the parties to the arbitration.³²

²⁷ Alan L, 'Reimagining the framework for resolving intra-African commercial disputes in the context of the African continental free trade area agreement' 18 *World Trade Review* 3, 2019, 5.

²⁸ Benz S, 'Strengthening interim measures in international arbitration,' 156.

²⁹ Wong R, 'Interim relief in aid of international commercial arbitration – a critique on the International Arbitration Act,' 24 *Singapore Academy of Law Journal* 2, 2012, 500.

³⁰ Dewan N, 'Interim measures in arbitration – a comparative analysis of Indian and English Arbitration Acts,' 669.

³¹ Ferguson S, 'Interim measures of protection in international commercial arbitration: problems, proposed solutions, and anticipated results' 55; Bucy D, 'How to best protect party rights: the future of interim relief in international commercial arbitration under the amended UNICTRAL Model Law,' 585.

³² Bucy D, 'How to best protect party rights: the future of interim relief in international commercial arbitration under the amended UNICTRAL Model Law,' 585.

There are two forms of interim awards: firstly, those meant to prevent loss, damage and prejudice. Secondly, those intended to facilitate the enforcement of the final award.³³ The former is aimed at preserving the position of the parties until the dispute is resolved such as orders for the preservation of evidence, orders for the conservation of perishable goods and measures for the protection of confidential information.³⁴ The later aims to stay the hand of the adverse party where their actions may cause the final award to be irrelevant.³⁵ For example, an award for the provision of security for costs, preservative orders and awards requiring the submission of assets to a third party that may be used in the satisfaction of a final award.³⁶

Therefore, the limiting of an EACJ Tribunals power to award interim measures only with regards to the subject matter of the dispute is likely to affect the efficacy of the final award where an interim measure was necessary is a more broad range of issues. Where the final award is negated as a result of the actions of an adverse party during the proceedings, the aggrieved party is left in no better position than he had been before commencing the arbitration. Therefore, it is imperative that the powers of the Tribunal be extended to cover a broader scope of issues that might affect the enforcement or efficacy of the final award.

3.4 CONSIDERATIONS IN THE AWARD OF INTEREST

The EACJ Rules make no reference to the award of interest despite the fact that interest is instrumental in restoring a party to the position they would have been in had they not suffered the loss or harm.

According to Alexis Maniatis *et al.*, the policy objectives of awarding interest are: 1) enforcing the social obligation to abide by contracts; 2) thwarting unjust enrichment; and 3) preventing incentives by either side to benefit by delaying payment.³⁷ In making a determination as to whether or not to award interest, arbitrators usually have regard to: 1) whether they have the

³³ Bucy D, 'How to best protect party rights: the future of interim relief in international commercial arbitration under the amended UNICTRAL Model Law,' 586.

³⁴ Bucy D, 'How to best protect party rights: the future of interim relief in international commercial arbitration under the amended UNICTRAL Model Law,' 586.

³⁵ Bucy D, 'How to best protect party rights: the future of interim relief in international commercial arbitration under the amended UNICTRAL Model Law,' 587.

³⁶ Bucy D, 'How to best protect party rights: the future of interim relief in international commercial arbitration under the amended UNICTRAL Model Law,' 587.

³⁷ Maniatis M, Dorobantu F and Nunez F, 'A framework for interest awards in international arbitration,' 825.

authority to award interest; 2) whether the debtor is liable to pay; 3) over which period of time the liability to pay interest should be applied; and 4) which rate of interest should be applied.³⁸

The Tribunal in *McCullough & Company v. Ministry of Post, Telegraph and Telephone* drew from the general practice of awarding interest in international arbitration when it observed the following: 1) interest is awarded so as to compensate an aggrieved party for the delay caused by the actions of the defendant; 2) the rate of interest must be reasonable given the circumstances of the case and with specific regard to i) the contractual provisions between the parties; ii) the law applicable to the contract; iii) the facts of the case which resulted in the damage; iv) the nature and extent of the awarded compensation; v) the knowledge held by the defendant about the consequences which its default would have on the financial position of the Claimant; vi) the market rates in effect; and vii) the rate of inflation.³⁹

A controversial issue arising out of the award of interest is the rate at which that interest should be awarded where the rate is not provided by the applicable law.⁴⁰ This is especially so with regards to pre-award interest where the length of the arbitration process will significantly affect the final sum.⁴¹

Furthermore, whether the award of interest should be at a simple or compound rate is a hotly contested issue. Simple interest gains on the principle amount owned.⁴² The latter is interest which is accrued on the principle amount periodically such that the interest also accumulates interest.⁴³ These are issues which the EACJ should settle with regards to its powers.

3.5 ISSUES OF ENFORCEMENT MECHANISMS

The New York Convention has had an undeniable impact on the growth of arbitration to its status today as the leading form dispute settlement in international commercial disputes.⁴⁴ In acceded to the Convention, States were permitted to make commercial reservations to the effect

³⁸ Gotanda J, 'Awarding interest in international arbitration,' 40; Gotanda J, 'A study of interest,' 5.

³⁹ (1986), Iran-US Claims Tribunal, The Hague.

⁴⁰ Stephen-Chu G and Kelly J, 'Awards of interest in international arbitration: achieving coherence through purpose,' 28.

⁴¹ Maniatis M, Dorobantu F and Nunez F, 'A framework for interest awards in international arbitration,' 822.

⁴² Berger B and Moltzahn E, 'Interest in international arbitration – an overview', 2014 *International Business Law Journal* 5, 2014, 367.

⁴³ Berger B and Moltzahn E, 'Interest in international arbitration – an overview,' 367.

⁴⁴ Tweeddale and Tweeddale, *Arbitration of commercial disputes: international and English law and practice*, 40.

that they may refuse to enforce non-commercial international awards.⁴⁵ Moreover, States were also entitled to make reciprocity reservations under Article 1 of the Convention permitting a State to deny the enforcement of an award made in a State not party to the New York Convention. Save for Rwanda, all the EAC member States have made the latter reservation. In *Kersa Holdings v. InfanCourtage*, it was ruled that the reciprocity should exist between the *lex arbitri* and the place of enforcement.⁴⁶

The New York Convention mandates that a signatory State must enforce an award where no reciprocity reservation exists.⁴⁷ The Convention obliges contracting parties to: 1) enforce arbitration agreements and 2) enforce foreign arbitral awards.⁴⁸

Where a final award is issued, a Tribunal becomes *functus officio*.⁴⁹ The very purpose of arbitration is the attainment of an enforceable award.⁵⁰ Therefore, it is essential that arbitration rules properly address the issue of enforcement of an award after a Tribunal completes its mandate. Where recognition regards the National Courts acceptance of an award as having been validly made, enforcement refers to the actual claim or recovery of that which was ordered by an award.⁵¹ Enforcement is sought where an award debtor has its assets and where the case may require, such enforcement may be sought in a number of different jurisdictions.⁵²

As previously noted, under Rule 32(3) of the EACJ Arbitration Rules “enforcement of arbitral awards shall be in accordance with the enforcement procedures of the country in which enforcement is sought.” The problem with this Rule is that it presumes that the laws of the member States are pro-enforcement.⁵³ Furthermore, it does not support a system of harmony of enforcement procedures within the region. This is the perfect example of a generic Rule constructed without consideration of the local context and the laws which exist thereunder nor

⁴⁵ Tweeddale and Tweeddale, *Arbitration of commercial disputes: international and English law and practice*, 56.

⁴⁶ (1996) Cour Superieure de Justice of Luxembourg.

⁴⁷ Tweeddale and Tweeddale, *Arbitration of commercial disputes: international and English law and practice*, 58.

⁴⁸ Greenberg, Kee and Weeramantry, *International commercial arbitration: an Asia-pacific perspective*, 24.

⁴⁹ Charles M Willie and Co. (Shipping) Ltd v. Ocean Laser Shipping Ltd, (1999), Queens Bench Division (Commercial Court) of the United Kingdom.

⁵⁰ Tweeddale and Tweeddale, *Arbitration of commercial disputes: international and English law and practice*, 340.

⁵¹ Tweeddale and Tweeddale, *Arbitration of commercial disputes: international and English law and practice*, 408.

⁵² Moses, *The principles and practice of international commercial arbitration*, 226.

⁵³ Kariuki F, ‘Challenges facing the recognition and enforcement of international arbitral awards within the East African community,’ 6.

of the particular aims of the EAC to achieve legal integration and harmony within the region contrary to TWAIL scholarship.

The Organisation of American States and the Organisation for the Harmonisation of Business Law in Africa (OHADA) have adopted regional instruments for the enforcement of arbitral awards although they are not strictly regional economic communities.⁵⁴ The Caribbean Community Member States are expected to harmonise their commercial arbitration laws to buttress the efficient conduct of arbitration laws. Members who are party to the New York Convention are deemed to have acceptable recognition and enforcement laws.⁵⁵ Article 220 of the Treaty of Rome which establishes the European Economic Community (EEC), charges Member States to engage in “negotiations with each other with a view to ensuring for the benefit of their nationals ... the simplification of the formalities governing the reciprocal recognition and execution of judicial decisions and of arbitral awards”. In conformance to this Article, the EEC implemented the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters in 1968. Due to the overwhelming adoption of the New York Convention, no such Convention was made for the enforcement of arbitral awards. Moreover, The European Convention on International Commercial Arbitration was adopted in 1961. The EEC, in comparison to the EAC, has a relatively harmonised arbitration system.

Save for South Sudan, all Partner States of the EAC are party to the New York Convention. Given that all Partner States apart from Rwanda have made a reciprocity reservation, the question naturally arises as to what will happen when an award is given in South Sudan to be enforced in a Contracting State other than Rwanda. Moreover, Tanzania is a dualist country but has yet to domestically implement the Convention.⁵⁶ Therefore, the Convention does not carry the force of law in Tanzania.⁵⁷

Contrariwise, Section 41 of the Ugandan Arbitration and Conciliation Act specifically provides that “any New York Convention award which would be enforceable under this Part shall be treated as binding for all purposes on the persons as between whom it was made.” Similarly, Section 36 of the Kenyan Arbitration Act stipulates that “an international arbitration award

⁵⁴ Oppong R, ‘The East African Court of Justice, enforcement of foreign arbitration awards and the East African Community integration process’, 63 *Journal of African Law* 1, 2019, 3.

⁵⁵ Oppong R, ‘The East African Court of Justice, enforcement of foreign arbitration awards and the East African Community integration process,’ 3.

⁵⁶ Oppong R, ‘The East African Court of Justice, enforcement of foreign arbitration awards and the East African Community integration process,’ 11.

⁵⁷ Oppong R, ‘The East African Court of Justice, enforcement of foreign arbitration awards and the East African Community integration process,’ 11.

shall be recognised as binding and enforced in accordance with the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.”

The grounds upon which the national Courts of Rwanda may refuse to recognise or enforce an award are comparable to those listed in the New York Convention.⁵⁸ On the other hand, Section 35 and 36 of the Kenyan Arbitration Act instruct that the High Court may set aside or refuse to enforce an award where the award is *inter alia* contrary to Kenya’s public policy. EACJ arbitral awards enjoy no privileged status.⁵⁹

According to the Court in *Christ for All Nations v. Apollo Insurance Company Ltd*,⁶⁰ an award is inconsistent with public policy where it is:

- a) “*inconsistent with the Constitution or other laws of Kenya, whether written or unwritten; or*
- b) *inimical to the national interest of Kenya; or*
- c) *contrary to justice or morality.*”

The Tanzania Arbitration Act gives room for “resisting the enforcement of a foreign award” and for “contesting the validity of the award”.⁶¹ Kariuki argues that this violates the New York Convention which provides narrow grounds for refusing the recognition and enforcement of an award.⁶² He goes on to state that the same is true for the Kenyan Arbitration Act under which the High Court may refuse to recognise and enforce an award if the award was rendered as a result of fraud, bribery, corruption or undue influence.⁶³

According to Oppong, this diversity of enforcement mechanisms will affect the vertical relations between the Partner States of the EACJ and will ultimately undermine the utility of its arbitration mandate.⁶⁴ As noted in Chapter One, the EAC was created in an attempt to enhance the socio-economic as well as the legal integration of the Community. Yet the laws on

⁵⁸ Kariuki F, ‘Challenges facing the recognition and enforcement of international arbitral awards within the East African community,’ 18.

⁵⁹ Oppong R, ‘The East African Court of Justice, enforcement of foreign arbitration awards and the East African Community integration process,’ 7.

⁶⁰ [2002] 2 EA 336 (CCK).

⁶¹ Section 30(1) and 30(2), *Arbitration Act* (Chapter 15, 1931).

⁶² Kariuki F, ‘Challenges facing the recognition and enforcement of international arbitral awards within the East African community,’ 11.

⁶³ Section 37(1)(a)(vii), *Arbitration Act* (Act No 4 of 1995).

⁶⁴ Oppong R, ‘The East African Court of Justice, enforcement of foreign arbitration awards and the East African Community integration process,’ 7.

the recognition and enforcement of arbitral awards differ entirely between the Contracting States and the Rules do little to harmonise or clarify the issue.

3.6 LACK OF AWARENESS OF THE EXISTENCE OF THE EACJ

The main problem causing the underutilisation of the EACJ is that people are not cognizant of the role, jurisdiction or mandate of Court or its arbitration mechanism. Francis Kariuki has thus recognised that “it faces capacity, outreach and visibility pit falls.”⁶⁵ The citizens of the EAC appear not to be appraised of the existence and potential of the EACJ.⁶⁶ It has been observed that “the Community is yet to resonate well with the ordinary people. It has remained an exclusive members club.”⁶⁷

In summarising alternate reasons for the underutilisation of the EACJ arbitration mechanism, Ruhangisa concludes that:

*“the wait and see tendency could be one of the possible reasons explaining the slow momentum in utilising the Court’s arbitral jurisdiction. As the EACJ’s arbitral jurisdiction is new, people may hesitate to risk filing their matters in the institute whose workings are unknown.”*⁶⁸

The EACJ must do more to ensure public awareness of its role in the Community. Due to the time limitations of this study, no data analysis of the cognisance levels of the general public about the EACJ was conducted. The above conclusions are drawn from legal commentary on the fact and the authors own experience working at the EACJ during which time the EACJ staff expressed their general concern about the publics lack of awareness of the EACJ, its function, its role and their rights before the forum.

⁶⁵ Kariuki F, ‘Challenges facing the recognition and enforcement of international arbitral awards within the East African community,’ 24.

⁶⁶ Luocho LO, ‘Legitimacy of the East African Community,’ 206.

⁶⁷ Luocho LO, ‘Legitimacy of the East African Community,’ 217.

⁶⁸ Ruhangisa, ‘Judicial protection under EAC law: direct actions,’ 249.

3.7 CONCLUSION

The EACJ Arbitration Rules are marred by a myriad of weaknesses which may prove to be unsatisfactory to private disputants. In order to bolster the use of its arbitration mechanism, the Court must amend its Rules to cater more satisfactorily to the needs of parties.

It is unfortunate that the EACJ arbitration mechanism is underutilised especially in light of the EACs pursuit of integration. Therefore, Chapter Four analyses whether effective commercial arbitration can aid in the achievement of the integration agenda given its aim towards increased socio-economic activity within the region. As such, it is of monumental importance that the Arbitration Rules of the Court be amended in order to meet the demands of the economic and legal integration of the Community.

CHAPTER FOUR:

WHETHER EFFECTIVE COMMERCIAL ARBITRATION CAN AID IN AUGMENTING THE EAC INTEGRATION AGENDA

4.0 INTRODUCTION

This Chapter seeks to analyse the role which arbitration can play in augmenting the EAC integration agenda given the EAC's pursuit of economic integration. Regional economic integration is the process by which trade barriers between contracting States are eliminated and, where deeper integration is desired, the political, legal and socio-economic systems of the States are unified.¹ Regional integration combines markets which brings firms into greater competition with each other.² Generally, there are six stages of integration: "1) preferential trading arrangement; 2) free trade area; 3) customs union; 4) single market; 5) monetary union; and 6) political union."³

The impetus for regional economic integration largely arose at the end of World War II.⁴ The Benelux Customs Union formed in 1947, the 1951 European Coal and Steel Company, the European Economic Community of 1957 and the European Free Trade Association formed in 1960 represent the first regional economic integration schemes in the modern sense. They spurred the formation of other regional integration policies in Latin America, Asia and Africa.⁵ In Africa, the benefits of integration fuelled by the advantages of globalisation have been

¹ Mwasha O, 'The benefits of regional economic integration for developing countries in Africa: A case of East African Community (EAC)', *Korea Review of International Studies*, 2008, 69 – <https://gsis.korea.ac.kr/wp-content/uploads/2015/04/11-1-05-Ombeni-N.-Mwasha.pdf> on 12 November 2019.

² Schiff M and Winters L, *Regional integration and development*, World Bank and Oxford University Press, Washington DC, 2003, 50.

³ Choo M, 'Dispute settlement mechanisms of regional economic arrangements and their effects on the World Trade Organisation', 13 *Temple International and Comparative Law Journal* 2, 1999, 255.

⁴ Riesenfeld S, 'Legal systems of regional economic integration', 22 *American Journal of Comparative Law* 3, 1974, 415.

⁵ Schiff and Winters, *Regional Integration and Development*, 5; Mwasha O, 'The benefits of regional economic integration for developing countries in Africa: A case of East African Community (EAC)', *Korea Review of International Studies*, 2008, 73 – <https://gsis.korea.ac.kr/wp-content/uploads/2015/04/11-1-05-Ombeni-N.-Mwasha.pdf> on 12 November 2019.

argued to be the best strategies for the economic development of African States.⁶ Integration allows Contracting States to exploit knowledge and resource based advantages.⁷

The EAC is composed of 6 States, covers over 1,820,664 square kilometres and boasts of a population of about 150 million people (estimates from 2013).⁸ The EAC integration agenda aims at both negative and positive integration.⁹ The former involves the elimination of barriers to the free movement of goods and services. The latter is characterised by the formation of a common sovereignty through the creation of new institutions.¹⁰ It is in this context which TWAIL requires legislators to take account of when formulating laws – and in this case, Rules of arbitration.

4.1 THE ECONOMIC MOTIVATIONS FOR SEEKING INTEGRATION

States are motivated to integrate based on the expected trade, investment and economic benefits that can be derived as a result of successful integration.¹¹ There are two main economic motivations to integrate: trade creation and trade diversion.¹² Firstly, trade is created and bolstered when the development of a uniform external trading policy is undertaken and internal free trade is ensured so as to lower the cost of production for the Contracting States.¹³ Secondly, trade diversion is the process by which global imports are substituted with imports from the member States.

⁶ Mwasha O, 'The benefits of regional economic integration for developing countries in Africa: A case of East African Community (EAC)', *Korea Review of International Studies*, 2008, 76 – <https://gsis.korea.ac.kr/wp-content/uploads/2015/04/11-1-05-Ombeni-N.-Mwasha.pdf> on 12 November 2019.

⁷ Mwasha O, 'The benefits of regional economic integration for developing countries in Africa: A case of East African Community (EAC)', *Korea Review of International Studies*, 2008, 76 – <https://gsis.korea.ac.kr/wp-content/uploads/2015/04/11-1-05-Ombeni-N.-Mwasha.pdf> on 12 November 2019.

⁸ Otieno-Odek J, 'Law of regional integration – a case study of the East African Community' in Dovelung J, Majamba H, Oppong R and Wanitzek U, *Harmonisation of laws in the East African Community: the state of affairs with comparative insights from the European Union and other regional economic communities*, LawAfrica Publishing (K) Ltd, Nairobi, 2018, 17.

⁹ Otieno-Odek, 'Law of regional integration – a case study of the East African Community,' 18.

¹⁰ Otieno-Odek, 'Law of regional integration – a case study of the East African Community,' 18.

¹¹ Mwasha O, 'The benefits of regional economic integration for developing countries in Africa: A case of East African Community (EAC)', *Korea Review of International Studies*, 2008, 73 – <https://gsis.korea.ac.kr/wp-content/uploads/2015/04/11-1-05-Ombeni-N.-Mwasha.pdf> on 12 November 2019.

¹² Mwasha O, 'The benefits of regional economic integration for developing countries in Africa: A case of East African Community (EAC)', *Korea Review of International Studies*, 2008, 74 – <https://gsis.korea.ac.kr/wp-content/uploads/2015/04/11-1-05-Ombeni-N.-Mwasha.pdf> on 12 November 2019.

¹³ Mwasha O, 'The benefits of regional economic integration for developing countries in Africa: A case of East African Community (EAC)', *Korea Review of International Studies*, 2008, 74 – <https://gsis.korea.ac.kr/wp-content/uploads/2015/04/11-1-05-Ombeni-N.-Mwasha.pdf> on 12 November 2019.

Moreover, the investment and collaboration opportunities for the private sector are improved.¹⁴ Furthermore, States aim to secure access to larger markets.¹⁵ Faced with the pressures of globalisation, economies require efficiency. This can be achieved by harnessing larger markets and increasing access to technology, processes and innovations developed by other States.¹⁶ Producers are granted entry into States where the cost of their goods had initially been inflated as a result of trade barriers such as duties.¹⁷

According to Maurice Schiff and Alan Winters, integration can create four gains: firstly, increased competition results in reduced prices as firms attempt to incentivise greater sales. Secondly, the expansion of markets allows for the better utilisation of economies of scale.¹⁸ Thirdly, larger markets results in an increase of consumer choice. Lastly, integration produces stronger incentives for improved productivity and reduced internal inefficiencies.¹⁹

4.2 ECONOMIC INTEGRATION GOALS AND ACHIEVEMENTS OF THE EAC

Article 5(1) of the Treaty declares that:

“The Partner States undertake to establish... a Customs Union, a Common Market, subsequently a Monetary Union and ultimately a Political Federation in order to strengthen and regulate the industrial, commercial, infrastructural, cultural, social, political and other relations of the Partner States to the end that there shall be accelerated, harmonious and balanced development and sustained expansion of economic activities.”

Through the Protocol for the Establishment of the East African Community Customs Union, the Customs Union was officially established in 2005. The Customs Union aims to:

“(a) further liberalise intra-regional trade in goods on the basis of mutually beneficial trade arrangements among the Partner States;

¹⁴ Mwasha O, ‘The benefits of regional economic integration for developing countries in Africa: A case of East African Community (EAC), *Korea Review of International Studies*, 2008, 74 – <https://gsis.korea.ac.kr/wp-content/uploads/2015/04/11-1-05-Ombeni-N.-Mwasha.pdf> on 12 November 2019.

¹⁵ Schiff and Winters, *Regional Integration and Development*, 6.

¹⁶ Schiff and Winters, *Regional Integration and Development*, 6.

¹⁷ Schiff and Winters, *Regional Integration and Development*, 31.

¹⁸ The proportionate saving of costs when production becomes more efficient. This can be achieved by either increasing production or lowering costs where costs are spread over a large number of goods.

¹⁹ Schiff and Winters, *Regional Integration and Development*, 51.

- (b) promote efficiency in production within the Community;*
- (c) enhance domestic, cross border and foreign investment in the Community; and*
- (d) promote economic development and diversification in industrialisation in the Community.*²⁰

Moreover, the Protocol recognises that “the Partner States are desirous to deepen and strengthen trade among themselves and are resolved to abolish tariff and non-tariff barriers to create the most favourable environment for the development of regional trade.”²¹ In mandating the establishment of the Customs Union, the Treaty requires that the Partner States include in the Protocol *inter alia*:

- “(a) The elimination of internal tariffs and other charges of equivalent effect;*
- (b) The elimination of non-tariff barriers;*
- (c) Establishment of a common external tariff;*
- (d) Subsidies and countervailing duties;*
- (e) Competition;*
- (f) Duty drawback, refund and remission of duties and taxes;*
- (g) Customs co-operation;*
- (h) Re-exportation of goods; and*
- (i) Simplification and harmonisation of trade documentation and procedures.*²²

The Partner States are further enjoined to “adopt an East African Trade Regime and co-operate in trade liberalisation and development”.²³ Through the Protocol for the Establishment of the East African Community Common Market, the Common Market was officially established on the 1st of July 2010. It secures the free movement of goods²⁴, persons and labour²⁵, services²⁶ and capital²⁷ and the right of establishment and residence.²⁸ Internal tariffs, surcharges and

²⁰ Article 3, *Protocol for the Establishment of the East African Community Customs Union*, 2004.

²¹ Preamble, *Protocol for the Establishment of the East African Community Customs Union*.

²² Article 75, *Treaty for the Establishment of the East African Community*.

²³ Article 74, *Treaty for the Establishment of the East African Community*.

²⁴ Article 6, *Protocol for the Establishment of the East African Community Common Market*, 2009.

²⁵ Article 7-12, *Protocol for the Establishment of the East African Community Common Market*.

²⁶ Article 16-23, *Protocol for the Establishment of the East African Community Common Market*.

²⁷ Article 24-28, *Protocol for the Establishment of the East African Community Common Market*.

²⁸ Article 13-15, *Protocol for the Establishment of the East African Community Common Market*.

excise taxes were removed in 2010 in order to bolster intra-regional trade thus officially establishing a single market.²⁹

As summarised by James Otieno-Odek:

“The thematic areas of cooperation in the EAC are: trade liberalisation and development; investment and industrial development; standardisation, quality assurance, metrology and testing; monetary and financial cooperation; infostructure and services; development of human resources, science and technology; free movement of persons, labour, services; right of establishment and residence; agriculture and food security; environment and natural resource management; tourism and wildlife management; health, social and cultural activities; enhancing the role of women in socio-economic development; political affairs; legal and judicial affairs; private sector and civil society; and cooperation with other regional and international organisations and development partners.”³⁰

The active participation of the private sector is instrumental to the success of these integration efforts.³¹ Ensuring their participation and protection requires an understanding of the needs of the private sector.³²

4.3 THE PLACE OF ARBITRATION IN THE AUGMENTATION OF REGIONAL INTEGRATION

A natural effect of larger markets is the facilitation of an upsurge in the manufacture and sale of goods and services.³³ An increase in production causes a decrease in the cost of production of each individual unit of a product.³⁴ Therefore, firms can potentially realise greater profit

²⁹ Gichuki N, ‘Analysis of the approximation of commercial laws in Kenya under the East African Community Common Market Protocol’ in Dovelung J, Majamba H, Oppong R and Wanitzek U, *Harmonisation of laws in the East African Community: the state of affairs with comparative insights from the European Union and other regional economic communities*, LawAfrica Publishing (K) Ltd, Nairobi, 2018, 411.

³⁰ Otieno-Odek, ‘Law of regional integration – a case study of the East African Community,’ 24; Article 74-131, *Treaty for the Establishment of the East African Community*.

³¹ Otieno-Odek, ‘Law of regional integration – a case study of the East African Community,’ 33.

³² Otieno-Odek, ‘Law of regional integration – a case study of the East African Community,’ 33.

³³ Simms R and Errol S, ‘The building blocks of successful regional integration: lessons for CSME from other integration schemes’ 56 *Social and Economic Studies* 4, 2007, 259.

³⁴ Simms R and Errol S, ‘The building blocks of successful regional integration: lessons for CSME from other integration schemes,’ 259.

margins.³⁵ As such, preferential trading agreements enable regions to exploit economies of scale as market costs are distributed over a larger market base.³⁶ This theoretically raises the rate of productivity and competition within the market.³⁷ Consequently, regional integration raises the potential for disputes between the private sector.³⁸ Accordingly, it is imperative that when attempting to augment an integration scheme, attention be paid to alternative dispute resolution.³⁹

The past 20 years have witnessed the rapid growth of international trade as a result of globalisation, and with it, the growth of the desirability and use of arbitration given its efficiency, expedition and flexibility.⁴⁰ Kenneth Kiplagat has gone so far as to assert that “if the failure of regional integration in developing countries so far can be attributed to one factor, that factor must be the lack of an elaborate and well thought-out dispute resolution regime”.⁴¹ This further underscores the importance of TWAIL’s assertion that laws be developed to precisely suit the needs and circumstances of the people concerned. Commercial arbitration is a more optimal platform than litigation in the resolution of disputes given the divergent personal and State interests in the region.⁴²

The economic order has shifted within developing countries. Initially, States and State agencies were the principle economic players. Now, the private sectors’ role in the development and the bolstering of economic activity is undisputed.⁴³ Naturally commercial disputants have largely shifted from predominately involving States to significantly include private sector disputants.⁴⁴ This state of affairs necessitates the acknowledgement, development and promotion of a robust dispute resolution mechanism well suited to resolving commercial disputes.⁴⁵

³⁵ Simms R and Errol S, ‘The building blocks of successful regional integration: lessons for CSME from other integration schemes,’ 259.

³⁶ Carstens A and Ghani E, ‘Making regional economic integration work,’ 43 *The Pakistan Development Review* 4, 2005, 341.

³⁷ Carstens A and Ghani E, ‘Making regional economic integration work,’ 341.

³⁸ Echols M, ‘Regional economic integration’, 31 *The International Lawyer* 2, 1996, 453.

³⁹ Echols M, ‘Regional economic integration’, 458.

⁴⁰ Rinker B, ‘The future of arbitration in Latin America: a study of its regional development’, 8 *Case Western Reserve Journal of International Law* 2, 1976, 480.

⁴¹ Kiplagat P, ‘Dispute recognition and dispute settlement in integration processes: the COMESA experience’, 15 *Northwestern Journal of International Law and Business* 3, 1995, 490.

⁴² Muigua K, ‘Building legal brides: fostering Eastern Africa integration through commercial arbitration’, 3rd Annual East Africa International Conference, Dar Es Salaam, 9-10 April 2015, 3.

⁴³ Kiplagat P, ‘Dispute recognition and dispute settlement in integration processes: the COMESA experience,’ 490.

⁴⁴ Kiplagat P, ‘Dispute recognition and dispute settlement in integration processes: the COMESA experience,’ 490.

⁴⁵ Kiplagat P, ‘Dispute recognition and dispute settlement in integration processes: the COMESA experience,’ 490.

The Partner States have a legitimate interest in ensuring that business relations are not hindered by protracted dispute resolution procedures.⁴⁶ Accordingly, Naomi Gichuki has asserted that the augmentation of harmonious economic integration:

*“can only prosper within a legal framework that is suited to the needs of modern-day business practice... Trade relations often lead to conflicts of interest that call for an independent arbiter. Nowhere is the speedy resolution of disputes more appreciated than in business circles.”*⁴⁷

Moreover, she emphasises that:

*“it is widely acknowledged that the more people integrate, the more the conflicts that will arise due to the increased avenues of relations... Litigation would become an obstacle to the free flow of trade in the region. There has been a shift in the world of business thinking that has tended to favour alternative methods of dispute resolution instead of the conventional judicial system.”*⁴⁸

There exists an entanglement between the success of integration schemes and the success of its dispute resolution mechanisms.⁴⁹ It has been observed that economic integration requires a dispute resolution mechanism.⁵⁰

Effective dispute resolution mechanisms fulfil two important functions: firstly, players engaged in cross-border trade are provided with a stable environment in which to conduct their economic activities.⁵¹ The security of market access is improved.⁵² Although cross-border trade is inherently risky and requires the commitment of considerable resources, this risk is mitigated by the existence of a mechanism by which the players are held accountable, compliance is

⁴⁶ Gichuki, ‘Analysis of the approximation of commercial laws in Kenya under the East African Community Common Market Protocol,’ 413.

⁴⁷ Gichuki, ‘Analysis of the approximation of commercial laws in Kenya under the East African Community Common Market Protocol,’ 413.

⁴⁸ Gichuki, ‘Analysis of the approximation of commercial laws in Kenya under the East African Community Common Market Protocol,’ 413.

⁴⁹ Lehmann J, ‘Regional economic integration and dispute settlement outside Europe: a comparative analysis’, 7 *International Law Forum Du Droit International* 1, 2005, 61.

⁵⁰ Taylor C, ‘Dispute resolution as a catalyst for economic integration and an agent for deepening integration: NAFTA and MERCOSUR?’, 17 *Northwestern Journal of International Law and Business*, 1997, 849-850.

⁵¹ Desarrollo B, *Regional institutions and dispute settlement mechanisms*, The Johns Hopkins University Press, Washington DC, 2002, 91.

⁵² Schiff and Winters, *Regional Integration and Development*, 110.

maximised, and potential disputes effectively and expeditiously resolved.⁵³ As applied to the case of the former EAC, Schiff *et al.* advance this position as follows:

“In the 1950s and 1960s severe frictions between Kenya, Tanzania, and Uganda arose over the benefits from economic integration within the East African Community. Uganda and Tanzania contended that all the gains were going to Kenya, which was steadily enhancing its position as the industrial centre of the common market, producing 70 percent of the manufactures and exporting a growing percentage of them to its two relatively less developed partners. By 1958, 404 of the 474 companies registered in East Africa were located in Kenya. By 1960, Kenya’s manufacturing sector accounted for 10 percent of its gross national product (GNP); in the other two states the share of manufacturing was 4 percent. The community collapsed in 1977, having failed to satisfy the poorer [economies].”⁵⁴

In this illustration lays the evidence that effective dispute resolution mechanisms (of which arbitration is generally preferred by the business community) are integral in the achievement of the East African integration agenda. In boosting economies, new entrants into the market must be encouraged. However, in order to encourage new entrants, the security of market access must be improved. The existence of a robust arbitration mechanism is one way of improving market security.

Secondly, disputes are de-politicised. Because arbitration requires the use of impartial, ‘outside entities’, trade disputes are prevented from being politicised when affected by non-trade considerations.⁵⁵

Samson Sempesa has asserted that “it is not seriously disputed nowadays that international arbitration through impartial third parties is the most effective means of dealing with the transnational trade and investment issues.”⁵⁶ International commercial arbitration is preferred to litigation because it enables contracting parties to resolve disputes removed from the substantive and procedural rules of national Courts which they rarely understand and view as having minimal significance in resolving the issues in dispute.⁵⁷

⁵³ Desarrollo, *Regional institutions and dispute settlement mechanisms*, 91.

⁵⁴ Schiff and Winters, *Regional Integration and Development*, 142.

⁵⁵ Desarrollo, *Regional institutions and dispute settlement mechanisms*, 91.

⁵⁶ Sempasa S, ‘Obstacles to international commercial arbitration in African countries,’ 411.

⁵⁷ Sempasa S, ‘Obstacles to international commercial arbitration in African countries,’ 411.

The legal traditions of the EAC States vary. A significant benefit of arbitration is that it removes any advantage which a party might enjoy by adjudicating a dispute in their country of origin.⁵⁸ Such benefits include strategic advantages derived from familiarity with the legal systems, forms, processes and applicable laws of ones' home State.⁵⁹

Simply put:

*“With the onset of regional economic integration, it has become imperative for different economic blocs to identify the modalities of legal harmonisation that are most appropriate for the fulfilment of their overall objectives. The elimination of barriers to trade and investment begins where effective legal systems with uniform rules are developed.”*⁶⁰

Kenya stands as the economic hegemony of East Africa.⁶¹ Its capitalist policies have led to increased growth and innovation.⁶² Kenya's macroeconomic environment is stable.⁶³ On the other hand, economic growth in Tanzania is hampered by political obstacles which hinder the effective coordination of sector reform.⁶⁴ The Tanzanian economic landscape is characterised by ethno-political considerations.⁶⁵ Economic policies are often frustrated by the desire to fuel large-scale investment on the one hand and nationalist fears on the other.⁶⁶

The political interests in Uganda are closely entangled with business interests as a result of the politicisation of privatisation in the 1990s.⁶⁷ Conversely, as oppose to Kenya and Tanzania,

⁵⁸ Gichuki, 'Analysis of the approximation of commercial laws in Kenya under the East African Community Common Market Protocol,' 414.

⁵⁹ Gichuki, 'Analysis of the approximation of commercial laws in Kenya under the East African Community Common Market Protocol,' 414.

⁶⁰ Gichuki, 'Analysis of the approximation of commercial laws in Kenya under the East African Community Common Market Protocol,' 415.

⁶¹ Oversees Development Institute, *East African prospects: an update on the political economy of Kenya, Rwanda, Tanzania and Uganda*, May 2014, i.

⁶² Oversees Development Institute, *East African prospects: an update on the political economy of Kenya, Rwanda, Tanzania and Uganda*, May 2014, i.

⁶³ The World Bank Report Edition No. 18, *Kenya economic update: in search of fiscal space – government spending and taxation: who benefits?*, October 2018, iv.

⁶⁴ Oversees Development Institute, *East African prospects: an update on the political economy of Kenya, Rwanda, Tanzania and Uganda*, May 2014, i.

⁶⁵ Oversees Development Institute, *East African prospects: an update on the political economy of Kenya, Rwanda, Tanzania and Uganda*, May 2014, ix.

⁶⁶ Oversees Development Institute, *East African prospects: an update on the political economy of Kenya, Rwanda, Tanzania and Uganda*, May 2014, ix.

⁶⁷ Oversees Development Institute, *East African prospects: an update on the political economy of Kenya, Rwanda, Tanzania and Uganda*, May 2014, xi.

policymaking in Rwanda is not so heavily driven by political challenges.⁶⁸ Nevertheless, Rwanda is amongst the least developed economies in the region.⁶⁹

The World Bank has characterised Burundi's economy as being highly fragile with extremely low rates of urbanisation.⁷⁰ It has been classified as one of the poorest countries in the world.⁷¹ Its economy is vulnerable to turbulence caused by internal and external economic fluctuations.⁷²

Lastly, the political, economic and security challenges in South Sudan have threatened to collapse its economy and State.⁷³ The country has poor economic and social infrastructure.⁷⁴ The state of its governance curtails political will. Institutional changes are thus required to aid its ability to enact effective legislation.⁷⁵

Given the extreme legal, economic and political diversity in the Community, there is a need for a delocalised dispute resolution forum which is harmonised across the States. This will ensure that the integration agenda is not hampered by political or economic considerations in a given State which may destabilise the legal harmonisation of the Community. Furthermore, the EAC Treaty lists the political, legal and judicial co-operation of the Partner States as being guiding objectives for the Community.⁷⁶ The adoption, development and harmonisation of the arbitration mechanism available for adjudicating private sector disputes is one means of achieving this objective.

4.4 CONCLUSION

It is evident that the private sector is essential to the economic harmony and prosperity of regional integration schemes. Businesses should be encouraged to exploit open borders

⁶⁸ Overseas Development Institute, *East African prospects: an update on the political economy of Kenya, Rwanda, Tanzania and Uganda*, May 2014, x.

⁶⁹ Overseas Development Institute, *East African prospects: an update on the political economy of Kenya, Rwanda, Tanzania and Uganda*, May 2014, x.

⁷⁰ The World Bank Report No. 122549-BI, *Republic of Burundi: addressing fragility and demographic challenges to reduce poverty and boost sustainable growth – systematic country diagnostic*, 15th June 2018, 1-3.

⁷¹ The World Bank Report No. 122549-BI, *Republic of Burundi: addressing fragility and demographic challenges to reduce poverty and boost sustainable growth – systematic country diagnostic*, 15th June 2018, 1-3.

⁷² The World Bank Report No. 122549-BI, *Republic of Burundi: addressing fragility and demographic challenges to reduce poverty and boost sustainable growth – systematic country diagnostic*, 15th June 2018, 1-3.

⁷³ African Development Bank, *The political Economy of South Sudan*, August 2018, 1-2.

⁷⁴ African Development Bank, *The political Economy of South Sudan*, August 2018, 1-2.

⁷⁵ African Development Bank, *The political Economy of South Sudan*, August 2018, 1-2.

⁷⁶ Article 5, *Treaty for the Establishment of the East African Community*.

through, for example, business collaboration. Nevertheless, the success or failure of such collaboration hinges on the existence of supportive public policies,⁷⁷ including the effective resolution of disputes.

The integration agenda is expected to bolster the operations of the private sector through cross-border operations, the exploitation of comparative and competitive advantages and by reaping the benefits of dropped tariff and non-tariff barriers.⁷⁸ Moreover, the EAC Customs Union has helped augment trade in the Community through its policies on competition, the implementation of uniform customs procedures and the application of external tariffs.⁷⁹

The enlargement of an economic base, increased competition and increased collaboration between the commercial sector will naturally result in the rise of the number of commercial disputes in the region. Therefore, the augmentation of the integration agenda will more than likely see the rise of the use of arbitration. The EACJ should be enjoined to promote the use of Article 32(c) of the Treaty as a mode through which commercial disputes which arise in the region are resolved given that it is the regional dispute resolution body developed for just such a purpose.

Nevertheless, in order to promote the use of Article 32(c), the Court must first make the necessary amendments to its arbitration Rules in order to more efficiently serve the needs of the private sector. Chapter Five of this study will thus propose recommendations for the amendment of the Rules.

⁷⁷ Gichuki, 'Analysis of the approximation of commercial laws in Kenya under the East African Community Common Market Protocol,' 425.

⁷⁸ Mwasha O, 'The benefits of regional economic integration for developing countries in Africa: A case of East African Community (EAC), *Korea Review of International Studies*, 2008, 88 – <https://gsis.korea.ac.kr/wp-content/uploads/2015/04/11-1-05-Ombeni-N.-Mwasha.pdf> on 12 November 2019.

⁷⁹ Mwasha O, 'The benefits of regional economic integration for developing countries in Africa: A case of East African Community (EAC), *Korea Review of International Studies*, 2008, 88 – <https://gsis.korea.ac.kr/wp-content/uploads/2015/04/11-1-05-Ombeni-N.-Mwasha.pdf> on 12 November 2019.

CHAPTER FIVE:

FINDINGS, RECOMMENDATIONS AND CONCLUSION

5.0 INTRODUCTION

This Chapter presents a brief summary of the findings. It thereafter proposes recommendations for the amendment of the Arbitration Rules of the EACJ. It subsequently presents a conclusion to the study.

5.1 FINDINGS

This research sought to examine: 1) why the EACJ arbitration mechanism is underutilised; 2) whether commercial arbitration under the EACJ mechanism provides a desirable means of dispute resolution; and 3) the role which arbitration can play in the augmentation of the EAC integration agenda. In view of these objectives and research questions, the following section presents the findings of the research.

Firstly, the EAC arbitration mechanism is underutilised because the Arbitration Rules of the Court do not fully conform to the core principles of international arbitration. Although these principles should be practiced in such a way as to suit the East African circumstance as advocated for by TWAIL scholarship, the content of those principles should uphold the integral precepts of international arbitration.

This research found that the Arbitration Rules of the Court are marred by a number of weaknesses:

1. The Rules significantly stifle party autonomy by not according parties the right to select arbitrators of their choosing;¹
2. The Rules provide that an arbitration may only be conducted in English² despite the language diversity which exists in the Community;

¹ Rule 8, *East African Court of Justice Rules of Arbitration*.

² Rule 22(1), *East African Court of Justice Rules of Arbitration*.

3. A Tribunal has very limited scope to award interim measures³ despite the role which interim measures play in maintaining the efficacy of the final award;⁴
4. The Rules are silent on whether or not a Tribunal may award interest despite the fact that interest is instrumental in ensuring that an aggrieved party is fully compensated;⁵
5. Rule 32(3) does not effectively resolve the issue of enforcement of awards nor does it promote a system of harmony in the enforcement procedures of the Community given that the enforcement rules of the EAC Partner States are marked by extreme diversity.⁶

Furthermore, a significant cause of the underutilisation of the EACJs' arbitral jurisdiction is the lack of awareness by the general East African population of the role, mandate and jurisdiction of the Court.⁷ The Court faces outreach and visibility obstacles.⁸

The second research question was whether commercial arbitration under the EACJ mechanism provides a desirable means of dispute resolution. It was found that as a result of the drawbacks listed above, the EACJ arbitration mechanism does not meet the needs of the private sector in the resolution of commercial disputes. Nevertheless, by offering a delocalised forum, the EACJ arbitration mechanism has great potential for the resolution of commercial disputes which arise in the Community.

Lastly, Chapter Four presents an assessment of the role which arbitration can play in augmenting the EAC integration agenda in answer to the third research question. It found that arbitration can indeed aid significantly in securing the active participation of the private sector in cross-border trade, thereby boosting private sector economic activity across the region.⁹ However, the involvement of the private sector depends of the existence of supportive public policies such as effective dispute resolution mechanisms.¹⁰ Arbitration is generally observed

³ Rule 14, *East African Court of Justice Rules of Arbitration*.

⁴ Ferguson S, 'Interim measures of protection in international commercial arbitration: problems, proposed solutions, and anticipated results,' 55; Wong R, 'Interim relief in aid of international commercial arbitration – a critique on the International Arbitration Act,' 500.

⁵ Gotanda J, 'Awarding interest in international arbitration,' 41.

⁶ Oppong R, 'The East African Court of Justice, enforcement of foreign arbitration awards and the East African Community integration process,' 7.

⁷ Kariuki F, 'Challenges facing the recognition and enforcement of international arbitral awards within the East African community,' 11.

⁸ Kariuki F, 'Challenges facing the recognition and enforcement of international arbitral awards within the East African community,' 11.

⁹ Mwashu O, 'The benefits of regional economic integration for developing countries in Africa: A case of East African Community (EAC), *Korea Review of International Studies*, 2008, 74 – <https://gsis.korea.ac.kr/wp-content/uploads/2015/04/11-1-05-Ombeni-N.-Mwashu.pdf> on 12 November 2019.

¹⁰ Gichuki, 'Analysis of the approximation of commercial laws in Kenya under the East African Community Common Market Protocol' 425.

as the preferred mode of dispute resolution by the business community.¹¹ Therefore, there is an entanglement between the success of economic integration schemes and the existence of effective dispute resolution mechanisms.¹²

5.2 RECOMMENDATIONS

In order for the EAC to promote private sector engagement in the process of economic integration, the EACJ must be enjoined to provide dispute resolution services that fit the needs of the commercial sector. Therefore, the following amendments to the Arbitration Rules of the EACJ are proposed.

Firstly, party autonomy is a founding principle of international commercial arbitration.¹³ The Rules should be representative of this principle. The Rules should be amended to ensure that parties are free to determine the constitution of the arbitral Tribunal or the identity of the sole arbitrator. International commercial disputants have a vested interest in ensuring that their chosen arbitrators are possessed of subject-specific expertise, knowledge and experience in the subject matter of their dispute.¹⁴

Secondly, language considerations should not be undermined by the Rules. They are important in ensuring the efficacy of the arbitral proceedings. Therefore, the Rules should be amended to allow parties determine the language of the proceedings. Where the parties do not agree, the Tribunal should be bestowed with the power to select the language of the arbitration as it deems fit given the parties involved. Thus, the Arbitration Rules should be amended to be more accommodative of the language diversity that exists within East Africa.

Thirdly, the limited scope of an EACJ Tribunal to award interim measures should be extended in order to ensure that the efficacy of the final award is preserved. Therefore, the powers of the arbitral Tribunal to award interim measures should be extended to include the two categories of interim measures cited in Chapter Three: firstly, those intended at avoiding loss, damage or prejudice.¹⁵ Such awards include orders for the preservation of evidence, orders for the

¹¹ Sempasa S, 'Obstacles to international commercial arbitration in African countries,' 411.

¹² Lehmann J, 'Regional economic integration and dispute settlement outside Europe: a comparative analysis,' 61.

¹³ Tweeddale and Tweeddale, *Arbitration of commercial disputes: international and English law and practice*, 259.

¹⁴ Moses, *The principles and practice of international commercial arbitration*, 3-4.

¹⁵ Bucy D, 'How to best protect party rights: the future of interim relief in international commercial arbitration under the amended UNICTRAL Model Law,' 586.

conservation of perishable goods and measures for the protection of confidential information.¹⁶ Secondly, those aimed at facilitating the enforcement of the final award.¹⁷ For example, an award for the provision of security for costs, preservative orders and awards requiring the deposit of assets to a third party that may be used in the satisfaction of a final award.¹⁸

Furthermore, the Rules should be amended to expressly confer a Tribunal with the power to award interest. Parties have a legitimate interest in knowing which powers a Tribunal will have when making the determination of the choice of procedural rules. When determining whether or not to award interest, the first point which arbitrators have regard to is whether they have the authority to make such an award.¹⁹ Therefore, the Rules should clarify the issue. It is recommended that the parties be at liberty to determine whether or not a Tribunal has the authority to award interest and if so, the rate of interest to be awarded, the time through which the interest will run and whether the interest will be compound or simple interest. Where the parties have failed agree and the debtor is liable to pay, the determination of these issues should be left to the Tribunal.

Moreover, the enforcement mechanisms of the EAC member States should be harmonised in order to ensure the proper enforcement of arbitral awards rendered under the EACJ arbitration mechanism. It is recommended that the Partner States adopt a regional instrument for the enforcement of arbitral awards. The Partner States may opt to uniformly adopt the New York Convention in the recognition and enforcement of arbitral awards rendered by the EACJ. Alternatively, the EAC member States should harmonise their recognition and enforcement laws so as to ensure the harmonious enforcement of arbitral awards in all six Partner States as has been done by the Caribbean Community and the European Economic Community.

Lastly, the EACJ must address its capacity and outreach obstacles. It is recommended that the Court conduct public awareness campaigns to spread awareness about its role, capacity and jurisdiction as well as the rights which EAC residents have before its forum.

¹⁶ Bucy D, 'How to best protect party rights: the future of interim relief in international commercial arbitration under the amended UNICTRAL Model Law,' 586.

¹⁷ Bucy D, 'How to best protect party rights: the future of interim relief in international commercial arbitration under the amended UNICTRAL Model Law,' 587.

¹⁸ Bucy D, 'How to best protect party rights: the future of interim relief in international commercial arbitration under the amended UNICTRAL Model Law,' 587.

¹⁹ Gotanda J, 'Awarding interest in international arbitration,' 40; Gotanda J, 'A study of interest,' 5.

5.3 CONCLUSION

This research sought to assess the practice of arbitration under the EACJs Article 32(c) arbitration mechanism given the general preference in the region for international rather than local arbitration and the regions aims at economic and legal integration. The study first analysed how commercial arbitration under the EACJ mechanism operates by assessing its Rules of Arbitration. It then analysed those Rules in an attempt to determine whether or not the Rules are desirable for the private sector. Finally, it assessed the role which arbitration can play in the augmentation of the Community's integration agenda.

In light of the research questions, the study found that the EACJs Arbitration Rules are underutilised due the weaknesses which mar them and the visibility limitation of the Court. As a result, and with regards to the second research question, the arbitration mechanism of the EACJ does not meet the needs of commercial disputants in the region. Nevertheless, they have a lot of potential for delocalised dispute resolution. Lastly, arbitration can aid in the Community's economic integration by promoting the participation of the private sector.

Therefore, both hypotheses were proven. The EACJs arbitration mechanism is currently undesirable to the private sector due to the shortcoming of its Rules. Secondly, arbitration can be used to augment the integration agenda of the EAC.

There is a lot of potential in the EACJ arbitration mechanism. It is high time that the Community began promoting local and regional methods of dispute resolution. The private sector should be encouraged to arbitrate their commercial disputes locally rather than internationally. This will aid in the harmonisation of commercial practice and dispute resolution. Nevertheless, in order to encourage regional dispute resolution, the regional dispute resolution mechanisms must fit the needs of the business community. Therefore, the Rules of Arbitration of the EACJ should be amended to better fit the needs of the private sector.

REFERENCES

6.1 BOOKS

Desarrollo B, *Regional institutions and dispute settlement mechanisms*, The Johns Hopkins University Press, Washington DC, 2002.

Greenberg S, Kee C and Weeramantry R, *International commercial arbitration: an Asia-pacific perspective*, 1ed, Cambridge University Press, New York, 2011.

Moses M, *The principles and practice of international commercial arbitration*, 3ed, Cambridge University Press, United Kingdom, 2017.

Schiff M and Winters L, *Regional Integration and Development*, World Bank and Oxford University Press, Washington DC, 2003.

Tweeddale A and Tweeddale K, *Arbitration of commercial disputes: international and English law and practice*, 1ed, Oxford University Press, New York, 2005.

6.2 CHAPTER IN BOOK

Alter K and Hooghe L, 'Regional dispute settlement systems' in Tanja A, Brozel and Risse (eds), *Oxford Handbook of Comparative Regionalism*, Oxford University Press, United States, 2016, 538-558.

Gastorn K and Masinde W, 'The EAC Common Market' in Ugirashebuja E, Ruhangisa J, Ottervanger T and Cuyvers A (eds) *East African Community Law Book: Institutional, Substantive and Comparative EU Aspects*, Brill – Nijhoff, Leiden, 2017, 285-292.

Gichuki N, 'Analysis of the approximation of commercial laws in Kenya under the East African Community Common Market Protocol' in Dovelung J, Majamba H, Oppong R and Wanitzek U, *Harmonisation of laws in the East African Community: the state of affairs with comparative insights from the European Union and other regional economic communities*, LawAfrica Publishing (K) Ltd, Nairobi, 2018, 409-425.

Muigua K, 'Arbitration institutions in East Africa' in Onyema E (eds) *The Transformation of Arbitration in Africa: The Role of Arbitral Institutions*, Kluwer Law International B.V. the Netherlands, 2016, 75-91.

Onyema E, ‘The jurisdictional tensions between domestic courts and arbitral tribunals’ in Menaker A (eds) *International Arbitration and the Rules of Law: Contribution and Conformity* 1ed Kluwer Law International, The Netherlands, 2017, 481-500.

Otieno-Odek J, ‘Law of regional integration – a case study of the East African Community’ in Dovelung J, Majamba H, Oppong R and Wanitzek U, *Harmonisation of laws in the East African Community: the state of affairs with comparative insights from the European Union and other regional economic communities*, LawAfrica Publishing (K) Ltd, Nairobi, 2018, 17-55.

Park W, ‘The procedural soft law of international arbitration: non-governmental instruments’ in Mistelis L and Lew J (eds) *Pervasive Problems in International Arbitration*, 1ed, Kluwer Law International, London, 2006, 141-154.

Ruhangisa J, ‘Judicial protection under EAC law: direct actions’ in Ugirashebuja E, Ruhangisa J, Ottervanger T and Cuyvers A (eds) *East African Community Law: Institutional, Substantive and Comparative EU Aspects*, 1ed, Brill, Netherlands, 2017, 229-253.

6.3 HARDCOPY JOURNAL

Alan L, ‘Reimagining the framework for resolving intra-African commercial disputes in the context of the African continental free trade area agreement’ 18 *World Trade Review* 3, 2019.

Alter K, Gathii J and Helfer L, ‘Backlash against international courts in west, east and southern Africa: causes and consequences’ 27 *The European Journal of International Law* 2, 2016.

Anglade L, ‘The use of transnational rules of law in international arbitration’ 38 *Irish Jurist, New Series* 1, 2003.

Axline W, ‘Underdevelopment, dependence, and integration: the politics of regionalism in the third world’ 31 *International Organisation* 1, 1977.

Benz S, ‘Strengthening interim measures in international arbitration’, 50 *Georgetown Journal of International Law*, 2018.

Berger B and Moltzahn E, ‘Interest in international arbitration – an overview’, 2014 *International Business Law Journal* 5, 2014.

Braden J, ‘Sound rules and administration in arbitration’ 83 *University of Pennsylvania Law Review and American Law Register* 2, 1934.

Branson D and Wallace R, 'Awarding interest in international commercial arbitration: establishing a uniform approach' 28 *Virginia Journal of International Law* 4, 1988.

Bucy D, 'How to best protect party rights: the future of interim relief in international commercial arbitration under the amended UNICTRAL Model Law', 25 *American University of International Law Review* 5, 2010.

Carstens A and Ghani E, 'Making regional economic integration work', 43 *The Pakistan Development Review* 4, 2005.

Choo M, 'Dispute settlement mechanisms of regional economic arrangements and their effects on the World Trade Organisation', 13 *Temple International and Comparative Law Journal* 2, 1999.

Dewan N, 'Interim measures in arbitration – a comparative analysis of Indian and English Arbitration Acts, 2003' 6 *International Business Law* 6, 2004.

Drohozal C, 'Commercial norms, commercial codes, and international commercial arbitration', 33 *Vanderbilt Journal of Transitional Law* 79, 2000.

Echols M, 'Regional economic integration', 31 *The International Lawyer* 2, 1996.

Eslava L and Pahuja S, 'Beyond the (post)colonial: TWAIL and the everyday life of international law' 45 *Law and Politics in Africa, Asia and Latin America* 2, 2012.

Fagbayibo B, 'Exploring legal imperatives of regional integration in Africa' 45 *The Comparative and International Law Journal of Southern Africa* 1, 2012.

Ferguson S, 'Interim measures of protection in international commercial arbitration: problems, proposed solutions, and anticipated results' 12 *Currents: International Trade Law Journal* 2, 2003.

Gathii J, 'Rejoinder: twailing international law' 98 *Michigan Law Review* 6, 2000.

Gotanda J, 'Awarding interest in international arbitration', 90 *American Journal of International Law* 40, 1996.

Harpole S, 'Language in arbitration procedure: a practical approach for international commercial arbitration', 9 *Contemporary Asia Arbitration Journal* 2, 2016.

Hrnčíříková M, 'The meaning of soft law in international commercial arbitration', 16 *ICLR* 1, 2016.

Kiplagat P, 'Dispute recognition and dispute settlement in integration processes: the COMESA experience', 15 *Northwestern Journal of International Law and Business* 3, 1995.

Lehmann J, 'Regional economic integration and dispute settlement outside Europe: a comparative analysis', 7 *International Law Forum Du Droit International* 1, 2005.

Luoch LO, 'Legitimacy of the East African Community,' 53 *Journal of African Law* 2, 2009.

Maniatis M, Dorobantu F and Nunez F, 'A framework for interest awards in international arbitration', 41 *Fordham International Law Journal* 4, 2018.

Mattli W, 'Justice in the global economy: from litigation to arbitration', 55 *International Organisation* 4, 2001.

McLaughlin J, 'Arbitration and developing countries' 13 *The International Lawyer* 2, 1979.

Mutua M, 'What is TWAIL?' 94 Proceedings of the Annual Meeting (American Society of International Law), 2000.

Opong R, 'The East African Court of Justice, enforcement of foreign arbitration awards and the East African Community integration process', 63 *Journal of African Law* 1, 2019.

Poorooye A and Feehily R, 'Confidentiality and transparency in international commercial arbitration: finding the right balance', 22 *Harvard Negotiation Law Review* 275, 2017.

Rajveer A, 'Parties' autonomy in international commercial arbitration', 9 *International Journal of Science & Engineering Research* 10, 2018.

Rampall Y and Feehily R, 'The sanctity of party autonomy and the powers of arbitrators to determine the applicable law: the quest for arbitral equilibrium', 23 *Harvard Negotiation Law Review* 345, 2018.

Riegner M, 'How universal are international law and development? Engaging with postcolonial and Third World scholarship from the perspective of its Other' 45 *Law and Politics in Africa, Asia and Latin America* 2, 2012.

Riesenfeld S, 'Legal systems of regional economic integration', 22 *American Journal of Comparative Law* 3, 1974.

Rinker B, 'The future of arbitration in Latin America: a study of its regional development', 8 *Case Western Reserve Journal of International Law* 2, 1976.

Sempasa S, 'Obstacles to international commercial arbitration in African countries' 41 *The International and Comparative Law Quarterly* 2, 1992.

Simms R and Errol S, 'The building blocks of successful regional integration: lessons for CSME from other integration schemes' 56 *Social and Economic Studies* 4, 2007.

Simoës F, 'The language of international arbitration', 35 *Conflict Resolution Quarterly* 1, 2017.

Stephen-Chu G and Kelly J, 'Awards of interest in international arbitration: achieving coherence through purpose', 7 *Indian Journal of Arbitration Law* 1, 2018.

Straus D, 'The growing consensus on international commercial arbitration' 68 *The American Journal of International Law* 4, 1974.

Strong S, 'Research in international commercial arbitration: special skills, special sources', 20 *The American Review of International Arbitration* 2, 2009.

Taylor C, 'Dispute resolution as a catalyst for economic integration and an agent for deepening integration: NAFTA and MERCOSUR?', 17 *Northwestern Journal of International Law and Business*, 1997.

Tsietsi T, 'International commercial arbitration: case study of the experience of African States in the International Centre for Settlement of Investment Disputes,' 47 *The International Lawyer* 2, 2013.

Tung S, 'The importance of languages in international arbitration and how they impact parties' due process rights' 10 *Contemporary Asia Arbitration Journal* 1, 2017.

Wilske S, 'Linguistic and language issues in international arbitration – problems, pitfalls and paranoia', 9 *Contemporary Asia Arbitration Journal* 2, 2016.

Wong R, 'Interim relief in aid of international commercial arbitration – a critique on the International Arbitration Act' 24 *Singapore Academy of Law Journal* 2, 2012.

6.4 ONLINE JOURNALS

Mwasha O, 'The benefits of regional economic integration for developing countries in Africa: A case of East African Community (EAC), *Korea Review of International Studies*, 2008 – <https://gsis.korea.ac.kr/wp-content/uploads/2015/04/11-1-05-Ombeni-N.-Mwasha.pdf>

Ostrove M, Sanderson B and Veronelli A, ‘Developments in African arbitration’ *Global Arbitration Review*, 2018, <https://globalarbitrationreview.com/chapter/1139890/developments-in-african-arbitration>

6.5 WORKING PAPERS

Gotanda J, ‘A study of interest’ Villanova University Charles Widger School of Law, Working Paper Series, 2007 – <http://digitalcommons.law.villanova.edu/wps/art83>

6.6 CONFERENCE PAPERS

Kariuki F, ‘Challenges facing the recognition and enforcement of international arbitral awards within the East African community’, Commercial Private International Law in East and Southern Africa, Johannesburg, 15 September 2015.

Muigua K, ‘Building legal brides: fostering Eastern Africa integration through commercial arbitration’, 3rd Annual East Africa International Conference, Dar Es Salaam, 9-10 April 2015.

Muigua K, ‘Promoting international commercial arbitration in Africa’ East African International Arbitration Conference, Fairmont the Norfolk, Nairobi, 28-29 July 2014.

6.7 REPORTS

African Development Bank, *The political Economy of South Sudan*, August 2018.

Broderick, *SOAS Arbitration in Africa Survey Domestic and International Arbitration: Perspectives from African Arbitration Practitioners*, 2018.

International Centre for Settlement of Investment Disputes, *ICSID Annual Report*, 2018.

International Centre for Settlement of Investment Disputes, *ICSID Caseload Statics Issue 2018-2*, 2018.

Oversees Development Institute, *East African prospects: an update on the political economy of Kenya, Rwanda, Tanzania and Uganda*, May 2014.

Quarterly e-journal of the International Chamber of Commerce, *ICC Dispute Resolution Bulletin*, 2018.

The World Bank Report Edition No. 18, *Kenya economic update: in search of fiscal space – government spending and taxation: who benefits?*, October 2018.

The World Bank Report No. 122549-BI, *Republic of Burundi: addressing fragility and demographic challenges to reduce poverty and boost sustainable growth – systematic country diagnostic*, 15th June 2018, 1-3.