



# UNIVERSITY OF LUSAKA

**A CRITICAL ANALYSIS ON THE EFFECTIVENESS OF THE COMESA COURT OF  
JUSTICE ARBITRATION RULES OF 2018 IN ADDRESSING CHALLENGES FACED  
BY ZAMBIA AND OTHER COMESA MEMBER STATES IN INTERNATIONAL  
COMMERCIAL ARBITRATION**

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**Research dissertation submitted for the approval of the University of Lusaka  
Senate in partial fulfilment of the requirements for the award of the Master of  
Laws- General (LLM)**

**University of Lusaka**

**JANUARY, 2024**

## **DECLARATION**

I do hereby declare that *A Critical analysis on the effectiveness of the COMESA Court of Justice Arbitration Rules of 2018 in addressing challenges faced by Zambia and other COMESA member states in International Commercial Arbitration* which is hereby submitted to the School of Law at the University of Lusaka for consideration of the Master of Laws (LLM) degree is an original work and has not been previously submitted for any degree at any other tertiary institution.

Every reference and source utilized or cited in this document has been appropriately acknowledged, indicating the complete reference details. As the author of this document, I fully take responsibility for any inaccuracies, mistakes, or omissions that may be present in the text.

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**April, 2024**

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## **ABSTRACT**

The African continent has recently experienced a rise in cases involving international commercial arbitration. This generally means that African arbitration institutions have a mandate to be equipped with the best arbitration rules that conform to internationally accepted standards.

Given the above, the COMESA Court of Justice revised its Arbitration Rules of 2003. It launched the COMESA Court of Justice Arbitration Rules of 2018 to improve arbitration under COMESA and to mitigate challenges that nations in the common market face in settling international commercial arbitration disputes.

This study has analyzed the 2018 rules critically and evaluated the rules' effectiveness in addressing challenges in arbitration that COMESA member states face.

The methodology employed in this study was qualitative.

The research findings are that the new rules have, however, not been effective and have little impact in mitigating the various challenges that are still faced in international commercial arbitration by member states. International commercial arbitration challenges such as the cumbersome notice process when filing an action at the Court, the bias of the Court in reviewing the exhaustion of local remedies, lack of investor-state arbitration at the Court, prolonged arbitration processes, high costs of arbitration, difficulties with recognition and enforcement of arbitral awards, lack of important provisions in the Courts' current arbitration rules (these include provisions for handling complex arbitration disputes such as joinder and consolidation, provisions for expedited procedures, and provisions for the conduct of legal representatives and provisions for the doctrine of separability).

Other challenges include interference by national Courts (which undermines the independent nature of the Court), jurisdiction challenges (for example the Courts' incapacity to handle human rights issues and limitations to only handle matters within the common market), and political and economic challenges.

The study equally found that other African arbitration institutions with better and updated arbitration rules such as the East African Court of Justice (EACJ), the Cairo Regional Centre for International Commercial Arbitration (CRCICA), and the Kigali International Arbitration Court (KIAC) have recorded better performance and have been able to address various challenges that are pertinent in international commercial arbitration processes in Africa.

The study concludes with recommendations for enhancing the efficiency of the COMESA Court of Justice as a regional Court in international commercial arbitration.

## **DEDICATION**

This piece of literature is warmly dedicated to my daughters, Luyando, Pezo, Choolwe, and Luumuno.

## **ACKNOWLEDGEMENTS**

I wish to thank my wife, Joyce, for the unwavering support I received during my studies.

To my lecturers, Dr Patricia Kamanga, Mr Chanda Chungu and Mr Lupiya Simusokwe i wish to say thank you for the knowledge you imparted to me.

To my supervisor, Mr Greenwell Lyempe, i say thank you sir. Your honest feedback and guidance were a motivating factor and encouragement in writing this piece of academic work i can be proud of.

## **KEY WORDS/ OPERATIONAL DEFINITIONAL TERMS**

The following terms used in this research have the following meanings:

‘arbitration’ means a formal method of ADR involving a neutral third party whose decision is final and binding.

‘arbitrator’ means an independent person or body officially appointed to settle a dispute.

‘arbitral tribunal’ means a group of neutral adjudicators which is convened for the sole purpose of resolving an arbitration dispute.

‘award’ means the final decision rendered by the arbitrator or arbitral tribunal which terminates the arbitral proceedings.

‘consolidation’ means the addition of one or more arbitrations resulting in a single award.

‘joinder’ means the allowing of a third party to join an existing arbitral proceeding as a claimant or respondent.

‘jurisdiction’ means the power or authority of the arbitral tribunal to decide a dispute.

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### **ARBITRATION RULES**

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East African Court of Justice Arbitration Rules of 2012.

International Chamber of Commerce (International Court of Arbitration) Rules of 2021.

KIAC Arbitration Rules of 2012.

London Court of International Arbitration (LCIA) Rules of 2014 (updated in 2020).

Nairobi Centre for International Commercial Arbitration Rules of 2015.

### **INTERNATIONAL INSTRUMENTS**

The UNCITRAL Model Law on International Commercial Arbitration of 1985

UNIDROIT Principles of 2016

### **REGIONAL TREATIES**

The Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA Treaty) of 1993

The East African Community Treaty of 1999

## **LIST OF ABBREVIATIONS**

- AfAA - African Arbitration Association
- AFSA - Arbitration Foundation of South Africa
- COMESA - Common Market for Eastern and Southern Africa
- CRCICA - Cairo Regional Centre for International Commercial Arbitration
- EAC - East African Community
- EACJ - East African Court of Justice
- ICC - International Chamber of Commerce
- LCA - Lagos Court of Arbitration
- LCIA - London Court of International Arbitration
- KIAC - Kigali International Arbitration Centre
- NCIA - Nairobi Centre of International Arbitration
- UNICTRAL - United Nations Commission on International Trade Law

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# CHAPTER 1

## INTRODUCTION

### 1.0 INTRODUCTION

***International Commercial Arbitration*** is a form of alternative dispute resolution that allows parties from different countries to resolve their disputes outside of traditional Court proceedings. The process involves the appointment of impartial arbitrators by the disputing parties, who then sit in an arbitral tribunal to hear evidence and make a binding decision in the form of an Award. Arbitration is often used to resolve disputes arising from commercial transactions, such as disputes between businesses or between businesses and consumers. The arbitrators have specialized knowledge in the relevant area of law and the procedure is typically faster and less formal than a Court proceeding, making it an attractive option for those seeking a swift and efficient resolution to their dispute.<sup>1</sup>

When investing in other international markets, businesses might face legal issues due to conflicts in national laws, language and cultural barriers, business customs, regulations, and disputes between parties<sup>2</sup>. When handling such issues, disputing parties will seek the help of experts specialized in handling disputes that arise in international commercial transactions.<sup>3</sup>

Contracts that include arbitration clauses are resolved through International Commercial Arbitration to settle disputes.<sup>4</sup> Africa boasts several prominent arbitration institutions that offer excellent arbitration rules such as the Cairo Regional Centre for International Commercial Arbitration. The Centre's Arbitration Rules of 2024 are well formulated and

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<sup>1</sup>'International Commercial Arbitration' < <https://www.ag.gov.au/international-relations/private-international-law/international-commercial-arbitration> > (accessed 11 September 2023).

<sup>2</sup> Ibid.

<sup>3</sup>'What is International Commercial Arbitration?' P| Caruso School of Law (May 09, 2023) < <https://www.pepperdine.edu/blog/posts/what-is-international-commercial-arbitration.html> > (accessed 11 September, 2023).

<sup>4</sup> '*International arbitration: What it is and how it works*' < <https://www.pon.harvard.edu/daily/international-negotiation-daily/international-arbitration-what-it-is-and-how-it-works/> > accessed (17 September, 2023).

have provisions such as Joinder and Consolidation that are capable of handling complex arbitration disputes.

In the realm of commercial dispute resolution, international commercial arbitration has emerged as the foremost choice due to its impartiality and effectiveness. Interestingly, there has been a significant upswing in the utilization of arbitration in Africa for resolving international commercial disputes. This trend underscores the growing confidence in arbitration as a viable mechanism for settling disputes across borders and cultures.<sup>5</sup>

It has been observed that there is a significant participation of African players in the field of international commercial arbitration. The International Chamber of Commerce (ICC), for instance, reported in 2019 that approximately 5% of the total accumulation of parties in its caseload were from Sub-Saharan Africa, with Nigeria accounting for 19 cases, South Africa for 13 cases, and Mauritania for 10 cases.<sup>6</sup>

The caseload London Court of International Arbitration (LCIA) in 2019 for example, equally showed that more than 10% of its total caseload came from Africa<sup>7</sup>. This is an indication that African states, their arbitral institutions, and legal practitioners have made significant efforts to strengthen arbitration domestically, amid various challenges that have existed in African arbitration, particularly in COMESA.

Currently, approximately 100 institutions that offer arbitration services exist in Africa.<sup>8</sup> Unfortunately, not all African arbitration organizations have achieved international or regional recognition in international commercial arbitration. As regards international commercial arbitration, the COMESA Court of Justice has not gained popularity as regards international commercial arbitration both in the regional and international

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<sup>5</sup> What is international arbitration?//Cooley//Global Law Firm. < <https://www.cooley.com/news/insight/2022/2022-12-31-what-is-international-arbitration>> (accessed 17 September, 2023).

<sup>6</sup> LCIA 2019 Annual Casework < <file:///H:/Synced%20Folders/Downloads/20014%20LCIA%20>> p.11 (accessed 7 September, 2023).

<sup>7</sup> Ibid.

<sup>8</sup> Arbitration| Duke University School of Law. < <https://law.duke.edu/lib/research-guides/arbitration/>> (accessed 17 September, 2023).

sphere as the Court has handled more disputes involving COMESA employees than international commercial arbitration.

By Article 38 of the COMESA Treaty,<sup>9</sup> the COMESA Court of Justice introduced the new 2018 rules. The rules repealed the COMESA arbitration rules that had previously been in effect since 2003. The 2018 Rules include provisions on significant matters such as the composition, jurisdiction of the arbitral tribunal, the seat and the location of the arbitration proceedings, the arbitral process, the award and costs.

The 2018 Rules have significantly evolved from 2003 and yet still need further revision and update for the COMESA Court of Justice to be fully equipped to handle arbitration challenges in the common market.<sup>10</sup>

This study, as a result, endeavours to identify challenges faced by COMESA member states in international commercial arbitration and critically analyze the 2018 rules` s effectiveness in addressing these challenges. The study also proposes reforms in strategic areas where the rules would benefit from updating for them to be at par with other African arbitration institutions.

## 1.1 BACKGROUND OF THE STUDY

The ***Common Market for Eastern and Southern Africa*** (COMESA) has rightfully fought for its position as the largest regional economic entity in Africa<sup>11</sup>. It encompasses 21 member states, with a population exceeding 582.5 million people and a gross domestic product of US\$804 billion. Its export and import trade in goods is valued at an estimated US\$325 billion. COMESA is a force to reckon with regarding both internal and external trading in Africa<sup>12</sup>.

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<sup>9</sup> Ibid.

<sup>10</sup> John Gaffney "The 2018 COMESA Arbitration Rules: Already time for an update?" <<https://www.tamimi.com/law-update-articles/the-2018-comesa-arbitration-rules-already-time-for-an-update/>> (accessed 9 September, 2023).

<sup>11</sup> Ibid.

<sup>12</sup> Common Market for Eastern and Southern Africa < <https://ustr.gov/countries-regions/africa/regional-economic-communities-rec/common-market-eastern-and-southern-africa-comesa>> (accessed 17 September, 2023).

With the above, the COMESA Court of Justice needs to be better equipped to handle complex arbitration disputes. The Court should have been the best arbitration institution in the region. However, the 2018 rules lack important provisions that would equip the COMESA Court of Justice to offer better performance in handling arbitration disputes.

It is an undisputed fact that commercial arbitration in Africa is met with a lot of challenges.<sup>13</sup> These include difficulties with the recognition and enforcement of arbitral awards, economic challenges, political challenges, institutional and structural challenges, costly arbitration procedures, and no provisions for expedited procedures, just to mention a few. These challenges have not spared the common market and the 2018 rules, though recently updated, have been vague on several important issues which has made arbitration difficult for countries in COMESA.

It is from this background that this study focuses its attention on these challenges in line with the current 2018 rules' effectiveness in addressing the challenges.

## **1.2 STATEMENT OF THE PROBLEM**

International Commercial Arbitration has gained popularity in Africa as a preferred choice for dispute resolution. This form of dispute resolution is very important in international commercial transactions as it is considered to be faster and cheaper than litigation.<sup>14</sup> The frequency of arbitrations on the African continent has continued to rise, with many involving substantial claims. A noteworthy example of such actions is the US\$1.8 billion settlement that ExxonMobil and Shell received when they commenced an action against the Nigerian National Petroleum Corporation in 2011.<sup>15</sup>

It is common to find that African parties to international commercial arbitration disputes would rather have their cases heard in much more renowned and revered foreign

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<sup>13</sup> Robert Wheal, Elizabeth Oger-Gross, Tolu Obamuroh, Opeyemi Longe `Institutional Arbitration in Africa: Opportunities and Challenges: White & Case LLP` ( *Institutional arbitration in Africa: Opportunities and challenges | White & Case LLP*, 17 September, 2020)< <https://www.whitecase.com/insight-our-thinking/institutional-arbitration-africa-opportunities-and-challenges>> (accessed 17 September, 2023).

<sup>14</sup> Gaffney supra n 11

<sup>15</sup> Sebastian Perry (2018), `Mega-award against Nigeria comes to light`, Global Arbitration Review, <<https://www.thelawreviews.co.uk>> (accessed 17 September, 2023).

arbitration institutions such as the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA) while the African continent has quite several arbitration institutions at its disposal.<sup>16</sup> This preference is mainly necessitated by the ability of these renowned institutions to handle complex arbitration disputes.

If African arbitration institutions and Regional Courts are to be trusted to handle arbitration disputes by both local and foreign parties, they should be equipped with excellent arbitration rules capable of addressing various challenges in the arbitration process to attract cases to their dockets.<sup>17</sup>

As the judicial organ for one of Africa's biggest economic communities, the COMESA Court of Justice should be overloaded with international commercial arbitration cases in its docket but this is not the case. The Court has continued to record low cases. This is mainly attributed to its rules that have been inadequate to accommodate, for instance, Investor- State arbitration disputes. Investor- State arbitration disputes are common in COMESA since the organization is economic in nature and it promotes trade and investment. Parties in COMESA Member States have opted to file their disputes in other regional courts and Arbitration institutions instead of utilizing the COMESA Court of Justice due to its inadequate arbitration rules.

Whereas some African arbitration institutions and Regional Courts( such as the Kigali International Arbitration Centre and the Cairo Regional Centre for International Commercial Arbitration) have succeeded in receiving arbitration cases in their dockets due to the introduction of modern arbitration rules, the COMESA Court of Justice has had minimal success in receiving arbitration cases to its docket, despite introducing the 2018 Rules. This has largely undermined the Court's legitimacy as an arbitration institution and is less preferred as a Court of choice for international commercial arbitration disputes as parties from the Common Market would rather have other arbitration institutions handle their disputes.

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<sup>16</sup> Arbitration-ICC- International Chamber of Commerce found at <https://iccwbo.org>arbitration> (accessed on 23 January ,2024)

<sup>17</sup> Gaffney supra n 11

It is not in dispute that other factors such as location of the Court and the institutional and organizational framework might contribute to the limitation of the COMESA Court of Justice in excelling as an arbitration institution. For the sake of this study, the researcher focused on critically analyzing the COMESA Court of Justice's 2018 Rules and its effectiveness in handling international commercial arbitration disputes as it is on record that an effective arbitration institution is mainly attributed to an effective set of arbitration rules which has all the provisions necessary for a speedier and more refined arbitration process.

In the constantly evolving field of International Commercial Arbitration, arbitration institutions need to develop and implement effective arbitration rules that address various challenges. These may include streamlining the cumbersome notice processes, enhancing the recognition and enforcement of arbitral awards, expediting arbitration procedures, cheaper filing fees and more. By prioritizing these issues, arbitration institutions can ensure that their arbitration rules remain relevant and effective in addressing the needs of parties involved in international commercial disputes.

The 2018 rules were created to enhance the arbitration process in COMESA and align the COMESA Court of Justice with other internationally recognized arbitration institutions in Africa. The objective was to mitigate challenges in arbitration. However, despite the recent update from the 2003 Rules, the current rules have not addressed certain challenges such as prolonged and cumbersome notice processes, expensive arbitration processes, failure to enforce arbitral awards and intervention by national Courts in the arbitral process, among others.

This study therefore aimed at critically analyzing the COMESA Court of Justice's effectiveness as an international commercial arbitration institution by analyzing its 2018 rules. This was to address the competence of the Court in addressing various challenges faced by COMESA Member States in international commercial arbitration.

### **1.3 RESEARCH OBJECTIVES**

The objectives of the research are as follows:

- i. to identify challenges that are faced by COMESA Member States in international commercial arbitration;
- ii. to determine the effectiveness of the COMESA Court of Justice and the 2018 Rules in addressing challenges faced by COMESA Member States in international commercial arbitration by analysing the rules critically;
- iii. to undertake a critical comparative analysis of the COMESA Court of Justice with other better-performing Arbitration Institutions in Africa; and
- iv. to suggest new provisions and updates to the current 2018 Rules.

#### **1.4 RESEARCH QUESTIONS**

To successfully carry out this research, a few very important questions were raised by the researcher. These are:

- i. What are the prevailing challenges encountered by member states of COMESA in international commercial arbitration even after the introduction of the 2018 Rules?;
- ii. Are the 2018 Rules effective in addressing arbitration challenges in the common market?;
- iii. Why do other African arbitration institutions and Regional Courts excel in international commercial arbitration as compared to the COMESA Court of Justice? and
- iv. What provisions and updates should be introduced to the existing 2018 Rules to equip the COMESA Court of Justice to handle arbitration challenges in COMESA?

#### **1.5 LITERATURE REVIEW**

Since the introduction of the 2018 rules, there have not been a lot of scholarly works on the subject matter apart from a few commentary articles and journals by renowned experts in the realm of international commercial arbitration.

John Gaffney<sup>18</sup> is one such expert who has offered commentary on the 2018 Rules. In reviewing the rules, the author argues that despite being updated recently, the 2018 rules require further amendments to gain international recognition in arbitration. Additionally, the author notes that the rules lack important provisions. One such provision is that of joinder and consolidation of arbitrations.

James Thuo Gathii, *The COMESA Court of Justice: The Legitimacy of International Trade Courts and Tribunals*<sup>19</sup> offers insights into the jurisdictional limitations of the COMESA Court of Justice and gives a comprehensive analysis of the key issues that the COMESA Arbitration Rules of 2018 failed to address in terms of jurisdiction for arbitral tribunals in COMESA. A review of this piece of literature was instrumental in establishing the gaps that the 2018 rules have in relation to the effectiveness of the COMESA Court of Justice as an arbitration Court.

Muigua Karuiki, *Settling Disputes through Arbitration in Kenya* is an overall analysis of the challenges faced by Kenya in international commercial arbitration but does not give a general overview of the performance of the COMESA Court of Justice as compared to other arbitration institutions in Africa. A review of this book was vital in this study because it offered a comparative analysis of the arbitration atmosphere in Kenya and the Nairobi Centre for International Arbitration in particular with that of the COMESA Court of Justice.

Robert, Wheal (et.al), *Institutional Arbitration in Africa: Opportunities and Challenges*<sup>20</sup> gives a general analysis of institutions that administer arbitration services in Africa and offers a compelling comparative analysis of the COMESA Court of Justice and other African arbitration institutions. Although somewhat offering a biased approach in the analysis of African arbitration institutions to other institutions such as the London Court of International Commercial Arbitration and the International Chamber of Commerce, the insights in this paper offer a clear understanding of how African arbitration

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<sup>18</sup> Gaffney, supra n 11

<sup>19</sup> Gathii, James Thuo, *'The COMESA Court of Justice'*, In Fabri Ulftsen & Mzang (Eds). *The Legitimacy of International Trade Courts and Tribunals*, (Cambridge University Press, 2018).

<sup>20</sup> Robert (et.al) supra n 14

institutions are underperforming due to several factors such as challenges with the enforcement of arbitral awards.

Sebastian Perry, *Mega – Award against Nigeria Come To Light*<sup>21</sup> is an online Global Arbitration Review-Journal that focuses on how rapidly international commercial arbitration is developing in Africa and offers insight into the enforcement of awards in Africa and how African arbitration institutions (including COMESA) need to prepare and come up with good arbitration rules to maintain internationally accepted standards of arbitration processes. This piece of writing was reviewed with the intention of understanding that arbitration is steadily rising in Africa and that the continent has the potential of attracting international parties with huge claims in its dockets in the various arbitration institutions.

Willis Osemo, *COMESA Court Moves to Digital Justice System* is an online report that appreciates the steps the COMESA Court of Justice has taken in improving its caseload by introducing the electronic system of filling cases and submitting evidence to the Court. The report does not however give insight or highlight the other areas that the COMESA Court of Justice needs to take into consideration to improve its standards and make it a better arbitration institution in the region.

James Thuo Gathii, *Sub Regional Court or Employment Tribunal? The Legacy and Legitimacy of the COMESA Court of Justice*<sup>22</sup> is a research paper that analyzes the challenges that the COMESA Court of Justice faces and its legitimacy as a trade Court. The views in this paper were meant to be a fueling agent or catalyst for the COMESA Court of Justice to consider introducing new rules that would make it a better arbitration Court.

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<sup>21</sup> Sebastian, supra note 15 at 4

<sup>22</sup> Gathii, James Thuo, *Sub-Regional Court or Employment Tribunal? The Legacy and Legitimacy of the COMESA Court of Justice* (May 27, 2015). Helene Ruiz Fabri, Robert Howse, and Geir Ulfstein, *The Legitimacy of International Trade Tribunals*, 2015, Forthcoming, Loyola University Chicago School of Law Research Paper No. 2015-012, Available at SSRN: < <https://ssrn.com/abstract=2611362> > (accessed 23 January, 2024).

As earlier indicated, not so much has been written on the 2018 rules. The researcher therefore made use of the limited data to analyze the effectiveness of the 2018 rules as regards international commercial arbitration in the common market.

## **1.6 JUSTIFICATION/ SIGNIFICANCE OF THE STUDY**

This research holds great importance as it examines the obstacles faced by member states in the common market in arbitration despite the introduction of the updated 2018 rules. These rules were designed to address gaps and mitigate challenges in arbitration processes in COMESA.

This study is particularly significant in that it attempts to recommend modifications or amendments to the existing COMESA Rules which will enhance international commercial arbitration within COMESA.

These reforms include the inclusion of key provisions in the rules such as multi-party arbitration, joinder and consolidation and provisions for the conduct of legal representatives.

The study is also important as it is timely and addresses the 2018 rules which took 15 years to be updated. In this ever-evolving field of arbitration, institutions should strive to have modern arbitration rules to cope with new trends in arbitration.

The other significance of the study lies in its comprehensive comparative analysis of other arbitration institutions that have demonstrated excellence in arbitration.

## **1.7 METHODOLOGY**

The research methodology was primarily qualitative and involved a desk review of credible and authentic sources such as research data, publications, textbooks, articles, journals and commentary literature from experts in the field of commercial arbitration. The research also involved a review of primary sources such as cases, and arbitration rules of several institutions in Africa and abroad. The research also referred to the UNCITRAL Model Law.

A comparative approach of the COMESA Court of Justice with other better-performing arbitration institutions in Africa and abroad (and an analysis of their respective arbitration rules) was used in determining the effectiveness of the 2018 rules and assessment of the COMESA Court of Justice as an arbitration institution. This made it easier to arrive at the findings of the research and to give recommendations.

## **1.8 LIMITATIONS OF THE STUDY**

This study was based on desk research of secondary data and therefore had limitations as regards the availability and reliability of data. Not much scholarly works have been written on the COMESA Court of Justice since it introduced its 2018 rules. As a result, the researcher had limited data to work with.

## **1.9 ETHICAL CONSIDERATIONS**

This researcher made every effort to adhere to ethical considerations during the study to avoid violating any laws or regulations that apply to the COMESA jurisdiction or other countries, cultural beliefs, or private rights.

## **1.10 OUTLINE OF CHAPTERS**

**Chapter 1** is the overall introduction to the study. This includes the introduction, background to the study, statement of the problem, research questions, methodology, and rationale and justification of the study. This Chapter is designed in such a way as to give a broader outlook on the study and to pave the way for the main elements to be discussed in this research.

**Chapter 2** establishes the existence of international commercial arbitration challenges encountered by member states in the common market. It also discusses in detail the various challenges that COMESA member states face. This Chapter gives a brief overview of COMESA and the COMESA Court of Justice (CCJ). It also gives an analysis of the functions of the COMESA Court of Justice and its jurisdictional authority.

**Chapter 3** analyzes the effectiveness of the 2018 rules by critically analyzing each rule.

**Chapter 4** is a comparative study and discusses some of the most successful Arbitration institutions in Africa as compared to the COMESA Court of Justice. This chapter also gives an insight into the measures taken by other African arbitration institutions to achieve internationally accepted standards in international commercial arbitration. It also analyses the top arbitration institutions in the world, the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA).

**Chapter 5** gives a general and comprehensive conclusion of the study and gives recommendations that are timely and consistent with modern norms of international commercial arbitration practice.

## **1.11 CONCLUSION**

This Chapter has presented a brief overview of the research topic, its objectives, and how it expects to solve all of the research questions mentioned. It has highlighted the importance of analyzing the recently adopted 2018 rules to determine how these promote the effectiveness of the COMESA Court of Justice in commercial arbitration across borders, as well as the handling of challenges faced by COMESA member states. The Chapter has indicated the methodology employed during the study and how information was gathered and analyzed to support the research findings.

This Chapter also gives an outline of the various chapters that will be included in the research. The purpose of each chapter is briefly discussed, as well as the topics and themes that will be covered within each Chapter.

## CHAPTER 2

### INTERNATIONAL COMMERCIAL ARBITRATION CHALLENGES IN COMESA

#### 2.0 INTRODUCTION

Arbitration institutions in Africa have mainly faced difficulties in administering cross-border commercial arbitration, and the COMESA Court of Justice is not an exception. These obstacles often include judicial interference in various countries, corruption and government meddling, complicated arbitral processes, poor execution of arbitral awards, and lengthy arbitration hearings.<sup>23</sup> Certain jurisdictions face unique challenges due to jurisdictional, economic, and political reasons.

This Chapter gives a general overview of COMESA and analyzes the jurisdiction of the COMESA Court of Justice (CCJ), as well as the numerous challenges that are faced by Zambia and other COMESA member states.

#### 2.1 AN OVERVIEW OF COMESA AND THE COMESA COURT OF JUSTICE (CCJ)

The Common Market for Eastern and Southern Africa (COMESA) is composed of twenty-one (21) member states. These include Burundi, Comoros, Democratic Republic of Congo (DRC), Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Swaziland, Tunisia, Uganda, Zambia and Zimbabwe. It was established as a free trade area to replace the Preferential Trade Area for East and Southern Africa (PTA).<sup>24</sup>

Founded in 1991 as an association of sovereign states with unrestricted freedom, COMESA serves as a fundamental component of the African Economic Community, which was founded by the Abuja Treaty.<sup>25</sup>

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<sup>23</sup> Muigua, supra n 18.

<sup>24</sup> Kasongo. M. (2021) *Regional Courts and Arbitration: The Jurisdiction of the COMESA Court of Justice (CCJ)*. Alternative Dispute Resolution Journal of the Chartered Institute of Arbitrators (Kenya Branch), Vol. 9 issue 1. Nairobi: Glenwood Publishers Limited. P 102-106.

<sup>25</sup> Ibid.

### **2.1.1 Aims and Objectives of COMESA**

**Article 3** of the COMESA Treaty outlines the aims and objectives of the Common Market. These include:

- a) To promote sustainable growth and development among its member states. To accomplish this goal, the organization focuses on promoting a more balanced and harmonious development of the production and marketing structures within its member states;
- b) To raise living standards and foster closer relationships among member states by promoting joint development in all economic fields and adopting joint macroeconomic policies and programs.;
- c) To collaborate in creating an enabling environment for foreign, cross-border, and domestic investment, including the cooperative promotion of research and the deployment of science and technology for development;
- d) To collaborate in the promotion of peace, security, and stability among the Member States to improve economic development in the region;
- e) To collaborate in developing connections between the Common Market and the rest of the world and the adoption of common positions in international fora; and
- f) To contribute to the establishment, progress, and achievement of the goals of the African Economic Community.<sup>26</sup>

### **2.2 THE COMESA COURT OF JUSTICE**

One of the 8 COMESA institutions established as the judicial branch of the common market under Article 7 of the COMESA Treaty is the COMESA Court of Justice (CCJ). The PTA Tribunal and PTA Administrative Appeals Board were replaced by the Court.<sup>27</sup> The Court plays a crucial role in the region's economic integration by ensuring that the COMESA treaty is interpreted and applied correctly. It also upholds the rule of law and makes fair and impartial decisions on all cases brought before it. This helps to create a

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<sup>26</sup> Art. 3. <[https://www.comesa.int/wp-content/uploads/2019/02/comesa-treaty-revised-20092012\\_with-zaire\\_final.pdf](https://www.comesa.int/wp-content/uploads/2019/02/comesa-treaty-revised-20092012_with-zaire_final.pdf)> (accessed on 4 February, 2024).

<sup>27</sup> Kasongo, supra n 24.

consistent legal framework for the common market, which in turn promotes regional integration and fosters economic growth.<sup>28</sup>

The COMESA Court of Justice consists of two divisions: the Appellant Division (AD) with five judges and the First Instance Division (FID) with seven judges. According to the Treaty, the council is responsible for directing all other COMESA subordinate organs, except the Court, in the exercise of its adjudication and arbitration authority. This provision is aimed at safeguarding the Court's independence.<sup>29</sup>

### **2.2.1 The Legal Framework of the COMESA Court of Justice**

The COMESA Treaty serves as the foundational document establishing COMESA and providing the legal framework for all subsequent instruments, which derive their legitimacy from it. All Protocols and Annexes to the Treaty are integral components of the COMESA Community Law.<sup>30</sup>

COMESA creates regulations that apply to all member states. These regulations are published in the Official Gazette of the common market and become effective on the date of their publication or a later date specified in the regulation.<sup>31</sup>

The Court draws from a variety of legal systems to establish a full set of Community Laws. These systems include English Common Law, Continental Civil Law, and Islamic Law, which were introduced through colonization and religious expansions. English Common Law is practiced in Eswatini, Kenya, Uganda, Zambia, and Zimbabwe. The Civil Law system is present in Burundi, Madagascar, and Rwanda, while Islamic Law is found in Egypt, Sudan, and Tunisia. Additionally, some member states have hybrid jurisdictions, such as Mauritius and the Seychelles, which use a blend of Common and

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<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> COMESA Court of Justice (2020) Medium Term Strategic Plan 2021-2025 p 7-8. Available at <<https://comesacourt.org>>

<sup>31</sup> Ibid.

Civil Law, Sudan, which has a hybrid of Islamic and Common Law, and Egypt, which has a hybrid of Islamic and Civil Law.<sup>32</sup>

The Court's arbitration jurisdiction allows it to establish laws and systems. Article 38 of the Treaty gives the Court the authority to create its own procedural rules. In 2016, the Court revised its Rules of Procedure, and in 2018, it updated its Arbitration Rules. In arbitration cases, some litigants use international legal systems like the UNIDROIT Principles.

The COMESA Court of Justice is also enriched by the wisdom and legal precedents of other regional Courts that share similar mandates. These include the East African Court of Justice, the SADC Tribunal, and the European Court of Justice.

### **2.2.2 Adjudication Jurisdiction of The COMESA Court of Justice**

According to Article 26 of the COMESA Treaty, individuals or organizations who reside in a COMESA member state have the right to submit a reference to the Court. This reference may be made to challenge any act, decision, regulation, or direction made by a council or member state that is believed to be illegal or in violation of the Treaty. In view of the above, **Article 26** provides that:

*any person who is resident in a member state may refer for determination by the Court the legality of any act, regulation, directive, or decision of the council or a member state because such an act, directive, decision, or regulation is unlawful or an infringement of the provisions of the treaty, provided that where the matter for determination relates to any act, regulation, directive by a member state, such person shall not refer the matter for determination under this Article unless he has first exhausted local remedies in the national Courts or tribunal of the member state.*<sup>33</sup>

Article 26 requires the exhaustion of local remedies in accordance with the worldwide rule of exhaustion of local remedies. Before sending the case to regional or international

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<sup>32</sup> Ibid p 8.

<sup>33</sup> Art. 26

tribunals, the regulation is meant to enable the member state where the alleged unlawful act or infringement occurred the chance to settle the dispute through its internal dispute resolution process. Other international and regional Courts have ruled that lawsuits filed in their Courts prior to the exhaustion of local remedies are inadmissible, therefore the COMESA Court of Justice is not the only body subject to this condition.

The requirement for local remedies to be exhausted was upheld by the International Court of Justice (ICJ) in the case of *Eletronica Sicula S.p. A. (ELSI) (United States of America v. Italy)*<sup>34</sup>. In addition, the African Court on Human and Peoples Rights (ACHPR) determined in *Peter Joseph Chacha v. Tanzania*<sup>35</sup> that the exhaustion of domestic remedies was mandated by international law and could not be chosen.

The COMESA Court of Justice, First Instance Division, in *Intelsolmac v Rwanda Civil Aviation Authority*<sup>36</sup> dismissed the claim because it was inadmissible because of the failure by the applicant to exhaust local remedies before filing the reference in terms of Article 26 of the COMESA Treaty.

In the case of *Republic of Mauritius v Polytol Paints & Adhesive Manufacturers Co. Ltd* in addressing a preliminary objection, the Court made it clear that, for the purposes of Article 26, a party may come before the Court directly if it was evident that the respondent (Polytol) had exhausted all local remedies.

The Court also held that the respondent had exhausted all available domestic remedies. If parties cannot exhaust local remedies, there is a window of opportunity wherein they could file lawsuits directly with the COMESA Court of Justice.

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<sup>34</sup> (1989) I.C.J. Rep.15 (Judgement of 20 July, 1989).

<sup>35</sup> Application No 003/2012 Judgement of 28 March, 2014.

<sup>36</sup> Reference No. 1 of 2009.

This was equally emphasized by the COMESA Court of Justice in *Agiliss v The Republic of Mauritius and 4 others* where it was held that exhaustion of local remedies should have an element of availability and effectiveness of the exhausted remedies.<sup>37</sup>

### **2.2.3 Arbitral Jurisdiction of the COMESA Court of Justice**

Article 28 of the COMESA Treaty grants the COMESA Court of Justice the power to adjudicate on legal issues that arise from disputes between member states, as long as the dispute is presented before it through a special agreement signed by the concerned member states or through an arbitration clause contained in a contract that gives such jurisdiction to COMESA or any of its organs.<sup>38</sup>

Based on Article 8, it is evident that the arbitral jurisdiction of the COMESA Court of Justice has two aspects. These are:

- i. The referral of a case to the Court by an arbitral clause in a contract which grants the COMESA Court of Justice jurisdiction, where COMESA or its institutions are a party<sup>39</sup>; and
- ii. Reference to the Court through a special agreement between member states.<sup>40</sup>

Article 28(a) of the treaty grants jurisdiction, subject to the requirement that at least one party be a member of the common market or any of its institutions. It is important to note that the arbitration Court is not authorized to hear disputes related to businesses involving private parties.

According to Article 28 (b) of the COMESA Treaty, the COMESA Court of Justice's jurisdiction is limited only to member states. This means that the Court is restricted in its ability to adjudicate disputes and provide legal remedies to parties that are not members of the COMESA trade bloc. The provision effectively creates a barrier to access to justice for non-member states, as they are unable to seek legal redress in the Court.

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<sup>37</sup> Application No. 1 and 2 of 2022.

<sup>38</sup> Ibid.

<sup>39</sup> Art 28(a).

<sup>40</sup> Art 28 (b).

For disputes brought under Article 28, the COMESA Court of Justice upholds party autonomy in arbitration instead of insisting on the exhaustion of local remedies.

Article 28 does not require the exhaustion of domestic remedies for arbitration, unlike Article 26. Therefore, the Court presumes that the parties intended to preclude any alternative remedy unless it is specifically stated that parties may only resort to arbitration upon the exhaustion of local remedies.<sup>41</sup>

#### **2.2.4 Jurisdiction conferred by other COMESA Legislation**

Apart from the treaty that established COMESA, the council's regulations, directives, and resolutions of the COMESA Court of Justice serve as crucial sources of COMESA law. These legal instruments provide guidelines and rules that member states must follow to ensure effective regional integration and harmonization. The COMESA Court of Justice plays a crucial role in interpreting and enforcing these laws to ensure that the common market operates smoothly and fairly for all member states.<sup>42</sup>

### **2.3 A CRITICAL ANALYSIS OF CHALLENGES FACED BY COMESA MEMBER STATES**

Arbitration institutions in Africa, including the COMESA Court of Justice, face several challenges in international commercial arbitration. This study has identified some of the challenges faced by COMESA member states in this area. These challenges include various factors that need to be addressed.

The following are the challenges identified by this study:

#### **i. Lack of Confidentiality**

Arbitration is often preferred due to its confidentiality. However, the member states of COMESA face a challenge regarding confidentiality in the arbitral process. According to Gaffney, the 2018 rules do not provide explicit or implicit assurance of confidentiality of the proceedings. This lack of confidentiality can

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<sup>41</sup> Katongo, *supra* n 24

<sup>42</sup> *Ibid.*

have implications for parties involved in the arbitration, such as the disclosure of sensitive or confidential information. It is important to ensure that arbitration proceedings provide adequate protection and assurance of confidentiality to parties involved to maintain trust in the process.<sup>43</sup>

According to Gaffney, one of the reasons why confidentiality is not a priority in COMESA arbitration is that only member states of COMESA are parties in such arbitrations thus making confidentiality a lower priority.<sup>44</sup>

Although it can be argued that a lack of confidentiality in arbitration can promote transparency and accountability in the proceedings, the opposite is true. Confidentiality in the arbitral process protects the reputation of the parties and witnesses. This protection results in parties and witnesses having the courage and confidence to produce evidence that they would otherwise not produce if the proceedings were made public for fear of implications that come with bearing witness such as harassment and threats.

This research has brought to light that although confidentiality in arbitral proceedings under the COMESA Court of Justice is expected, the 2018 Rules lack a specific provision for confidentiality in the arbitral process.

## **ii. Cumbersome Notice Process**

Gaffney has strongly argued that the notice process in the 2018 Rules is cumbersome and although there is a mention of the use of modern technology to conduct arbitration, it can be argued that alternative means of technology should be acquired by the Court to simplify the notice process and enhance the efficiency of arbitration.<sup>45</sup> It must be mentioned the COMESA Court of Justice

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<sup>43</sup> Gaffney, supra n 11.

<sup>44</sup> Ibid.

<sup>45</sup>Gaffney, supra n 11.

has introduced CaseLines, a virtual platform for arbitration.<sup>46</sup> <sup>47</sup>This is however not enough and the Court might do well to consider upgrading its current IT infrastructure to meet the demand in the cumbersome process of filling cases in the Court.

### **iii. Lack of Expedited Procedures**

According to Gaffney, the 2018 Rules fall short of providing parties with the option of an expedited procedure. An expedited procedure is a mechanism that allows parties to settle disputes in a fast and cost-efficient manner. In other words, it is a process designed to enable parties to resolve their disputes as soon as possible without incurring excessive expenses. The COMESA Court of Justice however offers emergency arbitration procedures which just provide for parties who require interim relief on an urgent basis before an arbitration tribunal has been formally constituted.<sup>48</sup>

It is common knowledge that expedited procedures are time-effective and reduce the costs of arbitration.

### **iv. Lack of Consideration for Joinder and Consolidation**

Another key issue that may arise in COMESA that the 2018 rules have neglected to address is that of joinder and consolidation. In the ever-changing realm of international commercial arbitration, complicated multi-party and multi-contract conflicts are becoming increasingly common. The lack of provisions for joinder and consolidation in the 2018 rules may make it difficult for the Court to handle complicated disputes effectively.

Joinder and consolidation are essential procedural tools that are commonly employed by several arbitration institutions in Africa when handling complex

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<sup>46</sup> Osemo, *supra* n 21.

<sup>47</sup> CaseLines provides a solution to the challenge of lawyers physically bringing cases to the Court of Justice.

<sup>48</sup> Rule 24.

arbitration disputes because they reduce time, are cost-effective, and are critical in the avoidance of parallel hearings of arbitration disputes that would otherwise be heard in a single arbitration.

The COMESA Court of Justice would have taken a similar approach as the Kigali International Arbitration Centre (KIAC). The KIAC has provisions for Joinder and Consolidation under Articles 8 and 11 of the 2012 Rules. Articles 16 and 17 of the Nairobi Centre of International Arbitration (NCIA) Rules also have these modern provisions.

**v. Lack of Investor-State Arbitration**

Another issue which is less discussed but equally as important is that the 2018 rules have no provision for investor-state arbitration. This has been argued by Gathii,<sup>49</sup> that it highly limits the jurisdiction of the COMESA Court of Justice, especially relying on the background that more than half of COMESA member states have been involved in investor-state arbitration. Parties in the common market usually seek the services of other arbitration institutions to handle investment disputes due to the incapacity of the COMESA Court of Justice to handle such disputes.

**vi. Role of National Courts**

Gathii gives a comprehensive analysis that one of the major issues that the COMESA Arbitration Rules of 2018 failed to address is the role of national Courts in COMESA arbitration.<sup>50</sup> He points out that national Courts play a significant role in the efficacy of international commercial arbitration, particularly in the recognition and enforcement of arbitral awards.<sup>51</sup>

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<sup>49</sup> Gathii, *supra* n 17.

<sup>50</sup> Gathii, *supra* n 17.

<sup>51</sup> *Ibid.*

The COMESA Court of Justice should have included a provision in its arbitration rules of 2018 to give itself a more vital role in the implementation of arbitral rulings rather than depending entirely on national Courts.<sup>52</sup> This asserts the Court's authority to make sure that its rulings are adhered to by national Courts in the common market.

**vii. High Costs of Arbitration**

Arbitration costs pose a major obstacle, given the intricate and time-consuming procedures involved. Furthermore, those opting for arbitration in the COMESA Court of Justice must shoulder the financial burden of arbitrator fees and expenses, in addition to administrative expenses if institutional arbitration is selected. While arbitration is often viewed as a cost-effective alternative to litigation, the actual expenses incurred during the arbitral process can prove to be a disadvantage. In addition, the use of stall tactics like Court applications during the arbitration process only adds to the already high costs.

**viii. Difficulties with the Recognition and Enforcement of Arbitral Awards**

One of the primary benefits of arbitration over litigation is the comparatively straightforward nature with which a foreign arbitral award rendered in a particular country can be executed in another. This is however not always achieved because enforcement of foreign arbitral awards has been a challenge in African arbitration. The party that prevails in an international commercial dispute usually has to enforce the judgement or award pronounced in its favour in another country where the unsuccessful party comes from.

The recognition of a Judgement obtained in a foreign Court will usually be subject to the domestic rules on the recognition of foreign Judgements of the country in which recognition is sought. Generally, such rules allow for a much more expensive review of the Judgement; thus, recognition and enforcement are

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<sup>52</sup> Ibid.

more likely to be denied. Enforcement proceedings under the arbitration process usually only require two weeks. However, in practice, due to certain intervening matters that arise, such as the resistance of the party against whom enforcement is sought, enforcement might be prolonged. It is often difficult for arbitral tribunals and the Courts to resist a party`s dilatory tactics and deny time extensions.

Although it is challenging to draw broad conclusions about the obstacles to the enforcement and recognition of arbitral rulings throughout the region, it is arguable that these obstacles are caused by the varying stages of development of arbitration regimes among the COMESA member nations.<sup>53</sup> National Courts may reach different conclusions on the recognition and enforcement of arbitral rulings, even in cases where comparable frameworks do exist. Article (v) of the New York Convention, which outlines the grounds a party may use to challenge the recognition and enforcement of an arbitral award, is mirrored in Article 34 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on international commercial arbitration, which serves as the foundation for a number of national arbitration laws in COMESA member states. Among these noteworthy justifications is that of **public policy**.<sup>54</sup>

While the UNCITRAL Model legislation has influenced the formulation of most national arbitration rules in COMESA member nations, the interpretation of this legislation has been applied in a manner that is both liberal and inconsistent. This has a profoundly noticeable impact on how arbitral awards are recognized and upheld across jurisdictions.<sup>55</sup>

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<sup>53</sup> *Challenges with recognition and enforcement of arbitral awards in Africa*, Available on <<https://www.ibanet.org/challenges-with-recognition-enforcement-arbitral-awards-africa> > (accessed on 3 February, 2024).

<sup>54</sup> Ibid.

<sup>55</sup> Muigua, supra n 18.

**ix. Prolonged Arbitration Processes**

It is widely accepted that until recently, arbitration was thought to be a faster alternative to litigation. However, in recent years, experts have raised concerns about the speed of arbitration in comparison to litigation. This is due to various factors, with the complexity of disputes submitted to arbitration in the COMESA Court of Justice being a significant one. Although the parties and the arbitral tribunal are free to determine the procedure they wish to follow, it has become customary for them to agree on a lengthy process. Moreover, parties can file unnecessary applications in Court to hinder the progress of arbitral proceedings. Additionally, arbitrators are increasingly ordering the production of evidence documents, which inevitably prolongs the proceedings.

The other contributing factor to prolonged arbitration processes is that the 2018 Rules lack provisions on the conduct of legal representatives such as those enshrined in Article 18.5 of the London Court of International Arbitration.<sup>56</sup>

These provisions moderate the behaviour of legal representatives and prohibit them from deliberately prolonging the arbitral process through unnecessary objections to the appointment of arbitrators; deliberate avoidance of presentation of documents or evidence with a view to prolong the arbitral process; and refusal or failure to adhere to the arbitral procedure rules with a view of frustrating the arbitral process. If the Court of Justice had full control over the conduct of legal representatives, prolonged arbitral processes would have never been a challenge in the common market.

**x. Challenges with Exhaustion of Domestic Remedies and the COMESA Court of Justice`s Bias in the Review of Domestic Remedies.**

The COMESA Court of Justice treaty necessitates the exhaustion of local remedies, in contrast to the treaties creating the SADC Tribunal or the East

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<sup>56</sup> Rules of 2014.

African Court of Justice (EACJ).<sup>57</sup> This rule of customary international law aims to strike a balance between two conflicting interests: first, it allows the nation in which a claim originates to have its Courts determine whether a local remedy is available before seeking an international remedy; second, it permits a claimant to seek an international remedy in cases where the local remedy was unavailable, ineffective, or insufficient.

This provision has been a crucial factor in explaining why there are not many cases brought before the COMESA Court of Justice, as this paper demonstrates later by studying a few cases.

Although it was decided over two decades ago, the 2001 case of the *Republic of Kenya and the Commissioner of Lands v Coastal Aquaculture*,<sup>58</sup> is very important for the sake of this study. Whether the case's applicant had used all available domestic remedies was in question. The applicant filed the lawsuit to prevent the Kenyan government from forcibly seizing its two parcels of land and endangering its \$24 million investment. The applicant had previously succeeded in halting the purchases as being against Kenyan law in both the High Court of Kenya and the Kenyan Court of Appeal, which at the time was the highest Court.

Instead of resorting back to Kenyan Courts, the COMESA Court of Justice was presented with a case after the Kenyan government made three attempts to take the applicant's property by force. The petitioner contended before the COMESA Court of Justice that the Kenyan government's persistent efforts to obtain its property prevented it from moving forward with investment projects valued at US\$24 million in preoperational costs. The lack of a satisfactory settlement and the uncertainty resulting from the Kenyan government's repeated attempts at acquisition made the COMESA Court of Justice preferable to Kenyan Courts.

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<sup>57</sup> Art. 26.

<sup>58</sup> Reference No. 3 of 2001.

The applicant argued that it was an intolerable situation for which the Kenyan national Courts were unable to provide relief.<sup>59</sup>

Despite expressing sympathy for the applicant's frustration with the project, the COMESA Court of Justice determined that there was no exhaustion of domestic remedies due to the applicant's withdrawal of a case from the Kenyan High Court shortly before the case was filed in the COMESA Court of Justice.<sup>60</sup>

By arguing that there was no exhaustion of domestic remedies, the COMESA Court of Justice was effectively avoiding having to rule on a politically contentious case from one of the more powerful COMESA member states. The COMESA Court of Justice failed to handle this issue well knowing that the government had persisted in trying to forcibly take possession of the applicant's property despite the applicant having won earlier lawsuits in Kenya, which according to this researcher, had been more than enough evidence in the exhaustion of domestic remedies, which the COMESA Court of Justice denied having been the case.

Another case worth analyzing is that of *The Republic of Mauritius v Polytol Paints and Adhesives Manufacturers Co Ltd*.<sup>61</sup> In this case, the COMESA Court of Justice's First Instance Division reinterpreted the conditions that apply to the exhaustion of domestic remedies rule by not interpreting this rule as severely as it had in the *Aquaculture* case discussed above. The COMESA Court of Justice held in this case that domestic remedies should be considered as fully exhausted when it is not reasonable to expect the applicant to obtain an adequate and effective remedy.<sup>62</sup>

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<sup>59</sup> Ibid. at p. 10

<sup>60</sup> Ibid.

<sup>61</sup> Preliminary Application No. 1 of 2012 (Arising from Reference No. 1 of 2012)

<sup>62</sup> Ibid.

However, in *ItelsoImac v Rwanda Civil Aviation Authority*,<sup>63</sup> According to the First Instance Division of the COMESA Court of Justice, in order to prove that it was not possible to exhaust domestic remedies due to the actions of a COMESA member state, a party must present compelling evidence of the measures taken to pursue local remedies. Moreover, it is necessary to describe in detail the type of actions taken by the state party or its agents to obstruct access to such remedies.<sup>64</sup> In this instance, a Ugandan company claimed that there had been a breach of contract. It had attempted to recruit eight different law firms, but none of them was willing to take on the company's allegations against the Rwandan government.<sup>65</sup> The COMESA Court of Justice's First Instance Division ruled that there was insufficient evidence to support the applicant's ardent pursuit of local remedies in order to resolve the case. This ruling demonstrated the COMESA Court of Justice's continued unwillingness to make decisions that contradict governments.

The COMESA Court of Justice's rulings in the instances examined on the exhaustion of domestic remedies have resulted in the effective blocking of significant rulings against the governments of COMESA member states.<sup>66</sup>

The COMESA Court of Justice is reluctant to adopt expansionist interpretations that could put it in conflict with the governments of the COMESA member states, even though this approach could be seen as legal diplomacy (a tactic to avoid decisions that would essentially constitute a review of sovereign decisions by the COMESA Court of Justice).

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<sup>63</sup> Reference No. 1 of 2009 (Ruling of 7 May, 2010).

<sup>64</sup> *Ibid* at p. 11.

<sup>65</sup> *Ibid*.

<sup>66</sup> Gathii, James Thuo, *The COMESA Court of Justice* (2018). Published in *THE LEGITIMACY OF INTERNATIONAL TRADE COURTS AND TRIBUNALS*, R. Howse, H. Ruiz-Fabri, G. Ulfstein, and M. Zang (eds.), Cambridge University Press, 2018, Available at <<https://ssrn.com/abstract=3314213>> (accessed 4 February, 2024).

This researcher sees this approach as a weakness on the part of the COMESA Court of Justice that was supposed to be addressed in the COMESA Court of Justice Arbitration Rules of 2018. There has been opposition to the expansionist decision-making among Africa's sub-regional Courts, and in one case, a Court has been suspended.<sup>67</sup>

The COMESA Court of Justice's cautious stance in refusing to overturn rulings made by member state national Courts is aptly illustrated in the *Itelso/Imac* case, where the Court dismissed substantial evidence indicating that the Rwandan government had made it impossible to pursue a domestic remedy.

The COMESA Court of Justice similarly dismissed the second appeal in the more recent case of *Agiliss v. The Republic of Mauritius and 4 others*, finding that the appellant had not exhausted domestic remedies, notwithstanding the appellant's affirmation that the available domestic remedies were ineffective.<sup>68</sup>

When interpreting the exhaustion of domestic remedies, the COMESA Court of Justice has not been very inventive.<sup>69</sup> It has deterred cases from reaching its docket by showing its inability to interpret domestic remedies.<sup>70</sup>

COMESA member states have a great deal of leeway to avoid having to defend themselves in front of the COMESA Court of Justice due to this strict interpretation of the exhaustion of domestic remedies.<sup>71</sup> The Court disregarded

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<sup>67</sup> See Alter, Karen J. and Gathii, James Thuo and Helfer, Laurence R, *Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences* (August 5, 2016). 27 *European Journal of International Law*, 293-328 (2016), iCourts Working Paper Series, No. 21, Duke Law School Public Law & Legal Theory Series No. 2015-19, Available at <<https://ssrn.com/abstract=2591837>> or <<http://dx.doi.org/10.2139/ssrn.2591837>> (accessed 6 February,2024).

<sup>68</sup> Appeal No.2 of 2022 (Arising from Reference No. 2 of 2022)

<sup>69</sup> Gathii, supra n 78.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

and rationalized member states' non-appearance in matters filed in its docket, demonstrating its deference to COMESA member states.<sup>72</sup>

Several regional Courts, like the East African Court of Justice (EACJ), are not at all like this. Remarkably, by ignoring the applicability of the exhaustion of domestic remedies rule, the EACJ and other regional Courts have a considerably wider range of matters appearing before their dockets.

The EACJ does not consider the exhaustion of domestic remedies before an application is made to its docket.<sup>73</sup>

#### **xi. Economic challenges**

The COMESA Court of Justice, which serves as the judicial arm of the Common Market for Eastern and Southern Africa, is currently encountering a host of operational challenges at its permanent seat located in Khartoum, Sudan.<sup>74</sup> The Court is facing significant obstacles due to the economic embargo imposed on the host member state.<sup>75</sup> The resulting difficulties have forced the Court to maintain and operate most of its financial affairs from Lusaka, Zambia, which has further complicated its operations.<sup>76</sup>

In addition, the Court is grappling with financial constraints arising from some Member States' failure to remit their budgetary contributions in a timely manner. These issues have significantly impacted the Court's ability to function effectively

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<sup>72</sup> For example, Burundi did not appear before the CCJ in *Eastern and Southern Africa Trade and Development (PTA Bank) v The Republic of Burundi*, Reference No. 1 of 2006 and Application No. 1 and 2 of 2006 (Decision of the First Instance Division of 16 August, 2006).

<sup>73</sup> Gathii, *supra* n 78.

<sup>74</sup> COMESA Medium Term Strategic Plan: 2021-2025. Available at <[https://www.comesa.int/wp-content/uploads/2022/03/4Final-MTSP-2021-2025-English-Reviewed-2\\_feb.pdf](https://www.comesa.int/wp-content/uploads/2022/03/4Final-MTSP-2021-2025-English-Reviewed-2_feb.pdf)> (accessed on 11 March, 2024).

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

and efficiently, hindering its mission to provide a fair and impartial judicial mechanism to resolve disputes within the region.<sup>77</sup>

Financial challenges also add to the backlog of cases the Court handles because the sitting of the Court is dependent on finances which are not readily available.

## **xii. Political challenges**

The Host Member State has been grappling with a series of political challenges since the close of 2018. These challenges have created a plethora of operational and administrative difficulties for the Court. As a direct consequence of these difficulties, the Court has been obligated to conduct the majority of its activities - including Court sessions, meetings, and other essential functions - away from its Seat.<sup>78</sup> This situation has resulted in a significant disruption to the Court's smooth operations, thereby posing a considerable challenge to the Court's ability to function effectively.

## **2.4 CONCLUSION**

This Chapter has generally discussed the overview of COMESA and has established that it is a free trade area consisting of 21 member states, including Zambia. It was established in 1991 as an association of sovereign states with unrestricted freedom and serves as a fundamental component of the African Economic Community.

The aims and objectives of COMESA include sustainable growth, joint development in economic activity, cooperation in creating an enabling environment for investment, promotion of peace, security, and stability, strengthening connections between the Common Market and other nations of the world, and their contribution to the establishment, development, and realization of the African Economic Community's aims.

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<sup>77</sup> COMESA, *supra* n 83 p 21.

<sup>78</sup> *Ibid.*

This Chapter has highlighted that the COMESA Court of Justice (CCJ) is one of the eight institutions established under COMESA and serves as the judicial branch of the common market under Article 7 of the COMESA Treaty.

Its main duties include interpreting and applying the COMESA treaty, upholding the rule of law, and making decisions on cases brought before it. The Court is composed of five judges in the Appellant Division and seven judges in the First Instance Division.

This Chapter has discussed the jurisdiction of the COMESA Court of Justice and has revealed and critically analyzed the various challenges encountered by countries in COMESA.

Some of these notable challenges include the cumbersome notice process at the Court, lack of expedited procedures, high costs of arbitration, lack of investor-state arbitration at the Court, prolonged arbitration processes and economic and political challenges.

It is recommended that the Court takes up digital operations (notices should entirely be digitized) to reduce the cumbersome notice process. This can be achieved by continuous enhancement and update of the Court`s current IT infrastructure.

The Court should also consider reducing the cost of arbitration in line with other regional Courts such as the EACJ as arbitration costs are becoming increasingly high and as a result defeating the purpose of arbitration in comparison to litigation (which should be more expensive).

The Court can also benefit tremendously by introducing investor-state arbitration in its docket bearing in mind that most COMESA Member States have been involved in investor-state disputes. COMESA Member States should not engage other arbitration institutions like the London Court of International Arbitration for investor-state disputes when there is a Court within the region that should have the capacity to handle such cases.

As regards the political and economic challenges, the COMESA Court of Justice should consider moving its seat from Khartoum, Sudan, which has experienced political instability since 2018 and has consequently suffered economic sanctions.

The Court should also not rely solely on its member states for budgetary contributions but should have a more self-reliant approach such as hosting of fundraising events to supplement its budget. Relying on contributions from member states has greatly limited the Courts' activities due to the low remittance of contributions by some states.

## CHAPTER 3

### A CRITICAL ANALYSIS OF THE COMESA COURT OF JUSTICE ARBITRATION RULES OF 2018

#### 3.0 INTRODUCTION

In November 2018, the COMESA Council of Ministers approved the new arbitration rules that the COMESA Court of Justice had developed. The original COMESA Arbitration rules issued in 2003 have been revised and repealed in favour of the current ones.<sup>79</sup> Any issue that the Court must decide by Article 28 of the Treaty is covered by these rules.<sup>80</sup> The 2018 rules provide comprehensive provisions on important matters, including the composition and authority of the arbitral tribunal, the location and time of the arbitration, the arbitral processes, the award, and the expenses.<sup>81</sup>

This Chapter thus critically analyzes some of the rules that are relevant to this study and also highlights and discusses areas that need reform.

#### 3.1 A CRITICAL ANALYSIS OF THE RULES

The 2018 Rules comprises 41 rules and 02 schedules. The rules are arranged systematically as discussed below.

##### 3.1.1 Preliminary

**Rule 1 to Rule 6** is the **Preliminary**. In this context, **Rule 1** provides citation and interpretation of the rules. **Rule 2** provides for the scope of the application. Parties are at liberty to choose the processes and amend the rules in accordance with Rule 2 as long as the Court permits it.<sup>82</sup> This rule gives party autonomy to the parties but with a limitation or restriction in the sense that the freedom of the parties to frame procedural

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<sup>79</sup> Mwangi Gakunga (2019) *COMESA Court launches Revised Arbitration Rules of Arbitration*. Online report available at < <https://www.comesa.int/comesa-court-launches-revised-rules-of-arbitration/> > (accessed on 9 February, 2024).

<sup>80</sup> Gaffney, *The 2018 COMESA Arbitration Rules, Already Time for an Update*. Available at <<https://www.tamimi.com/law-update-articles/the2018-comesa-arbitration-rules-already-time-for-an-update>> (accessed 9 February, 2024).

<sup>81</sup> Ibid.

<sup>82</sup> Rule 2 (2) (b).

rules gets subjected to the predesigned norms of the COMESA Court of Justice. Party autonomy is a fundamental component in international commercial arbitration as it protects the parties' rights regarding the appropriate authority of the arbitral tribunal.

It is the parties' prerogative to select the arbitrators and members of the arbitral tribunal in arbitration. This increases party confidence because it preserves predictability, allowing the parties to understand that the arbitration process will proceed in accordance with the terms of the arbitration agreement.

Considering the importance of party autonomy in international commercial arbitration, this rule needed to be amended further in order to give parties full autonomy in the arbitral process.

**Rule 3** provides for the mode of service. This rule allows for physical service.<sup>83</sup> In as much as physical service is elaborated in almost all the rules of international commercial arbitration institutions in Africa, it is a retrospective way of doing things in this digital era. Physical service is a cumbersome process in its entirety as it is expensive.

Although this rule provides for electronic service in paragraph 4,<sup>84</sup> the COMESA Court of Justice could have considered not prioritizing physical service, particularly given the development of digital service systems such as CaseLines.<sup>85</sup>

**Rule 4** provides for the computation of time. This rule was well formulated as it conforms to the rules of other international commercial arbitration institutions in the region and needs no further analysis. This also applies to **Rule 5** which provides for notice of arbitration.

**Rule 6** provides for legal representation. Even though this rule allows parties to choose legal representation, it is silent on changing of legal representation. As this study revealed, this rule would have benefited from a further amendment to allow flexibility for

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<sup>83</sup> Rule 3 (1).

<sup>84</sup> Rule 3.

<sup>85</sup> A good example is the introduction of CaseLines by COMESA for easier and quicker virtual processes.

change of legal representation. The rule lacks authority to adjust the approval by the arbitral tribunal of changes in legal representation.<sup>86</sup> A good example of such a provision is that of **Rule 5** paragraph 2 of the Cairo Centre for International Commercial Arbitration (CRCICA) which provides for changes in legal representation.<sup>87</sup>

### **3.1.2 Composition and Jurisdiction of the Arbitral Tribunal**

**Rules 7 to 10** address the composition and jurisdiction of the arbitral tribunal. In this regard, **Rule 7** provides for the appointment of the Arbitrator or arbitrators. The sitting judges who have been appointed to the Court are the ones chosen as arbitrators.

The President of the COMESA Court of Justice has the privilege of appointing them to the arbitral tribunal. The parties in this instance don't have the privilege to choose their arbitrators (as is the case in all institutional arbitrations) but can challenge the impartiality of an arbitrator and have him/ her replaced by a different arbitrator. It is a requirement that an arbitrator should disclose any circumstances likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence.<sup>88</sup> The parties, however, have the privilege to choose the number of arbitrators.<sup>89</sup>

The COMESA Court of Justice could consider introducing a new rule of allowing parties to choose the arbitrators (the way it is done in ad-hoc arbitration) in order to avoid the complicated and prolonged process of replacing an arbitrator if the parties feel he or she is impartial, despite the Court practising institutional arbitration. The Court would equally have adopted the stance on **Rule 9** of the Nairobi Centre for International Arbitration (NCIA)<sup>90</sup> which vividly provides for consideration of the nationality of a judge before appointment to the arbitral tribunal.

**Rule 8** provides for preliminary meetings. Preliminary meetings are primarily useful in helping to define and clarify certain issues that come up during the arbitration process in order to prevent future misunderstandings and delays. During the preliminary meeting,

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<sup>86</sup> Gaffney, above n 11.

<sup>87</sup> CRCICA Arbitration Rules of 2024.

<sup>88</sup> Rule 9(2)

<sup>89</sup> Rule 7(3).

<sup>90</sup> Arbitration Rules of 2015.

both parties can evaluate each other's arguments and focus the disagreement on particular points that can be decided by the arbitrator. In addition to encouraging the parties to decide on some potential interim issues, this meeting allows the arbitral panel and the parties to deliberate about the protocols that will be followed throughout the arbitration process.

This rule has significantly and favourably impacted the time it takes to conclude arbitration procedures.

**Rule 9** provides for the challenge of arbitrators. It should be emphasized that such objections are essential and a useful tool for guaranteeing the impartiality and integrity of the arbitration process when applied appropriately. Unfortunately, the right motivation isn't always applied while using arbitration challenges. More often than not, parties are using procedural tactics to subvert arbitrators in an effort to manipulate the process rather than uphold the impartiality and integrity of the arbitration. While party challenges are rarely grounds for disqualification of arbitrators, they are a useful tool for holding up proceedings or frustrating the other side.

**Rule 10** is a clause for liability exclusion whereby the parties, by submitting themselves to arbitration under these rules, agree to waive any claim made against the Arbitral Tribunal, Emergency Arbitrator, Judges, the Court, its officers and employees, or any individual appointed by the arbitral tribunal or the Emergency Arbitrator, arising from any act or omission performed in good faith in connection with the arbitration, will not be considered.

### **3.1.3 The Arbitral Proceedings**

**Rules 11 to 28** are concerned with the arbitral proceedings. **Rule 11** provides for general provisions which are straightforward and as this study revealed, did not need further analysis. **Rule 12** provides for the juridical seat of arbitration. Under this rule, parties have the power to designate the juridical seat of arbitration in accordance with the arbitration agreement.<sup>91</sup> Additionally, the arbitral tribunal can decide if so authorized

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<sup>91</sup> Rule 12 (a).

by the parties. In the event that the parties have not granted permission, the arbitral tribunal may decide based on the relevant circumstances and the parties' agreement.<sup>92</sup>

**Rule 13** provides for the place of arbitration and accordingly, the place of arbitration shall be in any of the Member States. The location of the arbitration may be agreed upon by the parties in any member state; if not, the arbitral tribunal will choose the location while considering the arbitration's circumstances. This rule would equally have benefited from further amendment and a similar approach to that of **Article 23** of the Kigali International Arbitration Centre (KIAC)<sup>93</sup> where the arbitral tribunal is given more authority to choose a geographically convenient place as the seat of arbitration would have been adopted.

However, it is prudent to mention that the study did establish that some provisions in the 2018 rules were well formulated and needed no further analysis. This includes **Rule 14** which is a provision on the language which shall be any of the official languages at COMESA which includes English, French and Arabic. The COMESA Court of Justice did well to include three official languages in order to avoid the bias that comes with language issues in international commercial arbitration in Africa. This research brought out an essential issue in that when dealing with international commercial arbitration, the language issue is of utmost importance.

Since the parties involved in the arbitration come from different countries and speak different languages, arbitrators must carefully consider the language in which the factual background of the case and relevant legal arguments are presented to the arbitral tribunal. This decision can have a significant impact on the position of the parties in the arbitration process and may even affect their fundamental rights to procedural due process, such as the right to be heard and treated equally. As a result, arbitrators must be aware of the far-reaching implications of their language determination and strive to ensure that all parties are given a fair and equal opportunity to present their case.

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<sup>92</sup> Ibid at (b).

<sup>93</sup> Arbitration Rules of 2012.

**Rule 15** outlines the necessary requirements for the plaintiff's statement of claim. **Rule 16** is the statement of defence, **Rule 17** provides for amendments to the claim or defence, and **Rule 18** has provisions for pleas as to the jurisdiction of the arbitral tribunal. This provision gives the arbitral tribunal the power to make decisions regarding its own jurisdiction. **Rule 19** provides for further written statements and **Rule 20** stipulates the period for the communication of written statements. **Rule 21** has provisions on evidence. This rule is however silent on a provision for admissibility of evidence.

A specific provision on the jurisdiction of the arbitral tribunal to ascertain the materiality, relevance, admissibility, and weight of the evidence produced was supposed to be included. Authority for deciding which piece of evidence is admissible in Court reduces the waste of the arbitral tribunal's time in dealing with irrelevant pieces of evidence brought to the Court which consequently results in prolonged arbitral processes.<sup>94</sup>

**Rule 22** provides for the hearing and this rule is straightforward and needs no further analysis. **Rule 23** denotes the conservatory and interim measures that the arbitral tribunal may decide regarding the dispute's subject matter. This covers actions such as maintaining the status quo, providing interim payments, safeguarding goods crucial to the settlement of the dispute, and providing security for related expenses.

**Rule 24** provides for emergency arbitration as one of the interim measures the Court can grant upon the request of the parties. This rule needed further amendment to accommodate for **expedited procedures** in the arbitral process. Further updating this rule, the COMESA Court of Justice should consider the approach of the Cairo Centre for International Commercial Arbitration (CRCICA) in **Annex 3 Article 1**<sup>95</sup> which specifically provides for expedited arbitration procedures.

**Rule 25** gives the arbitral tribunal authority to invite experts to give their expert opinions on the matter (if none of the arbitrators on the panel are experts in the dispute at hand). This helps the arbitral tribunal make an informed decision. However, since the parties

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<sup>94</sup> See Art 27 of the Cairo Regional Centre for International Commercial Arbitration Rules of 2024.

<sup>95</sup> Arbitration Rules of 2024.

pay for the expert's services, this is expensive for them.<sup>96</sup> It would have been beneficial for the COMESA Court of Justice to incorporate a provision in the rules that allows the appointment of a judge to the arbitral tribunal who is knowledgeable or has relevant expertise regarding the dispute in question. This would help minimize the costs associated with the invitation of experts during the arbitral process.

**Rule 26** includes provisions for situations where a party fails to take action or respond within the required timeframe, also known as **defaults**. **Rule 27** provides for closure of proceedings and **Rule 28** is a provision for a waiver. This rule, although straightforward in its interpretation, is less significant.

A mere failure to object to any compliance to a rule is not sufficient to warrant a waiver for objection to such a rule. This rule needed to have a provision or a clause for a party to justify its failure to object as is the case in **Article 32** of the Cairo Centre for International Commercial Arbitration (CRCICA).<sup>97</sup>

### 3.1.4 The Award

**Rules 29 to 35** elaborate on the Award. **Rule 29** provides for the decision of the arbitral tribunal in rendering the award, **Rule 30** provides for the form and effect of the award. This rule provides for final, interim, interlocutory and partial awards.<sup>98</sup> If the arbitration law of the nation in which the award is rendered mandates the filing or registration of the award, this rule additionally stipulates that the award must be filed or registered. This implies that the registered award becomes part of the law governing the national Court that is handling the award and the award is thus subject to judicial review.

**Rule 31** cites the relevant law of the arbitration proceedings; in this instance, the arbitral tribunal applies the law that the parties have agreed is relevant to the main issues at

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<sup>96</sup> Rule 25 (9).

<sup>97</sup> Arbitration Rules of 2024.

<sup>98</sup> Rule 30 (1).

hand.<sup>99</sup> In the event that the parties are unable to agree upon an applicable law, the arbitral tribunal will use the applicable law as decided by the *conflict of law* rules.<sup>100</sup>

**Rule 32** has provisions on settlements or other grounds of termination, **Rule 33** provides for interpretation of the award. This rule is straightforward and begs no analysis.

**Rule 34** is the correction of the award which is equally straightforward and hence needs no further analysis. It might be prudent to note that the COMESA Court of Justice allows no further costs for correction or completion of its award. **Rule 35** provides for additional awards.

### 3.1.5 Costs

**Rules 36 to 39** are specific provisions for the cost of arbitration under the CCJ.

**Rule 36** highlights the fixing of costs. Cost is a major factor in institutional arbitration. One of the positive attributes of arbitration as compared to litigation is that it is less expensive. This might be the case with ad-hoc arbitration but institutional arbitration is proving otherwise. In some instances, the cost of arbitration is even more than that of litigation. The COMESA Court of Justice would have taken the same approach as the East African Court of Justice (EACJ) in abolishing the payment of Court fees.

Equally, the EACJ does not allow payments to arbitrators. Only expenses of the arbitral tribunal are enshrined in the rules.<sup>101</sup> By mitigating the challenge of expensive arbitration processes in the Court, the EACJ has made major strides in ensuring that people in the eastern community region have easier access to justice. In this vein, sub-rule 2 (a) of Rule 36 of the COMESA Court of Justice still needs to be further explored and ultimately amended in order to have cheaper arbitration processes in the COMESA Court of Justice.

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<sup>99</sup> Rule 31 (1).

<sup>100</sup> All Answers Ltd, 'Conflict of Laws in International Commercial Arbitration' (Lawteacher.net, February 2024) < <https://www.lawteacher.net/free-law-essays/commercial-law/conflict-of-laws-in-international-commercial-arbitration-commercial-law-essay.php?vref=1> > (accessed 19 February 2024).

<sup>101</sup> Rule 37(i) of the EACJ Arbitration Rules of 2012.

**Rule 37** is a provision for apportionment of costs. In international commercial arbitration, the losing party is usually responsible for paying the arbitration's costs. Nonetheless, if the arbitral tribunal finds that the cost allocation is reasonable given the facts of the case, it may divide the expenses between the parties. **Rule 38** relates to the deposit of costs; upon appointment, the arbitral tribunal may ask a party to deposit funds in advance of the costs mentioned in Sub-rule (2) Paragraphs (a), (b), and (c) of Rule 36.

**Rule 39** provides for the security of costs. In certain instances and upon request from a party, the arbitral tribunal has the power to order any Claimant or Counter-Claimant to furnish security for costs in any manner the tribunal deems appropriate.<sup>102</sup>

### **3.1.6 Provision for Application of the CCJ Rules of Procedure of 2016**

According to **Rule 40**, in cases where the 2018 Rules regarding arbitration in the COMESA Court of Justice do not provide explicit guidance, the COMESA Court of Justice Rules of Procedure of 2016 will be the governing set of rules. This provision ensures that all arbitration proceedings are conducted in compliance with established and recognized procedures, thereby promoting fairness and impartiality in the administration of justice.

### **3.1.7 Declaration and entry into force**

**Rule 41** provides that the Rules officially entered into force after receiving approval from the Council of Ministers at Lusaka, Zambia in 2018.

## **3.2 IMPORTANT PROVISIONS THAT THE 2018 RULES LACK**

Having critically analyzed the COMESA Court of Justice Arbitration Rules of 2018, this study revealed that a few salient provisions that would have catapulted the COMESA Court of Justice`s international commercial arbitration process to internationally accepted standards and at par with other regional Courts were not included in the rules. These include and are not limited to:

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<sup>102</sup> Rule 39 (1).

- a) Lack of a provision for Joinder and Consolidation-** With the evolution of more complex arbitration disputes in international commercial arbitration, an arbitration institution must be equipped with provisions such as joinder and consolidation that will handle such cases.<sup>103</sup> At the request of an existing claimant or respondent, a third party may join an ongoing arbitral action as a claimant or respondent. Consolidation unites all relevant elements of two or more arbitrations into a single arbitration process and a single award will be given. In international commercial arbitration, this significantly reduces both time and costs;
- b) Lack of a provision for removal of an Arbitrator-** Whereas the rules have a provision for the challenge of an arbitrator by the parties in Rule 9, the COMESA Court of Justice Arbitration rules lack a specific provision on the removal of an arbitrator by the arbitral tribunal in an event that an arbitrator neglects to act, is unable to carry out their duties or tasks in compliance with the rules, intentionally breaks the rules, or purposefully prolongs the arbitral procedures. Similar provisions are included in the CRCICA Arbitration Rules of 2024.<sup>104</sup>
- c) Lack of a provision for Multi-Party and Multi-Contract Arbitration –** Multi-contract arbitration involves arbitration revolving around disputes arising out of or in connection with more than one arbitration agreement which is compatible and might be solved in one arbitration instead of two or more arbitrations.<sup>105</sup> This serves time and costs;
- d) Lack of a provision for Expedited Procedures -** Despite having a provision for emergency arbitration procedures, which, according to the rules can only be used as an interim measure if a party needs urgent interlocutory measures to be put in place by the arbitral tribunal, the 2018 rules lack a provision for expedited

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<sup>103</sup> See Art 8 and 11 of the Kigali International Arbitration Centre (KIAC) Rules of 2012 and Art 50 of the Cairo Regional Centre for International Commercial Arbitration (CRCICA) Rules of 2024.

<sup>104</sup> Art 13 of the Cairo Regional Centre for International Commercial Arbitration Rules of 2024.

<sup>105</sup> See Art 10 of the KIAC Arbitration Rules of 2012 and Art 51 of the CRCICA Arbitration Rules of 2024.

procedures. Expedited procedures are very important in international commercial arbitration as this procedure saves time and costs;

**e) Lack of a provision for Investor-State Arbitration-** Investor-state arbitrations are not permitted under the COMESA Treaty. This severely restricts the COMESA Court of Justice's jurisdiction attributed to the fact that over half of its members have participated in investor-state arbitration. The International Centre for Settlement of Investment Disputes (ICSID) has made decisions for the bulk of investor-state arbitrations involving COMESA member states. A provision in the 2018 rules would have provided a forum for such arbitration in the region at a reduced cost. Moreover, the COMESA Common Investment Area (CCIA) Investment Agreement offers a framework for investor-state arbitration. The International Convention on Settlement of Investment Disputes and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which support arbitration between a member state and an investor, are two conventions that the CCIA strongly advises COMESA member states to ratify. Investor-state arbitration is permitted under Article 20 of the CCIA in situations when an investor believes that a tax policy being implemented is expropriated. The investor must first notify COMESA's Secretary-General, who will then request that the taxing authorities determine whether or not this constitutes expropriation. The investor may submit the dispute to arbitration if there is no agreement within six months of the subject being referred to arbitration. The COMESA Court of Justice should consider including investor-state arbitration in order to attract more cases to its docket;

**f) Lack of a provision for change of legal representation-** Rule 6 of the COMESA Court of Justice Arbitration Rules is silent on change of legal representation. This rule needed to be expanded further so that it provides specific provisions granting authority to the arbitral tribunal to approve changes in legal representation. A similar approach to that of **Article 5(2)** of the Cairo

Regional Centre for International Commercial Arbitration<sup>106</sup> which allows for change in legal representation may as well be considered by the COMESA Court of Justice in order to promote the party`s legal rights and ability to choose and change legal representation; and

- g) Lack of a provision for Confidentiality-**The COMESA Court of Justice Arbitration Rules of 2018 lack specific provisions on confidentiality which is one of the most important attributes of arbitration. Such a provision was supposed to be included in the rules as is the case with other arbitration institutions in the region. A good example is the provision under Rule 30(4) of the East African Court of Justice (EACJ) Arbitration Rules of 2012 which provides for confidentiality of the arbitral proceedings. Without the parties' express consent, the award or any discussions from the arbitral proceedings under this Court cannot be made public due to their confidential nature.

Similar provisions are also found in Article 48 of the Kigali International Arbitration Centre<sup>107</sup> and **Article 54** of the Cairo Regional Centre for International Commercial Arbitration.<sup>108</sup>

- h) Lack of a provision for the conduct of legal representatives-** Provisions for the conduct of legal representatives are very important. These provisions will allow the smooth flow of arbitration processes in the Court by maximizing the equal and good behaviour of legal representatives by preventing them from engaging in actions that are intended to unfairly obstruct the arbitration process, such as knowingly concealing documents or evidence with intentions of prolonging the arbitration process

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<sup>106</sup> Arbitration Rules of 2024.

<sup>107</sup> Arbitration Rules of 2012.

<sup>108</sup> Arbitration Rules of 2024.

To optimize its efficacy in resolving certain challenges encountered by its member states in international commercial arbitration, the COMESA Court of Justice would have contemplated incorporating the aforementioned significant clauses in its 2018 rules.

### **3.3 CONCLUSION**

This Chapter has analyzed the 2018 rules and has appreciated the fact that the COMESA Court of Justice incorporated notable provisions in the 2018 rules such as prioritizing party autonomy, the inclusion of French and Arabic languages as official languages for proceedings, provisions for granting interim measures to the parties and the finality of the award rendered. These changes have brought about considerable advancements to the arbitration process. However, there is still room for improvement to make the rules more consistent with other international arbitration standards.

An analysis of the 2018 rules has reviewed that the Court should amend its current arbitral rules to capture several fundamental characteristics, such as a less complicated process of filing documents, expedited procedures, the conduct of arbitrators and legal representatives and the introduction of investor-state arbitration to its docket.

It is recommended that the Court should consider restructuring itself to establish a distinct administration focused exclusively on handling international commercial arbitration disputes so that it distinguishes itself from being termed as just a classic Court rather than an international commercial arbitration institution. The Court can also benefit from improving its administrative and institutional structure. This will help improve the overall performance.

## CHAPTER 4

### A COMPARATIVE ANALYSIS OF THE COMESA COURT OF JUSTICE ARBITRATION WITH OTHER INTERNATIONAL COMMERCIAL ARBITRATION INSTITUTIONS

#### 4.0 INTRODUCTION

The COMESA Court of Justice has not done much in establishing itself as a leading arbitration institution at regional, continental or international levels and rarely sees cases being brought to its docket. This is attributed to a few salient reasons, some of which are common and standard across the African continent and affect other arbitration institutions.<sup>109</sup> Despite other regional Courts gaining popularity across the region, the COMESA Court of Justice has not had much of an impact, especially in handling international commercial arbitration disputes. This is evident from the low caseload the Court has received from the time it was formed.

It is from this background that this part of the study endeavoured to compare the COMESA Court of Justice with a few arbitration institutions in Africa which have strived to excel in international commercial arbitration. This Chapter compares the jurisdictional authority, arbitration rules and a general overview of arbitral processes of other African institutions. This is very important as it will help the COMESA Court of Justice draw valuable lessons from other arbitration institutions and possibly pave the way for improvement in its international commercial arbitration processes.

#### 4.1 THE EAST AFRICAN COURT OF JUSTICE (EACJ)

Established in November of 2001, the East African Court of Justice (EACJ) is a regional Court serving as the judicial branch of the East African Community (EAC).<sup>110</sup> The East African Court of Justice is a highly esteemed judicial institution that operates under the

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<sup>109</sup> These range from high levels of perceived corruption, challenges with recognition and enforcement of arbitral awards etc.

<sup>110</sup> Possi, Ally, *An Appraisal of the Functioning and Effectiveness of the East African Court of Justice* (October 18, 2018). Potchefstroom Electronic Law Journal, Vol. 21, 2018, Available at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3378445](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3378445)> (accessed 7 March, 2024).

framework of a treaty. Its primary mandate is to ensure compliance with the East African Community Treaty of 1999 by interpreting and applying the law, while also ensuring adherence to the treaty. The Court is composed of two distinct divisions - the First Instance Division and the Appellate Division. The First Instance Division is responsible for hearing and determining cases at the initial stages, while the Appellate Division hears appeals from the First Instance Division. This structure is similar to that of the COMESA Court of Justice.

The East African Community Summit, the highest body in the community, has the authority to select the judges of the Court, a maximum of 10 in the First Instance Division and 05 in the Appellate Division, from among individuals nominated by the member states who have demonstrated their independence, impartiality, and integrity and who meet the requirements necessary to hold a high judicial office in their home countries, or who are jurists of acknowledged competence.<sup>111</sup>

#### **4.1.1 The Legal and Institutional Framework Governing the East African Court of Justice**

The East African Court of Justice operates under a legal and institutional framework that is primarily based on the Treaty for the Establishment of the East African Community.<sup>112</sup> This treaty establishes the Court as one of its organs, with its structure and composition outlined in Article 9, and its mandate specified in Article 24.<sup>113</sup> Several legal instruments regulate the operations of the Court, including:

**i. The Treaty for the Establishment of the East African Community.**

The East African Court of Justice has been established under Article 9 of the Treaty for the Establishment of the East African Community. The primary responsibility of the Court is to ensure that the Treaty is interpreted and applied

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<sup>111</sup> Ibid.

<sup>112</sup> East African Court of Justice (EACJ) Advocates Practicing Manual. Available at <<https://ealawsociety.org/wp-content/uploads/2020/09/SIMPLIFIED-MANUAL-FOR-THE-EAST-AFRICA-COURT-OF-JUSTICE.pdf>> (accessed 18 March, 2024).

<sup>113</sup> Ibid.

in accordance with the law and that it is complied with. This Court is established as the primary body for resolving disputes that concern the Treaty;

**ii. The East African Court of Justice Rules of Procedure, 2018.**

The East African Court of Justice's Rules of Procedure are established by the authority granted in Article 42 of the Treaty for the Establishment of the East African Community. These regulations address a range of topics, including document registration, preparation, notices, timing, amendments, and modes of service. They also cover procedural matters such as representation, appearance, commencement of proceedings, amendment of proceedings, discontinuance and withdrawal of proceedings, judgments, orders, and costs; and

**iii. The East African Court of Justice Arbitration Rules, 2012.**

The East African Court of Justice Arbitration Rules of 2012 were formulated by the authority of Article 42 of the African Community Treaty. The Rules govern all the arbitration proceedings and the parties to these proceedings have the autonomy to modify or waive the implementation of the arbitration rules.

The rules govern the composition of the arbitral tribunal and the process of arbitral proceedings, as well as their conduct, such as the challenge of an arbitrator, the replacement of an arbitrator, the location of the arbitration, the time and method of hearing, and so on. The rules also cover both the decision-making process and the arbitral award.

#### **4.1.2 Role of the East African Court of Justice**

The East African Court of Justice has three main functions. Firstly, it resolves disputes that arise from the East African Community Treaty, as described in Article 27, paragraph 1, in accordance with the Treaty and its procedural rules. Secondly, it

provides an advisory opinion, in line with Article 36 of the Treaty. Finally, it handles arbitral matters in accordance with Article 32 of the Treaty and its arbitration rules.<sup>114</sup>

#### **4.1.3 Jurisdiction of the East African Court of Justice**

The East African Court of Justice is established under Article 9 of the Treaty, just like other organs of the East African Community<sup>115</sup> within Chapter 8 of the treaty which has a detailed explanation regarding the essential aspects of the Court's functioning. This includes a thorough discussion of the role of the Court in the context of the treaty, as well as the procedures for appointing judges to the Court. Furthermore, the Chapter also covers the extent of the Court's jurisdiction, the official language used in Court proceedings, and finally, the location of the Court's seat, all of which are critical components of the Court's operations. Chapter 8 of the treaty also has a detailed explanation regarding the essential aspects of the Court's functions.

This includes a thorough discussion of the role of the Court in the context of the treaty, as well as the procedures for appointing judges to the Court. Furthermore, the Chapter also covers the extent of the Court's jurisdiction, the official language used in Court proceedings, and finally, the location of the Court's seat, all of which are critical components of the Court's operations.<sup>116</sup>

Furthermore, the East African Court of Justice has jurisdiction to adjudicate cases referred to it by its member states or organs of the institutions of the East African Community that don't fulfil their treaty-mandated requirements.<sup>117</sup> The Secretary-General has the authority to bring a member state that violates the terms of the East African Community Treaty to the East African Court of Justice.<sup>118</sup>

According to Article 29 of the East African Community Treaty, the Secretary-General may only make such a recommendation after conferring with the Council and the

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<sup>114</sup> East African Court of Justice Arbitration Rules of 2012.

<sup>115</sup> Treaty for the establishment of the East African Community of 1999.

<sup>116</sup> Fred K. Nkusi, *Understanding the Jurisdictional Powers of the East African Court of Justice*. Available at <<https://www.newtimes.co.rw/article/137681/Opinions/understanding-the-jurisdictional-powers-of-the-ea-court-of-justice>> (accessed on 28 February, 2024).

<sup>117</sup> Art 28 (1) of the Treaty for the Establishment of the East African Community of 1999.

<sup>118</sup> Ibid, Art 29(1).

defaulting state. Notably, the East African Court of Justice is accessible to both natural and legal people.<sup>119</sup>

In contrast to the COMESA Treaty, any individual can challenge the legitimacy of any act, rule, direction, decision, or action taken by a member state or institution in the East African Community.<sup>120</sup> Because of this, individuals can bring cases to the East African Court of Justice.<sup>121</sup> However, individuals are not permitted to challenge the actions of the East African Community organs under Article 30 of the Treaty.

The East African Court of Justice has jurisdiction to adjudicate employment disputes between the East African Community and its employees.<sup>122</sup>

The East African Court of Justice also has the authority to issue preliminary rulings when a question of law arises before a national judicial body. This is done to guarantee uniformity in the interpretation of the East African Community Treaty. A national Court may refer an issue to the East African Court of Justice for interpretation as long as the issue concerns the East African Community Treaty.<sup>123</sup>

Furthermore, when a member state, the Council, or the Summit requests an advisory opinion on a legal matter pertaining to the East African Community Treaty, the East African Court of Justice has jurisdictional authority to offer such an opinion.<sup>124</sup>

Most importantly, the East African Court of Justice has jurisdiction to handle matters originating from an arbitration dispute, which this study discusses further below. The arbitration disputes that the Court handles should have agreements with arbitration clauses that contain a provision giving the Court jurisdiction.<sup>125</sup>

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<sup>119</sup> Ibid, Art 30.

<sup>120</sup> Van der Mei AP 'Regional Integration: The Contribution of the Court of Justice of the East African Community' 2009. Available at <[https://www.zaoerv.de/69\\_2009/69\\_2009\\_2\\_b\\_403\\_426.pdf](https://www.zaoerv.de/69_2009/69_2009_2_b_403_426.pdf)> (accessed 28 February, 2024).

<sup>121</sup> Ibid.

<sup>122</sup> Art 31 of the Treaty establishing the East African Community, 1999.

<sup>123</sup> Ibid, Art 34.

<sup>124</sup> Ibid Art 36; Opinion No.1/2015. Matter of a Request by the Council of Ministers of the East African Community for an advisory Opinion.

<sup>125</sup> Art 32 of the treaty establishing the East African Community, 1999.

#### 4.1.4 International Commercial Arbitration under the East African Court of Justice

The jurisdiction of the East African Court of Justice extends to the arbitration of disputes arising from a commercial contract or agreement that includes an arbitration clause, and in which the parties have conferred jurisdiction on the Court.<sup>126</sup> It is worth noting that unlike the COMESA Court of Justice, which limits arbitration to member states, employees and third parties of COMESA member state institutions, any party or individual may initiate arbitration proceedings at the East African Court of Justice.<sup>127</sup> During the negotiation of any commercial contract, parties are free to grant jurisdiction to the East African Court of Justice to resolve any disputes arising from the contract.<sup>128</sup> Additionally, if a dispute arises, parties are free to enter into separate arbitration proceedings with the Court to resolve the matter.<sup>129</sup>

The substantive procedural guidelines for cases submitted to the Court for arbitration are outlined in the East African Court of Justice Arbitration Rules of 2012, sometimes known as the Arbitration Rules.<sup>130</sup> The rules allow the Court to effectively carry out its function as an arbitral tribunal by generally adhering to worldwide commercial arbitration standards. When disagreements are brought before the Court, arbitration procedures are governed by these guidelines.<sup>131</sup>

There is not much difference in the formulation of the East African Court of Justice Arbitration Rules<sup>132</sup> with that of the COMESA Court of Justice Arbitration Rules.<sup>133</sup> The normal procedures of filing, hearing and awards are the same. A party desiring to take their issue to arbitration at the East African Court of Justice must first notify the other party and then make a formal request for arbitration to the Court's Registrar, just like in the COMESA Court of Justice.

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<sup>126</sup> Faith M. Macharia, *The EACJ as a seat of Arbitration for Commercial Disputes*, 13 October, 2022. <<https://aln.africa/insight/the-eacj-as-a-seat-of-arbitration-for-commercial-disputes/>> (accessed on 29 February, 2024).

<sup>127</sup> Ibid.

<sup>128</sup> Ibid.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

<sup>132</sup> Arbitration Rules of 2012.

<sup>133</sup> Arbitration Rules of 2018.

The request takes the form of a statement of claim, which preferably includes the parties' details, the facts surrounding the dispute, and the sought-after remedies. As the basis for claiming the Court's jurisdiction, copies of the agreement including the arbitration agreement must also be included in the request.

Parties have the same flexibility as in the COMESA Court of Justice to suggest the language to be used in the arbitration, the applicable law, and the ideal number of arbitrators. This encourages party autonomy, which is a crucial component of arbitration. The applicant must serve the claim on the respondent when the request has been properly filed with the Court registrar. The respondent has thirty days to make a response and, if any, a counterclaim.

The President of the Court has delegated control over the selection of arbitrators and picks from a panel of sitting judges to form the arbitral tribunal.<sup>134</sup> The parties can decide to appoint a single arbitrator, who will be chosen by the Court president with their consent.

This allows the parties to choose a judge with the training, expertise, and abilities needed to resolve the conflict independently. After the arbitral tribunal is established, a preliminary meeting is held to discuss the issues to be decided, the location of the arbitration, and the manner of hearing.

After the conclusion of the hearing, the arbitral tribunal publishes a final and binding award which is to be implemented by the parties without any delay, in accordance with the provisions of the East African Community Treaty. It is important to note that by submitting themselves to the arbitral tribunal, the parties have undertaken to comply with the resulting award.<sup>135</sup> The award can be enforced through the ordinary enforcement procedures of the country in which the award is to be enforced.<sup>136</sup>

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<sup>134</sup> Macharia, supra n 135.

<sup>135</sup> Macharia, supra n 135.

<sup>136</sup> Ibid.

#### 4.1.5 Positive Attributes of Arbitration at the East African Court of Justice

While the East African Court of Justice rarely receives cases in its docket as compared to the COMESA Court of Justice, it exhibits a few salient attributes that the COMESA Court of Justice can certainly learn from in order to improve its efficiency as an arbitral institution. This includes:

- 1) **Cost-effectiveness of the Court-**The East African Court of Justice offers an exceptional benefit to those seeking arbitration by providing a completely cost-free approach, with only a nominal filing fee paid during the claim submission process.<sup>137</sup> This is due to the fact that the arbitrators are selected from the sitting Judges of the Court, eliminating the need for additional expenses. This is in contrast to the COMESA Court of Justice where arbitration costs have always been a significant obstacle to justice, with fees skyrocketing because of the hourly charges of arbitrators who must spend extensive time reviewing documents and hearing witness testimony. The accumulation of hours during arbitration often leads to high fees payable to the arbitrators, which can be a burden for the parties involved.<sup>138</sup>

However, the East African Court of Justice offers a cost-free arbitration process that provides relief to the parties and allows them to present their case thoroughly and satisfactorily, without the constant fear of accumulating costs.<sup>139</sup> The East African Court of Justice's unique approach provides a more affordable and accessible option for resolving disputes;

- 2) **No need for the exhaustion of local remedies-** When initiating an arbitration action at the East African Court of Justice, it is not mandatory to exhaust local remedies beforehand. This means that parties can directly file a case at the Court without first attempting to resolve the dispute at the local level;

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<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

<sup>139</sup> Ibid.

**3) No Bias in the Arbitral Process-** There is a growing global concern regarding the bias of arbitrators in international commercial arbitration.<sup>140</sup> The decline in impartiality and ethical standards of arbitrators is often attributed to home country bias.<sup>141</sup> However, the East African Court of Justice has taken a different approach by appointing judges from various countries to oversee arbitration proceedings. In arbitration, it is crucial that the tribunal is neutral impartial, and free from bias.<sup>142</sup>The selection model used by the East African Court of Justice ensures that local arbitration is free from perceived bias;

**4) Jurisdiction to attend to private parties and individuals-** Unlike the COMESA Court of Justice which does not have jurisdiction to arbitrate for individuals and private parties, the East African Court of Justice attends to arbitration between individuals and/ or private parties. This is a positive attribute in the sense that individuals and private parties in the East African Community are able to access justice through their regional Court.

This makes the East African Court of Justice visible and well-established to its citizens unlike the COMESA Court of Justice which has no firm grip and is barely known by ordinary citizens in its member states as an arbitration institution.

The East African Court of Justice, with its authority to arbitrate disputes involving private parties and persons inside the East African Community, has emerged as a crucial tool for the region's business sector to resolve conflicts emerging from their cross-border ventures;<sup>143</sup>and

**5) Ability to decide Human Rights Issues-**The East African Court of Justice has the ability to arbitrate over human rights issues. Although the COMESA Court of

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<sup>140</sup> Macharia, supra n 135.

<sup>141</sup> Ibid.

<sup>142</sup> Ibid.

<sup>143</sup> Faustin Ntezilyayo. F` *The East African Court of Justice`s Arbitral Jurisdiction over Commercial Contract Disputes`* < <https://www.eacj.org/wp-content/uploads/2020/04/EACJ-Arbitral-Jurisdiction-over-commercial-contract-disputes-Ntezilyayo-CJ.pdf>> (accessed 28 February, 2024).

Justice's authority allows for the development of various norms for interpreting the COMESA Treaty, there is no explicit provision for a mechanism for resolving conflicts pertaining to human rights within the framework of the Common Market.

## **4.2 THE CAIRO REGIONAL CENTRE FOR INTERNATIONAL COMMERCIAL ARBITRATION (CRCICA)**

The Cairo Regional Centre for International Commercial Arbitration (CRCICA) prides itself as the oldest and most established arbitration institution in both Africa and the Middle East and North Africa (MENA) Region.<sup>144</sup> The Centre provides specialist arbitration services to resolve trade and investment disputes. Additionally, it provides expert advice and offers ADR techniques including mediation and conciliation.<sup>145</sup> In addition, the Centre provides contract drafting advice to parties to international commercial and investment agreements; it organizes international conferences and seminars to promote arbitration and other alternative dispute resolution (ADR) techniques; and it runs training programs for international arbitrators and legal scholars from the Afro-Asian region through its Institute for Arbitration and Investment.

Of the arbitration institutes listed on the Global Arbitration Review's "White List" for the Middle East and Africa, the Cairo Regional Centre for International Commercial Arbitration is one of just two.<sup>146</sup> It is the foremost leading arbitration institution in Africa and this study would be incomplete without taking an in-depth look at the Centre in order to grasp what makes it unique as an arbitration institution in Africa.

It is common knowledge that a good set of arbitration rules that are in line with international best practices is one of the most attractive attributes of international commercial arbitration. It is with this that the Cairo Regional Centre for International Commercial Arbitration, a distinguished institution, has taken a significant step by

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<sup>144</sup>It was created in 1979 for a three-year trial term by the Egyptian government and AALCO. The Egyptian government and the Asian-African Legal Consultative Organization (AALCO) came to an agreement in 1983 to provide the latter institution permanent status as an arbitration institution. < <https://cricica.org.eg/> > (accessed 3 March, 2024).

<sup>145</sup>< <https://cricica.org.eg/> > (accessed 3 March, 2024).

<sup>146</sup> The other institution is the Bahrain Chamber of Dispute Resolution (BCDR). < <https://bcdr.org/wp-content/uploads/GAR-Guide-2022.pdf> > (accessed 3 March, 2024).

revising its arbitration rules of 2011 on 15th January 2024. It is worth noting that these updated rules are applicable to all arbitration cases that are initiated from this date onwards.

This move reflects the centre's commitment to ensuring that its rules remain up-to-date and relevant to the current legal landscape in international commercial arbitration.

For the sake of this study, significant provisions that have been included in the 2024 Rules must be discussed. These range from clauses covering expedited procedures, early dismissal of unfounded claims, consolidation, and multi-contract arbitration.

The alterations have improved the effectiveness and transparency of the Center's international commercial arbitration procedures while also aligning the regulations with global best practices. These are discussed in detail.

- a) Consolidation-** A new clause pertaining to the aggregation of two or more arbitrations into a single arbitration was included by the 2024 Rules. Under the guidelines, consolidation may be approved if one or more of the following conditions are met: The arbitration agreements must be compatible and the disputes must arise in connection with the same legal relationship, or out of contracts consisting of a principal contract and one or more ancillary contracts, or out of the same transaction or series of transactions. Furthermore, all parties must agree in writing.<sup>147</sup>

The CRCICA has the authority to decide whether to combine arbitrations; however, the Advisory Committee must approve the decision after considering input from non-requesting parties and any appointed arbitrators in the arbitrations that are being sought to be merged.<sup>148</sup> A proposal for consolidation may be approved or denied in accordance with Article 50 (1) of the 2024 Rules. A consolidation that meets one of the requirements under Article 50 will normally

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<sup>147</sup> Clement Fouchard, *et al* 'The Cairo Regional Centre for International Commercial Arbitration has launched the CRCICA Arbitration Rules of 2024' < <https://reedssmith.com/en/perspectives/2024/02/the-cairo-regional-centre-for-international-commercial-arbitration> > (accessed 3 March, 2024).

<sup>148</sup> *Ibid.*

be approved by the Cairo Regional Centre for International Commercial Arbitration. Even though Article 50's phrasing implies that the Centre has the authority to deny an application in cases where the parties have decided to consolidate, this would be an uncommon occurrence and would depend on the specifics of the arbitration;<sup>149</sup>

- b) Multi-Contract Disputes-** Parties may initiate a single arbitration under Article 51 of the 2024 rules for claims resulting from or related to several contracts. Whether the claims should be heard in a single arbitration is up to CRCICA. In doing so, it will take into account whether the claims are submitted under identical or compatible arbitration agreements and whether the relief requested is a result of the same transaction or a sequence of transactions;<sup>150</sup>
  
- c) Joinder-** The 2011 version of Article 17.5, which allows a tribunal to order that a third party be joined to arbitration as the arbitration agreement, is still included in the 2024 regulations. This joinder does not affect either party or the third party. This clause has one more specification added by the 2024 rules: in cases when joinder is allowed, the arbitral tribunal's constitution will not change;<sup>151</sup>
  
- d) Early dismissal of claims-** Tribunals may immediately dismiss claims that are found to be "manifestly without legal merit" under the 2024 guidelines, provided that they have heard all of the parties' arguments.<sup>152</sup> However, this provision is only available to a tribunal if all parties agree to it; otherwise, it is an opt-in provision. Different from the COMESA Court of Justice, several arbitration institutions have implemented such clauses in response to parties' grievances that panels fail or refuse to dismiss claims that are baseless or frivolous at the outset; and

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<sup>149</sup> Ibid.

<sup>150</sup> Ibid.

<sup>151</sup> Clement, *et al* supra n 156.

<sup>152</sup> Art 52.

**e) Expedited Arbitration-** An expedited arbitration process has been created in 2024 rules, Annex 3. This facilitates the prompt resolution of less complicated conflicts and/or those in which promptness is crucial. A tribunal established under the expedited arbitration procedure is required to deliver its final award within six months of its formation unless the parties agree differently. Unless the parties agree otherwise, cases decided expeditiously will be decided by a lone arbitrator who has been jointly nominated. It is very important to have accelerated procedures because one of the main complaints concerning arbitration is frequently stated as delays in the arbitral process.<sup>153</sup>

When giving an insight on the 2024 Rules, Ismail Selim and Mohamed Hafez<sup>154</sup> notes that in order to ensure that the arbitration process overseen by CRCICA is in line with globally recognized standards and to solidify CRCICA's position as a prominent arbitral institution in the Middle East and Africa, the organization has implemented its 2024 Rules. These updated rules will help to provide a fair, equitable, and transparent arbitration process that inspires confidence in all parties involved.<sup>155</sup> The duo noted further that the 2024 Rules integrate contemporary practices and technological advancements to improve the efficiency, transparency and flexibility of the arbitration process.<sup>156</sup> The insight goes on to explain that CRCICA's dedication to developing a transparent, flexible and efficient arbitration system in the modern era is illustrated by its adoption of expedited arbitration rules, clear procedural guidelines, increased emphasis on technology and new provisions dealing with various aspects of arbitral procedure.<sup>157</sup>

The above provisions, as earlier elaborated in this study, are missing in the COMESA Court of Justice arbitration rules of 2018. It cannot be emphasized more that the inclusion of these provisions in the COMESA Rules of 2018 would catapult the COMESA Court of Justice into international best practice in its arbitration processes.

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<sup>153</sup> Clement, *et al* supra n 156.

<sup>154</sup> Ismail Selim, Mohamed Hafez (CRCICA) 'CRCICA Launches New Arbitration Rules 2024' Kluwer Arbitration Blog. Available at < <https://arbitration.blog.kluwerarbitration.com/2024/01/15/crcica-launches-new-arbitration-rules-2024/> > (accessed 18 March, 2024).

<sup>155</sup> Ibid.

<sup>156</sup> Ibid.

<sup>157</sup> Ibid.

### 4.3 KIGALI INTERNATIONAL ARBITRATION CENTRE (KIAC)

According to survey respondents in the School of Oriental and African Studies (SOAS) Arbitration in Africa Survey<sup>158</sup>, the Kigali International Arbitration Centre is considered to be among the top five arbitration institutions in Africa and the Centre has fought for its rightful place among the better-performing arbitration institutions in Africa. This is because of the arbitral rules of the Centre which are well designed and user friendly<sup>159</sup> which this part of the research will analyze further.

#### 4.3.1 An Overview of the Centre

The Private Sector Federation (PSF) of Rwanda launched the Kigali International Arbitration Centre (KIAC), herein referred to as the Centre.<sup>160</sup> The Rwandan government supported this initiative due to the inclusion of arbitration in its Investment Climate Reforms.<sup>161</sup>

The Centre was founded on January 10, 2010, under Law No. 51/2010. In 2012, it was put into full function. It was founded to serve as a forum for the arbitration of disputes and as an organization that supports arbitration in Rwanda.

Cases from parties all over the world, including the US, Kenya, Italy, Pakistan, Senegal, South Africa, the United Arab Emirates, Germany, Uganda, and Zambia, are received by the Centre.

Arbitration can be conducted under the KIAC Arbitration Rules of 2012 or UNCITRAL Arbitration Rules, as agreed by the contracting parties.<sup>162</sup> Like other international arbitration procedures, the KIAC Arbitration rules were developed with consistency in mind. Apart from executing arbitration under its regulations, the KIAC offers legal

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<sup>158</sup> 2020 Report.

<sup>159</sup> Robert Wheal et al, *Institutional Arbitration In Africa: Opportunities and Challenges*. < <https://www.whitecase.com/insight-our-thinking/institutional-arbitration-africa-opportunities-and-challenges> > (accessed 22 February, 2024).

<sup>160</sup> < <https://www.kiac.org.rw> > (accessed 5 March, 2024).

<sup>161</sup> Ibid.

<sup>162</sup> Aimey De Schoutheete and Julien Degroot, *Rwanda- Global Arbitration Review* < <https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review/2023/article/rwanda> > (accessed 5 March, 2024).

counsel for the preparation of international contracts, facilitates ad hoc arbitration, and manages arbitration and mediation programs.<sup>163</sup>

When it comes to cases handled, the KIAC has a stellar record.<sup>164</sup> The Centre was established in 2012 and has since handled over two hundred cases, of which sixty per cent were domestic and forty percent were foreign. Since 2017, the Centre has handled twenty to thirty cases annually on average.

#### **4.3.2 Important Features of the KIAC Arbitration Rules of 2012**

A number of significant aspects of the regulations call for particular consideration. First, the rules provide for scrutiny of the draft award that the arbitral tribunal shall submit to the Centre Secretariat. The Secretariat may recommend changes to the award's form and, without impairing the arbitral tribunal's discretion, may also call attention to important issues.<sup>165</sup> This is likely to ensure a better quality of arbitral awards, following in the footsteps of the International Chamber of Commerce practice.<sup>166</sup>

Second, the regulations provide a party to apply to an emergency arbitrator, similar to the COMESA Court of Justice, in order to acquire immediate interim or conservatory measures that are necessary and cannot wait for the arbitral panel to be constituted.<sup>167</sup>

Third, if both parties agree, the rules permit the consolidation of two or more arbitration processes into a single proceeding.<sup>168</sup> The Centre may, at the request of a party, consolidate two or more arbitrations into a single arbitration where:

- a) The parties have all agreed to consolidate the arbitrations; or
- b) All of the claims presented in the arbitrations are based on the same arbitration agreement; or

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<sup>163</sup> Bernadette Uwicyeza, *Africa Rising? Prospects for Emerging African Arbitral Venues*, ARB ATLANTA (November, 2014).

<sup>164</sup> Aimey et al, supra n 171.

<sup>165</sup> Art. 3 of the KIAC Arbitration Rules, 2012.

<sup>166</sup> Aimey et al, supra n 171.

<sup>167</sup> Art 34 and Annex II of the KIAC Arbitration Rules, 2012.

<sup>168</sup> Art 11.

- c) The claims brought forth in the arbitration are based on multiple arbitration agreements; or
- d) The arbitrations are between the same parties; or
- e) The disputes in the arbitration arise in connection with the same legal relationship; and
- f) The centre finds the arbitration arises in connection with the same legal relationships, and the Centre finds the arbitration agreement to be compatible.

The Centre may take into account any circumstances which it considers to be relevant, including the fact that one or more arbitrators have been confirmed or appointed in more than one arbitration when making its decision on consolidation. Unless otherwise agreed by the parties, when the arbitration is consolidated under the KIAC rules, it shall be consolidated into the arbitration which commenced first. This is a provision the COMESA Court of Justice lacks as was established in the previous Chapter of the study. Consolidation of arbitral proceedings saves time and costs.

Fourth, the rules in the KIAC are very straightforward on the issues of joinder. The question of whether third parties may be bound by the agreement may be discussed by the parties under this clause. In international commercial arbitration, the term "joinder" refers to the introduction of parties that were not initially involved in the arbitration.

Parties to an arbitration dispute may seek the Secretariat to join other parties per Article 8 of the KIAC Rules, provided that they meet the qualifications outlined in this article. One such criterion is that additional parties cannot be joined once an arbitrator has been chosen and confirmed unless both the initial parties and the newly added one agree.

As a result of the above provisions, the KIAC rules are currently in line with the rules of other better-performing arbitration institutions. These provisions give confidence to the

parties that bring cases to its docket as they are assured that their cases will be handled effectively.<sup>169</sup>

#### 4.3.3 Positive Attributes of the Kigali International Arbitration Centre

The Kigali International Arbitration Centre has certain attributes that make it a preferred seat of arbitration in Africa. These include:

- **Doctrine of Separability-** This particular approach empowers the tribunal to make individualized determinations concerning both the validity of the arbitration agreement and the legality of the contract. This doctrine is backed up by a variety of convincing arguments:
  - i. In the case of a void contract, this provision helps to maintain the agreement of the parties to settle disputes through arbitration;
  - ii. It strengthens the integrity of the arbitral process; and
  - iii. Courts normally only take into account the arbitral ruling rather than the merits of the dispute, and there is a legal presumption that two agreements exist (the contract and the arbitration clause).

Prior to the development of the law of separability, there was a persistent concern among legal professionals that if a tribunal were to set aside a contract that contained an arbitral clause, it would retroactively suppress its own adjudicatory power. This concern stemmed from the fear that if an arbitral clause was invalidated, the entire contract would be deemed unenforceable, thereby rendering the tribunal powerless to resolve any disputes that may arise between the parties.

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<sup>169</sup> The LCIA Rules supports Joinder in Article 22.1 and the ICC supports Joinder in Article 7 of its 2021 Rules. < <https://arbitrationblog.kluwerarbitration.com/2021/01/03/joinder-and-consolidation-provisions-under-2021-icc-arbitration-rules-enhancing-efficiency-and-flexibility-for-resolving-complex-disputes/> > (accessed 5 March,2024).

The law of separability, however, has provided a solution to this problem by allowing arbitral clauses to be treated as separate and independent agreements that are not affected by the invalidity of the underlying contract.<sup>170</sup>

This serves to sustain stability and carry out the parties' intended outcomes. A clearly defined doctrine such as the doctrine of separability is crucial because it guarantees the arbitral process's impartiality and fairness while also lessening the likelihood that the Courts may meddle in the proceedings.

This is undoubtedly a significant and positive development for the KIAC. Article 31<sup>171</sup> provides for the doctrine of separability;

- **Restricted intervention of state Courts in arbitration-** Due to the above-discussed provision of the doctrine of separability, the KIAC has restricted the intervention of state Courts in its arbitration proceedings. This is a very positive attribute as the intervention of state Courts in arbitration poses a challenge in the recognition and enforcement of arbitral awards. The COMESA Court of Justice needs to adopt a similar approach in order to minimise the intervention of national Courts in its arbitration proceedings;
- **Flexible Arbitration rules-**The KIAC Arbitration rules are flexible so much that they allow a party to choose arbitrators who are not on the Court's panel of arbitrators. This gives party autonomy to the parties. The COMESA Court of Justice would do well to introduce such a provision. This will discourage the cumbersome process of replacing arbitrators who are challenged by the parties;

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<sup>170</sup> Cuniberti, Gilles, *Beyond Contract - The Case for Default Arbitration in International Commercial Disputes* (February 23, 2009). University of Luxembourg Law Working Paper No. 2009-03, Available at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1348448#paper-references-widget](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1348448#paper-references-widget)> (accessed 7 March, 2024).

<sup>171</sup> KIAC Arbitration Rules of 2012.

- **Low levels of perceived corruption-** The Centre is perceived to have very low levels of corruption owing to its location in Rwanda. Rwanda is a country that has led the East African Community in the fight against corruption and it is fairly ranked on the corruption index in Africa. The country is also well ranked in Africa due to its efforts to promote the rule of law as well as exhibiting a good track record of political stability since 1994;<sup>172</sup>and
- **The ICSID Agreement-**The signing of a co-operation agreement with the International Centre for Settlement of Investment Disputes (ICSID) in April 2019 supports the trend of relocating investment disputes closer to their source by allowing ICSID hearings to be held at KIAC facilities. Additionally, this agreement promotes knowledge exchange about arbitration, conciliation, and other dispute resolution techniques between the ICSID and the KIAC.<sup>173</sup>

Given that the KIAC's arbitration rules are modelled after those of prestigious international arbitration organizations like the ICC and LCIA, they are highly relevant to contemporary commercial arbitration. The KIAC Arbitration rules clearly uphold the fundamentals of international arbitration. This researcher finds it easier to say that even though it is still in its infancy, the Centre is a modern arbitration institution that the COMESA Court of Justice may learn from.

#### **4.4 LONDON COURT OF INTERNATIONAL ARBITRATION (LCIA)**

The London Court of International Arbitration (LCIA) is considered as one of the world's leading international arbitration institutions and this study would be incomplete without attempting a comparative analysis of this renowned arbitration institution's efficient arbitration rules with that of the COMESA Court of Justice.

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<sup>172</sup> See Control of Corruption- Country Rankings, GLOB.ECON available at <<https://www.theglobaleconomy.com/rankings/corruption/> > (accessed 8 March, 2024).

<sup>173</sup> Available at < <https://icsid.worldbank.org/news-and-events/news-releases/icsid-concludes-cooperation-agreement-kiac> > (accessed 8 March, 2024).

The Secretariat, the Court, and the Company are the three (03) distinct structures that make up the LCIA. The Secretariat is the sole permanent body among them, and its duties include managing arbitral procedures. The Registrar is the Secretariat's highest authority.<sup>174</sup>

The Court, which consists of thirty-five (35) members serving five (05) year terms, oversees the Secretariat's operations. The Court's primary responsibilities include selecting arbitrators, deciding cases involving the challenging of arbitrators, and managing costs. When it comes to interpreting some LCIA Rules sections, the Court also has the last word.<sup>175</sup> The Company (another organ of the Court) bears the responsibility of overseeing the LCIA's operations and development.<sup>176</sup>

Numerous academics have written about the LCIA and its stand as one of the leading arbitration institutions globally. The author of this paper, therefore, focused on examining certain noteworthy provisions from the 2014 LCIA arbitration rules for the purposes of this study.

#### **4.4.1 Analysis of some provisions in the LCIA Arbitration Rules of 2014**

Some of the salient provisions in the LCIA Arbitration Rules include:

- i. Efficiency from Arbitrators-** Article 5.4<sup>177</sup> provides that prior to their appointment, the candidate arbitrators are obliged to submit a declaration, which entails a statement in which they must confirm their readiness, willingness and ability to devote enough time, effort, and attention to ensure that the arbitration is conducted efficiently and expediently.

This declaration aims to ascertain that the appointed arbitrators are fully committed to the arbitration process and have the necessary skills and resources to conduct the proceedings fairly and impartially. It is necessary to read this

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<sup>174</sup> Aceris Law LLC, *The London Court of International Arbitration-LCIA* (03/02/2018). Available at <<https://www.acerislaw.com/london-court-of-international-arbitration-lcia/>> (accessed 8 March, 2024).

<sup>175</sup> Ibid.

<sup>176</sup> Ibid.

<sup>177</sup> LCIA Arbitration Rules 2014.

clause in light of Articles 10.1<sup>178</sup> and 10.2 of the rules<sup>179</sup> which states that the arbitrator may be removed by the LCIA Court if they do not conduct the arbitration or take part in it with a fair level of diligence, efficiency, and devotion.

- ii. **Speed of the arbitral proceedings-** A number of clauses in the rules are designed to expedite arbitration processes. Article 18.3, which gives the arbitral tribunal the power to refuse to approve the appointment of additional legal counsel if doing so would significantly slow down the arbitral procedures, is a prime example of one of these provisions.<sup>180</sup> The arbitral tribunal considers the following factors when granting or withholding the approval of new legal representatives; the stage at which the arbitration has reached, and the likelihood of incurring extra costs or time as a result of the change or addition;
  
- iii. **Provisions for the conduct of Legal Representatives-** One of the rules' most creative and exceptional provisions are found in the Annex of the LCIA Arbitration Rules of 2014. This is the *General Guidelines for the Parties' Legal Representatives*.<sup>181</sup> The following guidelines have been put in place to ensure that legal representatives attending the LCIA arbitration exhibit good and equal behaviour;
  - a) The guidelines restrict legal representatives from inappropriately and wilfully obstructing the arbitration process;
  - b) Legal representatives are also discouraged from repeatedly challenging the appointment of an arbitrator or the authority and jurisdiction of the arbitral tribunal in attempts to prolong the arbitral process;
  - c) From knowingly making false statements to the arbitral tribunal or the Court, and from obtaining or assisting in the preparation of false evidence

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<sup>178</sup> Ibid at Art 10.1

<sup>179</sup> Art 10.2.

<sup>180</sup> Article 18.3 of the LCIA Arbitration Rules 2014 provides that any appointment of new legal representatives has to be approved by the tribunal and the appointment can be withheld if it compromises the composition of the arbitral tribunal or the finality of the award on the grounds of possible conflict or other like impediment.

<sup>181</sup> Art 18.5 and Art 18.6 of the LCIA Arbitration Rules 2014.

presented to the arbitral tribunal or the Court with a view to mislead the Court; and

- d) From knowingly concealing or facilitating the concealment of any document (or portion thereof) that a Court has ordered them to produce.<sup>182</sup>

The COMESA Court of Justice should consider such a provision in its Arbitration Rules for better and speedy arbitral processes;

- iv. Expedited formation of the Arbitral Tribunal-** According to Article 9 (A) of the LCIA Arbitration Rules, in situations of urgent need, either party may seek Court intervention for the prompt establishment of the arbitral tribunal. The petition must clearly state the reasons for the urgency necessitating the accelerated formation of the tribunal.

In the event that the LCIA approves the application, the Court will promptly designate the tribunal and may shorten any proceedings as outlined in Article 22.5. It should be noted that should the arbitration process become permanent, the same tribunal will continue to preside over the case;<sup>183</sup> and

- v. Provisions for Joinder and Consolidation-** Article 22.1 (viii)<sup>184</sup> allows the inclusion of one or more third parties into the arbitration process, provided that all parties involved have given written consent to be part of a single final award or separate awards concerning all parties implicated in the arbitration.

Article 22.1 (ix)<sup>185</sup> allows for the consolidation of arbitration cases, which means that two or more separate arbitrations can be combined into a single arbitration. However, this is only possible if all parties involved in the arbitrations to be

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<sup>182</sup> Annex to the Rules 'General Guidelines for the Parties Legal Representatives'.

<sup>183</sup> Giuseppe Broccoli, *The 2014 LCIA Rules- A Brief Analysis of the 2014 London Court of International Arbitration Rules*. Available at < <https://www.mondag.com/italy/international-courts--tribunals/436072/the-2014-lcia-rules-a-brief-analysis-of-the-2014-london-court-of-international-arbitration-rules>> (accessed 8 March, 2024).

<sup>184</sup> LCIA Arbitration Rules, 2014.

<sup>185</sup> Ibid.

consolidated agree to it in writing. The benefit of consolidation is that it streamlines the arbitration process, potentially saving time and costs for all parties involved.

As it is almost customary to find this provision in the best-performing arbitration institutions, the COMESA Court of Justice, as earlier emphasized in this study, should consider incorporating this very important provision in its arbitration rules.

#### **4.5 THE INTERNATIONAL CHAMBER OF COMMERCE (ICC)**

The ICC was founded in 1919 and headquartered in Paris, France.<sup>186</sup> It is the world's largest business organization with national committees the world over. The ICC International Court of Arbitration (the ICC Court) was formed in 1923.<sup>187</sup>

The ICC Court operates under the auspices of the International Chamber of Commerce and consists of more than one hundred arbitrators from roughly ninety countries. The ICC Court provides dispute resolution mechanisms in line with international business requirements and offers dispute resolutions which do not have state interference and provides juridical supervision.

The ICC Court is undoubtedly the most preferred and widely used arbitration institution. In the year 2023 alone, the ICC recorded approximately one thousand cases.<sup>188</sup>

The ICC Court updated its arbitration rules effective January 2021 (the 2021 Rules) from the 2017 rules in order to offer better arbitration procedures. A few important provisions were updated. Significant among the updates were provisions concerning multi-party arbitration (joinder and consolidation), party representation, avoidance of partiality and conflict of interest, increasing transparency at the ICC Court, changes in the appointment of arbitrators, and so forth.

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<sup>186</sup> International Chamber of Commerce 'Our Mission, Our History, Our Values'. Available at <<https://iccwbo.org/about-icc-2/our-mission-history-and-values/>> (accessed 9 March, 2024).

<sup>187</sup> Ibid.

<sup>188</sup> Financier World Wide "Commercial Arbitration in 2024" An In-depth Feature, February, 2024. Available at <<https://www.financierworldwide.com/indepth-feature-commercial-arbitration-2024>> (accessed 9 March, 2024).

For the sake of this writing, the author focused on one provision in particular (joinder and consolidation) for cementing the need for the COMESA Court of Justice to have a similar provision in its arbitration rules.

#### **4.5.1 Joinder and Consolidation under the ICC Court**

In the current global business landscape, cross-border transactions have become increasingly intricate and multifaceted. As a result, the international arbitration system is expected to evolve to meet the needs of its users. The system should be equipped with new mechanisms that can handle disputes that involve multiple contracts, numerous jurisdictions, parties, and third parties. It is essential to ensure that the international arbitration system can efficiently and effectively manage complex disputes that may arise in the course of international business transactions.<sup>189</sup>

In 2012, the incorporation of pioneering provisions regarding the consolidation of arbitrations and the addition of new parties was introduced. With the 2021 Rules, certain issues that were previously unclear have been further clarified, providing more precise guidance and direction for the arbitration process.

Article 10(c) of the 2021 Rules, in particular, now indicates that consolidation is allowed. Especially in situations where all of the claims in the arbitrations are made under the same arbitration agreement or agreements.<sup>190</sup> This implies that arbitrations based on a single clause or numerous clauses that are comparable to one another could be merged.

More importantly, the 2021 Rules' Article 7(5) introduces a new paragraph that significantly changes the conditions for adding additional parties once the tribunal is created.<sup>191</sup>

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<sup>189</sup> International Arbitration Survey: The Evolution of International Arbitration (2018), p. 10.

<sup>190</sup> George Vlavianos, The 2021 ICC Rules: Presentation and Commentary. Available at <<https://www.lexology.com/library/detail.aspx?g=d0aee523-3950-44d2-8915-6ddea06afc3f>> (accessed 10 March, 2024).

<sup>191</sup> Ibid.

To provide context, previous rules barred adding parties to arbitration once the tribunal was formed without unanimous consent. However, Article 7(5) of the 2021 Rules revised this provision.<sup>192</sup> This provision empowers the tribunal to assess the feasibility of allowing a new party to participate in the arbitration proceedings after the appointment of an arbitrator while taking into consideration all relevant circumstances.

When considering whether to add a new party to a tribunal, several factors need to be taken into account. These factors may include the tribunal's jurisdiction over the additional party, potential conflicts of interest, the timing of the request, and the influence it may have on the arbitration procedure. However, it's important to note that the decision to add a new party does not affect the tribunal's authority over that party.<sup>193</sup>

Consolidation of multiple international arbitrations and adding new parties to an ongoing international arbitration can provide several advantages. By consolidating multiple arbitrations, parties can save time and money that would otherwise be spent on conducting multiple separate arbitrations. Consolidating arbitrations can also help avoid inconsistent decisions or conflicting awards that may arise if the same issues are decided separately in different arbitrations.

Moreover, adding new parties to an ongoing arbitration can provide a more comprehensive resolution of disputes. New parties can bring new issues, perspectives, and evidence that can help in a better understanding of the dispute. Additionally, adding new parties can also create more efficient use of resources by avoiding the need to conduct separate proceedings on the same or related issues.

Ultimately, consolidating multiple arbitrations and adding new parties to an ongoing arbitration can bring several benefits, including cost and time savings, consistency in decision-making, and a more comprehensive resolution of disputes.<sup>194</sup>

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<sup>192</sup> ICC Court Arbitration Rules of 2021.

<sup>193</sup> Art 7(5).

<sup>194</sup> George Vlavianos & Stavros Michalopoulos, *The 2021 ICC Rules: Presentation and Commentary*, Insight, 28 October, 2020. Available at <<https://www.dlapiper.com/en-ga/insights/publications/2020/10/the-2021-icc-rules-presentation-commentary>> (accessed 10 March, 2024).

The current COMESA Arbitration Rules require such provisions to be included.

#### **4.6 CONCLUSION**

The COMESA Court of Justice, as an arbitration Court in international commercial arbitration, has not gained significant regional or international recognition in comparison to other arbitration institutions, such as the Cairo Regional Centre for International Commercial Arbitration, the East African Court of Justice, and the Kigali International Arbitration Centre within the African context, as well as the London Court of International Arbitration and the International Chamber of Commerce's International Arbitration Court at the global level.

These institutions have gained recognition and are attractive seats of arbitration mainly because they have formulated their arbitration rules to internationally accepted standards.

It cannot be disputed that favourable arbitration rules are a catalyst for attracting parties as parties have confidence that their expectations in the arbitral process will be met.

The COMESA Court of Justice Arbitration Rules of 2018 lack several provisions that other arbitration institutions analyzed in this Chapter have incorporated in their rules. The analyzed institutions share almost key identical provisions in their arbitration rules.

These range from provisions on consolidation and joinder, low costs, provisions prohibiting bias in the arbitral processes, provisions on expedited procedures, the conduct of legal representatives, provisions on jurisdiction to attend to private parties, provisions to attend to human rights cases, provisions on early dismissal of claims, provisions for enforcing the doctrine of separability, and provisions for restricting the intervention of national Courts in the arbitral processes.

As arbitration agreements grow more intricate and convoluted, the COMESA Court of Justice must be equipped with advanced and modern provisions in its arbitration rules. This will ensure that the Court can effectively cater to the needs and expectations of parties who opt to bring their cases to its docket.

The incorporation of the provisions mentioned above in the arbitration rules of the COMESA Court of Justice will significantly enhance the Court's reputation and bring it up to the globally recognized standards. As a result, the Court will become an appealing destination for arbitration, not only at the regional level but also internationally. The inclusion of these provisions will not only ensure fairness and impartiality in arbitration proceedings but also build trust and confidence among the parties involved.

## **CHAPTER 5**

### **CONCLUSION AND RECOMMENDATIONS**

#### **5.0 CONCLUSION**

International commercial arbitration is widely regarded as the most preferred means for resolving international commercial disputes. This is primarily attributed to its many positive aspects, including the involvement of a neutral third party to make the decision, lower costs when compared to litigation, a speedier process than litigation, legally binding outcomes, and the finality of the decision.

The use of international commercial arbitration has been on the rise globally, and Africa is no exception. In recent years, there has been an increase in the number of international commercial arbitration disputes being handled by African arbitration institutions. As the caseloads continue to grow, it is essential that these institutions have access to modern arbitration rules to provide the best possible arbitration services.

This study examined the effectiveness of the new arbitration rules introduced by the COMESA Court of Justice in 2018, which replaced the 2003 rules. The study aimed to investigate how these updated rules address the challenges faced by members of the common market in international commercial arbitration. To achieve this objective, the study compares the legal frameworks and operations of other arbitration institutions with those of the COMESA Court of Justice.

The significance of this study lies in the fact that it is timely and informative. It took the COMESA Court of Justice over a decade to amend its 2003 arbitration rules to formulate the recent 2018 rules.

With the constant development of international commercial arbitration concepts in the modern age, the Court should not take another decade to review its legal framework and to improve its institutional and organizational structure for it to be in line with other better-performing arbitration institutions.

The study is important in that it will help the COMESA Court of Justice draw valuable lessons from other arbitration institutions which have recorded better performance in international commercial arbitration.

The COMESA Court of Justice was established under Article 7 of the COMESA Treaty as the judicial organ of the common market. It has jurisdiction to hear arbitration disputes under Article 28 of the Treaty.

The Court also has jurisdiction to attend to other legal matters in the common market such as offering advisory opinions and interpretation of the COMESA Treaty when requested by member states.

The COMESA Court of Justice operates in Africa's largest regional economic community with 21 member states and 560 million people whose combined GDP is approximately \$804 billion. As such, the Court needs to be in a position to offer the best legal services as regards international commercial arbitration in the COMESA region and Africa at large.

The COMESA Court of Justice, however, has low or limited visibility as an arbitration institution both at regional and international levels and is often outshined by other regional Courts and arbitration institutions. The majority of the less-informed citizenry of the common market is oblivious to its existence. This means that the likelihood of the existence of challenges in international commercial arbitration among member states is undeniable and this study was undertaken given the above.

The study endeavoured to establish the existence of challenges in international commercial arbitration in the common market. The findings of the research reveal that indeed COMESA member states are faced with numerous challenges in international commercial arbitration.

These challenges include the cumbersome notice process when filing an action at the Court, the bias of the Court in reviewing the exhaustion of local remedies, lack of investor-state arbitration at the Court, prolonged arbitration processes, high costs of arbitration, difficulties with recognition and enforcement of arbitral awards, lack of

important provisions in the Courts' current arbitration rules (these include provisions for handling complex arbitration disputes such as joinder and consolidation, provisions for expedited procedures, and provisions for the conduct of legal representatives and provisions for the doctrine of separability).

Other challenges include interference by national Courts (which undermines the independent nature of the Court), jurisdiction challenges (for example the Courts' incapacity to handle human rights issues and limitations to only handle matters within the common market), and political and economic challenges.

The study also investigated the efficacy of the COMESA Arbitration Rules of 2018. An analysis of the COMESA Court of Justice revealed that its arbitration rules, although recently updated, lack very important provisions. These provisions include joinder and consolidation, the conduct of parties' legal representatives, provisions for direct access to the Court without the exhaustion of local remedies, provisions for investor-state arbitration, expedited processes, multi-party arbitration, quicker notice processes and provisions for early dismissal of unmeritorious claims.

It is common knowledge that attractive arbitration rules are key in contributing to a Court's caseload. The attractiveness of an arbitral seat largely depends on the arbitration rules of the arbitral institution. The COMESA Court of Justice however has a low caseload as parties would rather take their disputes to more established Courts that would meet their expectations.

The study further analyzed the efficacy of the COMESA Court of Justice as an arbitration institution and for the sake of establishing why the COMESA Court of Justice is underperforming as an arbitration Court, the researcher adopted a comparative way of analyzing the Court with other regional and foreign arbitration institutions. These institutions are the East African Court of Justice, the Kigali International Arbitration Centre, the Cairo Regional Centre for International Commercial Arbitration, the London Court of International Arbitration and the International Chamber of Commerce's International Arbitration Court.

These institutions are on record to be better performing in handling arbitration disputes than the COMESA Court of Justice as is evident from the caseloads in their dockets.

The findings are that, for example, the East African Court of Justice has adopted cost-effective measures for arbitration in its docket by having a *no-cost* policy and non-payment of arbitration fees to its arbitrators. This has attracted cases to its docket and has elevated the Court as a hub for justice in the East African Community. Also, the Court does not need the exhaustion of local remedies before filing an action in its docket. On the other hand, the COMESA Court of Justice considers the exhaustion of local remedies before filing a case in its docket. This is a very important attribute that the COMESA Court of Justice should emulate as it promotes prompt justice.

As much as this is commendable as far as international law on exhaustion of local remedies goes, it is an obstacle in the dispensation of justice at the COMESA Court of Justice especially since the COMESA Court of Justice have in the past exhibited a bias towards the review of the exhaustion of local remedies as shown in the cases digested in this paper.

An analysis of the Kigali International Arbitration Centre further revealed important features that the Court has put in place. Most importantly, the Centre's arbitration rules are well formulated and in line with other international institutions such as the London Court of International Arbitration and the International Chamber of Commerce's International Arbitration Court.

The arbitration rules of the Kigali International Arbitration Centre have modern provisions and are equipped to handle complex arbitration disputes. The rules have provisions for multi-party arbitrations, joinder of third parties and consolidation. This has largely contributed to the Centre's impressive caseload although it is just in its infancy as compared to other African Arbitration Institutions, case in point, the COMESA Court of Justice.

The study also went further to analyze the Cairo Regional Centre for International Commercial Arbitration. The Centre prides itself as one of the oldest and most prominent arbitration institutions in Africa. The Centre also prides itself in having the

most recently updated arbitration rules in Africa which came into force in January 2024. The rules were well formulated such that they might serve as an example for the ideal arbitration rules for other regional arbitration institutions including the COMESA Court of Justice. They include modern provisions on joinder and consolidation and multi-party arbitration.

The researcher also provided an analysis of the London International Court of Arbitration and the International Chamber of Commerce which are leading arbitral institutions in the world.

The findings of the study revealed a remarkable resemblance in the formulation of arbitration rules in the analyzed institutions which are modern and capable of handling complex arbitration disputes.

The COMESA Court of Justice would do well to adopt similar provisions in its arbitration rules. The Court must equip itself with updated modern arbitration rules to be better positioned in addressing challenges that COMESA member states are facing in international commercial arbitration.

The study equally brought out very important aspects concerning the jurisdiction of the COMESA Court of Justice in comparison to other arbitration institutions.

The jurisdiction of the Court is a limiting factor and contributes to the low caseload in the Court's docket. Other institutions such as the East African Court of Justice have extended jurisdiction to handle human rights cases. This is a positive attribute as it promotes justice and the recognition of fundamental human rights in the East African region.

The COMESA Court of Justice, being the judicial arm of the largest economic community in Africa, has the capability of becoming a hub for international commercial arbitration, not only in the COMESA region but in Africa at large. The Court just needs to improve on certain aspects of its operations as well as equip itself with modern arbitration rules which are a prerequisite to smoother arbitration proceedings and an attraction for parties to bring cases to its docket.

## 5.1 RECOMMENDATIONS

For the COMESA Court of Justice to position itself as an elite arbitral institution in the region and the world over, and be able to address challenges encountered by its member states in international commercial arbitration, the researcher concludes the study by recommending the following:

- i. **Need to update the current arbitration rules-** Although recently updated, the COMESA Court of Justice needs to further review and update its current arbitration rules. The Court should consider including important provisions in its rules such as joinder and consolidation, the conduct of parties' legal representatives, provisions for direct access to the Court without the exhaustion of local remedies, provisions for investor-state arbitration, expedited processes, provisions for multi-party arbitration, provisions for quicker notice processes and provisions for early dismissal of unmeritorious claims.

The inclusion of such provisions in the rules will promote speedier proceedings, transparency and the overall smooth flow of arbitration proceedings. The addition of these provisions will also make the COMESA Court of Justice able to handle complex arbitration disputes and ultimately make the Court an attractive seat for international commercial arbitration;

- ii. **Need to enhance the institutional and structural capacity of the Court-** To elevate the performance of the Court, it is imperative to improve the skills and competencies of the staff and judges. This can be accomplished through a comprehensive approach that includes ongoing training, education, conferences, and study tours to observe and learn from other successful arbitration institutions. By adopting this approach, the Court can enhance the knowledge and expertise of its personnel, which will ultimately lead to more efficient and effective dispute resolution for all parties involved.

To ensure effective and efficient operations, the Court should consider strengthening its organizational structure. This could be achieved by adding more sitting judges, thereby enabling the Court to handle more cases and reduce the backlog. In addition to the organizational aspect, institutional enhancement is crucial for the Court's long-term success. To achieve this, the COMESA Treaty should be reviewed and amended to ensure that it aligns with the Court's goals and objectives.

Furthermore, governance regulations and policies should be reviewed to ensure that they are in line with international best practices and that they promote transparency and accountability;

- iii. **Need to review and improve Treaty limitations of Jurisdiction-**The Court has an opportunity to enhance its reputation and broaden its reach by considering the extension of its jurisdiction to private parties outside the common market. By doing so, it can expand its scope and become a more attractive option for litigants seeking justice.

Additionally, the Court can further establish itself as a progressive institution by also having jurisdiction to hear human rights issues. This would demonstrate its commitment to protecting fundamental rights and freedoms, and contribute to the development of international law;

- iv. **Need for the Court to develop enforcement mechanisms-** While the Court can issue rulings, it lacks direct enforcement mechanisms. Member states are not always compelled to comply with its decisions as can be seen from the case law digested in this writing. This undermines the Court`s authority and effectiveness. The Court should also consider sanctioning non-compliant member states to assert itself as a judicial organ of the common market;

- v. **Need to improve the financial position of the Court**-The Court is currently experiencing several constraints in carrying out its activities due to insufficient funds. To facilitate effective operation, it is imperative to improve the Court's financial position. This can be achieved by embarking on a comprehensive resource mobilisation exercise. Additionally, the Court needs to strengthen its financial management systems to ensure that available resources are used efficiently and effectively.

Another essential step is to increase contribution collections from member states, which will provide the necessary financial backing to meet the Court's operational requirements. It is also crucial to engage potential cooperating partners who can provide extra-budgetary resources to supplement the Court's financial needs. By adopting these measures, the Court can improve its financial position and enhance its ability to function effectively;

- vi. **Need to improve the current IT infrastructure** – To achieve full automation of the Court system, it is essential to invest in acquiring the most up-to-date ICT software and equipment. This technological upgrade will significantly reduce the complexity of notification processes and enhance online filing solutions, thereby leading to improved efficiency and effectiveness in Court proceedings;

- vii. **Need to enhance justice delivery**- To ensure justice delivery, the Court can adopt various strategies. One such approach is to expand the composition of the Court by increasing the number of judges or introducing specialized Courts for specific cases. Collaborating with other regional Courts can bring invaluable expertise and resources, leading to better decision-making and a more robust legal system. Another way to strengthen the Court is by introducing alternative dispute resolution mechanisms such as conciliation, and ad hoc arbitration. These mechanisms of ADR can provide parties with a faster, less expensive, and more flexible way to resolve their disputes, reducing the burden on the Court system.

The Court can also enhance justice delivery by ensuring that it grants unlimited access to all stakeholders, including private individuals, private businesses, and citizens from countries outside the common market by simplifying its Treaty provisions, reducing the costs of arbitration and providing legal assistance such as drafting of arbitration agreements and offering consultative services. This can promote greater utilisation of the Court's services;

**viii. Need to move the seat of the Court-** Given the persistent political instability that has affected Sudan since 2018, it seems prudent for the COMESA Court of Justice to consider relocating its seat. The economic sanctions that have been imposed on Sudan as a result of this instability have greatly affected the Court's ability to operate effectively. The Court opted to temporarily sit in other countries such as Kenya and Zambia due to the political instability in the host nation. As such, it may be necessary to find a more stable host nation to ensure that the Court can continue to fulfil its mandate of upholding international justice and providing legal services to its member states; and

**ix. Need to improve the Courts' visibility-** Despite its vital role in the common market, the COMESA Court of Justice remains largely invisible to the citizens it serves. To change this, the Court must implement a comprehensive marketing campaign to raise awareness of its services. This can be achieved through various means, such as organising informative meetings and seminars for stakeholders, including Court users, disseminating information via its website and social media channels, conducting Court user satisfaction surveys to identify and address areas of improvement, and creating interactive forums where citizens in the common market can engage with the Court and better understand its role in protecting their rights and interests. By implementing these measures, the COMESA Court of Justice can increase its visibility and impact, ensuring that it is better equipped to serve the needs of the common market.

**WORD COUNT: 23,883**

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