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SCHOOL OF LAW

COURSE: PROJECT PAPER

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**THE PLACE OF INTERNATIONAL ARBITRATION IN EAST AFRICA: A CASE
STUDY OF THE EFFECTIVENESS OF THE EAST AFRICAN COURT OF JUSTICE AS
AN INTERNATIONAL ARBITRAL TRIBUNAL**

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I hereby certify that this research was undertaken under my supervision and submitted for examination with my approval as the University supervisor.

Supervisor's name: Dr. Kariuki Muigua

Signature:

Date:

LIST OF CASES AND ADVISORY OPINIONS

1. Alice Nayebare v EALS Arbitration Cause No 1/2012
2. Anne Mumbi Hinga v Victoria Njoki Gathara, [2009] eKLR
3. Dolling-Baker v Merrett
4. Eastern Seaboard Concrete Construction Co., Inc., et al v Gray Construction Inc., et al.,
District of Maine
5. Hall Street Associates, L.L.C. Petitioner v Mattel, Inc
6. Matter of a Request by the Council of Ministers of the EAC for an Advisory Opinion
Opinion No 1/2008;
7. Matter of a Request by the Council of Ministers of the EAC for an Advisory Opinion
Opinion No 1/2015.
8. Modern Holdings (EA) Limited v Kenya Ports Authority Ref No 1/2008 (11 February
2009)
9. Walusumbi v Attorney General of Uganda Ref No 8/2013 (27 February 2015).

LIST OF INTERNATIONAL CONVENTIONS

1. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States
2. The Treaty for the establishment of the East African community of 1999

LIST OF RULES

1. Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) rules
2. The East African Court of Justice Arbitration Rules, 2012
3. The London Court of International Arbitration, Arbitration Rules 2014
4. The ICSID Additional Facility Rules
5. ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules)
6. ICSID Rules of Procedure for Conciliation Proceedings (Conciliation Rules)
7. ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules)

MODEL LAW

1. UNCITRAL Model Law on International Commercial Arbitration 1985 (With amendments as adopted in 2006)

LIST OF ABBREVIATIONS

1. ADR-Alternative Dispute Resolution
2. COMESA- The Common Market For Eastern And Southern Africa
3. EAC-East African Community
4. EACJ-East African Court of Justice
5. ICSD-International Centre for Settlement of Investment Disputes
6. LCIA-The London Court of International Arbitration
7. UN-United Nations
8. UNCITRAL-United Nations Commission on International Trade
9. UNCTAD- United Nations Conference on Trade and Developments
10. RECs-Regional Economic Communities
11. SADC -Southern African Development Community

DEFINITION OF TERMS

1. Arbitration-a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.
2. An arbitral tribunal (or arbitration tribunal) - is a panel of one or more adjudicators which is convened and sits to resolve a dispute by way of arbitration. The tribunal may consist of a sole arbitrator, or there may be two or more arbitrators, which might include either a chairman or an umpire.
3. Effective- successful in producing a desired or intended result.
4. Developing Countries-less economically developed country
5. Dispute –a disagreement between two or more parties
6. International- Involving more than one country
7. International arbitration – Arbitration is considered to be international if:
 - a) the parties to an arbitration agreement have, at the time of conclusion of that agreement, their places of business indifferent states; or
 - b) one of the following is situated outside the State in which the parties have their place of business: the place of arbitration, if determined in, or pursuant to, the arbitration agreement; any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or
 - c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.”
8. Jurisdiction- the official power to make legal decisions and judgments.
9. Promote -support or actively encourage (a cause, venture, etc.); further the progress of.

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ABSTRACT

This research reflects on the functioning of the East African Court of Justice (EACJ) as an international arbitral. The motivation behind this research paper is to evaluate the effectiveness of the East African Court of Justice in resolving disputes through arbitration. In doing so, the research will do an analysis on the history behind the establishment of the court, the court's jurisdiction, the legal framework guiding the court in resolving arbitration disputes, the progress the court has had in resolving disputes through arbitration, the challenges facing the court and suggest the way forward. The research will further analyze the dynamics of arbitration disputes in the twenty-first century, and the impact of the national laws of the states on the court's effectiveness.

It is worth noting that the research paper focuses on East African Community with six (6) member states who so far have established legislative and institutional mechanisms in the area of domestic and international arbitration. These are: Kenya, Uganda, Tanzania, Rwanda, Burundi, and South Sudan. Given its relevance to the East African Community, this may therefore be the time to audit the East African Court of Justice's functioning as an international arbitral tribunal and reflect on whether it is moving in the right direction.

The hypothesis of this research is that the East African Court of Justice has been struggling as an international arbitral tribunal. In tracing its history so far it is easy to discern the importance role East African Court of Justice should play in promoting international arbitration in East African Community.

Keywords

East African Court of Justice Arbitral Jurisdiction; effectiveness as International Arbitral tribunal

CHAPTER 1

1.1 Introduction

Globalization has led to growth of commercial and investment disputes as different transacting parties interact with one another in the course of business. This has resulted to demand for effective dispute resolution mechanisms that would address the emerging market trends at a global level.¹For example; a prudent investor usually seeks investments which will yield a fair return at a minimum risk. The other party in the commercial equation, the entrepreneur, in the market for capital attempts to encourage the investor by assuring him that the risks inherent in a particular business transaction will be acceptable. The existence of the possibility of a conflict between them, both the investor and the entrepreneur necessitates the need to have specific assurances that potential disputes will be resolved promptly, efficiently, and inexpensively. In this regard arbitration is the preferred dispute resolution mechanism for many such investors and entrepreneurs.²

Africa, and even more so East Africa, is not new to this reality. The need for an effective, time saving, reliable and cost-effective mechanism has not only become desirable but also invaluable.³ The existence of such a demand gap has made international arbitration as means of resolving disputes a viable and attractive mechanism.

¹ Alternative Dispute Resolution Methods, Document series No. 14, page 2 (Harare Zimbabwe 11 to 15 Sept. 2000) available at< http://www2.unitar.org/dfm/Resource_Center /Document_Series/Document14/DocSeries14.pdf> (accessed vide: Kariuki Muigua, Promoting International Commercial Arbitration in Africa page 1(Published in CI Arb Kenya , Alternative Dispute Resolution Journal Volume 5, Number 2 2017) lastly accessed on 20th February 2019

²McLaughlin, Joseph T. “Arbitration and Developing Countries.” The International Lawyer, vol. 13, no. 2, 1979, Page 211 <JSTOR, www.jstor.org/stable/40705956> lastly accessed on 20th February 2019

³ Alternative Dispute Resolution Methods, Document series No. 14, p.2 (Harare Zimbabwe 11 to 15 Sept. 2000) available at< http://www2.unitar.org/dfm/Resource_Center /Document_Series/Document14/DocSeries14.pdf> (accessed vide: Kariuki Muigua, Promoting International Commercial Arbitration in Africa page 1(Published in CI Arb Kenya , Alternative Dispute Resolution Journal Volume 5, Number 2 2017) lastly accessed on 20th February 2019

Arbitration has been defined by several scholars, for instance: *Gould*, defined arbitration as a process in which formal disputes are determined by a private tribunal which has been selected by the parties to the dispute⁴. *Khan* defines arbitration as private consensual processes in which disputing parties decide to present their grievances to a third party for resolution.⁵

Black's Law Dictionary defines arbitration, is defined as a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.⁶ *Kariuki Muigua*, widely defines Arbitration as a mechanism for settlement of disputes which usually takes place in private, pursuant to an agreement between two or more parties in which parties agree to be bound by the decision to be given by the arbitrator according to law, or if so agreed, other considerations after a full hearing, such decision being enforceable in law.⁷

Lastly, *Jacob K Gakeri*⁸ defines *arbitration* as an adjudicative process in which the parties present evidence and arguments to an impartial and independent third party who has the authority to hand down a binding decision based on objective standards.

Arbitration is a private system of adjudication. Parties who arbitrate are the ones who have made a deliberate choice to resolve their disputes outside of any judicial system. Succinctly, arbitration involves a final and binding decision, producing an award that is enforceable in a court.⁹ This method of solving disputes has taken root mainly in settling of commercial disputes.

⁴ Gould N, Dispute resolution in the Construction Industry: An Evaluation of British Practice: A Department of the Environment, Transport and the Regions Partners in Technology Research Project (Thomas Telford, 1999) 84

⁵ Khan F, Alternative Dispute Resolution, A paper presented to the Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.

⁶ Bryan A. Garner, Black's Law Dictionary 9th Edition page 119

⁷ Kariuki Muigua, Settling Disputes Through Arbitration In Kenya (3rd Edn Glenwood Publishers Ltd, 2017) Page 2

⁸ Jacob K Gakeri, Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR (*International Journal of Humanitarian and Social Sciences, Vol. 1 No. 6; June 2011*) page 221

⁹ Margaret L. Moses, The principles and practice of International Commercial Arbitration , page 1(Cambridge University Press)

This research mainly focuses on international arbitration as practiced in the East African Court of Justice. In this regard there is need to distinguish domestic arbitration and international arbitration. Further defining international arbitration becomes imperative in this discourse.

National or domestic arbitration is one that is concerned purely with arbitration of matters within a country's jurisdiction. If everything concerned with the arbitration is related to that jurisdiction, then the arbitration is a domestic arbitration.¹⁰

On the other hand in determining what constitutes international arbitration, two elements ought to be considered. These are: The nature of the dispute in question and the nationality of the parties involved in the arbitration.¹¹

This criterion of determining whether arbitration is international in nature is adopted by the United Nations Commission on International Trade Model Law on International Arbitration (herein after UNCITRAL Model Law).¹² To this end Article 1(3) of the UNCITRAL Model Law¹³ verbatim provides that: "*arbitration is considered to be international if:*

- a) *the parties to an arbitration agreement have, at the time of conclusion of that agreement, their places of business indifferent states; or*
- b) *one of the following is situated outside the State in which the parties have their place of business:*

¹⁰Charles Manzoni, International Arbitration, The Key Elements; page 2-3 a presentation at 39 Essex Street on Wednesday 5th May 2004 <http://www.39essex.com/docs/articles/CMZ_International_Arbitration_050504.pdf>lastly accessed on 20th February 2019

¹¹Charles Manzoni, International Arbitration, The Key Elements; page 2-3 a presentation at 39 Essex Street on Wednesday 5th May 2004 <http://www.39essex.com/docs/articles/CMZ_International_Arbitration_050504.pdf>lastly accessed on 20th February 2019

¹²UNCITRAL Model Law on International Commercial Arbitration 1985 (With amendments as adopted in 2006) <https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf>lastly accessed on 20th February 2019

¹³ Ibid No.12

- i) *the place of arbitration, if determined in, or pursuant to, the arbitration agreement;*
- ii) *any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or*
- c) *the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.”*

This research adopts this definition of international arbitration. International arbitration is considered to have a number of attributes which include confidentiality, autonomy of parties, private and consensual process, flexibility and limitation of appeals.¹⁴

The allure of international arbitration mostly lies in the fact that it operates in exclusion of courts and its transnational applicability in international disputes with minimal or no interference by the national courts, thus boosting the parties' confidence of realizing justice in the best way achievable.¹⁵ Overtime, arbitration has been lauded over litigation as a faster and easier method of settling legal disputes.¹⁶ Unlike with litigation, where the judges are arbitrarily designated, arbitration allows parties to select their arbitrators, which means that they can choose individuals with particular expertise who are able to quickly comprehend complex technical issues.¹⁷

¹⁴Kariuki Muigua, *Settling Disputes through Arbitration in Kenya (Glenwood Publishers Ltd)* Page 3 to 6.

¹⁵Kariuki Muigua, *Promoting International Commercial Arbitration in Africa* page 2(Published in *CIArb Kenya , Alternative Dispute Resolution Journal* Volume 5, Number 2 2017)

¹⁶U.N. Conference on Trade and Development, New York and Geneva, 2005, *Dispute Settlement : International Commercial Arbitration*, 5.1 International Commercial Arbitration, 5, U.N. Doc. UNCTAD/EDM/Misc.232/Add.38,<http://unctad.org/en/Docs/edmmisc232add38_en.pdf>lastly accessed on 20th February 2019 [Hereinafter U.N. Conference on Trade and Dev. 5.1]

¹⁷Tsotang Tsietsi, *International Commercial Arbitration: Case Study of the Experiences of African States in the International Centre for Settlement of Investment Disputes* (Source: *The International Lawyer*, Vol. 47, No. 2 (FALL 2013), page 250 to 251

This attribute among makes international arbitration the preferred mechanism to resolve international disputes especially international commercial disputes where technical and complex matters may be the subject matter of the dispute.¹⁸

As Collier and Lowe correctly asserted, *"where the courts might appear remote, rigid, and slow and expensive in their procedures and the judges might seem unversed in the ways of commerce and the law, insensitive and ill adapted to the exigencies of commercial life, arbitrators offered an attractive alternative. Arbitrators were originally drawn from the same commercial community as the traders, often experienced in the trade, capable of offering practical suggestions for the settlement of the dispute and of doing so informally, quickly and cheaply."*¹⁹

In international arbitration parties to a dispute have the autonomy to choose the arbitrators to arbitrate their dispute. This gives the parties an opportunity to choose arbitrators that are quick to grasp the complex issues at hand. In return the arbitrators will also be quick to dispense with the dispute, thus saving the parties' time and, more importantly, money.²⁰

Another argument in favour of arbitration is that it gives parties control over the dispute resolution process by allowing them to determine by agreement, the forum, the applicable law, and the procedures to be adopted in arbitrating their dispute.²¹

¹⁸ Tsotang Tsietsi, International Commercial Arbitration: Case Study of the Experiences of African States in the International Centre for Settlement of Investment Disputes (Source: The International Lawyer, Vol. 47, No. 2 (FALL 2013), page 250 to 251

¹⁹John G. Collier & Vaughn Lowe, The Settlement of Disputes in International Law: Institutions and Procedures 45-46 (1999).

²⁰Tsotang Tsietsi, International Commercial Arbitration: Case Study of the Experiences of African States in the International Centre for Settlement of Investment Disputes (Source: The International Lawyer, Vol. 47, No. 2 (FALL 2013), page 250 to 251

²¹ U.N. Conference on Trade and Development, New York and Geneva, 2005, Dispute Settlement : International Commercial Arbitration, 5.1 International Commercial Arbitration, 5, U.N. Doc. UNCTAD/EDM/Misc.232/Add.38,<http://unctad.org/en/Docs/edmmisc232add38_en.pdf>lastly accessed on 20th February 2019 [Hereinafter U.N. Conference on Trade and Dev. 5.1]

Expounding further on the attributes of international arbitration, it is considered to be a means of settling dispute that is flexible. The flexibility lies in the fact that the parties can choose to by-pass certain procedural requirements associated with litigation that could potentially lengthen the settlement of the dispute. This flexibility also contributes to faster and cheaper resolution of disputes.²²

International arbitration further assures of confidentiality.²³ The confidential character of arbitration was captured by the English Court of Appeals in :*Dolling-Baker v Merrett*, which stated that: “...as between parties to an arbitration, although the proceedings are consensual may thus be regarded as wholly voluntary, their very nature is such that there must, my judgment, be some implied obligation on both parties not to disclose or use any other purpose any documents prepared for and used in the arbitration, or closed or produced in the course of the arbitration, or transcripts or notes of evidence in the arbitration or the award, and indeed not to disclose what evidence had been given by any witness in the arbitration, save with of the other party, or pursuant to an order or leave of the court. That qualification necessary, just as in the case of the implied obligation of secrecy between banker and customer...”²⁴

Further dispute resolution by way of arbitration is also commended for leading binding determination of a dispute and an award that is not subject to any appeal mechanism.

²²Tsotang Tsietsi, International Commercial Arbitration: Case Study of the Experiences of African States in the International Centre for Settlement of Investment Disputes (Source: The International Lawyer, Vol. 47, No. 2 (FALL 2013), page 251

²³U.N. Conference on Trade and Development, Dispute Settlement : International Commercial Arbitration, 5.1 International Commercial Arbitration, page 7-8 <http://unctad.org/en/Docs/edmmisc232add38_en.pdf>lastly accessed on 20th February 2019

²⁴ *Dolling-Baker v Merrett*, [1990] 1 W.L.R. 1205 A.C. at 1213 [Eng.]

The fact that an award is not subject to appeal on the merits gives the parties added security about the finality of the resolution process.²⁵

International arbitration awards issued by international arbitral tribunals are also easier to enforce in foreign states than judicial judgment tend to be, because of the transnational nature of international arbitration.²⁶

These attributes makes international arbitration an attractive means of solving disputes internationally especially commercial disputes. As earlier pointed out, increased globalization has led to arbitration becoming the most preferred mechanism for settling international commercial investment disputes.²⁷

While the rest of the world has tried to strengthen its legal capacity in international arbitration, Africa has been left behind in this journey. The reality of globalization that has downed on Africa has left it with no option but to try catch up with the rest of the world. This has led to formation of economic blocks such as the East African Community (EAC)²⁸ and Common Market for Eastern and Southern Africa (COMESA)²⁹, which have established legal institutions to address trade disputes within their regions. It is on this basis that the East African Court of Justice was established as an organ under East African Community.

East African Court of Justice, as an organ under East African Community, offers international arbitration as a means of solving disputes.³⁰

²⁵Ibid No. 23 page 8

²⁶Tsotang Tsietsi, International Commercial Arbitration: Case Study of the Experiences of African States in the International Centre for Settlement of Investment Disputes page 253

²⁷Franck, S.D., "The Role of International Arbitrators," page 1.

<<https://www.international-arbitration-attorney.com/wp-content/uploads/Microsoft-Word-ILW-ILSA-Article.docx>>frank2.pdf>lastly accessed on 20th February 2019

²⁸ East African Community <<https://www.eac.int/>> lastly accessed on 20th February 2019

²⁹ Common Market for Eastern and Southern Africa <<http://www.comesa.int/>>lastly accessed on 20th February 2019

³⁰Article 32 of the Treaty for the Establishment of the East African Community, 1999

This research paper will do an analysis on the history behind the establishment of the court, the court's arbitral jurisdiction, the legal framework guiding the court in resolving arbitration disputes, the progress the court has had in resolving disputes through arbitration, the challenges facing the court and suggest the way forward.

The research will further analyze the dynamics of international arbitration disputes in the twenty-first century. This is with a view of establishing the best international arbitration practices that EACJ ought to adopt to make it more effective.

1.2 Background of the Study

One of the most significant economic factors of the last two decades has been the change in the character of foreign investment in developing countries especially in Africa. The developing countries including East Africa Countries often lack the technical expertise and the capital to undertake such development, hence necessarily are dependent upon external sources of investment in order to increase their share of world trade.³¹

Private investors have been usually primarily attracted to commercially sophisticated and industrialized nations. Overtime private investors have shown increasing interest in developing countries. The shifting balance of economic power has made the developing countries highly desirable markets. They are leading contenders for investment capital.³²

Nevertheless with this new phenomenon of increased trade, investment and entrepreneurship in developing countries necessitates the need to have a mode of dispute resolution that is effective, acceptable to all parties and more importantly one that is considered transnational.

³¹E. I. Nwogugu, *The Legal Problems of Foreign Investment in Developing Countries* 1 (1965)

³²McLaughlin, Joseph T. "Arbitration and Developing Countries." *The International Lawyer*, vol. 13, no. 2, 1979, Page 211 <JSTOR, www.jstor.org/stable/40705956> lastly accessed on 20th February 2019

Overtime, it has been argued that resolution of disputes in national courts can substantially increase the risk, and therefore the price, of an international contract entered at a fixed-price basis.³³ The increase in price has been estimated to be fifty per cent. This risk factor represents the contingent liability as perceived by one of the parties when any dispute must be resolved by a foreign court rather than by an arbitral tribunal in some internationally recognized forum. Overtime, traditional litigation in a national court is considered to be a costly, time-consuming, cumbersome and inefficient process. Litigation in national courts hence is considered to obstruct, rather than enable the resolution of commercial and investment disputes.³⁴

Further the formal adversarial structure and the possibility of national bias can destroy the business relationships which are conducive to the smooth flow of international trade. Access to the national courts may be restricted because of the overcrowded courts dockets in many countries. The intricacies of the national procedures may be unknown to one or more of the parties. Moreover, foreign judgments may be difficult to enforce. For these reasons and others, businessmen and investors seek alternatives to traditional litigation.³⁵

The allure of a mode of dispute resolution that limits the risks involved with traditional litigation in national courts creates a gap that international arbitration seeks to fill. International arbitration is considered potentially more efficient and attractive mechanism.³⁶

³³K. Bocksteigel, *Arbitration and Courts - Recent Developments* (March 1978) (Paper Presented at the Sixth International Arbitration Congress, Mexico City).

³⁴McLaughlin, Joseph T. "Arbitration and Developing Countries." *The International Lawyer*, vol. 13, no. 2, 1979, Page 211 <JSTOR, www.jstor.org/stable/40705956> lastly accessed on 20th February 2019

³⁵Ehrenhaft, *Effective International Commercial Arbitration*, 9 *Law & Pol' y Int'l Bus.* 1191 (1977). Cf. Holtzmann, *Arbitration and the Courts* (March, 1978) (Sixth International Arbitration Congress, Mexico City)

³⁶McLaughlin, Joseph T. "Arbitration and Developing Countries." *The International Lawyer*, vol. 13, no. 2, 1979, Page 212<JSTOR, www.jstor.org/stable/40705956> lastly accessed on 20th February 2019

At international level disputes for example involving international trade, the discordant parties will be from different parts of the world, with correspondingly different world views, cultures and legal systems. Ideally, arbitration provides a flexible, mutually acceptable means of conflict resolution because the process is consensual: one party is not dragged unwillingly into court by another. The procedure is also considered to be understandable, flexible and informal, not overly burdened with the complex of legal rules and binding precedents. The arbitrators are often chosen by the parties and usually possess substantial commercial knowledge.³⁷

Other positive features of international arbitration include jurisdictional neutrality, confidentiality, reduced costs where there are well laid down procedures, and the possibility that the parties may strike a compromise which might not be available in a court of law. In general, the process is concerned with simple justice rather than the niceties of legal form and procedure.³⁸

Despite the many positive attributes of arbitration and its widespread use throughout the world, arbitration does not provide the definitive answer to all international disputes. There are some challenges associated with arbitration. *Professor Sanders*, for example rightly points out that the existence of different concepts of arbitration is one of the challenges facing international arbitration. The concept of arbitration is not the same everywhere in the world. The Anglo-Saxon concept of arbitration differs from that of the civil law countries and those two concepts both differ from the arbitration concept in the socialist countries. Hence Professor Sanders argues that for the unification of arbitration .He concludes that these different concepts constitute a great draw-back.³⁹

³⁷McLaughlin, Joseph T. "Arbitration and Developing Countries." *The International Lawyer*, vol. 13, no. 2, 1979, Page 212<JSTOR, www.jstor.org/stable/40705956> lastly accessed on 20thFebruary 2019

³⁸B. Cremades. *What is Arbitration? What Are Its Results, The Techniques of International Arbitration*, ICC Seminar (April 1977), at page 2-10.

³⁹Sanders, *International Commercial Arbitration*, 20 *Neth. Int'l L. Rev.* 37 (1973)

It ought to be appreciated further that often the very benefits which international arbitration should ideally provide may be lost in an international arbitration, unless the arbitration procedure is carefully chosen and tailored by the draftsmen. For example: time saving, cost effective, confidentiality, e.t.c.⁴⁰The parties to an international arbitration must anticipate the practical and legal consequences of the inclusion of an arbitration clause. Arbitration's effectiveness will always depend upon how well it satisfies the needs of the parties.⁴¹

The emergence of international arbitration as the preferred means of solving investment disputes forms the basis of this research. In light of the above, this research seeks to shed light on the effectiveness of East African Court of Justice as an international arbitral tribunal. Further the research will seek to enunciate the role EACJ plays in promoting international arbitration in East Africa, the challenges it faces and the way forward.

1.3 Statement of the Problem

The East African Court of Justice is a unique court because it has a hybrid function of entertaining both litigation and international arbitration. To many in the East African Community, it is a new but very important feature of the court.⁴² This research focuses on the role of East African Court of Justice in promoting international arbitration in East Africa.

East African Court of Justice is the only regional court in East Africa region offering international arbitration. Premised on this understanding, the court has the onerous duty to promote international arbitration in East Africa.⁴³

⁴⁰McLaughlin, Joseph T. "Arbitration and Developing Countries." *The International Lawyer*, vol. 13, no. 2, 1979, Page 215<JSTOR, www.jstor.org/stable/40705956> lastly accessed on 20th February 2019

⁴¹ McLaughlin, Joseph T. "Arbitration and Developing Countries." *The International Lawyer*, vol. 13, no. 2, 1979, Page 215<JSTOR, www.jstor.org/stable/40705956> lastly accessed on 20th February 2019

⁴²Fred K. Nkusi, Understanding the jurisdictional powers of the EA Court of Justice<<https://www.newtimes.co.rw/section/read/207744>> lastly accessed on 9th March 2019

⁴³<<https://ijrcenter.org/regional-communities/east-african-court-of-justice/>>lastly accessed on 9th March 2019

On this basis, there is need to interrogate the effectiveness of East African Court of Justice as an arbitral tribunal.

Overtime the court has not been very successful in attracting parties to arbitrate at the court. By 16th April 2015, President of the Court Justice Dr. Emmanuel Ugirashebuja noted that the court had only received one arbitral matter to arbitrate.⁴⁴This statistic illustrates the need to critique the effectiveness of East African Court of Justice as an International arbitral tribunal. Further this statistic raises the issue of the capacity of the court to arbitrate international disputes submitted to the court.

The success of East African Court of Justice in arbitrating international disputes would go a long way in promoting arbitration in East Africa. Further the international status of East African Court of Justice as an international court makes the court strategically placed to resolve international arbitral disputes. This research in essence seeks to illuminate the challenges facing East African Court of Justice as an international arbitral tribunal.

1.4 Justification of the Study

There is need for an effective international arbitral tribunal in East Africa. The East African Court of Justice as established under Article Nine (9) of the *Treaty for the Establishment of the East African Community of 1999* has the requisite jurisdiction and capacity to promote international arbitration in East Africa.

This is in accordance with its jurisdiction *to entertain arbitral matters as provided for under Article 32 of the Treaty and rules of arbitration.*⁴⁵

⁴⁴EACJ Judges' training on emerging trends in arbitration sets off<<http://eacj.eac.int/?p=2798>>lastly accessed on 9th March 2019

⁴⁵Fred K. Nkusi, Understanding the jurisdictional powers of the EA Court of Justice

The justification of this study is that; the international status of East African Court of Justice as an international court makes the court strategically placed to resolve international arbitral disputes.

Premised on this understanding, this research posits that there is need to address the factors that are inhibiting East African Court of Justice, in fulfilling its role as an international arbitral tribunal.

Effective exercise of the arbitral jurisdiction granted to East African Court of Justice *vide Article 32 of the Treaty and rules of arbitration*,⁴⁶ would significantly contribute to economic growth in East Africa.

The effectiveness of the East African Court of Justice can only be realized through a concerted effort to address the challenges facing the court as an international arbitral tribunal. The solution lies in identification of the challenges facing East African Court of Justice and offering viable recommendations, based on international best practices incorporated by other international arbitral tribunals.

1.5 Objectives of the Study

The general objective of this paper is to establish the role that East African Court of Justice plays in promoting international arbitration in East Africa. This will involve analyzing the jurisdiction of the court in arbitrating various disputes, establishing the parties with *locus standi* to arbitrate disputes at the court, establishing the rules that guide the court in arbitrating disputes, and lastly establishing procedures that are involved in arbitrating disputes at the court.

The specific objectives of the paper include;

<<https://www.newtimes.co.rw/section/read/207744>> lastly accessed on 18thMarch 2019

⁴⁶Fred K. Nkusi, Understanding the jurisdictional powers of the EA Court of Justice<<https://www.newtimes.co.rw/section/read/207744>> lastly accessed on 18thMarch 2019

- a) To establish the effectiveness of the East African Court of Justice as an international arbitral tribunal.
- b) To find out what role the East African Court of Justice has in promoting international arbitration in East Africa
- c) To identify the gaps, suggest solutions and establish areas for reform by the East African Court of Justice to make it an attractive and effective arbitral tribunal in East Africa.
- d) To establish international arbitration best practices as developed by other international arbitral tribunals over time that East African Court of Justice ought to adopt.

1.6 Research Questions

This paper will answer the following questions;

- a) What is the role of East African Court of Justice in promoting international arbitration in East Africa?
- b) What is the existing practice and procedures used in arbitrating disputes in East African Court of Justice?
- c) What challenges does the East African Court of Justice as an international arbitral tribunal face in arbitrating disputes?
- d) What are the gaps in the legal framework guiding East African Court of Justice in arbitrating disputes that ought to be addressed, to enhance the court effectiveness in resolving arbitral disputes?
- e) What are best practices by other international arbitral tribunals that the East African Court of Justice should adopt to make it more effective?

1.7 Research Hypothesis

This research proceeds on the basis that the East African Court of Justice as established under Article Nine (9) of the *Treaty for the Establishment of the East African Community of 1999*, has an onerous role to play in promoting arbitration in East Africa region. This is in accordance with its jurisdiction *to entertain arbitral matters as provided for under Article 32 of the Treaty and rules of arbitration*.⁴⁷

This research hypothesizes that there is need to critique the effectiveness of the East African Court of Justice in arbitrating disputes. Further this research accentuates the view that globalization has led to growth of commercial and investment disputes as different transacting parties interact with one another in the course of business. This has resulted to demand for effective dispute resolution mechanisms that would address the emerging market trends at a global level. Africa, and even more so East Africa, is not new to this reality. The need for an effective, time saving, reliable and cost-effective mechanism has not only become desirable but also invaluable.⁴⁸

The existence of such a demand gap has made arbitration as means of resolving disputes a viable and attractive mechanism. The East African Court of Justice, as a vital arbitral tribunal in East Africa region ought to fill such a demand gap. The effectiveness of East African Court of Justice as an international arbitral is seminal in promotion of international arbitration in East Africa.

This research proceeds on the basis that there is need to address the challenges facing East African Court of Justice as an international arbitral tribunal.

⁴⁷Fred K. Nkusi, Understanding the jurisdictional powers of the EA Court of Justice <<https://www.newtimes.co.rw/section/read/207744>> lastly accessed on 18thMarch 2019

⁴⁸Kariuki Muigua, Promoting International Commercial Arbitration in Africa page 1 (Published in CIArb Kenya , Alternative Dispute Resolution Journal Volume 5, Number 2 2017) lastly accessed on 18thMarch 2019

1.8 Theoretical Framework

Among other theories of law, this paper is centered on the positivist approach. The research paper is very much concerned with viewing the recent occurrences at East African Court of Justice in regard to arbitration. The reason for adopting the positivist approach, to the exclusion of natural law, lies in the fact that this research paper is based on the existing legal framework that guides the East African Court of Justice in arbitration of various international disputes.

This paper is focused upon looking at the written law as it is rather than the law as it ought to be and where need be offer an in-depth critique. This is in line with Professor Hart's view in his Holmes Lecture (entitled 'Positivism and the Separation of Law and Morals') that law should not be concerned with issues of morality⁴⁹.

This paper will not be concerned in any way with moral questions in the area of arbitration of disputes at East African Court of Justice.⁵⁰ To this extent, the natural school law will not be considered by this paper. Furthermore, this paper is based on positive law as opposed to natural law, because positive law is a law that is procedural in character. It is all about the law and its interpretation that this paper is concerned with. Any definitions of various terminologies that this research paper may seek to define will be mainly the definitions that the law has prescribed.

This research proceeds based on the critical legal theory which propounds that sense and order can be discerned from reasoned analysis of law and the legal system. In this regard, the writings of scholars who propounded this theory like Llewellyn were trying to improve the legal system by bringing it more in line with modern social conditions.⁵¹

⁴⁹ M.D.A. Freeman, Lloyd's introduction to jurisprudence 7th Edition Page. 129.

⁵⁰ Raymond Wacks, Understanding jurisprudence 3rd Edition, Page. 58

⁵¹ Daniel .W. Gebriel and Hassen Mohamed, Ethiopian Justice and Legal Research Institute Teaching Material on jurisprudence (2008) page 131

Premised on this understanding, this research critically analysis the law establishing the East African Court of Justice as an arbitral tribunal. Further, the research analysis the role of EACJ in promoting international arbitration to enhance economic growth in the East Africa region. This is with a view of enhancing the legal system governing the East Africa Court of Justice as an international arbitral tribunal.

This research is also based on the Afrocentric theory which proposes looking at a matter in hand from the African perspective.⁵² The theory seeks to have Africans viewing themselves as central in their history making and not marginal in economic and political experience.⁵³ Right from the periods of slave trade and colonialism, Africa has been viewed euro-centrally due to adoption of the European structure in many aspects of politics and economics. This has affected creating structures where African interest, perspectives and values dominate.

With regards to international arbitration, the referral of African disputes to offshore forums in Europe depicts Africa as a failure in building its own system and therefore relying on the European systems even after independence. Furthermore, the international rules of arbitration have been developed without the incorporation of African principles, values, and interests. Arbitration in European countries can be unsatisfactory to African states whose attitudes have been to detach themselves from the “imperialistic” and “dictatorial” tone of their former colonial master. A good example is the continued non-compliance cases by African states of ICSID awards. Therefore, to emphasize on legitimacy, and other related factors such as cost, commercial and investment disputes arising out of Africa requires a forum in Africa.

⁵² Midas Chawane ,’ The Development of Afrocentricity : A Historical Survey,’ < <http://www.scielo.org.za/pdf/yt/n16/06.pdf>> accessed on 1st October 2019

⁵³ Ibid

Premised on this theory, the research propounds that the role of the East African Court of Justice in promoting international arbitration in the East Africa region as it promotes arbitration tailor-made for the East Africa Community.

This research is based on the area of law and development. The study examines use of arbitration as a means of dispute resolution by the East African Court of Justice within the East African Community.

It seeks to answer to the problem of having a regional court that is not effective in promoting international arbitration in East Africa region, pointing out the shortcomings of the Court with regards to its effectiveness and suggest possible solutions.

The research is premised on the view that the need for an effective, time saving, reliable and cost-effective mechanism has not only become desirable but imperative catalyst of economic development in a region like East Africa.

The effectiveness of East African Court of Justice as an international arbitral tribunal is vital in promoting development in East Africa. This can be achieved through having in place a robust legal framework to guide the court.

With a proper dispute settlement mechanism, there is freer trade and movement of skilled and unskilled labour within the economic region without having unnecessary tension when disputes between parties arise.

This also tends to attract investors from outside the economic region to invest in the region. Special consideration has to be given to the concerns of both foreign investors and host countries with respect to dispute settlement procedures. On this basis it's imperative for East African Court of Justice as an international arbitral tribunal to be effective.

1.9 Research Methodology

The method that this research will be based on will be qualitative research (desk based) which will include: Library research and Internet searches. The library research will seek to critique the effectiveness of the East African Court of Justice as an international arbitral tribunal.

Further it will involve in-depth analysis of scholarly writings on East African Court of Justice as an international arbitral tribunal in East Africa community. This research paper will be based on comparative methods of inquiry in order to prove or disapprove the hypothesis.

1.10 Literature Review

Establishment of East African Community

Akiwumi, A.M., points out that the East African Community under which the East African Court of Justice is established, dates back to the colonial error where the first three-member states (Kenya, Uganda, the then Tanganyika) were colonies of the British Empire and governed under the umbrella of the East African Community. This was after Tanganyika was brought under the British administration.⁵⁴

Gathege P.S., posits that having regards to the existing social, cultural, economic, and their geographical juxtaposition Kenya Uganda and Tanzania saw it suitable to continue co-operation even after independence through establishment of the East African Community⁵⁵.

Stefan Reith and Moritz Boltz, are of the view that the East African Community enshrined political union in its founding treaty. Integration for East African Community is seen as the road to affluence and growth and which the EU, NAFTA and ASEAN provide inspiration.⁵⁶

⁵⁴Akiwumi, A.M. (1972) *'The East African Community'* 6 (2) The Journal of World Trade Law, 203.

⁵⁵Gathege P.S *'Dispute Settlement Within East African Community: The East African Court of Justice and its Jurisdiction'* Published LL.M Thesis, University of Nairobi, 2012, page 15

⁵⁶Stefan Reith and Moritz Boltz, *The East African Community, Regional Integration between aspiration and reality*

Stefan Reith and Moritz Boltz, expounding on the origin of the East African Community state that important steps towards establishing a community were taken in 1993 and 1997 at two summits of the heads of states. In 1993 the Permanent Tripartite Commission for Cooperation was set up: a coordinating institution that in 1998 produced a draft treaty for the later EAC. Cooperation on security matters was also initiated during this period.⁵⁷ Further in November 1999, the Treaty for the Establishment of the East African Community was signed by the heads of state of Uganda, Kenya and Tanzania. It entered into force on 7th July 2000. Two new members, Rwanda and Burundi, joined the Community in 2007.

Defining International Arbitration

In order to define international arbitration the starting point is defining arbitration and domestic arbitration. Arbitration has been defined by several scholars, for instance: *Gould*, defined arbitration as a process in which formal disputes are determined by a private tribunal which has been selected by the parties to the dispute.⁵⁸

Khan defines arbitration as private consensual processes in which disputing parties decide to present their grievances to a third party for resolution.⁵⁹ *Kariuki Muigua*, widely defines Arbitration as a mechanism for settlement of disputes which usually takes place in private, pursuant to an agreement between two or more parties in which parties agree to be bound by the decision to be given by the arbitrator according to law, or if so agreed, other considerations after a full hearing, such decision being enforceable in law.⁶⁰

⁵⁷Stefan Reith and Moritz Boltz, *The East African Community, Regional Integration between aspiration and reality*.

⁵⁸ Gould N, *Dispute resolution in the Construction Industry: An Evaluation of British Practice: A Department of the Environment, Transport and the Regions Partners in Technology Research Project* (Thomas Telford, 1999) 84

⁵⁹ Khan F, *Alternative Dispute Resolution*, A paper presented to the Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.

⁶⁰Kariuki Muigua, *Settling Disputes Through Arbitration In Kenya* (3rdEdn Glenwood Publishers Ltd, 2017) Page 2

Black's Law Dictionary defines arbitration, is defined as a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.⁶¹

Lastly, *Jacob K Gakeri*⁶² defines *arbitration* as an adjudicative process in which the parties present evidence and arguments to an impartial and independent third party who has the authority to hand down a binding decision based on objective standards. This research adopts these definitions.

Charles Manzoni, points out that a lot of people talk about international arbitration", without defining what it is. *Charles*, first points out that a national or domestic arbitration is one that is concerned purely with arbitration of disputes within the jurisdiction of a country.⁶³

In regard to what constitutes international arbitration, *Charles*⁶⁴ posits that two elements ought to be considered. These are: The nature of the dispute in question and the nationality of the parties involved in the arbitration.

To this end adopting the UNCITRAL Model Law criteria he states that: "*arbitration is considered to be international if*⁶⁵:

- a) *the parties to an arbitration agreement have, at the time of conclusion of that agreement, their places of business indifferent states; or*

⁶¹ Bryan A. Garner, Black's Law Dictionary 9th Edition page 119

⁶²Jacob K Gakeri, Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR (*International Journal of Humanitarian and Social Sciences, Vol. 1 No. 6; June2011*) page 221

⁶³Charles Manzoni, International Arbitration, The Key Elements; a presentation at 39 Essex Street on Wednesday 5th May 2004 <http://www.39essex.com/docs/articles/CMZ_International_Arbitration_050504.pdf >lastly accessed on 20th March 2019

⁶⁴Charles Manzoni, International Arbitration, The Key Elements; a presentation at 39 Essex Street on Wednesday 5th May 2004 <http://www.39essex.com/docs/articles/CMZ_International_Arbitration_050504.pdf >lastly accessed on 20th March 2019

⁶⁵Charles Manzoni, International Arbitration, The Key Elements; a presentation at 39 Essex Street on Wednesday 5th May 2004 <http://www.39essex.com/docs/articles/CMZ_International_Arbitration_050504.pdf >lastly accessed on 20th March 2019

- b) *one of the following is situated outside the State in which the parties have their place of business:*
- i) *the place of arbitration, if determined in, or pursuant to, the arbitration agreement;*
 - ii) *any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or*
- c) *the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.”*

This research adopts this definition of international arbitration as it seeks to critique the role of East African Court of Justice in promoting international arbitration in East Africa. Further this research will critique the effectiveness of the court as an international arbitral tribunal. It is noticeable that the existing literature does not explicitly define international arbitration. There exists guidelines that help to determine what amounts to international arbitration.

It is observable that there is no clear cut definition of what amounts to international arbitration. The existing literature gives elements that ought to be present for an arbitration to be termed as international arbitration. This is an apparent gap in the existing literature.

Kariuki Muigua, points out the attributes of arbitration which makes arbitration an attractive means of solving disputes internationally especially commercial disputes. These include confidentiality, autonomy of parties, private and consensual process, flexibility and limitation of appeals.⁶⁶

⁶⁶Kariuki Muigua, *Settling Disputes through Arbitration in Kenya (Glenwood Publishers Ltd)* Page 3-6.

Collier and Lowe analyzing the attributes that makes arbitration an attractive means of solving dispute state that:

“...where the courts might appear remote, rigid, and slow and expensive in their procedures and the judges might seem unversed in the ways of commerce and the law, insensitive and ill adapted to the exigencies of commercial life, arbitrators offered an attractive alternative. Arbitrators were originally drawn from the same commercial community as the traders, often experienced in the trade, capable of offering practical suggestions for the settlement of the dispute and of doing so informally, quickly and cheaply...”⁶⁷

This research in agreement with Collier, Lowe and Kariuki Muigua, who posits that the various attributes of arbitration especially its transnational nature makes it an attractive means of solving international disputes.

East African Court of Justice as an International Arbitral Tribunal

Gathege P.S, states that the East African Court of Justice, like the other organs of the Community, is established under Article Nine (9) of the *Treaty for the Establishment of the East African Community of 1999*⁶⁸.

Chapter Eight (8) of the Treaty further expounds on, *inter alia*, the role of the Court, the appointment of judges of the court, jurisdiction of the court, official language of the court, and the seat of the court.

⁶⁷John G. Collier & Vaughn Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* 45-46 (1999).

⁶⁸Gathege P.S 'Dispute Settlement Within East African Community: The East African Court of Justice and its Jurisdiction' Published LL.M Thesis, University of Nairobi, 2012, page 33

Asserting this further *is Faustin Ntezilyayo*, who proceeds to state that the East African Court of Justice as the judicial organ of the community was established by Article 9 (1) (e) of the Treaty for the Establishment of the East African Community (“The Treaty”).⁶⁹

Overview of the East African Court of Justice Jurisdiction

Fred K. Nkusi, in his article succinctly captures the jurisdiction of the East African Court of Justice. In this regard he predicates that, as currently established the East African Court of Justice has a threefold role: to decide, in accordance with treaty and rules of procedures, on contentious matters arising out EAC Treaty within the meaning of Article 27, paragraph 1, of the Treaty, to give an advisory opinion in accordance with Article 36 of the Treaty, and finally *to entertain arbitral matters in accordance with Article 32 of the Treaty and rules of arbitration*.⁷⁰

Fred K. Nkusi, illustrating the uniqueness of East African Court of Justice as international arbitral tribunal, states that; generally, classic courts’ (including most regional courts like the European Court of Justice) that entertains contentious matters doesn’t entertain arbitral disputes. However, the East African Court of Justice is unique because it has a hybrid function of entertaining both litigation and international arbitration. To many in the East African Community, it is a new but very important feature of the court.⁷¹

⁶⁹Faustin Ntezilyayo, Mciarb, The East African Court of Justice’s Arbitral Jurisdiction Over Commercial Contract Disputes

<http://blogaila.com/2016/03/18/the-east-african-court-of-justices-arbitral-jurisdiction-over-commercial-contract-disputes-by-dr-faustin-ntezilyayo/#_ftn2>lastly accessed on 20th March 2019

⁷⁰Fred K. Nkusi, Understanding the jurisdictional powers of the EA Court of Justice <<https://www.newtimes.co.rw/section/read/207744>> lastly accessed on 20thMarch 2019

⁷¹Fred K. Nkusi, Understanding the jurisdictional powers of the EA Court of Justice <<https://www.newtimes.co.rw/section/read/207744>> lastly accessed on 20th March 2019

Ntezilyayo F, interpreting Article 32 of the Treaty postulates that the prima facie reading of Article 32⁷² indicates that in order for the court to arbitrate over a matter, the parties must submit to its jurisdiction by way of an Arbitration Agreement or Arbitration Clause in a contract⁷³.

This retains one of the seminal features of arbitration; party autonomy; which involves the parties willingly submitting to an arbitral process, having autonomy over the arbitrator and the process making the outcome mutually acceptable to the parties as explained by *Kariuki Muigua*.⁷⁴

Faustin Ntezilyayo, elucidates the East African Court of Justice Arbitral jurisdiction as follows: East African Court of Justice's arbitral jurisdiction is based on provisions of Article 32 of the Treaty which allows the Court to constitute itself into an arbitral tribunal.⁷⁵

The Need for an Effective International Arbitral Tribunal in East Africa

Stephan W. Schill, in pointing out the importance of international arbitration states that international arbitration is a particularly good example of confronting complexity in modern international law and dispute settlement. He is of the view that one-off arbitral tribunals, constituted under different arbitral rules and without a uniform supervisory mechanism, resolve individual cases based on different national and international standards and thus create a tremendous risk of inconsistent decisions.⁷⁶

⁷² The Treaty for the Establishment of the East African Community of 1999

⁷³ Faustin Ntezilyayo, Mciarb, *The East African Court of Justice's Arbitral Jurisdiction Over Commercial Contract Disputes*

<http://blogaila.com/2016/03/18/the-east-african-court-of-justices-arbitral-jurisdiction-over-commercial-contract-disputes-by-dr-faustin-nteziyayo/#_ftn2>lastly accessed on 20th March 2019

⁷⁴ Kariuki Muigua, *Settling Disputes through Arbitration in Kenya* page 3

⁷⁵ Faustin Ntezilyayo, Mciarb, *The East African Court of Justice's Arbitral Jurisdiction Over Commercial Contract Disputes*

<http://blogaila.com/2016/03/18/the-east-african-court-of-justices-arbitral-jurisdiction-over-commercial-contract-disputes-by-dr-faustin-nteziyayo/#_ftn2>lastly accessed on 20th March 2019

⁷⁶ Stephan W. Schill, "International Arbitrators as System-Builders." *Proceedings of the Annual Meeting (American Society of International Law)*, vol. 106, 2012, pp. 295–297

<www.jstor.org/stable/10.5305/procanmeetasil.106.0295> lastly accessed on 20th March 2019

This research agrees with his views and further posits that effective international arbitration can be realized through establishment of effective arbitral tribunal.

Kariuki Muigua, analyzing the need for an effective means of solving disputes submits that, with increased globalization, arbitration has become the most preferred mechanism for settling international commercial investment disputes.

He is of the view that globalization has led to growth of commercial and investment disputes as different transacting parties interact with one another in the course of business.

This has resulted to demand for effective dispute resolution mechanisms that would address the emerging market trends at a global level. Africa, and even more so East Africa, is not new to this reality.⁷⁷

Franck, S.D, further asserts that with increased globalization, arbitration has become the most preferred mechanism for settling international commercial investment disputes.⁷⁸ This research is in agreement with this assertion.

This research in line with these views asserts that an effective East African Court of Justice as an international arbitral tribunal would offer effective, time saving, reliable and cost-effective mechanism of solving disputes.

In his article, *Kariuki Muigua*, propounds that the allure of arbitration mostly lies in the fact that it operates in exclusion of courts and its transnational applicability in international disputes with minimal or no interference by the national courts, thus boosting the parties' confidence of realizing

⁷⁷Kariuki Muigua, Promoting International Commercial Arbitration in Africa page 1(Published in CIArb Kenya , Alternative Dispute Resolution Journal Volume 5, Number 2 2017) lastly accessed on 20thFebruary 2019

⁷⁸Franck, S.D., "The Role of International Arbitrators," page 1.

<<https://www.international-arbitration-attorney.com/wp-content/uploads/Microsoft-Word-ILW-ILSA-Article.docsfranck2.pdf>>lastly accessed on20thFebruary 2019

justice in the best way achievable.⁷⁹ Agreeing with these views, East African Court of Justice as an international arbitral tribunal offers a platform for arbitration of disputes.

Agreeing with these sentiments *McLaughlin, Joseph T.*, in his scholarly writing predicates that the allure of a mode of dispute resolution that limits the risks involved with traditional litigation in national courts creates a gap that international arbitration seeks to fill. He is of the view that international arbitration is considered potentially more efficient and attractive mechanism.⁸⁰

Challenges facing International Arbitration

Professor Sanders, rightly points out that the existence of different concepts of arbitration is one of the challenges facing international arbitration. The concept of arbitration is not the same everywhere in the world. The Anglo-Saxon concept of arbitration differs from that of the civil law countries and those two concepts both differ from the arbitration concept in the socialist countries. Hence Professor Sanders argues that for the unification of arbitration .To him these different concepts constitute a great draw-back.⁸¹

McLaughlin, Joseph T., rightly points out that the very benefits which arbitration should ideally provide may be lost in an international arbitration, unless the arbitration procedure is carefully chosen and tailored by the draftsmen. For example: time saving, cost effective e.t.c.⁸²

The parties to an international arbitration must anticipate the practical and legal consequences of the inclusion of an arbitration clause. Arbitration's effectiveness will always depend upon how

⁷⁹Kariuki Muigua, Promoting International Commercial Arbitration in Africa page 2(Published in CIArb Kenya , Alternative Dispute Resolution Journal Volume 5, Number 2 2017)

⁸⁰McLaughlin, Joseph T. "Arbitration and Developing Countries." *The International Lawyer*, vol. 13, no. 2, 1979, Page 212<JSTOR, www.jstor.org/stable/40705956> lastly accessed on 20thFebruary 2019

⁸¹Sanders, International Commercial Arbitration, 20 *Neth. Int'l L. Rev.* 37 (1973).

⁸²McLaughlin, Joseph T. "Arbitration and Developing Countries." *The International Lawyer*, vol. 13, no. 2, 1979, Page 215<JSTOR, www.jstor.org/stable/40705956> lastly accessed on 20thFebruary 2019

well it satisfies the needs of the parties.⁸³ This research agreeing with these views asserts that the benefits associated with arbitration would be preserved if the arbitration agreement between parties is meticulously drafted.

1.11 Limitation

There is limited literature expounding on the East African Court of Justice as an international arbitral tribunal. This is attributable to the few disputes that the court has arbitrated since its inception.⁸⁴ Further there is limited literature in regard to the cases arbitrated by EACJ due to the nature of arbitration as a means of resolving disputes that is confidential in nature.

1.12 Chapter Breakdown

Chapter I introduces the study. It contains the introduction, background of the Study, statement of the Problem, objectives of the Study, research questions, research hypothesis, theoretical framework, literature review, and justification of the study and research methodology.

Chapter II shall outline the historical perspective of The East African Court of Justice and its role in resolving international arbitration disputes

Chapter III shall critique the effectiveness of East African Court of Justice as an International Arbitral Court

Chapter IV shall focus on the challenges facing the East African Court of Justice as an International Arbitral Tribunal

Chapter V shall comprise conclusion, summary of the research findings, recommendations, and areas of the research findings.

⁸³ McLaughlin, Joseph T. "Arbitration and Developing Countries." *The International Lawyer*, vol. 13, no. 2, 1979, Page 215<JSTOR, www.jstor.org/stable/40705956> lastly accessed on 20thFebruary 2019

⁸⁴ EACJ Judges' training on emerging trends in arbitration sets off<<http://eacj.eac.int/?p=2798>>lastly accessed on 9th March 2019

CHAPTER TWO

A HISTORICAL PERSPECTIVE OF THE EAST AFRICAN COURT OF JUSTICE AND ITS ROLE IN RESOLVING INTERNATIONAL ARBITRATION DISPUTES

2.0 Introduction

In a bid to appreciate the historical origin of the East Africa Court of Justice, there is a need to analyze the broader perspective of the establishment of regional courts in Africa at large.

The reality of the political and economic fragility of post-colonial Africa in the 1960s became apparent after the demise of colonial rule.⁸⁵ Subsequently first waves of independence moved over the continent, as a number of national leaders started calling for the economic and political integration of African states in order to achieve development and undo the balkanization of Africa brought by colonialism.⁸⁶ This resulted in the creation of larger markets and consolidation of resources to form Regional Economic Communities (RECs) along geographical lines.⁸⁷

Thus, the East, West and Southern parts of Africa came together in their respective regions to form the East African Community (EAC), the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC) respectively.⁸⁸

⁸⁵ Murungi L, 'Revisiting the role of sub-regional courts in the protection of human rights in Africa' Unpublished LLM Thesis, University of Pretoria, Pretoria, 2009, page 7.

⁸⁶ Murungi L, 'Revisiting the role of sub-regional courts in the protection of human rights in Africa' Unpublished LLM Thesis, University of Pretoria, Pretoria, 2009, 7. See also Kritzinger von Niekerk L, 'Regional integration: Concepts, advantages, disadvantages, and lessons of experience' Southern African Regional Poverty Network- <<https://sorpn.org/documents/d0001249/P1416-RIconceptsMay2005.pdf>>

⁸⁷ Thoko K, 'SADC and human security: Fitting human rights into the trade matrix' 13(1) *African Security Review*, 2004, 110.

⁸⁸ These were formed in 1967, 1975 and 1980 respectively. -<<https://www.unec2.org/oria/pages/e-c-%0E2%80%93-east-2frican-community>; <https://www.unec2.org/ori2/pages/ecowos-economiccommunity-west-2frican-states>; <https://www.unec2.org/oria/pages/sodc-southern-ofricondevelopment-community>> lastly accessed on 4th April 2019

Evidently there was a profusion of intergovernmental organizations charged with various public functions previously reserved for states in Africa. This was in pursuit of regional economic integration.⁸⁹

Further judicial bodies were established as the supranational organs of the Regional Economic Communities (RECs) and were tasked with resolving disputes within the communities to ensure smooth sailing.⁹⁰ The various regional court's jurisdiction to resolve various disputes was as stipulated by the treaties establishing the courts.⁹¹

The operations of these organizations affect the ordinary lives of individual citizens in the member states.⁹² The East African Community is an example of such an intergovernmental organization.⁹³ This research paper primarily focuses on the East African Community's judicial organ namely the East African Court of Justice (EACJ). This chapter shall offer a historical perspective of the East African Court of Justice since its inception and its role in resolving international disputes via arbitration.

2.1 Establishment of the East African Community

The existence of the East African Community dates back to the colonial era where the first three-member states (Kenya, Uganda, the then Tanganyika) were colonies of the British Empire and governed under the umbrella of the East African Community.

⁸⁹ Oluoch, LO Wauna. "Legitimacy of the East African Community." *Journal of African Law*, vol. 53, no. 2, 2009, page 194 to 221

⁹⁰ Ebobrah S, 'Litigating human rights before sub-regional courts in Africa: Prospects and challenges' *17(1) African Journal of International and Comparative Law*, 2009, page 80.

⁹¹ Abimbola A. Olowofoyeku, Sub-Regional Courts and the Recusal Issue: Emergent Practice of the East African Court of Justice, 20 *Afr. J. Int'l & Comp. L.* 365 (2012) page 365-366

⁹² Oluoch, LO Wauna. "Legitimacy of the East African Community." *Journal of African Law*, vol. 53, no. 2, 2009, page 194 to 221

⁹³ Oluoch, LO Wauna. "Legitimacy of the East African Community." *Journal of African Law*, vol. 53, no. 2, 2009, page 194 to 221

This was after Tanganyika was brought under the British administration⁹⁴. Having regards to the existing social, cultural, economic, and their geographical juxtaposition, the three-member states saw it suitable to continue co-operation even after independence. This was achieved by the ratification of the *Treaty of the East African Community of 1967*.⁹⁵

However, this relationship did not last for long due to ideological and political differences amongst the heads of states. The other main reasons contributing to the collapse of the original East African Community were lack of a strong political will; lack of strong participation of the private sector and civil society in the cooperation activities; the continued disproportionate sharing of benefits of the Community among the Partner States due to their differences in their levels of development; and lack of adequate policies to address this situation.⁹⁶ Further it notable that amongst the key reasons for the accelerated breakdown of the community was owing to the fact that the Treaty did not provide for a mechanism for conflict resolution in the event of disputes among the partner states.⁹⁷

The first East African Community was formally dissolved in 1977. Following the dissolution of the former East African Community in 1977, the Member States negotiated a Mediation Agreement for the distribution of Assets and Liabilities, which they signed in 1984.⁹⁸ Regional integration between Kenya, Uganda, the then Tanganyika failed despite the fact that it is was only

⁹⁴ Akiwumi, A.M. (1972) '*The East African Community*' 6 (2) *The Journal of World Trade Law*, 203.

⁹⁵ Gathege P.S '*Dispute Settlement Within East African Community: The East African Court of Justice and its Jurisdiction*' Published LL.M Thesis, University of Nairobi, 2012, page 15

⁹⁶ Gathege P.S '*Dispute Settlement Within East African Community: The East African Court of Justice and its Jurisdiction*' Published LL.M Thesis, University of Nairobi, 2012, page 2

⁹⁷ East African Community < <https://www.eac.int/eac-history>> lastly accessed on 4th April 2019

⁹⁸ East African Community < <https://www.eac.int/eac-history>> lastly accessed on 4th April 2019

through economic and political co-operation that the small underdeveloped economies of African countries had a chance to survive in the rough waters of globalization.⁹⁹

During the dissolution of the then East Africa Community in 1977 the member states (Kenya, Tanzania and Uganda) agreed to explore areas of future co-operation and to make concrete arrangements for such co-operation. This was captured in the mediation agreement negotiated by member states during the dissolution of the East African Community in 1977.¹⁰⁰

In 30th November 1993, there was signing of the Agreement for the Establishment of the Permanent Tripartite Commission for East African Co-operation following meetings of the three Heads of States (Kenya, Tanzania and Uganda).¹⁰¹ The East African Heads of State directed the Commission to start the process of upgrading the Agreement establishing the Permanent Tripartite Commission for East African Co-operation into a Treaty¹⁰².

However the full East African Co-operation operations started on 14th March 1996, when the Secretariat of the Permanent Tripartite Commission was launched at the Headquarters of the EAC in Arusha, Tanzania.¹⁰³

The Treaty-making process, which involved negotiations among the Member States as well as wide participation of the public, was successfully concluded within 3 years.¹⁰⁴ The Treaty for the Establishment of the East African Community was then signed in Arusha on 30th November 1999.

The Treaty Establishing the East African Community (herein referred to as the Treaty) came into

⁹⁹ Oluoch, LO Wauna. "Legitimacy of the East African Community." *Journal of African Law*, vol. 53, no. 2, 2009, page 194 to 221

¹⁰⁰ East African Community < <https://www.eac.int/eac-history>> lastly accessed on 4th April 2019

¹⁰¹ East African Community < <https://www.eac.int/eac-history>> lastly accessed on 4th April 2019

¹⁰² East African Community < <https://www.eac.int/eac-history>>lastly accessed on 4th April 2019

¹⁰³ East African Community < <https://www.eac.int/eac-history>> lastly accessed on 4th April 2019

¹⁰⁴ East African Community < <https://www.eac.int/eac-history>> lastly accessed on 4th April 2019

force on 7th July 2000 with membership from three states: Kenya, Uganda and Tanzania. Rwanda and Burundi then joined in 2007, with South Sudan becoming a member in 2016.¹⁰⁵

The Treaty aims at developing policies and programmes aimed at widening and deepening of integration in the political, economic, social and cultural fields, research and technology, defence and security, legal and judicial affairs for the mutual benefit of the Partner States.¹⁰⁶

The Treaty for the Establishment of the East African Community of 1999 provides for various thematical areas that relate to business transactions within the region and dispute resolution, including use of arbitration. These are, *inter alia*: the Principles of the Community¹⁰⁷, Establishment of the Organs and Institutions of the Community¹⁰⁸(e.g, *The East African Court of Justice*¹⁰⁹), Co-operation of Trade Liberalization and Development¹¹⁰, Co-operation of Investment and Industrial Development¹¹¹, Co-operation in Infrastructure and Services¹¹², Free Movement of Persons, Labour, Services, Right of Establishment and Residence¹¹³, and Relations with other Regional and International Organizations and Development Partners¹¹⁴.

It is under East African Court of Justice that International Arbitration is practiced as established under chapter 8 of *The Treaty for the Establishment of the East African Community of 1999*.

¹⁰⁵ East African Community < <https://www.eac.int/eac-history>> lastly accessed on 4th April 2019

¹⁰⁶ Odek, J. O. (2002) (Ed.), *The East African Community Treaty: Its Impact on Kenya*, Reporting International Treaties, 1.

¹⁰⁷ Chapter 2 of the Treaty for the Establishment of the East African Community, 1999

¹⁰⁸ Chapter 3 of the Treaty for the Establishment of the East African Community, 1999. The organs are: the Summit, the Council of Ministers, the Coordinating Committee, Sectoral Committees, and the East African Court of Justice, the East African Legislative Assembly, and the Secretariat.

¹⁰⁹ Chapter 8 of the Treaty for the Establishment of the East African Community, 1999

¹¹⁰ Chapter 11 of the Treaty for the Establishment of the East African Community, 1999

¹¹¹ Chapter 12 of the Treaty for the Establishment of the East African Community, 1999

¹¹² Chapter 15 of the Treaty for the Establishment of the East African Community, 1999

¹¹³ Chapter 17 of the Treaty for the Establishment of the East African Community, 1999

¹¹⁴ Chapter 24 of the Treaty for the Establishment of the East African Community, 1999

This research paper focuses on International Arbitration as mode of resolution of disputes, as practiced under East Africa Court of justice.

2.2 Establishment of the East African Court of Justice (EACJ)

The East African Court of Justice (herein referred to as the EACJ) came into being on 30th November 2001, after an inauguration ceremony that signified the commencement of operations of the East African Community's (EAC) judicial organ.¹¹⁵

It is noticeable that not much have happened during the Court's infancy. It was not until 2005 that the EACJ received its first case - four years down the line since its inception. Being the judicial arm of the EAC, the EACJ is important to furthering the EAC project.¹¹⁶

Tracing back the history, the EACJ is trying to emulate the defunct East African Court of Appeal (EACA), established during the days of the former EAC.¹¹⁷ The EACA had jurisdiction to determine only civil and criminal appeals originating from the decisions of the national courts of the then EAC Member States. Its case law is highly appreciated by legal practitioners and jurists across the EAC region even today. Understandably, the current EACJ would not want to fall short of the legacy of its predecessor.¹¹⁸

The current EACJ was established at the time of the proliferation of international adjudicatory bodies during the 1990s. Currently the EACJ serves the EAC, which is an intergovernmental organization consisting of six countries.

¹¹⁵ Ally Possi, An Appraisal of the Functioning and Effectiveness of the East African Court of Justice, 21 Potchefstroom Elec. L.J. 1 (2018) page 2

¹¹⁶ Ally Possi, An Appraisal of the Functioning and Effectiveness of the East African Court of Justice, 21 Potchefstroom Elec. L.J. 1 (2018) page 2

¹¹⁷ As earlier elaborated the former EAC was established in 1967 and collapsed after ten years of existence

¹¹⁸ Ally Possi, An Appraisal of the Functioning and Effectiveness of the East African Court of Justice, 21 Potchefstroom Elec. L.J. 1 (2018) page 3

South Sudan has recently acceded to the EAC Treaty and become the most recent member,¹¹⁹ joining Burundi, Kenya, Rwanda, Tanzania and Uganda. The admission of South Sudan into the block was received with mixed feelings. This is because, without a doubt, the Country's economic and political condition as well as its track record in governance, human rights and the rule of law (which are key tenets for inviting a new member into the EAC) invites many questions on its admission.¹²⁰

This was manifested by the case of: *Walusumbi v Attorney General of Uganda* Ref No 8/2013 (27 February 2015). In this case the applicants questioned the admission of South Sudan into the EAC. The basis of the application was Article 3 of the Treaty for the Establishment of the East African Community, 1999, which lay down the criteria and norms that a country must have complied with to be considered eligible to join the EAC. They argued unsuccessfully that South Sudan did not satisfy the criteria as provided by the Article 3 of the Treaty.

2.3 The East African Court of Justice jurisdiction

The East African Court of Justice, like the other organs of the Community, is established under Article Nine (9) of the Treaty¹²¹. Chapter Eight (8) of the Treaty further expounds on, *inter alia*, the role of the Court, the appointment of judges of the court, jurisdiction of the court, official language of the court, and the seat of the court.

¹¹⁹EAC 2016 <<http://www.eac.int/news-and-media/statements/20160415/communiquesigning-ceremony-treaty-accession-republic-south-sudan-east-african-community>>lastly accessed on 5th April 2019

¹²⁰ Ally Possi, An Appraisal of the Functioning and Effectiveness of the East African Court of Justice, 21 Potchefstroom Elec. L.J. 1 (2018) page 3

¹²¹ Gathege P.S 'Dispute Settlement Within East African Community: The East African Court of Justice and its Jurisdiction' Published LL.M Thesis, University of Nairobi, 2012, page 33

The Treaty provides that the role of the court is to be a judicial body which ensures adherence to law in the interpretation and application of and compliance with the Treaty establishing the Community¹²².

As currently established the East African Court of Justice has a threefold role: to decide, in accordance with treaty and rules of procedures, on contentious matters arising out EAC Treaty within the meaning of Article 27, paragraph 1, of the Treaty, to give an advisory opinion in accordance with Article 36 of the Treaty, and finally *to entertain arbitral matters in accordance with Article 32 of the Treaty and rules of arbitration*.¹²³

The EACJ jurisdiction as enumerated above is clear and more progressive. Like most other contemporary international courts, the EACJ has gone beyond the old model of international judicial bodies, which were primarily created to settle disputes between states.¹²⁴

A number of key players can subscribe to the Court for remedies (have the requisite locus standi to approach the court). The EACJ can adjudicate cases referred by Member States when other Member States or organs or institutions of the Community fail to meet the obligations provided by the EAC Treaty.¹²⁵ The Secretary General may also refer to the EACJ a Member State's contravention of the EAC Treaty.¹²⁶ The Secretary General can make such a reference only after consulting with the defaulting state and the Council, as provided by Article 29 of the EAC Treaty.

¹²² Article 23 of the Treaty for the Establishment of the East African Community, 1999

¹²³ Fred K. Nkusi, Understanding the jurisdictional powers of the EA Court of Justice <<https://www.newtimes.co.rw/section/read/207744>> lastly accessed on 5th April 2019

¹²⁴ Ally Possi, An Appraisal of the Functioning and Effectiveness of the East African Court of Justice, 21 Potchefstroom Elec. L.J. 1 (2018) page 3

¹²⁵ Article 28(1) of the Treaty for the Establishment of the East African Community, 1999

¹²⁶ Article 29(1) of the Treaty for the Establishment of the East African Community, 1999

Significantly, natural and legal persons can access the EACJ.¹²⁷ Individuals are entitled to question the legality of any Act, regulation, directive, decision or action of a Member State or an institution which goes contrary to the EAC Treaty.¹²⁸ Individuals also need not demonstrate specific interest when instituting a case.¹²⁹

On this basis individuals are able to seek the services of the EACJ like any other subjects of the Court. However, Article 30 of the Treaty does not allow individuals to challenge acts of the EAC organs, which is yet another example of how the EACJ's jurisdiction is circumscribed. EACJ can handle matters of dispute between the Community and its employees.¹³⁰

Further EACJ can handle matters originating from an arbitration clause agreement, and special agreements binding the disputing parties where there is a clause conferring jurisdiction on the Court.¹³¹ This forms the basis for this research which seeks to enunciate how the EACJ has exercised this authority. This discourse questions the effectiveness of the East African Court of Justice in exercising this jurisdiction.

¹²⁷ Article 30 of the Treaty for the Establishment of the East African Community, 1999

¹²⁸ Article 9 of the Treaty for the Establishment of the East African Community, 1999 distinguishes organs and institutions of the EAC. As per Art 9(1), the organs of the EAC are: the Summit, the Council, the Co-ordination Committee, the Sectoral Committees, the EACJ, the EALA, the Secretariat; and such other organs as may be established by the Summit. Under art 9(3), institutions of the Community shall include: "... the East African Development Bank established by the Treaty Amending and Re-enacting the Charter of the East African Development Bank, 1980 and the Lake Victoria Fisheries Organisation established by the Convention (Final Act) for the Establishment of the Lake Victoria Fisheries Organisation, 1994 and surviving institutions of the former East African Community shall be deemed to be institutions of the Community and shall be designated and function as such". Also see *Modern Holdings (EA) Limited v Kenya Ports Authority* Ref No 1/2008 (11 February 2009).

¹²⁹ Van der Mei AP "Regional Integration: The Contribution of the Court of Justice of the East African Community" 2009 ZaORV page 429

¹³⁰ Article 31 of the Treaty for the Establishment of the East African Community, 1999

¹³¹ Article 32 of the Treaty for the Establishment of the East African Community, 1999 See *Alice Nayebare v EALS Arbitration* Cause No 1/2012.

The case of: *Alice Nayebare v EALS Arbitration Cause No 1/2012* which was the first matter to be referred to East African Court of Justice for arbitration had an arbitration clause granting the East African Court of Justice the requisite jurisdiction to arbitrate over the matter ¹³²

In ensuring consistency in interpreting the EAC Treaty, the EACJ makes preliminary rulings when a matter of concern appears before a national judicial body. When faced with a question regarding an interpretation of the EAC Treaty, a national court may refer the matter to the EACJ for interpretation. ¹³³ This requirement is discretionary. Also, the EACJ can give an advisory opinion upon being requested by the Summit, the Council or a Member State whenever there is a question of law arising from the EAC Treaty. ¹³⁴ Advisory opinions are determined by the Appellate Division of the Court. ¹³⁵

In ensuring that the EAC integration becomes a reality, the Court's role is key. It is the Court's stripped mandate of ensuring compliance to the EAC Treaty that will drive EAC integration forward. The Court is expected to effectively assert its authority in all matters concerning EAC integration, without limitations. Notwithstanding the fact that its importance is now accepted, there remain genuine concerns about its role and some of the challenges that it has had to face from time to time. ¹³⁶

¹³² <http://eacj.eac.int/?tribe_events=arbitration-cause-no-1-of-2012-alice-nayebare-vs-east-african-law-society>lastly accessed on 5th April 2019

¹³³ Article 34 of the Treaty for the Establishment of the East African Community, 1999

¹³⁴ Article 36 of the Treaty for the Establishment of the East African Community, 1999

Also see : *Matter of a Request by the Council of Ministers of the EAC for an Advisory Opinion* Opinion No 1/2008; *Matter of a Request by the Council of Ministers of the EAC for an Advisory Opinion* Opinion No 1/2015.

¹³⁵ Rule 75(4) of the *East African Court of Justice Rules of Procedure* (2013)

<<http://eacj.org/wp-content/uploads/2013/09/EAC-Rules-of-Procedure-2013.pdf>>lastly accessed on 5th April 2019

¹³⁶ Ally Possi, *An Appraisal of the Functioning and Effectiveness of the East African Court of Justice*, 21 Potchefstroom Elec. L.J. 1 (2018) page 13

For instance, this research seeks to evaluate the role that East African Court of Justice plays in promoting international arbitration in East Africa. This will mainly involve critiquing the effectiveness of East African Court of Justice as an international arbitral tribunal.

This is in accordance with jurisdiction granted to the East African Court of Justice by Article 32 of the Treaty for the Establishment of the East African Community, 1999.

2.4 International Arbitration as practiced under East African Court of Justice (EACJ)

Increased globalization has brought about the need for effective and reliable mechanisms for management of commercial disputes as well as other general disputes involving parties from different jurisdictions thus resulting in the emergence of transnational dispute management mechanisms such as arbitration. Arbitration as mechanism works best when a well-resourced, neutral and credible organization administers the process.¹³⁷

Arbitration is now regarded as the preferred mechanism for settling international disputes.¹³⁸ *Peter Cresswell* posits that international arbitration should grow in tandem with the globalization of trade.¹³⁹ Arbitration has thus gained popularity over time amongst members of the business community due to its advantages over litigation.¹⁴⁰

Transnational applicability in international disputes with minimal or no interference by national courts is one of the most outstanding benefits of arbitration over litigation.

¹³⁷ Emilia Onyema, *The Transformation of Arbitration in Africa: The Role of Arbitral Institutions* page 75

¹³⁸ Susan D. Franck, *The Role of International Arbitrators*, page 1 and available at: <<https://internationalarbitration-attorney.com/wp-content/uploads/Microsoft-Word-ILW-ILSA-Article.docsfranck2.>> lastly accessed on 7th April 2019

¹³⁹ Peter Cresswell, *International Arbitration: Enhancing Standards* 10, 10-13 (The Resolver, Chartered Institute of Arbitrators, 2014). See also Court's comment in the American case of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) where the Court stated that: "...the expansion of [American] business and industry will hardly be encouraged if, notwithstanding solemn contracts, [we] insist on a parochial concept that all disputes must be resolved under [our] laws and in our courts.... We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."

¹⁴⁰ Emilia Onyema, *The Transformation of Arbitration in Africa: The Role of Arbitral Institutions* page 76

The lack of interference by domestic courts boosts the confidence of parties in their pursuit of justice in a forum of their choice.¹⁴¹

It is in this recognition of arbitration as one of the most viable approaches to dispute management and resolution that makes arbitration institutions of importance across the continent.¹⁴² East Africa Court of Justice is one of the arbitration institution in East African Community.

The EACJ's arbitral jurisdiction is an invaluable mechanism at the disposal of the business community within the region to settle any dispute arising from their cross-border business.¹⁴³

Generally, classic courts' (including most regional courts like the European Court of Justice) that entertains contentious matters doesn't entertain arbitral disputes. However, the East African Court of Justice is unique because it has a hybrid function of entertaining both litigation and international arbitration. To many in the East African Community, it is a new but very important feature of the court.¹⁴⁴

In addition to the East African Court of Justice, jurisdiction over the interpretation and application of the EAC Treaty¹⁴⁵, the court has arbitration related jurisdiction. The EAC arbitration jurisdiction covers matters arising from arbitration agreements contained in a contract or agreement concluded by the Community or any of its institutions; and arbitration agreements contained in a commercial contract or agreement which the parties have conferred jurisdiction on the Court to deal with arising disputes.¹⁴⁶

¹⁴¹ Emilia Onyema, The Transformation of Arbitration in Africa: The Role of Arbitral Institutions page 76

¹⁴² Emilia Onyema, The Transformation of Arbitration in Africa: The Role of Arbitral Institutions page 76

¹⁴³ Faustin Ntazilyayo F, 'The East African Court of Justice's Arbitral Jurisdiction over Commercial Contract Disputes' <<http://blogaila.com/2016/03/18/the-east-african-court-of-justices-arbitral-jurisdiction-over-commercial-contract-disputes-by-dr-faustin-ntezilyayo/>> lastly accessed on 5th April 2019

¹⁴⁴ Fred K. Nkusi, Understanding the jurisdictional powers of the EA Court of Justice <<https://www.newtimes.co.rw/section/read/207744>> lastly accessed on 5th April 2019

¹⁴⁵ Article 27, of the Treaty for the Establishment of the East African Community, 1999

¹⁴⁶ Article 32 of the Treaty for the Establishment of the East African Community, 1999

The East African Court of Justice requisite authority/jurisdiction to arbitrate various matters is provided under Article 32 of *The Treaty for the Establishment of the East African Community of 1999*.

To this end, Article 32 of *The Treaty for the Establishment of the East African Community of 1999* delimiting the arbitral jurisdiction of the court verbatim provides: The Court shall have jurisdiction to hear and determine any matter:

- a) arising from an arbitration clause contained in a contract or agreement which confers such jurisdiction to which the Community or any of its institutions is a party; or
- b) arising from a dispute between the Partner States regarding this Treaty if the dispute is submitted to it under a special agreement between the Partner States concerned; or
- c) arising from an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court.

The prima facie reading of Article 32¹⁴⁷ indicates that in order for the court to arbitrate over a matter, the parties must submit to its jurisdiction by way of an Arbitration Agreement or Arbitration Clause in a contract¹⁴⁸. This retains one of the seminal features of arbitration; party autonomy; which involves the parties willingly submitting to an arbitral process, having autonomy over the arbitrator and the process making the outcome mutually acceptable to the parties.¹⁴⁹

Further it is noticeable that the aspect of the East African Court of Justice, having jurisdiction to arbitrate international commercial disputes, to the Court enormously widens its scope.

¹⁴⁷ The Treaty for the Establishment of the East African Community of 1999

¹⁴⁸ Faustin Ntazilyayo F, 'The East African Court of Justice's Arbitral Jurisdiction over Commercial Contract Disputes' <<http://blogaila.com/2016/03/18/the-east-african-court-of-justices-arbitral-jurisdiction-over-commercial-contract-disputes-by-dr-faustin-ntezilyayo/>> lastly accessed on 5th April 2019

¹⁴⁹ Kariuki Muigua, *Settling Disputes through Arbitration in Kenya* page 3

The EAC Court has formulated the EACJ Arbitration Rules, 2012,¹⁵⁰ pursuant to provisions of Article 42 of the Treaty to guide the court in arbitration of disputes submitted to the court.

These Rules apply to every arbitration references pursuant to Article 32 of the EAC Treaty except, where the parties to an arbitration before the court agree to modify or waive application of the rules.¹⁵¹

Where the parties have agreed to submit to arbitration under the Rules, they are deemed to have submitted ipso facto to the Rules in effect on the date of the commencement of the arbitration proceedings, unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement.¹⁵²

EACJ arbitration is seen as a method of resolving cross-border commercial disputes in the East African region has all the attributes of an international arbitration. In fact, the EACJ Rules of Arbitration, 2012 are designed to make EACJ arbitration efficient, cost-effective, flexible, confidential, neutral, binding and expeditious. Moreover, the award rendered pursuant to EACJ arbitration is final and binding on parties.¹⁵³

¹⁵⁰ East African Court of Justice Rules of Arbitration, EACJ, Arusha, Tanzania, March 2012. The Rules were made in exercise of the powers conferred on the East African Court of Justice by Article 42 of the Treaty for the Establishment of the East African Community.

¹⁵¹ Rule 1(2) of the East African Court of Justice Arbitration Rules, 2012 provides that unless the parties to arbitration agree otherwise: (a) these Rules shall apply to every arbitration under Article 32 of the Treaty; (b) the parties to any arbitration may agree in writing to modify or waive the application of these Rules; (c) where any of these Rules is in conflict with any provision of the law applicable to arbitration from which the parties cannot derogate, that provision shall prevail.

¹⁵² Rule 7(1), East African Court of Justice Rules of Arbitration.

¹⁵³ Faustin Ntezilyayo , 'The East African Court of Justice's Arbitral Jurisdiction over Commercial Contract Disputes' <<http://blogaila.com/2016/03/18/the-east-african-court-of-justices-arbitral-jurisdiction-over-commercial-contract-disputes-by-dr-faustin-ntezilyayo/>> lastly accessed on 5th April 2019

2.4.1 Attributes of international Arbitration under East Africa Court of Justice

Faustin Ntazilyayo, in his article elaborates the attributes of international arbitration as practiced under East African Court of Justice. To this end he enumerates the following attributes¹⁵⁴:

- a) Confidentiality: The EACJ arbitral proceedings are not public. They are held privately. The confidential nature of the proceedings prevents the award or deliberation being published in the press without approval of the parties. Rule 30(4) of the East African Court of Justice Arbitration Rules, 2012)
- b) Flexibility: as a consensual process, EACJ arbitration is flexible. Parties and arbitrators are free to adopt flexible procedures and rules which suit everybody. Rules 1 (2) (b) thus provides that “the parties to any arbitration may agree in writing to modify or waive the application of these Rules.” Another part of the flexibility attribute is that a party may appear in person or send a lawyer or representative or, indeed, anyone that he/she chooses (Rule 4 of the EACJ arbitration rules, 2012).
- c) Finality: Subject to provisions of the Rules of Arbitration providing for the interpretation of the award, the correction of the award and the additional award and review of the Award, the arbitral award shall be final (Rule 36, (1) of the EACJ arbitration rules, 2012).
- d) Neutrality: Under EACJ there is a possibility to set up a neutral arbitral tribunal, to choose a neutral place of arbitration.

¹⁵⁴ Faustin Ntazilyayo , ‘The East African Court of Justice’s Arbitral Jurisdiction over Commercial Contract Disputes’ <<http://blogaila.com/2016/03/18/the-east-african-court-of-justices-arbitral-jurisdiction-over-commercial-contract-disputes-by-dr-faustin-ntezilyayo/>> lastly accessed on 5th April 2019

- e) Appointment of arbitrators from amongst the EACJ judges: The panel or the sole arbitrator is appointed from among the Court's judges who are all certified arbitrators. In addition Rule 37(1) states that "There shall be no fees payable to the arbitrators."
- f) Enforcement of awards pursuant to country in which enforcement is sought: There is no pre-enforcement judicial review and arbitral awards are enforced in accordance with the enforcement procedures of the country in which enforcement is sought (Rule 36 (3) of the EACJ arbitration rules, 2012).
- g) Non-payment of fees to arbitrators: Rule 37(1) of the EACJ arbitration rules, 2012) states that "There shall be no fees payable to the arbitrators."

2.5 In Conclusion

Increased cross-border trade and investment in the region creates odds for more commercial disputes to arise. In this regard EACJ arbitral jurisdiction stands to be an invaluable mechanism in improving contract enforcement in the East African region by promoting an alternative avenue for businesses to resolve disputes quickly and cost effectively. All in all, the arbitral jurisdiction of the Court has to be seen within the overarching role that the Treaty has conferred it to uphold the rule of law and thus, contribute to the improvement of the East African region's investment climate ensuring that contract enforcement becomes an important contributor to the region's economic prosperity.¹⁵⁵ The EACJ arbitral jurisdiction if effectively exercised would to a great extent promote international arbitration in East African community.

¹⁵⁵ Faustin Ntazilyayo , 'The East African Court of Justice's Arbitral Jurisdiction over Commercial Contract Disputes' <<http://blogaila.com/2016/03/18/the-east-african-court-of-justices-arbitral-jurisdiction-over-commercial-contract-disputes-by-dr-faustin-ntezilyayo/>> lastly accessed on 5th April 2019

CHAPTER 3

A CRITIQUE OF THE EFFECTIVENESS OF EAST AFRICAN COURT OF JUSTICE AS AN INTERNATIONAL ARBITRAL COURT

3.0 Introduction

The need for an effective, time saving, reliable and cost-effective mechanism has not only become desirable but also invaluable with increased globalization.¹⁵⁶ The existence of such a demand gap has made arbitration as means of resolving disputes a viable and attractive mechanism. The East African Court of Justice, as a vital arbitral tribunal in East Africa region ought to fill such a demand gap. The effectiveness of East African Court of Justice as an international arbitral is seminal in promotion of international arbitration in East Africa.

In order to ensure efficiency in carrying out its duties as an Arbitral Tribunal, EACJ developed Arbitration Rules in 2012(The East African Court of Justice Arbitration Rules, 2012).¹⁵⁷ This was in accordance with Article 42 of the treaty¹⁵⁸ which empowers the court to make rules to regulate its operation. Verbatim Article 42 of the treaty provides that: *the Court shall make rules of the Court which shall, subject to the provisions of the Treaty, regulate the detailed conduct of the business of the Court.*¹⁵⁹

The East African Court of Justice Arbitration Rules, 2012 are applicable in arbitration of matters before the court in accordance with Article 32 of *The Treaty for the Establishment of the East African Community of 1999*.¹⁶⁰ The main parts of these rules provide for the composition and

¹⁵⁶Kariuki Muigua, Promoting International Commercial Arbitration in Africa page 1(Published in CIArb Kenya , Alternative Dispute Resolution Journal Volume 5, Number 2 2017) lastly accessed on 5th April 2019

¹⁵⁷ Rule 1 (1) of the East African Court of Justice Arbitration Rules, 2012

¹⁵⁸ Article 42 of The Treaty for the Establishment of the East African Community of 1999,

¹⁵⁹ Article 42 of The Treaty for the Establishment of the East African Community of 1999

¹⁶⁰ Rule 1(2)(a) of the East African Court of Justice Arbitration Rules, 2012

process of the arbitral tribunal, the conduct of proceedings, the decision making, the arbitral award, the finality and enforceability of award and rules on issues.

The EACJ Rules of Arbitration, 2012 are designed to make EACJ arbitration efficient, cost-effective, flexible, confidential, neutral, binding and expeditious. Moreover, the award rendered pursuant to EACJ arbitration is final and binding on parties.¹⁶¹ This chapter seeks to critique the effectiveness of the East Africa Court of Justice as an international arbitral tribunal. In doing so this chapter shall analyze the East African Court of Justice Arbitration Rules, 2012, which guides the court in arbitrating disputes.

3.1 Analysis the East African Court of Justice Arbitration Rules, 2012

3.1.1 Application of the Rules

These Rules apply to every arbitration references pursuant to Article 32 of the EAC Treaty except, where the parties to an arbitration before the court agree to modify or waive application of the rules.¹⁶² Where the parties have agreed to submit to arbitration under the Rules, they are deemed to have submitted ipso facto to the Rules in effect on the date of the commencement of the arbitration proceedings, unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement.¹⁶³

The parties to arbitration before the court however reserve the right to modify or waive the application of the rules in arbitration of their dispute by the Court.¹⁶⁴

¹⁶¹ Faustin Ntezilyayo , ‘The East African Court of Justice’s Arbitral Jurisdiction over Commercial Contract Disputes’ <<http://blogaila.com/2016/03/18/the-east-african-court-of-justices-arbitral-jurisdiction-over-commercial-contract-disputes-by-dr-faustin-ntezilyayo/>> lastly accessed on 5th April 2019

¹⁶² Rule 1(2) of the East African Court of Justice Arbitration Rules, 2012 provides that unless the parties to arbitration agree otherwise: (a) these Rules shall apply to every arbitration under Article 32 of the Treaty; (b) the parties to any arbitration may agree in writing to modify or waive the application of these Rules; (c) where any of these Rules is in conflict with any provision of the law applicable to arbitration from which the parties cannot derogate, that provision shall prevail.

¹⁶³ Rule 7(1), East African Court of Justice Rules of Arbitration.

¹⁶⁴ Rule 1(2)(b) of the East African Court of Justice Arbitration Rules, 2012

This is an attractive feature of the court as it renders credence to the arbitration attribute of parties having autonomy over the arbitration process, which in turn makes the outcome mutually acceptable to the parties.¹⁶⁵

This enhances the effectiveness of the court as an arbitral tribunal as parties have liberty to determine the process they think will be effective in arbitrating their dispute. Consequently, the outcome is mutually acceptable to the parties.

3.1.2 Commencement of arbitral proceedings in East Africa Court of Justice

Rule 5 of the East African Court of Justice Arbitration Rules, outlines the manner in which the Respondent ought to respond to a claim from a Claimant before the court.

To enhance the effectiveness of the court as an arbitral tribunal Rule 6 of the East African Court of Justice Arbitration Rules, provides for default provisions. Where the Claimant fails to communicate his or her claim the court issues a termination notice. Where the Respondent fails to communicate his or her statement of defence to the tribunal, the court proceeds ex-parte. Where there is non-attendance by either party to arbitration before the court without sufficient cause, the court has liberty to proceed ex-parte. Lastly, if a party, duly invited to produce documentary evidence, fails to do so within the specified period, without sufficient cause, the Tribunal may make the award on the evidence before it. These outright provisions of the rules ensure expediency in arbitration of disputes before the court. These salient provisions of the rules serve to minimize any delay that may be occasioned by a party to arbitration before the court as an arbitral tribunal.¹⁶⁶

Further, Rule 4 of the East African Court of Justice Arbitration Rules gives leeway to parties being represented or assisted by persons of their choice through the arbitral process before the court.

¹⁶⁵ Kariuki Muigua, *Settling Disputes through Arbitration in Kenya* page 3

¹⁶⁶ Rule 6 (1) to (3) of the East African Court of Justice Arbitration Rules, 2012

This enhances the effectiveness of the court as the court can arbitrate a dispute in absentia of any of the parties provided they are represented.

This is attractive to parties who seek to arbitrate commercial disputes, as they can appoint representatives for purposes arbitration of their commercial dispute.

This also minimizes delays to arbitration before the court that may be occasioned by parties' non-availability due to various commitments.

3.1.3 Composition of the Arbitral Tribunal

Rule 8 of the East African Court of Justice Arbitration Rules, 2012 provides for the appointment of arbitrators, the appointing authority (i.e. the President or in his/her absence the Vice President of the Court) appoints, from among the Judges of the Court a Panel to constitute the Tribunal to conduct the arbitral proceedings, unless the parties have agreed on a Sole Arbitrator who, in the like manner, is appointed from among the Judges of the Court.

Rule 8(2) of the East African Court of Justice Arbitration Rules, 2012 further stipulates that the Chairman of the Tribunal is appointed by the appointing authority from among the Judges constituting the Tribunal. In making the appointment, the appointing authority is required to have due regard to the necessity to secure the appointment of independent and impartial arbitrators (Rule 8(3) of the East African Court of Justice Arbitration Rules, 2012). To ensure that the judges resolve the disputes effectively all judges are trained in arbitration without exception. This makes the judges well versed in arbitration.¹⁶⁷

Further to ensure the effectiveness of East African Court of Justice as an arbitral tribunal in circumstances where judges may need experts in certain fields beyond their technical knowledge,

¹⁶⁷ Fred K. Nkusi, Understanding the jurisdictional powers of the EA Court of Justice <<https://www.newtimes.co.rw/section/read/207744>> lastly accessed on 5th April 2019

the Court may hire experts to assist the judges to get the information that may be required to guide them in arbitrating fairly and judiciously.

This is well spelt out in Rule 26 of the Court's rules of the East African Court of Justice Arbitration Rules. In a recent arbitration case, the arbitral tribunal was composed of 2 Judges from the Appellate Division (one being the Chairman) and a Judge from the First Instance Division.¹⁶⁸

3.1.4 Conduct of Arbitral Proceedings

For smooth arbitration proceedings, it is essential to make sure that, impartial and independent arbitrators who understand their role and the rules they are bound by in dispensing justice fairly and equally are appointed.¹⁶⁹ On this basis Rule 16 of the East African Court of Justice Arbitration Rules, 2012 provides thus that a prospective arbitrator shall disclose to the appointing authority any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, once appointed, shall disclose such circumstances to the parties unless they have already been duly informed of these circumstances. This enhances the effectiveness of the East Africa Court of Justice by ensuring that there is no conflict of interest .Further this ensures the seminal tenet of impartiality of arbitrators in arbitral proceedings is upheld.

Further, under Rule 17 of the East African Court of Justice Arbitration Rules, 2012, an arbitrator may be challenged on the grounds that circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality or independence. A challenged arbitrator is allowed to withdraw from

¹⁶⁸ Faustin Ntazilyayo , 'The East African Court of Justice's Arbitral Jurisdiction over Commercial Contract Disputes' <<http://blogaila.com/2016/03/18/the-east-african-court-of-justices-arbitral-jurisdiction-over-commercial-contract-disputes-by-dr-faustin-ntezilyayo/>> lastly accessed on 5th April 2019

¹⁶⁹ Faustin Ntazilyayo , 'The East African Court of Justice's Arbitral Jurisdiction over Commercial Contract Disputes' <<http://blogaila.com/2016/03/18/the-east-african-court-of-justices-arbitral-jurisdiction-over-commercial-contract-disputes-by-dr-faustin-ntezilyayo/>> lastly accessed on 5th April 2019

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

Rule of Competence-Competence is manifested under Rule 23(2) of the East African Court of Justice Arbitration Rules, 2012. To this end Rule 23(2) provides that in the conduct of arbitral proceedings, Tribunal has the power to decide on an objection that it has no jurisdiction, including any objection concerning the existence or validity of the arbitral agreement.

Rule 11 of the East African Court of Justice Arbitration Rules, 2012 provide that an arbitral dispute is to be decided in accordance with the law chosen by the parties. Here, the parties have the leeway to choose the suitably applicable law to their dispute. Once, they are unable to do so the East African Court of Justice adjudicates the dispute under natural justice and fairness and the rules of law it considers to be appropriate given all the circumstances of the dispute.

It is noticeable that the East African Court of Justice as an arbitral tribunal has power under rule 14 to take interim measures. This is significant in ensuring the effectiveness of the court as it such measures can ensure justice is realized and the court as an arbitral tribunal does not issue orders in futility.

Under Rule 20(2) of the East African Court of Justice Arbitration Rules, 2012, the Tribunal has the power to determine the admissibility, relevance, materiality and weight of any evidence. Lastly under Rule 20(3) of the East African Court of Justice Arbitration Rules, 2012, parties to arbitration before the court are required to be treated with equality and each party be given full opportunity of presenting its case which is in accordance with rules of natural justice and further enhances the effectiveness of the court..

3.1.5 Arbitral Awards

The Rules determine both formal and substantive requirements that an arbitral should meet. This is due to the fact that an arbitral award is a documentary instrument that has legal effect.¹⁷⁰ All these requirements are provided for in Rule 30 of the East African Court of Justice Arbitration Rules, 2012).

To this end Rule 30 of the East African Court of Justice Arbitration Rules, 2012, provides that an arbitral award shall be made in writing and shall be final and binding on the parties. Further such an award has to state the reasons upon which the award is based, unless the parties agree that no reasons are to be given, or the award is an award on the agreed terms (i.e. consent award). In addition, an arbitral award shall be signed by the arbitrator(s) and the signed award shall be communicated to parties by the Tribunal.

Rule 30 of the East African Court of Justice Arbitration Rules, 2012) further requires an award to contain the date when and the place where the award was made or is deemed to have been made. Rule 30(3) of the East African Court of Justice Arbitration Rules, 2012) further provides that where there are three or more arbitrators and one or more arbitrators fail to sign, the award should state the reasons for the absence of the signature(s). Finally, the award may be made public, including through law reporting, only with the consent of all parties this is in accordance with Rule 30(4) of the East African Court of Justice Arbitration Rules, 2012) These vital prescriptions by the rules upholds accepted international standards when it comes to writing of arbitral awards, ensuring the effectiveness of the court .

¹⁷⁰ Faustin Ntezilyayo ,‘The East African Court of Justice’s Arbitral Jurisdiction over Commercial Contract Disputes’ <<http://blogaila.com/2016/03/18/the-east-african-court-of-justices-arbitral-jurisdiction-over-commercial-contract-disputes-by-dr-faustin-ntezilyayo/>> lastly accessed on 5th April 2019

The award issued by the East African Court of Justice as an arbitral tribunal is final as provided by Rule 36(1) of East African Court of Justice Arbitration Rules. Essentiality, finality implies that courts cannot interfere with an arbitral award through judicial review.¹⁷¹ The finality of the award by the court is important as it prevents over adjudication of a dispute, which is a seminal principle in arbitration.

In the case of: *Anne Mumbi Hinga v Victoria Njoki Gathara*, [2009] eKLR the court in addressing the requirement as to finality of an arbitral award stated that finality as a concept in arbitration is shared worldwide especially by states that have modelled their Acts on the UNICITRAL Model Law like Kenya.

Further, in the case of: *Hall Street Associates, L.L.C. Petitioner v Mattel, Inc*¹⁷², the court argued that enhanced court review of arbitration awards “...opens the door to the full-bore evidentiary appeals that render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.”

The requirement as to finality of an arbitral award was also considered in the case of: *Eastern Seaboard Concrete Construction Co., Inc., et al v Gray Construction Inc., et al., District of Maine*¹⁷³ where the first Circuit Court of Appeals refused to intervene with a second award issued by an arbitrator to clarify the initial award based on the finality policy.. In this case the court placed great emphasis on the limited scope of judicial review of an arbitral award and inter-alia held that “courts ‘deferential review of arbitration awards’ extended to the arbitrators reasoning for revisiting and clarifying his award. If an arbitrator says that he or she intended to make a

¹⁷¹ Kariuki Muigua, *Settling Disputes through Arbitration in Kenya*, 3rd Edition page 148

¹⁷² 552 U.S.-(2008)

¹⁷³ Civ. No. 08-37-P-s, United States of America

particular finding or ruling but inadvertently left it out and stated it incorrectly the courts respect for arbitration, precludes judicial second-guessing of the arbitrator.”

This demonstrates the importance of finality of an award as provided by Rule 36(1) of East African Court of Justice Arbitration Rules, 2012. This is an important trait of the court especially for those who wish to arbitrate commercial disputes appreciate.

3.1.6 Post-Award Remedies

Under Rule 30 (1), of the East African Court of Justice Arbitration Rules, 2012) an award is final and binding. It is not subject to any remedy except those provided in the Rules. The arbitral jurisdiction of the EACJ being a creature of the Treaty, an award rendered in accordance with Article 32 of the Treaty is not subject to any review by national courts.

However, the East African Court of Justice Arbitration Rules, 2012) adopted by the Court in exercising the powers conferred upon it by Article 42 of the Treaty provide for a number of remedies and procedures that are administered by the original tribunal that rendered the award or the appointing authority (i.e. the President or in his/her absence, the Vice-President of the Court).

It is in this regard that the Rules provide for the interpretation of the award (Rule 33 of the East African Court of Justice Arbitration Rules, 2012), the correction of the award (Rule 34 of the East African Court of Justice Arbitration Rules, 2012) and the additional award and review of the award (Rule 35 of the East African Court of Justice Arbitration Rules, 2012). These post award remedies as provided by the East African Court of Justice Arbitration Rules, 2012, ensures justice is realized as they offer the court’s arbitral tribunal a chance to correct any mistake or even clerical error that it might have made resulting to an erroneous award.

This is in line with world best practices by international arbitral tribunal. For example: Article 50, Article 51 and 52 of the ICSID Convention lists grounds for interpretation, revision and annulment of the award. On this basis this research posits that the existence of post award remedies enhances the effectiveness of East Africa Court of justice as an international arbitral tribunal.

3.1.7 Enforcement of the award

As earlier stated the award by the court is final and binding on the parties and is not subject to any pre-judicial review by national courts of Partner States.¹⁷⁴ By submitting the dispute to arbitration under Article 32 of the Treaty, the parties are deemed to have undertaken to implement the resulting award without delay¹⁷⁵.

Rule 36(3) of East African Court of Justice Arbitration Rules, provides that the enforcement of arbitral awards shall be in accordance with the enforcement procedures of the country in which enforcement is sought. This ensures the court as an arbitral tribunal is effective as its award can be enforced through established procedures of the country in which enforcement is sought. Still, under the East African Court of Justice Arbitration Rules, specifically rules 21 and 22, the parties in the dispute must have stated in the agreement or contract the place of arbitration as well as the language in which the proceedings will be conducted.

3.1.8 Costs in East African Court of Justice Arbitral Proceedings

In regard to costs of arbitral proceedings *Kariuki Muigua* verbatim opines, “...*the arbitration process invariably involves costs and expenses and the questions of who bears the costs, how much is payable and when costs are to be awarded are very delicate questions. The costs of arbitration, also called costs of the award include: the arbitrator’s fees, costs of hiring the venue of*

¹⁷⁴ Rule 30(1) of the East African Court of Justice Arbitration Rules, 2012

¹⁷⁵ Rule 36(2) of East African Court of Justice Arbitration Rules

arbitration, costs of providing transcripts of the proceedings (where these have been contracted), legal fees of advocates employed to advice on legal issues and experts' fees, disbursements and other allowances."¹⁷⁶ This analysis illustrates the nature of costs and expenses incurred in an arbitration process.

The East Africa Court of Justice has the unique feature of having reduced costs by providing that no fees are payable to the arbitrators (Rule 37(1) of the EACJ Arbitration Rules, 2012) who, as stipulated above, are appointed among the Judges of the Court. This outstanding feature of the EACJ arbitral proceedings that no fees are payable to the arbitrators ensures effectiveness of the court by enhancing accessibility to the court.

3.2 Juxtaposing EACJ as an arbitral tribunal with other international arbitral tribunals

3.2.1 International Arbitration under International Centre for Settlement of Investment Disputes

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (herein ICSID Convention) established the International Centre for Settlement of Investment Disputes (herein referred to as ICSID), which is an institution that provides for facilities and services for arbitration and conciliation of investment disputes.¹⁷⁷ The ICSID Convention became operational on October 14th 1966 with about 28 members states; today 163 countries have ratified the convention to become contracting parties.¹⁷⁸

The creation of the ICSID Convention was advocated for by developed countries while developing countries had some reservations against it.¹⁷⁹

¹⁷⁶ Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya*, 2012, 3rd Edition page 154

¹⁷⁷ Article 1 (2) of the ICSID Convention (The principal mandate of ICSID is to provide facilities for conciliation and arbitration between contracting states and nationals of other contracting states.)

¹⁷⁸ ICSID website < <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx> > lastly accessed on 3rd May 2019

¹⁷⁹ Singh S & Sharma S, *Investor-State Dispute Settlement Mechanism: The Quest for a Workable Roadmap* (2013) 29 *Merkourios - International and European Law: General Issue* 91

ICSID has two sets of procedural rules that may govern the initiation and conduct of its proceedings.¹⁸⁰ These are: the ICSID Convention, Regulations¹⁸¹ and Rules¹⁸² and the ICSID Additional Facility Rules.¹⁸³ The ICSID Convention, Regulations and Rules are available only when a dispute is between an ICSID Convention Contracting State (Contracting State) and a national of another Contracting State.¹⁸⁴ The ICSID Additional Facility Rules are available for settlement of investment disputes where only the home-state or the host-state is a Contracting State.¹⁸⁵ ICSID also administers investment disputes under other rules such as the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) rules.¹⁸⁶ The ICSID Convention confers upon the Center jurisdiction over disputes arising directly out of an investment.¹⁸⁷ Although the arbitral procedures conducted under the aegis of ICSID are not mandatory, because of the profile of the Center, which though autonomous is an integral part of the World Bank system, contracting parties and their nationals have frequently utilized its services

¹⁸⁰ Background Information on the International Centre for Settlement of Investment Disputes (ICSID) page 3 <<https://icsid.worldbank.org/en/Documents/ICSID%20Fact%20Sheet%20-%20ENGLISH.pdf>>lastly accessed on 3rd May 2019

¹⁸¹ Administrative and Financial Regulations

¹⁸² Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules) and Rules of Procedure for Conciliation Proceedings (Conciliation Rules); Rules of Procedure for Arbitration Proceedings (Arbitration Rules)

¹⁸³ Background Information on the International Centre for Settlement of Investment Disputes (ICSID) page 3 <<https://icsid.worldbank.org/en/Documents/ICSID%20Fact%20Sheet%20-%20ENGLISH.pdf>>lastly accessed on 3rd May 2019

¹⁸⁴ Article 25 (1) of the ICSID Convention.

¹⁸⁵ ICSID Additional Facility Rules‘ 2006 page 5 :The Administrative Council of the Centre adopted Additional Facility Rules authorizing the Secretariat of ICSID to administer certain categories of proceedings between States and nationals of other States that fall outside the scope of the ICSID Convention <https://icsid.worldbank.org/apps/ICSIDWEB/icsidocs/Documents/AFR_English-final.pdf >lastly accessed on 3rd May 2019

¹⁸⁶ Background Information on the International Centre for Settlement of Investment Disputes (ICSID) page 3 <<https://icsid.worldbank.org/en/Documents/ICSID%20Fact%20Sheet%20-%20ENGLISH.pdf>>lastly accessed on 3rd May 2019

¹⁸⁷ Jacob K Gakeri, Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR (*International Journal of Humanitarian and Social Sciences, Vol. 1 No. 6; June2011*) p. 224

in investment disputes.¹⁸⁸ Arbitral proceedings are instituted by a written request to the Secretary General.¹⁸⁹ The Convention contains detailed rules on the constitution¹⁹⁰, powers and functions of the Arbitral tribunal¹⁹¹, the award¹⁹², interpretation, revision and annulment of the award¹⁹³, replacement and disqualification of arbitrators¹⁹⁴, recognition and enforcement of awards¹⁹⁵, cost of proceedings¹⁹⁶, as well as place of proceedings¹⁹⁷.

One of the most striking features of the ICSID arbitral process is the inviolable character of the award.¹⁹⁸ It is insusceptible to the jurisdiction of domestic courts of the contracting parties. Contracting parties are required to recognize and enforce the arbitral award.¹⁹⁹ This is an unmatched attribute of the ICSID arbitral process.²⁰⁰

Summarized overview of the Arbitration process under ICSID Convention²⁰¹:

An ICSID Convention arbitration proceeding is governed by:

- a) the ICSID Convention;

¹⁸⁸ According to the ICSID 2018 Annual Report, Fifty-seven new ICSID cases were registered in FY2018. This is a 16% increase over the number of cases registered last year (49), and constitutes the highest number of cases ever registered at ICSID in a single fiscal year. Fifty-six of the new cases were arbitration proceedings and one was a conciliation case. The majority of these new cases were instituted under the ICSID Convention (51 cases), and six arbitrations were instituted under the Additional Facility Rules. ICSID 2018 Annual Report <<https://openknowledge.worldbank.org/handle/10986/30613>> lastly accessed on 4th May 2019

¹⁸⁹ Article 36 of the ICSID Convention

¹⁹⁰ Article 37 to 40 of the ICSID Convention

¹⁹¹ Article 41 to 47 of the ICSID Convention

¹⁹² Article 48 to 49 of the ICSID Convention

¹⁹³ Article 50 to 52 of the ICSID Convention

¹⁹⁴ Article 56 to 58 of the ICSID Convention

¹⁹⁵ Article 53 to 55 of the ICSID Convention

¹⁹⁶ Article 59 to 61 of the ICSID Convention

¹⁹⁷ Article 62 to 63 of the ICSID Convention

¹⁹⁸ Jacob K Gakeri, Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR (*International Journal of Humanitarian and Social Sciences, Vol. 1 No. 6; June2011*) p. 224

¹⁹⁹ Article 54 of the ICSID Convention

²⁰⁰ Jacob K Gakeri, Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR (*International Journal of Humanitarian and Social Sciences, Vol. 1 No. 6; June2011*) p. 224

²⁰¹ Overview of an Arbitration under the ICSID Convention

<<https://icsid.worldbank.org/en/Pages/process/Arbitration.aspx>> lastly accessed on 4th May 2019

- b) the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules);
- c) the Rules of Procedure for Arbitration Proceedings (Arbitration Rules); and
- d) the Administrative and Financial Regulations.

A brief analysis of the legal framework guiding Arbitration under ICSID²⁰²:

The ICSID Convention²⁰³

The ICSID Convention provides the framework for the conduct of an arbitration proceeding. The main procedural provisions are contained in Chapters IV to VII of the Convention. These provisions cross-reference other provisions, such as Article 14(1) of the Convention concerning the required qualities of an arbitrator. The conditions for jurisdiction are in Chapter II. All provisions of the Convention are mandatory except when the Convention allows parties to agree otherwise. If a question of procedure arises which is not covered by the Convention or by the applicable Arbitration Rules, the Tribunal has discretion to decide the question. (Article 44 of the Convention)

The Institution Rules²⁰⁴

The Institution Rules explain how to institute an arbitration proceeding, including the form and contents of the request for arbitration. They apply to the steps taken between filing a request for arbitration until dispatch of the notice of registration. Article 36 of the Convention also applies to

²⁰² Overview of an Arbitration under the ICSID Convention

<<https://icsid.worldbank.org/en/Pages/process/Arbitration.aspx>> lastly accessed on 4th May 2019

²⁰³ Overview of an Arbitration under the ICSID Convention

<<https://icsid.worldbank.org/en/Pages/process/Arbitration.aspx>> lastly accessed on 4th May 2019

²⁰⁴ Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules)

this period. On average, cases are registered within three weeks of the Centre receiving the request for arbitration with supporting materials and the fee for lodging the request.

The Institution Rules do not apply to the institution of post-award remedy proceedings under the ICSID Convention and Arbitration Rules.

The Arbitration Rules²⁰⁵

The Arbitration Rules govern the arbitration proceeding once a request for arbitration has been registered. They complement the ICSID Convention procedural provisions, including provisions concerning post-award remedies.

Article 44 of the ICSID Convention provides that arbitrations will be conducted in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration, except as the parties otherwise agree. The current rules came into effect on April 10, 2006.²⁰⁶

The administrative and financial regulations²⁰⁷

The Administrative and Financial Regulations contain provisions concerning:

- a) the costs of the proceeding (Regulation 14 to 16);
- b) publication of case-related information (Regulation 22);
- c) functions with respect to individual proceedings, including the ICSID Secretariat's services (Regulation 23 to 29);
- d) calculation of time limits and submission of supporting documentation (Regulation 29 to 30);
- e) immunities and privileges (Regulation 31 to 32); and official languages (Regulation 34)

The main steps in an ICSID Convention arbitration are depicted in the following flow chart.

²⁰⁵ Rules of Procedure for Arbitration Proceedings (Arbitration Rules)

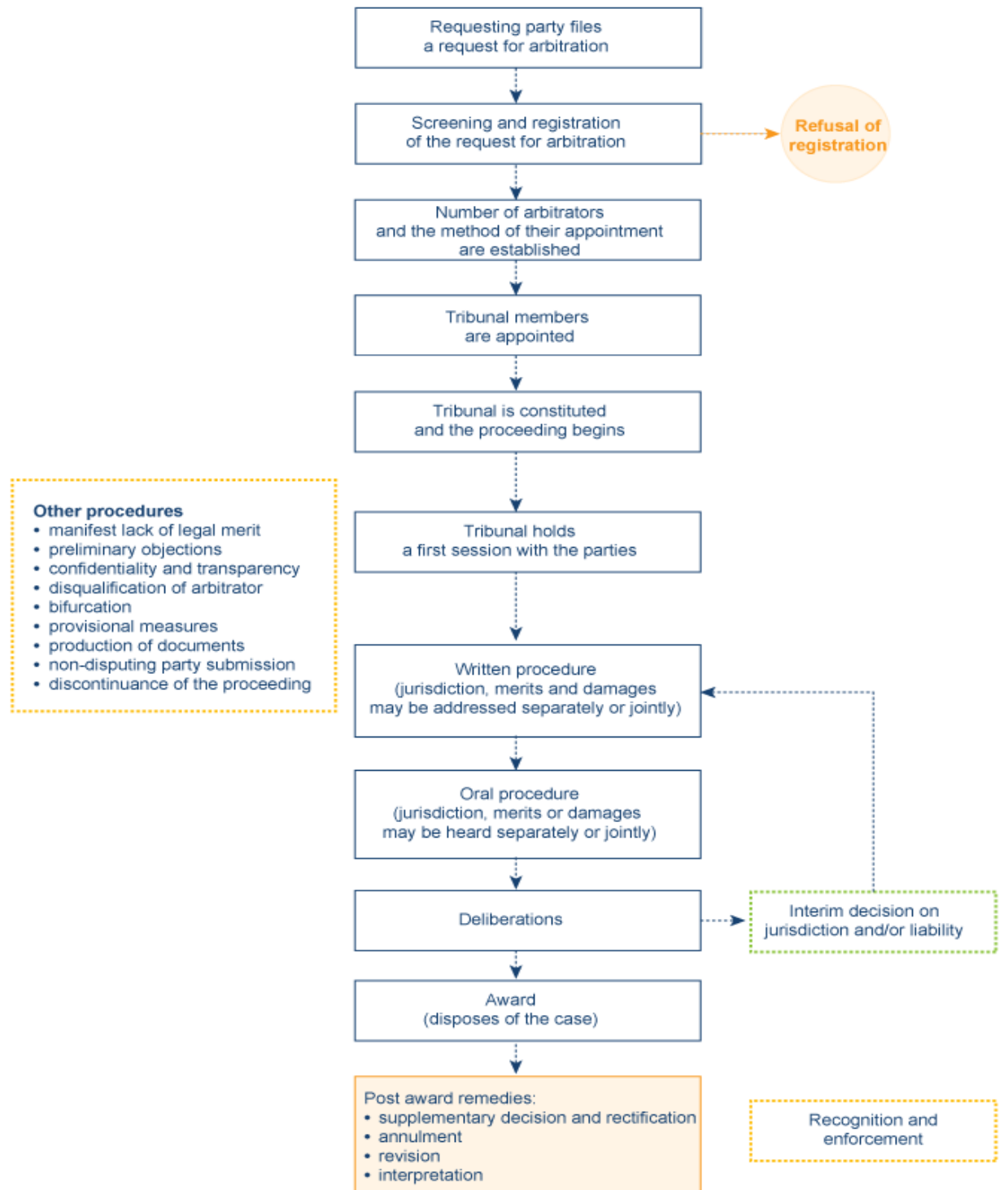
²⁰⁶ Overview of an Arbitration under the ICSID Convention

<<https://icsid.worldbank.org/en/Pages/process/Arbitration.aspx>> lastly accessed on 4th May 2019

²⁰⁷ Overview of an Arbitration under the ICSID Convention

<<https://icsid.worldbank.org/en/Pages/process/Arbitration.aspx>> lastly accessed on 4th May 2019

Conduct of an ICSID Convention Arbitration



The effectiveness of ICSID as an international arbitral tribunal is illustrated by the frequency at which contracting parties and their nationals have frequently utilized its services in investment disputes.²⁰⁸ Further the inviolable character of the award of ICSID as provided for under Article 54 of the ICSID Convention makes the Centre an attractive arbitral tribunal for investment disputes.²⁰⁹ The arbitral award is insusceptible to the jurisdiction of domestic courts of the contracting parties. Contracting parties are required to recognize and enforce the arbitral award as if it were a final judgment of a court in that state. This salient attribute of the ICSID arbitral process is unmatched.²¹⁰

Further ICSID has since 1978 enforced the Additional Facility Rules, which authorize the ICSID Secretariat to administer certain categories of proceedings between states and nationals that are *ultra vires* the Convention.²¹¹ An in-depth review of ICSID annual reports²¹² which provides statistics for arbitral disputes filed at the Centre, awards made, and pending cases vividly create

²⁰⁸According to the ICSID 2018 Annual Report, Fifty-seven new ICSID cases were registered in FY2018. This is a 16% increase over the number of cases registered last year (49), and constitutes the highest number of cases ever registered at ICSID in a single fiscal year. Fifty-six of the new cases were arbitration proceedings and one was a conciliation case. The majority of these new cases were instituted under the ICSID Convention (51 cases), and six arbitrations were instituted under the Additional Facility Rules.
ICSID 2018 Annual Report <<https://openknowledge.worldbank.org/handle/10986/30613>> lastly accessed on 4th May 2019

²⁰⁹Article 54(1) of the ICSID Convention verbatim provides that: Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.

²¹⁰ Jacob K Gakeri, Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR (*International Journal of Humanitarian and Social Sciences, Vol. 1 No. 6; June2011*) p. 224

²¹¹ ICSID Additional Facility Rules' 2006 page 5 :The Administrative Council of the Centre adopted Additional Facility Rules authorizing the Secretariat of ICSID to administer certain categories of proceedings between States and nationals of other States that fall outside the scope of the ICSID Convention
<https://icsid.worldbank.org/apps/ICSIDWEB/icsidocs/Documents/AFR_English-final.pdf >lastly accessed on 3rd May 2019

²¹²According to the ICSID 2018 Annual Report, Fifty-seven new ICSID cases were registered in FY2018. This is a 16% increase over the number of cases registered last year (49), and constitutes the highest number of cases ever registered at ICSID in a single fiscal year. Fifty-six of the new cases were arbitration proceedings and one was a conciliation case. The majority of these new cases were instituted under the ICSID Convention (51 cases), and six arbitrations were instituted under the Additional Facility Rules.
ICSID 2018 Annual Report <<https://openknowledge.worldbank.org/handle/10986/30613>> lastly accessed on 4th May 2019

the picture of a system that has won the confidence of investors and Contracting Parties in every part of the globe.²¹³

3.2.2 International Arbitration under the auspices of London International Court of Arbitration

The London Court of International Arbitration (hereinafter “LCIA”) is considered as one of the world’s leading international arbitral tribunals. Formerly it was known as the “London Court of Arbitration.” The London Court of International Arbitration (LCIA) administers and provides a forum for arbitration for all parties, irrespective of their location or system of law.²¹⁴

The LCIA is composed of three separate structures: the Secretariat, the Court and the Company.

The Secretariat is the only permanent organ. It is responsible for carrying out the day-to-day management of arbitral proceedings. The Registrar is the highest authority of the Secretariat, which is assisted by the Deputy Registrar.²¹⁵

The Court supervises the Secretariat’s activities. LCIA Court is composed of thirty-five members, who serve a five year mandate. The main functions of the court are: acting as an appointing authority, determining challenges to arbitrators, and controlling costs. Further the Court also has the final word on interpreting provisions of the LCIA Rules, when they are in question.²¹⁶

The Company is the only organ that does not provide administrative services. It is in charge of supervising the LCIA’s activities and development, according to the applicable law.²¹⁷

²¹³ Jacob K Gakeri, Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR (*International Journal of Humanitarian and Social Sciences, Vol. 1 No. 6; June2011*) p. 224

²¹⁴ International arbitration law.com

<<http://internationalarbitrationlaw.com/about-arbitration/international-arbitration/institutional-arbitration/london-court-of-international-arbitration-lcia/>> lastly accessed on 4th May 2019

²¹⁵ Aceris Law LLC, The London Court of International Arbitration – LCIA (03/02/2018)

<<https://www.acerislaw.com/london-court-international-arbitration-lcia/>>lastly accessed on 5th May 2019

²¹⁶ Aceris Law LLC, The London Court of International Arbitration – LCIA (03/02/2018)

<<https://www.acerislaw.com/london-court-international-arbitration-lcia/>>lastly accessed on 5th May 2019

²¹⁷ Aceris Law LLC, The London Court of International Arbitration – LCIA (03/02/2018)

<<https://www.acerislaw.com/london-court-international-arbitration-lcia/>>lastly accessed on 5th May 2019

Conduct of Arbitration in London Court of International Arbitration

Arbitration in London Court of International Arbitration is consensual. On this basis parties who wish to arbitrate their disputes in London Court of International Arbitration refer to LCIA arbitration or its Rules in their arbitration clauses drafted prior to a dispute arising. This allows them to commence proceedings in the event of a dispute, rather than resorting to domestic courts. However, parties may also agree to resort to arbitration after a dispute has arisen, in a separate agreement, although this is often difficult as a practical matter.²¹⁸

To commence an arbitration in London Court of International Arbitration under the Rules, a party should file with the LCIA a Request for Arbitration and it is delivered to the registrar.²¹⁹ When the Respondent in the arbitral proceedings receives a Request for Arbitration, the next step is to prepare a Response. Article 2 of the LCIA Arbitration Rules 2014 provides that a Respondent shall file any Response to a Request within 28 days of the date that the arbitration commenced (namely, within 28 days of the date on which the LCIA received the Request and registration fee).²²⁰

One of the most *distinct and striking features* of the LCIA arbitral process is electronic filing of documents. From 1st October 2014, a party may file a Request electronically at LCIA²²¹.

Also a Respondent can file a Response electronically through LCIA online platform. The online platform by LCIA for filing of documents facilitates filing of an application for the appointment of an Emergency Arbitrator or an application for expedited appointment of the Arbitral Tribunal.²²²

²¹⁸ Aceris Law LLC, The London Court of International Arbitration – LCIA (03/02/2018)

<<https://www.acerislaw.com/london-court-international-arbitration-lcia/>>lastly accessed on 5th May 2019

²¹⁹ Article 1 of LCIA Arbitration Rules 2014 verbatim provides: Any party wishing to commence an arbitration under the LCIA Rules (the “Claimant”) shall deliver to the Registrar of the LCIA Court (the “Registrar”) a written request for arbitration (the “Request”), containing or accompanied by:

²²⁰ LCIA Notes for parties page 6 <<https://www.lcia.org/adr-services/guidance-notes.aspx>> lastly accessed on 13th May 2019

²²¹ Through LCIA online filing system, available at <onlinefiling.lcia.org>(LCIA Notes for parties page 5 to 6)

²²² LCIA Notes for parties page 6 <<https://www.lcia.org/adr-services/guidance-notes.aspx>> lastly accessed on 13th May 2019

The prerequisite to use the LCIA online filing system is that an individual needs to complete a simple registration process, which generates a unique username and password and provides access to our various online forms. The online filing system by LCIA is designed to be user-friendly requesting step-by-step all of the information required by the LCIA Arbitration Rules 2014. In this way, it acts as a useful checklist for parties unfamiliar with LCIA arbitration to ensure that they have included in their Request or Response (or in their application for an Emergency Arbitrator or for expedited formation) all of the information that the Rules require.²²³

The LCIA Arbitration Rules 2014 are the rules that guide Arbitration in LCIA. They are a set of arbitral rules that parties can, by agreement, adopt to provide the framework for the resolution of their dispute by arbitration.

A succinct analysis of the LCIA Arbitration Rules 2014²²⁴

LCIA Arbitration Rules 2014, offer to parties a state of the art arbitration forum with all the seminal attributes of modern arbitration. These include²²⁵: maximum flexibility for parties and Arbitral Tribunals to agree on procedural matters; speed and efficiency in the appointment of arbitrators; a combination of the best features of the civil and common law systems; emergency procedures, including expedited formation of the Arbitral Tribunal (and, under the 2014 Rules, emergency arbitrator); an Arbitral Tribunal's power to decide on its own jurisdiction; ethical guidelines for the parties' legal representatives (under the 2014 Rules); an Arbitral Tribunal's power to order security for claims and for costs, as well as to grant a range of interim and conservatory measures; special

²²³ LCIA Notes for parties page 6 <<https://www.lcia.org/adr-services/guidance-notes.aspx>> lastly accessed on 13th May 2019

²²⁴ LCIA Arbitration Rules 2014 became effective on 1st October 2014 as the guiding legal framework for arbitration in LCIA

²²⁵ LCIA Notes for parties page 3 <<https://www.lcia.org/adr-services/guidance-notes.aspx>> lastly accessed on 13th May 2019

powers for joinder of third parties (and, under the 2014 Rules, consolidation); waiver of right of appeal, assisting parties to obtain finality; costs computed on an hourly basis, rather than as a percentage of the amount in dispute; and staged deposits - parties are not required to pay for the whole arbitration in advance.²²⁶

LCIA previously had LCIA rules (1998 rules). LCIA rules (1998 rules) continue to apply to arbitrations in LCIA that were commenced before 1st October 2014, as well as to arbitrations where the parties' agreement expressly refers to the LCIA Rules 1998 or, for example, to "*the LCIA Rules in force as at the date of the agreement*" (where that date was before 1/10/ 2014)²²⁷

LCIA adopted new Arbitration Rules (LCIA Arbitration Rules 2014) for all the proceedings under LCIA as an international arbitral tribunal. These rules were effective 1st October 2014. The LCIA Arbitration Rules 2014 provide significant changes mainly in respect of: (1) the law governing the arbitration agreement, (2) the proceedings itself (3) the conduct required to legal representatives and (4) the appointment of emergency arbitrators (as part of the emergency procedures available under the LCIA Rules).²²⁸

1. The law governing the arbitration agreement and the seat of arbitration.

Article 16.4 of the LCIA Arbitration Rules 2014 verbatim provides that:

"The law applicable to the Arbitration Agreement and the arbitration shall be the law applicable at the seat of the arbitration, unless and to the extent that the parties have agreed in writing on the

²²⁶ LCIA Notes for parties page 3 <<https://www.lcia.org/adr-services/guidance-notes.aspx>> lastly accessed on 13th May 2019

²²⁷ LCIA Notes for parties page 2 <<https://www.lcia.org/adr-services/guidance-notes.aspx>> lastly accessed on 13th May 2019

²²⁸ Giuseppe Broccoli, The 2014 LCIA Rules - A Brief Analysis Of The 2014 London Court Of International Arbitration Rules <<http://www.mondaq.com/italy/x/436072/International+Courts+Tribunals/The+2014+LCIA+Rules>> lastly accessed on 13th May 2019

application of other laws or rules of law and such agreement is not prohibited by the law applicable at the arbitral seat."

The effect of this provision is that it gives certainty in respect of the application of the common principle of the *lex arbitri* and avoids any discussion about the usual alternative between law of the seat and law of the contract. In the absence of parties' choice, in fact, if on the one side there are strong arguments to maintain that the arbitration agreement should be governed by the law applicable to the contract (since the arbitration agreement is a clause of the underlying contract) and on the other hand the principle of autonomy and separability of the arbitration clause the law of the seat will rightly be considered as the most appropriate (as the 1958 New York Convention points out under Article V (1) (a)).²²⁹

In regard to the seat of the arbitration, while Article 16.1 provides that the parties have the power to choose the seat until the formation of the Arbitral Tribunal (and even after with the consent of the Tribunal itself), Article 16.2 provides that in case of failure from the parties to choose the seat of the arbitration, the latter will be London by default, unless the Tribunal, having considered the comments from the parties, will consider more appropriate a different place.²³⁰ In adopting these rules should consider this given the effect that the law of the seat might have on supervisory, conservatory or interim measures.

2. Improving the efficiency and speed of the arbitration proceedings in LCIA.

The LCIA Arbitration Rules 2014 provide for various measures to improve the efficiency and the speed of the arbitration proceeding itself. Below a brief description of the most relevant.

²²⁹ Giuseppe Broccoli, The 2014 LCIA Rules - A Brief Analysis Of The 2014 London Court Of International Arbitration Rules
<<http://www.mondaq.com/italy/x/436072/International+Courts+Tribunals/The+2014+LCIA+Rules>> lastly accessed on 13th May 2019

²³⁰ LCIA Arbitration Rules 2014

a) **More efficiency from arbitrators.** Article 5.4 of the LCIA Arbitration Rules 2014 provides that the candidate arbitrators, before their appointment, shall sign a declaration pursuant to which they will state *"whether the candidate is ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration."* This provision has to be read in connection with Articles 10.1 and 10.2 of the LCIA Arbitration Rules pursuant to which the LCIA Court has the power to revoke the arbitrator if she/he *"does not conduct or participate in the arbitration with reasonable efficiency diligence and industry."*²³¹

Further In the context of improving the speed of the proceeding, Article 15.10 of the LCIA Arbitration Rules 2014 verbatim provides that: *"the Arbitral Tribunal shall seek to make its final award as soon as reasonably possible following the last submission from the parties [...]. When the Arbitral Tribunal [...] establishes a time for what it contemplates shall be the last submission from the parties (whether written or oral), it shall set aside adequate time for deliberations as soon as possible after that last submission and notify the parties of the time it has set aside."*²³²

These provisions seek to promote a timely and efficient conduct of the arbitration under LCIA.²³³

b) **Timing and speed of proceeding.** Under LCIA Arbitration Rules 2014 various provisions are aimed at improving the speed of arbitration proceedings. Article 5.1 of the LCIA

²³¹ LCIA Arbitration Rules 2014

²³² LCIA Arbitration Rules 2014

²³³ Giuseppe Broccoli, The 2014 LCIA Rules - A Brief Analysis Of The 2014 London Court Of International Arbitration Rules <<http://www.mondaq.com/italy/x/436072/International+Courts+Tribunals/The+2014+LCIA+Rules>> lastly accessed on 13th May 2019

Arbitration Rules 2014 provides expressly that *"any controversy between the parties relating to the sufficiency of the Request or the Response"* shall not impede the formation of the Arbitral Tribunal. The import of this provision of the rules is that the LCIA Court does not carry out any assessment of the completeness of the Request or the Response. Any controversy relating to the Request or Response shall therefore be dealt with directly by the Arbitral Tribunal once duly constituted in accordance with the rules.

Under Article 14.1 of the LCIA Arbitration Rules 2014 parties and the Arbitral Tribunal are encouraged to make contact no later than 21 days from the notification of the formation of the Tribunal. Such contact may be made with any viable mean *"whether by a hearing in person, telephone conference-call, video conference or exchange of correspondence"*. In line with Article 14.1 of the LCIA Arbitration Rules 2014, Article 13.1 of the LCIA Arbitration Rules 2014 seeks to make contacts between the parties and the tribunal easier by allowing direct communication instead of communication through the Registrar.

With a view of improving the speed of the proceeding, Article 18.4 of the LCIA Arbitration Rules 2014 (to be read in conjunction with Article 18.3) grants the Arbitral Tribunal the power to withhold the approval of the appointment of new legal representative if such appointment would have an impact (amongst the others) also on the costs and time of the proceeding. While in fact Article 18.3 of the LCIA Arbitration Rules 2014 provides that any appointment of new legal representative has to be approved by the Tribunal, said appointment can be withheld by the Tribunal if it *"could compromise the composition of the Arbitral Tribunal or the finality of any award (on the grounds of possible conflict or other like impediment)"*.

In granting or withholding the approval the Tribunal "*shall have regard to the circumstances, including: the general principle that a party may be represented by a legal representative chosen by that party, the stage which the arbitration has reached, the efficiency resulting from maintaining the composition of the Arbitral Tribunal (as constituted throughout the arbitration) and any likely wasted costs or loss of time resulting from such change or addition*".²³⁴

3. Provisions regarding conduct of legal representatives.

Certainly one of the most innovative and outstanding provision of the LCIA Arbitration Rules 2014 is that contained in the Annex to the LCIA Rules “*General Guidelines for the Parties’ Legal representative*” as referred to by Article 18.5 and 18.6 of the LCIA Arbitration Rules 2014.²³⁵

The purpose of these ‘General Guidelines for the Parties’ Legal representative’ is to promote the good and equal conduct of the parties’ legal representatives appearing by name within the arbitration under LCIA.²³⁶

Despite the fact that the General Guidelines are not substantially different from the IBA Guidelines on Party Representation in International Arbitration (other provisions of the LCIA Arbitration Rules 2014 recalls the IBA Guidelines see for instance Article 13.5 of the 2014 LCIA Rules compared with IBA Guideline 8 (b)) it is to be welcomed the express inclusion in the Rules of

²³⁴ Article 18.4 of the LCIA Arbitration Rules 2014

²³⁵ Article 18.5 of the LCIA Arbitration Rules 2014 verbatim states: Each party shall ensure that all its legal representatives appearing by name before the Arbitral Tribunal have agreed to comply with the general guidelines contained in the Annex to the LCIA Rules, as a condition of such representation. In permitting any legal representative so to appear, a party shall thereby represent that the legal representative has agreed to such compliance.

²³⁶ Annex to the LCIA Rules “*General Guidelines for the Parties’ Legal representative*”

principles which are to be intended “*to promote the good and equal conduct of the parties’ legal representatives...*”²³⁷

Pursuant to the General Guidelines, the legal representatives should not: engage in activities intended unfairly to obstruct the arbitration or to jeopardize the finality of any award, including repeated challenges to an arbitrator's appointment or to the jurisdiction or authority of the Arbitral Tribunal known to be unfounded by that legal representative; knowingly make any false statement to the Arbitral Tribunal or the LCIA Court; knowingly procure or assist in the preparation of or rely upon any false evidence presented to the Arbitral Tribunal or the LCIA Court; knowingly conceal or assist in the concealment of any document (or any part thereof) which is ordered to be produced by the Arbitral Tribunal.²³⁸

Article 18.5 of the LCIA Arbitration Rules 2014, requires each legal representative to have agreed to comply with the Guidelines as a condition of their appointment.

Further Article 18.6 of the LCIA Arbitration Rules 2014 empowers the Arbitral Tribunal to sanction the legal representative who is found to have violated the Guidelines.²³⁹

4. Emergency Procedures as prescribed by the LCIA Arbitration Rules 2014.

There are two mechanisms available in respect of emergency procedures. The first one relates to the expedited formation of the arbitral tribunal and the second is the possibility for a party to apply for the appointment of an Emergency Arbitrator who will deal with emergency relief.²⁴⁰

²³⁷ Giuseppe Broccoli, The 2014 LCIA Rules - A Brief Analysis Of The 2014 London Court Of International Arbitration Rules
<<http://www.mondaq.com/italy/x/436072/International+Courts+Tribunals/The+2014+LCIA+Rules>> lastly accessed on 13th May 2019

²³⁸ Annex to the LCIA Rules “ *General Guidelines for the Parties’ Legal representative*”

²³⁹ LCIA Arbitration Rules 2014

²⁴⁰ Giuseppe Broccoli, The 2014 LCIA Rules - A Brief Analysis Of The 2014 London Court Of International Arbitration Rules
<<http://www.mondaq.com/italy/x/436072/International+Courts+Tribunals/The+2014+LCIA+Rules>> lastly accessed on 13th May 2019

a) ***Expedited Formation of the Arbitral Tribunal***-Article 9A of the LCIA Arbitration Rules 2014 provides that, in case of exceptional urgency, any party may apply to the LCIA Court (with written request to the Registrar) and request the expedited formation of the Tribunal. The request shall be made simultaneously with the Request for Arbitration or the Response (depending if it is the claimant or the respondent who makes the application). The application must state the specific grounds of the exceptional urgency which requires the expedited formation of the Tribunal.

If the LCIA Court grants the application (ie recognizes that there are exceptional reasons for the expedited formation of the Tribunal) then the Court shall appoint the Tribunal as expeditiously as possible and will have also the power to abridge any time period of the proceeding pursuant to Article 22.5. The non-applicant will usually be given the opportunity to comments on the application, despite the fact that the Court may decide to grant the application even without having given such possibility to the non-applicant.²⁴¹

It is relevant to mention that the Tribunal appointed under an expedited formation is the same Tribunal that will decide the merit of the case in the sense that it is the permanent (as opposite to a temporary) Tribunal.²⁴²

b) **Appointment of an Emergency Arbitrator**-Article 9B of the LCIA Arbitration Rules 2014 allows a party to request the appointment of an Emergency Arbitrator to deal with urgency relief. This is in line with other main arbitration rules. Such provision reflects the importance of interim emergency reliefs that can be applied in arbitration procedures.

²⁴¹ Article 9A of the LCIA Arbitration Rules 2014

²⁴² Giuseppe Broccoli, The 2014 LCIA Rules - A Brief Analysis Of The 2014 London Court Of International Arbitration Rules
<<http://www.mondaq.com/italy/x/436072/International+Courts+Tribunals/The+2014+LCIA+Rules>> lastly accessed on 13th May 2019

However enforcement of any interim relief granted by arbitral tribunal in various jurisdictions remains a challenge. On this basis parties might prefer to recur to local courts (in various jurisdictions) and this is not prevented by the LCIA Arbitration Rules.²⁴³

Article 9B of the LCIA Arbitration Rules 2014 provides verbatim that: "*[...] in the case of emergency at any time prior to the formation [...] of the Arbitral Tribunal [...] any party may apply [...] for the immediate appointment of a temporary sole arbitrator to conduct emergency proceedings [...].*"

From the reading of Article 9B of the LCIA Arbitration Rules 2014 it is vividly clear that the Emergency Arbitrator is a sole and temporary arbitrator appointed only for the purpose of deciding on any interim relief that the applicant wishes to obtain.

In other words, the Emergency Arbitrator will not remain in office to determine the merit of the case.

The main features of the procedure for the appointment of Emergency Arbitrator may be summarized as follows: "*The application shall set out, together with all relevant documentation: (i) the specific grounds for requiring, as an emergency, the appointment of an Emergency Arbitrator; and (ii) the specific claim, with reasons, for emergency relief.*"²⁴⁴

²⁴³ Giuseppe Broccoli, The 2014 LCIA Rules - A Brief Analysis Of The 2014 London Court Of International Arbitration Rules
<<http://www.mondaq.com/italy/x/436072/International+Courts+Tribunals/The+2014+LCIA+Rules>> lastly accessed on 13th May 2019

²⁴⁴ Article 9B(9.5) of the LCIA Arbitration Rules 2014

The LCIA Court is required to determine the application as soon as possible and, if the application is granted, the LCIA Court appoints the Emergency Arbitrator within the three days from the receipt of the application.²⁴⁵

The Emergency Arbitrator conducts the emergency proceedings in any manner she/he determines to be appropriate in the circumstances and giving the opportunity to each party, if possible, to be consulted on the claim submitted and the reasons for the emergency relief (that said the Emergency Arbitrator is not bound by holding a specific hearing and may take the decision solely on the basis of the documentation submitted).²⁴⁶

The Emergency Arbitrator shall take a decision on the application within 14 days following her appointment. The time limit could be eventually extended (in exceptional circumstances) by the LCIA Court or by agreement between the Parties. The decision of the Emergency Arbitrator may take the form of an order or even of an award (despite the award cannot fall within the concept of 'award' as provided for by the 1958 New York Convention).²⁴⁷ The order or the award may be confirmed, varied or revoked by an order or award made by the subsequently appointed Arbitral Tribunal.²⁴⁸

Particular attention should be given to the drafting of the arbitration clause to be governed by the 2014 LCIA since, as clarified by para 9.14, the provision shall not apply *"if either: (i) the parties have concluded their arbitration agreement before 1 October 2014 and the parties have not agreed in writing to 'opt in' to Article 9B; or (ii) the parties have agreed in writing at any time to 'opt out' of Article 9B"*.

²⁴⁵ Article 9B(9.6) of the LCIA Arbitration Rules 2014

²⁴⁶ Article 9B(9.7) of the LCIA Arbitration Rules 2014

²⁴⁷ Article 9B(9.8) of the LCIA Arbitration Rules 2014

²⁴⁸ Article 9B(9.11) of the LCIA Arbitration Rules 2014

5. LCIA Arbitral Award

Under the LCIA Rules, arbitral awards are final and binding. They also provide for waiver of the right to appeal, as long as this is admissible under the applicable law, ensuring that businesses will not spend years on appellate litigation.²⁴⁹

In conclusion the LCIA Arbitration rules enhance the efficacy of the LCIA as an international tribunal making it an attractive forum for arbitration of disputes. Advantages associated with arbitrating at LCIA include but not limited to: It is a reputable and efficient forum recognized world in arbitration of disputes, cost efficiency as the LCIA's administrative charges and arbitrators' fees are *not* based on the sums in dispute, but on time spent by arbitrators and the LCIA's secretariat, which may be very attractive for the medium and high value disputes; and LCIA Arbitration rules 2014 that guide arbitration in LCIA are formulated to enhance efficacy of arbitration of disputes in LCIA.²⁵⁰

3.2.3 Efficiency of East African Court of Justice as an International Arbitral Court in comparison to LCIA and ICSID

A prima-facie comparison of EACJ with LCIA and ICSID clearly illustrates that EACJ as an international arbitral tribunal has a long way to go to be considered efficient as the two international arbitral tribunal²⁵¹. For EACJ to be as effective as ICSID and LCIA, there is need to reform the structure of EACJ as an international Arbitral Tribunal, amend the existing EACJ arbitral rules, and enact additional rules and regulations where necessary.

²⁴⁹ Article 26(26.8) of the LCIA Arbitration Rules 2014

²⁵⁰ Nadia Hubback; Jane Fedotova; Konstantin Astafiev; Irina Suspitcyna, The Resolution of Disputes at the London Court of International Arbitration (LCIA): Practical Aspects page 169 (Moscow, March 21, 2014), 2 Russ.L.J. 168 (2014)

²⁵¹ ICSID and LCIA

Succinctly stated; restructuring of EACJ Arbitral Tribunal should involve having a separate administration structure solely concerned with international arbitration of disputes from the EACJ Court. This is by having regulations and rules enacted for administration of EACJ Arbitral tribunal. The structure of ICSID and LCIA as discussed above would offer the best guideline on how to restructure EACJ.

Further there is need to amend the existing EACJ Arbitration Rules, 2012 to capture various seminal attributes. These include but not limited to; finality of the award, conduct of arbitrators and legal representatives, filing of documents, constitution of the arbitral tribunal, emergency procedures, law governing arbitration proceedings.

In general adopting similar provisions as provided for by ICSID Arbitration rules and LCIA Arbitration rules would make EACJ arbitral tribunal an effective and attractive forum for arbitration of disputes. E.g Finality of award as provided for ICSID Arbitration rules and LCIA Arbitration rules.

3.3 In conclusion

For the East African Court of Justice as an arbitral tribunal to act as an effective arbiter of international disputes and promote international arbitration in East Africa there is need for various changes as discussed above to be effected. However the existing EACJ Arbitration Rules, 2012 can offer a basis for effective arbitration of disputes as they are formulated in accordance with best international norms and practices when it comes to international arbitration of disputes to a large extent. However, as already indicated as time changes and various issues emerge it will be imperative to review the rules and structure of EACJ as an international arbitral tribunal. This will enhance the effectiveness of EACJ as an international arbitral tribunal to a level similar to ICSID and LCIA international arbitral tribunals.

CHAPTER FOUR

CHALLENGES FACING THE EAST AFRICAN COURT OF JUSTICE AS AN INTERNATIONAL ARBITRAL TRIBUNAL

4.0 Introduction

Despite the strides that East African Court of Justice has made since its inception, the court continues to encounter a myriad of challenges that are preventing it from fulfilling its role of promoting international arbitration in East Africa. This is manifested by the fact that the EAC Court does not have a vibrant arbitration matters cause list. By 16th April 2015, President of the Court Justice Dr. Emmanuel Ugirashebuja noted that the court had only received one arbitral matter to arbitrate.²⁵² This is the case of: *Alice Nayebare v EALS Arbitration Cause No 1/2012* which was the first matter to be referred to East African Court of Justice for arbitration had an arbitration clause granting the East African Court of Justice the requisite jurisdiction to arbitrate over the matter.²⁵³

This statistic illustrates existence of underlying challenges that the East African Court of Justice is facing as an International arbitral tribunal.

This is despite the fact that East African Court of Justice has the unique feature of having reduced costs. This is by providing that no fees are payable to the arbitrators under Rule 37(1) of the East African Court of Justice Arbitration Rules, 2012).

This chapter seeks to enunciate the seminal challenges that East African Court of Justice faces as an international arbitral tribunal in exercise of its arbitral jurisdiction. This is jurisdiction over matters arising from arbitration agreements contained in a contract or agreement concluded by the Community or any of its institutions; and arbitration agreements contained in a commercial

²⁵²EACJ Judges' training on emerging trends in arbitration sets off <<http://eacj.eac.int/?p=2798>> lastly accessed on 16th May 2019

²⁵³ <http://eacj.eac.int/?tribe_events=arbitration-cause-no-1-of-2012-alice-nayebare-vs-east-african-law-society> lastly accessed on 16th May 2019

contract or agreement which the parties have conferred jurisdiction on the Court to deal with arising disputes.²⁵⁴

4.1 Analyzing challenges facing the East African Court of Justice as an International Arbitral Tribunal

The need for an effective, time saving, reliable and cost-effective mechanism has not only become desirable but also invaluable with increased globalization.²⁵⁵The existence of such a demand gap has made arbitration as means of resolving disputes a viable and attractive mechanism. The East African Court of Justice, as a vital arbitral tribunal in East Africa region ought to fill such a demand gap. The effectiveness of East African Court of Justice as an international arbitral is seminal in promotion of international arbitration in East Africa. However the East African Court of Justice continues to face various challenges which ought to be addressed to enhance its effectiveness. Some of the challenges facing the East African Court of Justice as an international arbitral tribunal include:

a) The sitting of judges on adhoc basis

Judges at East African Court of justice who ought to facilitate arbitration of disputes operate on adhoc basis.²⁵⁶The Judges of the Court are appointed by the Summit from among sitting judges of any National court of judicature or from jurists of recognized competence and the Registrar is appointed by the Council of Ministers.²⁵⁷

²⁵⁴ Article 32 of the Treaty for the Establishment of the East African Community, 1999

²⁵⁵Kariuki Muigua, Promoting International Commercial Arbitration in Africa page 1(Published in CIArb Kenya , Alternative Dispute Resolution Journal Volume 5, Number 2 2017) lastly accessed on 5th April 2019

²⁵⁶ East African Court of Justice, Strategic Plan 2018-2023

< <http://eacj.eac.int/wp-content/uploads/2013/09/EACJ-Strategic-Plan-2018-2023.pdf>> lastly accessed on 23rd May 2019

²⁵⁷ Article 24 of The Treaty for the Establishment of the East African Community of 1999

The President and the Vice President are also appointed by the Summit from the Judges of the Court. Originally composed of six Judges, two from each of the three father founders of the Community namely; The Republics of: Kenya, Tanzania and Uganda, the Court is currently composed of ten Judges, following the accession of the Republics of Burundi and Rwanda to the Community.²⁵⁸ The court ought to be composed of a maximum of fifteen judges.²⁵⁹

Despite the East African Court of Justice currently being composed of ten judges, the service of the Judges of the Court continues to be *ad-hoc*. Only the President and the Principal Judge are based in Arusha thus affecting the performance of the Court.²⁶⁰

b) Limitation of the tenure of judges of East African Court of Justice by either age or duration of service negatively impacts the performance of the Court.²⁶¹

There is lack of continuity in the court in regard to experience and development of jurisprudence due to limitation of tenure of judges either by age or duration of service.²⁶²

Article 25 of the Treaty for the Establishment of the East African Community of 1999 provides: *“Judge appointed under paragraph 1 of Article 24 of this Treaty, shall hold office for a maximum period of seven years. A Judge shall hold office for the full term of his or her appointment unless he or she resigns or attains seventy (70) years of age or dies or is removed from office in accordance with this Treaty.”*²⁶³

²⁵⁸ East Africa Court of Justice Website <http://eacj.eac.int/?page_id=24> lastly accessed on 23rd May 2019

²⁵⁹ Article 24(2) of The Treaty for the Establishment of the East African Community of 1999

²⁶⁰ East African Court of Justice, Strategic Plan 2018-2023 page 6

< <http://eacj.eac.int/wp-content/uploads/2013/09/EACJ-Strategic-Plan-2018-2023.pdf>> lastly accessed on 23rd May 2019

²⁶¹ East African Court of Justice, Strategic Plan 2018-2023 page 6

< <http://eacj.eac.int/wp-content/uploads/2013/09/EACJ-Strategic-Plan-2018-2023.pdf>> lastly accessed on 23rd May 2019

²⁶² East African Court of Justice, Strategic Plan 2018-2023 page 6

< <http://eacj.eac.int/wp-content/uploads/2013/09/EACJ-Strategic-Plan-2018-2023.pdf>> accessed on 23rd May 2019

²⁶³ Article 25 (1) and (2) of The Treaty for the Establishment of the East African Community of 1999

This is a challenge facing the court as there is a high turnover of judges of the court, making the court lack continuity. This discourages potential parties who may want to arbitrate disputes at the court.

c) Visibility of the East African Court of justice as international arbitral tribunal²⁶⁴

Visibility of the Court continues to be a challenge as there is limited knowledge of the Court as an international arbitral tribunal among citizenry, legal practitioners, and judicial officers resulting into limited use of the Court.²⁶⁵ The lack of knowledge of the existence of East African court as international arbitral tribunal is one of the factors contributing to the ineffectiveness of the court as an international arbitral tribunal.

This lack of knowledge of arbitral services being offered by East African court of Justice contributes significantly to the low number of disputes being filed in the court for arbitration.

East African court of Justice does not have a vibrant arbitration matters cause list. By 16th April 2015, the court had only received one arbitral matter to arbitrate.²⁶⁶ This is the case of: *Alice Nayebare v EALS Arbitration Cause No 1/2012* which was the first matter to be referred to East African Court of Justice for arbitration had an arbitration clause granting the East African Court of Justice the requisite jurisdiction to arbitrate over the matter.²⁶⁷

This is despite the fact that East African Court of Justice has the unique feature of having reduced costs by providing that no fees are payables to the arbitrators (Rule 37(1) of the East African Court

²⁶⁴ East African Court of Justice, Strategic Plan 2018-2023 page 6
< <http://eacj.eac.int/wp-content/uploads/2013/09/EACJ-Strategic-Plan-2018-2023.pdf>> lastly accessed on 23rd May 2019

²⁶⁵ East African Court of Justice, Strategic Plan 2018-2023 page 6
< <http://eacj.eac.int/wp-content/uploads/2013/09/EACJ-Strategic-Plan-2018-2023.pdf>> lastly accessed on 23rd May 2019

²⁶⁶EACJ Judges' training on emerging trends in arbitration sets off<<http://eacj.eac.int/?p=2798> >lastly accessed on 16th May 2019

²⁶⁷ <http://eacj.eac.int/?tribe_events=arbitration-cause-no-1-of-2012-alice-nayebare-vs-east-african-law-society>lastly accessed on 16th May 2019

of Justice Arbitration Rules, 2012) who, as stipulated above, are appointed among the Judges of the Court.²⁶⁸

d) Lack of or Inadequate Marketing of the East African Court of Justice as an International Arbitral Tribunal

There has not been zealous marketing of East African Court of Justice as an arbitral tribunal. This leads to citizenry, legal practitioners, and judicial officers in East Africa Community having little knowledge of the fact that East Africa Court of Justice arbitrates disputes. This is a challenge as it limits the number of disputes submitted to the court for arbitration.

The lack of deliberate marketing of the court as the suitable international arbitral tribunal results in few parties submitting to the court for arbitration. This also reduces confidence in parties who wish to submit to the court for arbitration. Compared to other international arbitral tribunals like ICSID and LCIA which are vibrantly marketed through internet and various platforms there is inadequate marketing of EACJ.

e) Limited use of East African Court of justice

Although the East African Court of Justice as an international arbitral tribunal has many advantages against other arbitration institutions, there has been limited use of the Court for arbitration. Even the five Governments of the Partner States have not been able to utilize the free services of the Court as far as arbitration is concerned but find it easier to go to France, London or Hong Kong for exorbitant arbitration and leave out an institution of their own creation.²⁶⁹

²⁶⁸ Rule 37(1) of the East African Court of Justice Arbitration Rules, 2012

²⁶⁹ Dr. John Eudes Ruhangisa (Registrar, East African Court of Justice), The East African Court Of Justice: Ten Years Of Operation (Achievements And Challenges) page 9

This limited use of East African Court of Justice as an international arbitral tribunal inhibits the growth of the court as an international arbitration institute.

f) East African Court of Justice is financially constrained

Lack of enough funds to facilitate operations of the court, limits the effectiveness of the court. This means that the court cannot implement various development projects that would enhance its effectiveness. For example: Ensuring the judges are resident in the court and operate full time and not on *ad hoc* basis.²⁷⁰

g) Delay in operationalizing the Court's administrative and financial autonomy.

This directly affects the effectiveness East African Court of Justice as an international arbitral tribunal as it cannot operate optimally in provision of services such as arbitration of various disputes.²⁷¹

h) Difficulties of Enforcing East African Court of Justice's Arbitral Awards

Rule 36(3) of East African Court of Justice Arbitration Rules, provides that the enforcement of arbitral awards shall be in accordance with the enforcement procedures of the country in which enforcement is sought. This can be challenging especially where the procedure of enforcement in a particular country involves use of courts and lengthy and/or tedious processes. This may discourage parties to arbitrate disputes before the East African Court of Justice. This can also create an opportunity for court interference. For instance this can happen where a municipal court

²⁷⁰ East African Court of Justice, Strategic Plan 2018-2023 page 6
< <http://eacj.eac.int/wp-content/uploads/2013/09/EACJ-Strategic-Plan-2018-2023.pdf>> lastly accessed on 23rd May 2019

²⁷¹ East African Court of Justice, Strategic Plan 2018-2023 page 6
< <http://eacj.eac.int/wp-content/uploads/2013/09/EACJ-Strategic-Plan-2018-2023.pdf>> lastly accessed on 23rd May 2019

decides that the award given by the East African Court of Justice is against public policy and hence unenforceable in the country in which enforcement is sought.

Court interference intimidates investors since they are never sure what reasoning the court of the country in which enforcement is sought might adopt should it be called up onto deliberate on enforceability of an award by East African Court of Justice. Comparing this with ICSID arbitral tribunal whose arbitral awards are inviolable.²⁷²

Also for example the London Court of International Arbitration provides in its rules (LCIA Rules), that the arbitral awards are final and binding. They also provide for waiver of the right to appeal, as long as this is admissible under the applicable law, ensuring that businesses will not spend years on appellate litigation.²⁷³ This important feature of having awards which are inviolable and not subject to appeal encourages arbitration in these institutions. Such a feature should be adopted by East African Court of Justice.

i) Cultural, Economic, Religious and Political Differences within the East Africa community

Cultural, economic, religious and political differences within the state parties can act as a hindrance to arbitration at the East African Court of Justice. These differences may create varying opinions of issues, prejudices and conflicts of interests especially in international economic relations. This in-turn inhibits arbitration at East African Court of Justice.

For example, Kenya is known for her aggressive, competitive and capitalistic nature of doing business. On the other hand, Tanzania started off as a socialist country before adopting capitalism.

²⁷² Jacob K Gakeri, Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR (*International Journal of Humanitarian and Social Sciences*, Vol. 1 No. 6; June 2011) p. 224

²⁷³ Article 26(26.8) of the LCIA Arbitration Rules 2014

Even throughout the transition, it has adopted a protectionist approach. This has led to divergent ideologies and policies by member states that hinder integration and full realization of institutions such as the East African Court of Justice.

j) Existence of many Arbitration Institutions within the East Africa Region

The East Africa region has many institutions that offer arbitration. These includes: Chartered Institute of Arbitrators in Kenya, Nairobi Centre for International Arbitration in Kenya, Centre for Alternative Dispute Resolution in Kenya, Tanzania Institute of Arbitrators, Centre for Arbitration and Dispute Resolution in Uganda, Kigali International Arbitration Centre in Rwanda, and Burundi Centre for Arbitration and Mediation.²⁷⁴ These institutions have overshadowed the arbitral role of the East African Court of Justice which is new compared to some. Some institutions like the Chartered Institute of Arbitrators are well marketed consequently and are well known to various parties who wish to arbitrate their disputes within the region

k) Existence of other well-established International Arbitration Institutions across the Globe

In addition to the locally established arbitration institutions, there are also other well-established institutions that handle International Arbitration. These: the COMESA Court of Justice handling international arbitration matters that arise among parties within the member states, International Chamber of Commerce (ICC) in Paris, the London Court of International Arbitration (LCIA) in London, the Permanent Court of International Arbitration at the Hague, and International Centre for Settlement of Disputes (ICSID) in Washington D.C.

²⁷⁴ Emilia Onyema, The Transformation of Arbitration in Africa; The Role of Arbitral Institutions

The above institutions offer alternatives to the Court (EACJ), and are mostly preferred by international investors (including those operating within EAC) due to their long professional reputation.

l) Perception of East Africa Court of justice as a Classic Court rather than an International Arbitral Tribunal

East African Court of Justice is generally perceived as a classic court that entertains contentious matters and doesn't entertain arbitral disputes. This is despite the fact that it is unique because it has a hybrid function.²⁷⁵ This perception of East Africa Court of Justice as a classic court acts as a hindrance, to parties who would wish to arbitrate at the court. Parties to arbitration as an alternative dispute resolution mechanism chose arbitration because of its attributes over other dispute resolution methods. This being the case, where parties wish to arbitrate a dispute they abhor an institution which they perceive would in any way not uphold arbitration attributes. Hence, the unique hybrid function of East African Court of Justice can act as a hindrance to parties who would wish to arbitrate at the court.

m) Lack of precedents of East Africa Court of Justice as an International Arbitral Tribunal

One of the main attribute of arbitration is confidentiality. This involves parties selecting arbitrators privately and undertaking the arbitration process privately with no onlookers except parties to the dispute. Further the decisions/awards of arbitral tribunals or arbitrator are not published.²⁷⁶ This being the case any arbitration undertaken at East African Court of Justice is not published hence there are no existing records of decisions/awards made by the court.

²⁷⁵ Fred K. Nkusi, Understanding the jurisdictional powers of the EA Court of Justice <<https://www.newtimes.co.rw/section/read/207744>> lastly accessed on 25th May 2019

²⁷⁶ Kariuki Muigua , Settling Disputes through Arbitration in Kenya 3rd Edition 2017 page 3

This means that parties who would wish to arbitrate at East African Court of Justice have no existing precedent to consider and determine the efficiency of the court.

n) Varying Arbitration Legal Framework/Models governing the Member States

There exist varying arbitration law models in East Community. For example: Kenyan Arbitration Act (No. 4 of 1995) is drafted in line with UNCITRAL model law. On the other hand, Tanzania Arbitration Act which was enacted on 22 May 1932 is not drafted in line with the UNCITRAL model law.²⁷⁷ This varying arbitration legal framework may act as a hindrance to arbitrate at East African Court of Justice where parties to a dispute are from such states as they may face difficulty in agreeing the choice of law that will be applicable

4.2 In conclusion

To enhance the effectiveness of East Africa Court of Justice as an international arbitral tribunal it's paramount to address the challenges stipulated above. This will involve enactment of legal changes, structural changes, and administrative changes.

²⁷⁷ Kariuki Muigua, Promoting International Commercial Arbitration in Africa page 6(Published in CIArb Kenya , Alternative Dispute Resolution Journal Volume 5, Number 2 2017)

CHAPTER 5

CONCLUSION, SUMMARY OF THE RESEARCH FINDINGS, RECOMMENDATIONS AND AREAS FOR FURTHER RESEARCH

5.0 CONCLUSION

Overtime globalization and increase in foreign investment has led to growth of commercial and investment disputes as different transacting parties interact with one another as they transact. Consequently this resulted to demand for effective dispute resolution mechanism that would solve these disputes.²⁷⁸East Africa is not new to this reality. The need for an effective, time saving, reliable and cost-effective mechanism has not only become desirable but also invaluable.²⁷⁹The existence of such a demand gap has made arbitration as means of resolving disputes a viable and attractive mechanism. Arbitration has become the most preferred mechanism for settling international commercial and investment disputes.²⁸⁰

For a very long time, East Africa has not been on the same page with the rest of the world on matters of International Arbitration given the delay in the economic growth. However, with existence of institutions such as the East African Court of Justice with jurisdiction over arbitration matters, the future is promising. All is needed is to strengthen the capacity of the court as an international arbitral tribunal, and address the challenges as discussed above.

²⁷⁸ Alternative Dispute Resolution Methods, Document series No. 14, page 2 (Harare Zimbabwe 11 to 15 Sept. 2000) available at < http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document14/DocSeries14.pdf> (accessed vide: Kariuki Muigua, Promoting International Commercial Arbitration in Africa page 1(Published in CI Arb Kenya , Alternative Dispute Resolution Journal Volume 5, Number 2 2017) lastly accessed on 30th March 2019

²⁷⁹ Alternative Dispute Resolution Methods, Document series No. 14, p.2 (Harare Zimbabwe 11 to 15 Sept. 2000) available at < http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document14/DocSeries14.pdf> (accessed vide: Kariuki Muigua, Promoting International Commercial Arbitration in Africa page 1(Published in CI Arb Kenya , Alternative Dispute Resolution Journal Volume 5, Number 2 2017) lastly accessed on 30th March 2019

²⁸⁰ Franck, S.D., “The Role of International Arbitrators,” page 1.

<<https://www.international-arbitration-attorney.com/wp-content/uploads/Microsoft-Word-ILW-ILSA-Article.docsfranck2.pdf>> lastly accessed on 31st May 2019

With such implementation, East African Community and the rest of the continent will be able to benefit well from the use of the court in resolving International Arbitration Disputes, as well as effectively compete against other established International Arbitral Tribunals.

This research concludes that there is need for an effective international arbitral tribunal in East Africa. The East African Court of Justice as established under Article Nine (9) of the *Treaty for the Establishment of the East African Community of 1999* has the requisite jurisdiction and capacity to promote international arbitration in East Africa. This is in accordance with its jurisdiction *to entertain arbitral matters as provided for under Article 32 of the Treaty and rules of arbitration.*²⁸¹The international status of East African Court of Justice as an international court makes the court strategically placed to resolve international arbitral disputes.

This research concludes that there is need to address the factors that are inhibiting the East African Court of Justice in fulfilling its role as an international arbitral tribunal. Effective exercise of the jurisdiction granted to East African Court of Justice *to entertain arbitral matters vide Article 32 of the Treaty and rules of arbitration,*²⁸²would significantly contribute to economic growth in East Africa.

The effectiveness of the East African Court of Justice can only be realized through a concerted effort to address the challenges facing the court as an international arbitral tribunal as enumerated above. The solution lies in identification of the challenges facing East African Court of Justice and

²⁸¹Fred K. Nkusi, Understanding the jurisdictional powers of the EA Court of Justice <<https://www.newtimes.co.rw/section/read/207744>> lastly accessed on 31st May 2019

²⁸²Fred K. Nkusi, Understanding the jurisdictional powers of the EA Court of Justice <<https://www.newtimes.co.rw/section/read/207744>> lastly accessed on 31st May 2019

offering viable recommendations, based on international best practices incorporated by other international arbitral tribunals.

5.1 SUMMARY OF THE RESEARCH FINDINGS

This research established that the East African Court of Justice, is established under Article Nine (9) of the Treaty²⁸³. Chapter Eight (8) of the Treaty²⁸⁴ further expounds on, *inter alia*, the role of the Court, the appointment of judges of the court, jurisdiction of the court, official language of the court, and the seat of the court. The Treaty provides that the role of the court is to be a judicial body which ensures adherence to law in the interpretation and application of and compliance with the Treaty establishing the Community²⁸⁵.

This research establishes that the East African Court of Justice is a unique court because it has a hybrid function of litigation and international arbitration. To many in the East African Community, it is a new but very important feature of the court.²⁸⁶

This research has emphatically established that the East African Court of Justice has the requisite authority/jurisdiction to arbitrate various matters as provided for under Article 32 of *The Treaty for the Establishment of the East African Community of 1999*. In this regard Article 32 of The Treaty for the Establishment of the East African Community of 1999 delimiting the arbitral jurisdiction of the court verbatim provides: The Court shall have jurisdiction to hear and determine any matter:

²⁸³ Gathege P.S ‘Dispute Settlement Within East African Community: The East African Court of Justice and its Jurisdiction’ Published LL.M Thesis, University of Nairobi, 2012, page 33

²⁸⁴ The Treaty for the Establishment of the East African Community of 1999.

²⁸⁵ Article 23 of the Treaty for the Establishment of the East African Community, 1999

²⁸⁶ Fred K. Nkusi, Understanding the jurisdictional powers of the EA Court of Justice <<https://www.newtimes.co.rw/section/read/207744>> lastly accessed on 31st May 2019

- a) arising from an arbitration clause contained in a contract or agreement which confers such jurisdiction to which the Community or any of its institutions is a party; or
- b) arising from a dispute between the Partner States regarding this Treaty if the dispute is submitted to it under a special agreement between the Partner States concerned; or
- c) arising from an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court.

This research posits that the prima facie reading of Article 32²⁸⁷ indicates that in order for the court to arbitrate over a matter, the parties must submit to its jurisdiction by way of an Arbitration Agreement or Arbitration Clause in a contract²⁸⁸. This retains one of the seminal features of arbitration; party autonomy; which involves the parties willingly submitting to an arbitral process, having autonomy over the arbitrator and the process making the outcome mutually acceptable to the parties.²⁸⁹

This research in interpreting the salient provision of Article 32(c) of *The Treaty for the Establishment of the East African Community of 1999*, establishes that this provision widens the court arbitral jurisdiction. To this end, Article 32 (c) of *the Treaty for the Establishment of the East African Community of 1999* provides that East African Court of Justice has jurisdiction to arbitrate disputes arising from an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court. The significance of this provision is that it grants the East African Court of Justice requisite jurisdiction to arbitrate international disputes.

²⁸⁷ The Treaty for the Establishment of the East African Community of 1999

²⁸⁸ Faustin Ntezilyayo F, 'The East African Court of Justice's Arbitral Jurisdiction over Commercial Contract Disputes' <<http://blogaila.com/2016/03/18/the-east-african-court-of-justices-arbitral-jurisdiction-over-commercial-contract-disputes-by-dr-faustin-ntezilyayo/>> lastly accessed on 31st May 2019

²⁸⁹ Kariuki Muigua, *Settling Disputes through Arbitration in Kenya* page 3

This research established that East African Court of Justice has an onerous role to play in promotion of international arbitration in East Africa region. This is because East African Court of Justice is the only regional court in East Africa region offering international arbitration.

To this end, effectiveness of East African Court of Justice as an arbitral tribunal is vital in promoting international arbitration in East Africa region.²⁹⁰

On this basis this research undertook to establish the effectiveness of East African Court of Justice, as international arbitral tribunal. This research established that in order to ensure efficiency in carrying out its duties as an Arbitral Tribunal, EACJ developed Arbitration Rules in 2012(The East African Court of Justice Arbitration Rules, 2012).²⁹¹ This was in accordance with Article 42 of the treaty²⁹² which empowers the court to make rules to regulate its operation. Verbatim Article 42 of the treaty provides that: *the Court shall make rules of the Court which shall, subject to the provisions of the Treaty, regulate the detailed conduct of the business of the Court.*²⁹³

The East African Court of Justice Arbitration Rules, 2012 are applicable in arbitration of matters before the court in accordance with Article 32 of *The Treaty for the Establishment of the East African Community of 1999*.²⁹⁴ The main parts of these rules provide for the composition and process of the arbitral tribunal, the conduct of proceedings, the decision making, the arbitral award, the finality and enforceability of award and rules on issues. This research establishes that these rules plays a seminal role in ensuring East African Court of Justice is effective as international arbitral tribunal.

²⁹⁰<https://ijrcenter.org/regional-communities/east-african-court-of-justice/>lastly accessed on 31st May 2019

²⁹¹ Rule 1 (1) of the East African Court of Justice Arbitration Rules, 2012

²⁹² Article 42 of The Treaty for the Establishment of the East African Community of 1999,

²⁹³ Article 42 of The Treaty for the Establishment of the East African Community of 1999

²⁹⁴ Rule 1(2)(a) of the East African Court of Justice Arbitration Rules, 2012

For example: The East Africa Court of Justice has the unique feature of having reduced costs by providing that no fees are payable to the arbitrators under Rule 37(1) of the EACJ Arbitration Rules, 2012.

However there are gaps in the rules that need to be addressed to enhance the effectiveness of East African Court of Justice. For example: provision of electronic filing of documents in the rules e.t.c

This research further undertook a comparative approach to gauge the effectiveness of East African Court of Justice as an international arbitral tribunal. This research compared East African Court of Justice with London Court of International Arbitration and International Centre for Settlement of Investment Disputes which are renowned international arbitral tribunals. Premised on the comparative analysis this research established that East African Court of Justice as an international arbitral tribunal has a long way to go to be considered efficient as the two international arbitral tribunals²⁹⁵. For EACJ to be as effective as ICSID and LCIA, there is need for various reforms to be undertaken.

These reforms for example will involve: restructuring of EACJ Arbitral Tribunal to have a separate administration structure solely concerned with international arbitration of disputes from the EACJ Court. This is by having regulations and rules enacted for administration of EACJ Arbitral tribunal. The structure of ICSID and LCIA would offer the best guideline on how to restructure EACJ.

Further there is need to amend the existing EACJ Arbitration Rules, 2012 to capture various seminal attributes. These include but not limited to; finality of the award, conduct of arbitrators and legal representatives, filing of documents, constitution of the arbitral tribunal, emergency

²⁹⁵ ICSID and LCIA

procedures, law governing arbitration proceedings. In general adopting similar provisions as provided for by ICSID Arbitration rules and LCIA Arbitration rules would make EACJ arbitral tribunal an effective and attractive forum for arbitration of disputes. E.g Finality of award as provided for ICSID Arbitration rules and LCIA Arbitration rules.

Further this research established that of East African Court of Justice has not been effective as it ought to be. This is manifested by the fact that the EAC Court does not have a vibrant arbitration matters cause list. By 16th April 2015, President of the Court Justice Dr. Emmanuel Ugirashebutja noted that the court had only received one arbitral matter to arbitrate.²⁹⁶ This is the case of: *Alice Nayebare v EALS Arbitration Cause No 1/2012* which was the first matter to be referred to East African Court of Justice for arbitration had an arbitration clause granting the East African Court of Justice the requisite jurisdiction to arbitrate over the matter.²⁹⁷

Lastly this research established that despite the strides that East African Court of Justice has made since its inception, the court continues to encounter a myriad of challenges that are preventing it from fulfilling its role of promoting international arbitration in East Africa. It was this research view, that addressing these challenges would to a great extent enhance effectiveness of East African Court of Justice. The statistic of having only received one arbitral matter²⁹⁸ illustrates existence of underlying challenges that the East African Court of Justice is facing as an International arbitral tribunal.

²⁹⁶EACJ Judges' training on emerging trends in arbitration sets off<<http://eacj.eac.int/?p=2798> >lastly accessed on 31st May 2019

²⁹⁷ http://eacj.eac.int/?tribe_events=arbitration-cause-no-1-of-2012-alice-nayebare-vs-east-african-law-society>lastly accessed on 31st May 2019

²⁹⁸ *Alice Nayebare v EALS Arbitration Cause No 1/2012*

5.2 RECOMMENDATIONS

An in-depth critique of East African Court of Justice as an international arbitral tribunal clearly illustrates that EACJ as an international arbitral tribunal has a long way to go to be considered an efficient international arbitral tribunal like London Court of International Arbitration and International Centre for Settlement of Investment Disputes which are renowned international arbitral tribunals²⁹⁹. There is need for deliberate reforms to be undertaken to address the various shortcomings that inhibits East African Court of Justice from fulfilling its role of promoting international arbitration.

It is in light of the above that this research paper recommends the following to enhance effectiveness of East African Court of Justice as an international arbitral tribunal:

5.2.1 Short term recommendations

1. Enhanced marketing of East African Court of Justice as an international arbitral tribunal -

There is need for deliberate and well thought out marketing strategies of East Africa Court of Justice as an International Arbitral Tribunal. There is need for zealous marketing of East African Court of Justice as an arbitral tribunal. This will sensitize people especially citizens of the member states of the East Africa Community of the existence of East Africa Court of Justice as an International Arbitral Tribunal. This will enhance knowledge of the Court as an international arbitral tribunal among citizenry, legal practitioners, and judicial officers.³⁰⁰ This will directly promote use of East African Court of Justice as an international arbitral tribunal.

²⁹⁹ ICSID and LCIA

³⁰⁰ East African Court of Justice, Strategic Plan 2018-2023 page 6
< <http://eacj.eac.int/wp-content/uploads/2013/09/EACJ-Strategic-Plan-2018-2023.pdf>> lastly accessed on 31st May 2019

Global marketing of the East African Court of Justice as an effective arbitral tribunal also creates awareness and debunks the perception that East Africa Court of Justice operates as a classical court which does not offer arbitration as a means of solving disputes.

2. Increased use of East African Court of Justice by member states of East African Community as an arbitral tribunal to solve any commercial or investment disputes the member states may have. East African Community is composed of Kenya, Uganda and Tanzania. Rwanda, Burundi and South Sudan.³⁰¹ These five Governments of the Partner States ought to take deliberate actions to utilize the free services of the Court as far as arbitration is concerned rather than them arbitrating their disputes in France, London or Hong Kong and leave out an institution of their own creation.³⁰²

This will require the five Governments of the Partner States, to deliberately formulate their investment and commercial contracts³⁰³ with an arbitration clause granting East African Court of Justice requisite jurisdiction to arbitrate disputes arising in implementation of these contracts. For example: the Republic of Uganda made a bold step to convince the Company that was to construct Uganda Railway to include an arbitration clause in the agreement to the effect that in case of dispute the two sides will submit themselves to the East African Court of Justice.³⁰⁴

³⁰¹ East African Community < <https://www.eac.int/eac-history> > lastly accessed on 31st May 2019

³⁰² Dr. John Eudes Ruhangisa (Registrar, East African Court of Justice), The East African Court Of Justice: Ten Years Of Operation (Achievements And Challenges) page 9

³⁰³ Commercial and investment contracts with companies, foreign investors, other states, and individual persons

³⁰⁴ Dr. John Eudes Ruhangisa (Registrar, East African Court of Justice), The East African Court Of Justice: Ten Years Of Operation (Achievements And Challenges) page 9

This will enhance the growth of East African Court of Justice as an international arbitration institution. Further the EAC member states will benefit from advantages associated with East African Court of Justice as an international arbitral tribunal.

For example: The East Africa Court of Justice has the unique feature of having reduced costs by providing that no fees are payable to the arbitrators under Rule 37(1) of the EACJ Arbitration Rules, 2012.

3. Ensuring the sitting of judges who are the arbitrators in East African Court of Justice³⁰⁵ is permanent. This will enhance the effectiveness of East African Court of Justice as an international arbitral tribunal. This is because the judge will be readily available when needed to arbitrate disputes or constitute an arbitral tribunal to arbitrate various dispute.

For example: To issue preliminary orders before the arbitration itself.³⁰⁶

4. There is need for improved relation and integration among the East African community member states since political, economic, and social differences affect the functioning of the East African Court of Justice as an Arbitral Tribunal. This will reduce cultural, political, economic, and social differences. Policies like East Africa Tourist Visa,³⁰⁷ which is a single entry visa for foreigners visiting Kenya, Rwanda and Uganda simultaneously encourages integration. Also open border policy for East African Member states citizens will go a long way in encouraging integration.

³⁰⁵ Rule 8 of the East African Court of Justice Arbitration Rules, 2012 provides for the appointment of arbitrators, the appointing authority (i.e. the President or in his/her absence the Vice President of the Court) appoints, from among the Judges of the Court a Panel to constitute the Tribunal to conduct the arbitral proceedings, unless the parties have agreed on a Sole Arbitrator who, in the like manner, is appointed from among the Judges of the Court.

³⁰⁶ Rule 14 of the East African Court of Justice Arbitration Rules, 2012 provides for interim measures.

³⁰⁷ <http://www.magicalkenya.com/visit-kenya/visa-information/east-africa-tourist-visa/> < lastly accessed on 28th January 2019

This integration reduces the cultural, political, social and economic differences amongst East African member states creating a conducive environment for use of the East African Court of Justice as an international arbitral tribunal.

5. Continuous training of the judges who are arbitrators in regard to best practices when it comes international arbitration. It is paramount for there to be continuous and consistent training of judges in regard to arbitration. This will ensure the judges as arbiters keep abreast of emerging issues in the area of arbitration and are have requisite capacity to arbitrate disputes in brought before the court. This will to a great extent improve the confidence in the court by parties who seek to arbitrate their disputes in the court. Further it will enhance the reputation of the court as the arbitral awards issued by the court will stand the test of time. This will enhance the effectiveness of East African Court of Justice as an international arbitral tribunal and further promote arbitration in East Africa region.

5.2.2 Medium term recommendations

1. Amendment of the East African Court of Justice Arbitration Rules 2012 to address the nature and enforcement of the arbitral award. There is need to have the East African Court of Justice Arbitration Rules amended to provide a more elaborate approach to enforcement of the arbitral awards by the East African Court of Justice. Rule 36(3) which deals with enforcement of awards is widely phrased giving room for misuse/abuse and over litigation. Verbatim it provides that the enforcement of arbitral awards shall be in accordance with the enforcement procedures of the country in which enforcement is sought. The provision can be amended to provide the court at which a party should seek enforcement. Also the rules can be amended to make the arbitral award insusceptible to the jurisdiction of domestic courts of the contracting parties.

This will involve requiring contracting parties to recognize and enforce the arbitral award as if it were a final judgment of their domestic courts.

The rules can adopt the inviolable character of the award of ICSID as provided for under Article 54 of the ICSID Convention which makes the Centre an attractive arbitral tribunal for investment disputes.³⁰⁸

Alternatively the rules can be amended to provide for waiver of the right to appeal, as long as this is admissible under the applicable law, ensuring that businesses will not spend years on appellate litigation. This will be similar to LCIA Rules, which provide that the arbitral awards are final and binding. They also provide for waiver of the right to appeal, as long as this is admissible under the applicable law, ensuring that businesses will not spend years on appellate litigation.³⁰⁹

Also the rules can be amended to limit the number of times a party can appeal the arbitral award e.g limiting appeal only to high court and the decision of the high court to be final and binding. This brings about finality. This will limit court interference making East Africa Court of Justice an effective arbitral tribunal.

2. Amendment of the East African Court of Justice Arbitration Rules 2012 to improve the efficiency and speed of the arbitration proceedings in East African Court of Justice. This can require the parties who undertake arbitration in East African Court of Justice to commit to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration. Further the rules should provide the Arbitral Tribunal should

³⁰⁸Article 54(1) of the ICSID Convention verbatim provides that: Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.

³⁰⁹ Article 26(26.8) of the LCIA Arbitration Rules 2014

undertake to make its final award as soon as reasonably possible following the last submission from the parties. The LCIA Arbitration Rules 2014, offers a guideline in this regard.

3. The East African Court of Justice as an international arbitral tribunal ought to incorporate electronic filing of documents. This will allow a party to file a Request electronically at Also allow a Respondent to file a Response electronically through an online platform. The online filing system should be designed to be user-friendly. This online platform to allow electronic filing of documents in East African Court of Justice will enhance efficacy of the court.
4. The East African Court of Justice should pass or make General Guidelines for the Parties' Legal representative. The purpose of these 'General Guidelines for the Parties' Legal representative' will be to promote the good and equal conduct of the parties' legal representatives appearing by name within the arbitration. This will enhance effectiveness of East African Court of Justice as an international arbitral tribunal.
5. There is need for the East Africa Court of Justice to adapt internationally accepted arbitral principles, procedures, rules and norms to make it an attractive institution for international arbitration. Parties who seek to arbitrate disputes, need to be assured that the East Africa Court of Justice as an arbitral tribunal, arbitrates disputes following internationally accepted arbitral principles, procedures, rules and norms. This creates confidence to parties who seek to arbitrate disputes in East Africa Court of Justice. Further this will give the East Africa Court of Justice as an international arbitral tribunal, capability to effectively compete with other institutions offering arbitration as a means of solving disputes.

6. There is need for the East Africa Community member states to adopt similar model when drafting legal frame work to govern arbitration. Further the member states can agree to ratify various accepted international conventions governing arbitration. For example: UNICITRAL model law. This will make the East Africa Court of Justice an attractive institution for citizens of the East Africa Community as there would be no conflict of law and determination of choice of law will be straight forward and less tedious.

5.2.3 Long term recommendations

1. Restructuring of East African Court of Justice as an Arbitral Tribunal. This will involve having a separate administration structure solely concerned with international arbitration of disputes under East African Court of Justice Court. This is by having regulations and rules enacted establishing an administration that is solely concerned with arbitration in East African Court of Justice. The structure of ICSID and LCIA would offer the best guideline on how to restructure East African Court of Justice.
2. Provision of the seat of the arbitration of East African Court of Justice to be in any place of choice of the parties provided that it is within East African Region. In case of failure from the parties to choose the seat of the arbitration, the latter will be Arusha by default, unless the Tribunal, having considered the comments from the parties, and consider more appropriate a different place. This to a great extent will enhance effectiveness of East African Court of Justice as an international arbitral tribunal.
3. Operationalizing the East African Court of Justice administrative and financial autonomy by the member states. This will to a great extent enhance effectiveness of East African Court of Justice as an international arbitral tribunal as it will be able to initiate various projects aimed at improving its effectiveness.

4. Adopting additional facility rules and regulations that would enable parties to use the EACJ facilities for arbitration. These rules will also give the parties a leeway to appoint arbitrators other than the EACJ judges. Also enable them to adopt different rules other than EACJ Arbitration Rules, 2012. This will be in accordance with Article 42 of the treaty³¹⁰ which empowers the court to make rules to regulate its operation.
5. Promoting international arbitration in East Africa through: training of arbitrators, setting up a library with scholarly materials for arbitration, offering a rating system of arbitrators, and offering a publishing platform for arbitration scholarly writings and articles. This to a great extent will enhance the reputation of East African Court of Justice as an international arbitral tribunal. Indirectly, it will also market East African Court of Justice as an international arbitral tribunal. Consequently enhancing effectiveness of East Africa Court of Justice as an international arbitral tribunal.

5.3 AREAS FOR FURTHER RESEARCH

This research has established the following to be areas that may need further research:

1. The process of commencing emergency proceedings to seek interim measures in East African Court of Justice- Rule 14 of the East African Court of Justice Arbitration Rules, 2012 only provides for interim measures. These interim measures are granted by the tribunal during the course of the proceedings. The rules do not provide for how to commence emergency proceedings to seek interim measures. There is need for further research on how parties commence emergency proceedings to seek interim measures.
2. There is need for further research on the training the judges of East African Court of Justice undertake to make them competent arbitrators.

³¹⁰ Article 42 of The Treaty for the Establishment of the East African Community of 1999,

There is no provision in the East African Court of Justice Arbitration Rules, the Treaty Establishing East African Community, or the EACJ website that stipulates the training that judges ought to undertake to be regarded as competent arbitrators.

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