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Arbitration as a Mechanism of Solving Disputes in The East African Community

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Abstract

In the face of the growth and development of Regional Economic Communities in Africa, the need for effective and reliable management of trade disputes is imperative. Arbitration offers an Alternative Dispute Resolution mechanism without unnecessary delay or expense, where parties involved are free to agree how their disputes are resolved as compared to the time consuming and often expensive court processes. The aspects that will be examined in this paper are: the benefits of arbitration over court litigation within the context of international trade focusing on regional integration in the East African Community, the dynamics that exist in its use,and opportunities that exist for its promotion in the East African Community.

Study background

Regional integration is a development priority for East Africa, and the advancement of trade and economics are key elements for its success. Trade and investment facilitates development and prosperity but it also leads to the inevitable path of trade disputes. Increased cross-boarder economic activity increases the possibility of trade conflicts and disputes therefore making the need for effective and reliable management of trade disputes imperative. Arbitration offers an alternative dispute resolution mechanism without unnecessary delay or expense where parties involved are free to agree on how their disputes are resolved in contrast to the time consuming and often expensive court process. Effective and long term regional integration requires that regional institutions have competent, expeditious, and effective dispute settlement mechanisms. International commercial arbitration can be used as a means to foster East African integration through effective management of trade disputes in the region for enhanced economic development of the partner States. In the case of *Earl of Mexborough vs. Bow (1843), 7 Beav. 132.* Lord Langdale stated *"that many cases occur, in which it is perfectly clear, that by means of a reference to arbitration, the real interests of the parties will be much better satisfied than they could be by any litigation in a court of justice."* Due to the legal hurdles associated with national courts, arbitration with its potential advantages emerges as a viable mechanism for handlingcommercial conflicts that arise between individuals in regional trade

agreements within the East African Community partner States. There is also the aspect of the home court advantage that propounds that national courts would have a natural bias towards their citizens and corporations.

For the purposes of this paper, trade disputes will be limited to commercial disputes arising from an international sale of goods contract between private individuals of partner States in the East African Community, and how this dispute can be solved using arbitration. Sale of goods contracts may give rise to disputes, with respect to quality, price and payment, transportation and timing, and conditions of delivery. This dispute is a private commercial dispute between the parties and affects international trade. Any dispute arising is a private commercial dispute between the parties. A contract of sale is usually regarded as an international contract of sale where the sale is entered into between parties who are situated in different States. UNCIRAL Model Law footnote to Article 1 postulates that the word 'commercial' has a wide interpretation and includes matters arising from all relationships of a commercial nature, whether contractual or not, including the simple supply or exchange of goods and services. A contract between individuals of the partner States in the East African Community will therefore be regarded as an international contract of sale. The aspects that will be considered is how arbitration can be used to solve trade disputes in the EAC, and the role it can play in facilitating the regional integration process.

1.2 Statement of the problem

Trade and investment leads to a path of economic development and this may lead to trade disputes and in consideration of increased trade activities, the role of an effective dispute resolving mechanism during the sale of goods transaction process has become vital.(Ndulo, 1996), states that, regional integration is taking centre stage in East Africa through increased levels of cross-broader trade between local and foreign investors. As a result, effective dispute solving mechanisms are critical in safeguarding or cushioning local and indigent investors from exploit. Regional integration alone is not enough for economic development in the East African Community. There is a prerequisite for the synchronization of trade laws and commercial practices which are important aspects of integration and without which meaningful economic integration cannot be achieved. Developing an effective dispute solving mechanism for sale of goods contracts is imperative in achieving meaningful economic integration, and arbitration offers an effective dispute solving mechanism.

There are pitfalls associated with the court system in most countries including adjournments and delays. Arbitration is therefore gaining momentum as the preferred mode of dispute resolution in the region. However, does arbitration offer a better dispute solving mechanism for disputes arising in regional economic institutions in Africa such as the East African Community?

1.3 Objectives of the study

This study was guided by the following specific research objectives:

i) To establish the effectiveness of arbitration as a dispute resolution process in the East African Community
ii) To illustrate the role arbitration can play in solving trade disputes between individual members of partner States within the EAC.
iii) To determine possible legal solutions to the inadequacies of using arbitration as dispute solving mechanism in the East African Community and the advantage it offers over the use of national courts.

1.4 Review of empirical studies

This paper focuses mainly on the efficiency of arbitration as a dispute solving mechanism in the EAC. This paper is relevant in articulating the advantages that would result in the use of arbitration as a dispute solving mechanism as opposed to court litigation within the EAC. When used widely, arbitration is far superior to what would typically get at the court house. Analysis of existing literature reveals that the majority of commitment studies have been based on how arbitration can be used as dispute solving mechanism in other regional blocs. (Voeten, 2010) analyses the role that regional courts can play in resolving disputes between administrative agencies and private parties with regard to implementation of international law. National administrative agencies or courts may not always be well equipped to interpret these laws. The author suggests the creation of an Asian regional judicial institution that contributes to the uniform application of laws. The proposed institution provides incentives for harmonization without creating new obligations thus recognizing

the diversity among the Asian States. The author however limits his study to the Asian region and does not offer an East African perspective. According to this study, effective institutions perform two core tasks that can stimulate economic activity, they resolve disputes in efficient and impartial ways and they coordinate the interpretation of laws and treaties. In doing so, they could have broader effects on regional cooperation such as improving incentives for compliance, increasing the perceived commitment of parties to a regional integration project and contributing to the enactment of agreements. Preliminary review of the literature confirmed the studies on the use of arbitration to solve disputes arising from the EAC are few. Although, it must be highlighted that some studies on the use of arbitration to foster the East African integration exist. (Kariuki, 2015), propounds that international commercial arbitration is highly relevant to business and trade because investors prefer to put capital into countries with high political stability, legal certainty, and string markets. The author further postulates that apart from boosting trade and investment in the East African region, international arbitration, if used as the preferred mode of dispute settlement can also be a useful tool in fostering mutual trust. However the primary focus of this research is on the EACJ jurisdiction in arbitration as a tool used to further the harmonization of law and trade practices within the East African Community, the EACJ is more concerned in handling non-economic disputes. (Odek, 2002) examines the provisions of the Treaty of the establishment of the EAC and its relevance in Kenya. The various obligations and objectives of the treaty are analyzed. The author then examines the steps of integration and the timeframe for the steps in integration .The author examines the role of each of the organs of the community as set out in the treaty and this includes the role of the East African Court of Justice.

Opiyo (2016), examines the existing regional arbitral institutions in Africa and also highlights the challenges attributed to the apparent resolution of disputes in foreign forums and whether it restricts access to justice, to local investors who have investments located in regions having a regional arbitral institution, in comparison to regions that have none. The arbitral jurisdiction of the EACJ is also analyzed to establish whether it offers flexible alternative arbitral services to local investors. The paper concludes by acknowledging the recent launch of the Nairobi Centre for International Arbitration, and the Kigali International Arbitration Centre as national arbitral institutions, and recommends their recognition as regional arbitral institutions in the EAC Treaty. The author submits that the right to access to justice has been enhanced or limited in respect to arbitral institutions within the East African Community. The author further postulates that prior to the launch of Kigali International Arbitration Centre and the Nairobi Centre International Arbitration, the East African region had insidiously fallen victim to imbalanced arbitral treatment that made its local investors conduct arbitral proceedings in foreign forums much to their displeasure. The originality of this paper lies in using a comparative study of court litigation and arbitration within the EAC specifically where a sale of goods dispute arises between individuals of two partner States (Kariuki, 2015). The author further examines the arbitration centers in East Africa and their role in transforming arbitration in East Africa so as to examine the effectiveness of these institutions and how they can better collaborate in sharing their regional space examining current trends, successes, and challenges facing the arbitration institutions, with a view to highlighting the state of legal and institutional frameworks for effective determination of disputes through arbitration. This study however only focuses on arbitration institutions within the EAC partner States.

As yet, there has not been any documented qualitative study on the use of arbitration as a mechanism of solving disputes that may arise specifically with regard to sale of goods contracts within the EAC. This study contributes to the debate of the effectiveness of arbitration as a platform of solving dispute when compared to litigation. .

1.5 Methodology

This study was analytical and evaluative. From the two main research methodologies that generally dominate the field of research, which are qualitative and quantitative research respectively, this study adopted the qualitative approach. The methodology used was theoretical analysis of the arguments in the literature thematically on the basis of assessing the effectiveness and efficiency of arbitration as a dispute resolution method in solving disputes that arise between individuals in the EAC, and the adequacy of arbitration law. This involved an in-depth analysis of the secondary literature on the topic of arbitration as a mechanism of solving disputes, and its effectiveness in doing so.

In the context on this study, adopting the qualitative method of collecting data means that the study is mainly a library-based research. Consequently, the study depended on secondary data. The technique entails analyzing existing literature

and relevant researches that have been previously carried out. Throughout this paper, the effectiveness of arbitration as well as the costs were addressed and compared as a dispute solving mechanism to litigation within the EAC. The study sought to assess the applicability of arbitration within the EAC where a sale of goods contract dispute arises, this will be context of this study. The research examined the core instruments of arbitration law within the EAC. It explored the procedural issues affecting the effectiveness and efficiency of arbitration by comparing it with litigation.

Results and Discussion

The following results were presented after literature review. Regional integration is a development priority for East Africa, the advancement of trade and economics are key elements for its success. Trade and investment facilitates development and prosperity but it also leads to the inevitable path of trade disputes. Increased cross boarder economic activity increases the possibility of trade conflicts and disputes therefore making the need for effective and reliable management of trade disputes imperative. Arbitration offers an alternative dispute resolution mechanism without unnecessary delay or expense, where parties involved are free to agree on how their disputes are resolved, in contrast to the time-consuming and often expensive court process. Effective and long term regional integration requires that regional institutions have competence, expeditious and effective dispute settlement mechanisms.

International commercial arbitration can be used as a means to foster East African integration through effective management of trade disputes in the region for enhanced economic development of the partner States. In the case of *Earl of Mexborough v. Bow (1843), 7 Beav.* 132. Lord Langdale stated *"that many cases occur, in which it is perfectly clear, that by means of a reference to arbitration, the real interests of the parties will be much better satisfied than they could be by any litigation in a Court of justice."*

Due to the legal hurdles associated with national courts, arbitration with its potential advantages emerges as a viable mechanism for handling commercial conflicts that may arise between individuals in regional trade agreements within the East African Community partner States. There is also the aspect of the home court advantage that propounds that national courts would have a natural bias towards their citizens and corporations. The basic concept of arbitration is a simple one, the disputing parties agree in advance or after the dispute arises to submit their disputes to a person(s) whose expertise or judgment they trust. The parties also agree in advance that the decision will be final and binding; the arbitrator listens to the parties, considers the facts and arguments and makes a decision.

Arbitration according to the American Arbitration Association (2013) is defined as a private process by which parties agree in writing to submit their disputes to one or more impartial person/s authorized to resolve the dispute, who can then issue a non-binding or final and binding award. The most favorable situation for a party to a dispute in an international commercial transaction is to litigate in one's own courts. While it is good for one party, it is not good for the other party because of all the difficulties of litigating in unfamiliar procedure, and not being able to use lawyers who are familiar with a particular company. It is also relevant that one party is staying at home while the other party is staying in a foreign country with all the inconvenience and expense that it entails. Arbitration of such disputes is a means to reduce the inequalities because while it is possible for the arbitration to take place in an arbitration organization located in the home country of one or the other party, it is also possible for the arbitration to be administered by an arbitration institution located in a third country. The nature of arbitration with its emphasis on mutual settlement rather than the adversarial nature of the court system has a tendency to receive easy reception among leaders and citizens. Arbitration mechanisms are geared towards a reconciliation of the disputants rather than contentious litigation.

Effectiveness of Arbitration as a Dispute Resolution Process

Okekeifere (1998) stated that an effective dispute resolution method is one that produces results, not just well conducted or well-favoured proceedings. An effective dispute resolution process should have the following features: speed of proceedings, affordability, possibility of expert adjudication, flexibility, certainty, confidentiality, aiding international business, accommodation or third party interests, aiding development of law, public policy restrictions, and ease of enforcement. In order to determine whether arbitration is superior to litigation, these factors must be taken into consideration.

As a result of the legal hurdles associated with national courts, international commercial arbitration emerges as a viable mechanism of handling sale of goods disputes that may arise in the course of commercial transactions among member States. According to a study done by World Bank Group (2013), regional integration alone is not enough to spur economic growth; the EAC needs an investment-friendly climate that includes a business regulatory environment that is well suited to scaling-up trade and investment, and can act as a catalyst to modernize the regional economy. Improving the investment climate in the EAC has therefore been seen as an essential ingredient for successful integration, which is the foundation for expanding business activity, boosting competitiveness spurring growth, and ultimately supporting human development. The important role of international commercial arbitration in the international market integration has been acknowledged and it is capable of being used as an important means of confidence-building among foreign investors and the host countries, in the context of economic cooperation at the regional level.

Arbitration tends to be a private procedure and this tends to be a two-fold advantage that outsiders do not get access to any potentially sensitive information, and the parties to the arbitration do not run the risk of any damage publicly arising out of the reports of the proceedings. When commercial disputes arise, there is a need to resolve them as simply and efficiently as possible, so that those involved in the dispute can get back to business. In order of this ideal situation to be achievable in the EAC region, there is a need to assure the business community of a legal system that is predictable and reliable thus providing the necessary certainty that there is a clearly established mechanism of dispute resolution. This eases the enforcement of cross-border business contracts.

Parties to a dispute always have a dispute settlement option that includes mediation or conciliation arbitration or litigation. The first three are usually classified as diplomatic because the parties retain control over who mediates the process. Whether they accept the proposed dispute solving mechanism and the process including the resolution is usually hidden from the public. This paper however focuses on arbitration.

Comparative Benefits of Arbitration over Court Litigation

According to Hensler(2003), dispute resolution is an indispensable process for making social life peaceful. The dispute resolution process tries to resolve and check conflicts and allows persons to maintain cooperation especially considering the objectives of regional integration or a regional integration body such as the EAC. The purpose of the contemporary movement in favor of arbitration is to influence businesses and legal decision makers in their perceptions of the best ways to resolve legal disputes. The arguments for and against arbitration will be applied to the comparative analysis to substantiate the claim that arbitration is likely to be the better trade dispute resolution method within the EAC when compared to ligation. The following section will compare arbitration with litigation. The factors used in this comparative assessment will be speed of proceedings, affordability, possibility of expert adjudication, flexibility, certainty, confidentiality, aiding international business, accommodation or third party interests, aiding development of law, public policy restrictions, and ease of enforcement.

One of the advantages of arbitration is that a party can choose a person having specific knowledge of the relevant issue, to decide a dispute for example commercial norms of a particular industry requires certain knowledge related to these issues. Wilkson (2012) postulates that in national courts, the parties to conflict are at the whim of the court and can only hope that the judge hearing their case is knowledgeable in that area of law governing the conflict. Therefore when highly specialised disputes need a specialized panel, arbitration can provide the right forum for these types of disputes.

There are no appeals in arbitration and therefore the order is final. This saves time and costs associated with this process in contrast to litigation. The principle of finality is an important aspect that has contributed significantly in changing the popularity of arbitration. It is widely accepted in most of the institutional rules globally. However, the only way to go against an arbitral award is to submit an application in a court of law.

Arbitration provides more than just a means to resolve a dispute. It can not only craft a resolution upon the parties' needs but also save a personal or business relationships because they are less adversarial, which is ultimately imperative in the development of the regional integration process. Arbitration aids parties in dealing with each other and settling their disputes by a straightforward means, by providing legal and procedural familiarity, in which both sides can be confident in governing their relationship.

Arbitration is an ideal choice for dispute solving due to fears of underdevelopment of jurisprudence. The location of the arbitration tribunal was to avoid concerns that may arise with respect to jurisprudence systems. Walker (2012), states that factors such as an underdeveloped legal system is a deterrent to disputants considering litigating in that location. Therefore local laws may be perceived as inadequate thus making it feasible for parties to select arbitration to resolve disputes.

Court hearings and judgments are usually public. Arbitration hearings are confidential and only the parties to the arbitration proceedings receive copies the awards, which is an advantage where trade secrets are involved. Rothman(1994), states that arbitration allows for the arbitration itself as well as the award, to be kept confidential if the disputing parties so desire. Parties desire confidentiality because it allows them to control the flow of information, avoid the damage of publicity from an adverse award and it also mitigate the potential of copycat litigation.

Courts can mandate third parties and witnesses within their jurisdiction to come before the court. Arbitrators on the other hand do not have the authority to call on their parties without their consent and do not have the authority to compel a party to bring a witness. Court proceedings are usually marked by strict often inflexible statute-covered procedural rules. The flexibility of arbitration permits accuracy regarding the needs of the parties, as well as the forum within which it is set. Disputants can determine such things as language, law, forum, procedural rules, number of arbitrators and the like. Parties have the freedom to structure their own procedure so long as it retains the key elements of arbitration (third party neutral, finding, and binding decision) for statutory protections to apply. Arbitration allows the disputants and arbitrators to streamline the process. The freedom to choose among procedural options suffuses nearly all aspects of arbitration, the wide arbitration spectrum includes a considerably rich and diverse array of procedures, including the precise breath of the arbitrator's jurisdiction, selection of the tribunal, the character of the hearing, pre and post hearing procedure.

There have been well established legal judicial channels that have been key players in resolving commercial disputes airing from trade disputes. These channels include the court process through which parties solve their disputes through litigation as the procedure for such actions are well established. It is also important to highlight that precedent and decisions have been well set, making it easy to determine and predict the outcome of cases and there is clear enforcement mechanism of these court made decisions.

Arbitration is a dispute resolution process that can save disputant's time and money versus traditional litigation. They saying "time is money" is quite appropriate when it comes to the dispute resolution process. Disputants have businesses to run and budgets to keep, resolving their arguments in courts wastes their time and dampens their income. Parties often seek speedy resolution which is one reason why disputants can turn to arbitration mechanisms. Wilkson (2012), further postulates that few ways that arbitration keeps cost and time at a minimum is by allowing disputants to take witnesses by any order, after normal business hours, or over the weekend.

The traditional adversarial court system may not always be the best way to resolve a trade dispute. Distrust in national laws and local courts can cause more concern when entering into a dispute resolution. Furthermore, the challenge or uncertainty of enforcing a judgment in a foreign land can make litigation less appealing compared to arbitration.

When self-determination and flexibility is desired, arbitration is the mechanism of choice. Cunbesti (2009), states that the flexibility of arbitration is often the reason it is sought. Arbitration is quite flexible and not as strict as litigation, both procedurally, as well as regarding the underlying atmosphere the parties to the dispute may face in an adversarial environment. The flexibility and choice to partake in an arbitration process versus traditional litigation provides a way to overcome a one-size- fits all to the dispute resolution process.

Conclusion

The reasons for choosing arbitration over litigation boil down to neutrality, expertise, confidentiality, procedural flexibility, ability to choose the language and place of arbitration, finality of the award and enforceability. Arbitration also allows parties to select arbitrators who are experienced professionals with particular expertise relevant to the dispute, which in this case would be arbitrators privy to regional integration matters.

Arbitration can offer a better mechanism of for the resolution of commercial disputes. This can be attributed to factors such as the speedy hearing and the determination of cases and the lack of backlog. Arbitration can also resolve severed relationships between the parties in question. This is very beneficial for the regional integration process.

The vision embodied in any regional economic community such as the EAC is to create wealth, raise the living standards of all the people, and enhance international competitiveness of the region. It is hoped that this vision will be achieved through increased production, trade and investment in the region. For regional bodies to attract more investors they must create incentives that will encourage them to invest in the region and this includes an effective dispute solving mechanism, arbitration gives this solution.

Recommendations

As part of the overall strategy to deepen the regional integration process in the East African region, in using arbitration as dispute solving mechanism must ensure that it does not only solve disputes but also lays out a solid basis for future expansion of the system.

The East African Court of Justice (EACJ) should be empowered to impose penalties on partner States that fail to implement the decisions of the court. The ability of the court to function lies on the enforceability of its orders and judgments. It is therefore proposed that the EACJ be given the mandate to punish for contempt and be able to impose a lump sum or penalty payment. This will ensure compliance with any arbitral awards by partner States.

It is generally desirable for the rules and practices of the partner States of the East African Community, with respect to arbitration laws, to be similar in order to ensure seamless enforceability of arbitration as a dispute solving mechanism. This is however not the case in the East African Community, for example Burundi and Rwanda practice Civil law while Kenya, Tanzania, and Uganda practice Common Law. An enabling environment can only be created where there is a uniform and clear dispute settlement mechanism applicable to all partner States. Article 30 of the Treaty should be amended to allow references to be made by any person (legal or natural) who is aggrieved and not necessarily a person who is a resident in one of the partner States of the EAC.. This will further deepen the regional integration process not only within the EAC but also in Africa.

The EAC should strive to create a separate and distinct East African Arbitration Centre. This centre should have its own structures, seat, arbitrators, and staff. This will ensure impartiality and efficiency and encourage a flexible and less rigid approach to dispute settlement as compared to if jurisdiction is solely vested in the court.

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