



CURRENT COMMERCIAL ARBITRATION PRACTICE AND DEVELOPMENTS IN KENYA AND EAST AFRICA

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Congress



INTRODUCTION

This presentation gives a brief overview of commercial arbitration in East Africa and the changes that have swept through the region recently.

Each country will be discussed generally and recent developments highlighted

We will start off with Kenya, our host country for this roadshow, then touch on Rwanda, Burundi, Tanzania and Uganda

Generally speaking, commercial arbitration has been embraced in the region and the respective countries are taking great strides to make the region a financial services hub.



THE CASE FOR ARBITRATION

- ❖ The 5 Member countries of the East Africa Community all have different legal systems largely inherited from the former colonial regimes and therefore managing cross border disputes through the Court system can be difficult.
- ❖ Investors in the region may also have a hard time grasping the various laws in each state
- ❖ Parties in the region may feel that litigation does not guarantee fair administration of justice for a number of reasons including:
slow pace of litigation, corruption, lack of expertise, complexity of procedures, different legal systems, underdeveloped jurisprudence

- ❖ Commercial arbitration, however, provides a reliable mechanism for managing commercial disputes in the region.
- ❖ Parties control the pace of the process; it is not adversarial, parties can choose an arbitrator, can choose the applicable law for the determination of the dispute, the seat of the arbitration, the venue for the hearing of the dispute and can also select an expert in the area of the dispute, the process is confidential and so on.
- ❖ Commercial Arbitration is thus embraced in the region as a viable method of dispute resolution and this is evident from the tremendous developments in the region

KENYA



KENYA

- ❖ Arbitration in Kenya is governed by the Arbitration Act, 1995
- ❖ The Act is largely modeled after the United Nations Commission on International Trade (UNCITRAL) Model Law on International Commercial Arbitration
- ❖ Kenya is also a State Party to the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) and the International Convention on the Settlements of Investment Disputes (ICSID)
- ❖ In sum, the New York Convention requires signatory states to recognize private agreements to arbitrate and to enforce arbitration awards made in other state parties.

- ❖ The Chartered Institute of Arbitrators, Kenya branch has for the past 30 years or so (since 1984) provided the platform for commercial arbitration in Kenya.
- ❖ In 2012, however, Kenya passed the Nairobi Centre for International Arbitration Act which established an independent commercial arbitration institution being the Nairobi Centre for International Arbitration (NCIA)
- ❖ The NCIA seeks to promote, facilitate and encourage the conduct of domestic and international commercial arbitration in Kenya
- ❖ Kenya is also on track to introduce Court Mandated Mediation

RWANDA



RWANDA

Rwanda has made great strides on the commercial arbitration front;

Although it became a party to the Washington Convention on the Settlement of Investment Disputes in 1979, it was only in 2008 that it acceded to the New York Convention.

The same year, Rwanda enacted a modern arbitration law, providing for appropriate conditions for arbitrations to be held in Rwanda.

However, Rwanda had no formal mechanism for domestic or international commercial arbitration at the time.

- ❖ 3 years later, Rwanda established the Kigali International Arbitration Centre (KIAC), the first independent international arbitration centre in the region.
- ❖ Thus the last entrant to the commercial arbitration stage in the East Africa region became the first country to establish an international Arbitration Centre.

BURUNDI



BURUNDI

Statutes in Burundi are known as Codes.

In **2008**, Burundi passed a new Investment Code which harmonized the country's investment legislation with the frameworks applicable in other countries within the East African Community.

Under the Code, for all investments made in the capital, arbitration must be located in Burundi, if located elsewhere parties can opt for international arbitration

Burundi also ratified ICSID meaning dispute with the Burundian government (regarding an eventual expropriation, for example) could also be brought before ICSID

Disputes between the government and investors can also be mediated by the Multilateral Investment Guarantee Agency (MIGA).

In 2014, Burundi acceded to the New York Convention but with a commercial reservation- the convention only applies to disputes characterized as commercial under municipal law.

TANZANIA



TANZANIA

- ❖ Tanzania ratified the New York Convention in 1965 and passed the Tanzanian Arbitration Act which provides for court annexed arbitration and domestic arbitration.
- ❖ The Tanzanian Arbitration Act however **predates** the UNCITRAL model law and is yet to be updated
- ❖ There are two arbitration bodies in Tanzania; The Tanzanian Institute of Arbitration and The National Construction Council
- ❖ the Tanzania National Construction Council specializes in commercial disputes arising from the construction industry whereas the Tanzania Institute of Arbitration deals with all kinds of commercial disputes.

- ❖ The Tanzanian Institute of Arbitration is a non-governmental institution which was established in 1996 aimed at conducting commercial arbitration.
- ❖ The Tanzania Arbitration Institute Rules of 2008 govern the conduct of its arbitral proceedings; while the
- ❖ National Construction Council has the National Construction Council Arbitration Rules of 2001.
- ❖ Both institutions have adopted the UNCITRAL Model Law on International Commercial Arbitration

UGANDA



UGANDA

The Judicature Act of Uganda provides for Alternative Dispute Resolution under Court's direction.

Court-annexed arbitration falls in this regard because it is carried out pursuant to a Court Order as opposed to consensual arbitrations which are pursuant to a existing agreement to that effect.

The **Arbitration and Conciliation Act of Uganda** incorporated the provisions of UNCITRAL as well as the UNICITRAL Arbitration Rules and greatly empowered parties and increased their autonomy.

The Act also provided for the Centre for Arbitration and Dispute Resolution (CADER) as a Statutory Institutional alternative dispute resolution institution

EAST AFRICA COURT OF JUSTICE

The EAC was established by the EAC Treaty in 2000.

Article 9 of EAC Treaty established the East African Court of Justice (“EACJ”).

Under Article 32 of the EAC Treaty, parties may refer arbitration to the EACJ when pursuant to a contractual dispute resolution clause designating the EACJ as having arbitral jurisdiction or, by agreement after a dispute has arisen.

In 2001, the EACJ drafted Rules of Arbitration (“EAC Rules”), which govern proceedings referred to EACJ arbitration; these were updated in March 2012

Under the EACJ appointing authority will appoint a tribunal, or Sole Arbitrator if the parties so agreed, from among the Judges of the EACJ

No fees are payable to the arbitrators, but parties must pay administrative expenses and other costs of arbitration.

OVERVIEW

- ❖ All EAC states are thus now party to the New York Convention
- ❖ The region is now being served by 2 international commercial arbitration centers and several domestic arbitration centers
- ❖ The rules of the Centers' include an emphasis on low fees, with costs considerably lower than in traditional arbitration centers such as London, Paris or Singapore; and
- ❖ most rules also include an emergency arbitrator option, similar to that contained in the recently amended rules of the International Court of Arbitration at the ICC, to allow for rapid interim relief where this might be appropriate.

CONCLUSION

The increasing number of arbitration centers in the region shows that countries are seeking to attract foreign investment, while at the same time providing easy access to an independent arbitral forum.

It is evident that local courts are becoming increasingly familiar with arbitration as a valid method of resolving disputes.

There have been huge developments in the region as far as commercial arbitration is concerned and it is clear that the message to the world is welcome to East Africa, We are open for business.



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A D V O C A T E S



THANK YOU