The 2018 COMESA Arbitration Rules: already time for an update?

John Gaffney - Senior Counsel - Arbitration / Competition - Abu Dhabi

Fawzi Mashal
F.Mashal@tamimi.com - DIFC, UAE

Introduction

Founded in 1994, the Common Market for Eastern and Southern Africa ('COMESA') is the largest regional economic organisation in Africa. With its 21 Member States, population of over 583 million, a gross domestic product of US$805 billion, a global export/import trade in goods worth US$324 billion, and an area of 12 million square kilometres covering two-thirds of the African Continent, COMESA forms a major marketplace for both internal and external trading.

The COMESA Authority is made up of the 21 Heads of State and Government of Member States. It is the supreme Policy Organ and is responsible for the general policy, direction and control of the performance of COMESA's executive functions. The Council of Ministers is COMESA's second highest Policy Organ. It comprises ministers designated by the Member States. The Council is responsible for ensuring the proper functioning of COMESA in accordance with the provisions of COMESA's founding Treaty ('COMESA Treaty'). Furthermore, a Court of Justice was established under Article 7 of the COMESA Treaty to "*ensure the adherence to law in the interpretation and application of this Treaty.*"

Article 28 of the COMESA Treaty grants the COMESA Court of Justice jurisdiction to hear and determine any matter arising from: (a) an arbitration clause contained in a contract to which the Common Market or any of its institutions is a party which confers such jurisdiction; and (b) on matters arising from a dispute between the Member States regarding the Treaty if the dispute is submitted to it under a special agreement between the Member States concerned. Hence, only disputes involving COMESA or its institutions and third parties, and disputes between Member States in which the arbitration clause or special agreement gives jurisdiction to the Court of Justice may be submitted to COMESA arbitration. Therefore, commercial disputes between private parties cannot be brought to the Court of Justice for arbitration.

In exercise of the powers conferred upon it by Article 38 of the COMESA Treaty, the Court of Justice, with the approval of the Council, issued the COMESA Court Arbitration Rules in 2018 ('the COMESA Rules'). These are a revision (and repeal) of the original rules governing arbitration in COMESA, which were issued in 2003. The COMESA Rules apply to any matter that is to be determined by the Court under Article 28 of the Treaty. The Rules contain detailed provisions on key issues, such as the composition and jurisdiction of the arbitral tribunal, the seat and place of arbitration, the arbitral proceedings, the award, and costs.

Although the COMESA Rules have come a long way since 2003, various areas could benefit from updating so that they are aligned with other international arbitration rules. This article aims to highlight those areas and to propose reforms.

Areas of the COMESA Rules that would benefit from updating

The areas where the COMESA Rules would benefit from updating in order to conform to international best practice include:

A. The use of modern means of technology

At present, there is scant mention in the Rules of the use of modern means of technology to conduct arbitrations. For example, under Schedule 1, Section 5, in the case of an Emergency Proceeding the "*Emergency Arbitrator may conduct the emergency proceedings in any manner… including through a hearing by telephonic or electronic communication, or any other means.*" However, this provision applies only to Emergency Proceedings; accordingly, while it is a step in the right direction towards a more technology-centric set of rules, it is not enough.

More than a few arbitration rules have been amended in recent years to expressly allow proceedings to be conducted virtually. For example, such rules provide for certain documents (i.e. Request for Arbitration or Answer to Request for Arbitration) to be delivered electronically (e.g., Article 4 of the 2021 Dubai International Financial Centre-London Court of International Arbitration Rules ('DIFC-LCIA Rules') provides that, "[t]he Claimant shall submit the Request… in electronic form, either by email or other electronic means…"). Furthermore, the 2015 Nairobi Centre for International Arbitration Rules ('NCIA Rules') states at Rule 22(5) that "*[a] hearing or any part of a hearing may be conducted via video-conference, telephone or such other electronic means, with the agreement of parties or at the discretion of the arbitrator." Similarly, the 2011 Cairo Regional Centre of International Commercial Arbitration Rules ('CRCICA Rules') states at Article 22 that "[t]he arbitral tribunal may direct that witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing (such as video conference)*."

The COMESA Rules are silent on this matter and only in Rule 3 do they provide that "*any notice, including a notification, communication or proposal*" is deemed to be received subject to being "*physically delivered*". They would benefit from implementing more technology-friendly provisions that enable parties to take advantage of the various modern means of technology available in order to conduct the proceedings more efficiently, especially considering the restrictions on international travel imposed by the current pandemic.

B. Confidentiality

Confidentiality is perceived as one of the advantages of international arbitration. The attractiveness of considering arbitration as a means of settling disputes stems from the idea that confidentiality is a fundamental attribute to arbitration. For example, Article 39.1 of the 2016 Singapore International Arbitration Centre Arbitration Rules ('SIAC Rules') requires parties to "treat all matters relating to the proceedings and the Award as confidential". Similarly, Rule 34 of the NCIA Rules provides that "*[u]nless the parties expressly agree in writing to the contrary, the parties shall undertake to keep confidential all awards in their arbitration, as well as all materials… and all other documents*", However, the CRCICA Rules, 2012 Kigali International Arbitration Centre Arbitration Rules ('KCIA Rules') and the 2018 Lagos Court of Arbitration Rules ('LCA Rules') do not expressly provide for the confidentiality of proceedings. And neither do the COMESA Rules, either explicitly or implicitly afford such protection to the parties. This might be because COMESA Member States will be parties in COMESA arbitrations, so confidentiality may be deemed inapt. Nonetheless, the COMESA Rules could benefit from adopting the approach evidenced in Rule 34 of the NCIA Rules.

C. Authorisation of changes in legal representation

The doctrine of party autonomy is a recognised concept in international arbitration worldwide. Party autonomy necessitates a party's ability to select legal representatives of its choosing. However, this right may be overridden by the Tribunal's power to withhold its approval of a party's authorised representative (e.g., Article 18.4 of the DIFC-LCIA Rules: "*The Arbitral Tribunal may withhold approval of any intended change or addition to a party's authorised representatives where such change or addition could compromise the composition of the Arbitral Tribunal or the finality of any award (on the grounds of possible conflict of interest or other like impediment).*") A similar provision is provided for under Article 17 of the 2021 International Chamber of Commerce Arbitration Rules ('ICC Rules').

The COMESA Rules do not regulate the approval by the arbitral tribunal of changes in legal representation. Although there is a prescribed mechanism to select party representatives, there are no provisions granting the Tribunal power to withhold approval. While, on the one hand, this can be construed as a positive attribute of the COMESA Rules, upholding a facet of party autonomy, on the other hand, it might cast doubt as to the inherent power of the Tribunal to efficiently manage the conduct of the proceedings.

D. Expedited procedure

Not all institutions offer an expedited procedure, and where that is the case, other provisions often exist that aim to accelerate the usual procedure. For example, under the DIFC-LCIA Rules, in cases of "exceptional urgency", any party may apply to the LCIA Court for the emergency formation of the tribunal (Article 9A). The position is slightly different under the ICC Rules where the Expedited Procedure Rules may apply if the amount does not exceed US$2,000,000 for arbitration agreements concluded on or after 1 March 2017, and US$3,000,000 for arbitration agreements concluded on or after 1 January 2021, or, if "the parties so agree". Additionally, under Rule 10 of the NCIA Rules, "*[i]n exceptional circumstances or due to an emergency, prior to or on the commencement of the arbitration, a party may apply to the Centre for the expedited formation of an Arbitral Tribunal*".

Although they do provide a mechanism for a party to apply for the appointment of an emergency arbitrator prior to the appointment of the tribunal, the COMESA Rules do not offer parties an expedited procedure before the arbitral tribunal. Such a process would enhance the Rules in disposing of disputes in an expedited matter, where suitable.

Alternatively, the COMESA Rules may benefit from implementing an early dismissal mechanism. An example of such mechanism can be found under Article 29 of the SIAC Rules (which are based on Rule 41(5) of the International Centre for Settling International Disputes ('ICSID') Arbitration Rules) allowing parties to file an objection that a claim is either manifestly without legal merit or manifestly outside the jurisdiction of the Tribunal. Such a provision, as is the case with provisions on expedited procedures, would aid in making the COMESA Rules more cost and time efficient.

E. Joinder/consolidation

Multi-party and multi-contract complex disputes are now ever-present in international arbitration practice. This is unsurprising given the increasingly complex nature of international trade and commerce.

Joinder (which involves the inclusion of additional parties in an arbitration) and consolidation (which involves the combination of multiple arbitrations into one proceeding) are two key procedural mechanisms that have been incorporated in leading institutional arbitration rules in order to save time and costs and

avoid parallel proceedings and inconsistent decisions. For example, Articles 8 and 11 of the KCIA Rules and, articles 16 and 17 of the NCIA Rules grant the Tribunal the power to join or consolidate proceedings. This is also evident under Articles 14, 22 and 22A of the DIFC-LCIA Rules. The COMESA Rules do not provide for either the joinder of parties or the consolidation of proceedings. We suggest that consideration be given to make provision for each, where it would aid the efficient resolution of multi-party and/or multi-contract disputes (to the extent that such disputes are likely to arise in the COMESA framework).

Conclusion

The recent modernisation of the COMESA Rules towards international best practice standards is welcome and timely. A welcome next step would be to further amend the COMESA Rules to align them with international best practice standards in the areas reviewed in this article to the extent appropriate having regard to the unique subject matter of the Rules.

For further information, please contact John Gaffney (j.gaffney@tamimi.com).