



# OVERVIEW OF INTERNATIONAL COMMERCIAL DISPUTES IN THE SUB REGION

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# INTRODUCTION

- ▶ International commerce presents challenges for dispute settlement.
  - ▶ The disputes are mostly decided in foreign environments by foreign methods thus creating uncertainty and discomfort and increasing risks of doing business.
  - ▶ It is critical to have competent legal and technical skills to undertake the task of dispute resolution.
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# INCIDENCE OF INTERNATIONAL COMMERCIAL DISPUTES IN EAST AFRICA

- ▶ Commercial activity has increased in the region over the year and with it the incidence of commercial disputes.
  - ▶ Commercial Courts have been established within the region to cater for increased business disputes.
  - ▶ Adoption of Alternative Dispute resolution mechanism for example adoption of the UNCITRAL MODEL LAW ON ARBITRATION.
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# PARTICIPANTS IN DISPUTE RESOLUTION

- ▶ Courts
  - ▶ Government as parties
  - ▶ Private Sector
  - ▶ The Bar
  - ▶ Regional Fora ( COMESA, EAC Courts)
  - ▶ International Resolution forums (Arbitration bodies)
  - ▶ Good offices
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# CHOICE OF FORUM

- ▶ Dependent on the transactions
  - ▶ Most international transactions go to arbitration
  - ▶ Most of the Arbitrations are done in the more developed arbitration centres e.g London and Washington D.C for instance World Duty Free, Dowans Holdings Vs. Tanesco.
  - ▶ Few are settled in the domestic courts (Modern Holdings Vs. Kenya Ports Authority), Coastal Aquacultures Ltd
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# CHALLENGES WITH DOMESTIC COURTS

- ▶ Delays
  - ▶ Costs and Fees
  - ▶ Uncertainty
  - ▶ Corruption and public perception
  - ▶ Lack of technical expertise
  - ▶ Financial and physical infrastructure constraints.
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# CROSS-CUTTING ISSUES

- ▶ Due to the confidential nature of such disputes it is difficult to know whether there are disputes, and nature and extent of such disputes.
  - ▶ However, most disputes are settled outside public domain hence information and terms of settlement not readily available
  - ▶ Factors that influence settlement may be diplomatic pressure, cost of litigation, fear of losing, corruption.
  - ▶ Loss of opportunities for “lessons-learnt” due to the confidential nature of the dispute settlement processes.
  - ▶ Loss of opportunities for capacity building due to use of foreign lawyers and other experts.
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# CASE STUDY

*WORLD DUTY FREE COMPANY LTD V THE  
REPUBLIC OF KENYA*

# BACKGROUND

- ▶ The *World Duty Free Company Ltd. v The Republic of Kenya* case involved a contractual claim by the World Duty Free Company Ltd., the Claimant, against the Republic of Kenya, the respondent, for the latter's effective expropriation of the company without compensation.
- ▶ The claim was submitted to the International Centre for the Settlement of Investment Disputes (ICSID), pursuant to the relevant agreement's arbitration clause, and an arbitral tribunal consisting of three persons was duly constituted.

# WORLD DUTY FREE CLAIMS

- ▶ The Claimant entered into a contract with Kenya to obtain licenses to operate and equip certain duty free complexes at Nairobi and Mombasa airports, and also to renovate and upgrade the passenger facilities of these two airports. The complexes were opened in 1990.
- ▶ In 1992, however, President Moi through Kamlesh Pattni placed further pressure on the company to participate in a fraud scheme that would have allowed at least US\$438 million to be claimed by an agent company from the Kenyan state in the form of export credits for transactions that never occurred.
- ▶ When the company refused to participate in this transaction and offered to give evidence in a criminal prosecution against Mr. Moi's emissary (Mr. Kamlesh Pattni), the latter arranged to take legal control of the company by way of receivership through Kenyan courts. Mr. Pattni refused to return the property and restore the claimant's contractual rights until the claimant refused to give evidence for the criminal prosecution. The claimant thus sued at ICSID, claiming breach of contract.

# LITIGATION IN KENYA

- ▶ Kamlesh Pattni, lodged a claim against World Duty Free claiming that he had purchased the company through a series of transaction. He applied to the court to appoint receivers. The High Court granted the application and receivers were appointed and injunctions issued against Mr Nasir from interfering with the Company.
- ▶ The Court of Appeal confirmed the High Court decisions and declined to set aside the receivership.
- ▶ In the meantime, Mr Nasir was deported.
- ▶ In an ex-parte judgment the Mr Pattni was awarded the shares in the company effectively taking the company away from Mr Nasir.

# FINDINGS OF THE TRIBUNAL


- ▶ First, it found that the ‘donation’ was a bribe notwithstanding any local practise suggesting that it was consistent with domestic public policy. It noted that the concept of Harambee had been abused and that it was (a) probably not, in Kenyan law and custom, inclusive of bribery, and (b) even if it were, would still likely be regarded as a breach of international public policy.
- ▶ Further, it was clear from the one of the company’s statements that its agent was uncomfortable about the arrangement, and that he knew that he had to pay the money in order to obtain the contract. Thus the existence of the bribe was not in doubt. i

# FINDINGS OF THE TRIBUNAL

- ▶ Second, the tribunal found that bribery constituted a breach of international public policy, as well as of English and Kenyan public policy. The concept of ‘international’ public policy meant, effectively, that of transnational public policy, meaning a breach of the policy concerns of all or most states. After reviewing a number of authorities, including various tribunal decisions, decisions of national courts, and international conventions and declarations, the tribunal concluded thus:

*“In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to international public policy of most, if not all, States, or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal”.*

# issues

- ▶ Use of local dispute resolution to resolve international commercial disputes.
  - ▶ Use of Arbitration Clause.
  - ▶ Choice of Law
  - ▶ Choice of Forum for arbitration. ICSID, Washington. DC. London.
  - ▶ Use of local and international counsel.
  - ▶ Preparations for dispute resolution
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# OTHER CASES

- ▶ DORWANS-RICHMOND VS TANESCO IN TANZANIA
- ▶ KEN-REN FERTILIZER CASE IN KENYA

THANK YOU

