

## A role for REC courts of justice in AfCFTA-related disputes?

Of the eight Regional Economic Communities (RECs) recognised by the African Union as building blocks of the envisaged African Economic Community and the newly-established AfCFTA, three have community courts of justice to which private parties – natural and legal persons – have access. (There are also ‘non-recognised’ regional organisations with courts enjoying jurisdiction to hear applications brought by private parties. Examples are the Economic and Monetary Community of Central Africa (CEMAC), the West African Economic and Monetary Union (WAEMU), and the mostly French-speaking OHADA (in English the ‘Organisation for Harmonisation in Africa of Business Laws’) with its Common Court of Justice and Arbitration.)

The ability of a regional court to hear disputes between individuals (‘private parties’) and member states and institutions or organs of a REC is of central importance to the development of ‘community law’ and the integration process at all levels. Member states do not readily litigate against each other in the regional courts or at all. On the other hand, when private parties with the means are affected by the actions of member states, they are the ones who bring matters to the courts.

The three ‘recognised’ courts with jurisdiction over such disputes are the ECOWAS Community Court of Justice (ECCJ), the COMESA Court of Justice (CCJ), and the East African Court of Justice (EACJ). The SADC equivalent, namely the SADC Tribunal, suffered a lamentable and early demise when Zimbabwe refused to comply with its orders and convinced the other member states of SADC to restrict the Tribunal’s jurisdiction to state-party disputes. The ill-fated Revised Protocol never came off the ground after South African and Tanzanian courts declared their countries’ signing of the Protocol invalid. Thus far, the member states of SADC have shown little appetite for reviving the Tribunal and what SADC is left with is the so-called SADCAT or SADC Administrative Tribunal. This Tribunal is exclusively concerned with SADC

staff disputes and has little if any effect on the primary affairs of the Community.

In the case of SACU, although it is not one of the recognised RECs, the *ad hoc* Tribunal envisaged by the SACU Treaty of 2002 has not materialised. As in the case of SADC, the five member states of SACU do not appear interested in activating their dispute resolution body. (If this conclusion is correct, it makes the suggestion by the Namibian High Court in *Clear Enterprises (Pty) Ltd v The Minister of Finance*<sup>1</sup> that the applicant could approach the SACU Council with a request to refer its dispute with SACU to the Tribunal little more than cold comfort.)

Turning to the three functioning, ‘recognised’ community courts, they are in general terms equipped, competent and by their own admission keen to deal with trade disputes. Could this include testing a member state’s compliance with obligations under the AfCFTA, whose own dispute resolution mechanism is not open to private parties? A first reaction would be ‘no’. The REC courts are confined by their founding treaties to the interpretation and implementation of those treaties, nothing beyond. Yet, ‘no’ does not have to be the answer. The proverbial devil is in the detail and despite the fact that all three courts have in one way or another been hampered in becoming ‘go-to’ institutions for aggrieved traders, the question should be explored.

The political and economic peculiarities of the environment in which the courts function, the seriousness with which the member states approach their treaty obligations, ignorance about the RECs and their courts of justice, the enforcement of the courts’ orders, and the availability of alternative avenues for dispute settlement are all factors affecting the appeal of the community courts of justice. However, the jurisdictional and procedural constraints imposed by the courts’ founding instruments documents are the more important hurdles to clear. Each of the three courts is subject to its own distinct restriction.

In ECOWAS, apart from the right of staff of the Community and its institutions to approach the ECCJ, access to the Court by ‘individuals’ or ‘corporate bodies’ (the terms used in Article 10(c) of the Court’s Protocol) stands on two legs. The one is the ability of ‘individuals’ and ‘corporate bodies’ to challenge actions of officials of the Community that affect their rights. The other is the right of ‘individuals’ (the term used in Article 10(d) of the Court’s Protocol) to sue member states of ECOWAS for a violation of their human rights. Arguably, the right to seek redress against an official of the Community is of limited value and not many such cases have made their way to the Court. By contrast, the right to approach the Court for human rights violations has led to the majority of the matters before the Court. The downside is that in principle this right

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<sup>1</sup> [2019] NAHCMD 156 (17 May 2019).

is confined to individuals or natural persons, to the exclusion of legal persons. Aware of the shortcoming imposed by its Protocol, the Court did pry open a narrow window for corporate complainants to bring their causes to the Court under Article 10(d). However, where in the case of an individual the Court will entertain a reference on the mere allegation that any recognised human right has been violated, thus far, in the case of legal persons ('corporate bodies'), only the right to freedom of expression, the right to property and the right to a fair hearing have been enumerated as 'rights that are fundamental and necessary for the existence of a corporate body which a legal entity can enjoy and be deprived of'.<sup>2</sup> While this may look like a reasonable opening for legal persons to approach the Court, the limits of the possibility become clear when compared to the position in COMESA and the EAC.

The provisions in the COMESA and EAC treaties for natural and legal persons to approach their respective community courts are closely related. In both instances, a natural or legal person resident in a member state may approach their court of justice to challenge the legality of any Act, regulation, directive, decision or action of a member state and the Council of Ministers (in COMESA), or an institution of the Community (in the case of the EAC), on the basis that the Act, action or measure complained of is unlawful or an infringement of the provisions of the particular treaty. In either case, the right to take a matter to the court is qualified. The COMESA Treaty requires the resident to exhaust local remedies available in the courts or tribunals of the member state concerned. The EAC Treaty, on the other hand, requires the resident to institute proceedings within two months of the date of the measure or action complained of or from the day the alleged violation came to their attention. The jurisprudence of both the CCJ and the EACJ shows that these qualifiers prevented a number of references from proceeding beyond the preliminary stage.

A more substantial difference between the EACJ and the CCJ that emerged after the latter's Appellate Division ruling in *Government of the Republic of Malawi v Malawi Mobile Ltd*<sup>3</sup> is the approach of the two courts to the effect of the foundational provisions of the respective treaties. In the case of the EACJ, it has become settled law that Articles 6(d) and 7(2) on the principles of good governance, democracy, accountability, social justice, human rights and the like form the basis of enforceable rights for aggrieved residents of partner states of the EAC. The EACJ does not shy away from delving into the domestic law of partner states to determine whether their actions constitute a violation of those and other provisions of the Treaty. In the case of COMESA, the Appellate Division poured cold water on the willingness of its First Instance Division in *Malawi Mobile*<sup>4</sup> to follow a similar route as the EACJ when it held that alike provisions

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<sup>2</sup> *Dexter Oil Limited v Republic of Liberia* ECJ/CCJ/JUD/03/19 (6 February 2019) para 72.

<sup>3</sup> Appeal 1/2016 (23 April 2017).

<sup>4</sup> *Malawi Mobile Limited v Government of the Republic of Malawi* Reference 1/2015 (20 November 2015).

in the COMESA Treaty did not grant enforceable rights to residents. A possible further damper in the case of the CCJ is the Appellate Division's ruling in *Malawi Mobile* that a natural or legal person approaching the Court on the basis of a Treaty violation should already, during the process of exhausting local remedies, show some connection between their case and the Treaty.

Finally, the EACJ has ruled that the alleged unlawful act of a partner state covered by Article 30 of the Treaty includes any act, not necessarily one confined to an infringement of the EAC Treaty. Arguably, if a partner state fails to comply with an obligation under the AfCFTA Agreement, the Court may look into the matter and determine whether the member state failed to uphold the rule of law as demanded by Articles 6(d) and 7(2) of the Treaty.

By way of summary, in their different ways and given the treaty constraints within which they operate, all three REC courts have shown themselves capable of dealing with trade disputes. Of the three, the EACJ is more likely to draw such disputes due to its willingness to test partner states' laws and actions against their commitments under the EAC Treaty and its associate instruments that are considered part of the Treaty. Moreover, following its early landmark ruling in *Prof Peter Anyang' Nyong'o v The Attorney General of Kenya*,<sup>5</sup> the Court explicitly regards Article 30 of the EAC Treaty that allows natural and legal persons standing before the Court, as a special statutory cause of action that is not dependent on the violation of any right or interest.

The COMESA Court has won itself a favourable reputation with its judgment in *Polytol Paints*. However, its rulings in *Malawi Mobile* created some uncertainty on the direction the Court will take in future cases. This does not detract from the fact that the Court has shown itself capable of dealing with a trade dispute.

In the case of ECOWAS, corporate bodies ('legal persons', in other words) are faced with the challenge of bringing their disputes under a peculiar 'rights' rubric that is inextricably linked to the 'natural person-human rights' jurisdictional mandate of the ECCJ. Like the EAC, it counts to the advantage of the ECCJ that it has a regular flow of cases that allowed it to establish itself firmly as the judicial arm of ECOWAS governance. It is also the only of the three regional courts that regularly includes in its ruling an order to an offending state party to report within a determined timeframe on the steps it had taken to give effect to the Court's ruling. In this regard, it follows the practice of the African Court of Human and Peoples' Rights.

Sooner or later, any of the three REC courts may have to face the question of whether it is clothed with jurisdiction to entertain a complaint that one of its member states had failed to comply with an obligation

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<sup>5</sup> Reference 1/2006 (30 March 2007).

under the AfCFTA Agreement. (The AfCFTA is member state-driven.) In the COMESA Court of Justice, the exhaustion of domestic remedies, the accompanying costs, and the requirement that an aggrieved litigant must establish a link to the Treaty during the local remedy process, may prove a hurdle too high. A similar challenge may await a corporate litigant in the ECOWAS Community Court unless it can persuade the Court that its complaint relates to one of the limited number of rights that the Court recognises for jurisdictional purposes. To its benefit may be the fact that Article 10 of the Court's Protocol does not explicitly require the complaint to relate to a violation of the ECOWAS Treaty or its associate instruments.

The EACJ is the most likely court where the residents of a partner state may find an open door. The way in which the Court has developed a settled approach to hold partner states accountable to the fundamental and operational principles in Articles 6 and 7 of the EAC Treaty may just allow compliance with the AfCFTA Agreement to be tested by the Court. The integrative effect of such a move should not be underestimated, however remote the first attempt may look at the moment.

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