

FACTORS INFLUENCING RESOLUTION OF COMMERCIAL
DISPUTES IN THE COMESA REGION

BY

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DECLARATION

This management research project is my original vwrk and has not been presented for a degree in any other university

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This management research project has been submitted for examination with my approval as University supervisor

Signed

Date

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DR JOHNYABS

DEDICATION

For Dawn, lu and my parents. for the love and support

And for all those who believe in alternative methods to dispute resolution.

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TABLE OF CONTENTS

DECLARATION.....	II
DEDICATION.....	III
ACKNOWLEDGEMENT.....	IV
LIST OF TABLES.....	VII
ABSTRACT.....	VIII
CHAPTER ONE: INTRODUCTION.....	1
I.1 Background of the study.....	1
I.1.1 Resolution of international commercial disputes.....	I
1.1.2 The COMESA Region.....	4
1.2 Statement of tlrc Problem.....	6
1.3 objectives of the study.....	8
1.4 Importance of the study.....	8
CHAPTER TWO: LITERATURE REVIEW.....	10
2.1 Introduction.....	10
2.2 The need for resolution of commercial disputes.....	10
2.3 Approaches in resolution of commercial disputes.....	13
2.3.1 Building collaborative relationships.....	17
2.3.2 Mediation.....	18
2.3.3 One-to-one dispute resolution.....	20
2.4 Factors hindering commercial dispute resolution.....	21
2.4.1 Values.....	21
2.4.2 Sources of power.....	22
2.4.3 Delay.....	23
2.4.4 Cost.....	23
2.4.5 Antagonism.....	23
2.4.6 Limits of legal solutions to commercial problems.....	24
2.4.7 Lack of certainty/loss of control.....	24

CHAPTER THREE: RESEARCH METHODOLOGY	25
3.1 Research Design	25
3.2 The target population and Sample size	25
3.3 Data collection	25
3.4 Data analysis.....	26
CHAPTER FOUR: DATA FINDINGS, ANALYSIS AND INTERPRETATION	28
4.1 Introduction.....	28
4.2 Demographic findings.....	29
4.3 General Quantitative findings.....	32
CHAPTER FIVE: SUMMARY, CONCLUSION AND RECOMMENDATIONS	38
5.1 Summary of findings.....	38
5.2 Conclusion	39
5.3 Recommendation	40
5.4 Suggestion for further study.....	40
REFERENCES	41
APPENDICES	45
Appendix I: Letter of Introduction.....	45
Appendix II: Questionnaire.....	46
Appendix III: Map of countries within COMLSA.....	49

LIST OF TABLES

Table 4.1: Gender of the Respondent	29
Table 4.2: Level of Education.....	30
Table 4.3: Age of the Respondent.....	31
Table 4.4: Respondents' Understanding of the COMESA Region.....	32
Table 4.5: Modes of Payments recommended by the Respondent for COMESA Region.....	33
Table 4.6: Perceived Major Constraints to Business within COMESA.....	35
Table 4.7: Whether Limitations Affecting COMESA are Addressed.....	36

ABSTRACT

We live in a shrinking world where local concerns become regional, and regional become global. Economic activity is cross-border which means that people and institutions from different cultures with different legal backgrounds and different business expectations are learning to work with each other. Disputes are an inevitable product of business transactions and resolution of those disputes can describe the difference between a productive commercial relationship or closure; a phenomenal rise in domestic and international investment or none at all.

The objective of this study was to establish the factors that influence resolution of commercial disputes within COMESA as well as to investigate the factors that hinder resolution of commercial disputes within COMESA. A descriptive survey was used by the virtue of its capacity to enable the researcher describe the area of research and explain the collected data in order to investigate the differences and similarities with our frame of reference within a given period of time. The targeted population was the 20 countries within the COMESA region which included Angola, Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

Commercial attaches representing each member state were the targeted respondents for the study. The researcher used primary sources to collect the data which consisted of a semi-structure questionnaire comprising of both open-ended and close-ended questions. Open ended questions were used to address the essential concepts, processes, and skills that go beyond the specifics of instruction as well as those areas that the researcher would wish to get deeper

explanation from the respondents while the close ended questions guided the researcher to capture quick information from the respondents as well as those that are express in meaning and thus will not require explanations beyond what is stated. Data collected from respondents will be both quantitative and qualitative in nature and was analyzed using a statistical package as well as the content analysis and presented using tables, pie charts, and bar graphs for easier interpretation.

From the study the researcher recommends that, involving different parties in discussions at proposal or concept stage may give them an opportunity to flag up areas of possible difficulty. Although their participation might delay a decision, implementation may be speeded up due to the greater perceived legitimacy of the process and likely outcomes made more acceptable.

CHAPTER ONE: INTRODUCTION

1.1 Background of the Study

In today's turbulent and cvcr-changing environment, disputes, issues, and problems at work are inevitable (McDermott and Berkeley. 1996). Increased teamwork (Appelbaum et al.. IWO) and new organizational arrangements (Bennett and Savani, 2004). mixed with constant change (Rashid et al.. 2003) can create quite a stir among employees. Leaders are often tasked with the management ol not only their own but their employees' disputes. This is because disagreements and misunderstanding are key characteristics of human relationships whether the relationship is a domestic, national or international one. The potential lor disputes is even higher where the parties arc from different cultural, economic and political backgrounds with different legal systems.

1.1.1 Resolution of international commercial disputes

International business transactions involve business ventures that span across the national borders of a country. Hie parties involved in international business transactions arc states. international bodies, multinational companies, and individuals. By their very nature, such transactions are invariably sensitive as different cultures and ideals are brought together in the name of the enterprise of business. Regulation of these business relationships is therefore necessary to ensure that cultural boundaries are accommodated whilst moral and legal boundaries are not overstepped. This necessitates the intervention of law. in various forms, to e m u r c l h a , die purpose for making these Trans -border transactions is not defeated and the whole slru cturc does not break down. Law not only regulates the relationship between the parties but

also determines the outcome of disputes that arise from and out of the business relationships.

Laws regulating dispute settlement in international business transactions exist both at the international and national levels. The sources of international law on dispute resolution are treaties and conventions, international custom, general principles of law recognized by civilized nations, and judicial decisions and writings of highly qualified jurists. National sources of law governing dispute resolution include statutory legislation, case law, customary law and general principles of law.

When a dispute arises between two parties belonging to the same country, there is an established forum available for the resolution of the same. The parties can get the said dispute resolved through the courts established by law in that country. Generally, this has been the most common method employed by the citizens of a country for the resolution of their disputes with the fellow citizens. But what about when a dispute arises between two persons belonging to two different countries? One option available to the parties is to go to the domestic courts of either country for the resolution of that dispute; the other is to seek an appropriate Alternative Dispute Resolution (ADR) method.

Mayer (2000, p. 116) describes the process of commercial dispute resolution as an "art" or an artist's palate in which each person can blend different skills, in different combinations, at differing intensities, and produce different desired results. For instance, *Might* is a method of dispute management that is commonly used especially in the context of an organization. This occurs by avoiding an issue, or transferring away from a problem. A remedy often used by employees is to "vote with their feet" and leave" (Beasley and Rayner, 1907, p. 180). Avoidance

^{1H)} "resolve" a dispute as the issue remains unaddressed (Richardson, 1095; Wilmot and

Hockcf, 2001). Research show that, in general, confronting a dispute is more effective than avoiding it (Donohue and Kolt. 1992). Additionally, employees respect managers more when they confront problems as opposed to avoiding them (Putnam and Wilson. 1982). Superiors who confront disagreements directly are perceived as the most constructive managers of disputes (Burke. 1970; Renwick 1977). In sum, direct discussion, or one-to-one dispute resolution, is regarded by employees as more effective than avoidance.

Effective commercial dispute resolution is critical to any business and can best be achieved with good advice - both pre-litigation and during litigation and with the client having a clear understanding of the options available. The works of Dickmann et al. (1994) and Centre for Public Resources (1994) suggested that disputes could be caused by cultural and contractual matters, and Howlett (2003) believed that conflict of laws and jurisdictional problems could also lead to disputes, and therefore, these sources should not be overlooked.

Nonetheless, it is inevitable that occasional disputes would occur in the course of doing business and the eventual fighting aims to identify a winner and a loser, This often takes the form of one party invoking an organization's formal grievance procedure in which a dispute is investigated with high costs to all involved. Taking into account the literature, a consolidated list of sources of disputes was developed by Chan (2002), in his study of dispute management of international construction projects. Based on the consolidated list, brainstorming among the research team members and preliminary discussions with a few experts were carried out and 20 possible problem areas of disputes of international construction projects in China were shortlisted. The list includes variations, extension of time, payments, quality of works, technical specification, availability of information, administration/management, unrealistic client expectations, risk

allocation, project scope definition, poor communication, difference in ways of doing things, lack of team spirit, previous working relationships, adversarial approach in handling disputes, unfamiliar with local conditions, conflict of laws, jurisdictional problems, lack of local legal system, and unclear contractual terms.

In conclusion, flexibility and speed are the hallmarks of today's corporate winners. For business, ADR is accessible and largely successful; most cases are suitable for it the skill is to identify which are not.

1.1.2 The COMESA Region

The Common Market for Eastern and Southern Africa (COMESA) was founded in 1993 as a successor to the Preferential Trade Area for Eastern and Southern Africa (PTA), which was established in 1981. COMESA formally succeeded the PTA on 8 December 1994 upon ratification of the Treaty by 11 signatory states. The establishment of COMESA was a fulfillment of the requirements of the PTA Treaty, which provided for the transformation of the PTA into a common market ten years after the entry into force of the PTA Treaty.

The main objectives of the common market are to attain sustainable growth and development of member countries by promoting a more balanced production and marketing structure; promote joint development in all fields of economic activity, in addition to jointly adopting macroeconomic policies and its programs to improve the welfare of the citizens and encourage close relations between member countries as well as co-operating in the creation of a suitable environment for domestic, foreign, and cross border investment. In addition, the region aims at collaborating in strengthening the relations between the common market and the rest of the world



as well as in driving peace and security process between member countries so as to strengthen the economic development ties in the region.

The Authority of the Common Market is the supreme policy organ of COMESA, comprising Heads of State or Government of member countries. The Authority is responsible for the general policy and direction and control of the performance of the executive functions of the common market and the achievements of its aims and objectives, the inaugural meeting of the Authority took place in Lilongwe, Malawi in December 1994.

In October 2000, substantial progress towards the eventual creation of a Customs Union was made with the announcement in Lusaka of the formation of a Free Trade Area (FTA). The member states of Djibouti, Egypt, Kenya, Madagascar, Malawi, Mauritius, Sudan, Zambia and Zimbabwe agreed to eliminate tariffs on goods which conform to the COMESA Rules of Origin. Burundi and Rwanda joined the FTA on 22 January 2004. Following an earlier decision by Namibia and Swaziland to seek the approval of the Southern Africa Customs Union (SACU), of which they are also members, to join COMESA, Namibia appears to have reconsidered. The DRC, Eritrea, Ethiopia, Seychelles, Uganda, Angola and Comoros are yet to join the FTA. Mozambique and Tanzania withdrew from COMESA in 1998 and 2000 respectively.

The establishment of the Court of Justice (Court) of the Common Market for Eastern and Southern Africa (COMESA) is a major event in the history of COMESA as an organization and in the development of COMESA Community Law and Jurisprudence. The Court was established in 1994 under Article 7 of the COMESA Treaty as one of the organs of COMESA. The court ** established under the COMESA Treaty and became fully operational in September 1998. It is located in Lusaka, Zambia and is composed of seven judges. The Court is meant to examine

and arbitrate in disputes relating to arbitrary commercial practices, interpret the provisions of the Treaty governing COMESA and see to it that member states implement and respect its decisions. A host agreement was signed in Khartoum on 26 January 2004 according to which the capital of Sudan will be the permanent seat of the Court following a decision on the location of the Court at the 5th COMESA Summit in Sudan in March 2003.

Not only is the Common Market a creature of the law, but it pursues its aims exclusively through a new body of law. Common Market law, which is independent, uniform in all the Member States of the Common Market, separate from and yet superior to national law, and many of whose provisions are directly applicable in all the Member States.

Nevertheless, like any true legal system, the Common Market legal system needs an effective system of judicial safeguards when the law is challenged or must be applied for resolutions of commercial disputes. The Court of Justice, as the judicial organ of the Common Market is the backbone of that system of safeguards. Its Judges ensure that the law is not interpreted and applied differently in each Member State, that as a shared legal system, it remains a Common Market system and that it is always identical. In order to fulfill that role, the Court of Justice has jurisdiction to hear disputes to which Member States, the Secretary General, residents of Member States (individuals and legal persons) may be parties.

¹ **Statement of the Problem**

We live in a shrinking world where local concerns become regional, and regional become global. Economic activity is cross-border which means that people and institutions from different cultures with different legal backgrounds and different business expectations are learning to

work with each other. Disputes are an inevitable product of business transactions and resolution of those disputes can describe the difference between a productive commercial relationship or closure; a phenomenal rise in domestic and international investment or none at all. Yet, despite increasing globalization and internationalization of business, interventions designed to attract domestic and foreign investment sometimes excludes procedures for resolving commercial disputes.

The establishment of the Court of Justice (Court) of the Common Market for Eastern and Southern Africa (COMESA) is a major event in the history of COMESA as an organization and in the development of COMESA Community Law and Jurisprudence. At the same time, many jurisdictions do not recognize "conciliation" as a formal institution, in the context of private arbitration. However, it is becoming more apparent that contractual parties often consider it expedient to explore opportunities for amicable settlement of some contractual aspects of a dispute, even pending any formal arbitration proceedings.

Past studies have concentrated on workplace dispute resolution which tends to focus on grievance procedures and the law (Barton and Keefe, 1999), and arbitration and mediation (Nolan-Haley, 2001). The focus on these formal methods is surprising since such procedures are widely regarded as ineffective and are regularly criticized (Harlos, 2001; Peirce et al., 1998). For example, Eaton and Keefe (1999) write of the widespread criticisms of grievance procedures, how the benefits have eroded, and how the systems have become adversarial and ineffective at resolving disputes (for a review of empirical research on the grievance procedure, see Lewin (1999)). Lewin (1993) describes how employees are reluctant to use formal grievances for fear⁰¹ retaliation or other negative repercussions. In addition, Harlos (2001, p. 337) found that such

"organizational systems suppress or silence the very phenomena they are designed to encourage". Employees prefer to use informal methods of dispute resolution (Gwartncy-Gibbs, 1994; Gwartncy-Gibbs and Lach. 1991). In this paper, an informal method, which represents an alternative to formal processes, is examined.

Based on the above mentioned facts, it is imperative to identify factors that influence resolution of commercial disputes in order to fill the existing research gap. This study will fill the void by answering the question: what are the factors influencing and hindering the resolution of commercial disputes within the COMESA region?

1.1 Objectives of the Study

The objective of the study is to establish the factors that influence resolution of commercial disputes within COMESA and to investigate the factors that hinder resolution of commercial disputes within COMESA.

1.2 Importance of the Study

The governments, government organs and both public and private companies of different member countries will utilize this study by formulating policies that are compatible with those of their bloc. These include the formation of cross-border tariffs and other international trade policies.

The research will benefit academicians especially in the universities and other institutions of higher learning on the concept of dispute resolutions especially in the context of regional commercial disputes.

It is through this study that the researcher will point out factors that influence and hinder resolution of disputes within COMESA. Membership of this bloc, who currently counts at 20, will be in a position to understand areas that need special attention at any time to avoid the succumbing of it through commercial disputes.

CHAPTER TWO: LITERATURE REVIEW

2.1 Introduction

This chapter presents the review of literature on commercial disputes and their resolutions. The discussion is in the form of both the past studies as well as the empirical review

2.2 The Need for Resolution of Commercial Dispute

Litigation in the courts of one's own country is expensive, lengthy and unpredictable: litigation in foreign courts is commonly more so. Domestic courts may not readily enforce judgments from foreign courts. It is natural that parties to international contracts will suspect the national courts of the other contracting party, dislike the costs and delays associated with litigation and lament the breakdown in business relationships. The arbitral process is generally less coercive and invasive than litigation, since comparatively little discovery and pre-hearing proceedings are involved. It is usually more flexible and adaptable to the needs of the parties and the individual dispute. Arbitral proceedings and awards are confidential. The parties themselves can make a selection of knowledgeable neutrals. Delay and cost to the parties are less. In the context of Bangladesh, judicial system is blocked by a huge backlog of suits and cases. The backlog of cases causes wearying delays in the adjudicative process, and over-burdens the Bangladesh judiciary (Alam. 2000).

The present rate of disposal of cases is a bit alarming, and is not at all conducive to meet the ends of justice. It is prejudicial to the rule of law and is damaging the economic growth of the country.

Commercial cases involving tens of crores of taka are pending in different courts across Bangladesh (Mahbub. 2005, p. 16)

These cases are pending for years together due to various problems associated with the complicated legal system, delay in disposing of such cases. It has been the government's plan to introduce an arbitration mechanism to resolve all money suits to reduce the time of resolving such cases from 10/12 years to 6/9 months to the greater benefit of parties concerned, and for boosting the national economy. (Mahbub. 2005. p. 16)

New directions, fundamental change and the negotiation of some form of dispute can all lead to disagreements, disputes and confrontation between contending viewpoints, interests and arguments. Latent conflicts may be brought to the surface. People may display protective behaviour. Different interests may seek to use corporate development opportunities and channels of communication for their own ends. New ways may need to be found to handle disagreements.

Sensitive trainers and developers recognize that the people of an organization and its external business partners may have different perceptions of the desirability, direction and consequences of change and cooperation. Some may feel strongly about certain issues. Old debates, clashes of personality, divisions within the boardroom or tensions between supply chain partners may be brought to the surface.

Within many companies and marketplaces there is a legacy of distrust and much scope for misunderstanding between departments, business units, head offices and operating subsidiaries. Some may harbour suspicions that particular groups are seeking to benefit from changes at the

expense of others. Certain departments may feel they are being asked to absorb an unfair proportion of staff or budget cuts.

There may be potential flash points. Divisions may resent the re-allocation of overhead costs from a corporate centre. Holding and subsidiary company boards and supply chain partners may have differing expectations and perspectives. There might be varying degrees of misunderstanding between national cultures and distinct minorities within an international organization or supply chain.

Trainers need to be aware of such differences and should react accordingly. A standard approach may be appropriate for a relatively homogenous organization. However, the greater the diversity between the different elements of an organization or collaborative partners the more desirable it is likely to be that the implementation of change and transformation programmes and cooperative activities should reflect local and differing situations.

Possible areas of disagreement and/or arenas of confrontation need to be recognized and likely disputes of interest addressed. Training messages and corporate communications can themselves become a source of distrust and tension, especially when words are not consistent with deeds. People may perceive a gap between rhetoric and reality. For example, trainers might stress the need to adopt a longer-term approach to the building of partnering relationships with customers while directors take short-term actions to cut costs that disadvantage other parties.

The Leading Performance Improvement and Research Programme has examined the approaches of a wide range of organizations in many sectors and identified critical success factors for Managing change, competing and winning (Coulson-Thomas, 2002, 2004). It builds on past and



related work on building strategic and key customer relationships (Hurcomb. 1998) and using e-business technologies to encourage closer cooperation within and across supply chains (Bartram. 1996).

2J Approaches in Resolution of Commercial Disputes

Because of the uniqueness of each situation. McFall (1982, p. 17) advises that when specifying performance criteria for a specific task, "at best ... one can list the central features in common to all acceptable performances". The skill-sets in the model represent the central features of one-to-one dispute resolution. Moreover, the variety of possible skill combinations and the uniqueness of each situation help to dispel the simplistic notion of a communication panacea (Postman. 2002).

Many approaches of dispute resolution focus on problem-solving communication (e.g. the "Seven Step Problem Solving Process for Interpersonal Conflict Situations" by Lawler and Katz. 1985) and minimise the relational element that is characteristic of interpersonal communication. The model presented acknowledges that all interpersonal communication is relationship-bound (Wilmot, 1987) and gives equal weight to managing people (in the people/relating skill-set) and managing tasks (in the problem-solving skill-set) in the process of dispute resolution. This equality is evident from the relatively equal importance ratings attributed to the skill-sets in the Endings of the skills survey (see Table II).

Various approaches have been criticised for the trivial handling of emotion in interpersonal dispute resolution (Lidwell. 1998) or worse, its complete ignorance (Kolb and Bartunek. 1992; Thomas. 1992). Emotions, which distinguish disputes from disagreements and problems

(Davidson and Greenhalgh, 1999; Jones, 2001), are included in the model as one of the five key influences on the dispute resolution process. The use of skills for managing emotions was found to determine whether dispute resolution was effective or ineffective, as the ineffective incidents were characterised by an absence of emotional skills and the presence of a high volume of negative emotions. The skill of emotional control was viewed as a strength, echoing the findings of Gibson (1997). Emotional control did not mean a lack of emotional expression, the importance of which is also stressed by Barrios and Finder (2000). The constructive expression of emotion during the one-to-one interaction involved communicating feelings without extreme anger or aggression. The skill findings in this area support the developing literature on emotion in what Fineman (2000) describes as the "emotionally-illiterate" workplace.

The model includes the importance of interaction management in the communication process (Kolb, 1983), unlike normative approaches. This is represented in the three skill-sets: skills when preparing for the one-to-one, skills for making an effective approach, and concluding skills. Use of such skills contrasts with the chaotic communication that was found in the ineffective incidents and in disputes in general (Fortado, 2001). Interaction management skills are regarded among the most valuable contributions made by professional mediators to a dispute resolution process (Kolb, 1983; Sillars and Wilmot, 1994). One might conclude from these findings showing employees effectively using these skills themselves, that "self-mediation" is possible (Dana, 1999).

The role of colleagues in the one-to-one dispute resolution process is included in the model, their presence is excluded from many approaches and this omission is frequently criticised (Wolcott et al., 1997). The findings support the importance of their role, as identified in

previous studies (Chataway and Kolb. 1994; Sheppard et al.. 1989; Volkema et al., 1997). For example in a nation-wide study into workplace bullying, colleagues were the "first port of call" for 77.4 per cent of employees being bullied at work, and line managers were second at 51.4 per cent (Health and Safety Authority. 2001).

The model can be used to describe the skilful process employees use to resolve their disputes effectively. It can also describe how and why disputes are not resolved. For example, it can be used to examine how communication problems occur around the eight sets of inhibiting factors. Therefore, in contrast to the idealistic and prescriptive approaches that dominate the literature, this model is more realistic because of its depiction of skills alongside the inhibiting factors that challenge the process.

traditionally, international commercial arbitration, and more specifically for the purposes of this paper, arbitration in Bangladesh has been beset with many problems, these relate to institutional, legal infrastructural, mainly cultural and educational factors. Despite recent positive response to the global movement towards modernization and internationalization of arbitration in Asia, there still persist many difficulties in Bangladesh that need to be urgently addressed. Dispute settlement and enforcement of arbitral award in many Asian countries including Bangladesh still remain a grave cause of concern for foreign investors.

Successful and unsuccessful companies pursue very different approaches to avoiding disputes, handling differences and encouraging dispute (Coulson-Thomas. 2002. 2004). People associated with "loser" companies are cautious collaborators. They stress the time, effort and expense required to establish and build relationships, and they often conclude that the likely results do not justify a*, investment required.

In making such choices losers act as though working with others is an option rather than a necessity. At heart they are reluctant to share and would prefer to operate alone. They keep to themselves in an attempt to avoid becoming entangled in rivalries and drawn into disputes. When negotiating they pursue divisive strategies and seek to benefit at the expense of other parties. They sometimes foment conflicts in order to achieve sectional interests.

Some losers prize their independence so much they pass up opportunities to grow that would require them to work with colleagues and business partners. Dispute is seen as a constraint on their freedom of action. They settle into familiar ways of operating. If existing arrangements and practices appear to work reasonably well they are reluctant to consider alternatives that might offer additional benefits.

Winners are more willing to work with colleagues and are more likely to be prepared to cooperate with other complementary suppliers. They see and seek the advantages of dispute. It might enable them to learn and develop. It may allow them to offer a wider range of services to their customers and pursue a broader range of opportunities.

Winners are usually receptive to approaches from others. They are open to new ideas. They welcome suggestions for improvements and innovation. They actively search for potential business partners and explore possibilities for joint initiatives or collective action. They do not mind the confrontation and argument that may need to precede mutual respect and a meeting of minds. They endeavour to find common ground, resolve conflicts and promote shared interests and goals.

23.1 Building Collaborative Relationship;!

It helps if aspiring collaborators are compatible and complementary. When they need to work with others losers tend to seek out potential collaborators with similar characteristics to themselves. As a consequence, they sometimes find in crisis situations that the whole is not necessarily greater than the sum of the parts. Like drunks endeavouring to prop each other up they compound each other's weaknesses.

If the parties endeavouring to co-operate are very different they may not have enough in common to cement a relationship. On the other hand, if they are so alike as to add little to each other's capabilities dispute may not be justified. Winners are more likely to understand that lasting relationships often involve dissimilar but complementary partners that allocate roles and responsibilities according to comparative advantage.

Losers tend to be essentially selfish where relationships are concerned. They seek to co-operate on their terms, and they often put the bare minimum of effort into maintaining them. They hold back emotionally and intellectually and endeavour not to become too deeply involved. They are wary and may even undertake cost-benefit assessments. When negotiating they endeavour to "score points" and adopt win-lose approaches.

Collaborative "partnerships" can take various forms. Whether an informal arrangement or a formal joint venture, such relationships can be of great importance. Opportunities can be addressed and significant amounts of new business won as a result of co-operative action. The consortium bid for a major contract, with each member focusing on an area of core expertise is increasingly acceptable and may be encouraged.

Winners work hard at reaping the benefits of co-operation. They commit the effort required to establish and regularly review collaborative processes and practices. For example, they may put practical arrangements in place to clarify the ownership of customers, prevent poaching and protect intellectual property. They are more willing to practice open book accounting and create electronic links between parties, in situations where losers would worry about the confidentiality of information and the risk of exposure to computer viruses and hacking.

Winners also recognise that if internal and external relationships are to grow and deepen they should be acceptable and mutually beneficial to all the parties involved. Instinctively, when negotiating they look for win-win outcomes. They also avoid rushing. Some parties will take longer to adjust and integrate than others. Winners also understand the dynamic nature of associations and arrangements. Time, effort and care may need to be devoted to them if they are to become more intimate.

Winners willingly commit. They become involved. They are flexible and understanding, and prepared to do things differently to accommodate particular and legitimate interests. They are also not "fair weather friends". They can be relied on in crisis situations.

2.2.2 Mediation

Dispute should not be pursued at any cost or become a distraction. Some losers devote great effort to achieving "teamwork" that may conceal or sideline differences and gloss over concerns in order to achieve a bland consensus. Winners adopt a more entrepreneurial approach. They encourage open and frank discussion. They become demanding collaborators and partners. On "fusion" they may create waves in order to make faster progress.



Overall winners recognise that a lack of tension may mean the absence of ambition. The quiet organization may be asleep. Their drive and desire to innovate and push back the boundaries of what is possible may provoke confrontation between those favouring the status quo and those who desire to move on. The need for activities and processes for building mutual understanding, reconciling differences and building collaborative relationships is understood and addressed.

Discussion, informed debate, a willingness to challenge and a degree of confrontation is sometimes desirable. It can prevent complacency, spur innovation and lead to higher performance and the creation of new offerings (Coulson-Thomas, 2001). Disputes are usually better in the open - where efforts can be made to resolve them - than hidden when they can fester. Winners put simple and low level dispute resolution procedures in place.

Involving different parties in discussions at proposal or concept stage may give them an opportunity to flag up areas of possible difficulty. Although their participation might delay a decision, implementation may be speeded up due to the greater perceived legitimacy of the process and likely outcomes made more acceptable.

Mechanisms for identifying, tracking and resolving issues can range from an *ad hoc* discussion forum or inter-unit team to a partnering agreement or formal issue monitoring and management. Trainers may need to learn how to identify common ground, isolate points of difference and assess and address the root causes of disputes. In the interests of sustaining a valued dispute organizational boundaries may need to be redrawn, roles and responsibilities reallocated. Processes re-engineered and strategies reviewed.



2JJ One-To-One Dispute Resolution

One-to-one dispute resolution is an informal method that involves two employees resolving their dispute through face-to-face communication and without direct intervention by management; this method is often preferred by employees. For example in a study by Jameson (1999. p. 166), employees selected direct discussion as "the most valuable, most ideal and the most realistic dispute management strategy".

However, there are numerous shortcomings in the literature on one-to-one dispute resolution and multiple calls for more research therein. For example. Rowc and Bendersky (2003) opine that research needs to catch up with the reality that employers are beginning to rely on the disputing parties themselves to resolve their own disputes. This is echoed by Jameson (1909. p. 166) who comments, "its actual use is largely undocumented". Previous studies have only identified the existence of and preference for the one-to-one method. Therefore, its working process and influencing factors remain largely unknown and merit further exploration. This gap is addressed in the present study. One-to-one dispute resolution is isolated from other methods and its skilful communication process is examined.

The lack of research into this method has also resulted in a plethora of step-by-step. "how-to" models of interpersonal dispute resolution in the workplace (for example. Fisher and Ury's (1981) Model of Principled Negotiation, and Weeks' (1992) Fight Essential Steps to Conflict Resolution). These "lazy" models are frequently criticised for being too simplistic, limited, and rigid (Gulliver. 1979), and for failing to reflect the emotional, complex, and unique process of dispute resolution (Bren et al., in press; Neale and Bazerman. 1991). The models are accompanied by anecdotal literature on the skills of interpersonal dispute resolution (e.g.

Anderson et al., 1990; Lacey, 2000) and a myth that communication is the panacea for all problems (Postman, 2002). Surprisingly little research has been conducted to counter this myth and improve the literature in this field. Deutsch (1994, p. 28) appeals for more research into skills: We know little about educating people in the skills as distinct from the knowledge and attitudes involved in effective conflict resolution.

Additionally, there are frequent calls for the validation of skills training programs in dispute resolution (McConey and Davidson, 1996) as Lewicki et al. (1992) caution that several of the dominant models of dispute resolution have not been thoroughly tested or confirmed.

2.4 Factors Hindering Commercial Dispute Resolution

A range of factors have stimulated the growth of commercial dispute resolution on a global scale. There are elements which may pertain and others that will inspire discussion as to methods of incorporating. Suffice to say that, in many key jurisdictions, commercial dispute resolution is understood by business, standard in contracts and has found its way into the legal vocabulary. Today, Courts not only embrace mediation, some of them require it. The reasons for this phenomenon were, at the outset, specific to the West and, in particular, the USA where commercial practice was being undermined by an inadequate public commercial justice system

2.4.1 Values

Four categories of values are evident in the disputes and the resolution process. The categories were respect, fairness, work-related values, and general ethics. The value of respect refers to one's need to be treated with respect both in terms of competence in doing one's work, and also in terms of how one is treated when alone and when in front of other colleagues. The value of

fairness refers to unfair work-related issues and unfair treatment at work. e.g. not being paid for working extra hours, not getting time in lieu, and being blamed for mistakes that were not one's fault. Work-related values relate to what was considered right and wrong in relation to one's work/job, e.g. it was considered wrong to create unnecessary work, to waste work time, and to be irresponsible about one's work. General ethics refer to behaviour that is morally wrong and/or illegal, e.g. drunkenness on the job. sexual harassment, unfair dismissal, and breaking health and safety regulations.

2.4.2 Sources of power

Power of experience refers to having both knowledge and years of experience in a company or line of work. Power of age typically referred to an older employee having power because of his/her older age. This tended to be viewed as an inhibiting factor. Power of support from other employees refers to one feeling better or stronger due to the support received from others in the workplace. Power of seniority refers to the power held by an employee who is senior to another. Power of friendship refers to the power of having an established relationship with a colleague. In some cases, "being friends" made a situation easier to resolve. In other cases, friendship made it difficult to confront an issue. Boss power refers to the power a boss holds over subordinates because of his/her status. Power of territory refers to the power of having a claim on a location, on clients, or work responsibilities. This was particularly evident when an employee was starting a new job and felt that he/she did not have any territorial power. Power of parity refers to the power of equality that exists when both parties are of equal status so one cannot "pull rank" on *** other. It contrasts with power differences, such as boss power, power of seniority, power of hierarchy, and power of age. Power from an open corporate culture refers to the support an

employee feels from a workplace that is characterized by open and direct discussion of issues. Power of family connections with the boss refers to the disputant being related to his/her boss. It was found only in the ineffective incidents and it inhibited resolution efforts. Power of the boardroom refers to the formal and official image of a company's boardroom that was used, although rarely, by the disputing parties

2.4.3 Delay

It has been clearly established that lingering, unresolved disputes have a counterproductive effect on the development and economic growth of the private sector. A contract can come to a standstill waiting for a dispute on a sub-contract to be resolved in the courts.

2.4.4 Cost

Companies and small traders do not make money in court rooms. The cost of legal fees multiply with the years, lower the profitability of any business involved in litigation and risk becoming disproportionate to the issue or claim at stake. Companies can set out on a path of genuine dispute but, as costs escalate, end up lighting over which business is going to go into liquidation

2.4.5 Antagonism

The antagonism and accusations of lawsuits are a necessary attribute of the court process. Very-good lawyers are usually very antagonistic. Parties are driven apart by a process that makes it impossible for companies to continue to do business once the relationship has been destroyed in the courtroom.

2.4.6 Limits of Legal Solutions to Commercial Problems

Courts administer justice in accordance with the law and the law tends to provide one answer only, and that is not usually a commercial one. Sometimes the best solution on a construction site could be a change in contract specifications and the promise of continued working relations, but the law does not provide for such a commercial solution: it looks backwards to determine fault while business wants to look to future opportunities (Peter, 2005).

2.4.7 Lack of Certainty / Lots of Control

Business was increasingly concerned about commercial disputes being resolved through precedent and law particularly when subject to other jurisdictions. Winning a case in one State does not mean you are sure to win in another. Lawyers build cases to the point where the fundamental issues are forgotten, submerged in case law. Lawyers will focus on the strengths of a case and never its weaknesses. The outcome could reflect the skills of the legal counsel which tends to mirror the pocket of the party.

CHAPTER THREE: RESEARCH METHODOLOGY

3.1 Research Design

This study is descriptive in nature where the researcher carried out a survey on factors influencing resolution of commercial Disputes within COMESA. This design was preferred because it enabled the researcher to describe the area of research and explain the collected data in order to investigate the differences and similarities within the frame of reference within a given period of time. In addition, the method permitted gathering of data from the respondents in natural settings resulting in a description of the data, in words, pictures, charts, or tables. Moreover, much of the data to be collected from the respondents was quantitative in nature.

3.2 The Target Population and Sample Size

The target population for this study was the Commercial Attaches in the High Commissions and Embassies representing the various countries within COMESA in Kenya. Currently, COMESA constitutes of 20 country members including Angola, Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe. The researcher used the whole population for this study and therefore both the population and the sample size is 20

3-4 Data Collection

The researcher used primary sources to collect the data. This consisted of a semi-structure questionnaire comprising of both open-ended and close-ended questions. Open ended questions stressed the essential concepts, processes, and skills that go beyond the specifics of instruction

as well as those areas that the researcher wished to get deeper explanation from the respondents. At the same time, these questions encouraged the respondents to give a full, meaningful answer using their own knowledge and/or feelings on brand equity and the liquid food packaging products.

Close ended questions on this study enabled the researcher to capture quick information from the respondents as well as those that are express in meaning and thus did not require explanations beyond what was stated. These set of questions also assisted the researcher in saving time for data collection.

In addition to both the open-ended and the close-ended questions, the researcher collected information that was semi-discrete in nature. This entailed the use of a four-point scale that assisted the respondent to indicate their level of agreement or disagreement with certain statements as placed by the researcher. Likewise multiple response data was collected by listing the variables 011 which the respondents ticked on all relevant answers as required by the researcher.

The researcher used the drop and pick method to administer and collect the questionnaires from the respondents.

3.5 Data Analysis

Data collected from respondents was both quantitative and qualitative in nature. Quantitative data was analyzed using the Statistical Package for Social Scientists (SPSS) tools. Data was analyzed using descriptive statistics such as frequencies, mean scores and the standard deviations. The basis of using descriptive approach was to give a basis for determining the

weights of the variables under the study. The findings were then presented using tables, pie charts, and bar graphs for easier interpretation.

On the other hand, qualitative data was analyzed using content analysis. This analysis enabled the researcher to analyze the data that was not quantitative in nature. At the same time the method allowed respondents to express their feelings on certain issues to a larger extent as compared to the quantitative analysis.

CHAPTER FOUR: DATA FINDINGS, ANALYSIS, INTERPRETATION

4.1 Introduction

This chapter discusses the data findings, analysis, interpretation and presentation. The study sought to establish the factors influencing resolution of commercial disputes in COMESA Region where descriptive survey was used by the virtue of its capacity to enable the researcher describe the area of research and explain the collected data in order to investigate the differences and similarities with our frame of reference within a given period of time. The targeted population was the 20 countries within the COMESA region which included Angola. Burundi. Comoros. Democratic Republic of Congo. Djibouti. Egypt. Eritrea. Ethiopia. Kenya, Madagascar. Malawi. Mauritius. Namibi, Rwanda, Seychelles. Sudan. Swaziland, Uganda, Zambia and Zimbabwe. Commercial attaches representing each member state were the targeted respondents for the study. The researcher used primary sources to collect the data which consisted of a semi-structure questionnaire comprising of both open-ended and close-ended questions. Open ended questions were used to address the essential concepts, processes, and skills that go beyond the specifics of instruction as well as those areas that the researcher would wish to get deeper explanation from the respondents while the close ended questions guided the researcher to capture quick information from the respondents as well as those that are express in meaning und thus will not require explanations beyond what is stated. Data collected from respondents was both quantitative and qualitative in nature and was analyzed using a statistical package as well as the content analysis and presented using tables, pic charts, and bar graphs for easier interpretation.

The chapter is organized into three sections which includes the demographic information: general quantitative information as well as the section on qualitative findings.

4.2 Demographic Findings

This section discusses the findings on the respondents' profile or personal information. This included the gender, level of education as well as the duration the respondent has worked as commercial attaches.

Table 4.1: Gender of the Respondent

	Frequency	Percent
Male	13	65.0
Female	7	35.0
Total	20	100.0

Table 4.1 shows the gender of the respondents. According to the table, 65% of all the respondents were male while 35% were female. This implies that majority of commercial attaches in C'OMLSA Member States are male. Details of the same are illustrated by the pie chart below.

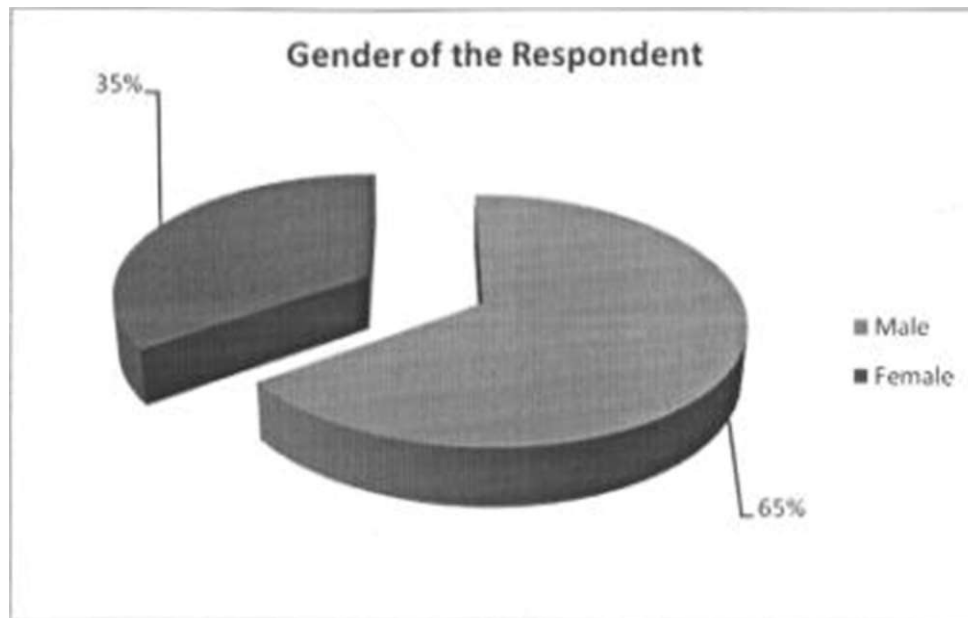


Table 4.2: Level of Education

	Frequency	Percent
Diploma	1	5.0
Undergraduate	13	65.0
Postgraduate	6	30.0
Total	20	100.0

Table 4.2 is an illustration of the level of education of the respondents. According to the findings, majority (65%) were undergraduates while 30% were postgraduates, only 5% had diploma. This is an indication that most of the commercial attaches representing the various countries in the COMFSA Region are at least undergraduates. The same information is depicted by the bar graph below.

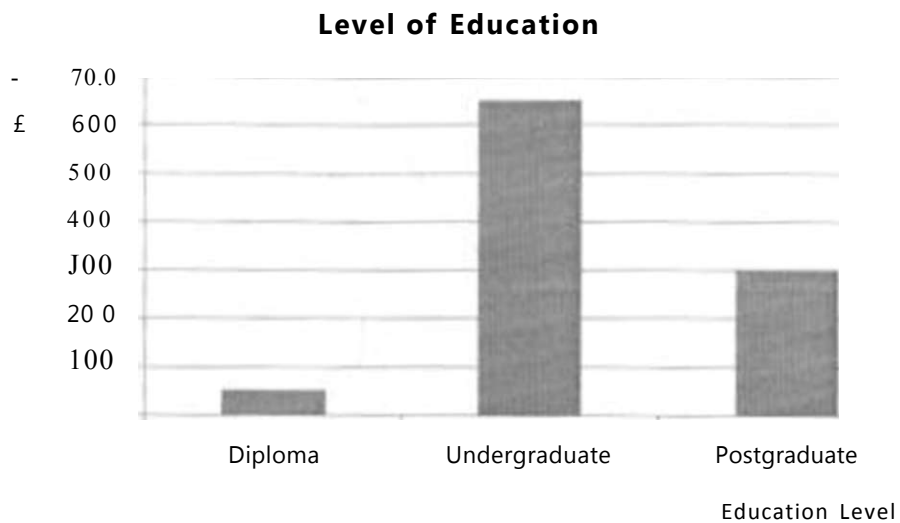
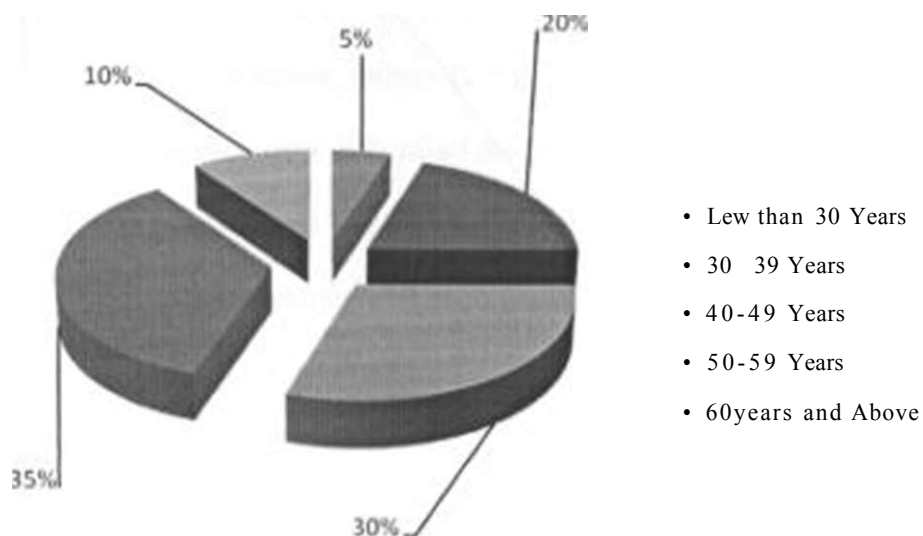


Table 4.3: Age of the Respondent

	Frequency	Percent
Less than 30 Years	1	5.0
30 - 39 Years	4	20.0
40 - 49 Years	6	30.0
50 - 59 Years	7	35.0
60 years and Above	2	10.0
Total	20	100.0

Table 4.3 above illustrates the age of the respondents. According to the table, 35% of all the respondents were aged between 50 and 59 years while 30% were between 40 and 49 years of age. At the same time, 20% ranged from 30 - 39 years of age. Only 5% of all the respondents were less than 30 years. This implies that, majority (75%) were over 40 years of age. The same is elaborated by the pie chart below

Age of the Respondent



4.3 General Quantitative Findings

This section discusses general information on dispute resolution in COMESA Region. This included the respondents' best understanding of the East African Community; the modes of payment that the respondents think should be implemented within COMESA as well as the major constraints to business in the region.

Table 4.4: Respondents' Understanding of the COMESA Region

	Frequency	Percent
Free movement of goods, services and people	4	20.0
Free movement of goods, services, capital and labor	11	55.0
Lower tariff on goods originating within COMESA	5	25.0
Total	20	100.0

Table 4.4 illustrates the respondents understanding on the meaning of COMESA Region. According to the findings, majority (55%) understand the region as free movement of goods, services, capital and labour. Others (25%) said it was a lower tariff on goods originating within COMESA. However, only 20% of all the respondents understood it as free movement of goods, services and people. This implies that majority of commercial attaches representing different COMESA Region Countries in Kenya view the region as free movement of goods, services, capital and labour. The same information is depicted by the bar graph below.

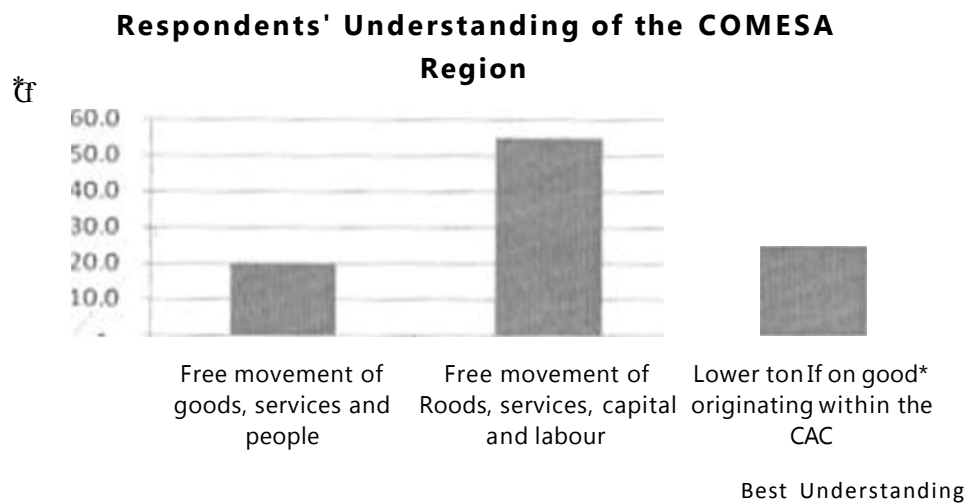


Table 4.5: Modes of Payments recommended by the Respondent for COMESA Region

	Frequency	Percent
Cash on delivery	5	25.0
Letters of credit	4	20.0
Suppliers/trade credit	7	35.0
Inter-company account transfer	3	15.0
COMESA clearing house	1	5.0
Total	20	100.0

Table 4.5 above illustrates the mode of payment that the respondent would recommend for the inter-trades within COMESA region. From the table, the researcher found that, the respondents would recommend supply/trade credit more than any other mode of payment within the region as supported by a majority of 35%. Other respondents recommended cash (25%) on delivery letters of credit (20%) as well as inter-company account transfer (15%). Only 5% of all the respondents recommended introduction of COMESA clearing house as mode of payments within the region. The same information is illustrated by the pie chart below.

Modes of Payments recommended by the Respondent for COMESA Region

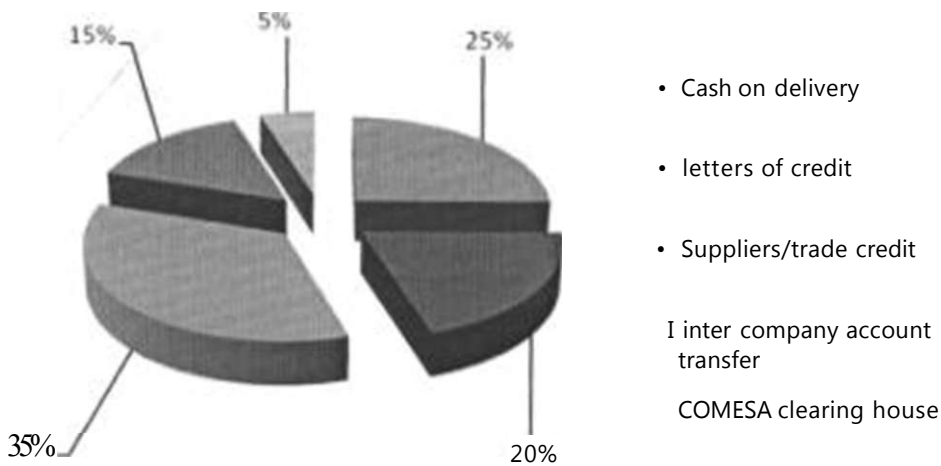
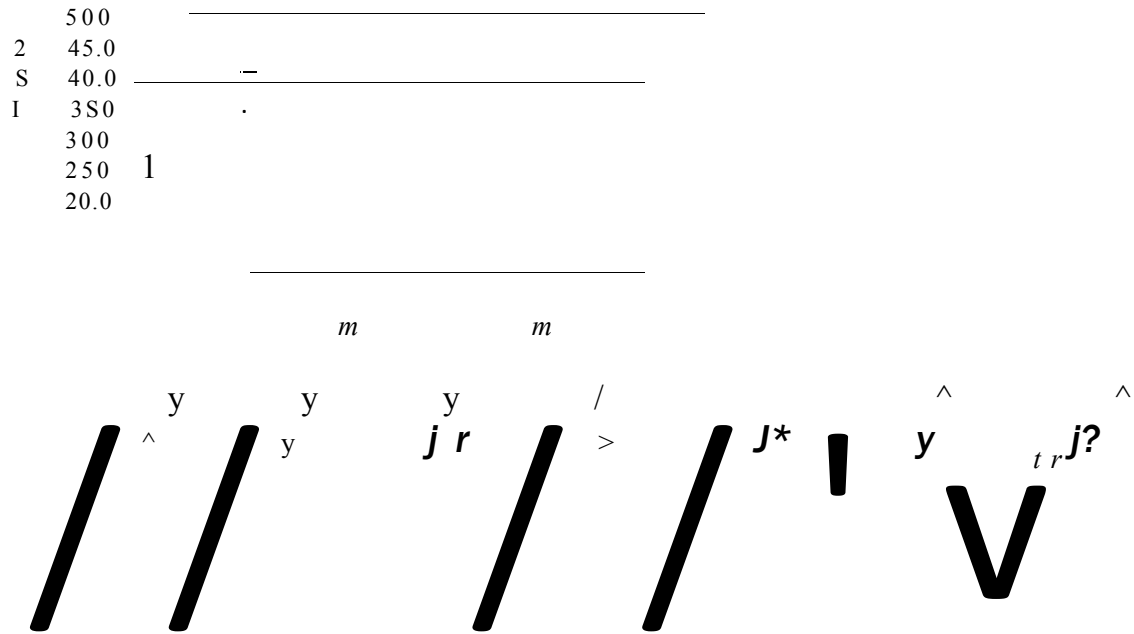


Table 4.6: Perceived Major Constraints to Business within COMESA

	Frcquency	Percent
Macroeconomic factors	5	25.0
Infrastructure and services	1	5.0
Financial factors	1	5.0
Government/Political factors	9	45.0
I-labour factors	1	5.0
Supply sourcing	2	10.0
Marketing relating factors	1	5.0
Total	20	100.0

Table 4.6 below illustrates the major constraints as perceived by the respondents to the resolution of commercial disputes in COMESA Region. According to the findings, government/political factors was highlighted as the major threat with a majority of 45%. In addition, macroeconomic factors and supply sourcing were also serious threats as was supported by 25% and 10% respectively. Other major constraints were the financial; infrastructural; market related factors as well as labour factors with 5% support each. The same information is well illustrated by the bar graph below.

Perceived Major Constraints to Business within COMESA



Bett Understanding

Table 4.7: Whether Limitations Affecting COMESA are Addressed

	Very critical and has not been addressed	Very critical but has been addressed	Not critical and has not been addressed	Not critical but has been addressed
Poor intra-state infrastructure	80.0	45.0	40.0	20.0
Multiplicity of objectives	45.0	20.0	55.0	35.0
Inadequate political will	50.0	20.0	60.0	35.0
Ineffective supra-national authority	15.0	60.0	15.0	10.0
Inactive involvement by the private sector	70.0	55.0	60.0	65.0
Distribution of gains of integration	75.0	70.0	25.0	25.0
Absence of a workable compensation mechanism	65.0	60.0	45.0	45.0

Overlapping membership in other integration schemes	65.0	20.0	85.0	55.0
Economic dominance by one member state	65.0	5.0	50.0	65.0
Loss of national sovereignty	40.0	10.0	50.0	25.0
Trade diversion	50.0	25.0	60.0	60.0

Table 4.7 illustrates the level to which certain factors are critical to commercial dispute resolution and the extent to which they are addressed by the COMESA Region. According to the table, poor intra-state infrastructure is a critical factor that has not been addressed (80%) while inactive involvement by the private sector had was termed as critical and has been addressed.



CHAPTER FIVE: SUMMARY, CONCLUSION AND RECOMMENDATION

S.I Summary of Finding*

The study sought to establish factors affecting resolution of commercial dispute within the COMESA Region. Commercial attaches representing each member state were the targeted respondents for the study. From the study, 65% of all the respondents were male while 35% were female. This implies that majority of commercial attaches in COMESA Member States are male. At the same time, majority (65%) were undergraduates while 30% were postgraduates, only 5% had diploma. In the age of the respondents, 35% were aged between 50 and 59 years while 30% were between 40 and 49 years of age. At the same time, 20% ranged from 30 - 39 years of age. Only 5% of all the respondents were less than 30 years.

Regarding the respondents' understanding on the meaning of COMESA Region, majority (55%) understand the region as free movement of goods, services, capital and labour. Others (25%) said it was a lower tariff on goods originating within COMESA. However, only 20% of all the respondents understood it as free movement of goods, services and people. Concerning the mode of payment that the respondent would recommend for the inter-trades within COMESA region, the researcher found that the respondents would recommend supply/trade credit more than any other mode of payment within the region as supported by a majority of 35%. Other respondents recommended cash (25%), on delivery letters of credit (20%) as well as inter-company account transfer (15%). Only 5% of all the respondents recommended introduction of COMESA clearing house as mode of payments within the region.

On the major constraints as perceived by the respondents to the resolution of commercial disputes in COMESA Region. According to the findings, government/political ("actors was highlighted as the major threat with a majority of 45%. In addition, macroeconomic factors and supply sourcing were also serious threats as was supported by 25% and 10% respectively. Other major constraints were the financial; infrastructure!; market related factors as well as labour factors with 5% support each.

Regarding the level to which certain factors are critical to commercial dispute resolution and the extent to which they are addressed by the COMESA Region, poor intra-state infrastructure is a critical factor that has not been addressed (80%) while inactive involvement by the private sector had was termed as critical and has been addressed. At the same time, 60% of the respondents believe that distribution of gains of integration is very critical but has been addressed. In addition, 85% admitted that, overlapping membership in other integration schemes is one of the non-critical factors in COMESA region dispute resolution though it had not been addressed by the member state.

5.2 Conclusion

From the study, most of the commercial attaches representing the various countries in the COMESA Region are at least undergraduates. Majority of commercial attachées in COMESA Member States are male, majority (75%) were over 40 years of age. majority of commercial attaches representing different COMESA Region Countries in Kenya view the region as free movement of goods, services, capital and labour. At the same time, most of commercial attaches would recommend supply/trade credit and supplemented by cash payments. This in turn indicates that the currency for the COMESA state should be harmonized.

Regarding the major constraints to the commercial dispute resolution within the COMESA Region, government/political factors was highlighted as lite major factor. Nevertheless, macroeconomic factors and supply sourcing are also major constraints, not forgetting financial; infrastructure!; market related factors.

5.3 Recommendation

New directions, fundamental change and the negotiation of some form of dispute can all lead to disagreements, disputes and confrontation between contending viewpoints, interests and arguments as witnessed within the COMESA region, fhercforc, involving different parties in discussions at proposal or concept stage may give them an opportunity to flag up areas of possible difficulty. Although their participation might delay a decision, implementation may be speeded up due to the greater perceived legitimacy of the process and likely outcomes made more acceptable.

5.4 Suggestion for Further Study

The study was meant to establish factors affecting commercial dispute resolutions within the COMESA region. The researcher recommends the same study be repeated for different integration blocs in Africa. At the same time, a study focusing on political disputes resolution should be done within the COMESA region should be done to supplement the results and hence enable a concrete conclusion on how disputes within different integrations should be deal with.

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APPENDICES

Appendix I: Letter of Introduction

OCTOBER 2009.

DLAR RESPONDENT,

Letter of introduction.

This questionnaire is designed to collect views on the factors that influence commercial dispute resolution within the COMESA region.

The study is being carried out as part of management research project in partial fulfillment of the requirements for the award of the degree of Master of Business Administration. School of Business, University of Nairobi.

The information collected will be used strictly for academic purposes only and will be treated with utmost confidence. A copy of the final research will be available to you upon request.

Thank you for your kind assistance.

Yours sincerely,

Caroline Gakenia.

MBA Student

Appendix II: Questionnaire

PART ONE: DEMOGRAPHIC INFORMATION

Country of origin

Gender

Male | J Female | |

Which one of the following is your best understanding of the East African Community?

a] Free movement of goods, services and people | J

b] Free movement of goods, services, capital and labour | J

c] Lower tariff on goods originating within the LAC |]

d] Don't know []

Which of the following modes of payment do you think should be implemented within COMESA?

a] Cash on delivery []

b] Letters of credit ()

c] Supplier trade credit | J

Appendix II: Questionnaire

FART ONE: DEMOGRAPHIC INFORMATION

Country' of origin

Gender

Male Female

Which one of the following is your best understanding of the Last African Community?

a) Free movement of goods, services and people

b) Free movement of goods, services, capital and labour

c) Lower tariff on goods originating within the FAC

d) Don't know

Which of the following modes of payment do you think should be implemented within COMESA?

a) Cash on delivery

b) Letters of credit

c) Suppliers/trade credit

d| Inter-company account transfer |]

e) PTA clearing house I J

Which of the following represents major constraints to business in COMESA?

a] iMacroeconomic factors []

bj Infrastructure and services | J

c) Financial factors []

d) Government factors [J

e) Labour factors |]

f] Supply sourcing | J

h] Marketing relating factors | J

The points stated below have been found as major limitations affecting any regional bloc. How would you rate them within the context of COMF.SA?

Key

1. Very critical and has not been addressed

2. Very critical but has been addressed

3. Not critical and has not been addressed

4. Not critical but has been addressed

Poor intra-state infrastructure

Multiplicity of objectives

Inadequate political will

Ineffective supra-national authority

Inactive involvement by the private sector

Distribution of gains of integration

Absence of a workable compensation mechanism

Overlapping membership in other integration schemes

Economic dominance by one member state

Loss of national sovereignty

Trade diversion

Appendix III: Map of Countries within COMESA

