

Some Observations on Supplementary Act.1/12/25 Relating to the Community Court of Justice

Professor Amos Enabulele

Mr. Ubose Olorunfemi, LLB, LLM, BL

Michael Agbo, Esq, LLB, LLM, BL

Chioma V. M. Okeke, BA (Philosophy), LLB, BL

Mercy Olutayo, LLB

1. Introduction

- 1.1 Permit us to begin by congratulating both the Court and the Commission for the harmonisation of the legal texts of the Court under a single piece of legislation –*Supplementary Act.1/12/25 Relating to the Community Court of Justice* – and strategically doing so, in our view, through a Supplementary Act.
- 1.2 It is strategic because the essentiality of state consent to the bindingness of a treaty is not applicable to Supplementary Acts. See *Muhammed Tawfiq Ladan, The Legal Aspect of Regional Integration in West Africa and the Role of the ECOWAS Court of Justice*, 4 *TUMA L. REV.* 37, 50 (2016), where he affirmed, and rightly too, that “the principal instruments of lawmaking will no longer be conventions and protocols (which require the cumbersome process of ratification by member States.”
- 1.3 We are encouraged to observe that, although the legislative exercise was not conceived as a comprehensive overhaul, several important amendments were nevertheless introduced within the limited scope of authority available, if we may put it that way.

2. Noteworthy Revisions

We welcome (and indeed celebrate) the improvements made to the following provisions:

2.1 Limitation

2.1.1 The amendment of article 9(3), to reflect the jurisprudence of the Court in relation to the difficulty it had with the English version, as demonstrated by this Court in *Federation of African Journalists v. The Republic of The Gambia*, ECW/CCJ/JUD/04/18, where it compared the English and French versions to determine the correct intendment of the provision. Needless to recall that prior to that case, there were conflicting decisions of the court on the point. See *Shagbor Joseph Yongo v. The Government of Benue State & 7 Ors*, ECW/CCJ/APP/15/13; *Djot Bayi Talbia v. Nigeria*, ECW/CCJ/JUD/01/09; and *Femi Falana v. Benin*, ECW/CCJ/JUD/02/12.

2.1.2 It is therefore felicitous to note that the 2025 Act has completely removed any possibility of such conflicting interpretations in the application of the provisions.

2.1.3 We were however thinking that there was no need to change the 1991 phrasing of “[a]ny action by or against...”, to “Any action against the Community or a Community Institution or *instituted by the Community or a Community institution against a third party or a Community official* shall be statute barred after three (3) years from the date when the right of action arose” (*emphasis supplied*). We believe the previous wording on the score lent more scope to clarity.

2.2 We welcome the revision of **article 9(5)** – Arbitration – clarifying the role of the court in relation to arbitration.

2.3 We welcome the deletion of **article 9(e)** which did not quite add anything to the article.

3. Judgments of the Court

3.1 The new provision in article 24(6) is a significant progress. We are hoping it will work well in practice. Also noticeable is the elimination of two seeming overly cautious provisions in the previous version of article 24. The first is the replacement of the title from “Method of Implementation of Judgments of the

Court” to methods of “Enforcement of Judgments of the Court”. It is also important to highlight the needful replacement of “[j]udgments of the Court that have financial implications for nationals of Member States or Member States are binding”, with “judgments of the Court are binding”, without the unnecessary qualification of “that have financial implications ...”.

4. Missed Opportunities?

4.1 Having said that, we respectfully wish to draw attention to certain provisions which, in our view, merited/merit consideration – or reconsideration – when the opportunity presents itself in the future.

4.1.1 **Article 9(1)(f)** – We observe that the Supplementary Act failed to align the wording of the previous article 9(1)(g), now article 9(1)(f) – another provision over which the court has had to engage in textual comparison between the French and English versions – with the jurisprudence of the Court as it did with article 9(3). See *Peter David v Ralph Uwechue*, ECW/CCJ/RUL/03/10. We believe the 2025 Supplementary Act presented an opportunity for the English version to be revised to reflect the wording of the French text, which the Court has already affirmed to be better worded.

4.1.2 **Article 9(6)** – there seems, in our respectful view, to be no justification for tampering with a provision that was working very well, in our view. See *Petrostar (Nig.) Ltd v. Blackberry (Nig.) Ltd* ECW/CCJ/JUD/05/11 and *Ocean King Nigeria Limited v. Senegal* ECW/CCJ/JUD/07/11. While we are inclined to believe that the drafters had their reasons for introducing this amendment, it is nevertheless difficult for us, as both users of the Court and close observers of its jurisprudence, to appreciate why the provision has been revised in a manner that now entirely excludes the individual. The current provision that “[t]he Court shall have jurisdiction over any matter provided for in an agreement between Member States or with ECOWAS where the parties provide that the Court shall settle the dispute arising from the agreement”, seems unwarranted and we feel confident to predict that neither member States nor the Commission is ever likely to invoke the same.

4.1.3 **Articles 9(f) (previously 9(g)) and 10(c) (now 10(3))** – we believe these provisions should have been revised to reflect the jurisprudence of the court clarifying that the correct respondent in any such matters is the Community. Perhaps the provision would have benefited from a redrafting that: “Individuals and corporate bodies in proceedings [brought against the community] for the determination of an act or inaction of a Community official which violates the rights of the individuals or corporate bodies”. This suggested drafting reflects the Court’s jurisprudence in *Peter David v. Ambassador Ralph Uwechue (supra)*.

4.1.4 **Article 10(6)** – we respectfully believe that, by deleting “any” from the pre 2025 version and replacing it with “...or at the request of the parties ..., as against “...or at the request of any of the parties ...”, the 2025 Act has, inadvertently, further complicated the preliminary reference procedure, thereby making it even less likely to be invoked in practice. This is because national courts, already reluctant to engage the preliminary reference mechanism, are now more likely to interpret the revised wording as requiring a *mutual* request, which is far less probable than a *unilateral request*. In our view, it is doubtful that a party who stands to be disadvantaged by such a request would consent to it, should national courts adopt this interpretation.

5. Third Party Proceedings and Intervention

5.1 There seems to be a fundamental gap in the previous texts of the Court that needed to have been filled by the 2025 Act. These relate to third party proceedings and intervention. At the moment, these are only provided for in the Rules of Court – articles 89 and 91 of the Rules of Court respectively – without an enabling provision in the Act. This, in our view is an anomaly of a character of which this Court itself refused to place its imprimatur upon on several occasions on the ground that its jurisdiction is regulated by its constitutive instrument – *Olajide Afolabi v. Federal Republic of Nigeria*, ECW/CCJ/JUD/01/04 and *Chief Frank C. Ukor v. The Government of the Republic of Benin*, ECW/CCJ/JUD/06/07.

- 5.2 We believe the Rules of the Court are nothing more than the handmaid of their constitutive instruments (the Supplementary Act in this case), for the just administration of justice, and so cannot permit what the constitutive instrument has not permitted.
- 5.3 It is intriguing to note that the Supplementary Act failed to seize the opportunity to correct these fundamental gaps in the previous texts of the Court. Therefore, and respectfully, we do not think the Court has any lawful basis for third party proceedings and intervention. The only basis, in our view, on which the Court can exercise a form of third-party proceedings or intervention is article 27(5).
- 5.4 Thus, although we believe that article 27(5) of the Act is misplaced as it should have been in article 24, we believe it could provide jurisdictional footing for the sort of proceedings in *Ibrahima Kassory Dioubate v. K Energie S.A. and the Republic of Guinea*, ECW/CCJ/JUD/14/2020 regarding the Application of Mobile Power Systems Fze *Ibrahima Kassory Dioubate v. K Energie S.A. and the Republic of Guinea*, ECW/CCJ/JUD/05/26.
- 5.5 Perhaps, the proponents of the Supplementary Act did not direct their mind to the disparity between the Act and the Rules of Court in these regards nor did they direct their mind to the need to properly place the provision protecting the rights of third parties in article 27(5) of the Act, where it really belongs – article 24. The Court may need to revisit its 2022 Rules of Procedure to revise Articles 89 and 91 of the Rules and expressly link them with Article 27(5) of the Supplementary Act concerning the protection of third-party rights, pending the eventual amendment of the Supplementary Act itself to provide a clear and autonomous legal basis for third-party proceedings.
- 5.6 If revised, the new Articles 89 and 91 should expressly state that the right of seisin they confer is derived from the protection of third-party rights under Article 27(5) of the Supplementary Act.

5.7 In adopting this position, we consider that the Court would merely be exercising a power available to it at least by necessary implication from the express terms of Article 27(5). Our reasoning draws support from the jurisprudence of the International Court of Justice in the following cases: *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Separate Opinion, ICJ Rep 1989 177, 220; *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion: ICJ Rep 1949, p. 174; and *Effect of Awards of Compensation*, Advisory Opinion of July 13th, 1954: ICJ Rep 1954, p. 47.

5.8 Until remedial legislative action (on the Rules or Act) it seems out of place and against the jurisprudence of this Court and other international courts for to exercise jurisdiction based solely on its Rules when such jurisdictional basis is not conferred on it by the Supplementary Act.

6. Conclusion

6.1 In concluding, we wish once again to reiterate our commendation of the Supplementary Act.

6.2 Nonetheless, we remain of the view that there is room for improvement should the opportunity present itself in the future. We have, quite deliberately, refrained from commenting on the restriction placed on the capacity of the individual to seise the Court in respect of matters arising from ECOWAS texts, which makes it impossible for individuals to litigate economic rights before the Court. See the *Pinheiro (SAN) v. Ghana* ECW/CCJ/JUD/11/12, para 47-49 (enforcement of economic rights) and *Djibril Yipene Bassole and Léonce Siméon Martine v. Burkina Faso*, ECW/CCJ/JUD/25/16 (enforcement of ECOWAS Community texts) lines of cases.

6.3 We believe those restrictions could not, in our assessment, have been accommodated within what we understand to be the legislative scope of the Supplementary Act.

6.4 In the final analysis, we would recommend that, now that the Court has amassed a substantial and sophisticated body of jurisprudence across several dimensions of Community law, any future review or amendment of existing instruments ought, as a matter of sound legislative method, to begin with that jurisprudence. Such an approach would enable the solutions already adopted by the Court in practice to be incorporated into the revised text, thereby ensuring the progressive development of Community law as a living and evolving legal order.

6.5 We appreciate that this would be an arduous undertaking, particularly given that ECOWAS does not possess an institutional body comparable to the International Law Commission. Nevertheless, we remain convinced that there is considerable value to be gained from drawing systematically upon the Court's jurisprudence.

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