The Future of International Commercial Law in East Africa

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Abstract

International commercial law as a body of law that governs international sale transactions has a bright future in the East African Community (EAC) region. As long as international trade is growing so does the relevancy of international commercial law. As a Regional Economic Community, the EAC continues to facilitate trade arrangements between its Partner States to enable them to benefit from greater access to each other's markets. Regional trade initiatives and economic integration as espoused by the EAC are no doubt integral to international commercial law through their impact on commercial transactions. In particular, the creation of an economic and monetary union is bound to advance international commercial law.

This paper posits, therefore, that international commercial law has a favourable future in EAC, and indeed there are many developments that have been embarked on by the EAC to boost its relevancy. As will be illustrated in the paper, key among these developments is the holistic integration approach that has been embraced by the EAC. Commencing with a Customs Union, integration in the EAC has moved to a Common Market, is heading to a Monetary Union, and is ultimately bound to crystallize into a Political Federation. The paper shows that such an ambitious integration process poses both potential opportunities and limitations on the future of international commercial law. The paper highlights what the EAC is doing to harmonise its commercial laws to attain a common investment area and an effective functioning common market. It also explores the implications of this effort on the future of international commercial law and suggests proposals on the way forward.

A. Introduction

The East African Community (EAC) is a regional intergovernmental organization comprising of Uganda, Tanzania, Rwanda, Kenya and Burundi. The EAC has its headquarters in Arusha, Tanzania. The Treaty for the establishment of East African Community came into force on 7th July 2000 and the EAC established a fully fledged Customs Union on 1 January 2010; after five years of transitory implementation. The Customs Union is the first stage of the EAC integration process. The second stage, the EAC Common Market, came into force on 1 July 2010. The Common Market allows for the free movement of persons, capital, goods, services, and the rights of residence and establishment. The next pillar of EAC is Mon-

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etary Union: negotiations have commenced and it is expected that the Monetary Union will be in place by 2012. The ultimate and the last stage of EAC integration will be a Political Federation, which is expected to be attained by 2015.[1]

Evidently, the above developments illustrate that the countries in the region are set on adopting a united front with their dealings with the outside world. Further, to benefit effectively from international commercial law, the EAC countries have since embarked on measures, such as, harmonizing their laws to make trade within the region seamless.

Accordingly, the EAC Treaty, which established the East African Community, and the Protocols establishing both the EAC Customs Union and Common Market, require that the laws of the Partner States be harmonized.[2] The EAC Development Strategy 2006-2010 stipulates harmonization of laws as a key strategic intervention. A lot of effort is therefore, being put in place to harmonize commercial laws of the Partner States. Harmonization of commercial laws is anchored on best practices recognized in the field of international commercial law.

Within the context of harmonization, it is also worth mentioning that EAC Partner States belong to different regional trading blocks, which give rise to different harmoniation processes. Four members of EAC (Rwanda, Kenya, Burundi, and Uganda) are also members of the Common Market for Eastern and Southern Africa (COMESA). Tanzania is a member of the Southern African Development Community (SADC).

To rationalise the impact of multiple membership on trade, member states of EAC, COMESA and SADC have entered into a Tripartite Arrangement that aims at establishing a Free Trade Area amongst themselves. The Tripartite Agreement also requires harmonising such commercial laws that are relevant to the functioning of the EAC-COMESA-SADC Free Trade Area (FTA).[3]

Regional cooperation and integration envisaged in the EAC as stipulated in the EAC Treaty is broad-based. It covers, among other areas of cooperation, trade, investment and industrial development, monetary and fiscal affairs, infrastructure and services, human resources, science and technology, natural resources management; tourism and wildlife management, health, social and cultural activities, the role of women in socio-economic development; cooperation in political matters, including defence, security, foreign affairs and legal and judicial affairs.[4]

This paper will confine itself to the EAC pillars of integration relevant to the realm of international commercial law.

1 Art. 5 of the Treaty for the Establishment of the East African Community (hereinafter cited as: *'Treaty'*). Available at <www.eac.int>. The timeframes mentioned on each pillar were the targets set by the EAC Heads of State.

2 *See* Art. 126 Treaty; Art. 47 Common Market Protocol.

3 'COMESA-EAC-SADC tripartite framework, *State of play*', Report by the Chair of the Tripartite Task Force (July 2010).

4 *See* Art. 5 Treaty.

B. The Future of International Commercial Law in EAC

I. Customs Union

A Customs Union is obtained when two or more countries remove tariffs and other barriers on the movement of goods originating from among its member states and adopt a common external policy.[5] In March 2004, the EAC Partner States signed the EAC Customs Union Protocol, which came into effect in January 2005. A "fully fledged" Customs Union entered into force 5 years later on 1 January 2010. In 2006, the EAC Legislative Assembly passed a Bill, which was to become the EAC Customs Management Act, 2006.

Pursuant to Article 8(4) of the EAC Treaty, EAC Community laws take precedence over similar national ones. Once EAC legislation is enacted and published in the EAC Gazette, all Partner States are obliged to implement it.[6] In this respect, all EAC Partner States are governed by the EAC's harmonised Customs Management Act, which has greatly enhanced commercial transactions among the member states.[7] It is also worth mentioning that since 2006 the Customs Management Act has been enforced in all the Partner States without any problem relating to interpretation or application.[8]

II. Common Market

The Protocol establishing the EAC Common Market[9] was signed on 20 November 2009 by the EAC Heads of State and it entered into force on 1 July 2010. The Protocol provides for the free movement of goods, free movement of persons and labour, free movement of services, free movement of capital and the rights of establishment and residence

III. Monetary Union

A Monetary Union may arise when two or more states agree on a single currency and agree to harmonize macro-economic policies especially in exchange rate, interest rate and taxation policies. The ground work for an EAC Monetary Union has started. The meetings of Ministers Responsible for Finance, Central Bank Governors and other experts are on going and it is expected that a Monetary Union will be in place in the EAC by 2012.

The establishment of an economic and monetary union is bound to advance international commercial law. The reasons for this are several. First, the EAC

5 J.P. Kabudi, 'Free Movement of Goods, Implications and Challenges' (EAC Common Market Protocol), Paper presented to Awareness Seminar for Judicial Officers on EAC Common Market Protocol 15-19 November 2010, on file with the author.

6 Report of the 9th Meeting of the Sectoral Council on Legal and Judicial Affairs, 8 October 2010. The Sectoral Council is spearheaded by the Attorneys General of the Partner States.

7 Detailed information, available at <www.eac.int/trade>.

8 Report of the meeting of the Sub-Committe on Approximation of laws in EAC Context, held on 11-12 February 2010, in Nairobi-Kenya. The meeting discussed among others how EAC laws get a force of law in the Partner States and which law to prevail should there be a conflict between an EAC law and a similar national one.

9 The Protocol is retrievable at EAC website, available at <www.eac.int>.

envisages that the EAC customs union, common market and use of single currency will facilitate intra-regional trade. Second, the EAC provides opportunities for trade transactions to be concluded with different countries outside the community and this is likely to be the trend, at least in the foreseeable future. The aforementioned ideals suggest that international commercial law has a future role to play in the EAC. Recent trade statistics from the region are also supportive of this view.[10] After the full entry into force of the customs union, intra trade between the various EAC Partner States has increased by 13%.[11]

C. Rationale for the Harmonization of Laws in the EAC

I. The Legal Basis for Harmonization and Approximation of Laws in EAC

Harmonization of laws in the EAC is a Treaty requirement.[12] The Treaty sets out the objectives of the Community as being to develop policies and programmes aimed at widening and deepening co-operation among the Partner States, in among other Sectors, legal and judicial affairs.[13] Therefore, in order to achieve one of the objectives of the Community, i.e. co-operation in legal and judicial affairs, Partner States committed themselves to harmonize all their national laws appertaining to the Community.[14]

The EAC Common Market Protocol more specifically obliges Partner States to align their national laws, rules and procedures in order to faciltate the effective functioning of the common market. Article 32 of the EAC Common Market Protocol states that

> "the Partner States undertake to progressively harmonize their tax policies and laws to remove tax distortions in order to facilitate the free movement of goods, services and capital and to promote investment within the Community".

While Article 47 of the same protocol provides that:

> "The Partner States undertake to approximate their national laws and to harmonise their policies and systems, for purposes of implementing this Protocol".

At their 11th Summit held on 20 November 2009, the Heads State directed the EAC Partner States to:

10 Detailed information, available at <www.eac.int/trade>.

11 Statement by the Director General, EAC Customs and Trade Directorate, during the launch of a fully fledged Customs Union, EAC Secretariat, dated 13 January 2010, available at <www.eac.int>.

12 Art. 126 Treaty.

13 Art. 5(1) Treaty.

14 Art. 126(2)(b) Treaty.

a. Undertake a review of their domestic laws with a view to causing necessary amendments to ensure that the same are consistent with the Treaty obligations arising from the Common Market Protocol by 31 December, 2010; and
b. Commence the implementation of the Common Market Protocol by discharging the obligations arising there from, inter alia, removing any existing restrictions on the freedoms and rights enshrined in the Protocol.[15]

II. EAC Harmonization/Approximation Process

There is an established Sub-Committee whose role is to harmonise national laws in the EAC context.[16] The Sub-Committee on the Approximation of Laws in the EAC Context works by studying and analyzing laws of the Partner States to establish the gaps, differences, similarities and the weaknesses of various laws of the Partner States. The Sub-Committee also compares the same laws with international best practice. After the thorough study of a particular law, the Sub-Committee makes recommendations to Partner States to amend or align their national laws to EAC Law.

The sub-Committee is spearheaded by the chairpersons of the law reform commissions of the Partner States. The reports of the Sub-Committee are approved by the sessions of the Attorneys General, who also undertake to amend their national laws as per the recommendations made.

The Sub-Committee has so far registered substantial achievements. It has highlighted the gaps, differences, weaknesses of many laws of Partner States. In addition, the Law Reform Commissions of Partner States regularly share information while amending their national laws or initiating new bills.

In the area of commercial law, the Sub-Committee has so far reviewed laws governing:

- Companies;
- Insolvency;
- Partnerships; and
- Business Names Registration.

III. Prioritization of Commercial laws

Increasingly, the EAC region is experiencing the emergence of a business environment supportive of cross-border investments, mergers and acquisitions. Capital Markets in Kenya, Rwanda, Uganda and Tanzania are also becoming vibrant. Initial Public Offers (IPOs) are being opened to all East Africans. Such IPOs attract cross-border share investment, grow regional equity markets and improve business.[17] It is clear from these commercial developments that the EAC region is moving towards realizing a common investment regime.

15 Report of the 11th Summit, 20 November 2009, available at <www.eac.int>.

16 It is the Sub-Committee on Approximation of laws in EAC Context. It is spearheaded by the chairpersons of the Law Reform Commissions of the Partner States.

17 Safaricom, Kenya's largest mobile telecommunications network service provider launched its initial public offer to all east Africans in 2008. Bralirwa Ltd, Rwanda's largest beer and Beverages company has launched its IPO to all east Africans starting from November 2010.

Against the foregoing background, the EAC observed the need to undertake a close examination and review of existing laws of the Partner States that have a direct bearing and impact on the EAC Common Market and Monetary Union requirements as well as those laws that have a bearing on forging a common investment regime. It was agreed that the review should be expeditious. The purpose of the undertaking is to come up with concrete proposals for the harmonization of all commercial laws that would fit the requirements of the Treaty establishing the EAC (Articles 5; 126 (2) (b)).

The EAC Secretariat has categorised the commercial laws to be harmonised within the following nine (9) broad clusters, namely:

1. Banking laws (covering legislation on banking; banking and lending institutions; development banking; bills of exchange and arrangement; microfinance, etc);
2. Business transactions laws (covering legislation on bankruptcy; building societies; business organizations; capital market development; chattels transfer; the co-operative movement; export processing zones; transfer of businesses etc.);
3. Finance and Fiscal legislation;
4. Insurance and Re-Insurance Legislation;
5. Investments (covering legislation on foreign investments; investment disputes; privatization; copyrights; patents and trademarks; etc.);
6. Procurement and Disposal of Assets Legislation;
7. Monetary legislation (covering exchange rates; interest rate; inflation; etc.)
8. Standardization, Quality Assurance and Metrology legislation; and
9. Trading law (covering legislation on bulk sales; business premises; contract, customs; external trade; import and export transactions; sale of goods, etc.).

With the support of the Investment Climate Facility for Africa (ICF), the EAC Secretariat commissioned a study to harmonise the commercial laws of the Partner States. According to the Terms of Reference, the assignment will be carried out in two phases. The first phase entails an overall review and identification of commercial laws in the Partner States within the nine broad clusters of commercial laws that have a direct bearing and impact on the EAC Common Market, the EAC Monetary Union and a common investment area. The first phase of the assignment was completed in June 2010 and it focused on conducting a detailed review and diagnostic analysis of the convergences, gaps and differences in the laws in the EAC Partner States.

The second phase of the project will involve drafting EAC Legislation in the identified and agreed priority areas. The drafted laws will be debated in the EAC's legislative assembly with the view to being enacted by the East African Legislative Assembly (EALA).

The following 6 (six) areas of law have been identified as a priority for harmonization by the EAC and their Bills are in the offing.

1. Intellectual property law;
2. Contract law;
3. Public Private Partnership law (PPP);
4. The law of the recognition of judgements;
5. Business registration law; and
6. The law related to enforcement measures and procedures for debt recovery.

It should be noted that the laws enacted by the EAC Legislative Assembly will supersede similar national ones and have the force of law in the respective Partner States once published in the EAC Gazette[18]. It is therefore true that, once the above listed Bills are passed, the EAC will be governed by uniform laws in those respective areas.

IV. Challenges

There is a host of challenges in the commercial law field in the EAC region. The most noticeable include the following.

1. Scope of the Work

From the East African Community's experience and research conducted, the magnitude of the work on harmonization of laws is huge. The Sub-Committee on the Approximation of Laws in the EAC Context is not only charged with the harmonization of commercial laws but also with the review and reform of all other laws that have a bearing on the Community's operations.

2. Financial Restraints

The Sub-Committee's work has also been hampered by a lack of sufficient resources. Its work requires a lot of research into the identified laws both at national and international levels. Efforts of review and legal audit, while absolutely essential to the legal reform process, have often slowed down the pace of drafting laws with a resultant effect of failing to meet the set objectives in a timely manner.

3. Conflicting Commitments

Members of the Sub-Committee are legal experts drawn largely from National Attorney General's Chambers and National Law Reform Commissions. These officers continue to attend to their respective office assignments back in their Partner States. The work of the Community is thereby considered secondary to their national obligations.

In addition, the Sub-Committee continues to play its role with different sectors of EAC that require harmonization of laws in different programmes and activities. The speed of harmonization of commercial laws is thus affected by being weighed alongside all other legal reform obligations within the EAC.

18 *See* Art. 8(4) Treaty.

4. Partner States' Different Legal Systems

Three of the Partner States (Uganda, Tanzania and Kenya) share a common legal system (Common law) while the other two (Rwanda and Burundi) follow the civil law system. In these systems, different procedures and legislative practices are followed in enactment of national laws that inevitably put forward the national interests. This challenge has greatly worked against meeting the timelines as envisaged.

5. Lack of Awareness of the Arbitration Jurisdiction of the East African Community Court.

In order to fulfil the objectives of the Community and ensure the delivery of the expectations of the people, the Treaty establishes among other organs the East African Court of Justice.[19] The Court has jurisdiction to hear and determine any matter:

a. arising from an arbitration clause contained in a contract or agreement which confers such jurisdiction to which the Community or any of its institutions is a party;
b. arising from a dispute between the Partner States regarding the Treaty if the dispute is submitted to it under a special agreement between the Partner States concerned; or
c. arising from an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court.

Clause (c) above is of specific interest to international commercial law. However, on scrutiny of the investment agreements concluded within EAC Partner States, one does not see the parties refer matters to the East African Court of Justice for determination. A sample view of the Investment Agreements between the EAC Partner States and foreign countries or in ordinary commercial agreements and contracts shows a favour for western-based arbitration institutions.[20] Clauses relating to applicable law always refer to applicable Rules of international law. From the above, one can discern two pertinent issues:

a. that the business community lacks awareness of the Court's jurisdiction when it comes to settlement of commercial arbitration matters; and
b. doing business in the EAC will remain expensive if arbitration matters are continually referred to New York or Paris.

19 *See* Art. 9 Treaty.

20 Treaty between the government of the United States of America and the Government of the Republic of Rwanda concerning the encouragement and reciprocal protection of investment disputes shall be settled under ICSID or UNCITRAL Arbitration Rules. Also other commercial agreements refer to Applicable Rules of International law.

V. Proposed Way Forward

a. Emphasize the use of laws passed by the regional legislative body (EALA) as their laws have the force of law in all Partner States and supersede similar national ones;
b. Popularise the arbitration jurisdiction of the East African Court of Justice so as to cut on costs in terms of time and finance associated with arbitration institutions outside the EAC region;
c. Encourage Partner States to ratify international commercial instruments.

VI. Conclusion

In conclusion, the harmonization of commercial laws will enable the creation of a stable legal environment within the EAC zone, which will be key to the development of the region and will benefit both international and national investors. It is therefore, correct to state that the future of international commercial law in the EAC is bright. Partner States are committed to benchmark their national commercial laws with the best international practices and domesticate laws passed by the regional legislative body. In turn, this will yield a region governed by harmonised commercial laws.