

THE SCOPE FOR INTERNATIONAL COMMERCIAL LEGAL PRACTICE IN THE EAST AFRICAN COMMUNITY

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PART A

1. INTRODUCTION

- The Law of International trade is concerned with the regulation of the exchange of goods and services within the international trading system. The international trading system can be loosely defined as the body of international rules by which countries are required to abide in their trade relations with one another.¹

¹ *International Trade Centre and Commonwealth Secretariat, Business Guide to World Trading System, 2nd ed., Geneva: ITC/CS, 1999. Xxiv, 329pp*

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- The Commonly held view is that a transaction is international where the seller and buyer have places of business in different states and are governed by different legal systems. It need not involve an import and export element.²

² Cf Goode 877 – 878

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- International trade allows the residents of each country to specialize in the production of goods and services that they do best and import goods and services that foreigners are willing to supply to a lower cost than domestic producers.³

³ *Adam Smith, An inquiry into the Nature and causes of the wealth of Nations, (1776; ed., Chicago: University of Chicago Press, 1976, pp 478 – 479.*

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- There is mutual gain in international trade in that it opens up consumption possibilities⁴, introduces economies of scale, expansion of markets and benefits of competition.
- The people of the East African Region have during and after the historical migrations integrated socially and economically.

⁴ *In EAC for example banks, petrol stations, manufacturing companies, stock markets have expanded trade across borders*

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- The scramble for Africa by colonial powers led to the birth of East African states as we know them today.
- Formal economic and social integration in the region commenced with, among other things, the construction of the Kenya Uganda Railway in 1897 – 1901.

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- Subsequent conclusion of East African Common Services Organisation Agreements and the Treaty for East African Cooperation culminated in the establishment of the East Africa High Commission in 1961 which was replaced by the East African Common Services Organisation in 1967 respectively⁵. The Treaty for the East African Co - operation was officially dissolved in 1977.

⁵ *The Treaty for the Establishment of the East African Community 2000, Preamble pg. 1*

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- The Treaty for the Establishment of the East African Community that revived the regional economic integration organization between the Republic of Kenya, the United Republic of Tanzania and the Republic of Uganda was signed on 30th November 1999 and came into force in the year 2000. The Republic of Burundi and the Republic of Rwanda acceded to the Treaty in July 2007.

2.0 LEGAL FRAMEWORK THAT EAC HAS PASSED TO FACILITATE CROSS BORDER AND INTERNATIONAL TRADE

- The Treaty for the Establishment of the East African Community under Article 5(1) introduces the key objective of the Community as *‘ aimed at widening and deepening co- operation among the Partner states in political, economic, social and cultural fields, research and technology, defence, security, and legal and judicial affairs’*

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- Article 5(2) lays the foundation for the intended integration milestones under the Treaty to include a Customs Union, a Common Market, a Monetary Union and ultimately a Political Federation.

2.1 The Customs Union

- To this end, the Partner States⁶ were mandated under Article 75 of the Treaty to conclude a Protocol for the Establishment of a customs Union whose key facets include:

⁶ *Burundi, Kenya, Tanzania, Uganda, and Rwanda*

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- a) The elimination of internal tariffs and other charges of equivalent effect;
- b) Establishment of a common external tariff;
- c) The elimination of non-tariff barriers;
- d) Application of a common Customs law;
- e) Harmonization of procedures and institutional framework for implementation of the customs Union; and
- f) Development of a common Trade policy.

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- The Protocol for the Establishment of the East African Community Customs Union was concluded in the year 2005. The Customs Union has been progressively implemented in the Partner States and took full effect in January 2010. The region has witnessed profound rise in cross border and international trade in the five years of progressive implementation of the Customs Union.⁷

⁷Report on the Review of the Customs Union 2009.

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- Indeed almost all of the key pillars of the Customs union are in place. Institutions to constantly review trade and customs measures under the Union⁸, monitor elimination of non-tariff barriers⁹ and dispute resolution mechanism¹⁰ are in place.

⁸ *The Council of Ministers*

⁹ *Committee on elimination of Trade non-tariff barriers*

¹⁰ *East African Community Customs Management Act Sections 219-231/Article 41 of the Protocol and Annex IX to the Protocol (EAC Customs Union (Dispute Settlement Mechanism) Regulations.*

2.3 The EAC Common Market

- The Protocol for the Establishment of the East African Common Market was negotiated by the Partner States in terms of Articles 5, 76 and 104 of the Treaty. The Protocol came into force on the 1st July 2010. The key Pillars of the Common market are the Free movement of labour, goods, services and capital; and the right of residence and establishment.

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- This stage of integration is geared to build on the economic gains attained during the Custom Union. Various Annexes to the Protocol have been negotiated in terms of the post negotiation programme agreed upon by the Partner States. Those pertinent to facilitation of cross border trade are the annexes on free movement of persons, free movement of labour, Free movement of services, free movement of capital and mutual recognition of professional and academic qualifications.

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- In these Annexes, the Partner States have made time bound commitments to open up their territories to specified elements of the rights and freedoms outlined in the Protocol.
- Of specific note is that the Partner States in concluding the Customs Union and the common Market Protocols adhered to the fundamental Principles of international trade as follows:

3. FUNDAMENTAL PRINCIPLES OF INTERNATIONAL TRADE AND THE EAC PROTOCOLS.

3.1 Non-Discrimination

- The core Non-Discrimination principles of international trade are the most favoured-nation clause and the national treatment provision¹¹. These were embraced in the two protocols aforesaid.

¹¹GATT 1994 Article 1.1 and Article 111; 1 2 and 4

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- These were embraced in the two protocols aforesaid. This was crucial as all the Partner states are WTO Members and must abide by its rules¹².

¹² The most –favoured-nation clause operates to preclude a WTO Member from discriminating between other WTO Members in respect of all matters pertaining to the import or export of goods whereas the national treatment provision operates to preclude a WTO Member from discriminating between the products of other WTO members and its own products after import.

3.2 Market Access and Tariff Bindings

- Each WTO Member is required to indicate the tariff and other conditions that it will apply to imports of specified products in accordance with GATT 1994 and the conditions, if any, that it will apply to the provision of services within its territory in accordance with GATS. These Commitments are contained in Schedules annexed to GATT 1994 and GATS respectively.

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- It is a cardinal principle of the WTO that the commitments contained in these Schedules constitute the basic obligation of each member and cannot be unilaterally modified.

3.3 The Elimination of Quantitative Restrictions

- One of the key pillars of trade in goods is the obligation to eliminate quantitative restrictions.

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- It states that no prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import, or export licences or other measures shall be instituted or maintained by any Member on importation of any product of the territory of any other Member or on the exportation or sale for export of any product destined for the territory of any other Member. The community is progressively ridding the region of these non-tariff barriers to trade.

3.4 Dispute settlement

- Article 41 of the Customs Union Protocol and Annex IX (regulations) thereof embraced the WTO dispute settlement mechanism. Where a dispute arises, resort is had to consultations, including good offices, conciliation and mediation. If the dispute is not resolved the Secretary General upon notification is to put in place a dispute settlement panel.

4. THE EAST AFRICAN COMMUNITY MONETARY UNION

- The Treaty under Article 82 provides for Monetary and Financial cooperation. To this end, the Partner States are obligated to maintain convertibility of their currencies as a basis for the establishment of a Monetary Union. The Partner States have since the revival of the East African community honoured this commitment.

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- Furthermore, the Article requires the Partner states to harmonize their macro-economic policies especially in exchange rate policy, interest rate policy, monetary and fiscal policies and remove obstacles to free movement of goods, services and capital within the Community.

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- These measures are meant to facilitate trade and capital movement and eventually integrate the financial systems of the Partner States. Indeed negotiations of the Protocol for the Establishment of The East African community Monetary Union commenced in January 2011¹⁴

¹⁴ A high level task Force for the Monetary Union is spearheading the negotiations.

5.0 ACTS OF THE COMMUNITY

- The East African Community is made up of the Summit and the Council of ministers which are the Policy making Organs, the Secretariat which is the executive Organ, the East African Legislative assembly that plays legislative and oversight role and the East African Court of justice, which is the judicial Organ of the Community. The Community has also established institutions to discharge specific mandates in the integration agenda.

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- The East African Legislative Assembly has since its inauguration enacted legislation that support international and cross border trade in the region.
- The most significant of them in this regard are as follows;

5.1 THE EAST AFRICAN CUSTOMS MANAGEMENT ACT, 2005

- This Act came into operation on 1st January 2005. It has been amended from time to time upon recommendations of the council. It provides for the management and administration of Customs and other related matters. The Protocol for the Establishment of the Customs Union is implemented through its Annexes and the provisions of this Act.

5.2 THE EAST AFRICAN COMMUNITY STANDARDS, QUALITY ASSURANCE, METROLOGY AND TESTING ACT, 2006

- The purpose of the Act is to make provisions for ensuring standardization, quality assurance, metrology and testing products produced or traded in the Community in order to facilitate industrial development and trade. The Act establishes East African Standards Committee among other mechanisms to oversee the implementation of its provisions. Over a thousand East African standards have been developed and are in use in the region.

5.3 THE EAST AFRICAN COMMUNITY COMPETITION ACT, 2006

- The Act establishes an East African Competition Authority tasked with handling cross border unfair competition and trade practices including gathering of information, investigation and handling of complaints; issuing of legally bidding decisions, imposing sanctions and remedies; and referring matters to the East African Court of justice among others¹⁷. The Council has recently adopted regulations¹⁸ to the Act and same is due to be operationalised.

¹⁷See Sections 26 and 42 of the Act

¹⁸Refer to the Council decision

5.4 THE EAST AFRICAN COMMUNITY TRADE NEGOTIATIONS ACT, 2008

- The general purpose of the Act is to provide for a regional trade negotiations mechanism for the Community. It establishes the East African trade Negotiations commission comprising of 10 commissioners from each Partner State. The Act has not been operationalized due to perceived difficulties in ceding negotiation authority to a regional body. The Act also has drafting concerns that require attention.

PART B

6.0 EAC Policy measures, strategies, programmes and activities to promote cross border and international Trade.

- a) Accreditation of diplomatic missions to the EAC
 - In its Endeavour to strengthen its position as a supranational Organisation, EAC has recently been on a diplomatic offensive to establish international relations with development Partners. Accordingly it has accredited numerous European and Asian Countries to the EAC¹⁹.

¹⁹Among those accredited are the Republics of Germany, United Kingdom, Japan, China, Netherlands, Norway, among others.

b) Outreach activities by the office of the Secretary General and EALA

- The office of the Secretary General has continuously engaged in outreach activities to boost the international image of EAC. Indeed, these outreach activities are closely linked to the diplomatic successes above said. As a direct result of this, EAC has continued to conclude Memorandums of Understanding

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- (MoUs) and financing agreements with many European, Asian and American Development Partners aimed at supporting integration projects and programmes in the Community.

The Speaker of the East African Legislative Assembly and the Regional Affairs and Conflict Resolution Committee of EALA have played a supportive role to these endeavours.

C) Harmonisation and Approximation of national laws

- In order to achieve the objectives of the Community aforesaid, the Treaty provides *inter-alia* that the Partner States shall take steps to:
 - i) Harmonise all their national laws appertaining to the Community²⁰

²⁰ Article 126(2)c

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- ii) Harmonise their legal training and certification; and shall encourage the standardization of the judgments of Courts within the Community²¹
- iii) Establish a Common syllabus for the training of lawyers and a common standard to be attained in examinations in order to qualify and to be licensed to practice as an advocate in their respective superior courts²²

²¹ *Article 126(2)1*

²² *Article 126(2)a*

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- In a deliberate effort to implement these Treaty provisions the Council established a Sub - Committee on Approximation of Laws comprised of Commissioners of the Law Reform Commissions of the Partner States and officers from State Law Offices to coordinate harmonization and approximation of the national laws. The Sub- Committee has since decided to prioritize harmonization of Commercial laws that impact most the implementation of the Common Market.

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- In this respect they have singled out intellectual property law, Contract law, and Public Private Partnership law (PPP), the law on recognition and enforcement of judgments and Business Registration law for immediate harmonisation²³

²³ *Investment Climate Facility for Africa (ICF) is leading the process on the identified areas*

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- Furthermore EAC has commissioned a study with a view to harmonise legal training curriculum, legal and regulatory frame work governing legal training, certification and practice in the Community. The Consultants are preparing a final draft to be validated at a regional workshop before submission to the Council for consideration²⁴.

24 The Study has been conducted by International Law Institute; African Centre for Legal Excellence (ILI), Kampala...

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- It is worth noting that Article 8(4) of the Treaty provides
- “Community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of the Treaty”
- and Partner States are enjoined to take measures to confer precedence to regional institutions²⁵

d) Engagement of the Private sector and Civil Society on community matters.

- The Treaty obliges the Community to develop an enabling environment for the private sector and civil society organizations²⁶. To this end, EAC has granted observer status in meetings of its Organs to the East African Business Council (EABC), East African Law society, Kituo cha Sheria among others.

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- Furthermore the Council has directed the Secretary General to operationalise Article 127(3) & (4) by setting up a consultation forum between the private sector and civil society organizations and EAC organs²⁷.

²⁷ Draft rules for the forum have been developed and are receiving input from the stakeholders.

e) Trade Promotion Forums:

- The Community has among other initiatives hosted East African Investment Conference and East African Petroleum Conference on an annual basis to promote international and regional trade and investment. Also EAC exhibitions are continuously being made in strategic regional and international forums especially to spur growth in the tourism sector.

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- The above policy measures, strategies, programmes and activities undertaken by EAC are a clear indication that the future is bright for international and cross border trade, hence international commercial practice in the region is bound to blossom.

PART C

7.0 PERSPECTIVES ON LEGAL PRACTICE IN THE REGION AND OPPORTUNITIES COMMERCIAL LAWYERS SHOULD FOCUS ON.

- Legal practitioners in the region have by and large confined their operations in the Partner states where they reside. There is presently little evidence of cross border legal practice in the community although there is a unanimous view that cross border practice is a good idea²⁸

²⁸ *ILI, Kampala Interim Report of the Study on Harmonisation of Legal training, legal & regulatory Framework governing Legal Training, Certification and practice within the Community.*

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- From the foregoing integration developments at the EAC, opportunities for cross border legal practice are readily available.
- Firstly, Arusha is host to the international Criminal court for Rwanda (ICTR) for the past 14 years²⁹;

²⁹ *ICTR has jurisdiction to hear and determine cases emanating from the 1994 Genocide in Rwanda*

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- the African Court for Human and Peoples' rights³⁰; and the East African court of justice (EACJ)³¹. These Courts have given opportunity to advocates to practice law across borders in the Community.

³⁰*The Court has jurisdiction over Human Rights violations in the AU countries.*

³¹*EACJ has jurisdiction over interpretation and application of the Treaty. It has Arbitration Jurisdiction on Commercial disputes and disputes between EAC Partner States, see Articles 27 and 32 of the Treaty.*

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- Secondly, with the establishment of the regional bar association, regular interactions of law practitioners in national and regional forums has engendered the much needed rapport, trust and confidence between the practitioners and is likely to result in increased briefs across the borders.
- Thirdly, with the increased cross border trade and investment and movement of persons and capital, international trade disputes are likely to increase and business persons will increasingly

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expect their lawyers to open up law firms in countries where they have investments or in the least partner with local law firms in those countries³²

- Fourthly, the establishment of the EAC Common market means in fact that EAC is indeed one market for purposes of provision of services and therefore measures currently being taken to harmonise standards of legal education, certification and admission to practice should be embraced by the profession whole heartedly.

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- Furthermore, the national bar associations should advocate for review of national arbitration legislation in line with the Uniform Model Law on International Commercial Arbitration³³ where this has not happened so as to make commercial arbitration attractive to investors within the respective Partner States.
- Last but not least, in concluding commercial agreements/contracts practitioners should increasingly provide for arbitration of disputes by local arbitration centres, and especially the EACJ

³³*Refer to the UNCITRAL Model Law*

8.0 CONCLUSION

- With the deeper integration of the Community, the environment is increasingly becoming conducive for cross border trade, hence international commercial legal practice shall flourish.
 - Thank You

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- However, the slow implementation of harmonization of national laws, lack of awareness of the pertinent details of the integration agenda by the people of East Africa, unfounded fears of domination by the stronger economies and limited resources available to carry through projects and programmes of the Community remain a stumbling block to this unstoppable river of hope for the region.