LIBERALIZATION OF TRADE IN LEGAL SERVICES WITHIN THE EAST AFRICAN COMMUNITY

HILLARY K. SIGEI

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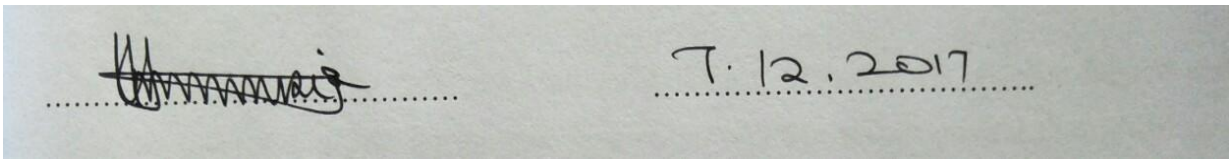
DECLARATION

I **Hillary Kiprotich Sigei**, declare that this thesis is my own original work and that to the best of my knowledge it has not been presented and will not be presented to any other University for any other degree award. Other works cited or referred to are accordingly acknowledged.



Hillary K. Sigei **Date**

Signature

This thesis has been submitted with my approval as University Supervisor.

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Mr. Jackson Bett Date

Signature

ACKNOWLEDGMENT

I extend my deep appreciation and gratitude to my supervisor, Mr. Jackson Bett for his constant guidance, constructive criticism and encouraging remarks. I remain greatly indebted to his invaluable input without which this paper would not have attained its authenticity. It was an honor to write my thesis under his supervision.

I would also like to greatly thank my Assistant, Mike K.C. Rono for his priceless support and lastly my family and friends for all their support, prayers and encouragement throughout this journey.

DEDICATION

This thesis is dedicated to my friend, companion and wife, Joy without whom this work would not have been concluded. I also dedicate to my three little angels, Nathanie, Natasha and Neema who despite their age and demands, they have made me a better person.

LIST OF ACCRONYMS AND ABBREVIATIONS

ABCF	African Capacity Building Foundation.
CMP	Common Market Protocol.
CLE	Council of Legal Education.
EAC	East African Community.
EALS	East African Law Society.
ECJ	European Court of Justice.
ECOWAS	Economic Community of West African States.
EU	European Union.
GATT	General Agreement on Tariffs and Trade.
GATS	General Agreement on Trade in Services.
GDP	Gross Domestic Product.
ILPD	Institute of Legal Practice and Development.
IMF	International Monetary Fund.
ITO	International Trade Organization.
LSK	Law Society of Kenya.
MFN	Most Favoured Nation.
MRA	Mutual Recognition Agreements.
NAFTA	North American Free Trade Agreement.
OECD	Organization for Economic Cooperation and Development.
RBA	Rwanda Bar Assocation.
TLS	Tanganyika Law Society.
UK	United Kingdom.
WB	World Bank.
WTO	World Trade Organization.

LIST OF STATUTES

Regional Agreements and Directives

1. Treaty for the establishment of the East African Community, 1999.
2. Treaty for the European Economic Community of 25th March 1975 (The Treaty of Rome).
3. Treaty of Economic Community of West African States (ECOWAS) of 24th July, 1993.
4. Council Directive 77/249/EEC of 22nd March 1977 (EU Directive 77/249).
5. Council Directive 89/48/EEC of 21st December, 1988 (EU Directive 89/48).

National Statutes

1. Advocates Act, Cap. 16 Laws of Kenya.
2. Legal Education Act, No. 27 of 2012.
3. Kenya School of Law Act, No. 26 of 2012.
4. Law Society of Kenya Act, 2014.

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CHAPTER ONE

1 BACKGROUND TO THE STUDY

1.1 Introduction

On 20th November, 2009, the East African Community signed the Common Market Protocol (CMP) which was ratified on 1st July, 2010, putting in place a common market within the Community.[1] This in essence created a possibility of a market area for Legal services that would transcend national borders. That is, the CMP created a possibility of a borderless East African Community where any legal service provider can offer services within the Community. The protocol sought to create a legal framework within which cross border movement of legal service could take place.

The case for liberalization of the service sector and in this study legal service is based on the following reasons: the EAC Common Market presents a number of opportunities for the region, particularly the single market size of approximately 133.5 million people and the five partner states realize a combined Gross Domestic Product (GDP) of about 74.5 billion US Dollars.[2] The common market offers more employment opportunities for professionals, technicians and artisans, who benefit from greater accessibility to, markets in the region. The Common Market increases opportunities for trade in services in the region, such services includes professional services, communication, distribution services, education services, financial services, tourism and travel-related services as well as transport services. There is greater mobilization of capital, including equity and portfolio investments, bonds, money market instruments, collective investment schemes and bank loans. There is also increased competition among firms within the partner states, which may spur them to produce better quality goods and services.

[1] Odongo, M, Trade Notes Issue No 33 of January 2011 Towards an East African Community Common Market: Challenges and Opportunities.

[2] Institute of Economic Affairs, 2011.

The EU, which is an accomplished regional body comprising of European States, has been used as a model for integration given its achievements so far.[3] Since the 1950s, the EU has been a pioneer in regional integration.[4] This has been attributed to a number of principles that were put into practice eventually catapulting the EU into a success project. The visionary leadership, political will, a consensus approach combined with solidarity and tolerance are the main tenets that have guided the EU over the years and enabled its institutions to survive many crises. The resound lesson of the EU model is the necessity of genuine investment by member States in the goal of regional integration; that national governments should put the long term goal of co-operation above more immediate domestic priorities.[5] This implies that upcoming regional blocs, and in this case, the EAC, partners need to recommit and put the integration process as a national interest so as to achieve its long term goals.[6]

It is more than five years since the ratification of the CMP, and Cross Border Legal Practice (CBLP) within the region has not actually become a reality. The EAC member states currently deal with legal services policies as a domestic concern, each with its own distinct and dissimilar policy and regulatory regimes. Although some of their regulations allow some of CBLP, the same is not under the provisions of the CMP.[7] Tanzania in the schedule of commitments opted not to indicate any commitment to opening up its legal services market to its East African counterparts. This made apparent the deep mistrust and lack of clear common vision amongst the EAC partner states on the true design, scope and scheme of operation on cross border legal practice. This clearly demonstrates how far realization of cross border trade in legal services within the CMP framework is in the EAC which forms the subject matter of this study.

[3] Cameron, Fraser. "The European Union as a Model for Regional Integration. September 2010. Council on Foreign Relations. http://www.cfr.org/world/european-union-model-regional-integration.

[4] *IBID.*

[5] *IBID.*

[6] *IBID.*

[7] This shall be seen later in the study.

1.2 Statement of the Problem

When partner states signed the Common Market Protocol[8] in principle, they committed themselves to operate as a single market in the provision of legal services.[9] In principle, legal service providers have a right to provide legal services in any of the five partner states, but the reality when one digs deeper into the matter, shows an abundance of obstacles to lawyers' right to free movement. This study examines the concept of cross border legal practice as outlined in the CMP[10] and in the context of the partner states' legal frameworks and outline the issues, opportunities, challenges brought about or faced by this form of integration that needs to be addressed, overcome and harnessed to enable lawyers or legal practitioners to benefit from this form of integration.

1.3 Research Questions

The study sought to answer the following research questions: -

1. What are the provisions of the EAC CMP with regard to cross border trade in legal service and specifically what commitments on legal services did partner states commit to when signing up the CMP?
2. Does the legal frameworks for legal practice in the five partner states support or hinders cross border legal practice in the EAC as envisaged in the CMP?
3. What are the challenges facing cross border legal practice as envisaged in the CMP and what lessons can be drawn from the cross border legal practice under the EU?
4. What reforms measures need to be undertaken to ensure the realization of cross border legal practice in the region?

[8] The Protocol was signed by the EAC Heads of State on 20th November 2009 and it entered into force on 1st July 2010.

[9] Article 16(1) of the Common Market Protocol guarantees the free movement of services supplied by nationals of Partner States and the free movement of service suppliers who are nationals of the partner states within the Community.

[10] Article 11.

1.4 Objectives

The main objective of this study is to examine the provisions of the EAC CMP with regard to cross border trade in legal service and the commitments by partner states to opening up their legal markets.

Other objectives include:

i. To examine the various commitments by the Partner states.
ii. To examine the legal frameworks existing in the five partner states on legal practice and whether it supports or hinders cross border legal practice among the five partner states.
iii. To examine the challenges facing cross border legal practice under the CMP and draw lessons from the EU experience.
iv. To make appropriate proposals for reforms towards realization of cross border legal practice in the EAC.

1.5 Research Hypotheses

In undertaking this study, the researcher adopted these hypotheses:

i. Liberalization of trade in legal services in the EAC as envisaged in the CMP will increase opportunities for cross-border legal services.
ii. The failure by member states to implement the provisions of the CMP provisions has hindered the free movement and provision of legal services as envisaged by the CMP.

1.6 Research Justification

This study seeks to contribute to body of knowledge on cross border movement of legal practice under the CMP framework.

The opening up of the East African legal market promised alot of opportunities to legal services providers, and this study seeks to analyze whether the EAC has achieved free market on legal services within the community, if not, it seeks to arrive at a conclusion as to why EAC has not and recommends how it can achieve it.

It is envisioned that knowledge, best practices and recommendations arising from this study could be helpful to policy makers and implementers.

Due to the lack of specific literature on this subject, legal services regulators and individuals interested in the discourse shall benefit immensely from this study. It shall aid them to understand cross border legal practice better and the opportunities that accrue therefrom that can be harnessed and to contribute and enhance academic discourse of this particular subject.

This study shall contribute to policy making, in that head of member states, private organizations and civil society organizations involved with the integration process will be able to pull out some basic principles by which to be guided in their quest for EAC integration strategies.

1.7 Theoretical Framework

Various theories have been fronted to explain the phenomenon of regional integration; for purposes of this study the theory of neo- functionalism by Ernst B. Hass has been adopted to analyze regionalism in the EAC.[11]This theory originally used to explain European integration process[12] is thus able to build bridges between the EU especially where neo-functionalism is taken out of the EU region and used to explain other integration phenomena.

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[11] Haas, Ernst B., 'The Uniting of Europe', {3rd Edition],(Notre Dame, Univ. of Notre Dame Press, 2004).

[12] Haas, E. B. '*International Integration: The European and the Universal* Process', *International Organization, pp. 366-392*.

Burley & Mattli[13] argue that neo functionalism is concerning "how and why nation states cease to be wholly sovereign, how and why they voluntarily mingle, merge and mix with their neighbor as to lose the factual attributes of sovereignty while acquiring new techniques for resolving conflicts among themselves." Neo functionalism was premised on the assumptions that "the deliberate merger of economic activity, in particular economic sectors across borders generates wider economic integration that would 'spill over' into political integration," thus the above two process being accelerated by the creation of supranational structures. The center stage therefore for neo-functionalism is the 'spill-over'[14] effect approach to integration matter. Ernest Haas assumed that once integration efforts had been launched, there would be pressures for further integration in a particular region. In his view social and economic groups would demand additional economic integration.[15]

Uzodike [16]stated that, according to neo functionalism theorist, four analytical variables, actors, motives, process, and context are important to the understanding of integration. Neo functionalists argue the primary integration players are below and above the nation state. The actors below the state include interest groups and political parties, and actors above the state are supranational regional institutions. Consequently, regional supranational structures promote integration, foster the development of interest groups, and cultivate close ties with them and with fellow technocrats in national structures.

The automatic consequences of additional economic integration enhance growth and as a significance of it, conflicts. Such conflicts over growth and interest generated of regional or supranational structures from integration can only be resolved through such regionally

[13] Burley, A.M. & Mattli, W. (1993). *Europe before the Court: A political Theory of Legal Integration*. International Organisation, 47, 41-47.

[14] The 'spill-over' effect refers to a situation where a government's decision to place a specific sector under a central authority exerts pressure to extend the institutions authority into other neighboring policy areas. Examples being areas like taxation and currency exchange rates.

[15] Haas, E. B.(1972) '*International Integration: The European and the Universal* Process' In M. Hodges (Ed), European Integration. Harmondsworth Penguin.

[16] Uzodike, U.O. (2009). The Role of Regional Economic Communities in Africa's Economic Integration: Prospects & Constraints in Ogude, J et al. (2009 September).

established judicial systems. This study therefore seeks to ensure that whereas economic and related activities can easily be adopted by sovereign states in the manner of the neo-functionalism theory, rules of engagement and regulations governing such relationships can only be fostered through liberalization of legal services so as to harmonize the legal infrastructure between such trading blocks.

Following the neo-functionalists approach, this study proposes that a modest function-based cooperation in the EAC be seriously considered. Broadly defined, it would be a regional cooperation arrangement, which would be essentially minimalist and incremental in approach, and which does not make unrealistic demands on the institutional, technical and political capacities of participating member states. This integration arrangement would be achieved through dialogue between the EAC, private sector and civil society, and interest groups within the requirements of the treaty establishing the community.[17]

The second variable of neo functionalism, motives in the community formation which is dominated by nationally constituted groups with specific interests and aims, willing and able to adjust their aspirations by turning to supranational means when it appears profitable.[18]In this case the objectives of integration as outlined in the treaty establishing the EAC[19] clearly outlines the motives behind integration. The third variable, is the process that includes the functional spillover; political spillover and upgrading of common interests. Burley & Mattli[20] point out that, upgrading common interest is the third element in the neo functionalist description of the dynamics of integration. It occurs when the member states experience significant difficulties in arriving at a common policy while acknowledging the necessity of reaching some common stand to safeguard other aspects of interdependence among them. Nation states deepen

[17] *ibid*.

[18] *ibid*.

[19] The treaty for the establishment of the EAC signed on 30th November 1999 and entered into force on 7th July 2000 in Article 5 outlines the objectives.

[20] *ibid*.

interdependence by taking joint actions in one sector after another through the process of upgrading common interests.[21]

The theory has been fused in this study as conceptualized at the deliberate steps and actions which EAC member states took to actualize the objects of the CMP. The actions of ceding some of the state's sovereignty and functionalism in order to foster and benefit from regional integration is one of the principles of neo-functionalism. Though these objects have largely not been fully achieved, the joint intentions involved in the actualization of documentations including the execution of the CMP and ultimately enlisting specific commitments clearly illuminates the progressive desire to enhance interdependence and liberalization of provision of legal services among others in the region.

1.8 Research Methodology

The study will be based on secondary sources. Secondary sources include desktop and library research which forms the essential bulk of the data. The researcher examines empirical studies, essays, theses, reports, books and journals mainly on regional economic integration and the EAC economic integration initiative. The researcher used journal articles, international agreements, books, Government reports, databases and repositories papers presented at conferences, dissertations, newspapers, and discussion papers. Key documents to be analyzed include the legal documents and reports of the East African Community. These were found in various libraries, particularly the High Court of Kenya library, Law Society of Kenya library, University of Nairobi Parklands library and on the Internet, to enable the researcher to adequately tackle this study.

Through a qualitative content analysis, the relevant information will be collected from documented material relating to the research questions and objectives with an effort of ensuring a perspective representation of the findings is made. As specified by Bryman, qualitative content analysis proceeds with "a searching out of underlying themes in the material being analyzed using a brief quotation to illustrate the relevant points".[22] This material will be comprised of in

[21] Uzodike, U.O.

[22] Bryman, Alan (2001), Social Research Methods. Oxford: Oxford University Press, p. 381.

the secondary sources cited above. The analytical framework shall inform the recommendations made in Chapter 5 herein.

1.9 Literature Review

Much has been written on Trade in services and its importance. Trade in services has generally gained importance over the last decades, the World Trade Organization[23] notes that services represent the fastest growing sector of the global economy which account for about 70% of the world Gross Domestic Product (GDP), one third of global employment and nearly 20% of global trade. The International Monetary Fund[24] also noted that the role of services has changed dramatically in recent decades**.** Services represent the largest single sector in developed economies and increasingly in developing economies as well, accounting for nearly two-thirds of value-added and employment in the former and about half in the latter. Services are also the fastest-growing component of international trade. Since 1980, services exports have grown more strongly than merchandise exports and now amount to about US$1.5 trillion annually, or about one-fifth of total world exports. Trade Policy Department of Commerce of the Government of India[25] also indicates that trade in services has a considerable impact on the world economy. With trade in services currently valued at around well over two trillion US Dollars, trade in services shows great prospects for the growth of domestic economies and the creation of jobs. Thus the liberalization of service, it noted, is extremely important.

This importance of services in International Trade has prompted the negotiations and ratification of Agreements in Trade in Services. Internationally, the General Agreement in Trade in Services (GATS) which came to force in January 1995 is the first and only set of multilateral rules governing international trade in services. It establishes a framework of international rules within which firms operate around the globe and it covers major services, most major world markets,

[23] World Trade Organization, 'Services: rules for growth and investment', (last accessed on 15th August, 2016 at http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm).

[24] A. Lehmann, N. T. Tamarisa & J. Wieczorek (2003), International Trade in Services, Implications for the IMF, IMF Policy Discussion Paper.

[25] Trade Policy Department of Commerce, Government of India; A consultative Paper on Legal Services under GATS in preparation for the ongoing services negotiations at the WTO.

the different ways in which a service can be supplied to a customer in a foreign market, and the establishment of commercial operations in foreign markets.[26] It outlines a clear set of obligations for each member country and a legal structure to ensure that these legal obligations are met with. Trade Policy Department of India[27], noted that GATS, strives to achieve this Liberalization of services , because it is within this framework that most countries party to the GATS are obligated to liberalize their services sector to promote free trade in services.

GATS cover all forms of services under twelve categories including legal services.[28] Trade Policy Division, Department of Commerce, Government in India[29] noted that Legal firms have taken on a more international orientation in recent years in order to keep pace with the growing global needs of their clientele. Most of the demand for foreign legal services comes from businesses and organizations involved in international trade. Business law and international law are therefore the sectors most affected by international trade in legal services, although the possibility of entry of Foreign Service suppliers in more traditional sectors of domestic law should not be discounted as the sector becomes increasingly integrated and competitive. It further noted that the legal services sector has experienced a steady and continuous growth in the past decades as a consequence of the growth in international trade and the emergence of new fields of practice, particularly in the area of business law. Issues such as corporate restructuring, privatization, cross-border mergers and acquisitions, intellectual property rights, new financial instruments, and competition law have recently generated an increasing demand for more sophisticated legal services. It concluded to say given the potential in the field of legal services, this sector should be opened up as soon as possible to allow it to reach its full potential.

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[26] Services 2000-*Canadian Services Industries and the GARS 2000 Negotiations, Canadian Legal Services, A consultative Paper in preparation for the World Trade Organization (WTO) General Agreement On Trade in Services (GATS) Negotiations*, in Industry Canada: International Investment and Services Directorate 4(1999).

[27] *IBID.*

[28] Trade Policy Department Of Commerce, Government of India, *IBID*.

[29] A consultation paper on Legal Services under GATS, in preparation for the ongoing service negotiations at the WTO, (last accessed on 15.08.2014 at http://commerce.nic.in/trade/consultation-paper-legal-services-GATS.pdf).

The Australia International Legal Services Advisory Council[30] notes that with rapid developments in information technology, and international commerce, international legal services emerged as a significant global market in the late 1980s. Over subsequent decades the capacity to provide legal services covering the laws of multiple jurisdictions has attained critical importance in facilitating efficient transnational trade in services and encouraging investment, including foreign direct investment. Indeed, legal services, particularly commercial legal services, as an enabling service, form part of the essential infrastructure that underpins a robust economy. Hence, increased opening of legal services markets through trade agreements will have a multiplier effect on the outcome of those agreements by enabling more efficient trade across all goods and services traded under the terms of the agreement.

This international trend to establish general frameworks regulating trade in services influenced efforts to establish regional frameworks following the GATs model. The African Capacity Building Foundation (ACBF)[31] recognizing benefits of integration notes that the enhanced regional cooperation and integration will provide the African Continent with a platform for effective participation in international negotiations. Regional bargaining power and pooling of expertise are crucial to Africa in terms of a meaningful contribution to reshaping the global economic order and protecting the interests of its peoples. It further notes that Africa has no choice but to integrate into world economic and financial systems, if it is to grow sustainably and reduce extreme poverty. Given the nature of the Continent's economies, regional cooperation and integration are important for facilitating the integration process. If properly conceived and implemented, regional integration offers numerous advantages to developing economies. Closer trade links among such economies have the potential of strengthening their capacity to participate in world trade. Countries can thus overcome obstacles caused by the relatively small size of the domestic markets, by offering producers opportunities to realize greater economies of scale and benefit from the establishment of regional infrastructure.

[30] Australia International Legal Services Advisory Council (2010); Review of Bilateral & Regional Trade Agreements, submission to their productivity Commission, (last accessed on 15.08.2016, available at http://www.pc.gov.au/__data/assets/pdf_file/0013/102532/subdr096.pdf).

[31] Soumana Sako (2006), *Challenges Facing Africa's Regional Economic Communities in Capacity Building;* African Capacity Building Foundation Occasional Paper No. 5.

East Africa recognizing the benefits of integration, on 30th November, 1999 decided to re-integrate[32] in the form of East African Community by signing and ratifying the East African Community Treaty. The Partner States committed to cooperating in forming a customs union, a common market, a monetary union and ultimately a political federation. The Customs union was adopted in January 2005 through the Customs Union Protocol and Common Market Protocol in July 2010 through the Common Market Protocol (CMP). The CMP which regulates trade in services adopted a model similar to the GATs model. The coming to effect of the CMP opened up the EAC services market to citizens of the partner states of the EAC, legal services being one of those services.

Despite the recognition of the importance of liberalization and ultimate objective to fully open up the regional market by signing the CMP and adopting the GATs Model, actualization of the objectives is yet to be fully achieved. There is however keen interest from among the majority of the member states towards this goal. To achieve this, this study shall seek to identify challenges and possible obstacles which hampers actualization of this important and visionary character of liberalization of legal services in the region.

To achieve the benefits that would accrues from cross border legal practice there is need for the adoption of sound regulatory system. The American Bar Association Task Force on International Trade in Legal Services[33] recognizing the opportunities presented by cross border legal practice however, pinpointed that a sound regulatory system that addresses the challenges posed by globalization can enhance the state's business climate and attractiveness for foreign trade and investment. Increasing international economic interaction, and globalization of the legal profession and international trade in legal services, makes liberalized trade in this area important,

[32] Kenya, Uganda and Tanzania had formed the East African Community in 1967, which unfortunately collapsed in 1977.

[33] American Bar Association Task Force on International Trade in Legal Services (2014), *International Trade in Legal Services and Professional Regulation: A Framework for State Bars Based on the Georgia Experience*, February 4, 2012 (Updated January 8, 2014).

note Paul D. Paton.[34] He further noted that nowhere is the challenge to traditional domestic barriers and fiefdoms more evident than in the area of legal services, part of the GATS agreement.

Stephen M. Worth,[35] also remarks that legal practice has become an increasingly global concern in the past two decades. However, cross border legal practice poses serious challenges, he raises some of the issues that is posed by this cross border legal practice *hither*, when a lawyer encounters an ethical problem, what ethical code governs the misconduct? Is it countries, his country of origin and the place of practice? Is being subjected to two codes of conduct fair?

The opening up of the East African legal market presented opportunities as the EAC common market provides a single market size of approximately 133.5 million people and the five partner states realize a combined GDP of about 74.5 billion US Dollars. However, harmonization of legal practice in the EAC is however far from being realized, despite ongoing efforts to create a seamless field across the region. Currently, only Rwanda and Kenya allows legal practitioners from partner states to practice in their countries. The United Republic of Tanzania however in the schedule for progressive Liberalization of Services[36] decided not to open up its legal services to lawyers from the Partner states as envisioned in the CMP and the EAC Treaty. The World Bank[37] writing generally on reforms in professional services in East Africa Community noted that while economic benefits from regional integration are evident, the pace of integration depends upon member's conviction that liberalization benefits their domestic constituencies. It further noted that the five (now six) East African countries have made progress in the area of services including the East African Community Common Market negotiations. It further noted that the five East African countries have made progress in the area of services including the East African Community Common Market negotiations. It notes that the EAC countries have, at least

[34] Paul D. Paton, Legal Services and the GATS: Norms as Barriers to Trade.

[35] Stephen M. Worth, (2004); The Transnational Practice of Law; Staggering Growth in spite of Economic and Regulatory Barriers to Entry, 7 GONZ.J.INT'L.I,I.

[36] Annex V of the EAC Common Market Protocol.

[37] World Bank (2010), "Reform and Regional Integration of Professional Services in East Africa: Time for Action", Poverty Reduction and Management Unit 2 Africa Region, p.1.

on paper, committed themselves to liberalizing services and to regional integration in a number of service sectors. Still the degree of commitment varies among the East African countries. It noted that some countries have fear about integration and it could be useful to look for ways to alleviate concerns. The report provided information needed for informed choices as East African countries contemplate reform and international integration. The study further noted that regional market for professional services is fragmented by restrictive policies, such as nationality requirements, and regulatory heterogeneity, relating to licensing, qualification, and educational requirements.

The characteristic of law practice in the EAC indicates that the practice of law reflects the cultural characteristic and mistrust towards Kenyan lawyers, often perceived as pushy, and aggressive. This has been a factor in the smaller EAC economies' reluctance to admit Kenyan law professionals to practice in their territories. The possibly large numbers of lawyers in Kenya has also largely contributed to this mistrust in the context of stiff competition that would accrue by the complete opening of the regional market. Rwanda and Burundi have a fundamentally different legal system as the two were Belgian colonies and therefore follow Francophone civil law systems, while the three founding members; Kenya, Uganda and Tanzania were all British colonies and therefore follow Common law systems.[38] Former Chairman LSK Ahmednasir Abdullahi[39] cautioned that it might be challenging for Tanzanian and Ugandan Lawyers to practice in Kenya as the number of lawyers in Kenya alone are more than the combined number of lawyers in Uganda and Tanzania. This, he said, is one of the reasons why even with the restrictions lifted, no Ugandan and Tanzanian law firm or lawyers are in the country. "They rather pass on the work to their Kenyan counterparts. The former president East African Law Society (EALS) Tom Ojienda reckons that Kenyan lawyers would jump at the opportunity to practice in the two Anglophone EAC neighbours.

Whereas there is acknowledgement of the shortcomings and fears of complete liberalization as expressed, a critical look at the greater good from liberalization of legal services within the region has informed the partner states' deliberate decisions to continue with the processes of

[38] *IBID.*

[39] *IBID.*

negotiations towards MRAs by seeking to assuage and assure others of the benefits rather than the suspicions and negatively perceived consequences.

Phillip Aliker**,** a Ugandan Barrister in England and Wales specializing in EAC laws states that laws in Uganda are different; Uganda has not made changes to allow non-Ugandan's to be admitted to the Roll of Advocates. However, one can be admitted as an advocate on an ad-hoc basis on petition to a judge, though one would still be disadvantaged in terms of correspondence not being on an equal footing with local lawyers. In Kenya, however, any foreign advocate who has approval of the Attorney General may practice in the Kenyan courts. However, such a foreigner must be a lawyer who is entitled to appear before the superior courts of a commonwealth country.

Professor Ben Kiromba Twinomugisha[40] notes that advocates play an increasingly important role in business transactions, some of which involve more than one partner states. In his view he says that East African legislation is an appropriate regional framework to handle various aspects pertaining to legal practice that go beyond the national advocates' regulatory mechanisms. He further posits that cross border legal practice has real benefits for both advocates and the public, especially business persons and that with cross border legal practice, advocates are able to follow their clients who are transacting business in another partner state.

Herbeth Rubasha[41] states that traditionally Rwanda and Burundi hail from a civil law background which is in many respects differs from that of other partner states Ugandan, Kenya and Tanzania that embrace common law systems. The two regimes largely differ both in terms of practice and legislation. On the case of the successes and milestones achieved so far, he notes that in the case of Rwanda, it is noted that under the law establishing the bar[42]foreign lawyers may render services on an *ad hoc* basis, practice law on a permanent basis under the home state professional title and may even become a full member of the profession of the host state if he has

[40] Cross Border Legal Practice in an Integrated East African Community.

[41] Cross Border Legal Practice in East Africa: A civil Law perspective.

[42] Law No. 03/97 Establishing the Bar in Rwanda (Official Gazette No. 08 of 15/04/1997).

effectively and regularly pursued activities in the host state involving the law and regulations that regulate the bar.[43]

It is informative to note that despite the difference in the regimes and even languages Rwandans and Kenyans have largely been able to practice across the borders in the two states. This fact thus affirms the proposition that despite the historical and language differences, the existing legal frameworks can still be harnessed with appropriate modifications.

Ochieng,[44] in discussing legal issues in the operationalization of the EAC Common Market, noted that in achieving the harmonization process, legal practitioners must overcome several challenges including the challenge of language barrier as a result of Burundi and Rwanda using French while Kenya, Uganda and Tanzania are using English; differences in Legal systems in view of the fact that Rwanda and Burundi are based on European Civil Law; Kenya, Uganda and Tanzania are based in common law systems. Sentiments echoed by Prof. Twinomugisha,[45] the different legal systems and language barriers. Further he noted that legal conservatisms should also be overcome; this is because lawyers comfortable in their jurisdiction may not be willing to compete in other jurisdictions.

From the above literature, it is notable that the literature reviewed does not specifically address how the CMP has been implemented to realize an open market in the EAC region, it deals mostly with other contexts. Further, there is paucity of knowledge on the how the six partners' states of the EAC have implemented CMP to realize the cross border trade in legal services.

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[43] Carol A. Needham, The Licensing of Foreign Legal Consultants in the United States, (1998) 21 Fordham Int'l L. J. 1126; Carol A. Needham, Practicing Non-U.S. Law in the United States: Multijurisdictional Practice, Foreign Legal Consultants and Other Aspects of Cross-border legal Practice, (2007) 15 Mich. St. J. Int'l L. 605.

[44] Ochieng, D., Legal issues in the Operationalization of the EAC Common Market: The Role of the Legal Profession, a paper presented to the joint EALS/TLS CLE seminar held on 19th April, 2010 at the Ubongo Plaza Hotel in Dares Salaam, pg. 16.

[45] Twinomugisha, Towards Cross Border Legal Practice in East Africa, a paper presented on 19th April, 2011 at a joint CLE seminar held at the Blue Pearl Hotel in Dares Salaam.

This study therefore enriches literature in addressing CBLP in the community, and how measures taken by the member states to implement the CMP and the challenges experienced. The EU model has been used as a benchmark wherefrom the EAC can learn lessons and surmount the challenges experienced so far.

1.10 Limitations and Delimitations

The researcher reviews the legal and regulatory frameworks in the five partner states against the backdrop of the CMP to establish the extent to which CBLP envisioned in the protocol has been and can be implemented within the EAC. The EU experience is also analyzed so as to give insight to the EAC journey towards implementation of the CMP.

This subject is still largely at infancy stage, thus the researcher experienced limited availability of secondary data on the subject. However, the Researcher endeavored to obtain all information to enable him present a credible study at the end of the research.

1.11 **Outline of the Chapters**

The study is presented as follows: -

Chapter One: Background to the Study

This is the introductory Chapter. It contains the background material to the study. It outlines the need for the study, the statement of the problem, the objectives as well as research questions that the study seeks to answer. It discusses the significance of this study as well as the existing literature on the subject. It further discusses the hypotheses employed, methodological approach used to arrive at the findings of the study, justification for the research, theoretical framework and limitations faced in the study. It finally outlines the breakdown of the Chapters and the general organization of the thesis.

Chapter Two: International Trade in Legal Services

This Chapter is devoted to discussing the international regulatory regime governing and regulating trade in services and legal services in particular. Thereafter, the East African region regulatory regime is analyzed whereby provisions of the Common Market Protocol (CMP) which

was ratified by the EAC partner states are discussed. This is undertaken with a view of answering the research question. This study concludes by discussing the EAC model and how the EAC model has been concluded following the principles in the GATs Model.

Chapter Three: Legal and Institutional Framework governing the provision of legal services in the East African Community

This Chapter looks at the existing legal and regulatory frameworks for Cross-Border Legal Practice in EAC partner states. The chapter considers the extent to which the existing legal frameworks permit or impede cross-border legal practice in the context of the EAC Treaty and the CMP.

Chapter Four: Cross Border Legal Practice under the European Union

This Chapter gives a synopsis of Cross Border legal practice in the European Union (EU); the EU being a pioneer in regional integration makes it appropriate to draw lessons from its experience. In particular, it points out the EU experience in its ongoing regulatory reform towards single market legal services within the Community. This experience provides ideas and insights that could inform policy makers in their discussions about the EAC approach.

Chapter Five: Conclusions and recommendations

This is the concluding Chapter. It concludes the study with a summary of the main arguments and general assessment of recommendations on how to move forward in the implementation of the Common Market Protocol as far as opening up of the East African Legal market.

CHAPTER TWO: INTERNATIONAL TRADE IN LEGAL SERVICES

2.1 Introduction

This Chapter proceeds with a discussion of the international regulatory regime governing and regulating trade in services and legal services in particular. Thereafter, an analysis of the East African region regulatory regime is undertaken whereby provisions of the Common Market Protocol (CMP) which was ratified by the EAC partner states are discussed. This is undertaken with a view of answering the research question in Chapter 1: *cross border trade in legal services and the various commitments undertaken by the partner states under the CMP*. At the end of the Chapter, how the CMP borrowed from the GATS; the first Mutual Recognition Agreements governing cross border provisions of services shall be demonstrated.

2.2 Global Regime in Trade in legal Services: General Trade in Services (GATS)

The General Agreement on Trade in Services (the "GATS") represents global leadership to govern trade in services. It was negotiated and concluded as a result of the Uruguay Round of multilateral trade negotiations and it came into effect in 1995 as the first multilateral agreement covering this important and growing area of services trade.[46]

2.2.1 History

In the mid-1940s the allies led by the United States drafted a world order consisting of three international institutions; the World Bank, the International Monetary Fund (IMF) and the International Trade Organization (ITO). Economists and politicians recognized that foreign trade policy focusing on protectionism had been one of the triggers of the Great Depression and in broadest sense also of World War II. In order to prevent such disasters from reoccurring and to benefit from the advantages of free trade between nations, the ITO was expected to provide legal framework for fair and free global trade under the jurisdiction of the UN. The basic idea behind was the assumption of free trade serving as a catalyst for worldwide economic growth and increasing global welfare.

[46] D. Steger (2003), Dispute Settlement, World Trade Organization and General Agreement on Trade in Services (GATS), United Nations Conference on Trade and Development (UNCTAD), Available at http://unctad.org/en/docs/edmmisc232add31_en.pdf (last accessed on 20.08.2014).

Thus with this newly drafted world trade system, this scenario was eventually intended to become a reality. The ITO was meant to cover all international affairs dealing with employment, economic development, trade policy, competition policy and production of raw materials. In 1948 the General Agreement on Tariffs and Trade (GATT) was put into effect as a first step on the path towards the ITO. Since then, within 8 trade liberalization rounds, the number of participating countries grew, tariffs were reduced and rules for non-tariff barriers were set.[47]

While goods-related trade was overwhelmingly dominant in the aftermath of World War II when GATT was put on track, international trade in services grew rapidly since the 1970s.[48] Thus the inclusion of a service-specific agreement (GATS) within the world trade system was as a response to the fundamental changes in the global trade patterns that occurred over the last decades. GATS aims at developing a credible and reliable system of international rules and principles of promoting trade in services and thus promote the economic growth and development of all trade partners.[49] The Agreement is administered by the World Trade Organization (WTO).

GATS defines trade in services as 'the supply of a service through any of the four modes of supply.'[50] Services include activities such as those listed in the Sectoral Classification List (W/120)[51] which include health, education, water, pensions, transportation, communications, and distribution, services provided in hotels and restaurants, education, construction and accounting services.[52]

[47] http://www.unc.edu/~toatley/poli140/Chapter_2.pdf <accessed on 9.11.2016).

[48] http://iogt.org/wp-content/uploads/2015/03/POLITICAL-ECONOMY-Serving-whose-interests-the-political-economy-of-international-trade-in-service.pdf <accessed on 2.11.2016>.

[49] M. Omolo (2005), , *The General Agreement on Trade in Services (GATS); Rules vs National Policies*, Institute of Economic Affairs, Trade Notes Issue No. 13.

[50] Article 1 of the GATS.

[51] MTN.GNS/W/120 available at http://www.wto.org/english/new_e/news00_e/w/120.doc.

[52] 11Choike – trade in services http://www.choike.org/nuevo_eng/informes/1169.html.

On the other hand, Cross Border Legal Practice has been defined as the general situation in which a lawyer originally licensed in one jurisdiction, the *home state*, provides legal services in another jurisdiction, the *host state*.[53] This can occur when the lawyer physically travels to the host State, or when the lawyer provides services through other means. Thus, although it is clear that the GATS apply to all "legal services" it is less clear how "legal services" should be defined in the context of the GATS. However, the World Trade Organization's (WTO's) Classification list of Services Sector (W/120) has classified legal service as a professional service. This classification system corresponds to the United Nation's (UN's) classification system of legal services.[54]For purposes of this study the researcher will adopt the simple definition of trade in services; that is trade in services refers to a situation where the provider and consumer of the service are from different countries.

2.2.2 Basic Features and Scope of GATS

As stated in the Preamble to the GATS, the main purpose of the Agreement is to contribute to trade expansion "under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries." GATS has a potentially broad scope of application, in the sense that all trade in services are covered. In view of this, provision of legal services is well covered under the scope of GATS and the cross border legal practice can be actualized as a result of this framework that covers a wide range of professional services.

[53] Terry, L. (2001) *GATS' Applicability to Transnational Lawyering and its Potential Impact on US State Regulation of Lawyers*; Vanderbilt Journal of Transnational Law, 34 (Issue) P.955.

[54] The UN classification "legal services" are sub-divided into legal advisory and representation services concerning criminal law legal advisory and representation services in judicial procedures concerning other fields of law legal advisory and representation services in statutory procedures of quasi-judicial tribunals, boards, legal documentation and certification services ;other legal and advisory information and arbitration and conciliation services, previously part of management consultancy services (added in the February 1997 revision).

On the scope of GATS, Article I provides inter alia that the agreement applies to measures by Members[55]affecting trade in services. Article XXVIII on definition of '*measures*'[56]by members affecting trade in services' include measures in respect of the purchase, payment or use of a service, the access to and use of, in connection with the supply of services which are required by those members to be offered to the public generally and finally the presence, including commercial presence, of persons of a member for the supply of a service in the territory of another member.

This definition, in itself, does not provide a precise meaning to the phrase '*Measures by Members affecting trade in services'* thus the obligations and disciplines of GATS apply to all forms of intervention by central, regional and local governments as well as non-governmental bodies with delegated governmental powers. Measures include laws, regulations, rules and decisions of courts and administrative authorities, and it also covers practices and actions of governments and non-governmental bodies with delegated governmental powers.[57] It only provides a list of certain types of measures that will be considered as coming within the meaning of that phrase.[58] In order to give the expression a mere precise meaning, it is essential to examine its constitutive elements individually. [59]

[55] Article 1:3(a) says *measures by members* means measures taken by a central, regional or local government and authorities; and non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.

[56] Article XXVIII defines measure to mean any measure by a member, whether in the form of a law, regulation, rule, procedure, decision, administrative action or any other form.

[57] Examples of measures would include legislation of a member, by-laws of a municipal authority, and rules adopted by professional bodies in respect of professional qualifications and licensing. All such measures would potentially come within the scope of the GATS.

[58] *United Nations Conference on Trade and Development (2003) Dispute Settlement under the WTO, GATS, United Nations, New York & Geneva.*

[59] *ibid*

GATS structure is based on two main elements; a set of general obligations, concepts, principles and rules that apply to all measures affecting trade in services and specific commitments that apply to the services sector and sub-sectors listed in each member's schedule.[60]Therefore for one to understand the effect of GATS on cross border legal services, one must first understand three aspects:

- First, consider the provisions that automatically apply to every country that is a signatory to GATS.
- Second, determine if a country exempted itself from the Most Favored Nation provision in the GATS (MFN Exemption List).
- Third, one must examine the schedules of specific commitments submitted by individual countries; i.e. distinguish between: general obligations and specific commitments.

2.2.2.1 General Obligations

The general obligations apply for all signing members and for all sectors and modes of supply. Here, the general rules and disciplines apply automatically to all members and service sectors. This means therefore, once a country signs the GATS; its regulation of legal services is automatically subject to certain provisions of GATS. These rules include the Most Favoured Nation (MFN) Principle,[61] the obligation to transparency[62] and the general commitment to reach progressive liberalization via continuous negotiations.[63]

These are discussed as hereunder:

[60]This complex web of rights, obligations, exemptions/exceptions and specific commitments to be best understood one must make reference to all the relevant legal documents; the text of GATs itself, MFN Exemptions taken pursuant to the Annex on Article II Exemptions and listed in WTO Member's schedules, the specific commitments on Market Access, National Treatment, and additional commitments inscribed in members' schedules, the Annexes to the GATS, which deal with certain sectors and subjects, Ministerial Decisions and Declarations and, subsequent Protocols that have been entered into with respect to certain service sectors. Thus applicable legal provisions on a particular subject may be contained in a number of these different documents.

[61] Article II.

[62] Article III.

[63] Preamble.

2.2.2.1.1Most Favored Nation (MFN)

This forms the core principle of GATS contained in Article II of GATS and it applies to all measures affecting trade in services. This provision requires each member country to "accord immediately and unconditionally to services and service suppliers of any other member treatment all WTO Member States the same treatment that it provides to any WTO Member State with respect to measures affecting trade in legal services. In other words, it is an "*equal protection*" type of provision that requires equal treatment as between foreign countries.[64] Countries shall not discriminate in the extension of concessions to all signatories of the agreement and a benefit given to services and service providers of one member country shall be accorded to services and services of other member countries. The MFN provision thus prohibits reciprocity provisions in so far as the reciprocity requirement is applied to foreign legal services providers i.e., a member country will not be able to enter into specific reciprocity agreements with other countries to give their lawyers more favorable access to your market or use reciprocity as a condition for admission.

2.2.2.1.1.1 MFN Exemption List

This MFN obligation applies generally to all services and all service suppliers through all modes of supply, except where MFN exemptions have been inscribed in a member's list of MFN Exemptions in its schedule in accordance with the terms and conditions of the Annex. [65] At the time the GATS was signed, a WTO Member State was entitled to place legal services on an MFN exemption list. If a country exercised this option, then it is not required to comply with the MFN requirement.[66]

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[64] MFN is the "normal" non-discriminatory tariff charged on imports of a good.

[65] The first Annex to GATS, however, provides that the Council for Trade in Services will review all MFN exemptions granted for more than five years and provides for termination of MFN exemptions.

[66] Four Members have MFN exemptions in legal services, while four other Members have exemptions in professional services. The countries that have MFN exemptions for legal services are: Brunei Darussalam, Bulgaria, Dominican Republic and Singapore. The countries that have MFN exemptions for professional services are: Costa Rica, Honduras, Panama, and Turkey. Three of the MFN exemptions for legal services cover all measures pertaining to the provision of legal services and apply to all countries on the basis of reciprocity. The fourth exemption extends full national treatment for Modes 3 and 4 only to companies and citizens of countries with which preferential

No new MFN exemptions are permitted at this time since the MFN exemption list was an annex to the Agreement Establishing the WTO. Thus to understand applicability of GATS to legal services, one must evaluate whether the country is exempt from MFN requirements. Most Member States (including the major players involved in the export and import of legal services) have not put legal services on their MFN exemption list and will not be permitted to have a reciprocity requirement for foreign lawyers without violating the GATS.

2.2.2.1.2 **Transparency**

Article III of GATS stipulates the general obligation on transparency requirements and it applies to all WTO member states. Each member shall publish promptly all relevant measures of general application which pertain to or affect the operation of this Agreement. Thus, international agreements pertaining to or affecting trade in services to which a member is a signatory shall be published. Further, all relevant laws, regulations and measures regarding the conduct of trade in legal services in member countries shall be published and disseminated. Members are to make public all measures which regulate legal services in its country and the WTO must be notified of any relevant changes to government policies, regulations or laws regulating legal services.[67]

arrangements exist. All the professional services exemptions maintain reciprocity as a condition for authorizations to exercise professional activities, including legal services.

[67] Article III.3 stipulates that each member shall promptly and at least annually inform the council for Trade in Services of the introduction of any new, or any changes to existing laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Agreement.

2.2.2.2 Specific Commitments

In addition to the General Obligations discussed above, there are also certain provisions in the GATS that can apply if a member state listed legal services on its Schedule of Specific Commitments. These provisions are to be progressively realized.

This schedule of specific commitments is essentially a matrix, which indicates the levels of commitment that each WTO member is willing to take with respect to specific type of commitments for various modes of supply of services. It contains country-specific schedules listing national liberalization commitments regarding market access and national treatment for the designated fields of services. These specific commitments apply only to the sectors and modes of supply that are included in the list of each member, and in the way conditioned there. Each member state is free in defining its own liberalization obligations in its schedules, so theoretically only independently chosen service sectors will become subject to the specific liberalization commitments and obligations.[68]

All countries are also free to exclude service sectors entirely from all provisions of the agreements for a limited period of time. These exemptions are listed in annexes and will become subject to further negotiations within 10 years. Thus specific commitments can only apply if a WTO member has decided to make specific commitments relating to a particular sector in its schedule. Kenya, Uganda, Rwanda, Burundi, Tanzania listed legal services on their schedule as a covered service, thus making them subject to, many of GATS' provisions. Where a country lists legal services on its schedule, the future laws and current laws not included in the schedule governing that service must comply with additional provisions in the GATS.

These specific commitments are discussed as hereunder:

[68] CCBE, Cross-Border practice Compendium 8-Belgium (D.M. Donald-Little ed. 1996); Louis-Henri Verbeke, *Brussels: What's the Crack Jacques?* Law. In EUR. (1992).

2.2.2.2.1 National Treatment

Article XVII of the GATS contains the National treatment provision and it stipulates that the service or service providers of member countries operating in another member country shall be accorded the same treatment as the citizens of the host member country in the conduct of their commercial operations. Thus if a country lists a particular sector, such as legal services, on its Schedule of Specific Commitments, then that country has agreed to provide "national treatment" with respect to that sector, subject to any limitations noted in the Schedule of Specific Commitments.[69]The national treatment provision is important because it acts as an equal protection clause for foreign lawyers as compared to domestic lawyers.[70] If a country has "scheduled" legal services, this article would prohibit regulators from providing foreign lawyers with treatment that is less favorable than the treatment it accords to domestic lawyers, except as specifically noted in the Schedule. In the services sectors listed in a Member's schedule of commitments, the Member cannot take measures to discriminate between domestic and Foreign Service providers; in other words, foreign firms must be treated as favorably as domestic firms. Any measure which violates the national treatment obligation must be clearly inscribed in the Member's schedule of commitments. This principle shall therefore enable the practicability of legal practitioners from other countries engaging in legal practice across the region without discrimination.

2.2.2.2.2 Market Access

It is contained in Article XVI of the GATs and essentially provides that if a country lists a particular sector, such as legal services, on its Schedule of Specific Commitments, then that country has agreed to provide market access with respect to that sector, subject to any limitations noted in its Schedule of Specific Commitments. In essence, the market access provision requires that access to the legal services market may not be provided in a manner less favourable than is set forth in the country's Schedule of Specific Commitments. Thus, except as otherwise noted in a country's schedule of specific commitments, the market access provision would forbid

[69] https://www.wto.org/english/tratop_e/serv_e/guide1_e.htm <accessed on 1.11.2016>

[70] Michael J. Chapman & Paul J. Tauber, *Liberalizing International Trade in Legal Services: A Proposal for an Annex on Legal Services Under the General Agreement on Trade in Services,* 16 MICH.J. INT'L L. 941, 947 (1995).

limitations on the number of service providers, for example by quotas, numerical limitations, or monopolies.

Article XVI contains a range of measures restrictive of market access that a WTO member cannot maintain or adopt unless specified in its schedule.[71]

2.2.2.3 Domestic Regulation

As discussed, GATS addresses trade-restrictive impact of Government measures through its prohibition on market access and national treatment restrictions where specific commitments have been taken by WTO members. Nonetheless, even in sectors where full market access and national treatment has been committed, foreign suppliers may find it difficult under prevailing regulations in a host market. The existence of restrictive regulatory effects is more likely in services than in merchandise trade, given the defining role of regulation for products that are intangible by nature and the intrinsically close relationship between product and supplier.[72]

Article VI obliges member states to bring their domestic regulation in line with their WTO obligations. This Article provides that in sectors where specific commitments are undertaken all domestic measures affecting trade in that service must be administered in a reasonable, objective and impartial manner.[73]

This provision seeks to prevent an erosion of the value of commitments through non-discrimination and non-qualitative impediments concealed in domestic regulation or in the administration thereof.[74] For instance where a member state has made commitments on legal services, it must provide for adequate procedures to verify the competence of professionals of any other member state.[75]

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[71] These include, limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test and limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test.

[72] Trade in Services Division of the WTO Secretariat, *Disciplines on Domestic Regulation pursuant to GATS Article VI.4*.

[73] Article VI (1) of GATS.

[74] Cronje, J.B. (2013) *the admission of foreign legal practitioners in South Africa; a GATS perspective.* Stellenbosch.

[75] Article VI (6) of GATS.

Where authorization and registration are required, licensing and qualification requirements must be based on objective and transparent criteria and may not be trade-impeding or needlessly burdensome.[76]

Local licensing or qualification authorities must inform a foreign applicant of its decision concerning an application and, if requested, provide information concerning the status of the application.[77] An affected applicant has the right to challenge any administrative decision affecting trade in services including decisions concerning the verification of professional competences, qualifications and licenses and have such decisions reviewed by local courts or tribunals.[78]

2.2.3 Scope of GATS

The Agreement applies four modes of supply through which services may be exchanged.[79]Namely:

2.2.3.1 Cross –border Supply

Services are supplied from the territory of one-member country to the territory of another member country. Thus, it is the service itself that crosses the border and as far as legal service is concerned Mode 1 of supply is engaged whenever foreign lawyers create a legal product or advice, which is then sent from outside the country to clients inside the country; this delivery may occur by means of mail, telephonically, or electronically. This is probably the most frequently used Mode, occurring numerous times daily across many of the world's borders when lawyers offer advice to a client in a different country by phone, fax or e-mail. It does not usually give rise to complaints or problems, possibly because it is very difficult to restrict through regulation.[80] If a WTO Member State has any foreign trade at all, there undoubtedly are domestic lawyers in the country who are engaged in Mode 1.

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[76] Article VI (5) of GATS.

[77] Article VI (3) of GATS.

[78] Article VI (2) of GATS.

[79] Article 1:2 (a)-(d) of GATS.

[80] International Bar Association (IBA) (2002); *GATS, A Handbook for International Bar Association Members, Bars.*

2.2.3.2 Consumption Abroad

This is the purchase by foreigners of services in the territory of another country, i.e. it involves the purchase abroad by a country's citizens of the services of foreign lawyers. There are no statistics for the frequency of use of this Mode, but it is most likely to apply in the business sphere following investment abroad. The most common example of services provided under Mode 2 is tourism services, medical services where a person in one member state travels to the territory of another member to receive medical treatment.[81]

2.2.3.3 Commercial presence

Service providers of one member state are allowed to conduct business on another member state through the establishment of a territorial/commercial presence[82] i.e. offices, branches, agencies, joint ventures and other forms to provide a service. In this mode foreign lawyers move and establish a permanent presence in a country, such as a branch office. It will usually involve the establishment of an office in a foreign country by one of the large commercial firms. It is frequently politically contentious, and many countries have barriers against foreign law firms being able to set up offices within their borders.[83]

2.2.3.4 Movement of Natural persons

Professionals from one-member country temporarily migrate to the territory of another member country to supply a service i.e. foreign lawyers themselves enter a country in order to offer legal services. Where a law firm establishes an office abroad (mode 3), it will more often than not have some lawyers from the home country. This mode is also utilized whenever a foreign lawyer flies in temporarily and is physically present to provide the services. This mode however differs from mode 1 since in mode 1, it's the product, legal services that crosses the border virtually, whereas in this mode, it's the service provider that crosses the border.

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[81] United Nations Conference on Trade and Development (UNCTAD).

[82] Commercial presence is defined in Article XXVIII of GATS to mean any type of business or professional establishment, including through: (i) The constitution, acquisition or maintenance of a juridical person, or (ii) The creation or maintenance of a branch or a representative office within the territory of a member for the purpose of supplying a service.

[83] International Bar Association (IBA) (2002).

To understand a country's obligation under the GATS, one has to consult the country's schedule of specific commitments and understand the distinction drawn because the exceptions are listed as subsets of these four modes of supply.

2.2.4 Enforcement of GATS

The WTO however, does not monitor or "police" a country's regulations and that the GATS may not be enforced by individuals. It is a government-to-government agreement. It may only be enforced by governments, which allege that another WTO Member State has not honored its promises. Should a WTO Member State fail to honor its commitments, it can be subject to retaliatory trade sanctions. Disputes are handled in a multi-stage process; the WTO Appellate Body has the ultimate right to resolve disputes and authorize retaliatory trade sanctions. As a result, this remedy may be cumbersome to invoke because a lawyer may have difficulty persuading his or her government to bring a claim. Once a claim is brought, however, this remedy is a very powerful tool.

2.3 Cross Border Trade in Legal Services under the East African Treaty

Before analyzing the EAC integration under the EAC treaty, a brief history of EAC integration is outlined; with an attempt to show that the East African Community (EAC) has increasingly recognized the significant welfare gains that can be realized through regional integration.

2.3.1 Overview of the EAC

In order to understand the concept cross-border legal practice in the EAC, one must trace the origin and development of the EAC and its objectives. The East African Community is a regional inter-governmental organization comprising of six member countries, the Republics of Kenya, Uganda, Tanzania, Rwanda, Burundi and South Sudan, representing about 158 million citizens.[84] It was established in 1999 under a signed treaty[85], which was signed on 30 November 1999 and entered into force on 7 July 2000 following its ratification by the original three Partner States -

[84] http://www.eac.int/about/overview.

[85] The Treaty for the Establishment of the East African Community.

Kenya, Tanzania and Uganda. Burundi and Rwanda were admitted in 2006 and became full members on July 1st 2007; South Sudan on the other hand became a full member of the community on 5th September, 2016.[86] According to the protocol, the foundation for the EAC regional cooperation and integration is linked to their shared history, language, culture and infrastructure, and therefore the potential for integration is founded more on historical ties and political aspirations.[87]

Regional integration in East Africa dates back to pre-colonial times.[88] The first moves towards cooperation between states were made in 1919. Kenya, Tanganyika and Uganda – all of them under British administration – formed a customs union. Subsequently cooperation arrangements culminated into the formation of the East African High Commission in 1948, which superseded the East African Common Services Organization and later the EAC in 1967, [89]where the three member states of Kenya, Tanzania and Uganda agreed to cooperate on a wide range of economic and social issues. The first EAC, and the extensive integration which it achieved, was hailed a success, but the project nevertheless collapsed in 1977. The former EAC collapsed in 1977; the factors behind the collapse have varied. However, one of the weaknesses that have often been pointed out was that it was politically driven and some of its key decisions depended on the whims of the leaders at the time Presidents Jomo Kenyatta (Kenya), Milton Obote (Uganda) and Julius Nyerere (Tanzania).[90] Furthermore and following Idi Amin's military coup in Uganda in

[86] This is after submitting its ratification instruments to the bloc's secretariat in Arusha on 5th September, 2016. This follows South Sudan admission as the EAC 6th member by Heads of State of the EAC partner states at their 17th Ordinary Summit on March 2, 2016.

[87] Prince Amadichukwu (2013), *Regional Integration in Africa: Quest, Challenges and the Way Forward*; paper presented in the African Economic Conference 2013 on the regional integration in Africa" in October 28-30, 2013 in Johannesburg, South Africa organized jointly by the African Development Bank, the Economic Commission for Africa and the United Nations Development.

[88] Reith Stefan and Moritz Boltz, 'The East African Community: Regional Integration between Aspiration and Reality' (2011) KAS International Reports, <http://www.kas.de/wf/doc/kas_28725-544-2-30.pdf> (accessed 19.10.2016).

[89] This EAC was created in 1967 in Arusha following the Signing of the 'Treaty for East African Cooperation' among Kenya, Uganda and Tanzania.

[90] Oluoch, F., 2013. Lest we forget: What killed the first EAC Marriage. The East African, 2-8 November, Issue 992, p. 11.

1971, personality clashes ensued and as such the East African Authority, constituted by the three Heads of State could not meet to discuss and resolve emerging issues.[91]

There was also no common political will because after the three countries became independent, the leaders got busy consolidating power within their turfs. There emerged ideological differences, which led to the three countries adopting different politico-economic models. Kenya preferred capitalism; Uganda settled for a mixed economy[92], while Tanzania preferred a socialist model in the form of *Ujamaa*. There were differences in levels of economic development, where Kenya took most of the benefits and other partner states were merely importers from it. It's this perceived trade dominance being a sticking issue to date.[93] In 1984, the parties agreed on how to divide assets and liabilities following the collapse of the EAC[94] and agreed to explore areas of future co-operation and to make concrete arrangements for such co-operation.

Despite this historical setback, the spirit of cooperation among the three East African States of Kenya, Uganda and Tanzania was rekindled and in 1994 the Permanent Tripartite Commission for East African Co-operation established.[95] These efforts led to rebirth of the EAC in 1999, with the signing of the Treaty for the establishment of the EAC[96], which came into force in the year 2000, following ratification by the partner states. EAC membership expanded to five Partner States when Rwanda and Burundi joined the bloc in 2007 to make EAC a five-partner state regional economic bar. South Sudan the sixth partner state became on 5th September, 2016,

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[91] Economic Commission for Africa, Sub-Regional Office for Eastern Africa (SRO-EA) (2013), *Domesticating & Mainstreaming of Regional Integration Processes, instruments & decisions into national policies, legal & regulatory frameworks; issues, challenges & opportunities- The case of Uganda,* Kigali, Rwanda available athttp://www.uneca.org/sites/default/files/publications/domistification.pdf (Last accessed on 21.08.2014).

[92] Uganda oscillated between capitalism and socialism through Obote's political and economic blue-print; *"The Common Man's Charter"*.

[93] Oluoch, F., *op cit*.

[94] Parties signed the East African Community mediation Agreement for division of assets and liabilities

[95] On 30 November 1993: 1st Summit of East African Heads of State sign Agreement establishing the Permanent Tripartite Commission for East African Co-operation in Kampala, Uganda.

[96] Article 2 of the Treaty for the Establishment of the EAC established the EAC as a regional inter-governmental organization.

making it a six partner bloc. This study is however only limited to the five partner states since as at the time of writing this thesis South Sudan was still within the grace period accorded to it to comply with the provisions of the CMP by establishing their commitments and legal and policy framework towards compliance with the CMP.

The EAC was conceived to be both an economic and political union with the cardinal objective of widening and deepening cooperation of Partner states in political, economic and social sectors for the mutual benefit of the EAC citizens.[97] The East African Community (EAC)[98] is the regional intergovernmental organisation of the Republics of Kenya, Uganda, the United Republic of Tanzania, Republic of Burundi and Republic of Rwanda (Member States) with its headquarters in Arusha, Tanzania and the Republic of South Sudan.[99]

The principal source of EAC law is the Treaty for the Establishment of the East African Community (the "Treaty").[100] The Treaty was signed on 30th November 1999 and entered into force on 7th July 2000 following its ratification by the Original three Partner States – Kenya, Uganda and Tanzania. The Republic of Rwanda and the Republic of Burundi acceded to the EAC Treaty on 18th June 2007 and became full Members of the Community with effect from 1st July 2007. According to the Treaty, the main objective of the EAC is to widen and deepen the integration process. Article 5(2)[101] of the Treaty establishes the objectives to be the formation and subsequent evolution of a Customs Union, a Common Market, a Monetary Union and finally

[97] Ameyo, Dan. *The Role of Lawyers in the Realization of its Strategic Drivers,* a paper presented at the Conference of the East Africa La Society Conference and Annual General Meeting at Ngurdoto Hotel in Arusha from 25-27th November, 2011.

[98] The East African Community Report available at, http://www.eac.int/about/overview <accessed on 9.11.2016>

[99] *IBID.*

[100] The Treaty entered in force on 7th of July 2000, and was amended on 14th December 2006 and 20th August 2007. The full text is to be found at http://www.eac.int/treaty/<accessed on 12th October, 2016.

[101] Article 5(2): In pursuance of the provisions of paragraph 1 of this Article, the Partner States undertake to establish among themselves and in accordance with the provisions of this Treaty, a Customs Union, a Common Market, subsequently a Monetary Union and ultimately a Political Federation in order to strengthen and regulate the industrial, commercial, infrastructural, cultural, social, political and other relations of the Partner States to the end that there shall be accelerated, harmonious and balanced development and sustained expansion of economic activities, the benefit of which shall be equitably shared.

a Political Federation, under the overarching aim of equitable development and economic growth amongst the Member countries.

The roadmap of EAC integration was that the process was to move from a Customs Union, [102]a Common Market, [103]then to a Monetary Union,[104]and the Political Federation[105] as the ultimate goal.

The Treaty obliges the Partner States to plan and direct their policies and resources with a view to creating conditions favourable to regional economic development[106] and through their appropriate national institutions to take necessary steps to harmonize all their national laws appertaining to the Community.[107] Harmonization is one of the key concepts espoused by EAC; with particular respect to the integration of laws, Article 126 of the Treaty and Article 47[108] of the Common Market Protocol both call for the harmonization of national legal frameworks.[109]

2.3.2 Common Market under the EAC framework

Article 76 of the Treaty establishing the EAC provides for the establishment of a common Market among the partner states; and provides that within the common market, there shall be free movement of labour, goods, services, capital, and the right of establishment.[110] Article 104 goes ahead to stipulate the scope of co-operation. This Article requires partner states to adopt

[102] Protocol for the Establishment of the East African Community Customs Union was signed by the three East African Heads of State on 2 March 2004 in Arusha, Tanzania.

[103] It forms the basis of this discussion. The Protocol on the Establishment of the East African Community (EAC) Common Market entered into force on 1 July 2010, following ratification by all the five Partner States: Burundi, Kenya, Rwanda, Tanzania and Uganda.

[104] The Protocol establishing the East African Monetary Union was signed by the EAC Heads of State on 30 November 2013, in Kampala Uganda during their 15th Ordinary Summit.

[105] As at the time of writing of this thesis the Political federation is yet to be put in place.

[106] Article 8(1) of the Treaty Establishing the East African Community.

[107] Article 126(2) b of the Treaty Establishing the East African Community.

[108] Article 47 requires Partner States undertake to approximation of their national laws and to harmonize their policies and systems, for purposes of implementing this Protocol.

[109] The Sub-Committee on the Approximation of Laws in the EAC Context.

[110] This is subject to the Protocol that partner states were to conclude on Common Market (Article 76(4). This was signed in November 2009.

measures to achieve the free movement of persons, labor and services and to ensure the enjoyment of the right of establishment and residence of their citizens within the community.[111] Towards the realization of this, Article 104(3) provides that the partner states shall as may be determined by the Council:

a. Ease cross border crossing by citizens of the Partner states;
b. Maintain common standard travel documents for their citizens;
c. Effect reciprocal opening of border posts and keep posts opened and manned for every twenty-four hours;
d. Maintain common employment policies;
e. Harmonize their labor policies, programmes and legislation including those on occupational and safety;
f. Establish a regional Centre for productivity and employment promotion and exchange information on the availability of employment;
g. Make their training facilities available to persons from other partner states; and
h. Enhance the activities of the employers and workers' organizations with a view of strengthening them.

In accordance with the provisions of Article 76 and 104 of the CMP, the EAC has adopted the **Common Market** Protocol (CMP) to govern the following freedoms and rights: free Movement of Goods; free Movement of Capital; free Movement of Services; free movement of Labor; and free movement of Persons. It can be noted that these provisions seem to lay emphasis on fostering cross border movement of persons and labour and none specifically addresses the question of services. However, provisions affecting cross border movement of persons and labour are also of great importance as far as provision of legal services under Mode 4 (GATS modes of service provision) is concerned.

The provisions of the CMP are discussed hereunder:

[111] Article 104(1) of the Treaty Establishing the East African Community.

2.3.3 Common Market Protocol

The five Partner States (Kenya, Uganda, Tanzania, Rwanda and Burundi) of the East African Community signed a Common Market Protocol in November 2009 and its implementation began earnestly in July 2010. The Protocol provides for four freedoms of movement for goods, people and labor, services and capital as well as to rights to reside or establish oneself or business venture anywhere within the boundaries of the Community.

The Common Market Protocol comprises nine parts and six annexes.[112] Part A of the Protocol is the interpretation; Part B provides for the establishment of the EAC Common Market; Part C provides for the Free Movement of Goods; Part D provides for the Free Movements of Persons and Labour; Part E provides for the Rights of Establishment and Residence; Part F provides for the Free Movement of Services; Part G provides for the Free Movement of Capital; and Part H addresses Other Areas of Cooperation in the Common Market. The stated objective of the EAC Common Market is "to widen and deepen cooperation among the Partner States in the economic and social fields for the benefit of the Partner States."

The EAC "Common Market" seeks to integrate Partner States' markets into a single market[113] in which there is free movement of persons, labour, goods, services and capital; and the right of

[112] CMP Annexes - Annex I: The East African Market Protocol (Free Movement of Persons) Regulations; Annex II: The East African Community Common Market(Free Movement of Workers) Regulations; Annex III: The East African Community Common Market (The Right of Establishment) Regulations; Annex IV: The East African Community Common Market (The Right of Residence) Regulations; Annex V: The East African Community Common Market Schedule of Commitments of the Progressive Liberalization of Services; Annex VI: The East African Community Common Market Schedule on the Removal of Restrictions on the Free Movement of Capital.

[113] Article 4(2) of the Common Market Protocol- The specific objectives of the Common Market include to:

i. Accelerate economic growth and development of the Partner States through the attainment of free movement of goods, persons and labour, the rights of establishment and residence and the free movement of services and capital.

ii. Strengthen, coordinate and regulate the economic and trade relations among the Partner States in order to promote accelerated, harmonious and balanced development within the Community.

iii. Sustain the expansion and integration of economic activities within the Community, the benefit of which shall be equitably distributed among the Partner States.

establishment and residence.[114] The implementation of the EAC Common Market is guided by four fundamental principles, namely: non-discrimination of nationals of other Partner States on grounds of nationality; equal treatment to nationals of other Partner States; transparency in matters concerning the other Partner States; and sharing information for the smooth implementation of the Protocol.[115] For purposes of our study, it can be seen that the CMP seeks to community partner states into a single market in which there is free movement of legal service providers to provide services and also to establish for purposes of providing services and offering labor.

2.3.4 Scope of Co-operation in the East African Community in the Context of Legal Services

In principle every lawyer or advocate or attorney who is a citizen of any of the EAC partner states, is guaranteed the right to provide services throughout the EAC; this is in the spirit of the EAC Treaty and the CMP.[116]

First, the CMP provides that partner states shall remove measures that restrict movement of services and service suppliers; harmonize standards to ensure acceptability of services traded.[117]

Second, part F of the Protocol contains the substantive and comprehensive provisions that guarantee the free movement of services[118] supplied by nationals of partner states and the free movement of service suppliers who are nationals of the partner states within the Community.

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iv. Promote common understanding and cooperation among the nationals of the Partner States for their economic and social development and;

v. Enhance research and technological advancement to accelerate economic and social development

[114] A common market, as stated in the Treaty, is defined as "partner states markets integrated into a single market in which there is free movement of capital, labor, good and services".

[115] Article 3 of the Common Market Protocol.

[116] Article 16(1) of the Protocol provides that the Partner States hereby guarantee the free movement of services supplied by nationals of Partner States and the free movement of service suppliers who are nationals of the Partner States within the Community.

[117] Article 5 (2) (d).

Third, Article 11[119] provides for harmonization and mutual recognition of academic and professional qualifications to facilitate the movement of labor. The sectoral council of education, the EAC secretariat was directed to develop a legal binding framework for MRAs and mechanisms on how signed MRAs can be adopted as instruments of EAC.[120] The secretariat is also to develop a framework for recognition of foreign qualifications from outside EAC. The MRA Regulation stipulates that partner states will mutually recognize academic qualifications from other partner states. The MRAs shall, among others, provide for among others: Academic and professional qualifications; Registration procedures; Competencies; and Code of conduct and disciplinary processes The MRAs are a tool for promoting economic integration, growth and development as they are for individual mobility. The existence of these agreements is beginning to pave the way for regional level action and discussion of the harmonization of wider legislative frameworks. This makes it easier for professionals to work more freely across national boundaries in East Africa and promotes wider access to much needed skills. Those professions that have been early adopters of MRAs have already reported a growing sense of a regional professional identity because of the collaboration required in negotiating their MRAs.[121]

2.3.4.1 Modes of supply of services

The protocol in Article 16(2) covers four modes of supply namely:

i. Free movement of services from the territory of a partner state into the territory of another partner state.[122]
ii. Free movement of services in the territory of a partner state to serve consumers from another partner state[123];

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[118] Article 16(7) defines services to include services in any sector except services supplied in the exercise of governmental authority which are not provided on a commercial basis or in competition with one or more service suppliers.

[119] Partner states to mutually recognize the academic and professional qualifications granted, obtained, requirements met, licenses or certifications granted, in other partner states.

[120] The East African Community Common Market (Mutual Recognition Of Academic and Professional Qualifications) Regulations 2011

[121] Three MRAs are currently in place in East Africa, covering accounting services (2011), architectural Services (2011) and engineering services (2012).

[122] Similar to Mode 1 of GATS whereby the Service is the one which is crossing the border.

iii. Free movement of services by a service supplier of partner state, through commercial presence of the service supplier in the territory of another partner state[124]; and

iv. Free movement of services by the presence of a service supplier, who is a citizen of a partner state, in the territory of another partner state[125].

Seven (7) out of twelve (12) service sectors have been included in the Protocol.[126]The opening of the remaining five sectors has been committed to by all partner states but a timeframe for negotiation has not yet been agreed. The implementation of these provisions shall be done progressively.[127]Article 16(5) requires the partner states to progressively remove existing restrictions and not to introduce any new restriction on the provision of services in the partner states by nationals of other partner states except as otherwise provided in the protocol.

2.3.5 General Provisions

2.3.5.1 National Treatment

Article 17 of the CMP provides that partner states shall accord to services and suppliers of other partner states, treatment not less favorable than that accorded to similar services and service suppliers of the partner state. Partner states may accord to services and service suppliers of other partner states, either formally identical treatment or formally different treatment to that it accords to like services and service suppliers of the Partner state. Where formally identical or formally different treatment modifies the conditions of competition in favor of services or service suppliers of the partner state compared to like service or service suppliers of other partner states, then, the same is considered to be less favorable. An exception to this provision is provided in Article 21(1)(d) wherein the Protocol allows partner states to adopt or enforce measures which

[123] Mode 2 of GATS, where the service is 'consumed abroad'.

[124] Mode 3 under GATS, commercial presence.

[125] Mode 4 under GATS which is Movement of Natural persons.

[126] These are Business Services, Communications Services, Distribution Services, Education Services, Financial Services, Transport Services and Travel and Tourism Services.

[127] Article 23 of the Protocol provides *inter alia* The implementation of Article 16 of this Protocol shall be progressive and in accordance with the Schedule on the Progressive Liberalization of Services, specified in Annex V to this Protocol.

are necessary: to protect public morals or to maintain public order; to protect human, animal or plant life or health; to secure compliance with laws or regulations which are not inconsistent with the provisions of this part including those relating to the prevention of deceptive and fraudulent practices or which deal with the effects of a default on services contracts; the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; and safety.

2.3.5.2 Most Favored Nation Treatment

Article 18 contains the MFN provision and it provides that each partner state shall upon coming to force of this protocol accord unconditionally, to services and service suppliers of the other partner states, treatment no less favorable than it accords to like services and service suppliers of other partner states or any other third party or a customs territory.

2.3.5.3 Notification Requirement

Article 19 of the CMP requires partner states to notify the Council of all measures of general application affecting free movement of services at the entry to force of the protocol. Partner states shall also notify the council of any international agreements pertaining to or affecting trade in services with third parties that they are signatory to, prior to and after the entry into force of the protocol. Notifications submitted to the Council are to be transmitted to other partner states. Partner states are also required to at least annually inform the council of the introduction of any new laws or administrative guidelines, or any changes to existing laws or administrative guidelines which affect trade in services provided in the Protocol.

2.3.6 Specific Commitments

Article 23 further provides that the implementation of the Protocol shall be progressive and in accordance with the schedule on progressive liberalization of services specified in Annex V[128] to the protocol. Annex V thus stipulates how all partner states have committed to liberalize their legal markets in all the four modes of supply. Legal services are one of the services included in Annex V.

[128] The East African Community Common Market schedule of Commitments on the progressive Liberalization of Services.

Just like the GATS, the schedule of commitments under the CMP is also in a matrix which indicates the levels of commitment that each partner state is committing to with respect to specific type of service for the various modes of supply. Partner states further given different timeframes for liberalizing legal services. Kenya[129] has liberalized legal advisory and representation services in judicial procedures concerning other legal services. Uganda and Rwanda have made progress towards liberalization of legal services. Tanzania did not make any commitment with regard to legal services. Burundi has also undertaken to liberalize legal services sector by eliminating all market access restrictions.

2.3.5 EAC Cross Border Legal Practice (CBLP) Bill

This bill was introduced in pursuance of Article 126 of the East African Community Treaty and it seeks to provide for cooperation in legal and judicial affairs in East Africa. Its objectives[130] are to harmonize promote cross border legal practice, promote harmonization of legal training and certification, facilitate free movement of legal professional services and rules to regulate cross border legal practice within the community.[131]

The same Bill establishes the East African Law Council[132] whose mandate is to act in collaboration with law councils of partner states to regulate cross-border practice.[133] Each national law council is tasked each year, to submit a list of eligible advocates for cross border legal practice.[134] Every Advocate eligible in any of the partner state, can practice in any other EAC partner state without having to register, re-register or acquire a temporary practice certificate.[135] This provision has been controversial as it has been critiqued that it breads inconsistency because without consultation of various law councils and law societies and would hinder harmonization of legal training and certification. It is seen as going against the principle of sovereignty, because, individual states will not be able to control who practices in their courts. Proposals have been made to address this, by allowing each partner state to decide who should

[129] Elimination date for any barrier was 2010.

[130] Article 3

[131] As shall be seen in Chapter 3 currently legal practice in East African states is national and is managed and controlled locally by respective states.

[132] Article 4
[133] Article 5.
[134] Article 8.
[135] Article 8(4)

practice law in their own jurisdiction and the process of to be administered independently by of each respective partner state. The EALA should therefore pass legislation governing cross boarder legal practice; this is the approach of the EU where the Parliament and council passed four sets of directives concerning cross border legal practice.[136]These laws passed in the EU have facilitated effective pursuit of cross border legal practice in the EU. The direction taken with the EAC CBLP bill has been seen as a very dangerous one as it seeks to merge regulations of law practice in all the six partner states into one.

The Bill also provides for reciprocal enforcement of suspensions and striking off in partner states[137]such that if one is disbarred in Kenya, then that person is automatically disbarred in all other partner states. For dispute resolution, the Bill stipulates that complaints shall be referred by the national bar association or by the aggrieved person.[138]

There have been recommendations against the bill in its entirely and that partner states should proceed based on Mutual Recognition Agreements (MRAs) that would be signed with respective law societies of the different countries. This arrangement would give each partner state an opportunity to first agree on what set of standards on legal training and certification, standards and rules to regulate cross border legal practice to apply since this has not been harmonized.

Discussions however on Mutual Recognition Agreements are making progress and it appears that partner states are putting efforts to expedite the process of concluding the agreements that would allow members of the various bar associations to practice in any of the six countries.[139] It has been advanced that the MRAs would serve the purpose as they would contain the proper technical details regarding the modus operandi under cross-border legal practice as opposed to the omnibus provisions in the Bill.

[136] This shall be seen in Chapter 4.
[137] Article 9
[138] Article 11
[139] The Bill then has been seen more as a political document.

2.4 Conclusion

From the foregoing discussion, it is clear that the GATS framework is a core instrument upon which other regional arrangements have borrowed. This is largely seen in the EAC model which has replicated the GATS modal approach as the coverage of the Agreement borrowing the GATS modal definitions.[140]

[140] Joy Kategekwa: Opening markets for foreign skills: How can the WTO Help?

CHAPTER THREE:

LEGAL AND INSTITUTIONAL FRAMEWORK GOVERNING LEGAL PROFESSION IN THE EAST AFRICAN COMMUNITY

3.1 Introduction

This Chapter examines the legal and regulatory framework governing the legal profession in the East African Community partner states. From the outset, it is important to point out that professional services have traditionally been subject to a high degree of regulation; the regulatory measures being as a result of direct governmental regulation and rules adopted by self-regulatory bodies. These regulations have taken different forms, ranging from qualitative and quantitative entry regulation to conduct regulations. As far as regulation of legal services is concerned, it is noteworthy to point out from the outset that the five partner States have in place of some form of legal and institutional framework governing the the profession which is discussed hereunder.

3.2 The legal and regulatory framework governing the legal profession in the East African Community partner states

3.2.1 Kenya

Kenya's legal system is based on the English Common Law system resultant from its British colonial history. There are three key legislations governing lawyers and advocates: the Advocates Act[141] which is the key legislation, the Council of legal education (CLE) Act[142] and the Law Society Act. [143] The Advocates Act in section 9 outlines the requirements for one to be eligible to practice as an advocate. That is: one must have been admitted as an advocate; his name is for the time being on the Roll; and he has in force a practicing certificate.

[141] Chapter 16, Laws of Kenya, as amended by Act No 18 of 2014.

[142] Act No. 27 of 2012 which became operational from 28th September, 2012.

[143] Act No.21 of 2014 assented to on 24th December, 2014 and became effective from 14th January, 2015

For one to be admitted to the bar, section 12 states that such person has to be a citizen of Kenya, Rwanda, Burundi, Uganda or Tanzania; and is duly qualified in accordance with section 13 outlining professional and academic qualifications. That is: a person shall be duly qualified if he has passed the relevant examinations prescribed by CLE, and has attended pupillage or is an Advocate for the time being of the High Court of Uganda, the High Court of Rwanda, the High Court of Burundi or the High Court of Tanzania.

The procedure for admission to the bar is outlined in section 15 of the Act; which upon a petitioner meeting the requirements[144] stipulated shall sign the roll of advocates. The Roll is kept under the custody of the Registrar.[145]The Registrar is mandated to issue practicing certificates authorizing advocates to practice as such.[146]The issuance of practicing certificate confers membership of an advocate to the society.[147]

Dispute Resolution Mechanisms

Section 53 of the Act establishes the Complaints Commission mandated to hear and determine complaints against advocates, firms of advocates and their members or employees. Section 57 of the Act establishes the disciplinary tribunal to deal with issues of professional misconduct.[148] Appeals arising from the decisions of the tribunal lies to the High Court of Kenya[149] which powers shall be exercised by not less than two of the Judges of the Court. If such powers are exercised by two judges and the opinion of the Court is equally divided, the matter shall be reheard by three judges.

[144] Petition the Chief Justice who upon satisfying himself about the qualifications shall make an order for the petitioner to be admitted. The Petitioner is also required to pay requisite fees.

[145] Section 16 of the Advocates Act.

[146] This happens upon an advocate making an application and paying the Society the fee prescribed for a practicing certificate and the annual subscriptions payable for the time being to the Society and to the Advocates Benevolent Association and the submission of written approval by the Chairman of the society not objecting the grant of the license; this is stipulated in section 22 of the Act.

[147] Section 23 of the Advocates Act.

[148]Section 60 of the Advocates Act.

[149] Section 64 and 65 of the Act.

Section 68 of the Act stipulates that the orders made shall be noted in the roll of advocates. Where an advocate is a member of a professional body outside Kenya, or is subject to the jurisdiction for the purposes of discipline of a professional body outside Kenya, the Registrar shall also send to the professional body a certified copy of every final order made under this Part suspending or striking off the name of the advocate from the Roll.[150] Section 81 of the Act gives power to the Council of the Society, with the approval of the Chief Justice, to make rules with regard to the professional practice, conduct and discipline of advocates.

The Council of Legal Education Act re-established the Council of Legal Education with the primary purposes of: promoting legal education and training, and the maintenance of the highest possible standards by the legal education providers; and the provision of a system to guarantee the quality of legal education and legal education providers. The Council is re-established as a dedicated regulator and supervisor of legal education in Kenya, segregating it from the Kenya School of Law which through parallel legislation has been set up as a Government agency for post-university professional legal training. Its functions are outlined in section 8(1) and 8(2) of the Act.

As far as cross border legal practice is concerned the Council plays a key role in establishing criteria for the recognition and equation of academic qualifications in legal education[151] and advising the Government on the standardization, recognition and equation of legal education qualifications awarded by foreign institutions.[152] Section 23 and the second schedule outline the courses that must be administered by a legal provider offering a degree in law.

The Kenya School of Law Act[153] establishes the Kenya School of law (KSL) [154] as a public legal education provider responsible for the provision of professional legal training as an agent of the Government.[155]

[150] Section 68 (3).

[151] Section 8(3) of the Act.

[152] Section 8(3) (g) of the Act.

[153] Act no. 26 of 2012.

[154] Section 3(1) of the Act.

The school therefore has the mandate of training persons to be advocates under the Advocates Act; ensuring continuing professional development for all cadres of the legal profession; providing para-legal training; the provision of other specialized training in the legal sector and developing curricular, training manuals, conduct examinations and confer academic awards. Section 16 and the second schedule of the Kenya School of Law Act provides for the admission requirements that one must meet to be admitted to the school.[156]

[155] Section 4 of the Act

[156] Admission Requirements into the Advocates Training Programme (ATP) includes passing of relevant examinations of any recognized university in Kenya and becoming eligible for conferment of the Bachelor of Laws Degree (LL.B) of that university; attainment of a minimum entry requirements for admission to a university in Kenya; and obtaining of a minimum grade B (plain) in English Language or Kiswahili and a mean grade of C (plus) in the Kenya Certificate of Secondary Education or its equivalent and the sitting and passing of the Pre-Bar examination set by the School.

The Law Society of Kenya Act[157] provides for the establishment of the Law Society of Kenya[158]which has the mandate to advise and assist members of the legal profession, the government and the larger public in all matters relating to the administration of justice in Kenya. The society has to ensure that all persons who practice law in Kenya or provide legal services in Kenya meet the standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide; set, maintain and continuously improve the standards of learning, professional competence and professional conduct for the provision of legal services in Kenya; determine, maintain and enhance the standards of professional practice and ethical conduct, and learning for the legal profession in Kenya; facilitate the acquisition of legal knowledge by members of the Society and ancillary service providers, including paralegals through promotion of high standards of legal education and training; formulate policies that promote the restructuring of the legal profession in Kenya to embrace the spirit, principles, values and objects of the Constitution of Kenya; facilitate the realization of a transformed legal profession that is cohesive, accountable, efficient and independent; establish mechanisms necessary for the provision of equal opportunities for all legal practitioners in Kenya; protect and promote the interests of consumers of legal services and the public interest generally, by providing a fair, effective, efficient and transparent procedure for the resolution of complaints against legal practitioners; develop and facilitate adequate training programmes for legal practitioners.

3.2.2 Uganda

Uganda was a British colony and thus English legal system and law are predominant in Uganda. Its legal system is based mainly on English Common Law.

The current legal regime governing the legal profession is found in the Advocates Act,[159] the Uganda Law Society Act [160]plus the regulations made there under and the Law Development Centre Act[161] which administers the bar course training.

[157] Act No. 21 of 2014.

[158] Section 3 of the Act.

[159] Cap. 267. The Advocates Act, enacted in 1956, was extensively amended in 2002 pursuant to the

The Advocates Act is the most important of the laws regulating the practice and provision of legal services by advocates. It establishes the Law Council[162] which is the supervisory body over professional legal education including continuing legal education (CLE). It also supervises and controls the provision of legal aid. Above all, it has to advise and make recommendations to the Government on matters relating to the legal profession.

The Registrar is required to keep a roll of advocates,[163] and to be admitted into the roll of advocates one must have complied with such requirements as to the acquisition of professional skill and experience as may be specified in regulations made for that purpose by the Law Council.[164]

The procedure is through an application to the Chief Justice. When the Chief Justice is satisfied that the applicant is a fit and proper person to be an advocate, he directs the Registrar to enter the name of the applicant on the Roll upon payment of prescribed fees. The Registrar has to comply with such a directive.

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recommendations of the Odoki Committee. The amendments widened access to the profession by accommodating Ugandan entrants with foreign qualifications and those who had been admitted to practice in other common law jurisdictions. Measures for quality assurance and control over legal education were introduced in view of liberalization of university education.

[160] Cap. 286. The Uganda Law Society Act has never been amended since its enactment in 1956. In several respects, it does not rhyme with the times.

[161] Cap. 132 of 1970.

[162] Section 3 and 4 of the Advocates Act; It exercises through the medium of the Committee on Legal Education and Training, general supervision and control over professional legal education in Uganda, including continuing legal education for persons qualified to practice law in Uganda; it advises and make recommendations to the Government on matters relating to the profession of advocates; it exercises, through the medium of the Disciplinary Committee, disciplinary control over advocates and their clerks; it exercises general supervision and control over the provision of legal aid and advice to indigent persons; and exercises any power or perform any duty authorized or required by the Advocates Act or any other written law.

[163] Section 7 of the Advocates Act.

[164] Section 8(1) of the Advocates Act.

The qualifications for entry to the legal profession are stipulated in section 6 of the Act: a degree in law from a University in Uganda; or a degree in law, obtained by a Ugandan citizen, from another university outside Uganda recognized by the law council; and professional training the Bar Course.[165]To be admitted to the bar, besides meeting the academic requirements a person must also meet certain personal and ethical requirements including: not being adjudged bankrupt, is not subject to professional misconduct proceedings,[166] has not been convicted of a criminal offence involving moral turpitude[167]and sentenced to a term of one year or more, without the option of a fine.

Upon admission to the bar, the advocate has to fulfill ongoing requirements to remaining in the roll; which include attending courses in continuing legal education. Registrar shall issue a practicing certificate to every advocate whose name is in the roll and who applies for such a certificate and upon payment of such fee as the Law Council may prescribe.[168]

Section 13 of the Act allows for the temporary admission of advocates or any legal practitioner who has come or intends to come to Uganda for the purpose of appearing or acting in a case or matter.
However, such person shall only be entitled to appear or act in the case or matter for the purpose for which he or she is admitted; and when appearing in any court in the conduct of the case or matter he or she appears together with, an advocate with a valid practicing certificate or a person who meets the qualifications specified in section 6 discussed above. Such practitioner or advocate is required to pay the prescribed fees.

[165] Ugandan citizens must earn a Diploma in Legal Practice from the Law Development Centre in order to gain admission to the Roll of Advocates.

[166] This happens where the Disciplinary Committee is of the view that there is a prima facie case against the advocate and the alleged misconduct of the offence is one involving gross moral turpitude.

[167] Moral turpitude includes fraud and dishonesty.

[168] Section 11 of the Advocates Act.

Disciplinary Resolution Mechanism

Section 18 of the Act establishes the Disciplinary Committee mandated to hear and make determinations on complaints against an advocate of professional misconduct.[169] An appeal from decisions of the Disciplinary Committee lies with the High Court and the same is heard and determined by three judges.[170] In section 28, whatever orders are made against an advocate must be drawn up and noted in the roll of advocates.

Section 29 of the Uganda Advocates Act contains a very important provision with regard to cross border legal proceedings. It stipulates that where an advocate or legal practitioner (by whatsoever name or style designated) who is entitled to practice as such in, any East African country, is suspended from practice or struck off the roll or list of advocates or legal practitioners, in that country by order of a competent court or other competent authority in that country, he or she shall be deemed to have been suspended from practice as an advocate in Uganda. But if in any such case the name of the advocate is restored to the aforesaid roll or list of advocates or legal practitioners in that country, or if he or she otherwise becomes entitled again to practice as provided in that country, his or her name shall, on request, be replaced on the roll by the registrar.

The Uganda Law Society Act establishes the Uganda Law Society in Section 2 whose main objects include: to maintain and improve the standards of conduct and learning of the legal profession in Uganda; to facilitate the acquisition of legal knowledge by members of the legal profession and others; to represent, protect and assist members of the legal profession in Uganda as regards conditions of practice and otherwise. Any person entitled to practice by virtue of section 6(2) of the Advocates Act, who applies for membership, shall be admitted as a member of the society subject to payment of such annual subscriptions as may from time to time be prescribed.[171]

[169] Section 20 of the Advocates Act.

[170] Section 22,23,24,25 and 26 of the Act.

[171] Section 6 of the Act.

The Law Development Centre Act[172] establishes the Law Development Centre (LDC) in section 2 of the Act mandated to organize and conduct courses of instruction for the acquisition of legal knowledge, professional skill and experience by persons intending to practice as attorneys. The Law Council shall determine such subjects to be undertaken. LDC offers a one-year course in legal practice. For a person to be admitted to the school one has to be holding a degree in law granted by a university in Uganda whose programme has been accredited by the Law Council or be a Ugandan citizen who is a holder of a degree in law obtained from a country operating the common law system. The person must also pass pre-entry examination.

3.2.3 Tanzania

Tanzania's legal system is based on the English Common Law system derived from its British colonial legacy. Its legal framework governing the legal profession is contained in the Advocates Act, the Law School of Tanzania Act and also the Tanganyika Law Society Act.

The Advocates Act is the most important of the laws regulating the operations of advocates in Tanzania.[173] It stipulates the provisions for the qualifications of persons who may be admitted as advocates, manner of admission as well as the discipline mechanism. It establishes institutions which facilitate its functioning; these institutions include: Council of Legal Education (CLE), Office of the Chief Justice and the Advocates Committee.

Section 5A of the Act establishes the CLE and outlines its mandate in section 5B to include general supervision and control of legal education in Tanzania.

[172] Chapter 132.

[173] This is the position in the other East African Community Partner States.

Section 6 of the Act requires the Registrar to maintain a roll of advocates, and every person qualified to practice as an advocate is to be entered upon that roll.[174]Section 8 of the Act stipulates the requirements that one must meet to be admitted as an advocate and they include one must be a holder of degree of law, is a legal practitioner, thereby having right of audience before any court having unlimited jurisdiction in civil and criminal matters in any commonwealth country. The Applicant/Petitioner besides acquiring professional qualification is also required to tender evidence that: he has complied with requirements pertaining to the acquisition of professional experience as may be specified in the regulations made by the CLE, has been in continuous practice as an advocate in Kenya, Uganda or Zanzibar during the five years immediately preceding his application. A person having these qualifications may apply to the Chief Justice that such person be admitted as an advocate.

The Chief Justice upon receiving a petition has to satisfy himself as to the qualifications and suitability of the applicant, possession by the applicant of adequate knowledge of the language of the court, production of such testimonials as to character. Once the Chief Justice is satisfied with such requirements, he may admit the applicant as an advocate. The Advocate so admitted shall submit certificate of admission and pay prescribed fees before such person can be entered in the Roll of Advocates. The Registrar, upon production of an admission certificate signed by the Chief Justice, and on payment to the Registrar of the prescribed fee, shall enter on the Roll of Advocates the name of the person so admitted.[175]This is the roll of advocates which the Registrar is required to maintain[176] and to enter upon it every person qualified to practice as an advocate in Tanzania.[177]

[174] Section 7.

[175] Section 8(4).

[176] Section 6.

[177] Section 7.

Disciplinary Resolution Mechanism

The Advocates Committee is the main disciplinary authority for advocates. It's established under section 4 and 5 and is charged with the responsibility of hearing and determining any allegation of misconduct made against any advocate by any person.[178]It has original jurisdiction in matters of discipline and any appeal from its decisions lie to the High Court of Tanzania siting as a full bench of not less than three judges. [179]

The Registrar has a duty to issue certificates authorizing advocates to practice as advocates[180]upon the application by every advocate as stipulated in section 35 of the Act.[181]

Law School of Tanzania Act[182] established the Law School of Tanzania[183]mandated to offer, conduct and impart practical legal training programmes as may be prescribed by the council; promote and provide opportunities and facilities for the study and for the training in legal practice and allied subjects; conduct exams and grant awards of the governing board in practical legal training and to establish associations with other colleges and institutions both nationally and internationally. Section 11 of the Act stipulates the qualifications for one to be admitted to the school.

Tanganyika Law Society Act[184]is the enabling legislation for lawyers practicing in Tanzania and is mandated to oversee and regulate lawyers.[185]

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[178] Section 13.

[179] Section 24A.

[180] Section 34.

[181] That is deliver or send to the Registrar a written declaration in the prescribed form in duplicate stating the name and place of business of the applicant and the date of his admission and signed by the applicant or his partner; pay to the Registrar the prescribed fee; for the practicing certificate; pay into the funds of the Law Society the annual subscription for the current year prescribed under the Tanganyika Law Society Act

[182] Act No. 18 of 2007.

[183] Kenya, Uganda and Tanzania are at bar. Although Kenya established its law school a long time ago, 1963 while Uganda established the Law development Centre of Uganda in 1970.

[184] Cap 307 R.E. 2002.

[185] Section 3.

Its objectives are outlined in section 4 of the Act: maintaining and improving of standards of conduct and learning of the legal profession in Tanzania. It also facilitates the acquisition of legal knowledge by members of the legal profession. It assists government and courts in all matters affecting legislation and administration and practice of law in Tanzania. It also represents, protects and assists members of the legal profession in Tanzania as regards the conditions of practice or otherwise. All advocates are mandated to be members of the Tanganyika Law Society and the East Africa Law Society.[186]

3.2.4 Rwanda

Rwanda has a dual legal system that embraces aspects of both civil and common law although it is gradually moving towards a more common law based system.

The Bar Association in Rwanda is established by an Act of Parliament; [187]which fulfills the role of legal representation and regulation of its members and the administration of justice. The Law establishing the Bar Association is the key legislation governing the legal profession. It stipulate among others: the terms and conditions of access to and practicing the profession. It is particularly the case for: the procedures for entry into the profession, in particular, the preparation of tests; the regulation of the professional internship; and continuing training.

[186] Section 7(1).

[187] Law No 83/2013 of 11/09/2013 establishing the Bar Association in Rwanda and determining its organization and functioning.

Article 4 of the Act establishes the Bar Association [188] whereas Article 6 stipulates the qualifications that one must possess in order to be able to practice as an advocate. These are: one must be a Rwandan national; hold at least a Bachelor's degree in Law or its equivalent; have a recognized certificate from Institute of Legal Practice and Development (ILPD) or its equivalence; not definitively sentenced to a term of imprisonment equal to or exceeding six (6) months; to have passed the test conducted by the Bar Association; not convicted for the crime of genocide perpetrated against the Tutsi; and not convicted for the crime of genocide ideology and related offences.

A foreigner may also be allowed to practice as an Advocate on condition of reciprocity or in accordance with international agreements to which Rwanda is a party.[189] Where their national legislation provides for reciprocity and subject to international agreements, Advocates from foreign Bar Associations shall be granted the right to practice, provided they observe the regulations governing the Advocates' profession in Rwanda. The President of the Bar Association shall have the power to grant such authorization. Advocates from States which have concluded a regional integration agreement with Rwanda shall be allowed to practice in Rwanda as provided for in such regional integration agreement.

To be admitted to the roll of the bar association, a person applies to the council of the Bar Association furnishing documents showing that he/she fulfills all the necessary requirements for practicing as an Advocate.[190] Advocates on the roll of advocates are required to pay subscription fees determined by the council of bar association. [191]

[188] The Bar Association shall comprise the following organs:

i. the General Assembly;
ii. the Council of the Bar;
iii. the President of the Bar.

[189] Article 7.

[190] Article 8.

[191] Article 52.

Article 24 of the Act establishes the Council of Bar Association whose mandate[192] is to examine and decide on the issues related to the practice of the Advocates' profession, and give advice, on its own initiative or upon request on any other matters relating to the Bar Association; make decisions on the enrollment on the roll of the Bar Association; to put in place regulations meant for the promotion of Advocates' profession; to implement disciplinary measures that are provided for.

The Act provides for the creation of committees of the Bar. Key among them is the Permanent Disciplinary Committee[193] established under Article 26 and mandated to consider all claims that are linked with the discipline of Advocates; to decide on issues referred to it, to take disciplinary measures; to fight injustice and discrimination; to monitor the conduct and the practice of Advocates; to ensure compliance with the laws and regulations governing the Advocates' profession.

[192] Article 25 of the Act.

[193] In addition to the Standing Disciplinary Committee, and pursuant to Article 25 of the Act, the Rwanda Bar Association has established, the following Committees: -

a. Committee on access to the profession and training;
b. Committee on ethics and the practice of the profession;
c. Committee on legal and judicial aid;
d. Budget and Finance Committee;
e. Committee on Legal Affairs, legislation and the human rights;
f. Institutional and international relations Committee;
g. Committee for Social Affairs, public relations, Protocol, youth and recreational activities. 239 Article 77.

In order to be eligible to practice as an Advocate in Rwanda or practice related activities one must be enrolled to the roll of Advocates or the List of interns.[194] Advocates registered in foreign bar associations are eligible to practice in Rwanda. Article 78 provides that they may do so only occasionally upon written permission from the President of the Bar, who shall grant it in light of, on the one hand, a recommendation of the President of the Bar of origin, and on the other hand, documents establishing the existence of reciprocity referred to in Article 80 the Regulation. Such foreign advocates shall be governed by Rwanda laws during their stay in Rwanda and are to pay requisite fee.

To be admitted to the bar, a request to the President of the Bar is made;[195]and the applicant must furnish documents evidencing among others their completion of a Bachelor's degree and a certificate from ILPD.[196]

Applicants from foreign nations seeking admission are required to supply same or equivalent documents. In addition they should supply documented evidence establishing to the requisite standard that in his/her country of origin, Rwandan candidates can also be admitted to practice the profession of Advocate. Nationals of the countries of the East African Community are exempted from this last condition. This is of great relevance to this study.

Applicants are to sit for a written test and sometimes if necessary an oral test is administered.[197]Upon passing the test one takes an oath,[198]and the council of the Bar immediately registers the advocate to the roll of advocates.[199] The Act has an obligation for each advocate to annually commit to pursue mandatory continuing professional training.[200]

[194] Article 77.

[195] Article 79.

[196] This is the requirement applicable after 11/3/2016.

[197] Article 82.

[198] Article 86.

[199] Article 87.

[200] 130(9) of the Act.

3.2.5 Burundi

The Burundian legal system is largely based on German and Belgian civil codes and customary law. Considering its relatively young economy, Burundi can greatly benefit from employing measures aimed at setting in place appropriate rules, administrative procedures and forms for effective performance of international commercial arbitration, qualifying and accrediting arbitrators, providing administrative services and other technical services in aid of arbitration and general sensitization of the public on international commercial arbitration. This will go a long way in building capacity and affording the country the ability to engage competitively with the other EAC Members.

For an effective and efficient integration of Burundi within the East African Community, the Government of Burundi has put capacity building in English language skills among its key priorities. Currently, English is the working language of the East African Community (EAC) as stipulated by the Treaty for its establishment.

3.3 The admission of non-citizens to practice law by the East African Community (EAC) member states through Cross-Border Practice

An aspect of the Common Market is the free movement of persons, the right of establishment and provision of services by East African citizens throughout the region; in fairly simplistic terms, the right of a Burundi lawyer to be admitted and to establish chambers in Uganda. The legal implications of the Common Market are to prohibit discrimination based on nationality. As a general rule, Regulations as to qualification, discipline and other matters of supervision and control, if applicable to both nationals and non-nationals, are acceptable unless they infringe another aspect of Community Law.

What this means, therefore when fully implemented, is that professionals will be free to move and establish firms within the region, provided they comply with the national laws regulating the profession. Since a convenient form of informal cross-border practice is already in existence through twining of firms, a flood is most unlikely. Nevertheless, the law should be prepared for the realities of the Common Market. It may be noted that members of the Uganda Law Society have been preparing for this through their deliberations at the East African Law Society (EALS). Kenya took the lead by enabling the citizens of Tanzania, and of, Uganda to enroll and practice in Kenya, provided they have the qualifications specified by the Advocates Act of Kenya, or equivalents (section 13(2) of the Kenyan Act).

3.3.1 The status of the envisaged cross-border legal practice in the East African Community Member States

From the foregoing discussion, it is apparent that admission to practice law is highly regulated by Statute in all the East Africa Community partner states. Besides the Advocates Act, there is a host of other laws regulating the legal profession; these include statutes establishing bar associations and those that regulate legal training.

The purpose of regulation is to maintain quality and standards in the profession, to protect consumers and to ensure maintenance of professional ethics and etiquette. The Advocates Acts of the individual countries as discussed however remains the key statutes in the partner states establishing regulatory bodies, prescribing qualifications for admission to practice law, stipulating the requisite practical training prior to enrolment and setting out procedures for admission. Some of the key features of individual partner states include:

- Rwanda and Burundi have fundamentally different legal systems as the two were Belgian colonies and therefore follow the Francophone civil law system, while the three founding members Kenya, Uganda and Tanzania were all British colonies after 1945 and therefore follow the common law system.
- With the exception of Rwanda and Burundi, all other jurisdictions apply a nationality requirement in order to practice domestic (host) law or to be admitted in those jurisdictions.

- Temporary admission on a case by case basis is permitted in all jurisdictions. In the cases of Tanzania and Uganda, this is further limited to lawyers from certain jurisdictions or those with whom a reciprocal agreement is in place.
- Rwanda automatically recognizes all EAC license holders and they are allowed to practice domestic (host) law.
- Uganda allows advice on domestic (host) law, restrictions only apply to court representation.
- Rwanda and Burundi have no restrictions provided there is a mutual recognition agreement or reciprocity from the home bar of the migrant lawyer.

Thus to realize the envisaged cross-border activity of advocates it is necessary to establish common rules to regulate cross border practice within the East African Community. This is the subject of the East African Community Cross Border Legal Practice Bill which, at the time of writing, is yet to be passed by the relevant organs of the community.

There are several on-going discussions by national societies and associations and by the East African Law Society on the harmonization of legal systems and curricula as a way of enhancing the efficiency of cross border practice activities of advocates within the community. For example, the East African Law Society, under its Professional Development Programme, is working towards the adoption of a common code of practice, conduct, ethics and etiquette to enable the adoption of regional best practice and absorption of enhanced knowledge and skills of East African lawyers on litigation and application of community law.

The East African Community commissioned a regional study, carried out by the International Law Institute, with a view to harmonize legal training curriculum and harmonize legal and regulatory framework governing legal training, certificate and practice within the community. The envisaged criteria for cross border legal practice would include: a recognized law degree; membership of national and East African Bar associations; certification as advocate in home country; being subject to disciplinary procedures in home and any other East African community country where the advocate wishes to practice, professional liability and fidelity insurance, compliance with ethical and practice rules in host country.

3.3.2 Some of the challenges affecting implementation of cross-border legal practice in the East African Community Member States

There are various challenges that are encountered in the EAC with regard to the implementation of the EAC CMP. These range from regulations set by the professional bodies (law societies and bar associations) in all the EAC jurisdictions and the historical traditions and legal systems of individual countries that can be construed as potential obstacles to integration of legal services in the EAC and include the following;

i. Discrepancies in levels of amendment of national laws within the partner states to facilitate the rights and freedoms envisioned under the CMP with regard to services. Kenya and Rwanda has recorded tremendous progress on this.

ii. While Kenya, Uganda and Tanzania share a common legal system (Common law), Rwanda and Burundi have the civil law system. This state of affairs presents difficulties due to the different legal procedures and practices where national laws are used in settlement of commercial disputes. Different legal systems also create a difficulty for interested advocates. One is required to be familiar with both legal systems in order to be able to practice in another partner state whose legal system is different from that of the home country.

iii. Different rolls of advocates in each partner state; this makes it difficult for advocates from outside the host country to engage in legal practice without having to ensure that their names are contained in the roll of advocates in the states they wish to practice.

iv. Some countries have weak regulatory frameworks in national levels making it difficult if not almost impossible to develop one at the regional level.

v. Different political systems create a challenge in the sense that political environment determines the dimension in which a country is run and governed. Where there is no political goodwill, then achieving CBLP becomes a mirage.

vi. There exists a language barrier since not all the partner states use the same official language. This presents a major challenge to advocates intending to practice in a country within the EAC whose official language is different from the one used in the home country.

vii. Nationalistic tendencies which may breed protectionism of the different legal markets and contempt for legal practitioners from outside the jurisdiction as well as disparities in bar associations within the region where there is no goodwill or mistrust between the various bar association hence creating an uncomfortable working environment which hinders the development of CBLP.

Against this background, creation of an enabling legal and regulatory environment should be a critical factor for the effective implementation of the CBLP at national and regional levels. To achieve operational efficiency of such strategies, strong back up support is needed in terms of legislation and regulation. Therefore policies and regulatory frameworks of this sector should be aligned to this objective.

3.4 Conclusion

This chapter has discussed the various legal regimes in the member states to the EAC. It has also sought to establish the challenges facing cross border legal practice being the different regulatory mechanisms and lack of uniformity in the admission requirements among others. It concludes by asserting the fact that given the much needed legal services in the continued integration of the East African Community, coupled with already existing forms of cooperation between advocates in the region, it is imperative that every effort is made to encourage the various on-going initiatives to create an enabling environment for cross-border legal practice and to sensitize all stakeholders in this respect.

CHAPTER 4: CROSS BORDER LEGAL PRACTICE UNDER THE EUROPEAN UNION

4.1 Introduction

This Chapter discusses the applicable treaty provisions, directives, and case law that have shaped the EU's progress toward an integrated legal market. The laws of the European Union (EU) have been structured to allow lawyers considerable freedom to practice in all Member States of the EU.[201] In the last 25 years, lawyers both within and outside the EU have realized substantial benefits from the easing of restrictions on admission to the legal profession. A combination of legislation and case law has steadily expanded interstate legal practice rights, making the multistate practice of law a reality throughout the EU.[202] Lawyers from any State are able to represent clients on a continuous basis throughout the EU, practice virtually any type of law within any EU country, and form multinational law firms with offices in any EU commercial center.[203] In short, lawyers are able to pursue a modern international legal practice throughout most of Europe.[204]

4.2 EU TREATY

The EU's attempts to harmonize the legal profession are based on the Treaty Establishing the European Economic Community (Treaty of Rome)[205] which established as a primary goal of the EU the creation of an internal market without internal frontiers, where goods and services are to be traded freely and easily: this is pursuant to the purpose clause in Article 3. To fulfill the 'purpose clause' of the Community, Article 3 declares specific objectives which include the free movement of persons (allowing EU citizens the right of establishment in another EU country),

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[201] The European Community (EC) became the European Union (EU) when the Treaty on European Union (TEU), signed in Maastricht, came into force in November, 1993. For purposes of consistency, this Paper will refer to the pre-November 1993 EC as the EU.

[202] Roger J Goebel, "The Liberalization Of Interstate Legal Practice In The European Union: Lessons For The United States?' (2000) 34 *Int'l Law* 307.

[203] *IBID.*

[204] *IBID.*

[205] Treaty Establishing the European Economic Community (entered into force Jan. 1, 1958).

and the free movement of services (allowing EU citizens the freedom to provide services in another EU country).[206]

4.2.1 The Freedom, Trade Liberalization and Right of Establishment within the EU under the EU Treaty

Articles 43 through 48 of the EC Treaty grant to every EU citizen the right to establish a permanent practice or business in another EU country. The right of establishment is based primarily on Article 43, which reads, in its relevant part, as follows:

> *[R]estrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms ... under the conditions laid down for its own nationals by the law of the country where such establishment is effected.*

Thus, Article 43 identifies three major aspects of the right of establishment:

(a) the right to set up agencies, branches, and subsidiaries;

(b) the right to conduct activities as a self-employed person; and

(c) the right to set up and manage companies and firms.

On account of this provision community nationals can freely move to another member state to establish on a permanent basis and pursue an economic activity in a self-employed capacity, under the same conditions as nationals of hosts' states. Article 43 is especially significant for its protection against discrimination. This means that a self-employed person cannot be prevented from establishing himself in another Member State simply because of his nationality. Thus, all EU practicing lawyers have an enforceable right under the EC Treaty to establish a practice in another Member State on the condition that they meet the national laws that apply to nationals and non-nationals alike.

[206] *IBID.*

In order to further the EU goal of freedom of establishment, Article 44 authorizes the Council to issue directives and to describe specific areas of concentration for legislative programs. Article 47 is especially relevant for the rights of lawyers. It authorizes the Council to issue directives 'for the mutual recognition of diplomas, certificates and other evidence of formal qualifications,' and 'for the coordination of the provisions laid down by law in Member States concerning the taking up and pursuit of activities as self-employed persons'. Almost all practicing professionals in the EU are required to obtain some type of license to practice, which is granted only after a professional has proven his educational or professional credentials. Before the implementation of Article 47, professionals found it extremely difficult to obtain a professional license if they had received their training in another Member State. The purpose of Article 47 was to promote professional mobility by permitting legislative harmonization of standards for education and training, and the recognition of diplomas or certificates awarded at their conclusion.

4.2.2 Exceptions/Restriction to the Right of Establishment

The freedom of establishment is not unlimited; the treaty contains two derogations from the provisions. The exceptions are covered in Articles 45 and 46. Article 45 authorizes a Member State to limit the establishment rights of a foreign professional when the services he seeks to provide are 'connected, even occasionally, with the exercise of official authority'. The term 'official authority' has led to much litigation due to its vagueness. Its interpretation must be done on a case by case basis taking into account national provisions governing the official activity.[207] In *Reyners v Belgium*[208], the first landmark judgment in the area of free movement of lawyers, the Court was asked to determine whether the whole legal profession was exempt from free movement because activities are connected with exercise of official authority. The ECJ held that a lawyer's profession does not involve a direct and specific connection with the exercise of official authority and therefore is not limited by Article 45. It stated that it didn't apply because the activities do not have a strong enough connection with the exercise of official authority, even though the activities involve regular contacts and co-operation with the courts. Article 46 authorizes a Member State to limit the establishment rights of a foreign professional on the grounds of public policy, public security, or public health.

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[207] Condinanzi, Massimo, Lang, Alessanda and Nazeimbene, Bruno: *Citizenship of the Union & Freedom of Movement of Persons* p. 120-121.

[208] Case 2/74, *Jean Reyners v. Belgium*, [1974] ECR 631.

4.2.3 The Freedom to Provide Services

While Articles 43 through 48 grants to every EU citizen the right of establishment, Articles 49 through 55 grants to every EU citizen the freedom to provide services. The right of EU citizens to provide cross-border legal services to citizens of another Member State is based primarily on Article 49, which reads as follows:

> *[R]estrictions on freedom to provide services within the Community shall be prohibited in respect to nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.*

This provision provide for the abolition of restrictions hindering cross-border services and guarantees the right for community nationals established in one member state to carry out economic activity for a temporary period in a member state whether either the provider or receiver of the service isn't established using the national professional title without having to apply for recognition of qualifications.

Article 50 allows an EU citizen, who is providing a service, to 'temporarily pursue his activity' within another Member State. Article 50 further states that persons providing services cannot be discriminated against on the basis of their nationality, since the service provider may pursue his activity 'under the same conditions that are imposed by that State on its own nationals'. Article 52 authorizes the Council, to adopt legislation to achieve the EU goal of freedom to provide services throughout the Union. Article 54 requires Member States to give national treatment to providers of services from other Member States.

4.2.4 Exceptions/Derogation from the freedom to provide legal services

Article 55 allows Member States to place restrictions on the providing of trans-border services in order to protect 'public policy, public security or public health'. However, this restriction has rarely been used by the Member States.

4.3 Directives

Article 44[209] and 52[210] required the council to draw up a general programme and issue directives to abolish all remaining restrictions on the freedom of establishment and freedom to provide services. However, the transition period ended before these requirements had been fulfilled. Although the Commission proposed many draft directives, the Council did not adopt any of them due to serious disagreement between Member States as to the proper level of professional education and training, and the scope of professional activities. Therefore, adoption was delayed because the Council could not reach a unanimous agreement.[211] Aggravating the slowdown was the fact that the Member States were not giving a 'direct effect' to the treaty provisions that granted the right of establishment. Instead, they were waiting for the Council to issue a directive to establish the scope of these Articles.[212]

This could have created a setback in the development of a single market for the European citizens but the Court intervened in confirming the direct effects of the provisions on establishment and services despite the absence of secondary legislation. In 1974, the ECJ finally ended this setback to the achievement of professional rights with its landmark decision in *Reyners v Belgium*.[213] Reyners was a Dutch citizen who was domiciled in Belgium and had obtained a Belgian law diploma, but was denied the status of a Belgian *avocat*. Since Belgian law required Belgian citizenship as a condition for the status of avocat, Reyners' application was

[209] Article 44 provides that before the expiry of the first stage, the Council, acting by means of a unanimous vote on a proposal of the Commission and after the Economic and Social Committee and the Assembly have been consulted, shall lay down a general programme for the abolition of restrictions existing within the Community on freedom of establishment. The Commission shall submit such proposal to the Council in the course of the first two years of first the stage. The programme shall, in respect of each category of activities, fix the general conditions for achieving freedom of establishment and, in particular, the stages by which it shall be attained.

[210] Article 63 provide that before the end of the first stage, the Council, acting by means of a unanimous vote on a proposal of the Commission and after the Economic and Social Committee and the Assembly have been consulted, shall lay down a general programme for the abolition of restrictions existing within the Community on the free supply of services. The Commission shall submit such proposal to the Council in the course of the first two years of the first stage.

[211] *IBID*.

[212] *Van Gend En Loos v Nederlandse Administratie Der Belastingen* (C-26/62) [1963] ECR 1.

[213] *Reyners v Belgian State* (C-2/74) [1974] ECR 631.

denied. On appeal, the Belgian Supreme Administrative Court, the *Conseil d'Etat*, asked the ECJ for a ruling on whether Article 43 had direct effect. In its opinion, the Court stated that 'the rule on equal treatment with nationals is one of the fundamental legal provisions within the Community'.[214] The Court went on to hold that 'the rule of national treatment' is effective even if the Council fails in its obligation to pass the implementing directives. However, directives are still desirable and needed because they can 'promote the effective exercise of the right of freedom of establishment'. Reyners was a major breakthrough for lawyers who were prevented from practicing in other Member States, particularly for its holding that Article 43 had a 'direct effect' for professionals seeking to rely on the right of establishment.[215] This meant that professionals no longer had to wait for the Commission to implement a directive. Instead, they could immediately receive the benefits of EU membership. We now proceed to see the legislator's role in creating a single European market for lawyers without justified obstacles.

4.3.1 Directive 77/249 (Service Directive)

This was the first initiative towards regulating lawyers' free movement. It was adopted as Council Directive 77/249/EEC of March 22, 1977 to facilitate the effective exercise by lawyers of freedom to provide services.[216] The Service Directive is significant because it marked the EU's first attempt to allow lawyers the freedom to build a cross-border legal practice.[217] The directive sets forth the principle of mutual recognition among Member States of professionals' licenses. In its opening statement it states that if lawyers are to exercise effectively the freedom to provide services, host members must recognize as lawyers those persons practicing the profession in various member states. Consistent with Article 49 of the EC Treaty, it allows lawyers from one Member State to provide temporary legal services in another Member State. While providing their services, lawyers may advise their clients on different areas of the law, including the law of the host State where temporary services are rendered.[218] However, lawyers

[214]This rule is derived from Articles 14-16 of the EC Treaty.

[215]*IBID.*

[216]Council Directive 77/249, 1977 OJ (L78) 17.

[217]Jonathan Barsade, 'The Effect of EC Regulations upon the Ability of US Lawyers to Establish a Pan European Practice' (1994) 28 *Int'l Law* 313, 319.

[218] Proposal for a European Parliament and Council Directive to Facilitate Practice of the Profession of Lawyer on a Permanent Basis in a Member State Other than that in which the Qualification was Obtained, COM(94) 572, 2 [hereinafter 'Explanatory Memorandum'].

may only render their services under the home State professional title and not under the host State professional title.[219]

While the Service Directive is significant for being the first time the EU has addressed the issue of cross-border legal services, its practical effect was somewhat limited in scope.[220] The directive permits the host Member State to impose certain technical requirements on lawyers from other Member States.[221] Perhaps the most important limitation on the directive's power is Article 5, which requires visiting lawyers to act in conjunction with a host state lawyer and to be introduced to the local authorities, including 'the presiding judge and, where appropriate the President of the relevant Bar,' by the host state lawyer with whom they will be working together.[222]

Some Member States experienced considerable difficulty implementing the Service Directive as national law. Due, in large part to the technical requirements of Article 5, the Service Directive has been the issue of several ECJ judgments. In 1985 *Commission v Germany*, the Commission brought an action against Germany on the grounds that the German rules did not properly follow the language of the directive.[223] When Germany introduced its national rules to apply the terms of the directive, Germany required the foreign lawyer to work together with a German lawyer when providing legal services. Moreover, the local German lawyer had to be present at all times during the court proceedings. Germany argued that its national rules were justified by Article 5 of the directive, which allows a Member State to require foreign lawyers 'to work in conjunction with' a host State lawyer. The Court ruled that the German requirements were excessive and too restrictive. The Court specifically held that Article 5 of the directive, which refers to local lawyers as being 'answerable' to the host state court, did not imply that the local lawyer became

[219] Opinion of the Economic and Social Committee on the Proposal for a European Parliament and Council Directive to Facilitate Practice of the Profession of Lawyer on a Permanent Basis in a Member State Other than that in which the Qualification Was Obtained, 1995 OJ (C 256) 14, 14.

[220] Nicholas J Skarlatos, 'European Lawyer's Right to Transnational Legal Practice in the European Community' (1991) 1 *Legal Issues Of Eur Integration* 49, 55.

[221] Directive 77/249, Art 5.

[222] *IBID.*

[223] *Commission v. Germany* (C-427/85) [1988] ECR 1123.

the primary representative of the client or of the foreign lawyer, or that he must be continuously present during court room proceedings. Instead, the foreign lawyer and the local lawyer should decide upon their respective roles in a 'form of cooperation appropriate to their client's instructions'. The Court also rejected the German argument that foreign lawyers working without the full cooperation of a host state lawyer might have insufficient knowledge of German law. The Court referred to the lawyer's need to have adequate knowledge of German law when representing his client, 'who is free to entrust his interests to a lawyer of his choice'. Thus, *Commission v. Germany* facilitated cross-border legal practice by its liberal interpretation of the Directive 77/249 within the context of interstate legal representation.

Another limitation is seen where member states may reserve to certain categories of lawyers estate administration of deceased persons, the drafting of formal documents for real estate transfers.[224] This approach influenced from civil law states where these activities are reserved to the separate notarial profession.[225] Example is in the UK and Ireland where certain activities are reserved to solicitors.[226]

When it comes to rules to govern the conduct of the lawyer in providing legal services in another state Article 4 provides that home state rules apply except in legal proceedings or proceedings before public authorities where the relevant host state rules are applicable unless they require a registration in the host state. Although a lawyer remains subject to the home state regulations, he must at all times respect the host state rules especially those concerning the type of activities which are incompatible with legal services in the state, professional secrecy, relations with other lawyers, conflict of interest and publicity.

Lawyers providing services must observe the rules of the host state without prejudice to his obligation in the home state where he is established. A lawyer is therefore to respect two sets of rules. The principle of double dentology; that is a lawyer providing services in another member

[224] Article1(1).

[225] Goebel, Roger J: "*The Liberalization of interstate Legal Practice in the European Union: Lessons from the US*,"p. 419.

[226] Adamson, Harnish 'Free Movement of Lawyers. P. 48.

state will be subject to two sets of rules of professional conduct, that of the home state and those set by the host state. This principle was subject to objection in the legal doctrines because of its difficulties in practice. In the *Gullung case*[227] the court made its contribution to interpreting Article 4 where it was noted that members of the legal profession providing legal services in another member state are required to comply with the rules relating to professional ethics in force in the host members state. Mr. Gullung was barred from access to the legal profession in France in accordance with the Lawyers Direcitve, because he was both a French and German nation and had previously received disciplinary measures when he worked as a notary in France. Therefore he didn't fulfill the dignity, good repute and integrity criteria of French regulation governing the legal profession. The court rejected his argument that the directive was only applicable at the time of his providing of services and not before. If the authority in host state has already found in formal proceedings against persons that he lacks such capacity then such person is barred from access to the profession on these grounds in another community state. The court concluded that the directive cannot be relied upon by a lawyer established in one member state intending to provide services in another member state where he has been barred from access to the legal profession for reasons relating to dignity, good repute and integrity.

The Council of Bars and Law Societies of Europe (CCBE) Code of conduct comes to play in a major role in resolving this controversy as to which rules to apply. It provides for a series of harmonized rules of conduct from all the member states and offer a solution if there is a conflict between home and host state rules. From the outset it should be noted that lawyers are bound by rules of professional conduct and subject to disciplinary measures by the relevant authority in their country. These rules can vary substantially between member states. Besides the legal profession is governed by a variety of legal and moral obligations towards the client, courts, administrative authorities and the legal profession in general. This can create problems in a community of inter-state legal practices where conflicts arise between home and host state rules. This led CCBE to adopt on 28 October 1988 the code of conduct for lawyers of each national bar association. It is a document aimed at forming some sort of cross-border code and its' objective is to mitigate the difficulties resulting from the application of double deontology notably set out

[227] Case 292/86, Claude Gullung V. Conseil de L'orde des avocats du barreau de Colmar et de Saverne [1988] ECR 111.

in Article 4 and 7.2 of the Lawyers Service directive and Article 6 and 7 of the Lawyers Establishment Directive.[228] The Code has been recognized by the European Community and the ECJ and is beginning to be treated as authoritative by national courts. It has helped to resolve differences between national codes and has greatly facilitated cross border movement of legal services. Lawyers in the community are expected to respect at all times the principles laid down by the CCBE, further where there is uncertainty as which rules are applicable the CCBE code functions as a guide. The code might however not fulfill its purpose since it's only directly applicable its adopted or incorporated into national law.

Article 7 of the directive lays down that in the case of non-compliance with the rules in force in the host state, the latter is to decide what the consequences are. However, under the duty of co-operation, the host state shall notify the competent authority in the home state of each disciplinary action taken.

The lawyer's directive was the beginning of a long route towards legislating the way in which European lawyers could exercise cross border legal practices. Ensuing from its provisions, it seems lawyers providing temporary services in another member state have a complete mutual recognition of professional competence.

4.3.2 Directive 89/48/EEC (Diploma Directive)

In its efforts to further the ability of lawyers to establish cross-border legal practice throughout the EU, the Council passed Directive 89/48 of 12 December 1988 on a General System for the Recognition of Higher-Education Diplomas Awarded on Completion of Professional Education and Training of at Least Three Years' Duration.[229]

Even before the adoption of this directive, the court laid down principles that were applied in situations concerning recognition of qualifications. In the *Thieffry Case*[230], Thieffry a holder of Belgian doctorate of laws was denied admittance to the Paris Bar because he did not have a French Law Degree. This was decided even though Thieffry's degree had been recognized by a

[228] Article 1.3.1 of the Code of Conduct for European Lawyers.

[229] Council Directive 89/48, 1989 OJ (L 19) 16 [hereinafter 'Directive 89/48'].

[230] Case 71/76, Thieffry V. Conseil de l'Ordre des Avocats a la Cour de Paris [1977] ECR 765, para. 19.

French university as equivalent to a French degree. Thieffry had also passed the French Bar exam. The court found that the denial of admittance constituted an unjustified restriction on the freedom of establishment. It was maintained before the court that there could be no requirement of recognizing foreign diplomas in the absence of directives to be adopted under Article 47 EC. The court however held that such requirement could under certain circumstances be derived directly from article 43. This meant that individuals had a right to have their professional qualifications and work experience recognized in other member states despite the lack of secondary legislation.

The Court in the case of *Vlassopoulou v Ministerium Für Justiz*[231]went on to make great contribution to the question of recognition of professional qualifications. Vlassopoulou was a Greek lawyer who received a doctorate in law from a German University. After working for several months with a German law firm located in Germany, she received permission to deal with foreign legal affairs concerning Greek law and Community law. When she later applied for admission as a Rechtsanwalt (German lawyer), the Ministry of Justice refused her application on the ground that she did not have the qualifications which were necessary for admission to the profession of Rechtsanwalt. Germany insisted that she follow the normal admission procedure, which included successfully completing two State exams and an apprenticeship training period. The applicant thereafter brought an action in Federal Court in Germany which referred it to the ECJ for a preliminary ruling. Mrs. Vlassopoulou argued that although Article 43 of the EC Treaty allows Member States to formulate national requirements, these requirements should not hinder the efforts of non-nationals to establish themselves by insisting on burdensome and restrictive national rules. The Court agreed with Mrs. Vlassopoulou's argument. It stated that Germany could require non-nationals to meet certain qualifications necessary for the practice of law before being admitted (even where those qualifications hindered the establishment of non-nationals). However, the Court went on to hold that Germany could not ignore the training and educational credentials of the applicant when evaluating whether to grant her admission to the legal profession. It ruled that national requirements concerning qualifications may have the effect of hindering nationals of other member states in the exercise of their right of establishment

[231] *Irene Vlassopoulou v Ministerium für Justiz Bundes-und Europaan-gelegenheiten Baden Wurttemberg* (C-340/89) [1991] ECR 2357.

guaranteed to them in Article 43. This is especially where national rules in question took no account of the knowledge and qualification already acquired by the person concerned in another member state. At this point there was no formal procedure for examining whether the relevant diploma was equivalent to a German law degree. Therefore, Germany was obliged to recognize the foreigner's knowledge and experience and allow the foreigner to prove that she had the knowledge which she allegedly lacked. Vlassopoulou showed that Member States were obligated in all cases to compare a foreign applicant's qualifications with those required of their own nationals. Where the applicant's qualifications were equivalent to those required of its own nationals, then the host State had to accept the applicant's diploma.[232] Where the equivalence was only partial, then the host State could require that the applicant demonstrate that s/he possessed the necessary qualifications, either through professional experience or by taking courses. If refused acceptance, the applicant was entitled to a reasoned explanation and could contest the decision in a national court. The court proceeded by applying the principle of mutual recognition and stated that the competent authority in the host state has to make a comparison between the qualifications required in the host state and the applicant's qualifications in order to evaluate whether they are equivalent. The comparison is to be done on an objective basis taking into account the diplomas, certificates and other evidence of qualifications a person had.

The principle in the Vlassopolou case contributed immensely to safeguarding the free movement of law and practice in the community and it is critical as it continues to apply to cases that fall outside of secondary legislation; that is when an individual seeks to pursue a profession which is not covered by secondary legislation.

The *Diploma Directive* establishes the legal framework within which lawyers may establish a permanent practice in different Member States.[233] The purpose of the Diploma Directive is to meet the expectations of suitably qualified professionals who want to pursue a regulated profession in other Member States.[234] The practice of law falls within the provisions of the

[232] Coopers and Lybrand, 'The Impact of European Union Activities on Sport' (1995) 17 *Loy LA Int'l & Comp LJ* 245, 260.

[233] Explanatory Memorandum, 57, 2.

[234] Directive 89/48, Article 2.

directive as one such 'regulated profession' because it requires the possession of a diploma.[235] This provision is contained in Article 4 of the directive, which addresses those 'professions whose practice requires precise knowledge of national law' where providing 'advice concerning national law is an essential and constant aspect of the professional activity'. If the host State determines that a lawyer's education and training 'differs substantially from those covered by the diploma required in the host State', then the host State may impose on the lawyer either an adaptation period or an aptitude test. The adaptation period requires visiting lawyers to practice law in the host State under the supervision of a lawyer from the host State for a maximum of three years.[236] The aptitude test, in the alternative, requires visiting lawyers to take an exam assessing their abilities to pursue the practice of law in the host State. However, the directive requires that an aptitude test must be limited to the professional knowledge which is essential for the lawyer to practice law in the host State.

More than any previous measure, the Diploma Directive established the framework by which a visiting lawyer may be permanently integrated into the legal profession in a host State.[237] No longer were lawyers limited to practicing their home State's law or general EU law; instead, they were allowed to practice another Member State's law. However, Member States were slow to implement the Diploma Directive.[238] This was unfortunate since the establishment of an effective cross-border legal practice depends largely on the mutual recognition of diplomas.[239] There were two major reasons for the Member States' reluctance to implement this directive. These included the directive's vague language and the underlying disparities among the various legal systems in the EU.

4.4.3 Directive 98/5/EC (Establishment Directive)

The need to overcome the delay in achieving full implementation of the Service Directive and the Diploma Directive was acknowledged in Directive 98/5. The purpose of Directive 98/5 is

[235] Article 1(d).

[236] Article 1(g).

[237] Explanatory Memorandum, above n 57, 2.

[238] Malcolm Ross, 'Freedom of Establishment and Freedom to Provide Services: Mutual Recognition of Professional Qualifications' (1989) 14 *Eur L Rev* 162, 165.

[239] Explanatory Memorandum,

best described by its full title, which is '*to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained'*.[240] The adoption of the Establishment Directive is perhaps the most significant step in achieving freedom for lawyers to practice in other Member States. The directive allows a lawyer to become established in another Member State and to practice law on a permanent basis under his home-country professional title; [241]this could be done either as a salaried person or in a self-employed capacity. Thus a qualified legal professional from one member state and registered with the national authority is enabled by this directive to practice in another member state than where the qualification is originated.

The directive presents lawyer two options for establishing. First, is establishing in the host country and practicing under home-country professional title without having to undertake any examination; this is stipulated in Article 3. Second the directive allows for integration into the host state profession and acquisition of the professional title of the host state; this is stipulated in Article 10, discussed later in this part. A lawyer wishing to avail himself of this privilege must first register himself with the host State by providing the authorities with proof of his home State registration.[242] A lawyer wishing to practice in another member state other than the one in which he obtained his professional qualifications must do so under his home country professional title.[243]

The areas of practice are specified in Article 5 of the directive. After receiving registration in the host State, the lawyer may 'give advice on the law of his home Member State, on Community law, on international law and on the law of the host Member State'.[244] The lawyer established

[240] Council Directive 98/5, 1998 OJ (L 77) 36 [hereinafter 'Directive 98/5'].

[241] Article 2.

[242] Article 3. That is the competent authority of the host state shall register the lawyer if he can produce a certificate from the home competent authority certifying that he is registered with them. The competent authority of host state may require that the certificate is no holder than three months and shall further inform the competent authority of home state that the lawyer concerned that it has registered that lawyer.

[243] Article 4.

[244] Article 5(1).

under his home title shall comply in any event with the procedural rules applicable in the national courts of the host member state.

In Article 6 of the directive, rules of professional conduct which shall be applicable to lawyer established under their home title are subject to the host member states rules of professional conduct, notwithstanding those rules which they are subject to in their home member state. Article 7 on disciplinary proceedings against a lawyer established under his home title in another member state provides that where such lawyer fails to fulfill his obligations under the host member state; rules of procedure, penalties and remedies provided in the host member state shall apply.

Where a lawyer desires to be integrated fully in the legal profession of the host member state, he must fulfill some conditions. First, the lawyer may take an aptitude test under the system of Directive 89/48/EEC, where the competent authority of the host state deems it necessary. Subsequently the lawyer may practice under the professional title of the host member state. Second, after regularly practicing law for three years in the host State, a lawyer can avoid the aptitude test requirement and obtain the host State professional title.[245] This is where a lawyer has effectively and regularly pursued professional activities involving the law of the host member state for a period of at least three years, he shall be granted access to the legal profession of the host member state. Subsequently such lawyer shall be granted the right to practice under the professional title of the host member state without being required to take an aptitude test. Third, provided in Article 10(3) lawyers who have effectively and regularly pursued professional activities in the host Member State for at least three years, but for a lesser period than three years with regard to the law of the host Member State, including Community law. Such a lawyer may obtain admission to the legal profession of the host Member State from the competent authority of that Member State, without having to take the aptitude test. In deciding whether or not to give the lawyer concerned access to the legal profession of the host Member State, the competent authority of that State shall take into account the effective and regular professional activities pursued by the lawyer concerned. In addition, it shall also take into account all the knowledge and professional experience gained with respect to the law of the host Member State and any

[245] Article 10.

attendance made at lectures or seminars on the law of the host Member State, including the rules regulating professional practice and conduct.

Where a lawyer seeks to undertake joint practice, Article 11 of the directive comes to play. Lawyers who are established under home title may practice jointly if the lawyers practicing under the professional title of the host Member State are allowed to do so subject to certain rules. First, where the fundamental rules of the home Member State governing groupings are incompatible with the rules governing the same subject-matter in the host Member State, the rules of the host Member State prevail, as long as their application is justified by the public interest in protecting clients and third parties. Host Member State shall make it possible for two or more lawyers who are established under their home title, to practice in a form of joint practice. The manner in which lawyers practice jointly is subject to the laws of the host Member State. If the host Member State provides for more forms of joint practice for lawyers established under the professional title of the host Member State, that host Member State must also provide these forms to lawyers who are established under their home title. Lawyers who are established under their home title, but who come from different Member States, and lawyers established under their home country title may also practice jointly with lawyers established under the professional title of the host Member State.

The duty of co-operation between competent authorities of the host and home state in order to facilitate the application of the directive is stipulated in Article 13 of the directive.

Establishment Directive has been the issue of minimal but significant litigation since its adoption. In *Grand Duchy of Luxembourg v European Parliament*[246], Luxembourg which was adamant against the adoption of the directive on May 4, 1998 brought an action for annulment, alleging that Directive 98/5 infringed various articles of the EC Treaty. The specific provisions of the directive challenged by Luxembourg were Articles 5 and 11, which concern respectively the right of migrant lawyers to practice under their home-county professional title and their area of activity. Luxembourg alleged that these articles infringed the second paragraph of Article 43 of the EC Treaty by creating a difference in treatment between national and foreign lawyers and

[246] *Lux v Parliament* (C-168/98) [2000] ECR I-9131.

that public interest was prejudiced due to a lack of consumer protection. Specifically, Luxembourg argued that the Diploma Directive had recognized that national law 'is not identical or even broadly the same from one Member State to another'. Therefore, 'by abolishing all requirement of prior training in the law of the host Member State ...', discrimination occurs between national and foreign lawyers.[247] The Court rejected this argument by observing that foreign lawyers are excluded from certain practice areas such as probating estates and preparing property title transfers, and also that the host State could exclude the foreign lawyer from engaging in 'representation or defense of clients in legal proceedings...'. With regard to Luxembourg's consumer protection argument, the Court explained that consumers are forewarned by the requirement that the foreign lawyer use his home-country title in the host State. The client is also protected by the requirement that all lawyers have professional indemnity (malpractice) insurance. Moreover, clients are protected by disciplinary rules which apply to all lawyers in the host State.

4.4 Conclusion

The EU shares many common features with the EAC as a common market with a number of sovereign states and a mixture of civil and common law jurisdictions. Further both have regional courts mandated to interpret and enforce treaty provisions and in the case of the EU directives. The EU has made major milestones in integration which the EAC should learn from as demonstrated hereunder:

a) CBLP within the EU is based on the Treaty establishing the European Community which established as a primary goal the creation of an internal market without internal frontiers whereby goods and services are to be traded freely and easily. The Rome treaty envisioned a progressive elimination of restrictions on the right of nationals of one Member State to reside and practice their professions in another Member State. To this end, the Treaty of Rome directs the Council to enforce these goals through one of two means of legislation: regulations and directives. From the foregoing discussion, it should be noted that even before directives were passed, the ECJ acted as a key impetus to the realization of CBLP because it gave liberal interpretation of treaty provisions and gave

[247] Council Directive No. 89/48, OJ. L 19/16 (1989).

direct effect interpretation to Treaty provisions. Citizens of the EAC partner states should seek enforcement by the ECJ of Treaty provisions and the ECJ on the other hand should borrow from the ECJ's precedents so as to act as an impetus to liberalization of trade in legal services.

b) As already seen a number of directives were passed in the EU over the years, the EAC should follow the EU's example in enacting legislations progressively to address the key issues that affect CBLP.

c) The evolution of CBLP in the EU as demonstrated has and continues to be a long and arduous process. But the milestones achieved have been realized progressively, which is an ardent lesson that EAC should learn. Nothing was achieved overnight, but there has been continuous discourse on the subject with the level of integration improving over time. Thus notwithstanding the hurdles earlier seen, the EAC should learn from the EU and progressively work towards realizing a common market.

d) But, the essential role of the Court in the development of a system of free movement for legal professionals has been clearly demonstrated. The development was slow and the court acted as a necessary force for action when progress by the legislator was none. As seen in the *Reyners* and *Binsbergen* cases discussed above, the Court took a positive step by confirming that the rules on free movement were applicable to legal professionals and that they did have direct effects, despite the lack of prescribed secondary legislations in the field. By this the court importantly opened up for a series of cases on the interpretation of the provisions. Case law on free movement of legal services has made a significant contribution to the law on the free movement of persons.[248] Therefore the European Court of Justice acted as an engine that pushed the European Union towards its goal. The EACJ should take up the mantle of propelling CBLP too.

[248] Michael J. Chapman & PaulJ. Tauber, *Liberalizing International Trade in Legal Services: A Proposal for an Annex on Legal Services Under the General Agreement on Trade in Services,* 16 MICH.J. INT'L L. 941, 947 (1995).

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

This chapter concludes the study; it summarizes the study and makes conclusion based on research findings. It makes recommendations on how CBLP can be realized in the region especially learning from the EU.

5.2 Conclusion and Recommendations

The EAC Treaty and the CMP contains provides for rights and freedoms with regard to cross border movement of services which the six partner states have made certain commitments and steps to safeguarding those rights and freedoms. However, albeit partner states' general support for and commitment to the free movement of goods, workers and services, some partner states in the EAC are very cautious and reluctant to fully integrate. There is a remote tendency to seek to maintain their sovereignty in some of these issues. Annex V of the CMP illustrates the cautious and skeptical attitude among some partner states towards CBLP. Under this annex, only Kenya and Rwanda have fully committed themselves to eliminating barriers to cross border legal practice. Burundi and Uganda's elimination date was 2015 while Tanzania has not committed itself regarding legal services.

Additionally, this research proposes that Partner states individually need to make efforts to domesticate the EAC CMP in order to provide a more practical and realistic legal environment enabling CBLP. There is discrepancy in the steps undertaken to amend national laws within the partner states to realize the provisions of the CMP. This demonstrates the great need for attitudinal change for EAC integration process to succeed. Individual partner states ought to engage the stakeholders to make this a success. In Rwanda, there have been concerted efforts towards domestication of the EAC CMP in a framework that has involved the Bar Association as well as educational institutions. This practice should be replicated in the other EAC partner states. This study suggests that the various Professional associations in the EAC take an active role in their respective professional groups so that their views can be heard particularly in the formulation of an MRA in their profession. There is a need for a fundamental attitudinal change

if the existing platforms for engagement of non-state actors in the EAC integration processes are to achieve the purpose for which they were established. The need for non-state actors to thematically and structurally define themselves from the national up to the regional level for purposes of strengthening this engagement is also critical to the process. The input of professional groups will be significant in setting up a system defining the scope and coverage of the profession, the educational and training requirements prior to licensing procedures and other requirements before registration. These organizations are in the best position to recommend ways of narrowing international variances in the licensing of professionals towards mutual recognition**.** The success of EU processes was in some measure a result of co-operation and agreement between competent authorities in the member states.

Whereas some of the bottlenecks that hinder realization of CBLP require legal intervention in some countries to enable its success, the lack of political good will in some partner states has acted to the detriment of the noble objectives envisioned by the CMP.

The anticipated cross-border legal practice in the EAC, as envisaged in the EAC Cross Border Legal Practice Bill, which aims to open doors for practicing the legal profession across the borders in the bloc, has not been passed by the EALA. The Bill has been pending for some time now with the concerned States voicing disquiets regarding its enactment alone. Proposals have been made to have the Bill as a professional services Bill as opposed to having it exclusively as a legal practice Bill. This happens despite the fact that some member states as discussed have failed to open up for lawyers from the other EAC states as per the bloc's Common Market Protocol[249].If the Bill is passed, member states need to ratify and ensure it is implemented in order for the success of CBLP.

Where there have been MRAs[250] between the Partner states, there is apparent discrepancy in levels of amendment of national laws within the partner states to facilitate the rights and

[249] http://www.informereastafrica.com/node/1013#sthash.6bLWJ6UJ.dpuf.

[250] There has been ongoing negotiations on MRAs between member states of EAC and towards the end of October, 2016 following a continuous engagement a final draft of MRA between Kenya, Uganda, Rwanda and Burundi was

freedoms envisaged under the CMP. The amendments need to be matched with a corresponding review of the supporting institutional and structural frameworks. Commendable progress in the review and amendment of National Laws and Policies in line with the CMP is only evident in Kenya and Rwanda.[251]

Language barrier within the different EAC partner states presents a fundamental challenge in the area of harmonizing and standardizing laws, policies and legal processes. The different languages including English, Swahili, French, Kirundi and Kinyarwanda have a major impact on how the legal framework can be harmonized to ensure there is uniformity. Burundi and Rwanda are civil law jurisdictions; whereas Kenya, Uganda and Tanzania are common law jurisdictions. There is a perception that the differences inherent pose conceptual hurdles for successful inter-jurisdictional mobility. This poses conceptual hurdles in particular where the assumption is that liberalization will entail immediate access to courts.

This study has shown a positive appraisal of the hypothesis that, indeed there exist hindrances arising out of the partner states' reluctance to enact legislation that would fully implement the CMP and actualize CBLP as envisaged by the CMP. The benefits accruing to the EAC professionals if an enabling and conducive legal and political environment was set up would be immense. Markets would open up across the region for professionals concerned to offer services across the region. There will definitely be increased cross border sharing of resources leading to positive growth both in terms of economy and socio political integration and liberalization in general trade attached to legal services. The study has finally given proposals as well as legal intervention that if gradually implemented will guide the successful implementation of the CBLP as envisaged in the CMP.

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concluded during the Nairobi Round held in August, 2016 and has been circulated for approval by the respective competent authorities of advocates in the relevant countries.

[251] http://www.newtimes.co.rw/news/views/article_print.php?i=13914&a=16230&icon=Print (accessed on 28th July, 2016).

5.3 Recommendations

This study recommends the EAC Partner States should progressively implement the provisions of the CMP and eliminate any provisions that hinders the realization of CBLP. To realize this, it is imperative that the EAC partner States, development partners and other stakeholders around the regional integration agenda develop a common and standardized CMP domestication scorecard to empirically measure the progress towards full realization of the CMP based on the levels of domestication of the same by the partner states. This progressive realization can be realized through MRAs to be implemented in Phases. For an MRA to succeed, it should be implemented in phases so that the scope of a mutual recognition process is limited at the initial stage of liberalization. The introduction of liberalization stages is necessary as a practical way of narrowing the gap in the variability of professional practice globally. Harmonization of training and qualification requirements and curricula will take much longer to achieve especially given the current differences between the common law and civil law jurisdictions. Recognition of foreign professional regardless of their route to qualification would be a better way to address this issue.

There is need to conclude the Cross Border Legal Practice Bill and the EAC Secretariat and partner states hastens its enactment so that the attendant framework becomes available to guide the various professionals in the conclusion of Mutual Recognition Agreements. The concerns raised should be looked into for this discourse to finalize. With the Bill being enacted and the Framework in place, the professionals across the region will be better placed to join efforts in supporting the integration process.

The EALA should be empowered to facilitate the negotiation of a code of regulations similar to the role played by the Council of Bars and Law Societies of Europe (CCBE) in the EU. The key role played by the CCBE in dispute resolution has been seen, so it would be imperative for EALA to follow in CCBE steps. This will assist in coming up with targeted interventions to bolster the achievements attained thus far.

Litigation on integration in the EACJ can act as an impetus for realization of the provisions of the EAC Treaty and the CMP. This can be drawn from the EU experience.

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