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CROSS-BORDER SALE OF GOODS WITHIN THE EAST AFRICAN COMMUNITY: THE NEED FOR A UNIFORM LEGAL REGIME

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Abstract

The establishment of the East African Community has enhanced cross-border trade between private (both natural and legal) persons in the region. Cross-border trade has been enhanced by the elimination of barriers to trade in the form of custom duties at the border. A report by the United Nations Economic Commission for Africa (UNECA) shows that in 2017, the net value of cross-border trade in East Africa was $2.4 billion. Tanzania and Kenya are seen as the economic heavyweights of the region, although each of the EAC Partner States has a key role to play in promoting trade in the region. Tanzania accounts for approximately 30% of East African Community's economy while Kenya accounts for approximately 50% of the economy of the region.

However, despite this growth in trade as a result of regional integration, cross-border private traders feel that the EAC Treaty and Protocols do not adequately protect contracts of sale that they enter into in the course of trade. Most importantly, and apart from the domestic laws of the EAC member states, crucial areas of the contract of sale like formation of the contract, transfer of property, obligations of parties and remedies are evidently not regulated by EAC instruments. This paper seeks to examine the possibility of the EAC to adopt the

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Convention on Contracts for the International Sale of Goods of 1980 (CISG) or to conclude a similar instrument that governs cross-border trade between private persons. Data was collected through triangulation which incorporated interviews, secondary data from literature on international sale of goods, and internet sources.

Results show that the Sale of Goods Acts of EAC member states are old, contain several inconsistencies, and are not capable of responding to the challenges of the modern commercial environment. In addition, these Acts were founded on the English Sale of Goods Act of 1893 which has since been amended severally, yet these Acts remain unchanged. The paper therefore recommends that the EAC should encourage its member states to ratify the CISG or to conclude a protocol/Act of the Community to provide for a legal regime that guides cross-border private traders in concluding and implementing the contract of sale of goods.

Keywords: Cross-border Sale of Goods, Harmonisation, Sale of Goods Laws, CISG, Certainty, Applicable Law

1. Introduction

Article 7(1) (a) of the Treaty for the Establishment of the East African Community, 1999 ("The EAC Treaty") provides that one of the operational principles governing the Community is 'people-centred and market-driven cooperation'. Based on this, private citizens are expected to play a key role in the integration process. At the moment, the EAC does not have a unified cross-border sale of goods regime. Traders may therefore not even know which law to adhere to when concluding their sale of goods contracts, deciding on the law that will govern the contract, dispute resolution mechanisms, the currency to use, legal regime governing transportation of the goods, and remedies available in case of breach of terms of the sale of goods contract, among other concerns. Where parties have not chosen the applicable law and the same is not stated in the contract of sale, case law shows that the applicable law would be "the law with the closest and the most real connection."[1] But shouldn't there be certainty especially with respect to the East African Community whose desire is to have a Political federation as the ultimate stage of integration? Is it time that Partner States of the East African Community concluded a treaty similar to the United Nations Convention on Contracts for the International Sale of Goods ("CISG")? The CISG is a multilateral treaty that was concluded in 1980 and came into force in 1988 to provide for a uniform legal framework for international commerce.[2]

Recent reports on cross-border trade within East Africa show that cross-border trade in East Africa continues to grow, although sometimes it declines, due to the continuing presence of non-tariff barriers in most EAC Partner States.[3] A report by the United Nations Economic Commission for Africa (UNECA) shows that in 2017, the net value of cross-border trade in East Africa was $2.4 billion. This was, however, a decline from $3.5 billion in 2013, which resulted from influx of imports from continents like Asia and the European Union. The decline was also a result of the increasing protectionist economic policies adopted by countries like the Republic of Tanzania and

1 Spry J in *Karachi Gas Company Limited v H Isaq [1965] EA 42.*

2 United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980, S. Treaty Document Number 98-9 (1984), UN Document Number A/CONF 97/19, 1489 UNTS 3.

3 Augutus Muluvi et al, "Kenya's Trade within the East African Community: Institutional and Regulatory Barriers." Kenya Institute for Public Policy Research and Analysis (KIPPRA), accessed at https://www.brookings.edu/wp-content/uploads/2016/07/01_kenya_trade.pdf on April 14, 2020.

Kenya. These two countries have recently fought trade wars by barring goods from crossing their borders. Tanzania accounts for approximately 30% of East African Community's economy while Kenya accounts for approximately 50% of the economy of the region.[4] The products that are most traded by private entities within the EAC are food items like sugar, maize, fruits, sorghum, rice, dry beans, and livestock.

The East African Community has a large market for trade. Currently, there are approximately 146 million consumers with sufficient purchasing power. There is also the Common Market for East and Central Africa (COMESA), with over 460 million consumers.[5] The Republic of Kenya, Uganda, Rwanda and Burundi are members of the COMESA. For these four countries, the total number of consumers is very big, which means that the pull forces for trade within the region continue to increase.[6] In addition, the Republics of Burundi, Rwanda, Tanzania and Uganda are covered by the Everything But Arms (EBA) initiative by the European Union in which all products from these countries have access to the European Union market.[7] The only exception is arms and ammunitions. In addition, the African Growth and Opportunity Act (AGOA) allows EAC Partner states to export to the United States of America, the only exception being Burundi, whose eligibility was revoked with effect from January 1, 2016.[8] The net effect of these developments is that traders from the EAC can freely trade with each other and at the same time trade with their counterparts in Europe, US, and other continents.

There is an extensive institutional framework that is charged with the responsibility of resolving disputes within the EAC. Article 23 (1) of the EAC Treaty establishes the East African Court of Justice ("the EACJ") as a judicial body with the power to ensure adherence to the law in interpreting, applying, and complying with the Treaty. This position is further cemented by article 27 (1) of the Treaty. In this regard, the EACJ is the custodian of all matters regarding the interpretation and application of the Treaty. Although

4 The Exchange, (2018), "Cross border trade in East Africa: Why Tanzanians preferred Kenyan maize in the last quarter of 2018", Accessed at https://theexchange.africa/tag/cross-border-trade-in-east-africa/ on April 14, 2020

5 COMESA website, available at https://www.comesa.int/, accessed on April 14, 2020.

6 See COMESA website, note 4 above.

7 EAC, "European Union Everything But Arms", accessed at https://www.eac.int/everything-but-arms on April 14, 2020.

8 EAC, "African Growth and Opportunity Act", accessed at https://www.eac.int/agoa on April 14, 2020.

the EACJ is the ultimate dispute resolution organ of the EAC, it has declined to preside over trade disputes between private entities within the EAC, citing jurisdictional limitations under article 30 of the Treaty. Such cases include *Alcon International v Standard Chartered Bank of Uganda & 2 Others*,[9] and *Modern Holdings (EA) Ltd v Kenya Ports Authority*.[10]

The EACJ's jurisdiction to preside over sale of goods disputes appears to be restricted sale of goods between and among Partner States. In the recent case of *British American Tobacco (U) Limited v The Attorney General of Uganda*,[11] the EACJ was called upon to make a determination as to whether custom duties imposed on a company domiciled in a partner State of the EAC contravened the EAC Treaty and its protocols. In 2017, Uganda passed into law the Excise Duty (Amendment) Act, which imposed a higher excise duty on imported cigarettes than cigarettes manufactured in Uganda. Cigarettes imported by British American Tobacco (Uganda) Ltd from its sister company in Kenya were therefore categorised as having been imported from a "foreign" country and would attract a higher excise duty. Until the enactment of the law, these goods had been categorised as locally manufactured goods. Uganda argued that this was done to promote local industries. The Treaty defines a "foreign country" as a country other than a Partner State.[12] The EACJ held that by categorising Kenya as a foreign country, Uganda violated the EAC Treaty and the Protocol on the Establishment of the East African Customs Union, 2004. Most importantly, the EACJ accepted jurisdiction to hear and determine the matter for reason that a partner state was involved.

The conclusion of protocols and legislation in addition to the EAC Treaty has further increased the avenues for resolution of disputes within the EAC. For example, the Protocol Establishing the East African Community Customs Union ("The Customs Union Protocol") establishes an East African Committee on Trade Remedies with specific functions that are distinct from those of the East African Court of Justice.[13] The Committee handles matters pertaining

[9] East African Court of Justice at Arusha, Reference No. 6 of 2010, First Instance Division. Decision delivered on September 2, 2013.

[10] East African Court of Justice at Arusha, Reference No. 1 of 2008. Decision delivered on February 2, 2009.

[11] Reference No. 7 of 2017.

[12] Articles 2 (2), 5 (2) and 8 (1) (c), EAC Treaty and article 1(1), Protocol on the Establishment of the EAC Customs Union.

[13] Article 24 (1) of the Customs Union Protocol.

to EAC Rules of Origin, anti-dumping measures, subsidies and countervailing measures, safeguard measures, dispute settlement, and any other matter that the Council of Ministers refers to it for resolution. This committee, clearly, does not have jurisdiction to determine disputes between private entities and, therefore, does not help the situation. The EACJ held in In the *East African Law Society v The Secretary General of the East African Community*,[14] that there is no provision in the protocol that stops the EACJ from presiding over matters regarding the interpretation and application of the EAC Treaty. It should be recalled that the EACJ can only preside over such matters when Partner States or institutions of Partner States are involved. This is the import of article 30 of the EAC Treaty.

The Protocol on the Establishment of the East African Community Common Market ("The Common Market Protocol") has also established other dispute resolution mechanisms. Article 54 (1) of the Protocol states that any disputes arising from the implementation of the Protocol shall be resolved in accordance with the provisions of the Treaty. Article 54(2) goes on to confer jurisdiction to solve such disputes on national courts of Partner States. Partner States guarantee under the Protocol that parties whose rights and liberties have been infringed upon shall have recourse in their national courts based on their constitutions, national laws, and administrative procedures.[15] There is also the East African Community Competition Act of 2006 whose import is to regulate competition within the EAC. The East African Community Competition Authority has the mandate of ensuring that there is healthy competition between undertakings within the East African Community.[16]

In effect, there is an extensive body of legal instruments and institutions that regulate cross-border trade within the East African Community. However, these legal instruments and institutions do not regulate cross-border trade between private entities. This justifies and calls for further examination of laws of the Community and those of the Partner States to determine which laws should guide private entities when concluding and enforcing their sale of goods contracts. Article 30 of the EAC Treaty, for example, provides that citizens of a Partner State can only sue the Partner State or an institution of the Community on the grounds of legality of any Act, regulation, directive, deci-

[14] Reference No. 1 of 2011. Decision delivered on February 14, 2013.
[15] Article 54 (2) (a) of the Protocol.
[16] Section 42 of the East African Community Competition Act, 2006.

sion or action of that Partner State or an institution of the Community. This article is very limiting, hence, natural or artificial persons of Partner States of the EAC cannot sue each other in the EACJ. There are three options available: Allowing the status quo to remain which is limiting, encouraging EAC Partner States to ratify the CISG, and recommending to the EAC to conclude a protocol on sale of goods contracts or the East African Legislative Assembly to enact a law to govern such transactions within the community. Considering that the EACJ has declined jurisdiction to determine sale of goods disputes between private entities, a discussion regarding the establishment of a special court to determine such disputes is also not too remote to be had. This paper will explore the possibility of EAC Partner States adopting and concluding a protocol that is similar to the UN Convention on Contracts for the International sale of Goods to make it easier for private entities (natural and artificial persons) to understand and actively engage with the law on cross-border sale of goods and also the various avenues for dispute resolution.

2. Methodology

This is a mixed-method research of an exploratory kind and nature. A sequential exploratory approach was adopted, involving two stages: The first stage involved a critical review of literature on cross border trade in the EAC and the nature, function and application of the UN Convention on Contracts for the International Sale of Goods. Literature on the nature of Sale of Goods Acts of selected Partner States of the EAC were also reviewed. Data was collected through triangulation method. Triangulation is the most suitable data collection technique for mixed-method research.[17] This involved a review of literature, reports, investigation of theoretical and empirical models, interviews with experts in the field of sale of goods and enquiries by sending emails to researchers and Commercial Law teachers. Triangulation is the use of more than one approach in research to increase confidence in the research as results of the research are subjected to more than one independent measure of confirmation and verification.[18] It is submitted that literature in this area is vast, but none has made recommendation for the adoption and conclusion

[17] Tashakkori, A. & C., T., 2003. *Thousand Oaks.* CA: Sage.

[18] Williamson, G., 2005. Illustrating triangulation in mixed-methods nursing research. *Nurse Res,* Volume 12, p. 7–18.

of an instrument similar to the UN Convention on the International Sale of Goods within the EAC. The findings were synthesised and presented in the sections that follow.

3. An analysis of the UN Convention on Contracts for the International Sale of Goods (CISG)

The CISG was concluded and adopted at an international conference in Vienna in 1980, hence it is also called The Vienna Convention on International Sales. It came into force on January 1, 1988 after being ratified by 11 countries and therefore meeting the conditional 10 ratifications. As at March 2020, 93 states had ratified, acceded to, approved, accepted, or succeeded to the Convention.[19] The purpose for the conclusion of this convention is to ensure "the adoption of uniform rules which govern contracts for the international sale of goods and take into account how the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote its development."[20] In every international sale of goods contract, there are at least two legal systems at play: the legal system of the country of the seller, and the legal system of the country of the buyer.[21] Sometimes the parties to the country can choose a law outside their two legal systems, say, for example, a Kenyan buyer and a Tanzanian seller choosing United States law as the applicable law. There is no provision in the convention that prevents them from doing that. Hence, the CISG provides a uniform legal regime to govern the international sale of goods contract between the two parties.

Parties to the international sale of goods contract are at liberty to choose the law that is applicable to their contract. Courts welcome the idea of parties selecting the applicable law, as was the case in *Vita Food Products Inc. v Unus Shipping Co Ltd*[22] where the contract expressly provided that it would be governed by English Law. While upholding this provision, Lord Wright held as follows:

[19] See the status of ratification at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&clang=_en.

[20] See the Preamble of the Convention.

[21] Bamodu, G (1994) 'Transnational Law, Unification and Harmonization of International Commercial Law in Africa.' Journal of African Law, 38 (2). 125 – 143.

[22] [1939] UKPC 7.

> …where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided that the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy….

The Kenyan position, however, may be a little restrictive, as expressed in the Court of Appeal decision in *Alitalia Airlines v Shaka Zulu Assegai*.[23] The court stated as follows:

> …While it is well established under English common law that such a right of incorporation may be freely exercised (see Chesire: Private International Law, 5th Ed 1957 Ch 8 pp 205-221) the position in Kenya is different. Neither in the pleadings nor in the trial was the jurisdiction of the Kenyan courts to entertain the suit contested. And a litigant who submits to the jurisdiction of the Kenyan courts must, ipso facto, submit to the statutory restrictions on the exercise of that jurisdiction. Section 3(3) of the Judicature Act (cap 8 of the Laws of Kenya) provides that the jurisdiction of the courts
>
> "shall be exercised in conformity with
>
> (a) the Constitution;
>
> (b) subject thereto, all other written laws, including Acts of Parliament of the United Kingdom cited in part I of the schedule to this Act, modified in accordance with part II of that Schedule;
>
> (c) ……..

So, despite the fact that the contract of passenger carriage between the parties had points of contact with Libyan and Italian Laws, the Judicature Act excludes references to such laws. It follows that the proper law of the contract is Kenyan Law…"[24]

This decision was at odds with the nature of international sale of goods and cannot be said to be the Kenyan position in this subject. Later decisions have upheld party autonomy in choice of law rules. For example, in *International Aircraft Group SA v Airway Kenya Aviation Limited,*[25] Justice Mary Kasango accepted the provision in the parties' agreement making English Law the applicable law to the contract. The judge applied the Sale of Goods Act 1979 of England because English Law was the applicable law. Similarly, in

[23] [1989] 551.
[24] See above, at 551-552.
[25] (High Court Milimani) case no. 360 of 2004 (UR), ruling delivered on September 29, 2004.

Friendship Container Manufacturers Limited v Michell Cotts Kenya Limited,[26] Mbaluto J upheld a clause in the bill of lading making reference to the Hague-Visby Rules and South African jurisdiction and the limitations period of one year as provided for in the international sale of goods contract. Where parties to the contract have not indicated the applicable law, courts have held that the applicable law is the "law with which the contract has the closest and most real connection.[27] In *Karachi Gas Company Limited v H Isaq,*[28] for example, where the contract was between a Kenyan exporter and a Pakistani importer and a dispute arose between the two parties yet they had not provided for the applicable law, Spry J held the following:

> … there is nothing in the evidence to suggest that the parties ever applied their minds to the question of the law to govern their contract. That being so, the proper law is, I think, that with which the contract has the closest and most real connection…and to determine that, it is necessary to take into account all relevant circumstances….[29]

So, what circumstances should courts consider when determining the law with which the contract has the closest and most real connection? English courts have developed a variety of tests to apply in this case. First, the rule in *lex loci contractus* applies in cases where the contract was to be performed wholly in the country where it was made. The law of this country would therefore be the one with which the contract has the closest and most real connection. Secondly, the rule in *lex loci solutionis* postulates that where a contract was to be performed in a country other than the one in which it was concluded, it has its closest and most real connection in that country. This rule may not help the situation much with regard to the choice of the proper law because a contract may be performed in more than one country and therefore choosing the most applicable law may be difficult.

The rules of *lex loci contractus* and *lex loci solutionis* were revisited by the Kenyan High Court in the case of *Radia v Transocean (Uganda) Limited*[30] where the court (Sheridan J) held that there is a presumption in favour of the *lex loci contractus* if the place where the contract is to be performed coincides

[26] (Milimani High Court) Case number 2985 of 1995 (UR), ruling delivered on November 23, 2001.
[27] See Lord Simmonds in *Bonython v Commonwealth of Australia [1951] AC 201 at 219 and Karachi Gas Company Limited v H Isaq [1965] EA 42.*
[28] [1965] EA 42
[29] Spry J in *Karachi Gas Company Limited v H Isaq [1965] EA 42.*
[30] [1985] KLR 300.

with the place where it is made, but this presumption can be rebutted by a stronger presumption of lex loci solutionis. In the absence of any term, the proper law to be applied is the law with which the transaction has its closest and most real connection.[31] The CISG therefore seeks to solve some of these problems with regard to the conclusion, performance, and interpretation of the international sale of goods contract. A critical look at the salient provisions of this convention will shed more light on its application. The convention is divided into four parts as discussed hereunder.

3.1.1 Application of the CISG

Articles 1-13 are dedicated to Sphere of Application and General Provisions. The convention applies to contracts of sale of goods between parties whose place of business are in different states.[32] It also applies when the States are Contracting States or when the rules of private international law lead to the application of the law of a contracting state. The nationality of the parties, their place of residence or the kind of commercial activity do not, therefore, matter on determining the application of the convention. The convention also applies strictly to commercial goods and not services, intangibles, aircraft, ship, auctions, family, or household goods. This is in line with section 2 of the Kenyan Sale of Goods Act.[33]

3.2.2 Formation of the Contract

Formation of the international sale of goods contract is discussed in articles 14-24. When an offer is made, it must be addressed to a person and must also be sufficiently definite. This means that it must sufficiently describe the goods together with the price. An offer that is not addressed to a specific person it taken as an invitation to make an offer and therefore does not deserve acceptance.[34] The convention does not recognise unilateral contracts or those that are addressed to the whole world like was the case in *Carlill v Carbolic Smoke Ball Company.*[35] Where the parties have not agreed on a

[31] For an in-depth discussion on the reasons for the conclusion of the CISG, see Leonard Obura Aloo, "The United Nations Convention on the International Sale of Goods (CISG): Is it time for Kenya to consider ratifying it?" *Law Society of Kenya Journal Vol 1, No 2, 2005.*

[32] Article 1 of the CISG.

[33] Cap 31, Laws of Kenya.

[34] Article 14(2).

[35] (1892) 2 QB 484.

price and stated it in the contract, the price will be generally presumed from the comparative prevailing prices in comparative circumstances.[36] The offer becomes effective when it reaches the offeree and the offeror can revoke it any time before the offeree has sent an acceptance.[37] In line with the common law rule in *Felthouse v Bindley*[38] that silence does not amount to acceptance, the convention restates this position in article 18.1. Acceptance is only effective if the assent by the offeree reaches the offeror within the time that he has fixed. This is at odds with the common law rule that acceptance is affective once it is posted, as was the case in *Adams v Lindsell.*[39]

3.3.3 Obligations of the Buyer and the Seller

Obligations of the parties, sale of goods, passing of property and passing of risk are discussed in articles 25-88. Hence, the obligation of the seller to pass a good title to the buyer, ensure that the goods are of merchantable quality, deliver the goods, and to hand in to the buyer any documents that represent the title to the goods are discussed in this part. Similarly, the obligations of the buyer to pay for the goods and to take delivery, among other obligations, are discussed in this part. Remedies of both the buyer and the seller in the event either of the two parties breaches their obligations under the contract are also discussed. The remedies of specific performance[40] and damages, for example, are available. Damages are determined using the test proposed in *Hadley v Baxendale.*[41] In this case, the court held that damages for breach of contract are those, which may fairly and reasonably be considered arising naturally from the breach of contract or such damages as may reasonably be supposed to have been in the contemplation of both the parties at the time the contract was made. It has, however, been argued that the test of foreseeability is generally broader and therefore more generous to the aggrieved party.[42] Neither party is liable for non-performance of the contract where the contract is frustrated or in cases of *force majeure.*

[36] Article 55
[37] Article 37
[38] [1862] EWHC CP J35
[39] (1818) 1 B & Ald 681
[40] Article 28
[41] (1854) 9 Exch 341
[42] Jacob Ziegel and Claude Samson 'Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods' (1981) Toronto 168–305.

3.4.4 Final Provisions

The final provisions of the convention (articles 89-101) provide for how the convention will come into force, accession and reservations. Along with the preamble, these articles are sometimes considered as addressing states and not traders.[43]

In conclusion, the CISG offers a uniform legal framework to parties to the international sale of goods contract with regard to formation of the contract, obligations, passing of property and risk, and adequate remedies in the event either of the parties breaches their obligations. There is no such instrument within the EAC that unifies individual Member States' sale of goods laws so that cross border traders within the EAC have a uniform law to govern their sale of goods contracts. The current paper that proposes the conclusion of an instrument of this nature is therefore justified. Subsequent sections will examine the possibility of the EAC either adopting of this convention in its entirety or concluding a protocol or legislation of its nature and kind.

4. Status of Ratification of the CISG by EAC Member States

The East African Community comprises six (6) Member States as at March 2020. These States are the Republics of Kenya, Uganda, Tanzania, Burundi, Rwanda, and Southern Sudan. The Republic of Burundi acceded to the Convention on September 4, 1998, while the Republic of Uganda acceded to the Convention on February 12, 1992. Kenya participated in the Vienna Conference and signed the final Act but has not yet ratified the convention as at March 2020. The Republics of Rwanda, Tanzania and Southern Sudan are also yet to ratify the convention. This means that only Uganda and Burundi have ratified the convention, among the Member States of the EAC. Kenya therefore relies on its Sale of Goods Act.[44]

Tanzania has the Sale of Goods Act,[45] while Rwanda has two key laws: Decree of 30/08/1888 relating to contracts and conventional obligations (CCB III), O.B. 1888 and Law No 45/2011 of 25/11/2011 governing Contracts,

[43] Peter Winship, 'Commentary on Professor Kastely's Rhetorical Analysis (1988) 8 *Northwestern Journal of Law & Business 623, 628.*

[44] Cap 31 Laws of Kenya.

[45] Cap 214 Laws of Tanzania.

O.G., No 04 BIS OF 23/01/2012. There is also Law No 68/2013 of 30/08/2013 authorizing the accession to the United Nations Convention on Contracts for the International Sale of Goods adopted in Vienna in 1980, O.G., No 51 of 23 December 2013. This law authorises Rwanda's accession to the United Nations Convention on contracts for the International Sale of goods adopted in Vienna in 1980. However, Rwanda has not yet acceded to the convention, despite the authorisation. Southern Sudan has The Sale of Goods Act, 2011 that was enacted by the Southern Sudan Legislative Assembly pursuant to article 59(2)(b) and 85(1) of the Interim Constitution of Southern Sudan. The provisions of these laws will be analysed in subsequent sections with a view to making a case for harmonisation and the conclusion of a uniform law on cross border sale of goods in the EAC.

5. An analysis of EAC Partner States' Sale of Goods Acts

This section seeks to analyse the Sale of Goods Acts of selected EAC Partner States with a view to determining their points of convergence and divergence and therefore making a case for harmonisation and or adopting a common law that will govern sale of goods in the community. Some of the laws are not in the English language and the countries belong to a different legal tradition. An example is the laws of the Republic of Rwanda, which are in French. Rwanda is a civil law jurisdiction, and this makes it even more important that these laws be harmonised. It is submitted that some of these laws are old and may not adequately address the needs of the modern trader in the EAC. The Kenyan Act, for example, was first enacted as Act No. 33 of 1930, 90 years ago! This may not be a bad thing after all, but in this context it is. This is because the commercial environment is rapidly developing, and so the legal framework governing it should also develop. The date of commencement was October 1, 1931. The Sale of Goods Acts will be analysed under four categories: formation of the sale of goods contract, transfer of property, obligations of parties, and remedies in the event of breach.

5.1 Formation of the Sale of Goods Contract

Though Part II of the Kenyan Sale of Goods Act[46] bears the heading "formation of the contract" there is nothing in it, which regulates the actual formation of the contract of sale of goods. It therefore appears reasonable to assume that the contract envisaged by the Act is to be formed according to the rules, which govern the formation of contracts in general, namely, the rules of the common law. There are three main elements in the definition of contract of sale:[47] there must be goods which are to be transferred to the buyer, the seller transfers or agrees to transfer the property in goods to the buyer and there is a price for the said transfer. Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property: Provided that, where necessaries are sold and delivered to an infant or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.[48]

The consideration for the transfer of ownership must be "a money consideration".[49] This means that barter is not a "sale" of goods. It is an exchange of goods since no "money" (cash or cheque) is paid by either party. In *Aldridge v Johnson*[50] an agreement provided for the exchange of 52 bullocks with 100 quarters of barley, the difference in their value being payable in cash. It was held that the agreement constituted a sale of goods within the statutory definition. The money paid by the one party would be regarded as the "money consideration" for the goods delivered or to be delivered by the other party. The apparent inadequacy of the consideration is, of course, legally irrelevant. In any case the owner of the goods must be assumed to know what he is doing.

The Sale of Goods and Supply of Services Act of Uganda[51] similarly outlines its provisions regarding the formation of the contract for sale of goods and supply of services under Part II. The Act defines a contract of sale of goods as a contract by which the seller transfers or agrees to transfer the property in

46 Cap 31, Laws of Kenya.
47 Section 3(1) of the Act.
48 Section 4(1) of the Act.
49 Section 3(1) on definition of contract of sale and section 10 on the price.
50 (1857) 7 E&B 885.
51 Assented to by the president on December 22, 2017.

the goods to the buyer for a money consideration, called the price.[52] This definition is similar to the definition provided by the Kenya Act. The similarity between the Ugandan Act and the Kenyan Acts is conspicuous. However, the Ugandan Act has further provisions for contract for supply of services, which the Kenyan Act does not have. There is need to harmonise this provision. Both Kenya and Uganda are common law jurisdictions and the language in the Acts is English.

Under the Tanzanian sale of Goods Act,[53] formation of the contract of sale is provided for under section 2(1) and the definition of contract for sale of goods and an agreement for sale is similar to the definition given by the Kenyan Act.[54] The Sale of Goods Act of Southern Sudan also has a similar provision on definition of the sale of goods contract.[55] These sale of Goods Acts resemble the parent English Sale of Goods Act of 1893, from which they were inherited. Although the English Sale of Goods Act of 1893 has undergone several amendments and repeals to keep it in line with development in the law of commerce, the East African Sale of Goods Acts have remained static; they have defiled change.[56] The situation in Zanzibar is peculiar. Even though there is a political union between Tanganyika and Zanzibar, which created the United Republic of Tanzania, Zanzibar has retained all its laws and courts. Zanzibar's relevant law on sale of goods and contracts is the Contract Decree.[57] This law is a carbon copy of the Indian Contract Act.

Part VII of the Contract Decree (sections 76-123) covers sale of goods, but it is less comprehensive than the law on sale of goods as found in the Sale of Goods Acts of Kenya, Uganda and Tanzania. Questions have arisen as to what would happen where the Contract Decree is silent on a provision regarding the sale of goods contract. This question was raised in *Hussein Bachoo v The Clove Growers Association of Zanzibar*[58] where the seller had contracted to sell to the buyer forty-seven bags of "fair quality cloves." Upon delivery, the buyer found that 7 bags did not meet the required quality. The buyer there-

52 Section 2. of the Act
53 Cap 214 Laws of Tanzania.
54 Section 3(1) Cap 31 Laws of Kenya.
55 Section 6, Sale of Goods Act, 2011, Laws of Southern Sudan.
56 Aubrey L. Diamond, "Sale of Goods in East Africa", *The International and Comparative Law Quarterly Vol. 16, No. 4 (Oct. 1967), pp. 1045-1087.*
57 Cap 149, Laws of Zanzibar.
58 [1957] EA 193.

fore decided not to pay for the seven bags that did not meet the quality. The seller sued the buyer and argued that since the buyer had accepted part of the goods, he was under an obligation to accept the entire quantity. This argument was based on section 119 of the Contract decree, which provided as follows:

> …when the seller sends to the buyer goods not ordered with goods ordered, the buyer may refuse to accept any of the goods so sent, if there is risk or trouble in separating the goods ordered from goods not ordered….

Per Windham CJ, there was no trouble in separating the forty bags from the seven bags hence this section did not apply. There was also no other section of the Contract Decree or any other Zanzibar law that provided for the effect of "mixed goods" in a contract of sale. The judge then reverted to section 24 of the Zanzibar Order in Council,[59] regarding the substance of common law, doctrines of equity, and statutes of general application in force in England on July 7, 1897. Therefore, the relevant Statute of general Application in 1897 was the English Sale of Goods Act of 1893. Section 30 of that Act provided as follows:

> …where the seller delivers to the buyer the goods, he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole….

Since the buyer had decided to only reject the goods that were inconsistent with the description, section 30 of the English Sale of Goods Act was available for him.

Similarly, in *Abdulla Ali Nathoo v Warji Hirji*,[60] a contract for the sale of fifty bags of onions had comprised onions that were unfit for human consumption. The buyer accepted the onions, sold them off for approximately half of what he had agreed to pay the seller and claimed to set off damages for breach of warranty against the price. The seller had not given any express warranty, despite knowing that the buyer wanted to resell the onions for human consumption. The buyer's agent had chosen the fifty bags from a bulk of one-hundred bags that the seller had purchased, but had not inspected them, despite having been given an opportunity to do so.

[59] Zanzibar Order in Council, 1924.
[60] [1957] EA 207.

Windham CJ considered section 113 of the Contract Decree, which provided as follows:

> …where goods are sold as being of a certain denomination, there is an implied warranty that they are such goods as are commercially known by that denomination, although the buyer may have bought them by sample, or after inspection of the bulk….

In this case, the goods were onions, and onions are only sold for human consumption, and therefore there was no breach of this warranty.[61] The judge therefore considered section 114 which provided as follows:

> …where goods have been ordered for a specified purpose, for which goods of the denomination mentioned in the order are usually sold, there is an implied warranty by the seller that the goods supplied are fit for that purpose….

Section 111 on the other hand stated as follows: "…on the sale of provisions, there is an implied warranty that they are sound…."

It should be noted that the buyer's agent had been afforded an opportunity to examine the goods but did not. The judge therefore opined that the common law doctrine of caveat emptor should apply. He borrowed this doctrine from the ruling of Mellon J in *Jones v Just*[62] that: "…where there is a sale of a definite existing chattel specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty…" The judge therefore held that the Contract Decree does not have a provision on implied warranty. Had he read section 116 of the Decree; he would have noted some element of Caveat Emptor. The section states as follows:

> …in the absence of fraud, and of any express warranty of quality, the seller of an article which answers the description under which it was sold is not responsible for a latent defect in it….[63]

Regarding formalities of the contract, the Kenyan, Tanzanian and Ugandan Acts mimic section 4 of the English Sale of Goods Act in their section 4. This is with regard to the contract being in writing, (either with or without seal) or by word of mouth, or partly in writing and partly by word of

[61] See *Horn v Ministry of Food (1948) 2 All E.R. 1036.*
[62] (1868) L.R. 3 Q.B. 197 at 202, Ct. of QB.
[63] Section 116 of the Contract Decree.

mouth, or being implied from the conduct of the parties.[64] The Sale of Goods Act of Southern Sudan discusses these provisions under section 8. Provisions on the contract of sale are essentially reminiscent of provisions of the Law of Contract. Hence, this is where the Sale of Goods law meets the Law of Contract. This is reflected in section 4(1) of the Sale of Goods Acts of Kenya, Uganda, and Tanzania and section 7 of the Sale of Goods Act of Southern Sudan. The Sale of Goods Act of Kenya, for example, states as follows:

> Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property: Provided that, where necessaries are sold and delivered to an infant or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor….[65]

The provisions in the Sale of Goods Acts of Burundi and Rwanda are in French. This makes it very difficult for traders within the EAC who do not understand French to navigate through the sale of goods contract in those countries. Rwanda and Burundi are also civil law jurisdictions in which the tradition of precedent is not obeyed. Whereas Kenya, Uganda and Tanzania are common law jurisdictions and can easily borrow legal traditions from each other, it is not the case with Rwanda and Burundi who are Partner States of the EAC. This disharmony is too conspicuous to be overlooked. If EAC partner States were to adopt the CISG, Part 2 of the convention is very informative as it reiterates the common law rules of the formation of the contract.it also outlines the elements of the international sale of goods contract. The offer, for instance, has to be made to a specific person and has to be accepted unconditionally. Silence does not amount to acceptance.[66] Payment of the consideration has to be in money and if the contract does not mention this, determination as to what constitutes the price will be derived from the dealing of the parties.[67] These provisions are conspicuously missing in the sale of goods Acts of EAC Partner States. A call for adoption of the CISG should therefore not be too remote to be made.

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64 See section 4 of the Sale of Goods Acts of Kenya, Uganda and Tanzania.
65 Section 4 of Sale of Goods Act, Cap 31 Laws of Kenya.
66 *Supra, note 33.*
67 *Supra, notes 33 to 36.*

5.2 Transfer and Passing of Property

The law on transfer of property in the Sale of Goods Acts of Kenya, Uganda, Tanzania, Southern Sudan, and the Contract Decree of Zanzibar is governed by the maxim nemo dat quod non habet which translates to 'someone cannot give a better title than they have.' It is not the same case with Burundi and Rwanda, which operate in a civil law jurisdiction. Essentially, the exceptions to this principle as provided for in the Sale of Goods Acts of Kenya, Uganda and Tanzania do not apply in Burundi and Rwanda. The Kenyan sale of Goods Act has this provision in section 23 while the Tanzanian Act has its provisions on transfer of title in section 22. The Ugandan Act has these provisions in section 29 while the Southern Sudan Act has its provision in section 27. These provisions are worded similarly. The Kenyan Act, for example, stipulates as follows:

> Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell….[68]

There are, however, various exceptions to this general rule. The first exception is in market overt. This involves the passing of good title in a public, open, and legally constituted market and has its origins in the common law custom of the realm.[69] The provision on sale of goods in a market overt under the UK sale of Goods Act was found in section 22. This provision is however conspicuously missing in the Sale of Goods Acts of Kenya, Uganda, Tanzania, and the other EAC countries. This section is applied in Kenya, Uganda and Tanzania as a statute of general application because the section is not present in their Sale of Goods Acts. This makes a valid case for harmonisation of these Acts and or adoption of a common law in that regard.

Other exceptions are in seller or buyer in possession. The English Sale of Goods Act of 1893 has this provision under section 25. Kenyan, Ugandan and Tanzanian Acts have the provision in sections 26, 32, and 25 respectively. The Southern Sudan Act has this provision in sections 30 and 31. The import of this provision is that where a buyer is in possession of the goods with the consent

[68] Section 23 of the Sale of Goods Act, Cap 31 Laws of Kenya.
[69] The Case of the Market Overt (1596) 5 Co. Rep. 83b.

of the seller, even before paying for such goods, they can pass a good title to a third party who purchases without notice of defect. This may seem straightforward, but it is laden with complexities. In *Mubarak Ali v Wali Mohamed & Co*,[70] for example, Thacker J held that "…the word 'seller' necessarily in my opinion means one who has some legal right to sell, either as owner or trustee or agent for the owner or someone with the legal power of sale or authority to sell, not one who purports to sell and has no title or authority at all…" The import of the sections in the Sale of Goods Acts of EAC Member States is that they do not protect the real owner of the goods from losing that ownership when someone who is not the owner purports to sell under this exception of the *nemo dat* principle.

Section 108 (1) (a) of the Contract Decree of Zanzibar has more comprehensive provisions regarding these exceptions than Kenya, Uganda, Tanzania and Southern Sudan. The section states as follows:

> No seller can give to the buyer of goods a better title to those goods than he has himself, except in the following cases: (a) when any person is, by the consent of the owner, in possession of any goods, or of any bill of lading, dock-warrant, warehouse keeper's certificate, wharfinger's certificate, or warrant or order for delivery or other document showing title to goods, he may transfer the ownership of goods of which he is so in possession, or to which such documents relate, to any other person, and give such person a good title thereto, notwithstanding any instructions of the owner to the contrary: Provided that the buyer acts in good faith and under circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods or documents has no right to sell the goods….

This section, although comprehensive, appears to protect the innocent buyer at the expense of the real owner of the goods.

Regarding passing of property, provisions on Kenyan, Ugandan and Tanzanian Sale of Goods Acts are founded on section 18 of the English Sale of Goods Act of 1893. The Kenyan provision is in section 19 while the Tanzanian and Ugandan provisions are in section 17 and 25 respectively. The Southern Sudan Act has its provisions in section 22. The Kenyan Act, for example, states as follows: "…Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred…" These provisions also

[70] (1938) 18 K.L.R.

have several rules for ascertaining the intentions of parties regarding when property in the goods will pass from the seller to the buyer.

The Kenyan provisions on the rules are listed under section 20 and were considered in two cases. In *Mbugua s/o Gakua v Mwangi Mugwe*,[71] there was a contract for the sale of a lorry at a "price to be fixed by the Controller." Under the Defence (Sale and Purchase of Motor Vehicles) Regulations 1945, a motor vehicle to which the regulations applied could not be sold without a permit issued by the Motor Vehicle Controller, which had to state the maximum price at which the vehicle could be sold. It was held that paragraph (c) of section 20 did not apply as it involved the seller being "bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price."[72] The court interpreted the phrase "or do some other act or thing" *ejusdem generis*, so that it meant anything connected to measuring or weighing. There was no weighing or measuring in this sale. The contract was therefore a conditional contract, and property passed to the buyer upon the Motor Vehicle Controller stating the price.

Section 20(c) further came into play in *Karimbux v Dalgety & Co Ltd*,[73] a contract for specific goods "about 188 bags of maize meal" at 10s. a bag. The total number of bags delivered were 181. According to Webb J, the property in the goods was passed over to the buyer when the bags were counted, price ascertained, and communicated to the buyer by means of the Railway waybill. The Contract Decree of Zanzibar does not have a provision on passing of property that is similar to the provisions of the Sale of Goods Acts of EAC member states.

Adopting the CISG, which under Part 3 lists elaborate provisions regarding "Sale of Goods", can cure these difficulties in the creation, enforcement and interpretation of provisions on transfer of property in the goods. Article 30 is particularly informative. It states that: "The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention."[74] This provision, and the provisions in articles 31, 32, 33 and 34 of the Convention, are very informative and have clearly stated that it is the obligation of the seller to ensure

[71] (1949) 16 EACA.
[72] Section 20(c) of Cap 31.
[73] (1934) 1 EACA 121.
[74] See article 30 of the CISG. Articles 31, 32, 33, and 34 are also very informative.

that they pass a good title to the buyer, evidenced by authentic documents. It is not the case with Sale of Goods Acts of EAC Partner States, which talk about courts applying certain rules to determine when property in the goods is to pass.[75] The other provision that is conspicuously missing from the Sale of Goods Acts of the EAC partner States pertains to the concept of transfer of risk. Article 66 states that: "Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller." Hence, even when the property has passed on to the buyer, and the goods are damaged as a result of a fault on the buyer, he still has to pay the price. This is not stated in the Sale of Goods Acts of Partner States of the EAC.

5.3 Terms of the Contract and Obligations of Parties

The Sale of Goods Acts of EAC member states have provisions on terms of the contract of sale and obligations of parties scattered all over, but traceable. The Kenyan Act, for example, discusses conditions and warranties between section 12 and section 17. The Ugandan Act discusses these under sections 11 and 21. The Tanzanian Act has its provisions between sections 11 and 16, while the Southern Sudan Act has its provisions between sections 15 and 21. These sections are phrased in a similar manner. They are all founded on the English Sale of Goods Act, 1893. Section 11(1)(b) of the English Act states that "whether express terms of the contract are conditions or warranties depends on the construction of the contract." Courts have often times held that express terms in a contract are conditions and not warranties.

It is a condition that goods sold by description shall correspond to that description. Courts in East Africa have not had problems in making such appropriate interpretations of the Sale of Goods Acts. For example, in *Alibhai Panju and Sons (Tanganyika) Ltd v Sunderji Nanji*,[76] there was a contract for the sale of 30 tons of mtama, at 500s per ton. There were two varieties of mtama: red and white. White mtama retailed for 500s per ton while red mtama retailed for 300s a ton. The sellers delivered red mtama but the buyers rejected it on the ground that they had intended the white mtama. The court upheld the buyer's position because the mention of 500s showed that they had intended to purchase the white mtama, which retailed at that price.

[75] See, for example, section 19 and 20 of the Kenyan Sale of Goods Act, Cap 31 Laws of Kenya.
[76] (1949) 16 EACA 72 (On appeal form Tanganyika).

Implied terms for merchantable quality and fitness for purpose usually go together. In *Omer v A Besse & Co (Aden) Ltd*,[77] the written contract involved the sale of an Austin 5-ton truck. The truck was sold in Aden and was suitable for use there, but the buyer argued that it was not suitable for use on the rougher roads outside the protectorate. The court held that "an Austin" was a trade name and that the implied condition of fitness for purpose was excluded under the proviso to section 16(1) of the ordinance. It should be noted that if a new model of a car is introduced in the market, it may take some time for its name to become a trade name.[78] Regarding section 16(2), there is an implied condition of merchantable quality only where goods are sold by description. Sir Kenneth O'Connor P. said as follows "…I have some doubt whether this vehicle falls within the category of 'goods…bought by description'…in section 16(2)…I doubt whether the buyer in this case bought in reliance upon the description given as identifying the goods…He bought relying upon getting a particular truck which he identified by visual inspection and examination. However, if we were to assume that this was a sale by description, and because the truck was fit for use in Aden, it was held to be of merchantable quality.

This decision was completely unfortunate. It shows the danger of a community choosing to apply a foreign law with which they are not familiar. The buyer in this case was illiterate. The agreement was in English but was never read to him or even translated to Arabic, the language that he was familiar with. The sellers had intended the agreement to be a hire purchase agreement, but the courts found out later that it was a contract of sale, to be paid in instalments (!). The contract contained this clause: "…the has examined or caused to be examined the truck and satisfied himself of its condition and running and no warranty is implied on the part of the owners as to the state or quality of the truck or its fitness for any purpose whatsoever…" The buyer then signed the agreement without knowing the nature and effect of this clause. The Court of Appeal simply applied *L'Estrange v F Graucob*,[79] and held that the buyer was bound by the exclusion clause. This was a case where the parties were not equal, yet commercial law assumes that trading parties are equal and are therefore free to design their own terms.

[77] (1960) EA 907 EACA (On appeal from Aden).

[78] See *Norman v Overseas Motor Transport (Tanganyika) Ltd (1959) EA 131 where the car in question was "Morris isis".*

[79] (1934) 2 KB.

In *Hassan v Hunt*,[80] the court held that milk that turned sour within a few hours of delivery was not of merchantable quality. Similarly, in *Universal Cold Storage Ltd v Sabena World Airlines*,[81] Sir Udo Udoma considered the fact that the meat was of merchantable quality when it was delivered at Entebbe Airport, and that the sellers did not know that the meat was to be transported on to Burundi.

When determining whether the goods are fit for the intended purpose and that they are of merchantable quality, the buyer is assumed to have made known to the seller the purpose. The buyer can then rely on the skill and judgment. In *Doola Singh & Son v Uganda Foundry & Machinery Works*,[82] there was a contract for the sale of certain specified parts of a saw bench. The sellers were to manufacture the parts while the buyers were to use the parts to construct the saw bench. Some of the parts that the sellers supplied were faulty and this led to the machine breaking down in its first trial. Although the sellers had constructed a dozen efficient saw benches and it was part of their normal business to supply them, the trial judge found that their experience in machine construction was poor and the factory equipment was therefore inadequate. The judge also found that the buyers had a lot of knowledge on saw benches and had therefore taken up the duty to construct them. Manning J in the Court of Appeal,[83] however, departed from this position and held that there was a breach of section 16(1) of the Ordinance. The majority also established that the parts that the sellers supplied were not of merchantable quality and therefore breached section 16(2) of the Ordinance.

Regarding sale by sample, *Jafferali Abdulla v Janmohameds Ltd*[84] is authoritative. Here, handbills advertising an auction sale of plates stated that "sample of the goods can be inspected in our Auction Room." The auctioneer then held up a plate, saying "…this is a sample of the plates…" Many of the plates turned out to be broken when the buyer purchased them. It was therefore held that the bulk of the plates did not correspond to the sample.

In the Zanzibar Contract Code, provisions on conditions and warranties are outlined in sections 109-118. There are two main differences between these

[80] (1964) EA 201.
[81] (1965) EA 418, in the High Court of Uganda.
[82] (1945) 12 EACA 33.
[83] 12 EACA at p. 36.
[84] (1951) 18 EACA 21.

provisions and those found in the Sale of Goods Acts of the EAC member states. The first difference is that all implied terms are warranties and therefore parties have a right to reject any breach. Secondly, the stipulations are not as clear as they are in the Sale of Goods Acts of Kenya, Uganda, Tanzania and Southern Sudan. Two conflicting sections, section 114 and section 116, deserve mention. Section 114 states as follows:

> …where goods have been ordered for a specified purpose, for which goods of the denomination mentioned in the order are usually sold, there is an implied warranty by the seller that the goods supplied are fit for that purpose….[85]

Section 116, on the other hand, states as follows:

> …in the absence of fraud and of any express warranty of quality, the seller of an article which answers the description under which it was sold is not responsible for a latent defect in it….[86]

The conflict is conspicuous. In section, 114, there is an implied warranty that goods shall be fit for the purpose for which they were ordered, yet section 116 states that it is only in cases of fraud or the presence of an express warranty. This conflict would be even more conspicuous where a Zanzibar trader and a Kenyan trader enter a contract for the sale of goods, and they choose Zanzibar law as the applicable law. A Kenyan trader who is used to the Kenyan Sale of Goods Act whose provisions on conditions and warranties are clear will be shocked when the court applies sections 114 and 116 of the Contract Decree of Zanzibar. The dispute is likely not to be adequately solved by those two sections.

Duties of the seller and those of the buyer also deserve mention. One such duty is the duty of the seller to deliver the right quantity of goods, as established by section 31 of the Kenyan Act, section 37 of the Ugandan Act, section 30 of the Tanzanian Act, and section 37 of South Sudan Act. All these provisions are founded on section 30 of the English Act, yet their application has been problematic, as seen in the cases discussed in this section. Under section 30(1)(2) of the English Act, the buyer has a right to reject the goods if the wrong quantity is delivered. This places the seller under an obligation to deliver the right quantity. The seller also has an obligation to deliver goods of

[85] Section 114 of the Contract Decree.
[86] Section 116, Contract Decree.

the right description.[87] These rules do not apply if the difference in the quantity ordered and quantity delivered is insignificant, in other words, where the maxim *de minimis non curat lex* applies. In *Jiwan Singh v Rugnath Jeram*,[88] it was held that a difference of 16cwt was huge and did not therefore fall under the *de minimis* principle.

Unless the buyer agrees otherwise, he is not under any obligation to accept delivery by instalments.[89] The Zanzibar Contract Decree does not have an equivalent of this provision. Courts of law make use of the provision in the English Act as a statute of general application. In *Besson & Co Ltd v Allarakhia Hasham*,[90] there was a single contract for the delivery of 50 tons of rice. The court held that the seller was allowed to deliver in instalments provided that the instalments were of a reasonable size. This ruling was based on the absence of a provision in the Contract Decree compelling the seller to deliver the goods in the required quantity. In hindsight, the English Act should have been applied as a statute of general application.

Section 30 (3) of the English Act deals with instances where the contract goods are missed with goods of a different description that is not included in the contract. In *Pan African Trading Agencies v Chande Brothers Ltd*,[91] it was a term of the contract that the beans sold should be of a "fair average quality." Nearly half of the 370 tons of beans delivered were damp and mouldy, hence not of a fair average quality. The buyers rejected the damp and mouldy beans. De Lestang J held as follows:

> …the general principle which emerges from these cases is that section 32(3) of the Ordinance applies and there is a right of rejection when the goods delivered do not comply with the contract specification, whether such specification relates to quality, size, mode of parking and so forth. No attempt was made in any of these cases to limit or restrict the meaning of the word 'description' in the section…I think it must be a question of fact in each case whether quality affects the description of the goods or not….

The judge held that the term stating that the beans must be of fair average quality formed part of the description and therefore the buyers had a right to

87 Section 30 (3).
88 (1945) 12 EACA 21.
89 Section 31(1) of the English Act.
90 (1914) 1 ZLR 462.
91 (1952) 19 EACA 141.

reject the damp and mouldy beans.[92] Provisions on obligations of parties and terms of the contract in the Sale of Goods Acts of Kenya, Uganda and Tanzania are similarly worded, but very problematic in application as has been seen in the court decisions discussed in this section. Similar provisions in the Sale of Goods Acts are worded differently and in French. In addition, and as mentioned earlier, the two countries are civil law jurisdictions, making court decisions on this subject difficult to trace due to lack of precedent. Adopting the CISG, whose provisions on obligations of parties and terms of the contract are stated in Part 3 of the Convention, can cure these discrepancies. Chapter II of Part 3 for example discusses the obligations of the seller. For example, under article 30, the seller has an obligation to deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract. Article 30 states that the seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

Duties of the buyer are discussed in Chapter III of Part 3 of the convention. Article 53 states that the buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention. This provision would have been similar to the provision in section 29 of the Sale of Goods Act of Kenya, which states that delivery of the goods and payment of the price are concurrent conditions. That part of section 29 has been very problematic to enforce because delivery of the goods and payment of the price are hardly ever-concurrent conditions. Oftentimes the buyer could pay in advance or after the delivery. It is also the duty of the buyer under article 60 to take delivery of the goods, which consists of doing all the acts, which could reasonably be expected of him in order to enable the seller to make delivery.[93] EAC Partner States can consider adopting the CISG, which would readily cure the discrepancies identified in the Sale of Goods Acts of Partner States. One advantage of the CISG is that it can be applied in the formation and enforcement of the contract of sale between traders within the EAC and between a trader within the EAC and another one outside the EAC.

[92] For a comprehensive appraisal of sale of Goods Law in East Africa, see Aubrey L. Diamond, "Sale of Goods in East Africa", note 48.

[93] See article 60(1) of the CISG.

5.4 Remedies

Several remedies are available for a party whose rights under the contract of sale have been violated. These remedies are scattered in the Kenyan, Ugandan, Tanzanian and Southern Sudan Acts and also the Zanzibar Contract Decree. Remedies that are common in all the Sale of Goods Acts are suing for the price, damages, specific performance, lien, stoppage in transit, right of resale, and rejection of goods.

Damages for non-acceptance and non-delivery of the goods are dealt with in section 50 and 51 of the Kenyan Act, sections 61 and 62 of the Ugandan Act, sections 49 and 50 of the Tanzanian Act, and sections 62 and 63 of the Southern Sudan Act. The English Act has these provisions in sections 50 and 51. Section 50(1) of the Kenyan Act, for example, stipulates that "…Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance…" Section 51(1) provides as follows: "…Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery…" These sections have triggered disputes in courts across the EAC region in the past.

In *Devshi Samat Shah v Budhram Mohanlal*,[94] the seller claimed damages for non-acceptance under a contract for the sale of physic nuts. There was no market for the nuts, which were worthless and accordingly the seller was held to be entitled to receive the cost of the nuts to him together with the profit he would have made on the sale to the buyer. In *Pan African Trading Agencies v Chande Brothers Ltd*,[95] discussed earlier, nearly half of the beings contracted for were not of the contract quality and it was held that the buyers were entitled to reject the faulty beans. In addition, they claimed damages for non-delivery in respect of the beans they had rejected. The sellers knew that the beans were for export to an overseas buyer. The buyers had resold the beans that were in good quality at a profit of 100s. per ton. De Lestang J opined thus: "…nevertheless, it does not necessarily follow that they would have succeeded in reselling all of the rejected beans at that profit and it seems to me, therefore, that the loss of profit allowed was problematical and consequently too remote…" For this reason, the buyers were only entitled to the difference

[94] (1951) 18 EACA 79.
[95] (1952) 19 EACA 141.

in the contract price and the current market value of the poor-quality beans. The buyers were, however, only awarded nominal damages because there was no evidence that there was a ready market for the beans. This appears to be harsh on the buyers who were entitled to beans that met the quality stated in the contract of sale.

The CISG has clear provisions on remedies of both the seller and the buyer when the contract of sale is breached. Remedies of the buyer when the seller has breached terms of the contract of sale include specific performance under article 46, avoiding the contract under article 49, or refuse to take delivery under article 52. Remedies available to the seller when the buyer has breached the terms of the contract include avoiding the contract under article 64 or sue for damages under article 74.

One other area of commercial law that needs to be incorporated in these Acts is electronic commerce (e-commerce). Developments in modern technology have made it possible for sellers to either design or make use of web pages to display their goods and interact with their customers. All the customer needs to do is to log into the website, select the product they need, and place an order. Payment is also through online platforms like mobile payment methods and electronic banks. There are several legal issues arising in such kind of a transaction. First, at what point is the contract concluded? How do we differentiate between an offer and an invitation to treat? At what point does property pass to the buyer? What are the obligations of the seller and those of the buyer? What is the applicable law, considering the cross-border nature of the transaction? These questions can only be answered by repealing these Acts and or adopting a common law to deal with the issues therein.

The CISG has provisions on contracts concluded through electronic communication channels. Schedule II of the convention is titled "Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on Contracts for the International Sale of Goods." Article 39 of this part states that "The United Nations Convention on Contracts for the International Sale of Goods is also complemented, with respect to the use of electronic communications, by the United Nations Convention on the Use of Electronic Communications in International Contracts, 2005 (the Electronic Communications Convention)." The Electronic Communications Convention aims at facilitating the use of electronic communications in international trade by assuring that contracts concluded, and other communications exchanged

electronically are as valid and enforceable as their traditional paper-based equivalents.[96] This complementarity can ensure that parties to a sale of goods contract within the EAC and outside the EAC can conclude electronic sale of goods contracts and enforce them through the CISG. The Sale of Goods Acts of Partner States of the EAC do not have provisions of this nature. This makes the adoption of the CISG an important call to make.

6. Possible Approaches to Harmonisation of Sale of Goods Acts in the EAC

Harmonisation does not have a specific definition, but has such synonyms as integration, homogenisation, convergence, unification, or parallelism.[97] Legal harmonisation is the process of making rules similar, to bring about uniformity in application and interpretation.[98] Baasch Anderson notes that creating uniform laws is not as important as applying such laws uniformly.[99] Can approximation of laws also be used to mean harmonisation? Heath disagrees, by noting that approximation differs from complete harmonisation in that it merely aims at reaching a minimum level of common agreement between what people are seeking to make similar.[100] This discussion shows that the language used to discuss harmonisation may be obfuscated by several other words that may have similar meanings.

Andenas *et al*[101] propose the doctrine of consequential harmonisation, which looks to achieve a defined outcome. They propose that the starting point should be: what is it that needs to be harmonised? For the Sale of Goods laws in the EAC, the answer to this question would be laws; to ensure that the applicable law in contracts of sale between cross-border traders in the EAC is certain. Although EAC partner states may feel that harmonising these laws

96 See paragraph 39 of Schedule II of the CISG, page 42.

97 Andenas, M., Andersen, C., & Ashcroft, R. (2011). "Towards a theory of harmonisation." in M. Andenas, & C. B. Andersen (Eds.), *Theory and Practice of Harmonisation (pp. 572-594). United Kingdom: Edward Elgar Publishing. P. 576.*

98 Bruno Zeller, *CISG and the unification of International Trade Law (Routledge-Cavendish, 2007).*

99 Camilla Baasch Anderson, "Furthering the Uniform Application of the CISG, Sources of Law on the Internet", (1998), *Pace International Law Review, 403, 404.*

100 Christopher Heath, "Methods of Industrial Property Harmonisation-The Example of Europe." In Christoph Antons, Michael Blakeney and Christopher Heath (eds) *Intellectual Property Harmonization within ASEAN and APEC (Aspen Publishers, 2004) 39, at 46.*

101 Above, note 75.

would breach their territorial sovereignty, the idea is to avoid conflict of laws that cross-border traders face when enforcing the contract of sale of goods.[102] When he was asked whether Sale of Goods laws in the ASEAN region should be harmonised to create a harmonised sale of goods law in the region, Bell opined that he does not see that need, and the CISG should instead be widely adopted by countries in the region.[103] Should this also happen in the EAC, so that the EAC Member States need not develop a protocol or treaty or even harmonise their Sale of Goods Acts but instead fully ratify and adopt the CISG?

Since it is only Uganda and Burundi that have ratified the CISG in the EAC, it is time that other members of the EAC were encouraged to ratify the convention, considering its importance in promoting cross-border sale of goods. The analysis carried out in this paper has shown that Kenya, Uganda and Tanzania have similar provisions in their Sale of Goods Acts. But the analysis has also shown that sale of goods laws of Burundi and Rwanda are not similar to those of the other Partner States of the EAC. laws in these two countries are in French and the countries are civil law jurisdictions. Hence, the doctrine of precedent does not apply. Court decisions are not as important as statute law and the Constitution. Harmonising these laws may not be as important as having all the Partner States of the EAC adopt and ratify the CISG based on its important provisions as analysed in this paper. International trade law commentators have recently suggested that we are now in the "dawn of regionalism"[104] where most countries are joining regional economic blocs to promote cross-border trade by eliminating barriers to trade. One reason EAC member states have not ratified the CISG could be because the UK has not ratified it too.[105] We noted earlier that the Sale of Goods laws of EAC Partner States are founded on the UK Sale of Goods Act of 1893. Hence, the former colonies of the UK may not have seen any need to ratify it when their colonial master has not done so.

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[102] Jurgita Malinauskaite, *International Competition Law Harmonisation and the WTO. Past, Present, and Future, 8.*

[103] Gary Bell "Harmonisation of Contract Law in Asia - Harmonising Regionally or Adopting Global Harmonisations - The Example of the CISG" (2005) *Singapore Journal of Legal Studies 362 at 372.*

[104] José Angelo Estella-Faria "Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?" (2009) 14 *Uniform Law Review 5 at 7.*

[105] Bruno Zeller and Benjamin Hayward "The CISG and the United Kingdom – Applying a More Radical Perspective to a Difficult Practical Problem" (forthcoming).

Perhaps the most important reason for the EAC to create a uniform law on sale of goods within the region is to enhance legal certainty. The principle of legal certainty is not novel.[106] It is 'the sine qua non condition for a democratic society or a state governed by the rule of law.'[107] 'Legal certainty requires that laws are accessible, operable, legible, intelligible and up-to-date, and it can be seen as the inherent object of the law itself, by defining its purpose.'[108] For cross-border traders in the EAC, legal certainty would enable them to engage in cross-border sale of goods knowing that the law is certain and that any dispute that might arise in the course of trade will be adequately resolved by a familiar law.

Harmonisation of laws in the EAC is a treaty requirement. In article 126(2)(b), Partner States committed themselves to harmonize all their national laws appertaining to the Community. The Protocol on the Establishment of the East African Common Market ("Common Market Protocol") more specifically obliges Partner States to align their national laws, rules and procedures in order to facilitate the effective functioning of the CM.[109] Although there is a Committee in place with the task of harmonising domestic laws to be in line with EAC Law, nothing much has been done yet regarding the harmonisation of these laws. If anything, such harmonisation should be done on the finding that Burundi and Rwanda are civil law jurisdictions while Kenya, Uganda, Tanzania, and South Sudan are common law jurisdictions. It should also be done on the finding that the Sale of Goods Acts of Kenya, Uganda, Tanzania and South Sudan lack important provisions on sale of goods within the context of modern technology.

Should the EAC Partner States adopt the CISG, the other question that would follow is "which forum should hear disputes arising from the enforcement of the contract of sale?" Under the norms of private international law, parties are at liberty to choose the applicable law in the event a dispute has arisen. For this reason, the contract of sale will be interpreted and disputes aris-

[106] Gustav Kalm, 'Building Legal Certainty Through International Law: OHADA Law in Cameroon', Institut d'Études Politiques (Sciences Po) (October 2011) Buffett Center for International and Comparative Studies Working Paper Series, Working Paper No. 11-005.

[107] Georges Vedel, 'Proceedings of the Conference L'Etat de droit au quotidien', 65, cited by D. Labetoulle, 'Principe de légalité et principe de sécurité', in Mélanges en l'honneur de Guy Braibant Dalloz, (1996) 403

[108] See note 85, above.

[109] Art 32 & 47.

ing from its enforcement resolved based on private international law norms.[110] Laws of any EAC Partner States would readily apply, if the parties choose the laws of that country. Current Sale of Goods Acts of EAC Partner States do not have such a provision.

7. Conclusion

The CISG presents a crucial opportunity for private cross-border traders within the EAC on matters relating to applicable law in the enforcement of their sale of goods contracts and resolution of disputes. As it stands, the Sale of Goods Acts of Partner States of the EAC are old, have conflicting provisions, and do not respond to the demands of the modern commercial environment. These Acts are founded on the English Sale of Goods Act which has since undergone several amendments yet the EAC member states Acts have still retained the original provisions on the contract of sale, passing of property, obligations of parties, and remedies. Only Uganda and Burundi have ratified the CISG. Cross-border traders in the other partner states cannot therefore apply this convention, as the states have not ratified it.

It is recommended that EAC encourages its Partner States to ratify this convention to facilitate the enforcement of sale of goods contracts by citizens. Alternatively, the EAC should use the CISG as a model law to conclude a protocol/Act of the Community to govern sale of goods contracts between cross-border traders. In addition, the EACJ should be accorded jurisdiction to solve disputes between private traders in the EAC, either as a trial court or an appellate court. Such jurisdiction may resemble the jurisdiction that the defunct Court for Appeal of Eastern Africa had when hearing appeals for decisions arising from domestic courts of Partner States. Lastly, the East African Law Reports should be revived as it gave East Africans an opportunity to access decisions of courts across the EAC.

[110] See article 7(1) and (2) of Chapter II on General Provisions of the CISG.

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