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Co-operation between cooperatives in East Africa: The impact of the East African Community Cooperative Societies Act, 2014

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Abstract

The East African Community (EAC) was established with the mission of inter alia promoting regional trade which includes the Cooperatives sector for the development of the region's economy. This underscores the cooperative principle of Cooperation amongst cooperatives. Progressive laws and policy frameworks by the EAC point to the spirit of cooperation. The International Labour Organisation through its Recommendation No. 193 of 2002 resolved to promote cooperatives at both the national and international levels. In pursuit of a regional cooperatives sector, the EAC enacted the EAC Cooperative Societies Act 2014 to accord the cooperative sector an appropriate legal and policy framework. The paper reviews existing international law and policy framework and their contribution to sound regional cooperatives sector, the reception of the EAC's cooperatives law whilst drawing lessons from Europeans who have through the European Commission exploited the Statute for a European Cooperative Society, 2003 (SCE) to the benefit of the sector. It is acknowledged that significant steps have been made towards having an appropriate legal and policy framework though lethargic reception of the Act by Partner States has stalled the dream of a borderless cooperative sector. Goodwill in implementing the Act is paramount to ensure growth of the sector and through the Sixth cooperative principle make EAC the pacesetter in the African cooperative movement.

Key words: Cooperatives, Economic integration, International Law

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Introduction: Cooperatives and cooperative principles

Cooperatives are autonomous associations of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly-owned and democratically controlled enterprise (ILO 2002). These enterprises thrive in a string of seven principles which include voluntary and open membership, democratic member control, member

economic participation, autonomy and independence, education, training and information, cooperation among cooperatives and concern for the community (ICA 2017). From the aforementioned principles that bind cooperatives we can derive cooperative values such as self-help, responsibility, democracy, equity and equality, openness and social responsibility which collectively reflect cooperation.

The East African Community was established via the East African Community Treaty of 1999 and comprises of six partner states namely Kenya, Uganda, Tanzania,

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Rwanda, Burundi and South Sudan. This paper primarily focuses on the East African Community Cooperative Societies Act 2014 ('The EAC Coop Act') and its potential impact on the sixth cooperative principle – cooperation among cooperatives. This principle encourages joint effort and mutual operation amongst cooperatives. It is premised on the values of self-help and collective responsibility which can be achieved through openness, representation, accountability, reciprocity and adherence to cooperative identity (ICA 73). Undoubtedly, successful co-operation requires structures which co-operatives have history of organising local, national, and international structures to aid co-operation among co-operatives (ICA 74). Part of such critical structures include legal framework which is appreciated as a potential catalyst in building a more active and structured cooperative movement, in which cooperatives may thrive both individually and as a system (Fici 2015).

In appreciation of the role of the law in supporting the cooperatives principle, the ILO resolved to adopt the Recommendation 193 that was aimed at among other things promote cooperatives at both national and supranational levels and has a significantly influenced countries to harmonise their laws and given rise to regional practice for example the adoption of the Statute for a European Cooperative Enterprise (2003) (ILO 2015: 45) and most recently the East African Community. We are therefore basically appraising the EAC Coop Act and outlining the potential impact of that law if at all its successful implementation sees the light of day.

Most importantly, we should remember that this Act has a limited scope and is meant for primary cooperatives and excludes financial cooperatives commonly referred to as savings and credit cooperative societies (SACCOS) whose regulation is still domestic to the Partner States laws.

The Legal Framework for East African Community Regional Cooperatives

A sound legal, policy and regulatory framework is necessary for a successful industry to thrive. The law should provide a favourable environment for the establishment and operation of cooperatives as peoples' organizations and cooperatives should be treated on equal terms with other forms of enterprise. (ILO 2015: 25). The impact of a supportive legal framework is critical and goes a long way to sustain and influence policy directives and guide regulatory efforts. In relation to co-operatives, the EAC has a multi-layered approach in terms of moulding cross-border co-operatives practice – the domestic legal framework and international law.

Domestic and International Law: The EAC Co-operatives Act is heavily reliant on domestic laws in terms of the formation and registration of the co-operative societies and the enforcement of arbitral awards in case of dispute resolution. This means that the domestic laws of the member countries play a complimentary and supportive role to actually give effect to the aims of the regional law.

The main international law *per se* influencing the regulation of co-operatives is the International Labour Organisation's Promotion of Co-operatives Recommendation (Recommendation 193) passed in June 2002 and replaced Cooperatives (Developing Countries, Recommendation 127). It is not a Convention or explicit binding law but it has enormous power to influence the development of formally binding instruments (Hagen: 2014: 54). It is the foundation of the new era that would allow and encourage co-operatives to co-operate and operate internationally. Other international laws apart from the EAC Act that may influence the industry include the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the East African Community Treaty which play

complimentary roles in the furtherance of the aim to promote cross-border cooperatives practice through effective dispute resolution mechanisms and service delivery.

The Salient Features of the EAC Co-operatives Law: There are several salient features of the East African Community Cooperatives Law. These are highlighted below.

Multi-layered Regulation. As earlier acknowledged, the EAC Co-operatives Act has introduced a twin layer of laws to regulate regional co-operatives practice. The first layer is the domestic laws and regulations of the member states and the second is the regional and/ or international law that adequately handle the cross-border activity.

International personality. This Act grants a duly registered society and the member an international personality. Upon satisfaction of the requirements stipulated in Section 7 of the Act and obtaining a juridical personality granted by Section 8 of the Act, a society immediately acquires an international legal personality whilst the member simultaneously becomes an international player since they are unconditionally entitled to a certain level of treatment in all the Partner States in as far as their relationship with the society is concerned.

Moreover, it is noteworthy that this international personality is not granted by the nationalities of the founder members of the cooperative society but by registration. Essentially, members from a single partner state can register a society under this Act and tailor their operations with a wingspan of the whole region.

Embracing Alternative Dispute Resolution. Arguably, this is the most significant feature of the EAC Cooperatives Act. The appreciation of the central role effective dispute resolution mechanisms

play in influencing cross-border trade and investment came at an umpteenth moment. The Act regulates cross-border cooperatives practice across five different jurisdictions involving different legal systems and dissimilar regimes when it comes to dispute resolution in the Cooperatives movement.

Kenya has a rather strict mechanism of settling disputes arising out of the operations of Cooperative societies and their members – through the Co-operative Tribunal whose powers are equivalent to the Judiciary. The Tribunal is established under part XV of the Co-operative Societies Act and conducts its operations in similar fashion to courts of law albeit with a few exceptions for example less stringent rules of evidence but have all other powers and privileges a court would have. In Uganda and Rwanda however, such disputes are subject to the alternative dispute resolution mechanisms specifically domestic Arbitration. Part X and Chapter 10 of the respective statutes oblige cooperators to resolve their disputes through arbitral tribunals whose awards are thereafter enforced as judgments or through relevant cooperative authorities respectively.

In light of the foregoing, it is noteworthy that the EAC Coop Act has introduced a tri-pronged approach to dispute resolution. First is the employment of Conciliation via Section 44, secondly Arbitration through Section 45 and 47 and lastly recourse domestic courts. Disputes arising out of cooperative operations are subjected to Conciliation first and in case of unproductive results then Arbitration is employed. However, when parties are aggrieved by the decision of the Arbitrators then appellate relief may be sought through

litigation in domestic courts with the first appeal entertained at the high court. This then leaves room for subsequent appellate duels in the Courts of Appeal and probably Supreme Courts depending on the how the parties choose to litigate.

The beauty of Arbitration as envisaged by the EAC Cooperatives Act is that it has attracted all the benefits of international arbitration and overcome its weaknesses. The Arbitrators in this fold have been given powers ideally characterizing judicial authority as stipulated in Section 48 which allows them to wield power equivalent to civil courts with the ability to summon witnesses, compel compliance with evidence rules and issue binding orders. Moreover, the widely hailed notion of consent in Arbitration has been suppressed since all co-operators under the act have to first seek refuge in Conciliation and better still undergo arbitration as the dispute resolution mechanism.

International Arbitration has one main advantage over domestic arbitration as seen through the Rwandese and Ugandan avenues and domestic litigation in the case of Kenya and Tanzania – the ability to enforce awards beyond territorial limits (Margaret: 4). According to the Act, an arbitral tribunal in Burundi can now deliver awards that are enforceable in Kenya and vice-versa. This is a great achievement of internationalization of the cooperatives sector on East Africa since the test of an elaborate cross-border economic activity is the ability to have efficient dispute resolution mechanisms that is seemingly neutral to the parties and whose directives can be seamlessly enforced in relevant territorial jurisdictions.

Precedence. Section 54 of the EAC Cooperatives Act explicitly stipulates that the Act shall take precedence over the Partner States domestic laws in respect of matters contained in the regional co-operatives law. There is a general principle in international law that in case of conflict between domestic and international law, the latter prevails. However, the application of international law especially domestically is usually subject to the Constitutional attitude of sovereign countries. For example, Article 2 of the Constitution of Kenya 2010 appreciates the general principles of international law as part of its laws. In similar fashion, the Constitutions of other EAC Partner States for example Rwanda, Burundi, Tanzania and Uganda also invite the application of international laws whose principles champion for the prevalence of international over domestic law.

By expressly providing for precedence, the EAC Cooperatives Act is in tandem with the principles of international law and shall most likely spur the achievement of the EAC Treaty which amongst others aims to accord a common market and free movement of services across Partner States.

Tax Exemption. The Act has created incentives to encourage the upsurge in registration of regional societies. Section 30 provides for exemptions from corporate tax for societies whose annual income does not exceed USD 500,000 and exemptions from Value Added tax for societies whose annual income is below USD 1,000,000. However, individual members of such societies are liable to pay income tax and only the juridical person enjoys such incentives.

Amalgamation and mergers. Section 10 of the EAC Cooperatives Act allows cooperatives to amalgamate or split. This is

a vital provision since it allows for the companies to through necessity or prudence merge and form bigger co-operatives. It is noteworthy that the freedom granted through this provision may allow for the formation of alliances and partnerships among like-minded societies in the region.

East African Co-operative Agency. The Act establishes an East African Co-operative Societies Agency whose man functions shall include registering, organizing, promoting and supporting co-operatives through training, conducting research and other technical support. This Agency conceived by Section 52 of the Act furthermore stipulates that the majority of the members constituting this agency shall be selected from cooperative societies. This is a commendable proposal owing to the fact that cooperatives shall front candidates who have sufficient experience in the sector to promote their interests and exude the knowledge amassed during their years of service to the cooperative movement.

The Potential Impact

The potential impact of the East African Cooperative Societies' Act 2014 is summarized below:

- i. **Harmonization of national cooperative laws:** As earlier acknowledged, the laws that regulate cooperatives at the domestic level in the EAC Partner States are dissimilar. As seen in the European SCE, there was a silent and gradual harmonization of national laws to bridge the gaps between diverse national laws (Avsec 2006). Similarly, the birth of a regional entity whose registration and a substantial extent of regulation has been delegated to national laws shall definitely yield
- mixed results and cast uncertainty due to the differences in rules and legal systems. There is therefore a genuine reason to adore a harmonized legal framework that would ensure equal treatment of cooperatives in the member states. This may be
- ii. **Cooperation among co-operatives: joint ventures:** Indeed the aim of Recommendation 193 and the 6th cooperative principle may be achieved if the Act is effectively implemented. Despite the slow implementation currently and the lethargy of States in ratifying the Act, once embraced shall increase regional co-operation and we anticipate several alliances amongst cooperatives in the region.

The EAC Cooperatives Act targets primary cooperatives and doesn't regulate financial cooperatives (which seemingly are the giant players), cooperative initiatives may not grow as rapidly as expected.
- iii. **Shadow impact: increased commercial arbitration.** Disputes can never be wished away – they are part and parcel of commercial transactions. With anticipated increase in regional co-operatives practice and transactions, we eagerly await disputes between members of these regional bodies, their officials and business partners and other government related agencies. It is only wise to infer that there is need for capacity building in terms of the training of professionals and laying facilities that may accord seamless dispute resolution activities in the sector (Caron 2015: 10). Moreover, governmental authorities should be

notified and sufficiently briefed on the conduction of international dispute resolution proceedings, enforcement of awards and actual balancing of the interests of due to the intricate nature of cooperative entities and their members.

However, regional co-operatives should carefully develop policies and train their personnel especially on the laws, regulations and policies of the various countries which form the business environment of their activities to avoid unnecessary run-ins with the authorities.

iv. **Ripple effect: need for regionalization of other business entities.** Other forms of business entities for example companies and partnerships may soon clamour for harmonization of the regional laws to stimulate cross-border activity. It is just a matter of time before the ripple effects of the liberalization of the sector influences the business environment in East Africa. Companies preceded cooperatives as the preferred vehicles for conducting business and if this latest milestone achieved by cooperatives proves to be successful, then it shall be inevitable to dream of an East African Company and/ or Partnership law.

v. **Incentives for the cheeky.** The incentives extended to these regional co-operatives are quite tempting especially in terms of taxation and dispute resolution. Shrewd business persons may actually exploit these incentives by tailoring their business entities and operations on 'cooperative' principles primarily to avoid tax through registering layered alliances or otherwise calculated business moves.

vi. **Regional integration bonus.** Regional cooperatives shall undoubtedly positively contribute to regional integration which is a critical pillar of the EAC Treaty. Encouraging cross border activity and a friendly environment through a supportive framework shall ensure liberalization of cooperative markets which shall go a long way in bolstering the call for regional integration.

Conclusion

Indeed the regional cooperatives law spells hope for the East African cooperatives sector and regional integration. There is need for more co-operation between the co-operatives across borders in the region due to the potential impact that the EAC Coop Act tags along. There is however the need to amend the Act to accommodate financial cooperatives which are more vibrant and actually the trailblazers of cooperatives practice in the region. For the sector to benefit from the fruits of Recommendation 193, we need prompt implementation of the Act and call upon the governments to put in place supportive legal and policy frameworks to enable cooperation among cooperatives in East Africa.

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