

Paper presentation at the 25th East
Africa Law Society Conference

The mutual recognition agreement for lawyers, a case for re-negotiation and adoption

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Introduction

Over the years as global and multilateral trade increased, trade in legal services took an upward trend and continues to expand.

With this trend has come an increase in international business which has also spawned an increase in the demand for reliable multi-jurisdictional legal services.

Businesses playing across regions needs all the more legal advisory services covering the jurisdictions of the multitude of countries in which they operate. Therefore, the liberalisation of trade in legal services becomes fundamental. The Protocol on the establishment of the East African Community Common Market has been in existence since 2010 and placed the level of integration of the East African Community at the Common Market .

The Protocol on the establishment of the East African Community Common Market pursuant to the East African Community Treaty under Article 2 provides for these freedoms and rights; Free Movement of Goods, Free Movement of Persons, Free Movement of Labour / Workers, Right of Establishment, Right of Residence, Free Movement of Services and Free Movement of Capital.

The Common Market is underpinned by the same operational and fundamental principles of the Community as enshrined in Articles 6 and 7 of the East African Treaty. Further, under Article 2 of the Common Market Treaty, the partner states further undertake to ensure; Non-discrimination of nationals of other Partner States on grounds of nationality; Equal treatment to nationals of other Partner States; Ensure transparency in matters concerning the other Partner States; and Share information for the smooth implementation of the Protocol.

This paper concerns itself with the free movement of services which ties into the wider international trade phenomenon of Trade in Services under the World Trade Organization's General Agreement on Trade in Services (GATS), legal services in this case, but especially the free movement of



What is a Mutual Recognition Agreement?

An MRA is a legal instrument that is signed between similar professional associations originating from different countries, to enable a professional from a home country to be automatically recognized and allowed to practice as a professional in a host country. Therefore, any professional qualification issued in the home country becomes automatically recognized in the host country .

The East African Community in 2011 adopted special Regulations to govern mutual of professionals, the EAC (Mutual Recognition of Academic and Professional Qualifications) Regulations 2011.

Regulation 7 of those Regulations provides that MRAs should provide for the following, among other things:

- i.) Academic and professional qualifications;
- ii.) Registration procedures;
- iii.) Competencies; and
- iv.) Code of conduct and disciplinary processes

Pursuant to the Common Market Protocol, the East African Community partner states agreed to enter into Mutual Recognition Agreements (MRAs) for certain professionals like lawyers, doctors, veterinary doctors, engineers, dentists, midwives and architects. MRAs for accountants, architects and engineers were signed in 2010. A couple of them like the MRA for engineers entered into force in 2012.

Part D of the Common Market Protocol addresses the issue of free movement of persons and labour whereas Part F addresses the free movement of services (eg legal services). Article 11 of the CMP deals with harmonization and Mutual Recognition of Academic and Professional Qualifications - aimed at ensuring the free movement of labour/workers and services as envisaged in the EAC Treaty.

The Mutual Recognition Agreement for Academic and Professional Qualifications for Advocates in East Africa has since been drafted and was signed in Arusha on 18th February, 2017 by the competent authorities of the Partner States. The Attorney-Generals of the Partner States asked for more time to further review the Agreement before they could endorse it . That has dragged to-date.

Why/Objectives of the MRA

The MRA fulfils a partner state's obligation under the treaty and common market protocol to provide for free movement of labour for professionals across E Africa.

It also provides for the acceptance of individuals and law firms to practice in a member states country without repeating the qualification process that she or he would have already undertaken in their jurisdiction.

Lawyers are guarantors of civil and economic rights of their clients which arise in a regional block where traders frequently enter transactions with neighbours in each other's partner states. The increasing trade and future efforts require professionals among whom are lawyers, engineers, architects, accountants, medical professionals who are enablers of economic activity.

It provides an opportunity to expand one's practices and reach out to the rest of 175m East Africans thereby building bigger practices in the region that can attract bigger transactional work long associated with bigger non-African law firms.

Through a bigger market, East African law firms will be one-stop shop to a market close to a USD 200 bn dollar market in combined GDP giving the firms more visibility and provide spring board to the rest of Africa so as to attract international twinning's as well .

To the clients, a business that operates in the region will have the benefit of having a one-stop shop and service that is standard across the region. One will also have the benefit of using their services in another country.

It is also believed the MRA's will drive mergers and acquisitions across the region, more twinning's between East African law firms or close cooperation through mergers which will grow big firms and grow standards of the legal profession that brings lawyers from diverse backgrounds. It is also believed it will attract better remuneration and more exposure for younger members of the bar.

It provides a bigger market for specialised practice or boutique firms. One will have access to clients who need a specialised service away from his or her jurisdiction that might have a smaller market.

How it works

The MRA provides that an advocate who wishes to practice in a partner state will apply to the competent authority for admission but must possess the bar and university qualifications with post qualification experience of two years and a certificate of good standing from his home country.

Once admitted, one will be able to practice in both your countries and the country of admission on a permanent basis or temporary subject to work permit restrictions and payment of the necessary fees and all other requirements that the host country places on its Advocates. Note that the principle of national treatment applies to professionals; the treatment given to Advocates of the home country should be the same to East African lawyers. One can register with every EAC partner state he/she wishes to practice but must pay the necessary fees in that country and abide by the rules of the host country.

The Advocate is also subject to the disciplinary action of the host country should any issue of transgression arise but the mother bar or country must be notified and can commence disciplinary action as well.

Salient provisions of the MRA

1. Legal education programmes offered by partner states will require accreditation by a competent authority to be put in place by a partner state.

2. For admission to a common law country if one originates from one as well, a bar qualification, four-year degree, post qualification experience of two years and a certificate of competence on ethics and continuous education requirements, a practice certificate of not less than two years are required. If all requirements are met, such Advocate need not do further training or examination except where the competent authority feels there are fundamental differences in the identified scope of practice.

3. Recognition of Advocates between common law and civil law jurisdiction shall be recognised by a competent authority of the country where the application is made and shall be granted on consideration of: Foundational knowledge and core competencies in the law of the host country in accordance with guidelines provided for by annex 1. Where the authority is

4. Similarly, an Advocate who is trained outside E Africa must first seek recognition from his home country to be recognised in a partner state.

5. Scope of practice shall be limited by the law of the host country. This provision gives the competent authority of the host country to legislate and provide for certain services that cannot be provided by a recognised lawyer. It is generally believed that countries shall close out the litigation and limit it to citizens but allow only commercial transactions since the integration process is largely commercial driven.

6. Articles 11 and 13 are undertakings by the competent authorities to make regular audit qualification requirements, amend laws for the realisation of the MRA including removing citizen requirements for recognition, laws and policies that restrict admission make information available in time to all national bars on admission requirements.

7. Article 13 provides for the law societies to amend procedures, laws and policies to allow the implementation of the MRA, code of conduct and liability insurance.

8. The MRA also provides for a code of conduct which will be largely administered by the host country of the recognised Advocate.

9. Fess shall be charged but all competent authorities must be guided by the principle of national treatment and not be a barrier to trade between jurisdictions.

10. The MRA also establishes the mutual recognition agreement committee consisting of three members of each partner state, a member of the competent authority of each partner state, a member of the law society, the chief Justice of a partner state of his nominee and the CEO of the east Africa law society. Its sole purpose is to implement the MRA.

Comparative Analysis with the European Union

The EU came up with the Establishment of Lawyers Directive 98/5/EC for lawyers which is applicable for permanent establishment for lawyers whereas Lawyers' Services Directive 77/249/EEC regulates temporary service provision by EU lawyers .

All EU Member States are required to either adopt a Directive into their national law or to implement the effect of the Directive within their legislative framework.

In instances where there are considerable differences between a professional's home qualifications and those of the host country, then he or she will be required to undergo an adaptation mechanism by either undergoing an adaptation period (professional practice under the supervision of a qualified member of the profession) or by taking an aptitude test that usually covers only those items of professional knowledge which are deemed to be lacking.

EU member states are allowed to reserve the rights to restrict certain practice areas. England and Wales has the highest number of restricted practice areas, for example the exercise of rights of audience in courts, the conduct of litigation, the administration of oaths, probate and notarial activities, among others. These restricted practice areas may only be carried out by eight groups of lawyers who must be qualified in the law of England and Wales.

Under the EU Establishment of Lawyers Directive 98/5/EC, an EU lawyer who wishes to practice on a permanent basis in a host country has to register with the relevant Bar Association or Law Society in that country and thereafter, he/she becomes subject to the same rules pertaining to discipline, insurance and professional conduct as the domestic lawyers. Once the foreign lawyer has been duly registered in the host country, he/she can subsequently apply (after 3 years) to be admitted to the host state profession, without being required to pass the usual exams; this is subject to being able to demonstrate that he/she has engaged in effective and regular practice of the law of the host country within that period.

Through something termed the 'Bologna Process', a series of ministerial meetings and agreements between European countries to ensure comparability in the standards and quality of higher-education qualifications, the EU adopted the European Higher Education Area (EHEA) under the Lisbon Recognition Convention. The EHEA aims to make academic degree standards and quality assurance standards more comparable and compatible throughout Europe. This helped with convergence of academic standards of legal education .

Challenges

- Securing professional indemnity insurance covers on a continuing basis, in both the home and the host country.
- The burden of complying with the rules of professional conduct of both the home and the host country including the need to comply with continuous education and training requirements in both the home and the host country .
- The requirement to obtain work permits or the slow issuance of the same.
- Fear of competition, protectionism/national sovereignty concerns and fear of change may cause some of the relevant stakeholders to be reluctant to embracing and implementing the process .
- Lack of adequate information on the mutual recognition process to garner the necessary support for implementation of cross-border legal practice.
- Establishing a suitable mechanism of dealing with partially qualified professionals.
- The internet is providing major competition as people are consuming legal services free of charge over the internet, some from what are termed as “Alternative Legal Service Providers.”
- Adapting to different legal systems may prove to be a hurdle for some lawyers since Kenya, Uganda & Tanzania are common law jurisdictions whereas Burundi and Rwanda are civil law jurisdictions.
- There may be an apprehension about the potential lowering of legal standards in a host country by allowing foreign lawyers to practice freely.
- Disparities with regard to national identification systems among the Partner States affects the free movement of persons .
- Legal Status of successfully concluded MRAs - it is unclear whether an MRA between the relevant competent authorities can be recognized as a formal EAC instrument and whether the same would be legally binding in nature. In view of this, the EAC Secretariat has since been directed to develop a legally binding framework for MRAs as well as mechanisms on how signed MRAs can be formally adopted as instruments of the EAC .

- Only lawyers with sufficient resources (mostly the more established lawyers and law firms) can sustainably carry out cross-border legal practice.
- Lack of full commitment from Partner States in some instances - see Annex V of The East African Common Market Protocol - Schedule of Commitments on The Progressive Liberalization of Services (Legal Services) which indicates the commitments that were made by the Partner States towards elimination of barriers and realizing cross-border legal practice.

The summary of the commitments made is as follows: Summary of EAC Commitments with regard to Legal Services:

- i.) Kenya agreed to liberalize only the legal advisory and representation services in judicial procedures concerning other fields of law, by 2010.
- ii.) Burundi agreed to liberalize its legal services sector by eliminating all market access restrictions by 2015.
- iii.) Rwanda agreed to liberalize its legal sector by 2010.
- iv.) Uganda agreed to fully liberalize its legal sector by 2015.
- v.) Tanzania didn't make any commitment with regard to legal services, and no reasons were ever given. It also never gave any timelines for liberalizing its legal sector.

It is not clear or there is even no evidence that the partner states have fulfilled any of the commitments above and Tanzania's failure to make any commitment on when or even if it would liberalize its legal sector speaks of a lack of commitment to expeditiously implement the free movement of lawyers in the EAC.

Way Forward and Recommendations

a.) Professional bodies and competent authorities (where the two are different), at both a national and regional level, should come up with mechanisms of co-operation especially through the East African Law Society. Stronger and well-developed law societies/bar associations in the EAC region should assist their less developed counterparts, to ensure that the legal profession is well regulated in the EAC region .

b.) There is need for a more comprehensive market access mechanism for lawyers for example, the Partner States should consider waiving the work permit requirement for EAC citizens

c.) Partner States should endeavor to harmonize their respective education standards so that the pace of achieving mutual recognition can be hastened.

d.) Lastly, the most important, Political will and commitment from all Partner States to support the process and ensure that cross-border legal practice is realized as soon as possible .

e.) The EAC should borrow a leaf from the EU's Bologna process .

Conclusion

There are more opportunities than threats for professionals and lawyers in partner states through MRA's. It has been proven that an increase in competition not only improves standards, but also quality.

By lawyers from other partner states moving, they are therefore not replacing local professionals but helping to bring in new work.

It is also evident that smaller law firms and/or lawyers might not get the opportunity to work on certain complex, exciting and highly rewarding work.

The threat seems to be bigger though from the outside if the EAC does not re-negotiate and adopt the MRA for Advocates, the international law firms are here and with their muscle and resources are increasingly tapping into the multi-jurisdictional, cross-border work involving the big multinationals and corporates.

The MRA must therefore become a reality.

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