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# UNINTEGRATED NATIONAL PAYMENT SYSTEMS AS A CONSTRAINT ON THE GROWTH OF CROSS-BORDER TRADE IN SECURITIES IN COMESA REGION

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**ABSTRACT**

The pace at which finality of cross-border payments for cross-border purchases of securities is achieved determines the rate at which cross-border securities trades are settled, and with that, the rate of growth of cross-border trade in securities in the Eastern and Southern African region. The study assesses the legal framework for cross-border transfer of payments for securities purchased across international borders so as to establish whether or not it has provided adequate incentives for speedy transfer of such payments at minimum transfer costs.The study employs the doctrinal approach to evaluating legal rules. The main findings of the study were that (a) law and policy permits cross-border trade in securities, (b)law and policy permits cross-border payments, (c) COMESA Treaty provisions do not recognize cross-border payments for securities as admissible to clearing and settlement in the COMESA Clearing House, (d) law does not make provision for regional integration of the national payment system, (e) that it takes weeks for an electronic fund transfer, and a month or more for a cross-border payment by cheque to reach a cross-border beneficiary within the COMESA region, (f) the purchaser of securities is without legal or equitable relief during the waiting period. The study makes recommendations for (a) introduction of legal provisions aimed at fostering full currency convertibility in the national payment system,

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(b) facilitating regional integration of the national payment system and its streamlining,(c) introduction of a regionally-integrated cross-border multilateral netting payment system especially dedicated to the clearing and settlement of cross-border payment instruction and obligations, and (d) admissibility of cross-border payment instructions and obligations on cross-border trade in intangible financial assetsinto the COMESA Clearing House.

**I**

## 1.INTRODUCTION

The object of this article is to examine the state of the legal framework for the transfer of funds—price or consideration for securities—across international borders so as to establish whether or not it has provided adequate incentives for speedy transfer of securities across international borders at minimum transaction costs in Eastern and Southern Africa (hereinafter 'the COMESA Region').[2]

An argument is also made that the infrastructural isolation of the Zambian national payment system from payment systems of other jurisdictions in the region is likely to lengthen the duration of cross-border transfers of funds, and increase the cost of cross-border payments for foreign securities. A corollary argument is made that the resulting much higher cost of cross-border payments than the cost of purely domestic payments is likely to increase transaction costs for cross-border securities deals. A further argument is made that the higher cost of foreign securities than the cost of domestic securities is likely to put a premium on domestic securities thereby creating equity home bias—a condition which is inimical to the growth of cross-border trade in securities in the region.

**II**

## 2.BACKGROUND TO THE PROBLEM

As COMESA observes:

"Up until the late 1990s, COMESA Countries followed an economic system

[2]The edifice of this article is a segment of my PhD research work revolving "Legal Aspects of Cross-border Trade in Securities in Eastern and Southern Africa." The said segment examines the adequacy of the legal framework for the transfer of funds—for securities purchased across international borders—to ensure speedy transfer of those funds at minimum transaction costs, and increase cross-border trade in securities in the COMESA Region.

which involved the state in all aspects of production, distribution and marketing,thus denying the private sector an economic role to play, except as shopkeeper,and promoted import substitution and subsidized consumption. The theory wasthat emerging industries could be identified by the state and nurtured througha system of subsidies and grants, and protection from foreign competitionbehind high tariff walls, and that these industries could then grow to a sizefrom which they could favourably compete with foreign firms. This did notactually happen as the domestic markets were too small in terms of purchasingfor industries to realize economies of scale. The lack of competition resulted indiscouraged foreign investment and insufficient levels of investment in capitaland labour. Initially, import substitution and subsidy programs were financedfrom domestic earnings such as revenue realized from agricultural commodities. As revenue from these sources declined, owing to declining terms of trade andreduced efficiency in production, these countries started to borrow on westerncapital markets and from the World Bank and the IMF to maintain previous levels of consumption. The borrowing was done at commercial rates since the these countries were considered as middle income countries. The borrowed money was not usually put to good use resulting in declining GDP, increasing expenditure levels as a result of higher debt servicing. In order to counter these trends, COMESA Countries had to impose exchange controls and heavy restrictions on foreign currency transactions so as reduce capital flight."[3]

And the legal and institutional framework has evolved following the same in-ward focus. Thus, the protectionist response of COMESA countries to such challenges has greatly shaped the legal and institutional framework for the regulation of foreign currency transactions and the entire financial system. An argument is made that since COMESA countries were, at the time of the economic depression referred to above, preoccupied with rescuing the domestic economy, there was not much prospects of giving thoughtful consideration to outward-focussed concepts such as cross-border transfer of funds and integration of national payment systems. Sadly, successive pieces of legislation relating to national payment systems have been characterized by the same inward focus—a condition which is inimical to integration of national payment systems in the region.

[3]Common Market for Eastern and Southern Africa, 'Historical Development of COMESA,' available athttp://www.comesa/int; http://training.itcilo.it/actrav_cdrom1/english/global.Visited 9/01/2016 at 11:20 AM.

## 2.1.STATEMENT OF THE PROBLEM

National payment systems facilitate exchange of financial assets through transfer of the price for those goods from the buyer to the seller. In this sense, payment systems facilitate growth of commercial transactions. In light of this position and the background to the problem under investigation, the problem under investigation may be stated as follows:

**"Has the legal framework for the transfer of funds across international borders provided adequate incentive to facilitate cross-border securities transaction at minimum transaction costs?"**

**III**

## 3. METHODOLOGY

This research falls into the qualitative research category. It focuses on answering specific questions relating to the problem under investigation by using both primary and secondary data. The research is underpinned by a doctrinal approach evaluating the legal framework for the transfer of funds across international borders for foreign purchased securities. This method was used in analysing both primary and secondary data. Primary sources of data such as relevant legislation and case law touching on the subject/problem were used. Secondary sources such as journals and other written commentaries on primary sources were also used.

A checklist of documentary sources was used. The study employed non-probability sampling method in the selection of documents which were used in the analysis—purposive sampling. Both primary and secondary sources of data were used as aids to drawing inferences, making deductions and comparisons.

The main objective of the study is to answer the question whether or not the legal framework for the public distribution of securities has provided adequate incentives for speedy transfer of funds across international borders—for cross-border purchases of securities—at minimum transaction costs. The study also sets out to flesh out some shortcoming in the regulatory framework currently in force and make necessary proposals for reform as a possible solution to those shortcomings.

The research questions used were:

a) Does the law and policy permit cross-border trade in listed securities?

b) Does the law and policy allow cross-border payments for cross-border purchases of securities?

c) Does the law provide rules for regional integration of the national payment system?

d) Does the law and policy provide for settlement of trades without finality of payment?

**IV**

## 4.RESULTS

The results of the study may be summarized in tabular form as follows:

| QUESTION | ANSWERS | | |
|---|---|---|---|
| | **National Law** | **Regional Law** | **European Union Law** |
| 1. Does the law permit cross-border trade in securities? | YES | YES | YES |
| 2. Does the law permit cross-border payments? | YES | YES | YES |
| 3. Does the provide rules for regional integration of the payment system? | NO | YES | YES |
| 4. Does the law permit settlement of trades without finality of payment? | NO | NO | NO |
| 5. Does the law provide for or recognize a regional central bank? | NO | YES | YES |

V

## 5. DISCUSSION

Payment systems reduce the cost and increase speed of exchanging goods (both tangible and intangible goods) and services and the disadvantage of holding cash (such as the risk of theft, counterfeit currency and lost interest); therefore, payment systems support the growth of transactions.[4] Thus, regional payment systems promote and support the growth of regional cross-border flows by increasing speed, lowering payment risks and ensuring high degree of finality.[5]

Efficient regional payment systems promote regional trade and integration by:

- facilitating integration of national financial systems and capital markets (which include stock markets);
- improvement of national processes in small countries that cannot afford their own national payment systems; and
- the eventual establishment of a regional single currency regional payment system would eliminate exchange risk and enhance intra-regional trade and investment.[6]

### 5.1. DEFINING THE ROLE OF THE DOCTRINE OF CONSIDERATION AND PAYMENT SYSTEMS IN CROSS-BORDER TRADE IN SECURITIES

Consideration is the price for which the promise of the other party to the transaction is bought. The definition of consideration as the price of the promise of the other party was aptly summarised by Sir Frederick Pollock in famous words which were adopted by Lord Dunedin in the House of Lords in 1915.[7] His Lordship stated:

"An [act] or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given is enforceable."[8]

On the importance of consideration to enforceability of contractual obligations, J.C. Smith (1979) observes:"The language of benefit and detriment is, and I believe long has been,out of date. So is the idea that consideration must be an economicbenefit of some kind. All that is necessary is that the defendant should,expressly or impliedly, ask for something in return for his

[4] United Nations Economic Commission for Africa (2010), ibid
[5] See ,United Nations Economic Commission for Africa, at p. 268
[6] Ibid.
[7] Dunlop vs Selfridge [1915] AC 847, at p. 855
[8] Sir Frederick Pollock, 'Principles of Contract,' (1950), 13thEdn, at p. 133, Stevens & Sons

promise, anact or a promise by the offeree, [if he gets what he has asked for], thenthe promise is given for consideration…"[9]

Sir Frederick Pollock observed that no legal action could competently be maintained against the offeror for failure to fulfil their promise unless the offeree has done an act or made a promise—which is of value in the eyes of the law—in response to the offeror's promise.[10]

## 5.2. CONSTRAINTS RELATING TO UN-INTEGRATED NATIONAL PAYMENT SYSTEMS IN THE REGION

The major challenge to the growth of intra-African trade is that most African payment systems are small, [fragmented] and lack competition adding to inefficiencies, high payment costs and exorbitant bank charges.[11]By comparison with international practices, African payment systems are often inefficient in terms of cost, time, convenience, adaptability and finality.[12] An international fund transfer via electronic networks that takes just minutes to go around the globe can take two weeks to arrive at a cross-border beneficiary in some African countries, and a cheque can take more than a month to clear in Sub-Saharan Africa.[13]

Against this backdrop, the central theme of this section is that un-integrated national payment systems contribute longer periods of remitting funds to a cross-border vendor of securities. An argument is made that as a result of these long periods of cross-border transfers of funds, the settlement of trades has to wait for as long as it takes the funds reach a cross-border vendor of securities. This in effect, is likely to lower the liquidity of the underlying securities and slow down the rate of cross-border trade in securities in the region. Another argument is made that furnishing valuable consideration—money consideration in for-cash securities transactions—is critical to protection of the interests of purchaser through effective enforcement of rights and duties acquired under the cross-border securities transaction. Proposals herein made for the acceleration of regional integration efforts are predicated upon the notion that speedy transfer

[9] J.C. Smith, 'The Law of Contract—Alive or Dead? 13, The Law Teacher (1979), 73, at p. 77
[10] Sir Frederick Pollock (1950), ibid
[11]The United Nations Economic Commission for Africa, 'Assessing Regional Integration in Africa IV: Enhancing Intra-African Trade,' 2010, at p. 267
[12] Ibid.
[13] Ibid.

and receipt of cross-border payments for securities is likely to ensure allocative efficiency in the cross-border finance component of a cross-border securities transaction. In this regard, an argument is made that in the face of the customary practice of transferring securities against payment, allocative efficiency in the financial component of the securities transaction, is likely to increase the rate at which securities are transferred across international borders. With the fast rate of transferring securities across international borders, cross-border trade in securities is likely to grow in the region.

The following sub-section looks at how the definition of "clearing and settlement system" under the Zambian National Payment Systems Act constrains the growth of cross-border trade in securities between Zambia and other COMESA countries.

### 5.2.1. CONSTRAINTS RELATING TO THE DEFINITION OF "CLEARING AND SETTLEMENT SYSTEM" IN ZAMBIA.

The only specific and main piece of legislation governing the payment systems in Zambia is the National Payment Systems Act No. 1 of 2007 (hereinafter 'the NPS Act 2007'). Before the NPS Act 2007, there was no specific piece of legislation which governed payment systems in Zambia. Thus, various pieces of legislation, which still form part of the legal framework thereof, governed payment systems in Zambia.[14]

A payment system is defined as a clearing and settlement system operating under clearing house rules.[15] Clearing is defined as the receipt, exchange and distribution of payment instructions.[16] Settlement is defined as defined as the discharge of settlement obligations by the Bank of

[14] Such as the Bank of Zambia Act 1996, Banking and Financial Services Act, the Cheques Act, the Bills and Exchange Act 1882, the Building Societies Act, and the Insurance Act.
[15] See, section 2 definition of the term 'payment system' in the Zambian NPS Act 2007. Under Annex 6 of the SADC Protocol on Finance and Investment 2006, 'payment system' is defined as "a set of instruments, banking procedures and typically, inter-bank funds transfer systems that ensure circulation of money": See, Article 1 thereof
[16] See, section 2 definition of the term 'clearing' under the NPS Act 2007. Under Annex 6 of the SADC Protocol on Finance and Investment 2006, a clearing system means " a set of procedures whereby financial institutions present and exchange data and/or documents relating to the transfer of funds or securities to other financial institutions at a single location (clearing house)": See, Article 1 thereof

Zambia or other settlement agent.[17] In this sense, a 'clearing and settlement system' means "a system or arrangement for clearing or settling payment obligations or instructions in which:

(i) there are at least three participants one of which is a bank;

(ii) clearing or settlement is wholly or partly in Zambian Kwacha; and

(iii) the payment obligations which arise from clearing within the system or arrangement are ultimately settled through adjustments to the account of one or more participants at the Bank of Zambia or other settlement agent.[18]

From the foregoing discussion and definition of 'clearing and settlement system' under the NPS Act 2007, an argument is made that the Zambian clearing and settlement system does not accommodate the clearing and settlement of instruction and obligations given or incurred in respect of securities among participants or counter parties. It is tilted in favour of clearing and settlement of instructions and obligations of three or more participants given or incurred in respect of the transfer of funds to the exclusion of all those given or incurred in respect of securities between such participants. A further argument is made that such a negative feature serves only to facilitate clearing and settling of instructions and obligations given and incurred in respect of securities and funds for those securities through two distinct systems. Consequently, the settlement of trades is likely to be delayed with increasing transaction costs. Proposals are made for implementation of measures aimed at ensuring that both instructions and obligations given or incurred in respect of transfer of funds and securities are cleared and settled under one system.[19]This model has been adopted under the Securities Act 2016 and finds expression in the definition of 'clearing and settlement' in section 2 thereof. 'Clearing and settlement' is defined as:

*(a)* process of preparing for settlement of a securities transaction which

[17]Section 2 definition of the term in the NPS Act 2007.Under Annex 6 of the SADC Protocol on Finance and Investment 2006, settlement is defined as "an act that discharges the obligation of two or more counter parties incurred in respect of transfer of funds or securities between such counter parties": See, Article 1 thereof

[18] Definition of the term in section 2 of the NPS Act 2007

[19] This conception—the clearing and settlement of both instructions and obligations for the transfer of securities and funds under one system—resonates with the conception of a "clearing and settlement systems" under the SADC Protocol on Finance and Investment 2006. Under this Protocol, "clearing and settlement" relates to presentation and discharge of respective instructions and obligations of two or more counter-parties given or incurred in respect of transfer of funds or securities between such counter-parties: See the definition of "clearing system", "settlement" and "settlement system" in Article 1 of the Sixth Annex to the SADC Protocol on Finance and Investment 2006.

has been executed on a securitiesexchange;

(b) provision of clearing and settlement facilities; and

(c) determination of payment and delivery obligations of the parties to a securities transaction, whether or not on a net basis.

Under this single system, transactions concluded on securities exchanges are executed and completed when a clearing and settlement agency transfers the securities transacted from the securities account of the transferor to that of the transferee.[20] The Bank of Zambia is under an obligation to simultaneously transfer funds through debiting and crediting appropriate current accounts of participating clearing banks.[21]

An argument is made that such a measure is likely to reduce the cost and increase the rate at which securities are cleared and settled. In this regard, an argument is made that the Zambian clearing and settlement system is unlikely to promote expeditious transfer of securities both locally and across international border.

As a possible way of putting the Zambian clearing and settlement system in proper perspective and in line international best practice, it is proposed that the definition of 'clearing and settlement system' in section 2 of the National Payment Systems Act 2007 be amended as follows:

"**clearing and settlement system** means 'a system through which instructions and obligations of two or more counterparties given or incurred in respect of transfer of funds or securities between such counterparties are cleared and settled."

## 5.2.2. CONSTRAINTS RELATING TO RESTRICTIONS ON THE USE OF FOREIGN CURRENCIES IN THE ZAMBIAN CLEARING AND SETTLEMENT SYSTEMS

[20] Section 107(1) of the Securities Act 2016

[21] Section 107(1)(a)(b) of the Securities Act 2016

Further, there is a requirement that instruction or obligations for clearing or settlement be wholly or partly in Zambian Kwacha.[22] An argument is made that such a restriction is likely to serve as a constraint on efforts tailored to the attainment of currency convertibility in the region.[23]A further argument is made that such provisions are unlikely to promote efficient transfer of funds and with that, the transfer of securities across international borders given the customary practice of transferring securities against payment.[24] As such, the settlement of cross-border trades is likely to be delayed. An argument is made that with such delays, the growth of cross-border trade in securities in eastern and southern Africa is likely to stall. In order to promote expeditious distribution of securities and payment therefor across international borders, it is proposed that the definition and conception of the clearing and settlement system be replaced with the following definition:

"Clearing and Settlement System means a system or arrangement for clearing or settling instructions or obligations in which:

(i) there are at least three participants one of which is a bank;

(ii) clearing or settlement is in the currency of a COMESA or SADC Member State; and

(iii) the payment or <u>securities</u> clearing or settling instruction or obligations, or arrangement are ultimately settled through adjustments to the account of one or more participants at the Bank of Zambia or other settlement agent."

**5.2.2.1. THE COMPETENT AUTHORITY FOR REGULATION OF THE NATIONAL PAYMENT SYSTEM IN ZAMBIA**

The competent authority regulating and overseeing operations of national payment systems so as to ensure the integrity, effectiveness, efficiency, competitiveness and security of the payment systems in Zambia, is the Bank of Zambia.[25] The underlying objective of this regulatory

[22] See, section 2 of the NPS Act 2007

[23] Under Annex 6 of the SADC Protocol on Finance and Investment 2006, 'currency convertibility' is defined as "the ability of residents of a State Party and non-residents to exchange the currency of that State Party for foreign currency and to utilize the foreign currency in cross-border transactions. A measure of currency convertibility of a State Party is the absence of restrictions on (i) the making or receipt of payments for international transactions, and (ii) the exchange of currency of that State Party for foreign currency for such purposes at minimized cost: See, Article 1 thereof

[24] See, section 107(1) and the definition of 'settlement' in section 2 of the Zambian Securities Act 2016

[25] See, section 5(1) of the Zambian NPS Act 2007

oversight is promotion of stability and safety of the Zambian financial system.[26] In this respect, the Bank of Zambia is also mandated to:

(i) regulate entry criteria for participants to a payment system;

(ii) issue and vary guidelines to be followed by participants with respect to payment orders;

(iii) prescribe rules and arrangements relating to operation of payment systems and in particular provide for:[27]

- netting arrangements;
- risk-sharing and risk-control mechanisms;
- finality of settlement and finality of payment;
- the nature of financial arrangement among participants;
- the operational systems and financial soundness of a clearing house; and
- such other matters pertaining to systemic risk; and
- give such other directives to participants as may be necessary to ensure the integrity, effectiveness, efficiency or security of the payment system.

### 5.2.3. CONSTRAINTS RELATING TO INADEQUATE LEGAL FRAMEWORK FOR REGIONAL INTEGRATION OF THE ZAMBIAN PAYMENT SYSTEM

COMESA Member States which are also members of SADC have noted that cooperation among their central banks through policy coordination, capacity building and system development is critical to payment system reform and facilitation of cross-border payments.[28] Despite this call to extroversion in the management of the Zambian national payment systems, careful perusal of the provisions of the NPS Act 2007 reveals that the mandate of the Bank of Zambia under the said piece of legislation in inward-focused. The underlying objective of the mandate of the Bank of Zambia is to ensure safety and stability of the Zambian financial system.[29] No emphasis is placed on the contribution of the Zambian payment system to the safety and stability of the regional payment system. No provision is made for better integration of the Zambian payment system into

[26] Ibid

[27] See, section 5(3) (a) to (d) of the Zambian NPS Act 2007

[28] See, the third perambulatory paragraph of the preamble to Annex 6 of the SADC Protocol on Finance and Investment 2006.

[29] See, section 5(1) of the NPS Act 2007

other payment systems in the region so as to facilitate efficient transfer of cross-border payments, either. In particular, there is no provision for:

(i) co-operation between the Bank of Zambia and other central banks in eastern and southern Africa through policy coordination;

(ii) harmonization of clearing and settlement rules with those of other countries in eastern and southern Africa;

(iii) regionally coordinated capacity building and payment system development; and

(iv) theexchange of information on best international practices and challenges in eastern and southern African states so as to ensure efficiency in domestic and cross-border payments.

An argument is made that this state of affairs is runs counter to the treaty obligation on SADC and COMESA Member States to ensure that their central banks cooperate with central banks of other member states in:[30]

(i) defining and implementing a cross-border payment strategy for the region, which strategy may be based on currency convertibility within the region or in future, on a single currency for the region;

(ii) identifying and measuring payment systems risk and establish appropriate procedures for measuring such risks;

(iii) establishing and maintaining mutually beneficial relationships with international bodies such as the World Bank, the Bank for International Settlement (BIS) and central banks of third states; and

(iv) keeping abreast of modern trends in payment, clearing and settlement systems.

In view of the foregoing, proposals are made for inclusion in the Zambian National Payment Systems Act No. 1 of 2007 of provisions aimed at enhancing cooperation between the Bank of Zambia and central banks of other countries in eastern and southern Africa. Legal provisions which enhance cooperation between the Bank of Zambia and other central banks in the region through policy coordination, regionally coordinated capacity building and payment system development, harmonization of payment, clearing and settlement rules and information exchange on international best practices and internal challenges, are likely to foster regional integration of payment systems in eastern and southern Africa.

[30] See, Articles 3 (a) to (e), and 4(2) of Annex 6 to the SADC Protocol on Finance and Investment 2006

On the possible effect of the isolated nature of the Zambian national payment system—like those of many jurisdictions in the region—on the speed at which cross-border fund transfers are effected, and transaction costs for cross-border deals, the United Nations Economic Commission for Africa (2010) observes that:

"[M]ost African payments systems are small, fragmented andlack competition, adding to inefficiencies, high payments costs and exorbitant bank charges. The situation hurts the ability of African enterprises, especially SMEs, to trade efficiently."[31]

An argument is made that the high cross-border payment costs, and high prices for foreign securities are likely to discourage local small and medium scale enterprises and individual investors from participating in cross-border trade in securities in the region. An argument is also made that the infrastructural isolation of the Zambian national payment system from payment systems of other jurisdictions in the region is likely to lengthen the duration of cross-border transfers of funds, and increase the cost of cross-border payments for foreign securities. A corollary argument is also made that the resulting much higher cost of cross-border payments than the cost of purely domestic payments is likely to increase transaction costs for cross-border securities deals. A further argument is made that the higher cost of foreign securities than the cost of domestic securities is likely to put a premium on domestic securities thereby creating equity home bias—a condition which is inimical to the growth of cross-border trade in securities in the region.

As a possible solution to this shortcoming in the legal framework, proposals earlier made for introduction of provisions—into the national payments laws—tailored to facilitation of regional integration of the Zambian payment system are hereby re-enforced.

### 5.2.4. LEGAL CONSTRAINTS RELATING TO DELAYS IN ARRIVAL OF CROSS-BORDER PAYMENTS FOR SECURITIES.

[31] United Nations Economic Commission for Africa, 'Assessing Regional Integration in Africa IV: Enhancing Intra-Africa Trade,' 2010, para 8.1, p. 267

In an attempt to conceptualize the constraint that the delay in arrival of funds to a cross-border seller of securities in Sub-Saharan Africa works against a cross-border purchaser, let us consider the following scenario:

"A and B are resident in different jurisdictions. They hold securities accounts with X (their common intermediary). B agrees to transfer some of his XCo securities to A for a money consideration. Transfer of securities and the attendant passing of property in the securities is to be done upon receipt of funds from A. Payment is made by way of electronic fund transfer. Two days after the wiring the funds to B, (ten days before funds can reach B), B with the knowledge of A, purports to sell the same position to C. A attempts to stop B from going ahead with the deal with C but to no avail. Four days later (a week before arrival of funds to B from A) C purports to pledge that position to X for marginal loan advanced by the latter. Could A competently maintain an action in a court of law for (among other reliefs) an interim injunction to restrain B from disposing of the position in question until the funds from A reach B? Could a constructive trust of that position be declared in favour of A? Would the court award damages for any loss A might have suffered as a result of entering the deal with B?"[32]

With regard to our scenario above, an argument is made that before the seller can receive the cross-border payment from the purchaser, their promise to transfer the securities [upon receipt of the funds] is not met with valuable consideration, yet. Consideration for B's promise to transfer XCo securities to A consists in acceptance by A of the offer as signified by performance of what the offeror has asked for—make payment for the securities.[33] Once payment is made in accordance with the offer, an obligation on the part of B to transfer the securities arises—and not before then. Thus, an argument is made that before an obligation on the part of B to transfer the securities can arise—upon the coming through of the funds—B cannot competently be

[32] If payment were made by way of cheque or similar paper-based means of payment, reference would have been made to the thirty-day clearance period. Thirty days would possibly increase the likelihood of other transactions with regard to XCo listed securities thereby complicating the chain even further.

[33] On the importance of consideration with regard to enforceability of contractual obligations, J.C. Smith (1979) observes: "The language of benefit and detriment is, and I believe long has been, out of date. So is the idea that consideration must be an economic benefit of some kind. All that is necessary is that the defendant should, expressly or impliedly, ask for something in return for his promise, an act or a promise by the offeree, [if he gets what he has asked for], then the promise is given for consideration…": J.C. Smith, 'The Law of Contract—Alive or Dead? 13, The Law Teacher (1979), 73, at p. 77

compelled to transfer the securities to A in the eyes of the law. The obligation to transfer XCo securities, it would appear, arises upon finality of cross-border payment for the securities.[34]

A further argument is made that before an obligation to transfer XCo securities to A can arise, no action for anticipatory breach or indeed actual breach can properly be maintained.[35] Can there be actual or anticipatory breach of an obligation which does not exist? For this same reason, equity is unlikely to grant interim injunctions or declare constructive trusts in favour of A. Two reasons seem to lend support to this view, namely (i) equity follows the law. It will thus, not create new conditions nor fix new rights, interests or obligations for parties to a contract, (ii) thus, grant of an injunction to A would presuppose finality of payment. Presupposition is not part of the role of courts—their role being enforcement of accrued rights and obligations of parties to contracts. What if payment never comes through on account of exchange controls or failure to pay by A, or any other reason for that matter?[36], and (iii) equity will not aid such a party by treating him as a volunteer—a person who has not supplied consideration.[37]

It is submitted that constraints such as those identified in our analysis of the scenario above are likely to hurt the ability of market participants, especially small and medium scale enterprises (SMEs), to increase their trading in securities across international boundaries in the region. Proposals are made for implementation of measures aimed at accelerating existing regional efforts for integration of payment systems.

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[34]There are basically two promises made in listed securities contracts, namely (i) the promise by the purchase to pay for the securities, and (ii) the promise by the vendor to transfer the securities to the purchaser upon receipt of funds for the securities. In listed securities systems, there is an entrenched commercial practice of transferring securities to the purchaser upon receipt of the funds from them—transfer against payment. In this context, it is not sufficient that that the purchaser has actually made a promise to pay for the securities in exchange for the vendor's promise to transfer them upon receipt of payment. There is also need for recourse to national payment systems to facilitate the actual cross-border transfer of funds by the purchaser and receipt of the same by the vendor resident in the other jurisdiction.

[35]Sir Frederick Pollock observed that no legal action could competently be maintained against the offeror for failure to fulfil their promise unless the offeree has done an act or made a promise—which is of value in the eyes of the law—in response to the offeror's promise: Sir Frederick Pollock, Principles of Contract, (1950), 13th edn, at p. 133.

[36] The maxim that 'equity regards as done that which ought to be done' will not "turn the conditional into the absolute, the optional into the obligatory, or make for the parties contracts different from the ones they have made for themselves: Per Lord Atkinsonin De Beers Mines Ltd vs British South Africa Co. [1912] AC 52, at pp. 65-66

[37] No interim relief in the form of injunctions will be granted. In case of non-performance, specific performance will not be decreed either. See, Cannon vs Hartley [1949] Ch 213

The promise to pay for the securities is anchored on the expectation that payment by the purchaser will be facilitated by the national payment system of his jurisdiction while minimizing the amount of convertible currency reserves that may be required to fund the transfer of funds across international borders. Likewise, the promise by the vendor to transfer the securities to the purchaser upon receipt of the funds is predicated on the expectation that the payment system in his jurisdiction will facilitate receipt of the funds in his home currency.[38] The other expectation is that upon finality of payment, the vendor will have title to the securities to pass to the purchaser.

Speedy and efficient transfer of funds from the purchaser to the vendor across international boundaries depends on how well-integrated the national payment systems in the two jurisdictions are. The less integrated the national payment systems are, the longer it is likely to take for the funds to reach the vendor across international borders. Settlement of trades on the stock markets refers to 'completion of a securities transaction through the final transfer of securities and monies between the buyer and seller.'[39]Thus, transactions concluded on a securities exchange are executed and completed when a CSA transfers the securities transacted from the securities account of the transferor to that of the transferee.[40]The net effect of the foregoing is that the CSA will transfer securities from one account to another on proof of finality of payment.[41]An argument is made that the longer periods for transferring funds to the vendor may only serve to delay the settlement of trades and the overall transfer of securities across international borders.

An argument is made that regionally integrated and efficient national payment systems are likely to facilitate speedy settlement of trades on stock markets, stimulate the growth of cross-border securities transactions, and overall cross-border trade in securities in the region.

**5.2.4.1. CONSTRAINTS RELATING TO UNAVAILABILITY OF EQUITABLE REMEDIES DURING THE WAITING PERIOD**

Where a purchaser of property pays for the property in full or makes part-payment therefor, the purchaser becomes an owner in equity through the acquisition of an equitable interest in the property.[42] The vendor retains legal ownership pending completion of formalities for perfection

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[38] It is expected that the payment system in his home country will ensure speedy receipt of the funds while minimizing the amount of convertible currency reserves required to fund receipt of the payment

[39] See, the definition of 'settlement' in section 2 of the Zambian Securities Ac 2016

[40] See, section 107(1) of the Zambian Securities Act 2016

[41] In settlement of the payment obligation of the buyer of securities

[42]See, the speech of Sir George Jessel, MR in LysaghtVs Edwards [1876] 2 Ch D, 449,at pp. 456-459.

of the interests of the purchaser.[43] The vendor becomes a constructive trustee of the property for the benefit of the purchaser from that moment.[44]

The acquisition of proprietary interests in in the property upon successful payment for them is particularly important in relation to the question whether an interim injunction could be granted or indeed the remedial constructive trust declared as devices for protecting the interests of the purchaser of securities. The rules governing the grant of interim injunction are well-established. One of the primary rules is that a court exercising equitable jurisdiction will not grant an interlocutory injunction unless the applicant's right to relief is clear as manifested in the acquisition of an interest or right in property the interim relief is meant to protect.

In exercising the discretion to grant or refuse an injunction or receiver, courts in England are guided by the Latin maxim "ubi jus ibiremedium" which is literally translated as "where there is a right or interest in the property, there is a remedy." Thus, before a receiver or an injunction is granted, the court should be satisfied that there exists a proprietary interest in favour of the applicant in the property which the remedy of receiver or injunction is intended to protect. Failing such an interest, the remedies will not be available. Against this backdrop, Lord Diplock speaking in effect for the House of Lords in the case of **Siskina (Cargo Owners) vsDistosCompaniaVaviera SA**,[45]categorically stated that the English High Court had no power to grant an interlocutory injunction except in protection or assertion of some legal or equitable right.[46] Two years later, the House of Lords reaffirmed its position on issue in **Bremer VulkanChiffbau und Maschinenfabrikvs South India Shipping Corporation Ltd.**[47]

In the English case of **American Cyanamid Co. vs Ethicon Co. Ltd**[48], the court underscored the acquisition of rights in the property as a precondition to the grant of interim injunction by holding that:

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[43] Ibid
[44]Ibid
[45] [1979] A.C. 210
[46] Adopting judgment of Cotton LJ in North London Railway Co vs Great Northern Railway (1883) 11 Q.B.D 30, at pp. 39-40
[47] [1981] A.C 909
[48][1977] AC 396.

"The object of an interim injunction is to protect the plaintiff against injury by [violation of his rights] for which he could not be adequately
compensated in damages."[49]

Similarly, Justice Tipping in the New Zealand case of **Fortex Group (In Receivership and Liquidation) vs Mac Intosh**[50] underscored the acquisition of an interest in the property as the pre-condition to declaration of the remedial constructive trust. He held:

"The [remedial constructive trust] does not exist at all until the court
imposes it. Thus, all that is necessary, from the point of view of the
subject-matter, is for there to be some assets in the defendant's hands in respect of which the court considers it appropriate to impress a trust in favour of the plaintiff. Clearly, there are such assets in the present case. but before the Court can contemplate declaring that assets owned in law by B should, by way of remedy, be held by B in favour of A, there must be some principled basis for doing so, both vis-à-vis B and vis-a-vis any other person who has [a proper interest] in the subject-matter which would be affected by imposition of the trust. In the present case, the receivers and liquidators administer the assets of the Fortex Group for those who in law are entitled to them, i.e. the secured creditors. The secured creditors through their debenture trustees, have rights at law in the assets. They have rights both under their fixed charge and the floating charge which became fixed with the appointment of the receiver."[51] It is therefore, submitted that before B, in the scenario above, could receive the funds transferred by A, A has no interest—equitable or legal or otherwise—in XCo securities the subject of their transaction.[52] Consequently, no injunctive relief can competently be granted until the funds can finally reach B.[53] Further, no constructive trust may be declared in favour of A.[54]

[49]At p. 406. This is also the position in Roman Law. This position is popularized in the axiomatic maxim *" ubi jus ibiremedium*" which is literally translated as "where there is a legal or equitable right or interest, there is a remedy in equity".
[50] [1998] 3 NZLR 171 (Court of Appeal)
[51]At p. 175.
[52] It is also a term of the agreement between A and B that property in the XCo securities passes only after receipt of funds by B from A.
[53] The fact that the damage that the purchaser may suffer is likely to be atoned in damages makes the grant of an interim injunction unlikely, also.
[54] Further, even after the receipt of the funds by B, where the securities are sold to C, a remedial constructive trust is unlikely to be declared since B will no longer hold the securities. A would only have recourse to a personal action against B for damages for breach of contract. The remedy that appears readily available to A before funds can reach B is an action for damages for anticipatory breach on the strength of his promise to pay for the securities. He can

On account of the foregoing, it is further submitted that the current situation consisting in un-integrated (fragmented) national payment systems in the region serves as a constraint on the growth of cross-border trade in securities by:

- delaying settlement of cross-border trades which has to wait until finality of payment i.e. fourteen days in case of payment via electronic networks or longer than thirty days if payment is made by way of cheque or other paper-based means of payment;
- by denying the purchaser of securities (across international boundaries) interim injunctions and declaration of constructive trust of the subject-matter of the transaction during the waiting period(time it takes for funds to arrive at the vendor of securities).
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Proposals are made for integration of national payment systems in eastern and southern Africa. Such integration is likely to speed up the transfer and receipt of funds wired across international borders. As far as regional integration of national payment systems can make possible the receipt of cross-border payment within twenty four to forty eight hours of the time of the transfer, such efforts should be encouraged. Such measures are likely to bring about immediate acquisition and enforcement of proprietary rights acquired under a cross-border securities transaction.

### 5.2.5. CONSTRAINTS RELATING TO USE OF A SINGLE REGIONALLY-LINKED PAYMENT SYSTEM

Regional integration of payment systems may be achieved by either linking various national payment systems in a network or by setting up specific clearing and settlement system dedicated to cross-border transactions.[55]

COMESA Members have pursued the former method. An argument is made that given the rapid growth in domestic and cross-border transactions in the region—with the combined growth pluming through a single system—a single regionally-linked-payment-system is likely to prove insufficient for efficient clearing and settlement of cross-border payments. A further argument is

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either accept B's breach (selling securities to C) and claim damages at once or keep pressing for performance upon arrival of funds to B. A is under no duty to mitigate his loss before the funds can come through to B. Waiting until such a time therefore entitles him to a higher quantum of damages: See, Hochstervs De la Tour (1853) 2 E. & B. 678; Universal Cargo Carriers Corp. vsCitati [1957] 2 Q.B. 401, at p. 438.

[55] Africa Development Bank, 2010, at p. 273, op.cit

made that this negative feature is likely to lead to delayed clearance and settlement of cross-border payments thereby defeating the very object of regionally integrating national payment systems. It is thus, proposed that a separate clearing and settlement system specifically dedicated to processing cross-border payments be put in place. An argument is also made that efficient and speedy clearing and settlement of cross-border payments is likely to lead to speedy settlement of trades—since securities are customarily transferred to the purchaser against receipt of payment for the securities. A further argument is made that, to the extent that regional integration of payment systems increases the rate at which trades are settled on stock market as a result of speedy settlement and clearing of cross-border payments for securities, regional integration of payment systems is likely to lead to growth of cross-border trade in securities.

### 5.2.5.1. INTEGRATION OF NATIONAL PAYMENT SYSTEMS UNDER THE COMESA SCHEME

COMESA has adopted a phased monetary harmonization program designed to establish a monetary union.[56] In line with this program, COMESA has launched a free trade area (FTA). As earlier observed, a key challenge to intra-African trade is facilitation of payments.[57] Thus, in a bid to facilitate the growth of regional trade, COMESA launched a payment system called COMESA Cross-border Payment and Settlement System (hereinafter 'COMPASS Initiative' or simply 'COMPASS') in 1999, making it the first Regional Economic Community to implement a separate payment system dedicated to cross-country transactions.[58]

The major objective of COMPASS was to increase speed, lower transaction costs and reduce risk associated with currency convertibility in an effort to promote intra-regional trade.[59] In an effort to achieve an effective FTA and customs union, and to reduce cost of cross-border financial transactions, COMESA re-designated COMPASS to Regional Payment and Settlement System (REPESS) essentially transforming it into a regional payment initiative.[60]

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[56] See, Articles72-78 of Part Ten of the COMESA Treaty 1993
[57] Africa Development Bank, (2010), at p. 267, *op.cit*
[58] Ibid, at p. 276
[59] Ibid
[60] The decision to re-designate was made by the COMESA Authority at its meeting held in Cairo, Egypt in May, 2001

REPESS is a cross-border multilateral netting payment system. It essentially links members' national payment system and is expected to be more efficient and cheaper to operate thereby leading to lower transaction costs. As the COMESA Committee of Governors of Central Banks (2010) observes:

"REPSS (i) Guarantees prompt payment to the exporter - at the latest by the next day that the importer deposits the required amount at its Central Bank; (ii) Builds trust amongst traders that would lead to an increase in intra-regional trade; (iii) Drastically reduces the cost of making intra-regional trade transactions; (iv) Levels the playing ,field by getting all commercial banks to deal directly with one another, without having to go through banks outside the region; and (v) Eliminates the need for confirmed Letters of Credit and ultimately gets trade transactions to be effected on open accounts."[61]

COMPASS was a separate payment system especially dedicated to cross-border transactions. REPESS is therefore, a departure from the COMPASS concept. The rapid growth in both domestic and cross-border transactions in the region is likely to out-grow the capacity of the national payment system. Thus, clearing and settling payment instructions and obligation relating to domestic and cross-border transactions through the same system might slow down the ultimate transfer of funds across international borders. Proposals earlier made for setting up a separate cross-border payment systems especially dedicated to cross-border payments be set up as opposed to linking up existing national payment system as contemplated under the REPESS initiative, are hereby reinforced.

At the time of writing this thesis, research revealed that COMESA Members are at different levels of implementation of the REPESS Initiative. At one end are countries which have barely started implementing the initiative and at the other are countries which are nearing completion.[62]

[61]See, Minutes of the Thirty First Meeting of the Bureau of the COMESA Committee of Governors of Central Banks, August 4, 2010, paragraph 9, at p. 2

[62] The following countries have made notable progress—albeit with varying degrees—namely (i) Burundi (ii) Democratic Republic of Congo (iii) Egypt (iv)Malawi (v) Mauritius (vi) Rwanda (vii) Sudan (viii) Swaziland (ix) Uganda, and (x) Zambia. The following countries are lagging behind, namely (i) Comoros (ii) Djibouti (iii) Eritrea (iv) Ethiopia (v) Seychelles (vi) Tanzania (vii) Zimbabwe

The difference in levels of implementation of the REPESS Initiative serves as a constraint on efficient settlement of cross-border payments through REPESS.

Given the potential efficiency of REPESS—settlement of cross-border payments within twenty four hours of deposit of the funds into the home central bank by the purchaser—it is highly recommended that the initiative be aggressively marketed among COMESA Member States so as to ensure region-wide implementation. An argument is made that full region-wide implementation of REPESS, provided it accommodates settlement of transactions in securities and other intangible assets—is likely to promote growth in cross-border trade in securities as a result of speedy settlement of trades which comes with speedy settlement of cross-border payments.[63]

**3.2.6. CONSTRAINTS RELATING TO THE NARROW CLASS OF TRANSACTIONS THAT COULD BE CLEARED THROUGH THE COMESA CLEARING HOUSE**

COMESA Members have undertaken to cooperate in monetary and financial matters in order to establish monetary stability within the Common Market with the aim of facilitating economic integration.[64] Cooperation for this end consists in:

a) strengthening the clearing and payment systems in order to promote the use of national currencies in the settlement of payments for [all] transactions among member states thereby economizing on the use of foreign currency[65];

b) taking measures that would facilitate trade and capital movement within the Common Market.[66]

For purposes of paragraph (a) above, COMESA Members have undertaken, until a Common Central Bank is established, to settle all payments in respect of all transactions [in goods and services] conducted within the Common Market, through the Clearing House.[67]

An argument is made that restricting the role of the COMESA Clearing House to settlement of transactions in [goods and services] leaves out transactions in securities and other intangible

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[63] This argument is run against the exclusion of cross-border transactions in securities from the categories of trade that could be cleared through the COMESA Clearing House under Article 73 of the COMESA Treaty 1993
[64] See, Article 72 of the COMESA Treaty 1993
[65] Article 72(a) of the COMESA Treaty 1993
[66] Article 72(b) of the COMESA Treaty 1993
[67] Article 73 of the COMESA Treaty 1993

financial assets. A further argument is made that such a narrow scope of admissible categories of trade is contrary to the express undertaking by COMESA Members to cooperate in the creation of an enabling environment for the promotion of foreign and cross-border investment in securities.[68] Facilitation of cross-border payments for securities is critical to effective cross-border transfers of title or interests in securities—since securities are transferred against payment. Proposals are made for inclusion of transactions in securities and other intangible assets in the trade categories admissible by the COMESA Clearing House by way of amendment to Article 73 of the COMESA Treaty 1993. The following amended Article 73 is proposed: Proposed Article 73:

"73(1).For purposes of sub-paragraph (a) of Article 72 of this Treaty, the Member States undertake, until a common central bank is established, to settle all payments in respect of all transactions in [goods, services, securities and other intangible financial assets] conducted within the Common Market through the Clearing House."

Alternatively, the same result may be achieved by introducing an interpretation clause couched in the following terms:

"(2). In this Part, "goods" includes all chattels personal and things in action."

As has been alluded to above, COMESA has not established a regional central bank, yet. What COMESA has in place is a regional clearing house which acts as agent for the central banks of a cross-border seller and the buyer, respectively. On this score, developed regions like the European Union have increased efficiency and reduced the cost of cross-border clearing and settlement by establishing a regional central bank—the European Union Central Bank. It is through this system that both cross-border payments for goods and intangible financial assets are cleared and settled.

## VI

## CONCLUSION

The conclusion reached in this article is that the legal framework for the transfer of payments for securities across international borders has not provided adequate incentives for speedy transfer of those funds at minimum transaction costs thereby increasing the cost of cross-border payments.

[68] See, Articles 3(c), 80(e) and 81(b) and (c) of the COMESA Treaty 1993

An argument has been made that the delayed transfer of funds across international borders in effect delays the settlement of trades concluded on securities exchanges since the latter depends on finality of payment. As a possible solution to this shortcoming in the law, proposals have been made for regional integration of national payment systems characterized by clearing and settlement system especially dedicated to cross-border payments as opposed to a single linked-system.

An argument has been made that speedy settlement of cross-border trades that comes from efficient integrated payment systems is likely to increase cross-border trade in securities in the COMESA Region. It has also been arguedthat increased cross-border trade in securities increases the liquidity of the underlying stock markets.