

THE TREATY FOR EAST AFRICAN CO-OPERATION AND THE UNIFICATION OF COMMERCIAL LAWS

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One of the less publicized provisions of the East African Treaty for Co-operation, Article 29 provides in a very general way for co-operation and consultation among the partner states on a number of matters that can potentially affect the efficient operation of the common market. Subsection (b) of that Article provides that "the Counsel to the Community shall advise the Partner States on, and endeavour to promote, the harmonization of the commercial laws in operation in the Partner States." This provision is reinforced by Article 2 of the Treaty, which lists the general aims of the Community and includes among them "the approximation of the commercial laws of the Partner States."¹ The purpose of this short paper is to discuss the impact these provisions may or should have on the existing commercial laws in East Africa.

The non-customary laws of the different jurisdictions in East Africa are already similar in most important respects. There are a number of reasons for this similarity, the most important being the basic similarity in the colonial experiences of the jurisdictions. The commercial laws of all East Africa jurisdictions have been mostly drafted by British civil servants who had a common social and educational background, who tended to consult with counterpart officials in other colonies, and who were often advised about the content of commercial laws by the Colonial Office in London that was charged with administering all the British colonies.² Despite the basic similarity of the commercial laws, however, there have been recurrent efforts to achieve even greater uniformity in the past few decades. The 1945 Colonial Office paper proposing the establishment of an East African High Commission suggested that the High Commission have considerable power to legislate in commercial law areas,³ but this proposal was subsequently dropped and the 1947 Order in Council did not vest such power in the High Commission that it established.⁴ The 1961 Raisman report, which immediately preceded the foundation of E.A.C.S.O., again proposed that the Central Legislative Assembly be empowered to enact

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1. Article 2, sec. 2(j).

2. See generally Franck, *East African Unity Through Law* 123-24 (Yale Univ. Press, 1964).

3. Inter-Territorial Organization in Africa, 1945, Colonial No. 191 (H.M.S.O.).

4. East African (High Commission) Order in Council, S. R. and O. No. 2863(1947).

commercial legislation that would be effective throughout East Africa.⁵ As before, however, the proposal was not accepted and the Central Legislative Assembly operating under the E.A.C.S.O. agreement lacked authority to legislate in commercial law areas.⁶ Since 1961 a number of commentators who have championed the cause of greater East African unity have argued that there is a need for greater uniformity of commercial laws, and some have even lamented what they perceive to be a trend towards dissimilarity since independence.⁷

Articles 2 and 29 (b) of the Treaty for Co-operation appear to be a product of this drive for further unification of the commercial laws. The wording of the Articles, however, raises two problems in determining their intended impact. First, they use the term "commercial laws" to define the scope of the provisions. Although this term is often used in the legal profession, there is no uniformly accepted precise definition of it, nor does the Treaty for Co-operation provide one. For two reasons, however, this difficulty does not pose as serious a problem as might be supposed. First, neither Article has any immediate effect; Article 29 (b) only calls on the Counsel to the Community to advise the partner states on the harmonization of commercial laws and Article 2 only lists the general long term goals of the Community. Implicitly, therefore, the partner states have reserved the authority to make the ultimate decision on the content of their commercial laws. Still the provisions have some importance in that they commit the different governments, in making these decisions, to consider the interrelationship between their "commercial laws" and those of the other governments. Secondly, other provisions of the Treaty indicate some limitations on the potential impact of Articles 2 and 29 (b). Various provisions of the Treaty declare certain discriminatory commercial practices to be "incompatible with this Treaty,"⁸ provide

5. Technically, the Commission recommended only that the governments of Kenya, Uganda and Tanganyika consider adding commercial legislation to the list of subjects on which the Central Legislative Assembly was competent to act. East Africa, Report of the Economic and Fiscal Commission, 1961, Cmd.1279(H.M.S.O.), pp.30, 72.

6. The E.A.C.S.O. agreement did provide for the continuation of the East African Industrial Council, which had been established by the East African High Commission and in which each country had vested authority to grant industrial licences for the manufacture of a number of different types of articles. See Tang. Rev. Laws, cap.324; Laws of Uganda, 1964, cap. 102; Laws of Kenya, 1962, cap. 496. Article 23 of the Treaty for East African Co-operation provides for the continuation of this Council, although no additional types of articles can be added to the list subject to centralized licensing. The Treaty also proposes that the individual laws of the three countries conferring authority on the Council be replaced by an Act of the Community.

7. Ghai, "Some Legal Aspects of an East African Federation", and de Smith, "Integration of Legal Systems," both in Leys & Robson, *Federation in East Africa*, at 179-80, 167 (O.U.P. 1965); Franěk, *supra* note 2, at 121-37.

8. Article 16.

for continuation of the East African Industrial Licensing Laws,⁹ provide for coordination on taxation policies,¹⁰ charge the Communications Council with the duty of consulting with the partner states on co-ordination of surface transport policies,¹¹ and deal with a number of other laws which affect commerce.¹² Presumably Article 2 should not be interpreted as possibly committing the partner states to anything inconsistent with these other provisions, nor should Article 29 (b) be read to authorize the Counsel to promote legislation inconsistent with other Treaty provisions. The Council to the Community and the partner states can still act to promote "harmonization" of laws in these areas to the extent possible without conflicting with the other treaty provisions—indeed it is to be hoped that the Counsel will offer his advice on as wide a range of matters as possible—but the potential impact of Articles 2 and 29 (b) on laws affecting commerce that are dealt with elsewhere in the treaty is certainly less than it is on other laws affecting commerce.

The second problem results from the use of the words "harmonization" in Article 29 (b) and "approximation" in Article 2. Again the Treaty fails to provide a definition for these words. Yet the decision to use these words may be significant in view of the failure to use the word "unification" that has been most often employed by commentators. These are several possible explanations for this failure. Unification may have been considered too narrow a term. One of the principal purposes of the common market section of the Treaty of Co-operation is to establish a single trade area throughout East Africa. This goal could be frustrated by laws in any state which discriminated against trade emanating from a partner state in favour of trade originating locally—for example, a law which made it difficult for a company incorporated elsewhere in East Africa to register to do business in, say, Tanzania. Articles 2 and 29 (b) may have been designed to encourage the abolition of such discriminatory laws even though each state had such a law and in that sense the laws were "unified". This explanation still leaves open the question of the Treaty's intentions with regard to non-discriminatory commercial laws which are nevertheless different in the various East African countries. As regards these laws, a member of the Tanzanian government who is familiar with the content of the negotiations leading up to the Treaty, and with whom I discussed this matter, offered the opinion that "unification" was not used because

9. Article 23. See note 6 *supra*.

10. Articles 29(a) and 88.

11. Article 29(c).

12. For example, Articles 24 to 28 inclusive provide for currency and banking regulations and Articles 13 and 14 contain a number of special provisions concerning the marketing of agricultural products.

the negotiators feared that such a word would imply that all partners to the Treaty were to be governed by the same commercial laws enacted by the Legislative Assembly, which obviously was not the intention. In his opinion "harmonization" and "approximation" should be ready as meaning unification in the sense that the partner states should each strive to adopt commercial laws identical to the laws in force elsewhere in East Africa. Nevertheless, it is certainly possible to interpret the use of words which literally have a vaguer meaning than unification as indicating that the partner states intended to set as a goal of the Community something less than complete identity of their commercial laws. The rather feeble means for implementing the goal of harmonizing the commercial laws provided by the Treaty may support such an argument, since it tends to suggest that some or all of the partner states have insisted on preserving their ability to consider factors other than achievement of a state of identity with the other states in determining the content of their commercial laws.

This uncertainty about the intended meaning of "harmonization" and "approximation" renders unclear what precisely is the intended effect of the Treaty on commercial laws and may cause the Counsel to the Community some difficulty in determining what actions to take under Article 29 (b). It would be fruitful, therefore, to examine closely the reasons that have caused so many to advocate unification of commercial laws in East Africa and compare them with those purposes of the Treaty of Co-operation that are explicitly stated or otherwise well known. This examination should help to determine the extent to which it would make sense to interpret the Treaty as calling for identical commercial laws.

Unfortunately, commentators advocating unification of the commercial laws in East Africa have not often stated the arguments supporting that position in any detail. Their basic argument, which is also made by commentators advocating unification of commercial laws elsewhere in the world, seems to be that a lack of unity in the commercial laws will make it more difficult for commercial enterprises to conduct their businesses on an inter-state basis, and consequently that unification will encourage the establishment of a single trade area.¹³ Why a lack of unity will have

13. "If there were uniform commercial legislation throughout East Africa, the administrative and legal work of concerns trading in the whole area, or contemplating doing so, would be simplified, with subsequent economies in overhead costs, and the operation of the Common Market itself would be facilitated." East Africa, Report of the Economic and Fiscal Commission (The Raisman Report), 1961, Cmd. 1279 (H.M., S.O.), p.30. A similar expression of the benefits of uniformity can be found in Franck, *supra* note 2, at 121-23.

The justification for commercial law unification of promoting inter-state trade has been advanced elsewhere in the world, and is being used now to justify the adoption of treaties which would provide a uniform law applicable to all international sale of goods transactions. See Honnold, "The Uniform Law for the International Sale of Goods: The Hague Convention of 1964", (1965) 30 *Law & Contemp. Prob.* 326.

that effect is not made at all clear by the commentators, but there are several possible hypotheses. Because of a large degree of vagueness in the rules governing choice of law,¹⁴ a businessman in a foreign state may find it so difficult to determine what law would apply to a contemplated transaction across state lines that he simply decides to forgo the transaction. Alternatively, he may originally ignore the legal implications of his inter-state transaction, but sometime in the future discover in the course of a lawsuit that the applicable law is other than he had assumed and at that point decide to restrict his inter-state trade. Even if businessman's activities are largely based in the foreign state so that as a choice of law matter it is clear that state's law applies, or if the foreign state's law puts requirements on the businessman regardless of how much contact he has with that state, the businessman may decide that it is too much trouble to comply with the different requirements, or that to do so would require so much adaptation of his methods of managing his activities, that it would negate any benefits to be obtained from the expansion of those activities. Thus, one commentator has suggested that the different laws governing the settlement of labour-management disputes presently existing in East Africa may discourage enterprises from hiring a large number of employees in different states because of the necessity of devising different management approaches to labour disputes in each state.¹⁵

A lack of unity in some commercial laws can cause business enterprises to act in a way which tends to benefit one state more than the others even though none of the statutes themselves discriminate between local and foreign enterprises. For example, if the company law of one state gives the management of a corporation greater freedom from its shareholders than do the laws of the other states, a majority of corporations may decide to incorporate in that state even though their activities extend throughout East Africa.¹⁶ Because one of the most important purposes of the Treaty of Co-operation is to insure that the benefits of the Community are divided equitably among the member states, a lack of unity in the commercial laws which encourages a concentration of certain benefits to one state is undesirable.

There are two other possible arguments favoring unification of commercial law that should be mentioned briefly. It is sometimes argued that the law has an educative function that encourages the persons to whom it applies

14. See Sawyerr, "Contractual Capacity of Minors and the Conflict of Laws in East Africa: A Study in Conflicts Method," (1968) 1 *E.A.L.Rev.* 1.

15. See Franck, *supra* note 2, at 122-23.

16. Such a pattern of incorporation could give certain tax advantages to the state in which the majority of corporations choose to incorporate.

to adopt its values. Unification of law generally, therefore, including unification of commercial law, might contribute to uniformity in attitudes and culture, which would be desirable since one aim of East African co-operation is to create a spirit of oneness (umojja) among the inhabitants.¹⁷ It would seem, however, that even assuming the existence of an educative function for law, unification of commercial law, because it affects only a small proportion of the population, would be a relatively unimportant means of achieving the desired spirit of unity. Unification of personal law (family, succession, etc.) would be much more important for the attainment of this end.

A final argument that might be advanced in support of unification rests on the assumption that there is an ascertainable "best" set of commercial laws for East Africa. As sometimes advanced in other areas of the world this argument has presumed the existence of a "best" law for almost anyplace without the necessity of considering the socio-economic conditions of the people to whom it is to be applied—a sort of natural justice theory.¹⁸ The argument need not necessarily be so far-fetched as applied to East Africa, since there is some basis for maintaining that the commercial needs and practices of each of the states are very similar. If so, then some people might argue that it would be possible to ascertain a "best" set of commercial laws that is consistent with those similar needs and practices and that no state can reasonably object to adoption of these "best" laws.

The argument made by some persons that there may be a "best" set of commercial laws for East Africa suggests, perhaps inadvertently, some of the potential disadvantages of unification of commercial laws. The difficulty I see in this argument is that it seems to assume the drafting of commercial laws is primarily a technical exercise in determining what set of rules will best facilitate the operation of business. In fact the drafting of commercial laws requires the making of important policy, or value, choices that can have a significant impact on the socio-economic structure in a particular state, and it is quite possible that the different governments in East Africa may not wish to make the same choices. For example, consumer protection legislation, such as that imposing

17. "Most important... (uniformity of laws in East Africa) confirms a sense of East African community much as do the other common services. East African man cannot fail to be impressed that the company he may establish, the profit he may make, the profession for which he may qualify, even the crime he may commit will probably be regarded in much the same way by law, regardless of whether he acts in Tanganyika, Kenya, or Uganda." Franck, *supra* note 2, at 123. See also Dunham, *supra* note 13, at 236.

18. Dunham, *supra* note 13, at 235-36.

government regulation over prices on consumer goods,¹⁹ necessitates judgements about how extensively a government should intervene to protect the interests of consumers who may be unable or unwilling to protect themselves. One of the most dramatic contemporary examples of a value choice affecting commercial law is the Tanzanian nationalizations. The laws affecting the nationalizations of the banking and insurance businesses provide in essence that no private company may engage in the banking or insurance businesses in Tanzania,²⁰ a law which is at variance with the laws in Kenya and Uganda and obviously prevents a banking or insurance business from operating throughout East Africa. Actually the Treaty of Co-operation explicitly provides for a lack of unity in some laws affecting commercial life and inter-state trade and even provides for laws which discriminate between local and foreign enterprises. For example, the Treaty appears to contemplate indefinite continuation of the agricultural marketing boards existing in each country to which all producers in the country are often required to sell their produce.²¹ Because the Treaty provides especially for these matters, they should not be affected by Articles 2 and 29 (b). The existence of these special provisions illustrates, however, that the governments recognize that laws affecting commerce can involve important policy considerations affecting the structure of society and that a complete unification of all laws concerning commerce would necessitate a sacrifice in each government's present ability to reach their own decisions on these policy matters that they are not presently prepared to make.

The drafting of commercial laws not only requires value choices but it also involves difficult determinations about the best means to achieve through law the goals indicated by those value choices. For example, both Tanzania and Kenya have recently enacted hire-purchase laws which to

19. All East African jurisdictions have legislation enabling the government to set maximum prices on the retail sale of goods. Laws of Kenya, 1962, cap. 504; Laws of Uganda, 1964, cap. 104; Tang. Rev. Laws, cap 309; Laws of Zanzibar, cap. 152.

20. The law nationalizing the insurance business specifically prohibits all private insurance businesses. Tanzania Acts, No. 4 of 1967, sections 8, 13. The law establishing the National Bank of Commerce does not specifically forbid the operation of private banks, but it vests all the Tanzanian assets and liabilities of all the then existing private banks in the National Bank of Commerce and prohibits each of those banks from engaging in the banking business thereafter. Tanzania Acts, No. 1 of 1967, sections 8, 14.

21. Article 13. Notwithstanding Article 13, Article 14 states that it is a long term aim of the Treaty that "trade arrangements between the national agencies or [agricultural] marketing boards of the Partner States may be entered into directly within a single system of prices and a network within the Partner States as a whole of marketing services and facilities." Whether this provision contemplates the eventual demise of national marketing boards to which all producers in the country must sell is not at all clear.

a large extent share common goals.²² Both laws strive to make the substantive content of hire purchase contracts somewhat less unfavourable to consumers than they have been previously and to devise means to make it more likely that a court will pass judgement on disputes arising in situations in which the consumer has a great deal at stake.²³ Yet the detailed provisions of the laws enacted by the two countries vary in some respects. The differences are partly attributable to different value judgments made on detailed points but they are also partly attributable to different theories about the best method for achieving a common goal. For example, Kenya, but not Tanzania, requires persons carrying on a hire-purchase business to be licensed by the Government.²⁴ The licensing officer is directed to take into account the financial condition of the applicant and the manner in which he has conducted his hire-purchase business in the past.²⁵ The purpose of this requirement is apparently to help insure that persons carrying on a hire-purchase business will fulfill their responsibilities under the Act. Tanzania obviously shares a similar policy goal but apparently hopes it can be accomplished without the necessity of establishing a licensing bureaucracy.²⁶ Given the present state of knowledge, it is not possible to say which of these approaches will best accomplish the ends desired. Hopefully, however, after each Act has been in effect for some time it will be possible to hazard a guess. If so, then some positive benefit—in terms of greater knowledge about the effects of different laws on hire-purchase practices—will actually have resulted from the existence of different laws in the two countries, a benefit that could not have been acquired if in the past few years there had been a rigid insistence on unification of all commercial laws in East Africa.

Unless there is something to be gained thereby, it would seem to me desirable, and consistent with the general structure of the East African Community, that the partner states to the Treaty preserve their power to make their own value judgement about how they would like their societies

22. Kenya Acts, No. 42 of 1968. Tanzania Acts, No. 22 of 1966. The Kenya Act becomes effective on a day fixed by the Minister and published in the Gazette. To my knowledge a day has yet to be fixed. The President of Kenya gave his assent to the Act on 26 June, 1968.

23. For a comprehensive discussion of the Tanzania Act, see Macneil, "The Tanzania Hire Purchase Act, 1966", (1966) 2 E.A.L.J. 84.

24. Kenya Acts, No. 42 of 1968, sections 18-23.

25. *Id.*, section 20 (5).

26. Tanzania's failure to provide for licensing may also be due in part to a policy decision that is different from the decision made in Kenya. Since the Kenya Act directs the licensing officer to take into account an applicant's financial position, it is possible that one effect of the Act will be to prevent small shopkeepers from financing their own credit sales through hire-purchase. It may be that Tanzania was less willing than Kenya to risk such an effect.

to be organized. For this reason, and because of the positive benefits in the form of increased knowledge about the effects of different types of regulation of commercial practices that may sometimes be gained from reasonable diversification of the commercial laws, the complete unification of commercial laws in East Africa should not be attempted, in my view, unless the benefits of unification are clearly substantial. As argued previously, except in those few instances in which a lack of unification leads to an unequal distribution of the benefits of the Common Market among the partner states, the principal hypothesized benefit of unification of the commercial laws is a greater willingness of private enterprises to conduct business across state lines. Yet this hypothesis rests on the assumptions that business decisions are substantially influenced by considerations about the law applicable to the contemplated transaction and that the necessity of having to take account of two or more different laws will discourage businessmen from engaging in interstate trade. To my knowledge these assumptions have never been tested empirically in East Africa, but nevertheless there is some basis for doubting their complete validity in every case. There have been studies in the United States which suggest that in that country a surprisingly large number of business decisions are made without regard to legal considerations.²⁷ Perhaps most relevant to the questions being discussed in this article is a study conducted in America about practices with regard to contracts between businessmen, mostly manufacturers.²⁸ The study revealed that although these businessmen often carefully plan those parts of their contracts that concern the content of their performance (e.g., quality, quantity, time and place of performance), they are "least concerned about planning their transactions so that they are legally enforceable contracts."²⁹ Although there are several explanations for this phenomenon, one of the most important is another finding of this study—that these businessmen very rarely resort to legal means (such as lawyers or courts) to resolve contract disputes. Instead they will negotiate "apparently as if there had never been any original contract."³⁰ There is often little reason for a businessman to be concerned with considerations of legal enforceability at the time a contract is formed, since it is highly unlikely that this type of issue will ever arise in a court or in future negotiations. According to the author of the study, a principal reason that businessmen are reluctant to use legal sanctions is that they usually desire to preserve their ability to negotiate

27. See, e.g., Macaulay, "Non-Contractual Relations in Business: A Preliminary Study" (1963) 28 *Am.Soc.Rev.* 55; Comment, "The Statute of Frauds and the Business Community: A Re-Appraisal in light of Prevailing Practices," (1957) 66 *Yale L.J.* 1038.

28. Macaulay, *supra* note 27.

29. *Id.*, at 60.

30. *Id.*, at 61.

future transactions with the other party. The mores of the American business world regard resort to legal sanctions as an unfriendly act and not conducive to maintenance of that degree of mutual respect that is often essential to the continuance of a business relationship. Although this study applied only to certain types of business transactions, and was conducted in the United States and therefore does not necessarily reflect practices in East Africa, in the absence of evidence to the contrary it should at least raise the question whether the common assumption that businesses in East Africa always take account of legal difficulties in planning transactions is accurate. If they do not in some instances, to that extent the existing lack of unity in East Africa's commercial laws would not be a serious impediment to interstate trade, and the principal argument for unification of these laws would be undermined.³¹

Experience in several other areas of the world provides another reason for doubting the importance of complete unification of commercial laws to the establishment of a single trade area. Canada, the United States, and the Soviet Union all have federal structures which allow for some variation in the commercial laws,³² yet most persons would conclude that these countries have successfully established a single trade area. Similarly the treaty establishing the European Economic Community contains no provision requiring unification of the commercial laws of the member states.³³ It is true that in all these areas the commercial laws

31. It is principally worries about the legal enforceability of his agreements that might dissuade a businessman from engaging in inter-state trade. If the laws of the different countries differ only as to the content of the terms of an agreement in the event the agreement itself is silent, then the businessman can overcome any difficulties caused by the lack of uniformity by drafting a detailed contract.

The study reported in the text deals just with laws directly affecting contractual agreements. Obviously there are other laws which affect business decisions, such as patent and trademark laws, tax laws, and registration of business names regulations. The only point being made in the text is that there are some commercial laws which, at least in America, appear to have little or no impact on business decisions.

32. For general discussions about the amount of uniformity in the laws of these countries, see Dunham, "A History of the National Conference of Commissioners on Uniform State Laws", (1965) 30 *Law & Contemp. Prob.* 233; Palmer, "Federalism and Uniformity of Laws: The Canadian Experience," (1965) 30 *Law & Contemp. Prob.* 250; Hazard, "Unity and Diversity in Socialist Law", (1965) 30 *Law & Contemp. Prob.* 270.

33. The Treaty of Rome does provide for unification of some laws, including in some instances the enactment of commercial laws by the central legislative body. For example, Articles 85 through 90 authorize the Council of the European Economic Community to enact laws regulating anti-competitive business practices and these laws will be in effect throughout the Community. Article 100 applies more broadly and authorizes the Council to "issue directives for the approximation of such legislative and administrative provisions of the Member States as have a direct incidence on the establishment or functioning of the Common Market." The test suggested by this Article seems somewhat similar to the one I recommend be used in East Africa. See subsequent text discussion.

are similar in many important respects, but then so are they in East Africa. It is also true that in all these countries, as in East Africa, there are persons asserting the need for even greater unity. Whether or not these assertions are correct, however, for purposes of determining the wisest interpretation of Articles 2 and 29 (b) of the Treaty of Co-operation, it is important to remember that all these areas have been quite successful at establishing a single trade area while permitting reasonable diversity in their commercial laws.

Since there is reason to doubt that in every instance unification of the commercial laws will provide substantial benefits to the East African Community, I would argue that Articles 2 and 29 (b) of the Treaty for Co-operation should not be interpreted as committing the partner states to a goal of complete unification of their commercial laws. This does not mean that it was unwise to include these Articles in the Treaty for Co-operation or that there are no areas within commercial law in which greater unification than now exists would be desirable. It does mean, however, that in deciding whether to strive for greater unification in a particular area, or whether to argue against enactment of a new law by a partner state which would decrease the amount of unification already achieved, the Counsel to the Community and the partner states should make an effort to determine the costs and benefits of unification. Adoption of this approach will make implementation of Article 29 (b) more difficult than may have been contemplated originally, since determining the benefits of unification in each area in which greater or less unification is proposed requires an empirical study of the effects of legal considerations on the relevant business decisions. Because it is sometimes difficult to carry out accurate empirical studies of his type, in those areas of commercial law in which the partner states share similar or identical policy choices, and in which there are no identifiable advantages in having the partner states experiment with different methods of achieving common goals—perhaps because there is general agreement that one method is superior—unification is probably desirable. It can be achieved at little or no cost and there may be some benefits from unification, even if not easily ascertained, in term of making inter-state trade more feasible or perhaps in creating a greater sense of unity within East Africa. If it is possible to identify some costs of unification, however, I do not think unification should be promoted unless it is first determined that there are probable, and not just blindly assumed, benefits of a substantial nature from such a course. Moreover, even if it is determined that benefits would result from greater unification than now exists, it may be possible to achieve most of those benefits with only a partial unification while still permitting

the partner states some freedom to implement their own policy preference or to experiment with different methods of achieving a common goal. It should be noted that in order to determine the benefits of unification under this approach I advocate it will not always be necessary to conduct a full scale scientific survey to determine business practices, although one or two such surveys may be desirable to acquire a general picture. Often a few informal questions to a number of concerned business enterprises about the effects of an existing lack of unity in the commercial laws will provide a rough basis for an evaluation of the potential benefits of unification. In other instances more conventional academic research into the operation of commercial law in other parts of the world or into patterns of litigation in East Africa will provide some insight into the possible benefits of unification.

In order to provide a better idea of the approach to unification of commercial laws in East Africa that I advocate, I have attempted a brief analysis of the costs and benefits of unification in several areas. I have not had the time or resources available to permit me to make an adequate empirical study of the effects of the present laws in these areas on interstate trade, and consequently I do not present these analyses as definitive discussions of whether the commercial laws in the areas discussed should be unified, but rather only as examples of the type of analysis that needs to be made.

The first area that I would like to examine is the aforementioned one of regulation of hire-purchase contracts. In 1966 Tanzania, the first East African country to enact legislation applying specially to this important consumer contract, passed a statute³⁴ (applicable only in Tanganyika) that is based largely on the 1938 English Hire-Purchase Act.³⁵ Recently Kenya enacted a statute based on the same English Act but with some significant differences from the Tanzania legislation.³⁶ Uganda and

34. Tanzania Acts, No. 22 of 1966.

35. 1 & 2 Geo. 6, cap. 53. This Act was substantially amended in 1964. Hire-Purchase Act 1964, 12 & 13 Eliz. 2, cap. 53.

36. Kenya Acts, No. 42 of 1968. The following is intended as only a partial list of the differences between the Kenya and Tanzania legislation. As discussed previously, Kenya, but not Tanzania requires hire-purchase businesses to be licensed. See note 24 *supra* and accompanying text. Tanzania, but not Kenya, requires the owner to provide the hirer with a Swahili translation of the hire-purchase agreement. Tanzania Acts, No. 22 of 1966, sec. 5(2). Both Acts allow the hirer to terminate the agreement at any time, but Kenya requires the hirer to return the goods to the owner as a precondition to termination whereas Tanzania only requires the hirer to send a written notice of termination to the owner. Kenya Acts, No. 42 of 1968, sec. 12; Tanzania Acts, No. 22 of 1966, sec. 14. Both Acts prohibit repossession without a court order after two thirds of the hire-purchase price has been made, but Kenya does permit the owner to place the goods in some sort of protective custody pending a court hearing provided the hirer has failed to pay two instalments on the hire-purchase price. Kenya Acts, No. 42 of 1968, sections 15-16; Tanzania Acts, No. 22 of 1966, sections 17-18.

Zanzibar have yet to enact legislation applying specially to these contracts. A further lack of unity in the laws pertaining to hire-purchase contracts is presented by the fact that Uganda, Kenya and Zanzibar have each passed Money-lenders Acts imposing various requirements on institutions other than banks in the business of regularly lending money.³⁷ The existence of such legislation makes possible litigation in those countries about whether what appears to be a hire-purchase contract is in fact that type of rental contract or should more properly be considered a loan with a security interest by an enterprise subject to the Money-lenders Act and possibly invalid under that Act, and this possibility of litigation poses a threat to financiers of hire-purchase that their contracts will be declared unenforceable.³⁸ Tanganyika does not have a Money-lenders Act and consequently persons selling on hire-purchase terms in that country need not be worried about this type of legal difficulty.

At the time the Kenya hire-purchase legislation was first being considered the Attorney-General of Kenya stated that the East African governments were then negotiating about a uniform hire-purchase statute to be enacted in all jurisdictions.³⁹ Apparently little resulted from these negotiations, for Kenya proceeded to enact its own legislation without further objection from the Attorney General. In my opinion the governments are wise to go slow on unification of hire-purchase legislation. As I have argued earlier, there are potential benefits in diversity in terms of eventually acquiring greater knowledge about how best to regulate the hire-purchase transaction effectively. And there would probably not be very many benefits from unification. Hire-purchase contracts are usually standardized form contracts and the formulation of them involves a great deal of planning, about considerations of legal enforceability as well as other matters. Interviews I have had with representatives of companies financing hire-purchase contracts with consumers indicate,⁴⁰ however, that those companies which do business in more than one country operate largely separate organizations in each country and in fact did so before the recent enactment of hire-purchase laws in Tanzania and Kenya. An important reason for this structure in the consumer oriented hire-purchase industry is that the companies need to investigate the credit rating of

37. Laws of Kenya, 1962, cap. 528; Laws of Uganda, 1964, cap. 264; Laws of Zanzibar, cap. 166.

38. See *Lombank (Uganda) Ltd. v. Patel*, 1961 E.A. 150 (U); *Patel v. Credit Finance Corp. Ltd.*, 1963 E.A. 533 (C.A.).

39. See *Daily Nation*, 21 December, 1967, p. 5, col. 1.

40. These interviews were conducted in connection with a research project designed to determine the effects of the Tanzania Hire-Purchase Act. This project has been carried on jointly by Mr. S. Picciotto, Faculty of Law, The University College, Dar es Salaam, and the author. We hope to publish the results of this project at a subsequent date.

prospective customers and to collect arrears from delinquent hirers, and these functions are best performed on a local level. Because the industry is organized in this manner, it should not be difficult for these companies to draft separate standardized form contracts for use in each country nor would it be burdensome to organize the administration of the contract (collections, repossession, etc.) to meet the special requirements of each country's laws. It is certainly possible that if the hire-purchase laws were unified a company operating principally in one country, say Kenya, might be willing to finance an occasional hire-purchase contract with a resident of another country, say Tanzania. Because of the difficulty of checking the hire's credit rating and policing his payments at a great distance, however, these instances would necessarily be rare. There may be a greater likelihood that a company would be willing to enter into interstate hire-purchase contracts to finance large purchases by other businesses (the purchase of office equipment and furniture). There already is uniformity in the laws applying to such transactions, however. Both the Kenya and Tanzania Acts are limited to hire-purchase transactions involving less than a stipulated amount,⁴¹ with transactions above that amount continuing to be governed by the common law, as they are in Uganda and Zanzibar.

There is one respect, however, in which Tanzania's Hire-Purchase Act tends to defeat one of the general aims of the Treaty for Co-operation. Immediately after the enactment of this Act, the large finance companies, most of whom carried on business throughout East Africa, stopped entering into any contracts in Tanzania that were subject to the Act. This pull-out had nothing to do with the difficulties caused by the existence of different laws in East Africa but rather was caused, at least ostensibly, by the companies' belief that the Tanzania Act was so favourable to hirers that it would no longer be profitable to operate a hire-purchase business in Tanganyika⁴². And since there are some efficiencies of scale in the hire-purchase business, this restriction on the size of the market may discourage some finance companies from entering the East African market. This result is inconsistent with one of the principal purposes of the Treaty for Co-operation—to establish a large market that would encourage

41. The Kenya Hire-Purchase Act is limited to contracts involving less than 80,000 shillings, except that all companies carrying on a hire-purchase business must get a license, even if they deal exclusively in contracts involving an amount greater than the jurisdictional limit. Kenya Acts, No. 42 of 1968, sec. 3. In Tanzania the limit is 60,000 shillings. Tanzania Acts, No. 22 of 1966, sec. 3.

42. The provision to which the finance companies objected most strenuously prohibits an owner from repossessing a good leased on hire-purchase without first obtaining a court order if two-thirds of the hire-purchase price has been paid by the hirer. Tanzania Acts, No. 22 of 1966, sec. 17.

investors to open new enterprises. If the prescription of Articles 2 and 29(b) for the "approximation" and "harmonization" of commercial laws is to be interpreted in light of the purposes of the Treaty for Co-operation, therefore, the Counsel to the Community probably should inquire whether the finance companies are acting reasonably in fearing Tanzania's law,⁴³ and if he finds affirmatively, endeavour to promote some change in Tanzania's law so that a market throughout East Africa for the hire-purchase business can be re-established. There would be no need to promote identity of the partner states' hire-purchase laws, however, since a lack of unification itself does not pose a serious difficulty to carrying on a hire-purchase business throughout East Africa. Moreover, if Tanzania's decision to include the provisions in its Hire-Purchase Act that are most objectionable to the finance companies turns out to have been based on an important value choice, the clear implication of the failure of the Treaty to vest authority to enact commercial laws in the Central Legislative Assembly is that Tanzania need not feel compelled to amend its Hire-Purchase Act at all. Each Partner state has carefully preserved its power to make its own value choices about the content of its commercial laws.⁴⁴

Basic contract law is another area in which the laws of East Africa are diverse. At one time the Indian Contract Act applied in all East African jurisdictions. Today, however, Kenya and Uganda have replaced that Act with the common law of England relating to contract,⁴⁵ and Tanganyika and Zanzibar have enacted their own contract ordinances,⁴⁶ both of which are based on the Indian Contract Act although they differ in several respects from that Act as well as from each other. Because the Indian Contract Act was originally drafted by the British, the Tanganyika and Zanzibar Contract Ordinances resemble the English common law of

43. There is some reason to believe that the finance companies' pull-out from Tanzania was caused not by a fear that it was impossible to continue operating profitably but rather by a fear that the hire-purchase business would become less profitable and that, if Tanzania's law proved successful, Uganda and Kenya might enact a similar law. In any event, interviews conducted during the research project mentioned in note 40 *supra* revealed that many retail firms, including Singer Sewing Machine Company, have continued to sell their goods on hire-purchase and apparently without any undue loss of profits as a result of the Act.

44. It should be noted that the Tanzania nationalizations could give rise to an argument under Article 29(b) similar to the one I have suggested might be made about Tanzania's Hire-Purchase Act. See note 20 *supra* and accompanying text. It is evident, however, that the Treaty for Co-operation neither was intended to nor will have the effect of repealing these nationalizations.

45. Laws of Kenya, 1962, cap. 23; Laws of Uganda, 1964, cap. 75.

46. Tanganyika Rev. Laws (Supp. 1961), cap. 433; Laws of Zanzibar cap. 149.

contract in many important respects, but on the face of the statutes there appear to be several significant differences.⁴⁷

There is evidence to suggest that no very great benefits would result from unification of East Africa's contract law. Although at one time the general law of contract may have had a substantial impact on commercial life, in the past few decades there has been an increasing movement towards enactment of special statutes or the establishment of special judicial doctrines to regulate most important commercial transactions. For example, today there are in East Africa sale of goods ordinances,⁴⁸ special laws regulating negotiable paper,⁴⁹ extensive specialized regulation of landlord-tenant transactions,⁵⁰ and special statutes dealing with insurance,⁵¹ partnership,⁵² employment⁵³ and consumer⁵⁴ contracts. Although none of these statutes purports to be exhaustive, leaving uncovered matters to be dealt with according to general contract law, the statutes do provide for nearly all important issues that arise with any frequency. The result is that there is very little room left for operation of the general law of contract.⁵⁵ This conclusion is supported by a categorization by type of transaction that I have made of contract cases reported between 1960 and 1967 in the East African Reports plus those otherwise unreported cases appearing in the Digest for the East African Court of Appeal for which enough facts

47. See, e.g., sections 25 and 56 of the Tanganyika Contract Ordinance. In the past courts have often interpreted sections of the Indian Contract Act that on their face appear to diverge from English common law as if they were mere codifications of the common law. See, e.g., *Das v. Prosad*, (1920) A.I.R. Calcutta 1021; *Victoria Industries Ltd. v. Ramanbhai & Bros Ltd.*, (1961) E.A. 11(C.A.). If the East African courts follow a similar pattern in interpreting the Tanganyika and Zanzibar Contract Ordinances, then there will be less divergence in East African contract law than it now appears.

48. Laws of Kenya, 1962, cap. 31; Tang. Rev. Laws (Supp. 1961), cap. 214; Laws of Uganda, 1964, cap. 79. See Diamond, "Sale of Goods in East Africa", (1967) 16 *Int. & Comp. L.Q.* 1045.

49. E.g., Laws of Kenya, cap. 27; Tang. Rev. Laws (Supp. 1961), cap. 215; Laws of Uganda, 1964, cap. 76.

50. The rent restriction acts are a principal example. Laws of Kenya, 1962, cap. 296; Tang. Rev. Laws (Supp. 1962), cap. 479; Laws of Uganda, 1964, cap. 210.

51. For example, Tanganyika and Kenya have statutes requiring motor vehicle drivers to purchase third party liability insurance and placing a number of requirements on such insurance contracts. Laws of Kenya, 1962, cap. 405; Tang. Rev. Laws (Supp. 1960), cap. 169.

52. Laws of Kenya, 1962, cap. 29; Tang. Rev. Laws (Supp. 1961), cap. 433, sections 190-226; Laws of Uganda, 1964, cap. 86.

53. E.g., Laws of Kenya, 1962, cap. 226; Tang. Rev. Laws (Supp. 1956), cap. 366; Laws of Uganda, 1964, cap. 192.

54. For example, all three countries have statutes authorising government control over prices. Laws of Kenya, 1962, cap. 28; Tang. Rev. Laws (Supp. 1957), cap. 210; Laws of Uganda, 1964, cap. 104; Laws of Zanzibar, cap. 152.

55. A study conducted in the United States reached a similar conclusion about the effect of contract law in that country. Friedman, *Contract Law in America* (Univ. Wis. Press, 1965).

were noted to permit me to determine the type of transaction.⁵⁶ The data reported in the following table should be considered approximate only, since it is sometimes difficult to categorize a case as falling in one category or another. Moreover, the cases examined here do not necessarily provide an accurate picture of the subject matter of all contracts litigation in East Africa, principally because the vast majority of litigation does not appear in the reports I have examined, and partly because a number of the cases reported in the East African Reports originate in Aden. Finally, the data reported in the following table does not indicate the proportion of unlitigated contractual disputes occurring in connection with different types of contracts, and it is possible, although I think unlikely, that general contract law has greater influence in the settlement of those disputes.

Table I—Categorization of Contract Cases by Type of Transaction

Type of Case	Number Reported
Landlord and Tenant	47
Mortgage Contract	22
Sale of Goods	22
Insurance	20
Hire-Purchase	18
Employment	11
Negotiable Instruments	10
Sale of Services (including bailment)	11
Building Contract	8
Sale of Land	5
Miscellaneous	10
Total	184

It can readily be seen from this Table that most of the cases fall into areas which are largely dominated by specialized statutes. General contract law was a frequent basis for decision only in the last four categories, which contained approximately 18 per cent of all the cases, although of course it was in addition an occasional basis of decision in cases involving transactions that are ordinarily governed by specialised statutes.

The evidence I have collected suggests, therefore, that general contract law does not have a substantial impact on most commercial transactions, and, if accurate, this finding makes it seem unlikely that general contract law has much impact on business decisions or that the differences in contract law within East Africa deter inter-state trade. On the other hand

56. Since 1963 the Digest has been noting every decision of the Court of Appeal although it has not always included enough information about the facts to enable me to place the case in one of my categories.

it may be difficult to identify any costs in unifying the contract laws of East Africa. The debates in the Kenya, Uganda and Tanganyika legislatures at the time their respective contracts acts were enacted suggest that none of the countries perceived that any very important policy decisions were being made.⁵⁷ Zanzibar's contract ordinance has been in effect since 1917, and so far as can be determined it continues in force out of inertia rather than any conviction that it best implements the policy preferences of the Zanzibar government. Moreover, it is unlikely that much knowledge will be gained about the effects of different laws by continuing the existing diversity in general contract law since that law has such a limited applicability. It may be that if pressed the East African governments would identify some important public policies supporting the difference in their general contract laws. If not, however, then general contract law may be one of the areas in which unification can be supported on the simple ground that there is nothing to lose.

I have not been able to discover any area of commercial law in East Africa in which the laws are presently diverse and in which there is clearly a pressing need for unification in order to promote inter-state trade. In view of the basic similarity of each country's commercial law, this finding is not surprising. And it is supported by my aforementioned discussion with a member of the Tanzanian government, who offered the opinion that the inclusion of Article 29(b) in the Treaty was not a response to what was considered a pressing problem with the existing commercial laws. One can well imagine serious problems that would arise, however, if the commercial laws of East Africa were more diverse. Negotiable instruments law is almost a classical example of a law which needs to be uniform⁵⁸. Negotiable instruments can acquire the high degree

57. For example, in submitting the Tanganyika Law of Contract Bill, the Attorney-General indicated that the principal reason for replacing the Indian Contract Ordinance was that copies of the latter were difficult to obtain. See Macneil, *Contracts: Instruments for Social Co-operation: East Africa*, p. 732 (Fred B. Rothman & Co., 1968). In the legislative debates on the Kenya Law of Contract Bill it was suggested that English law was preferred to the Indian Contract Act because the former "is a living law which changes with circumstances as it is developed and explained by the judges." Kenya Legislative Council Debates, Vol. 86, Col. 384, October, 26, 1960 (Mr. Conroy, Temporary Minister for Legal Affairs). This statement may suggest that some type of policy judgment was being made. In introducing the Uganda Law of Contract Bill, the government stated that English Law was preferable to the Indian Contract Act both because English Law reports were more readily available than Indian reports containing cases interpreting the Indian Act and because Kenya had already adopted English law and it was "desirable that the law of Uganda and the law of Kenya should not diverge on a matter of such commercial importance." Special Supp. to Uganda Gazette, vol. LV, 26 Oct., 1962, p. 425.

58. The law in East Africa on this subject is essentially identical and based on the 1882 English Bill of Exchange Act. See cites in note 49 *supra*. Zanzibar has no special legislation but the English Act is applicable through the general reception statute.

of transferability that is necessary if they are to fulfill their function as an approximate equivalent to currency only if the business community can place a high degree of confidence in their validity. If the formal requirements for negotiability were different in the various East African countries, businessmen might lose confidence in negotiable instruments as a form of payment in inter-state transactions.⁵⁹

So far I have discussed "harmonization" or "approximation" of the commercial laws under the Treaty for Co-operation solely in terms of the possible need for greater unification of commercial laws in East Africa. There is another direction in which the commercial laws need change. Most of the commercial laws of East Africa are based on English statutes, and frequently on English statutes first enacted some years ago that have since been amended or repealed in that country. Except for areas directly related to agricultural development, such as the laws governing co-operatives and marketing boards, there have been few attempts to adapt these statutes to the current needs of East Africa. A excellent example is company law. Uganda and Kenya have company laws which are based on the 1948 British legislation⁶⁰ and Tanganyika's law is based on the 1928 British legislation.⁶¹ All these laws are designed to facilitate the operation of the large corporation with many shareholders that has become so dominant in the western business world. The complexities they require as a result often discourage the emerging African entrepreneurs from using

59. There follows a short list, not intended to be exhaustive, of areas in which the commercial law in East Africa is not identical and in which, therefore, consideration might be given to the desirability of greater uniformity. There are some differences in the companies and partnership legislation in East Africa. See notes 60-61 *infra* and note 52 *supra*. Only Kenya, Uganda and Zanzibar have Money-Lenders Acts. See note 37 *supra*. The Trade Licensing Acts in each country give extensive discretion to government officials to deny trading licences and could potentially cause great difficulty to a trader desiring to open a series of retail stores throughout East Africa. See Laws of Kenya, 1962, cap. 497; Kenya Acts, No. 33 of 1967; Laws of Uganda, 1964, cap. 100; Tang. Rev. Laws (Supp. 1962), cap. 208. Kenya has recently enacted a Cheques Act which should be considered for enactment in the other jurisdictions. Kenya Acts, No. 41 of 1968. See Picciotto, "Payment by Cheque," (1968), 1 *E.A.L. Rev.* 175. The various laws in East Africa regulating assignment of contractual obligations differ substantially, particularly as to whether the assignment must be in writing. See Macneil, *supra* note 57, at 423-26. The reception statutes are also a potential source of divergence in East Africa commercial laws. Although each jurisdiction receives English statutes of general application, the reception dates differ substantially (Kenya and Zanzibar—1897; Uganda—1902; Tanganyika—1920). *Id.*, at 6-13. English statutes of general application enacted in the "gaps" would be in force in some jurisdictions but not others.

60. Laws of Uganda, 1964, cap. 85; Laws of Kenya, 1962, cap. 486.

61. Laws of Tanganyika, 1947, v. IV, p.2688. Amendments are reported in Tang. Rev. Laws, cap. 212. A revised Companies Act based on the 1948 British legislation has been enacted in Tanganyika but it does not come into effect until a day appointed by the President by notice in the *Gazette*. To date the President has not fixed the day for the Act to come into force. See Tang. Rev. Laws (Supp. 1959), cap. 419.

the advantages of incorporation. It has often been suggested that there is a need in East Africa to establish a new type of business organisation which will better meet the needs of the emerging African entrepreneurs, perhaps something similar to the Ghana Partnership Act,⁶² but no concrete steps have yet been taken at the legislative level to meet this need. The word "harmonization" used in Article 29(b) of the Treaty of Co-operation is sufficiently broad, in my view, to allow the Counsel to the Community to interpret his function to be to promote the modernization and adaptation of East Africa's commercial laws to the needs of these societies as well as to promote unification, and I would hope that he would act in that manner. Of course, just as empirical studies should be made to determine the desirability of unification, so should such studies be made to determine the needs of East Africa before any new laws are proposed.

Finally, some attention must be given to the procedures that should be employed by the Counsel to the Community and the partner states in drafting and proposing unified and modernized commercial laws. Because the gathering of empirical information must antedate any serious effort at reform, it would be unfortunate if the Counsel to the Community or a representative of a partner state should draft new laws without ever leaving their offices. What is needed is to establish some institution which can provide the necessary research assistance. Britain has recently met this need in that country by establishing a Law Commission consisting of five well known lawyers together with a staff, all of whom devote full time to proposing reform legislation.⁶³ The experience of Canada and the United States is also relevant to East Africa since those countries have a federal structure creating a perceived need for unification of laws. There exists in each country an organization which drafts and promotes the adoption of uniform legislation in the local legislatures, particularly in the area of commercial law.⁶⁴ Although certainly these organizations have their critics who doubt that they have functioned successfully, for East Africa the useful information concerns their structure. In the United States (the Canadian organization has a similar structure) the organization is formally governed by a group of Commissioners appointed by the Gover-

62. Incorporated Private Partnerships Act, No. 152 (1962), Acts of Ghana. See Franck, *supra* note 2, at 129-30.

63. Law Commissions Act of 1965, cap. 22.

64. The United States organization is the National Conference of Commissioners on Uniform State Laws. Its major accomplishment to date has been the preparation of the Uniform Commercial Code, which has now been enacted in all but one jurisdiction in the United States. The Canadian organization is the Conference of Commissioners on Uniformity of Legislation in Canada. The work of these organizations is described in Dunham, *supra* note 32, and Palmer, *supra* note 32.

nors of the States. The Commissioners have appointed a number of committees charged with preparing a draft of uniform legislation in a particular area and it is these committees that do the real work of the organization. The committees usually consist of a mixture of academic and practicing lawyers and, on occasion, one or more non-lawyers. Because the committees consist of experts in a particular field, its members often possess sufficient empirical knowledge about the needs for legislative reform in their area, and if they do not they at least know how to make the proper inquiries. They are also provided with sufficient funds to commission research work specially for the committee if it is decided there is a need for it.

The approach of appointing a committee of experts who should at least know how to go about collecting the necessary empirical information about the desirability of unification, or the need for adaptation to local circumstances, of the commercial laws seems like an appropriate procedure for East Africa. The experts could be drawn from the various law faculties, from the practicing bar and from the government legal staffs. Hopefully they could be persuaded to serve without demanding an additional salary, limiting the need for extra funds to travel expenses. Both Uganda and Tanzania are presently planning legal research centers and hopefully these institutions could perform any special research needed by the committee members. Since the East African Treaty for Co-operation charges the Counsel to the Community with the duty to initiate reform of commercial law, he would seem to be the appropriate person to appoint and co-ordinate the work of these committees.