Introduction

In international law, for a treaty to become legally binding, it must first of all enter or come into force in a manner consistent with the constitutional requirements of the signatory States. In other words, a treaty does not become law upon its adoption, but upon certain conditions being met following its adoption. It is the provisions of the treaty that determine how and when it enters into force. This is confirmed by Article 24 (1) of 1969 Vienna Convention on the Law of Treaties which provides that “A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree”.

For a bilateral treaty, the negotiating States may agree that it shall enter into force on a particular date or upon exchange of the instruments of ratification or on any other date. Where a multilateral treaty is concerned, it may provide that it shall enter into force on such date following the deposit of the instrument of ratification by a specified number, percentage or category of signatory States. For example, Article 110(3) of the United Nations Charter provides that the Charter shall come into force upon the deposit of ratifications by the five Permanent Members of the Security Council and a majority of other signatory States.

If there is no such provision, or no such agreement, regarding the date of entry into force, it is assumed that the treaty enters into force “as soon as consent to be bound by (it) has been established for all the negotiating States” (Article 24 (2) of Vienna Convention on Law of Treaties). If the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that country on that date (Art.24 paragraph 3).

In other words, a treaty can come into force for some Member States as

soon as the conditions are met, but for others on different dates depending on when they express the consent to be bound by the treaty.

A treaty may, however, be applied provisionally, in whole or in part, pending its entry into force if it so provides or the negotiating States have in some other manner so agreed (Article 25 (1) of the aforementioned Convention).

Under community law[1], a treaty between the Member States such as a constitutive treaty or an amendment or a supplement to the latter enters into force on a specified date upon its ratification by **all** the Member States[2]. It is important to note that the mechanism of provisional application of a treaty pending its entry into force contained in Article 25 (1) of Vienna Convention is not applied in Community Law in respect of treaties between the member states themselves. It is applied only in respect of international agreements between the Community and one or more third countries or international organizations (e.g. the Economic Partnership Agreement between the European Union and its Member States of the one part, and West African States, ECOWAS and UEMOA of the other part; the Canada-EU Comprehensive Economic and Trade Agreement – CETA; the EU-UK Trade and Cooperation Agreement which governs post-Brexit relationship between the EU and the UK). Moreover, the principle of staggered entry into force of a treaty embodied in Art. 24 (3) of the Vienna Convention is not applied, either.

However, it is possible, under certain conditions, for a Member State to “opt out” of some obligations, in a specific policy area, of a treaty between the Member States (it may “opt in” later on). If that happens, a separate protocol is concluded, which must be ratified by all the other Member States and annexed to the principal treaty [3]. It is also possible for a group of Member States to go ahead, under a separate agreement, with further integration between them, in a particular policy

area, subject to the limits and in accordance with the detailed arrangements laid down in the Treaties. Other Member States can join subsequently.

In case *Variola v Amministrazione delle Finanze* the European Court of Justice (ECJ) stated as follows: “The freedom of each Member State to vary, in relation to itself and without express authority, the date on which a Community rule comes into force is excluded by reason of the need to ensure uniform and simultaneous application of Community law throughout the Community”.

ECOWAS Practice

Prior to the 2006 reform of, among other things, the legal regime for Community Acts, ECOWAS distinguished between provisional entry into force and definitive entry into force.

Provisional entry into force

ECOWAS protocols contained a clause enabling the Member Countries to put them into force provisionally, upon their signature by the Heads of State and Government, pending their ratification. Examples are Protocol A/P.1/5/79 relating to Free Movement of Persons, Residence and Establishment; Protocol A/P.1/12/99 relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security which entered into force provisionally upon signature on 10 December 1999 pending ratification; Protocol A/P.2/01/03 relating to the application of Compensation Procedures for Loss of Revenue incurred by ECOWAS States as a result of the Trade Liberalization Scheme which came into force temporally upon signature on 31st January 2003; Supplementary Protocol A/SP.1/01/05 amending the preamble and Articles 1,2,9 and 30 of Protocol A/P.1/7/91 relating to the Community Court of Justice which took effect provisionally upon

signature on 19 January 2005; Supplementary Protocol A/SP.1/06/06 amending the Revised Treaty and in particular establishing a new legal regime for Community acts.

This approach seemed to diverge with respect to the practice under community law mentioned above. Besides, it presented significant practical problems. One such problem related to the constitutional conditions for entry into force of a treaty within the domestic legal order.

Many ECOWAS Member States require that a treaty should be "domesticated" before it becomes legally binding. For instance, Section 12 (1) of the Nigerian 1999 Constitution, as amended, provides: "No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly". Article 75 (2) of the Constitution of the Republic of Ghana states: "A treaty, agreement or convention executed by or under the authority of the President shall be subject to ratification by (a) Act of Parliament; or (b) a resolution of Parliament supported by the votes of more than one-half of all the members of Parliament".

Similarly, Article 11 (2) of the Constitution of the Republic of Cape Verde provides that "International Treaties and Agreements, validly approved and ratified, shall be in force in the Cape Verdean judicial system…" A treaty which comes into force, albeit provisionally, upon being signed by the Heads of the Executive can hardly be said to have met these conditions. And compliance with the legal obligations contained therein might be difficult to obtain.

One can argue that ECOWAS is, after all, a supranational organization and can therefore impose its decisions on the Member States. However, the supplementary protocol amending or supplementing the Treaty

must first acquire the force of law in accordance with the procedure prescribed by the constitution of each Member State before one can invoke the principle of supranationalism.

Another problem arising from the mechanism of provisional entry into force was the fragmentation of the Protocols in a manner which impeded the integration process. In fact, a Member State could choose to apply, on the basis of a provisional entry into force clause, only those provisions of a Protocol which it considered to be in its national interests, and defer the application of the other provisions pending parliamentary ratification. Let us take a practical example. Under Protocol A/P.1/5/79 relating to Free Movement of Persons, Residence and Establishment, a Member State could decide to implement the provisions concerning the abolition of visa and entry permit which were straightforward, and wait for its national ratification process to be completed before implementing the provisions concerning the right of residence and establishment which it considered somewhat contrary to the interests of its citizens.

As there was no time-frame within which the Protocol must be ratified by all the Member States, the wait could be very long. Meanwhile, discriminatory rules of national law would be applied to non-national ECOWAS citizens in terms of residence and establishment, jeopardizing the realization of the objectives of the Community.

Definitive entry into force

This occurred when the protocol was ratified by the required number or percentage of the Member States. The usual language was: “This Protocol shall definitively enter into force upon the ratification by at least … signatory States, in accordance with the constitutional procedure of each Member State.”

Member States, in the main, did not seem to be in any hurry to ratify definitively a supplementary protocol which had already come into force in a manner which allowed them some flexibility. Thus, many supplementary protocols, including very important ones like Supplementary Protocol A/SP.1/01/05 which, among other things, conferred a human rights mandate on the Court of Justice, or Supplementary Protocol A/SP.1/06/06 amending the Revised Treaty, do not seem to have been fully ratified, calling into question their applicability within the domestic legal system.

Current Regime

It is based on the Supplementary Protocol amending the Revised Treaty. Under this instrument, the mechanism of provisional entry into force is discontinued; supplementary protocols are renamed supplementary acts. New Article 9 (1) of ECOWAS Treaty states as follows: “Community Acts shall henceforth be known as Supplementary Acts…” Like supplementary protocols, supplementary acts are adopted by the Heads of State and Government to supplement the Treaty and are binding on the Member States and the Community institutions; they are annexed to, and form an integral part of, the Treaty. Unlike supplementary protocols, however, supplementary acts enter into force definitively upon their signature; Member States are required “to commence the implementation of (their) provisions on (their) entry into force”. They are not subject to ratification.

The drafters of Supplementary Protocol A/SP.1/06/06 seem to have taken inspiration from the WAEMU (UEMOA) law. As a matter of fact, the concept of supplementary act began in WAEMU law. Article 42 (modified) of WAEMU Treaty provides that: “In order to carry out their missions and under the conditions laid down in this Treaty, the Conference (of Heads of State and Government) shall adopt supplementary acts, in accordance with the provisions of article 19

…"Furthermore, in a landmark ruling in an action brought before it for the annulment of a supplementary act, the WAEMU Court of Justice stated in part that: "In examining the legal nature of the supplementary act, it should be noted that only WAEMU Community law uses the supplementary act designation. In other words, it is a community act specific to WAEMU Community law…"(Case n° 032005 Eugène Yaï v Commission de l'UEMOA, *Recours en annulation de l'Acte Additionnel no. 06/2004*).

Under the WAEMU law, supplementary acts are not subject to ratification. They enter into force upon their publication, are directly applicable, and binding on the Member States and the institutions of WAEMU. This regime is replicated in ECOWAS law. However, in terms of scope and effect, there is a significant difference between WAEMU supplementary act and ECOWAS supplementary act. Whereas the former cannot modify the Treaty (see Article 19 of WAEMU Treaty) being subordinate to it, the latter can, and does, modify and amend ECOWAS Treaty. In fact, it can increase the obligations of the Member States, or the competences conferred on the Community, in the Treaty; it seems to have become the main instrument through which the integration rights and obligations are created. Thus, it is a primary, independent source of law, unlike the WAEMU supplementary act which is a secondary source to the extent that, as a"community act", it is enacted by an organ of WAEMU having the necessary powers, to carry out a mission already set out in the Treaty and, therefore, derives its legal force from the latter. Given this fundamental difference, it would not be unreasonable to conclude that the legal regime of WAEMU supplementary act may not be applied to ECOWAS supplementary act.

The assumption of the drafters seems to be that by adopting the WAEMU legal regime for supplementary act, ECOWAS would avoid the "lengthy parliamentary ratification processes" which "delayed the entry into force of the legal texts thereby paralyzing the integration process"

(see *Official Journal –Supplementary Acts/Protocols/Decisions/ New regime for Community Acts* on ECOWAS website); this would facilitate the entry into force of supplementary acts and accelerate their implementation. However, the big question is: can parliamentary ratification be avoided; can the consent to be bound by a supplementary act amending a treaty be expressed by the signature of the Head of the Executive only? The answer seems to be 'no'.

In community law, any amendment or supplement to a treaty is also a treaty; as such, it must be ratified by all the Member States in accordance with their respective constitutional requirements before it can enter into force (see note 2). This makes sense, since, upon its entry into force, the amendment is automatically incorporated into the domestic legal systems of all the Member States and becomes a direct source of rights and obligations for both individuals and Member States.

Thus, ECOWAS supplementary act, or "supplementary protocol" – the label does not seem to matter – which amends or supplements the Treaty of which it becomes an integral part – may have to be ratified by all the Member States before it can enter into force. In fact, many of these instruments contain obligations which cannot be fulfilled without the intervention of the lawmakers. It is appropriate, therefore, that they be scrutinised and approved before they enter the Community legal system. It is true that the ratification process is long, but it does not have to be open-ended; a time-frame can be built into it. Article 48 (5) of the Treaty on European Union (TEU) states that: "If, two years after the signature of a treaty amending the Treaties, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council", which will have to re-negotiate [4] or make some changes to the proposed treaty in order to secure unanimous ratification (notice that the inability of just one fifth of the Member States to ratify can give rise to a ratification crisis).

Conclusion

The discontinuation of the mechanism of provisional entry into force, through Supplementary Protocol A/SP.1/06/06, is a bold step in the right direction. It has solved the problem arising from the mechanism as Member countries can no longer apply the provisions of a Supplementary Protocol in an incomplete or selective manner, rendering ineffective those provisions which they object to. However, the Supplementary Protocol has created another equally difficult problem i.e. the suppression of the parliamentary ratification process for entry into force of a primary legal instrument. This has the potential to paralyze the integration process. It is in fact hard to see how a Member State,in an integration organization, can be compelled to fulfil an obligation arising from a treaty which does not have the force of law within its domestic legal system not having been ratified or "domesticated" in accordance with the constitutional requirements.

In case **Mr Chude Mba v Republic of Ghana,** the High Court of Ghana ruled on 2nd February 2016, that **"the decision of the ECOWAS Court cannot be enforced by the Court in Ghana because the Republic of Ghana has not domesticated the Protocol of the ECOWAS Court of Justice"**. The Honourable Court does not seem to be alone in overruling the Court of Justice on those grounds. It would appear that there is a growing list of national courts which question the jurisdiction of the regional Court for similar reasons. The latest on the list seems to be the Supreme Court of the Republic of Cape Verde. In a case between a Venezuelan diplomat, **Mr Alex Saab,** and the Government of Cape Verde, the latter claimed not to be bound by a judgment delivered by ECOWAS Court by virtue of Protocol A/SP.1/01/05 which had not been ratified by the Republic. The decision of the top court of Cape Verde caused a lot of ink to flow both within and outside the West African region.

It is most desirable that the regional organization revisit the rules governing the entry into force of primary legal instruments with a view to endowing the Community with legal texts consistent with the Community legal system. The list of Protocols or Supplementary Acts which have not been ratified by all the Member States many years after they were adopted appears to be long. The inevitable consequence is limited application of the instruments. This may be acceptable in an intergovernmental cooperation organisation, but not in an organization whose aim is to establish a common market through, among other things, the removal, between Member States, without exception, of obstacles to free movement of persons, goods, services and capital, and to the right of residence and establishment. Every effort should therefore be made to secure unanimous ratification. This will ensure that ECOWAS law is applied uniformly, equally and simultaneously throughout the Community, in conformity with the international best practices. It will also help to enhance its effectiveness and enforceability, and strengthen the political and judicial control mechanisms, reinforcing the capacity of the regional organization to achieve its noble objectives.

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[1] “Economic Community” is one of the forms of regional economic integration. It implies a customs union, free movement of persons, goods, services and capital, and harmonization of the laws of the Member States to the extent required for the proper functioning of the Community. It is distinct from a “free trade area” defined by Article XXIV of GATT. Community law is the body of law that derives from the Community. It is developed by the European Economic Community/ European Union.

[2] See, for instance, Article 54 of the Treaty on European Union (TEU) which provides that the Treaty shall enter into force on a date, which it

specifies, “following the deposit of the Instrument of ratification by the last signatory State to take this step”.

See also Art. 48 (4) TEU which states: “The amendments (to the Treaties) shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements”.

[3] For Instance, the UK initially opted out of the Maastricht Treaty thereby avoiding blocking the entry into force of the Treaty. This led to the conclusion of the Social Protocol which was ratified by the other eleven Member States and annexed to the Treaty. The UK opted in later on in 1997.

[4] Opt-outs could be negotiated, if the conditions are met, to avoid a stalemate.