



# TRALAC ANNUAL CONFERENCE 13-14 OCTOBER 2022

Day 2 Session 5: Dispute Settlement in Africa – Book Launch

09.00 – 10.30 hours

*Domestic Remedies*

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# Summary

- ✓ Introduction
- ✓ Africa's Legal Systems
- ✓ Potential Disputes
- ✓ Customs & Customs Powers
- ✓ Sources of Customs Law
- ✓ Appeals against Customs Decisions
- ✓ Some Observations
- ✓ Concluding Remarks



# Introduction: Language diversity in Africa

Country	Official/National Language	Other Languages
Cameroon	English, French	<b>24 Major African Language Groups</b>
Chad	French, Arabic	Sara (South) and more than <b>120 different languages and dialects</b>
Côte d'Ivoire	French	<b>60 Native languages and dialects with Dioula most spoken</b>
Ethiopia	Amharic	Tigrinya, Oromo, Gurage, Somali, Arabic, <b>80 other local languages</b> , English ( <i><b>major foreign language taught in schools</b></i> )
Nigeria	English	Hausa, Yoruba, Igbo (Ibo), Fulani, Ijaw, Ibibio and about <b>250 other indigenous languages</b>



# Introduction: Diversity of Legal Systems

**Common Law: Mainly former British colonies (Binding Precedents)**

**Civil Law: Roman-Germanic, Roman-Dutch, Neo-Roman-Germanic ...**

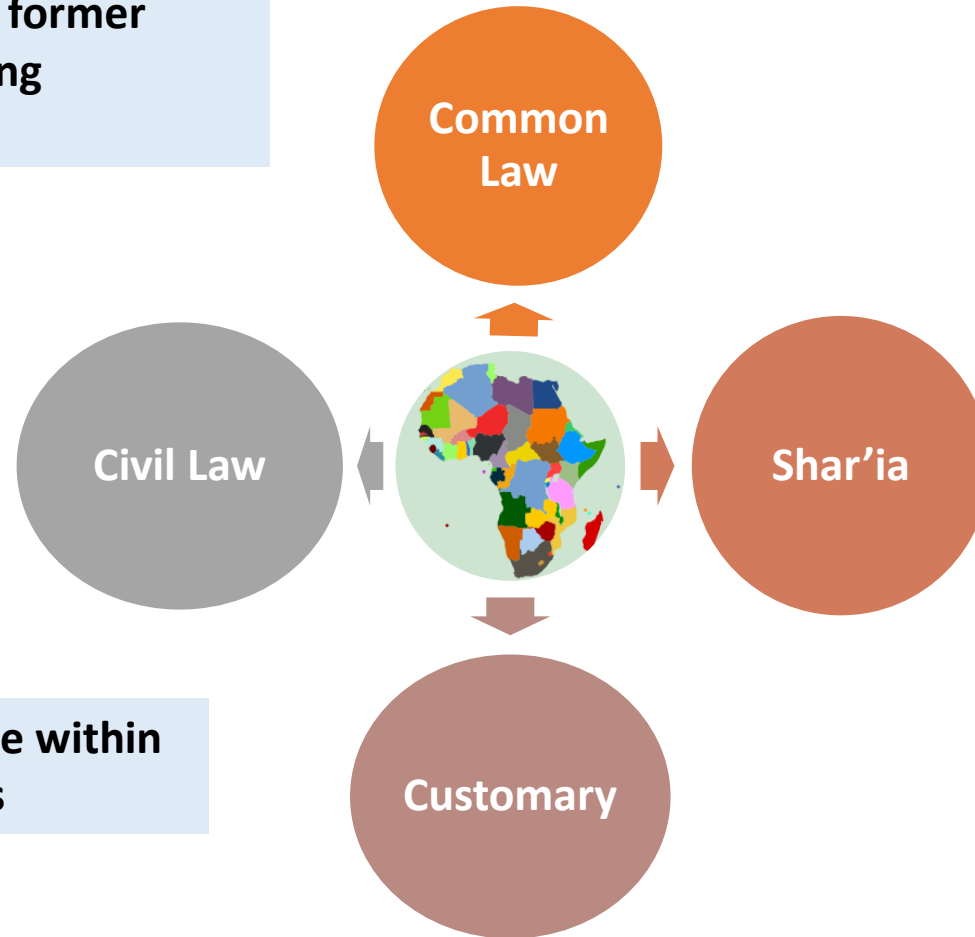
**Customary Law: Diverse within and between countries**

**Civil Law Jurisdictions: 29**  
**Common Law Jurisdictions: 11**  
**Mixed Civil/Common Law: 15**

**WHAT ARE THE IMPLICATIONS FOR RESOLUTION OF TRADE DISPUTES AT THE NATIONAL LEVEL?**

- ✓ Decision-making levels (border, regional, headquarters)
- ✓ Mechanisms for dispute resolution (ADR)
- ✓ National Judicial System
- ✓ Reporting and Access

**Muslim Law (Shari'a): North Africa, West Africa, Horn of Africa**



# Simplified: Legal Systems in Africa

Systems based on Civil Law Principles	Systems based on Common Law Principles	Mixed Civil Law/ Common Law Based Systems
Algeria, Angola, Benin, Burkina Faso, Cabo Verde, Central African Republic, Chad, Comoros, D.R.Congo, Congo R., Côte d'Ivoire, Djibouti, Egypt, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Libya, Madagascar, Mauritania, Morocco, Mozambique, Niger, Sahrawi Arab Democratic Republic, São Tome & Principe, Senegal, Togo, Tunisia	Gambia, Ghana, Kenya, Liberia, Malawi, Nigeria, Sierra Leone, South Sudan, Tanzania, Uganda, Zambia	Botswana, Burundi, <b>Cameroon</b> , Eritrea, Eswatini, Ethiopia, Lesotho, <b>Mauritius</b> , Namibia, Rwanda, Seychelles, <b>Somalia</b> , South Africa, Sudan, Zimbabwe
29 Member States	11 Member States	15 Member States

Ref: Herbert Smith Free Hills: *Guide to Dispute Resolution in Africa* 2022

# Potential Disputes

Customs Administration	Non-Tariff Barriers	Trade Remedies
<ul style="list-style-type: none"> <li>✓ <i>Interpretation of the Law</i></li> <li>✓ <i>Classification of Goods</i></li> <li>✓ <i>Valuation of Goods</i></li> <li>✓ <i>Determination of Origin</i></li> <li>✓ <i>Trade remedy administration</i></li> <li>✓ <i>Exercise of Customs powers: licensing, detention, penalties, post-clearance audit investigations</i></li> <li>✓ <i>Customs as a barrier to trade</i></li> </ul>	<p>E.g. <b>EAC Non-Tariff Barriers Act</b></p> <ul style="list-style-type: none"> <li>✓ <i>Inter-ministerial and inter-agency responsibilities to monitor and resolve complaints from other countries</i></li> <li>✓ <i>Addressing complaints from other countries</i></li> </ul>	<ul style="list-style-type: none"> <li>✓ <i>Specific laws on trade remedies</i></li> <li>✓ <i>Provisions on trade remedies within Customs legislation</i></li> <li>✓ <i>Specialized trade remedy institutions (Ghana, Kenya, Madagascar and South Africa)</i></li> </ul>
<i>Administrative, quasi-judicial and judicial tribunals, courts</i>	<i>Unilateral decisions or bilateral consultations</i>	<i>Administrative, quasi-judicial and judicial tribunals, courts</i>

A well-functioning system of dispute resolution at the national level requires (a) efficient customs administration (b) provisions for appeal to bodies outside the administration (c) courts as a last resort



# What is Customs?

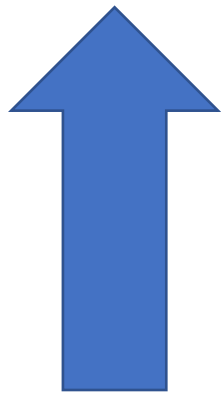
*“The Government Service which is responsible for the administration of **Customs law** and the collection of duties and taxes and which also has the responsibility for the application of other laws and regulations relating to the importation, exportation, movement or storage of goods” (WCO)*

## Functions

- Collection of duties and taxes on internationally traded goods (plus *exemptions and refunds*) (**DISPUTES**)
- Facilitating international trade and implementing investment policy (**DISPUTES**)
- Protecting society and the state (restricted and prohibited goods; customs controls) (**DISPUTES**)
- Compilation of international trade statistics

# Customs Powers: National Law

- ✓ Bearing arms (paramilitary) e.g. Nigeria
- ✓ Powers of arrest, or taking a police officer to carry out enforcement
- ✓ Search of persons, premises, means of transport (*all jurisdictions*)
- ✓ Administrative settlement of Customs offences (*all jurisdictions*)
- ✓ Seizure and detention of goods



**Potential for Abuse**

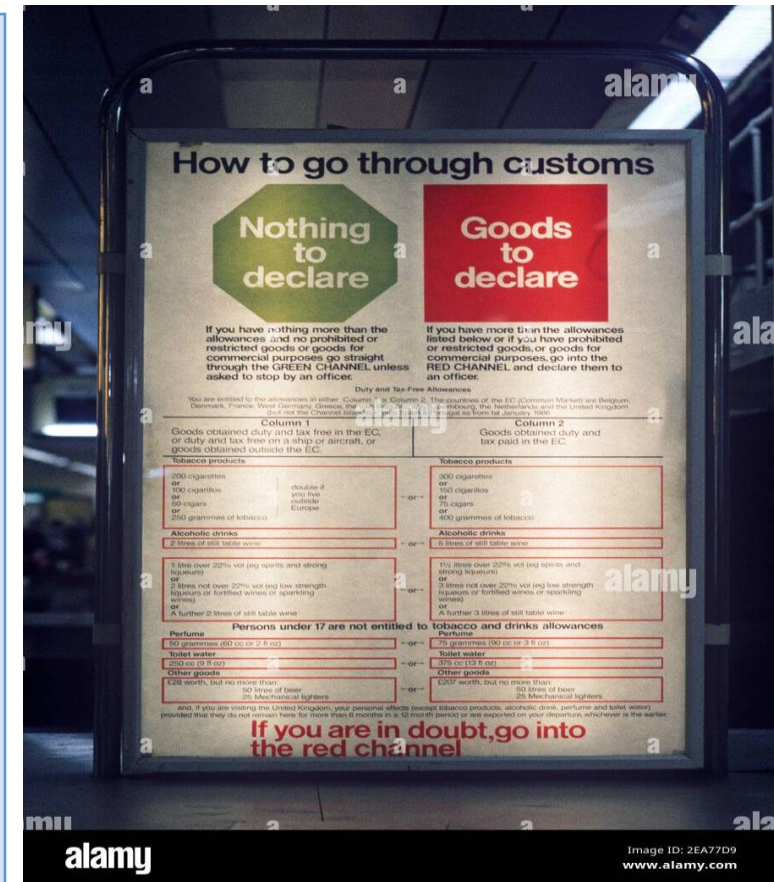


**Appeal Mechanisms**



# Sources of Customs Law

- ✓ International law
  - **WTO Agreements:** Valuation, Safeguards, Anti-Dumping, Trade Facilitation ...
  - **WCO Conventions e.g.** Harmonized System Classification, Revised Kyoto Convention...
  - **UN Convention on Law of the Sea**
  - **ICAO Convention (Annex 9 Facilitation)**
  - **UN Convention on Carriage of Goods by Sea (Bills of Lading)**
- ✓ Agreements and Treaties of the AfCFTA and RECs
- ✓ National (Constitution; Customs plus...)



# Appeals against Customs Decisions

Jurisdiction	Applicable Law and Mandate
<b>Kenya</b>	<i>Tax Appeals Tribunal Act (2013)</i> : review decisions of the administration on appeal from aggrieved parties on any matters arising under the provisions of any tax law, including EAC Customs Management Act 2004 ( <i>further appeals to High Court in accordance to Rules set by Chief Justice</i> )
<b>Uganda</b>	<i>Tax Appeals Tribunal Act (Cap. 345)</i> : mandate similar to Kenya (further appeal to the High Court on matters of law)
<b>Tanzania</b>	<i>Tax Revenue Appeals Board (Chapter 408)</i> : mandate similar to Kenya (further appeal to Tax Revenue Appeals Tribunal). Appeals from Tribunal go to the Court of Appeal
<b>Ethiopia</b>	Customs Proclamation No. 622/2009: appeals on origin, valuation, classification – first pay “under protest” then appeal to a Review Committee established by the Administration (further appeals to the Federal Tax Appeal Commission)
<b>Nigeria</b>	Appeals against a decision of the Comptroller General of Customs to the High Court after exhaustion of internal mechanisms

# Independent Appeals Tribunals in SADC

Jurisdiction	Applicable Law and Mandate
<b>Lesotho</b>	Customs and Excise Act 1982: Revenue Appeals Tribunal hears appeals on tariff classification and customs valuation decisions (further appeal to the High Court on questions of law and fact). <i>On administrative settlement of offences, appeals are made to the Minister, and the Minister's decision shall be final.</i>
<b>Zambia</b>	Zambia Tax Appeals Tribunal Act: hears appeals against customs technical matters, interpretation of the law, reviews administrative decisions (further appeal on questions of law or mixed law and fact made to the Supreme Court, not the High Court)
<b>Zimbabwe</b>	Customs and Excise Act: Fiscal Appeals Court is a specialized division of the High Court to hear appeals against Commissioner's decisions on tariff classification/ appeals against valuation decisions are made to the High Court of Zimbabwe
<b>Malawi</b>	Customs and Excise Act empowers Minister for Finance to appoint a SPECIAL REFEREE to hear and determine disputes on "amount of duty payable" (Sen. Res. Mag. Blantyre appointed in 1970)

# Some Observations

- ✓ *Disputes will always arise due to **inherent complexity** of laws and regulations, their interpretation, and enforcement*
- ✓ *Where there are **clear guidelines** on internal and external appeal mechanisms at the national level, those affected by administrative decisions have used them*
- ✓ *Many countries have established appeals tribunals consistent with the provisions of the WTO Trade Facilitation Agreement, but their mandates are very different (some restricted e.g. Zimbabwe; others wide e.g. Zambia)*
- ✓ *While judgements of courts of law are often reported, the decisions of appeals tribunals are sometimes not reported well – but there are shining lights*
- ✓ *No independent tribunals (outside the court system) have been established to hear appeals against customs decisions in some jurisdictions e.g. **Nigeria, Rwanda, South Sudan, South Africa***

# Recommendations

- ✓ Administrative decisions: ensure those affected or to be affected by decisions are given an opportunity to be heard, ensure procedural fairness
- ✓ Publication of Tribunal and Court Decisions (Reports and Digests of Cases)
- ✓ Encourage utilization of Alternative Dispute Resolution mechanisms
- ✓ Review of laws and procedures for consistency with international (such as WTO and WCO), continental (AfCFTA), regional norms (RECs) and national requirements (e.g. *fair administrative action*)
- ✓ Greater transparency and openness: how much do we know about what happens within regulatory institutions?

# Concluding Remarks: Pitfalls of Court System

*Kenya Revenue Authority & another v Mutamba & 26 others (Civil Appeal 124 of 2017) [2022] KECA 808 (KLR) (24 June 2022)*

- ✓ KRA carried out post-clearance audit to find out if proper duties and taxes had been paid on 26 imported motor vehicles (different owners) and found out misdeclaration, underpayment and even non-payment contrary to EAC Customs Act
- ✓ Commissioner put up a notice in the Daily Nation newspaper (21 May 2012) requiring the owners to liaise with motor vehicle inspection section of KRA, and then deliver the vehicles and relevant documents for verification
- ✓ Respondents filed a judicial review application at the High Court (May 2012): claimed they had not been given an opportunity to be heard
- ✓ High Court delivered judgement on 7 December 2016: KRA had not given appellants an opportunity to be heard
- ✓ KRA appealed to the Court of Appeal 12 May 2017: claimed they had been given an opportunity to be heard but failed to take up the opportunity
- ✓ 24 June 2022: Court of Appeal delivered judgement in favour of KRA



# Concluding Remarks

*How will AfCFTA change the way decisions are being made at the national level, and appeals against such decisions?*

- ✓ No change: AfCFTA is an additional system of laws and regulations to those already being administered (national, regional, continental)
- ✓ Most issues are resolved at the national level administratively (local offices, regional offices, headquarters; Minister), in tribunals, or courts of law (no change expected)
- ✓ Regulatory agencies, the tribunals and courts will need to take account of the provisions of the AfCFTA Agreement, Protocols, Annexes in making decisions and judgements
- ✓ Few cases will be lodged at the RECs tribunals (specifically EAC and COMESA) – perhaps ECOWAS as well (but have been focusing more on Human Rights)