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Issuer and Investor Proprietary Rights in Eastern and Southern African Frontier Securities Markets—The Role of the Compensation Fund, and the Case for a Regional Compensation Fund

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ABSTRACT

Although empirical evidence shows that investment flows to Sub-Saharan Africa, in form of foreign portfolio investment (FPI), have been on the rise in the past two decades, further evidence shows that actually, investment flows into the Common Market for Eastern and Southern Africa (the COMESA Region) have been very low. Against this backdrop, the need for an efficient Domestic Compensation Fund (DCF) has been highlighted. It is also against the said background that the establishment of a Regional Compensation Fund (RCF)—as a complement of the DCF—has been mooted as a possible way of enhancing the attractiveness regional securities markets as they compete with other markets outside the COMESA Region for those FPI flows to Sub-Saharan Africa. This article examines mainly the Zambian regulatory and institutional framework which regulates the public distribution of securities domestically and across international borders so as establish whether or not it provides adequate incentives and safeguards for prompt and adequate compensation of investors and other market participants who suffer pecuniary loss on account of the default of a licenced person or their employee. The study employs the doctrinal and the non-doctrinal approaches to examining the effectiveness of regulatory rules and institutions. The main finding of the study was that the regulatory and institutional framework for the public distribution of securities does not provide adequate incentives and safeguards for prompt and adequate compensation of investors and other market participants as aforesaid. In particular, the results of the study show that (a) although the regulatory and institutional framework provides for the compensation of the investors and other market participants for their losses, it does not (i) provide for recourse to other bodies for the recovery of unmet or unsatisfied claims or portion of the claim, (ii) fix the time-frame for the determination of compensation claims, (iii) provide for a statutory right of appeal against the determinations or decisions of the DCF, and (iv) a RCF has not been mooted yet or established as a complement to the DCFs in the COMESA Region. The central argument of this article is that liquid and efficient DCFs which are supported by a vibrant RCF are likely to promote market participation and enhance the resilience and fortitude of domestic securities markets in the COMESA Region as they strive to recover from the financial shocks of COVID-19.

Key Words: Proprietary Rights, Default, Loss, Licenced-Person, Issuer, Investor, Compensation

INTRODUCTION

The central premise of this article is that a properly managed, liquid and efficient compensation fund—in the sense of paying prompt and adequate compensation—has the potential of boosting the integrity of the market and investor and issuer confidence.[1] Such a fund is likely to provide incentives for both domestic and foreign issuers and investors to list or cross-list or indeed invest in securities on a particular securities market.

The rise in market confidence is attributable to the assurance the issuers and investors have that

compensation is available for any loss they may suffer as a result of the default of a market intermediary who is licenced to operate in a particular securities market.

The object of this article is to answer the question whether or not the Zambian regulatory and institutional framework for the domestic and international public distribution of securities provides adequate incentives and safeguards for the effective compensation of market participants who suffer pecuniary loss as a result of the default of a licenced person. Effective compensation here means 'adequate and prompt' compensation. Zambia is used here as a case study since most of the observations, the shortcomings which have been fleshed out, and the proposals for remedial regulatory and institutional reform which have been made in this article are relevant to most jurisdictions in the COMESA Region. The central argument is this article is that the inadequate provisions which relate to the right of subrogation on the part of the Domestic Compensation Fund (the DCF), its lack of lack of legal personality and its narrow scope, and the absence of a Regional Compensation Fund (RCF), are likely to compromise the capacity of the DCF to dispense prompt and adequate compensation for market participants. The corollary central argument is that the lack of liquid and efficient DCFs which are supported by a vibrant RCF in most jurisdictions in the COMESA Region is unlikely to promote market participation and enhance the resilience and fortitude of the domestic securities markets in the region as they contrive to recover from the COVID-19 shocks. The study fleshes out some shortcomings in the said framework, and makes necessary proposals for remedial legislative and institutional reform.

BACKGROUND TO THE PROBLEM

The Southern African Development Community (SADC) (2006) observes that there are low levels of investment flows into the SADC, despite a number of measures that have been taken to improve the investment environment in the region.[2] SADC observes further that more is required to be done in order to enhance the attractiveness of the region as an investment destination; and that without effective policies on investment protection and promotion, the region will continue to be marginalised in terms of investment inflows and sustainable economic development.[3]

Empirical evidence shows that foreign portfolio investment flows to Sub-Saharan Africa—in form of listed equity—have been steadily increasing over the past decade.[4] It is worth mentioning here that due diligence was made to find more recent data on the flow of Foreign Direct Investment (FDI) and Foreign Portfolio Investment (FPI) to Sub-Saharan Africa before the advent of the COVID-19 Pandemic but to no avail.

Pre-COVID-19 Foreign Investment Flows to Sub-Saharan Africa

As indicated in Graph 1 below, for the period under consideration (2008—2013), FDI inflow has been relatively stable making this form of investment the major source of international private capital for Sub-Saharan Africa. During this period, FDI brought in USD 183.65 billion or 65.74% of the total international private capital flows. In contrast to the FDI impressive trend, bank lending fell in 2010. Although bank lending has contrived to toll the post-2010 line, it still has lost its second place to FPI since 2010. Bank lending attracted USD 42.2 billion or 15.1% of the total cross-border private capital flows to the region during the period which is under consideration.

In contrast to bank lending, foreign portfolio flows (FPI)—comprising bonds, listed private equity and private equity (unlisted)—have been phenomenal in their steady growth over the period which is under consideration. Foreign Portfolio Investment (FPI) flows have risen from about USD 1.5 billion in 2008 to USD 53.5 billion at the close of the period in 2013. This growth accounts for 19.15% of the total international private capital flows to Sub-Saharan Africa in the period which is under consideration. This tremendous growth has propelled FPI into the rank of the second-major source of international private

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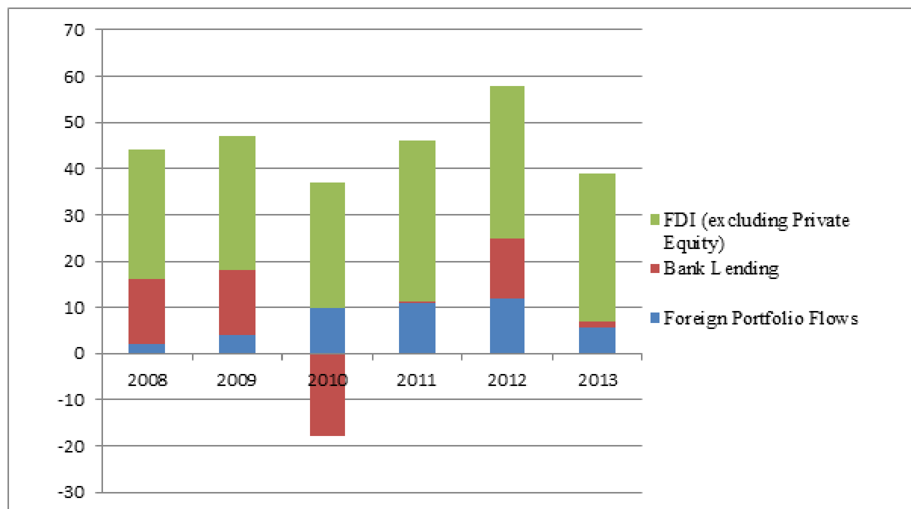
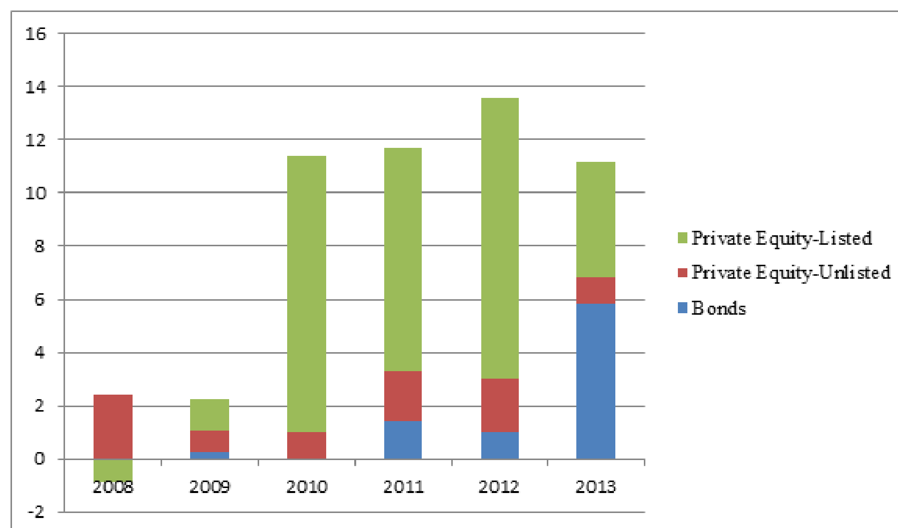
capital in the region—the place which was previously occupied by bank lending until 2010. As indicated in Graph 2 below, listed private equity accounted for USD 34.3 billion or 64.1% of the total portfolio flows (USD 53.5 billion) to the region. Private equity brought in USD 10.2 billion or 19.06% of the total, while bonds brought in USD 9.0 billion or 16.82% of the total.

Graph 1: Net Private Capital Flows to Sub-Saharan Africa (USD Billions) (2008—13).



Source: International Monetary Fund, World Economic Outlook Database, 2014.

Graph 2: Net Portfolio Flows to Sub-Saharan Africa (USD Billions) (2008—2013)



Source: International Monetary Fund, World Economic Outlook Database, 2014.

Despite this positive outlook, as observed by SADC, investment inflows into the southern part of the Common Market for Eastern and Southern Africa (the COMESA Region) have been low. The article argues that an efficient compensation fund is likely to enhance the attractiveness of Eastern and Southern African securities markets and sharpen their competitive edge as they compete with other markets in Sub-Saharan Africa for portions of FPI inflows to Sub-Saharan Africa.[5] The competitive edge of regional securities markets could be enhanced further by the creation of a regional compensation fund. An argument is also made that an efficient compensation system in the region could also give a competitive edge to COMESA Frontier Securities Markets (FSMs) against those markets which are located within South Africa—such as the Johannesburg Stock Exchange.

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COVID-19 and Post-COVID-19 Foreign Investment Flows to Sub-Saharan Africa

According the International Monetary Fund Report for the year 2020,[6] Global financial conditions have tightened sharply in 2020. Investors have pulled out over $90 billion from emerging markets since the beginning of the crisis, the largest capital outflow on record.[7] The IMF also observes that financial markets in sub-Saharan Africa have also come under pressure.[8] In 2020, sovereign spreads in the region have increased by about 700 basis points since February, reaching all-time highs, with the largest rise experienced in oil exporters.[9] The IMF observes further that bond issuances have stopped, and large capital outflows were recorded from the region's frontier and emerging markets as indicated in Figure 3 below. Foreign Capital inflows were negligible due to the CODID-19 disruptions of production, distribution and value chains in the region.[10] The central argument of this article is that by legislating for and establishing liquid and efficient Domestic Compensation Funds, in COMESA jurisdictions, which are supported by a vibrant Regional Compensation Fund, legislators and policy-makers are likely to promote market participation and enhance the resilience and fortitude of domestic securities markets in the COMESA Region as they strive to recover from the financial shocks of COVID-19.

Table 1: Sub-Saharan Africa Frontier and Emerging Markets: Cumulative Portfolio Flows

Country/Region	Percentage of 2020 GDP
Nigeria	-0.5%
Zambia	-1.7%
Kenya	-1.6%
Namibia	-2%
Rwanda	-1.9%
Cote d' Ivoire	-2.5%
Ghana	-3.5%
South Africa	-7%
EM	-4%

Source: EPFR Global/Haver Analytics 2020

Note: Last update: April 6, 2020. Cumulated flows since January 21, 2020. EM is the simple average of: Brazil, India, China, Indonesia, Korea, Mexico, Philippines, Thailand, and Turkey. EM = Emerging Market Economies.

Admittedly, the International Portfolio Diversification (IPD) opportunities which are provided by the COMESA Frontier Securities Markets (FSMs) are likely to attract issuer and investor participation. This is but a general view since only the risk-seeking issuers and investors are likely to issue their securities and venture their capital into the FSMs in spite of the poor issuer and investor protection which is provided by the domestic regulatory and institutional frameworks in most jurisdictions in the region. As for the risk-averse issuers and investors, the IPD opportunities which are presented by the COMESA FSMs need to be accompanied by enhanced issuer and investor protection. This is where the domestic and the region compensation funds which we have proposed come in as a possible way of ensuring that the pecuniary loss which the participating issuers and investors suffer are compensated promptly and adequately out of the said institutions.

Statement of the Problem

In light of the background to the problem which is under investigation the statement of the problem could be

formulated as follows:

To what extent does the Zambian regulatory and institutional framework for the public distribution of securities domestically and across international borders provide incentives and safeguards for prompt and adequate compensation of issuers, investors and other market participants who suffer pecuniary loss as a result of the default of a licenced-person?

LITERATURE REVIEW

With due diligence, the author searched for pieces of literature which touch on the subject of issuer and investor protection—the compensation of issuers and investors by a Securities Market Compensation Fund for the loss they suffer as a result of the default of a licenced person. However, except for the author's earlier work which examined the quality of issuer and investor protection in cross-border intermediated securities systems,[11] no other work was found. Therefore, the hope is that other scholars will contribute to the discourse on the role of a Compensation Fund in enhancing issuer and investor protection in securities markets, and complementing the role of international portfolio diversification (IPD) in promoting issuer and investor participation in Frontier Securities Markets. In an earlier study, the author observes that as far as the compensation of market participants by a Securities Market Compensation Fund is concerned, there are three classes of jurisdictions in the COMESA Region, namely:

1. The jurisdictions which have not established a compensation fund for the securities markets;
2. The jurisdictions which have established a compensation fund for the securities markets but have restricted the right of civil recovery to the investors; and
3. The jurisdictions which have established a compensation fund for securities markets and extended the right of civil recovery other market participants than the investors—that is to *any person* who suffers pecuniary loss as a result of the default of a person who is licenced to operate in a particular securities market.

The author has, in the earlier work, recommends the extension of the scope of the compensation funds whose cover is restricted to the investors, *to any other person (especially the issuers)* who suffer pecuniary loss as a result of the default of a licenced person. The author observes in the earlier work that [t]his sort of bias towards the investor—effective exclusion of other market participants from compensation fund protection—serves only to promote investor participation and increased demand for listed securities.[12] This view is rationalized by the position that since the issuers have been left out of the compensation net in some of the COMESA jurisdictions, the lesser protection which is accorded to the issuers is likely to discourage the primary listing and the cross-listings of securities by foreign issuers—a condition which would reduce the supply of securities to securities exchanges.[13] The author argues in the earlier work that since demand for the listed securities in the jurisdictions which provide restricted cover is likely to exceed the supply of securities to securities markets, the price for the listed securities is likely to be prohibitively high.[14] In the present work, the author argues that the high prices for the listed securities in some of COMESA Frontier Securities Markets (FSMs) is likely to water down the efficacy of the low correlation which these markets have with each other, with the Emerging Securities Markets and with the Developed Securities Markets in facilitating international portfolio diversification by the risk-seeking investors.[15] This view is rationalized by the position that although, on account of the perceived or calculated high investment returns, the risk-seeking investors are likely to ignore the potential investment risks, the high prices of the securities may restrict the sphere of their participation in the securities market as they require a little more capital. In the present work, a compensation system which covers the losses of both the issuers and the investors has been mooted as a possible way of promoting the general participation issuers and investors, and other entities in securities markets and enhancing the resilience and fortitude of COMESA Frontier Securities Markets as they strive to emerge out of the financial shocks of the COVID-19 Pandemic.

METHODOLOGY

This study falls into the qualitative research category. It focuses on answering specific questions which relate to the problem which is under investigation by using both primary and secondary data. The research is underpinned by the doctrinal and the non-doctrinal approaches to examining the effectiveness of the regulatory and institutional framework which governs the compensation of securities market participants who suffer pecuniary loss as a result of the default of a licenced person. By the doctrinal approach the author gives a descriptive exposition of the applicable legal rules, and offers a complete restatement of the law were applicable.[16] By the non-doctrinal approach, the author identifies the legal problem, analyses it and proposes remedial changes to the regulatory and the institutional framework which governs the compensation of securities market participants who suffer pecuniary loss as a result of the default of a licensed person in Zambia.[17] These two methods were used in analysing both primary and secondary data. Primary sources of data such as relevant legislation and case law which relate to the subject/problem which is under investigation were used. Secondary sources of information such as journals and other written commentaries on the primary sources were also used. A checklist of documentary sources was used, as well. And, as a possible way of avoiding subjectivity in the selection of documentary sources, the study employed non-probability sampling method—purposive sampling. Both primary and secondary sources of data were used as aids to drawing inferences, making deductions and comparisons.

The research questions which were used are:

1. What market-mechanisms are available for the protection of issuer and investor proprietary rights?
2. How are the unmet or unsatisfied claims treated by the domestic compensation fund recovered?
3. What rights are available to a market participant who is dissatisfied with the decisions the domestic compensation fund which relate to their claims?
4. What limitations are placed on the claims which are made on the domestic compensation fund?
5. What regional institutional framework complements the domestic compensation fund?

THE RESULTS OF THE STUDY

QUESTION	ANSWER
1. Does the law provide for compensation of market participants?	YES
2. Is there recourse to other bodies for recovery of unmet or unsatisfied claims?	NO
3. Does the law fix the period within which compensation should be met from the time of the claim?	NO
4. Is there a statutory right of appeal against decisions of the domestic compensation fund?	NO
5. Is there a regional compensation fund as a complement to the domestic compensation fund?	NO

DISCUSSION

This part examines the regulatory and institutional framework for the compensation of market participants who suffer pecuniary loss as result of the default of a licenced person so as to establish whether or not the said framework provides adequate incentives and safeguards

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for effective and efficient compensation—prompt and adequate compensation.

The Role Of The Compensation Fund In Promoting Securities Market Participation

The Compensation Fund for the Lusaka Securities Exchange (the LuSE)[18] is established and maintained by the Minister of Finance.[19] The Fund was established pursuant to section 64 of the repealed Securities Act of 1993. However, the Fund has been allowed to continue as if it was established under the Securities Act of 2016,[20]which repealed and replaced the Securities Act 1993. The Compensation Fund is managed and administered by a six-member Committee which is called the Compensation Fund Committee.[21]

The purpose of the Compensation Fund for the LuSE is to compensate persons who suffer pecuniary loss as a result of the default of a licensed dealer, licensed investment advisor or an employee of such dealer or advisor.[22]

Meaning Of 'Default'

The Securities Act 2016 does not give a definition for the word 'default' which is used in section 177 of thereof. However, the Securities (Compensation Fund) Regulations which were made under the repealed Securities Act of 1993 define 'default'—in relation to failure by a licensed person to perform their legal obligation[23]—as:

"Default arising from—

1. the bankruptcy, winding up or insolvency of the licensee;
2. any breach of trust committed by the licensee; or
3. any defalcation, fraud or misfeasance committed by the licensee, or by any representative, director or employee thereof."[24]

From the definition of 'default' which has been given above, it could be argued that the Zambian Securities Act 2016 does not define the term 'default'. Rather, it is also argued, the said piece of legislation, merely states the potential sources or causes of the default. The Supreme Court of Zambia has held that where the statutes do not offer a definition of a particular phrase or word, the dictionaries may be consulted.[25] Although the Supreme Court did not state the ranking of the dictionaries 'as a source of law', we think that the law dictionaries should necessarily rank ahead of the general-subject dictionaries. We also think that within the category of law dictionaries, the specific-subject law dictionaries should rank ahead of the general-subject law dictionaries. The fundamental rule here is that where the definition which is rendered by a general-subject dictionary or a general-subject law dictionary is inconsistent with the definition which is rendered by a law dictionary or a specific-subject law dictionary, the former should be void the extent of the inconsistence.

The Definition of 'Default' in the Black's Law Dictionary[26]

A default is an omission of that which ought to be done.[27] Specifically, a default is the omission or failure to perform a legal duty.[28] Default also refers to the failure to observe a promise or to discharge an obligation,[29] or the failure to perform an agreement.[30] The term also embraces the idea of dishonesty, [31] and of wrongful act.[32] In the broad sense, default may take the form of an act or omission which is discreditable to one's profession.[33] In the context of default, 'defalcation' is the misappropriation of trust funds or money which is held in any fiduciary capacity or indeed the failure to properly account for such funds.[34]

6.2.1. Significance Of The Definition Of 'Default' And 'Defalcation'

Where the default of a licensed market operator is caused by bankruptcy, winding up or insolvency, the

affected market participant or operator has a right to register their claim and prove it in the winding up of the affairs of the defaulter as an unsecured creditor. Under insolvency law, if the assets of the defaulting market operator are not sufficient to pay any of the unsecured claims, the claims should abate completely. Where the available assets are not sufficient to pay the unsecured claims in full, the claims should be paid proportionately, while the unpaid portions abate proportionately.

Where the default of a licensed market operator is caused by a general breach of trust or by defalcation, the affected market operator may commence a civil recovery action against the trustee and possibly ask the court for an order to account for the assets of the trust. The injured market participant may also ask the court for a tracing order for the tracing of the trust assets if they have been invested at all. In the bankruptcy or winding up of the licenced person, the trust assets will not form part of the estate of the licenced person which is available to the general body of creditors. As Patten LJ observes in *Re Lehman Brothers International (Europe) (In Liquidation),[35]* that:

[A] beneficiary under a trust is not *ipso facto* a creditor of the trustee. Although the trust relationship may give rise to the unsecured claims against the trustee for breach of the trust or even negligence and may sometimes exist in a wider contractual framework, it remains at its core a different legal relationship… The trust property does not form part of the trustee's estate in the event of insolvency so as to be available to meet the claims of the general creditors, and the beneficiary is entitled to the property in *specie* free from any such claim.

Therefore, where a market participant or operator suffers pecuniary loss as a result of the default of a licenced person who later goes into liquidation, the trust assets which are recovered as a result of the trustee's account or the judicial tracing will be out of the reach of the insolvent licenced person's liquidator. Where the trust assets are no longer vested in the trustee (the licenced person) and cannot be traced, is a beneficiary of the trust (the injured market operator), have recourse to the LuSE Compensation Fund. Therefore, the role of the compensation Fund is to complement the role of the Capital Markets Tribunal and the courts in safeguarding the proprietary rights of the LuSE market participants. Consequently, the role of a liquid and efficient compensation fund is to insure the losses of market participants albeit without the intricacies and exacting conditions of traditional insurance business. A compensation fund therefor, takes the losses or claims of market participants out of the realm of uncertainty—liquidation, insolvency and traditional insurance—and places them into a realm of certainty; they—the market participants—know with reasonable certainty that their losses will be made good by the Compensation Fund. An argument is made that such certainty and the enhanced protection of the proprietary rights of the market participants is likely to incentivize securities market participation. Since the default of a licensed person which causes pecuniary loss is compensable, it is likely to incentivize the following, namely:

1. encourage market participants to deal with licensed market operators;
2. encourage on-market sales of securities;
3. enhance market integrity and increase the confidence of market participants; and
4. encourage general securities market participation.

Conditions For Paying Compensation Out Of The Domestic Compensation Fund

Compensation is only paid out of the Fund upon the fulfilment of certain conditions. Firstly, the default which occasions the loss of a market participant should arise in the course of or connection with any dealing in securities.[36] Secondly, the loss which is suffered by a market participant should consist in money or securities or other property.[37] Thirdly, the money or securities or other property which is lost in connection with any dealing in securities should have been entrusted to the licensed dealer or advisor or their employee in the course of or in connection with their business.[38]

The Constraints Within And On The Regulatory And Institutional Framework For The Compensation Of Injured Market Participants

A number of constraints within and on the regulatory and institutional framework for compensation of market participants who suffer pecuniary loss as a result of the default of a licenced person, have been identified in this section. These constraints are discussed in the following subsections.

Constraints Relating To Shortcomings In Subrogation To The Rights Of The Injured Market Participant

The Zambian Securities Act 2016 does not make a distinction between the default which is occasioned by an intermediary's own fault and the default which is triggered by the acts or omissions of other intermediaries or advisors (market-third parties), or indeed the acts or omissions of the non-market third parties. A question may be asked, for example, "is compensation payable for the loss which suffered by a cross-listing issuer or an investor as a result of default by a dealer which is occasioned by the improper market practices of other intermediaries or advisors who are resident within or outside the jurisdiction"? Is there a right of subrogation on the part of the Compensation Fund? Put another way, can the Compensation Fund take over the rights of the affected market participant once the market participant is put back into the money or the property? Should the right of subrogation lie against the innocent defaulter as opposed to the other licensed person who wilfully or negligently causes the default? Section 183 of the Securities Act 2016 seems to provide answers to these questions when it provides that:

s. 183. Any disbursement from the Compensation Fund that is on account of a <u>default by a licensed</u> person shall be <u>a debt due to the Fund and recoverable, from the licensed person,</u> at the suit of the Commission.

It is clear from section 183 above that once the Compensation Fund compensates a market participant for the loss which they have suffered on account of the default of a licenced person, the payment so made constitutes a debt which is due to the Fund from the licenced person. It is also clear that the Securities and Exchange Commission (the SEC) has the statutory right to commence a civil recovery action against the licenced person whose default caused the loss of the market participant who has been compensated. Thus, the Fund is subrogated to the rights which the injured market participant, who is compensated, may have against the licenced person. And, the Fund's right of subrogation necessarily extends to the licenced person who causes loss to a market participant on account of the default of third-party market participants—their fellow market dealers or advisors or indeed their employees. This argument is rationalized by the position that the defaulting licenced person is 'a person' who within section 177 of the Securities Act 2016 has a statutory right of action against a 'licenced person' (which the other dealers and advisors are). This argument is however, made with *proviso* that the innocent defaulting licenced person, who is liable to the action of the SEC, proves that money or securities or other property which they have lost was entrusted to the culpable licenced person in the course of their business. Once the innocent licenced person proves as aforesaid, they can claim compensation from the Compensation Fund. And, once the Fund compensates them for their loss, the Fund will be subrogated to the rights which the innocent licenced person may have against the culpable licenced person. This should be the case where X, a licenced person (a dealer/broker) borrows a securities position from Y (another licenced person) for the purposes of effecting a short-sale. In that case, Y has an effective claim for compensation is X fails to pay back the borrowed securities position and Y fails to fulfil the client's (investor's) obligation to deliver a certain securities position to another investor on an agreed date. Therefore, the current regulatory and institutional framework requires the SEC to maintain two separate civil recovery actions—one against the defaulting innocent licenced person, and the other against the defaulting culpable licenced person. Recalling here that market efficiency is the ultimate regulatory objective of the Securities Act 2016, it could be argued that the aggregate time and cost of vindicating the subrogatory rights of the SEC is likely to compromise efficacy of the regulatory and

institutional framework in ensuring effective and efficient compensation of the market participant. Thus, the Securities Act 2016 does not allocate the rights/compensation and the liability/cost efficiently—that is, it does not provide allocative efficiency. As Coase observes:

[I]f a rule has the effect of minimizing transaction costs, or ensuring that such costs are borne by the person who can best minimize them, it is said to be efficient. However, if it unnecessarily increases or provides for the choice of sub-optimal exchange, it is inefficient.[39]

Allocative efficiency in the compensation system could be instilled by a 'culpability-based' approach to subrogation. Such an approach would require a distinction to be drawn between the default of an innocent licenced person and the default of the culpable licenced person. The proposed 'culpability-based' approach or the 'end-to-end' approach would only focus on the two ends of the participation chain—the injured market participant and the culpable licenced person. Thus, the proposed approach will ask the following questions, namely:

1. has a market participant who is claiming compensation out of the Fund suffered pecuniary loss?
2. Is that pecuniary loss which is referred to in paragraph (a) above a direct consequence of the default of the intermediate (innocent) licenced person?
3. Is the default of the intermediate licenced person a direct consequence of the default of the licenced person who is at the other end of the participation chain?

If the answer to question (i) is a 'no', then the matter ends there. However, if the answers to the questions which have been posed above is a 'yes', then the Compensation Fund should compensate both the market participant and the intermediate licenced person(s), and be subrogated to the rights of all the injured persons. The Fund should also claim the aggregate disbursement from the culpable defaulting licenced person. Such an approach, it is argued, is likely to shorten the time and reduce the cost of enforcing the subrogatory rights of the SEC. The corollary argument is that the quick recovery of the disbursements from the culpable defaulter is likely to incentivize the compensation of market participants. This view is rationalized by the position that the recoveries are supposed to replenish the Fund so that it does not run dry—for the Fund should operate as a 'revolving fund'. If it takes inordinately long to recover the disbursements, the capacity of the Fund to pay out compensation is likely to deminish. And, as of necessity, the Fund will have an incentive to delay the payment of compensation until the recoveries are made—a condition which is likely to defeat the purpose for which the Fund was established in the first place. By the 'culpability-based' approach, if the default of the licenced person who at the end of the participation chain and the default of the intermediate defaulting licenced person is caused by the externalities which are beyond their control—such as systemic shocks, market failures or the disruption in the supply or production or value chains (which is caused by a pandemic such as COVID-19), the Fund should proceed to compensate the market participant who has ultimately suffered pecuniary loss as a result of the default. However, the Fund should not be subrogated to the rights which the ultimate market participant and the intermediate licenced persons may have against the immediate defaulting licenced person. In other words, the defaulters will be absolved from liability. The monies which the defaulters would otherwise be liable to pay, absent the proposed approach, should for all regulatory purposes be treated as 'bail-out' packages. If such relief were accorded to the defaulting innocent licenced persons, it is likely to keep the defaulters in the market and enhance the resilience and fortitude of the COMESA securities markets as it strives to emerge from the systemic shocks of COVID-19 pandemic.

In order to expedite cross-border enforcement of the subrogatory rights of the Domestic Compensation Funds (the DCFs) within the COMESA Region, there is need to ensure extra-territorial criminalization of improper market practices. As a corollary to extra-territorial criminalization of improper market practices, there is need to increase corporation between exchange commissions and compensation funds in the region.

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Enhanced information exchange and extradition of offenders should greatly assist in realizing funds which are paid out the Fund. Implementation of the SADC Protocol on Mutual Legal Assistance 2002 would greatly assist in the realization of this goal, also. Effective compensation of injured market participants and recovery of funds which are paid out of the Fund, are likely to enhance the integrity of securities markets, and to keep the Fund afloat.

Constraints Relating To Lack Of Legal Personality On The Part Of The Compensation Fund

By vesting the right of subrogation in the Fund, section 183 of the Zambian Securities Act 2016 seems to suggest that legal personality has been conferred on the Fund by the Act so as to sue and be sued in its own name. That is to say, conferment of legal personality by implication. However, the question is, 'does the conferment of the right of subrogation amount to a conferment of full and proper legal personality in the sense that this concept is known in civilized states? Full and proper legal personality implies the capacity to sue and be sued in one's own name. Before we launch to examine this aspect, it is worth noting that section 64 of the Securities Act 1993 (repealed) did not confer nor purport to confer legal personality on the Compensation Fund for the Zambian securities markets. It is also worth noting that section 176 of the Securities Act 2016 (repealed and replaced section 64 of the Securities Act 1993) does not confer or purport to confer legal personality on the Fund. However, sections 70 and 71 of the repealed Act, and sections 182 and 183 of the current Act by implication vest limited legal personality on the Fund by limiting the liability of the Fund and conferring the right of subrogation on it. The capacity to acquire legal rights and incur legal obligations is a hallmark of legal personality. And, on account of those rights and obligations, a legal person should be capable of enforcing those rights (the capacity to sue), and in the like manner, other legal persons should be able to enforce those obligations against him/her/it (liability to be sued). Although the Securities Act 2016 confers the right to sue on the Fund (otherwise the SEC which is its agent cannot acquire (as a statutory delegatee) the right to sue on behalf of the Fund for they say *'nemo dat quod non habet'*), it does not confer a corresponding right on the part of other legal persons to sue the Fund. Section 183 may as well be declared unconstitutional for being discriminatory in itself and its effect.[40] By discriminatory here, we mean that sections 182 and 183 of the Securities Act 2016 subjects the defaulting licensed persons to disabilities and restrictions while the injured market participants and the Fund are accorded privileges and advantages.[41] Thus, on the authority of the constitution and the foregoing position, it is submitted that section 183 has no regulatory effect. There is also another shortcoming in the regulatory and institutional framework which relates to the lack of a right of appeal against the decisions of the Fund under Part XVI of the Securities Act 2016. Generally, the jurisdiction of the Fund is limited to the actions of the licensed persons, market the market operators and the Commission.[42]

The traditional and accepted practice of conferring full, proper and functional legal personality is to expressly provide in the Act of Parliament establishing an entity that such an establishment has the capacity to sue and be sued in its name and to perform [all] such acts as a body corporate may by law do or perform. [43] As possible solution to this shortcoming, proposals are made for the repeal of section 176 and its replacement with the following new section:

s. 176. The Compensation Fund established pursuant to the repealed Act is continued in existence as if established under this Act as a body corporate, with a common seal, capable of suing and being sued, and subject to this Act, to do [all] such acts as a body corporate may by law do or perform.

Such a provision is likely to ensure:

1. the availability of the right of action on both sides—the Fund on the one hand and the market participants and the defaulting licensed persons on the other, for the proper functioning of the market;
2. ownership of property by the Fund in its name; and
3. enhanced capacity of borrow funds in own name for the purposes of discharging its mandate under the Act, and for investment.

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Constraints Relating To The Limited Liability Of The Compensation Fund

Section 182(1) of the Zambian Securities Act 2016 limits the amount of the aggregate or segregate claim or claims which may be disbursed by the Fund as compensation for the losses of the market participants which are occasioned by the default of the licensed persons. Questions may be asked, 'would not that stance defeat the underlying object of the fund?'[44] Would it not defeat the purpose of the right of subrogation that has been conferred upon the Fund in section 183 of the Securities Act 2016? In the event that the value of a cross-listing or other transaction which is sought on Zambian securities exchanges is much higher than the compensation ceiling, would not that discourage the intended business? It could be argued that the imposition of a ceiling is contrary to the underlying object of the fund and the right of subrogation conferred on the Fund. A further argument is made that the ceiling is also likely to discourage high-value cross-border transactions. A further argument is made that given the underlying object of the Fund and the availability of the right of subrogation, the Fund should proceed to pay prompt and adequate compensation to the injured market participant. Once compensation is paid, the Fund should be subrogated to the rights of the injured participants against the defaulting licensed person notwithstanding their default in payment of contributions to the Fund.[45]

Furthermore, an argument is made that:

1. stream-lined subrogation to the rights of the injured participants;
2. availability of the right of action on the part of the Fund and the market participants (right of market participants to sue the Fund in respect of its actions in the discharge of its mandate); and
3. availability of insurance taken by licensed persons in addition to their contributions to the Fund…

is likely to keep the Fund afloat without necessarily imposing the compensation ceilings.

An argument is made that a capable, properly managed, liquid and efficient (in terms of payment of prompt and adequate compensation) Compensation Fund is likely to incentivise cross-jurisdictional cross-listings and trade in securities by foreign issuers and investors. This is because foreign issuers and investors who are often vulnerable to abuse by the fiduciaries—dealers, brokers and advisors—of their authority on account of physical distance, know that such a Fund will pay out prompt and adequate compensation for their loss.

As has been earlier established in my earlier article,[46] that cross-jurisdictional cross-listing does not in effect assign a new *locale* or *situs* to the cross-listed securities. The securities retain the *locale* or *situs* of issuing company. All that cross-listing does is expose the securities to a larger, more liquid and efficient market than the home market of the issuer. Consequently, the ultimate purchase of cross-listed securities by investors in the host state or other third countries, is effectively a "cross-border" purchase. An argument is made that with implementation of the proposals which have been made in this sub-section, cross-jurisdictional cross-listings into the LuSE are likely to increase. The growth in cross-border cross-listings, is likely to increase the overall cross-border trade in securities in the region, it is argued.

Constraints Relating To Lack Of Statutorily-Fixed Determination Period For Compensation Claims

The central premise of this subsection is that an efficient domestic compensation fund is designed to absolve investors from potential further losses that are associated with lengthy and protracted litigation. On this premise, it could be argued that an efficient compensation fund is likely to allow the investors and other securities market participants to transfer to it, the psychological and emotional drag, stress, strain and suffering that litigants normally go through. It is submitted that not only would such a regulatory feature enhance justice and protection for the securities market participants but also save them time and money and enhance their health—their well-being.[47] An argument is also made that the lack of provisions fixing the

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period within which a claim for compensation should be determined is likely to breed ground for delays in the investor compensation system—the very disease the compensation fund is designed to cure. This, it is argued, is likely to defeat the purpose of the compensation fund.[48] As a possible solution to this shortcoming in the regulatory framework, proposals are made for the introduction of the fixed period, in the regulatory rules, within which the claims for compensation should be determined.

Constraints Relating To Lack Of A Statutory Right Of Appeal Against Decisions Of The Domestic Compensation Fund

The central premise of this subsection is that the availability of an appellate avenue in the domestic administrative or judicial system provides the checks and balances in the system. This positive feature, it is argued, contributes to the realization of the fundamental object of any justice system. Conversely, an administrative or judicial system that is devoid of checks and balances or means of ensuring the same is likely to breed the potential for abuse of the administrative or judicial power, as the case may be. Against this backdrop, it could be argued that a compensation system that has effective means of providing internal or external checks and balances is likely to eliminate the potential for abuse of the power and enhance the efficacy of the regulatory framework in ensuring prompt and adequate compensation of securities market participants for their losses.

Under Part XVI of the Zambian Securities Act 2016, there is neither an express nor implied provision for a right of appeal against decisions of the Compensation Fund to grant or to decline compensation to an injured market participant, either with respect to the entire claim or the quantum of the compensation or indeed any matter which is incidental or connected to such matters.[49] Further, the jurisdiction of the Zambian Capital Markets Tribunal (CMT) is at present limited to:

- hearing and determining appeals from decisions of the SEC or any person exercising or performing the powers or functions of the SEC; and
- hearing and determining proceedings relating to securities market misconduct.[50]

Let us suppose that there is a dispute between the claimant and the national Fund as to whether or not (i) the claimant is entitled to compensation at all or (ii) quantum of compensation.[51] Which authority would serve as a legitimate forum for settling such disputes? The CMT? The High Court for Zambia?

It is clear from the jurisdictional provisions relating to the CMT that entitlement to compensation or merit of the claim for compensation, quantum thereof or matters connected or incidental thereto are aspects falling outside the jurisdiction of the CMT. An argument is made that even if a right of appeal against the decision of the Compensation Fund could be established by necessary implication, it would effectively fall outside the scope of the jurisdiction of the CMT.

In respect of the above, a question may be asked, 'should the claimant then have recourse to the High Court for Zambia for determination of the question whether or not they are entitled to compensation or quantum thereof?'

The High Court for Zambia has unlimited and original jurisdiction in civil or criminal matters.[52] What then is the meaning of unlimited jurisdiction? The Zambian Supreme Court in its supreme wisdom and efficiency has observed:

The jurisdiction of the High court is unlimited but not limitless since the court must exercise its jurisdiction in accordance with the law. Indeed, Article 94(1) must be read as a whole including phrases like under any law and such jurisdiction and powers as may be conferred on it by this constitution or any other law.[53]

The position that could be distilled from Chief Justice Ngulube's perceptive observation is as follows:

- if a particular statute does not expressly or impliedly confer a right of appeal or action to/in the High Court, then the matter ends there;
- if the statute gives the right of appeal or action but points to a different forum, then the aggrieved party could only have recourse to that other forum—and not the High Court; and
- if a particular statute gives a right of appeal or action to/in the High Court, then the High Court could competently assume jurisdiction to hear and determine such matters.

An argument is made that absent an express or implied provision for a right of action or appeal against the decision of the Compensation Fund, the injured participants have no recourse to the High Court. A corollary argument is made that lack of an appellate avenue in respect of matters aforesaid deprives the compensation system of checks and balances thereby making the system vulnerable to abuse. A further argument is made that such potential for abuse is likely to compromise the efficacy of the regulatory framework in ensuring effective, prompt and adequate compensation of injured securities market participants for their pecuniary losses. The resulting ineffective compensation, it could be argued, is likely to discourage further participation of issuers and investors. It could also be argued in this respect that since issuer and investor participation is crucial to increased supply and demand for securities across international borders,[54] the resulting poor compensatory service is likely to hinder the growth of cross-border trade in securities in the COMESA Region.

As a possible solution to this shortcoming in the law, proposals are made for:

- the amendment of section 184 of the Zambian Securities Act 2016 so as to include appeals against decisions of the Compensation Fund in the jurisdiction of the Capital Markets Tribunal;
- inclusion of the right of appeal against the decision of the Compensation Fund under Part XVI of the Securities Act 2016.

Constraints Relating To The Narrow Scope Of Domestic Compensation Funds In The Comesa Region

The central premise of this subsection is that the availability of prompt and adequate compensation of investors for losses on their investment, be they occasioned by licensed, authorized or other market participants, is likely to encourage their participation and increase demand for the listed securities.[55] Similarly, an issuer who knows that prompt and adequate compensation is available for pecuniary loss that they may suffer as a result of the arbitrary or wrongful termination or cancellation of their listings is likely to undertake multiple listings or cross-border cross-listings in the region.[56]

Constraints Relating to Narrower Scope of Domestic Compensation Funds in Most Jurisdictions in the Region

Professor Coffee, observes that under the bonding theory, cross-listing firms are seeking ways in which they can increase their equity financing at a lower cost of capital by utilizing stronger regulatory laws and enforcement in foreign jurisdictions than that available in their home country.[57]

Thus, a foreign issuer will tend to migrate to jurisdictions offering better regulation and enforcement than those offering lax regulation and enforcement.

Consequently, a prudent foreign issuer who is contemplating a cross-border listing or cross-listing will first compare the degree of protection accorded to issuers in the host state.[58] If that potential host state offers worse issuer and protection than the home state, then the matter should end there;[59] however, if the

prospective host state offers better issuer protection then the matter is taken to the second stage—assessment of investor protection.[60] Secondly, the issuer will assess the degree of protection afforded to investor in the prospective host state. If the degree of investor protection is lower, then the inquiry should end there.[61] However, if the degree of investor protection accorded by the prospective jurisdiction of cross-listing is higher, then the issuer could proceed to list or cross-list cross-border.[62]

On the strength of the bonding theory, an argument is made that by extending the compensation net to 'any person' in section 176(1), the Zambian Securities Act 2016 enhances the efficacy of the Zambian regulatory framework in protecting a cross-section of market participants—issuers, investors and other types of market participants. Thus, both domestic and foreign juristic and non-juristic issuers are likely to migrate to the LuSE. In the like manner, the South African Financial Markets Act 2012 imposes an obligation on securities exchanges to maintain a compensation fund for purposes of compensating its clients.[63]

However, there are key jurisdictions in the Eastern and Southern African Region which have narrowed the scope of their compensation funds to investor protection. These jurisdictions include Kenya and Mauritius.[64] An argument is made that this sort of bias towards the investor—effective exclusion of other market participants from compensation fund protection—serves only to promote investor participation and increased demand for listed securities. A further argument is made that since issuers have been left out of the compensation net in these jurisdictions, lesser protection for issuers is likely to discourage cross-listings by foreign issuers, and thereby reduce the supply of securities to securities exchanges. A corollary argument is made that since the demand for listed securities in these jurisdictions is likely to exceed supply of securities to securities markets, the price for securities is likely to be prohibitively high. An argument is also made that given the higher transaction costs for cross-border securities deals than for domestic ones which characterize the securities deals in the region,[65] the higher prices of securities are likely to discourage the participation of non-institutional investors in cross-border securities trading. Such a phenomenon is opposed to the regional treaty order which enjoins COMESA Members to encourage their natural and juristic citizens participate in cross-border trade in securities in the region.[66]

The there is also a category of key jurisdictions which have not established compensation or stabilization funds for their securities industries. These include Seychelles and Zimbabwe.[67] An argument is made that the total absence of compensation funds in these jurisdictions does not only serve to discourage cross-border listings and cross-listings by issuers but also foreign investor participation thereby hindering growth of cross-border trade in securities in the region.

As a possible solution to these shortcomings in the regulatory framework, proposals are made as follows:

- COMESA jurisdictions which have restricted the scope of their compensation funds to investors should extend cover to any person who suffers loss as a result of default of a licensed person; and
- Those jurisdictions which have not yet established compensation funds should do so on the terms stated in paragraph (i) above.

An argument is made that going the Zambian, South African and Malawian way is likely to increase the scope of the compensation net and increase both issuer and investor participation—a condition necessary for stability of the price of securities in the region. To crown it all, there is need to complement the efforts of national compensation funds with a regional compensation fund.

Making A Case For A Regional Compensation Fund

A regional compensation fund could prove useful in cases where the domestic compensation fund has not enough funds to effect prompt and adequate compensation for market participants.

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The *Nexus* Between Earlier Proposals For A Regional Stock Exchange And Proposals For A Regional Compensation Fund

Professor Mwenda, has recommended the establishment of a regional securities exchange in his work as a possible way of increasing cross-listings and liquidity of securities markets in the region.[68] Since issuers and investors will only seek to list/cross-list or invest on the regional securities exchange if and only if the protection thereon is better than that which is provided by the domestic securities exchanges, an argument is made that the regional compensation fund to the extent that it enhances issuer and investor protection is likely to ensure the success of the regional securities exchange. Other regional institutions such as the regional compensation fund which we have proposed are prerequisites to the success of a regional securities exchange. As Irvin observes:

In the case of a single regional exchange as the ultimate objective, some observers argue that regional institutions must already be in place ahead of a regional exchange, pointing out that the West Africa's Bourse Régionale de Valeurs Mobilières was set up fifty (50) years after its eight member countries had unified their economies and introduced a single currency. These eight countries had several regional institutions already in place at the BRVM's launch, including a central bank, financial market supervisory body, supreme court, as well as a regional legislative framework.[69]

Further Attempts At A Case For A Regional Compensation Fund

A further case for a regional compensation fund may also consist in answers to the following scenarios:

a. What about the cases which fall outside or on the periphery of the insider trading regime—are they entitled to compensation out of the Domestic Compensation Fund? Under the definition of 'insider' in section 2 of the Zambian Securities Act 2016, persons who are connected to the issuer or an entity which is connected to the issuer, are insiders for the purposes of regulating insider trading. Persons who receive inside information from any of these categories are also classified as insiders.[70] The definition does not, however, extend liability to persons who are in possession of insider information which was acquired by other means than through the categories which have been enumerated in the definition of 'insider' in section 2 of the Securities Act 2016. Which authority, a question may be asked, would compensate a person who suffers pecuniary loss as a result of buying securities from a participant who receives inside information from a third party who had hacked into the cyber financial system of the issuer? Of course the person who breaks into the issuers cyber financial system has no connection whatsoever with the issuer and so does the tippee. They are thus, not insiders under the current anti-insider trading regime. Since they are not insiders, they cannot be criminally liable for the loss which may be occasioned by insider trading.[71]

The loss which is suffered by the injured party cannot also be regarded as occasioned by 'a licensed person' since the rogue tipper and the tippee-investor are not licensed persons. As noted above, the prerequisite for compensation to issue out of the Domestic Compensation Fund is that the loss of the claimant must be occasioned by the default of a licensed person. Since the pecuniary loss which is occasioned by insider trading falls outside the purview of the compensation fund, which authority would step in to compensate the injured market participant in the event that the insider trader cannot be traced or the judgment against them returns *nulla bona*?

In the event that a Domestic Compensation Fund fails to make adequate compensation for the loss of a market participant which domestic authority would take care of the short-fall? There is currently no domestic or regional authority which would step in to make good the short-fall. This view is supported by Rule 18 of the Securities (Compensation Fund) Regulations of 1993 which provides as follows:[72]

18 (1) Where the aggregate of all claims which have been allowed in relation to default by or in connection with a licensee exceeds the total amount which may pursuant to clause (2) of regulation seven be paid under these Regulations in respect of that licensee, then the said total amount shall be apportioned between the claimants in such manner as the Committee thinks equitable.

(2) Upon payment out of the fund of the said total amount in accordance with such apportionment, all other claims against the fund which may thereafter arise or be made in respect of the same default shall be absolutely discharged.

By sub-regulation (2) above, the unpaid portion abates thereby discharging the Fund from further liability. Further, as a second string, recourse cannot be had to other persons or bodies of persons with whom the Fund may have taken out insurance for the purposes of indemnification against liability of the Fund in respect of claims.[73] To this end, Regulation 20 of the Securities (Compensation Fund) Regulations 1993 provides that:

No claimant against the fund shall have any right of action against any person or body of persons with whom a contract of insurance or indemnity is made under these Regulations in respect of such contract, or have the right to claim in respect of any moneys paid by the insurer in accordance with any such contract.

Then there are also cases, as noted above, where the Domestic Compensation Funds are restricted to compensating investors. In the event that non-investor market participants suffer pecuniary loss as a result of default of a licensed person, which authority would step in to compensate them for their pecuniary losses? In such cases the regional compensation fund would prove useful. There are also cases where the defaulting licensed person may have been in arrears on contribution payments to the national Fund. In such cases the liability of the Domestic Fund to compensate the injured person is limited.[74] In such a case, recourse could be had to the Regional Fund as a Fund of last resort for purposes of recovering the shortfall. Also, in the case of a financial depression or crisis or systemic shocks in the regional financial system and issuers, investors and other market participants suffer huge pecuniary losses, which authority would make good such losses? There is currently no body in the region which provides insurance against such losses. Even the Trade and Development Bank of COMESA (formerly, the Preferential Trade Area Bank) has no such mandate. It is customary in financial services industries and most regulated industries for the regulator to allow a person who has paid the prescribed fee and has lodged their application for renewal of the license following expiration of the previous license to continue trading or offering their services previously licensed under the expired license. A question may be asked "would the compensation fund entertain a claim for compensation for loss occasioned by a person who has paid a license fee but awaits issue of the license by SEC? Since an application for a license is not an approval as signified by issuance of a license, the claim is likely to fail.[75] The said customary practice is essential for continued provision of services by licensed persons as they wait for their application for renewal of licenses. An argument is made that if such a customary practice is not accommodated by the Securities Act, securities exchanges, clearing and settlement agencies and other market operators would have to halt provision of their services as they wait for approval from SEC. A further argument is made such a state of affairs is likely to hurt the volume of securities trading as well as the integrity of securities exchanges in the region.

Of course market participants who suffer pecuniary loss in any or a combination of the circumstance enumerated above is at liberty to have recourse to the national legal system for judicial redress. However, an argument is made that given the slow wheels of national judicial systems in the region whereby a simple civil case takes years to conclude thereby putting litigants to huge cost, the regional compensation fund could prove a better alternative.

The author has noted elsewhere that the diversity of regulatory rules in the Eastern and Southern African Region increases the transaction costs for cross-border securities deals far above those of purely domestic

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deals.[76] This, the author has noted elsewhere, reduces the demand for the foreign securities. In this respect, an argument is made that the resulting fall in in prices of foreign securities is likely to place the price of the securities which are traded across international borders way below their transaction costs. This condition, it could be argued, is not conducive for the growth of cross-border trade in securities, and the integration of securities markets in the region since it is likely to discourage multiple listings and cross-border cross-listings and overall cross-border trade in securities.

As a possible solution to these shortcomings in the regulatory framework, proposals are made for:

1. amendment of domestic securities Acts to ensure that the loss which is occasioned by pure breach of continuous disclosure obligation or misrepresentation by issuers is compensable;
2. amendment of domestic Securities Acts so as to ensure that the loss which is occasioned by a licensed person who has applied for renewal of their license and has paid for the prescribed fee following the expiry of their previous license is compensable;
3. establish a Regional Compensation Fund which should serve as fund of last resort in the event that the Domestic Compensation Funds are unable to give out prompt and/ adequate compensation to securities market participants who suffer pecuniary loss at the hand of licensed persons. The Regional Compensation Funds would also come in handy in the event that the loss which is suffered is systemically triggered. A regional Compensation Fund would also be dedicated to compensating persons who suffer pecuniary loss as a result of the default of persons who are licensed or authorized to operate on the Regional Securities Exchange.

An argument is made that the implementation of the proposals for legal and institutional reform which have been made above is likely to enhance the supply of securities across international borders through the increased multiple listings and cross-border cross-listings. Against this backdrop, it could be argued that the implementation of the measures which have been proposed above is likely to enhance investor protection, and promote investor participation, and increase the demand for the securities which are listed on the Domestic Securities Exchanges, and the Regional Securities Exchange. A further argument is made that the resulting corresponding increase in demand for the securities which would be precipitated by the implementation of the proposed remedial reforms is likely to cancel out the increased supply of securities which would come from the multiple listings and cross-border cross-listings. This, it could be argued, is likely to ensure price stability. A corollary argument is made the resulting stability in the price of securities is likely to reduce volatility in the frontier securities markets in the region and enhance their attractiveness.

The Regional Legal Framework Supporting The Establishment Of A Regional CompensationFund

COMESA Member States have undertaken to develop a region-wide network of capital markets, with the purpose of facilitating the flow of information on the availability of stocks, bonds, securities and notes for their cross-border marketing.[77] An argument is made that availability of the said securities could well be supplied to other jurisdictions in the region through multiple listings and cross-border cross-listings. COMESA Member States are also under an obligation to implement the measures which are aimed at encouraging their citizens to participate in cross-border trade and investment in securities.[78] COMESA Member States are also under a general obligation to cooperate in creating an enabling environment for cross-border investment in the region.[79] An argument is made that indispensable to a legal, regulatory and institutional framework which is tailored to the promotion of cross-border trade and investment in listed securities is enhanced issuer and investor protection that could come from establishing a Regional Compensation Fund—a Regional Fund which would complement the efforts of Domestic Compensation Funds in the COMESA Region.

Possible Sources Of Funding For The Regional Compensation Fund

The Regional Compensation Fund could be funded and sustained by:

1. monies paid to or deposited into the Regional Fund by licensed persons, as may be prescribed. A portion of monies which are deposited into the Domestic Compensation Funds should go to the Regional Fund;
2. monies which are recovered by, or on behalf of, the Regional Fund in the exercise of any subrogatory right of action which is conferred by the Protocol on the Establishment of the Regional Compensation Fund;
3. contributions from Domestic Securities Exchange whose mandate is to ensure enhanced issuer, investor and other participants' protection;
4. contributions from Domestic Compensation Funds;
5. interests and profits accruing on the investments which are made by the Regional Fund; and
6. monies which are lawfully paid into the Regional Fund. This could include:
7. grants from COMESA Member States and foreign governments;
8. grants from the World Bank and similar international organisations.

Administration Of The Regional Compensation Fund (Rcf)

The Regional Compensation Fund could be established under the umbrella of the Common Market for Eastern and Southern Africa (COMESA). The RCF could be established under a "COMESA Protocol on the Regional Compensation Fund for Securities Markets". The Protocol should also provide for:

1. jurisdiction of the RCF;
2. composition of the RCF;
3. procedure for making claims from the RCF;
4. appeals; and
5. other matters connected to or incidental to the foregoing.

For purposes of ensuring safeguards and checks on the power of the RCF, it is proposed that the Domestic Compensation Fund or the claimant who makes a claim for compensation be clothed with a right of appeal against the decisions of the RCF. Such appeals could lie to the COMESA Court of Justice (COMESA CoJ).

Under the current regulatory framework, the jurisdiction of the COMESA CoJ extends to:

"…determining claims by any person against the Common Market or its institutions for acts of their servants or employees in the performance of their duties."[80]

Since the RCF would be established as an institution of COMESA, it could be argued that the claims which are made by the Domestic Compensation Funds (which have legal personality) and natural or other juristic persons could properly be regarded as the 'claims by persons against COMESA or at least against an institution of COMESA for decisions of the servants of that institution in accordance with Article 27(2) of the COMESA Treaty 1993'. Be as it may, it is recommended that the Protocol be passed as proposed above.

Possible Method Of Making Claims Into The Regional Compensation Fund

The Domestic Securities Acts should provide that:

1. the Domestic Compensation Fund shall provide prompt and adequate compensation for pecuniary loss which is suffered by any person on account of default or defalcation of a licensed person;
2. in the event that the Domestic Compensation Fund is unable to make prompt and/or adequate compensation, the Domestic Fund shall apply to the Regional Fund for assistance. Provided that the Regional Fund shall stand subrogated to all the rights that the Domestic Fund may be entitled after the loss is fully satisfied;

3. in the event that the Domestic Compensation Fund neglects or fails to make an application to the Regional Fund in accordance with paragraph (b) above, the person who is entitled to compensation shall have the right to apply directly to the Region Fund by proving his/its case as the Domestic Fund is mandated to do as stipulated below.

Provided that in the event that there is no Domestic Compensation Fund in the jurisdiction of the person who is entitled to compensation, that person shall have direct recourse to the Regional Compensation Fund as stipulated above;

1. for the purpose of facilitating receipt of compensatory assistance from the Regional Fund, the Domestic Fund shall be affiliated to the former;
2. the Domestic Fund shall make annual contributions to the Regional Fund and ensure that a portion of contributions that licensed person make to it is relayed to the Regional Fund.

Thus, compensatory claims to the Regional Fund could be made by a Domestic Fund on behalf of any person who suffers pecuniary loss as result of the default or defalcation of a licensed person, as aforesaid. The Domestic Fund which makes a claim to the Regional Fund for prompt and adequate full or complementary compensation will need to prove the following:

1. that the person on whose behalf a claim is being made has a genuine claim for compensation; and
2. that the Domestic Fund is unable to promptly or adequately compensate any such person.[81]

CONCLUSION

This article has examined the Zambian regulatory and institutional framework which governs the domestic and international public distribution of securities so as to establish whether or not the said framework provides adequate incentives and safeguards for the effective compensation of market participants who suffer pecuniary loss as a result of the default of a licenced person. The general conclusion reached in this article is that the said framework does not provide adequate incentives for the effective compensation of the securities market participants who suffer pecuniary loss on account of the default of a licensed person. It was noted that the following are the constraints within and on the regulatory and institutional framework, namely:

1. lack of a streamlined right of subrogation on the part of the Domestic Compensation Fund;
2. the lack of legal personality on the part of the Domestic Compensation Fund;
3. limited liability on the part of the Domestic Compensation Fund;
4. lack of a fixed period within which the claims for compensation should be determined;
5. lack of the right of appeal on the part of the claimants;
6. the narrow scope of the mandate of the Domestic Compensation Funds in some jurisdictions in the COMESA Region; and
7. lack of Compensation Funds in some jurisdictions within the COMESA Region;

As a possible way of remedying these shortcoming in the regulatory and institutional framework, the necessary proposals for remedial legislative and institutional reform have been made, including the establishment of a Regional Compensation Fund as a complement to the Domestic Compensation Fund.

FOOTNOTES

[1] The edifice of this article is a segment of my PhD research work on “Legal Aspects of Cross-border Trade in Listed Securities in Eastern and Southern Africa. The segment examines constraints relating to inadequate provisions on the right of subrogation, limited liability on the part of the Domestic

Compensation Fund (the DCF), narrow scope of most DCFs in the region and the lack of a Regional Compensation Fund: See, Samamba, L.T., 'Legal Aspects of Cross-Border Trade in Securities: The Case of Eastern and Southern Africa (PhD Thesis, University of Lusaka) 1-419, http://research.unilus.ac.zm/xmlui/handle/123456789/41/browse?type=author&value= SAMAMBA %2 C+ Lennox+ Trivedi, accessed 11 May, 2023.

[2] See, the Third Preambulatory Paragraph in the Preamble to the First Annex to the SADC Protocol on Finance and Investment 2006

[3] See, fifth and sixth Preambulatory Paragraphs in the Preamble to the Annex to the SADC Protocol on Finance and Investment 2006, respectively

[4] Foreign Investment flows can take the form of Foreign Direct Investment (FDI) or Foreign Portfolio Investment (FPI).

[5] For further suggestions for strategies for increasing the attractiveness of COMESA Frontier Securities Markets in this regard, see, (i) Samamba, LT., 'Eastern and Southern Frontier Stock Markets: A Case for their Attractiveness and Growth Potential' (2017) 3 Afri. L. J. 13-33, (ii) Samamba, L.T., 'Strategies for Increasing Liquidity of Eastern and Southern African Stock Markets' (2017) 3 Afri. L. J. 34-52, and (iii) Samamba, L.T., 'Enhancing the Attractiveness of Eastern and Southern African Stock Markets Through Demutualization' (2018) 4 Afri. L.J. 6-29.

[6] International Monetary Fund, 'Regional Economic Outlook—Sub-Saharan Africa: COVID-19, An Unprecedented Threat to Development' (April, 2020) 1-25

[7] *ibid,* at 2

[8] *ibid*

[9] *ibid*

[10] *ibid*

[11] See, Samamba, L.T., 'Legal Aspects of Cross-Border Trade in Securities: The Case of Eastern and Southern Africa (PhD Thesis, University of Lusaka) 1-419, at 124 http://research.unilus.ac.zm/xmlui/handle/123456789/41/browse?type=author&value= SAMAMBA %2 C+ Lennox +Trivedi, accessed 11 May, 2023.

[12] *ibid*

[13] *ibid*

[14] *ibid*

[15] For the low correlation which the Frontier Securities Markets have with each other and other grades of market, see: See, David Mstaen, Africa—*The Ultimate Frontier Market: A guide to the Business and Investment Opportunities in Emerging Africa* (Harriman House 2012); Justin F. Buckett and Michael E.M. Surdakasa, *Investing in Africa: An Insider's Guide to the Ultimate Emerging Market* (1st edn, Wiley 2000); Samamba, L.T., *Corporate Disclosure Regulation in Africa's Emerging Securities Markets: An International Comperative Analysis* (Lambert Academic Publishing 2020) at 64-66.

[16] For a detailed discussion of this approach, see, Salter, M. and Mason, J., *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson Education Limited 2007)

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[17] Dobinson, I. and John, N., 'Qualitative Legal Research', in McConville, M. and Chiu, W.H. (eds), (2007). *Research Methods for Law* (Edinburgh University Press 2007) 16-45.

[18] And such other securities exchanges as may be established in future.

[19] Section 176 of the Zambian Securities Act 2016, s 176

[20] *ibid*

[21] See, the Securities Act 2016, s 178(1)(2). Membership is drawn from a cross-section of organisations. Ministry of Finance; The Bankers Association of Zambia; an association of capital market players; the Law Association of Zambia; the Zambia Chamber of Commerce and Industry; the Securities and Exchange Commission who is a member thereof.

[22] See, the Zambian Securities Act 2016, s 177

[23] 'Legal obligation' includes an obligation arising under a contract or quasi-contract or under a trust (including a constructive trust): See, definition of the phrase in Regulation 2 of the Securities (Compensation Fund) Regulations 1993.

[24] See, definition of the term in Regulation 2 of the Securities (Compensation Fund) Regulations, Statutory Instrument No. 162 of 1993. This statutory instrument remains in force as if it was made under the succeeding Act—the Securities Act of 2016—until it is revoked by a later statutory instrument or subsequent amendment to the Parent Act: See, section 15 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia.

[25] See, *Stallion Motors and African Cargo Services Limited v Zambia Revenue Authority* (*Appeal No. 11/2012) [2014] ZMSC 83* (31 July 2014)

[26] Black, H.C., *Black's Law Dictionary* (Rev 4th Ed, West Publishing Co. 1968) at 505

[27] *Town of Milton v. Bruso*, 111 Vt. 82, 10 A. 2d 203, 205.

[28] *Easterwood v. Willingham*, Tex. Civ. App., 47 S.W.2d 393, 395.

[29] *Bradbury v. Thomas*, 27 P.2d 402, 135 Cal. App. 435.

[30] *Eastman v. Morgan*, D.C.N.Y., 43 F. Supp. 637, 641.

[31] *In re State*, 210 Wis. 9, 245 N. W. 844, 845.

[32] *Greco v. S. S. Kresge Co.,* 277 N.Y. 26, 12 N.E.2d 557, 562, 115 A.L.R. 1020.

[33] *Hilkert v. Canning*, 58 Ariz. 290, 119 P.2d 233, 236.

[34] *In re Butts*, D.C.N.Y., 120 F. 970; *Crawford v. Burke*, 201 Ill. 581, 66 N.E. 833.

[35] [2009] EWCA Civ 1161 [33].

[36] *ibid*

[37] *ibid*

[38] *ibid*

[39] Coase, R.H., *The Problem of Social Cost* (CreateSpace Independent Publishing Platform 2016) 1-44.

[40] See, the Zambian Constitution, Art 23(1), Chapter 1 of the Laws of Zambia

[41] For the definition of 'discriminatory', see, Zambian Constitution 1991/2016, art 23(3)

[42] See, the Zambian Securities Act 2016, 184(3)(a)(b)(c), Chapter 354 of the Laws of Zambia

[43] See, the Zambian Securities Act 2016, s 7(1), which expressly clothes the Securities and Exchange Commission with such power. In the United Kingdom, the Fund Manager which administers the Financial Services Compensation Scheme is established as a body corporate: See, the United Kingdom Financial Services and Markets Act 2000, ss 212, 213.

[44] The underlying object of the Fund is to ensure prompt and adequate compensation for loss suffered by market participants as a result of default by licensed persons. The desired end of prompt and adequate compensation is increased investor/issuer protection, investor/issuer confidence and enhanced overall integrity of the market.

[45] By section 9(2)(a) the Commission may take appropriate action against the licensed person defaulter who has caused loss to a participant and lagging in payment of contributions may be taken after compensation is paid out

[46] See, Samamba, L.T., 'Legal Constraints on the Growth Cross-border Cross-listings in the COMESA Region—The Case of Zambia' (2018) 4 Afri. L. J. 12-47

[47] It is argued that this positive feature is likely to enhance investor confidence and well as the integrity and attractiveness of the securities markets.

[48] Both the Securities Act 2016 and the Securities (Compensation Fund) Regulations 1993 do not fix the time within which a claim could be determined from the date of lodgement.

[49] Under the Kenyan Capital Markets Act 2000, Part II thereof does not make provision for such safeguards or checks on the power of the Compensation Fund, either. Under the Mauritian Securities Act 2005, Part XIV thereof does not provide for checks and balances on the power of the Compensation Fund, also. The South African Financial Markets Act 2012 does not make provision for such safeguards either.

[50] See, the Zambian Securities Act 2016, s 184(3)(a)(b)

[51] Establishing or settling such matters is very important when viewed in light of the Fund's right to subrogate to the rights of the injured participant. In exercising the right of subrogation, the Fund would be entitled to no more than the claimant injured participant is actually entitled to at law or in equity. This position finds expression and support in the Latin Maxim *"nemo plus juris ad alienum transferee potest quam ispe habet"* which is literally translated as "one can only transfer an interest or right that he himself has". Similarly, a Compensation Fund cannot competently subrogate to the rights which the injured participant is not, at law or in equity, entitled to.

[52] See, Article 134(a) of the Zambian Constitution as amended by Act No. 2 of 2016. Article 134 is the substitute for Article 94 which was embodied in the repealed Constitution of 1996

[53] The perceptive words of Chief Justice Matthews Ngulube in delivering judgment of the Court in Zambia National Holdings Limtied And United National Independence Party (UNIP) V. The Attorney-General (1994) S.J.22 (S.C.).

[54] Supply of securities could be increased through multiple listings and cross-border cross-listings. Securities advertising and increased institutional and individual investor participation is likely to increase demand for the securities supplied to securities exchanges.

[55] See, Samamba, L.T., 'Legal and Institutional Aspects of Cross-border Trade in Securities in Eastern and Southern Africa' (PhD Thesis, University of Lusaka 2020) [Samamba, L.T., PhD Thesis]

[56] *ibid*

[57] Coffee C. J., 'Racing Towards the Top?: The Impact of Cross-listings and Stock Market Competition on International Corporate Governance' (2002) 102 Colum. L. Rev. 1757, at 1770; See also, Kyle W. Pine, K.W.., 'Lowering the Cost of Rent: How IFRS and Convergence of Corporate Governance Standards can Help Foreign Issuers Raise Capital in the United States and Abroad' (2010) 30 North-western Journal of International Law & Business 1-30

[58] Samamba, L.T., PhD Thesis, *op.cit*

[59] *ibid*

[60] *ibid*

[61] *ibid*

[62] *ibid*

[63] See, the South African Financial Markets Act 2012, ss 8(1)(h), 15(1). The Malawian Securities Act 2010 also extends compensation to 'persons' who suffer pecuniary loss as a result of default of a licensed person: See, Malawian Securities Act 2010, s 52(1).

[64] See, the Kenyan Capital Markets Act 2000, 18(1), and section 148(2) of the Mauritian Securities Act 2005, s 148(2), respectively.

[65] See, Samamba, L.T., 'Enhancing Regulation Of International Securities Markets In The Eastern And Southern Africa Through Harmonization Of Regulatory Rules' (2018) 4 Afri. L. J. 1, for empirical evidenceto that effect.

[66] See, the COMESA Treaty 1993, Art 81(b)(c)

[67] Perusal of Parts 1 to 14 of the Seychelles Securities Act 2007, and Parts I to XIV of the Zimbabwean Securities 2004 reveals that these jurisdictions have not so far established compensation funds for their securities industries.

[68] Mwenda, K.K., 'Legal Aspects of Corporate Finance: The Case for an Emerging Stock Market,' PhD Thesis, Warwick University, 2000)

[69] Irvin, J., 'Regional Integration of Stock Exchanges in Eastern and Southern Africa: Progress and Prospects,' The International Monetary Fund (IMF) Working Paper, WP/05/122, at 19

[70] See, the Zambian Securities Act 2016, s 2, paragraphs (a)(i)-(vi), (b)(c) and (d) of the definition of 'insider')

[71] 'Insider trading' is defined as trading in securities by an insider for the benefit of the insider or any other person: See, the Zambian Securities Act 2016, s 2 (Definition of phrase 'insider trading')

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[72] Securities (Compensation Fund) Regulations, Statutory Instrument No. 162 of 1993

[73] See, the Securities (Compensation Fund) Regulations 1993, reg 19(1)(2)

[74] See, the Zambian Securities Act 2016, s 182(1)

[75] Perhaps an argument which is based on estoppel by conduct could be persuasive.

[76] See, Samamba, L.T., PhD Thesis, *op.cit*

[77] See, the COMESA Treaty 1993, Art 80(d)

[78] See, the COMESA Treaty 1993, Art 81(b)

[79] See, the COMESA Treaty 1993, Art 3(c)

[80] See, the COMESA Treaty 1993, Art 27(2)

[81] These two requirements should also be satisfied by a claimant to whom the right to claim from the regional compensation fund has accrued