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GLOBALIZATION AND PRIVATE INTERNATIONAL LAW IN COMMONWEALTH AFRICA

*Richard Frimpong Oppong**

The discussion of globalization and private international law in Commonwealth Africa presents a challenge because whilst the concepts of private international law and Commonwealth Africa can be easily defined, globalization does not easily lend itself to definition. Indeed, as Ralf Michaels has observed, globalization is a “remarkably vague concept in general discourse.”¹ A lot of ink has already been spilled on clarifying the concept of globalization, so I will not attempt to define it. Rather, this paper intends to focus on a number of developments introduced by globalization and how those developments are shaping or would shape private international law in Africa.

Globalization has led to increased trade among countries. Regional economic blocs have emerged to expand and take advantage of this. There are currently about 14 regional economic integration organizations in Africa, eight of which have been recognized by the African Union as the building blocks of a future African Economic Community. It is a well-known fact that in regional economic integration organizations, such as the EU, OAS and MERCOSUR, attention to national private international law regimes and harmonization of private international law are key aspects of the integration project. To date, this has not been the case in Africa.

Despite decades of economic integration in Africa, none of the communities have or have had private international law on their agenda. This is so even though some of the founding treaties contain provisions that can be interpreted as enjoining the communities to adopt private international law initiatives. Examples are article 57(1) of the *Revised Treaty establishing the Economic Community of West African States* (ECOWAS)² and article 126 of

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1. Ralf Michaels, *Globalisation and Law: Law Beyond the State*, in *LAW AND SOCIAL THEORY* 287 (Reza Banakar & Max Travers eds., 2013).

2. “Member States undertake to cooperate in judicial and legal matters with a view to harmonizing their judicial and legal systems.” *Revised Treaty of the Economic Community of West African States* (ECOWAS), art. 57, May 28, 1975, 2373 U.N.T.S. 233.

the *Treaty for the Establishment of the East African Community*.³ At present, no initiative of private international law of significance has been undertaken under these provisions. What could explain this state of affairs? The low level of intra-regional trade and movement of persons; the under-developed nature of private international law research and scholarship; the stage of development of the communities; and the lack of political will.

At the national level, it does not appear that economic integration is impacting existing private international law regimes.⁴ The issue of foreign judgments enforcement is illustrative. An effective foreign judgment enforcement regime is a key component of any successful economic integration initiative. So far, it seems careful thought has not been given to this issue in Africa.

There have been cases in which judgments from other African countries were denied recognition or enforcement by national courts. This was due to the fact that the foreign judgments emanated from countries which had not been designated as beneficiaries under the statutory regime for registration of foreign judgments.⁵ These cases reflect a wider problem: under the statutes on the registration of foreign judgments, not many African countries have been designated as beneficiaries.⁶ At present, it is only between

3. "In order to promote the achievement of the objectives of the Community as set out in Article 5 of this Treaty, the Partner States shall take steps to harmonise their legal training and certification; and shall encourage the standardisation of the judgments of courts within the Community." Treaty for the Establishment of the East African Community, art. 126, Aug. 20, 2007, 2144 U.N.T.S 255.

4. *But see Shah v. Manurama Ltd* [2003] 1 EA 294 (HCU) (Uganda) in which the court reformed the Ugandan rules relating to foreign plaintiffs and security for costs on the basis that the plaintiff was resident within the East African Community.

5. *Heyns v. Demetriou* [2001] Malawi High Court 52 (Malawi) (holding that a South African judgment could not be registered under Malawi's British and Commonwealth Judgments Act, 1922 and the Judgment Extension Act 1922); *Barclays Bank of Swaziland v. Koch* 1997 BLR 1294 (HC) (Swaz.) (holding that a Swaziland judgment could not be registered under Botswana's Judgments (International Enforcement) Act); *Willow Investment v. Mbomba Numba* [1997] TLR 47 (Tanz.) (the Tanzanian court refused to enforce a judgment from Zaire); *SDV Transmi (Tanzania) Limited v. M/S STE DATCO* (Civil Application No. 97 of 2004) (Court of Appeal, Tanzania, 2004) (in which the absence of a regime for the reciprocal enforcement of judgments between Tanzania and Democratic Republic of Congo was the determinative consideration that made the court grant a stay of execution in favour of the applicant against the Democratic Republic of Congo resident respondent judgment creditor who had no assets in Tanzania); *Italframe Ltd. v. Mediterranean Shipping Co.* [1986] eKLR 54 (Kenya) (judgment from Tanganyika (now Tanzania) denied registration in Kenya); *Re Lowenthal and Air France* 1966(2) ALR Comm. 301 (Kenya) (judgment from Zambia denied registration in Kenya).

6. South Africa's regime designates only Namibia. Namibia's regime designates only South Africa. Swaziland's regime has been extended to Lesotho, Botswana, Zimbabwe, Zambia, Zanzibar, Malawi, Kenya, and Tanzania. Ghana's designates only Senegal (see First Schedule of Foreign Judgments and Maintenance Orders (Reciprocal Enforcement) Instrument, 1993, L.I. 1575). Tanzania's regime designates Lesotho, Botswana, Mauritius, Zambia,

the founding members of the East African Community (EAC)—Kenya, Tanzania and Uganda—that judgments can be registered in each other’s countries.⁷ It is a damning indictment on Africa’s economic integration that a judgment from the United Kingdom—a former colonial power—is more likely to be registered in member states of the various regional economic communities than judgments from their respective member states.

Harmonization of private international law has not occurred within the regional economic organizations. There is little sign that it would occur any time soon, notwithstanding the various calls that have been made for it.⁸ An important initiative in this regard, which may ultimately offer a model for harmonization of private international law in Africa, is the OHADA initiative⁹ to harmonize the substantive laws among its seventeen member countries.¹⁰ This initiative has produced some concrete outcomes including ten

Seychelles, Somalia, Zimbabwe, and the Kingdom of Swaziland (see Reciprocal Enforcement of Foreign Judgments Order, GN Nos. 8 & 9 of 1936); Kenya’s regime designates Malawi, Seychelles, Tanzania, Uganda, Zambia and Rwanda (Foreign Judgments (Reciprocal Enforcement) (Extension of Act) Order, sec. 2).

7. See, e.g., *Sebagala & Sons Electric Ltd. v. Kenya Nat’l Shipping Lines Ltd.* [2000] LawAfrica LR 931 (Kenya) (enforcement of judgment from Uganda); *Pioneer General Assurance Society Limited v. Zulfikarali Nimji Javer* [2006] eKLR (Kenya) (Kenyan court registered judgments from Uganda, payment of interest on a Ugandan judgment registered in Kenya); *Société de Transports International Au Rwanda v. H.H. Abdi*, Civil Application No. NAI 298 of 1997 (Court of Appeal, Kenya, 1997) (appeal against a decision setting aside the registration in Kenya of a Rwanda judgment).

8. See, e.g., RICHARD FRIMPONG OPPONG, *LEGAL ASPECTS OF ECONOMIC INTEGRATION IN AFRICA*, 111–15 (Cambridge University Press, 2011).

9. Treaty on Harmonization of Business Law in Africa (OHADA) (Port Luis 1993). The initiative is being pursued under the aegis of the Organisation for the Harmonization of Business Laws in Africa (OHADA), which is not an economic integration organization. Most of the members of OHADA are francophone states in West Africa, and they all share a civil law tradition. The objective of the OHADA Treaty is to harmonize the business laws in the contracting states through the elaboration and adoption of simple, modern and common rules adapted to their economies.

10. Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo-Brazzaville, DR Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Ivory Coast, Mali, Niger, Senegal, and Togo. These states are mostly Francophone. Guinea-Bissau is Portuguese-speaking and Equatorial Guinea is Spanish-speaking. Cameroon is bilingual—English and French. Liberia and Angola are on record as having expressed interest in becoming members. See generally BORIS MARTOR ET AL., *BUSINESS LAW IN AFRICA: OHADA AND THE HARMONIZATION PROCESS* (Kogan Page, 2nd rev. ed. 2002); Claire Moore Dickerson, *Harmonizing Business Laws in Africa: OHADA Calls the Tune*, 44 COLUM. J. TRANSNAT’L L. 17 (2005); Nelson Enonchong, *The Harmonization of Business Law in Africa: Is Article 42 of the OHADA Treaty a Problem?*, 51 J. AFR. L. 95 (2007); Salvatore Mancuso, *Trends on the Harmonization of Contract Law in Africa*, 13 ANN. SURV. INT’L & COMP. L. 157 (2007); Babatunde Fagbayibo, *Towards the Harmonisation of Laws in Africa: is OHADA the Way to Go?*, 42 COMP. INT’L L. J. S. AFR. 309 (2009); Marcel Fontaine, *Law Harmonization and Local Specificities—a Case Study: OHADA and the Law of Contracts*, 18 UNIFORM L. REV. 50 (2013).

Uniform Acts already in force.¹¹ The existing Acts govern major sectors such as general commercial law, company law, carriage of goods by road, and arbitration. Some of the Uniform Acts have provisions significant to private international law. For example, the Uniform Act on Arbitration¹² deals with the enforcement of arbitral awards (art. 30) and endorses the principle of separability (art. 4).

The willingness of the seventeen states to abandon their disparate national laws in favor of harmonized rules represents a triumph for international legal cooperation in Africa. But, so far, this is an isolated example. It is significant to note that all the member states of OHADA are civil law countries. Any attempt to extend OHADA Uniform Acts into the common law countries would involve a clash of legal traditions and principles.¹³ As Date-Bah predicts, “[it] is thus likely that before the Anglophones can come into their fold, their existing Uniform Acts may need some readjustment to reflect the legal tradition of the joining group.”¹⁴

The impact of international effort at unification of private international law, mainly under the umbrella of the Hague Conference on Private International Law, has not been very significant in Africa.¹⁵ There are currently 26 African countries that are parties to Hague Conventions¹⁶ and four that are member states of the Conference¹⁷—the most recent member being Zambia.

11. UNIF. ACT RELATING TO GEN. COMMERCIAL LAW; UNIF. ACT RELATING TO COMMERCIAL CO. & ECON. INTEREST GRP. (OHADA) (1997); UNIF. ACT ORG. SEC. (OHADA) (1997); UNIF. ACT ORG. SIMPLIFIED RECOVERY PROCEDURES & MEASURES OF EXECUTION (OHADA) (1998); UNIF. ACT ORG. COLLECTIVE PROCEEDINGS FOR WIPING OFF DEBTS (OHADA) (1998); UNIF. ACT ON ARBITRATION (OHADA) (1999); UNIF. ACT ORG. & HARMONIZING UNDERTAKINGS ACCOUNTING SYS. IN THE SIGNATORY STATES TO THE TREATY ON THE HARMONIZATION OF BUS. LAW IN AFRICA (OHADA) (Journal No. 10).

12. UNIF. ACT ON ARBITRATION (OHADA), art. 30, 4 (1999). The Act applies to any arbitration when the seat of the Arbitral Tribunal is in one of the Member States.

13. See Akere T. Muna, *Is OHADA “Common Law Friendly”*, 3 INT’L L. F. DU DROIT INT’L 172 (2001); S.K. Date-Bah, *The Preliminary Draft OHADA Uniform Act on Contract Law as Seen by a Common Law Lawyer*, 13 UNIFORM L. REV. 217 (2008); Simon Tabe Tabe, *Unification of Business Law in Cameroon: Realities of the Application of the OHADA Uniform Act on Commercial Companies in Anglophone Cameroon Twelve Years After (1998-2010)*, 16 INT’L TRADE & BUS. L. REV. 136 (2013).

14. Date-Bah, *supra* note 13, at 221. In addition, there are issues of translation and the procedures for implementing the Uniform Acts (which currently avoids national legislative procedures).

15. See generally Richard Frimpong Oppong, *The Hague Conference and the Development of Private International Law in Africa: A Plea for Cooperation*, 8 Y.B. PRIVATE INT’L L. 189 (2006).

16. Botswana; Burkina Faso; Burundi; Cape Verde; Egypt; Gabon; Guinea; Kenya; Lesotho; Liberia; Madagascar; Malawi; Mali; Mauritius; Morocco; Namibia; Niger; Rwanda; Sao Tome and Principe; Senegal; Seychelles; South Africa; Swaziland; Togo; Zambia; and Zimbabwe.

17. Egypt; Morocco; South Africa and Zambia.

This is an improvement: in December 2006 only 18 African countries were parties to its conventions and 3 African countries were members of the Conference.¹⁸ Significantly, there appears to be an awareness of Hague Conventions in legal circles and there have been instances in which some conventions have been invoked in countries that are not parties to it.¹⁹

Professor Symeonides has observed elsewhere that informal norms that possess some of the attributes of law are neither a new nor uncommon phenomenon, and that law creation predates the emergence of the modern state.²⁰ That being said, it cannot be denied that with globalization has come increased attention to non-state law and its place in private international law.²¹ In this regard, one issue lacking legislation or judicial decision is what must be upheld as the proper law when parties to a contract choose non-state law. Parties are certainly free to include in their contract whichever terms they deem appropriate, including choosing non-state law as the law that governs their contract. Nevertheless, the effectiveness or enforceability of such a term is a matter for national law. It is for national courts to decide

18. The following are the new additions: Cape Verde; Gabon; Kenya; Rwanda; Sao Tome and Principe; Senegal; Togo; Zambia.

19. See, e.g., *SAJ v. AOG*, Petition 1 of 2013 (eKLR) (Supreme Court, Kenya, 2013) in which the court lamented that Kenya had not ratified the 1980 Hague Convention on Civil Aspects of International Child Abduction. In the following: *NS v. RH* 2011 (2) NR 486; *In the Matter of Iren Najjuma*, HCT-00-FD-FC-0079-2009 (High Court, Uganda, 2009); *In the Matter of Michael, an Infant*, HCT-00-FD-FC-072-2009 (High Court, Uganda, 2009), the courts advocated for Namibia and Uganda to become a party to the Hague Adoption Convention. Ugandan Judge Egonde-Ntende stated the following:

It is time to reform this aspect of our law by making inter-country adoption possible where there are no suitable local adoptive parents in order to ensure that all our children grow up in the loving care of their natural parents or adopted parents and are able to develop to their full potential. This would bring the law in line not only with our Constitution and International Obligations but also with international practice under the Hague Convention on the Protection and Cooperation in respect of Inter-Country Adoption of Children. It is time too for Uganda to sign up and ratify this convention for the benefit of its children and take advantage of the availability of a worldwide/international network of government agencies for the protection of children.

Id.

20. Symeon C. Symeonides, *Party Autonomy and Private-Law Making in Private International Law: The Lex Mercatoria that Isn't*, (Nov. 19, 2006), available at <http://ssrn.com/abstract=946007> or <http://dx.doi.org/10.2139/ssrn.946007>.

21. See e.g., Symeon C. Symeonides, *The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments*, (April 25, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2256661 (allowing parties the freedom to choose “rules of law” to govern their contract). These are rules that “are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise.” *Id.* at 23.

whether they will give effect to such an agreement; however, in the countries covered in this study, the legal position remains an open question.

In Nigeria, it has been held that in order for the Uniform Customs Practice for Documentary Credits to be applicable, it must be incorporated in a contract.²² However, in Kenya, it has been held the parties may choose “transactional law (including the general principles of law; international development law; the *lex mercatoria*; codified terms and practices; and trade usages).”²³ This state of affairs leads me to conclude that private international law in Africa has largely remained impervious to how the forces of globalization are shaping the development of the subject in other regions of the world. This is especially so from the perspective of harmonization of laws, reform of national laws, and participation in international initiatives.

That being said, the jurisprudence of the courts reveals sensitivity to the impact of globalization and the need to adapt private international law rules to ensure that they meet the needs of globalization. Some courts have emphasized policy considerations and values that are important in a globalized world. For example, in the recent South African decision of *Government of the Republic of Zimbabwe v Fick*,²⁴ the Constitutional Court emphasized the need to ensure that “lawful judgments are not to be evaded with impunity by any State or person in the global village” and the need to promote international cooperation. Other policy-oriented considerations that have influenced outcomes in conflicts cases include the following: exigencies of international trade and commerce;²⁵ the need to hold parties to “their obligations in terms of their agreement;”²⁶ the need to deal with issues in a “practical way” and to avoid an “ivory tower” and an “academic approach;”²⁷ taking into account the parties different bargaining powers in deciding whether to give effect to jurisdiction agreement;²⁸ and the need to ensure that the selection of the appropriate legal system is sensitive to con-

22. *Eagle Super Pack (Nigeria) Ltd. v. African Continental Bank Plc.* [2006] 19 NWLR 20 (on appeal from *African Continental Bank v. Eagle Super Pack (Nigeria) Ltd.* [1995] 2 NWLR 590).

23. *Nedermar Technology BV Ltd v. Kenya Anti-corruption Commission* [2008] eKLR 476 at 499.

24. [2013] ZACC 22, at 28. The court developed the common law regime for enforcing judgments from foreign countries so that it can be used to enforce judgments of international courts; in this instance, an order for costs from the Southern African Development Community Tribunal.

25. *Westdeutsche Landesbank Girozentrale (Landesbausparkasse) v. Horsch* 1993 (2) SA 342 at 343–44; *Richman v. Ben-Tovim* 2007 (2) SA 238 at [9].

26. *MAK (Pty) Ltd. v. S.t Paul Insurance Co.* 2007 (1) BLR 210 at 218.

27. *Bourgwelss Ltd. v. Shepavolov* 1999 NR 410 at 422.

28. *Valentine Investment Company (MSA) Ltd. v. Federal Republic of Germany* [2006] eKLR Civil Case 237 of 2003 (Kenya) (High Court of Kenya).

siderations of international harmony or uniformity of decisions, as well as the policies underlying the relevant legal rule.²⁹

It is submitted that if globalization dictates specific policies, values or approaches to private international law problems, the most likely route for these to be embodied in African private international law would be through judicial decisions. National legislation, regional or continental harmonization of laws, and participation in international conventions are not likely to be a major route for transmitting those policies, values and approaches.

It is in this regard that comparative internationalism in judicial decision-making and academic writings on private international law in Africa become important.³⁰ Scholarship on African private international law must be sensitive to and engage with developments outside the continent. Such scholarship may influence not only judicial decisions but also legislation in the field.

Comparative law and the use of comparative foreign materials enrich judicial decisions. For private international lawyers, this has been argued as a path to harmonization in the absence of international conventions.³¹ Southern Africa provides a good example of how comparative law aids international (in this case regional) harmonization of law. Judgments of southern African courts, particularly those of South Africa, are frequently cited in other southern African countries. The legal principles of the common law countries³² are also largely similar. But, unlike the Roman-Dutch law countries in southern Africa,³³ there is infrequent judicial comparativism among their courts. In general, the common law countries, especially those in West Africa, do not frequently cite each other's case law. Rather, the source of the harmony in their jurisprudence is England from where they borrow principles of law. There is very little reliance on decisions from outside England in the judgments of the Commonwealth African court.

This is unfortunate in two respects. First, there have been significant reforms of conflicts rules in some common law countries that are likely to be beneficial to Commonwealth African countries. Notable in this respect are developments in Canadian case law. Second, with increased Europeanization and, one may say, near death of English common law conflict of

29. *Society of Lloyds v. Price and Lee* 2006 (5) SA 393 at [27] (South Africa); *Tanzania National Roads Agency v. Kunda Singh Construction Ltd* [2013] eKLR case no. T3735-12 (Sweden).

30. See generally RICHARD FRIMPONG OPPONG, *PRIVATE INTERNATIONAL LAW IN COMMONWEALTH AFRICA* (Cambridge University Press, 2013).

31. Christopher F. Forsyth, *The Eclipse of Private International Law Principle? The Judicial Process, Interpretation And The Dominance Of Legislation In The Modern Era*, 1 J. PRIVATE INT'L L. 93 (2005).

32. Ghana, Gambia, Kenya, Malawi, Nigeria, Tanzania, Sierra Leone, Uganda and Zambia.

33. Botswana, Lesotho, Namibia, South Africa, Swaziland and Zimbabwe.

laws, Commonwealth African countries may have to turn their attention elsewhere for persuasive authority—the considerations that animate the European rules, including the demands of the European internal market, are not necessarily present in Commonwealth Africa.

In conclusion, I would reemphasize my earlier observation that private international law in Africa has so far remained largely impervious to how the forces of globalization are shaping the development of the subject in other regions of the world. We can see this most clearly in the areas of harmonization of laws, reform of national laws, and participation in international initiatives. However, some of the values that imbue the concept of globalization find expression in the jurisprudence of national courts. Comparative judicialism, improved access to judgments of courts, and academic works on the subject—which have to date remained scant—are necessary to ensure the transplant of these values and, in general, the growth of African private international law.