Harmonisation of Private International Law in the African Union

By:

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The area of private international law concerns issues that originate in legal relationships with a foreign element. The particularity of the harmonisation of private international law at a continental level is that it involves the supranational coordination of a legal subject which is essentially national law. As a result of economic integration in the African Union with the *African Continental Free Trade Area*, cross-border economic transactions are encouraged. Consequently, the number of private international law disputes on the African continent is increasing. At the same time, national legislation and case law of the African Union member states diverge significantly. This non-harmonised state of private international law forms an important obstacle to international trade and to cross-border economic transactions. For this reason, it is crucial for the African economic integration to strive for a harmonisation of private international law.

Private International Law and economic integration on the African continent

A great advantage of private international law is that it allows to harmonise legal systems, without necessarily unifying substantive laws. For many African states this seems to be much easier to digest, especially since for them sovereignty is often a concern. What is more, a harmonised private international law tackles a dual task concerning *Africa's economic integration*: it strengthens interstate legal relations and simplifies cross-border economic transactions.

Leading scholarship suggests that the path towards harmonisation of private international law consists of structuring the *regional economic communities*, recognised by the African Union and which together will form the *African Economic Community*, according to legal traditions and first harmonising private international law within the same legal tradition. Concerning legal foundations for harmonisation, not every regional economic community provides a legal basis in a similar manner nor accords the same urgency as to legally bind their member states. Furthermore, even though economic integration efforts have been going on for decennia and there are numerous legal foundations for harmonisation, not much has been accomplished. This could be resolved with the help of strong institutions with the attributed competence of harmonising laws. Although the *regional economic communities* have many institutions which could execute this task, the issue is that the treaties have not mandated this task to one specific institution.

Furthermore, the analogy with the evolution of harmonisation of private international law in the European Unioncannot be ignored. Today, private international law in the European Union has evolved into a *real Community competence*. In addition, the European Union has become a *member* of the Hague Conference on Private International Law. When looking at the process of harmonisation of private international law in other regional economic organisations, notably the *Organisation of American States*, the *Organisation for the Harmonisation of Business Law in the Caribbean* and the *Organisation for the Harmonisation of Business Law in Africa* and in Asia with the *Asian Principles of Private International Law*, three steps the African Union could take

are deduced: the creation of ‘Specialised Conferences on private international law’ with the specific task of harmonising private international law, the promotion of initiatives for draft model laws on private international law by legal scholars and a close cooperation with the Hague Conference on Private International Law.

Recommendations for Harmonisation

The answer to the underdeveloped and non-harmonised state of private international law in the African Union is fourfold. The *judicial path* is the first answer. Due to a lack of harmonised private international law, national courts are always the first to deal with this gap when being confronted with a case which involves a foreign element. In addition, the enlargement of regional economic community courts with the attributed competence of reviewing decisions of national courts would be a helpful step towards ensuring that a harmonised and authoritative interpretation is given to relevant legislation.

What is more, *continental engagement* is necessary. With regards to the question whether harmonisation of private international law should go combined with harmonisation of substantive laws, several authors have recommended that there should be a reform and harmonisation of private international law first, as this allows national substantive laws to remain mostly untouched. Concerning a future merger of the regional economic communities into the African Economic Community, there are no clear guidelines in protocols as to solving issues of conflict of laws or of jurisdictions. This means that the actual merger might not be as evident as planned. The establishment of a private international law orientated body under the African Economic Community is necessary and urgent. Unfortunately, until today no such efforts have been made.

In addition, the *ratification of international conventions* by the African Union member states is crucial. No member state has signed an international convention relating to the recognition and enforcement of foreign judgments. However, this needs to be put in perspective as not many of such conventions exist. Furthermore, there have been many cases where courts have refused to recognise or enforce judgments originating from other African nations. A

ratification of the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* by member states could be the way to alleviate the burden of needing to negotiate a similar convention on foreign arbitral awards. Regarding *the Hague Conference on Private International Law*, only 7 out of 55 African Union member states are a member. It could be useful for the African Union itself to become a member. *The Hague Principles on Choice of Law in International Commercial Contracts* can provide a useful contribution for private international law in the African Union with regards to commercial contracts. The *Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* of the Hague Conference can replace the need for the drafting of 'African Principles on the Recognition and Enforcement of Foreign Judgments'.

Last but not least, the potential role of non-state initiatives needs to be emphasised. The *Research Centre for Private International Law in Emerging Countries at the University of Johannesburg* is designing the proposed 'African Principles of Commercial Private International Law' with the objective of adopting the model laws both in national legal systems and in the process of African economic integration of the African Economic Community and the regional economic communities.

Conclusion

Harmonisation of private international law in the African Union is currently remarkably underdeveloped. Since harmonisation is indispensable for the planned economic integration, it is essential to pursue further developments. To conclude, harmonisation of private international law in the African Union is an affair to be closely followed.

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