Reforming Private International Law in African Countries: Looking Inward and Outward

By:

Richard Frimpong Oppong

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Recent studies by the World Bank reveal that legal reform has been a significant aspect of the agenda of African countries to improve and encourage business. In 2019, the Bank reported that for six years in a row Sub-Saharan Africa led with the highest number of business regulatory reforms captured by its Doing Business reports.[1] The reports are largely domestic focused and address measure only few benchmarks of private international law or conflict of laws significance such as "whether valid arbitration clauses or agreements are enforced by local courts."[2]

That said, there is no gainsaying that a robust private international law regime should be a key aspect of any legal system that aims to encourage business, especially businesses with cross-border dimensions. For example, the ability to enforce choice of law, jurisdiction agreements, arbitration agreements, foreign

judgments and arbitration awards are all important considerations when it comes to cross-border business dealings. This post calls on African countries to reform their private international law regimes in this regard. It focuses on two main areas namely engagement with the Hague Conference on Private International Law (the Conference), and domestic reforms through legislation and judicial decisions.

In 2006, I published a paper in the *Yearbook of Private International Law* entitled “The Hague Conference and the Development of Private International Law in Africa: A Plea for Cooperation”. The paper explored how Africa’s engagement with the Conference can further develop the subject at both national and continental levels and help to resolve conflict of laws problems. The Conference may aptly be considered as the “United Nations” of Private International Law or Conflict of Laws.

As at the time of writing that paper, Africa’s engagement with the Conference was modest, at best: only 3 African states were members of the Conference (Egypt, Morocco, and South Africa), while only 18 African countries were party to the Conference’s various conventions. African intellectual and academic investment in the work of the Conference was also minimal, with very few academic papers addressing the Conference’s work from an African perspective. My paper advocated for increased cooperation between the Conference and Africa, and noted that the channels for cooperation are many, and can be mutually beneficial.

Cooperation between the Conference and Africa has increased significantly since 2006. In fact, Conclusions of recent meetings of the Conference’s Council on General Affairs and Policy have noted the necessity of expanding the organization’s work globally, including throughout Africa. Since 2006, Burkina Faso, Mauritius, Tunisia, and Zambia have become members of the Conference. A number of African countries that were previously not party to any Hague Convention, such as Gabon, Ghana, Kenya, and Rwanda, have also become party to at least one convention. Indeed, there are currently over 20 African states that are party to one or more Hague Conventions, albeit mainly on issues of family law and civil procedure.

This post argues for greater collaboration between African countries and the Conference to ensure the continuing development of private international law on the continent, especially in fields of commercial significance. There are a number of important subject areas such as the enforcement of judgements, choice of law and jurisdiction agreements for which domestic reforms could be inspired by some of the Conference's work.

Collaboration between the Hague Conference and African countries should obviously not supplant the need for domestic reforms through legislation and judicial decisions. There is need for such reforms to facilitate increased cross-border transactions and investment in Africa. Some recent notable examples include Kenya's Movable Property Security Rights Act 2017, Zambia's Movable Property (Security Interest) Act 2016, and Zimbabwe's Movable Property Security Interests Act 2017, all of which contain choice of law rules regarding the rights and obligations of debtors and secured creditors. Also noteworthy are South Africa's International Arbitration Act 2017, Zambia's Companies Act 2017 and Corporate Insolvency Act 2017, and Ghana's Companies Act 2019 all of which address a number of important conflict of laws issues.

Some of these legislated reforms have generated controversy as they appear to undermine party autonomy in international contracts. For example, since 2017, the Tanzanian parliament has passed laws that are aimed at protecting national resources. These laws include the *Natural Wealth and Resources (Permanent Sovereignty) Act*, 2017, which provides that disputes arising from extraction, exploitation or acquisition and use of natural wealth and resources shall be adjudicated by judicial bodies or other organs established in Tanzania and in accordance with Tanzanian laws. Similarly, under the *Public Private Partnership (Amendment) Act*, 2018 all Public Private Partnerships agreements are now subject to local arbitration under the arbitration laws of Tanzania and/or conclusively dealt with by Tanzanian courts. In South Africa, the *Protection of Investment Act*, 2015 (Act No 22 of 2015) allows for disputes to be resolved using international arbitration, but it imposes two important conditions, namely: "the exhaustion of domestic remedies" and the requirement that "such arbitration will be conducted between the Republic and the home state of the applicable investor". Similarly, section 28(4) of the *Namibian Investment Promotion Act*, 2016 provides that "The jurisdiction over disputes relating to

this Act lies exclusively with the courts of Namibia, but the Minister and investor or investment, as required by the circumstances of the alleged breach of rights or obligations may, by written agreement, agree to arbitration in accordance with the Arbitration Act, 1965 (Act No. 42 of 1965) in Namibia".

Although these reforms have been controversial, it is submitted that they are commendable initiatives. The exaltation of party autonomy sometimes collides with the exacting demands of development in African countries, and there have been many cases in which arbitrators and judges siting abroad have not managed to strike the right balance.

One subject in need of urgent reform is the recognition and enforcement of foreign judgments – a field bedeviled with outdated legislation and inconsistent judicial decisions. There are currently a number of regimes for enforcing foreign judgments in Africa. They include the common law, Roman-Dutch law, civil law and statutory regimes. Without going into significant technical detail these regimes suffer from significant issues, which could undermine the ability of foreign judgment creditors to secure enforcement of their judgments. These issues include restricted grounds of international competence; uncertain and nationalistic defences; requirement to enforce judgments only in local currency; lack of designation of state beneficiaries under the statutory regimes, restriction to enforcement of only foreign money judgments; potential political interference in the statutory regimes; cost and timelines, and complicated civil procedures for enforcement.

Regarding judicial decisions, the need to give effect to jurisdiction and arbitration agreements reached a new height with courts in Ghana and Nigeria exercising jurisdiction to restrain foreign proceedings brought in breach of such agreements. In the Ghanaian case of *Quantum Oils Terminals Ltd v International Finance Corporation*,[3] the parties had entered into a number of agreements which contained Ghanaian court jurisdiction agreements. In breach of those agreements, the International Finance Corporation instituted proceedings against the applicant in London. Justice KA Asiedu granted an anti-suit injunction restraining the International Finance Corporation from taking any step or steps to pursue, prosecute or progress any claims, suit or action in any court outside Ghana against Applicants. English courts have consistently

exercised the power grant antisuit injunctions. It is positive to see African courts prepared to exercise the same jurisdiction in appropriate cases – it is an important judicial remedy to control forum shopping.

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[1] World Bank Group, Doing Business 2019 – Fact Sheet Sub-Saharan Africa. https://www.doingbusiness.org/content/dam/doingBusiness/media/Fact-Sheets/DB19/FactSheet_DoingBusiness2019_SSA_Eng.pdf

[2] World Bank Group, Doing Business 2019 p 117. https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf

[3] *Quantum Oil Terminals Ltd v. International Finance Corporation*, Suit No: Misc/00228/17 (Rulings of 8 January 2018 and 23 February 2018).

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