A Call for the Wider Study of Private International Law in Africa: A Review of Private International Law in Nigeria

By:

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December 18, 2020

For too long, law students in Nigerian universities have largely considered Private International Law [or Conflict of Laws as it is more commonly known in Nigeria] as an esoteric subject. Most students avoid it because of the adverse effect they think it is sure to have on their cumulative grade points average and the seeming lack of practical benefit of the subject to their future law practices. They do not know any better. Nigerian legal practitioners have had to provide legal advice and represent clients before trial and appellate courts as well as arbitral tribunals on disputes involving private international law questions within the context of Nigerian law. Those pieces of advice and legal representations would have benefitted greatly from a comprehensive private international law treatise. On their part, Nigerian courts have had to meander

through the maze of interpreting questions of private international law without the benefit of the direction that high quality academic works [available in some other subject areas] provide. I am gratified to announce that finally, *a Daniel is come to judgment*.

Since Nigeria's return to civilian rule in 1999, there have been significant increase in cross border trade, international business transactions and foreign investments in Nigeria. Successive Nigerian governments across all tiers have made the attraction of foreign investments a cardinal part of their economic policies and have accordingly made deliberate efforts and committed abundant resources to attractforeign investments into Nigeria.[1]This accords with the preponderance of opinion to the effect that, with the right economic policies, FDI inflow into developing economies can be a major catalyst for economic development.[2] With these activities however, have come the resultant need for increased attention to the body of laws in Nigeria that regulate transactions with multi-jurisdictional elements.

In a recent article, I called for increased study of private international law in Africa and the establishment of a harmonised private international legal regime especially in the context of the Agreement establishing the African Continental Free Trade Area (AfCFTA) which came into force on 30 May 2019.[3] I argued that the economic integration and the concomitant growth in international relationships that are sure to result from these integration efforts will undoubtedly lead to a rise in cross border disputes, which call for resolution using the instrumentality of private international law. That call, especially in the case of Nigeria, was significantly handicapped by the absence of a treatise length textbook on the subject.

Interestingly, I had, in that article, borrowed heavily from the writings of Professor Richard Frimpong Oppong, a renowned private international law expert in Africa, and Dr Chukwuma Samuel Okoli, a Postdoctoral Researcher at T. M. C. Asser Institute in the Hague and a prolific writer in the field of private international law in Nigeria. Writing on the importance of a private international law system that responds to the interests of Africa, Dr Okoli observed that with growing international trade with Africa comes an inevitable rise in disputes among contracting parties conducting trade on the continent.[4]According to

him, when these disputes arise, questions such as what courts have jurisdiction, what law(s) should apply, and whether a foreign judgment will be recognised and enforced by the courts of African States, will need to be resolved for international trade to run smoothly.[5]

On his part, Professor Oppong, argued that a well-developed and harmonised private international law regime is an indispensable element in any economic community and can play a significant role in addressing issues such as the promotion of international trade and investment, immigration, regional economic integration, globalisation and legal pluralism.[6] It is altogether fitting that these two will join forces to produce the first treatise length textbook on private international law in Nigeria and it is against the foregoing backdrop that I wholeheartedly welcome the product of their collaboration, *Private International Law in Nigeria*.[7]

The book examines Nigerian law rules, principles, and doctrines for the resolution of disputes with cross-border components. The authors begin by tackling the elephant in the room which is to provide a helpful explanation of the conceptual and preliminary issues which constitute the most intricate aspects of private international law. The concepts addressed are Characterisation; Substance and Procedure; and of course, Renvoi which the authors wittingly recall has been described in the past as a subject loved by academics, hated by students and ignored by lawyers and judges. There is also a special treatment of the concept of domicile which is one of the cardinal concepts in the field of English private international law and by necessary implication that of Nigeria, and which is one of the fundamental connecting factors that indicate the law or jurisdiction that governs a dispute particularly in matters related to jurisdiction, family law, property law, and other issues affecting the legal rights and privileges of parties.

The book expertly navigates the topic of jurisdiction, a cardinal concept under Nigerian adjectival law, but which in some cases is weaponised and has now acquired exaggerated notoriety to the extent that it now constitutes a cog in the wheel of the smooth and timely determination of cases in Nigeria. To avoid the monster that jurisdiction as a concept has developed into, the book carefully focuses on a consideration of jurisdiction in actions in personam. The

authors consider the rules for determining jurisdiction in actions in personam and the extent to which judges in Nigeria have succeeded or mostly failed in appreciating or applying jurisdictional rule son actions in personam especially by misapplying rules designed for international litigation in the context of interstate disputes in the unique federal system practiced in Nigeria.

The result of the authors' analyses of Nigerian appellate courts' cases bordering on the jurisdiction of Nigerian courts in actions in personam arising from causes of action which accrue outside the territorial jurisdiction of the courts is particularly eye-opening. The authors divide the failure of Nigerian courts in this regard into three scenarios to wit: cases where Nigerian courts reach the right decision but wrongly apply choice of venue rules to arrive at that decision; cases where Nigerian courts wrongly apply choice of venue rules and reach the wrong decision; and cases where Nigerian courts simply conflate the choice of venue provisions in the rules of the respective courts in Nigeria with the rules of private international law applicable in actions in personam in Nigeria. The reasoning of the courts in the cases treated leaves a lot to be desired and call fora dispassionate soul searching.

Private International Law in Nigeria lucidly addresses the historical controversies surrounding the requirement for leave to issue and serve a court process out of jurisdiction both in the case of interstate (domestic) disputes and in international disputes strictly so called. The book highlights the delicate balance between the Sheriffs and Civil Process Act and the various rules of court. For good measure, the authors clearly explain what the Nigerian Supreme Court got wrong in the infamous **M. V. Arabella** case [which the court has now thankfully moved away from].[8] In that case the Supreme Court set aside a writ of summons that was issued in the Federal High Court Lagos and served on a defendant resident in Abuja, Federal Capital Territory without the leave of court. The court relied on Order 10 rule 14 of the Federal High Court (Civil Procedure) Rules 1976[9] and discountenanced the contention of the appellant that the Federal High Court is one court and no leave of court is required to issue and serve a court process in one judicial division of the court (i.e. in one State) for service in another State. The authors however rightly highlight the reluctance of the Supreme Court to explicitly overrule cases that were obviously wrong, a trend that has been on the rise in the last two

decades; and which is the subject of another day's discussion.

What I would consider as an ambitious aspect of the book, however, is the authors' categorical position regarding the non-binding effect of the *obiter dicta* of some Supreme Court decisions. For instance, while discussing a recent decision of the Nigerian Supreme Court[10]the authors stated that the *obiter dictum* of Aka'ahs JSC is not binding on lower courts in Nigeria and should not be followed.[11]While this undoubtedly represents the correct position of the law in principle, it is however of doubtful practical effect given the peculiarity of the diminishing line between *rationes decidendi* and *obiter dicta* under the Nigerian version of the doctrine of *stare decisis* as well the attitude of Nigerian courts to decisions of higher courts.

Special consideration is also given to such procedural law concepts as 'forum selection clauses', 'forum non conveniens', 'lis alibi pendens' and 'limitations on jurisdiction' as well as the substantive law topics of Contract, Torts, Foreign Currency Obligations, Bills of Exchange, Marriage, Matrimonial Causes and Administration of Estates. Very crucially too, the book does not fail to address the critical topics of enforcement of foreign judgments and international arbitral awards, while the last two chapters, grouped under a part entitled, 'International Civil Procedure' are dedicated to the consideration of the procedural rules applicable in international civil disputes including domestic remedies affecting foreign proceedings, international judicial assistance in the service of legal processes and taking of evidence. Nigerian lawyers with cross border practices will find these two chapters particularly helpful. One topic that is however given a less than adequate treatment is the topic of adoption. To be fair, adoption law and procedure in Nigeria is largely covered in opacity but a more comprehensive treatment of the subject in this book would have finally afforded practitioners the long-needed reference point.

On the whole, the book draws on over five hundred Nigerian cases including [thankfully] contemporary judicial decisions touching on the subject of private international law, relevant legislations and academic writings while exploring, where necessary, comparative perspectives from other jurisdictions.

This book is without doubt, one of the most impactful legal textbooks in Nigeria

in at least twenty five years. It is a refreshing addition to the legal libraries across Nigeria and beyond. Judges at all levels of courts in Nigeria, legal practitioners, arbitrators and lawmakers alike as well as law teachers, researchers and students, will find *Private International Law in Nigeria* a highly resourceful and practical guide that fills an intellectual void in a long neglected but increasingly critical field of law. It is a long overdue contribution to the field of private international law in particular, and to legal scholarship in Nigeria as a whole.

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[1] Akinlo Enisan, 'Determinants of Foreign Direct Investment in Nigeria: A Markov Regime-Switching Approach' (2018) RIC 21.

[2] Organisation for Economic Cooperation and Development, Foreign Direct Investment for Development: Maximising Benefits, Minimising Costs (OECD 2002) 3.

[3]Orji Uka, 'Cross Border Dispute Resolution under AfCFTA: A Call for the Establishment of a Pan-African Harmonised Private International Legal Regime to Actualise Agenda 2063' (2020) ALP available at http://alp.company/resources/business-advisory/cross-border-dispute-resolution-under-afcfta-call-establishment-pan last accessed on 11 November 2020.

[4]Chukwuma Okoli, 'Private International Law in Africa: Comparative Lessons' available at http://conflictoflaws.net/2019/private-international-law-in-africa-comparative-lessons/.

[5]Chukwuma Okoli, (n. 4) above.

[6] Richard Frimpong Oppong, 'Private International Law and the African Economic Community: A Plea for Greater Attention' The International and Comparative Law Quarterly, Vol. 55, No. 4 (Oct., 2006), Cambridge University Press pp.911-928 available at https://www.jstor.org/stable/4092623.

[7] Chukwuma Samuel Adesina Okoli and Richard Frimpong Oppong, *Private International Law in Nigeria* Hart Publishing: Oxford, 2020.

[8] *Owners of M. V. Arabella v Nigeria Agricultural Insurance Corporation* (2008) 11 NWLR (Pt. 1097) 182.

[9] For similar reasons, the Court of Appeal in *Nestle* (Nig) Plc v. *Owners of M. V. MSC Agata*(2014) 1 NWLR (Pt. 1388) 270 at pp. 288-290 set aside writ while relying on Order 6 rule 12(1) of the Federal High Court (Civil Procedure) Rules 2000.

[10] *Social Democratic Party v Biem*an unreported decision of the Supreme Court in Appeal No. SC/341/2019 43.

[11] Chukwuma Okoli and Richard Oppong, (n. 7) above at p. 73.

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