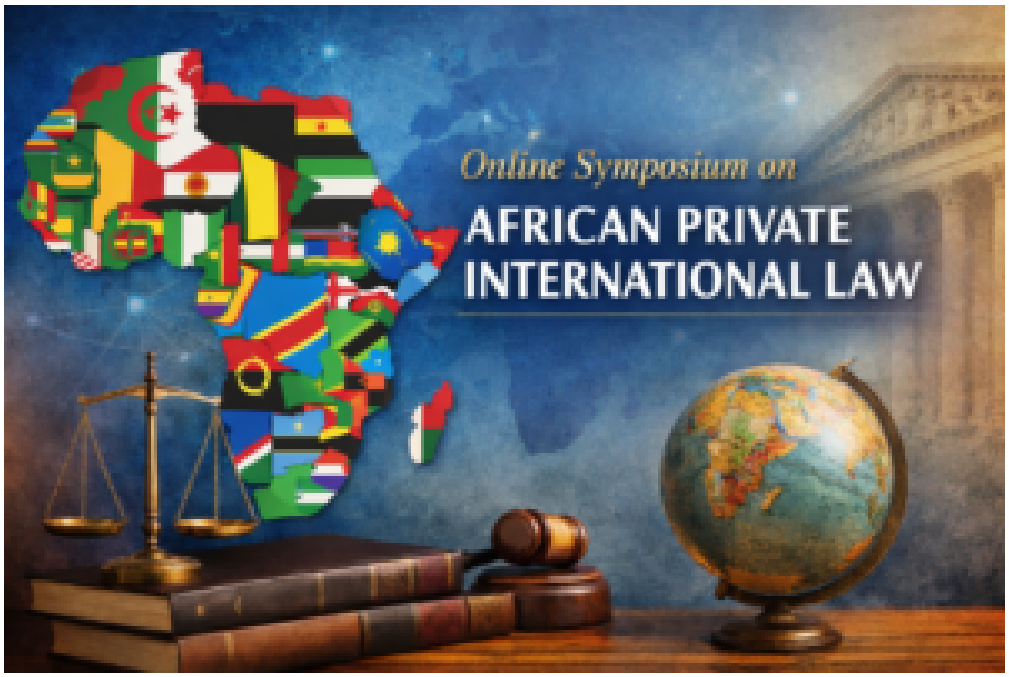
Online Symposium on Recent Developments in African PIL (VI) – Proof of Foreign Law and the Fragility of Foreign Marriages in Ghanaian Courts



*As part of the second online symposium on **recent developments in African private international law**, we are pleased to present the sixth contribution, kindly prepared by **Theophilus Edwin Coleman (University at Buffalo School of Law, New York (USA) & Senior Research Associate, RCPILEC, University of Johannesburg, South Africa).***

From Daddy to Zaddy or Both? Proof of Foreign Law and the Fragility of Foreign Marriages in Ghanaian Courts – Reflections on *Akosua Serwaah Fosuh v. Abusua-Panin Kofi Owusu & 2 Others*, Suit No. GJ12/20/2026

1. Introduction

Few aspects of conflict of laws generate more confusion in practice than proving foreign law. For a layperson, the idea that law must sometimes be proven as a fact using evidence might seem counterintuitive. However, this doctrinal stance is central to how many legal systems, including Ghana, treat foreign law. The recent decision of the High Court of Ghana in *Akosua Serwaah Fosuh v. Abusua-Panin Kofi Owusu & 2 others*[1] (hereinafter *Akosua Serwaah Fosuh*) highlights the complex issues that arise from the lack of proof or otherwise of foreign law governing marriages conducted outside Ghana. Indeed, this decision has highlighted the apparent fragility of foreign marriages. At the same time, it serves as a valuable reminder to litigants, lawyers, and the Ghanaian public, given the case's extensive publicity, that foreign law must be pleaded in Ghanaian courts in accordance with strict benchmarks and standards.

At stake in the *Akosua Serwaah Fosuh* case was not merely marital status and competing spousal rights, but also the social stability of the institution of monogamous civil marriage under Ghanaian law, spousal rights, particularly inheritance expectations, and issues concerning customary widowhood rites. The plaintiff primarily based her claim on an alleged civil marriage under German law to assert her spousal rights. Despite the emotionally charged nature of the case, especially among some Ghanaians, the court, as expected, focused on evidentiary principles and the requirements of substantiating foreign law. Considering the sentimental and public nature of the case, this contribution aims to clearly outline the legal consequences of the decision in *Akosua Serwaah Fosuh*, the risks of failing to meet the evidentiary standard for foreign law on spousal rights, and how this can create uncertainty for foreign marriages in Ghanaian courts.

This contribution is organised into six main sections. The first section outlines the factual background in *Akosua Serwaa Fosuh*, focusing on the issue of proving the validity of a civil marriage contracted in Germany. It then briefly reviews the types of marriages recognised under Ghanaian law and their relevance to the facts of the case. The third section examines Ghana's legal framework governing proof of foreign law. The fourth section analyses the court's position in *Akosua Serwaa Fosuh*, considering statutory and judicial standards for establishing foreign law. The fifth part examines the broader implications of the case for

litigants and for those entering foreign marriages. The sixth section briefly addresses the need to reconsider the strict standards governing the proof of foreign law in Ghana. The final part emphasises that litigants and attorneys should not treat foreign law as an afterthought, as their failure to meet technical requirements may have dire consequences for the outcome of their case.

2. *Akosua Serwaa Fosuh*: The facts

Akosua Serwaa Fosuh, the plaintiff, requested the High Court to declare her as the sole surviving spouse of the late Charles Kwadwo Fosuh, also known as Daddy Lumba, a renowned musician and public figure. As the only surviving spouse, she was entitled to conduct the widowhood rites for the deceased.[2] The plaintiff further sought an order from the court to prohibit the Head of Family of the deceased from dealing with the second defendant, Priscilla Ofori, as a spouse of the deceased. Additionally, the plaintiff asked the court to prevent Priscilla Ofori from presenting herself as a surviving spouse of Daddy Lumba. The plaintiff's main claim was that she and the deceased were married at the Civil Marriage Registry in Germany in 2004, and that this monogamous marriage lasted until Daddy Lumba's death. Prior to the civil marriage in Germany, the plaintiff and the deceased had also married under Ghanaian customary law in 1991.[3]

Conversely, the defendants opposed the plaintiff's claim and the validity of the German marriage.[4] The second defendant also challenged the validity and authenticity of the documents tendered by the plaintiff in support of the civil marriage under German Law. Additionally, the second defendant stated that the deceased publicly presented her as his wife for over fifteen years and considered her his surviving widow.[5] In addition to presenting the second defendant as the surviving spouse in the public showcase, she argued that the deceased married her under Ghanaian customary law in 2010.[6] In essence, the civil marriage between Akosua Serwaa and the deceased preceded the alleged customary marriage between the deceased and Priscilla Ofori, a fact that is important to consider.

The case primarily focused on whether the plaintiff was the deceased's sole surviving spouse and therefore the only person authorised to perform the widowhood rites. This issue was crucial because establishing that the plaintiff was

the sole surviving spouse following a civil union or marriage concluded in Germany would render any subsequent marriage and the deceased's public display of Priscilla Ofori as a spouse null and legally invalid under Ghanaian law. To fully understand the case, it is helpful to briefly outline the types of marriages recognised under Ghanaian law.

3. A brief outlook of the forms of marriage in Ghana

Ghanaian law recognises three main types of marriage: customary, Ordinance, and Islamic (Mohammedan) marriages. Each type of marriage is distinct, with its own characteristics and rights.[7] Customary marriage follows the traditions of the couple's tribe or ethnic group and is based on the mutual consent of the families of the couple. Customary marriage typically involves the exchange of a dowry or head drink between the two families, symbolising their consent, acceptance, and support for the union between the man and the woman.[8] The Customary Marriage and Divorce (Registration) Law (PNDCL 112) of 1985 allows customary marriages to be officially registered. A key characteristic of customary marriage is its inherently polygamous nature, permitting the man to marry multiple wives (unlimited in number), so long as he remains exclusively married under customary law.[9]

Ordinance marriage, on the other hand, is statutory, monogamous and a civil union that must be registered, executed by the couple (man and woman), who are then issued a marriage certificate.[10] The formal process for concluding an ordinance marriage requires following the registration procedures at a district or municipal assembly or a court registry. An Ordinance marriage is strictly monogamous, meaning it involves only one man and one woman. Once married, the spouses are legally forbidden from entering into any other marriage until the current marriage is dissolved by a court of law. Notwithstanding this, it is increasingly common for many Ghanaians to celebrate Ghanaian custom by marrying under customary law and then converting their marriage to ordinance by registering it with a court registry or a district or municipal assembly. Converting a customary marriage to an Ordinance extinguishes all rights acquired under customary law, including the man's right to have multiple spouses.[11]

The third type of marriage, which does not apply in this case, is Islamic marriage. It is performed in accordance with Islamic practices and officiated by an Islamic religious leader. Islamic marriages are typically polygamous. Both partners must be Muslims, and Ghanaian law mandates that the marriage be registered under the Marriage of Mohammedans Ordinance. The registrar for Mohammedan marriages and divorces must be informed within one week of the marriage. Such ceremonies may be officiated only by an Imam or a Kadhi. A man may marry up to four wives, and marriages between close family members or cousins are not permitted.[12] It is noteworthy that the validity of marriages under Ghanaian law is determined following the Marriage Act Ordinance, 1951 (Cap 127).[13] To synthesise the various types of marriage under Ghanaian law and for the purposes of this case, it is worth noting the following:

(1) A couple has the right to marry under customary law. So long as a man is exclusively married under customary law, he is permitted to have multiple wives.

(2) A couple has the option to marry under ordinance. Such a marriage is strictly monogamous, and once established, neither party is legally permitted to marry another person until the marriage is officially dissolved by a court of law.

(3) The relationship between customary and ordinance marriage is that a couple married under customary law can convert to ordinance marriage. However, once this conversion occurs, the man's rights, including the right to marry more than one wife under customary law is extinguished. The marriage then becomes fully monogamous.[14]

Hence, in *Akosua Serwaah Fosuh*, the assertion that the plaintiff and the deceased concluded a civil monogamous union under German law, if proven under Ghanaian law, would convert their marriage into a civil or ordinance marriage, thereby extinguishing the deceased's rights to marry more than one wife or to marry under any other marriage type. Proving the validity of the German marriage implies that any later marriage between the deceased and the second defendant would be considered invalid, legally void and of no effect.

This, in turn, raises the question of the longstanding conflict of laws issue

concerning the stringent evidentiary burden required for a plaintiff to prove foreign law, as illustrated by the plaintiff's attempt to demonstrate that the marriage was monogamous under German law. If the plaintiff cannot demonstrate the validity of the German marriage as per German law, any later marriage under customary law, such as the deceased's marriage to the second defendant, Priscilla Ofori, would be considered valid.

4. Proof of foreign law in Ghana: An overview

Generally, under common law, courts are presumed to know only their domestic law. Foreign law, including statutes, case law, and other procedural rules from a different legal system, must be properly pleaded and substantiated with the required evidence. In conflict of laws, this approach is doctrinally justified on the ground that a judge, such as one in Ghana, is typically not expected to possess or be aware of the content of foreign laws, such as South African, German, or Canadian law. Based on this understanding, under the common law, foreign law is treated as evidence that must be substantiated, rather than as a legal question. Consequently, a court is not required to investigate the content of foreign law on its own initiative.

Indeed, according to section 1(2) of Ghana's Evidence Act 1975 (NRCD 323), the "determination of the law of an organization of states to the extent that such law is not part of the law of Ghana, or of the law of a foreign state or sub-division of a foreign, state, is a question of fact, but it shall be determined by a court".[15] Statutory requirements consider foreign law as a matter of fact, a position consistently upheld by Ghanaian courts. For example, in *Davis v. Randall*,[16] it was held that Sierra Leonean law is foreign law and must be proven as a fact.[17] A party seeking to rely on foreign law in a Ghanaian court, per the decision in *In Re Canfor (Deceased); Canfor v. Kpodo*,[18] will be required to plead that law and prove it.[19] To plead the foreign law is one thing, but the most crucial aspect is proving its content. Where a party seeking to rely on foreign law fails to prove it, section 40 of the Evidence Act provides that "the law of the foreign state is presumed to be the same as the law of Ghana".[20]

The standard of proof for establishing foreign law is the preponderance of probabilities, as in other civil case matters.[21] However, meeting this evidentiary

standard would require the court to assess the consistency of the evidence, the credibility of the witnesses, and the veracity and reliability of the documents submitted. Foreign law is, therefore, a matter of fact and must be proven on a case-by-case basis. As the Supreme Court of Ghana stated in *Ama Serwaa v. Gariba Hashimu & another*,[22] "foreign law is a question of fact and ought to be pleaded and proven at the trial stage. This method of proving foreign law, is by offering expert witnesses, merely presenting a lawyer with the text of a foreign will not be sufficient".[23] Also, in *Godka Group of Companies v. PS International Ltd*,[24] it was held that merely presenting or providing the text of a foreign law to a judge to draw the judge's conclusion does not satisfy the requirement of proof of the foreign law.[25] *Godka* established that an expert witness is preferred. The *Godka* Court stated: "the general principle has been that no person is a competent witness unless he is a practising lawyer in the particular legal system in question, or unless he occupies a position or follows a calling in which he must necessarily acquire a practical working knowledge of the foreign law."[26]

The question of an expert's competency is a legal issue decided by the judge. Therefore, the court must be convinced that the individual is an "expert trained on the subject to which his testimony relates by reason of his special skill, experience or training." Also, per the decision in *Val Cap Marketing v. The Owners of M V Vinta*,[27] Ghanaian courts do not permit the use of affidavits to prove foreign law.[28] Additionally, the opinions of an expert witness serve as a persuasive influence on Ghanaian courts.[29] Accordingly, the court is not bound to accept the opinion of the expert witness.[30] Based on the foregoing, the treatment of foreign law is a highly technical and complex process. Even if a plaintiff follows the procedural technicalities established by various case law, including pleading and proving the law with an expert witness, the evidence remains just persuasive, with the court ultimately deciding how much weight to give it.

5. *Akosua Serwaah Fosuh*, the treatment of foreign documents and law

The plaintiff submitted a marriage certificate issued under German law, but the defendants questioned its authenticity. The court rejected the certificate and advised the plaintiff's counsel to meet the Evidence Act requirements.[31]

According to the Court, the plaintiff's counsel failed to meet the specified requirement. Most notably, the defendant's counsel indicated that the marriage certificate and its translated copy submitted to the court lacked probative value.[32] Since the marriage certificate was a foreign document, the plaintiff needed to fulfil the requirements of section 161 of the Evidence Act. Section 161 of the Evidence Act presumes signatures are genuine if they are affixed by officials of recognised public entities, accompanied by certification of authenticity and official position.[33] The law also mandates that this certification be signed and sealed by a diplomatic agent from Ghana or a Commonwealth country who is assigned or accredited to that nation.[34] Be that as it may, if all parties are given a reasonable opportunity to verify a foreign official's signature, the court may, for good cause, treat it as presumptively authentic without certification.[35]

The court observed that the plaintiff did not comply with the provisions. The plaintiff acknowledged the real difficulty in fulfilling the statutory requirements of section 161(2) of the Evidence Act.[36] The authenticity of the marriage certificate was therefore challenged. Additionally, beyond the authentication concerns, the plaintiff failed to submit the original certificate for the court to compare, despite being informed that an original certificate existed. The plaintiff submitted a family book extract that does not establish a civil marriage, particularly because the certificate lacked signatures from both spouses.[37] In addition to the plaintiff's failure to prove the authenticity of the marriage certificate and to comply with the Evidence Act, they also failed to meet the *Godka* requirement to prove foreign law through an expert witness.[38] The Court also highlighted the significance of the expert witness in verifying the authenticity of the marriage certificate by outlining the key features of a valid marriage certificate from Germany.[39]

Since the plaintiff did not prove the foreign law and the documents did not meet the applicable statutory requirements under the Evidence Act, the court inferred that the failure to establish the foreign law creates a presumption that German and Ghanaian law are the same, unless the contrary is shown. Thus, under Ghanaian law, an ordinance marriage certificate is valid only if it bears the signatures of the parties to the marriage. In the words of the Court, "without the marriage certificate and or video, the court cannot prove the civil marriage on a photograph alone. In the era of photo shoots and Artificial Intelligence, the court is cautious in accepting photographs alone without further credible corroborating

documentary evidence, where proof of a fact demands strict documentary proof".[40]

The court found that the plaintiff failed to prove her marriage under German law, as proving foreign law is a factual matter. The plaintiff did not meet the presumption that she entered into the marriage by providing an authentic, identified, and certified copy of the marriage certificate. Considering the lack of authentication and identification, coupled with the plaintiff's failure to rely on an expert witness from Germany, the court rejected the documents presented as having no probative value and would not be considered for purposes of proving any civil marriage between the plaintiff and the deceased.[41] Because the plaintiff did not demonstrate the existence of a valid monogamous marriage under German law, the court determined that a customary marriage between the plaintiff and the deceased existed. As previously explained, such a customary marriage allows a man to have more than one wife. The implication was that the plaintiff was not the sole surviving spouse. The court therefore determined that both the plaintiff and the second defendant were both customarily married to the deceased, Daddy Lumba, and declared that they were the surviving spouses of the deceased.[42]

6. Broader implications of *Akosua Serwaah Fosuh*

In Ghana, litigation practices have not fully adapted to the transnational context and the complexities associated with cross-border marriages. *Akosua Serwaah Fosuh* highlights the increasing prevalence of cross-border marriages and how fragile such marriages become when strongly tested against the legal microscope and the evidentiary standards required by Ghanaian law. It also indicates the extent to which the failure or otherwise to prove foreign law and present the relevant documents in accordance with the statutorily prescribed format can impact several aspects of spousal rights. Hence, couples contracting marriages outside of Ghana must now be informed of the legal implications of such marriages. The significance of foreign law, such as establishing the validity of the marriage and authenticating relevant documents, should not be an afterthought for either the couple or their lawyers when legal issues arise. The court bases its decisions on law and evidence, not emotions, and failing to substantiate a legal position can lead to an unfavourable outcome.

7. Rethinking the strict requirements of proof of foreign law in Ghana in contemporary times

Ghanaian law explicitly requires rigorous proof of foreign law and adherence to statutory and case law principles. This strict approach has faced significant criticism from scholars. In Ghana, proving foreign law can be challenging due to potential manipulation by disputing parties, especially considering the assumption under Section 40 of the Evidence Act that Ghanaian law is the same as foreign law if the plaintiff fails to prove the content of the foreign law. Indeed, Oppong and Agyebeng note that assuming that Ghanaian and foreign law are the same because a plaintiff cannot prove the content of foreign law oversimplifies the matter and can occasionally cause injustice.[43] The learned authors further aver that section 40 of the Evidence Act:

> *"…wrongly assumes that there is a corresponding Ghanaian law for every specific issue on which foreign law would be relevant. This may not always be the case. Ghana's legal system is relatively underdeveloped, and it is unlikely there will be any substantive Ghanaian law on some subjects. Also, the laws of individual states vary. Accordingly, there is a high probability that there may be no corresponding cause of action or remedy in Ghana for any cause of action or remedy that exists in a foreign country on several matters. If a court deems it appropriate in such a situation, it should invite counsel to address the court on the issue, including how the issue is dealt with in the foreign state to ensure that the interest of justice is served."[44]*

A plaintiff's choice to invoke foreign law, coupled with difficulties or inability to provide supporting evidence and the operationalisation of section 40 of the Evidence Act, can influence the outcome of the case. If Ghanaian law is assumed to align with the foreign law when the plaintiff cannot substantiate their claim, this may allow the plaintiff to escape the applicability and dictates of the foreign law (or a defendant to strongly oppose an unfavourable outcome of applying foreign law).[45] This highlights the difficulties of dealing with foreign law in Ghanaian courts and the extent to which such herculean tasks may be manipulated by a plaintiff to their gain or a defendant against a plaintiff.

Notwithstanding these criticisms, the law clearly states that a plaintiff relying on foreign law must first plead it and then prove it; if they fail to do so, the foreign law is assumed to be the same as Ghanaian law.

Flowing from the challenges associated with the legal framework on the proof of foreign law, Oppong and Agyebeng have suggested that Ghanaian courts take judicial notice of English law, thereby eliminating the need to call expert witnesses.[46] This call is based on Ghana's status as a Commonwealth country that follows the common law tradition, with many legal professionals trained, directly or indirectly, in English law.[47] Unfortunately, the suggestion by the learned authors does not apply in the current context, as *Akosua Serwaa Fosuh* concerns the validity of a foreign marriage under German civil law, and many Ghanaian lawyers and the Ghanaian legal system are not trained in such a civil law orientation. Therefore, adherence to the *Godka* principles and the requirements of the Evidence Act, underscoring the probative value of a foreign document, is essential. Indeed, regardless of the sentiments surrounding the case, it is important to emphasise that the court's decision was firmly grounded in relevant precedents and procedural rules that must be followed in such cases.

8. Conclusion

The case of *Akosua Serwaah Fosuh* highlights that in Ghanaian courts, foreign law is not self-executing. It requires careful pleading and rigorous proof, in accordance with specific statutory requirements and the standards set out in case law. A foreign marriage certificate does not automatically substantiate the validity or otherwise of a marriage. Without expert testimony that convincingly clarifies the legal meaning, formalities, requirements, and consequences, such evidence has limited probative value in Ghanaian courts. In fact, transnational disputes require and depend on transnational evidence to verify the parties' rights and entitlements. The decision in *Akosua Serwaah Fosuh* does not merely concern the rights and entitlements of competing spouses; it embodies the timeless principle in private international law: foreign law enters Ghanaian courts only through the pathway of proof. So long as this timeless rule exists, any marriage contracted outside Ghana and potentially subject to legal dispute may be fragile the moment it enters the annals of the Ghanaian court.

Previous contributions:

1. ***Online Symposium on Recent Developments in African Private International Law**, by Béligh Elbalti & Chukwuma S.A. Okoli* (Introductory post)
2. ***Recognition and Enforcement of International Judgments in Nigeria**, by Abubakri Yekini & Chukwuma Samuel Adesina Okoli*
3. ***The Recognition and Enforcement of Foreign Judgments within the CEMAC Zone**, by Boris Awa*
4. ***Foreign Judgments in Mozambique through the Lens of the Enforcement of a Chinese Judgment: Liberal Practice in the Shadow of Statutory Rigidity**, by Béligh Elbalti*
5. ***Party Autonomy, Genuine Connection, Convenience, Costs, Privity, and Public Policy: The Kenyan High Court on Exclusive Jurisdiction Clauses**, by Anam Abdul – Majid and Kitonga Mulandi*
6. ***Cross-border employment, competition and delictual liability merge in the South African High Court: Placement International Group Limited v Pretorius and Others**, by Elisa Rinaldi*

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[1] *Akosua Serwaah Fosuh v. Abusua-Panin Kofi Owusu & 2 others*, Suit No. GJ12/20/2026 (28 November 2025) (Unreported).

[2] Ibid at par 1.

[3] Ibid.

[4] Ibid at par 10.

[5] Ibid at par 2.

[6] Ibid at par 51.

[7] See, Marriages Act, 1984 (Cap 127). See also, *Obed Hoyah v. Naa Kwarley Quartey* [2020] GHACA 13 (30 July 2020); *Adzraku v Adzraku & Anor* [2023]

GHAHC 530 (15 December 2023); *Moro and Another v. Ayebio & others* [2024] GHAHC 31 (12 April 2024); *Raphael Quist v. Matilda Larbi* [2023] GHACC 73 (6 June 2023); *Apomasu v. Bremawuo* [1980] GLR 278.

[8] *Graham v. Graham* [1965] GLR 407; *Yaotey v. Quaye* [1961] GLR 573.

[9] Ibid.

[10] *Coleman v. Shang* (1959) GLR 390; *Adzraku v Adzraku & Anor* [2023] GHAHC 530 (15 December 2023).

[11] *Coleman v. Shang* (1959) GLR 390.

[12] Marriage of Mohammedan Ordinance, 1951 (Rev.) (Cap 129). See also, *Apomasu v. Bremawuo* [1980] GLR 278.

[13] See, Marriage Act Ordinance, 1951 (Cap 127); *Boateng v. Serwa and others* [2021] GHASC 195 (14 April 2021).

[14] See, *Ernestina Boateng v. Phyllis Serwaa and 2 others*, Civil Appeal No. J4/08/2020 (14 April 2021).

[15] Section 1(2) of the Evidence Act, 1975 (NRCD 323).

[16] *Davis v. Randall* [1962] 1 GLR 1.

[17] Ibid. See also, *Clipper Leasing Corporation v. S and Ghana Airways Limited* [2025] GHASC 27 (29 April 2025); Josiah Ofori-Boateng, *The Ghana Law of Evidence* (Waterville Publishing House 1993) pp. 7.

[18] *In Re Canfor (Deceased); Canfor v. Kpodo*, [1968] GLR 177.

[19] Ibid.

[20] Section 40 of the Evidence Act, 1975 (NRCD 323). See also, *Ama Serwah v. Yaw Adu Gyamfi & Vera Adu Gyamfi*, where the High Court of Ghana, in accordance with section 40 of the Evidence Act, assumed that the Italian law on the subject matter and that of Ghana were the same after the plaintiff failed to prove the foreign law.

[21] *Akosua Serwaah Fosuh* at par 85. See also, Richard Frimpong Oppong &

Kissi Agyebeng, *Conflict of Laws in Ghana* (Sedco Publishing 2021) 40.

[22] *Ama Serwaa v. Gariba Hashimu & another*, Civil Appeal No. J4/31/2020 (14 April 2021).

[23] Ibid.

[24] *Godka Group of Companies v. PS International Ltd* (1999-2000) 1 GLR 409.

[25] Ibid.

[26] Ibid.

[27] *Val Cap Marketing v. The Owners of M V Vinta*, Civil Appeal No. 27/98 (Court of Appeal, Accra, 1999).

[28] Ibid.

[29] *See*, section 1(2) of the Evidence Act; *Fenuku v. John Teye* [2001-2002] SCGLR 985; *Tetteh & another v. Hayford 9Substituted by) Larbi & Decker* [2012] 1 SCGLR 417. In effect, the court the court determines the degree of weight to be accorded to the evidence by an expert witness.

[30] Ibid.

[31] *Akosua Serwaah Fosuh* par 88.

[32] *Akosua Serwaah Fosuh* par 90 and 106-107.

[33] Section 161(1) of the Evidence Act, 1975 (NRCD 323).

[34] Section 161(2) of the Evidence Act, 1975 (NRCD 323).

[35] Section 161(3) of the Evidence Act, 1975 (NRCD 323).

[36] *Akosua Serwaah Fosuh* par 91.

[37] *Akosua Serwaah Fosuh* par 94.

[38] *Akosua Serwaah Fosuh* par 87.

[39] *Akosua Serwaah Fosuh* par 101.

[40] *Akosua Serwaah Fosuh* par 104.

[41] *Akosua Serwaah Fosuh* paras 107-108.

[42] *Akosua Serwaah Fosuh* par 164.

[43] Richard Frimpong Oppong & Kissi Agyebeng, *Conflict of Laws in Ghana* (Sedco Publishing 2021) p. 39.

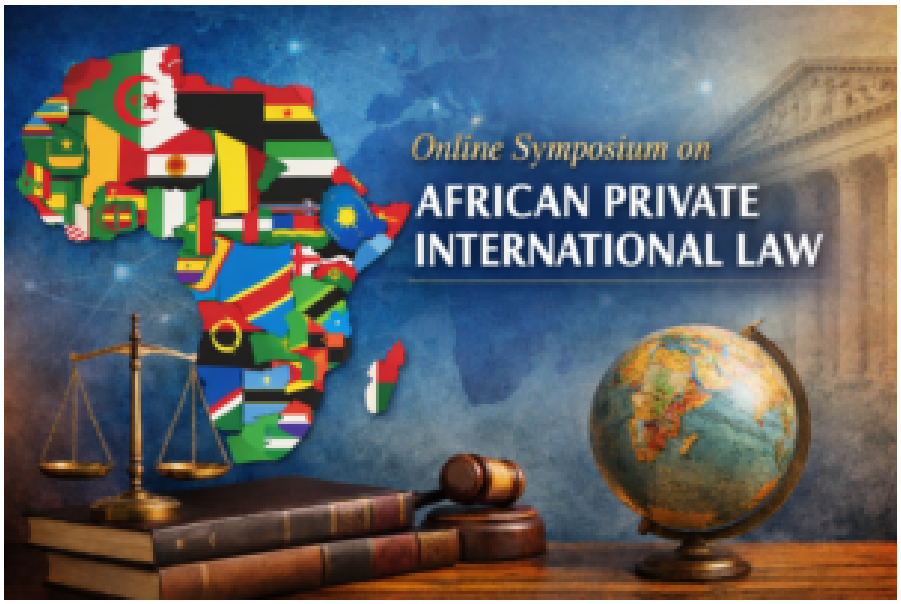
[44] Ibid at 39.

[45] Ibid.

[46] Ibid at 40-41.

[47] Ibid at 40-41.

Online Symposium on Recent Developments in African PIL (V) – Cross-border employment, competition and delictual liability merge in the South African High Court: Placement International Group Limited v Pretorius and Others



As part of the second online symposium on ***recent developments in African private international law****, we are pleased to present the fifth contribution, kindly prepared by* ***Elisa Rinaldi*** *(****University of Pretoria, South Africa****) on* **Cross-border employment, competition and delictual liability merge in the South African High Court: *Placement International Group Limited v Pretorius and Others.***

The High Court of South Africa recently heard a dispute that concerned an application for interim relief to interdict South African competitors from competing in the field of international recruitment.[i] The case of *Placement International Group Limited v Pretorius and Others* [2025] ZAGPPHC 1252 centred on the work undertaken by international hiring companies who, with the rise of transnational employment, facilitate the recruitment and placement of potential employees from anywhere in the world. The applicant in this dispute, Placement International Group Limited, a company incorporated in Hong Kong, is a hiring company who worked to source candidates in South Africa for employment opportunities overseas. The dispute was brought by Placement International against a previous employee who, upon leaving the applicant's employment, went on to establish her own hiring company. The respondents, a South African national, and her company, Integricore Global (Pty) Ltd, incorporated in South Africa, aimed to facilitate the hiring of South African

candidates, resulting in direct competition with the applicant. Aggrieved, the applicant turned to the South African High Court to request that they interdict Integricore from sourcing candidates in South Africa as they considered this to amount to unlawful competition. The relief sought by the applicant was based on South African common law.

The alleged unlawful competition arose out of an employment relationship between the applicant and respondent. The central contention by the applicant was that the respondent had breached her fiduciary duties by establishing Integricore and working in direct competition with Placement International.[ii] The applicant argued that the information regarding potential candidates and companies was proprietary confidential information which the respondent required and used in order to establish Integricore.[iii] The right to claim relief for breach of an employee's fiduciary duties exists in South African common law, granting the aggrieved party a right to claim under either delict or contract.[iv] Such an election is permitted in South African law and in this case, the applicant decided to claim under delictual breach of fiduciary duty rather than under the terms of the contract.

The decision to claim under delict prompted an interesting investigation into the integrity of such claim. The reason being is that the employment contract, between the applicant and responded, contained a restraint of trade clause which, as according to the choice of law clause within the contract, should have been governed by Hong Kong law.[v] The applicant, however, decided not to enforce the contractual provision for reasons that turned out to be rather interesting. While employers are said to be in a generally stronger bargaining position when it comes to choice of law, in this instance the choice of Honk Kong law applied against the employer. As it came to be revealed, the position of restraint of trade clauses in Hong Kong law is that they are generally void for being against public policy.[vi] This is the case unless the employer is able to show that the restrictions are necessary to protect their legitimate business interests. In South Africa the position is reversed. Restraint of trade clauses are generally valid and enforceable unless they are deemed unreasonable.[vii] In determining whether a restraint of trade clause is unreasonable, a court will consider whether the business interest is deserving of protection and weigh this against the interests, of the former employee, to earn a living. Irrespective of this distinction, the applicant chose to rely on South African common law instead of the contract,

likely because of the fact that the application of Hong Kong law would not result in their favour.

The decision to rely on the common law led the High Court to consider whether this amounted to an abuse of process. Reason being is that, the common law right to claim relief for breach of fiduciary duty is a right that comes to existence through the employment contract, a point which the court rightfully made:

"It is a far cry to approach the court for common law relief based on a fiduciary duty arising from the contract of employment when the same contract does not have the same consequence under Hong Kong law as a South African contract of employment. That creates doubt on the applicant's entitlement to common law interdictory relief by merely jettisoning a troublesome consequence of the choice of law in the contract of employment."[viii]

Nevertheless, the court reasoned that the decision to rely on the South African common law could not amount to an abuse of process in light of there being doubt as to whether the applicant would have been able to establish a contractual right under Hong Kong law for the enforcement of the restraint of trade clause.[ix] The protection of lawful competition also seemed to necessitate a decision on the merits.[x] Having concluded that there was no abuse of process, the court went on to make its judgment against the applicant. A number of reasons were made, most of which were due to the circumstances surrounding the termination of the employment relationship between the applicant and respondent.[xi] In essence, the competition arising from the activities of Integricore was found to be lawful, meaning there was no right from which to claim interdictory relief. The respondent's knowledge of the South African market was found to be part of the respondent's general skill set and not part of the applicant's proprietary confidential information. In other words, the applicant had not proven that there was a reasonable apprehension of irreparable harm, which is an element that must be proven in order for the interdict application to succeed. Lastly, the court held that it would be unlikely to grant relief by exercise of their judicial discretion due to the contractual relationship being governed by Hong Kong law.

Certain concerns have been raised in respect to the lack of a private international law approach by the High Court in this judgment. These concerns can be read here. Essentially, the court failed to conduct a proper investigation into the choice of law governing the unlawful competition claim. A private international law

approach would have necessitated characterising the dispute and determining which law would apply, either by application of a conflict rule or through the determination of which legal system is manifestly closer or significantly connected to the dispute. The South African choice of law rule for delictual disputes is the *lex loci delicti*.[xii] The court, however, did not follow through with a determination on the choice of law. Nonetheless, I do not believe that the court erred in their approach for a few reasons. The main issue concerned the question of whether the applicant had met the requirements for an interdict, as according to South African law. The applicant had approached the High Court for interdictory relief on the basis of South African common law. The court scrutinized this decision in light of the employment contract and its express choice of Hong Kong law. Far from ignoring the relevance of foreign law, the court went on to ascertain the content of Hong Kong law in respect to restrain of trade. The determination of whether the applicant had established a *prima facie* right to claim interdictory relief, as well as whether the court should grant discretionary relief in lieu of a *prima facie* right hinged on the employment contract, its choice of Hong Kong law as well as its subsequent repudiation. A determination of the applicable law over the alleged unlawful competition was not necessary in order for the court to make its conclusion. The question of whether the competition was unlawful was answered by looking at the surrounding circumstances of the employment contract and, more specifically, the conduct of the applicant in respect to the contract. The employment contract and its choice of law clause was central to the court's adjudication of the matter.

While a clear and express private international law approach is always valuable, particularly in South Africa where private international law disputes are not often heard, a dogmatic choice of law approach is not always necessary. The court may in fact be commended for how it handled the aspects of foreign law which arose in this dispute. The court went through the process of actually ascertaining the position in Hong Kong law, highlighting the importance of express choice of law clauses within contractual agreements. What may be considered a cosmopolitan approach, akin to private international law concerns, ensured the court considered factors beyond the elements necessary for interdictory relief under South African law. The court raised concerns surrounding potential abuse of process, which factored heavily in the courts choice to not grant discretionary relief. The attention brought to these concerns are welcomed, particularly in the face of the relative ease that transnational employers have over the litigation

process.[xiii]

Previous contributions:

1. **Online Symposium on Recent Developments in African Private International Law**, *by Béligh Elbalti & Chukwuma S.A. Okoli* (Introductory post)
2. **Recognition and Enforcement of International Judgments in Nigeria**, *by Abubakri Yekini & Chukwuma Samuel Adesina Okoli*
3. **The Recognition and Enforcement of Foreign Judgments within the CEMAC Zone**, *by Boris Awa*
4. ***Foreign Judgments in Mozambique through the Lens of the Enforcement of a Chinese Judgment: Liberal Practice in the Shadow of Statutory Rigidity**, by Béligh Elbalti*
5. ***Party Autonomy, Genuine Connection, Convenience, Costs, Privity, and Public Policy: The Kenyan High Court on Exclusive Jurisdiction Clauses**, by Anam Abdul – Majid and Kitonga Mulandi*

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[i] *Placement International Group Limited v Pretorius and Others* [2025] ZAGPPHC 1252 (*Placement International).*

[ii] Ibid para 1-9.

[iii] Ibid para 6

[iv] See generally, *Lillicrap Wassenaar and Partners v Pilkington Brothers* [1985] 1 All SA 347 (A).

[v] *Placement International* (n1) para 33.

[vi] Ibid para 30.

[vii] For a very recent judgment on restraint of trade clauses in South Africa see, *TWK Agri (Pty) Ltd v Holtzhausen and Another* [2025] ZALCJHB 252.

[viii] *Placement International* (n1) para 33.

[ix] Ibid para 40.

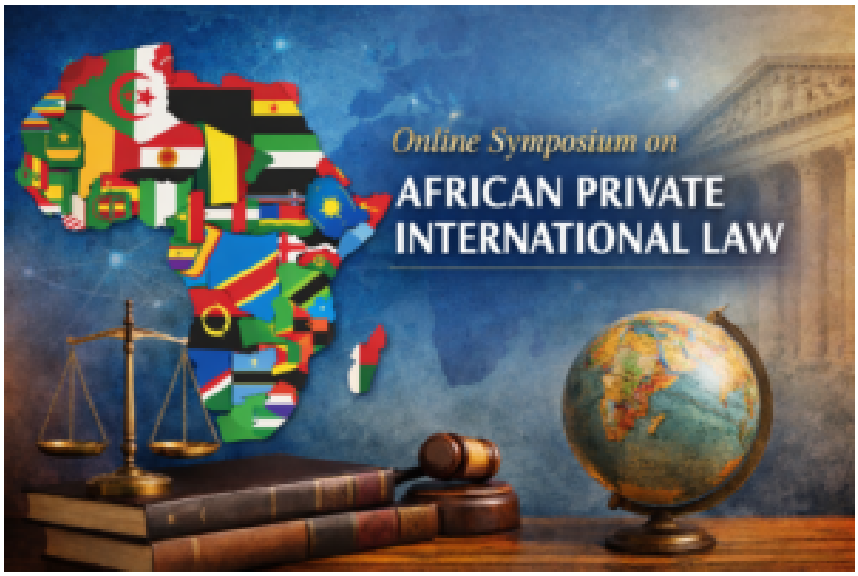
[x] Ibid.

[xi] Ibid para 42 – 50.

[xii] See *Burchell v Anglin* 2010 3 SA 48 (ECG) and *Apleni v African Process Solutions (Pty) Ltd and Another* (15211/17) [2018] ZAWCHC 160.

[xiii] See generally, Rinaldi E 'A comparative analysis of the mandatory rule doctrine and its application in the South African Labour Court' (2021) 15 *Pretoria Student Law Review*.

Online Symposium on Recent Developments in African PIL (IV) – Party Autonomy, Genuine Connection, Convenience, Costs, Privity, and Public Policy: The Kenyan High Court on Exclusive Jurisdiction Clauses



As part of the second online symposium on ***recent developments in African private international law****, we are pleased to present the fourth contribution, kindly prepared by* ***Anam Abdul-Majid (Advocate and Head of Corporate and Commercial Department, KSM Advocates, Nairobi, Kenya)*** **and** ***Kitonga Mulandi (Lawyer, KSM Advocates, Nairobi, Kenya)****, on* ***Party Autonomy, Genuine Connection, Convenience, Costs, Privity, and Public Policy: The Kenyan High Court on Exclusive Jurisdiction Clauses***

I. Introduction

Kenya has emerged as a regional and global hub for the development of private international law, positioning it as one of Africa's leading jurisdictions through progressive judicial reasoning and landmark decisions. Kenyan jurisprudence has not only shaped domestic private international law but is also frequently relied upon by courts in other African jurisdictions, particularly East Africa, as persuasive authority. Given the consistent and dynamic evolution of this field by Kenyan courts, it is essential to take account of recent decisions that have engaged with and developed key private international law concepts.

One such relatively recent decision is *Maersk Kenya Limited v Multiplan Packaging Limited (Civil Appeal E181 of 2022) [2024] KEHC 8462 (KLR) (Civ) (8 July 2024) (Judgment*), which engages with several core doctrines of private international law and therefore warrants closer analysis.

This case is significant for four interrelated reasons. First, it examines the limits of exclusive jurisdiction clauses in maritime contracts where both parties are Kenyan entities and the alleged breach occurred within Kenyan territory. Second, it clarifies the operation of the doctrine of privity of contract in the context of agency relationships under bills of lading, particularly by recognising that consignees who were not original contracting parties may nonetheless have standing to sue carriers on the basis of rights conferred by the carriage documents. Third, it articulates important public-policy considerations capable of overriding contractual forum-selection agreements, especially where such clauses would impose insurmountable barriers to access to justice, contrary to Article 48 of the Constitution of Kenya. Finally, the decision reinforces procedural discipline in jurisdictional challenges by holding that parties who enter an unconditional appearance and substantively participate in proceedings waive any subsequent right to contest the court's jurisdiction or to rely on an exclusive forum-selection clause.

II. Facts

The facts of the case centred on whether Kenyan courts had jurisdiction to hear and determine the dispute, notwithstanding that the contract forming the subject matter of the proceedings contained an exclusive jurisdiction clause conferring jurisdiction on the English High Court in London. The dispute arose out of a maritime contract of carriage relating to the Respondent's shipment of cargo from Mombasa, Kenya, to Juba, South Sudan.

The contractual arrangement involved a composite mode of performance: sea carriage to Mombasa (the transit port), inland storage at Mombasa, and subsequent road transportation to the final destination in South Sudan. This contractual structure generated performance obligations across multiple jurisdictions. Under Kenyan customs regulations, goods in transit are subject to the provision of security bonds to ensure compliance with fiscal obligations. The Respondent's failure to meet this requirement triggered the dispute, ultimately leading to the Appellant's decision to trans-ship the goods to Dubai, acting on instructions from Maersk Egypt A/S.

The application was further complicated by a layered agency relationship. The

shipper was alleged to be acting as an agent of the Respondent (the consignee), while the Appellant, Maersk Kenya Limited, acted as an agent of Maersk Egypt A/S, which itself acted as agent for another entity within the Maersk corporate structure. The Court characterised this arrangement as an "agents-of-agents" scenario, raising difficult questions of privity of contract and whether the Respondent, as consignee under the bill of lading, could maintain an action against Maersk Kenya Limited in the absence of direct contractual privity.

Although the Court acknowledged that no direct contractual agreement existed between the parties, it placed decisive weight on the fact that both parties were Kenyan companies and that the alleged breach occurred in Kenya. These connecting factors proved determinative in the Court's forum analysis. While recognising that Clause 26 of the Terms of Carriage constituted a standard-form English exclusive jurisdiction clause in maritime contracts also governed by English law, the Court nevertheless held that such a boilerplate provision could not operate to oust the jurisdiction of Kenyan courts. In the Court's view, the practical realities of the dispute disclosed no genuine connection to the English forum beyond the bare contractual designation.

III. Summary of the Judgment Delivered by the High Court of Kenya

This case is particularly relevant because it does not engage with a single isolated issue, but rather addresses a constellation of interrelated doctrines, each of which contributes to greater doctrinal clarity in private international law.

Although the contract contained an exclusive jurisdiction clause, the Court found that the contractual arrangement comprised distinct segments, one of which concerned the transportation of the Respondent's cargo from Mombasa to Juba, South Sudan, with Mombasa functioning as a transit port for offloading and interim storage prior to onward road transportation. Owing to the Respondent's failure to pay the requisite bond-in-transit charges, the goods were subsequently trans-shipped to Dubai on the instructions of the first applicant.

The application was further grounded in complex agency relationships: the shipper was alleged to be acting as an agent of the Respondent, while the Appellant acted as an agent of Maersk Egypt A/S, which itself acted as agent for another entity within the corporate structure. The Court observed that there was

no direct contractual agreement between the parties. Nevertheless, it placed decisive weight on the fact that both parties were Kenyan companies and that the alleged breach occurred within Kenya.

Against this background, the Court articulated several important principles:

- (a) where parties operate as “agents of agents”, they are properly characterised as third parties, with the consequence that no privity of contract exists between them;
- (b) there is no principled basis for two Kenyan companies to litigate their dispute in London in the absence of a genuine connecting factor to that forum;
- (c) disputes between Kenyan companies arising from breaches occurring in Kenya should, as a matter of public policy, be adjudicated by Kenyan courts;
- (d) Kenyan courts may override exclusive jurisdiction clauses where the circumstances of the dispute demonstrate that the matter ought properly to be heard in Kenya;
- (e) a party seeking to challenge territorial jurisdiction must do so at the earliest opportunity and must refrain from taking substantive steps in the proceedings. By entering an unconditional appearance, filing multiple affidavits, and applying for the release of the goods, the Appellant was held to have submitted to the Court’s jurisdiction and thereby waived any subsequent right to contest it; and
- (f) contractual clauses purporting to oust the jurisdiction of Kenyan courts may be contrary to public policy unless there is a clear and substantive connection between the dispute and the chosen foreign forum. In the absence of such a connection, referral of a dispute of this nature to London was held to be unjustified.

IV. Comments

The judgment represents a sophisticated attempt to reconcile competing values in private international law, namely party autonomy and access to justice. Notably, the Court did not override the jurisdiction clause on the basis of abstract or generalised appeals to injustice; rather, it arrived at that conclusion through the

following considerations:

(a) Presuming Validity of Clause 26:

The Court began from a presumption in favour of the validity and enforceability of exclusive forum-selection clauses. Its reasoning was that this presumption is at its strongest where: (1) the clause is negotiated by sophisticated commercial parties; (2) the designated forum has a genuine connection to the transaction; (3) the costs of litigating in that forum are proportionate to the value and nature of the dispute; and (4) the parties are subject to reciprocal obligations to litigate exclusively in the chosen forum. In such circumstances, the clause ought, in principle, to be enforced.

(b) Rebuttable Presumption:

The Court held that the presumption of validity attaching to exclusive forum-selection clauses may be rebutted where their enforcement would create insurmountable barriers to access to justice, particularly in the context of standard-form contracts concluded between parties of unequal bargaining power—a consideration that goes to the very root of genuine consent.

Applying this reasoning, the Court concluded that Clause 26 did not bind the Respondent because it was not a party to the contract. Relying on the doctrine of privity of contract, the Court emphasised that the Respondent, as consignee, played no role in negotiating the shipping agreement between Maersk Line A/S and the shipper and could therefore not be bound by its forum-selection clause.

Crucially, the Court was careful to avoid conflating layered agency relationships—described as an "agents-of-agents" structure—with contractual privity. It rightly held that the Respondent, as consignee, could not be taken to have consented to the Terms of Carriage, which constituted a contract exclusively between the shipper and the carrier.

(c) Waiver of the Right to Enforce:

The Court's finding of submission to jurisdiction through conduct is well grounded and consistent with established jurisprudence, which recognises that a party may waive its right to rely on a forum-selection clause, or otherwise submit to the court's jurisdiction, by its conduct. In such circumstances, the forum-selection clause is rendered inoperative.

The Court's conclusion that the Appellant's entry of an unconditional appearance, coupled with the obtaining of interim relief for the release of the cargo, amounted to submission to jurisdiction is sound. This approach not only accords with the underlying rationale of the doctrine—namely, the protection of rights that have accrued to the opposing party—but also reinforces the principle that a party cannot be permitted to litigate on the basis of approbation and reprobation, a well-established cornerstone of equitable jurisprudence.

(d) Public Policy:

The enforcement of a forum-selection clause in a dispute valued at twenty million Kenyan shillings, where both parties are Kenyan companies, is untenable, unsound, and inconsistent with the underlying principles of private international law. Such an approach disregards a foundational premise of contract law: that parties enter into contractual arrangements with knowledge of, and consent to, their negotiated terms. In the context of exclusive jurisdiction clauses, this logic is even more compelling, as the very purpose of such clauses is to secure a just, convenient, and—most critically—predictable framework for the resolution of disputes should they arise.

The Court's characterisation of the clause as contrary to "public policy" is not only difficult to reconcile with these long-standing principles but is also problematic in its reasoning. The Court's attempt to define the relevant public policy relies heavily on the Canadian decision in *Uber Technologies Inc v Heller*, using it to support the proposition that where the costs of litigating in the designated forum are disproportionate to the value of the claim, enforcement of the forum-selection clause would offend public policy.

This reasoning sits uneasily with settled authority in private international law, which makes clear that mere inconvenience—including administrative burden and litigation costs—does not, without more, amount to "strong cause" sufficient to

displace an exclusive jurisdiction agreement freely entered into by the parties.

V. Conclusion

The Kenyan High Court's decision in Maersk v Kenya Limited v Multiplan Packaging Limited affirms several settled principles: the doctrine of privity of contract, the presumptive validity of exclusive jurisdiction clauses, and the consequence that a party may waive its right to rely on such a clause through submission to the court's jurisdiction. Yet the decision exposes a critical tension in the Court's reasoning. The dispute involved two Kenyan companies, a contract performed in Kenya, and the alleged breach occurring in Kenya, these connecting factors would ordinarily support the exercise of jurisdiction. The difficulty lies in the Court's use of public policy to displace the jurisdiction clause on the bases of cost and inconvenience.

This approach sits at odds with established authority. As articulated in *The Eleftheria (1969) 1 Lloyd's L. R. 237* and subsequent authorities, inconvenience or increased litigation costs do not, without more, amount to 'strong cause', sufficient to displace an exclusive jurisdiction agreement freely entered into by parties. Further the Court's reliance on the Canadian decision in *Uber Technologies Inc v Heller,* upon which the Court premised its analysis, concerned very particular circumstances, of a consumer contract concluded between parties of profound unequal bargaining power, with the central question being the validity of an arbitration agreement, a related but distinct legal concept for determination. The reliance on public policy in this context is problematic for three reasons: (1) the concept construed widely risks development into an indeterminate tool for judicial discretion; (2) the court has not articulated a coherent test for determining when or how cost and convenience may rise to the threshold to override clear contractual choices; and (3) the broad conception of public policy threatens the essential rationale behind exclusive jurisdiction clauses, being the predictability such offers parties to international commercial contracts and have become accustomed to expect. If jurisdiction clauses may be displaced on grounds of general convenience, parties can no longer rely on their contractual allocations of risk, and the very purpose of such clauses is defeated.

Ultimately, Maersk demonstrates that there ought to be greater comparative

engagement and doctrinal grounding while balancing party autonomy and safeguarding access to justice.

Previous contributions:

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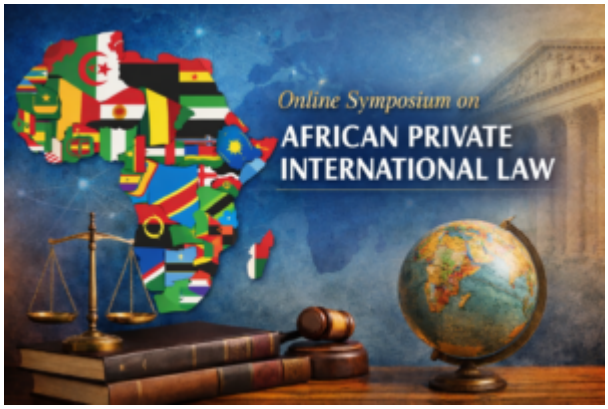
4. **Foreign Judgments in Mozambique through the Lens of the Enforcement of a Chinese Judgment: Liberal Practice in the Shadow of Statutory Rigidity**, *by Béligh Elbalti*

Online Symposium on Recent Developments in African PIL (III) – Foreign Judgments in Mozambique through the Lens of the Enforcement of a Chinese Judgment: Liberal Practice in the

Shadow of Statutory Rigidity



As part of the second online symposium on ***recent developments in African private international law****, we are pleased to present the third contribution, prepared by* ***Béligh Elbalti (The University of Osaka, Japan)****, on* ***Foreign Judgments in Mozambique through the Lens of the Enforcement of a Chinese Judgment: Liberal Practice in the Shadow of Statutory Rigidity****.*

I. Introduction

The purpose of this note is to briefly introduce the recognition and enforcement regime in Mozambique based on a recent case decided by the Mozambican Supreme Court (*Tribunal Supremo*).

It aims modestly to help fill a gap in legal literature. Indeed, scholarly work on Mozambican private international law in general, and on the recognition and enforcement of foreign judgments in particular, remains extremely limited (For an overview on Mozambican private international law system, see D Moura Vicente, 'Mozambique' *in* J Basedow *et al.* (eds.), *Encyclopedia of Private International Law – Vol. III* (Elgar, 2017) 2354).

The note also seeks to shed light on recognition and enforcement practice in a country that has largely remained outside the radar of comparative law scholars and researchers.

It is hoped that this contribution will encourage more detailed and in-depth studies that do justice to a legal system which appears, despite some

anachronistic aspects of its legal regime, to have one of the most liberal enforcement practices in Africa.

II. The Case

The case presented here concerns the enforcement in Mozambique of a Chinese judgment in a dispute involving two Chinese citizens resident in Mozambique. The underlying factual background may be summarized as follows.

The dispute appears to have arisen from a breach of contractual obligation. The applicant, X, initially tried to recover the debt in Mozambique by initiating execution proceedings against Y (the respondent) for payment of a sum of money (*ação executiva para pagamento de quantia certa*). However, the Mozambican court upheld the objections to execution (*embargos à execução*) filed by Y and dismissed the execution for lack of evidence prove the existence of an enforceable title or establishing the alleged debt.

X subsequently initiated civil condemnation proceedings (*processo de Condenação Civil*) in China, claiming damages for breach of contract, and obtained in his favor a judgment ordering Y to pay damages. Armed with a final Chinese judgment, X sought its enforcement in Mozambique by bringing an action for review and confirmation (*revisão e confirmação*).

Y challenged the review and confirmation of the foreign judgment on the grounds that there is an identity between the prior execution proceedings in Mozambique and the confirmation proceedings. X replied that the two actions differed in terms of the legal effects sought (the execution proceedings concerned the compulsory payment of a debt and not concerned with the review and confirmation of a foreign judgment) and cause of action (the execution proceedings were based on the alleged existence of an enforceable title, whereas the confirmation proceedings were based on the existence of a foreign judgment requiring recognition and enforcement).

III. The Ruling

In deciding this issue, the Mozambican Supreme Court rules as follows (*Case No.*

75/2024-C of 25 April 2025).

The Court first cited the relevant provision of the CCP setting out the conditions for the recognition and enforcement of foreign judgments in Mozambique (Article 1096). Under that provision, a foreign judgment may be declared enforceable (confirmed) only if seven conditions are satisfied:

- a) the authenticity and intelligibility of the decision;
  b) the final and binding character of the judgment in the State of origin;
  c) the jurisdiction of the foreign court under Mozambican rules on conflicts of jurisdiction;
  d) the absence of *lis pendens* or *res judicata* arising from proceedings before Mozambican courts, unless the foreign court was first seized;
  e) proper service of the defendant;
  f) compliance with Mozambican public policy; and
  g) where the judgment is rendered against a Mozambican national, respect for Mozambican substantive law where applicable under Mozambican conflict-of-laws rules.

Then the Court moved to examine each of the above conditions, with a special focus on the legal issue raised by the parties, ruling as follows (detailed summary):

> *Mozambique applies a delibation (delibação) system for the recognition of foreign judgments. Under this system, focus is placed on compliance with formal requirements laid down by Article 1096. There is therefore no review of the merits, except with regard to a possible violation of public policy or domestic private law where the judgment was rendered against a Mozambican national (the so-called nationality privilege).*
>
> *Regarding the requirement of authenticity and intelligibility, the judgment was duly legalized and raises no doubts as to its intelligibility.*
>
> *Accordingly, the requirement of Article 1096(a) is satisfied*
>
> *Regarding finality, this requirement is presumed to be satisfied in the absence of evidence to the contrary. Since the presumption was not rebutted, the requirement under Article 1096(b) is satisfied.*

Regarding the jurisdiction of the foreign court, Mozambican law predominantly follows the bilateral (mirror-image) theory, according to which a foreign court is internationally competent if a Mozambican court would have had jurisdiction in comparable circumstances. The case concerned a contractual claim for damages. Under Mozambican rules of international jurisdiction, such claims fall within the jurisdiction of the courts of the place of performance of the obligation. As the obligation was to be performed in the State of origin, the foreign court was internationally competent for the purposes of Article 1096(c).

Accordingly, the requirement of Article 1096(c) is also satisfied.

Regarding the issue of res judicata disputed by the parties, this requirement aims to prevent contradictory effects within the Mozambican legal order by barring enforcement where a Mozambican court has already rendered a final decision on the same dispute, involving the same parties, claim, and cause of action, as that decided by the foreign court. For this purpose, the comparison for determining whether the res judicata exception exists is not between the action for the enforcement of the foreign judgment (action for review and confirmation) and another action brought before Mozambican courts. Rather, res judicata, for the purposes of recognition and enforcement of foreign judgments, results from a comparison between the action decided by the foreign court (which resulted in the judgment sought to be declared enforceable) and the action decided by Mozambican courts concerning the same dispute. In the present case, although Y alleged the existence of res judicata based on earlier Mozambican proceedings, he failed to establish the required identity of parties, claim, and cause of action.

Accordingly, the requirement under Article 1096(d) is satisfied.

Regarding proper service, both the applicant and the respondent had the opportunity to participate in the foreign proceedings.

Accordingly, the requirement under Article 1096(e) is also satisfied.

Regarding public policy, the foreign judgment in question does not contravene Mozambican public policy principles, as civil liability for damage resulting from breach of legal transactions is an institution widely accepted in Mozambique.

> *Finally, with regard to the requirement under Article 1096(g), since both parties are Chinese nationals, the judgment was not rendered against a Mozambican national, the nationality privilege does not arise, rendering this provision inapplicable.*

IV. Comments

The decision of the Mozambican Supreme Court is both interesting and significant in several respects, two of which are particularly noteworthy. First, it is interesting because it reproduces various elements discussed in literature, notably in an article published in 2022 by M. Muchanga,[i] who also serves as the President of the Mozambican Supreme Court (A M Muchanga, 'Reconhecimento de Sentenças Estrangeiras em Matéria de Direito Privado na Ordem Jurídica Moçambicana' 1 *O Embondeiro: Revista Dos Tribunais* (2022) 15).

The decision is also significant because it does not only clarify some general principles underlying the recognition and enforcement of foreign judgments in Mozambique (1), but also it sheds further light on the specific conditions applicable to their recognition and enforcement (2).

1. General Principles underlying the Recognition and Enforcement of Foreign Judgments in Mozambique

a) Applicable legal framework

Mozambican law in the field of the recognition and enforcement of foreign judgments, and private international law more generally, is not merely inspired by Portuguese law; it is, in fact, Portuguese law, extended to Mozambique when it was one of Portugal's overseas (*ultramar*) territories. Regarding the recognition and enforcement of foreign judgments, the relevant rules are contained in the Portuguese CCP of 1961 (*Código de Processo Civil*), whose application was extended to Mozambique in 1962 (Articles 1094–1101). This legal framework, inherited at independence in 1975, continues to govern the recognition and

enforcement of foreign judgments in Mozambique. These rules are particularly significant given the extremely limited number of conventions concluded by Mozambique (e.g., the 1990 Mozambican–Portuguese Convention on Legal and Judicial Assistance), which, in practice, are generally not invoked by the courts, even in situations where international conventions would, in principle, apply.

b) Reciprocity not required

Recognition and enforcement in Mozambique do not depend on the existence of reciprocity. Judgments rendered in states where recognition and enforcement are themselves subject to a reciprocity requirement, such as China (Article 299 of the Chinese CCP), do not appear to encounter particular difficulties when enforcement is sought in Mozambique, as the present case clearly illustrates. Other cases show a similar practice, with judgments from countries requiring reciprocity (such as Germany and the UAE (Dubai)) being smoothly recognized and enforced in Mozambique.

It is also worth mentioning that the Supreme Court of Mozambique concluded in 2018 a Memorandum of Understanding (MoU) with the Supreme People's Court of the People's Republic of China, which, i*nter alia*, aims to facilitate the recognition and enforcement of judgments in both countries (Article 4). However, this MoU does not appear to have played any decisive role, either directly or indirectly, in the outcome of the present case.

c) Necessity for review and confirmation procedure

Giving effect to foreign judgments in Mozambique is based on the so-called *delibation* (*delibação*) system, i.e. a process of individualized review through which foreign judgments would be admitted or not to produce their legal effects in the forum, including *res judicata* effects (Muchanga, *op.cit.*, 21). This confirms, along with other relevant provisions in the CCP (Article 497(4), 1094(1)), that foreign judgment do not enjoy *de plano* effect (automatic recognition) in Mozambique.

d) No review of the merits

As a matter of principle, review of the merits is not permitted, and the case law of the Supreme Court is fairly consistent on this point. This principle, however, admits two notable exceptions, as indicated in the decision: public policy and the so-called nationality privilege (Muchanga, *op. cit.*, at 21). As the present case clearly illustrates, review of the merits is only exceptionally engaged on public-policy grounds. By contrast, review of the merits becomes more relevant in connection with the nationality privilege, notably in the application of Article 1096(g). Here again, as will be shown below, the case law of the Supreme Court is far from turning this requirement into an insurmountable hurdle, even where the foreign decision (including arbitral awards) is rendered against a Mozambican national.

2. Requirements for the Recognition and Enforcement in Mozambique

According to Article 1101 of the CCP, the court dealing with recognition and enforcement requests should not only examine *ex officio* certain requirements (notably those relating to authenticity, public policy, and the nationality privilege) but should also, on its own motion, refuse recognition and enforcement if, upon examination of the case file, it appears that any of the other statutory requirements are not satisfied. For this reason, although the parties' submissions focused primarily on the fulfilment of one specific requirement, the Supreme Court nonetheless examined whether all the remaining conditions were met. This approach is consistent with the Court's established practice, which systematically undertakes a comprehensive review of all statutory requirements for recognition and enforcement.

Below is a brief overview of the recognition and enforcement requirements as set out in Article 1096 of the CCP, considered in light of the Supreme Court's practice.

a) Authenticity and intelligibility

The authenticity requirement relates essentially to the origin of the foreign

judgment (Muchanga, *op. cit.*, at 25). Typically, authenticity is verified through the process of legalization in accordance with the applicable legal provisions (notably Article 540 of the CCP). Supreme Court case law shows that the Court often requests the party seeking enforcement to provide the necessary legalization when it is not included in the initial application. As for intelligibility, this concerns the clarity and comprehensibility of the foreign decision (Muchanga, *op. cit.*, at 26). Several Supreme Court decisions indicate that this requirement applies particularly to the operative part of the judgment.

b) Finality

In Mozambique, courts generally recognise and enforce only foreign judgments that are final under the law of the State of origin as repeatedly confirmed by the Supreme Court. Proof of the finality of the foreign judgment takes the form of a certificate attesting that the judgment has become final and binding under the law of the country of origin. However, as the present case shows, the Supreme Court considered that finality is presumed even in the absence of documentary evidence establishing it. This presumption may nevertheless be rebutted by the respondent through the submission of appropriate evidence.

c) Indirect jurisdiction.

One of the most important clarifications concerns the standard by which the jurisdictional requirement is to be assessed. Contrary to what has been suggested in some scholarly writings,[ii] the jurisdiction of the foreign court must be assessed by reference to Mozambican rules of direct jurisdiction, in the sense that a foreign court is regarded as competent if, in comparable circumstances, Mozambican courts would have assumed jurisdiction. This approach is commonly described as the bilateralisation of rules of direct jurisdiction, or – more widely known – the mirror-image principle (Muchanga, *op. cit.*, at 28).

d) *Res judicata* and *Lis pendens,* or Conflicting Judgments and Proceedings

In the context of the recognition and enforcement of foreign judgments, the defence of *lis pendens* applies where a foreign judgment was rendered while proceedings were still pending before Mozambican courts, whereas the defence of *res judicata* applies where a Mozambican court has already rendered a final and binding judgment on the same matter. In such cases, the foreign judgment may be denied recognition and enforcement, as its admission would either undermine Mozambican proceedings or judgments, or eventually result in two contradictory final judgments producing effects within the Mozambican legal order (Muchanga, *op. cit.*, at 30).

The application of both the *lis pendens* and *res judicata* defences requires identity between the foreign and domestic actions with respect to the parties, the claim, and the cause of action (Article 498(1) of the CCP). Accordingly, the *res judicata* defence was not admitted when the party resisting enforcement of a foreign divorce judgment awarding parental authority and alimony invoked the existence of a Mozambican judgment that had only declared the dissolution of the marriage.

The significance of the present case lies in the Supreme Court's clarification that the *res judicata* defence should be assessed based on a comparison between the action adjudicated by the foreign court and the action previously decided by Mozambican courts, rather than between the review-and-confirmation proceedings and the local action.

e) Service and right to defence

While Article 1096(e) primarily refers to proper service, this provision is generally understood broadly to encompass not only the defendant's right to be duly informed of the proceedings but also the right to a genuine opportunity to be heard (Muchanga, *op. cit.*, at 31). This interpretation is confirmed by the present decision, in which the Supreme Court focused on the parties' opportunity to participate in the foreign proceedings. Case law shows that, in line with the wording of Article 1096(e), where Mozambican law dispenses with initial service, there is no need to verify whether the defendant was formally served. It also shows that defects or irregularities in service can be cured if the losing party actively participated in the proceedings before the foreign courts.

f) Public policy

In the present case, the Supreme Court found no violations of Mozambican public policy, understood in the literature as "international public policy" (*ordem pública internacional*), which concerns "the fundamental principles structuring the Mozambican legal order" (Muchanga, *op. cit.*, at 31–32). It is worth noting that, while the Supreme Court has recognized public policy as an exception to the principle prohibiting review of the merits, in other cases it has addressed public policy from the perspective of the effects (*efeitos*) of foreign judgments, which should not be intolerable for the Mozambican legal order.

g) Choice-of-law test or the privilege of nationality

This is one of the most emblematic requirements in the Mozambican enforcement regime inherited from Portuguese law. Under this provision, foreign judgments rendered against Mozambican nationals must not contravene Mozambican private law where, under Mozambican conflict-of-laws rules, Mozambican law would have applied. This is commonly known as the "privilege of nationality." (Muchanga, *op. cit.*, at 21, 31).

What is remarkable in Mozambican practice is that, despite the anachronistic nature of this requirement,[iii] it has played a relatively limited role. Case law shows that the privilege operates only if two conditions are met: (1) Mozambican law governs the dispute according to Mozambican conflict-of-laws rules; and (2) the judgment was rendered against a Mozambican national, i.e., the unsuccessful party in the foreign proceedings.

Accordingly, as the present decision shows, when the foreign judgment concerns only foreign parties, this provision does not apply. This approach is also extended to cases in which a foreign judgment cannot technically be regarded as rendered against a Mozambican national, such as non-contentious proceedings. In such situations, the Supreme Court has found the requirements of Article 1096(g) to be satisfied.

Second, and most importantly, the privilege applies only when Mozambican law should have been applied under Mozambican choice-of-law rules. Accordingly, if the foreign law applied by the court of origin corresponds to the law that would

be applicable under Mozambican rules, the privilege of nationality does not apply, even if the judgment is rendered against a Mozambican national. In these situations, the Supreme Court has frequently concluded that there is no inconsistency with Mozambican private law and that the requirement in Article 1096(g) is satisfied. The scope of this exception is considerable, notably in international commercial contracts, where party autonomy is generally recognized and fully upheld by Mozambican courts.[iv]

V. Concluding Remarks – Peculiarities of the Recognition and Enforcement Practice in Mozambique

As mentioned above, Mozambican law in the field of the recognition and enforcement of foreign judgments is of Portuguese origin. It therefore appears quite natural that Mozambican scholars, and even judges of the Mozambican Supreme Court, rely heavily on Portuguese case law and scholarly writings when interpreting and applying Mozambican law and the inherited Portuguese legal framework. This is more so given the scarcity of legal literature and scholarly writings in the field.

This state of affairs seems to justify the strong temptation to view the legal framework in force in Mozambique – as well as in other Lusophone countries, particularly in Africa[v] – through Portuguese lenses, which may lead one to assume that Mozambican private international law is identical to that applicable (or formerly applicable) in Portugal (except of course where Portugal has since moved beyond the rules left in its former colonies).

This approach nevertheless suffers from some serious shortcomings. First, due to the over-reliance on Portuguese literature and case law, the solutions developed by the Mozambican Supreme Court remain largely unknown. Second, such reliance also risks superimposing an external legal perspective on Mozambican judicial and practical realities. By way of illustration, the Portuguese legal framework governing the recognition and enforcement of foreign judgments is often portrayed in literature as allowing, under certain circumstances, a review of the merits and control over the law applied by the foreign court.[vi] These features have frequently been criticized as constituting a "serious obstacle to the recognition of foreign judgments" in Portugal.[vii] It has indeed been observed

that, in Portuguese practice, choice-of-law control operates so as to bar a significant number of enforcement cases.[viii] If one were to assume that a similar approach prevails in Mozambique, one would expect comparable obstacles to the recognition and enforcement of foreign judgments before Mozambican courts.[ix]

Available case law, however, presents a completely different picture. An examination of approximately 28 decisions of the Mozambican Supreme Court concerning the recognition and enforcement of foreign judgments between 2013 and 2025 shows that, excluding the few cases rejected on purely procedural grounds or subsequently withdrawn, the success rate of enforcement applications is remarkable: 100%.

Those cases also show that foreign judgments from various counties, including Germany, France, Spain, Portugal, England, South Africa, Australia, UAE (Dubai) and China, all were recognized and enforced, often without any particular difficulty, with the court sometimes simply enumerating the recognition and enforcement requirements and concluding that they were all satisfied. Moreover, although the nationality privilege is often examined in the Supreme Court's decisions, the available cases indicate that it has not constituted a serious obstacle to the recognition and enforcement of foreign judgments.

These observations highlight the importance of consulting local case law rather than relying solely on assumptions drawn from other jurisdictions. Careful study of domestic practice provides valuable insights for both legal scholars and practitioners,[x] and contributes to a more accurate understanding of how foreign judgments are recognized and enforced in practice, within their local legal context and environment.

Previous contributions:

1. **Online Symposium on Recent Developments in African Private International Law**, *by Béligh Elbalti & Chukwuma S.A. Okoli* (Introductory post)
2. **Recognition and Enforcement of International Judgments in Nigeria**, *by Abubakri Yekini & Chukwuma Samuel Adesina Okoli*
3. **The Recognition and Enforcement of Foreign Judgments within the CEMAC Zone**, *by Boris Awa*

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[i] M. Muchanga, who also a university lecturer, has been involved in many of reported foreign judgments enforcement cases, including the one commented on here.

[ii] See eg, R F Oppong, 'Private International Law and the African Economic Community: A Plea for Greater Attention' 55 *International & Comparative Law Quarterly* (2006) 917, explaining that the 'international jurisdiction of the foreign court will…be recognized only when the court of the forum did not claim jurisdiction of its own over the subject-matter'. The formulation suggests that the indirect jurisdiction of the foreign court would be denied whenever the jurisdiction of the Mozambican courts is justified according to its own rules of direct jurisdiction.

[iii] See F K. Juenger, 'The Recognition of Money Judgments in Civil and Commercial Matters' 36 *AJCL* (1988) 34.

[iv] On the issue of the law applicable to commercial contracts in Mozambique, see R Dias and C F Nordmeier, 'Angola and Mozambique', *in* D Girsberger et al. (eds.), *Choice of Law in International Commercial Contracts: Global Perspectives on the Hague Principles* (OUP, 2021) 265.

[v] Lusophone countries are countries or territories where Portuguese is an official language. African Lusophone countries include Mozambique, Angola, Cape Verde, Guinea-Bissau, São Tomé and Príncipe. Outside Africa they include, in addition to Portugal, Brazil, East Timor and Macau (China).

[vi] See eg S P. Baumgartner, 'How Well Do U.S. Judgments Fare in Europe?' 40 *The Geo. Wash. Int'l L. Rev.* (2008) 187, 228.

[vii] S P. Baumgartner, 'Understanding the Obstacles to the Recognition and Enforcement of U.S. Judgments Abroad' 45 *International Law and Politics* (2013) 978.

[viii] See C M D Da Silva, 'De la reconnaissance et de l'exécution des jugements étrangers au Portugal (hors du cqdre de l'application des conventions de Bruxelles et de Lugano)', *in* G Walter and S P. Baumgartner (eds.), *Recognition and Enforcement of Judgments Outside the Scope of the Brussels and Lugano*

Conventions (Kluwer Law International, 2000) 481.

[ix] See eg R Dias and C F Nordmeier, 'Private International Law of Contracts in Angola and Mozambique' 37 *Obiter* (2016) 138.

[x] In this sense also, A Boris, 'The Recognition and Enforcement of Foreign Judgments within the CEMAC Zone', on this blog.

From Deference to Objectivity: How Courts Are Rewriting the Commercial Reservation

By Taimoor Raza Sultan, Stockholm University

Introduction

The 1958 New York Convention *('NYC')* is widely regarded as international arbitration's most significant achievement. Having been ratified by over 160 states, , establishing a credible system of enforcement for arbitral awards. Yet the commercial reservation under Article 1(3), which allows the reserving state to limit the application of the *'Convention only to differences …. considered as commercial'* under its own national law, risks jeopardizing the uniformity of the convention. By domesticating the definition of commerciality, the reservation invites forum shopping and inconsistent enforcement.

The *CC/Devas (Mauritius) Ltd. v. Republic of India* brings this latent tension to the surface. Devas Multimedia secured awards totaling approximately $111

million against India after Antrix Corporation (the commercial arm of the Indian Space Research Organization) terminated a 2005 satellite spectrum lease agreement. Antrix cited 'essential security interests' requiring the S-band spectrum for India's defense forces and strategic public services. Relying on its settled domestic jurisprudence, India maintained that the Convention was inapplicable to BIT arbitrations, on the basis that investor–State disputes differ in nature from commercial arbitrations and implicate issues of public international law.

Enforcement attempts across Australia, the United Kingdom, and Canada achieved significantly different results, particularly in their respective approaches to defining commerciality under the convention. Australia strictly deferred to India's view, while Canada applied an objective commercial lens. The UK court refused to decide the commercial reservation issue, instead ruling primarily that India's NYC ratification does not waive sovereign immunity under s.2(2) SIA 1978 (*para 98*). This article compares the Australian and Canadian approaches, then proposes a '*enforceability-focused objective standard*' to limit abuse while preserving the reservation's purpose.

Australia's Deferential Approach

In *Republic of India v. CCDM Holdings, LLC [2025] FCAFC 2,* the Federal Court of Australia unanimously reversed the enforcement order issued by the primary judge, holding that India is immune under section 9 of the Foreign States Immunities Act 1985 as the enforcement of the award is limited by India's reservation under Article 1(3) of the Convention.

Furthermore, Article 1(3) creates a reciprocal obligation that even the non-reserving States like Australia must honor reservations declared by the reserving States in their mutual relationship *(para 65)*. The court characterized the BIT dispute as arising from '*public international law*' rights between the investor and the sovereign, and certainly not constituting private commercial relationship *(para 81)*. The Indian Cabinet's annulment decision was also motivated by the country's '*strategic requirements*', which reinforces the non-commercial nature of the transaction. It, therefore, concludes that India has not submitted to the jurisdiction of Australian courts under section 10(2) *(para 75)*.

Crucially, the respondent did not adduce evidence to contest the non-commercial

nature of the transaction *(para 76)*. In the absence of proof of Indian law to the contrary, the court applied the presumption that foreign law is the same as Australian law (Neilson v. Overseas Project [2005] HCA 54). On that basis, the dispute was characterized as non-commercial under Australian law. The court made clear, however, that reliance on any different characterization under Indian law would have required specific proof of the content and application of Indian law to rebut the presumption *(para 77)*. While this reflects a recognition of state sovereignty, the states could strategically reclassify market activities as policy-driven, which could frustrate investor expectations, undermining the pro-enforcement ethos of the New York Convention, and potentially deterring investment in reserving states like India.

Canada's Objective Approach

The Quebec Court of Appeal (COA) adopted a contrasting approach in *CC/Devas (Mauritius) Ltd v Republic of India* (2024 Quebec CA) by denying immunity to India under both the waiver and commercial activity exception of the State Immunity Act 1985 (sections 4 & 5), and permitted enforcement and asset seizure.

The court primarily based its decision and analysis on the commercial activity under section 5. Contextually, the BIT essentially involved the commercial leasing of India's spectrum capacity which aimed at *'encouraging foreign investment'* and can be termed as a *'trade agreement' (para 42)*. The court did not consider the annulment grounds of India's National Security Council materially relevant in the waiver determination. Instead, it focused more on economic substance, investment structure, and financial return of the deal. Such an approach also aligns more closely with the historically expansive interpretation of the commercial reservation under the New York Convention adopted by Indian courts. For instance, in *R.M. Investment and Trading Co. v. Boeing Co.* (1994), the court dealt with a state-level consultancy agreement for the sale of Boeing aircraft in India, and specifically remarked, *'the expression 'commercial' must be construed broadly having regard to the manifold activities which are part of international trade today' (para 12).* The Canadian court has interpreted the deal similarly, appreciating its commercial nature under current modalities of international trade.

The Canadian approach upholds the pro-enforcement approach of NYC, but it

risks under-appreciating the plain language of Article 1(3), which mandates reference to the domestic law of the reserving State.

Towards an Enforceability-Focused Objective Standard

The Devas saga reveals that the central fault line is not whether Article 1(3) mandates reference to the law of the reserving State, it plainly does, but rather how enforcing courts ought to apply that mandate. Australia's highly deferential approach allows the reserving state's self-characterization, casting a BIT dispute as a subject of public law or invoking annulment as a matter of public policy, to determine the scope of the Convention's applicability. Canada's objective approach, by contrast, considers the substance of the transaction by analyzing what the parties actually accomplished, including the investment of capital through commercial structures in order to receive financial gain.

The courts could, instead, adopt a pro-enforcement objective standard test without entailing a departure from the application of reserving state's law. This approach requires the objective assessment of facts in answering the question of whether the dispute arise from the State's market participation or exercise of core public authority? Courts may assess (i) the nature of act giving rise to the dispute, and (ii) nature of parties' relationship at the time the investment was made.

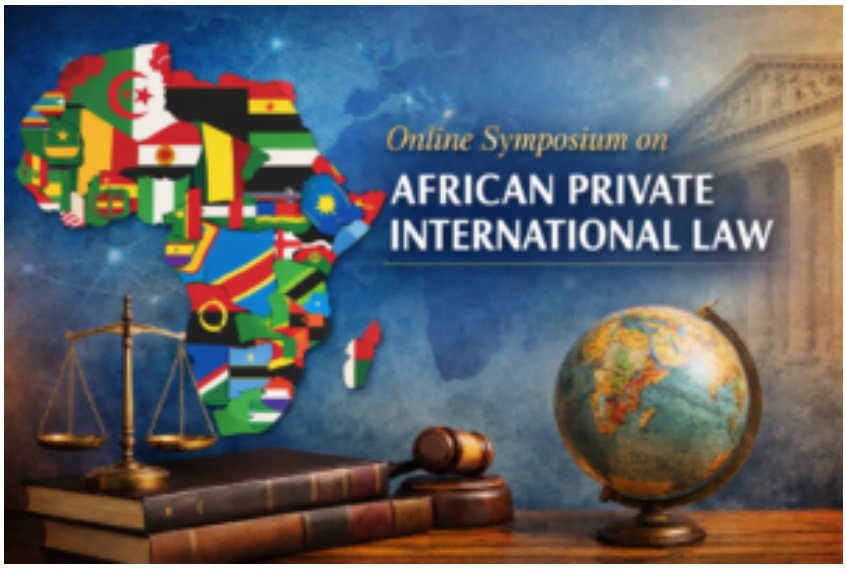
In Devas, Antrix had entered the satellite capacity market as a commercial counterparty. The subsequent BIT claim merely internationalized the consequences of that commercial decision. Indian courts have themselves consistently treated contracts involving state-owned enterprises as commercial in nature under the Arbitration and Conciliation Act 1996. Therefore, an objective standard gives effect to Article 1(3)'s reference to Indian law, while resisting post-dispute recharacterization of commercial conduct.

Conclusion

Such an objective approach is consistent with the pro-enforcement mandate of the Convention, supporting a narrow construction of the reservation, and aligns with a liberal understanding of commercial activity in contemporary business. Excessive deference risks abuse, whereas an objective approach promotes predictability allowing investors to structure transactions around identifiable commercial elements while preserving space for genuine exercises of sovereignty,

such as taxation and non-market regulation.

Online Symposium on Recent Developments in African PIL (II) – The Recognition and Enforcement of Foreign Judgments within the CEMAC Zone



*As part of the second online symposium on **recent developments in African private international law**, we are pleased to present the second contribution, kindly prepared by **Boris Awa (Kigali Independent University, Rwanda)**, on **The Recognition and Enforcement of Foreign Judgments within the CEMAC Zone**.*

I. Introduction

The Central African Economic and Monetary Community (CEMAC) is a regional intergovernmental organization comprising Cameroon, the Central African Republic, Chad, the Republic of Congo, Equatorial Guinea and Gabon. It was created by the Treaty establishing CEMAC on 16 March 1994 and revised in 2008 (Hereinafter referred to as the CEMAC Treaty). All CEMAC Member States also belong to the Organisation for the Harmonisation of Business Law in Africa (OHADA),[i] which aims to harmonise business law among its Member States. OHADA is composed of 17 Member States, all with legal systems rooted in the civil law tradition.

As regional integration and the harmonization of laws in CEMAC deepened, issues related to the recognition and enforcement of judgments became more prominent than ever before. This came in handy through the entry into force of the Judicial Cooperation Agreement of 28 January, 2004 (hereafter the "CEMAC Agreement").[ii] Closely linked to the CEMAC Agreement are other multilateral initiatives, such as the General Convention on Judicial Cooperation in matters of Justice, 12 September 1961 in Tananarive (hereafter the "Tananarive Convention")[iii], as well as bilateral treaties and domestic legislations of Member States, all of which are relevant in this context.

Against this background, we shall in turn discuss the conditions for the recognition of judgments under the laws of member States (II), under the relevant multilateral instruments, namely the Tananarive Convention and the CEMAC Agreement (III), and the hurdles that impede the recognition of foreign judgments under the CEMAC Agreement (IV).

II. Recognition and Enforcement under Domestic Legal Regimes

Most Member States in CEMAC have black letter laws on the recognition and enforcement of judgments. The table below outlines the relevant laws and provisions governing this area in each CEMAC Member State.

Jurisdiction	Code/Act	Provision

Cameroon	Law No 2007/001 of 19 April 2007 to Institute a Judge in Charge of Litigation Related to the Execution of Judgements and lay down Conditions for the Enforcement in Cameroon of Foreign Court Decisions, Public Acts and Arbitral Awards	Articles 5-9
Gabon	Civil Code (1972)	Articles 71-77
	Civil Procedure Code (1977)	Articles 967-971
Tchad	N/A	N/A
Central African Republic	Code of Civil Procedure (1991)	Articles 469-471
Equatorial Guinea	Spanish Civil Procedure Code (1881)	Articles 951-958
The Republic of Congo	Code of Civil, Commercial, Administrative and Financial Procedure (1983) (CCCAFP).	Articles 298-310

It emerges that five of the six CEMAC Member States have codified provisions on the recognition and enforcement of judgments. Moreover, the conditions for the recognition and enforcement of judgments in three Member States (namely, Cameroon, Gabon and Central African Republic) are similar. These include indirect jurisdiction, the right of defence, inconsistent judgments, public policy and finality. On the other hand, Congolese law provides no formal conditions for the recognition and enforcement of foreign judgments. In the Republic of Congo, the judgment debtor must seize the court that would have had subject matter jurisdiction to hear the claim, to render the foreign judgment executory in the Republic of Congo (art. 298 of the CCCAFP).

Apart from the aforementioned requirements for recognition and enforcement common to CEMAC member states, only Gabonese law (article 75 of the Civil Code) recognizes reciprocity as a condition for the enforcement of foreign

judgments.

III. Recognition and Enforcement under the Applicable International Instruments

Two principal legal instruments govern the recognition and enforcement of judgments in the CEMAC zone: the 1961 Tananarive Convention and the 2004 CEMAC Agreement.

1. The Tananarive Convention

The Tananarive Convention presents the first efforts towards the harmonisation of judgment enforcement in francophone Africa. This convention mirrors the zeal to set up a common legal regime among Francophone African countries on judgement enforcement immediately after obtaining their independence.

The Tananarive Convention provides five (5) conditions for the enforcement of judgments in contentious and non-contentious decisions in civil and commercial matters under the treaty. These conditions are set out in article 30 and include:

(1) competent court according to the rules set out in the Convention (art. 38),

(2) the decision was rendered following the laws on conflict of law applicable in the state of where enforcement in sought,

(3) the judgment has, under the law of the state of origin, acquired the force of res judicata and is capable of enforcement

(4) the right of defence must have been respected and

(5) the judgment is not contrary to public order in the state where enforcement is sought, and does not conflict with a final judicial decision rendered in that State.

2. The CEMAC Agreement

The CEMAC Agreement is the first legal instrument establishing a unified legal

framework for the enforcement of judgments within the CEMAC zone. Based on the principle of supremacy of community legislation over national laws, it follows that the CEMAC Agreement sits above local legislations in the hierarchy of legal norms. Thus, the legislation to be applied by the courts for the recognition and enforcement of judgments within the zone should be derived from CEMAC law – namely, the CEMAC Agreement – rather from local legislations.

There are five (5) conditions for the recognition and enforcement of judgments under the CEMAC Agreement. These requirements are set out in article 14 of the Agreement which states that the judgement must satisfy the following conditions:

(1) the decision emanates from a competent court of the country where it was rendered

(2) the decision is not contrary to case law in the member state where enforcement is sought,

(3) the decision has acquired the force of res judicata

(4) the judgment was rendered in a fair trial that guarantees the equitable presentation of parties, and

(5) the judgement is in conformity with public policy in the member state where enforcement is sought.

3. Brief Comparative Overview of the Two Instruments

While the conditions for allowing enforcement under the CEMAC Agreement may appear similar to those provided under the Tananarive Convention, several differences exist. Substantively, the Tananarive Convention allows the control of the law applied in the state where enforcement is sought, but this is not the case with the CEMAC Agreement. Also, while the CEMAC Agreement provides for the determination of the competent court based on the law of the rendering state, the Tananarive Convention provides controlling criteria for the determination of competent court in article 38 based on the type of civil or commercial dispute. Procedurally, under the CEMAC Agreement, the judgment creditor, by a petition (*requête*), seizes the president of the court in the place where enforcement is sought, provided that the court would have had subject matter jurisdiction to hear

the dispute (art. 16). Under the Tananarive Convention, the request for enforcement is brought, by petition (*requête*), before the president of the court of first instance or a corresponding jurisdiction at the place where enforcement is sought (art. 32).

It is worth noting that article 37 of the CEMAC Agreement abrogates treaties, bilateral agreements, and conventions among CEMAC members states insofar as they are contrary to the CEMAC Agreement. Thus, the Tananarive Convention ceases to be a source of law for purposes of the recognition and enforcement of judgments within the CEMAC zone to the extent that its provisions conflict with the CEMAC Agreement.

IV. Hurdles Besetting the Recognition of Foreign Judgments within the CEMAC Zone

1. Fragmentation of laws

The CEMAC region is characterized by the coexistence of multiple applicable legal frameworks governing the recognition and enforcement of foreign judgments, including domestic laws, bilateral conventions, multilateral conventions (notably the CEMAC Agreement and the Tananarive Convention). This raises questions as to the rationale for the continued conclusion of bilateral treaties on the recognition and enforcement of judgments, given that the enforcement regimes found under various instruments in the region are sometimes similar, with few differences.

2. Judicial neglect of the CEMAC Agreement

Given the superiority of CEMAC law over local legislation, the enforcement of judgments within the CEMAC zone should be governed by the CEMAC Agreement rather than by the domestic laws of the Member States. In practice, however, courts in several CEMAC Member States have not consistently adhered to this principle. Instead, judges often resort to domestic legislation with which they are more familiar when dealing with the recognition and enforcement of judgments

from member states within the CEMAC zone.

This approach has received judicial endorsement. in a number of cases decided by Cameroonian courts. One such example is *La succession Levy représentée par ses administrateurs, sieurs Levy Jesus Cyril et Levy Ishaï, commerçants demeurant à Bangui en République Centrafricaine,* which concerned the recognition and enforcement in Cameroon of a jugdment from the High Court in Bangui (Central African Republic) attributing letters of administration (*administrateurs)* to the plaintiffs. In that case, the court applied Cameroonian domestic law rather than the CEMAC Agreement (*Court of First Instance Douala-Bonanjo, Ordonnance of 31 January 2019 (Unreported)*).

A similar approach was followed in *Dame Tchagang Edo Ovono N'do Eyebe, Sieur Sandjong Mezui Verdier C/ Monsieur le Greffier en Chef du TPI Douala Bonanjo*, where a Gabonese judgment appointing the plaintiff as the heir and successor of the deceased Gabonese national was recognised and enforced in Cameroon on the basis of domestic law, in disregard of the CEMAC Agreement (*Court of First Instance Douala-Bonanjo, Ordonnance N°42 of 19 February 2019 (Unreported)*). Needless to say that the judgments referred to above are, in principle, legally flawed, as they disregard the hierarchy of norms established by the CEMAC Treaty.

Also, despite the fact that article 37 of the CEMAC Agreement abrogates treaties, conventions among others among member states which are contrary to the CEMAC Agreement, some courts in Chad continue to use the Tananarive Convention against the CEMAC Agreement. The Chadian case of *Etat du Cameroun, Représenté par Monsieur le Ministre des Finances C/ Fotso Yves Michel* mirrors this example where the Chadian High Court of Ndjamena enforced a judgment from the Supreme Court of Cameroon in Chad using the Tananarive Convention thereby disregarding the CEMAC Agreement (*High Court of Ndjamena, Repertoire No 78/2024 of 23 July 2024 (Unreported)*).

Several factors may explain this state of affairs. One particularly relevant in our view relates to is the scarcity of sufficient legal literature, with a regional or community-law focus on the recognition and enforcement of foreign judgments within the CEMAC zone. Conflict of law scholarship in the region continues to place predominant emphasis on domestic private international law, often overlooking the relevant community-law framework. As a result, judges are

deprived of adequate doctrinal guidance, and developments in CEMAC law in this field often go unnoticed.

V. Conclusion

The reception and application of the rules governing the mutual recognition and enforcement of judgments within the CEMAC zone is not uniform. While some judges in Cameroon disregard the CEMAC Agreement and apply domestic legislation in enforcing judgments rendered from CEMAC member states, others in Chad continue to rely on the Tananarive Convention. As a result, despite of its twenty-one years (21) of existence, the CEMAC Agreement has – to the author's best knowledge – yet to be effectively tested in judicial practice. This situation stems from the complexity of the applicable legal frameworks – domestic, bilateral, multilateral and regional integration frameworks – which operate concurrently.

Against this backdrop, it is recommended that academics within the CEMAC zone engage more actively with regional case law, increase scholarly output, and help raise the visibility of legal developments in the region. Such efforts would provide judges with doctrinal guidance and foster the development of private international law in the region in line with international standards and best practices.

Previous contributions:

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[i] For an overview from the perspective of models of trust management in private international, see Matthias Weller, '"Mutual Trust": A Suitable Foundation for Private International Law in Regional Integration Communities and Beyond?' 423

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[ii] On CEMAC and the 2004 CEMAC Agreement, see Weller, *op. cit.*, 184 ; E-A T. Gatsi, 'L'espace judiciaire commun CEMAC en matière civile et commerciale' 21 *Uniform Law Review* (2016) 101.

[iii] Ratified by 12 African States including, Cote d'Ivoire, Benin, Burkina-Faso, Madagascar, Mauritania, Niger, Senegal and all the CEMAC Member States, except for Equatorial Guinea. This is likely because Equatorial Guinea had its independence seven years after the adoption of the Convention. On this Convention, see Weller, *op. cit.*, 199.

Article V(1)(e) of the 1958 New York Convention in Light of a Decision of the Turkish Court of Cassation

Posted on behalf of Erdem Küçüker, an attorney-at-law registered at the Istanbul Bar Association and a private law LL.M student at Koç University. Mr. Küçüker specializes in commercial arbitration, arbitration-related litigation and commercial litigation, and acts as secretary to arbitral tribunals.

Article V of the 1958 New York Convention ("NYC") lists the grounds of non-enforcement of a foreign arbitral award. Accordingly, Article V(1)(e) provides that when "[t]*he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made*" the award's enforcement may be refused.

In 2024, the Turkish Court of Cassation quashed the lower courts' decision that declared an International Centre for Dispute Resolution of the American Arbitration Association ("ICDR") award as enforceable, stating that the courts

should have further investigated whether the award is final, enforceable and binding (Court of Cassation, 11th Civil Chamber, Docket No: E. 2022/5986, Decision No: K. 2024/2257, Date: 20.03.2024). This article explains the decision of the Turkish Court of Cassation and comments on the final, enforceable and binding character of an arbitral award in relation to Article V(1)(e) of the NYC.

Decisions of the Lower Courts and the Court of Cassation

The underlying dispute relates to the enforcement of an ICDR award with the seat located in the United States. In the arbitral award, the three respondents were ordered to pay a certain amount to the claimant. The claimant sought the enforcement of this arbitral award in Türkiye.

In the First Instance Court proceedings, the respondents did not submit an answer to the statement of claim. The court noted, amongst others, that (i) all documents in the arbitration, including the award, were validly notified to respondents, (ii) the award is final as per Article 30 of the ICDR Arbitration Rules ("Rules"), (iii) there is no means of appeal against the award, (iv) the respondents did not argue for the denial of the enforcement request. Thus, the court granted the enforcement of the award.

The respondents appealed this decision by claiming that they did not duly receive notification on the arbitration proceedings. However, the Regional Court of Appeal, as the second instance court, agreed with the first instance court that the respondents were duly notified on the proceedings and the award. The Regional Court of Appeal also held that it is the respondent who bears the burden of proof to establish that the award is not final or non-binding. It further incorporated the findings of the first instance court and stated that the award is final and binding according to the Article 30 of the Rules. The Regional Court of Appeal thereby dismissed the appeal on the first instance court decision.

Following the final appeal by the respondents, the was is brought before the Turkish Court of Cassation ("Court"). The Court initially referred to Articles 60-61 of the Turkish Private International Law Act numbered 5718 ("TPILA") and noted that to enforce a foreign arbitral award, the latter should be final and this requirement shall be considered by the court *ex officio*. The Court concluded that the finality of the award was not clearly established, based on the information available in the case file. Thus, the Court revoked the lower courts' decision,

holding that the lower court shall render a decision following a further investigation as to whether the award is final, enforceable and binding.

Comments

Article V(1)(e) of the NYC provides that:

"*Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that* […] [t]*he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made*".

Accordingly, this provision lists three grounds for the refusal of the enforcement of a foreign arbitral award, which are (i) the non-binding character of the award, (ii) the setting aside of the award and (iii) the suspension of the enforcement of the award. NYC provides that these should be established by the party against whom the enforcement is sought.

In relation to the first of the said grounds, an award shall be deemed to be binding if there is no possibility of appeal on merits. Parties can freely characterize an arbitral award as binding between them. This can be made through an explicit agreement in the arbitration clause. The parties can also refer to arbitration rules or laws, which govern that the arbitral award shall be binding. If the parties have such an agreement, the award shall gain binding character in the sense of Article V(1)(e) of the NYC.

In relation to the "*enforceable character*" of the award, an arbitral award shall be deemed as enforceable, once it is rendered unless the arbitration agreement/rules/laws provide otherwise,. Some jurisdictions provide remedies against the award, in which case the competent authority may decide to suspend an award's enforcement.

In terms of the *final character*, an award shall be deemed as final if, (i) there are no possible remedies foreseen against the award or parties waived to resort to such remedies, or (ii) parties initiated these remedies and these are rejected. Notably, for this ground, the NYC considers whether the award is set aside or not.

In the underlying dispute, the principle question discussed is whether the award was final, enforceable and binding on the parties. Before, analysing the binding, enforceable and final character of an award it should be noted that in the present case the Court's application of TPILA to revoke the lower courts' decision was systematically wrongful. Türkiye and the USA (i.e., the seat of arbitration) are parties to the NYC. As per Article 90(5) of the Constitution of the Republic of Türkiye and Article 1(2) of the TPILA, the provisions of the NYC prevail over the TPILA. Thus, the author considers that the Court should have applied the provisions of the NYC, instead of the TPILA.

Regarding the determination of the binding, enforceable and final character of an award, the lower courts relied on Article 30 of the Rules (2014 version), which provides under its paragraph 1 that:

"*Awards shall be made in writing by the arbitral tribunal and shall be final and binding on the parties.* […] *The parties shall carry out any such award without delay and, absent agreement otherwise, waive irrevocably their right to any form of appeal, review, or recourse to any court or other judicial authority, insofar as such waiver can validly be made.* […]".

Starting with the *binding character*, in the present case, the parties had agreed in the arbitration agreement that the Rules shall be applicable in the arbitration proceedings. As stated above, Article 30 of the Rules provide that the award shall be binding on the parties. Consequently, in the author's view, unlike the Court's findings, this gives the award the binding character and the respondents did not establish the contrary.

In terms of the *enforceable character*, the respondents did not seem to argue that the award's enforcement is suspended. Thus, the author considers that the award is enforceable as well.

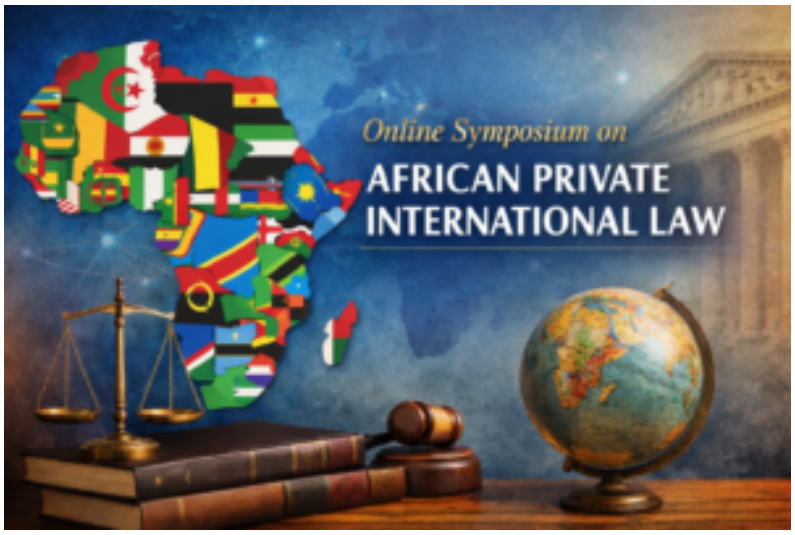
For the *final character*, Article 30 of the Rules, as agreed between the parties, provide that the award shall be final and the parties waive any form of appeal against the award. The validity of such waiver can be further discussed in light of the applicable law. Notwithstanding this, as explained above, the NYC places emphasis on whether the award is set aside, and it is the respondent who carries such burden of proof. In the case at hand, respondents neither argued that they brought a setting aside action against the award nor that the latter was set aside.

Thus, the author is of the view that the final character of the award was also established in the case at hand, unlike the ruling of the Court.

To summarize, the author initially finds that the Court's application of the TPILA, instead of the NYC, was systematically wrongful in light of the Turkish Constitution Article 90. Additionally, the lower courts' decision on the award's binding and enforceable character was rightful, which, in the author's view, did not require any further investigation. In terms of the finality of the award, the lower courts' reliance to the arbitration rules may be debated; however, since the respondents did not prove that the award was set aside, the author argues that the award should have been regarded as final and binding on this final ground as well.

For further discussions on the topic, see also: Erdem Küçüker, '*Binding and Final Character of Arbitral Awards in the Enforcement of Foreign Arbitral Awards in Türkiye – Recurring Need for Clarity*', Daily Jus Blog, 4 November 2025 (available at: https://dailyjus.com/world/2025/11/binding-and-final-character-of-arbitral-awards-in-the-enforcement-of-foreign-arbitral-awards-in-turkiye-recurring-need-for-clarity).

Online Symposium on Recent Developments in African PIL (I) – Recognition and Enforcement of International Judgments in Nigeria



As previously announced, we are launching the second online symposium on ***recent developments in African private international law****. As part of this symposium, a series of blog posts addressing various aspects of recent developments in African private international law will be published on this platform over the coming days.*

We open the series with a blog post by Abubakri Yekini (Senior Lecturer in Law at the University of Manchester) and Chukwuma Samuel Adesina Okoli (Assistant Professor in Commercial Conflict of Laws at the University of Birmingham and Senior Research Associate at the Centre for Private International Law in Emerging Countries at the University of Johannesburg), focusing on ***the recognition and enforcement of international judgments in Nigeria.***

1. Introduction

Questions surrounding the recognition and enforcement of judgments have become increasingly prominent in Nigeria, both in academic writing and in practice (Yekini, 2017; Okoli and Oppong, 2021; Olawoyin, 2014; Adigun, 2019; Bamodu, 2012; Olaniyan, 2014; Amucheazi et al, 2024; PN Okoli, 2016). This development is not surprising. Nigerian individuals, companies, and public authorities are now routinely involved in disputes with cross-border elements, whether arising from international trade, investment, migration, or human rights litigation.

Nigeria operates a common law system governed by a written Constitution. The

Constitution carefully allocates governmental powers among the three branches of government. Section 6 vests judicial power in the courts, while section 4 assigns legislative power to the National Assembly and State Houses of Assembly. Courts therefore play a central role in the interpretation and development of the law, but always within clearly defined constitutional limits. The Constitution and statutes enacted by the legislature form the bedrock of domestic law.

This constitutional structure has direct implications for the status of international law in Nigeria. Section 12 of the Constitution makes it clear that treaties and other international legal instruments do not become part of Nigerian law merely because Nigeria has signed or agreed to them at the international level. For such instruments to have domestic force, they must be enacted by an Act of the National Assembly. This position has long been settled and repeatedly affirmed by the courts (see *Abacha v Fawehinmi* (2000) NGSC 3).

Private international law in Nigeria largely remains judge-made, inherited from English common law as part of the received English law. Within this framework, courts have articulated principles governing when foreign judgments may be recognised, when they may be enforced, and when enforcement must be refused (*Toepher Inc of New York v. Edokpolor* (1965) All NLR 301; *Macaulay v RZB of Austria* (2003) 18 NWLR (Pt. 852) 282; *Mudasiru & Ors v. Onyearu & Ors* (2013) LPELR; *GILAR Cosmetics Store v Africa Reinsurance Corporation* (2025) LPELR-80701 (SC)).

Alongside these common law principles, there are two principal statutory regimes dealing with the recognition and enforcement of foreign judgments (*Willbros West Africa Inc v Mcdonnel Contract Mining Ltd* (2015) All FWLR 310, 342). The statutory registration scheme is governed by the Reciprocal Enforcement of Judgments Act 1922 ("1922 Ordinance") and the Foreign Judgments (Reciprocal Enforcement) Act 1960 ("1960 Act"), but the latter is not yet in force (*Macaulay v RZB of Austria* (2003) 18 NWLR (Pt. 852) 282; *Ekpenyong v. A.G and Minister of Justice of the Federation* (2022) LPELR-57801(CA)). These frameworks have traditionally been applied to judgments of courts established under the laws of foreign states.

More recently, Nigerian courts have been confronted with judgments of international and regional courts created by treaty, most notably the ECOWAS Court of Justice (*CBN v Gegenheimer & Anor (*2025) LPELR-81477 (CA)). These

courts are not courts of foreign states in the ordinary sense. Their jurisdiction derives from agreements between states, and they operate within legal systems that exist alongside, rather than within, national judicial structures. The fact that the ECOWAS Court sits in Abuja does not alter this position; it is not part of the Nigerian judicature as enumerated under section 6(5) of the Constitution.

Judgments of international courts therefore raise questions that are different in kind from those posed by judgments of foreign national courts. International courts increasingly hear cases involving Nigerian parties and Nigerian institutions. Claimants who succeed before such bodies understandably would seek to enforce their judgments before Nigerian courts, particularly where the international legal framework does not provide a direct enforcement mechanism.

It is against this background that this short article examines the recognition and enforcement of international court judgments in Nigeria. It does so by situating recent judicial developments within Nigeria's existing constitutional and legal framework and by questioning whether current approaches are consistent with the limits imposed by that framework.

2. The Existing Enforcement Frameworks in Nigerian Law

There are two main mechanisms for recognition and enforcement of foreign judgments in Nigeria. A brief overview of these mechanisms is necessary to appreciate the kinds of judgments Nigerian law already recognises and, equally importantly, those it does not.

a. Common law enforcement of foreign judgments

At common law, a foreign judgment may be enforced in Nigeria by bringing an action on the judgment itself. The judgment is treated as creating an obligation, often described as a debt, which the judgment creditor may seek to recover (*Toepher Inc of New York v. Edokpolor* (1965) All NLR 301; *Willbros West Africa Inc v Mcdonnel Contract Mining Ltd* (2015) All FWLR 310, 342). Over time, Nigerian courts have identified conditions that must be satisfied before this route is available. These include whether the foreign court had jurisdiction over the

judgment debtor, whether the judgment is final and conclusive, and whether it was obtained in circumstances consistent with basic requirements of fairness (Yekini; Okoli and Oppong)).

This common law route has always been limited in scope. It was developed to deal with judgments of foreign national courts operating within recognised state legal systems. Its underlying assumptions are rooted in territoriality and sovereignty. Jurisdiction at common law is assessed through concepts such as presence, residence, or submission within the territory of a sovereign state (*Adams v. Cape Industries plc* [1990] Ch. 433). Service of process, which founds the jurisdiction of the foreign court, is itself an exercise of sovereign authority.

The common law therefore assumes a relationship between two national legal orders: the foreign court that issued the judgment and the Nigerian court asked to give it effect. International courts do not fit easily within this framework. They are not organs of any single state. Their authority derives from treaties through which states agree to submit particular categories of disputes to an international judicial body. The legal force of their judgments exists, first and foremost, at the international level. Whether such judgments can have domestic effect depends on how each state structures the relationship between its domestic law and international obligations.

Some commentators have suggested that common law principles could be extended to accommodate international court judgments (Adigun, 2019). Others have acknowledged this possibility while also highlighting the uncertainties it would create (Oppong and Niro, 2014). Whatever the merits of these arguments, the critical point for present purposes is that the common law enforcement of judgments was never designed with international courts in mind. Extending it in this direction would require courts to resolve questions for which the common law offers no clear answers. Which international courts would qualify? Would ratification of the relevant treaty be sufficient, or would domestication be required? What defences would be available, and whose public policy would apply? (Oppong and Niro).

In the absence of legislative guidance, courts would be left to answer these questions on an ad hoc basis. That would place courts in the position of deciding which international obligations should have domestic force and on what terms. In Nigeria’s constitutional framework, that is a role more properly reserved for the

legislature. Unlike jurisdictions where courts are constitutionally mandated to engage in continuous development of the common law, Nigerian courts have traditionally exercised caution, particularly where the subject matter is affected by express constitutional provisions such as section 12 (cf Art 39(2) of the Constitution of the Republic of South Africa, 1996; *Government of the Republic of Zimbabwe v Fick 2013 (5) SA 325 (CC)* where the South African Constitutional Court enforced a judgment of the Southern African Development Community Tribunal against Zimbabwe by developing the common law regime. See also the Zimbabwean case of *Gramara (Private) Ltd v Government of the Republic of Zimbabwe,* Case No: X-ref HC 5483/09 (High Court, Zimbabwe, 2010).

b. Statutory regimes for foreign judgments

The limitations of the common law action on a judgment have long been recognised. Because the judgment creditor must commence fresh proceedings, jurisdiction must be established against the judgment debtor, and procedural obstacles may delay or frustrate enforcement (Yekini, 2017; Okoli and Oppong). To address these concerns, Nigerian law provides for statutory registration of foreign judgments in defined circumstances.

Two principal statutes govern this area. The first is the Reciprocal Enforcement of Foreign Judgments Ordinance 1922, Cap. 175, Laws of the Federation of Nigeria, 1958 ("1922 Ordinance"). This statute applies on a reciprocal basis to judgments from a limited number of jurisdictions, including the United Kingdom Ghana, Sierra Leone, The Gambia, Barbados, Guyana, Grenada, Jamaica, Antigua and Barbuda, St Kitts & Nevis, St Lucia, St Vincent, Trinidad & Tobago, Newfoundland (Canada), New South Wales and Victoria (Australia). Its scope is narrow and largely historical, but it remains in force.

The second is the Foreign Judgments (Reciprocal Enforcement) Act 1960, Cap. F35, Laws of the Federation of Nigeria, 2004 ("1960 Act"). The Act was intended to replace the 1922 Ordinance and to provide a more comprehensive framework for reciprocal enforcement. It proceeds on the basis of reciprocity. Judgments from foreign countries may be registered and enforced only where the Minister of Justice is satisfied that reciprocal treatment will be accorded to Nigerian judgments and issues an order designating the relevant country and its superior

courts (section 3(1)(a)).

Although Nigerian courts have, in practice, permitted registration under the 1960 Act notwithstanding the absence of formal designation (*Kerian Ikpara Obasi v. Mikson Establishment Industries Ltd* [2016] All FWLR 811), the structure of the Act would still not accommodate international courts judgments. It is concerned with judgments of courts of foreign states. It does not purport to regulate the enforcement of decisions of international courts created by treaty. The requirement of designation reflects a deliberate choice to tie enforcement to prior executive action i.e designation, rather than leaving the matter to judicial discretion. A similar conclusion was reached by the Ghanaian court in *Chude Mba v The Republic of Ghana*, Suit No HRCM/376/15 (decided 2 February 2016), where the applicant sought to enforce an ECOWAS Court judgment in Ghana. The court noted that "the ECOWAS Community Court is not stated as one of the courts to which the legislation applies" (see Oppong, 2017) for a fuller discussion of the case).

c. Treaty-based enforcement

Beyond these reciprocal regimes, Nigerian law recognises that international judgments may be enforceable where the National Assembly has chosen to give direct effect to international obligations through legislation. Arbitration provides the clearest illustration.

Nigeria signed the ICSID Convention in 1965 and enacted the International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act in 1967 to give domestic effect to its obligations. That Act provides that ICSID awards are enforceable as if they were judgments of the Supreme Court of Nigeria. The result is a clear and mandatory enforcement regime that leaves little room for doubt or judicial improvisation. A similar approach is reflected in the Arbitration and Mediation Act 2023, which governs the recognition and enforcement of international arbitral awards more generally.

These examples reflect the dualist framework set by the Constitution. Where international obligations are intended to produce direct domestic effects, legislation provides the necessary legal authority. The legislature defines the scope of enforcement and the procedures to be followed. Courts are then required

to apply the law as enacted. Therefore, it is crystal clear that Nigerian law has always treated the enforcement of judgments as a matter requiring domestic legal framework. This provides the backdrop against which the enforcement of international court judgments must be assessed.

3. CBN V. Gegenheimer & Anor (2025) LPELR-81477(CA) – The Nigerian Case

In May 2025, the Nigerian Court of Appeal had the opportunity, for the first time as far as we are aware, to engage directly with the question of the enforcement of international court judgments in Nigeria. The case arose from a monetary judgment of ?63,650,925.00 and USD 10,000 made by the ECOWAS Court of Justice against Nigerian authorities following a successful human rights claim. The judgment creditor subsequently approached the Federal High Court to register and enforce that award, which ultimately led to garnishee proceedings against funds held by the Central Bank of Nigeria.

For present purposes, the central issue was whether Nigerian courts had jurisdiction to enforce a judgment of the ECOWAS Court. More specifically, one of the complaints before the Court of Appeal was whether the 1st Respondent had complied with the conditions precedent for the enforcement the ECOWAS judgment, notwithstanding the requirements stated in section 4 of the 1960 Act, particularly the requirement relating to the conversion of foreign currency into Naira, and whether the judgment could be enforced in the absence of express domestic legislation authorising such enforcement.

The Court of Appeal answered these questions in the affirmative. In doing so, it reasoned as follows:

> *It is of common knowledge that the ECOWAS Court of Justice, established in 1991 and located in Abuja, hears cases from West African States, including Nigeria. It was created pursuant to Articles 6 and 15 of the Revised Treaty of ECOWAS. Its organisational framework, functioning, powers, and applicable procedures are set out in Protocol A/P1/7/91 of 6 July 1991; Supplementary Protocol A/SP21/01/05 of 19 January 2005; Supplementary Protocol A/SP.2/06/06 of 14 June 2006; Regulation of 3 June 2002; and Supplementary Regulation C/Reg.2/06/06 of 13 June 2006. In other words, its jurisdiction*

> *covers Nigeria. Accordingly, the argument by learned counsel for the Appellant that Nigeria did not domesticate the ECOWAS Court Treaty, Protocol, and Supplementary Protocols is lame.*

The Court further observed that the ECOWAS Court Protocol, particularly the 1991 Protocol as amended by the 2005 Supplementary Protocol, establishes the ECOWAS Community Court of Justice as the principal legal organ of ECOWAS, outlines its mandate, jurisdiction, functioning, and procedures, grants it competence over human rights violations within member states, and allows individuals to approach the Court directly without exhausting local remedies.

The Court also upheld the trial court's conclusion that non-compliance with section 4(3) of the 1960 Act does not rob the court of jurisdiction to enforce the judgment.

What appears clear from the decision is that the ECOWAS judgment was effectively registered and enforced on the basis of the ECOWAS Supplementary Protocol A/SP21/01/05 of 19 January 2005, Supplementary Protocol A/SP.2/06/06 of 14 June 2006, Regulation of 3 June 2002, and Supplementary Regulation C/Reg.2/06/06 of 13 June 2006, with a passing reference to the 1960 Act to indicate that the judgment nothing under the Act robs the court off its jurisdiction.

That reasoning is difficult to sustain. The first difficulty lies in the Court's treatment of domestication. The fact that Nigeria has accepted the jurisdiction of the ECOWAS Court answers the international question of competence; it does not answer the domestic question of enforcement. Jurisdiction determines whether the Court may hear a case and issue a judgment at the international level. It does not determine whether that judgment can be enforced within Nigeria. These are distinct matters. In a dualist constitutional system, the latter inquiry depends on the existence of domestic law authorising enforcement.

The Court did not identify any Nigerian statute that performs this function. Instead, it relied on the existence of ECOWAS instruments themselves. This approach blurs the distinction between international obligation and domestic law. It assumes that once Nigeria is bound internationally, domestic courts may act

without further domestication. That assumption runs directly against Nigeria's constitutional structure, particularly section 12 of the Constitution.

Equally problematic is the suggestion that the physical location of the ECOWAS Court in Abuja makes any legal difference. International courts frequently sit within the territory of member states without becoming part of the host state's judicial system. The ECOWAS Court is not a Nigerian court, at least within the meaning of section 6 of the 1999 Constitution, and its judgments are not Nigerian judgments. Treating them as such because the Court sits in Abuja has no legal foundation. Jurisdiction at the international level determines whether a court may hear a case; it does not determine whether its judgment can be executed against assets or institutions within Nigeria. Physical location is therefore irrelevant. A court may sit in Abuja and still operate entirely outside the Nigerian legal system, as is the case with the ECOWAS Court.

The second difficulty concerns the Court's reference to the 1960 Act. The proceedings proceeded as though the ECOWAS judgment could be situated within Nigeria's foreign judgment enforcement regime. Yet, as discussed earlier, the Act was designed to deal with judgments of courts of foreign states and operates on the basis of reciprocity. The ECOWAS Court does not, and could not realistically, fall within that category. It is not a court of a foreign country, and it has never been designated under the Act. One would therefore have expected the Court to be explicit that the Act does not apply to the judgment in question. Instead, citing provisions of the Act in determining whether the trial court had jurisdiction risks creating the impression that the statutory regime is equally applicable to questions arising from the enforcement of international court judgments. This is an impression that is difficult to reconcile with the structure of the legislation.

This critique should not be misunderstood. It is not a denial of Nigeria's international obligations, nor is it an argument that successful claimants before international courts should be left without remedies. The point being made is that domestic courts must act within the established legal framework, particularly in an area where foreign judgments do not have direct force of law except as permitted by statute or common law.

Ghanaian courts have consistently emphasised the country's dualist constitutional structure, under which international and regional judgments are not binding domestically unless the underlying treaty or enforcement framework has been

incorporated into Ghanaian law by legislation. In *Republic v High Court (Commercial Division), ex parte Attorney General and NML Capital Ltd* Civil Motion No. J5/10/2013 (unreported), the Supreme Court held that, in the absence of domestic legislation giving effect to the United Nations Convention on the Law of the Sea ("UNCLOS"), orders of the International Tribunal for the Law of the Sea were not binding on Ghana, notwithstanding Ghana's international obligations. Similarly, in *Chude Mba v Republic of Ghana* (*supra*), where enforcement of an ECOWAS Community Court judgment was sought, the High Court confined its analysis strictly to the statutory regime, namely the Courts Act 1993, the High Court (Civil Procedure) Rules 2004, and the Foreign Judgments and Maintenance Orders (Reciprocal Enforcement) Instrument 1993, and concluded that enforcement was unavailable because the regime depends on reciprocity and presidential designation of the foreign court, which were absent. Notably, in both instances the courts did not consider the common law regime for the recognition or enforcement of foreign or international judgments, treating the issue as one governed exclusively by statute and constitutional principles of dualism.

A similar outcome was reached in a very recent case in *Anudo Ochieng Anudo v Attorney General of the United Republic of Tanzania,* where the High Court of Tanzania declined to register and enforce a judgment of the African Court on Human and Peoples' Rights, holding that such judgments fall outside the scope of Tanzania's Reciprocal Enforcement of Foreign Judgments Act (Cap. 8 of the Laws of Tanzania, 2019). The court, *inter alia*, ruled that the Act applies only to judgments of foreign superior courts designated by ministerial notice and does not extend to international or regional courts established by treaty, including the African Court. Because the applicant anchored his claim exclusively on the Act and did not plead constitutional or international law as an independent basis for enforcement, the court held itself bound by the pleadings and precedent confirming that African Court judgments cannot be enforced under the statutory regime absent express legislative authorisation.

The decision of the Court of Appeal in *CBN v Gegenheimer*, with respect, is therefore a misnomer, as it lacks a solid legal foundation within Nigeria's existing constitutional and statutory framework. Whether judgments of international courts ought to be enforceable in Nigeria is ultimately a question for the legislature. Until such laws are enacted, courts should be cautious about

assuming powers they have not been granted.

4. Conclusion

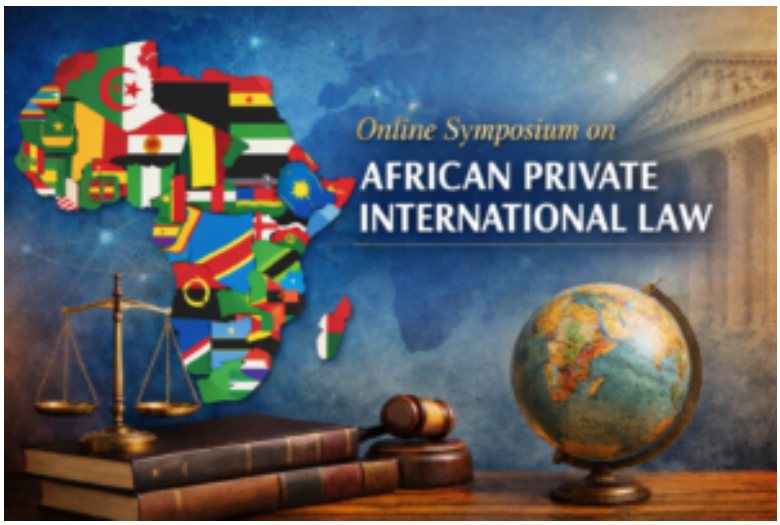
It is clear that judgments of international courts are not enforceable in Nigeria in the absence of specific legal framework permitting their enforcement. The position is well illustrated by the International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act 1967 and, more recently, the Arbitration and Mediation Act 2023, both of which demonstrate how Nigeria gives domestic effect to international obligations when it intends to do so.

The common law route is ill-suited to international court judgments. It was developed for judgments of foreign state courts and rests on assumptions of territorial jurisdiction and sovereignty that do not translate easily to treaty-based international courts. Extending it in this direction would leave courts to determine, without legislative guidance, which international judgments are enforceable and on what terms.

The decision in *CBN v Gegenheimer* is distinctive because it concerns the ECOWAS Court, a regional court whose jurisdiction Nigeria has accepted and whose role in access to justice is well recognised. Even so, acceptance of jurisdiction at the international level does not resolve the domestic enforcement question. Section 12 of the Constitution remains a barrier to direct enforcement in the absence of domestication. For that reason, the decision may yet face serious difficulty if the issue reaches the Supreme Court.

Beyond the ECOWAS context, it is difficult to see how judgments of other international courts could presently be enforced in Nigeria without similar legislative intervention. If international court judgments are to have domestic effect, the solution lies not in judicial improvisation, but in clear legislative action.

Online Symposium on Recent Developments in African Private International Law



It is not uncommon for African and foreign scholars of private international law (PIL) to lament the current state of the field in Africa. Until the early years of the 21st century, PIL was widely regarded, often with little hesitation, as 'a neglected and highly underdeveloped subject in Africa'.[i] Professor Forsyth famously described it as a 'Cinderella subject, seldom studied and little understood'.[ii] This limited scholarly attention is reflected, for instance, in the treatment of African PIL in the Hague Academy courses, which include only 4 courses specifically devoted to PIL in Africa, the most recent of which dates back to 1993.[iii] Since then, a number of pleas for greater attention to PIL in Africa,[iv] as well as calls for enhanced cooperation with African countries to ensure better involvement and inclusiveness,[v] have been voiced.[vi]

The last fifteen years, however, have witnessed a noticeable increase in scholarly interest and institutional engagement with PIL in Africa. This is reflected first in the growing body of academic publications,[vii] and the emergence of initiatives

aimed at articulating and strengthening an African perspective on the discipline. These include, among others, the publication of the African Principles on the Law Applicable to International Commercial Contracts, and the organization of a series of online workshops on 'Private International Law in Africa'.

At the institutional level, since 2011, 6 African States have become Members of the HCCH, with Namibia and Rwanda joining respectively in 2021 and 2025, bringing the total number of African HCCH Member States to 9. The recent opening of a regional office for Africa in Morocco further underscores the growing institutional presence and engagement of the HCCH on the African continent.

More importantly, 33 years after the last Hague Academy Course devoted to PIL in Africa, the subject will once again be addressed within the framework of the Hague Academy. In the forthcoming Summer Courses, Prof. Richard Oppong will indeed deliver a course on the 'Internationalism in Anglophone Africa's Commercial Conflict of Laws' This undoubtedly marks a significant milestone in the renewed visibility and recognition of PIL on the African continent.

There is, however, one aspect that remains relatively underemphasised: the rich and diverse, yet still understudied, body of African case law on PIL. This 'hidden treasure' demonstrates a simple, but often overlooked, fact: Africa is deeply connected to the rest of the world. From Chinese and Brazilian judgments being recognised in Mozambique, to Indonesian and Texan judgments being considered by courts in Uganda, or Canadian judgments sought to be enforced in Egypt; from Malawian courts applying the doctrine of *forum non conveniens* to many other remarkable decisions across the continent, African courts are actively engaging with transnational legal issues, including international jurisdiction and applicable law in employment contracts, the validity of foreign marriages, and cases of international child abduction. This case law also reveals the challenges faced by courts across the continent, which are often called upon to deal with complex issues using outdated or inadequate legal frameworks. Far from confirming the widespread perception of a stagnating field, judicial practice in Africa shows that important, and often fascinating, developments are taking place across the continent, developments that deserve far greater scholarly attention and engagement. Only through sustained scholarly engagement, by studying, commenting on, and comparing judicial approaches, and by highlighting shortcomings in existing legal frameworks and practices, can Africa develop a

strong and distinctive voice in the field of PIL.

This is precisely the purpose of the present online symposium. Building on an established tradition of this blog, Conflictoflaws.net will host the **second online symposium** on African private international law.[viii] The main objective of the symposium is to shed light on selected aspects of recent developments in private international law in Africa. A number of scholars known for their active commitment to the development of private international law on the African continent have kindly agreed to comment on some of these cases or to share their views on what, in their opinion, best illustrates the diversity of private international law in Africa.

The symposium will run over the coming days and will feature contributions addressing a wide range of themes and African jurisdictions. These include the following:

1. **Chukwuma Okoli (University of Birmingham) and Abubakri Yekini (University of Manchester, Uk)**, on the recognition and enforcement of international court judgments in Nigeria
2. **Béligh Elbalti (The University of Osaka, Japan)**, on the enforcement of a Chinese judgment in Mozambique
3. **Boris Awa (Kigali Independent University, Rwanda)**, on the recognition and enforcement of foreign judgments in the CEMAC region
4. **Solomon Okorley (University of Johannesburg, South Africa)**, on the application of the 1980 HCCH Convention in South Africa
5. **Anam Abdul-Majid (Advocate and Head of Corporate and Commercial Department, KSM Advocates, Nairobi, Kenya) and Kitonga Mulandi (Lawyer, KSM Advocates, Nairobi, Kenya)**, on choice of court agreements in in Kenya
6. **Theophilus Edwin Coleman (University at Buffalo School of Law, New York)**, on proof of foreign law and fragility of foreign marriages in Ghanian courts
7. **Elisa Rinaldi (University of Pretoria, South Africa)**, on Cross-border employment, contract and delictual liability merge in the South Africa

As aptly pointed out by Professor Oppong, 'there is a need for greater international engagement with African perspectives on [PIL]. There is also a need to attract more people to researching and writing on the subject in Africa.'[ix] In

line with these observations, we likewise hope that this initiative 'will contribute to both greater international engagement with, and increased participation in, private international law in Africa'.[x] Therefore, we encourage readers, in Africa and elsewhere, to actively engage with this initiative by sharing their views or by highlighting other developments of which they are aware. We also hope that this initiative will encourage researchers in Africa and beyond to make fuller use of the available resources and case law, and to comment on them, whether in the form of blog posts or scholarly contributions in academic journals.

This platform remains open and welcoming to such contributions.

Béligh Elbalti & Chukwuma S.A. Okoli

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[i] Richard F. Oppong, 'Private International Law in Africa: The Past, Present, and Future' 55 *AJCL* (2007) 678.

[ii] Christophe F. Forsyth, *Private International Law – The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* (5th ed., Juta, 2012) 46-47.

[iii] Abd-El-Kader Boye, 'Le statut personnel dans le droit international privé des pays africains au sud du Sahara: conceptions et solutions des conflits de lois: le poids de la tradition négro-africaine personnaliste', 238 *Recueil des Cours* (1993) ; U U. Uche, 'Conflict of Laws in a Multi-Ethnic Setting: Lessons from Anglophone Africa', 228 *Recueil des Cours* (1991) ; Salah El Dine Tarazi, La solution des problèmes de statut personnel dans le droit des pays arabes et africains 159 *Recueil des Cours* (1978) ; and Ph. Francescakis, 'Problèmes de droit international privé de l'Afrique noire indépendante', 112 *Recueil des Cours* (1964).

[iv] Richard F. Oppong, 'Private International Law and the African Economic Community: A Plea for Greater Attention' 55 *ICLQ* (2006) 911.

[v] Richard F. Oppong, 'The Hague Conference and the Development of Private International Law in Africa: A Plea for Cooperation' 8 *YPIL* (2006) 189.

[vi] Orji Agwu Uka, 'A call for the wider study of Private International Law in Africa: A Review of Private International Law In Nigeria', on this blog; Chukwuma Okoli, 'Private International Law in Africa: A Comparative Lessons', on this blog.

[vii] Jan Neels, 'List of Publications on South African Private International Law as from 2020', on this blog; Chukwuma Okoli, 'Private International Law in Africa: A Comparative Lessons', on this blog.

[viii] The first online symposium organized on this blog was devoted to Private international law in Nigeria. The symposium features interesting contributions by Chukwuma S. A. Okoli and Richard Oppong, Anthony Kennedy,Richard M. Mlambe, Abubakri Yekini and Orji Agwu Uka.

[ix] Richard F. Oppong, 'Private International Law Scholarship in Africa (1884-2009)' 58 *AJCL* (2010) 326.

[x] Oppong, Ibid.

The Titanium Brace Tightens: Rome II and Director Liability after Wunner

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In the preliminary reference Case C-77/24 *Wunner* (the Titanium Brace case), the CJEU was asked to determine whether a damages claim brought by a consumer directly against company directors for losses suffered from unlicensed online gambling fell within the scope of the Rome II Regulation (Regulation (EC) No 864/2007), or whether it was excluded under Article 1(2)(d) as a "*non-contractual*

obligation arising out of the law of companies".

The practical stakes were considerable. If Rome II applied, Article 4(1) would designate the law of the place where the damage occurred — which, for online gambling losses, would normally be the habitual residence of the consumer. If excluded, the applicable law would instead be determined by national conflict-of-laws rules, typically, the *lex societatis*.

1. Facts and Reference

The case arose from losses suffered by an Austrian consumer who participated in online games of chance offered by Titanium Brace Marketing Limited, a Maltese-registered online gambling company that did not hold a licence under Austrian gambling law. Following the company's insolvency, the consumer brought an action for damages directly against two former directors, alleging that they were personally liable for having allowed or caused the unlicensed offering of gambling services in Austria.

The Austrian Supreme Court referred questions to the CJEU concerning: first, whether such a claim is excluded from the scope of Rome II under Article 1(2)(d); and secondly, if Rome II applies, how the applicable law should be determined.

2. The Court's Reasoning: A Functional Interpretation of Article 1(2)(d)

2.1 Structural vs Functional approach

The Court reaffirmed that the exclusion in Article 1(2)(d) is not confined to 'structural aspects' of companies, but must be interpreted functionally, by reference to the nature of the obligation giving rise to liability. Drawing on its earlier case law, including *BMA Nederland*, the Court held that the decisive question is whether the non-contractual obligation arises from reasons specific to company law or external to it.

Where a director's liability flows from obligations "*incumbent on them owing to the creation of the company or to their appointment and linked to the management, operation or organisation of the company*", it is considered a company law matter, and is excluded from Rome II.

By contrast, where liability arises from the breach of an obligation external to the company's affairs, the exclusion does not apply.

2.2 Application to unlicensed online gambling

Applying that test, the CJEU held that Article 1(2)(d) does not cover actions seeking to establish the tortious liability of company directors for breaches of national prohibitions on offering games of chances to the public without the requisite license. The Court reasoned that the directors' alleged liability did not arise from company law. The claim was based on an alleged infringement of a general statutory prohibition under Austrian gambling law, applicable to '*any person*' offering games of chance without a licence. As such, the action did not concern the internal relationship between the company and its directors, but the breach of a regulatory norm protecting the public.

The consequence was that the action fell within the scope of Rome II, with the applicable law determined in accordance with Article 4.

3. The Consequence: Consumer Habitual Residence as the Applicable Law

The consequence of the ruling is significant. In online gambling cases, the "*place where the damage occurs*" will often coincide with the habitual residence of the consumer, since that is where participation in the gambling activity takes place and where the financial loss is suffered.

As a result, any action for damages brought directly against a director will, in principle, be governed by the law of the consumer's residence, regardless of where the company is incorporated, where the directors reside, or where the relevant management decisions were taken.

Following the preliminary ruling, the case will now be remitted to the Austrian court which is responsible for applying the CJEU's guidance and determining whether the directors actually incur liability under applicable Austrian law.

4. Analysis

4.1 A Tense Separation of Office and Obligation

The Court's distinction between obligations "*specific to company law*" and

obligations "*external*" to it may be potentially difficult to sustain in this context.

A director's decision to offer online gambling services in a Member State without holding the requisite licence is not a general act performed *erga omnes*. It is a paradigmatic management decision, taken precisely because the individual holds the office of director and exercises control over the company's commercial strategy. The duty to ensure regulatory compliance in market entry is closely bound up with corporate governance and risk allocation, particularly in highly regulated sectors such as gambling.

The Court relies on the fact that the prohibition is framed as a general rule applicable to "any person". However, in practice, only those directing the activities of the undertaking are capable of infringing the prohibition in the manner alleged.

4.2 The generic 'duty of care' analogy

The Court relies heavily on the distinction drawn in earlier case law between:

- a specific duty of care owed by directors to the company (company law), and
- a generic duty of care *erga omnes* (tort law).

However, this analogy sits uneasily with regulatory breaches in highly regulated sectors such as gambling. Unlike ordinary negligence, compliance with licensing regimes is inseparable from corporate governance. Treating such obligations as "external" significantly limits the operation of Article 1(2)(d) in regulated industries.

5. Consumer Protection Without a Consumer Contract?

The ruling confirms the applicability of Rome II while, in substance, applying the consumer-protective logic of Article 6 of the Rome I applicable to contractual obligations:

> *51. In the present case, those requirements militate also in favour of designating the place where the player is habitually resident as the place where the alleged damage occurred…*

The CJEU justifies the approach as analogous to the determination of the 'place where the harmful event occurred or may occur' in Article 7(2) of Regulation No 1215/2012 for the purposes of jurisdiction. However, this approach may risk encroaching on the distinction between contract and tort that has traditionally been treated as structurally decisive in EU private international law.

There are several preliminary rulings delineating the parameters of the 'place where the damage occurred' for the purposes of Article 4(1) of Rome II, and yet the CJEU saw fit to propose a specific sub-connecting factor within the umbrella of Article 4(1), for claims brought by the players of games offered by gambling companies. The sub-connecting factor identified essentially reproduces the one in Article 6 of Rome I for consumer claims in contract: the habitual residence of the consumer.

The outcome may be defensible from a consumer-protection perspective, but it raises questions of doctrinal coherence and legal certainty. Once the Court characterises the claim as non-contractual, the consequences of that classification should follow. Consumer protection under Article 6 Rome I is not triggered by consumer status alone, but by participation in a consumer contract meeting specific conditions. Its rationale – derogation from general connecting factors in favour of the consumer's habitual residence – is inseparable from the existence of a contractual relationship with a professional acting in the course of its business. Rome II, by contrast, contains no equivalent consumer-specific rule, suggesting a deliberate legislative choice not to extend such protection to non-contractual obligations. Applying that logic here might have prompted closer engagement with the reliance on a conflict rule whose rationale depends on the existence of a contract in the absence of one.

6. Veil-Piercing Through Conflict-of-Laws

While the Court insists that the imputation of liability is a matter for the applicable tort law rather than the *lex societatis*, the choice-of-law outcome itself has unmistakable substantive consequences.

By designating the consumer's habitual residence as the applicable law, the Court enables claimants to:

- bypass the insolvent company,
- sue directors personally, and

- subject them to a foreign legal system with which their corporate conduct may have only an indirect connection.

This functionally might be compared to a form of veil-piercing, where the corporate shield of separate juridical personality is not pierced by substantive company law doctrines, but by re-characterising managerial conduct as 'external' to company law for the purposes of Rome II. The result may be an expansion of directors' personal exposure as a by-product of the determination of applicable law.

7. Conclusion

The judgment in *Wunner* undoubtedly strengthens consumer protection and curtails the avoidance of host-state gambling controls through cross-border structuring. Yet it does so by drawing a distinction that is debatable. Do directors decide whether the company should hold a licence as private individuals, or as corporate officers?

Treating these decisions as external to company law risks blurring the boundary between corporate responsibility and personal liability, and in doing so, transforms Rome II from a neutral conflict-of-laws instrument into a powerful substantive lever. Whether this functional carve-out can be confined to gambling cases, or will spill over into other regulated sectors, remains an open and important question.

Directors of gaming companies should therefore carefully assess their personal and corporate risk profile when deciding which jurisdictions to offer online games in, as jurisdictional and applicable law rules may result in implications well beyond traditional frameworks.