SHORTER ARTICLES, COMMENTS, AND NOTES

PRIVATE INTERNATIONAL LAW AND THE AFRICAN ECONOMIC COMMUNITY: A PLEA FOR GREATER ATTENTION

I. INTRODUCTION

Private international law deals with problems that arise when transactions or claims involve a foreign element. Such problems are most frequent in a setting that allows for the growth of international relationships, be they commercial or personal. Economic integration provides such a setting and allows for the free movement of persons, goods, services and capital across national boundaries. The facilitation of factor mobility resulting from economic integration and the concomitant growth in international relationships results in problems which call for resolution using the tools of private international law. An economic community cannot function solely on the basis of economic rules; attention must also be paid to the rules for settling cross-border disputes. Consequently, considerable attention is given to the subject within the European Union (EU)[1] and other economic communities.[2]

Africa is currently pursuing economic integration through the African Economic Community (AEC). Palpably missing from the discourse on economic integration is any discussion of the role of private international law in this pursuit. The various instruments for the pursuit of integration are also silent on this, which is troubling. So underdeveloped is the subject in Africa that one writer has described it as 'the Cinderella subject seldom studied [and] little understood.'[3] This underdevelopment, coupled with

[1] Right from the European Community's inception, a sound private international law regime was identified as having a key role to play in the creation and sustenance of the internal market. Thus Article 220 (now Article 293 EC) of the Treaty of Rome charged Member States to enter into negotiations with each other with a view to securing for the benefit of their nationals, 'the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and arbitration awards.' As was subsequently noted, 'a true internal market between the six States will be achieved only if adequate legal protection can be secured. The economic life of the Community may be subject to disturbance and difficulties unless it is possible…to ensure the recognition and enforcement of the various rights arising from the existence of a multiplicity of legal relationships.' See Note sent to Member States on 22 October 1959, quoted in Council Report by Mr Jenard on the Convention of 27 September 1968 on Jurisdiction and Enforcement of Judgment in Civil and Commercial Matters OJ 1968 C59/1. The Convention (now Regulation) on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels I Regulation) was the direct product of this article.

[2] See eg work in the Organisation of American States (OAS) and the Common Market of the Southern Cone (MERCOSUR) cited in Part II below.

[3] cf Forsyth *Private International Law* (Juta Cape Town 2003) 43. Other African textbooks on the subject include: Christian Schulze *On Jurisdiction and the Recognition and Enforcement of Foreign Money Judgments* (UNISA Press 2005); J Kiggundu *Private International Law in Botswana, Cases and Materials* (Bay Publishing Gabarone 2002); John Ademola Yakubu *Harmonisation of Laws in Africa* (Malthouse Press Ltd Lagos 1999); IO Agbede *Themes on Conflict of Laws* (Shaneson Ltd Lagos 1989); RA Sedler *The Conflict of Laws in Ethiopia* (Faculty of Law Haile Sellaise I University Addis Ababa 1965).

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the diversity of approach to questions on the subject, has been identified as one of the key obstacles to integration in Africa.[4]

A well-developed and harmonized private international law regime is an indispensable element in any economic community. Private international law has an impact on the free movement of persons, goods, services and capital and consequently affects the functioning, and should therefore elicit the attention, of any economic community that envisages factor mobility. Thus, for example, within the European Community, the harmonization of the rules of private international law is seen as having a part to play in creating the internal market. Harmonization helps promote equal treatment and protection for citizens of the European Union, as well as other economic actors transacting or litigating in the internal market by subjecting them to a uniform and certain legal regime. Harmonization also boosts certainty in the law, thus reducing transaction and litigation costs for economic actors within the Community. All these factors influence and underlie many of the Regulations adopted by the European Community.[5]

With the significance of the subject for the promotion of international commerce and hence for development,[6] the underdeveloped and neglected state of Africa's private international law regime represents a loss of benefits, monetary and otherwise, that can result from the use of the legal infrastructure of Africa. It makes businesspersons lose confidence in the existing legal infrastructure of Africa. It also prevents the development of a consistent body of jurisprudence on the subject through academic research writing and judicial decision—two basic sources of private international law norms. All these call for greater attention to be given to the subject.

II. THE AFRICAN ECONOMIC COMMUNITY AND PRIVATE INTERNATIONAL LAW

A. The State of Affairs

The drive towards continent-wide economic integration in Africa began in 1963 with the formation of the Organisation of African Union (OAU) [now the African Union (AU)]. The OAU was essentially a political body but in 1991 it entered the realm of economic integration with the signing of the Treaty establishing the African Economic

[4] Bankole Thompson 'Legal Problems of Economic Integration in the West African Sub-Region' (1990) 2 African J of Intl and Comparative L 85, 99–100; Bankole Thompson and Richard S Mukisa 'Legal Integration as a Key Component of African Economic Integration: A Study of Potential Obstacles to the Implementation of the Abuja Treaty' (1994) 20 Commonwealth Law Bulletin 1446, 1454; Yinka Omorogbe 'The Legal Framework for Economic Integration in the ECOWAS: An Analysis of the Trade Liberalisation Scheme' (1993) 5 African J of Intl and Comparative L 355, 364; Muna Ndulo 'The Promotion of Intra-African Trade and the Harmonisation of Laws in the African Economic Community: Prospects and Problems' in MA Ajomo and Omobolaji Adewale (eds) *African Economic Community Treaty, Issues Problems and Prospects* (Nigerian Institute of Advanced Legal Studies Lagos 1993) 107, 111–12.

[5] See eg the Convention (and now proposed Regulation) on the Law Applicable to Contractual Obligations (OJ 1998 C 027)(Rome Convention) which is concerned with creating the right conditions for an internal market with the free movement of persons, goods, services and capital within the Community; the Brussels Regulation on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (EC Regulation No 44/2001) (Brussels I Regulation) aims at securing the free circulation of judgments within the Community to ensure that 'the economic life of the Community is not disturbed and trade is thereby encouraged'; Cheshire and North *Private International Law* (Butterworths London 1999) 481.

[6] IFG Baxter 'International Conflict of Laws and International Business' (1985) 34 ICLQ 538; J Darby 'The Conflict of Laws and International Trade' (1967) 4 San Diego L Rev 45.

Community (AEC Treaty).[7] It envisages an economic union covering the whole of Africa using the various regional economic communities as building blocks. It aims at the gradual removal among its Member States of all obstacles to the free movement of persons, goods, capital and services. One of its cardinal objectives is the integration of the economies of its members. The establishment of a 'common market' is seen as a means of ensuring the achievement of this objective. With the birth in 2002 of the AU as the successor to the OAU, the drive towards economic integration has gathered even more force. The Economic Commission for Africa (ECA) brought to the fore the urgency with which Africa should pursue its integration efforts when it noted:

> It is reasonable to assume that the most significant trend in this millennium is global competitiveness . . . nations are moving to integrate their economies with those of their neighbours . . . This shift is nowhere more urgent than in Africa, where the combined impact of our relatively small economies, international terms of trade and the legacy of colonialism, mis-rule and conflicts has meant that we have not yet assumed our global market share despite our significant market size.[8]

Economic integration and development are two cardinal objectives of the AU. The efforts at integrating the economies of Africa are inspired by the economic philosophy that international commerce facilitates development. It is envisaged that uniting the economies of Africa would permit the economies of scale; make them more competitive; provide access to a wider trading and investment environment; promote export to regional markets; and provide the requisite experience to enter global markets. Integration will also provide a framework for African countries to cooperate in developing common services for finance, transport and communication.[9]

Conspicuously missing in all these efforts is an emphasis on the role of law and for that matter private international law in facilitating and sustaining the economic integration efforts. Apart from a quick reference to a dispute settlement mechanism one does not find much about law[10] and even less so private international law in the AEC Treaty or subsequent instruments, which aim at promoting economic integration. This contrasts sharply with the experiences of other economic communities. A case in point is the Organisation of American States, which has economic integration among its objectives. The Organisation, through its Inter-American Conference on Private International Law, has supervised the negotiation and adoption of over 20 conventions on the subject by its members.[11] These conventions cover various aspects of the

[7] Treaty Establishing the African Economic Community: reprinted in (1991) 3 African J Intl Comparative L 792, and (1991) 30 Intl Legal Materials 1241; see generally MA Ajomo and Omobolaji Adewale (eds) *African Economic Community Treaty, Issues Problems and Prospects* (Nigerian Institute of Advanced Legal Studies Lagos 1993). The AEC Treaty entered into force in 1994.

[8] Forward to: *Assessing Regional Integration in Africa*, ECA Policy Research Report July 2004.

[9] ECA Annual Report on Integration in Africa (2002) 2.

[10] In the 65-paged Treaty the word 'law' appears thrice; in the preamble, Article 18(2), and 35(1) a. Assigning a minimal role for law has been noted as a characteristic of Africa's integration effort and has been criticized. See P Kenneth Kiplagat 'Dispute Recognition and Dispute Resolution in Integration Processes: The COMESA Experience' (1994–1995) 15 North Western J Int'l L & Business 437; P Kenneth Kiplagat 'An Institutional and Structural Model for Successful Economic Integration in Developing Countries' (1994) 29 Tex Int'l L J 39, 50–1.

[11] See <http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/documents/eng/aboutoas.asp > Friedrich Juenger 'The Inter American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons' (1994) 42 AJCL 381; Alejandro

subject, including the recognition and enforcement of judgments and choice of law in contract.[12] Recent conference topics have focused on the free trade agenda of the region.[13] Also, within the Common Market of the Southern Cone (MECOSUR), the 'harmonization of legislation in relevant areas' is seen as a key to 'strengthen the integration process'.[14] Private international law is one area that has attracted attention and progress there has been described as 'impressive'.[15] Indeed, the history of cooperation in the field of private international law in the Americas dates back to the 19th century. As early as 1928 the Pan-America Code on Private International Law, better known as the 'Bustamante Code' had been adopted. It is truly ironic that none of the more than 14 regional economic communities in Africa has private international law on its agenda.[16] Indeed, ignoring bilateral agreements for the recognition and enforcement of judgments, no international convention negotiated between African states exists on the subject. It is suggested that true integration should not aim only at the removal of barriers to the movement of persons, goods, services and capital, but also the removal of legal barriers; an underdeveloped or neglected private international law regime is one such legal barrier.

While the development of a comprehensive private international law regime has stagnated in Africa, the volume, structure and techniques of commercial dealings have advanced worldwide to the extent that Africa's regime may not be able to meet the needs of the emerging commercial techniques. One such notable trend is the growth in electronic commerce.[17] It is increasingly being advocated that the rules of private international law have to be modified to meet these new challenges from international commerce.[18] Other challenges include the Internet, intellectual property protection, and trans-boundary environmental issues. Strengthened economic cooperation in

Garro 'Unification and Harmonization of Private Law in Latin America' (1992) 40 AJCL 587; Jose Daniel Amado 'Recognition and Enforcement of Judgments in Latin American Countries: An Overview and Update' (1990–91) 31 Virginia J Intl L 99; Leonel Pereznieto Castro 'Some Aspects Concerning the Movement for Development of Private International Law in the Americas through Multilateral Conventions (1992) 39 Netherlands Intl L Rev 243; Paul A O'Hop Jr 'Hemispheric Integration and the Elimination of Legal Obstacles under a NAFTA-Bases System' (1995) 36 Harvard Intl L J 127, 163–6.

[12] See, Inter-American Convention on the Law Applicable to International Contracts (1994) and the Inter American Convention on Jurisdiction in the International Sphere for the Extra Territorial Validity of Foreign Judgments (1984).

[13] Diego P Fernandez Arroyo and Jan Kleinheisterkamp 'The VIth Inter-American Specialized Conference on Private International Law (CIDIP VI): A New Step Towards Inter-American Legal Integration' (2002) 4 Yearbook of Private Intl L 237, 254.

[14] See Article 1 of Asuncion Treaty 1991, available at <http://www.sice.oas.org/trade/mrcsr/mrcsrtoc.asp> also Diego P Fernandez Arroyo 'International Contracts Rules in Mercosur: End of an Era or Trojan Horse' in Patrick J Borchers and Joachim Zekoll (eds) *International Conflict of Laws for the Third Millennium, Essays in Honour of Friedrich K Juenger* (Transnational Publishers New York 2000) 157–63.

[15] Fernandez Arroyo, ibid 172.

[16] Article 126 of the Treaty of the East African Community which enjoins Member States to 'encourage the standardisation of judgments of courts with the Community', and 'harmonise all their national laws appertaining to the Community', may broadly be interpreted to encompass issues of private international law. The author is however not aware of any initiative taken under this article of significance for private international law.

[17] See, SO Manteaw 'Entering the Digital Market Place-Commerce and Jurisdiction in Ghana' (2003) 16 Transnational Lawyer 345.

[18] Baxter (n 6).

Africa will lead to increased cross-boundary business activities between private parties. The presence of a strong legal framework to facilitate this envisaged growth in commercial activity should be paramount and a sound private international law regime is no mean part of that framework.

For example, a well-thought-out foreign judgment enforcement regime is indispensable to the success of the economic community. If the enforcement of private legal claims is unduly complicated, time-consuming and expensive, it would prove to be an obstacle to closer economic relations and hamper the development of a stable economic union.[19] The same thing can be said for jurisdiction and choice-of-law rules. Complex and diverse private international law rules engender uncertainty, increase transaction costs and may drive away investors. For economic actors, certainty, predictability, security of transactions, effective remedies and cost are paramount considerations in investment decision-making.[20] In an era of high competition for investors, Africa, with its already small share of international trade and investment flow, cannot afford to score low marks on these considerations.

B. Differences in Approaches to the Subject in Africa

In Africa there exists a diversity of approaches to the various aspects of private international law. This is a reflection of the different legal traditions on the continent. The following legal traditions can be identified: common law, civil law, Roman-Dutch law, Islamic law and customary law.

One area that is illustrative of this diversity is the rules regulating the enforcement and recognition of foreign judgments.[21] Different approaches exist as regards the rules relating to international jurisdictions as the basis of the competence of foreign courts, the powers of the enforcing countries including the power of its courts to go into the merits of the case on which the foreign judgment was founded, the type of foreign judgments that can be enforced and the grounds for non-recognition of foreign judgments. The section below provides an account of the law in five African countries.[22] The account is brief and is mainly intended to expose the diversity of approaches and the challenges this poses for international economic relations in Africa.

[19] P Hay 'The Common Market Preliminary Draft Convention on the Recognition and Enforcement of Judgments—Some Considerations of Policy and Interpretation' (1968) 16 AJCL 149; PMC Koh 'Foreign Judgments in ASEAN—A Proposal' (1996) 45 ICLQ 844; Robert C Casad 'Civil Judgment Recognition and the Integration of Multi-state Associations: A Comparative Study' (1980-1981) 4 Hasting Intl & Comp L Rev 1 where he identifies 'an effective scheme for the mutual recognition and enforcement of civil judgments' as one feature of any economic integration initiative 'likely to achieve significant integration'.

[20] BA Caffrey *International Jurisdiction and the Recognition and Enforcement of Foreign Judgments in the LAWASIA Region: A Comparative Survey of the Laws of Eleven Asian Countries Inter-se and with the EEC Countries* (CCH Australia Ltd North Ryde 1985) 6 where he notes 'predictability, security of transaction and the prompt efficient and certain enforcement of claims' as factors that future prominently in investment decision-making.

[21] S Thanawalla 'Foreign Inter Partes Judgments: Their Recognition and Enforcement in the Private International Law of East Africa' (1970) 19 ICLQ 430. Forsyth (n 3) 332 et al.

[22] The section is limited to the recognition and enforcement of only money judgments. The common law countries enforce only money judgments, but see section 3(1)(b) of the Foreign Judgments (Reciprocal Enforcement) Act (Cap 43) of Kenya allows for the registration of an order or judgment from a designated court in civil proceedings under which moveable property is ordered to be delivered to any person.

1. South Africa

South Africa is a Roman-Dutch law country. In South Africa[23] the recognition and enforcement of foreign judgments is governed by common law and statutory rules.[24] At common law a foreign judgment creditor is not allowed to enforce the judgment directly. A fresh action must be brought for the foreign judgment to be made an order of a local court. This necessarily entails both financial and time costs. For a foreign judgment to be enforced under South African law, first it must have been rendered by a court with international competence under the private international law rules of South Africa. Two grounds of such international competence are residence and submission. Although easily stated the terms 'residence' and 'submission' defy definition.[25] There is continuing debate as to whether other grounds such as nationality, domicile, and attachment of property should suffice for international competence.[26] Secondly, the judgment must be final and conclusive. Thirdly, it should not be contrary to the Protection of Business Act 99 of 1978.[27] There exist grounds under which the foreign judgment will not be recognized. These include its being contrary to public policy, infringement of the rules of natural justice and procurement by fraud. These grounds often give rise to interpretive difficulties and leave a lot of room for judicial discretion. The uncertainty that comes with it can be a disincentive to business.

Another means of enforcing civil judgments is through the Enforcement of Civil Judgments Act 32 of 1988. This Act was intended to provide an expedited means of enforcing foreign judgments emanating from designated countries. Significantly, unlike other statutory schemes in Africa, reciprocal treatment from the designated country is not required. The Act provides procedures for the foreign judgment to be registered. Once registered it is treated as a judgment emanating from the magistrates' court. A person may challenge the registration of the judgment on grounds similar to that pertaining under the common law including fraud, breach of natural justice, satisfaction, prescription or lapse, absence of jurisdiction on the part of the foreign court and contravention of South African public policy. However, because the Act applies only to enforcement proceedings in the magistrates' courts where the financial limits on actions is 100,000 Rand, it may not prove very useful in international commercial dispute judgments where the stakes may be extremely high. Consequently the scheme that was intended to ensure an expedited and simplified way of enforcing foreign judgments may be very much inaccessible to foreign litigants and their judgments may have to be enforced under the common law rules in the High Court with all its challenges.

[23] The law on this area is currently under review with a view to reform. See South African Law Reform Commission, Consolidated Legislation Relating to International Cooperation in Civil Matters, Project 121 Discussion Paper 106 <http://www.law.wits.ac.za/salc/issue/ip21.pdf>

[24] The Enforcement of Civil Judgments Act 32 of 1988, Protection of Business Act 99 of 1978.

[25] PSG Leon 'Roma non Locuta est.: the Recognition and Enforcement of Foreign Judgments in South Africa' (1983) 26 Comparative and Intl L J of Southern Africa [CILSA] 325; See the Ugandan case of *Transroad Ltd v Bank of Uganda* [1998] UGAJ No 12 Civil Appeal No 3 of 1997 on the difficulty of defining submission.

[26] ibid 338–9.

[27] Under section 1 of this Act certain types of judgment eg those related to mining, can not be enforce in South African except with the consent of the Minister for Economic Affairs. For a discussion and critique of this Act see Forsyth (n 3) 435–7.

2. Angola and Mozambique[28]

Angola and Mozambique are two civil law countries in Southern Africa. Their law on this subject is contained in their respective Civil Procedure Codes, which are founded on the Portuguese Civil Code of 1966. For a foreign judgment to be recognized, certain conditions must be met. First, the judgment must be an authentic document. The court of the forum must be satisfied that the judgment is genuine. This is a matter of proof and is unlikely to give rise to much difficulty. Secondly, the judgment must be final in the foreign country and the matter should not have been pending before any court in the forum except where the foreign court was first seised. This requirement envisages a situation of multiple litigation on the same subject matter in different fora. Thirdly, the defendant must have had notice of the foreign proceedings and in the case of a default judgment the original notification initiating the proceedings must have been handed to him in person. This requirement is similar to the requirements of natural justice and due process in common law countries. Fourthly, in those cases where the rules of private international law of the forum provide that the substantive law of the forum should have been applied, the decision reached by the foreign court affecting a citizen of the forum may not disadvantage that citizen-defendant in relation to the decision that would have been reached had the law of the forum been applied. In other words, a national of the forum should not be treated less favourably than he/she would have been treated in his/her national court. Finally, the foreign court must have had international jurisdiction in accordance with the private international law rules of the forum.

International jurisdiction of the foreign court will, however, be recognized only when the court of the forum did not claim jurisdiction of its own over the subject-matter. They will claim jurisdiction if: (a) the defendant had been resident for a minimum of six months or if their national is a party to the litigation; (b) the act giving rise to the litigation was carried out on the territory of the forum or carried out by a national of the forum provided that the country of nationality of the victim would also have claimed jurisdiction if the act had been committed by its national against a national of the forum; (c) it is found that the forum would have been the most convenient forum for the trial of the action and actual links between the subject-matter and the forum exist.

A judgment founded on a foreign jurisdiction agreement will not be recognized if the aim of that agreement was to exclude the jurisdiction of the forum, whenever such jurisdiction would have existed under the Code, or one of the parties is a national of the forum or the matter concerns assets situated in the forum. Such jurisdiction agreements are treated as void. This hostility to jurisdiction agreements is akin to Latin American countries' historical disdain for similar clauses founded on their rejection of the principle of party autonomy—a principle so important in international commerce.[29] This treatment of jurisdiction agreements can be a disincentive to international commercial relations since they are very much part of the current modes of dealing across national boundaries.

[28] This part relies heavily on the work of Andre Thomashausen of the Institute of Comparative Law South Africa. See A Thomashausen 'The Enforcement and Recognition of Foreign Judgments and other forms of Legal Cooperation in the SADC' (2002) 35 CILSA 26.

[29] Juenger (n 11) 386–8.

Apart from the interpretive difficulties associated with these provisions, one cannot lose sight of their nationalistic fervour and attempt to protect nationals of the forum. In an international commercial setting this may be an obstacle to attracting commercial dealings with one's nationals.

3. Tanzania[30]

Tanzania is a common law country in East Africa. The recognition and enforcement of foreign judgments in Tanzania is governed by the common law rules and a statutory regime for the registration of judgments from specified countries. Although little will be said of the common law rules, [31] it is worthy of note that the common law rule that a cause of action survives the foreign judgment such that fresh action could be brought by either party if dissatisfied with the judgment,[32] may not apply in Tanzania. This is because under section 11 of the Civil Procedure Code 1966, 'a foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between that same parties or between parties under whom they or any of them claim . . .'[33] This presumption makes it easier for an application for summary judgment to be founded on it since the judgment is less susceptible to challenge and shifts the burden of proof, with the cost it entails, onto the defendant.[34] In jurisdictions where this conclusive rule does not exist, a party may have to rely on the common law rules of estoppel and provide proof to that effect. This entails additional litigation cost and time for the judgment creditor.

The statutory regime is governed by the Reciprocal Enforcement of Foreign Judgments Act of 1935,[35] together with two subsidiary pieces of legislation, namely, the Reciprocal Enforcement of Foreign Judgments Order[36] and the Reciprocal Enforcement of Foreign Judgment Rules.[37] Under the Act, 'judgment' means a judgment or order given or made by a court in any civil proceedings, or a judgment or order given or made by a court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party.

The Act applies to judgments given in named foreign countries on the basis of reciprocity. The President designates these countries after he is satisfied that judgments of the Tanzanian courts will be accorded similar treatment in that country.[38] Thus, like other statutory enforcement schemes in Africa, the doctrine of reciprocity lies at its

[30] I am indebted to Mrs Eleanor Ngalo for providing me with materials relating to the law in Tanzania.

[31] I concentrate in this part only on the statutory regime since the common law position is similar to that of other common law countries like Ghana discussed below.

[32] This rule has been abolished in England by s 34 of Civil Jurisdiction and Judgment Act 1982.

[33] Discussed in Thanawalla (n 21) 430.

[34] This presumption is, however, rebuttable by proof of want of jurisdiction, fraud, breach of natural justice, a law in force in Tanzania or international law and the fact that the judgment was not given on the merits. See ss 11 and 12 of the Civil Procedure Code 1966.

[35] Ch 8 of the Revised Laws of Tanzania.

[36] GN Nos 8 and 9 of 1936.

[37] GN No 15 of 1936.

[38] The Reciprocal Enforcement of Foreign Judgments Order list named courts in the following countries in its schedule Lesotho, Botswana, Mauritius, New South Wales, Zambia, Seychelles, Somalia, Zimbabwe, Kingdom of Swaziland, and the United Kingdom.

heart. Consequently, it may inure to the benefit of judgment creditors from only some few countries. Section 3(2) of the Act provides that any judgment of a superior court of a foreign country to which this part extends, shall apply if: (a) it is final and conclusive between the parties thereto and (b) there is payable thereunder a sum of money not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty. Under the section, a judgment shall be taken to be final even if there is a pending appeal.

Section 4(1) of the Act provides that a judgment creditor of a judgment to which the Act applies may apply to the High Court for registration of the judgment at any time within six years after the date of the judgment, or in case of an appeal within six years after the date of the last judgment given in those proceedings. An application for registration can be made ex parte and shall be supported by an affidavit of facts.[39] A judgment shall not be registered if it has been wholly satisfied[40] or if it could not be enforced by execution in the country of the original court.[41] Upon registration, the judgment shall for the purposes of execution be of the same force and effect as if the judgment had been a judgment originally given in the registering court and entered on the date of registration.

The Act provides grounds under which an application could be made to set aside the registration. An application to set aside the registration of a judgment shall be made to a judge in chambers by summons supported by an affidavit.[42] Section 6(1) of the Act provides that the registration of the judgment shall be set aside if the registering court is satisfied that[43] (i) the judgment is not a judgment to which this part applies; (ii) courts of the country of the original court had no jurisdiction in the circumstances of the case; (iii) the judgment debtor being the defendant in the proceedings in the original court did not receive notice of those proceedings and did not appear; (iv) judgment was obtained by fraud; (v) enforcement of the judgment would be contrary to the public policy in the country of the registering court; and (vi) rights under the judgment are not vested in the person by whom the application for registration was made. The registration may also be set aside if the court is satisfied that the matter in dispute in the proceedings in the original court had, prior to the date of judgment in the original court, been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.

4. Ghana

Ghana is a common law country in West Africa. The recognition and enforcement of foreign judgments in Ghana is governed by common law and statutory rules. The dearth of case law[44] and writing in this regard makes it difficult to ascertain or advise on how far the Ghanaian courts will depart from the limitations of the common law as was inherited from the United Kingdom.

Under common law in Ghana a foreign judgment creditor cannot directly enforce the judgment in Ghana. He has to bring an action on the judgment. The common law

[39] The Reciprocal Enforcement of Foreign Judgment Rules, GN No 15 of 1936, s 3(1).
[40] The Reciprocal Enforcement of Foreign Judgment Act, 1935, s 4(1) (a).
[41] ibid s 4 (1) (b).
[42] Reciprocal Rules (n 39) s 10(1).
[43] Enforcement Act (n 40) s 6(1) (a) (i-vi).
[44] *Yankson v Mensah* [1976] 1 GLR 355; *Republic v Mallet, Ex Parte Braun* [1975] 1 GLR 68.

treats such judgments as evidence of a debt. Consequently, only judgments for fixed sums of money are enforceable in Ghana. To be recognized and enforced the judgment has to be final and conclusive and must have been given by a court which, as a matter of Ghanaian private international law, had jurisdiction. The fact that the judgment has to be final and conclusive raises difficult questions in the enforcement of default judgments, which in most jurisdictions are capable of being set aside within a certain time. However, the fact of a pending appeal does not render a judgment inconclusive although the court in the exercise of its discretion may be slow to enforce such judgment. A defendant to an action for recognition and enforcement can raise certain defences. These include the absence of international competence on the part of the foreign court, breach of natural justice, fraud and inconsistency with Ghana's public policy. A distinctive feature of this regime is that the court will not go into the merits or substance of the case and there is no requirement of reciprocity.

The procedure in Ghana is for the judgment creditor to issue a writ and to plead that the judgment debt is due and owing. He can apply for summary judgment under Order 14 of the High Court Civil Procedure Rules[45] on the grounds that the defendant has no real prospect of successfully defending the claim. The requirement of service, the time for exchange of pleadings, and the actual trial mean a lot of time may be spent before the judgment can be enforced, especially if one factors in the backlog of cases in the courts.

Apart from the common law regime, there is a statutory scheme for the registration of judgments in Ghana. This scheme dates back to 1908[46] and is currently regulated by Part V of the Courts Act 1993 [Act 459]. It operates on the basis of reciprocity. Thus, if the President is satisfied that when the benefits of the scheme are extended to judgments from a country similar benefits will be accorded Ghanaian judgments, he may by a legislative instrument designate that country as entitled to the benefits of the scheme.[47] The President may also by legislative instrument decree that no proceedings shall be entertained in any court in Ghana for the recovery of any sum alleged to be payable under a judgment given in a court of a country which accords less favourable treatment to judgments from Ghana.[48] It is debatable whether this power is limited to only previously designated countries. It appears from the language of the section that it is not so limited.

The statutory scheme applies to a judgment from the designated country if it is final and conclusive between the parties and there is payable under it a sum of money not being a sum payable in respect of taxes or other charges of similar nature or in respect of a fine or penalty. A judgment is final notwithstanding that an appeal is pending or that a legal possibility exists for an appeal.[49]

A judgment creditor of a judgment to which the scheme applies may apply, within six years of the judgment and with proof of prescribed matters, to the High Court for registration. A right of execution exists after registration. The judgment will, however, not be registered if it has been wholly satisfied or it could not be enforced by execution in the country of the judgment.[50] Additionally, where the sum payable under the judgment, which is to be registered, is expressed in a foreign currency the judgment shall

[45] Constitutional Instrument 47 of 2004.
[46] Foreign Judgments Extension Ordinance 1907, No 4.
[47] Section 81(1) of Act 459.
[48] Section 87 of Act 459.
[49] Section 81 of Act 459.
[50] Section 82 of Act 459.

be registered as if it were a judgment for a sum in the currency of Ghana based on the rate of bank exchange prevailing at the date of the judgment of the original court.[51] The effect of this conversion rule can be of great financial significance to both parties especially in an era of fluctuating movements in exchange rates. It may work to the disadvantage of one party. The rule appears to be an extension of the common law rule that a court cannot give judgment in a foreign currency.[52] This rule has been abandoned in England and modified in other jurisdictions in recognition of the hardship it can work on parties.[53] The existence of this rule is inconsistent with current thinking. In Ghana the rule has no application in common law actions.[54]

A person against whom a registered judgment may be enforced can apply for the registration to be set aside. There exist mandatory and discretionary grounds for setting aside the registration. The mandatory grounds are absence of jurisdiction, non-appearance in the original proceedings due to the fact that he was not given sufficient time to prepare a defence, fraud and inconsistency with Ghana's public policy.[55] Among the recognized bases of jurisdiction are residence, submission and, in the case of businesses, having a principal place of business, a place of business or an office in the foreign country. There are also discretionary grounds for setting aside registration. First, the registration may be set aside if the registering court is satisfied that the matter in dispute in the proceedings in the original court had, prior to the date of the judgment in the original court, been the subject of a final and conclusive judgment by a court that had jurisdiction in the matter.[56] This rule envisages a situation of two conflicting judgments and gives the court discretion not to register the judgment presented to it.[57] Secondly, the fact that an appeal is pending or the applicant is entitled to appeal may be a ground for setting aside the registration.

The above procedures for the recognition and enforcement of judgments in the selected countries[58] reveal some level of diversity in approach to the subject. One should, however, not exaggerate the extent of this diversity in Africa. African countries through their colonial experience can be divided into blocks with almost identical legal regimes. For example, the regime in the common law countries, like Ghana and Tanzania above, through their association with the United Kingdom and the Commonwealth, has resulted in an almost identical approach to the subject.[59] This trend has been facilitated by the draftsman's penchant for copying legislation from sister countries.

[51] Section 82(7) of Act 459.

[52] *Manners v Pearson* [1898] 1 Ch 581.

[53] *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443.

[54] *Royal Dutch Airlines (KLM) v Farmex Ltd* [1989–90] 1 GLR 46; RE Bannermah 'Award of Damages in Foreign Currency: A critical look at the Judgments' [1993–5] 19 Rev of Ghana L 231.

[55] Section 81(1)(a) of Act 459.

[56] Section 81(1)(b) of Act 459.

[57] For alternative solutions see M Wolff *Private International Law* (Clarendon Press Oxford 1962) 263, *Showlag v Mansour* [1995] 1 AC 431 and s 34(4) of the Brussels I Regulation.

[58] For a discussion of the regimes in other African Countries see Schulze (n 3); Louis Garb and Julian Lew (eds) *Enforcement of Foreign Judgments* (Looseleaf) (Kluwer Law International 2002); Philip R Weems (eds) *Enforcement of Foreign Judgments Abroad* (Looseleaf) (Mattew Bender New York 1993).

[59] KW Patchett *Recognition and Enforcement of Commercial Judgments and Awards in the Commonwealth*, (Butterworths London 1984); HE Read *Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth* (Harvard University Press Cambridge 1938).

For the international businessperson one important consideration in all these schemes is the extent to which they provide a cheap, rapid and uncomplicated means of enforcing judgments. It is doubtful whether these schemes afford this. They do not provide for automatic enforcement[60] and the possibility for registration or enforcement to be refused on vague and nationalist grounds exists. Another worrying trend is the role of the state, especially the executive, in these enforcement schemes.[61] For example, the doctrine of reciprocity elevates a purely private claim to one of public interest such that enforcement may be denied or at least the route to enforcement made more complicated depending on the treatment one's government accords to similar judgments from the enforcing country; something the individual has no influence over.

Some of the laws are also out of tune with the demands of modern international commerce.[62] An example is the Ghanaian rule which compels the conversion into cedis of the foreign judgment debt before registration. In a country where currency fluctuation is common this may work to the disadvantage of one party through no personal fault.[63] Their consistency with international law can also be questioned. It can be argued that the Ghanaian provision which allows the President to conclusively declare judgments from certain countries unenforceable because they do not accord favourable treatment to judgments from Ghana, violates international human rights law. A judgment is property and international human rights law recognizes the individual's right to own property. Article 17(2) of the Universal Declaration on Human Rights is very emphatic in its terms: 'no one shall be arbitrarily deprived of his property'. In so far as this evidences general international law, Ghana cannot make an individual's enjoyment of this right contingent on a state of affairs (the giving of less favourable treatment to judgments from Ghana) he/she has no hand in creating. To do so arguably amounts to an arbitrary deprivation of property and restricts the right of access to justice. All these call for a second look to be taken at these schemes if we hope to promote international commercial dealings on the continent.

It is not only in the area of recognition and enforcement of judgments that a diversity of rules exists. The same can be said of aspects of jurisdiction and choice of law. For example, whilst common law countries found jurisdiction on presence and residence and shun domicile and nationality as a basis of jurisdiction, that is not the case with the civil law countries. In addition, certain doctrines of the common law on jurisdiction seem unavailable in some countries. For example, there is doubt as to the existence of the doctrine of forum non-conveniens in the Roman-Dutch law of South

[60] Compare the approach adopted in the Brussels I Regulation, which provide for automatic enforcement with little procedural obstacles and narrowly defined grounds for non-recognition. Cheshire and North (n 5) 481.

[61] An interesting contrast is the approach adopted in Ethiopia, Egypt and Tunisia, which entrusts the reciprocity assessment to the judiciary. See Art 457 of the Ethiopian Civil Procedure Code 1965, Art 296 of the Egyptian Civil and Commercial Procedure 1968 and Art 319 of the Tunisian Code of Civil and Commercial Procedure. Also, S Teshale 'Reciprocity with respect to Enforcement of Foreign Judgments in Ethiopia: A critique of the Supreme Court's Decision in the Paulos Papassinous Case' (2000) 12 African J Intl Comparative L 569.

[62] U U Chukwumaeze ' Enforcement of Foreign Judgment in Nigeria: A Clog on the Wheel of Globalisation' 2004 Nigerian Journal of Legal Studies 1.

[63] Compare the rule in Australia and New Zealand, where the judgment creditor is given the option to state in his application whether he wishes the judgment to be registered in the currency of the original judgment: section 6(11)(a) of the Foreign Judgment Act 1991 (Cth) of Australia, s 4(3) of the Reciprocal Enforcement of Judgments Act, 1934 of New Zealand.

Africa.[64] In the area of choice of law, the extent to which, for example, parties are free to choose the governing law of their contract varies not only among jurisdictions but also the character of the transaction. For example, while it has been suggested that the position of the concept of party autonomy in the Roman-Dutch law of South Africa is 'equivocal',[65] there is also no definite solution on choice of law in torts.[66] For common law countries, it remains to be seen how far they will be prepared to do away with the old common law rules on choice of law in torts abandoned in England and other common law jurisdictions.[67] Consequently, a comprehensive and holistic look has to be taken at the subject in any discussion for reform.

III. CALL FOR REFORM

Given the diversity of approaches to the subject, there is a need for African countries to embark on a comprehensive look at and reform of the regime of private international law before any talk of a common market can be meaningful. The goal of ensuring 'the free movement of persons, goods, services and capital and right of establishment and persons'[68] will not materialize without these reforms.[69] The AEC Treaty envisages 'the establishment of a common market' as one of the 'stages' in the attainment of the Community's objective.[70] With the creation of a common market, together with the free movement of persons, goods, services and capital, one can foresee not only increased development of cross-national relationships, such as through marriages, but also an increase in international commerce. This will mean a greater resort to private international law for the resolution of cross-border conflicts. There will also be the need for harmonized private international law rules to govern the operation of divergent national substantive rules.[71]

Although no specific time is set for the attainment of the common market, it can be inferred from the Treaty that it must happen within the next 40 years. I contend that the time to begin preparation for it is now. Luckily, Africa has the benefit of other people's efforts to learn from. In the absence of a specific mention of the need to harmonize laws as one of the means of achieving the objectives of the Community, Article 77 of the AEC Treaty can be used as the basis for such an enterprise. A purposive construction of its provision leads to this conclusion. Under it Member States agreed 'to consult with one another for the purpose of harmonizing their respective policies in other fields for

[64] C Schulze 'Forum non-Conveniens in Comparative Private International Law' (2001) 118 S African L J 812, 827–828; Forsyth (n 3) 173–176.

[65] Forsyth (n 3) 298. See also George Nnona 'Choice of Law in International Contracts for the Transfer of Technology: A Critique of the Nigerian Approach' (2000) 44 J of African L 78.

[66] Forsyth (n 3) 325–327.

[67] Kiggundu (n 3) 281–283; Agbede (n 3) 159–74; *Signal Oil and Gas Co v Bristow Helicopters* [1974] 1 GLR 371; Private International Law (Miscellaneous Provisions) Act 1995 of UK; *Tolofson v Jensen* [1994] 3 SCR 1022, 120 DLR [4th] 289; *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491.

[68] AEC Treaty (n 7) Art 4(2)(1).

[69] A Ovrawah 'Harmonisation of Laws with the Economic Community of West African States (ECOWAS)' (1994) 6 African J Intl Comparative L 76.

[70] AEC Treaty (n 7) Art 4(2)(h).

[71] HD Tebbens 'Private International Law and the Single European Market: Coexistence or Cohabitation' in *Forty Years on: The Evolution of Postwar Private International Law in Europe* (Kluwer Deventer 1990) 62.

the efficient functioning and development of the Community.'[72] I advocate the enactment of a Community legislation setting up a body with a specific mandate to look into the private international law regime. Article 25(2) of the AEC Treaty, which allows the Assembly of Heads of State or Governments to establish additional specialized technical committees can provide the basis for such legislation. Legislation will be more empowering than relying on treaty interpretation for jurisdiction or competence.[73] Before this Community legislation is enacted, it is suggested that the Committee on Coordination established under the Protocol on the Relationship between the African Economic Community and the Regional Economic Communities, which has as one of its principal responsibilities the coordination and harmonization of 'integration legislation',[74] should interpret this function broadly to cover not only 'legislation' but the impact of existing legal regimes in Africa for the success of the Community. Among the areas that should receive immediate attention are choice of law in contract, jurisdiction and the recognition and enforcement of foreign judgments.

[72] AEC Treaty (n 7) Art 77.

[73] The wisdom of such a mandate is revealed by the speed with which a European private international law is emerging after the Community was specifically mandated by Article 65 of the Treaty of Amsterdam to legislate in the area of private international law. Article 65 provides that measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and insofar as necessary for the proper functioning of the internal market shall include: (a) improving and simplifying . . . the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases, and, (b) promoting the compatibility of the rules applicable in Member States concerning conflict of laws and of jurisdiction. Article 65 must be read together with Article 61(c), 95 and 67. The literature on this article is vast see generally, Andrew Dickinson 'European Private International Law: Embracing New Horizons or Mourning the Past' (2005) 1:2 J Private Intl L 197; Katharina Boele-Woelki and Ronald H Van Ooik 'The Communitarization of Private International Law' (2002) 4 Yearbook of Private Intl L 1, 11–24; Jürgen Basedow 'The Communitarization of the Conflict of Laws under the Treaty of Amsterdam' (2000) 37 CML Rev 687; Jona Israel 'Conflicts of Law and the EC after Amsterdam: A Change for the Worse?' (2000) 7 Maastricht J of European and Comparative L 81; Ulrich Drobnig 'European Private International Law after the Treaty of Amsterdam: Perspectives for the next Decade' (2000) 11 Kings College L J 190; Jurgen Basedow 'European Conflict of Laws under the Treaty of Amsterdam' in Patrick J Borchers and Joachim Zekoll (eds) *International Conflict of Laws for the Third Millennium, Essays in Honour of Friedrich K Juenger* (Transnational Publishers New York 2000) 175. For examples of legislation adopted or proposed under the mandate of this Article 65 see eg Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matter EC Regulation No 44/2001(Brussels I Regulation); Council Regulation EC Regulation No 1346/2000 of 29 May 2000 on Insolvency Proceedings; Council Regulation (EC) No 2201/2003 of 23 November 2003 Concerning jurisdiction and the Recognition and Enforcement of judgments in Matrimonial matters and the matters of Parental Responsibility, repealing Regulation (EC) 1347/2000; Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I) COM(2005) 650 final; Proposal for Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (Rome II) COM (2003) 427 final amended proposal COM(2006) 83 final; Green Paper on Wills and Succession. COM (2005) 65 final and generally Marie-Odile Baur 'Projects of the European Community in the Field of Private International Law' (2003) 5 Yearbook of Private Intl L 177. The European experience with to the subject, the adopted Regulations, other regional experiences and international conventions offer a great body of knowledge that the African Economic Community can rely on in trying to develop the subject for the AEC.

[74] Art 7(3)(b) of the Protocol on the Relationship between the African Economic Community and the Regional Economic Communities: reprinted in (1998) 10 African J Intl Comparative L 157.

It should be appreciated, however, that the question whether and to what extent uniform or harmonized private international law rules are needed for the functioning of an integrated economy is a controversial one.[75] Different economic units respond differently. The contrast between the approaches of the EU and the USA is worth noting in this regard. The EU has adopted a universalist approach, which lays down uniform rules on jurisdiction, choice of law and the recognition and enforcement of judgments, albeit on defined subject matters, for its members. Thus the Brussels I Regulation focuses on 'civil and commercial matters' while the Rome Convention applies only to contracts. In the USA on the other hand the individual states subject to constitutional constraints adopt a particularistic approach to questions of jurisdiction and choice of law with the recognition and enforcement of judgments regulated by the full faith and credit clause of the Constitution. The lesson may be that we need to avoid conventions, which are too broad in the scope of their application at the international level. Such conventions are difficult to negotiate. We also have to recognize that an economic community can perfectly well exist with members having a plurality of legal systems if a sound private international law regime exists within the national systems.

The reform agenda should be approached from both a national and international perspective. The ultimate aim should be to ensure a well-thought-out private international law regime that will engender stability, security and predictability in international commercial transactions in Africa.

At the national level there is the urgent need to reduce private international law rules into writing.[76] The lack of written rules is very much a feature of the common law countries in this area of the law. Occasionally in these jurisdictions, private international law rules are placed in a general statute.[77] In reducing the rules into writing a careful balance must be struck between the desire for certainty and the quest for flexibility. Flexibility will facilitate adaptation to new challenges through a process of judicial decision-making. This is an approach not uncommon in the common law world. Indeed, the evolution of private international law in the common law world has largely been the work of judges and 'eccentric professors'.[78]

National efforts should be complemented by continental efforts, spearheaded by the African Union, at unification of private international law rules. There should be an acknowledgement that it is possible for nations of diverse culture and legal tradition to achieve harmonization of their laws either substantively or through private international law. The USA and the EU's approach to the harmonization of law in an integrated economy respectively again attest to this. Each, however, comes with its own challenges.

In the USA the harmonization of commercial law through the Uniform Commercial Code has been a great success. The EU has however not been very successful in this

[75] Peter Hay et al 'Conflict of Laws as a Technique for Legal Integration' in M Cappelliti et al (eds) *Integration through Law Europe and the American Experience* Vol 1(2) (Walter de Gruyter Berlin New York 1989) 168.

[76] F von Schwind 'Problems of Codification of Private International Law' (1968) 17 ICLQ 428.

[77] Section 32 of the Matrimonial Causes Act 1971 and s 17 of the Wills Act 1971 of Ghana.

[78] WL Prosser 'Interstate Publication' (1952–3) 51 Michigan L Rev 959, 971, but see Peter North 'Private International Law: Change or Decay' (2001) 50 ICLQ 477 and Christopher Forsyth 'The Eclipse of the Private International Law Principle? The Judicial Process, Interpretation and the Dominance of Legislation in the Modern Era' (2005) 1:1 J Private Intl L 93.

regard; rather it focuses on the harmonization of minimum standards and objectives through Directives. On the other hand the EU has been very successful with the Brussels I Regulation and the Rome Convention—all dealing with aspects of private international law. Thus there is not only one course to follow. Whichever choice is made should however be with a full appreciation of its limitations and be informed by our socio-economic and political circumstances.

In Africa one could sense some efforts in both directions. In this respect the work of the Organisation for the Harmonization of Commercial Law in Africa (OHADA) and the Institute of Private International Law in Southern Africa needs mention. The Treaty on the Harmonization of Business Law in Africa established OHADA. It currently has 16 members. They are Benin, Burkina Faso, Cameroon, the Central African Republic, the Comoros, Congo-Brazzaville, Cote d'Ivoire, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, Senegal, Chad, and Togo.[79] Conspicuously missing from this list are the Anglophone countries, although the Treaty is open to membership from all African countries. One of the central concepts of the Treaty is the promotion of African economic integration.[80] The objective of the Treaty is 'the harmonization of business laws'[81] in the Contracting States. Pursuant to this, various Acts, called Uniform Acts, have been enacted and adopted dealing with aspects of commercial law. These include Uniform Acts on general commercial law, commercial companies and economic interest groups, and secured transactions, bankruptcy, debt collection procedures and accounting law.[82]

The approach adopted by OHADA aims at the unification of substantive law. This can be contrasted with that which aims at the unification of private international law rules. The OHADA approach has advantages and disadvantages.[83] Certainty comes with the substantive unification of laws. People transacting across national boundaries will be subject to the same substantive law. Indeed, to some, whenever feasible substantive unification may be preferred to the unification of private international law rules.[84] These attempts at substantive unification are fraught with difficulty and have been described as representing the product of 'mighty effort by dedicated men to solve inevitable collision problems in international commercial intercourse'[85] but they do not mark the end for the role of private international law in international commerce. As Goode admits, 'every substantive law harmonised reduces the scope of the conflict of laws . . . It is clear however that since there are practical limits to what can be harmonised, private international law will remain of considerable importance in the resolution of cross border disputes for the foreseeable future.'[86]

[79] <http://www.ohadalegis.com/anglais/presohadagb.htm>.

[80] Preamble to the Treaty <http://www.ohadalegis.com/anglais/presohadagb.htm> on the Harmonisation of Business Law in Africa.

[81] Article 1 of the Treaty on the Harmonisation of Business Law in Africa.

[82] See B Martor et al *Business Law in Africa, OHADA and the Harmonization Process* (Kogan Page UK 2002); Claire Moore Dickerson 'Harmonising Business Laws in Africa: OHADA case Calls the Tune' (2005) 44 Columbia J Transnational L 17.

[83] Helen Elizabeth Hartnell 'The New New International Economic Order: Private International Law' (1993) 87 American Society Intl L Proceedings 462.

[84] Hay (n 75) 256.

[85] Derby (n 6) 67.

[86] R Goode 'Rule, Practice and Pragmatism in Transnational Commercial Law' (2005) ICLQ 539, 541.

Substantive unification of private law does not eliminate the potential for private international law problems: 'the law of conflict of laws is not so easily banished from the realm of foreign trade.'[87] In the absence of an autonomous legal system to impose uniform interpretation, problems of diverse interpretation may bedevil uniform laws.[88] Problems of characterization will not go away. Thus, the unification of substantive law, whenever that course is taken, should be matched by improvement in private international law rules.

An approach of unifying private international law, leaving the substantive laws diverse has its merits.[89] It will entail only a minimal disturbance in national legal systems. Rules of private international law address themselves to only matters involving foreign elements. That is not so with substantive law. Thus, it is more likely to appeal to the politician with an eye on preserving his/her country's unique or perceived superior legal system. Also the process could be much simpler. A whole branch of substantive law may be covered by a few choice-of-law clauses. And for the international businessman it will foster predictability by pointing him to a specific jurisdiction in case of dispute and the applicable law.

The establishment of a court empowered to provide authoritative and final interpretation of the unified rules would enhance the success of this approach. Under the AEC Treaty the jurisdiction of the Court of Justice of the Community could be extended to encompass this role.[90] This should be coupled with mutual trust and respect of each other's national judicial competence.

The Institute for Private International Law in Southern Africa[91] is also doing a lot in the area of harmonization, especially for the Southern African regime. It was established in 2000 and is part of the University in Johannesburg. Its goal is to draft a code of private international law of contract for the Southern African Development Community (SADC) and/or the AU. This is a laudable effort by academics to develop the subject. The work of this Institute should be promoted by the AU and made a continent-wide initiative.

The harmonization of private international law in Africa should be combined with increased participation of Africa in international fora for the discussions of private international law issues. Currently, Africa's participation in these fora is at best minimal. For example, only three African countries, Egypt, Morocco and South Africa, are members of the Hague Conference on Private International Law.[92] In this era of globalization, we

[87] Derby (n 6) 70.

[88] ibid 71. With respect to OHADA it is envisaged that the existence of the Common Court of Justice and Arbitration will fulfil this role of ensuring uniformity in interpretation. See Article 14 of the Treaty on the Harmonisation of Business Law in Africa.

[89] Hay (n 75) 169.

[90] AEC Treaty (n 7) Art 18.

[91] <http://general.rau.ac.za/law/English/ipr/ipr.htm>.

[92] <http://hcch.e-vision.nl/index_en.php?act=states.listing> In 2004 Zambia was admitted to the Conference but is yet to accept the Statute of the Conference. Until then it can attend proceedings of the Conference as an observer. Some African countries appear content with signing on to Hague Conventions they did not help negotiate. Excluding the three Member States, 14 African countries (Niger, Burundi, Botswana, Lesotho, Guinea, Mauritius, Swaziland, Liberia, Malawi, Mali, Namibia, Seychelles, Burkina Faso, and Zimbabwe) have signed on to various Hague Conventions. See Information Concerning the Hague Conventions on Private International Law (2005) 52 Netherlands Intl L Rev 249–82.

cannot be oblivious to developments elsewhere.[93] It is significant that although all members of the European Union are also members of the Hague Conference, the Union is still seeking membership of the Conference.[94] This will give it a stronger voice in shaping the rules emerging from the Conference. It is only through participation that we can learn, be heard and make the emerging international conventions on the subject take account of our special needs and interests. It is recommended that AEC, besides encouraging its members to join, should follow suit and let its voice be heard on the international scene as regards matters of private international law.

IV. CONCLUSION

This paper exposes the neglect of private international law in Africa in the discourse on and steps towards economic integration. It has provided an account of the state of private international law in Africa. The neglect of the subject in Africa poses a challenge for the facilitation and sustenance of the gains of economic integration. There is need for greater attention, with a view to reforms, to be given to the subject to meet the challenges a successful economic union will engender. Like all community endeavours, however, there must be sacrifices and some legal systems may have to forgo long cherished doctrines and approaches to the subject. Compromises will have to be made but the price of inaction can be high. Lessons could be drawn from the treatment of the subject in other economic communities; however, the tendency to copy blindly should be avoided. The African Union, its institutional organs, judges, lawyers and African academics all have a role to play. The time to act is now.

RICHARD FRIMPONG OPPONG*

[93] Thalia Kruger 'The South African Litigant and European Union Rules of Civil Procedure' (2005) 38 CILSA 75; Charles T Kotuby 'Internal Developments and External Effects: The Federalization of Private International Law in the European Community and its Consequences for Transnational Litigants' (2001–2) 21 J of L & Commerce 157; JJ Fawcett 'The Europeanisation of Private International Law: The Significance for Singapore' [1997] Singapore J of Intl & Comparative L 69.

[94] See, Recommendation to the Twentieth Session of the Hague Conference on Private International Law on the Admission of the European Community to the Hague Conference on Private International Law 31 March–1 April 2005. See Kruger (2006) 55 ICLQ 447, 455.

* LLB, BL (Ghana), LLM (Cantab), LLM (Harvard), PhD Candidate University of British Columbia. Contact: foppong2000@yahoo.com. This paper is inspired by Professor Cheshire's 'Plea for a Wider Study of Private International Law' (1947) Intl L Q 14. The English responded positively to his plea. It is the hoped that this present plea will not go unheeded in Africa. Ironically, Professor Cheshire's plea was reprinted in (1948) South African L J 213; arguably, it went unnoticed in Africa.