



Private International Law in Commonwealth Africa

Richard Frimpong Oppong

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PRIVATE INTERNATIONAL LAW IN COMMONWEALTH AFRICA

This book provides a comprehensive and comparative examination of private international law in Commonwealth Africa. It offers an unrivalled breadth of coverage in its examination of the law in Botswana, Gambia, Ghana, Kenya, Lesotho, Malawi, Namibia, Nigeria, Sierra Leone, South Africa, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.

Drawing on nearly 1,500 cases decided by courts in these countries, and numerous national statutes, this book covers the four cornerstones of private international law: jurisdiction, choice of law, foreign judgments and arbitral awards enforcement, and international civil procedure. The book is clearly and logically structured – it is organised around broad themes or issues, with country reports, and accompanied by detailed commentaries. The author also provides an extensive bibliography of the literature on African private international law. Scholars and practitioners alike will find *Private International Law in Commonwealth Africa* invaluable and illuminating.

DR RICHARD FRIMPONG OPPONG is an assistant professor in the Faculty of Law at Thompson Rivers University in Canada. He was the Director of Studies in Private International Law at The Hague Academy of International Law in 2012. He has published numerous articles and books, and has been cited by the United States Court of Appeal for the Ninth Circuit and by the South African Supreme Court of Appeal.

To
Mary Adjei
Maame, thank you.

FOREWORD

The publication of *Private International Law in Commonwealth Africa* marks a significant milestone in the history and development of private international law in Africa. Its encyclopaedic analysis of fifteen national legal systems – which account for over 40 per cent of the continent's population yet over 70 per cent of its economic output – will go a long way to filling a gap in knowledge in respect of this important region of the world.

I have had the pleasure of getting to know Richard Frimpong Oppong in my work at the Hague Conference on Private International Law. The Hague Conference – the 'world organisation for cross-border cooperation in civil and commercial matters' – is the only intergovernmental organisation solely devoted to the study, development and global unification of private international law. While the organisation, whose origins lie in late-nineteenth-century continental Europe, has been effective in increasing its global coverage (it currently represents over 70 states from all continents and all major legal systems), the African continent remains regrettably under-represented. At present, the only Member States in Commonwealth Africa are South Africa and Zambia, although a handful of other such states are parties to one or more of the 'Hague Conventions' (i.e. the international treaties concluded at the Hague Conference).

I have been struck by how little there is by way of academic literature on private international law issues in Commonwealth Africa, with the possible exception of South Africa. To the extent that such literature does exist, it tends to paint the region in broad strokes. This often gives the impression that private international law issues are treated in a similar manner to how they are treated under English common law, the legal system on which the legal systems of Commonwealth African countries are principally founded. The comprehensive survey conducted in this book demonstrates that this is not necessarily the case. This suggests that Commonwealth Africa is not only a source for different solutions to private international law issues, but also new ground for the progressive unification of the rules

of private international law. It stands to reason, therefore, that private international law in Africa is deserving of 'special attention'.

Private international law is bound to gain prominence right across the African continent in the coming years, particularly in view of the regional economic integration processes currently underway. The experiences of similar processes elsewhere in the world (for example, within the European Union, Mercosur and ASEAN) reveal the linkages between an attention to private international law issues and the facilitation of cross-border trade and investment, let alone promotion of fundamental human rights. One need only look to organisations such as ECOWAS (Economic Community of West African States) and the EAC (East African Community) to realise the potential for mechanisms for cross-border judicial cooperation, uniform rules on choice of forum and choice of law, and regimes for the cross-border enforcement of judgments. In some of these organisations, the necessary legal infrastructure is already in place to develop harmonised solutions to these key private international law issues. Now, more than ever, it is important for decision-makers involved in these processes to have access to accurate data to assess what further action is needed.

Over recent years, Richard has developed a close relationship with the Hague Conference. He has generously contributed information on private international law developments in Commonwealth Africa, including case law and commentary from the various jurisdictions. He has also contributed his subject-matter expertise to ongoing projects, bringing with him a unique and indispensable African perspective. Most recently, he has been a member of the working group established to develop a non-binding instrument on choice of law in international contracts (the 'Hague Principles'), in which he participated alongside other experts in the fields of private international law, international commercial law and international arbitration law.

Richard's earlier writings and research on private international law issues in Commonwealth Africa have been of great interest and benefit to the ongoing work of the Hague Conference. Indeed, we considered his paper entitled 'The Hague Conference on Private International Law in Africa: A Plea for Cooperation' (published in Volume VIII of the *Yearbook of Private International Law*) to be so important and valuable that we decided to translate it into French, and to use it in our ongoing efforts to improve the participation of African states in the work of the Hague Conference, thereby drawing in not only Commonwealth Africa, but also 'Francophone Africa'.

I am very confident that the Hague Conference will benefit tremendously from the book in our continued efforts to promote existing Hague Conventions in Africa and to include African perspectives in the development of future conventions. Further afield, the book will provide an invaluable reference tool to academics, students and legal practitioners in Commonwealth Africa who study and practise in the field of private international law issues. It will also be an indispensable resource for government officials, as well as regional and international organisations, in collecting the fundamental data needed to assess what further action is needed for reform in private international law, whether at a national, regional or multilateral level.

Ultimately, however, the book will be of greatest benefit to the individuals and businesses whose cross-border relationships with and within Africa engage aspects of private international law. I have no doubt that the book will serve its aim of 'filling the current void' and 'complementing the existing African legal infrastructure necessary for regulating international commercial and transnational personal relationships'.

Dr Christophe Bernasconi
Secretary General
Hague Conference on Private International Law

PREFACE

'Why should I ever have become involved in this conflict of laws?' This was the sobering question the celebrated A. V. Dicey posed to his friend, James Bryce, in a letter dated 1896. When I took on this project little did I know the amount of work it would entail!

The seed for this project was sown while working as a research assistant for my Ph.D. supervisor, Professor Joost Blom, on the unrelated subject of economic torts in Canada. Intrigued by the comprehensiveness of the database he was using to organise his cases, I conceived of the idea of using his approach to do a similar work on African countries in the field of private international law. It is with a profound sense of gratitude that I acknowledge the contribution of Professor Blom to the successful execution of this project.

Although the seed for this project was sown in the corridors of the University of British Columbia, what one reads now is the product of five years of research which took place in three other universities, namely: Lancaster University, Dalhousie University and Thompson Rivers University. The contributions of these institutions and especially their law librarians are sincerely acknowledged.

This book was written solely by me and therefore is my responsibility alone. But whoever has tried his or her hands at such a monumental project – a project which covers fifteen countries – would appreciate my indebtedness to many who, in differing qualities and in varying degrees, have been instrumental in its accomplishment. I am indebted to Solomon Amoateng, Danny Auron, Benedict Daminabo, Malebakeng Forere, Tiyanjana Mphepo, Killey Mwitasi, Lisa Niro, Prince Nyekwere, Banjugu Nyangado, Justice Osei-Afriyie, Gwen Park, Professors Christopher Forsyth, David McClean, Gordon Woodman, Elizabeth Edinger and Olugbenga O. Bamodu for their diverse contributions. I am very much indebted to Professor Vaughan Black of the Schulich School of Law, under whose able supervision I wrote parts of this book as a Killam Postdoctoral Fellow. His support secured me substantial funding for

the post and this project and without his very penetrating reviews this work would have been poorer. I am equally grateful to Dr Christophe Bernasconi, Secretary General of the Hague Conference on Private International Law, for supporting this project.

This book would have been impossible without the immense support I received from my family. I am heavily indebted to my loving wife, Joyce Okofo Adjei, and 'my girls' Mary Adjei and Zoe Oppong Serwaa. Joyce's not so infrequent question 'Rich, is this the project you were working on in . . .?' constantly reminded me of Dicey's words and of the need for me to get this book published and out of 'our way' at the earliest possible time. Nana Ama, may your heart rejoice in realising that the book is indeed published! By cutting down on their play dates with me Mary and Zoe ensured that this work reached the world a little sooner!

I thank the staff at Cambridge University Press, including Finola O'Sullivan, Elizabeth Spicer, Amanda George, Mary O'Hara, Christina Sarigiannidou, and Sophie Rosinke for making this book possible. I acknowledge the very generous financial support I received from the Killam Trusts, Canada, which funded my postdoctoral fellowship at Dalhousie University, and the British Academy, which funded the initial material gathering phase of the project.

*Dr Richard Frimpong Oppong
Kamloops, British Columbia, Canada
4 May 2013*

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