

## The Global Need for Accessing the Content of Foreign Law – A perspective from Kenya

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**Abstract:** Kenya draws its main sources of law from the Constitution, statutes, subsidiary legislation, customary law, the principles of common law, and the doctrine of equity. The Constitution of Kenya entrenches foreign law as part and parcel of the Kenyan legal system, stating that any treaty or convention ratified by Kenya shall form part of the laws of Kenya<sup>1</sup>. Moreover, Kenya is a member of the East African Community, which requires each partner state to secure the enactment and effective implementation of all legislation necessary to give effect to the Treaty<sup>1</sup>. Kenya is not party to any private international law treaties or conventions. In practice, the application of foreign law in Kenya is similar to most common law jurisdictions: because Kenya is yet to develop its own rules on private international law, instead relying heavily on English law. The first part of this discussion will outline how Kenyan courts determine appropriate forum, choice of law and enforcement of judgments for disputes with foreign elements – drawing from case law, notably the De Brouwer case. The second part will highlight the challenges Kenya faces in its approach and application of foreign law.

### I. Kenya - determining forum, choice of law and enforcement of foreign law

Kenyan law applies the doctrine of *forum non conveniens* to determine the appropriate forum for resolution of a dispute with a foreign element. In instances where there is already a case pending in a foreign court that has not been precluded, Kenyan law applies the doctrine of *lis alibi pendens*, but this does not strictly preclude a Kenyan court from trying a suit in which the same matters or any of the matters are in issue in a foreign court<sup>2</sup>. Kenya law also recognizes the principle of *res judicata*, whereby a Kenyan court will not proceed with trial of any suit where a foreign judgment has been given on a matter directly adjudicated by a foreign court, but only where the foreign judgment is conclusive.<sup>3</sup>

Kenyan courts adopt a traditional common law approach to determine the choice of law i.e. domicile, residence or nationality. This approach is widely applied in cases of marriage disputes and succession matters, which will be discussed at the Conference. However, jurisprudence with regards to contracts is unclear – there are opinions that apply the *lex*

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<sup>2</sup> Section 6 of the Kenya Civil Procedure Act

<sup>3</sup> Section 9 of the Kenya Civil Procedure Act

*loci contractus* doctrine (the law of the place where the contract was made) and others that apply the *lex loci solutionis* doctrine (the law of the place of performance of the contract). This lack of uniformity in the application of private international law to contracts will be illustrated by the *Karachi Gas Co. Ltd v. H.Issaq*<sup>4</sup>, an East African Court of Appeal case. The *Raytheon Aircraft case*<sup>5</sup>, a Kenyan judgment rendered in 2005 will be discussed to illustrate how the issue of characterization and choice of law matters are approached in Kenya.

Kenya recognizes judgments made in countries with whom it has entered into an arrangement of reciprocal enforcement. The process of enforcement of these judgments is governed by the Foreign Judgment (Reciprocal Enforcement) Act<sup>6</sup>. Kenya primarily recognizes judgments from Commonwealth countries. However, the Act makes provision for entering into agreement with non-Commonwealth countries for reciprocal enforcement of judgments<sup>7</sup>. This Act sets out the minimum requirements that must be met before a judgment can be recognized in Kenya, and the nature of judgments and the jurisdictional requirements that must be met by a foreign judgment before it can be recognized in Kenya<sup>8</sup>. Once a judgment meets the stipulations laid down in the Act, one may apply to the Kenyan High Court within 6 years of the date of judgment for the registration of that judgment. Once registered, it has the same force and effect as a judgment issued by the High Court of Kenya.<sup>9</sup> *De Brouwer v. The Attorney General*<sup>10</sup>, a child custody case involving Kenyan and Belgian parents, will be discussed to illustrate the challenges of enforcing a Belgian court ruling where to do so would violate Kenya's laws (under Kenyan law, a mother cannot kidnap her children, while under Belgian and European law, she can).

## II. Challenges of approach and application of foreign law in Kenya

- i. ***Lack of uniformity in application of private international law***: case law will be used to illustrate the inconsistent application of private international law to contracts for the sale of goods, and where issues of forum agreements arise.
- ii. ***Kenya has yet to ratify a number of private international law treaties and conventions*** means that Kenyan courts tend to favor characterization rules that will lead to the application of Kenyan law, and Kenyan courts have shown an inclination towards rules that assert territorial sovereignty.
- iii. ***Accessibility of foreign law for Kenyan legal practitioners***: The National Council for Law Reporting, which publishes the Kenya Law Reports and runs a law reporting website ([www.kenyalaw.org](http://www.kenyalaw.org)) is making strides in this regard. It won the 2011 International Association of Law Libraries Award.<sup>11</sup> The site is now moving towards increasing access to foreign law.

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<sup>4</sup> 1965 (EA) 42.

<sup>5</sup> *Raytheon Aircraft Credit Corporation vs. Air Al Faraj Ltd (Civil Appeal Number 29 of 1999)*.

<sup>6</sup> Chapter 43 of the Laws of Kenya.

<sup>7</sup> Sections 13 and 14 of the Foreign Judgments (Reciprocal Enforcement) Act.

<sup>8</sup> The Act recognizes foreign arbitral awards in addition to judgments of designated courts.

<sup>9</sup> Sections 5 and 8 of the Foreign Judgments (Reciprocal Enforcement) Act.

<sup>10</sup> *Marie Elizabeth Christiane Adelaide De Brouwer V. The Hon. Attorney General*, Application No.1609 of 2003

<sup>11</sup> The association is a world-wide cooperative non-profit organization of librarians, libraries and other persons and institutions concerned with the acquisition, dissemination and use of legal information from sources other than their own

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jurisdiction. Previous recipients of the award include the International Committee of the Red Cross and the United Nations Audiovisual Library of International Law.